GENERAL SYNOD

LEGISLATIVE REFORM MEASURE

Explanatory Memorandum

Background and summary

1. The proposals which form the basis of the draft Legislative Reform Measure were set out in *A New Enabling Measure* (GS 2018) in January 2016. Those proposals were formulated in the light of responses to a consultation paper (GS Misc 1103) which was published in April 2015.

2. At the group of sessions held in February 2016 the General Synod passed a motion inviting the Archbishops' Council to initiate the legislative process to bring an 'Enabling Measure' to the General Synod for first consideration at the July 2016 group of sessions.

3. The draft Legislative Reform Measure will facilitate removing or reducing burdens resulting from ecclesiastical legislation. It will do that by making it possible, in certain cases, to amend or repeal some Acts of Parliament and Church Measures by way of orders approved by the General Synod without going through the full legislative process that applies to Measures.

4. It will additionally make it possible for amendments to be made by order which facilitate, or are otherwise desirable in connection with, the consolidation of existing legislation.

Notes on clauses

Clause 1 Power to remove or reduce burdens

5. Clause 1 provides the power to make orders removing or reducing legislative burdens.

6. The power to make orders is conferred on the Archbishops' Council: see subsection (1). But an order cannot be made by the Council under clause 1 unless it has been approved by the General Synod following a process of consultation and scrutiny set out in clauses 4 to 6.

7. The power to make orders must be exercised for the purpose of removing or reducing burdens resulting directly or indirectly from ecclesiastical legislation. For this purpose, "burden" is defined in subsection (2) as:

   - a financial cost;
   - an administrative inconvenience; or
   - an obstacle to efficiency.

8. "Ecclesiastical legislation" is defined by subsection (3) so that it includes Acts of Parliament, Church Measures and subordinate legislation.

9. Subsection (4) makes it clear that for the purposes of the order making power, a burden may result from inconsistencies or anomalies in existing legislation or from the form of existing legislation (for example, because it is hard to understand).

10. Other examples of burdens involving financial cost or administrative inconvenience could include burdens resulting from ecclesiastical legislation which–

    - establishes bodies that are unnecessarily large for their purpose;

- prescribes unnecessarily complex administrative processes;
- puts in place safeguards (e.g. consent or consultation requirements) of a kind that are disproportionate.

11. Subsection (5) provides that provision that can be made by order under the Measure includes–
    - provision abolishing, conferring or transferring, or providing for the delegation of, functions of any description,
    - provision creating a body or office,
    - provision conferring a discretion (so that the legislation itself need not prescribe for every eventuality), and
    - provision amending, repealing or revoking an enactment.

12. Provision abolishing an office can be made only under subsection (1) of clause 8 (which makes provision for consequential provision). That means that an order can abolish an office only if the abolition of that office is consequential on one or more of the main provisions in the order. There is no free-standing power to abolish offices by order. So for example, it would be possible for an order to abolish an office if the order transferred all the functions of that office to another office; but not if there remained functions that were to be exercised by the holder of the office in question.

Clause 2 Preconditions

13. Clause 2 imposes conditions on the exercise of the order making power provided by clause 1.

14. The Archbishops' Council may include provision in an order only if it considers that each of the following conditions is met–
    - that the policy objective intended to be secured by the provision could not be satisfactorily secured by non-legislative means;
    - that the effect of the provision is proportionate to the policy objective;
    - that the provision, taken as a whole, strikes a fair balance between the public interest, the interest of the Church of England as a whole, and the interests of any person adversely affected by the provision;
    - the provision does not remove any necessary protection;
    - the provision does not prevent any person from continuing to exercise any right or freedom which that person might reasonably expect to continue to exercise;
    - the provision is not of constitutional significance.

15. Determining whether the conditions are met necessarily involves an element of subjective judgement. While it is in the first instance for the Archbishops' Council to form a view on whether the conditions are met, it is open to the committee provided for in clause 6, and the General Synod as a whole exercising its powers under clause 6, to form its own view. (See further below.)

16. The conditions are not applicable where a provision in an order merely restates an existing legislative provision: see subsection (2). Restating an existing provision has the effect of preserving the law as it is and there is therefore no need for preconditions where that is being done.

Clause 3 Exceptions

17. Certain Acts of Parliament and Measures are expressly excluded from the scope of the order making power by subsection (1) of clause 3. These are–

- the Submission of the Clergy Act 1533 (which provides that canons cannot be contrary to the general law)
- the Appointment of Bishops Act 1533 (which sets out the procedure for appointing diocesan bishops)
- the Suffragan Bishops Acts 1534 to 1898 (which set out the procedure for appointing suffragan bishops and related matters)
- the Act of Uniformity 1662 (the unrepealed provisions of which prevent those who have not received episcopal ordination as priests from being appointed as incumbents etc. and require preachers to be licensed)
- the Church of England Assembly (Powers) Act 1919 (which devolves legislative power to the General Synod)
- the Synodical Government Measure 1969 so far as it relates to the General Synod and the Convocations
- the Church of England (Worship and Doctrine) Measure 1974 (which enables the General Synod to approve forms of service alternative to those in the Book of Common Prayer, subject to certain safeguards)
- the Legislative Reform Measure itself.

18. The repeal or amendment of some of these Acts and Measures will be outside the scope of the order making power anyway on the basis that provision made by an order must not be 'of constitutional significance' (see clause 2). But the specific exclusion of certain Acts and Measures will make it unnecessary to form a view as to whether any proposal to amend them is 'of constitutional significance'.

19. Subsection (2) excludes from the order making power provision which is subject to Article 7[1] or Article 8[2] of the Constitution of the General Synod.

20. Subsection (3) prevents an order from making provision which would extend, reduce or alter the purposes for which the Church Commissioners are able to make payments from their general fund.

21. Although the Synodical Government Measure 1969 is one of the Acts and Measure excluded from the scope of the order making power by subsection (1), it will be possible – by virtue of subsection (4) – for an order to make provision which relates to the constitution or functions of diocesan and deanery synods.

22. The exceptions contained in subsections (1) to (3) do not apply to consequential, supplementary, incidental, transitional, transitory or saving provision made under subsection (1) of clause 8. So, for example, were an order to make new provision in relation to guild

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[1] Article 7 applies to "provision touching doctrinal formulae or the services or ceremonies of the Church of England or the administration of the Sacraments or the sacred rites thereof". Any such provision must be referred to the House of Bishops and may be submitted for final approval by the Synod only in terms approved by the House of Bishops. Provision to which Article 7 applies may also be subject to references to the Convocations and the House of Laity.

[2] Article 8 applies to a Measure or Canon "providing for permanent changes in the Services of Baptism or Holy Communion or in the Ordinal" and to certain ecumenical schemes. Any such provision has to be referred to the diocesan synods and cannot be finally approved by the General Synod unless it has been approved by a majority of diocesan synods. In certain cases Article 8 also requires special majorities in the General Synod at final approval.

churches which replaced the City of London (Guild Churches) Acts 1952 and 1960, it would be possible for the order to make a consequential amendment to the definition of "guild church" in the Church of England (Worship and Doctrine) Measure 1974 so that it referred to the new provision.

Clause 4 Consultation

23. Clause 4 imposes an obligation on the Archbishops' Council to carry out consultation if it is proposing to make an order under clause 1.

24. The Council must consult–

- the members of the General Synod,
- persons who have or exercise functions to which the proposals relate,
- other persons whose interests would be substantially affected, and
- any other persons the Council considers appropriate.

25. Where the persons to be consulted are represented by an organisation (as for example, in the case of retired clergy, ecclesiastical judges, or cathedrals, which have established representative bodies), subsection (2) allows the Council to discharge its duty of consulting those persons by consulting the relevant organisation.

26. Subsection (3) deals with the situation where the Council concludes, following consultation, that it should change its proposals. Where that is the case, the Council is required to carry out such further consultation on the changes as it considers appropriate.

27. Subsection (4) deals with the possibility that the Council may have carried out consultation before the coming into force of the Measure which would, to any extent, have satisfied its consultation requirements. Where that consultation would have satisfied all the requirements as to consultation in clause 4, those requirements are taken to have been met and the consultation does not need to be repeated. If the consultation already carried would have satisfied those requirements only to a certain extent, the consultation requirements in the Measure are taken to have been carried out to that extent and those parts of the consultation do not need to be repeated; but the remaining consultation requirements will need to be undertaken.

Clause 5 Laying proposals before the General Synod

28. If, having completed the consultation under clause 4, the Archbishops' Council decides to proceed with its proposals, it must lay a draft of an order before the General Synod together with an explanatory document: see subsection (1).

29. Subsection (2) sets out the matters which must be addressed in the explanatory document. These are–

- an introduction to, and reasons for, the provision contained in the order,
- an explanation of why the Council considers that relevant conditions in clause 2 are satisfied,
- an assessment of the extent to which the provision contained in the order would remove or reduce burdens,
- details of the consultation undertaken under clause 4, the representations received, and the changes (if any) made as a result.

30. Subsections (3) to (5) make provision about circumstances in which the Council must or may decline to disclose information received by it in response to consultation under clause 4. Those circumstances include where a person making representations in response to a consultation asks the Council not to disclose that person's representations. Where that is the case, the Council must not disclose the representations if to do so would result in the person concerned being able to bring a claim for breach of confidence against the Council. Where the information provided relates to a person other than the person who provided it, the Council is not required to disclose information if it would adversely affect the interests of the other person and the Council has not been able to obtain his or her consent.

31. These restrictions on disclosure do not affect any disclosure that is made to the committee of the General Synod provided for in clause 6 where the information is requested by the committee for the purposes of its consideration of a draft order.

Clause 6 Scrutiny and amendment

32. Clause 6(1) provides for the establishment, by the General Synod in its Standing Orders, of a committee to consider and report on draft orders laid before the Synod under clause 5.

33. In accordance with subsection (2), the relevant Standing Orders must–

- provide for the membership and chairing of the committee;
- provide for all draft orders laid before the Synod under clause 6 to be referred to the committee;
- enable members of the General Synod to make representations to the committee on a draft order;
- enable the committee to amend a draft order.

34. The committee will be able to address any matter relating to the draft order in its report. In particular, if the committee takes the view that a provision of legislation at which a draft order is directed does not in fact amount to a "burden" (see clause 1), or that a precondition to the exercise of the order making power is not met (see clause 2), it will be able to draw that matter to the Synod's attention. The committee might choose to address its concerns by amending the order. The committee will also be able to report on the way in which consultation has been carried out by the Archbishops' Council (see clause 4).

35. Once the committee has reported, the General Synod has 3 options under subsection (3). It may–

- approve the draft order (with any amendments made by the committee),
- reject the draft order,
- refer the draft order back to the committee.

36. If, in the light of the committee's report or otherwise, the Synod takes the view that a provision at which the order was directed is not a "burden" or that any of the pre-conditions to the exercise of the order making power are not in fact met, the Synod can give effect to its view either by rejecting the order or by referring the order back to the committee with a view to its amendment.

37. If the General Synod refers a draft order back to the committee, the Standing Orders must provide for the committee to consider and report on the draft order again and must enable the

committee to make amendments. The Synod then has the same 3 options in relation to the order of approving it, rejecting it or referring it back. (See subsection (4).)

38. Subsection (6) provides that if the General Synod approves a draft order, the Archbishops' Council may exercise its power under clause 1 and make an order in the form of the draft as approved by the Synod.

Clause 7 Pre-consolidation amendments

39. Clause 7 provides a separate order making power which may be used only in conjunction with consolidation Measures.

40. Consolidation Measures restate the statutory provisions contained in several Acts and/or Measures in a single Measure, usually with 'corrections and minor improvements'. As well as drawing all the relevant statute law in a particular area into a single Measure, they provide an opportunity to present it in a more helpful way.

41. It is often necessary, as a preparatory step, to make some pre-consolidation changes to put the law into a fit state to enable it to be consolidated. As consolidation Measures themselves do not change the law, the General Synod's Standing Orders provide that once introduced, a consolidation Measure can pass through the Synod quickly, normally by-passing the Revision Committee and Revision Stages. But any pre-consolidation amendments to an Act or Measure can only be made by Measure under the normal procedure. That means that it currently takes up to 2 years to make changes to existing legislation that are of a technical or otherwise uncontroversial nature before that legislation can be consolidated.

42. The power in subsection (1) is concerned with facilitating pre-consolidation changes. It enables the Archbishops' Council, with the approval of the General Synod, to make orders that amend Acts of Parliament, Measures and subordinate legislation relating to a particular area of ecclesiastical law. But the order making power is exercisable by the Council only in so far as it considers that the amendments would facilitate, or would otherwise be desirable in connection with, a related consolidation of existing legislation.

43. Subsection (2) enables pre-consolidation amendments made by order to have retrospective effect in certain circumstances. Those circumstances are limited to those where the purpose of the provision is to remove a doubt, or to remove an anomaly that is not of substantial importance. A provision made under this power would, for example, enable an amendment to be made which stated that a particular provision in existing legislation was to be treated as always having had a particular meaning. Where existing legislation contains provisions the meaning of which are doubtful, it is often helpful to remove that doubt, not only for the future but also in order to cover action already taken in reliance on the provision in question.

44. Subsections (3) and (4)(a) require that an order containing pre-consolidation amendments be laid before the Synod for approval, with or without amendment.

45. If the Synod approves the order, it nevertheless does not come into force unless the related consolidation Measure is also passed: see subsection (4)(b). Subsection (5) provides that if the related consolidation Measure is passed, the order comes into force immediately before the consolidation Measure comes into force.

46. Subsection (6) enables the Business Committee to determine that an order under clause 7 does not need to be debated and to make it subject to the procedure for deemed approval by the

Synod. This is, as usual, subject to the right of any member to require that the order be debated or to move an amendment to the order.

Clause 8 Orders

47. Subsection (1) enables an order made under clause 1 or clause 7 to contain provision which is consequential on, or supplementary or incidental to, its main provisions. It also enables an order to make transitional, transitory and saving provision to ensure that it is clear whether the old legislation, the new legislation or other specially tailored provision is applicable in cases which overlap the change from the old legislation to the new.

48. Subsections (2) and (3) make special provision for the way in which orders under clause 1 or clause 7 have effect in the Isle of Man.

49. Subsection (4) requires that an order made under clause 1 or clause 7 must take the form of a statutory instrument. Once an order has been made, it must be laid before both Houses of Parliament and is subject to the 'negative procedure' under which it can be annulled by resolution of either House within 40 days.

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