

# **Review of Clergy Terms of Service: Part Two**

**Report on the second phase of the work**

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# Foreword

In December 2002, the Archbishops' Council set up a group under Professor David McClean to review the terms under which the clergy hold office, following the Council's response to the DTI's discussion document *Employment Status in relation to Statutory Employment Rights*.

The Group's terms of reference required to give it priority to consideration of the position of clergy without the freehold or employment contracts, and to report on this aspect in 2003. The Group's Report on the first phase of its work, GS 1527, was debated at the February 2004 sessions of General Synod, where its recommendations were welcomed and commended to the wider church for discussion.

Building on the positive response to GS 1527, both by the Synod and during the subsequent consultation, the Group has now completed this Report on the second phase of its work. We are deeply indebted to Professor McClean, the members of the review group and the assessors for the excellence of their work. Particular thanks are due to Patrick Shorrocks, secretary to the review group, whose contribution to the work has been immeasurable, and to Kevin Diamond who provided additional administrative support.

On behalf of the Council, we have pleasure in commending this report to Church for study and further Debate.

+ ROWAN CANTUAR

+ DAVID EBOR

## Review of Clergy Terms of Service: Part Two

# **1. Summary of Conclusions**

## **Clergy with the freehold**

- (i) We recommend that section 23 rights should be granted to all clergy as soon as practicable, including those appointed to offices now held on a freehold basis.

## **Common tenure and the capability procedure**

- (ii) We recommend that appointments to offices which are now freehold should in future be made on common tenure and be subject to the capability procedure.

## **Implications for the property aspects of freehold**

- (iii) We recommend that the legal rules as to what is now termed sequestration be restated and simplified.
- (iv) We consider it essential that the legal obstacles to the application of common tenure to beneficed clergy and other holders of freehold offices should be removed, by ending the legal treatment of the incumbent as having property rights akin to ownership of the office and its associated land and buildings. But this should be done in ways which give equivalent rights and responsibilities by different legal means.
- (v) We recommend that parsonage houses should be vested in the Diocesan Board of Finance (DBF) as benefice property, but on terms that give appropriate security of tenure to the occupant.

## **Consent issues**

- (vi) We recommend that, when the Diocesan Board of Finance (DBF) proposes to sell a parsonage house,
  - (a) the incumbent should have a legal right to register an objection with the DBF and make representations to the DBF against the proposal;
  - (b) if the DBF wished to proceed in spite of the objection, it would require the leave of the Commissioners who would adjudicate after consulting all parties;



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- (c) the PCC would have a right to make representations at either stage.
- (vii) In view of our endorsement of the principle that clergy should, where possible, receive parity of treatment in relation to their terms and conditions of service, we consider it desirable that equivalent rights should be afforded to all clergy, including archdeacons and suffragan and diocesan bishops, in respect of the houses that they occupy while in office. We recognize that this may give rise to some difficulties, not least in identifying a suitable adjudicatory body in the case of see houses. For this reason we are not making specific recommendations in this area but would welcome comments at the consultation stage.

### **Church and churchyard**

- (viii) We recognize the symbolic importance of the ceremony of induction, but recommend that it should not have any legal effect in terms of conferring property rights over the church and churchyard.
- (ix) We recommend that the formal ownership of churches and churchyards now vested in the incumbent should vest in the Diocesan Board of Finance (DBF) as benefice property. The incumbent should have the same rights of possession and the responsibilities as at present. It should be made clear that the change in the formal ownership does not affect the rights and responsibilities of parishioners and others in relation to the church and churchyard, nor the law as to the consecration of that property. In particular, the PCC would continue to be responsible for maintaining and insuring the church.

### **Non-stipendiary ministers (NSMs)**

- (x) We recommend that proper legal provision for non-stipendiary ministers (NSMs) should be made by including them within the scope of the Clergy Terms of Service Regulations which we recommended in our earlier report as a means of giving full legal force to the rights, duties and responsibilities of the clergy.
- (xi) We recommend that a non-stipendiary minister who is licensed should be appointed on the common tenure basis, and so have access to Employment Tribunals and be subject to the capability procedure.

### **House for duty and part-time posts**

- (xii) We recommend that clergy in house for duty and similar posts should also hold them on the common tenure basis, and so have access to Employment Tribunals and be subject to the capability procedure.

### **Priests in charge**

- (xiii) We recommend that a priest-in-charge displaced by pastoral reorganisation and not immediately appointed to another post should have financial and housing provision in certain circumstances and within clearly defined limits, but for no longer than a period of twelve months, terminable if the person concerned accepts another stipendiary post, or unreasonably refuses to accept a post equivalent to the one vacated.

### **Interim posts under common tenure**

- (xiv) We recommend that those appointed to interim posts pending pastoral reorganisation should be appointed as rector or vicar on the common tenure basis, with the prospect of reorganization mentioned in the instrument of appointment, and that, if displaced, such priests should be entitled to the provision outlined above for priests in charge.

### **Posts necessarily time-limited**

- (xv) We recommend that, where clergy are appointed to time-limited posts, it should be a requirement that the reason for the time-limited nature of the post should be clearly stated in the licence.

### **'Dual role' posts**

- (xvi) We recommend that special care is taken to ensure that, in the case of dual role appointments, the terms and conditions of the post are clearly spelt out, particularly where they are adjusted to reflect the terms and conditions of employees of the Diocesan Board of Finance.

### **Other groups**

- (xvii) We recommend that common tenure should be applied to Church Army personnel who are not working under a contract of employment, and to licensed stipendiary lay workers and stipendiary readers in a similar position.

### **Minority ethnic issues**

- (xviii) We recommend that all ministerial education should regularly include the following training: cross-cultural awareness (particularly

of differences in communication and the meaning of actions), relating to multi-ethnic parishes, working with volunteers, challenging racist and sexist assumptions and informing the Church about cultural difference and racial awareness.

### **Use of Employment Tribunals**

- (xix) We continue to recommend that clergy should have access to Employment Tribunals with the exception of cases where they are appealing against the outcome of proceedings under the Clergy Discipline Measure, which has its own appeal mechanisms.

### **Advice for clergy**

- (xx) We recommend as a general principle that clergy should have access to good professional advice, particularly when they are facing the prospect of dismissal or going through the capability procedure, as they face the potential loss not only of their livelihood but also their home.
- (xxi) We recommend that the officers of the Convocations should consider the role of the Convocations in providing appropriate objective advice to the clergy on employment law and Human Resources matters.

### **The pattern and form of legislation**

- (xxii) Given the importance of tackling inadequate security of tenure at an early date, the drafting and implementation of the legislation needs to be carried forward as a matter of priority, and we recommend that the proposals which find favour be the subject of a single package of legislation.

### **The transition to the new system**

- (xxiii) We recommend that
  - (a) section 23 rights (including access to Employment Tribunals) and common tenure (including the open-ended nature of the appointment) should be accorded to all clergy without the freehold as soon as the relevant provisions in the legislation are brought into force;
  - (b) the archbishop of each province should write to each bishop, inviting him to make a declaration in writing to the effect that he wished to have section 23 rights and transfer to the common tenure system;

- (c) after a date set in the legislation, the bishop should write similarly to those clergy in his diocese with the freehold (including suffragan bishops, archdeacons and cathedral clergy) inviting them to make a declaration in writing to the effect that they wished to have section 23 rights and transfer to the common tenure system;
  - (d) any office-holder declining to make the declaration at (b) or (c) should continue to hold office on the existing terms;
  - (e) all future appointments to what are now freehold posts should be on the new basis (whether or not the priest appointed had the freehold in his or her previous post);
  - (f) the transfer to the DBF of formal title to the church and churchyard to hold as benefice property should take place as soon as the relevant provisions in the legislation are brought into force;
  - (g) the transfer to the DBF as benefice property of title to parsonage houses, carrying with it the new arrangements for dealing with such houses set out in this report, should take place if the benefice is vacant on the day the relevant provisions are brought into force, or when it becomes vacant, or when the incumbent makes the declaration referred to in (c) above;
  - (h) corresponding provision be made in respect of the houses of other clergy in team ministries and cathedral clergy.
- (xxiv) In this connection, we hope that the House of Bishops would resolve to recommend all bishops to respond positively to the archbishops' invitation at (xxiii) (b).

### **Amendments to the Canons**

- (xxv) We recommend no change in the status of the Canons but the amendment of those provisions that would be inconsistent with the other legislation giving effect to the recommendations in this Report.

### **National and local human resources provision**

- (xxvi) We recommend that a professional HR function should be set up to support bishops and their staff. This will have the following implications.

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- Bishops will have a responsibility to ensure that HR advice is obtained and followed.
- National guidelines will be required over a range of areas, and these will need to set out where procedures have to be followed exactly and where there is room for local discretion.
- Additional expenditure will be required in the form of about 18 additional posts and their on-costs.

(xxvii) We recommend that policy, in areas where consistency across the Church would be expected by an Employment Tribunal, should be determined at national level, with indications being provided where there was scope for diocesan discretion.

(xxviii) We recommend that dioceses should collaborate and decide locally, in the light of geography, numbers, and existing resources, what HR provision is required, both at the strategic level (for example, the implementation of national policy at diocesan level and complex technical case work), and also at the operational level (for example, interpreting diocesan guidelines and dealing with routine enquiries).

(xxix) We recommend that the administrative work – which is already being carried out in individual dioceses – should continue to be provided at this level where appropriate, subject to any reorganisation required to comply with new standards and to restructuring of existing posts following the setting up of an HR function at regional levels.

### **Ministerial review**

(xxx) We recommend that ministerial review should be provided for bishops and that the House of Bishops should be invited to give consideration to setting up ministerial review schemes for bishops.

(xxxi) We recommend that general guidelines should be produced on the conduct of ministerial review, but that it should be for each diocese to devise its own system within these guidelines.

### **Revisions to the capability procedure**

(xxxii) We recommend that capability procedure panels should be able to come to a decision by majority vote.

(xxxiii) We recommend that the capability procedure as revised and set out in Annex 6 of this Report should be used for all those with common tenure.

## **Severance payments**

(xxxiv) We recommend that, in cases of removal after the capability procedure, any payments should be determined by the diocese or cathedral concerned on a case-by-case basis, in the light of national guidelines under which the level of payment would be related to the National Minimum Stipend and take into account the length of a cleric's service.

## **Appointments procedures**

(xxxv) We recommend that, when the Clergy Appointments Adviser's *Guidelines Towards Good Practice in the Appointment of Clergy to Parochial Posts in the Church of England* are issued, full use is made of them, as it is important to ensure that clear appointments procedures are in place.

## 2. Introduction

### **The structure of this second report**

1. In this report we have two main objectives. The first is to consider in the light of the proposals we made in our First Report (GS 1527) the future rights and responsibilities attaching to offices to which clergy are now appointed on a freehold basis. The second is to develop our proposals, clarifying a number of detailed issues and so paving the way for implementing legislation. After this introductory Part, we deal with the freehold offices in Part 3. The proposals are then developed in Part 4. Implementation is considered in Part 5; and the Human Resources (HR) function, ministerial review, and capability procedures in Part 6.

### **Background**

2. Many readers of this report will have the Review Group's First Report, but it may nonetheless be helpful to set out once again the events which prompted the review and to refer to the main recommendations of that report. This part accordingly confines itself to summarising the points made in our first report, and indicating where these points are subsequently developed in later parts of this report.
3. Section 23 of the Employment Relations Act 1999 gives the Government power to confer certain employment rights on people who are not technically employees (so-called atypical workers). Atypical workers include office holders; most clergy and ministers of religion come into this category. The Government has not suggested that atypical workers should become employees - and this is neither required nor provided for by section 23 - but only that they should have access to many of the rights that employees already have, in particular, the right to make applications to an Employment Tribunal including claims of unfair dismissal. In response to a discussion document issued by the Department for Trade and Industry in July 2002, *Employment Status in relation to Statutory Employment Rights*, the Archbishops' Council made a statement about the rights and responsibilities of the clergy which set the direction for our work:

The Church of England firmly believes that the clergy ... are entitled to terms and conditions of service which adequately protect their rights, recognize their responsibilities and provide proper accountability arrangements.

4. The Council set up the Review Group to address not only the implications of Section 23 for clergy, but also other related issues such as the clergy freehold. The Group's terms of reference required it to give priority to consideration of the position of clergy without the freehold and to report on that aspect in 2003, the rest of the review to be completed, if possible, in 2004. (For details of the Group's membership and terms of reference, please see Annex 1.)
5. In commissioning the Group's work, the Council recognized that within the Church of England there is a sharp distinction between clergy with the freehold, who have a high degree of security though arguably only limited accountability, and other clergy, whose rights are much more restricted and whose position has a degree of insecurity. This distinction seems to have no counterpart in the other churches.

### **Our first report**

6. In our First Report, our main focus was on clergy without the freehold. However, we set out there some approaches which we believe to be relevant to all clergy, not only those who were the particular subject of that report. As we have proceeded with the second phase of our work, we have been increasingly convinced that considerations of justice and consistency require the same basic principles to be applied across to the board to all clergy, whether they have the freehold or not. We recognized 'the distinctive nature of Christian ministry, aware that we are dealing with the men and women called by God to a particular form of service, of whom much is expected, and whose work is often demanding and difficult'. We also adopted a theological understanding, with much help from Professor Anthony Thiselton, of the role of legal rules in the context of relations between Christians. That drew on Luther's insight that laws which operate within the structures of society are one face of divine grace on behalf of the weak and vulnerable, and on the concept of covenant as a defined relationship on the basis of which both parties know where they stand and derive a sense of confidence from that knowledge.



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7. The full report must be consulted for the reasoning that underpinned our principal recommendations, and what follows can only be the barest summary. In a number of respects, our earlier recommendations are clarified and developed in this report. Throughout our work, the requirements of justice have been critical to our thinking. In particular, as we urged in our interim report in July 2003 (GS 1518) and repeated in the report on the first stage of our work (GS 1527):

As part of its commitment to social justice, the Church has urged employers to treat their workers well. It would therefore follow that clergy ought to enjoy the same rights and protections that the Church would urge employers to provide... The rights conferred by section 23 are generally seen as good practice, and the Group can see no reason for not granting them to clergy.

8. We therefore had little difficulty in agreeing to recommend that 'section 23 rights' should be granted to the clergy (with the exception of the right not to work on Sunday) in a way that would be legally binding. The principal rights that are covered by section 23 of the Employment Relations Act 1999 are: the right to time off for certain purposes; the right to maternity, paternity, adoption and parental leave; the right to an itemised pay statement; the right to a written, detailed statement of terms and conditions of work; and the right to apply to an Employment Tribunal in case of breach of any of the above and for redress against unfair dismissal.
9. After taking into consideration the views of senior ecclesiastical lawyers, we recommended that the Church should not attempt to set up its own system of internal tribunals for this purpose but that clergy should have access to Employment Tribunals with the Diocesan Board of Finance as the normal respondent. In addition to the grant of section 23 rights, we judged it important that clergy without the freehold (including priests-in-charge, assistant curates, team vicars and some team rectors, all working under a licence issued by their diocesan bishop) should be given greater security. We recommended that fixed-term appointments should not be used for clergy, except in a limited class of cases, including designated training posts, posts which are necessarily time-limited because they are related to a particular project or dependent on special funding which is for a set number of years, and certain

priests-in-charge in strictly interim situations. Recommendations for this latter category are developed in part 4 of this report.

10. We proposed that future appointments of clergy without the freehold should be made on a new basis to be called 'common tenure', normally until the retiring age, subject to removal on grounds of discipline, redundancy or incapacity, or after a new form of 'capability procedure' that would be invoked where a post-holder is failing to reach minimum standards.
11. We gave much time to the question whether clergy should become employees, and reflected on the particular relationship between the bishop and his clergy. We concluded that the employer's entitlement - and also opportunity - to control the work of an employee (if necessary on a day to day basis) was alien to the relationship between a bishop and his clergy. Largely for this reason, we ultimately rejected the idea of making clergy employees, and recommended that the office-holder status of clergy should be retained through the medium of common tenure by means of Church legislation.
12. Of critical importance was our recommendation that the Church must put in place proper mechanisms designed to ensure good practice and to foster deeper relationships of trust and partnership, including the provision of professional human resources advice and appropriate training for bishops and archdeacons. These recommendations are further developed in part 6.
13. We set out a possible 'capability procedure', which gave effect to certain principles: the procedures adopted must ensure that proper human resources advice is taken at every stage, and must be fully in accord with the requirements of natural justice; there must be a right of appeal at every formal stage; the procedures must ensure that the cleric has full opportunity to respond to all points made; a panel – not a single individual – should be involved at every formal stage; the procedure should be based on best secular practice; and the cleric should have sufficient notice of any appearance before a panel and the right to be supported by a friend or union representative. A revised version of the capability procedure, which takes into account many of the comments made on our first version, is included at Annex 6.
14. Our Terms of Reference speak of the need to provide terms of service for the clergy which contain a proper balance between

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rights and responsibilities. We emphasized in our First Report that no change in the legal conditions of tenure should be effected without at the same time clarifying the responsibilities of clergy. Any changes had to be seen as conditional upon our recommendations about clergy responsibilities and accountabilities. Those responsibilities need both to be based on general, church-wide, rules, and also to reflect specific local circumstances.

15. We saw as essential the creation of an accessible document containing a realistic and flexible statement of the rights, duties and responsibilities of the clergy, easily available to both clergy and laity. The present Canons – despite having the full force of law – do not provide that. So we recommended that those general rules should be expressed in Clergy Terms of Service Regulations, which would also have full legal effect and would replace some of the material currently in the Canons. The implications of our recommendations for the Canons are set out at paragraphs 149 – 151.
16. The duties and responsibilities of the clergy also involve reference to specific local circumstances. These flow, in the first instance, from the written material prepared as part of the process of making an appointment to a post. We are convinced of the importance of ministerial review in affirming the work of clergy, providing support, identifying training needs, developing potential, and protecting clergy against unrealistic expectations of parishes. We therefore recommended that (i) all clergy should be required to participate in diocesan ministerial review schemes (see the further discussion at paragraphs 177 -186) and to take appropriate advantage of Continuing Ministerial Education; (ii) that such schemes should make more active provision for lay involvement; and (iii) that all diocesan bishops should be required to ensure that ministerial review schemes are in place and properly followed.

### **Responses to the first report**

17. The Report on the first phase of the Group's work (GS 1527) was considered at the February 2004 sessions of General Synod. After a debate which showed wide support for the principal recommendations, the Synod formally welcomed the Report's recommendations by an overwhelming majority and commended it to the dioceses and the wider church, inviting dioceses and other interested parties to submit comments by July 2004. The Synod also requested us to make a further report to Synod at the conclusion of the second phase of our work.

18. There has been considerable interest in, and wide discussion of, the First Report. Discussions have taken place in groups representing Chairs of diocesan Houses of Clergy, and diocesan secretaries, in Diocesan Synods (sometimes with separate meetings of one or more Houses), Bishop's Councils, and relevant diocesan committees. There has also been consideration of relevant issues by the House of Bishops' Theological Group and the Bishops' Committee for Ministry. Members of our Group and of the staff of the Ministry Division have responded to many requests to take part in these discussions, and a considerable number of very helpful written comments has been received. Further details of our consultations and other work done are provided at Annex 2.
19. The general tenor of the discussions and comments was one welcoming our approach, and of widespread support for the main features of our proposals: the granting of section 23 rights, the continuance of office-holder status, the notion of common tenure, and the introduction of a capability procedure. We were encouraged both by the General Synod and in the course of our consultations to develop that approach as we pursued the second stage of our work. Several of the detailed issues that arose in the course of consultations and discussions on the first phase of our work were also made the subject of the written comments we received, and these have very much influenced us in the second phase of our work.

### **Continuing work with other churches and the DTI**

20. We had the advantage at an early stage in our work of seeing the submissions made by the other churches in response to the DTI's consultation paper. Inevitably, they reflected the very different ecclesiologies and practices of the churches, though there was a common preference for self-regulation rather than Government intervention.
21. We have been concerned to keep our sister churches informed of the progress of our work, though the particular features of our own system, with its division between freehold and other offices, limit the relevance of our work to their concerns. The DTI announced, just before the General Synod's debate in February 2004, that it was establishing a group with representatives of all the churches, other faiths, and interested parties such as Amicus, to take matters forward. The Church of England is represented there by the Archbishops' Council's Director of Ministry and the Secretary of its Deployment, Remuneration and Conditions of Service Committee (DRACSC), who have reported on its work to our Group. No

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concrete proposals have emerged from this to date, although further meetings are expected. However, we remain convinced that conferring section 23 rights (and the corresponding responsibilities) on clergy is the right approach and something that the Church should implement for the sake of its own self-understanding and integrity, even if this were not to be required of it by the Government.

### 3. Clergy with the freehold

22. As we have already noted, our Terms of Reference required us to give priority to consideration of the position of those without the freehold or employment contracts, but then to consider the future of the freehold. For all clergy we were required to ensure a proper balance between rights and responsibilities, and we found ourselves seeing the two as being inextricably linked. Although our First Report was essentially concerned, therefore, with the non-freeholders, we stated that many of its conclusions on both rights and responsibilities were equally relevant to those holding freehold office. Some 4,900 clergy – approximately 55 percent of the 9,000 full-time diocesan stipendiary clergy – hold a freehold office. They include archbishops, bishops, deans, some cathedral canons, archdeacons, and many parish clergy. These office-holders have always enjoyed a high degree of security of tenure. They are entitled to hold office until the compulsory retirement age of 70, and cannot be removed from office except for disciplinary reasons, mental or physical incapacity, pastoral breakdown or pastoral reorganisation.
23. In recommending in our First Report that section 23 rights should be conferred on all clergy in a way that made them legally binding, we explained that we saw no justification in this regard for distinguishing between archbishops and assistant curates, or between those who have the freehold and those who do not. We have heard no dissent from that proposition. There are, however, some difficulties in applying section 23 rights in the context of freehold office. As we go on to explain, freehold office is in law regarded primarily as a piece of property rather than as a working relationship in any way akin to employment, and a concept such as unfair dismissal has no obvious application to it. We consider below at paragraphs 145 -148 the general question of how to phase in the new system that we recommend, but we are clear what the objective should be. Accordingly

**(i) we recommend that section 23 rights should be granted to all clergy as soon as practicable, including those appointed to offices now held on a freehold basis.**

## **Freehold of property and freehold of office**

24. A distinction is often drawn between 'freehold of office' and 'freehold of property'. The distinction between office and property is convenient, but not entirely accurate, particularly in the case of the parochial clergy. The office of rector or vicar (and indeed that of a diocesan bishop) is regarded as a piece of property. The property rights of an incumbent flow from possession of the office or of the benefice. A team vicar does not have the freehold, although, for a fixed term of years, he or she has the same security of tenure as an incumbent, and has rights in relation to the house of residence closely aligned to those of an incumbent in relation to the parsonage house. A diocesan bishop has the freehold of office, but owns no property. The position of suffragan bishops is not entirely clear. They hold no property either, and it has sometimes been suggested that, because they have no powers as of right but only those that are delegated to them by the diocesan, they do not have a freehold office at all (although they have the same security of tenure as freeholders). It is plain that the various concepts are not as clear-cut as some suppose, and they are certainly not well understood. Nonetheless, for immediate purposes, we will speak of office and property as if they were truly distinct.

## **Origins of the freehold**

25. The 1967 report *Partners in Ministry* contains the following passage:

The Commission is not indifferent to the feelings of many in the matter of the freehold; nor is it unmindful of the long history which has brought these sentiments to birth. It strongly dissociates itself from any desire to push the clergy around, to make them tenants at will or contractual employees, or to whittle away their proper freedom of action. There is something of great value in the unique tradition of independence which the English clergy have inherited, and which in the past the freehold, with the benefice, have helped to maintain. Such a past history is remembered with gratitude, though candour compels the comment that as well as being a bastion for the prophet or sturdy reformer, or a support for the timid, the freehold has on occasions served as a wall to protect the lazy and indifferent, and as a means of perpetuating a ministry which is not for the good of the Church.

26. Behind this rather heavy style there are sentiments which remain familiar, but the underlying facts have changed markedly in the

intervening years. Calls for the abolition or reform of the freehold have continued to be heard, but there has not always been an appreciation of just how much has already changed in the nearly forty years since *Partners in Ministry* was published. It must be said, from a reading of the various debates, that it is not always entirely clear what precisely is being attacked, or defended, so we now set out in some detail in Annex 3 our understanding of the history of the freehold and of the present position.

27. As Annex 3 indicates, the origin of the freehold is bound up with property rights, and this understanding is still evident today in the way that an incumbent is 'instituted' to the spiritual responsibilities of his or her office, the 'cure of souls', and then 'inducted' into 'the possession of the temporalities of the benefice'. The procedure set out in paragraph 2 of Canon C11 involves the incumbent placing his or her hand 'upon the key or upon the ring of the church door' as the words of induction are spoken; this is a reflection of the ancient procedure, 'livery of seisin', for transferring an interest in land by delivery of some token of it with appropriate words. The authors of the 1994 report *Clergy Conditions of Service* comment: 'In effect, a beneficed clergyman was a landowner, rather than a tenant. Undoubtedly this brought him social position and some degree of material security' (GS 1126, paragraph 25).
28. The origins of the freehold benefice, then, are to be found in social conditions quite unrecognisable today, but they have created a clear and continuing association between the cure of souls in a parish and the ownership of property. Ancient parishes take a proper pride in the long succession of rectors or vicars who have served their people through the centuries, and nothing that we are proposing would break that historical succession into the future. However, the early development of the offices of rector or vicar provides no basis for a consideration of the terms on which those offices should be held today and in the future.

### **The erosion of the freehold**

29. The outcome of this historical development was the concept of a benefice as a life interest in property: the property consisting of the office of rector or vicar, the parish church and its churchyard, the parsonage house, and the tithes, glebe land, and endowments which provided the incumbent's stipend. In the course of the last 200 years many of these features have disappeared. This prompted Lynne Leader to write in her *Ecclesiastical Law Handbook* (Sweet and Maxwell, 1997) that 'the rights of the



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incumbent who holds the benefice are now so limited that to describe them as being in possession of a freehold living is to suggest an arrangement which departs somewhat from the actual state of affairs'.

30. First to disappear was the system of tithes. Tithes, originally payable in kind, were commuted to money payments ('tithe rentcharges') under the Tithe Acts 1836 to 1925, and tithe rentcharges were extinguished as a result of the Tithe Act 1936.
31. The incumbent's powers in relation to the parsonage house have been substantially modified by the imposition of consents and rights of objection in relation to sales and purchases under the Parsonages Measures 1938 and 1947. The incumbent has also been relieved of duties in respect of repair of parsonages, which now rest primarily with the diocesan parsonages boards, established by the Repair of Benefice Buildings Measure 1972 in succession to the earlier dilapidations boards.
32. The notion that an incumbent held a benefice for life has been qualified in a number of ways. Provision for removal on grounds of ill-health was first made by the Incumbents (Disability) Measure 1945 (now repealed and replaced by provisions in the Incumbents (Vacation of Benefices) Measure 1977), later supplemented by the Church Dignitaries (Retirement) Measure 1949 applying to deans, canons, prebendaries and archdeacons, and by the Bishops (Retirement) Measure 1986. A further qualification came with the development of processes for pastoral reorganization, which in effect enabled an incumbent to be made redundant by the abolition of his or her benefice. The system with which we are now familiar is derived largely from the Pastoral Measure 1968, which was replaced by the Pastoral Measure 1983 (itself now under review).
33. A major series of reforms followed wide discussion within the church of the work of Dr Leslie Paul and of the Fenton Morley report, *Partners in Ministry*. A report of a Terms of Ministry Committee chaired by the Rt Revd Patrick Rodger, then Bishop of Manchester, was debated at the July and November Groups of Sessions of the General Synod in 1972. The debates occupied more than 10 hours, spread over four days. The decisions then taken led to the establishment of the Central Stipends Authority, the creation of the post of Clergy Appointments Adviser, the development of the 'Sheffield' formula for clergy deployment, and the work which eventually produced the Patronage (Benefices)

Measure 1986. Three other reforms are directly relevant to the freehold and the benefice concept:

- (a) the pooling of benefice endowment income and the transfer of the ownership and management of glebe land to the dioceses, effected by the Endowments and Glebe Measure 1976 (the effects of inflation had, of course, meant that incumbents generally relied for their stipend not so much on the endowments of the benefice as on augmentation from diocesan funds);
  - (b) the introduction of a compulsory retirement age for bishops and other clergy in freehold offices, effected by the Ecclesiastical Offices (Age Limit) Measure 1975; and
  - (c) the introduction of procedures enabling an incumbent to be removed from office on account of pastoral breakdown, effected by the Incumbents (Vacation of Benefices) Measure 1977. (Such a procedure had actually been asked for by the Lower House of the Convocation of Canterbury in 1966.)
34. Bishops have lost the freehold of property, which was transferred to the Church Commissioners by the Episcopal Endowments and Stipends Measure 1943.
35. The appearance of team ministries has changed the arrangements under which many clergy work, and has contributed to the appearance of a large and growing class of clergy whose appointments are 'leasehold', being for a term of years with the possibility of renewal. A team rector is incumbent of the benefice, though sharing the cure of souls with the team vicars, but, since the Team and Group Ministries Measure 1995, all team rectors are appointed for a term of years. The office of team vicar has always been held for a term of years.
36. In summary, during the last 100 years the nature of the freehold benefice has been greatly changed, and the rights it confers are now subject to various constraints. An incumbent no longer has a life interest, and his or her tenure of office can end through compulsory retirement, ill health, after a breakdown of pastoral relationships, or the effects of pastoral re-organisation as well as for disciplinary reasons. Most of the property rights associated with the benefice, to tithes, endowments, and glebe, have been removed. Though the incumbent retains rights and obligations in respect of church and churchyard and the parsonage house, to

describe him or her as having the freehold of the benefice is potentially misleading.

37. The freehold has been repeatedly discussed in the last 40 years, and the debates show continuing unease at features of the present system. We provide a note about those debates in Annex 4. Their usefulness in the current review is limited, for the discussion of freehold of office tended to focus on either the possibility of employee status for the clergy or fixed-term appointments. Since we ruled out both of these options in our First Report, the discussion of freehold can now take place within the less constrained context of 'common tenure' and the retention of office holder status.

### **So, what is left of the freehold?**

38. So far as tenure of *office* is concerned, we have seen how what was once a guaranteed life tenure of freehold office has been much qualified, as provision has been made for compulsory retirement, ill-health retirement, vacation of benefices after a breakdown of pastoral relationships, the abolition of an office on pastoral re-organization, and deprivation for disciplinary reasons.

39. The detachment from the benefice of tithes, endowments, and glebe has much diminished the *property* aspects of the freehold. The Revd John Broadhurst could nonetheless say in the 1990 Convocations debate, albeit tongue in cheek,

I stand before you, Mr Chairman, as a wealthy man. I own property. I own three parish churches, two parsonage houses and one church hall. I have a freehold.

40. His interest in the church hall was no doubt as a trustee, but he could properly claim to have the legal title to the parish churches, their churchyards, and the parsonage houses. The Group has studied a relevant Opinion of the Legal Advisory Commission in which the authors struggle to describe the precise nature of the property rights enjoyed by the incumbent. The Commission used words such as 'qualified', 'elusive' and 'vestigial'. It is perfectly well known that the exercise of the rights, whatever their precise legal description, is subject to the faculty jurisdiction, the rights of the parochial church council, and the complex rules governing such matters as repairs to the parsonage house.

## **Common tenure and the capability procedure**

41. In our First Report we developed the concept of 'common tenure', defined as appointment to office, normally to the retiring age, but subject to removal after a capability procedure where a post-holder failed to meet minimum standards, or on grounds of discipline, redundancy (i.e. after pastoral reorganisation), or ill-health. In part 8 of that report, where we set out the basic elements of the approach, we declared that we considered that the 'common tenure' approach could be applied to freeholders also. If common tenure represents a fair balance of rights and responsibilities for clergy without the freehold, then it should, in principle, apply to all clergy offices.
42. We also presented a detailed capability procedure, showing how it could be applied not only to non-freeholders but also to incumbents, archdeacons, deans, bishops, and even archbishops in order to address the problems created by those few clergy who fall far short of minimum standards. Although the discussions of our First Report were focused on non-freeholders, the general application of the common tenure principle was often advocated, with that point very much to the fore.

**(ii) We recommend that appointments to offices which are now freehold should in future be made on common tenure and be subject to the capability procedure.**

## **Application of common tenure to bishops**

43. The recommendation above is worded so as to apply to all freehold offices, including that of diocesan bishop. We have already noted the somewhat unclear status of suffragan bishops under the present law, and we feel that it would be appropriate to establish their offices also on the basis of common tenure.
44. We consider that the application of common tenure to bishops would properly reflect the *koinonia* between bishop and clergy. A shared cure of souls ('both mine and yours') should be accompanied by a shared form of tenure.
45. It appears that the bishops themselves hold the same view. A straw poll of the House of Bishops in 1995 on the ideas then being discussed revealed 'a substantial majority of the House in favour of the abolition of the freehold for Bishops – at least if the freehold for other clergy were to be abolished or modified'.

46. We thought it right that the House of Bishops' Theological Group should be given the opportunity to reflect on the implications of any proposal to apply common tenure to bishops, particularly its possible effect on the relationship between a diocesan bishop and his clergy. The Theological Group's discussion showed that it did not feel that the proposal affected the theology of episcopacy.
47. We have recommended effectively detaching the office of incumbent from such residual property rights as still attach to that office, and framing the law relating to the appointment of incumbents in 'ways which avoid these lingering property overtones'. We have also recommended that in future the office of diocesan bishop should also be established on the basis of common tenure. We have considered the question about how the temporalities of a diocesan see should be dealt with, especially as this is an issue that directly impacts upon the Crown. The temporalities of all archbishoprics and bishoprics are now vested in the Church Commissioners (Ecclesiastical Commissioners Act 1860, s.2; Church Commissioners Measure 1947, ss.1, 2) with the important exception of the right of presentation to livings of which the bishop by virtue of his see is patron. The sovereign, however, is still technically the guardian of the temporalities during a vacancy in see, and exercises the rights of patronage during that period. We have set our faces against tackling the law relating to patronage, and we do not think the application of common tenure to diocesan bishops need disturb the present arrangements between bishops-elect and the Sovereign.

### **Implications for the property aspects of freehold**

48. We judge that there will be wide support for the two recommendations we have made, that section 23 rights should be granted to clergy holding freehold office, and that appointments to offices which are now freehold should in future be made on common tenure. (We come to the question of transitional arrangements in paragraphs 143-146.) It must however be recognised that, at least so far as parochial clergy are concerned, these recommendations are inconsistent with a legal understanding of a benefice as a piece of property.
49. We set out at considerable length in our First Report our understanding of the legal position of the clergy as 'office-holders', and we recommended no change in that status. We believe that everyone concerned with clergy appointments - be they the clergy themselves, patrons, the bishop, or the laity of the parish - thinks in terms of someone being appointed *to* an office; they do not think

in terms of the grant of a bundle of legal property rights which include rights *in* the office. The understanding of freehold of office as property is the result of an historical development, which has little, if any, relevance to today's circumstances.

50. As detailed above, the ideas surrounding the notion of the freehold have a long history. In outward legal form, little has changed, but over the years new circumstances have been addressed by a whole series of adjustments in the applicable rules. This has produced a mis-match between the outward legal forms and the true position, which has proved an obstacle to understanding and so to clear debate. We have tried to address the reality and to devise appropriate legal forms for it, rather than be bound by language that no longer expresses the true position.
51. It follows that the law as to the appointment of parochial clergy to freehold offices should be set out in ways that avoid these lingering property overtones. It may be better, for example, to speak of admission to an office rather than institution to a benefice. (It was even suggested to us that the word 'benefice' should be eliminated from the church's lexicon, but we resisted that suggestion; the word is both useful and flexible, usually referring in legislation to an office of defined responsibility for a geographical area comprising one or more parishes.)
52. If an incumbent is no longer seen as having property rights in the present sense, it will be possible to simplify the law as to the position during a vacancy in the benefice. Under the ancient practice of sequestration, authority is given to designated persons, as sequestrators, to receive the income of the benefice and apply it in specified ways. As a result of recent reforms, the rural dean and the churchwardens are the sequestrators unless some special provision is made. This is one example of a process that in practice is normally quite straightforward but which is wrapped up in terminology that is not generally understood and suggests something much more complicated. The law as to sequestration can be replaced by rules which address the practical issues without using legal forms which are little understood.

**(iii) We recommend that the legal rules as to what is now termed sequestration be restated and simplified.**

53. Under current law and practice, the institution of an incumbent (but not the licensing of a priest-in-charge) is immediately followed by his or her induction 'into possession of the temporalities of the benefice' (Canon C11, paragraph 1). Although the term

‘possession’ is used, the law understands the ‘temporalities’ as including the ownership of church and churchyard (however vestigial the rights thereby conferred) and of the parsonage. A priest-in-charge acquires no such rights; a team vicar acquires rights in the house of residence assigned to the office which are analogous to those of an incumbent, but not ‘ownership’.

54. That last example is important. We fully understand the need for clergy to have a proper security of tenure in respect of the house in which they are required to live, but what matters is the degree of security, not the legal form through which that security is given. At present, an incumbent may be the ‘owner’ of various pieces of property, but he or she has very few of the normal rights which are associated with ‘ownership’ as that concept would apply to the normal ownership of property. For example, clergy do not benefit from any increase in the capital value of the house, and are not required to meet many of the outgoings. As the benefit to clergy from the property is as a place to live while they hold office, for the better performance of their duties, it follows that they would not be worse off, were equivalent rights to be enjoyed by virtue of possession or occupation of the property, instead of this very notional ownership.

**(iv) We consider it essential that the legal obstacles to the application of common tenure to beneficed clergy and other holders of freehold offices should be removed, by ending the legal treatment of the incumbent as having property rights akin to ownership of the office and its associated land and buildings. But this should be done in ways which give equivalent rights and responsibilities by different legal means.**

55. We examine below in more detail the issues which arise in the context of church and churchyard and clergy housing.

### **The effect of these conclusions**

56. So far as freehold incumbents are concerned, the effect of what we recommend can be expressed as follows:

Freehold Incumbents	Common Tenure
<p>appointment to office to the retiring age, subject to removal after</p> <p>a breakdown of pastoral relationships,</p> <p>or on grounds of discipline, redundancy (i.e. after pastoral reorganisation), or ill-health; together with rights and responsibilities</p> <p>expressed in terms of property rights</p> <p>in relation to the church and churchyard and the parsonage house</p>	<p><b>appointment to office to the retiring age, subject to removal after</b></p> <p><b>capability procedure</b></p> <p><b>or on grounds of discipline, redundancy (i.e. after pastoral reorganisation), or ill-health; together with rights and responsibilities</b></p> <p><b>in relation to the church and churchyard and the parsonage house</b></p> <p><b>and all the additional rights associated with section 23 of the Employment Relations Act 1999</b></p>

## Housing issues: the present position

57. It is important to understand the present position as to the rights and obligations of an incumbent in respect of his or her parsonage house. Team vicars have similar rights and duties, but their houses are vested in the DBF; deans and residentiary canons are in a similar position in respect of their houses which are owned by the cathedral. In much of what follows, we refer simply to 'incumbent' and 'parsonage house', but the other cases are included, *mutatis mutandis*.
58. The general duties of an incumbent are set out in the Repair of Benefice Buildings Measure 1972. The incumbent has a duty to take proper care of a parsonage house, a duty equivalent to that of a tenant 'to use premises in a tenant-like manner'. The incumbent has to notify the Board of any repairs needed to a parsonage house, and may be required to pay the cost of any repairs caused or aggravated by his or her deliberate act or default.
59. The Measure contains detailed provisions as to the periodic inspections of parsonage houses by diocesan surveyors and their duty to report on what repairs are required, and on whether in the surveyor's opinion a parsonage house should be replaced, with



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comments on, *inter alia*, the state of the interior decoration of the parsonage house. The incumbent is given the right to make representations as to the contents of the report. The Diocesan Parsonages Board is under a duty to carry out repairs within any period recommended in the report, but the incumbent may be authorised by the Board to carry out repairs as the Board's agent. The Board also has rights of entry in order to carry out necessary work.

60. The Measure restricts the powers of the incumbent to make additions or alterations to the parsonage house. He or she must consult the registered patron and may not make any additions or alterations to the buildings of a parsonage house until after obtaining the consent of the Diocesan Parsonages Board. An incumbent who acts without consent may be required to restore the buildings to their previous condition.
61. Under the Measure, the Board must insure all the parsonage houses in its diocese against all such risks as are included in the usual form of houseowner's policy relating to buildings. It has the power but not the duty to pay certain outgoings such as ground rent, water charges, and any payments for the maintenance of a private road, common drive, and party fence or wall.
62. During a vacancy, most of the incumbent's powers and duties pass to the sequestrators (or, if there is no sequestration, to the bishop).
63. The sale and disposal of parsonage houses is governed by two sets of legislative rules, those in the Parsonages Measures 1938 and 1947, and those in the Pastoral Measure 1983. The report of the Review of the Pastoral Measure led by Professor Peter Toyne, published in early 2004, summarised their effect as follows (GS 1528, paragraph 3.62).

The Parsonages Measures focus on providing suitable parsonages (by purchase or building with the disposal of the unsuitable house) rather than the disposal of surplus houses without replacement. Proposals for the acquisition, sale or improvement of a parsonage in most cases require the consent only of the incumbent as freeholder (or the bishop in a vacancy) and the Diocesan Parsonages Board. Only patrons and PCCs have a right of representation.

The Pastoral Measure contains powers for dealing with parsonages in the context of pastoral reorganisation. Anyone can make representations, including incumbents, but the latter cannot veto schemes for disposal against their wishes. A scheme does not have to specify the new parsonage for a new united benefice but it is the norm and not to do so creates its own problems. A surplus house can under the provisions of the scheme become glebe (in which case the incumbent can object to the subsequent disposal) or be vested in the diocese for disposal or for parochial or diocesan purposes. If the last option is followed subsequent disposal does not require further approval and there are no rights of objection.

64. The Toyne Group's recommendations preserved these two alternative methods of proceeding, but it did ask that the possibility of disengaging the freehold of property from the freehold of office be given further consideration.
65. The effect of all this is that the incumbent effectively has a veto on the sale of the parsonage under the Parsonages Measure procedure and under the Pastoral Measure procedure. Although, in the latter case, the veto is not absolute, the level of compensation payable to a cleric who is dispossessed under the Pastoral Measure procedures has, we understand, in practice, discouraged dioceses from making much use of these provisions.

### **Future ownership of clergy houses**

66. The notion of common tenure implies a commonality or parity of treatment as between different groups of clergy. That in turn suggests that, so far as practicable, the legal provisions relating to housing should be broadly similar for all clergy. This does not necessarily mean that all houses - whether occupied by bishops, cathedral or parochial clergy - should be vested in a single owner. There would seem to be no reason for the Church Commissioners not to retain the ownership of See houses, or for the relevant cathedral not to continue to provide housing for deans and residentiary canons, as long as the terms of occupation are appropriately regulated. We have seen the terms of the licence which is used in respect of See houses. With adaptation, it provides a model which could be more generally used; indeed, its effect could be incorporated into the Terms of Service Regulations.
67. For the reasons we have already set out, essentially the need to remove the property associations of tenure of office, we do not think it possible to continue with the arrangement under which the

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formal ownership of parsonage houses now vests in the incumbent as corporation sole.

68. We considered a number of options for the future.
- (a) One option would be to make parsonage houses parochial property, with PCCs acquiring the primary decision-making power in respect of disposals, alterations and improvements and a direct entitlement to the net proceeds of any sale. At present, although the manner in which the proceeds of any sale may be applied is regulated by the Parsonages Measures, and the cost of providing a replacement house is a primary call on those funds, PCCs do not have any entitlement to them. However, entitlement to the proceeds of any sale would also raise the question whether the PCC should not fund all costs associated with the parsonage. This could change, in unforeseeable ways, the relationship between incumbent and PCC, and we think the idea would not only prove unworkable in multi-parish benefices but would also cause great complications on pastoral re-organization.
  - (b) We also explored the possibility of creating a new form of benefice corporation (possibly comprising the bishop, the incumbent and the churchwardens). We did not favour this idea either: it could prove both complicated and expensive, and might well be seen as substituting one piece of legal obfuscation for another.
  - (c) We favour the more transparent option of transferring parsonage houses to another body, while ensuring that the occupant has appropriate rights.
69. The DBF is the most obvious candidate. Under the Parsonages Measure 1938, the DBF is already entitled to receive any surplus proceeds of sale of a parsonage house, which are allocated to the diocesan stipends fund or the diocesan pastoral account. The Diocesan Parsonages Board (which is frequently the DBF wearing another hat, even where there is a distinct Parsonages Committee) has primary responsibility for the repair and maintenance of parsonages and for the payment of Council Tax. To transfer the legal ownership of parsonage houses to the DBF would, therefore, substantially reflect the reality of the present position, particularly if the provisions in the Parsonages Measures as to the application of proceeds of sale were preserved. As we have already noted, incumbents receive no benefit from their current ownership of the

house other than as a place to live while holding office: transfer of ownership in itself would not alter the arrangements under which they occupy the property. The DBF, although not the owner, already has the legal liability for Council Tax. We also note that transferring ownership of the house to the DBF would not have any income tax or national insurance implications, as clergy would still be required to live in the parsonage house, which they would be using for the better performance of their duties.

70. We propose that one aspect of this should be that the legislation should make it clear that the DBF would hold the property as 'benefice property' so that it would not form part of the DBF's corporate property or otherwise be capable of being diverted to other uses except as currently provided for under the law of the Church. (The approach taken in relation to what became diocesan glebe land under the Endowments and Glebe Measure 1976 might provide a helpful precedent in this connection.)

**(v) We recommend that parsonage houses should be vested in the Diocesan Board of Finance (DBF) as benefice property, but on terms which give appropriate security of tenure to the occupant.**

71. We have already referred to the terms of the licence which is used in respect of See houses, which seems a good model in this context also.

### **Consent issues**

72. We are well aware of the strong feeling amongst the parochial clergy that they must be secure in their occupation of their present house. It is often said that this is in the interests of the incumbent and his or her family and, indirectly, of the whole parish. Our account of the current legal position makes it clear that this security is not absolute, as many suppose. There are cases in which an incumbent's existing parsonage house can be sold, despite his or her objections.
73. The transfer of formal ownership of the parsonage house need not affect the rights of the occupant, though those rights would necessarily have to be expressed in a different legal form. There is, however, concern that the present position, at least under the Parsonages Measure procedures, gives too much power to the occupant. There are cases, few in number but often having expensive and disruptive consequences, in which a newly instituted incumbent, appointed on the understanding that the

parsonage house was to be sold in the near future, persistently and unreasonably refuses consent to a sale. In extreme cases, an incumbent has indicated immediately after institution that he or she will not consent to a sale. Other cases arise during a long incumbency, where in the absence of pastoral reorganisation there is no way of disposing of an increasingly unsuitable house as the incumbent vetoes any such notion.

74. It would be possible to preserve all these existing rights intact. However, as we have said above, the present position gives clergy unusually sweeping powers which have in a few cases been used irresponsibly to the detriment of the wider church. There is currently potential for rights to be abused, and a better balance between rights and responsibilities needs to be achieved.
75. Another possibility would be for the instrument of appointment, or a separate notice, to record the understanding that certain works or dealings (including a sale) might be required within a specified period of, say, three years, and to provide that the incumbent's power of veto would be removed in respect of those matters for that period. This would deal with some of the difficulties identified above. The downside, however, is that it might raise a suspicion amongst clergy that notice would be given in more cases than necessary, so that, even where no sale was actually envisaged, the diocese retained some room for manoeuvre, albeit for the short period specified in the instrument of appointment or the notice.
76. We considered a number of ways of effecting a more general reform.
  - (a) We think it would be unacceptable to leave the incumbent merely with the right to be consulted by the diocesan authorities, who would then be free to act, as they judged fit.
  - (b) A more robust provision would allow the incumbent to raise objections which would be considered by an impartial body outside the diocese. The Church Commissioners already have such a role under the Parsonages Measure in relation to objections raised by patrons and PCCs. Section 3(1) of the Measure states that where powers under the Measure are to be exercised notice shall be served on the patron and PCC(s), and
    - if any objection is raised within the prescribed time by such patron or councils the power shall not be exercised unless the Commissioners have informed the patron or

the council, as the case may be, that they are satisfied that the objection ought not to prevent the exercise of the power, together with a statement of the reasons upon which such conclusion is founded.

We note that dioceses and parishes are generally content with the way the national appellate or review functions are exercised in this context and in the related context of the Pastoral Measure 1983. We are aware of the ongoing debate as to whether those functions should continue to be under the aegis of the Church Commissioners or, at some future date, be transferred to the Archbishops' Council. Our references to 'the Commissioners' are without prejudice to that debate; we have in mind the accumulated experience held within the National Church Institutions in providing impartial groups to adjudicate on issues arising within dioceses.

There is a strong case for suggesting that the Commissioners could undertake a similar function in relation to objections raised by incumbents or team ministers. But in the case of a sale of a house by a cathedral chapter, the Commissioners would already have an involvement and could not act as the adjudicating body in these cases: possible candidates are the Cathedral Council or the archbishop of the province.

(c) A variant of this procedure would be for incumbents to retain the right to refuse consent to such dealings, but for this right to be qualified to the extent that consent must not be unreasonably withheld. The DBF would have the right to apply to a separate independent body, such as the Commissioners, if consent were not given. It would be for that body to decide whether the withholding of consent was indeed unreasonable. Although this approach might at first sight be more attractive to the clergy, there would not be a substantial difference between it and (b) above. It could, however, be difficult to administer, as the objections by the incumbent and by the PCC would have to be considered under different tests, and the notion of 'unreasonably withheld' could be read in either an objective or a subjective way. For these reasons we reject this approach.

(d) A rather more elaborate procedure, but one which might in the end be more economical and lead to the local resolution of at least some cases, would be a two-stage process. This model is used in cases under the Repair of Benefice Buildings Measure 1972 when the Diocesan Parsonages Board decides

not to carry out repairs recommended by the diocesan surveyor. In those cases, a notice is served on the incumbent, giving reasons for the decision; the incumbent may make representations within a period of one month after the notice is served; the Board considers the representations, with the incumbent having a right to meet the Board or its representative, and the Board having the power to make inspections and obtain such professional advice as it thinks fit. If the decision goes against the incumbent's wishes, he or she may within one month appeal to the Commissioners, who must decide the matter after consultation with both parties.

In our context, the procedure might be for the incumbent to have the right to register an objection with reasons, which would be considered by the DBF along with any representations from the PCC. If the DBF decided that it wished to proceed notwithstanding the objection, it would apply to the Commissioners for leave to proceed. The Commissioners would consider the views of all parties and give leave if, and only if, it was judged in all the circumstances proper to proceed with the proposals. This type of procedure appears to be fully compliant with the Human Rights Act 1998. We consider the wider implications of that Act at paragraphs 137 ~144 below.

**(vi) We recommend that, when the Diocesan Board of Finance (DBF) proposes to sell a parsonage house,**

- (a) the incumbent should have a legal right to register an objection with the DBF and make representations to the DBF against the proposal;**
- (b) if the DBF wished to proceed in spite of the objection, it would require the leave of the Commissioners who would adjudicate after consulting all parties; and**
- (c) the PCC would have a right to make representations at either stage.**

**(vii) In view of our endorsement of the principle that clergy should, where possible, receive parity of treatment in relation to their terms and conditions of service, we consider it desirable that equivalent rights should be afforded to all clergy, including archdeacons and suffragan and diocesan bishops, in respect of the houses that they occupy while in office. We recognize that this may give rise to some difficulties, not least in identifying a suitable adjudicatory**

**body in the case of See Houses. For this reason we are not making specific recommendations in this area but would welcome comments at the consultation stage.**

## **Church and churchyard**

77. As well as the house, the incumbent is 'owner' of the church and churchyard. However, if an attempt is made to list the rights and duties which others have in relation to them, it soon becomes clear that the use of the word 'owner' in this context is even more of a fiction than in the case of the house.
78. For example, parishioners and those on the electoral roll have rights of access to the church and (where the churchyard is open and space is available) rights of burial. The PCC is responsible for the repair and insurance of the church. The PCC and the incumbent may both be 'occupiers' for legal liability purposes. Any change to the church or churchyard requires approval under the faculty jurisdiction. And although the incumbent will usually be one of the petitioners for a faculty, others may apply for, and may indeed obtain, a faculty, despite the opposition of the incumbent. Finally, the incumbent does not own the movable contents of the church, which technically vest in the churchwardens.
79. We think the reality is that what an incumbent has is possession of the church and churchyard and a number of rights and responsibilities in that connection. For example, he or she has, very properly, rights over what happens within the church (though, in so far as forms of service are concerned, those are shared with the PCC). And the incumbent must ensure that the quinquennial inspections take place and that the faculty jurisdiction is observed. Such rights and responsibilities, however, derive from his or her appointment to office, not from property rights. The law should reflect this reality. The ceremony of induction by the archdeacon or his or her deputy into the temporalities of the benefice is usually effected by placing the cleric's hand on the key of the church door or other part of the building. We recognise that it is a tradition that is much appreciated, if not always fully understood. There is much to be said for continuing with this ceremony, but in such a way that it confers rights and responsibilities over the church and churchyard and not ownership.

**(viii) We recognize the symbolic importance of the ceremony of induction, but recommend that it should not have any legal effect in terms of conferring property rights over the church and churchyard.**



80. We therefore see advantages in the legal ownership of the church and churchyard being transferred to a body corporate. This course of action could also have practical advantages. The practical effect of the formal ownership enjoyed by the incumbent at present is that he or she will normally be a party to any licence or conveyance affecting the property; there may be exceptional cases in which the consistory court orders the execution of the necessary instrument. There are elaborate statutory provisions as to what can be done during a vacancy in the benefice. Vesting the property in a corporate body would lead to a simplification of all these provisions.
81. In whom, then, might the church and churchyard be vested? During a vacancy, most of the powers of the incumbent are exercisable by the bishop, and we therefore considered the option of transferring the legal ownership of churches and churchyards to him. However, for purely practical reasons – such as that the See itself can be vacant and that there is more likely to be relevant expertise in the diocesan office – we favour transfer to the Diocesan Board of Finance.
82. We are anxious that this should not involve, or be thought to involve, a ‘diocesan take over’. Any transfers should, therefore, be on such terms that the legal rights and responsibilities of the incumbent, PCC and others should remain substantially unchanged.
83. As we have already recommended in the case of the house, we therefore propose that the legislation should again make it clear that the DBF would hold the property as ‘benefice property’, so that it would not form part of the DBF’s corporate property or otherwise be capable of being diverted to other uses except as currently provided for under the law of the Church.

**(ix) We recommend that the formal ownership of churches and churchyards now vested in the incumbent should vest in the Diocesan Board of Finance as benefice property. The incumbent should have the same rights of possession and responsibilities as at present. It should be made clear that the change in the formal ownership does not affect the rights and responsibilities of parishioners and others in relation to the church and churchyard, nor the law as to the consecration of that property. In particular, the PCC would continue to be responsible for maintaining and insuring the church.**

## 4. Developing the proposals

84. In this part we consider a range of issues, some raised with us in the context of discussion of our First Report, others arising out of the second phase of our work.

### **The scope of ‘common tenure’**

85. The concept of common tenure was a key feature of our First Report and it attracted much support. We have now recommended that future appointments to what are now freehold posts should be on a common tenure basis. There were some ‘boundary’ issues in our First Report, which we must now seek to clarify. It is obviously important to be clear as to the categories of clergy who would fall within the common tenure system.
86. In our First Report we concluded (GS 1527, p. 34) that:
- common tenure should apply to team rectors, team vicars, some assistant staff, most priests in charge, cathedral clergy and many who work in other ways under a bishop’s licence. The rules we have set out as to the revocation of licences would disappear in their present form, and any loss of office would be subject to rights of appeal and to the jurisdiction of the Employment Tribunal.
87. Although we were able to go on to give some further details, the language we used at that stage in our work (‘some assistant staff, most priests in charge, ... and many who work in other ways under a bishop’s licence’) was necessarily imprecise. In our further thinking we have kept in mind the principles worked out in employment law, while recognizing that they are not directly applicable to the clergy as office-holders.
88. Our starting-point is that appointment on the common tenure basis should be the norm for all clergy who exercise their ministry under a licence from the bishop. To this general rule there will be some exceptions, most of which we identified in our earlier report. We consider in the following sections a range of particular cases.

## **Designated training posts**

89. The special position of those in ‘training posts’ is recognized in employment law: the duration of such posts may be fixed by reference to the time it takes to acquire the necessary competences and skills. In the Church context, we see no reason to disturb the traditional arrangement under which a newly-ordained deacon is appointed to a ‘title post’ with the expectation of moving on thereafter. Sensible planning, not least over housing, requires a fixed maximum tenure. We re-affirm the definition of such a post as

an assistant curacy to which a person is appointed during whatever is the minimum period of training after ordination defined by the House of Bishops and which is designated in the licence as a training post.<sup>1</sup>

90. This type of post would fall outside the standard common tenure pattern in that it would be for a fixed term, and the Terms of Service Regulations could contain special provisions for it. The diocese would undertake to provide training suitable to the circumstances of the person concerned, who would in turn undertake to participate in the relevant Continuing Ministerial Education provision. The Regulations could underpin the expectation that there should be a clear agreement between training incumbent and the holder of the title post as to training and responsibilities, and the bishop or his appointed officer should be able to facilitate such an agreement and help to resolve any difficulties.

91. In other respects a training post would be within the new arrangements. The present legal provisions as to the dismissal of an assistant curate by the incumbent would be repealed, and cases of under-performance would be dealt with by a capability procedure. This would be in a shortened form (see Annex 6).

## **Non-stipendiary ministers (NSMs)**

92. The position of NSMs was the subject of a number of comments on our First Report. As can be seen from the table below, NSMs have grown both in number, and as a proportion of the overall number of clergy.

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<sup>1</sup> The House of Bishops has stated that curates should normally serve four years before they take on posts of incumbent status, but never less than three years.

	1993	2002
<b>NSMs</b>	<b>1,454 (12%)</b>	<b>1,644 (15%)</b>
<b>OLMs</b>	<b>87 (1%)</b>	<b>447 (4%)</b>
<b>Full time stipendiary clergy</b>	<b>10,824 (87%)</b>	<b>9,182 (81%)</b>
<b>Total clergy</b>	<b>12,365 (100%)</b>	<b>11,273 (100%)</b>

93. An NSM serves under a bishop's licence and there is a set of Regulations for Non-Stipendiary Ministry, first agreed by the House of Bishops in 1987 and revised in 1995. Strictly speaking, these Regulations have no legal basis. Because we consider it to be a fundamental principle that all clergy should be treated in the same way and come under the same rules,

**(x) we recommend that proper legal provision for non-stipendiary ministers (NSMs) should be made by including them within the scope of the Clergy Terms of Service Regulations which we recommended in our earlier report as a means of giving full legal force to the rights, responsibilities and duties of the clergy.**

94. The Regulations for Non-Stipendiary Ministry envisage licences being for terms of years, and Notes to the Regulations suggest a first licence for 3 years and subsequent licences for 5 years. The use of fixed-term appointments, in the form of licences for a term of years, runs counter to the approach we have developed. We are not clear that the provisions in the Bishops' Regulations are fully observed insofar as they require a major review of licences by a Bishop's Officer for Non-Stipendiary Ministry in the year prior to the possible renewal of a licence. We believe the position of NSMs, and indeed of dioceses, would be more secure were they to be within the common tenure system (save of course for matters concerned with a stipend) and subject to the capability procedure.
95. We recognize that the circumstances of NSMs vary considerably. Individuals may be stipendiary and non-stipendiary at different stages in their ministry. The Bishops' Regulations for Non-Stipendiary Ministry stress the importance of a 'job description', essentially an agreement as to hours of work and areas of responsibility, and we endorse that emphasis. Bishops may wish to draw a distinction between those NSMs who, under such a job description, have undertaken significant parochial responsibility

and/or make clear and specified commitments of time, and others who simply 'help out' from time to time when they are available. The former could be licensed, attracting common tenure, the capability procedure, and appropriate section 23 rights; the latter could be given permission to officiate which would not attract those consequences. We know that practice as to who is licensed and who is given permission to officiate varies from diocese to diocese. Diocesan bishops must have some discretion in addressing individual cases, and any decision should follow discussion between the incumbent, the bishop and the NSM. If, however, the distinction between licences and permissions to officiate is to carry more significant legal consequences in the new system, there will need to be further discussion between bishops and in the Ministry Division as to general principles which should be followed. This is particularly important when voting rights and synodical representation depend on having a licence as opposed to permission to officiate.

96. There is a need for a degree of order and consistency. The Church depends on the work of NSMs and, as a matter of justice, they should not be denied the same rights and responsibilities as those who are paid, including the right to appeal to Employment Tribunals.
97. The Terms of Service Regulations should give section 23 rights to NSMs, except where these are obviously inapplicable, and therefore NSMs should have access to Employment Tribunals so that these rights are enforceable.

**(xi) We recommend that a non-stipendiary minister who is licensed should be appointed on the common tenure basis, and so have access to Employment Tribunals and be subject to the capability procedure.**

### **House for duty and part-time posts**

98. The number of posts advertised as 'house for duty' posts seems to be increasing. The 'duty' aspect is, in the majority of cases, less than full time, and the cleric may well be regarded as essentially an NSM by the laity amongst whom he or she works. There may be a number of part-stipendiary posts in special circumstances. We would not want to inhibit the flexible deployment of resources, human and material, by seeking to create unnecessary distinctions between one type of post and another. In accordance with our general approach, we would emphasize the importance of clear

conditions of appointment, either in the licence or in a separate work agreement or job description, and so

**(xii) we recommend that clergy in house for duty and similar posts should also hold them on the common tenure basis, and so have access to Employment Tribunals and be subject to the capability procedure.**

99. This is particularly important where clergy depend on their post to provide their accommodation.

### **Priests in charge**

100. Discussion of the position of priests-in-charge is complicated by the recommendations of the Toyne Group, which are now being taken forward by a Follow-Up Group under the chairmanship of the Bishop of Exeter, who has also served on the Terms of Service Group. The Toyne Group noted the fact that notions of 'suspension of presentation' are ill-understood, as is the distinction between a vicar and a priest-in-charge. It recommended, however, the formulation of statutory grounds for the suspension of presentation and the appointment of a priest-in-charge.
101. The grounds suggested by the Toyne Group were set out in its Recommendation 27 (GS 1528, pp. 40-41):
- (a) Where pastoral reorganization or a deanery, archdeaconry or diocesan plan for the deployment of stipendiary clergy of incumbent status is under consideration;
  - (b) Where the Diocesan Pastoral Committee considers that suspension of presentation will make better provision for the cure of souls in the diocese as a whole, having regard to the mission, financial and ecumenical needs of the diocese, as well as the traditions, needs and characteristics of the parishes in the benefice in question;
  - (c) Where the post is deemed less than a full-time one under a strategy devised by the responsible diocesan body; and
  - (d) Where the replacement of a parsonage is planned as a result of a minuted decision by the Diocesan Parsonages Board.
102. The recommendations were made against the background of the present law as to the rights of freeholders. Most of these recommendations would be affected by the acceptance of the recommendations in this report.

103. The present position is that pastoral reorganisation can lead to the disappearance of a freehold office such as that of an incumbent, the office-holder in effect being made redundant. There are provisions as to compensation for loss of freehold office in Schedule 4 to the Pastoral Measure; the compensation ceases to be payable if the person concerned accepts another stipendiary post, or unreasonably refuses to accept a post equivalent to the one vacated. A priest-in-charge, on the other hand, has no security of tenure, and his or her appointment comes to an end if suspension is lifted and an incumbent appointed; there is no compensation payable for loss of office. We consider that this difference of treatment is too great, and that, even where a priest is appointed with full knowledge of pending pastoral reorganisation, he or she should have at least some safety-net provision if subsequently required to vacate office. We expect that this provision would seldom be needed, but that should not prevent its being available as of right in the exceptional cases where it is needed.

**(xiii) We recommend that a priest-in-charge displaced by pastoral reorganization and not immediately appointed to another post should have financial and housing provision in certain circumstances and within clearly defined limits, but for no longer than a period of twelve months, terminable if the person concerned accepts another stipendiary post, or unreasonably refuses to accept a post equivalent to the one vacated.**

### **Interim posts under common tenure**

104. A feature of the common tenure system is that it would be possible, in a limited number of cases identified in the Terms of Service Regulations, to include in the instrument of appointment some special conditions. One such condition could register the fact that pastoral reorganization affecting the relevant benefice was under consideration. If, as we have recommended, incumbents are appointed on a common tenure basis, a priest could be appointed as incumbent with this condition in place. This would greatly reduce the use of the title 'priest-in-charge' and the discomfiture that is often felt where it is used, both in parishes and by patrons. The effect of including the condition would be that subsequent displacement from office as a result of the expected pastoral reorganisation would be 'fair' in employment law terms and would withstand any challenge on unfair dismissal grounds; and that,

were the issue of compensation to arise, it would be on the terms we have suggested above for priests-in-charge.

**(xiv) We recommend that those appointed to interim posts pending pastoral reorganization should be appointed as rector or vicar on the common tenure basis, with the prospect of reorganisation mentioned in the instrument of appointment, and that, if displaced, such priests should be entitled to the provision outlined above for priests in charge.**

### **Posts necessarily time-limited**

105. As we indicated in our First Report, some posts are necessarily time-limited, for example a three-year project funded by a charitable trust. Appointment in such cases would be for a specified time, and this fact would be clearly stated in the licence or deed of appointment.
106. As with designated training posts, unsatisfactory performance could lead to a capability procedure being invoked. This would probably be in the shortened form allowed by the procedure (see Annex 6).

**(xv) We recommend that, where clergy are appointed to time-limited posts, it should be a requirement that the reason for the time-limited nature of the post should be clearly stated in the licence.**

### **‘Dual role’ posts**

107. We have given further consideration to the complex circumstances in which one priest has two distinct roles. We repeat the analysis which appeared in our First Report (pp. 27-8) under the heading ‘Sector ministers’:

This is not a formal legal category, but can be used of various groups of clergy.

- (1) A significant number (typically hospital, prison and school or college chaplains) work under a contract of employment with a body outside the Church, and the terms of that contract and general employment law govern their rights and responsibilities, including the term of their appointment and the procedures for its termination. In some cases, their continued employment may depend on the employee holding a bishop’s licence; whether this is



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the case depends on the terms of the employment contract.

- (2) Another group of clergy is employed by a Diocesan Board of Finance/Education, or works in one of the National Church Institutions; again the terms of their employment contract govern their position, though many will also hold a bishop's licence in respect of either their principal work or the assistance they may give in parishes.
  - (3) Finally, there are clergy who hold a dual appointment, serving part-time in a parish, usually as priest in charge, and part-time in a diocesan role or with an outside body (for example, a local charity addressing a particular social problem). Part of their work may be carried out under an employment contract, but, overall, their work for the Church will be under a bishop's licence, which should be clear as to the relationship between the two posts in terms of tenure. Similar issues arise for residentiary canons also holding diocesan posts.
108. The third type of case is difficult. The mere fact that a minister could be fairly dismissed from one of two posts that are held simultaneously does not of itself constitute grounds for removal from the other post. On the other hand, where a priest's appointment can be regarded as being to one post with duties exercised in two different settings, under-performance in one sphere could be the basis for removal after a capability procedure, just as would under-performance by a parochial priest in respect of a major area of work.
109. The most difficult case is one in which a priest who is incumbent or priest-in-charge of a small parish also has an appointment in a diocesan post financed either by the DBF or some outside agency. If the funding for the second sphere of work ends, that employment can be ended. There would be no ground for ending the parochial appointment. It might, however, be possible to define that appointment as carrying a part-stipend, so that the post-holder could not claim a full stipend for half-time work. It may well be that one consequence of the disappearance of the notion of a benefice as a piece of property of a recognized character will be a greater willingness to have special conditions of appointment, including those relating to stipends.

**(xvi) We recommend that special care is taken to ensure that, in the case of dual role appointments, the terms and**

**conditions of the post are clearly spelt out, particularly where they are adjusted to reflect the terms and conditions of employees of the Diocesan Board of Finance.**

### **Clergy in special circumstances**

110. We noted in our First Report that there are some special groups of clergy whose appointments can properly be regarded as 'probationary'. They include clergy who have been allowed to resume the exercise of their Orders after having relinquished it, clergy allowed to resume their ministry after exclusion for disciplinary reasons, and some others returning to active ministry after an interval. We think it is acceptable that such persons, if they are to be licensed, should hold office initially for a limited term of years or on some special conditions which should be set out in the licence or in some related document to which the licence refers.

### **Other groups**

111. Some clergy serve wholly under contracts of employment with the DBF. Their terms of service will be governed by their employment contracts, which will need to be examined to ensure that they incorporate adequate provision for review and use of the capability procedure in line with the recommendations of this report.
112. Our recommendations have no application to ordinands. Entry into, or completion of, training for ordination does not imply a legal right to appointment to a post.
113. We have consulted the Chief Secretary of the Church Army as to the position of Church Army officers commissioned as evangelists. Some of these are employed by the Church Army and are outside the diocesan structures. Where Church Army officers are working in a diocesan or parochial context, most are treated as office-holders working under a licence, often in a post funded for a term of years for financial reasons.
114. There is also a number of stipendiary licensed lay workers. If they are not working under an existing contract of employment, it would be appropriate for them to be licensed on common tenure terms. Occasionally, readers are also appointed on a stipendiary basis, and these appointments should be made on equivalent terms.

**(xvii) We recommend that common tenure should be applied to Church Army personnel who are not working under a contract of employment, and to licensed stipendiary lay workers and stipendiary readers in a similar position.**

## **Minority ethnic issues**

115. During the General Synod's debate on our First Report in February 2004, the issue of the special concerns of minority ethnic clergy was raised by Mrs Patricia Dyer (Southwark). She expressed concern that the report did not include any reference to cross-cultural matters. She spoke of the number and type of obstacles that are presented to minority ethnic clergy, locally and nationally, and voiced the fear that expectations of minority ethnic clergy were often set higher than in the case of white clergy, and that parishioners had encouraged disciplinary action to be taken against a disproportionate number of minority ethnic clergy.
116. After consultation with the Committee on Minority Ethnic Anglican Concerns, members of the group met with the Revd Jenny Thomas (Southwark), a member of the Association of Black Clergy. She reiterated the perception amongst minority ethnic clergy that more was expected of them than of their white colleagues, and that complaints against them were more likely to be given credence. We recognize that there needs to be clear awareness of cross-cultural issues, not least in the operation of ministerial review and the handling of complaints. This has training implications. We would hope that the enhanced HR provision central to our overall approach would help ensure best practice in this sensitive area.

**(xviii) We recommend that all ministerial education should regularly include the following training: cross-cultural awareness (particularly of differences in communication and the meaning of actions), relating to multi-ethnic parishes, working with volunteers, challenging racist and sexist assumptions and informing the Church about cultural difference and racial awareness.**

## **Health and safety**

117. Health and safety issues are a major issue for the Church. Although many aspects of health and safety are related to the work of the clergy, the topic is in fact much wider: it concerns, for example, anyone who visits our churches or churchyards.
118. We are aware that Clergy Terms of Service Regulations will have a role to play in reducing clergy stress and contributing to their well-being, for example, by ensuring that expectations that others have of clergy are clearly defined and not unreasonable, and by recommending that appropriate time off is taken and that

arrangements are made for this to be made possible. However, we also note that bishops are not in a position to be directly responsible for the health and safety of their clergy, as they are not able to manage them on a day to day basis.

119. We recognize the importance of health and safety issues, but regard them as beyond our remit, not least because the Government has not included them in the rights contained in section 23 of the Employment Relations Act 1999.

### **Use of Employment Tribunals**

120. During the General Synod debate on our First Report, particular concerns were raised about our recommendations that clergy should have access to Employment Tribunals.
121. Some of these concerns focused on 1 Corinthians. 6.6: 'is it possible that there is nobody among you wise enough to judge a dispute between believers?' However, we continue to believe, with Professor Anthony Thiselton, that this text should not be used to determine the role of secular courts for Christians in modern England. In St Paul's day, the law had a criminal and a civil function, but was not intended to provide human rights protection for the weak and vulnerable. Consequently, the prohibition in 1 Corinthians against Christians making use of the secular courts could not be held to apply to cases where the law was being used to protect human rights. Moreover, Romans 13, with its emphasis on submission to the supreme authorities and its description of them as 'God's agents working for your good' provides positive theological support for the use of Employment Tribunals.
122. There is strong pressure from ministers in many churches to have access to Employment Tribunals; moreover, access to Employment Tribunals is a fundamental aspect of section 23 rights. We remain convinced that, for the reasons given in our First Report, it would be wrong to seek to establish some sort of internal Church Employment Tribunal or indeed an ecumenical tribunal serving a number of churches. We have confidence in the Employment Tribunal system as appropriate for clergy cases.
123. However, we naturally hope that the new arrangements will deliver a just and fair system based on the best practice and HR advice, so that clergy will take cases to Employment Tribunals only as a matter of last resort.

**(xix) We continue to recommend that clergy should have access to Employment Tribunals, with the exception of cases where they are appealing against the outcome of proceedings under the Clergy Discipline Measure, which has its own appeal mechanisms.**

### **Advice for clergy**

124. Another issue that has frequently been raised in responses to our First Report has been the importance of ensuring that clergy facing the prospect of dismissal or going through the capability procedure should have access to good objective advice. In that First Report, we emphasized that clergy should be able to bring a friend or union representative to any meeting held as part of the capability procedure.

**(xx) We recommend as a general principle that clergy should have access to good professional advice, particularly when they are facing the prospect of dismissal or going through the capability procedure, as they face the potential loss not only of their livelihood but also their home.**

125. There are various possible mechanisms for providing clergy with access to the necessary advice. One is, of course, through membership of a trade union that gives them access to the necessary advice. However, many clergy, while having no objection in principle to membership of a trade union, have no particular desire to join one themselves.

126. So far as internal church sources are concerned, the new Human Resources function (see Part 6) would be able to advise clergy on a full range of matters related to their new rights and responsibilities but it would not be able to represent their interests during, for instance, capability procedures, where its responsibility will clearly be to advise and support the bishop and the staff to whom he delegates these duties. It might be possible to arrange for the Registrar of a neighbouring diocese to give clergy some legal advice, although scope for this is likely to be limited. There are also issues about who would pay for such advice and whether, when Registrars would be advising the bishop in respect of clergy in their own diocese, clergy would regard the advice as being detached and objective.

127. A number of written responses raised the possibility of establishing a Clergy Professional Association. That proposal raises some difficult questions: would membership be mandatory? Would it be

funded by membership subscriptions or in some other way, and would the clergy or the parishes willingly pay? Then there is also the issue of what the relationship would be between a body of this sort and other bodies which represent the clergy, such as the Convocations and the Houses of Clergy in Diocesan Synods.

128. Our First Report recommended that the Church of England (Legal Aid) Measure 1994 should be amended so that financial assistance from the Church Legal Aid Fund should be made available to clergy appearing before Employment Tribunals. This did not mean that we were recommending that clergy going to an Employment Tribunal should be automatically eligible for legal aid from the Church Fund, merely that it should be possible to provide such aid where this might be thought appropriate.
129. The thinking behind our recommendation was that, since legal aid was already available for cases where a cleric faced the possibility of adverse consequences (including the loss of their home) as a result of proceedings in other contexts under Church legislation, equity would suggest that it should similarly be available where a cleric became involved in proceedings before an Employment Tribunal (which would typically be by way of a claim of unfair dismissal following the application of the capability procedure).
130. In response to our recommendation, the point was made that lay employees are not eligible for secular legal aid if they wish to bring proceedings in an Employment Tribunal, even in cases where their job carries tied accommodation. Thus clergy would not be disadvantaged in relation to lay employees if legal aid were not available to them in similar circumstances.
131. In the light of these considerations, we are now satisfied that widening access to the Legal Aid Fund is not the appropriate way of promoting the availability of legal advice to those clergy contemplating or bringing proceedings before an Employment Tribunal. Rather, we believe that further consideration should be given to whether the Convocations might be able to play a valuable role in this connection by drawing on the considerable expertise in this area to be found within the ranks of the clergy.

**(xxi) We recommend that the officers of the Convocations should consider the role of the Convocations in providing appropriate objective advice to the clergy on employment law and Human Resources matters.**

# 5. Implementation

## The pattern and form of legislation

132. Our Terms of Reference require us to indicate a timetable for the implementation of our proposals, assuming that they are broadly acceptable. The earliest occasion on which legislation might be introduced into Synod would be November 2005. However, that is the short inaugural Group of Sessions for the new quinquennium. In addition, there is already other major legislation in preparation. February 2006 may, therefore, be a more realistic prospect.
133. The precise timetable must be a matter for the Archbishops' Council and the Business Committee, but we address here a number of questions about the form of legislation needed to implement our proposals.
134. Any implementing legislation would include an enabling Measure and detailed Terms of Service Regulations made under the Measure. We have looked at the possible content of the latter, and Standing Counsel has already done some preliminary work on the legislation. If the proposals in this Second Report are accepted, legislation could be introduced either in two stages (the first dealing with licensed ministers and the second with incumbents and senior office holders) or in a single stage. A two-stage approach would require two Measures and substantial revision of the initial Terms of Service Regulations at the second stage.
135. The advantages of a two-stage process are that it would (i) enable those clergy who are generally acknowledged to have inadequate security of tenure to be dealt with first, allowing time for longer consideration of the more complex issues relating to the freehold, and (ii) allow the new HR support function time to develop on the ground, by restricting the number of clergy to whom the new regime will initially apply

136. However, there are persuasive arguments against a two-stage process. It would, during the period between the implementation of the first and second stages, sharpen rather than diminish the distinction between licensed ministers and those with the freehold, with the former having both rights and responsibilities that the latter would not. This interim period seems likely to be measured in years rather than in months, not least because it would not be practicable to introduce the Stage 2 legislation into Synod (possibly a different Synod from that which considered Stage 1) until the final form of Stage 1 was known, which would not be until it had passed through both Houses of Parliament. Legislating in two stages would also create drafting complications, notably in relation to team rectors, who presently hold fixed-term appointments but also have incumbent status in some respects, in particular in relation to the ownership of property. It would also be awkward if any changes to the Canons initially took effect in respect of some but not all clergy.

**(xxii) Given the importance of tackling inadequate security of tenure at an early date, the drafting and implementation of the legislation needs to be carried forward as a matter of priority, and we recommend that the proposals which find favour be the subject of a single package of legislation.**

## **Human rights issues**

137. We have received advice on the implications of the Human Rights Act 1998 for our proposals and in particular the manner of their implementation.
138. The key question is whether our recommendations as to the future of freehold offices might amount to an infringement of Article 1 of the First Protocol to the European Convention of Human Rights. This reads as follows.

Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one should be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a state to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.



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139. Following the judgment of the House of Lords in *Aston Cantlow PCC v Wallbank* ([2004] 1 AC 555) it seems clear that in the exercise of its legislative powers (which would be required to effect the change) the General Synod is performing a quasi-governmental function and is therefore acting as a public authority. It must therefore act in accordance with the Protocol.
140. The term 'possessions' in Article 1 has been given a wide interpretation by the courts to include intangible as well as tangible assets. Article 1 could therefore have application in relation to the whole bundle of rights that constitutes the freehold, but its most obvious relevance is to the land presently vested in the incumbent in right of his or her benefice. It was in that context that we first considered the issue.
141. The advice we received was that the application of Article 1 to a provision transferring the ownership of parsonage houses would to a great extent depend upon how the change was introduced. If the transitional provisions were to be so structured that no incumbent in post was compelled to surrender ownership of the house that he or she currently occupied, then it was hard to see how any application founded on Article 1 could be made, since it is only existing property and not the right to acquire property in the future that is protected.
142. If the new provisions were to take effect so as to transfer the freehold of a parsonage house while the incumbent was in post, then it appears that this would amount *prima facie* to an infringement of Article 1. However, in considering any application, the court will not automatically uphold the individual's rights but will seek to determine a fair balance between such rights and the general interest. It could be argued that the transfer of ownership is justifiable on the following grounds:
  - (a) the existing rights are in practice very circumscribed and therefore the incumbent will not be substantially disadvantaged, particularly if the requirement for his or her consent to dealings (albeit qualified) is retained; and
  - (b) this is an element in a larger package which seeks to achieve a proper balance of rights and responsibilities between individual clergy, the people they serve and the wider Church and community, as part of which clergy will receive a number of new rights.

143. In summary, we were advised that the provisions of Article 1 need not prevent us from framing recommendations which include the transfer of the ownership of parsonage houses, although these provisions would have to be taken into account in deciding whether and, if so, to what extent the new regime should be made to apply to existing office holders.
144. A number of ancient parishes have lay rectors, who own the freehold of the chancel. To remove that right would seem to raise more difficult issues under Article 1 of the First Protocol to the European Convention of Human Rights, and we think it best that any legislation implementing the recommendations in this report should not affect the rights of lay rectors.

### **The transition to the new system**

145. This raises the general question as to how the change to the new system we have recommended should be effected. Should the new system, or parts of it, apply to existing office-holders? Should it apply only to those taking up a new office after a date to be set by the legislation? Would pastoral reorganization that entailed an incumbent remaining in the same house but assuming a new role count as 'a new appointment'? Should there be a provision enabling those not obliged to be within the new system to 'opt in', and, if so, how would that be done? In addressing these questions, we need to have in mind not only the Human Rights issues just mentioned but also the point we have repeatedly emphasised, that rights and responsibilities go together and so should be seen as a single package.
146. There are three categories of clergy to consider: (a) those with the freehold; (b) those, such as members of a team, now holding office for terms of years; and (c) other clergy with no security of tenure at present.
147. Of these, perhaps the most difficult case is (b): those holding fixed-term appointments. Justice requires that they be given section 23 rights and access to an Employment Tribunal, without delay, should they feel that any non-renewal of their appointment amounted to unfair dismissal. However, we had some concern that it would not be right simply as a matter of course to make these appointments open-ended until retirement. We have already identified some posts that would continue to be held on a fixed-term basis, in particular designated training posts and those for time-limited projects. We considered whether provision should be made for the bishop to identify clergy who could be transferred

immediately to the full common tenure system, but thought this could prove difficult and invidious.

148. We also considered the possibility of separating out the component parts of our single package, so that the person concerned would enjoy section 23 rights and be subject to the capability procedure, but move to an open-ended appointment only on the renewal of his or her appointment. After a great deal of consideration, we rejected this possibility also, as we felt that justice, consistency and clarity required the conferring of common tenure on clergy in fixed-term appointments, particularly in cases where there was a risk of their appointment not being renewed.

**(xxiii) We recommend that**

- (a) section 23 rights (including access to Employment Tribunals) and common tenure (including the open-ended nature of the appointment) should be accorded to all clergy without the freehold as soon as the relevant provisions in the legislation are brought into force;**
- (b) the archbishop of each province should write to each bishop, inviting him to make a declaration in writing to the effect that he wished to have section 23 rights and transfer to the common tenure system;**
- (c) after a date set in the legislation, the bishop should write similarly to those clergy in his diocese with the freehold (including suffragan bishops, archdeacons and cathedral clergy) inviting them to make a declaration in writing to the effect that they wished to have section 23 rights and transfer to the common tenure system;**
- (d) any office-holder declining to make the declaration at (b) or (c) should continue to hold office on the existing terms;**
- (e) all future appointments to what are now freehold posts should be on the new basis (whether or not the priest appointed had the freehold in his or her previous post);**
- (f) the transfer to the DBF of formal title to the church and churchyard to hold as benefice property should take place as soon as the relevant provisions in the legislation are brought into force;**

**(g) the transfer to the DBF as benefice property of title to parsonage houses, carrying with it the new arrangements for dealing with such houses set out in this report, should take place if the benefice is vacant on the day the relevant provisions are brought into force or when it becomes vacant or when the incumbent makes the declaration referred to in (c) above;**

**(h) that corresponding provision be made in respect of the houses of other clergy in team ministries and cathedral clergy.**

**(xxiv) In this connection, we also hope that the House of Bishops would resolve to recommend all bishops to respond positively to the Archbishops' invitation at (xxiii) (b).**

## **Amendments to the Canons**

149. The changes recommended in this Report have implications for the text of the Canons of the Church of England. The Canons form part of the law of the land but include material of varying character. The majority of the Canons are similar in style to other legislative provisions, and often regulate matters in some detail. Others are more aspirational, exhorting priests to be diligent and careful in performing their duties. Others again are, and are known to be, more honoured in the breach than the observance (for example the provision of Canon C 24, paragraph 1, about the use of the Litany).
150. We have considered the relationship between the proposed Terms of Service Regulations and the body of Canons. In our view, it would not be right to make any change in the existing status of the Canons. They already have legal force, and to make observance of the Canons a specific requirement of the Regulations would raise difficult issues as to the effect of that requirement on the more aspirational Canons, and possibly force the Church to embark on a review of those Canons which would be time-consuming, expensive and seen by many as deserving no priority.
151. However, as both Canons and Regulations would have legal force, inconsistencies between the two texts must be avoided. We have identified a number of Canons that will need amendment if our recommendations are accepted. They include the following.
- Canon C 11, paragraph 1 speaks of the induction of a newly-instituted priest 'into possession of the

temporalities of the benefice' and this will need review in the light of our recommendations as to 'the freehold of property'.

- Canon C12, paragraphs 5 and 6, which provide for the summary revocation of licenses of priests and deacons, will need to be repealed, and the equivalent Canons which apply to licensed lay ministers, deaconesses and readers will require amendment in so far as they relate to ministers in those categories which will be brought within the common tenure system.
- Canon C 25, Of the residence of priests on their benefices, especially paragraph 2 ('No beneficed priest shall be absent from his benefice, or from the house of residence belonging thereto, for a period exceeding the space of three months together, or to be accounted at several times in any one year, except he have a licence to be so absent, granted by the bishop of the diocese'...) will need amendment to be consistent with the leave entitlements under the Regulations.

**(xxv) We recommend no change in the status of the Canons but the amendment of those provisions that would be inconsistent with the other legislation giving effect to the recommendations in this Report.**

### **Private international law: effects outside England**

152. The Church of England is not wholly contained within England itself: it is to be found in a number of places where English law does not apply. These include the Isle of Man and the Bailiwicks of Guernsey and Jersey, Crown dependencies with their own legal systems, and the chaplaincies of the Diocese of Europe in a large number of sovereign States, most, but not all, of which are Member States of the European Union.
153. Our recommendations have been framed with English circumstances in mind, and we are aware of the very different circumstances in these other jurisdictions. The Crown dependencies have no provisions corresponding to those of English employment law, and no Employment Tribunals. The notion of the freehold is relevant in those jurisdictions, but not in the Diocese of Europe (apart from its bishops). In most EU countries, the clergy have a status similar to that of the English 'office-holder' category, but some legal systems treat the clergy as

subject to employment law. Discussions with colleagues in the Diocese of Europe have revealed considerable uncertainty as to the identity of the employer in such cases. Although many non-discrimination provisions have their origin in EC Directives, there are variations between Member States as to the precise terms in which those Directives are implemented. More general differences between the laws of different countries can also be relevant: for example, different rules as to national holidays and their effect on leave entitlement.

154. We think that the general principles in our Reports are relevant in these contexts, so that rights akin to section 23 rights can be conferred expressly on clergy serving in the Diocese of Europe. The capability procedure can apply, though the geography of the Diocese of Europe may necessitate a shorter procedure to avoid repeated meetings of panels with heavy travel costs. Although an English Employment Tribunal could in theory be given jurisdiction to deal with clergy serving elsewhere, the practical difficulties of applying foreign law in such a Tribunal make such action inappropriate, and it would be preferable in this particular category of cases to have any unfair dismissal claim heard by an *ad hoc* tribunal, perhaps convened by the chancellor of the relevant diocese. It would be necessary to provide generally that, in their application to clergy working outside England, the Regulations were subject to the mandatory rules of the country in which they served.

## **6. The Human Resource function, ministerial review, and the capability procedure**

155. We have emphasised in each of our reports, and in the presentations we have made to the House of Bishops, synods, and committees, the crucial importance of providing the Church with a much enhanced human resource (HR) function, and the centrality of ministerial review and of effective capability procedures. This Part addresses those issues.

### **Human resources provision**

156. The decision to confer employment rights on clergy, including access to Employment Tribunals, means that the processes and practices adopted and exercised by bishops, and those to whom they delegate responsibilities for parochial clergy, will be judged by reference to the standards adopted in other professions. Bishops have the ultimate responsibility for clergy, although they share the day to day outworking of this with others. This is both recognition of the fundamental and historical nature of the relationship between clergy and bishop, and also an embodiment of best practice in terms of human resource management.

157. The Crown Nominations Commission and the House of Bishops have recently produced papers designed to assist people to understand the episcopal role. One paper speaks of one role of a bishop as that of being 'a competent manager of persons and of resources, under God'. The other, in describing the key elements of the role of diocesan bishop and the personal qualities required, includes in the list 'people management skills'.

158. In the increasingly complex and technical 'employment' environment, it is essential that specialist help is both available and used to navigate through the often choppy waters, even when the working relationship, with its rights and responsibilities, is one between office holder and those having pastoral oversight rather

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than between employee and employer. This is *not* to say that there are always difficulties, or that clergy are always presenting their bishops with problems. Nevertheless, it is important to have systems and processes that can help both parties to ensure that the right people are placed in the right environment, and, where things go wrong, can assist in sorting out the difficulties to the benefit of all concerned

159. The response to our First Report clearly included an acceptance that this implies the creation of a professional HR function to support bishops and their staff.
160. The introduction of common tenure, which will bring with it the clarification of rights and responsibilities for clergy and bishops alike, will open up our processes to the scrutiny of the Employment Tribunals. The Group sees this as a positive step. Accountability, responsibility, transparency and consistency in relationships are what the tribunals will audit in deciding whether the Church has acted reasonably in dealing with a problem. Our setting up of an HR function is, however, not merely to protect the interests of the Church when faced with claims of unfair dismissal. Its purpose is to support the development of a culture where people are enabled to be as effective as possible in their service of God. The processes and procedures that will need to be in place are for use not only when a problem occurs: they point to a particular way of conducting relationships on an ongoing basis.
161. In general, the role of the HR function is to:
  1. devise and deliver HR strategies and policies which help the Church to achieve its objectives through the people who hold office within it;
  2. help to bring best HR practice in the Church by providing advice and support to those whose job it is to manage change, and facilitating effective relationships between those in a diocese with authority and those who work under that authority;
  3. develop and maintain up-to-date policies, practices, and information which reflect changes in employment law and ensure both that the Church discharges its obligations to its staff and clergy, and that they, in turn, discharge their duties safely and competently;



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4. ensure that all those with relevant responsibilities are trained and competent to exercise them and receive the best professional advice.
162. On a day-to-day basis, this will be seen in the following activities:
- setting down and monitoring processes and procedures relating to all aspects of common tenure and section 23 rights and the responsibilities that go with them;
  - assisting appointment processes and enabling them to be properly carried out;
  - providing model job profiles, templates and guidelines;
  - providing training for those responsible for carrying through the processes; and
  - giving support and guidance on individual casework and local issues, particularly the management of capability procedures and employment tribunal proceedings.
163. This is not a definitive list, and it does not describe activities that the HR specialist can or should necessarily do on his or her own. The management of people and the processes surrounding this are team activities, drawing in the people with the most relevant or appropriate skills and competences. The bishop will need to decide how this is best to be done, drawing on his specialist team including the Diocesan Registrar, the HR adviser, the Diocesan Secretary (as the representative of the DBF, he or she will be the normal respondent in any Employment Tribunal cases), the archdeacons, and others with whom he shares the responsibility for the pastoral care of the clergy. However, the bishop will need to ensure that professional HR tasks are undertaken by appropriately qualified and experienced individuals.
164. In some dioceses, expertise in employment law may already be available through the Registrar, a solicitors' firm acting for the DBF, or other professionals. Where this is the case, the HR specialist and these employment law specialists will work closely in advising the bishop on particular matters. Where this is not the case, the HR adviser, with the bishop's consent, will take advice from a specialist lawyer as and when the need arises – a model that works well in other organizations.

### **National and local human resources provision**

165. It will be important to distinguish which HR work is undertaken locally (and we go on to offer a local model of HR provision) and

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which is undertaken nationally for the whole Church. The decision on this should be based on both financial and organizational considerations, bearing in mind that the different strands of HR work require different levels of HR specialism, skill, and experience.

166. The highest level of expertise is required at a *strategic* level: for professional development and policy design, development, and review; the formulation of the HR strategies needed to implement diocesan policies; support in managing change (structural reorganisation and the consequences of this for people including, in some circumstances, termination and redundancy); complex technical casework, including the operation of the capability procedure; translating nationally agreed policies into locally workable procedures; training and development where this is not already provided and, where it is, ensuring that it meets the new training needs consequent on the implementation of our proposals.
167. Less expertise is needed for *operational* advice: on the interpretation and application of terms and conditions of service such as leave provisions (maternity, paternity, parental, compassionate, etc), and dealing with routine enquiries on matters of less technical complexity such as the first stage of grievance or complaint procedures.
168. Finally there is the necessary *administrative* work: ensuring that personal files comply with data protection standards, and that the necessary special terms are included in deeds of appointment, licences, and statements of main terms and conditions of service; compiling job profiles; dealing with the administration of leave; and so on. Many of these tasks are already being carried out in every diocese, in registries, or diocesan or bishops' offices, but some reorganisation may be necessary to comply with the standards required in the new culture.
169. At present, some policies are developed nationally: those relating to pensions, stipends and some individual rights (grievance procedures, maternity, paternity, parental and adoption leave provisions, absence management guidelines etc.). They fall into two categories, those that are mandatory (such as pensions) and those that are for guidance and reflect best practice (such as current maternity, paternity and parental leave provisions for clergy). It would seem sensible and economical to continue to deliver these nationally. Some policies, which are currently for guidance only, will need to become mandatory, but with room for

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some tailoring, within clearly defined limits, at diocesan level to suit local circumstances.

170. Other aspects of the HR task would probably be best delivered locally, by staff with different levels of HR expertise. However, this must not be carried out by forty-four distinct HR services. There needs to be consistency across the Church, not least as this will be expected by any Employment Tribunal. Financial considerations alone demand agreements between dioceses on sharing services. Which dioceses collaborate is for local determination in the light of geography, existing regional arrangements, numbers, and the existing resources.
171. We are very conscious of the potential VAT implications. In general terms, services provided to an organization from 'outside' attract VAT, which is why VAT is payable on, for example, fees payable to diocesan registrars. It was partly this consideration that led to the National Church Institutions adopting joint employment arrangements, so that VAT was not payable when one institution provided services to another. This suggests that HR advisers should be employed jointly by all the dioceses, in whatever regional groupings were considered appropriate for sharing staff. Specialist advice may be needed to determine the best model, in order to achieve effective service without excessive cost or complexity.
172. We estimated in our First Report that a proper HR function across the dioceses would require an *additional* 18 posts in total. To arrive at this figure, we assumed the equivalent of 10,000 full time clergy posts (including part time clergy and NSMs) and used data provided by 300 organizations from across the private and public sectors, which suggested a ratio of all HR staff (including payroll) to all employees of 1:80 (although we noted that fewer HR staff were needed in larger and public sector organizations, with the figure varying from 1:110 in a large public sector organization to as much as 1: 63 in a small private organization.) Some HR work - an average of 1.5 posts per diocese - is already undertaken within *existing* posts by diocesan staff. In addition, the equivalent of 0.5 of a post per diocese is currently provided through HR consultancy bought in and *pro bono* advice and expertise, and 19 staff (clergy payroll and DRACSC) provide support at national level.
173. Ten thousand posts on a ratio of 1:80 would require HR/payroll staff of 125. If we estimate there are already 1.5 full-time equivalent posts across 44 dioceses and a further 0.5 full-time

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equivalents in consultancy and *pro bono* work and add these together with the 19 national staff, including clergy payroll, this gives us a total of 107 full time equivalent posts already dealing with HR matters. This means there is a shortfall of 18 posts. These posts are costed at a middle grade HR manager level with on-costs (pension and employer's national insurance contributions) and this brings us to the figure of £800,000.

174. The same basic data suggests that the cost of the HR/payroll function should be an average of 2.3 percent of the annual pay bill. This would also suggest an additional cost in respect of clergy of around £800,000. A Financial Memorandum to the General Synod has already stated that the non-staff costs that this restructuring will require could amount to at least an additional £500,000 pa in other expenditure, such as support staff, expenses, accommodation and associated costs. We therefore consider that the total additional cost might be between £1m and £1.5m pa, depending on office costs and the precise level of provision that is required.
175. In addition, there will be further costs in providing the necessary training for bishops, archdeacons, and diocesan staff, and for lay people and clergy carrying out ministerial reviews or acting as members of capability procedure panels.
176. Dioceses will need to assess carefully what already exists locally, what needs to be added, and to what extent tasks will have to be re-allocated to produce a dedicated HR function capable of being shared by a group of dioceses. This will be a considerable task, involving changes to existing jobs and for existing post-holders, with consequential changes in budget allocations. At present, however, we do not see any reason to amend our earlier estimate of an additional 18 posts, at a variety of levels, but we would emphasise that this relies on diocesan restructuring of existing posts.

**(xxvi) We recommend that a professional HR function should be set up to support bishops and their staff. This will have the following implications.**

- **Bishops will have a responsibility to ensure that appropriate HR advice is obtained and followed.**
- **National guidelines will be required over a range of areas, and these will need to set out where procedures have to**

**be followed exactly and where there is room for local discretion.**

- **Additional expenditure will be required in the form of about 18 additional posts and their on-costs.**

**(xxvii) We recommend that policy in areas where consistency across the Church would be expected by an Employment Tribunal should be determined at national level, with indications being provided where there was scope for diocesan discretion.**

**(xxviii) We recommend that dioceses should collaborate and decide locally, in the light of geography, numbers, and existing resources, what HR provision is required, both at the strategic level (for example the implementation of national policy at diocesan level and complex technical case work) and also at the operational level (for example, interpreting diocesan guidelines and dealing with routine enquiries).**

**(xxix) We recommend that the administrative work – which is already being carried out in individual dioceses – should continue to be provided at this level where appropriate, subject to any reorganization required to comply with new standards and to restructuring of existing posts following the setting up of an HR function at regional levels.**

## **Ministerial review**

177. Ministerial review will be a vital feature of the new arrangements, and in our First Report we recommended that all clergy should be required to participate in a diocesan ministerial review scheme and to take appropriate advantage of CME, and that all diocesan bishops should be required to ensure that diocesan ministerial review schemes are not only in place but properly followed.
178. We consider that, if bishops and clergy are to have a common form of tenure, then the provisions of ministerial review should apply to them also. We noted in this context that the House of Bishops' Theological Group made the point that ministerial review needed to include the bishops, and that it could not be done wholly within the diocese, but needed to embrace the concerns of the Metropolitan and the House of Bishops.

**(xxx) We recommend that ministerial review should be provided for bishops and that the House of Bishops should**

**be invited to give consideration to setting up ministerial review schemes for bishops.**

179. During the second phase of our work, we wrote to all diocesan bishops asking them to provide details of their existing ministerial review schemes, with a view to using this material to provide some general guidance that might be adapted for use in individual dioceses.
180. Responses were received from 40 dioceses, and Annex 5 analyses the principal features of these schemes. From the results of this survey we formed a number of impressions.
- There was generally a standard preparation form, with a list of questions, which was used as the basis for an interview. The questions covered a vast range of different areas: prayer life, areas of work that have given greatest or least satisfaction, potential financial problems, state of health, views of spouse, life-work balance, support networks, outside interests, reimbursement of expenses, standard of accommodation, the percentage of an average week spent in sleep (!), relations with ecumenical colleagues, feelings about the present Church of England structures and leadership, response to the general decline in both Church attendance and the numbers of ordained clergy, when and whether the cleric might like to be approached about a move, and where the cleric saw himself or herself in 5 years' time.
  - Ministerial Review was often explicitly distinguished from appraisal, and tended to emphasise the positive with a view to providing encouragement for clergy. However, the questions asked could be challenging and demanding.
  - In some dioceses, ministerial review was regarded as optional; in others, it was considered to be compulsory.
  - The frequency of review varied from every year to every 3 years.
  - Schemes normally excluded clergy in the first three years of their ministry.
  - Potential outcomes and follow-up could vary, but usually involved an agreed summary being placed on the bishop's file and some suggestions for training being forwarded to the CME officer.
  - Not all dioceses included contact with the diocesan bishop as part of ministerial review.

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- Reviewers tended to be drawn from either panels of specially trained lay or ordained people (from whom clergy were invited to choose a reviewer) or the bishop's senior staff (which seemed to mean, in effect, area or suffragan bishops, the dean, and the archdeacons).
  - There was often no provision for parish input or for the reviewer to visit the parish.
181. Our initial reflection on this body of information was that the potential for clergy to explore and discuss personal vulnerabilities is a valuable feature of many of the existing ministerial review schemes.
182. Some of those commenting on our proposals seemed to think that ministerial review constituted a preliminary stage in the capability procedure. We were not of that view. The capability procedure is triggered by specific events or concerns, whereas ministerial review is an ongoing, regular process.
183. We also considered that ministerial reviews should be informed by an awareness of cultural issues and clarify the responsibilities of clergy in a way that left them flexible enough to play to their particular strengths and gifts, as well as the particular needs in the local situation.
184. Given clergy numbers, and the amount of time required to carry out reviews thoroughly, the diocesan bishop and his senior colleagues are unlikely to be able to carry out all the reviews themselves. This implies a need for specially trained reviewers.
185. We should record that we also looked at the Methodist system of self-assisted review, which had been commended to the Group by several commentators on our First Report and at the self-assisted review scheme used in the Diocese of St Albans. We took the view that self-assisted review, although a valuable adjunct to ministerial review, was no substitute for the full procedure, which included keeping proper records.

### **National guidelines on ministerial review**

186. With the encouragement of the Standing Committee of the House of Bishops, we consulted a number of bishops about the issues on which national guidance is likely to be required. The following points emerged from this further consultation.
- Ministerial review should be carried out annually.

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- It should be on a one to one basis.
- An agreed record signed by both parties should be retained on the file.
- There needed to be a defined role for the bishop, clearly understood by all concerned in the process. Three models have been suggested to us. The first is that the bishop would undertake to do the review of each individual cleric, say, once every three years (numbers permitting). The second is that the bishop would only do the reviews of his senior colleagues. The third is that the bishop would not conduct the review himself, but would receive the written agreed record of it and use that as a basis for on going pastoral oversight of the individual cleric concerned.
- It will be important to provide for some lay participation in advance of the interview. In the case of the parochial clergy, this is most likely to be the churchwardens, although the weight of numbers (particularly in dioceses with a large number of multi-parish benefices) means that this may not be practical every year. However the lay persons consulted for this purpose should never be present during the interview. It will also be important to safeguard against them using this opportunity either to collude with the cleric or to air grievances against him/her.
- It will be important in the review to distinguish between objectives that are the joint responsibility of the parish and the cleric, and objectives that relate to his/her personal concerns and development. With this in mind, and with many ministerial review schemes already in place to address the former, further consideration should be given to whether an alternative term (such as annual interview) might be more appropriate to address the latter.
- Objectives should always be flexible enough to be revised in the light of changing circumstances.
- The bishop will be responsible for ensuring that all those engaged in ministerial review should be required to undertake appropriate training and preparation, and also for the administrative delivery of the diocesan scheme.
- The review should not be regarded in any way as the first step in the capability procedure.

**(xxxi) We recommend that general guidelines should be produced on the conduct of ministerial review, but that it**



**should be for each diocese to devise its own system within these guidelines.**

### **Revisions to the capability procedure**

187. Many responses to our First Report raised useful points in connection with the draft capability procedure. We agree that it will be important to ensure that the procedure is not used for trivial complaints, and that it would be a helpful improvement to state more clearly that one possible result of applying the capability procedure could be that, after the facts have been gathered, the complaint would be declared not to have been justified.
188. The reference in the procedure to minimum standards produced many requests for further clarification. Because circumstances are so varied, it is difficult to give a single answer, although there might be reference to the Terms of Service Regulations, the Canons, and the Ordinal. We believe that, in practice, minimum requirements would be clarified in a particular case by articulating expectations through job descriptions and ministerial reviews; involvement of the laity would assist this process, but the clergy would, in some cases, need protection from unrealistic expectations. Certainly, the informal stages of any capability procedure would make very plain what was amiss and what was required in the particular circumstances to meet minimum standards.
189. In response to a point made during the General Synod debate in February 2003, we agree that the priest and lay people at the two warnings and final dismissal hearings should come from another diocese, as their relationship with the bishop, the archdeacon or the dean might be seen to compromise the objectivity of the hearing.
190. We have addressed earlier in this report the application of the capability procedure to a number of categories of persons. We would add that it could be used in the case of clergy working under a contract of employment with the DBF. We have also identified a number of circumstances in which a shortened procedure could be used after careful consultation with the HR adviser; they are cases in which the office-holder's tenure is limited in time, or during the first three years of ministry or during the first year of any appointment.
191. We identified in our First Report the question whether the panels considering capability should be required to be unanimous in

reaching their decision. We do not think such a requirement would be appropriate. It is a feature neither of comparable procedures in other professions, nor of employment tribunals.

**(xxxii) We recommend capability procedure panels should be able to come to a decision by majority vote.**

**(xxxiii) We recommend that the capability procedure as revised and set out in Annex 6 of this report should be used for all those with common tenure.**

## **Severance payments**

192. If the capability procedure leads to removal from office, and the cleric concerned is not offered another appointment, it may be appropriate to consider some sort of severance payment. Such payments are provided for in a number of other contexts.
- (a) A priest removed from a freehold office after pastoral re-organisation is entitled under Schedule 4 to the Pastoral Measure 1983 to compensation, providing stipend and housing unless and until the priest concerned accepts or unreasonably refuses an equivalent post. The same provision applies to priests deprived of their benefice on the ground of pastoral breakdown under the Vacation of Benefices Measure. The Toyne Group considered these compensation arrangements and concluded (at paragraph 3.69 of its Report) that 'there would need to be a very persuasive case for changing the compensation provisions, which appear to be equitable and have stood the test of time'.
  - (b) The Toyne Group did not consider whether there should be any provision for displaced priests-in-charge. We have however made recommendations for the treatment of those leaving office in equivalent circumstances at paragraph 102 (recommendation (xiii)).
193. We were helped by a paper from a sub-group of the Deployment, Remuneration and Conditions of Service Committee of the Ministry Division suggesting an approach to the cases of removal after the capability procedure. Any payment would have to be settled on a case-by-case basis, but the group's paper will provide a valuable set of guidelines for those dealing with such issues. The principles on which the approach is based, and which we endorse, are that any payment should be more generous than the statutory minimum redundancy payment in order to reflect the loss of the

house. The level of payment would be related to the National Minimum Stipend, and take into account the length of a person's service. Payments for those holding senior posts would be enhanced by the multiplier used in determining pension levels applied for those holding senior posts.

194. There would be no national scheme to cover these payments, which would be made by the diocese or cathedral concerned.

**(xxxiv) We recommend that, in cases of removal after the capability procedure, any payments should be determined by the diocese or cathedral concerned on a case-by-case basis, in the light of national guidelines under which the level of payment would be related to the National Minimum Stipend and take into account the length of a cleric's service.**

### **Constructive Dismissal and Grievance Procedures**

195. Some commentators have raised the question whether the clergy would be able to rely on a claim of constructive dismissal. The legal advice we have received is that this would not be available, as it presupposes an employment relationship. This makes it all the more important that there should be procedures through which the legitimate concerns of ministers arising from their working relationships may be addressed. We therefore welcome the development of a grievance procedure for clergy and readers which is due to be issued shortly, although we note that it will require further amendment once the HR framework is in place.

### **Capability and discipline**

196. A number of commentators mentioned the question of the relationship between the capability procedure and that under the Clergy Discipline Measure. Capability issues must be distinguished from misconduct, which falls within the ambit of the Clergy Discipline Measure 2003. The Group met with the Clergy Discipline Commission to discuss the interface between the two procedures. Although the Clergy Discipline Measure includes neglect or inefficiency in the performance of a cleric's duties within its definition of misconduct, there would need to be an element of wilful or deliberate refusal to improve for such matters to merit disciplinary action.
197. Misconduct and lack of capability may be indistinguishable in the effect they have on others, but the emphasis in a disciplinary case is likely to be on a past unlawful act or omission (whether wilful or

inadvertent). By contrast, the capability procedure is about an inability to perform to a minimum professional standard, which has an impact on future performance.

198. Despite this distinction, there is nevertheless a degree of overlap between the operation of capability and discipline procedures. Initial steps under either procedure could lead to the conclusion that the matter should properly be dealt with by the other; it would be a matter of judgement. It should thus be possible to take proceedings either under the Clergy Discipline Measure or the capability procedure. It would be unacceptable to have both procedures under way at the same time; it might be right in some circumstances to suspend one procedure while an allegation was addressed under the other procedure. Both our Group and the Commission felt that the potential overlap would not be a matter of concern, provided that the procedure is followed at any one time was made clear to all involved.

### **Appointments procedures**

199. Although the procedures for appointments, including patronage, are outside our terms of reference, we believe that national guidance on issues of appointments practice is desirable for the following reasons.
- Capability issues are often related to how someone was appointed, in that they often arise from a mismatch between the cleric and the requirements of the post.
  - Appointments processes need to be clear and consistent.
  - A large number of people is involved in recruitment procedures – including bishops, patrons, archdeacons, churchwardens and parish representatives – and they need appropriate advice.
  - The change of culture which must accompany the implementation of our recommendations must be reflected in recruitment processes.
  - There are important practical points (for example, what questions are and are not permissible) and some issues of more general concern: when is a degree of local flexibility appropriate and when is it not; the tension sometimes felt between securing justice for the individual and justice across the board; the need to ensure that job descriptions do not build in unrealistic expectations, or unjustifiably higher expectations of, say, minority ethnic clergy.

200. We have seen the *Guidelines Towards Good Practice in the Appointment of Clergy to Parochial Posts in the Church of England*, which have been produced by the Clergy Appointments Adviser. We note that, at some point, further revisions may be required in the light of common tenure arrangements, and the setting up of an enhanced HR function, not to mention the proposed amendments to the Pastoral Measure.

**(xxxv) We recommend that, when the Clergy Appointments Adviser's *Guidelines Towards Good Practice in the Appointment of Clergy to Parochial Posts in the Church of England* are issued, full use is made of them, as it is important to ensure that clear appointments procedures are in place.**

### **The rights of patrons**

201. As indicated above, legislative changes to appointment procedures would be beyond our brief, and it will be for the bishop to ensure that the appointments process is followed. Moreover, our recommendations leave the rights of patrons unchanged. One effect of common tenure will be a reduction in suspensions, with the result that patrons would have more involvement in appointments procedures than they do at present. Patrons will necessarily be affected by the enhanced HR function and it will be necessary to consult them more fully about how good practice can be encouraged, in particular over such issues as discrimination and inappropriate questions at interviews, and how to encourage greater clarity over job specifications.

# **Annexes**

## Review of Clergy Terms of Service: Part Two

# Annex 1

## Membership

Professor David McClean (Chairman)  
*Professor of Law, University of Sheffield,  
Chairman of the Legal Advisory Commission and member of General  
Synod*

The Revd Canon Bob Baker  
*Rector of Brundall with Braydeston and Postwick, Prolocutor of the Lower  
House of the Convocation of Canterbury and member of the Archbishops'  
Council*

The Revd Prebendary David Houlding  
*Vicar of Hampstead St Stephen with All Hallows, Pro-Prolocutor of the  
Convocation of Canterbury, and member of General Synod and  
Archbishops' Council*

Mr Andrew Howard  
*Diocesan Secretary of Winchester (Leicester until December 2003)*

The Rt Revd Michael Langrish (until September 2004)  
*Bishop of Exeter*

The Revd Canon Cathy Rowling  
*Dean of Women's Ministry and Co-Director of Ordinands, York Diocese*

Anne Sloman  
*Member of the Archbishops' Council*

The Rt Revd Stephen Venner (from October 2004)  
*Bishop of Dover*

### **Assessors**

The Revd Judith Egar  
*Assistant Solicitor to the General Synod*

The Ven. Dr Gordon Kuhrt  
*Director of Ministry*

Mrs Su Morgan  
*Director of Human Resources*

Mr Stephen Slack  
*Chief Legal Adviser to the Archbishops' Council and General Synod*



## **Secretariat**

Mr Kevin Diamond  
Margaret Jeffery  
Mr Patrick Shorrock

# **Terms of Reference**

To review the terms under which the clergy hold office to ensure a proper balance between rights and responsibilities, and clear procedures for resolving disputes which afford full protection against possible injustice; and

to consider in this context the future of the freehold and the position of the clergy in relation to statutory employment rights.

In the review, to give priority to consideration of the position of clergy without the freehold or employment contracts, and to report on this aspect in 2003 with detailed proposals and a programme for their implementation, the rest of the review to be completed, if possible, in 2004.

## **Annex 2**

# **Work carried out by the group**

### **The following attended meetings of the Group during 2004:**

The Archbishops' Secretary Appointments Secretary – Ms Caroline Boddington

The Revd Jenny Thomas

Standing Counsel to the General Synod – Sir Anthony Hammond

Secretary of the Legal Aid Commission – Miss Ingrid Slaughter

### **Submissions were received from the following:**

#### *Bishops*

The Bishop of Exeter\*

The Bishop of Oxford\*

The Bishop of Rochester\*

The Bishop of Thetford

The Bishop of Willesden\*

#### *Other Clergy*

The Revd Jonathan Fraiss (Europe)\*

The Revd Canon Dr Judy Hunt (Chester)\*

The Revd Jonathan Jukes

The Revd Nigel Marns

The Revd Elizabeth Strickland

## Review of Clergy Terms of Service: Part Two

### *Lay People*

Mrs Mary Bordass (Salisbury)\*

Paul Goulding QC

Mr Philip Petchey Deputy Chancellor in the Diocese of Soutwark

\* = General Synod member

### *Corporate submissions*

Amicus

The Church Army

The Church of Scotland

The English Clergy Association

The Legal Aid Commission

The Scottish Episcopal Church

### *Responses from dioceses*

Bath and Wells

Blackburn

Bradford

Canterbury

Chelmsford

Durham

Ely

Leicester

Lincoln

Liverpool

London

Oxford

Peterborough

Portsmouth

Salisbury

St Edmundsbury and Ipswich  
Southwark  
Truro  
Worcester  
York

**Other material considered by the Group in whole or in part  
in addition to material already listed in GS 1527**

Accompanied Self-Appraisal (Methodist Church)  
Assisted Self-Appraisal for Clergy and Readers (Diocese of St Albans)  
Minutes of the General Synod Debate on the Report on the First Phase of  
the Work GS 1527  
Bishops' Regulations for Non-Stipendiary Ministry (ABM policy paper  
No.5, Feb 1996)  
Towards Good practice in the appointment of clergy in the Church of  
England – draft guidelines prepared by the Clergy Appointments Adviser  
1998 Report on the Working Party on The Freehold Ownership of  
Benefice Property Common Worship: Ordinal – Report by the Liturgical  
Commission GS1535  
Form of agreement between a diocesan bishop and the Church  
Commissioners relating to accommodation available to the bishop  
Opinion of the Legal Advisory Commission dated October 1995: Vacancy  
in benefice: ownership of ecclesiastical property

**Members of the Group attended discussions in the following  
dioceses:**

Bath and Wells  
Bradford  
Chelmsford  
Bradford  
Durham  
Guildford  
Lincoln  
London

## Review of Clergy Terms of Service: Part Two

Newcastle  
Norwich  
Portsmouth  
Rochester  
St Albans  
Sheffield  
Southwark  
Winchester

**General Synod commended our earlier report (GS1527) to the Church for discussion and invited comment. In addition, The Group's work has been discussed during 2004 at:**

The House of Bishops

The Archbishops' Council

The Deployment, Remuneration and Condition of Service Committee of the Archbishops' Council

Meeting with ecumenical partners (February)

Consultative Group of Diocesan Chairs and Secretaries

The Committee for Minority Ethnic and Anglican Concerns

The Inter-Diocesan Finance Forum

The Diocesan Secretaries Conference

Meeting of Chairs of Diocesan Houses of Clergy

House of Bishops Theological Group

Bishops' Committee for Ministry

DTI working Group with the Churches

Joint meeting between The Review Group and Clergy Discipline Commission

## Annex 3

# History of the freehold

1. The discussion paper Clergy Conditions of Service, published in 1994, contains an account of the origins of the 'parson's freehold' (GS1126, paras 22-23):

In early Christian England, when a great landowner accepted the new faith he naturally wanted a priest on hand to minister to his family and tenants. To secure this he would build a church, appoint a priest to it and set aside land to maintain them. Glebe, tithes and the donations from the faithful increased the value of the church and its land, and the landowner would take a healthy temporal income on his spiritual investment. 'Through the Old English Period the founder of such a church regarded it as his property, which would yield an income to him and his heirs. The origins of lay patronage in England lies in the custom which allowed the founder of a church to appoint its priest' (Stenton, Anglo-Saxon England, p.149). Bishops attempted to check the control of landowners over the clergy by requiring that priests were instituted before starting work, thereby bringing them under episcopal authority.

To satisfy their pious instincts without risk of continuing personal cost, it became common for patrons to bequeath their rights to a neighbouring monastery which then received the income from the parish. The Lateran Council of 1215 denounced the appropriation of parish income and directed that where possible a rector should live and officiate in his parish. If he lived elsewhere he should have a perpetual vicar canonically instituted who would enjoy a proportion of the income of the parish. This vicar, instituted by the bishop, could only be removed by judicial procedure and had to be given a minimum payment. He had both a freehold and a secure stipend. The freehold prevented the rector or patron arbitrarily

dismissing him from his parish and the stipend gave him a small head start on destitution.

2. Lynne Leader, in her *Ecclesiastical Law Handbook* (Sweet and Maxwell, 1997) gives some additional historical information (footnotes omitted):

Churches received endowments and thus acquired property for the maintenance of the priest, glebe land which the priest obtained a living being a common form of endowment. As the division into parishes developed, the law recognised the parochianus or parson of the parish as a corporation sole, who in their representative capacity was capable of preserving for their successors in perpetuity the original endowments of the church.

The parishioners of each parish were subject to tithes; a tenth of their produce being given to the church. Where the parish church was founded by a layman, the priest appointed to the church was known as the rector and had the right to receive those tithes. However, where the church was founded by a religious community the priest appointed was the vicar and that community was the rector entitled to receive the tithes; provision being made for the vicar's endowment in perpetuity, initially by ecclesiastical constitutions and ordinances and later by statute.

A rectory is a benefice to which the whole of the tithe and any glebe land of the parish has always been attached for the maintenance of the priest. It is an essential feature of a rectory that some land is attached to it, although the church and churchyard will suffice. Other benefices have been made rectories by statute. Where a religious community or other religious corporation was the rector the rectory was said to be appropriated, the benefice occupied by the priest being termed a vicarage. Following the Reformation and the dissolution of the monasteries many of these appropriated rectories passed into lay hands, and in such cases are known as impropriate rectories, the impropriator referred to as the lay rector.

## Annex 4

# Discussion of the freehold in the last 40 years

1. The proposals of the 1967 report *Partners in Ministry* were not accepted at the time, but its discussion led eventually to the major debates in the General Synod in 1972. It is remarkable that there was little opposition to the major proposals then put forward, and none on the grounds of their effect on the freehold. Indeed, an early speaker in those debates (Canon G. R. Sansbury of Lincoln) observed that 'The proposals do not assault the freehold, which can cause violent and irrational reactions, but some will ask whether the report goes far enough in that matter' (General Synod Report of Proceedings, 7 July 1972, vol. 3, p.330) Dean Fenton Morley did later call attention to the 'change – I will not call it destruction – of the freehold' which was taking place (Report of Proceedings, 8 November 1972, vol. 3, p.727).
2. A joint meeting of the Convocations of Canterbury and York in February 1990 discussed Terms and Conditions of Service of the Parochial Clergy. One paper prepared for the debate by Rt Revd David Say, retired Bishop of Rochester, was entitled *Freeholders or Employees*, a title which suggests some confusion of ideas: if one rejects, as we did in the report of the first phase of our work, the idea of clergy as employees, the result need not be the retention of the freehold quite unchanged. The second paper, by Canon John Williams of Chelmsford, reported the results of a limited survey of clergy opinion. He found considerable unhappiness at the notion of fixed-term appointments, with 70 percent of his respondents opposed, and that notion we ourselves rejected in our First Report. Although one speaker, the Revd John Packer of Sheffield (now Bishop of Ripon and Leeds) spoke in favour of fixed-term appointments, most speakers reflected the



unease of the Revd John Broadhurst (now Bishop of Fulham) at 'the drift from freehold to leasehold'. The Bishop of Barking said of 'freehold' that it was important to kick that particular word into touch as soon as possible: we had to address the realities of today not the myths of yesterday.

3. In January 1991, the General Synod passed by 316 votes to 84 a motion from the Southwark Diocesan Synod calling for the review of the freehold of all ecclesiastical offices, and its replacement by appointment for a renewable term of years. The Revd John Hall in moving the motion argued that the freehold symbolized protection and privilege, separating the clergy from the laity who had no such privilege; that it was inappropriate to a servant ministry, and that it created an expectation that ordination guaranteed a job for life. He argued that there should be a ten-year renewable term, to exclude the extremes of churchmanship. The emphasis in the debate was upon the problems caused by the 'immobility' of the clergy, with the difficulties it caused for pastoral reorganization. The Archbishop of York wanted mobility to be combined with security, reflecting a point made in the Convocations about some guarantee of income and housing for clergy 'between jobs'.
4. The Standing Committee of the Synod responded by setting up a Steering Group which in 1994 issued *Clergy Conditions of Service: A Consultative Paper* (GS 1126). This examined a very wide range of issues, and was circulated to dioceses and other interested parties for consultation. The responses, together with a debate in the House of Laity in December 1995, formed the basis of the paper *Improving Clergy Conditions of Service* (GS 1173). That group considered that there was then insufficient consensus about the possible abolition of the freehold to warrant a major exercise on the issue.
5. One aspect of the freehold, the freehold of property, was the subject of another series of reports. A Working Party chaired by Mrs Sarah James (Rochester) reported in October 1991 that the present system of ownership of church, churchyard and parsonage was 'not ideal', but that any action should await the outcome of the consideration of the wider issues about conditions of service. The matter was accordingly looked at again in response to a recommendation in *Improving Clergy Conditions of Service*. A staff working group set up by the Church Commissioners reported in May 1998. On the basis of the responses to two questionnaires, which revealed some misunderstandings of the legal position, it reported that the laity and diocesan administrators favoured reform

of the freehold ownership of parsonages but most clergy respondents were opposed. There was little interest in reform of the ownership of church and churchyard. Presented with a number of options, those who favoured reform generally felt that the freehold title to any property transferred should vest in the DBF on trust for the PCC.

# **Annex 5**

## **Diocesan Ministerial Review Schemes**

In Summer 2004, the Group asked diocesan bishops to provide details of their ministerial review schemes. This annex provides an analysis of the main features of the schemes in the 40 dioceses which replied.

Nature of review and length of interview	Parish input to review	Reviewer	Frequency	Further action	Files	Other features/comments
<p><i>Bath &amp; Wells</i> Diocesan bishop not personally involved</p> <p>About 1.5 hours</p>	<p>From next year, likely to be submission from a church warden and person of reviewee's choosing</p>	<p>3 archdeacons suffragan dean of women clergy acting dean bishop's chaplain retired bishop</p>	<p>Every second year alternating between archdeacon and some other person</p>	<p>Summary and areas for action agreed and signed.</p> <p>Separate response sheet for CME.</p> <p>Encouragement to self-refer in case of personal develop or stress-related problems.</p> <p>'Issues may be taken up by the appropriate archdeacon elsewhere. However they are not part of the Review process as the Review of Clergy Terms or Service seems worryingly to envisage.'</p>	<p>Summary retained on confidential file held by diocesan, suffragan and archdeacon</p>	<p>Separate Peer Review Scheme</p> <p>Ministry Review for Readers</p> <p>Clergy use feedback slips following reviews - 90percent satisfaction with process.</p>

Nature of review and length of interview	Parish input to review	Reviewer	Frequency	Further action	Files	Other features/comments
<p><i>Birmingham</i></p> <p>1.5 hours</p>	<p>The diocese has other CME courses where feedback is collated from lay leaders to help the ordained person assess how to develop their leadership</p>	<p>Diocesan or suffragan</p>	<p>Annual</p>		<p>Signed summary for interviewee, interviewer and diocesan bishops</p>	<p>Separate forms for NSMs and assistant clergy not in positions of primary responsibility</p>
<p><i>Blackburn</i></p> <p>2 meetings (1.25 hours) with reviewer, followed by a meeting with the diocesan/ suffragan</p>		<p>Clergy choose from around 40 trained reviewers, both clergy and lay.</p>	<p>Every two years</p>	<p>Meeting with bishop at which training needs identified and the Director of Training is consulted as necessary – reviewee may opt out of this.</p>	<p>Agreed statement is confidential to reviewee, reviewer, and senior staff</p>	<p>Applies to licensed lay workers</p>
<p><i>Bradford</i></p> <p>Scheme has been suspended pending review</p>						

Nature of review and length of interview	Parish input to review	Reviewer	Frequency	Further action	Files	Other features/comments
<p><i>Bristol</i></p> <p>All clergy with a licence (including NSM) for about 2 hours</p>		Bishop or archdeacon	once every 2 years	Senior staff member writes up a report, which is agreed with the cleric and signed by both.	Report kept on the cleric's blue file	<p>Peer review also available</p> <p>Form asks broader questions about CME, physical violence, annual leave, problems with accommodation and numbers of occasional offices taken</p>
<p><i>Canterbury</i></p> <p>Completing a summary sheet with an allocated consultant reviewer who acts as a sounding board</p>	<p>Also a system of parish visits conducted by the 2 bishops and the archdeacons every 2 years. A day with the parish including 90 minutes with the incumbent to discuss responses to a questionnaire completed prior to the meeting</p>	An allocated consultant reviewer	Every year	Summary sheets are analysed, and the recurrent themes/issues are used to help the Board of Ministry and Training to be more responsive in its provision of CME	Summary sheet sent to Ministry Development Officer, who arranges for it to be placed on personal file and copied to parish visit file	

Nature of review and length of interview	Parish input to review	Reviewer	Frequency	Further action	Files	Other features/comments
<p><i>Chelmsford (2 of 3 areas)</i></p> <p>2 hour private conversation</p>	<p>Takes form of parish visit and includes meeting with churchwardens and opportunity for lay leadership to contribute to the assessment</p>	<p>Area bishop or archdeacon</p>	<p>Every 2 years</p>		<p>Update of confidential register of ministers</p>	<p>To be reviewed in 2005</p> <p>Work consultancy also offered</p>
<p><i>Chelmsford (1 of 3 areas)</i> Formal interview with bishop based on self-assessment</p>	<p>Optional suggestion that it might be worth consulting a few parishioners before completing the questionnaire</p>	<p>Alternately between archdeacon and area bishop</p>	<p>Every 2 years</p>		<p>Update of confidential register of ministers</p>	<p>To be reviewed in 2005</p> <p>Work consultancy also offered</p>

<b>Nature of review and length of interview</b>	<b>Parish input to review</b>	<b>Reviewer</b>	<b>Frequency</b>	<b>Further action</b>	<b>Files</b>	<b>Other features/comments</b>
<i>Chester</i> <i>Track 1 with a consultant reviewer</i>	None but see track 2  Tracks can be combined if clergy wish	Consultant reviewer, but can be combined with bishop's visitation	Triennial	Reviewee to make action notes and send to CME officer and (if they wish) to bishop for visitation  Also option for a follow up interview after 6 months	Up to reviewer and reviewee to decide whether summary should be forwarded to bishop. less than 1percent of review documents are sent to the bishops	Schemes are being evaluated  Clergy are asked to fill in an evaluation anonymously to indicate whether they found the scheme helpful
<i>Chester</i> <i>Track 2 within the person's place of ministry</i>	Includes the opinions and reflections of some of those with whom the reviewee works	Consultant review but can be combined with bishop's visitation	Triennial	Reviewee to make action notes and send to CME officer and (if they wish) to bishop for visitation  Also option for a follow up interview after 6 months	Up to reviewer and reviewee to decide whether summary should be forwarded to bishop. less than 1percent of review documents are sent to the bishops	Schemes are being evaluated  Clergy are asked to fill in an evaluation anonymously to indicate whether they found the scheme helpful



Nature of review and length of interview	Parish input to review	Reviewer	Frequency	Further action	Files	Other features/comments
<p><i>Chichester</i></p> <p>Interviews with a clergy review assistant</p>	<p>Clergy are invited to seek out feedback from key lay people in the parish and ordained colleagues</p>	<p>Clergy</p>	<p>Two interviews a year over a 3 year period, each year focussing on a different area of (i) pastoral care (ii) worship and (iii) mission</p>	<p>Clergy are encouraged write a report to the bishop at the end of the 3 years and to contact the CME officer for advice on training</p>		
<p><i>Coventry</i></p>		<p>Bishop or archdeacon</p>	<p>Annually</p>		<p>Section sent to CME adviser</p>	

<b>Nature of review and length of interview</b>	<b>Parish input to review</b>	<b>Reviewer</b>	<b>Frequency</b>	<b>Further action</b>	<b>Files</b>	<b>Other features/comments</b>
<i>Derby</i>		Bishop, archdeacon or dean on a random basis	Biannual once a priest has been in post for 18 months		Copy of agreed report to bishop and (one section) to CME officer	
<i>Durham</i> Voluntary ministerial review		Trained consultant	Not specified	Agreed summary to be used as the start point for the next review discussion		
<i>Durham</i> Compulsory pastoral conversations		The bishop's staff	Every 18 months			
<i>Ely</i> 2 hour discussion of review form		Trained reviewers, lay and ordained, plus bishop's staff (bishops, archdeacons, dean and canons)	Every year	Summary agreed with action points  Separate part identifying CME needs sent to CME officer	Copy of summary form kept on minister's personal file in bishop's office	

Nature of review and length of interview	Parish input to review	Reviewer	Frequency	Further action	Files	Other features/comments
<p><i>Gloucester</i></p> <p>One and a half hour interview on the basis of detailed questionnaire submitted in advance</p>	<p>Encouragement to discuss parts of questionnaire with a colleague/churchwarden, but this is optional</p>	<p>Consultant and bishop's staff (dean, suffragan or archdeacon)</p>	<p>Over 3 years, twice with consultant and once with bishop or member of his senior staff</p>		<p>Agreed summary shared with reviewee, consultant and bishop's senior staff</p> <p>Form also sent to Diocesan Officer for Ministry identifying CME needs</p>	
<p><i>Leicester</i></p> <p>1.5 hours</p>		<p>Bishop, or dean/archdeacons or previous Director of Ministry</p>	<p>Biannual</p>	<p>Summary sheet sets goals and reviews whether previous goals have been achieved</p> <p>Separate form for CME</p>	<p>Confidential to bishop</p> <p>CME form also sent to DOM and CME officer</p>	<p>To be reviewed in 2004</p>

<b>Nature of review and length of interview</b>	<b>Parish input to review</b>	<b>Reviewer</b>	<b>Frequency</b>	<b>Further action</b>	<b>Files</b>	<b>Other features/comments</b>
<i>Lichfield</i>		Consultant annually – bishop every 5 years			Signed report is sent to diocesan, area bishop and archdeacon	
<i>Lincoln</i> Day long visitation in the parish	Bishops spend time with churchwardens and ordained colleagues, who also have input into parish profile part of standard form	Diocesan bishop or suffragan	At least once every 4 years	A week after the visit, clergy are asked to send the bishop comments about the process and future changes		Proposed to add an interview between clergy and a senior staff member, so that reviews happen every other year
<i>Liverpool</i> Two to three hours based on a self-assessment form that reflects the Ordinal in its questions		Area dean for parish clergy  Area deans reviewed by suffragan bishop	Three year cycle	Diocesan bishop sees summary of review and writes to the reviewee offering comment, support and encouragement. Appeal procedure if the content of the summary cannot be agreed between reviewer and reviewee	Summary and diocesan bishop's letter on file	Clergy encouraged to take part in an annual voluntary work consultation and to have a spiritual director

Nature of review and length of interview	Parish input to review	Reviewer	Frequency	Further action	Files	Other features/comments
<p><i>London</i></p> <p><i>Two Cities area</i></p>		Consultant	Annual	<p>Summary form produced and sent to bishop</p> <p>Separate form for Development Needs</p>		
<p><i>London</i></p> <p><i>Kensington area</i></p> <p>Two hour review with consultant</p>	<p>A pilot process of extended ministerial review in which staff colleague/churchwarden is invited to complete a form comment on their work and ministry, followed by 2 sessions with a consultant</p>			<p>Objectives for coming year agreed with consultant</p> <p>Bishop writes in response to any issues raised in the summary</p> <p>CME officer responds on CME</p>	Forms remain confidential to bishop, CME officer and consultant	

Nature of review and length of interview	Parish input to review	Reviewer	Frequency	Further action	Files	Other features/comments
<p><i>London</i> <i>Kensington</i></p> <p>Episcopal review in addition to ministerial review</p>		Area bishop	Every 3 years			
<p><i>Newcastle</i></p> <p>1- 1.5 hours with Reviewer</p>	Reviewer approaches a churchwarden and 1 other nominated by reviewee to comment on reviewee's ministry	Reviewee chooses from panel of reviewers	Every 3 years	Objectives set for next 3 years	<p>Signed summary form produced and sent to bishop and reviewee</p> <p>Separate form for Development Needs</p>	<p>Linked to the Church's agreed expectations of its ministers and the Diocesan Mission Statement</p> <p>Work consultancy and spiritual direction also available</p>

Nature of review and length of interview	Parish input to review	Reviewer	Frequency	Further action	Files	Other features/comments
<p><i>Norwich</i> Pastoral visitation</p> <p>At least an hour with incumbent sometimes on the basis of a prepared questionnaire</p>	<p>Reviewer spends at least a day in the parish</p>	<p>Bishop or archdeacon</p>	<p>Every other year</p>	<p>Bishop writes to the incumbent giving an account of the conversation and the conclusions drawn</p>		
<p><i>Oxford</i></p> <p>About an hour</p>		<p>Area bishop or archdeacon</p>	<p>Every three years</p>			<p>Peer review and work consultancy also available –‘We know it’s inadequate and a great deal more is needed.’</p>

Nature of review and length of interview	Parish input to review	Reviewer	Frequency	Further action	Files	Other features/comments
<p><i>Peterborough</i></p> <p>Interview of between 2-3 hours</p>		<p>Bishops, archdeacons, the dean</p>	<p>Every 2 years</p>	<p>Summary report with action points is read by the bishop and kept on the file.</p> <p>Separate page sent to CME officer, who draws courses to attention of reviewees.</p>		<p>Counselling, spiritual direction and work consultancy also available</p>
<p><i>Portsmouth</i></p>	<p>Stipendiary clergy are reviewed annually by the Archdeacons and every fourth year by the diocesan bishop</p> <p>NSMs are reviewed annually by selected diocesan appraisers</p>	<p>See previous column</p>				<p>A merger is proposed between the stipendiary and non-stipendiary schemes</p>



Nature of review and length of interview	Parish input to review	Reviewer	Frequency	Further action	Files	Other features/comments
<p><i>Ripon &amp; Leeds</i> Two 1 hour interviews with to agree a summary report</p>	<p>Invitation to consult churchwardens and other colleagues when filling in initial form</p>	<p>40 trained reviewers, clergy and lay</p>	<p>Every 2 years</p>	<p>Agreed summary is sent to diocesan bishop, who acknowledges receipt and invites reviewee to discuss report</p> <p>Separate form for CME</p>	<p>Summary is confidential to reviewee and diocesan bishop</p>	<p>Reviewer and reviewee complete evaluation form</p>
<p><i>Rochester</i></p>	<p>May involve attendance at an act of worship and discussion with Churchwardens</p>	<p>Archdeacon</p>	<p>Once every three years</p>	<p>Bishop receives a copy of every review and writes personally to each incumbent</p>		

Nature of review and length of interview	Parish input to review	Reviewer	Frequency	Further action	Files	Other features/comments
<p><i>St Edmundsbury &amp; Ipswich</i></p> <p>1-1.5 hours on the basis of an outline questionnaire</p>		Archdeacon or bishop	Every 2 years	<p>Dates for action are noted e.g. critical timing relating to children's education, sabbaticals, moves and retirements</p> <p>CME requirements noted and passed on to CME officer</p>	<p>' A signed copy of the review is added to the blue folder. All reviews are held on file until a person moves diocese when they will be removed and only the most up to date review retained. People are informed of this practice when the letter inviting them to review is sent out'</p>	

Nature of review and length of interview	Parish input to review	Reviewer	Frequency	Further action	Files	Other features/comments
<p><i>Salisbury</i></p> <p>At least 1 hour on the basis of a review form</p>		<p>Archdeacon, suffragan or diocesan bishop</p>	<p>Depends on the stage of someone's ministry.</p> <p>For clergy settled in post, once every 3 years by archdeacon or suffragan bishop. Every 4 years by diocesan bishop.</p> <p>More frequently for newly appointed clergy.</p>	<p>Outcomes available to senior staff</p>		<p>Scheme currently under review</p> <p>Consultant's review available annually</p>

Nature of review and length of interview	Parish input to review	Reviewer	Frequency	Further action	Files	Other features/comments
<p><i>Sheffield</i></p> <p>Personal interview</p>		<p>Member of the bishops senior staff</p>	<p>Two year cycle</p>			
<p><i>Sodor &amp; Man</i></p> <p>No ministerial Review at all</p>						

Nature of review and length of interview	Parish input to review	Reviewer	Frequency	Further action	Files	Other features/comments
<i>Southwark</i>	Parish visit by area bishop every 4 years	Year A: area bishop in the course of a parish visit Year B: archdeacon Year C: trained lay person Year D: archdeacon	Annual with a four year cycle	Agreed report signed and kept and used as the basis of the next year's report with the exception of year C where lay people are encouraged to ask different questions  CME needs identified and passed to the canon theologian		

Nature of review and length of interview	Parish input to review	Reviewer	Frequency	Further action	Files	Other features/comments
<i>Southwell</i> Emphasis on self - review	Questionnaire for use with Churchwardens in preparation material	Senior clergy reviewers will be identified and trained so that noone does more than 5 reviews per year	Annual 1 year episcopal review alternating with 1 year peer review	Role description  Personal development objectives and 3 month and 12 month professional/ diocesan objectives set and agreed with reviewer  Fits with a larger scheme of clergy development and support which includes a leadership programme and mentoring		Scheme to be initiated in Jan 2005  Wide range of tools for clergy to use in preparing for review, including: stress and/or burnout inventory, fourteen day journal, parish feedback questionnaire, preparatory session with work consultant using questionnaire  Feedback form for reviewees
<i>Truro</i> (i) Pastoral visit	Takes place in parish  Includes time with churchwardens without the priest being present.	Bishop or archdeacon	Six year rolling programme	Reviewer writes up impressions. Report is discussed at bishop's staff meeting		

Nature of review and length of interview	Parish input to review	Reviewer	Frequency	Further action	Files	Other features/comments
<p><i>Truro</i> (ii) Review</p> <p>2 hours on basis of completed form</p>		Bishop or archdeacon	Tends to be carried out just before/after pastoral visit	<p>Agreed review form is signed and put in priest's personal file</p> <p>3 objectives for the coming year are identified</p> <p>Any matters discussed or explored are then noted and action taken when necessary</p>	File kept in diocesan bishop's office.	Optional for clergy in their present post before 2002
<p><i>Wakefield</i></p> <p>1 hour discussion on basis of questionnaire</p>	In the context of a full day pastoral visit	Bishop or archdeacon	Every 2 years	Agreed report is taken to monthly staff meeting 'to make sure we all know how someone is getting on so that we can give them suitable support'	Copy of report kept on Bishop's file	

<b>Nature of review and length of interview</b>	<b>Parish input to review</b>	<b>Reviewer</b>	<b>Frequency</b>	<b>Further action</b>	<b>Files</b>	<b>Other features/comments</b>
<i>Winchester</i> 1.5 hours		Ordained trained consultant	Annual			
<i>Winchester</i> Bishop's pastoral consultation		Meeting with suffragan bishop	Every 18 months to two years		Summary forwarded to suffragan and Ordained Ministry advisor	
<i>Worcester</i> Four weeks' notice for preparation, submission of material 2 weeks before review  Meeting of 90 minutes		Initially reviewer allocated randomly but will conduct all subsequent reviews	Every 2 years	Formal letter to reviewee		Applies to stipendiary and non-stipendiary clergy



Nature of review and length of interview	Parish input to review	Reviewer	Frequency	Further action	Files	Other features/comments
<p><i>York</i></p> <p>2 meetings</p> <p>1 to discuss personal evaluation form and churchwardens' form and 1 to discuss review form</p>	<p>Churchwardens are asked to complete an evaluation on parish life and objectives</p>	<p>Clergy chose from a list of approved reviewers, ordained and lay</p>	<p>Every 3 years</p>	<p>Reviewee may ask for a meeting with bishop or archdeacon to discuss matters which have emerged</p> <p>Requests for CME sent to CME officer</p> <p>Objectives are set</p>	<p>Copy of review form sent to bishop and archbishop</p>	<p>Currently only 40 percent participate</p>
<p><i>Europe</i></p> <p>Geographical distances make it difficult</p>						<p>Ministerial review to be considered at a diocesan conference next year</p>

# Annex 6

## Revised Capability Procedure

### Nature of the Capability Procedure

1. The great majority of clergy, readers and licensed layworkers are carrying out their ministry to a high standard. However, there are some cases where problems that are not disciplinary in nature arise, and clergy are falling below an accepted minimum standard as described in the Canons, the Ordinal and the Clergy Terms of Service Regulations.
2. The principal concerns of a capability procedure are to help people to improve and to deal with problems of poor performance before they become too serious to be remedied. It is about ensuring that people have been made fully aware of what is required of them. Proper resources need to be made available in order to give people the opportunity – through training, counselling and other means – to equip themselves to improve their performance (where this is necessary) and to realize their full potential.
3. Cases likely to attract the capability procedure need to be distinguished from those in which people are fulfilling the basic requirements of the post, but no more, and are doing ‘a just good enough job’. In such cases, those concerned may well benefit from further development, help to remotivate them, or even more, any or all of which may support them in working to the best of their ability without the need to institute the formal stages of the capability procedure.
4. Capability procedures should thus be seen as addressing problems which are not disciplinary, where the requirements of the post are not being met, and where removal from office is a real possibility, even if this is an outcome that is to be avoided if

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possible. The procedure is likely, therefore, to apply to those few clerics who are not competent, or where the job is being done but pastoral relationships are breaking down because of, say, an abrasive personality. The use of this procedure would replace the provisions of the Incumbents (Vacation of Benefices) Measure dealing with pastoral breakdown.

5. Lack of capability implies a mismatch between the requirements of the job and the person doing it. Often this mismatch can be avoided by instituting better appointments procedures which seek to test, transparently, the candidate against the requirements of the job; articulating expectations through clearer job profiles and entering into regular, sensitive but frank discussion on how the job is being done. In some cases, it should be possible to address the mismatch by providing the appropriate training, although this requires a willingness on the part of the cleric concerned to participate in training.

### **Basic principles**

6. This procedure is based on the following principles: that the procedure is carried out in a way that is fully in accord with the requirements of natural justice; that proper human resource advice is taken at every stage; that there is a right of appeal at every formal stage; that the cleric has full opportunity to respond to all points made; that a panel should be involved at every formal stage, not a single individual; that the procedure should be based on best secular practice; that the cleric should have the right to be supported by a friend or union representative; and that sufficient notice is given in advance of any appearance before a panel.
7. The procedure fulfils the requirements of the Employment Act 2002 and the Employment Act 2002 (Dispute Resolution) Regulations 2004.
8. Lack of capability is one of the grounds for fair dismissal as far as Employment Tribunals are concerned. However, the decision to dismiss on this ground must never be the outcome of a single meeting, but only after a series of conversations that have recorded unhappiness with performance, provided evidence of opportunities given to improve and develop, and noted where there was persistent failure to improve. Potential removal from office on capability grounds should never come as a bolt from the blue. Conversations about capability issues should have taken place, not only during the regular discussions of how the job is being

done and more general career development discussions, but also on a regular basis as the issues arise. It would be important to provide evidence that removal from office was the last resort, including details of offers of help to enable people to improve their performance.

9. It is difficult to be too precise about what is meant by 'improvement in performance'. Action plans, clearly specifying where improvement is needed, will have to be drawn up, but these must not be used as a means of making additional demands on clergy without appropriate consultation. Rather the action plans will be ways of applying what is *already* required of them in the Canons and Ordinal (and in future by the Terms of Service Regulations) to their particular situation. There needs to be an acceptance that clergy will be less good in some areas than others. The question is whether there are any areas where they fall below the minimum acceptable standard, and, if so, whether this has a significant effect on their ability to carry out the whole of their ministry.

### **Who is covered by the procedure**

10. The procedure applies to all stipendiary clergy, non-stipendiary ministers, ordained local ministers, Church Army evangelists working under a licence from the bishop, stipendiary readers, and licensed lay workers. For reasons of brevity, we use the expression cleric throughout the text.
11. Diocesan Boards of Finance may also wish to consider applying the procedure, with any necessary adjustments, to all their employees, clergy and lay.

### **Instigation of the procedure**

12. The procedure may be used if the bishop, archdeacon or other person acting on their behalf identifies concerns or gets reports of alleged problems which appear to indicate that a cleric is failing to reach the minimum acceptable standard; or where a report under the Clergy Discipline Measure recommends that the matter investigated is not one of discipline but may be related to capability. The procedure is not intended to be used to pursue trivial matters which are best resolved informally, nor is the procedure normally appropriate for dealing with single occurrences unless the occurrence is of such seriousness as to merit this and this must be determined in the light of appropriate advice.

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13. In no circumstances may capability procedures and proceedings under the Clergy Discipline Measure be operated simultaneously, but one type of procedure may be suspended to enable another to take place.

### **Confidentiality**

14. At all stages, it is important to ensure that information is given only to those who need to know, and that those involved realize the need for confidentiality. Breach of confidentiality could undermine the position of the cleric involved.

### **Presence of Human Resource adviser**

15. So far as possible, the Human Resource adviser must be present at each stage of the formal procedure.

### **Cleric's right to be accompanied**

16. At all stages, if the cleric concerned wishes to bring a friend or union representative to any panel, he or she may do so, but should inform the archdeacon or the chair of the relevant panel in advance.

### **Establishing the facts**

17. The matters which prompted the original concerns or report will be considered alongside other information (which may include the results of ministerial reviews) to help provide a picture of the alleged problems. While some cases might be fairly clear-cut others may be more difficult to discern, and might require a sustained accumulation of information. The incidents may be small in themselves, but may represent part of a cumulative and persistent pattern of behaviour that prevents the person from fulfilling the requirements of the post, as measured against what is required of clergy.
18. There is a danger of inferring lack of capability where a cleric's cultural upbringing is different to that of the majority around him or her. This may be particularly acute where the cleric has a different ethnic background and will require those operating the procedure to be fully aware of what those differences could be and how they may best be handled. Ultimately it may mean managing the expectations of others to become more realistic or sensitively pointing out to a cleric how his or her behaviour or style could be moderated to avoid misunderstandings.
19. Where the facts are disputed, the standard of proof should be 'the balance of probabilities' and not 'beyond reasonable doubt'.

## Possible outcomes

20. One result of using this procedure may be that, after the facts have been gathered and assessed, a complaint is found to be unjustified or trivial. It may also prove to have been a one-off occasion, and thus there may be no capability problems. Another outcome may be that the expectations surrounding the job and the cleric are unrealistic. In this situation it will be necessary to examine the job description, in order to check whether it is realistic or whether it needs revision in the light of changing circumstances.
21. Other outcomes may include providing additional training or counselling, starting proceedings under the Clergy Discipline Measure, or, in some cases, removal from office.

## Before the formal stages of the procedure

22. It is hoped that discussions about expectations would resolve many issues at the informal stage of the procedure. This is the stage where any description of the job should be examined in order to see whether it is realistic or whether it needs revision in the light of changing circumstances.
23. Any reports which appear to raise issues of capability should be referred initially to the archdeacon (or suffragan bishop or dean where appropriate; the term *archdeacon* in what follows applies to other officers where appropriate). He or she may also raise the issue themselves. The *archdeacon* will collect information about the issue(s); frivolous and unsubstantiated reports should be weeded out at this point. If the person reporting the alleged capability problem is not prepared to be put on record or participate in the procedure, the *archdeacon* should take the matter no further. If the matter concerns a parochial cleric and the person reporting it is not one of the churchwardens, the *archdeacon* may discuss the matter with the churchwardens, and ensure that both the person reporting the issue and the cleric are informed about the results of the conversation.
24. If he or she decides to take the matter further, the *archdeacon*, in collaboration with the HR adviser should arrange an interview with the cleric; alerting him or her in advance to the concerns raised, and giving at least 10 days' notice of the interview. At the interview the *archdeacon* reviews the matters with the cleric, taking account of his or her strengths and gifts and acknowledging that it is not possible to be good at everything; explores with the cleric any contributory factors (such as domestic circumstances); explores what can be offered to the cleric to assist in improving

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performance (for example, training, mediation, or a period of leave); and seeks to agree with the cleric a form of action to improve performance and sets a date for reviewing progress. If the matter is the result of reports from others, they will be told that action is being taken, that improvement is expected, and that he or she will be asked to comment on this at a later stage. At this stage, nothing is given to the diocesan bishop in writing.

25. After the agreed interval, the *archdeacon* with the collaboration of the HR adviser reviews with the cleric and those who have reported the problems whether improvement has taken place as hoped. If this does not include the churchwardens, the *archdeacon* may take their advice. Any separate conversations with those who raised the matter or churchwardens must be reported to the cleric. If no further action is required, the archdeacon informs the cleric and those who raised the problem in writing.
26. Each stage in the process must be undertaken properly and appropriate time needs to be given for improvement in the hope that it might not be necessary to move on to the next stage.

### **Informal warning**

27. If the *archdeacon*, as a result of a lack of improvement in the cleric's performance, decides to issue an informal warning, he or she does so in writing indicating that performance will be monitored over a specified period and that, if there is a failure to improve, the next stage may be formal action in accordance with the procedure; a copy of the letter will be put on the cleric's personal file. The person(s) who reported the matter and others as appropriate will be asked to assist in the monitoring process, keeping records.
28. At the end of the set period, the *archdeacon* gathers information from the appropriate people and from the cleric and then decides whether or not there has been sufficient improvement and whether or not to move to the formal stage of the procedure. If the improvement has taken place, the *archdeacon* writes to the cleric confirming this, and the note of the informal warning is removed from the personal file.

### **Formal Procedure – stage 1: first formal warning**

29. If, in the light of the outcome, the *archdeacon* decides that the cleric's standard of performance has failed to improve, and that it is right to move on to the formal stage of the procedure, the *archdeacon* through the HR adviser writes to the cleric requiring

him or her to attend an interview with the panel, giving at least 10 days' notice providing details of the information about the performance problem(s), and inviting the cleric to bring a friend or union representative. Anyone who has reported the capability problem(s) and as appropriate the churchwardens or others who have been involved in monitoring the cleric's performance are also required to attend.

30. At the interview, the panel is required to consider the information provided, to give the cleric the opportunity to respond to the allegations and provide explanations; to give the people who have reported problems and the cleric and opportunity to call witnesses; and to decide whether to give a formal warning.
31. If the panel decides that a formal warning should be given, the *archdeacon* writes to the cleric notifying him or her of this, spelling out the improvement expected, and indicating that further action will be taken if there is no improvement within a specified time period (normally not less than 3 months) and that this may lead to eventual removal from office; places a copy of the warning on the personal file; and informs the diocesan bishop in writing.
32. The cleric has the right to appeal against the panel's decision, to an appeal panel. None of those on the original panel may serve on the appeal panel, although the appeal panel may ask members of the original panel to appear before it or provide written evidence.
33. At the end of the set period, the *archdeacon* again gathers information from those who have reported problems with the cleric's capability and others as appropriate and from the cleric the *archdeacon* may decide that improvement has taken place, and so inform the diocesan bishop; that more time for improvement should be given; or that it is necessary to move to the next stage.

### **Formal Procedure – stage 2: final formal warning**

34. A similar procedure is followed to that at Stage 1. If the panel agrees that a final formal warning should be given, the diocesan bishop, who chairs the panel, writes to the cleric with a final formal warning, which he or she is told will be placed on the personal file, and informs the cleric that if there is no satisfactory improvement within a specified time period (normally not less than 3 months), the outcome may be removal from office. Where the diocesan bishop considers it appropriate, he may nominate a bishop from a different diocese to act on his behalf if he has been involved at an earlier stage.



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34. The cleric has the right to appeal against the panel's decision, to an appeal panel.
35. At the end of the set period, the diocesan bishop again gathers information from those involved with the problem and others as appropriate and from the cleric. The bishop may decide that appropriate improvement has taken place, or decide to move to the removal from office stage.

### **Formal Procedure – stage 3: removal from office**

36. If the diocesan bishop considers that the required improvement has not taken place, the bishop writes to the cleric requiring him or her to attend a formal hearing of the final capability panel, and notifying him or her that they have failed to meet required standards and that removal from office is being proposed. The cleric is given the opportunity of making a representation to the panel as to why he or she should not be removed from office. If the panel decides to remove the cleric from office, the cleric will be given written reasons, and details of appeal rights.

### **Access to an Employment Tribunal**

37. Clergy who are removed from office following the capability procedure have the right to appeal to an Employment Tribunal.

### **After removal from office**

38. Where the final capability panel considers that the cleric is unsuitable for his or her current position, and should be removed from it, but may be able to meet the requirements of other posts, the panel will encourage the cleric to seek advice from the Clergy Appointments Adviser and the HR adviser in obtaining a new post. Where the bishop/archdeacon believes that the cleric cannot meet the required standard (even with training) and is unsuitable for an equivalent post in another parish/diocese, and the cleric recognizes this, a severance payment may be negotiated (in accordance with national guidelines). Before any offers of an alternative appointment are made, HR and legal advice must be obtained.

### **Membership of the panels**

39. Details of the composition of the panels are given in the Table. The cleric will have the right to object to membership of the panel. Those involved in dealing with capability procedures should have appropriate training and be aware of people's cultural differences

(particularly those relating to ethnicity), which, in some circumstances, could lead to wrong assumptions.

40. There will be a need to ensure that no member has had previous involvement with the case, before the procedure was set in train or at earlier stages. Where necessary, for example because of illness or a member of the panel moving on to another diocese, the bishop could ask a substitute of equal standing to serve. Cathedral statutes for tenure and dispute resolution would be overridden where necessary.
41. A panel's decision may be reached by a majority of two out of three panel members (or, where there are four members on the panel, three out of four).

### **Use of a shortened procedure**

43. There will be exceptional types of cases in which the procedure can be shortened, but the principles of natural justice and the opportunity to appeal against removal from office must not be jeopardised. They will include:
  - (a) Cases where immediate improvement can be expected, through an easily acquired alternative pattern of behaviour or action likely to produce immediate effects. If the expected improvement does not occur, and there are no mitigating circumstances such as ill health or personal difficulties, the procedure could move through each stage fairly quickly.
  - (b) Cases arising during the first year of a cleric's tenure in *any* post or during the first three years of a title post where it becomes clear that he or she is not suited to the post and so not capable of undertaking what is required. In the case of assistant curates, it will be important to bear in mind that they are still in a learning role, and that allowance for this needs to be made before the formal procedure is activated.
44. In these very particular cases, the Archdeacon, with advice from the HR adviser, may decide that a shortened procedure should be used. Only one stage of the procedure may be dropped. That is, there must always be an informal warning stage and a formal warning stage with appeal rights, prior to holding a hearing which might result in removal from office.

**Membership of panels to hear cases and appeals**

Persons involved	Parochial and cathedral clergy (except Dean), including NSMs, OLMs, (stipendiary) readers and other licensed clergy	Dean or Archdeacon	Bishop
Informal Warning	Normally Archdeacon but Suffragan Bishop or Dean if Archdeacon unable to act	Diocesan Bishop	Archbishop
First Formal Warning	Archdeacon (or Suffragan Bishop or Dean) with 1 priest <sup>1</sup> and 1 layperson <sup>1</sup>	Diocesan Bishop with 1 priest <sup>1</sup> and 1 layperson <sup>1</sup>	Archbishop with 1 priest <sup>2</sup> and 1 layperson <sup>2</sup>
<i>Appeal</i>	<i>Archdeacon (or Suffragan Bishop or Dean) not involved with first formal warning, with Chair of Diocesan House of Clergy and Chair of Diocesan House of Laity.</i>	<i>Other Diocesan Bishop<sup>2</sup> with 1 priest<sup>2</sup> and 1 layperson<sup>2</sup></i>	<i>Other Archbishop with 1 priest<sup>2</sup> and 1 layperson<sup>2</sup></i>
Final Formal Warning	Diocesan Bishop with Archdeacon (or Suffragan Bishop or Dean), 1 priest <sup>1</sup> and 1 layperson <sup>1</sup>	Diocesan Bishop with 1 priest <sup>1</sup> and 1 layperson <sup>1</sup>	Archbishop with: 1 priest <sup>2</sup> and 1 layperson <sup>2</sup>
<i>Appeal</i>	<i>Archdeacon (or Suffragan Bishop or Dean) not involved with first formal warning, with Chair of Diocesan House of Clergy and Chair of Diocesan House of Laity</i>	<i>Other Diocesan Bishop<sup>2</sup> with 1 cleric<sup>2</sup> and 1 layperson<sup>2</sup></i>	<i>Other Archbishop with: 1 cleric<sup>2</sup> and 1 layperson<sup>2</sup></i>
Final capability panel	Diocesan Bishop with Archdeacon (or Suffragan Bishop or Dean) and 1 priest <sup>3</sup> and 1 layperson <sup>3</sup>	Diocesan Bishop with 1 priest <sup>3</sup> and 1 layperson <sup>3</sup>	Archbishop with 1 priest <sup>3</sup> , 1 layperson <sup>3</sup> , and Prolocutor of the Province
<i>Appeal</i>	<i>Diocesan Bishop<sup>2</sup> with 1 priest<sup>2</sup> and 1 layperson<sup>2</sup></i>	<i>Other Diocesan Bishop<sup>2</sup> with Suffragan Bishop<sup>2</sup> and 1 Layperson<sup>2</sup></i>	<i>Other Archbishop with Prolocutor of other Province Chair of General Synod House of Laity</i>

- 1 Nominated from another parish by the Diocesan Bishop
- 2 Nominated from another diocese by another Diocesan Bishop
- 3 From another diocese nominated by the Archbishop of the Province (the Vicar General where the complaint is against a priest in the Diocese of Canterbury or York)
- 4 *In each case, the first person mentioned will chair the panel. If a named office-holder (e.g. a Chair or Prolocutor) is unable to act, he or she will nominate a substitute.*





