

GENERAL SYNOD

ECCLESIASTICAL JURISDICTION AND CARE OF CHURCHES MEASURE

Explanatory Memorandum

1. The draft Ecclesiastical Jurisdiction and Care of Churches Measure consolidates, with corrections and minor improvements, a number of enactments relating to ecclesiastical jurisdiction and the care of churches and other places of worship.
2. The main Acts and Measures consolidated by the draft Measure include the following:
 - Parochial Libraries Act 1708
 - Consecration of Churchyards Act 1867 (part)
 - Ecclesiastical Jurisdiction Measure 1963 (part)
 - Faculty Jurisdiction Measure 1964
 - Ecclesiastical Judges and Legal Officers Measure 1976
 - Ecclesiastical Fees Measure 1986 (part)
 - Care of Churches and Ecclesiastical Jurisdiction Measure 1991
 - Care of Places of Worship Measure 1999
 - Church of England (Miscellaneous Provisions) Measure 2014 (part)
 - Care of Churches and Ecclesiastical Jurisdiction (Amendment) Measure 2015
3. The draft Measure also consolidates a large number of other statutory provisions. For details of the enactments which are consolidated and repealed, reference should be made to Schedule 5 to the draft Measure (repeals and revocations).

Part 1 The Ecclesiastical Courts

4. The non-disciplinary jurisdiction of the ecclesiastical courts is restated in Part 1 of the draft Measure. The provisions of the Ecclesiastical Jurisdiction Measure 1963 dealing with that aspect of the courts' jurisdiction will be repealed, leaving the 1963 Measure to deal solely with the disciplinary jurisdiction for offences "involving matter of doctrine, ritual or ceremonial". (The provisions of the 1963 Measure dealing with the other aspects of the disciplinary jurisdiction were repealed by the Clergy Discipline Measure 2003.)
5. Part 1 accordingly continues the existence of consistory courts, the Arches and Chancery Courts, and the Court of Ecclesiastical Causes Reserved and continues to provide for the appointment and term of office of their respective judges. It also continues the appellate jurisdiction of the Privy Council in faculty appeals not relating to doctrine, ritual or ceremonial and of Commissions of Review in appeals which do relate to those matters.

Part 2 Legal Officers

6. Part 2 restates the provisions concerned with the functions and appointments of provincial and diocesan registrars and their terms of office.

Part 3 Care of Churches etc.

7. Part 3 restates various provisions relating to the care of churches and other places of worship. These include provision for the constitution and function of diocesan advisory committees, for

certain churches and chapels to opt in to the faculty jurisdiction, for the regular inspection of churches, and for the respective roles of churchwardens, parochial church councils and archdeacons in relation to their care and maintenance.

8. Clauses 45 and 46 have been drafted on the assumption that the draft Inspection of Churches Measure will be passed. Provision has, however, been made in Part of Schedule 4 to address the possibility that the 1955 Measure remains in force.
9. Provision (which restates provisions of the Parochial Libraries Act 1708) is made in relation to the preservation of historic parochial libraries.

Part 4 Faculty Jurisdiction

10. Part 4 restates and brings together a number of statutory provisions relating to the faculty jurisdiction. These include provisions as to the application and scope of the jurisdiction, parties to faculty proceedings, the demolition of churches, building on disused burial grounds, the reservation of grave spaces, and works to monuments.
11. Part 4 also restates provisions relating to the powers of consistory courts, including the power to attach conditions to the grant of a faculty, the making of costs orders against persons responsible for unlawful acts, and the issue by the consistory courts of injunctions and restoration orders.
12. Provisions relating to the functions of archdeacons and to matters which may be undertaken without a faculty are also restated.

Part 5 Miscellaneous

13. Part 5 restates provisions relating to the constitution and functions of the Rule Committee and the Fees Advisory Commission.
14. It also restates various provisions concerned with burials, the consecration of burial grounds, and the removal of the legal effects of consecration.

Part 6 General

15. Part 6 provides for the procedure for making regulations, orders and rules under the Measure. It also provides for interpretation of the Measure. It introduces the Schedules which contain consequential amendments to other legislation, transitional, saving and transitory provision, and repeals and revocations of other legislation. It also contains provision for the draft Measure's commencement, extent and short title.

Schedules

16. Schedule 1 makes various amendments to legislation concerned with other ecclesiastical jurisdictions. In particular, it amends the Ecclesiastical Jurisdiction Measure 1963 so as to remove from it everything except the disciplinary jurisdiction for offences involving matter of doctrine, ritual or ceremonial. The provisions which are removed will be found either in this Measure or in the particular Measure(s) to which the provisions relate.
17. Schedule 2 restates provision which must be included in the constitutions of diocesan advisory committees.
18. Schedule 3 makes amendments to other legislation which are consequential on the main provisions of the draft Measure.

19. Schedule 4 makes transitional, saving and transitory provision.
20. Schedule 5 contains repeals and revocations of a number of Acts, Measures and subordinate instruments.

Drafting notes, table of origins and table of destinations

21. Drafting notes, which are annexed to this explanatory memorandum, have been prepared by Legislative Counsel. These explain the approach taken by him in relation to various points which arose in preparing the draft consolidation Measure.
22. Legislative Counsel has provided a table of origins and a table of destinations (available online with the Agenda and papers for the July 2016 group of sessions). These show, respectively, the legislative origins of the provisions which are restated in the draft Measure, and the places in the draft Measure where restated provisions of existing legislation are to be found.

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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

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

Part 1 (the Ecclesiastical Courts) - general

2. 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 4 (deputy judge of consistory court: appointment and term of office)

3. Subsections (1) and (2) remove the contrast between section 4(1) and (1B) EJM 1963, the latter of which provides for appointments to be in writing but the former of which is silent on the point. The clause provides for each power to be exercised in writing (which reflects the position in practice). It does so in reliance on SO 63(3)(d) (removal of anomaly not of substantial importance).

Clause 7 (consistory court: jurisdiction)

4. Subsection (1)(a) refers to land in a diocese. The definition of “land” in subsection (3) reproduces the definition in paragraph 5(d) of Schedule 2 to the Interpretation Act 1978, since EJM 1963 was passed before 1979 and after 1850. As some weight rests on this reference to “land”, it is safer 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 the Interpretation Act).
5. Subsection (1)(a) also 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 are included in the consolidated provision to take account of the decision in *Re St Lawrence, Wootton* [2015] Fam 27. In that case, the Arches Court held 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 where the church was, 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).
6. Subsections (1)(b), (e) and (f) refer to provisions which are not mentioned in the existing provisions, so as to have in one place for ease of reference the free-standing jurisdiction that consistory courts have under various enactments.

7. Subsection (1)(h) restates the saving in section 6(1)(e) EJM 1963 for the residual jurisdiction which consistory courts had before that Measure was passed. That jurisdiction includes adjudicating and enforcing certain civil rights relating to ecclesiastical property or the recovery of money applicable for ecclesiastical purposes (see Halsbury's Laws, Volume 34 (2011 edition), para.1121, fn.2).

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

8. 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 contrasts 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 18 (Court of Ecclesiastical Causes Reserved: jurisdiction)

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

Clause 27 and Schedule 1 (other ecclesiastical jurisdictions)

10. Paragraph 1 of Schedule 1 retrospectively revives certain provisions of the Care of Cathedrals (Supplementary Provisions) Measure 1994. That Measure made amendments to some of the provisions being consolidated but was repealed by the Care of Cathedrals Measure 2011, depriving the amendments of their foundation. It is usual legislative practice to keep in force founding provisions for amendments which are themselves still in force. Certain provisions of the 1994 Measure are therefore to be revived from the time of their repeal. This retrospective provision is entirely technical and does not affect any rights or duties. It is made in reliance on SO 63(3)(d) (removal of anomaly not of substantial importance) and (3)(e) (improvement of form in which law stated).

Clause 29 (provincial registrar: deputy etc.)

11. 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 transferred to the Archbishops' Council, the Appointments Committee and the Business Committee. But the Order does not specify which of those bodies is to have the functions under EJLOM 1976. Subsection (8) provides for the Archbishops' Council to be the consultee, as it has in practice taken over the role from the Standing Committee. The provision is made in reliance on SO 63(3)(b) (removal of doubt).

Clause 36 (diocesan advisory committees: continuation)

12. Subsection (3) is new and gives a diocesan synod power to amend the diocesan advisory committee's constitution. If provision along the lines of section 2 CCEJM 1991 were being made from scratch today, it is likely that the diocesan synod would be given an ongoing power to amend the constitution, so as to be able to keep things up to date, etc. Subsection (3) is included in reliance on SO 63(3)(c) (bringing obsolete provision into conformity with modern practice).

Clause 38 (list of places of worship)

13. 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) of the Interpretation Act 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 that does not restate a provision of Article 4 of the 1994 Order and is not a modification for the purposes of section 17(2)(b) of the Interpretation Act. Subsection (3)(c) does, though, include a reference to Article 7(1)(a)(ii) of the 2010 Order (buildings used for Roman Catholic worship), on the basis that it is a modification of Article 4(d) of the 1994 Order.

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

14. Subsection (4) is new. Paragraph 5(2) of Schedule 1 CPWM 1999 indicates that entries on the list can be altered, but does not set out the procedure to follow. The requirements imposed by CPWM 1999 appear to apply only to applications for including a building in the list or for removing one from it (see section 2(1)); references in CPWM 1999 to “applications for the purposes of this Measure” would on that basis be read as references only to such applications. The existing provisions imply that a person entitled to apply for inclusion or removal of a building would also be entitled to apply for an alteration to the entry relating to the building. Subsection (4) makes express provision to that effect in reliance on SO 63(3)(b) (removal of doubt).

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

15. In subsection (7), paragraphs (a) and (b) refer to the see of each of Canterbury and York, rather than replicating the reference in paragraph 2(1) of Schedule 1 CPWM 1999 to the office of each Archbishop. And paragraph (c) refers to the see of the bishop of the diocese in which a building is situated, rather than replicating the reference in paragraph 2(1) of that Schedule to the see in which the building is situated. The existing provisions appear to 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 45 (regulations requiring inspections)

16. This clause restates the draft Inspection of Churches Measure. It is possible that the consolidation will come into force before that Measure does; the consolidation therefore needs to anticipate that possibility. Part 2 of Schedule 4 includes transitory modifications which would replace this clause and clause 46 with provisions which restate the Inspection of Churches Measure 1955. Those modifications would remain in force until the draft Inspection of Churches Measure itself came into force. For more on this, see the notes below on Schedule 4.

Clause 51 (role of archdeacon in ordering deposit of articles in place of safety)

17. Subsection (2) restates section 21(1) CCEJM 1991 but without the words “from the church”, on the basis that they are inconsistent with section 21 as a whole. The reference in section 21(2) to “any other person having custody” of the article implies that the provision is not confined to articles which belong to the parish and are vested in the churchwardens. The removal of the words is made in reliance on SO 63(3)(d) (removal of anomaly not of substantial importance).

Clause 53 (interpretation of Part 3)

18. The definition of “land” in subsection (1) restates the definition in CCEJM 1991 and emphasises that the definition in Schedule 1 to the Interpretation Act 1978 does not apply. The inclusion of “buildings” in the definition in CCEJM 1991 is confusing, given the numerous references in that Measure to buildings alongside references to land. The most likely explanation for doing so, and for thus raising a contrary intention for the purposes of the Interpretation Act so as to disapply the definition of “land” in Schedule 1, is to exclude estates, interests and rights.
19. The definition of “minister” in subsection (1) does not restate paragraph (aa) of the definition in section 31(1) CCEJM 1991, which refers to section 20(8A) of the Pastoral Measure 1983, since section 20(8A) was not consolidated in the Mission and Pastoral Measure 2011.

Clause 55 (curtilage of churches)

20. On the reference to “land”, the definition in paragraph 5 of Schedule 2 to the Interpretation Act 1978 would in principle apply, as the Faculty Jurisdiction Measure 1964 was passed after 1850 but before 1979. But in this context that definition does not add anything relevant. The natural meaning is relatively narrow, and the definition in clause 78(1) will produce the right result.

Clause 65 (sale of books in a parochial library)

21. The reference in subsection (1) to books “remaining in or belonging to” a parochial library (which does not appear in the existing provision) is intended to bring consistency with the wording in clause 75(7)(i).

Clause 70 (restoration order)

22. Subsection (5) restates section 13(8) CCEJM 1991, but provides for the limitation period to run by reference to when the proceedings were brought rather than when the order is made. Otherwise, in a case where the six years was nearly up, the applicant could not be confident of bringing proceedings in time and the respondent would have an incentive to delay the proceedings. Section 13(8) does contrast with section 13(7), which is in the more usual form, but that is thought to be an oversight. Provision for a limitation period to run by reference to when proceedings are brought is consistent with the equivalent secular provisions – see Part 7 of the Town and Country Planning Act 1990. The adjustment in subsection (5) of this clause is made in reliance on SO 63(3)(b) (removal of doubt).

Clause 87 (consecration of ground added to churchyard)

23. This clause does not restate section 2 CCA 1867, though the provision is to be repealed by the consolidation. The provision is unnecessary; there would need first to be express provision enabling a person to claim a fee, rather than a prohibition on making 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 89 (conditions on reservation under section 88)

24. On subsection (1), the reference to the owner of the right reserved under clause 88 restates the reference in section 10 CCA 1867 to “the owner thereof”. It is not 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.
25. Subsection (2) restates the proviso at the end of section 10 CCA 1867 but refers to a spouse, widow or widower rather than just a wife or widow. That is on the basis that, following the passing of the Married Women’s Property Act 1882, section 6(a) of the Interpretation Act 1978 (read with paragraph 2 of Schedule 2 to that Act) operates to provide that the masculine includes the feminine.
26. 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 93 (general interpretation)

27. Subsection (5) generalises provisions which currently apply only for the purposes of EJM 1963 or CPWM 1999. Restating the 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 95 and Schedule 4 (transitional, saving and transitory provisions)

28. Part 1 of Schedule 4 provides in paragraph 9 for the case where a provision is repealed by this Measure and also by the draft Statute Law (Repeals) Measure. That Measure includes some repeals relating to ecclesiastical jurisdiction, including the proviso to section 46(1) EJM 1963. It is not clear at this stage which Measure 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.
29. Part 2 of Schedule 4 sets out transitory provisions which will apply if the consolidation comes into force before the draft Inspection of Churches Measure does.
30. The transitory clauses 45A to 45D provided for by paragraph 10 of Schedule 4 restate the Inspection of Churches Measure 1955 (“ICM 1955”).
31. On clause 45B, subsection (1)(c) and (d) restates section 1A(b) and (c) ICM 1955 but without the express reference to “closed” churchyards. That is thought to refer to a churchyard where burials have been discontinued by an Order in Council under the Burial Act 1853. Orders under that Act may discontinue burials “subject to any exception or qualification” and often provide for exceptions relating, for example, to rights of burial conferred by faculty or in existing family graves or to the interment of cremated remains. It is not clear why there was thought to be a doubt about whether such churchyards were included. Accordingly, clause 45B does not restate the express reference to closed churchyards, on the basis that their inclusion in the reference to churchyards goes without saying. Indeed, making provision to

that effect here would cast doubt on the meaning of the expression elsewhere in the consolidation.

32. Also on clause 45B, subsection (4) restates the definition of “ruin” in section 6 ICM 1955. The reference in that definition to land would in principle be construed in accordance with the definition in paragraph 5 of Schedule 2 to the Interpretation Act 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) will produce the right result.
33. On clause 45C, subsection (4) restates section 2(2) ICM 1955, which refers to the consent of the bishop. The clause does not restate the definition of “bishop” in section 6 ICM 1955, which includes the guardian of the spiritualities if there is a vacancy in the see, as it is obsolete. Section 14 of the Dioceses, Pastoral and Mission Measure 2007 now provides for the exercise of a bishop’s functions during a vacancy in see.
34. Clause 45D restates section 2 ICM 1955 as applied by section 3(4) CPWM 1999. Section 3(4) of that Measure provides in its opening words that section 2(2) ICM 1955 does not apply to buildings on the list. But section 3(4)(b)(iii) then goes on to apply section 2(2) with modifications; the earlier reference to section 2(2) is thought to be a drafting error.
35. Paragraph 18 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, among other things) will not require provision to be made in rules. Paragraph 18 provides that, if this Measure comes into force first, transitory modifications of certain provisions will apply so as to reflect that Schedule 4 to the 2011 Measure remains in force in its current form.