

## CLAS CIRCULAR 2011/15 (20 October 2011)

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## CHARITIES & CHARITY LAW

### “Charitable purposes”

**For information.**

The Charity Commission has published a report on its investigation into fundraising appeals for humanitarian disaster relief by the radio station [Sunrise Radio](#) and Kismat Radio which established that funds raised by the station in the wake of the tsunami in December 2004 and the Pakistan earthquake in 2005 had still not been spent five years later. The most interesting feature of the report from a general charity law point of view is this: although neither Sunrise Radio nor Kismat Radio are charities, the Commission established that the funds raised by the appeals were held for charitable purposes. *Charitable funds in England and Wales come under the regulatory jurisdiction of the Commission whether or not the body that holds them is constituted as a charity.*

[Source: *Charity Commission What's New* - 13 October 2011]

### Charitable Incorporated Organisations: update

**For information.**

The latest news on the implementation of the Charitable Incorporated Organisation structure is that it has been yet further delayed. In reply to a written question in the Commons, Civil Society Minister Nick Hurd said that finalising the legal framework for CIOs was ‘taking longer than expected’. Subject to parliamentary approval, implementation was expected to start in early 2012 and would be phased in ‘to help the Charity Commission manage anticipated demand’.

[Source: HC Deb 10 October 2011 c 113w]

## EMPLOYMENT

### Holiday pay calculations

**For information: boring but very important**

According to Directive 2003/88/EC (the Working Time Directive) every worker is entitled to at least four weeks' paid annual leave. British Airways pays its pilots in three components: a fixed annual sum, a supplementary payment for the time spent flying (set at £10 per hour) and a supplementary payment for the time spent away from base (currently £2.73 per hour). Only basic salary is taken into account in calculating holiday pay. Ms Williams and her colleagues contended before the Supreme Court that their holiday pay must be based on their total remuneration including the two supplementary payments; and the Supreme Court asked the European Court of Justice for an opinion as to what remuneration an airline pilot was entitled to under EU law.

In its judgment in *Williams & Ors v British Airways plc* [\[2011\] ECJ C-155/10](#) the ECJ has concluded that

- a worker must receive his or her normal remuneration during annual leave because the purpose of holiday pay is to place the worker during periods of rest in a comparable position to that during periods of work:
- therefore, holiday pay must in principle be calculated on the basis of the normal remuneration received by the worker:
- however, where pay is made up of several components, what constitutes "normal remuneration" needs to be analysed.

**Comment:** the case will now go back to the Supreme Court for a final determination – but the SC is unlikely to ignore the ECJ's ruling.

In short, *employers need to be careful not to assume that holiday pay is necessarily linked solely to "basic pay"*. If, for example, an employee receives (eg) a special allowance for night-work in addition to his or her basic salary, it may well be that in EU law the night allowance counts as part of basic salary for holiday pay calculations.

[Source: *European Court of Justice Judgment* – 15 September 2011]

## National Minimum Wage

For information.

**Latest regulations:** The National Minimum Wage (Amendment) Regulations 2011, [SI 2011/2345](#), amend the National Minimum Wage Regulations 1999. They increase the various wage rates or clarify definitions for eligibility.

The National Minimum Wage (Amendment) (No.2) Regulations 2011, [SI 2011/2347](#), are of less general application, covering education-related definitions and, in Regulation 4, providing that the living accommodation provisions found in regulations 31, 36 and 37 of the 1999 Regulations do not apply to charges or deductions made by Higher Education Institutions and Further Education Institutions in respect of the provision of living accommodation, where the living accommodation is provided to a worker who is enrolled on a full-time higher education course or a full-time further education course with that Higher Education Institution or Further Education Institution (regulation 31(6) of the 1999 Regulations).

[Source: [www.legislation.gov.uk](http://www.legislation.gov.uk) – 27 September 2011]

**Updated guidance:** The Government has published updated [guidance](#) on the National Minimum Wage which will be helpful for employers who offer work experience, placements and internships. The guidance also includes a new worker checklist for employers and examples of case studies. The announcement from the Department for Business, Innovation and Skills emphasises that ***entitlement to the NMW does not depend on a job title but on whether the arrangement that an individual has with an organisation makes him or her a worker for NMW purposes.***

The criteria are as follows:

- There is a contract or other arrangement with you or your organisation, which entitles the individual to a reward. The contract does not have to be written: it may be implied (ie reflecting what happens in practice in the workplace) or oral (ie a spoken agreement of work in exchange for rewards).
- The reward is a monetary payment (ie cash or other form of financial payment) or a benefit in kind and the reward is not simply the reimbursement of genuine out-of-pocket expenses. While a reward would typically involve you or your organisation incurring a cost, the promise of a contract or future work could be considered a benefit in kind.
- The individual has to turn up for work even if he or she does not want to. In deciding if someone had to turn up for work a tribunal would look at factors such as whether you can impose sanctions on the individual for failing to do work, your grievance and

disciplinary procedures, and whether you or the individual are able to terminate the contract or arrangement by giving notice.

- You have to provide work for the duration of the contract or arrangement (this would include individuals doing 'casual work' and using someone's labour on a 'zero hours' contract).
- The individual has to perform the work or services personally and only has a limited right to send a substitute. Being able to delegate to another member of staff does *not* amount to substitution or subcontracting out the work for NMW purposes.
- You are not the individual's client or customer.

*Where an individual is a worker – and where no exemption applies – then that individual must be paid at least the NMW. On that basis, **some interns will be entitled to the NMW and others will not – but employers need to be extremely careful to consider the facts of each individual case.***

[Source: *BIS News* – 15 September 2011]

#### Unfair dismissal

**For information.**

Business Secretary Vince Cable and Chancellor George Osborne have announced proposed changes to the rules for unfair dismissal rules. The intention is:

- as from 6 April 2012 to extend the qualification period for the right to claim unfair dismissal from one year to two; and
- to implement measures to encourage early resolution of disputes, the speeding up of the tribunal process and measures to tackle weak and vexatious claims – which will include charging a fee for lodging an unfair dismissal claim.

The expectation is that the combined proposals will reduce the number of unfair dismissal claims by around 2,000 a year.

**Comment:** It should be said that the proposals have not been met with unrestrained enthusiasm. A negative reaction from trades unions was predictable, but employment law specialists have also criticised the proposals. Eversheds, for example, [warned](#) that increasing the length of service required before an unfair dismissal claim could be lodged might simply result in complaints being lodged on alternative grounds such as whistleblowing and discrimination, for which the qualifying period does not apply.

[Source: *BIS News* - 3 October 2011]

## FUNDING

### Listed Places of Worship Grant Scheme

On 14 October it was [announced on the LPWGS website](#) that the payable rate for Listed Places of Worship Grant Scheme claims for the first and second quarters of 2011/12 was **71.7261%**. Payments were likely to reach claimants' bank accounts on 17th / 18th October.

The breakdown of the October payments (released under the Freedom of Information Act) is as follows: During the period 1 April to 30 September:

- LPWGS received 1,577 applications.
- 1,218 were agreed as eligible.
- The total of eligible claims was £4,826,568.16 of eligible claims.
- After administration charges the budget/amount paid out was £3,461,913.71 or 71.7261%.

The shortfall was therefore £1.36 million.

[Source:

## IMMIGRATION

### National Audit Office study on immigration and student routes

**For information.**

The National Audit Office has announced that it is carrying out a study of whether or not the UK Border Agency is effectively controlling the migration of people who come to the UK to study through the student route (Tier 4) of the Points Based System for immigration. The study will report on whether or not the Agency ensures that non-EU student migrants comply with immigration rules and will also examine the Agency's actions to regularise or remove over-stayers.

This is the NAO's second study on the Points Based System, which was introduced in 2008. Publication is expected in spring 2012.

[Source: *NAO Website* - 21 September 2011]

## ODDS & ENDS

### Bates, Wells & Braithwaite breakfast seminars

**For information.**

Bates, Wells & Braithwaite LLP has recently established an internal Faith-Based Group of solicitors from across its various departments who have a particular expertise in advising churches and suchlike. BWB will be running a series of breakfast seminars at its offices at 2-6 Cannon St London EC4M 6YH on issues of particular interest to faith-based organisations, as follows:

- **Thursday 3 November** at 8:30am: *Immigration and employment status*: book [here](#).
- **Tuesday 6 December** at 8:30am: *Top issues for faith-based organisations* (including governance, tax & property matters): book [here](#).

[Source: *BWB Charity & Social Enterprise Law Update – Autumn 2011*]

### Diamond Jubilee commemoration: use of names & titles

**For information.**

Charities and community groups wishing to name a project for the Diamond Jubilee need to be careful how they do so. There is a blanket approval in place for the plain use of 'Diamond Jubilee' and 'Jubilee' for non-commercial purposes, subject to the proviso that building works start or finish in 2012 and events take place in 2012. However, anyone wishing to use other phrases - such as 'Queen Elizabeth II Diamond Jubilee,' 'Queen Elizabeth Diamond Jubilee', or 'The Queen's Diamond Jubilee' – to name a community hall, a commemorative garden or other building or project will need to apply for permission to do so.

Applications are now open for the [commemorative use of Royal names and titles](#) for community events, buildings and projects during the Queen's Diamond Jubilee in 2012. Application details are available [here](#).

[Source: *CLAS summary* - 7 October 2011]

### Music & copyright licensing: review

**For information**

The Government has accepted the recommendation made by Professor Ian Hargreaves in his independent review of Intellectual Property and Growth that the collecting societies

should be regulated through codes of conduct which enshrine minimum standards of fairness and transparency and which govern their relations with licensees.

David Mowat (*Con, Warrington South*) had [asked](#) what recent assessment BIS had made of the effect on small businesses of the conditions of Performing Right Society and Phonographic Performance Ltd licences and what statutory guidance regulates the issue and enforcement of such licences. Ed Davey said that BIS has not assessed the effect on small business of the licensing conditions of PRS and PPL; however, the Government will consult on the implementation of this recommendation later this year.

[Source: HC Deb 5 September c 333W]

### Music & copyright licensing: changes in the law

**For information: very important if you use  
music in any form**

Christian Copyright Licensing International has updated its [Guidance on the Copyright, Designs and Patents legislation](#). It is extremely complex, but, broadly speaking, if sound recordings are played during church activities, or during direct activities of the church in the local community (church fêtes, outreach events etc) you now require a PPL Church Licence (PPL was formerly known as Phonographic Performance Ltd). There are, however, a series of exceptions:

- **Divine worship:** PPL has agreed a not to require a licence for worship, matching the arrangement with the Performing Right Society for music.
- **Weddings and funerals** are deemed domestic occasions rather than public ones. However, if the wedding or funeral is being audio or video recorded (on a video camera or phone) while sound recordings are being played then those making the recording require a Limited Manufacture Licence, available from [www.PRSforMusic.com/lm](http://www.PRSforMusic.com/lm).
- **Church Home Groups** are deemed domestic occasions, not public ones.
- **Live concerts** do not require a PPL Church Licence if only live music is played – but if copyright music is played live they will require a PRS for Music Church Licence.
- **Private functions** such as birthday and Christmas parties are deemed domestic occasions.

The whole business of music licensing is incredibly complicated. Every church that uses music should check that it has the correct licence.

[Source: CCLI e-mail – 22 July 2011]

## PROPERTY & PLANNING

### Community Infrastructure Levy: consultation on reform

**For information.**

DLCG is seeking views on the detailed implementation of its proposals for the Community Infrastructure Levy and has published a consultation document which includes draft regulations. The consultation covers:

- the implementation of neighbourhood funds to give local authorities and their communities the means and flexibility to manage the impacts of development;
- allowing receipts to be used to provide affordable housing;
- providing transitional provisions to allow fair operation of the levy in Mayoral Development Corporation areas;
- requiring charging authorities to report openly and regularly on receipts and expenditure; and
- adding new Development Orders to the list of developments that may be liable to a charge.

The consultation document, draft regulations and questionnaire are available at: <http://www.communities.gov.uk/publications/planningandbuilding/cilreformconsultation>.

Responses can either be sent by email to [cil@communities.gsi.gov.uk](mailto:cil@communities.gsi.gov.uk) or in writing to Franciane Genouillé, Communities and Local Government CIL Team, Zone 1/E2 Eland House, Bressenden Place, London SW1E 5DU. The consultation will close on **30 December 2011**.

[Source: *BIS Consultations* - 10 October 2011]

### Metal theft petition

**Please sign it.**

An [e-petition](#) has been posted on the HM Government website calling for an amendment to the Scrap Metal Merchants Act 1964 to prohibit cash transactions by merchants. The thinking behind it is that if scrap metal merchants had to pay by cheque there would be an audit-trail to make it easier for the police to trace metal thefts. Given the increasing incidence of metal thefts, anything that puts pressure on the Government to tackle the problem must be worth a try; and the Church of England encouraging people to sign it.

[Source: [epetitions.direct.gov.uk](http://epetitions.direct.gov.uk) - 20 October 2011]

**Private sewers and lateral drains**

<b>For information.</b>
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The ownership of private sewers and lateral drains was transferred to water and sewerage companies in England and Wales on 1 October. Where drainage serves one property only and is within its curtilage it will **not** be transferred and will remain the owner's responsibility. Further information is available on Defra's [website](#), including Defra's guidance, [The private sewers transfer regulations: Provisional non-statutory guidance on private sewers transfer regulations](#), which was issued in June and last revised on 28 September.

[Source: *Defra Press Release* – 1 October 2011]

## WALES

### Commission on Devolution in Wales

For information

The Secretary of State for Wales has announced the membership and terms of reference of the independent Commission on Devolution in Wales. The Commission will be chaired by Paul Silk, Clerk to the National Assembly for Wales from 2001 to 2007 and a former Clerk in the House of Commons and will include two independent members and four party appointments:

- Dyfrig John CBE, Chairman of the Principality Building Society;
- Professor Noel Lloyd CBE, former Vice-Chancellor and Principal of Aberystwyth University;
- Professor Nick Bourne (Welsh Conservatives nominee);
- Sue Essex (Welsh Labour nominee);
- Rob Humphreys (Welsh Liberal Democrats nominee); and
- Dr Eurfyl ap Gwilym (Plaid Cymru nominee).

The terms of reference are as follows.

*Part I: financial accountability:* To review the case for the devolution of fiscal powers to the National Assembly for Wales and to recommend a package of powers that would improve the financial accountability of the Assembly, which are consistent with the United Kingdom's fiscal objectives and are likely to have a wide degree of support.

*Part II: powers of the National Assembly for Wales:* To review the powers of the National Assembly for Wales in the light of experience and to recommend modifications to the present constitutional arrangements that would enable the United Kingdom Parliament and the National Assembly for Wales to better serve the people of Wales.

In undertaking part I, the Commission should:

- provide independent advice on the case for improving the financial accountability of the National Assembly for Wales consistent with the fiscal and constitutional framework of the United Kingdom;
- consult widely on a package of fiscal powers which would improve the financial accountability of the National Assembly for Wales;

- make recommendations on whether a package of fiscal powers could be devolved to the National Assembly for Wales which are likely to have a wide degree of support; and
- consider and make recommendations on how best to resolve the legal and practical implementation issues from devolving a package of fiscal powers, including consistency within the United Kingdom.

Part I will be completed before work on part II begins.

In undertaking part II, the Commission should:

- examine the powers of the National Assembly for Wales, and in particular the boundary between what is devolved and non-devolved, whether modifications to the boundary should be made at this stage and any cross-border implications of such modifications;
- consult widely on any proposed modifications to the current boundary;
- make recommendations on any modifications to the settlement likely to have a wide degree of support; and
- consider and make recommendations on how best to resolve the legal and practical implementation issues from those modifications.

The Commission will not consider the Holtham Commission's proposals for funding reform in Wales, including Welsh Ministers' existing borrowing powers (because they are being dealt with through a separate bilateral process between the United Kingdom Government and the Welsh Government) nor and the structure of the National Assembly for Wales, including issues relating to the election of Assembly Members.

[Source: HC Deb 11 Oct 2011 c 25WS]

### Planning Review Independent Advisory Group

**For information: but the Welsh Churches might wish to respond to this**

The Environment and Sustainable Development Minister, John Griffiths, has [announced](#) a review to consider how planning services in Wales should be delivered in the future. The review will be conducted by an independent advisory group chaired by John Davies, former Welsh Director of the Planning Inspectorate. Other members of the group will be announced "shortly" and a call for evidence will be issued "this month".

During its review, the group will:

- identify the key policy objectives that the planning system is required to deliver now and in the future;
- assess existing institutional delivery arrangements, noting areas of good practice and areas in need of improvement; and
- propose options for the future delivery of the planning system, including plan making and development management services.

The group will deliver its report by June 2012 and make recommendations about:

- options for future delivery of the planning system, including a preferred approach;
- the primary and secondary legislation and policy and guidance necessary to introduce the identified options and preferred approach; and
- an assessment, on an all Wales basis, of the resources necessary, in terms of staff numbers and costs, to deliver the identified options and preferred approach.

The Welsh Government's Legislative Statement 2011-16 includes a commitment to introduce a Planning Bill to consolidate existing legislation and make the planning system more transparent and accessible. A White Paper will be published during 2013 which will inform a Planning Bill to be introduced into the Assembly "at a later date". The group's recommendations will form part of the evidence base for the Bill.

[Source: *Welsh Government Press Release* – 3 October 2011]