

## ILLUSTRATION OF ‘STATUTORY CODE OF PRACTICE’ OPTION

### Description

The principal elements of this option are as follows:

- the Priests (Ordination of Women) Measure 1993 and the Episcopal Ministry Act of Synod 1993 would be repealed in their entirety<sup>1</sup>;
- a code of practice would set out expectations as to the arrangements to be made for those conscientiously unable to receive women’s priestly and episcopal ministry, involving the voluntary delegation by diocesan bishops to ‘complementary bishops’ of episcopal functions identified in the code;
- that code of practice would be made by the House of Bishops, subject to approval by the General Synod; and
- bishops and others would be placed under a legal duty to ‘have regard to’ the code of practice.

The purpose of the code would be to make provision, common to the Church of England as a whole, which sought to address the concerns of those conscientiously unable to receive women’s priestly and episcopal ministry.

We believe that, were this option to be adopted, the code should therefore contain the following provision:

- (a) a procedure to be followed if a parish (a ‘petitioning parish’) which was conscientiously unable to receive the priestly and episcopal ministry of women, and/or the ministry of men ordained by women bishops, wished to take advantage (or cease to take advantage) of special arrangements for their sacramental and pastoral care;
- (b) that, without relinquishing their general oversight or legal jurisdiction in relation to petitioning parishes, bishops should make special arrangements for their sacramental and pastoral care, by delegating their responsibilities for those matters to a ‘complementary bishop’;
- (c) the detailed legal steps that should or could be taken to that end, including by the delegation of specified episcopal functions to complementary bishops;
- (d) the need for those with the right to present to petitioning parishes to respect their conscientious inability to receive the priestly ministry of women;
- (e) the need for diocesan bishops and others to consult complementary bishops in specified contexts (eg in relation to patronage and appointments, formal responsibility for which would remain with the diocesan bishop);
- (f) the need for complementary bishops to co-operate with diocesan bishops and others in specified contexts;
- (g) provision to identify those who could act as complementary bishops – namely the diocesan bishop of any other diocese who had made a

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<sup>1</sup> But with the effect of s.1(1), allowing for the ordination of women to the priesthood, being preserved.

declaration that he would not ordain or consecrate women, the holders of any suffragan see identified for the purpose by the archbishop of the province concerned, any suffragan bishop (whether in the diocese or elsewhere) and any stipendiary assistant bishop in the diocese - provided in each case that they were male;

- (h) provision for the diocesan bishop to decide who should act as complementary bishop in relation to a particular petitioning parish, after consultation with the parish, but subject to the parish being able to require the appointment of a bishop holding a suffragan see identified by the archbishop in the way described in (g) above; and
- (i) arrangements for the appointment, consecration and authorisation of bishops holding suffragan sees identified by the archbishop in the way described in (g) above.

It would also be possible, if desired, for the code to encourage bishops to make special arrangements in some respects for clergy and other licensed ministers who were themselves conscientiously unable to receive women's priestly and episcopal ministry but whose parishes had not petitioned. Those arrangements might include:

- (a) the disciplinary arrangements to be made for such clergy (in terms of the identity of those responsible for administering discipline); and
- (b) the arrangements to be made for the ministerial review of such clergy.

## **Commentary**

### *Procedure for making a code*

A decision would be needed as to who should make the code and any subsequent amendments to it<sup>2</sup>. Given that the code would be dealing with the exercise of episcopal functions and related matters, we believe it would be right for the House of Bishops to have primary responsibility for making it. But since it would address sensitive and important matters, the code ought also to require the approval of the General Synod<sup>3</sup>. Were the Synod to have to approve the code, the question would also arise as to whether the Synod could amend the code and, if it could, whether any amendments it passed would have to be accepted by the House of Bishops or whether the House would have power to reject such amendments.<sup>4</sup> We believe that both should be necessary.

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<sup>2</sup> The code of practice under the Clergy Discipline Measure 2003 is made by the Clergy Discipline Commission, but subject to approval by the General Synod. That under the Dioceses, Pastoral and Mission Measure 2007 is made by the House of Bishops, again subject to the Synod's approval. In both cases the Synod can amend the code put before it for approval.

<sup>3</sup> Subject to the possibility of the 'deeming procedure' being available in relation to uncontroversial changes.

<sup>4</sup> Clause 2 of the draft Ecclesiastical Offices (Terms of Service) Measure provides a recent precedent. That allows the Archbishops' Council to make draft Regulations providing for the terms of service of ecclesiastical office holders, subject to approval by the General Synod. The Synod can also amend the draft Regulations; but if it does so the Council may withdraw the draft Regulations for further consideration in view of the amendment(s).

The code could not formally be made until the Measure had come into force; but a fully developed draft of the code could be laid before the General Synod at the time it gave the Measure Final Approval so that the nature of the intended arrangements to be made under the code was apparent at that point.

### *Content of a code*

In its maximal form, a code could set out best practice in all relevant areas.

However, a code could not, and would not, of itself transfer any episcopal functions to a complementary bishop. Nor, unless the code were expressly made binding on diocesan bishops (as to which see below), could it of itself require the transfer of any functions from a diocesan bishop: it could only recommend good practice in relation to that and other relevant matters, leaving it to bishops to comply. **Any transfer of episcopal functions to give effect to the good practice enshrined within the code would therefore have to be achieved by (voluntary) delegation by the diocesan bishop.**

Nor could a code itself make any change in the canonical requirements with regard to the duty owed by clergy to their diocesan bishop or the making of the oath of obedience: that could only be achieved by legislative means. On the desirability of such change, see paragraphs 145 to 150 of the main body of the report.

### *Enforcing a code*

Enforceability questions arise from two points of view: (a) indirect enforcement through the disciplinary process and (b) direct enforcement so as to give interested parties the ability to ensure that the arrangements envisaged in the code are actually carried out.

So far as indirect enforcement through the disciplinary process is concerned, for a cleric to act in a way inconsistent with a code of practice would not involve misconduct for the purposes of the Clergy Discipline Measure 2003 since it would not, itself, involve his or her acting “ *in contravention of the laws ecclesiastical*” for the purposes of s.8 of the Measure. However, were the legislation to require that bishops and others concerned must ‘have regard to’ the code (ie to take it into account before acting in relation to any matter it addressed), then the possibility of disciplinary proceedings could, in principle, arise if evidence could be produced to show that a bishop had failed to have regard to it.

So far as wider questions of enforceability are concerned, the position is less clear. In the secular legal context there has been an increasing tendency to enforce provision made in codes of practice which are not intrinsically binding in law, including by using non-compliance with them to set aside administrative action on grounds of procedural fairness or unreasonableness. In consequence one commentator has written that in the ecclesiastical context “ ... *quasi-legislation has ramifications in the field of judicial review. It may create rights and duties and foster legitimate expectation whereby disregard of its content might give rise to redress by way of a*

*public law remedy in the Administrative Court*”<sup>5</sup>. Thus in *R v Bishop of Stafford ex parte Owen*<sup>6</sup>, alleged non-compliance with the Code of Recommended Practice for Team and Group Ministries was prayed in aid (unsuccessfully in the event) of a claim that a bishop had acted unlawfully in not further extending a team rector’s term of years.

Thus the fact that action was inconsistent with a code of practice might, but would not necessarily, enable an aggrieved party to bring legal proceedings in the civil courts to prevent that action being taken. Equally, the fact that something was recommended by the code might, but would not necessarily, enable an aggrieved party to bring proceedings to require that action to be taken.

Partly in view of that uncertainty, the question arises of whether a code could be expressly given greater binding effect in some way or another. In principle, there would be three main options:

- (a) One would be for the Measure to provide that bishops and others exercising functions under the Measure and/or the Regulations must ‘have regard to’ the code. That would not require them to apply it. But it would mean that, before taking a decision on a matter which it addressed, they would have to take into account what it said about the matter in question; and if they chose not to do what the code recommended they would in practice have to point to a reason for their departure from it.
- (b) Another would be for the Measure to provide that some specified part or parts of the code (eg those dealing with the need for sacramental and pastoral provision) would be legally binding on specified persons, so that they were legally required to comply with it.
- (c) A third would be that the legislation should not provide that any part of the code should be legally binding on anyone but, rather, that failure to comply with the code, or with some specified part or parts of it, would amount to misconduct for the purposes of the 2003 Measure<sup>7</sup>.

We believe that the first of these options is to be preferred because:

- (a) If legally binding obligations are to be imposed, it is important from the point of view of all concerned that there should be clarity as to the nature and effect of those obligations – and such clarity is more likely to be provided by legislation than by a code of practice (expressed as it is likely to be in more general and less specific language); and
- (b) Standing Order 46 of the General Synod’s Standing Orders provides that a Measure may not provide for an authority to make an instrument having the force of law of general application unless (*inter alia*) that instrument has to (i) receive the approval of the Synod and (ii) if it affects the rights of any person, be laid before both Houses of Parliament and be subject to approval or annulment (and so, in other words, take the form of a Statutory Instrument). Thus a code which imposed obligations that had any effect on the rights of bishops, clergy or others would need to take the form of a statutory

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<sup>5</sup> Hill, *Ecclesiastical Law* (3<sup>rd</sup> edition), page 22.

<sup>6</sup> Unreported, 2000

<sup>7</sup> That possibility was canvassed in paragraph 88 of the Guildford Report.

instrument; and that would seem to be inconsistent with the rationale for adopting the code of practice option in the first place.

We accordingly recommend that, if the code of practice option is adopted, the Measure under which it is made should provide for no more than that bishops and others should be under a legal duty to have to ‘have regard to’ the code.

*‘Entrenching’ the legislation*

A decision will be needed as to whether to include provision in the Measure corresponding to s.11 of the 1993 Measure, under which any Measure or Canon amending or repealing any provision of the Measure or any Canon promulgated under it requires approval by two-thirds majorities in each of the Synod’s Houses. We are advised that it is difficult to conceive of any significant changes that would not represent ‘Article 7 Business’ for the purposes of the Synod’s Constitution and Standing Orders (on the ground that they represented “*provisions touching ... the administration of the sacraments or sacred rites [of the Church of England]*”). The Article 7 procedure - involving as it does separate consideration by each of the Four Houses of Convocation and the House of Laity - would itself represent a sufficient safeguard, though, unlike Article 8, it does not automatically trigger a requirement for two-thirds majorities. The illustrative draft Measure does not include a provision equivalent to s.11 but this is something that will require further consideration, including by the Synod itself during any revision process.

