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PARLIAMENTARY REPORT

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CHARITIES ACT 2006: RELIGION AND PUBLIC BENEFIT

The Charity Commission has published its consultation on the operation of the public benefit test under the Charities Act 2006 (c 50). Although there has long been a public benefit test in common law,[1] the new Act removes the almost automatic presumption of public benefit and lays a much more explicit duty on charities, including those covered by the traditional 'heads of charity' in *Pemsel*,[2] to demonstrate their benefit to the public. The Act also gives the Commission responsibility 'to promote awareness and understanding of the operation of the public benefit requirement'[3] and, by implication, to carry out public benefit checks on charities.

Consultation on Draft Public Benefit Guidance[4] sets out the four key principles:

i. There must be an identifiable benefit;
ii. The benefit must be to the public, or to a justifiable section of the public;
iii. People on low incomes must be able to benefit; and
iv. Any private benefit must be incidental.

The document provides illustrative examples of what each of these principles might mean in practice and how the Commission proposes to apply them. It also suggests questions that charities should ask themselves when conducting their own evaluations. This particular consultation was due to close on 6 June 2007, but we understand that there will be two further rounds of consultation: a series on specific sectoral issues, one of which will be 'the advancement of religion', and a final consultation on the definition of 'public benefit'.

1 *Cocks v Manners* (1871) LR 12 Eq 547; *Gilmour v Coats* [1949] AC 426.
2 *Commissioners for Special Purposes of Income Tax v Pemsel* [1891] AC 531.
3 S 7 inserted 1B(3)2.
4 Available at <http://www.charitycommission.gov.uk>, accessed 21 March 2007.

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As part of its policy of engaging with faith-based charities, the Commission has set up a Faith and Social Cohesion Unit to provide support and advice for faith groups through outreach work, training and publications. It has several aims: to improve public understanding of faith charities; to work collaboratively with faith communities in order to identify and support organisations whose purposes are charitable that are not currently registered; and to assist faith charities to improve their standards of governance and accountability and to increase their effectiveness.

ECCLESIASTICAL EXEMPTION

The Department of Culture, Media and Sport and Cadw have published the long-awaited White Paper, *Heritage Protection for the 21st Century*,[5] proposing a single system for national designation to replace the listing of buildings, scheduling of monuments and registering of parks, gardens and battlefields. Responsibility for national designation in England would rest with English Heritage, which would make its decisions on the basis of special architectural, historic or archaeological interest underpinned by detailed selection criteria for national and local designation. World Heritage Sites would be included in the unified register. The White Paper also proposes new Registers of Historic Buildings and Sites of England and Wales to replace existing lists and schedules, together with improved consultation and appeal processes. The current system of listed building consent and scheduled monument control will be replaced by a unified 'historic asset consent'.

As already foreshadowed in previous statements,[6] ecclesiastical exemption from listed building consent will be retained in respect of those churches that already enjoy it. However, it is not intended to extend the current exemption to other ecclesiastical assets or to other denominations and, as at present, ecclesiastical buildings will remain fully subject to planning control. Paragraph 23 of the White Paper deals specifically with churches and envisages that 'register entries relating to ecclesiastical assets in use as places of worship (such as parish churches together with their attached churchyards and any separately designated tombs)' will be exempt from historic asset consent. Both churches and churchyards may be designated for their archaeological or historic importance and both will be covered solely by the exempt denominations' control systems, thus reducing the existing overlap of dual secular and ecclesiastical controls.

5 Cm 7057, available at <http://www.culture.gov.uk/NR/rdonlyres/D1933A0E-14F6-4AE0-8DDF-E6745380E88B/0/hrp_whitepaper_doc1.pdf>, accessed 15 April 2007.

6 For England, *Ecclesiastical Exemption: the way forward*, and for Wales, *A Review of the System of Ecclesiastical Exemption in Wales* – see (2006) Ecc LJ 348.

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The original proposal for compulsory 'High Level Management Agreements' appears to have been dropped. The White Paper confirms the preference for voluntary 'Heritage Partnership Agreements' negotiated between the exempt bodies, the local authorities and English Heritage; and there are already pilot projects in place at Rochester and Canterbury Cathedrals and throughout the Diocese of Bath & Wells, to test how the Heritage Partnership Agreement concept could work in practice.

EMPLOYMENT OF CLERGY

A Department of Trade and Industry Working Group, including representatives of most of the mainstream churches and of the Jewish, Muslim and Hindu communities, together with trades union delegates, has been looking at the protection of workers in religious organisations. Its recent *Model Statement of Good Practice* covers terms and conditions of employment, job-descriptions, support and training, grievance and disciplinary procedures, and consultation and information about significant changes that might affect job-holders.

Welcoming the *Model Statement*, the Trade and Industry Minister, Jim Fitzpatrick, said that it represented minimum standards that faith groups should aim to achieve and that, as a first step, the DTI was asking faith groups to assess their current positions in relation to the standards in the *Statement*. The DTI would revisit the issue in two years' time and then 'consider if any further action is appropriate, *including legislative action*'.[7]

EQUALITY ACT 2006

We reported in the last issue on the passage of the Equality Act (Sexual Orientation) Regulations (Northern Ireland) 2006 (SR(NI)/2006/439). The detailed implementation of the parent Act[8] continues: parts 2 and 3 came into effect for Great Britain on 30 April 2007, prohibiting discrimination on grounds of religion or belief (including lack of religion or belief) or on grounds of sexual orientation when providing goods, facilities, services, public functions, or education, and in management and disposal of premises. The Department for Communities and Local Government has published two sets of guidance notes on the operation of parts 2 and 3, setting out both the effect of the law and the exceptions – most significantly, those that allow charities and other organisations whose purpose is related to religion or belief to serve particular communities.[9]

7 HC Deb (2007–07) 20 March cc 43–44 WS, emphasis added.
8 Equality Act 2006 (c 3).
9 In what is maybe a sign of the times, the guidance notes are only available online, at <http://www.communities.gov.uk/pub/104/GuidanceonNewMeasurestoOutlawDiscriminationonGroundsof

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The Great Britain Regulations[10] provoked heated parliamentary debate, particularly over the position of Roman Catholic adoption agencies in regard to same-sex couples wishing to adopt. As with the parallel provisions for Northern Ireland, the Great Britain Regulations provide an exemption for 'organisations relating to religion or belief'. Regulation 14 (which applies specifically to religious organisations) provides that

> (3) Nothing in these Regulations shall make it unlawful for an organisation to which this regulation applies, or for anyone acting on behalf of or under the auspices of an organisation to which this regulation applies—
>
> (a) to restrict membership of the organisation,
> (b) to restrict participation in activities undertaken by the organisation or on its behalf or under its auspices,
> (c) to restrict the provision of goods, facilities or services in the course of activities undertaken by the organisation or on its behalf or under its auspices, or
> (d) to restrict the use or disposal of premises owned or controlled by the organisation,
>
> in respect of a person on the ground of his sexual orientation.
>
> (4) Nothing in these Regulations shall make it unlawful for a minister [of religion]—
>
> (a) to restrict participation in activities carried on in the performance of his functions in connection with or in respect of an organisation to which this regulation relates, or
> (b) to restrict the provision of goods, facilities or services in the course of activities carried on in the performance of his functions in connection with or in respect of an organisation to which this regulation relates,
>
> in respect of a person on the ground of his sexual orientation.

However, the exemption conferred by the Regulations is not absolute:

> (5) Paragraphs (3) and (4) permit a restriction only if imposed —

ReligionorBelief_id1510104.pdf> (religion or belief) and <http://www.communities.gov.uk/pub/103/GuidanceonnewmeasurestooutlawdiscriminationonthegroundsofsexualorientationPart3t_id1510103.pdf> (sexual orientation), accessed 3 May 2007. There are also exceptions in relation to some public functions, including education.

10 Equality Act (Sexual Orientation) Regulations 2007 (SI/2007/1263), available at <http://www.opsi.gov.uk/si/si2007/20071263.htm>, accessed 25 April 2007.

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(a) if it is necessary to comply with the doctrine of the organisation; or
(b) so as to avoid conflicting with the strongly held religious convictions of a significant number of the religion's followers.

One cannot help wondering if the question might one day arise as to whether discrimination on grounds of sexual orientation *is*, in fact, 'necessary to comply with the doctrine' of the organisation in question or to avoid conflict with 'a significant number' of its adherents. From a Christian perspective, precisely what is 'doctrine' for the purposes of the Regulations anyway? There is nothing about sexual orientation in the Nicene Creed. And what *is* a 'significant' number of followers? A majority? Ten per cent?

HOUSE OF LORDS REFORM

In February 2003, a range of options for reform of the House of Lords, from a fully elected second chamber to a fully appointed one (and all stations in between), was put to the House of Commons – who duly voted against every single one of them.

The particular interest for readers of this Journal is, of course, the possible impact of Lords reform on relations between Church and State. The most recent White Paper on House of Lords reform, published shortly in February 2007, was unequivocal:

> There have in the past been arguments about the disestablishment of the Church of England. There is little steam behind such arguments today, and, in any event, any profound change in the status of the Church must be in the first instance for the Church itself. It is therefore right for there to continue to be special representation of the Church of England in the reformed Lords.[11]

The White Paper went on to suggest, however, that the number of bishops in the Lords should be reduced from the present 26 and reiterated the government's desire to ensure the representation in the Lords of 'those of faith and those of none'[12] – but neither of those things would be possible if the reformed second chamber were to be wholly elected.

After protracted cross-party negotiations the matter was debated in both Houses. On 7 March 2007, the Commons voted in favour of two possible

11 *The House of Lords: reform*, Cm 7027 (London, 2007), para 6.22.
12 Ibid, para 6.24.

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options: by a majority of 113 for a totally elected second chamber or, failing that, by a majority of 38 for a chamber 80 per cent of whose members would be elected. Then, on 14 March, the Lords voted by a majority of 240 for a totally *appointed* second chamber and rejected all the other options.

It is very difficult to interpret the entrails, not least because the voting in the Commons involved a degree of spoiling tactics: 63 Labour MPs voted *both* for a totally appointed House *and* for a totally elected House. It is also quite hard to discern the government's preferred option, since the then Prime Minister and the Leader of the House both voted for half-and-half, while the present Prime Minister voted for 80 per cent election. But it is fairly clear that a wholly elected second chamber was not exactly what ministers had in mind.

The next move is by no means certain: the two votes are advisory only, institutional change will need legislation, and the new government might simply decide to leave the matter in abeyance rather than risk setting Lords and Commons on a collision course. One of the arguments for retaining Prime Ministerial involvement in episcopal appointments, advanced by James Callaghan in 1976 when the present system was established, was precisely that the bishops' presence in the Lords meant that 'their nomination must therefore remain a matter for the Prime Minister's concern'.[13] But even *that* has now been set aside: introducing the recent Green Paper, *The Governance of Britain* (Cm 7170), in a statement to the Commons, the new Prime Minister said that 'The Church of England is, and should remain, the established church in England. Establishment does not, however, justify the Prime Minister influencing senior church appointments, including bishops.'[14] And if a reformed second chamber is fully elected there will be no room for bishops in any case.

PARSONAGES MEASURE (AMENDMENT) RULES 2007 (SI 2007/862)

These Rules amend the Parsonages Measure Rules 2000 (SI 2000/3171) and take account of amendments to the Parsonages Measure 1938 made by the Church of England (Miscellaneous Provisions) Measure 2006. The amendments relate to Rules 7, 8 and 9 of the 2000 Rules and the Schedule. The form of the notices required to be served under sections 3 and 7 of the 1938 Measure of the exercise of certain powers under the Measure is no longer prescribed but, instead, the notices require objections or representations to be made within the prescribed time of 21 days and they must be passed to the Church Commissioners within 5 working days.

13 HC Deb (1975–76) 912 *c 613*.
14 HC Deb (2006–07) 3 July 2007 *c 817*.

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PLANNING-GAIN SUPPLEMENT

In December 2005, the government published a proposal for a new levy on development: Planning-gain Supplement (PGS). The proposal (which, according to the 2006 Pre-Budget Report, is not to be implemented before 2009) is currently the subject of exhaustive consultation. Its objective would be to divert some of the increased value of land arising from the granting of planning permission to what are regarded as socially desirable ends; and liability for PGS would be based on the land value uplift rather than on the nature of the development.

Because the government wants to avoid administrative complexities it appears to have rejected any kind of offset or banding in favour of a simple flat-rate tax levied at 'a modest rate'. The figure being suggested is 20 per cent (though it should be emphasised that that figure has no binding commitment behind it), with a minimum threshold for liability low enough to exempt very small-scale developments while preserving the PGS revenue stream and avoiding market distortions. The valuation date for PGS would, in practice, be the date of the letter informing the applicant that full planning permission had been granted – which means that liability to pay would not be linked to any sale.

Thus far, the government has been very careful to say 'if' rather than 'when' and to reserve its position on whether or not PGS will actually be introduced.[15] The crunch point for churches and religious charities, however, is this: if PGS is payable against the uplift value of the development rather than against the profit on any financial transaction, where will the money come from to pay it? Developers will recoup the tax from their profits on sales; but when a charity self-develops for its own internal purposes there is no ultimate cash transaction that can provide a convenient source of revenue. So, for example, from 2009 a religious nursing order wishing to build new sheltered accommodation, or a diocese proposing to build, a new school might well be faced with an increase in costs that would render its scheme non-viable.

RACIAL AND RELIGIOUS HATRED

The Government has announced that it hopes to introduce the Commencement Order bringing into effect the Racial and Religious Hatred Act 2006 (c 1) in the summer of 2007.[16]

15 And it has been observed by more than one commentator that we have heard this all before, in the shape of Community Land Tax and Development Land Tax, both of which fizzled out.

16 Vernon Coaker in reply to a written question from John Austin: HC Deb (2006–07) 21 May 2007 c 1063W.

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RELIGIOUS DRESS AND RELIGIOUS SYMBOLS

It appears that the Government strongly supports the wearing of school uniforms; and, in March 2007, the Department for Education and Skills published a consultation-paper on the subject.[17]

It begins by reminding consultees that school uniforms and associated matters are not a matter of statute and that whether or not a school should have uniform is a matter for individual governing bodies to decide.[18] It then refers to the right under the Human Rights Act 1998 (c 42) to manifest one's religion or beliefs, notes that this may require adherents to conform to a particular dress code, to wear or carry specific religious artefacts or not to cut their hair, and goes on to suggest that many religious requirements can be met within a school uniform policy providing that schools act reasonably in accommodating religious requirements.

However, the document also argues that the freedom to manifest a religion or belief does not mean that an individual has the right to manifest his or her religion at any time, in any place, or in any particular manner. Citing *R (On the application of Begum) v Headteacher and Governors of Denbigh High School* and *R (on the application of X) v Y School*,[19] it suggests that a school uniform policy that restricts the freedom of pupils to manifest their religion may still be lawful, so long as the restriction is justifiable on grounds specified in the Human Rights Act: health, safety and the protection of the rights and freedoms of others. In a slightly oblique reference to *R (on the application of X)*, which involved a claim to wear the *niqab* veil, it also argues that schools need to be able to identify individual pupils in order to maintain good order and identify intruders, and that if a pupil's face is obscured for any reason, the teacher may be unable to judge her degree of engagement or secure participation in discussions and practical activities.[20]

The consultation suggests that, in fulfilling their statutory obligations, school governors may have to strike a balance between the rights of individual pupils and the wider interests of the school as a whole. On the one hand, schools may have justifiable reason for restricting an individual's freedoms (for example, to ensure effective delivery of teaching and the promotion of cohesion and good order);[21] on the other, schools must consider their obligations not to discriminate on the grounds of sex, race, disability or religion, whether directly or indirectly.[22] The consultation was due to close on 12 June 2007.

17 *DfES Guidance to Schools on School Uniform Related Policies*, available at <http://www.dfes.gov.uk/consultations/conDocument.cfm?consultationId=1468>, accessed 20 March 2007.
18 Para 1.1.
19 [2006] UKHL 15 and [2007] EWHC 298 (Admin).
20 Para 2.1.
21 Para 2.6.
22 Para 2.7.

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The issue of religious symbols also continues to exercise employers. The National Health Service had intended to develop national guidance on dress codes for employees in relation to religion or belief; but, after discussion with the Department for Health and NHS trusts, it has been decided that national guidance is inappropriate because each trust employs a unique workforce that reflects its local community. Instead, it has been decided to collate 'best practice' examples and publicise them across the Service.[23]

SMOKE-FREE (SIGNS) REGULATIONS 2007

From 1 July 2007, virtually all enclosed public places and workplaces in England became smoke-free under the provisions of the Health Act 2006 (c 28). At the same time, the Smoke-free (Signs) Regulations came into effect, obliging all public buildings – including places of worship – to display at every entrance A5 signs including the no-smoking symbol and the words 'No smoking. It is against the law to smoke in these premises'. It should be noted that what is forbidden under the Act is smoking tobacco, herbal cigarettes and similar substances that are otherwise legal. The Act does not forbid the use of incense – a point that was clarified during the committee stage in the House of Lords.[24]

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23 Ms Rosie Winterton in reply to a written question from Paul Goodman: HC Deb (2006–07) 14 March 2007 c 446W.

24 HL Deb (2005–06) 20 April 2006 cGC575, in which the Minister, Lord Warner, said 'Noble Lords can carry on chewing their tobacco or taking their snuff unimpeded by the Bill. Joss sticks cannot be smoked, so they are not covered by the Bill, and the same applies to incense'.

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