

GENERAL SYNOD

DRAFT CARE OF CHURCHES AND ECCLESIASTICAL JURISDICTION
(AMENDMENT) MEASURE

REPORT OF THE REVISION COMMITTEE

Membership

- Chair:** The Very Revd David Brindley, Dean of Portsmouth (Deans)
- Ex officio* members
(Steering Committee):** The Rt Worshipful Charles George QC,
Dean of the Arches and Auditor (*ex officio*) (Chair)
Dr Christopher Angus (Carlisle)
The Rt Worshipful Timothy Briden,
Vicar General of the Province of Canterbury (*ex officio*)
The Revd Jeremy Fletcher (York)
The Revd Dr Mandy Ford (Leicester)
The Ven. Karen Gorham, Archdeacon of Buckingham (Oxford)
- Appointed members:** Canon Timothy Allen (St Edmundsbury & Ipswich)
The Ven. John Applegate (Manchester)
Mr John Barber (Manchester)
The Ven. Philip Down, Archdeacon of Ashford (Canterbury)
Mrs Mary Durlacher (Chelmsford)
The Revd Canon Peter Spiers (Liverpool)
- Consultants:** Mrs Anne Sloman (Church Buildings Council)
Mr Andrew Johnson (Diocesan Registrar of the Dioceses of Salisbury and Exeter)
- Staff:** The Revd Alexander McGregor (Deputy Legal Adviser)
Mr Christopher Packer (Legislative Counsel)
Mr Sion Hughes Carew (Secretary)

1. The draft Care of Churches and Ecclesiastical Jurisdiction (Amendment) Measure received First Consideration at the November 2013 group of sessions of the General Synod. The period for the submission of proposals for amendment under Standing Order 53(a) expired on 23rd December 2013.
2. Two submissions (from the Revd Simon Cawdell (Hereford) and the Revd Tony Redman (St Edmundsbury & Ipswich)) were received by the Revision Committee (“the Committee”) within the permitted time frame and were published on the Church of England website in accordance with Standing Order 53(aa). The Committee also received one submission (from the Revd Simon Cawdell) out of time, which it decided to consider. One proposal for amendment was made by a member of the Committee. Legislative Counsel and the Steering Committee also identified a number of issues which led to the proposal of further amendments to the draft Measure. A list of proposals for amendment (other than drafting amendments), and the Committee’s decision in respect of each, is set out in Appendix I.

3. The Committee met on two occasions and the proposals which it accepted form the basis for the draft of the Measure (GS 1919A) now before the Synod (in which amendments accepted by the Committee are shown in bold). Appendix II contains a destination table showing where new provisions have been inserted and how the provisions in the draft Measure at First Consideration (GS 1919) relate to those in the draft Measures now before the Synod.
4. A general question considered by the Committee was the question of gender neutral drafting. The General Synod had, in 2004, passed a resolution requesting that “all future legislation of this Synod referring to offices be drafted (where legal and drafting considerations permit) so that gender neutral language is employed”.
5. The difficulty with employing gender neutral language in the present Measure was that it was concerned with making amendments to older legislation – the Ecclesiastical Jurisdiction Measure 1963 and the Care of Churches and Ecclesiastical Jurisdiction Measure 1991 – that did not employ gender neutral language. The Committee was advised that to insert new provisions into those Measures that employed substantially different drafting conventions from those originally employed would result in inconsistency. Some provisions that were intended to cover office holders of both sexes would refer to the office holder using the pronoun “he” while other provisions would use “he or she”. Such inconsistency would be confusing and unsatisfactory from the legal point of view. The Committee accordingly accepted that this was an instance where legal and drafting considerations meant that gender neutral language could not be employed.
6. All decisions of the Committee were unanimous.

Consideration of the draft Measure clause by clause including proposals for amendment

Clause 1 (Guidance as to the planting, etc. of trees in churchyards)

7. The Committee made no amendments to clause 1 and agreed it should stand part of the draft Measure.

Clause 2 (Powers of archdeacons)

8. The Committee agreed an amendment suggested by Legislative Counsel to improve the drafting of the clause.
9. There were no other proposals for amendment.
10. The Committee agreed that clause 2 as amended should stand part of the draft Measure.

Clause 3 (Consultation with advisory committee)

11. The Committee agreed an amendment suggested by Legislative Counsel to improve the drafting of the clause
12. There were no other proposals for amendment.
13. The Committee agreed that clause 3 as amended should stand part of the draft Measure.

Clause 4 (Disused burial grounds)

14. The Committee made no amendments to clause 4 and agreed it should stand part of the draft Measure.

Clause 5 (Power for Rule Committee to prescribe works, etc. which do not require a faculty)

Submission from the Revd Simon Cawdell

15. The Revd Simon Cawdell's first submission contained a number of proposals as to the way in which the power conferred on the Rule Committee by the new section 26A should be exercised in practice. The Committee concluded that those were matters for the Rule Committee to consider in due course.
16. Mr Cawdell's submission, however, also contained a proposal that related to the new section 26A(9). This provision would empower the chancellor to make an order in relation to a particular parish so that certain matters might not be undertaken there without a faculty despite the fact that they had been prescribed by the rules as matters that could generally be undertaken without a faculty. Mr Cawdell was concerned that this power was "unfettered", and suggested that it be exercisable only after consultation with English Heritage or the relevant Diocesan Advisory Committee (DAC).
17. The Committee did not agree that the power was "unfettered": it was only exercisable in special circumstances. The Committee agreed, however, that the chancellor should be required to seek the advice of the DAC before exercising the power. It also considered that such a requirement should apply to the power conferred on the chancellor by the new section 26A(7) to make an order adding to the matters that could be undertaken without a faculty.
18. The Committee agreed to amend the clause accordingly.

Second submission from the Revd Simon Cawdell

19. Mr Cawdell's second submission was received out of time. The Committee, however, agreed to consider it.
20. Mr Cawdell proposed that the Measure should be amended so as to establish a general principle under which the Rule Committee, in the exercise of its power under the new section 26A, should provide for any alterations to a building to be undertaken without a faculty provided that they were approved by the archdeacon and the DAC had certified that "the proposed alteration neither affects the structural integrity of the building, or its outward appearance". Only works that were of a description expressly excluded by the Rules would not be subject to this general principle.
21. The Committee considered that such a principle would place a significant and undesirable constraint upon the Rule Committee in the exercise of its power under section 26A, requiring it to deal with works of a particular description in the same way, so that all alterations to a building, however significant or however minor, would be subject to the same level of control, namely consultation with, and approval by, the archdeacon, unless expressly excluded. The imposition of such a constraint would be inconsistent with the objective that the clause sought to achieve which was that the level of control should be proportionate to the particular nature of what was proposed.
22. The Committee also considered that Mr Cawdell's proposal would cause significant problems, resulting in a very wide range of works – unless expressly excluded by the Rules – being allowed without a faculty and without the giving of notice to the public or anyone else concerned. Establishing such a principle would result in the Church of England's arrangements no longer meeting the requirements set out in the Government's Code of Practice relating to the ecclesiastical exemption.

23. The Committee therefore rejected Mr Cawdell's proposal.

Other proposals

24. The Dean of the Arches suggested that the new section 26A(3) might not make it sufficiently clear that the archdeacon had a discretion to decline to give notice that a matter could be undertaken without a faculty even though the matter in question was included in the list of prescribed matters. It had been the intention of the original framers of the Measure that the archdeacon should have such a discretion, enabling the archdeacon to require that a faculty petition be submitted in respect of proposals where he or she was aware that they were contentious; or where other relevant considerations meant that it would not be right for them to be undertaken without going through the faculty process.

25. The Committee accepted that the matter ought to be clarified, and agreed an amendment to make it clear that the archdeacon had a discretion as to whether to give notice under section 26A(3)(a) allowing a matter to be undertaken without a faculty.

26. The Committee also considered that questions might arise as to whether particular proposals fell within the list of matters that could be undertaken without a faculty. The Committee agreed to amend the clause to make provision for any such question to be determined by the court.

Drafting amendments

27. The Committee agreed a number of amendments suggested by Legislative Counsel to improve the drafting of the clause. These included the division of the new section 26A, which was a very long provision, into two new sections and renumbering them as sections 18B and 18C as they more naturally belonged in Part 3 rather than Part 4 of the Care of Churches and Ecclesiastical Jurisdiction Measure 1991.

28. The Committee agreed that clause 5, as amended, should stand part of the draft Measure.

Clause 6 (now clause 7) (Power for appellate court to intervene in proceedings in cases of delay)

29. The Committee accepted the advice of Legislative Counsel and the Deputy Legal Adviser that the new subsection (6) should be omitted. This was because it went without saying that the parties to court proceedings were obliged to comply with directions and other orders made by the court and that an inferior court was obliged to comply with the directions and orders made by a superior, appellate court.

30. The Committee agreed to amend clause 6 accordingly and that the clause, as amended, should stand part of the draft Measure.

Clause 7 (now clause 8) (Duration of office of chancellor)

31. The Committee agreed amendments suggested by Legislative Counsel to improve the drafting of the clause and agreed that clause 7, as amended, should stand part of the draft Measure.

Clause 8 (now clause 9) (Interlocutory orders in the appellate courts)

32. The Committee agreed amendments suggested by Legislative Counsel to improve the drafting of the clause and agreed that clause 8, as amended, should stand part of the draft Measure.

Clause 9 (now clause 10) (Citation, commencement, extent and interpretation)

33. The Committee agreed amendments suggested by Legislative Counsel to improve the drafting of the clause and agreed that clause 9, as amended, should stand part of the draft Measure.

Proposed new clause

Submission from the Revd Tony Redman

34. The Committee considered a submission from the Revd Tony Redman, proposing that two new clauses be inserted into the draft Measure. The first proposed new clause was to provide as follows: “The work of the Diocesan Chancellor shall be subject to annual review by the Bishop of the Diocese”.
35. Mr Redman explained the rationale for his proposals on the basis that there was “no legal requirement for the chancellor to explain his work to the diocesan bishop, or for the diocesan bishop to reflect with the chancellor of the diocese on his work.” It was his view that this ought to be a legal requirement and that it would “provide a review process for chancellors similar to that recently introduced for diocesan registrars, and in line with the normal practice for all others with a responsibility held under episcopal authority”.
36. The Committee noted that the office of chancellor was summarised as follows in volume 34 of Halsbury’s Laws of England, at paragraph 1036 –
- As judge of the consistory court the chancellor acts in the capacity of official principal of the bishop, who appoints him to the office by letters patent. Although the power of nomination and appointment resides in the bishop, the chancellor's authority is derived from the law. He is a Queen's judge, in one of the Queen's courts. He acts in the court as an ordinary, that is to say, as an independent judge, uncontrolled by the bishop, and with no special instructions from him. There is no appeal from the chancellor to the bishop. The chancellor, being a judge independent of the bishop, may hear and determine in the consistory court a cause in which the bishop is himself interested.
37. The Committee was advised that the independence of the judiciary was a fundamental principle of the constitution. Halsbury’s Laws of England, volume 8(2), paragraph 303 summarised the principle in this way: “The independence of the judiciary is essential to the rule of law and to the continuance of its own authority and legitimacy.”
38. The judges in the temporal courts were not accountable to the Government or to Parliament for the exercise of their office. Any training and mentoring was provided by the Judicial College, an independent judicial body. Similar arrangements were made in the case of ecclesiastical judges by the Ecclesiastical Judges Association.
39. If any party to a judgment of a consistory court were to be aggrieved, that party had a remedy by way of appeal to a superior court or, in certain circumstances, by way of judicial review in the High Court.
40. To impose a requirement on the chancellor to account to the bishop for the exercise of the functions of his office would amount to an interference with the independence of the chancellor as an independent judge and would, as such, be unconstitutional.
41. The Dean of the Arches, in opposing Mr Redman’s proposal on behalf of the Steering Committee, explained that chancellors were not members of the bishop’s staff, but were special appointments made by letters patent. As such, they were not subject to supervision by the

bishop and could only be dismissed in special circumstances. Mr Redman's proposal would represent a major change in this understanding. It appeared, moreover, to be premised on the basis that chancellors never met with their diocesan bishops, which was not in fact the case.

42. In discussion, it was noted that many chancellors held informal meetings with their bishop at least once a year to discuss matters. It was also noted that with regard to the system of review for diocesan registrars, a variety of practices existed, including reviews with the bishop and diocesan secretary. However, given the chancellor's judicial independence, this was not a model to follow.
43. The Committee decided that while it was important to encourage best practice (which was something that the Ecclesiastical Judges Association was already doing), it was necessary to reject Mr Redman's proposal on the basis of its unconstitutionality.

Proposed new clause

Submission from the Revd Tony Redman

44. Mr Redman's second proposed new clause was as follows: "Where the Diocesan Bishop considers it desirable in the interests of the Diocese to amend the period of office of the chancellor of the Diocese, he shall consult with the Dean of the Arches with a view to amending the period of office accordingly."
45. This provision was explained by Mr Redman on the basis that it would enable the Bishop to remove the chancellor from office in circumstances where that was not currently possible. This would "bring chancellors into the same structural relationship to the Diocesan Bishop as the Diocesan Registrar and those who hold office under the Bishop in other areas of diocesan life".
46. The Committee reiterated that the chancellor was not in the same "structural relationship" with the bishop as the registrar or others holding office in the diocese because the chancellor was an independent judge. It was for that reason that the chancellor was not normally removable by the bishop.
47. The Committee was advised that the only circumstances in which a chancellor could be removed from office were if the Upper House of the Convocation of the relevant province resolved that he was incapable of acting or unfit to act: section 2(4)(b), Ecclesiastical Jurisdiction Measure 1963. The very limited scope of the bishop's power of removal was necessary in order to preserve the independence of the judiciary and reflected the position in respect of judges of the High Court and the other Senior Courts. Subject to a statutory retirement age, their tenure of office was subject only to a power of removal by Her Majesty on an address presented to Her by both Houses of Parliament.
48. The Committee was of the view that the provision proposed by Mr Redman would infringe the constitutional principle of judicial independence.
49. Moreover, the Committee was advised that a provision whereby the bishop had the power to curtail the term of office of a chancellor would also be likely to amount to a breach of article 6 of the European Convention on Human Rights and Fundamental Freedoms (which was incorporated into the law of the England and Wales by the Human Rights Act 1998).

50. Article 6 provided–

‘In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.’

51. In the case of *Starrs v Ruxton* 1999 SCCR 1052, the High Court of Justiciary in Edinburgh had held that where the member of the executive who had the power to appoint a judge also had the power to determine whether that judge could remain in office, the judge in question lacked the requisite degree of independence that Article 6 required.

52. In addition to the general constitutional point about the independence of the judiciary, the Committee therefore considered it also likely that a provision which gave the bishop a discretion to curtail the term of office of a chancellor would infringe article 6 of the Human Rights Convention. It consequently voted to reject Mr Redman’s second proposed amendment.

Proposed new clause

Proposal from Canon Timothy Allen

53. Canon Allen (a member of the Committee) proposed the insertion of a new clause to amend section 25 of the Care of Churches and Ecclesiastical Jurisdiction Measure 1991 (which provides for the membership of the Rule Committee).

54. His proposal was for a DAC secretary and chairman, both nominated by the Church Buildings Council, to be included among the membership of the Rule Committee when it was convened for the purpose of making rules concerned with the operation of the faculty system.

55. He also proposed that the person appointed by the Church Buildings Council who was currently a member of the Rule Committee for all purposes (including making rules relating to proceedings under the Clergy Discipline Measure 2003) should only function as a member when the Rule Committee was dealing with business concerned with the faculty jurisdiction.

56. The Committee accepted Canon Allen’s proposals and amended the Measure accordingly, inserting what is now clause 6.

Long Title

57. The Committee agreed an amendment to the Long Title suggested by Legislative Counsel and agreed that the Long Title, as amended, should stand part of the draft Measure.

**The Very Revd David Brindley, Dean of Portsmouth (Chair)
On behalf of the Committee**

May 2014

Draft Care of Churches and Ecclesiastical Jurisdiction (Amendment) Measure

Clause or schedule of original draft Measure (GS 1919)	Summary of submission	Committee’s decision
Clause 1	No submissions received	
Clause 2	No submissions received	
Clause 3	No submissions received	
Clause 4	No submissions received	
Clause 5	<p>Make the chancellor’s power under section 26A(9) subject to requirement to seek the advice of the DAC/English Heritage (the Revd Simon Cawdell)</p> <p>Establish a general principle relating to the Rule Committee’s power under the new section 26A so that any alterations to a building may be undertaken without a faculty provided that they are approved by the archdeacon and do not affect “the structural integrity of the building or its outward appearance”(the Revd Simon Cawdell)</p> <p>Clarify for the purposes of the new section 26A(3) that an archdeacon may refuse to give his consent to works not requiring a faculty being carried out (Dean of the Arches & Auditor)</p> <p>Provide that in the event of a question arising as to whether proposed works fell within the list of matters that may be undertaken without a faculty, the question be decided by the consistory court (Steering Committee)</p>	<p>Accepted</p> <p>Rejected</p> <p>Accepted</p> <p>Accepted</p>
Clause 6	Remove proposed new subsection (6) (Steering Committee)	Accepted
Clause 7	No submissions received	
Clause 8	No submissions received	
Clause 9	No submissions received	
Proposed new clause	That the work of the Diocesan Chancellor be subject to annual review by the Bishop of the Diocese (the Revd Tony Redman)	Rejected
Proposed new clause	Where the diocesan bishop considered it desirable to amend the period of office for the chancellor, he should be able to do so in consultation with the Dean of the Arches (the Revd Tony Redman)	Rejected
Proposed new clause	Provide for a secretary and a chairman of a DAC to be included among the membership of the Rule Committee when convened for the particular purpose of making rules regarding the operation of the faculty system (Canon Timothy Allen)	Accepted
Long Title	No submissions received	

Appendix II

Destination table

Draft Care of Churches and Ecclesiastical Jurisdiction (Amendment) Measure

GS 1919 (as at First Consideration)	GS 1919A (as amended by the Revision Committee)
1	1
2	2
3	3
4	4
5	5
-	6
6	7
7	8
8(1)	9(1)
8(2)	-
8(3)	9(2)
9(1-2)	10(1-2)
-	10(3)
9(3-6)	10(4-7)
9(7-8)	-
9(9)	10(8)