

REFORMING CHURCH LEGISLATION

A RESPONSE BY A WORKING PARTY OF THE ECCLESIASTICAL LAW SOCIETY TO THE ARCHBISHOPS' COUNCIL'S CONSULTATION DOCUMENT GS Misc 1103

The Ecclesiastical Law Society

- 1.1 The Ecclesiastical Law Society is a charity whose object is 'to promote education in ecclesiastical law for the benefit of the public, including in particular (a) the clergy and laity of the Church of England and (b) those who may hold authority or judicial office in, or practise in the ecclesiastical courts of the Church of England'. It has approximately 700 members, mostly Anglican and resident in the UK, but includes a significant number from other Christian denominations and from overseas. It publishes the *Ecclesiastical Law Journal*, and circulates newsletters as well as organising conferences and seminars for members and non-members. It is active in promoting the teaching of canon law at theological colleges and as a component of continuing ministerial education. It has established many working parties on matters concerning the ecclesiastical laws of the Church of England including participation in the revision committee of the draft Clergy Discipline Measure.
- 1.2 This response has been endorsed by the Committee of the Ecclesiastical Law Society and is submitted to the Archbishops' Council with its approval.

Introductory

- 2.1 The Working Party welcomes the initiative of the Archbishops' Council and the House of Bishops to develop a proposal to amend and revise the ecclesiastical law of the Church of England. This initiative is long-overdue. For a quarter of a century the Ecclesiastical Law Society has been lobbying for the repeal of obsolete ecclesiastical law. In 1987, the Society established a Working Party on the Revision of Ecclesiastical Statute Law under the chairmanship of Chancellor George Spafford and with a distinguished and experienced membership. Its reports were published in the *Ecclesiastical Law Journal*,¹ and comprised a systematic and authoritative review of all ecclesiastical legislation on a thematic basis. Its detailed recommendations comprised a relatively straightforward programme of repeals and consolidation, together with proposals to update much legislation that was considered unfit for purpose.
- 2.2 The Spafford Working Party proposed the repeal of more than 30 Acts and Measures, some over 400 years old. It also proposed a single unified consolidating Church Property Measure which would bring together and update all the dispersed provisions touching on the subject. It was disappointing that, despite the investment of considerable time and expertise by members of the Ecclesiastical Law Society, it was not thought appropriate to find time in General Synod's legislative agenda to bring forward reforms which the Working Party categorised as urgent, pressing and expedient 30 years ago.
- 2.3 Now that Archbishops' Council and the House of Bishops have indicated that General Synod may be waking to the need for reform, the Ecclesiastical Law Society, which for a quarter of a century has been 'a voice crying in the wilderness', renews its offer to place at General Synod's disposal its collective experience and the expertise of its members. Chancellor Spafford is now dead, but the Society has established a Working Party to offer an immediate response to GS Misc 1103 within the timescale prescribed and to offer advice and assistance as the consultation process continues.

¹ [1990] 2 Ecc LJ 47, [1992] Ecc LJ 305 and [1992] 2 Ecc LJ 388.

Identifying the problem

- 2.4 It is important that the Archbishops' Council takes time to reflect upon both the presenting issues and the underlying problem. The consultation document seems to move rather too quickly to the proposed solution and its *a posteriori* reasoning is less compelling than it might otherwise be.
- 2.5 It is unfortunate that the consultation document repeatedly adopts the terminology 'rule book' when speaking of the ecclesiastical law of the Church of England. Whether this is merely infelicitous short-hand or conscious trivialising is unclear. Downplaying the issue does not assist in the search for the best solution. Ecclesiastical law is part of the general law of the land, but it is perhaps misleading to refer to it as a branch of 'public law', which term is now generally restricted to administrative law, in contradistinction to 'private law'.²
- 2.6 The corpus of ecclesiastical law includes:
- i. Statute law, comprising Acts of Parliament and Measures;
 - ii. Delegated legislation, largely statutory instruments;
 - iii. Canons
 - iv. Common law decisions of ecclesiastical and secular courts;
 - v. Custom and tradition;
 - vi. 'soft law' in the form of guidance, statements of practice etc.
- Understanding the different sources and categories of ecclesiastical law is crucial to identifying the current problem and to framing the most appropriate solution.³ It is also important to understand that, uniquely amongst component provinces of the Anglican Communion, the Church of England is governed in part by primary legislation of the state within which it operates.⁴
- 2.7 Mindful of the historic development of ecclesiastical law and the nature of establishment, a distinction must be drawn between the law which regulates the inter-relationship between the church and the state and the internal governance of the community of faith as an unincorporated association. Of course, the Church of England is much more than a members' club, not least because as the national church it ministers to the entire population and not merely to its members (howsoever described). This is particularly obvious in terms of its legal duties in respect of marriage and burial, the involvement of the Crown in certain clerical appointments, and the presence of Lords Spiritual in the legislature.
- 2.8 It ought to be possible to differentiate between the public civic elements of the Church of England, in relation to which law making and law reform need to be addressed at a high level, and the private religious elements in relation to which the Church of England should enjoy an enhanced level of autonomy and a less complex procedure for self-regulation. Here the Church of England could usefully borrow from the conventions and practices of other provinces of the Anglican Communion.
- 2.9 In addition to the unfortunate use of the term 'rule book', the consultation document seems to perpetuate the misleading narrative of law as an oppressive and negative force. Christ himself spoke in terms of law and commands; and modern scholarship sees ecclesiastical law in terms of 'applied ecclesiology', a tangible expression of the self-understanding of the

² The decision of the House of Lords in *Aston Cantlow PCC v Wallbank* [2003] UKHL 37 determined that although 'the Church of England is not itself a legal entity', its component elements (particularly PCCs) were largely creatures of private law and not public law.

³ See N Doe, *The Legal Framework of the Church of England* (Oxford, 1996), and M Hill, *Ecclesiastical Law* (Third edition, Oxford, 2007).

⁴ See N Doe, *Canon Law in the Anglican Communion* (Oxford, 1998).

ecclesial community. The expressions 'law', 'order' and 'polity' carry deeper doctrinal implications. Rather than disparaging law as stifling creativity, its dynamic facilitative quality should be recognised, valued and deployed to advantage.

The proposed solution

- 3.1 The confused thinking in the consultation document concerning the nature of the problem is reflected in the form of the proposed solution:
- i. The problem of 'too much' law is to be addressed by creating more;
 - ii. The problem of 'too complex' law is to be addressed by creating a highly technical and legalistic new procedure and the establishment of a Scrutiny Committee adding yet further to the bureaucracy of the National Institutions (already over-burdened and under-resourced) when the direction of travel should be towards simplification.
 - iii. The difficulties occasioned by a Westminster model of governance for an essentially spiritual organisation is to be addressed by the wholesale introduction of another Parliamentary procedure, and one which has already proved itself not entirely successful.
- 3.2 There is a superficial attraction in reaching for an 'off the peg' solution such as that proposed which seeks to borrow from the Legislative and Regulatory Reform Act 2006. The Working Party counsels caution.
- i. Government departments have teams of civil servants, departmental lawyers, the Treasury Solicitor (now Government Legal Service), highly trained Parliamentary draftsmen, and access to specialist leading and junior counsel. The personnel within the Legal Office are individually well qualified and very experienced, but the Archbishops' Council should not underestimate the enormity of the task that will be placed on these already overburdened individuals;
 - ii. The term 'burden' was much discussed in Parliamentary debate and has taken on a particular meaning in Whitehall. However, it is not easy to translate such a term or concept into ecclesiastical legislation. Indeed it is a loaded term and could be interpreted as a means by which bishops will remove statutory checks and balances which they regard as burdensome, but which are in truth essential for the operation of a national church. If the emphasis were instead on legislative provisions which were obsolete or redundant then the purpose would be entirely transparent;
 - iii. Piecemeal reform such as this creates an unwieldy patchwork. It is easy to lose track of reforms which are undertaken below the radar and there will inevitably be difficulty in accessing authoritative texts of legislation which has been amended in this way. It is perhaps tolerable for 'mainstream law' which is administered by trained lawyers and where Government websites put complete texts into the public domain, but church legislation, used predominantly by non-lawyers, is less easily accessible.
 - iv. What is proposed is extremely complex even in the summary form presented in the consultation document. It will be more so if and when the proposals are formally worked up.
- 3.3 In particular, it is noticeable that there have been only 27 orders made under the powers in the 2006 Act – an average of around three per annum – and all deal with very minor regulatory issues. There is no hint of the Act being used to enable the carrying out of major statutory reform of the kind that is needed in relation to ecclesiastical legislation. This is because the provisions in the Act governing the exercise of the order-making powers have, understandably, been drafted so as to avoid them being used to introduce legislative change of the kind that should properly be subject to full Parliamentary scrutiny. It is likely that

General Synod (and indeed the Ecclesiastical Committee of Parliament) would require any new powers to be similarly circumscribed, so that they could not be used for anything but the most minor changes.

- 3.4 The Archbishops' Council needs to think long and hard about which categories of governance need to be the subject of primary legislation and which can just as satisfactorily be contained in a Constitution or Code of Canons which could be revised and amended by General Synod with relative ease and without recourse to Parliament. Other provinces of the Church of England function perfectly well on this basis. Maybe the time has come to separate first-tier issues (church-state relations and matters concerning the rights of individuals) where primary legislation is necessary and second-tier issues about which the Church of England is properly autonomous and which can be the subject of a governing instrument over which the General Synod will have proper and effective ownership.

A better solution?

- 4.1 The decision of the Archbishops' Council in putting out its 'blue sky' thinking at an early stage and to a wide range of consultees has the distinct advantage of permitting real and meaningful input to an inchoate proposal which is still embryonic. The Working Party offers the following series of recommendations to inform and shape long-overdue changes to make the ecclesiastical law and law-making of the Church of England fit for purpose in the twenty-first century.

Education

- 4.2 It is incumbent on the Archbishops' Council not to pander to the false narrative that law is a malign force which stifles the mission of the Church. On the contrary, it facilitates the Church of England – by law established – to fulfil its role and function and as the national church. If the law has been allowed to become moribund, that is the fault of the law-maker. With the dawn of a new quinquennium, it is to be hoped that those who stand for election for General Synod do so in the knowledge that the institution to which they wish to be elected is, amongst other things, a legislative body.

Process

- 4.3 The passage through General Synod of the Bishops and Priests (Consecration and Ordination of Women) Measure 2014 shows that, with goodwill, legislative change can occur swiftly. The reform of church legislation is just as overdue, more far reaching in effect, but far less contentious than women's consecration. Properly presented, draft legislation of the type outlined below, should receive universal support within General Synod, gain the approval of the Ecclesiastical Committee without difficulty and receive the Royal Assent promptly.

Repeal and consolidation

- 4.4 The most pressing need, as was recognised by the Spafford Working Party 30 years ago, is the immediate repeal of moribund, otiose, obsolete and arcane legislation, coupled with the consolidation of dispersed statutory provision. Much of the preparatory work has already been done. Indeed the wholesale repeal of huge swathes of obsolete legislation could be completed pursuant to an uncontroversial Revision Measure, while the radical proposal of a new Enabling Measure remained a matter of intense debate and polarised opinion.

Presentation

- 4.5 As with any change, the extent of 'buy in' depends upon how it is presented. The Working Party received comments from a variety of individuals including a few members of General Synod. There was a perception that the proposal is intended to move legislative authority

away from Synod and into the Archbishops' Council. There was a fear of a largely unelected and unaccountable body changing the law of the Church of England and diminishing the rights of its members (ordained and lay). The consultation document was perceived by some as saying that bishops have identified constraints on their power ('burdens') and the proposed Enabling Measure was a clandestine means of removing those constraints and ceding untrammelled authority to the bishops and to the Archbishops' Council. Without passing any judgment on whether this perception is soundly based, the Working Party observes that a Measure directed towards repealing obsolete legislation with a mopping up provision for consequential revisions and consolidation is much more likely to find widespread approval in General Synod than one whose sole purpose is to create an untried and untested procedure including the establishment of new committee with the capacity (real or perceived) to change the law surreptitiously.

- 4.6 There would be nothing objectionable in what we have loosely described as a 'mopping up' clause being drafted for future legislative reform to be undertaken using a fast-track procedure provided (i) this was ancillary to a wholesale and systematic repeal of obsolete legislation and (ii) it were subject to necessary safeguards of the type outlined in the consultation document.
- 4.7 The Working Party also commends consultation with the Law Commission, which has considerable experience of statute law reform, including the repeal of obsolete legislation.

Conclusion

- 5.1 In many ways, the view of the Working Party is that the substantive proposal is not radical enough. The ecclesiastical law of the Church of England will be subjected to years of piecemeal orders rather than the swift clear surgical intervention which it undoubtedly needs. The Working Party would encourage the Archbishops' Council:
- i. to address with greater depth and specificity the real nature of the current problem;
 - ii. to take immediate steps to repeal redundant and obsolete legislation and to conduct a thoroughgoing consolidation of the legislation that remained;
 - iii. to link this wholesale repeal with a provision for consequential amendments and future revisions and repeals on a fast track basis;
 - iv. to put in place adequate safeguards for when the fast track provision is invoked.
- 5.2 The Working Party encourages the Archbishops' Council to look afresh at its rationale for what is proposed. Since the Working Party is unconvinced of the premise which underlies the questions raised in the consultation document, they have not been addressed individually.
- 5.3 Both the Working Party and the Committee of the Ecclesiastical Law Society commend the Archbishops' Council for taking up the challenge of repealing and revising obsolete ecclesiastical legislation; and are willing to offer further assistance in the future to frame the best possible provisions for making the law of the Church of England and its governance fit for purpose in the twenty-first century to promote the mission and witness of the church at national, diocesan and parochial level.

Professor Mark Hill QC
(Vice Chairman, Ecclesiastical Law Society)
Dr Charles Mynors
Professor Peter Smith

20 July 2015