

A submission to the Scrutiny Committee in respect of the proposed 'Legislative Reform (Patronage of Benefices) Order 2019' (the 'Proposed Order').

THE PROPOSED ORDER CANNOT BE VALIDLY MADE

It is intended that the Proposed Order be made under the provisions of the Legislative Reform Measure 2018 (the '2018 Measure'). It is our submission that the provisions of the 2018 Measure do not provide a power for the Proposed Order to be made.

THE GROUNDS OF OUR SUBMISSION THAT THE PROPOSED ORDER CANNOT BE VALIDLY MADE

All statute law, including orders made under powers conferred by statute, must be construed in the context of its purpose. The purpose of the 2018 Measure is clearly to allow amendments to be made which are of limited scope, of a primarily administrative nature and to which it is appropriate to apply the reduced level of scrutiny which applies to the procedure for which it provides rather than that which is required for a Measure to be passed. There are three reasons why the Proposed Order falls far outside this purpose and why, therefore, the Proposed Order cannot be made under the powers contained in the 2018 Measure.

The First Ground: The 1986 Measure provides protections of great importance and the changes which would be made to it by the Proposed Order are comprehensive

First, the changes made by the Proposed Order are far reaching and affect a Measure, the Patronage (Benefices) Measure 1986 (the '1986 Measure') which is of the greatest importance in providing protections which balance the interests of the Bishop, Patron and Parochial Church Councils ('PCCs') involved.

The Second Ground: The 1986 Measure is designed to provide protections to the laity and the use of the 2018 Measure procedure prevents proper lay scrutiny of the proposed changes to the 1986 Measure

Secondly, the effect of the procedure under the 2018 Measure is to remove the Proposed Order from the effective scrutiny of the House of Laity which is clearly inappropriate to a Measure, such as the 1986 Measure, an important part of the purpose of which is to protect the laity, represented by the PCCs of the benefice concerned, from an inappropriate exercise of his powers by the Diocesan Bishop concerned.

The Third Ground: The condition of the 2018 Measure s.2(1)(d) is not satisfied

Thirdly, the judgement to be made by the Archbishops' Council under the 2018 Measure s.2(1)(d) is clearly the exercise by a body of an evaluative function under a duty imposed by statute. It is clear from the principle established more than seventy years ago in the case of *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1947] EWCA Civ 1 that where a body exercises an evaluative function under a duty imposed by statute the exercise will be invalid if it is manifestly unreasonable.

It is clear that the Proposed Order removes necessary protections of the interests of the PCCs of the benefice in respect of a Vacancy and, therefore, it would be manifestly unreasonable for the Archbishops' Council to consider, as it is required to do if the 2018 Measure procedure is to be used, that the conditions of the 2018 Measure s.2(1)(d) are satisfied by the Proposed Order.

MORE DETAIL OF THE GROUNDS OF OUR SUBMISSION

In the remainder of this submission we explain these grounds in more detail.

The First Ground: The 1986 Measure provides protections of great importance and the changes which would be made to it by the Proposed Order are comprehensive

In response to the Consultation Document on the Proposed Order published in November 2018 (the 'Consultation Document') we made a submission (the 'Consultation Submission') on 21st December 2018, a copy of which is attached to this e-mail.

In that Consultation Submission we explained (at para. 2.2.1) the importance of the provisions of the 1986 Measure in protecting the PCCs of a benefice in respect of the appointment to a Vacancy in the benefice against inappropriate exercises of their powers by the Diocesan Bishop and Patron.

In the Consultation Submission we said:-

- 4.1.1 *'As we have said, [See para. 2.2.4 of the Consultation Submission] the 1986 Measure is of the greatest importance in, inter alia, balancing the interests of the parishes of a benefice against those of the patron and the bishop. The effectiveness of that balancing is dependent upon the practicality of the procedural provisions which it contains.*
- 4.1.2 *The Legislative Reform Measure 2018 is essentially a measure designed to allow legislation to be amended with less than the normal level of scrutiny where the legislation is 'burdensome'. It is burdensome if it imposes a financial cost or causes an administrative inconvenience or an obstacle to efficiency. [Legislative Reform Measure 2018 s.1(2)] It is clear, however, that not every such burden may be removed under this reduced level of scrutiny. The fact that it is expressly stated that burdens which might be removed under the procedures include burdens which result from an inconsistency or anomaly in legislation or from the form of the legislation [Legislative Reform Measure 2018 s.1(4)] indicates that the purpose of the measure is concerned not with major matters of principle but legislative faults caused by inadvertence or which are of lesser importance. Specifically it is provided that the Archbishops' Council may use this procedure only if, inter alia, 'the provision does not remove any necessary protection.' [Legislative Reform Measure 2018 s.2(1)(d)]*
- 4.1.3 *It seems to us entirely inappropriate to make changes by means of this truncated procedure to an enactment providing important safeguards*

for parishioners particularly as those safeguards are dependent for their effectiveness upon their practicality. This is especially the case because part of the purpose of the 1986 Measure is to protect parishioners, the laity, against a diocesan bishop using his powers in respect of a vacancy inappropriately and the effect of using this truncated procedure is to remove the changes from the scrutiny of the House of Laity of the General Synod.'

In the context, this was clearly a submission that making substantial amendments to the 1986 Measure, as the Proposed Order would do, is not within the purposes of the 2018 Measure and is, therefore, *ultra vires* because of the fundamental importance of the 1986 Measure and of its practical operation, and because of the substantial changes which would be made by the Proposed Order if it were to be effective.

It was also clearly a submission, under the Second Ground which is stated above and is considered in more detail below, that making the Proposed Order is not within the power conferred by the 2018 Measure.

The Explanatory Document (the 'Explanatory Document') issued by the Archbishops' Council in March 2019 in response to the responses made to the Consultation Document gives no adequate account of our submission on this point (relegating its inaccurate summary to page 73 of Annexe C) seeming not to recognise that our submission was that the amendments which would be purported to be made under the Proposed Order were not within the powers conferred by the 2018 Measure.

The Second Ground: The 1986 Measure is designed to provide protections to the laity and the use of the 2018 Measure procedure prevents proper lay scrutiny of the proposed changes to the 1986 Measure

The effect of making changes to the 1986 Measure under the procedure provided by the 2018 Measure would be to allow changes to be made to the important protections conferred by the 1986 Measure on PCCs of a benefice, as representatives of the laity, against an inappropriate exercise by a Bishop of his powers in respect of the Vacancy without these changes being subject to effective scrutiny by the House of Laity.

Although the Archbishops' Council includes representatives of the laity, of its nineteen members only two are lay members who have not been appointed by one or other of the Archbishops. Plainly these two members cannot exercise a scrutiny of orders made under the 2018 Measure sufficient to prevent the interests of the laity being overridden. It is, therefore, clearly outside the purpose of the 2018 Measure to apply the procedure provided by that Measure to provisions, such as the provisions of the 1986 Measure, which are designed to protect the laity, represented by the PCCs of a benefice, from an inappropriate exercise of their powers by members of the episcopate.

The Third Ground: The condition of the 2018 Measure s.2(1)(d) is not satisfied

As we explain in the Consultation Submission (at paras. 2.2.1 – 2.2.3) Bishops have a financial interest in respect of a Vacancy in delaying an appointment. Anecdotal evidence, including the submissions made in response to the Consultation Document by other parties (see Annexe C of the Explanatory Document under the heading 'Other

Comments'), suggests that it is not uncommon for Diocesan Bishops to delay appointments deliberately.

The 1986 Measure contains important protections for the PCCs of a benefice against the Diocesan Bishop creating unnecessary delays. Some of those protections would be removed by the Proposed Order were it to be made and to be effective.

We have seen that the 2018 Measure provides that the Archbishops' Council may include a provision in an order under the 2018 Measure only if, *inter alia*, the condition of section 2(1)(d) is satisfied that the Council considers that the provision does not remove any necessary protection.

Proposed Article 2(3)

Article 2(3) of the Proposed Order amends the 1986 Measure s.7(2).

The Consultation Document, at para. 17, says that:-

'The Measure [this is a reference to the 1986 Measure s.7(2)] envisages – in the case of resignation or retirement – that the bishop might give formal notice of the vacancy triggering the commencement of the statutory process before the benefice actually becomes vacant; but it does not make this mandatory.'

For reasons which we explained at paras. 3.2.2 – 3.2.4 of the Consultation Submission, but which were ignored in Annexe C of the Explanatory Document, this statement at para. 17 of the Consultation Document is incorrect. The Bishop does not have a discretion under the 1986 Measure s.7(2) as to whether or not to give notice when he becomes aware that a benefice is to become vacant. He has a duty to do so as soon as he becomes so aware. The effect of Article 2(3) of the Proposed Order is that the Bishop, in these circumstances, would not be required to give notice until the Vacancy had actually occurred.

The provisions of section 7(2) are part of the protections conferred on PCCs by the 1986 Measure against the creation of unnecessary delay. Clearly were the Proposed Order made and legally effective it would *'remove ...[a]... necessary protection.'*

The Archbishops' Council would, therefore, be manifestly unreasonable if it were to consider that the change which would be made by Article 2(3) of the Proposed Order meets the conditions of the 2018 Measure s.2(1)(d). For that reason the making of the Proposed Order is not permitted by the 2018 Measure.

Proposed Article 2(6)

The Explanatory Document claims at para. 58 that, *'Article 2 would remove or reduce burdens as defined by section 1 of the Legislation Reform Measure by significantly reducing the scope for delay in the commencement of the process for filling a vacancy and thereby removing an obstacle to efficiency.'*

Article 2(6) provides a new power for the Bishop to delay the start date of the procedure applying to the Vacancy by up to three months and so, far from removing the scope for delay, increases it by removing one of the protections conferred on PCCs by the 1986 Measure.

The Archbishops' Council would therefore, be manifestly unreasonable if it were to consider that the change which would be made by Article 2(6) of the Proposed Order meets the conditions of the 2018 Measure s.2(1)(d). For that reason, also, the making of the Proposed Order is not permitted by the 2018 Measure.

OUR SUBMISSION

We submit, therefore, that this proposal to make substantial changes to the 1986 Measure under the 2018 Measure by means of the Proposed Order is an attempt to subvert the purposes of both Measures, to exploit the procedures of the latter Measure to make changes of a nature which could not have been envisaged when it was enacted and is *ultra vires*.

As we said in the Consultation Submission, the provisions contained in the 1986 Measure require substantial revision but that revision cannot be made under the 2018 Measure for such revision is outside the scope of the power conferred by that Measure. Rather it can, and should, only take place under a new Measure because it is only a Measure which is subject to proper and full scrutiny by representatives of the laity.