

## CLAS CIRCULAR 2011/14 (14 September 2011)

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# CHARITIES & CHARITY LAW

## Excepted and Exempt Charities

**For information.**

The Charities Act 2006 changes the way that excepted and exempt charities are regulated. The Commission aims to move towards a single registration requirement for all English and Welsh charities, except for:

- charitable incorporated organisations (CIOs) and
- exempt charities that have 'principal regulators'

The Charity Commission has published updated guidance, dated August 2011, on [Changes to the Regulation of Excepted and Exempt Charities](#), which explains the changes that began in 2009 and are currently on-going – and what the charities affected need to do. It covers the following:

[Part A - What are 'Excepted' and 'Exempt' charities?](#)

[A1 Excepted charities](#)

[A2 Exempt charities](#)

[Part B - Excepted charities](#)

[B1 What has changed for excepted charities and what plans do we have to bring the change into force?](#)

[B2 The Excepted Church Charity Programme](#)

[B3 Other groups of churches that have not previously registered](#)

[B4 Registered places of worship](#)

[B5 Local Ecumenical Partnerships \(LEPs\)](#)

[B6 Armed forces charities](#)

[B7 Applying for registration](#)

[B8 Completing the trustee declaration](#)

[B9 Frequently Asked Questions from excepted charities \(concerning converting to charitable incorporated organisation, use of non-approved governing documents, the lack of a registration number for unregistered charities and the registration requirement when income fluctuates\)](#)

[Part C - Exempt charities and their future regulation](#)

[C1 Why is the regulation of exempt charities changing?](#)

[C2 How will exempt charities be regulated when the changes in the 2006 Act come into force?](#)

[C3 What are principal regulators and what do they do?](#)

[C4 Where a principal regulator is appointed, will the Charity Commission be able to use any regulatory powers?](#)

[C5 Will exempt charities have to register as charities if they have a principal regulator?](#)

[C6 Does the Charity Commission appoint principal regulators?](#)

[C7 Which exempt charities now have principal regulators?](#)

[C8 Where can I find out more about principal regulators and their exempt charities?](#)

[C9 What will be the situation for exempt charities with no principal regulator?](#)

[C9A. If we are now required to register, is there a deadline?](#)

[C10 When will further changes take place?](#)

[C11 What about exempt charities that are waiting to hear how the changes will affect them?](#)

[C12 What accounting and reporting requirements apply to charities losing their exempt status on 1 June?](#)

[C13 What will happen if a charity is in the process of selling or leasing property, taking a mortgage or involved in charity proceedings when it loses its exempt status?](#)

[C14 How can exempt charities prove that they are really charities?](#)

The Commission has also published [Exempt Charities: updated guidance on recent changes](#) to take account of the fact that academies, foundation and voluntary schools and sixth form colleges are now exempt from registration.

[Source: *Charity Commission What's New* – 31 July & 6 August 2011]

### Equality Act: Charity Commission summary guidance

**For information.**

Having completed an evaluation of its summary guidance on the Equality Act with input from other regulators, charities and interest groups, the Charity Commission has now published [Supporting specific beneficiary groups - Equality Act summary guidance](#). The Commission will publish a fuller version of the guidance later in 2011 which reflects the feedback received and which will enable regulator to:

- give more detailed coverage to the issues and questions which have been identified in the evaluation; and
- take account of any relevant points from the appeal by the charity Catholic Care.

The fuller version will retain a focus on the charity exemption in the Equality Act. It will also include more examples and detail on areas such as the relationship between the public benefit test and the tests in the exemption, and how the tests in the exemption might work in relation to charities with restricted funds.

[Source: *Charity Commission What's New* – 28 July 2011]

## FUNDING

### Big Lottery Fund: consultation on proposed policy directions offerings

**For information.**

The Cabinet Office has announced a consultation on proposed policy directions to the Big Lottery Fund. The consultation invites views from a wide range of stakeholders, including the voluntary, community and social enterprise sector and other government departments. The draft direction proposes that The Fund when distributing money under shall take into account the following principles:

**ENGAGEMENT** - the development of programmes should be based on the active engagement of public, private and voluntary & community sector and social enterprise partners.

**REPRESENTATION** – the development of programmes should take account of those most in need by targeting inequality and improving the capability of people and communities to contribute to, participate in and benefit from outcomes funded through the Fund's programmes.

**SUSTAINABILITY** – a programme's ability to improve the environment today and for future generations and reduce the impact on the environment.

**LONGER TERM BENEFIT** – that projects can achieve longer-term financial viability and resilience.

**ADDITIONALITY AND COMPLEMENTARITY** – the development of programmes and funding of projects should complement and add value to the plans of action and activity of other funders and parties working towards the Fund's goals, including Government funding.

**COLLABORATIVE WORKING** – where this produces better results, the development of programmes and funding of projects should support collaborative action between funded organisations and public, private and civil society partners.

The consultation closes at **midnight on Friday 18 November 2011**. To respond, either complete the [response form](#) and send it to [biglotteryfundconsultation@cabinet-office.gsi.gov.uk](mailto:biglotteryfundconsultation@cabinet-office.gsi.gov.uk) or reply in writing to Deborah Boswell, Cabinet Office, 4/16 1 Horse Guards Road, London SW1A 2AS.

[Source: *Cabinet Office Press Release* - 22 August 2011]

## Gift Aid and Mass offerings

**For information.**

Roman Catholics believe that there is a value in having a Mass celebrated for a particular intention: for a deceased relative, for the sick, for those who face various difficulties or challenges. When requesting such an intention it has become customary to make an offering which is given to the celebrant. Canon 945 of the *Codex Iuris Canonici 1983* makes it clear that any offering given for the celebration of Mass is to be freely given and that the poor and needy are never to be denied the celebration of Mass for their intentions because of their inability to provide a customary offering. The question then arises as to whether or not Mass offerings meet the requirements of the Gift Aid scheme – and there seems to be a degree of muddle as to the answer.

A partner in Stone King LLP, Robert Meakin, raised the matter with HMRC and on 4 August [posted confirmation](#) from HMRC that such payments can be donated by Gift Aid on the basis that a priest will say Mass for an particular intention whether or not an offering is made and also on the grounds that there cannot be a solely private benefit in law because such Masses are open to the public. This ruling would the Church to reclaim basic rate tax on the offering and higher rate donors to reclaim the higher rate tax element in the donation.

Kaye Wiggins then reported in [Third Sector Online](#) that HMRC's position appeared to have shifted: that because Mass offerings are made in return for prayers for an individual they are a transaction rather than a donation and as such are not eligible for Gift Aid. She quoted an HMRC spokesman as saying that "If I asked for a Mass to be said for my cousin who is doing her A-levels, then that can't be Gift Aided because I am paying for a particular service".

There, for the moment, the matter rests – in a state of confusion. Though this might look to the outsider like an entirely domestic matter for the Roman Catholic Church, in reality it raises a wider issue for the charity sector generally about the distinction between a donation and a payment for a service. For the Churches in particular, there is also a wider issue about public worship as opposed to purely private devotions: we know that private devotions do not confer public benefit because that is what *Gilmour v Coats* [1949] AC 426 tells us.

We shall be monitoring developments.

[Source: *LMSC Summary* - 25 August 2011]

## EMPLOYMENT

### Employing subcontractors

The Supreme Court has handed down judgment in what one commentator has described as the most important employment case since 1999. In *Autoclenz Ltd v Belcher and Ors* [\[2011\] UKSC 41 \(27 July 2011\)](#), Autoclenz provided car-cleaning services to motor retailers and auctioneers. The claimants worked as car valeters for Autoclenz. All signed similar contractual documents which contained statements to the effect that they were self-employed; and they were taxed on that basis rather than under PAYE. In 2007, Autoclenz required the claimants to sign new contracts. The new contract contained a clause which provided that: "For the avoidance of doubt, as an independent contractor, you are entitled to engage one or more individuals to carry out the valeting on your behalf, provided that such an individual is compliant with Autoclenz's requirements of sub-contractors as set out in this agreement...". The contract also provided that: "You will not be obliged to provide your services on any particular occasion nor, in entering such agreement, does Autoclenz undertake any obligation to engage your services on any particular occasion."

The claimants sought a declaration in an employment tribunal that they were nevertheless "workers" within the meaning of the National Minimum Wage Regulations 1999 ("NMWR") and of the Working Time Regulations 1998 ("WTR") and, consequently, entitled to holiday pay and the National Minimum Wage. Both sets of regulations define "worker" in materially identical terms as "an individual who has entered into or works under ... (a) a contract of employment; or (b) any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual". It was common ground between the parties that if the terms of the written contract were valid then, as a matter of law, the valeters could not be said to be "workers" within the meaning of the WTR and the NMWR.

The ET held that the terms of the contract did not reflect the true agreement between the parties and could be disregarded – with the result that the claimants could be regarded as "employed" under contracts of employment within limb (a) of the definition. The Employment Appeal Tribunal allowed Autoclenz's appeal on the basis that the claimants were not employees under limb (a) but held that they were workers under limb (b) of the definition, on the basis that the ET had applied the incorrect legal test for the identification of sham terms. The EAT's view was that both parties had to intend the contractual clause to mislead before it could be said to be a sham and there was insufficient evidence of such an intention. Both sides appealed to the Court of Appeal which found for the valeters and restored the judgment of the ET, holding that the valeters were "workers" within the meaning of (a) and (b).

The Supreme Court unanimously dismissed the appeal by Autoclenz, holding that the claimants had been working under contracts of employment within the meaning of the

NWMR and the WTR. Lord Clarke, giving the judgment of the Court, concluded that *the ET had been entitled to disregard the terms included in the written agreement between the parties because the documents did not reflect what was actually agreed between the parties.*

The true terms of the contract were that Autoclenz undertook to offer work, the valeters would perform the services defined in the contract competently and within a reasonable time, they would be paid for that work, they were obliged to carry out the work offered to them by Autoclenz and they had to do that work personally and could not provide a substitute to do it.

In the opinion of the Supreme Court, courts and tribunals had to be alive to the possibility that written documentation might not accurately reflect the reality of the relationship between the parties because employers might include terms aimed at avoiding a particular statutory result, even where such terms did not reflect the real relationship (paras 21 - 25). The question in every case was "what was the true agreement between the parties?" (paras 26 – 29). The correct approach to that question was *to discover the actual legal obligations of the parties*; and to carry out that exercise an employment tribunal would have to examine all the relevant evidence: the written terms themselves read in the context of the whole agreement and the evidence of how the parties conducted themselves in practice and their mutual expectations (paras 31 - 33). On that basis, in the present case the ET had been entitled to disregard the terms of the written documents (paras 37 - 38).

In short:

"... the relative bargaining power of the parties must be taken into account in deciding whether the terms of any written agreement in truth represent what was agreed and the true agreement will often have to be gleaned from all the circumstances of the case, of which the written agreement is only a part. This may be described as a purposive approach to the problem. If so, I am content with that description" (*per* Lord Clarke JSC at para 35).

**Comment:** This judgment has obvious ramifications for organisations that engage subcontractors and may also impact on those who employ freelance researchers if contracts are written with terms that do not reflect the actual working practices of the job. But it may go wider than that: it re-emphasises – and at the highest level – the fact that *merely putting things in writing does not determine employment status*. In the final analysis, *what counts is the factual situation*.

[Source: *BAILII Judgment* – 28 July 2011]

## ODDS & ENDS

### Commission on a Bill of Rights: consultation

**For information.**

At least some readers may be interested to know that the Commission on a Bill of Rights established by the Government on 18 March 2011 has issued [a public consultation](#), seeking views on the following questions:

- “(1) do you think we need a UK Bill of Rights? If so,
- (2) what do you think a UK Bill of Rights should contain?
- (3) how do you think it should apply to the UK as a whole, including its four component countries of England, Northern Ireland, Scotland and Wales?
- (4) having regard to our terms of reference, are there any other views which you would like to put forward at this stage?”.

The Commission has been established with the following terms of reference:

“The Commission will investigate the creation of a UK Bill of Rights that incorporates and builds on all our obligations under the European Convention on Human Rights, ensures that these rights continue to be enshrined in UK law, and protects and extend our liberties.

It will examine the operation and implementation of these obligations, and consider ways to promote a better understanding of the true scope of these obligations and liberties.

It should provide interim advice to the Government on the on-going Interlaken process to reform the Strasbourg court ahead of and following the UK's Chairmanship of the Council of Europe.

It should consult, including with the public, judiciary and devolved administrations and legislatures, and aim to report no later than by the end of 2012”.

Responses can be sent via [email](#) or to: Secretariat for the Commission on a Bill of Rights, Postpoint 9.55, 102 Petty France London SW1H 9AJ. The deadline for responses is **11 November 2011**.

It is not intended to respond collectively on behalf of CLAS (though the Secretary has responded on his own behalf); but individual members might wish to do so.

[Source: *Ministry of Justice Press Release* – 5 August 2011]

## Copyright licensing

**For information.**

Members will be aware that the Community Sector Law Monitoring Group (of which the Secretary of CLAS is a member) has been involved in charity sector negotiations on copyright licensing for about three years.

In a letter sent on 2 June 2011 PPL UK, the licensing collector for recorded music, announced its intention to charge a fee of 1% of income to any community group wishing to play recorded music in public places unless that income is under £10,000 a year, in which case there will pay a flat fee of £42. Similar charges will be applied by the Performing Right Society.

Where this leaves churches *as churches* is not clear – though there appears to be no intention to introduce licensing for the use of music at worship. Discussions with PPL/PRS continue.

[Source: CLAS/CSLMG – 14 September 2011]

## Regulated entertainment: consultation

**For information: but you may wish to respond**

DCMS has launched a consultation on the operation of the Licensing Act 2003: [Regulated Entertainment: A Consultation proposal to examine the deregulation of Schedule One of the Licensing Act 2003](#). The consultation appears to start from the position that the present system is over-prescriptive, inconsistent and generally silly:

“At the moment, the law and regulations which require some (but not all) types of entertainment to be licensed are a mess. For example, you will need a licence if you want to put on an opera but not if you want to organise a stock car race. A folk duo performing in the corner of a village pub needs permission, but the big screen broadcast of an England football match to a packed barn-like city centre pub does not. An athletics meeting needs licensing if it is an indoor event, but not if it's held outdoors. A free school concert to parents doesn't need a licence, but would if there is a small charge to raise money for PTA funds or if there are members of the wider public present. A travelling circus generally needs a permit whereas a travelling funfair does not. A carol concert in a Church doesn't need a licence, but does if it is moved to the Church Hall.”

Moreover:

“This consultation is predicated on the fact that we think there is ample scope to sensibly deregulate most, but not all, of Schedule One to the 2003 Act. Removing the need for proactive licensing for regulated entertainment could provide a great boost for community organisations, charities, cultural and sporting organisations, for artists and performers, for entertainment venues, and for those local institutions that are at the heart of every community, such as parent/teacher organisations, schools and hospitals.”

So that looks like a “yes”, then.

CLAS will be responding as an organisation, but individual members may wish to respond on their own account. You can respond to the consultation online at [Regulated\\_entertainment\\_consultation@culture.gsi.gov.uk](mailto:Regulated_entertainment_consultation@culture.gsi.gov.uk) or by post to Nigel Wakelin, Regulated Entertainment Consultation Co-ordinator, Department for Culture, Media and Sport, 2-4 Cockspur Street, London SW1Y 5DH. The closing date for responses is **3 December 2011**.

[Source: *DCMS News* – 10 September 2011]

#### **Volunteers and private hire vehicle licensing: guidance**

**For information.**

[\*Private Hire Vehicle Licensing - a note for guidance from the Department of Transport\*](#) clarifies whether or not transport service providers need to be licensed for private hire. The guidance states that ‘The Department considers that genuine volunteers who receive no recompense or receive only enough to cover their actual expenses do not fall within the PHV licensing regime’. *The guidance applies to England and Wales only.*

[Source: *Department of Transport Press Release* – 3 August 2011]

## SCOTLAND

### Charity accounts: updated guidance

**For information.**

OSCR has published updated guidance on charity accounts to reflect the changes introduced by the Charities Accounts (Scotland) Amendment Regulations 2010. Some of the changes are only effective for accounting periods starting on or after 1 April 2011; others have already been introduced. The updated guidance explains the legal requirements both before and after the amendments take effect.

OSCR is sending a copy of the publication to each charity on the Scottish Charity Register. As well as publishing [Scottish Charity Accounts: An Updated Guide to the 2006 Regulations](#), OSCR has made available a [web page](#) which provides information on the format and independent scrutiny requirements for Scottish charity accounts.

[Source: *OSCR Press Release* - 12 September 2011]

### Registration of English charities in Scotland

**For information.**

OSCR has updated its briefing-note on [Constitutions of bodies established under English law applying for charitable status in Scotland](#). Whether or not an organisation which is a charity in England and Wales also needs to register in Scotland depends on whether or not it has a significant presence in Scotland: [Seeking charitable status in Scotland](#), OSCR's guidance on registration for England and Wales charities, gives full details.

[Source: *OSCR Publications* - 22 August 2011]

## TAX

### Charitable payments to overseas bodies

**For information: but important for those with overseas links.**

HMRC has updated section 9 (Payments to overseas bodies) of its [detailed guidance on non-charitable expenditure](#). It begins from the basis that:

9.1 When a payment is made or is to be made to a body outside the UK, this will only be considered charitable expenditure if

- the payment is made to a foreign supplier of goods or services in the ordinary course of the charity's activities; or
- the charity takes steps that the Commissioners for HMRC consider are reasonable in the circumstances to ensure that the payment is applied for charitable purposes, including where the payment is made to an overseas branch or office of the charity to be applied for charitable purposes.

The concern is that payments to bodies overseas should be for purposes that would be charitable in English law (English law being the test applied by HMRC even for charities in Scotland and Northern Ireland). Therefore:

9.4 When reviewing payments made to overseas bodies HMRC will generally ask the charity trustees to provide information about:

- the person or persons to whom the payment was given
- for what charitable purpose it was given
- what guarantees or assurances have been given by the overseas body that the payment will be applied for the purpose for which it was given
- what steps the trustees took to ensure the payment will in fact be applied for charitable purposes
- what follow-up action the trustees took to confirm that payments were applied properly.

Members who support work overseas need to make sure that the operation that they are supporting meets HMRC guidelines.

[Source: *HMRC What's New for Charities* - 3 August 2011]

**Digital by Default and Moving VAT Online – consultations**

**For information: payroll departments and  
those operating charitable companies might  
wish to respond**

In its [Digital by Default](#) consultation, HMRC is seeking views on the next steps in making its proposed Registration Wizard the digital by default channel to get set up for the main direct business taxes (Corporation Tax, Income Tax Self Assessment / Class 2 NICs, PAYE). It is part of the 'One Click' programme of work in HMRC to accelerate the move to delivery of services through online channels. The consultation also seeks comment on a number of other areas:

- XBRL tagging and small repayments for Corporation Tax;
- how HMRC can improve its service on ceasing businesses for Income Tax and PAYE; and
- providing email addresses as part of a business's designatory data.

Consultation responses should be sent by 31 October 2011 to: [keith.wear@hmrc.gsi.gov.uk](mailto:keith.wear@hmrc.gsi.gov.uk) or by post to: Keith Wear, Room BP7201, Benton Park View, Newcastle Upon Tyne NE981ZZ.

HMRC states that the consultation paper should also be read in conjunction with the parallel consultation, [VAT: consultation on the next steps for moving VAT online](#), which covers changes to the operation of VAT to move further transactions online, and the assistance into digital that will support those moves. In line with the Government's commitments, this consultation sets out the next steps in moving VAT online in two areas:

- VAT Return filing and electronic payment; and
- VAT Registration, Deregistration and Variations of business details.

HMRC proposes that from 1 April 2012, for VAT registered businesses with a turnover below **£100,000** it will be compulsory to file VAT returns online and make electronic payment of any VAT due. In support of the Government's Digital by Default agenda, online will also become the default channel for all businesses for VAT registration, deregistration and changes to registered details but these will not be mandated at this stage. As assistance into digital for those who need it is an integral part of the agenda, the consultation seeks views on where digital assistance may be required, and what forms that assistance should take.

As well as posing questions, the consultation contains, at Annex C, draft regulations to amend Part V (accounting, payment and records) of the Value Added Tax Regulations 1995 (S.I. 1995/2518). The regulations are intended to come into force on 1 April 2012.

The closing date for consultation responses is **31 October 2011**. Responses and enquiries should be directed to: John Nawbatt, HMRC, Business Tax SME Programme, 7th Floor, Bush House (SW Wing), The Strand, London WC2B 4RD: e-mail: [john.nawbatt@hmrc.gsi.gov.uk](mailto:john.nawbatt@hmrc.gsi.gov.uk).

[Source: *HMRC What's New* – 8 August 2011]

### VAT: charitable buildings

**For information.**

The First-Tier Tribunal (Tax) has ruled on another case in which the question was whether or not a new charity building was an independent annex for VAT purposes

#### ***Treetops Hospice Trust v Revenue & Customs* [\[2011\] UKFTT 503 \(TC\) \(25 July 2011\)](#)**

*VAT – zero rating – construction of new building adjoining original building – an enlargement of or an extension to the original building? – yes – had the new building been an annexe was it capable of functioning independently? – no – appeal dismissed.*

The Treetops Hospice Trust extended its 1960s building, which could only host ten day care patients at any given time. The new structure is a single storey building, built on to the south-east facade of the existing building: it runs at a 90 degree angle to the old building and the entire northwest aspect of the development shares a party wall with the existing building. The new building houses part of the seminar room, the new reception area and a large open-plan space which constitutes the new day-care unit, with a lounge area, an activity and dining area and a kitchen area. It also contains its own lavatory and storage facilities. The new unit is accessed from outside by a sweeping ramped pathway under an awning which gives in to the new reception area. It is clearly signposted 'Reception' at the foot of the ramp. There are two lockable doors which separate the existing building and the new one which are kept unlocked during the day and used for access between the two.

The question before the Tribunal whether the Commissioners were correct in concluding that the new building was an extension that did not qualify for zero rating. It was not in dispute that the building was intended for use solely for a relevant charitable purpose. The Tribunal concluded that the new building was an extension to the old and as such fell to be standard rated; however, "if we were to be found to be wrong and it were found to be an annexe, the qualifying provisions for zero rating are not met and it would still fall to be standard rated" (para 32), since, in the context of what the Hospice's Day Care Unit did and of the service it offered, the new building could not function or provide that service independently of the old. Note 17(a) was not therefore satisfied.

[Source: *BAILII Judgment* – 26 July 2011]