

Church of England Pensions Measure

Drafting Notes

Introduction

1. These notes use the following abbreviations –

CPM 1961 – the Clergy Pensions Measure 1961

CPAM 1972 – the Clergy Pensions (Amendment) Measure 1972

IA 1978 – the Interpretation Act 1978

CEPR 1988 – the Church of England Pensions Regulations 1988

CEPR 1997 – the Church of England Pensions Regulations 1997

CEMPM 2010 – the Church of England (Miscellaneous) Provisions Measure 2010

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).”

General points

3. The consolidation upgrades to the status of primary legislation provisions currently in regulations made under section 6 CPAM 1972, in particular the CEPR 1988. It is not thought necessary to include a saving for the possibility of a challenge to any exercise of that power. Although the CEPR 1988 include cases of sub-delegation for which there are no express *vires*, those cases are unobjectionable on the basis that they restate delegations originally conferred by primary legislation. In particular –

(1) In *Schedule 1, paragraph 2(1)* restates regulation 6(1) CEPR 1997, which restates a delegation conferred by section 21(4) CPM 1961.

(2) *Clause 6(1)* restates regulation 4(2) CEPR 1988, which restates a delegation conferred by section 1(5) CPM 1961 as amended by section 5(1) CPAM 1972.

(3) *Clause 14(10)* restates the definition of “retiring age” in regulation 2(1) CEPR 1988, which restates a delegation conferred by the definition of that expression in section 46(1) CPM 1961 and section 3(2) of the Deacons (Ordination of Women) Measure 1986.

(4) *Clause 18(1)* restates regulation 7(1) CEPR 1988, which restates a delegation conferred by section 3(1) CPM 1961.

- (5) *Clause 26(3)* restates regulation 18(1) CEPR 1988, which restates a delegation conferred by section 16 CPM 1961.
 - (6) *Clause 35(2)* restates regulation 30(1) CEPR 1988, which restates a delegation conferred by section 36(1) CPM 1961.
4. There is an inconsistency in the current provisions between references just to children, references just to dependants and references to both children and dependants. There is not thought to be any policy reason for these distinctions, and so the consolidation refers to children alongside references to dependants. These changes are made in reliance on SO 63(3)(d) (removal of anomaly not of substantial importance).
 5. Section 46(2) CPM 1961 provides that references to Acts and Measures include future amendments. Most of the subsequent Measures provide that they are to be read “as one” with CPM 1961, so section 46(2) applies to them too. And section 11 IA 1978 (when read with paragraph 1 of Schedule 2 to that Act) does likewise for regulations made under section 6 CPAM 1972. But the consolidation does not restate section 46(2), on the basis that it is preferable to follow the usual legislative practice and to assess the intention underlying each amending provision as it comes along.

Clause 2 and Schedule 1 (the Church of England Pensions Board)

6. In *Schedule 1, paragraph 3(3)* restates the requirement in regulation 7(3) CEPR 1997 for a casual vacancy to be filled in accordance with the preceding provisions of the regulations. But the consolidation applies the requirement to the chair as well as to the other members of the Board. Regulation 7(3) confines the requirement to the other members, but it is not clear why. The change is made in reliance on SO 63(3)(d) (removal of anomaly not of substantial importance).
7. *Paragraph 5(1)* makes express what is currently provided for by case law. In *A-G -v- Great Eastern Railway Co.* (1880) 5 App. Cas. 473, Lord Selborne said that “whatever may fairly be regarded as incidental to, or consequential upon, those things which the Legislature has authorized, ought not (unless expressly prohibited) to be held...to be *ultra vires*”. Express provision is usually included these days when establishing statutory bodies, for the sake of clarity. The provision is included here in reliance on SO 63(3)(c) (conformity with modern practice).
8. *Paragraph 6* does not restate the express power in section 22 CPM 1961 for the Board to appoint staff, on the basis that it goes without saying that a corporation is entitled to appoint people to carry out its functions.
9. *Paragraphs 7(1) and 9(1)* assume that section 6(1)(i) CPAM 1972, which enables regulations to give the Board power to appoint committees and to delegate functions to them, has been superseded by section 21(10A) CPM 1961, which was inserted by section 4 CEMPM 2010 and makes the full provision permitted by section 6(1)(i).
10. *Paragraph 8(2)* includes provision to anticipate any suggestion that a member’s vote should be discounted because of a defect in the member’s appointment. Express provision to that effect is common for statutory bodies and is included here in reliance on SO 63(3)(c) (conformity with modern practice).
11. *Paragraph 11* does not restate the reference to judicial notice in section 21(12) CPM 1961 as *sub-paragraph (2)* deals with the point. Moreover, reference to judicial notice is uncommon in statute nowadays as there is uncertainty about its effect.

12. *Schedule 1* does not restate the provision in section 21(2) CPM 1961 for the Board to have perpetual succession and a common seal, on the basis that each of those features is inherent in a corporation's status and goes without saying.

Clause 3 (meaning of "pensionable service")

13. *Subsection (2)* defines "pensionable service" for the past service scheme by restating the definition in regulation 2(1) CEPR 1988 (the full-out wording at the end of which is particularly significant). *Subsections (3) and (8)* define the expression for the funded scheme, by making express the implication of the rather oblique provision in regulation 2(5) CEPR 1988. The current provisions on the meaning of "pensionable service" are complex. Section 46(1) CPM 1961 defines the expression by reference to section 1 of that Measure, which was repealed by CEPR 1988. Regulation 33 of those Regulations contains specific savings but provides that they do not affect the general provision in section 17 IA 1978. Applying section 17(2)(a) IA 1978 to the references to section 1 in section 46 CPM 1961 accordingly requires one to read them as references to regulation 2 CEPR 1988.

Clause 15 (entitlement to lump sum)

14. This clause does not restate the rule-making power in section 3 of the Clergy Pensions (Amendment) Measure 1967, as the regulation-making power in *clause 53* is sufficient power and any duplication would be confusing. Moreover, it would not seem proper to confer a rule-making power which could be used to amend the Measure otherwise than by statutory instrument, thus avoiding any scrutiny by Parliament. The change is made in reliance on SO 63(3)(c) (conformity with modern practice).

Clause 18 (requirement for medical evidence etc. in case of infirmity)

15. *Subsection (2)* provides that the Board, having decided that a person is infirm and incapable of work, may nonetheless subsequently require medical or other evidence. The reference to "other" evidence brings consistency between the reference in regulation 7(1) CEPR 1988, which entitles the Board to require any evidence, and regulation 7(2), which entitles it to require medical evidence only. The change is made in reliance on SO 63(3)(d) (removal of anomaly not of substantial importance).

Clause 19 (suspension or reduction of pension in light of medical evidence etc.)

16. *Subsection (2)(b)* refers to "work", rather than restating the reference to "employment" in regulation 7(3) CEPR 1988, so as to replicate the breadth of the existing reference without raising distracting questions about what these days amounts to "employment". The change is made in reliance on SO 63(3)(b) (removal of doubt).

Clause 26 (power of Board to commute pension for capital sum)

17. *Subsection (2)* refers to a person aged 18 or over in order to clarify the reference in regulation 18(1)(a) CEPR 1988 to a person "of full age".

Clause 27 (guaranteed minimum pension)

18. This clause does not restate regulation 19(6) CEPR 1988 (which was inserted by the Church of England (Miscellaneous Provisions) Measure 2005), on the basis that it has been superseded by the definition of "widow or widower" in regulation 2(1) of those Regulations (which was inserted by CEMPM 2010).

Clause 29 (payments in and out)

19. *Subsection (3)* restates regulation 26(3) CEPR 1988 so as to continue to allow for payments of contributions equivalent premium under section 55(2) of the Pension Schemes Act 1993. That provision was repealed by paragraph 36 of Schedule 13 to the Pensions Act 2014, which came into force on 6 April 2016. That repeal was, though, subject to a saving in Article 2(4) of S.I. 2015/1502 in relation to payments made in the case of employment which ended before 6 April 2016 (and in respect of which contributions equivalent premium could still be payable).

Clause 32 (payments for deaconesses and licensed lay workers)

20. *Subsection (2)* makes express the implication of section 1 of the Deaconesses and Lay Workers (Pensions) Measure 1980 by providing that, in the case of deaconesses and licensed lay workers, the Church Commissioners have a power to make payments in addition to those that they are under a duty to make. This provision is made in reliance on SO 63(3)(e) (improvement of manner in which law stated).

Clause 34 (payment of pension etc.)

21. *Subsections (5) and (7)* update the reference in regulation 29(3) CEPR 1988 to a parent or guardian or person under whose care or with whom a child lives and rely instead on the status of having “parental responsibility” so as to cover the case of a parent who does not have parental responsibility and the case of a person who is not a parent but does have parental responsibility. The change is made in reliance on SO 63(3)(c) (conformity with modern practice).

Clause 40 (additional pension scheme for clerks)

22. *Subsection (1)* does not restate the second part of section 38A(1) CPM 1961, on the basis that it is covered by the incidental power in *paragraph 5 of Schedule 1*.

Clause 41 (provision of residences)

23. *Subsection (3)* refers to “land” but the clause does not provide an express definition. The nearby reference to “buildings” suggests that “land” has a narrow meaning here. But it is thought that there is no need to restate the definition in paragraph 5(b) of Schedule 2 IA 1978 or disapply the definition in Schedule 1 IA 1978, as there is nothing in either of those definitions which would seem to have special significance here.

Clause 56 (references to spouses, children, etc.)

24. *Subsection (4)* does not define “child” to include an express reference to an adopted child, on the basis that the general law on adoption already achieves that result. It is not clear why an express reference was included in the definition of “child” in section 46(1) CPM 1961, given that was the effect of the law on adoption then too. It is thought that including an express reference to adoption now would be confusing. The change is made in reliance on SO 63(3)(f) (conformity with existing law).