STATUTE LAW (REPEALS) MEASURE

A RESPONSE BY A WORKING PARTY OF THE ECCLESIASTICAL LAW SOCIETY TO THE GENERAL SYNOD'S CONSULTATION DOCUMENT GS Misc 1128

This is a response by a working party of the Ecclesiastical Law Society to the General Synod Consultation Document GS Misc 1128 on a possible Statute Law (Repeals) Measure. As long ago as 1990, the Ecclesiastical Law Society set up a working party to draw up suggestions concerning the revision of ecclesiastical statute law with the aim of making it more accessible and simpler to understand.[1] Since then the Society has actively sought to encourage General Synod to consider ways in which this might be done and the working party therefore welcomes these proposals concerning the repeal of obsolete legislation.

(1) The working party agrees with the proposals as set out in the Consultation Document with respect to:

- Suffragan Bishops Act 1534, s. 5
- Simony Act 1588 (the provisions imposing penalties by reference to the value of livings)
- Queen Anne's Bounty Act 1714
- Church Building Act 1822
- Ecclesiastical Corporations Act 1832
- Ecclesiastical Leases Act 1836
- Ecclesiastical Leases (Amendment) Act 1836
- Ecclesiastical Commissioners Act 1836
- Pluralities Act 1838 (with the proviso of preserving the effect of s. 36 as to the right of a surviving spouse or civil partner to occupy the parsonage house after the incumbent's death), but *not* s. 59 (see below)
- Ecclesiastical Commissioners Act 1840, ss. 35, 54, 55, 84, 86 and 88, but *not* s. 27 (see below)
- Ecclesiastical Commissioners Act 1841, ss 12 & 24
- Ecclesiastical Houses of Residence Act 1842
- Ecclesiastical Leasing Act 1842
- Ecclesiastical Leasing Act 1858
- Ecclesiastical Leases Act 1865
- Lecturers and Parish Clerks Act 1844, ss. 1 & 4
- Colonial Bishops Act 1853
- Ecclesiastical Commissioners Act 1860, s. 13
- Ecclesiastical Commissioners Act 1866, s. 17.
- Residence of Incumbents Act 1869
- Sequestration Act 1871
- Pluralities Acts Amendment Act 1885
- Church Dignitaries (Retirement) Measure 1949, subject to the suggested saving with respect to office holders not on common tenure.

[1] The working party would wish to acknowledge the contribution of the late Chancellor George Spafford, and his colleagues, whose reports are published at: [1990] 2 Ecc LJ 47, [1992] 2 Ecc LJ 305 and [1992] 2 Ecc LJ 388.

- Inspection of Churches Measure 1955, s. 4
- Church Commissioners Measure 1970
- Admission to Holy Communion Measure 1972
- Cathedrals Measure 1976
- Ecclesiastical Judges and Legal Officers Measure 1976, ss. 1(3) & 6
- Church of England (Miscellaneous Provisions) Measure 1976, s. 1(1) from 'and in particular' to the end, s. 1(6) & the Schedule
- Dioceses Measure 1978
- Ecclesiastical Fees Measure 1986, s. 11(1) & (3), & Sched. 2, paras 2-5
- Diocesan Boards of Education Measure 1991, s. 12
- Church of England (Miscellaneous Provisions) Measure 1992, s. 4(2)
- Church of England (Legal Aid) Measure 1994, s. 5
- Cathedrals Measure 1999, s 38(1)(3) & Sched. 1
- Church of England (Miscellaneous Provisions) Measure 2000, s. 1
- Churchwardens Measure 2001, s. 14 & Sched. 1

(2) The working party had some concerns with the following proposals:

Tithe Act 1536

The working party, while acknowledging that insofar as the provisions of the Act remain in force, they would generally appear to be obsolete, would nevertheless wish to point out that section 7 gives the right to an incumbent to occupy the parsonage house after a month's notice has been given at the time of his induction. The working party is not aware of any other legislative provision that recognises the right of an incumbent to occupy the parsonage house after his or her induction and therefore believes that this section should not be repealed until some legislative recognition is made of this right and/or alternative provision is made for the occupation of the parsonage house by a new incumbent.

Parochial Libraries Act 1708, ss 4 & 5,

The Consultation Document recognises the special historic significance of a number of such libraries and that they should therefore be preserved from loss. Section 4 requires the minister of a parish with such a library to make a new catalogue of the books in the library within six months of his or her institution, induction or admission and to sign the same, and section 5 requires a minister to do the same with respect to any library that is given for the use of the parish during his [or her] ministry. The working party did not consider that these provisions were in fact otiose. Whether some other less onerous checks and controls on the contents of the library might be more appropriate should be the subject of discussion and resolution. However, such libraries are very rare and this is a requirement that a minister would only have to undertake once. A proper record and oversight of what may be a very valuable collection of books belonging to the parish should not be easily dispensed with and a parish library should not be treated in any way below the standard of record and inspection that is required of churchwardens who are to check and confirm the presence of all articles that belong to the church listed in the inventory (Care of Churches and Ecclesiastical Jurisdiction Measure 1991, s 4). It would be helpful to establish and note the number of such libraries and the way in which they are currently managed. Until more information is available as to the existence of such libraries so that proper safeguards may be put in place, the working party did not consider that repeal was appropriate.

Clergy Ordination Act 1804

Section 1 provides that no person may be ordained deacon before the age of 23 or priest before the age of 24. This is now enshrined in Canon C3, paras 5 & 6. The power of General Synod to legislate by canon is now derived from the Synodical Government Measure 1969, s 1(1), (3), (5), Sch 1, para 1; Sch 2, art 6(a)(ii). Nevertheless, this is subject to the restriction that no canon may be made which is contrary to the laws, customs or statutes of the realm (Submission of the Clergy Act ss 1, 3, applied Synodical Government Measure 1969, s 1(3)). Canons may therefore be regarded as being in some sense 'subordinate legislation'. However, the existence of an Act of Parliament or a Measure reproduced by canon precludes any possibility of the validity of that canon being challenged as contrary to any law, custom or statute of the realm since the Statute or Measure is the legislative expression of that law. Accordingly, the working party would be reluctant to repeal s 1 of the Clergy Ordination Act 1804 insofar as it unequivocally states the relevant position in English law.

Pluralities Act 1838, s 59

Section 59 of the Act provides that any lease of the parsonage house by an incumbent must contain a condition for avoiding the tenancy upon a copy of an order of the bishop being served on the occupier requiring a spiritual person to reside in the parsonage house, and in the absence of such a condition, such a lease is itself void. The aim of the section is to ensure that the parsonage is available for occupation by a new incumbent or assistant curate, etc. as the bishop shall require, and it is particularly important that an at the end of an incumbency the parsonage house is free to be occupied by the new incumbent. While the granting of a lease is not common, it is not unknown for an incumbent to let out a room or part of the parsonage house. While this may ordinarily be regarded as a license there is the risk that if exclusive possession is granted this could in fact be construed as a tenancy. The working party is aware that the Housing Act 1988, Sch 2, Pt 1, Ground 5 would in most cases afford an adequate remedy to recover possession of a parsonage for use by the incumbent or other spiritual person from which to carry out his or her ministry. However, under the Act, written notice must be given by the landlord not later than the beginning of the tenancy that the property may be recovered on this ground, and in the unusual cases referred to above, it may be problematic to rely on an incumbent giving such written notice or where a letting is construed as a tenancy without any such notice having been given. Accordingly, the working party was of the view that, admittedly in fairly rare circumstances, this section still has some value in providing a mechanism to ensure that a new incumbent or other spiritual person might be put into possession of the parsonage house free of any other rights of occupation, and should therefore not be repealed.

Baptismal Fees Abolition Act 1872

Although it is perfectly correct in that the Table of Fees pursuant to the Ecclesiastical Fees Measure 1986 makes no provision for a fee to be required for the celebration of the sacrament of baptism, the Measure itself does not expressly prohibit the taking of fees for baptism (as seems to be suggested in the Consultation Document). To this extent, therefore, the Baptismal Fees Abolition Act 1872 is still relevant insofar as it gives statutory authority that the imposition of such fees is not lawful.

Ecclesiastical Commissioners Act 1840, s 27

Section 27 requires that to be appointed a dean, archdeacon or canon a person must have been in holy orders for at least six years. This is reproduced in Canon C 21, para 1. For the reasons given with respect to the Clergy Ordination Act 1804 (above) that there should be a reluctance to rely solely on the provisions of a canon where there is at present legislative

provision to the same effect, the working party does not consider that repeal of the Act is justified.

Ecclesiastical Jurisdiction Measure 1963, proviso to s 46(1)
The working party agrees with the sentiments expressed in the Consultation Document and fully acknowledges that attempts by bishops to conduct faculty (or any other proceedings) have not been successful and should be avoided in the terms of any patent given to a chancellor. Nevertheless, common changes in the form of the patent do not themselves constitute legislation and this repeal would in effect amount to a substantive change in the law, which, welcome as it is, would it is suggested be better done not as a part of a blanket repeal but by proper legislative process.

(3) The working party would also suggest the following legislation could usefully be considered for repeal so far as it is still extant:

Suppression of Religious Houses Act 1539
An Act to permit the Duke of Norfolk to purchase a monastery and Lord Cobham a chantry. Historically interesting, but of no legal significance today.

Parsonages Act 1865
The Act empowers the governors of Queen Anne's Bounty to dispose of land given to them for general purposes to provide houses for beneficed clergy and other purposes. Queen Anne's Bounty has now been dissolved and its rights, functions etc are now carried out by the Church Commissioners. There does not now appear to be any need for these express powers previously given to Queen Anne's Bounty.

Church Seats Act 1872
The whole Act to be repealed. The Act permits the (then) Ecclesiastical Commissioners to accept a church on the express condition that the seats be not let. The practice of letting pews for rent is otiose and the Act therefore no longer has any relevance.

The working party and the Committee of the Ecclesiastical Law Society (which has endorsed this response) repeat their offer to assist the General Synod in matters concerning the repeal and revision of ecclesiastical legislation.

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