

# Ecclesiastical Jurisdiction and Care of Churches Measure

## Drafting Notes

### Introduction

1. These notes use the following abbreviations –

CCA 1867 – Consecration of Churchyards Act 1867

ICM 1955 – Inspection of Churches Measure 1955

EJM 1963 – Ecclesiastical Jurisdiction Measure 1963

FJM 1964 – Faculty Jurisdiction Measure 1964

EJLOM 1976 – Ecclesiastical Judges and Legal Officers Measure 1976

IA 1978 – Interpretation Act 1978

CCEJM 1991 – Care of Churches and Ecclesiastical Jurisdiction Measure 1991

CPWM 1999 – Care of Places of Worship Measure 1999

SOs – the Standing Orders of the General Synod

2. The consolidation includes a number of “corrections and minor improvements” within the meaning of SO 63(3), which provides as follows –

*“(3) “Correction and minor improvement” means an amendment the sole effect of which is –*

*(a) to resolve an ambiguity;*

*(b) to remove a doubt;*

*(c) to bring an obsolete provision into conformity with modern practice;*

*(d) to remove an unnecessary provision or an anomaly not of substantial importance;*

*(e) to improve the form or manner in which the law is stated;*

*(f) to bring a provision into conformity with the existing law;*

*(g) to make transitional, transitory or saving provision which is necessary in consequence of an amendment within any of paragraphs (a) to (f).”*

### Part 1 (the Ecclesiastical Courts) - general

3. This Part restates the provisions on the non-disciplinary jurisdiction of the ecclesiastical courts. The EJM 1963, as amended by Schedule 1, is to remain in force for the sole purpose of preserving the disciplinary jurisdiction for offences involving “matters of doctrine, ritual or ceremonial” (see section 14 EJM 1963).

### Clause 3 (judge of consistory court: term of office)

4. Subsection (9) provides for the case where a chancellor’s term of office has been continued beyond the usual retirement age, but the continuance comes to an end during proceedings in which the chancellor is presiding. The chancellor is to be allowed to continue to preside in those proceedings until their conclusion. The existing provision in section 2(4) EJM 1963 does not expressly allow for that and its failure to do so is an anomaly; indeed, the existing provision is already applied in that way in practice. The clause makes express provision to that effect in reliance on SO 63(3)(d) (removal of anomaly not of substantial importance)

#### **Clause 4 (deputy judge of consistory court: appointment and term of office)**

5. Subsections (1) and (2) remove an inconsistency between section 4(1) and (1B) EJM 1963, the latter of which provides for appointments to be in writing, with the former silent on the point. In practice, each power is exercised in writing. A similar inconsistency is removed in clause 63(1). The changes are made in reliance on SO 63(3)(d) (removal of anomaly not of substantial importance).
6. Subsection (3) provides for the appointment of an *ad hoc* deputy chancellor to hear a case if the chancellor and the person appointed generally as deputy chancellor are precluded from hearing the case by, say, a personal interest. The reference in section 4(1) EJM 1963 to the chancellor's "inability" to act would cover that case, but the subsequent reference to the appointment of a deputy for a specific period is not apt. The clause makes express provision for such circumstances in reliance on SO 63(3)(b) (removal of doubt) and 63(3)(d) (removal of anomaly not of substantial importance).

#### **Clause 6 (judge and deputy judge of consistory court: oaths)**

7. Subsection (3) expressly requires the diocesan registrar to file the record of the oaths in the diocesan registry. Clause 13(3) makes equivalent provision for the provincial registrar. The changes are made in reliance on SO 63(3)(b) (removal of doubt).

#### **Clause 7 (consistory court: jurisdiction)**

8. Subsection (1)(a) refers to land in a diocese. Subsection (3) reproduces the definition of "land" in paragraph 5(d) of Schedule 2 to IA 1978, as EJM 1963 was passed before 1979 and after 1850. As some weight rests on this reference to "land", it is appropriate to use that definition so as to retain the meaning that "land" has in the existing provision (rather than rely on the definition in Schedule 1 to IA 1978).
9. Subsection (1)(a) refers to things "on, in or otherwise appertaining to" land in a diocese. The words "otherwise appertaining to" are not in the existing provision but appear in the clause to reflect the decision in *Re St Lawrence, Wootton* [2015] Fam 27. The Arches Court held there that, where an article appertaining to a church had been loaned to a museum, it remained subject to the jurisdiction of the consistory court of the diocese of the church, regardless of whether the museum was in that diocese. The additional words are included in reliance on SO 63(3)(f) (conformity with existing law).
10. Subsections (1)(b), (e) and (f) refer to provisions which are not referred to in the existing provision, in order to set out in one place for ease of reference the free-standing jurisdiction that consistory courts have under various enactments.
11. Subsection (1)(h) restates the saving in section 6(1)(e) EJM 1963 for the residual jurisdiction of consistory courts from before 1963. It includes adjudicating on some civil rights relating to ecclesiastical property and the recovery of money applicable for ecclesiastical purposes (see Halsbury's Laws, Volume 34 (2011), para.1121, fn.2).

#### **Clause 12 (deputy Dean of the Arches: appointment and term of office)**

12. Subsection (1) provides for the Archbishops' power of appointment to be exercisable jointly, though the existing provision in section 4(1) EJM 1963 does not. That is not consistent with other provisions in EJM 1963 (section 3(2)(a), for example) and is thought to be a mistake. The clause removes the inconsistency in reliance on SO 63(3)(d) (removal of anomaly not of substantial importance).

### **Clause 13 (Judges of Arches and Chancery Courts: oaths)**

13. Subsection (1) does not restate the existing requirement in section 3(6) EJM 1963 for a chancellor to swear oaths before acting as a judge of the Arches and Chancery Courts. The requirement for a chancellor to do so in front of the Archbishops or in open court is nowadays impractical. It is also unnecessary, given that a chancellor is already required by section 2(5) EJM 1963 to swear the same oaths before taking office as such. The requirement for a deputy Dean to swear the oaths is accordingly confined to the relatively rare case of a deputy who is not also a chancellor. The clause makes the changes in reliance on SO 63(3)(c) (bringing obsolete provision into conformity with modern practice) and (3)(d) (removal of unnecessary provision).

### **Clause 18 (Court of Ecclesiastical Causes Reserved: jurisdiction)**

14. Subsection (9) restates section 45(3) EJM 1963 for certain purposes. Although the existing provision is part of a section that deals only with disciplinary proceedings, the reference in that provision to "jurisdiction under this Measure" suggests that it has a general application that would cover the court's non-disciplinary jurisdiction.

### **Clause 27 and Schedule 1 (other ecclesiastical jurisdictions)**

15. Paragraph 1 of Schedule 1 retrospectively revives certain provisions of the Care of Cathedrals (Supplementary Provisions) Measure 1994. That Measure amended some of the provisions being consolidated but was repealed by the Care of Cathedrals Measure 2011, depriving those amendments of their foundation. It is usual legislative practice to keep in force the provision founding an amendment for as long as the amendment itself remains in force. For the sake of completeness and accuracy therefore, certain provisions of the 1994 Measure are to be revived from the time of their original repeal and then repealed again (and finally) in this consolidation. The retrospection is wholly technical and does not affect anyone's rights or duties; it is done in reliance on SO 63(3)(d) (removal of anomaly not of substantial importance) and (3)(e) (improvement of form in which law stated).
16. Paragraph 30 of Schedule 1 inserts new sections 20A and 20B into the Care of Cathedrals Measure 2011 in order to restate sections 60 to 62 EJM 1963 so far as they relate to the Vicar-General's jurisdiction over cathedrals. Subsection (4) of the new section 20A provides for an appeal against the registrar's taxation of costs to be made to the Vicar-General's court, whereas the existing provision in section 60(5) EJM 1963 provides for the appeal to be to the chancellor. It is anomalous for a chancellor to be the ecclesiastical judge who would hear an appeal against taxation of costs in a case relating to a cathedral. The change is accordingly made in reliance on SO 63(3)(d) (removal of anomaly not of substantial importance).

### **Clause 28 (provincial registrar: continuation of office)**

17. Subsection (8) restates section 3(5) EJLOM 1976, which requires consultation with the Standing Committee of the General Synod. That Committee was abolished by the National Institutions of the Church of England (Transfer of Functions) Order 1998 (S.I. 1998/1715), with its functions being transferred to the Archbishops' Council, the Appointments Committee or the Business Committee. But that Order does not specify which body is to have the functions under EJLOM 1976. Subsection (8) reflects the position in practice and makes the Archbishops' Council the consultee. The same change is made in the corresponding provision for deputy registrars in clause 29(7). In each case, the change is made in reliance on SO 63(3)(b) (removal of doubt).

### **Clause 32 and Schedule 2 (diocesan advisory committees: continuation)**

18. Paragraph 4(3) of Schedule 2 imposes an express requirement for the bishop to undertake the same consultation on an appointment to fill a casual vacancy as he or she would on an original appointment to the position concerned. It is not clear whether the existing requirement in paragraph 10 of Schedule 1 CCEJM 1991 to appoint a person to fill the vacancy carries with it the same requirement to consult. Express provision is included here in reliance on SO 63(3)(a) (resolution of ambiguity).

### **Clause 36 (diocesan advisory committees: continuation)**

19. Subsection (3) is new and enables a diocesan synod to amend the advisory committee's constitution. If provision along the lines of section 2 CCEJM 1991 were to be made anew, the diocesan synod would most likely be given a power to that effect, so as to enable it to keep the constitution up to date. Subsection (3) is included in reliance on SO 63(3)(c) (bringing obsolete provision into conformity with modern practice).

### **Clause 38 (the list of places of worship)**

20. Subsection (3)(c) refers to Article 7 of the Ecclesiastical Exemption (Listed Buildings and Conservation Areas) (England) Order 2010 (S.I. 2010/1176), on the basis that section 17(2) IA 1978 converted the reference in section 1(5) CPWM 1999 to Article 4 of the Ecclesiastical Exemption (Listed Buildings and Conservations Areas) Order 1994. Subsection (3)(c) does not refer to Article 7(1)(e) of the 2010 Order (educational institutions), as it does not restate a provision of Article 4 of the 1994 Order and so would not count as a modification for the purposes of section 17(2)(b) IA 1978. But subsection (3)(c) does refer to Article 7(1)(a)(ii) of the 2010 Order (buildings used for Roman Catholic worship), as it is a modification of Article 4(d) of the 1994 Order.

### **Clause 40 (application for inclusion in list: who may apply)**

21. Subsection (4) is new. Paragraph 5(2) of Schedule 1 CPWM 1999 indicates that an entry relating to a building on the list can be altered. But the procedure under that Measure relates only to applications to include or remove an entry (see section 2(1)). The references to "applications for the purposes of this Measure" should on that basis be read as references only to applications to include or remove an entry. The existing provisions imply that the person who is entitled to apply to include or remove an entry is also entitled to apply to alter the entry. Subsection (4) makes express provision to that effect in reliance on SO 63(3)(b) (removal of doubt).

### **Clause 41 (application for inclusion in the list: requirements for consent)**

22. In subsection (7), paragraphs (a) and (b) refer to the see of Canterbury and the see of York, rather than restating the reference in paragraph 2(1) of Schedule 1 CPWM 1999 to the office of the Archbishop. And paragraph (c) refers to the see of the bishop of the diocese where a building is situated, rather than restating the reference in paragraph 2(1) of that Schedule to the see where the building is situated. The existing provisions blur the distinction between a see and a diocese. The changes in subsection (7) are made in reliance on SO 63(3)(d) (removal of anomaly not of substantial importance).

### **Clause 43 (effect of inclusion in the list)**

23. In subsection (1), some parenthetical words have been added so as to clarify the effect of the definition of "building" contained in clause 38(4).

#### **Clause 46 (inspection of church or building: contents etc.)**

24. Subsection (1)(c) and (d) restates section 1A(b) and (c) ICM 1955 without the reference to a “closed” churchyard. That is thought to refer to a churchyard where burials have been discontinued by Order in Council under the Burial Act 1853. Such an Order may discontinue burials “subject to any exception or qualification” which could, for example, relate to rights of burial conferred by faculty or to interment of cremated remains. The clause does not refer expressly to closed churchyards, as it goes without saying that they come within the natural meaning of “churchyard” (and express provision here might cast doubt on the meaning of the expression elsewhere). Clauses 88(3) and 91(4) and (5) refer to churchyards where burials have been discontinued rather than to closed churchyards.
25. Subsection (4) restates the definition of “ruin” in section 6 ICM 1955. The reference in that definition to “land” would in principle be read in accordance with the definition in paragraph 5 of Schedule 2 IA 1978, as ICM 1955 was passed after 1850 but before 1979. In this context, though, the natural meaning is relatively narrow and the definition of “land” in clause 53(1) produces the right result.

#### **Clause 47 (archdeacon’s power to require inspection of church)**

26. Subsection (4) restates section 2(2) ICM 1955 but without the definition of “bishop” in section 6 ICM 1955. It contains an obsolete reference to the guardian of the spiritualities for the case of a vacancy in a see. Section 14 of the Dioceses, Pastoral and Mission Measure 2007 provides for the exercise of a bishop’s functions during such a vacancy.

#### **Clause 48 (power to require inspection of other place of worship)**

27. This clause restates section 2 ICM 1955 as applied by section 3(4) CPWM 1999. It states that section 2(2) ICM 1955 does not apply to buildings on the list but goes on to apply it with modifications; the earlier reference to section 2(2) appears to be a drafting error.

#### **Clause 53 (role of archdeacon in ordering deposit of articles in place of safety)**

28. Subsection (2) restates section 21(1) CCEJM 1991 but omits the words “from the church”, as they are inconsistent with section 21 as a whole. The reference in section 21(2) to another person with custody of an article suggests the provision is not limited to articles belonging to the parish and vested in the churchwardens. The change is made in reliance on SO 63(3)(d) (removal of anomaly not of substantial importance).
29. On subsection (5), the words “(and not withdrawn)” have been added to acknowledge the possibility of the archdeacon withdrawing a notice on becoming of the opinion that an article ought to be removed to a place of safety immediately. The change is made in reliance on SO 63(3)(e) (improvement of form or manner in which law is stated).

#### **Clause 55 (interpretation of Part 3)**

30. The definition of “land” in subsection (1) restates the definition in CCEJM 1991 and emphasises that the definition in Schedule 1 IA 1978 does not apply. The inclusion of “buildings” in the definition in CCEJM 1991 is puzzling, given that there are many references in that Measure to buildings alongside references to land. It is sufficient to raise a contrary intention for the purposes of IA 1978, with the result that the definition of “land” in Schedule 1 to IA 1978 does not apply. It seems likely that this approach was taken in order to exclude estates, interests and rights from the reference to “land”.

31. The definition of “minister” in subsection (1) does not restate paragraph (aa) of the definition in section 31(1) CCEJM 1991, as it relates to section 20(8A) of the Pastoral Measure 1983, which was not consolidated in the Mission and Pastoral Measure 2011.

**Clause 57 (curtilage of churches)**

32. On the reference to “land”, the definition in paragraph 5 of Schedule 2 IA 1978 would apply, as FJM 1964 was passed after 1850 but before 1979. But in this context that definition does not add anything relevant. The natural meaning in this context is relatively narrow, and the definition in clause 80(1) will produce the right result.

**Clause 59 (buildings licensed for public worship before 1 March 1993)**

33. Subsection (5) confers power to vary or revoke an order by order. The requirements in subsection (6) for filing then apply to an order to vary or revoke. The existing provision in section 6(4) FJM 1964 refers only to revocation and does not require it to be by order. The changes bring consistency with clause 58(6) and (7) and are made in reliance on SO 63(3)(d) (removal of anomaly not of substantial importance).

**Clause 65 (exclusive right to burial places)**

34. Subsections (1) and (3) refer to the possibility that the grant itself might have provided for the right to cease before the end of the 100-year period that would otherwise apply. That is thought to be a necessary implication of the existing provision in section 8 FJM 1964; if the intention had been to override such provision in the grant, the FJM would surely have said so in terms. This change, making express what is otherwise implied, is done in reliance on SO 63(3)(e) (improvement of manner in which the law is stated).

**Clause 67 (sale of books in a parochial library)**

35. Subsection (1) includes an express reference to books “remaining in or belonging to” a parochial library for consistency with the wording in clause 77(7)(i).

**Clause 72 (restoration order)**

36. Subsection (5) restates section 13(8) CCEJM 1991 but provides for the limitation period to hinge on when the proceedings are brought rather than when the order is made. Otherwise, an applicant cannot be sure of bringing proceedings in time and a respondent has an incentive to delay. The inconsistency between section 13(7) and (8) (with the former in the more usual form) is thought to be an oversight. Provision for the limitation period to hinge on when proceedings are brought is also consistent with the equivalent provisions under Part 7 of the Town and Country Planning Act 1990. The adjustment is made in reliance on SO 63(3)(b) (removal of doubt).

**Clause 81 (Rule Committee: continuation and membership)**

37. Subsection (7)(c) and (e) provide for the Rule Committee members who make rules on consistory court jurisdiction to make rules under clause 74 on licences for minor works. And under section 79(4) for consultation with the advisory committee before cases are decided. These points relate to consistory court practice and so come within clause 75(6). But setting them out is useful, since section 25(2)(f) CCEJM 1991 already mentions certain specific rule-making powers. Subsection (7)(c) and (e) thus make express what would otherwise be implied. The change is made in reliance on SO 63(3)(e) (improvement of manner in which law stated).

38. Subsection (7)(d) specifies the power to make rules under clause 77(4) to require an archdeacon to seek the advisory committee's advice on undertaking a matter without a faculty. It supplements clause 77(3), itself ancillary to clause 77(2). On the basis that the Rule Committee members under clause 77(2) and (3) include the three additional persons under clause 84(6), the implication is that the same members would make rules for the purposes of clause 77(4). The express reference to clause 77(4) is made in reliance on SO 63(3)(e) (improvement of manner in which law stated).

#### **Clause 89 (consecration of ground added to churchyard)**

39. This clause does not restate section 2 CCA 1867, on the basis that it is unnecessary. The general approach on legislative provisions for fees is to have an express provision enabling the person concerned to claim a fee, rather than a prohibition on a notional right to make such a claim. So in the absence of such a provision, the entitlement cannot be inferred and there is no need to prohibit it. The omission of this provision is made in reliance on SO 63(3)(d) (removal of unnecessary provision).

#### **Clause 91 (conditions on reservation under section 90)**

40. On subsection (1), the reference to the owner of the right reserved under clause 90 restates the reference in section 10 CCA 1867 to "the owner thereof". It is not completely clear whether "thereof" refers to the land or the right reserved. But the equivalent secular provisions in section 48 of the Cemeteries Clauses Act 1847 and article 10(6) of the Local Authorities Cemeteries Order 1977 indicate that the intention is to refer to the owner of the right reserved.
41. Subsection (2) restates the proviso at the end of section 10 CCA 1867 but refers to a spouse, widow or widower so as also to cover a case where the owner is a woman. That is on the basis that, following the passing of the Married Women's Property Act 1882, section 6(a) IA 1978 (read with paragraph 2 of Schedule 2 to that Act) operates to provide that the masculine includes the feminine.
42. Also on subsection (2), the reference to a widow or widower or spouse will, as a result of section 11 of the Marriage (Same Sex Couples) Act 2013, not apply to same sex married couples.

#### **Clause 95 (general interpretation)**

43. Subsection (5) generalises provisions which currently apply only for the purposes of EJM 1963 or CPWM 1999. Restating those provisions with that limited application would create the unhelpful implication that references to dioceses in other provisions of the consolidation might have a different meaning. This provision is made in reliance on SO 63(3)(d) (removal of anomaly not of substantial importance).

#### **Clause 97 and Schedule 4 (transitional, saving and transitory provisions)**

44. Part 1 of Schedule 4 provides in paragraph 9 for the case where a particular provision is to be repealed by this Measure and also by the draft Statute Law (Repeals) Measure. That Measure makes some repeals relating to ecclesiastical jurisdiction, including the proviso to section 46(1) EJM 1963. It is not clear at this stage which of the two Measures will come into force first. If this Measure does, with the result that the whole of section 46 EJM 1963 would be repealed, then the entry in the other Measure for the proviso to that section would itself be repealed.

45. Paragraph 10 of Schedule 4 includes transitory provisions in relation to Schedule 4 to the Mission and Pastoral Measure 2011. That Schedule is to be replaced by the draft Mission and Pastoral etc. (Amendment) Measure with a new scheme for compensation which will not require provision to be made in rules. Paragraph 10 provides that, if this Measure comes into force first, transitory modifications of certain provisions will apply so as to reflect the fact that Schedule 4 to the 2011 Measure would still be in force in its current form.