GENERAL SYNOD

A NEW ENABLING MEASURE

This paper explains the background to the consultation document on a possible new 'Enabling Measure' that was published in April as one of the strands of the reform and renewal programme. The purpose of such a measure would be to make it possible for the Synod to amend or repeal some legislation by a less complex process than is currently possible. This new, simplified process would not be available for the most sensitive and significant categories of legislation, for example of a doctrinal or constitutional kind.

The paper provides a report on the outcome of the consultation exercise, which ended in July and offers a response to the points which were made in the twelve submissions received. It goes on to explain how the Archbishops' Council proposes to engage further with the new Synod about this subject now that it has had the opportunity to reflect on all the comments received.

Background

1. GS MISC 1094, *Optimising the Role of the National Church Institutions (NCIs)*[1], was published in January among a number of other documents related to the emerging Reform and Renewal programme. It included a proposal for a new Enabling Measure to simplify the process for amending some of the Church of England's extensive corpus of statute law. The Archbishops' Council and House of Bishops had welcomed the proposal and asked for it to be developed further.

2. A consultation document (GS Misc 1103) agreed by the Council was published on 13 April, with comments being sought on it by the end of July. The consultation document explained the complex legal framework within which the Church operates and the problems this creates, which the Enabling Measure is intended to address. For ease of reference some of the document is summarised here. The full text is available online[2].

The historic context

3. The legal framework within which the Church operates is complex. It consists not only of the general statutory and common law of the land- for example in relation to charity and property law- but also of ecclesiastical law. The latter is itself a branch of English law and comprises: common law, which predates the Reformation; canon law, which has its roots in pre-Reformation canon law; and statute law passed during and since the Reformation by Parliament.

---

1 https://www.churchofengland.org/media/2141359/gs%20misc%201094%20-%20optimising%20the%20role%20of%20the%20ncis.pdf

2 https://www.churchofengland.org/media/2212596/gs%20misc%201103%20-%20consultation%20paper%20on%20possible%20new%20power%20to%20amend%20legislation%20by%20order.pdf

4. Since 1920 the Church of England has had its own legislative assembly (initially the Church Assembly, since 1970 the General Synod), which has power to pass Measures relating to any matter concerning the Church of England. These may include amendments to Acts of Parliament. Once Measures have received parliamentary approval and Royal Assent, they become part of the law of the land, having the same force and effect as an Act of Parliament. The constitutional convention since 1920 has been that Parliament does not initiate legislation affecting the internal running of the Church of England without the Church's consent.

5. Over the past 95 years the Church of England has used this right of initiative to initiate a large number of Measures. Some of these have been about reforming the Church's liturgy. Most, however, have been about revising and modernising the framework of rights and duties within which the various office holders and bodies within the Church operate, about property and resource issues and about modifying structures that are no longer well adapted for today's world.

6. Despite all the reform that has been attempted the Church of England remains subject to an astonishingly large volume of statute law. Volume 14 of Halsbury's Statutes (4th edition), which includes only the primary legislation (Acts of Parliament and Measures passed since 1920) relating to the Church of England from 1533 to 2003, runs to nearly 1,400 pages.

7. This is just one part of the total framework of law that applies to the Church of England since the figure of 1,400 pages excludes general Parliamentary legislation relevant to the Church, the Church's Canons, its liturgy, provisions of the common law and all secondary legislation (orders, regulations etc.) whether made by Parliament or the Synod.

The problem

8. The Archbishops' Council issued the consultation document because it concluded that this situation was not merely unsatisfactory theoretically but also presented some practical difficulties:

- In the past, far more detail was included on the face of primary legislation than would be the case today, where the practice would be to put much more of the detail in regulations or guidance. Since primary legislation can normally be amended or repealed only by fresh primary legislation the effect of that is that changes to this large corpus of legislation are time-consuming, costly and onerous.

- In a fast changing world institutions need, without compromising their core values, to be adaptable and fleet of foot. That is much harder if the surrounding framework of law is burdensome and the processes for changing any of it are very elaborate. As regards the latter, the legislative processes for Measures typically take three groups of sessions to complete, with the result that that part of the process usually takes 12 to 18 months. The parliamentary stages then normally take several months to complete. So

the legislative process itself typically takes around two years - and can take longer – in addition to the time needed to develop policy proposals in the first place.

- Law is essential for safeguarding key rights and duties but over-regulation through primary legislation can stifle creativity and give insufficient weight to trust and relationship. Legislating for everything can also reduce the focus on those areas where the law does have a key role to play.

Proposed approach

9. The Archbishops' Council considered whether it might be possible to simplify the processes by which Measures are considered by the Synod and then, after final approval, are scrutinised by the Ecclesiastical Committee of Parliament before being approved by the House of Commons and House of Lords and receiving the Royal Assent. It concluded, however, that there was no scope for any significant shortening. Where Measures are needed, as they will continue to be in many cases, the present stages each add value and need to be retained.

10. Instead, the Archbishop's Council identified a different solution, which was the subject of the consultation. This was to enact a new Enabling Measure, making it possible to amend or repeal some primary legislation by secondary legislation, in other words by an order approved by the Synod rather than by a Measure. Such a power for the Synod would be similar in some respects to that which Parliament created for itself in the Legislative and Regulatory Reform Act 2006 in relation to amending Acts of Parliament.

11. Before the Enabling Measure itself became law it would first need to have gone through all the normal legislative stages in the General Synod, and then, if given final approval there, have been submitted to the Ecclesiastical Committee and approved by both Houses of Parliament in the usual way.

12. The consultation document envisaged that the Measure would, like the 2006 Act, contain a number of safeguards. These included:

- Certain tests and preconditions that would have to be met before the power could be exercised - for example that it was directed to the removal and reduction of burdens and that it did not involve the removal or rights or freedoms.
- Certain pieces of Church legislation would be outside its scope and would therefore continue to be amendable only by means of a fresh Measure. These would include legislation dealing with constitutional or doctrinal matters.
- A prescribed procedure would be put in place involving, among other things a new Scrutiny Committee of the Synod which would examine proposals from the Archbishops' Council before they came to the Synod for approval.

Reponses to consultation

14. Twelve responses were received to the consultation paper (the full text of each is available online[3]). Of these:

- Seven were from diocesan secretaries on behalf of their dioceses (Bath & Wells, Chelmsford, Chester, Coventry, Exeter, Salisbury and Sheffield).
- Two were from members of the last General Synod (the Reverend Simon Killwick and Mr Adrian Vincent).
- Two were from representative groups of church lawyers - the Ecclesiastical Law Association (the professional body for diocesan registrars) and the Ecclesiastical Law Society (a charity for the promotion of education in ecclesiastical law).
- One was from the Sheffield Church Burgesses Trust (a patronage body).

15. In summary:

- The responses from dioceses were overwhelmingly supportive of the proposals.
- There was a good deal of support for the general proposition that the church's legislative framework needed to be simpler, though there were some differences of view over how to achieve that.
- The responses from the two Synod members and the Sheffield Burgesses Trust were more cautious, and expressed concerns about protecting existing rights.
- The ecclesiastical law bodies placed more emphasis on the need for the repeal of redundant legislation and the consolidation of legislation than for an enabling measure on the lines proposed. They also raised questions about the extent of the enabling power and the proposed procedural provisions.

16. Attached as an annex is a more detailed analysis from the Legal Office of the answers given in the submissions to the six questions asked in the consultation document. The analysis also offers some commentary on the responses and identifies points at which the original proposals might usefully be modified, clarified or developed in the light of the consultation exercise.

17. The Council considered the outcome of the consultation at its meeting on 24 September. It welcomed the proposed development of the original proposals along the lines set out in the Legal Office analysis. In particular it agreed that:

- The Enabling Measure should be seen both as an important means of advancing the simplification agenda and **one element in a wider programme of legislative reform**, which should also include **consolidation** of useful legislation and **repeal** of obsolete legislation.

- **The role of the Scrutiny Committee should be extended** so that it had the power not only to produce a report but also to make amendments to any order submitted it by the Archbishops' Council for consideration. In addition when

[3] https://www.churchofengland.org/media/2388264/submissions.pdf

the order, with any such amendments, came to the Synod, the latter would have the power to approve it, reject it or pass a **re-committal motion** (which would have the effect of sending it back to the Committee for further consideration of a particular point identified by the Synod).

18. The Council agreed that this report should be submitted to the new Synod in November as part of its briefing on the Reform and Renewal programme. The Council's intention is then to bring a motion for approval to the Synod in February inviting it to initiate the necessary legislative process and the creation of a Steering Committee so that the necessary legislation might come for first consideration at a subsequent group of sessions.

William Fittall
Secretary General
26 October 2015

ANNEX

Detailed analysis of responses

Question 1: Has the presenting problem been correctly identified in paragraphs 5 – 11 of the consultation paper, is the solution proposed in paragraphs 12 to 15 the right one, are there other possible solutions that need exploring?)

1. The seven responses from diocesan secretaries agreed with the presenting problem as identified in the report.

2. Fr Killwick, Mr Vincent, the Ecclesiastical Law Association (ELA) and the Ecclesiastical Law Society (ELS) considered that the problem was two-fold: (1) the sheer volume of disparate legislation and (2) over-prescription in primary legislation. They argued that the proposed solution addressed (2) but not adequately (1).

3. The ELA suggested that a greater focus was needed on the repeal of redundant legislation and consolidation of useful legislation. The following paragraphs offer some Legal Office commentary on these important suggestions since they are supplementary to what was covered in the consultation exercise.

Consolidation

4. Consolidation Measures – which restate the statutory provisions contained in several Measures in a single Measure (with 'corrections and minor improvements') – are one way in which the current body of statutory ecclesiastical law can be improved. As well as drawing all the relevant statute law in a particular area into a single Measure, they also provide an opportunity to present it in a more helpful way.

5. 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. But, once introduced, a consolidation Measure can pass through the Synod quickly: it is deemed to have been given first consideration without debate unless the Business Committee determine to the contrary, or at least five members of the Synod give notice that they wish the Measure to be debated (SO 51A). The Revision Committee and Revision Stages can also be dispensed with by the Synod. Where that does not happen, Standing Orders limit the scope for amendments that may be proposed to 'corrections and minor improvements' (SO 47).

6. The Legal Office has undertaken the consolidation of two significant pieces of legislation in recent years: the Care of Cathedrals Measure 2011 consolidated three Measures along with some other minor enactments. The Mission and Pastoral Measure 2011 consolidated eighteen enactments of varying lengths and was a major undertaking.

7. The Legal Office is now embarking on a further programme of consolidation. This includes:

   - the **Church Representation Rules**, which derive from a schedule to the Synodical Government Measure 1969 but which have been amended many times

- the legislation relating to **Church of England pensions**, which includes eleven Measures as well as various Regulations
- **ecclesiastical jurisdiction**, including the faculty jurisdiction/care of churches and clergy discipline, which encompasses seven Measures and
- church property, which includes over a dozen Acts and Measures.

8. The aim is to begin with the **Church Representation Rules**: the present intention is, if possible, to bring any necessary pre-consolidation changes to the Synod for approval in February 2016, with a consolidated text following in July. It may be also be possible to begin the consolidation of the **church property legislation** by including necessary pre-consolidation changes in the Measure to be introduced into the Synod in February 2016 to give effect to the Simplification Group's proposals.

Repeal of redundant legislation

9. Alongside this substantial programme of consolidation, the Legal Office has also now begun to identify redundant legislation, with a view to its repeal in a Statute Law (Repeals) Measure. Depending on progress, our aim is to introduce that in July 2016.

Implications for the Enabling Measure

10. The purpose of the proposed Enabling Measure is different: it would simplify legislation that is currently over-prescriptive. The proposed new powers would make it much easier both to repeal and amend primary legislation. There may also be cases where legislation is not needed at all, though each instance will need to be judged on its merits. Provision for the removal of existing burdens and obstacles would operate alongside the wider process of consolidation and repeal.

11. A number of other comments in the response from the ELS merit some commentary. The ELS suggestion that the Church of England "could usefully borrow from the conventions and practices of other provinces of the Anglican Communion" is useful if what is meant by that is that we should seek to avoid too much prescription and rely so far as possible on relationship and trust.

12. But where a framework of rules is necessary the Church of England is inevitably in a different position from any other church of the Communion because, uniquely it is an established church and ecclesiastical law is part of the law of the land. For the other churches of the Communion the provisions of their constitutions and canons are binding on the members of those churches as a contract between themselves; in other words they are a matter of private law in the same way, for example, as commercial relationships, or the rules of clubs and associations, are.

13. The ELS suggestion is that matters other than "the public civic elements of the Church of England" could be the subject of merely internal regulation. It is not at all clear, though, how such a distinction with what the ELS calls "private religious elements" could work. Quite where such a line would be drawn would be difficult (would the provisions concerned with the election of churchwardens and parochial church councils be public or private?) and there is the more fundamental question of what status in law provision in relation to the "private" elements would have (assuming that the intention is not for compliance to become optional).

14. More generally it may be helpful in relation to some of the other comments in submissions to make clear that, as a matter of principle, measures ought – like Acts of Parliament – properly to contain only provisions that reflect important matters of principle and policy and any ancillary provision that goes hand in hand with those provisions. Detailed matters – such as the size of committees, rules of procedure and technical details – should properly be left to **secondary legislation** (regulations, rules, orders etc.), which can be amended by further secondary legislation in a single stage.

15. The difficulty is that while this has been the approach in recent years, the historical legacy has left us with a large amount of legislation that is much too detailed. The Enabling Measure would enable us to address the legacy of too much past prescription without having to have lots of new amending Measures.

16. At the same time, it is proposed that any new Measures would be framed in a way that avoided unnecessary prescription and would leave it to secondary legislation to make any detailed, technical provision considered necessary.

17. The following examples illustrate this approach:

- **The Ecclesiastical Offices (Terms of Service) Measure was a good recent instance of how to do things economically**. It contains just 6 substantive sections. These establish the legal framework for holding office under common tenure including basic provision as to the duration of appointments, and for the provision, acquisition and disposal of housing for office holders. Most of the detail is in the Ecclesiastical Offices (Terms of Service) Regulations, hence the recent ability to amend regulation 29 on short-term appointments in a single vote at the July group of sessions.

- **The recent process of faculty reform illustrated the time and expense incurred as a result of the present inflexibilities**. An initial phase of reform was introduced in 2013, following the endorsement by the Council of the faculty simplification group's proposals in September 2012. This had to be limited to amendment of the Faculty Jurisdiction Rules, a piece of secondary legislation, since the more major aspects of the reforms were dependent on amending the Care of Churches and Ecclesiastical Jurisdiction Measure 1991, which we could not conclude until 2015. A further set of faculty Jurisdiction Rules then had to be made, replacing the 2013 Rules. Had the proposed Enabling Measure been available in 2013 the entire set of reforms could have been achieved in one go (this point was picked up in the response from the Salisbury diocesan secretary).

- We could similarly have delivered the changes secured by the **Ecclesiastical Property Measure and by the Diocesan Stipends Funds Measure** much more rapidly by way of order. The first will simplify life for parishes and the second will enable dioceses to apply their resources more flexibly.

18. It may also be helpful to illustrate some of the proposed safeguards by identifying examples of cases that would have fallen outside the scope of the proposed Enabling Measure or been in one of the excluded categories. Thus the Vacancies in Suffragan Sees and Other Ecclesiastical Offices Measure 2010 and the Clergy Discipline (Amendment) Measure 2013 would still need to have been Measures.

19. This is because, in the first case, the legislation touched on rights of the Crown in relation to the Church and would therefore have been within one of the proposed exclusions. In the second the new power to discipline clergy would not have amounted to removing or reducing any burden, or the overall burdens, resulting directly or indirectly for any person from any legislation and would therefore not have been within the scope of the power at all.

Question 2: What such an enabling Measure might specify in relation to the purposes for which the new power might be exercisable (should there be additions to or subtractions from the possibilities in paragraphs 16 to 20 of the consultation paper?)

21. The responses from the diocesan secretaries all supported the possibilities in paragraphs 16 to 20 as to the purposes for which the power should be exercisable and did not suggest additions or subtractions.

22. The Bath and Wells response and the responses from the ELA and ELS questioned the aptness of terminology borrowed from the Legislative and Regulatory Reform Act 2006 in the Church context and suggested modifications to it.

23. In the end, the precise language used is for the judgement of Legislative Counsel but the responses on this point can helpfully inform further consideration of the detailed provisions of the legislation.

24. Fr Killwick and the Ecclesiastical Law Society raised concerns about a power to remove "burdens" being applied in a way that would remove "safeguards" or "checks and balances" which while burdensome to some, exist to protect the rights of others. Similarly, the Sheffield Church Burgesses Trust expressed concern about the power being used to circumscribe the exercise of rights of patrons (even if it could not be used to abolish them).

25. Paragraphs 24 to 26 of the consultation paper describe conditions which would have to be met by any provision to be made under the Enabling Measure. As explained at paragraph 26, it would be possible to change *the way in which rights could be exercised* and an order could impose procedural restrictions on the exercise of such rights. But it would not be possible to "remove any necessary protection" nor to "prevent any person from continuing to exercise any right or freedom which that person might reasonably be expected to continue to exercise" (paragraph 26(d) and (e)).

26. There is clearly a balance to be struck between providing the necessary reassurance that the Enabling Measure could not be used in a way that undermined the exercise of existing rights and allowing enough flexibility for the power to have a useful purpose. Precisely where to strike the balance is a question for the Synod to consider. But striking the balance very differently from the way proposed in the consultation paper could significantly reduce the usefulness of the power.

Question 3: The form of provision that might be made by it (are the possibilities set out in paragraphs 21 to 23 of the consultation paper along the right lines?)

27. A concern that emerged across the range of responses related to the possibility of an office being abolished by an order under the Measure. One suggestion was that certain specified offices should be expressly excluded from abolition under the power. Other responses sought the exclusion of all offices.

28. A judgment needs to be made as to whether excluding the abolition of offices from the scope of the power altogether would be sensible. There are certainly some circumstances in which such an exclusion would be problematic given that it is proposed that the Measure should provide for the transfer of functions of any description. It would, in those circumstances, be anomalous if the Order which transferred the functions could not – as a consequence of doing so – abolish an office which had become redundant as a result of the transfer.

Question 4: Possible preconditions for the exercise of such a power (should there be additions to or subtractions from those suggested in paragraphs 25 to 26?)

29. Some aspects of this question have already been discussed in relation to consultation question 2 above. No other proposals were made as to additions or subtractions from the proposed conditions.

30. But the response from the Sheffield diocesan secretary questioned how the distinction identified in paragraph 26 of the consultation paper, as between removing established rights and imposing reasonable restrictions on their exercise, was to be operated. Clearly there are no bright-lines here. In the first instance it would be for the Archbishops' Council to judge whether a proposed provision fell within the proper scope of the power. But the Synod's scrutiny committee would also be expected to consider this. Ultimately, it would be for the Synod itself, in the light of the committee's report, to judge whether the relevant condition had been met and whether to approve the order.

Question 5: The pieces of legislation that should be excluded from the scope of the new enabling power (should there be additions or subtractions from those suggested in paragraphs 27 – 34?)

31. Few of the respondents commented in any detail on this question. Fr Killwick expressly supported the proposals in these paragraphs for the reasons given in the consultation paper.

32. The response from the Ecclesiastical Law Association proposed, however, that instead of the Measure prescribing legislation that would be excluded from the scope of the order making power, the Measure should list the enactments which were capable of such amendment. They further proposed that the list in the Measure should be capable of being added to by order.

33. However, we consider that the ELA's proposed approach would not be practical. It would involve identifying and listing in the enabling Measure almost every Act of Parliament relating to the Church, and every Church Measure, except those that it was considered should be excluded from the scope of the order making power.

34. This would be a cumbersome way of achieving the same result as proposed in the consultation paper. Moreover, in the event that it was desired to amend an enactment which had (inadvertently or otherwise) been omitted from the list in the Measure, it would be necessary first for the Synod to approve an order amending the Enabling Measure by adding that enactment to the list and then, once the amendment had taken effect, to approve a further order making the desired amendments.

35. The Bath and Wells response proposed the exclusion of any provision which would "fundamentally change the doctrine or practice of the Church of England". That is already covered by the proposal in paragraph 33 of the consultation paper that provision of a kind falling within Article 7 or Article 8 of the Constitution of the General Synod would be excluded altogether from the scope of the power.

36. The Sheffield Church Burgesses Trust proposed that the Patronage (Benefices) Measure 1986 should be added to the list of enactments expressly excluded from the scope of the order making power. Clearly that is a judgement call and the sort of point that members may wish to test in Revision Committee. Completely excluding the 1986 Measure, however, would have the effect that any amendment, however minor, procedural or uncontroversial, to that Measure could only be made by Measure.

37. So, for example, if it were desired to be less prescriptive about the timing and content of section 11 meetings, or to make provision enabling patronage registers to be kept in electronic form, that could not be achieved using the Enabling Measure.

38. It is therefore suggested that the understandable concerns of the Trust should be addressed instead by emphasising the pre-conditions to the exercise of the order making power that relate to necessary protection and existing rights and the role which the Synod (both through the Scrutiny Committee and in full Synod) would have in determining whether the power could be exercised in a particular case.

Question 6: the procedural framework within which the new power would be exercised (are the proposed arrangements for scrutiny in paragraphs 35 to 38 right?)

39. The response from the diocesan secretary of Bath and Wells included a proposal that, contrary to what is proposed in paragraph 36(i) of the consultation paper, members of the General Synod should have the opportunity to propose amendments to a draft order which had been laid before the Synod for approval. The suggestion is that what is currently proposed would have the effect of limiting the role of the General Synod. Similar concerns were also raised by Mr Vincent and more obliquely by the ELS.

40. It was never intended that the Synod would be expected to "rubber stamp" orders laid before it. Nor has it ever been intended that the procedure for deemed approval should be available in respect of such orders. The motion for the approval of the draft order would have to be moved on the floor of the full Synod and would be open for debate. A vote would be taken in the usual way. If the Synod declined to approve the draft order, the order could not then be made.

41. In addition, there is a good case for the Synod not taking a power to amend draft orders, for the same reason that Parliament does not (other than in a few very exceptional cases) have the power to amend statutory instruments.

42. A single-stage procedure on the floor of a large legislative assembly is not an ideal forum for the consideration of what by definition (since more fundamental issues cannot be dealt with by this process anyway) will be quite technical and detailed material. There is also the risk that amendments would be proposed that involved making changes that had not featured in the consultation process preceding the making of the order.

43. That said, a case can be made that it would be undesirable for the Synod to be presented with the choice of all or nothing when it came to decide whether to approve an order. In the light of the consultation responses, there are, therefore, two additional ideas that may be worth exploring further.

44. One is to develop the role of the Scrutiny Committee so that it would have the power to make amendments to any order submitted to it for consideration. A Committee with such powers would need to include some Council membership as well as 'backbench' members and perhaps have one of the ecclesiastical judges who are *ex officio* members of the Synod as its chair.

45. Having a Committee where, as it were, front benchers and backbenchers worked together on the detail would be more likely to create a helpful dynamic than one which institutionalised tension between the Council and the Synod. It might also be sensible to have a core membership of the Committee for a quinquennium but with a small number of members added for each order according to its subject matter.

46. In addition it would be possible, without the Synod itself taking a power to amend an order, to enable the Synod, if it wished the Committee to consider something further, to pass a re-committal motion which would have the effect of sending the order back to the Committee for further consideration of the point the Synod had identified.

Other points raised in responses

47. Other points raised by respondents included:

- a concern that the enabling power should not be used as a means of centralising authority away from local bodies. That is not the intention;
- whether any other bodies should be able to bring forward orders under the enabling power. It may be preferable to leave the formal power to bring all such orders to the Synod with the Archbishops' Council though the underlying policy proposals could be initiated by others;
- whether the House of Bishops should have a prescribed role in the process. Again, it seems simplest not to prescribe all the preliminary policy consultation processes but given that the House of Bishops is a constituent part of the General Synod and meets in its own right a couple of months before most groups of sessions the Council would not in practice bring legislative proposals to the Synod without first consulting the House or its Standing Committee;

- the importance of full consultation taking place before a draft order was made (including a proposal from the ELA that draft orders be published so that anyone might submit comments – presumably to the Scrutiny Committee);
- the need to avoid legislating on a subject at all where that was not necessary;
- a need to allay concerns that the purpose of the proposed Enabling Measure was to allow the Reform and Renewal programme to proceed without proper Synodical scrutiny and approval;
- the need to ensure that legislation should continue to be readily accessible online.

The Legal Office
Church House
Westminster October 2015

Published by the General Synod of the Church of England