

## GENERAL SYNOD

### DRAFT SCHEME AMENDING THE DIOCESE IN EUROPE CONSTITUTION

#### Explanatory notes

1. The Diocese in Europe ('the Diocese') is regulated by its Constitution ('the Constitution'), as last amended in 2014. Paragraph 48 of the Constitution allows it to be amended by a process involving:
  - the inclusion of the proposed amendments in a draft scheme;
  - the approval of the scheme by not less than two-thirds of the members of the diocesan synod present and voting;
  - the laying of the scheme before the General Synod; and
  - if the scheme amends certain specified provisions in the Constitution (or, in the case of a scheme which does not make such amendments, if a member of the General Synod requests that the scheme be debated) the approval of the draft scheme by the General Synod.
2. The Diocese wishes to make a number of amendments to the Constitution and a draft scheme ('the Scheme') has accordingly been prepared, which is set out in GS 2169. The amendments relate to the licensing of clergy, and bring the arrangements in the Diocese more closely (though not entirely) in line with the other dioceses of the Church of England. The amendments to be made by the Scheme received the unanimous approval of the members of the diocesan synod of the Diocese present and voting at its meeting in June 2019.
3. The Scheme is now accordingly laid before the General Synod. As none of the amendments to be made by the scheme relate to the specified provisions referred to above, the draft scheme does not require the approval of the General Synod. However, it is open to any member of the Synod to give notice of a desire that the draft Scheme be debated. Any such notice must be given in accordance with Standing Order 13 by not later than 5.30 p.m. on Monday 10th February.
4. The effect of the amendments and the reasons for making them are set out in the attached explanatory memorandum which was provided to the diocesan synod when the amendments were considered by it

**The Legal Office  
Church House  
Westminster**

**January 2020**

DIOCESE IN EUROPE

DIOCESAN SYNOD

DRAFT ARCHBISHOP'S INSTRUMENT

DRAFT SCHEME

AMENDING THE DIOCESE IN EUROPE CONSTITUTION 1995

EXPLANATORY MEMORANDUM

**Summary**

1. The proposed Archbishop's Instrument and the draft Scheme together make provision for a clearer legal basis for the grant and termination by the Bishop of clergy licences in the Diocese. In particular, the draft Scheme specifies
  - a. the limited range of circumstances in which a licence may be terminated;
  - b. the limited range of circumstances in which a licence may be granted for a fixed or limited term; and
  - c. a clear and formal basis for the grant of a licence to clergy over the age of 70.
2. The present proposals before the Synod are also intended to bring the arrangements for the licensing of clergy in the Diocese more closely into line with those in the rest of the Church of England, and so contribute to the continuing efforts of the Diocese to ensure that it operates, wherever practicable, on substantially the same basis as other dioceses.

**Legal context**

3. The licensing of clergy in the Diocese is undertaken pursuant to
  - a. the general application of the Canons and other ecclesiastical law of the Church of England, subject to modifications and exceptions provided for in the Constitution of the Diocese in Europe ("the Constitution"), as set out at paragraph 22(a) of the Constitution; and
  - b. the specific provision contained in paragraph 17 of the Constitution. This provides for the Bishop to grant his licence to a priest or deacon in accordance with Canon C12.
4. The most significant development in recent years relating to the holding of an ecclesiastical office in the Church of England was the introduction of Common Tenure. This is the name given to the terms of service under which ecclesiastical office holders to whom the relevant legislation applies hold office. It was introduced by the Ecclesiastical Offices (Terms of Service) Measure 2009, with detailed provisions contained in the Ecclesiastical Offices (Terms of Service) Regulations 2009. The latter has been amended by five sets of Amendment Regulations.
5. After consideration by the Bishop's Senior Staff, it was proposed that the Ecclesiastical Offices (Terms of Service) Measure 2009 should not apply in the Diocese. This was essentially because it would have afforded clergy of the Diocese a series of rights, and imposed obligations, akin to the general employment regime in the United Kingdom, when almost all clergy of the Diocese will be subject to the employment regime of the legal jurisdiction in which they live and exercise their ministry. The Constitution provides that the ecclesiastical law of the Church of England applies in the Diocese only "so far as the local law of any state or country shall permit" (paragraph 22(a)). Two different and

potentially conflicting legal regimes would have been likely to have caused considerable confusion, and given that the Diocese operates in over 50 different legal jurisdictions, a lack of clarity and certainty would have been inevitable. Furthermore, the principle of all clergy holding office on the basis of substantially the same terms – *Common Tenure* – was, and remains, something of a ‘mission impossible’ in the legal context in which the Diocese is set. Additionally, the Terms of Service legislation deals with a range of matters that it would not be practical to translate into the Diocese in Europe context, for example the provisions relating to the provision of housing.

6. As a result, and following consideration by the Diocese in Europe Diocesan Synod in 2010, the Archbishop of Canterbury deemed it appropriate to except the Ecclesiastical Offices (Terms of Service) Measure 2009 from application in the Diocese. The relevant provision is contained in the Instrument under the hand and seal of the Archbishop of Canterbury dated 31<sup>st</sup> January 2011.
7. In consequence of the Ecclesiastical Offices (Terms of Service) Measure and Regulations becoming law, an amendment was made to Canon C12. Amending Canon No.29 repealed paragraphs 5 and 6 of Canon C12. Those paragraphs dealt with the termination of a licence granted by the bishop to a minister to serve within the diocese. The intention was that the termination of a licence should thereafter be regulated, not by Canon C12, but by section 3 of the Ecclesiastical Offices (Terms of Service) Measure. This is now the position in the other dioceses of the Church of England (including the Diocese of Sodor and Man). However, as the Measure does not apply in the Diocese in Europe, the relevant provisions have no force in the Diocese.

#### **Archbishop’s Instrument**

8. The Archbishop’s Instrument provides that paragraph 3 of Amending Canon No.29 shall not apply in the Diocese so that paragraphs 5 and 6 of Canon C12, which were thereby repealed, shall continue to have full force and effect in relation to the grant and revocation by the Bishop of a licence to any ordained minister in the Diocese. It thus restores to the Bishop a power to terminate a licence, and provides proper Canonical authority for such action in the Diocese where other diocesan bishops are able to rely on statute law in theirs.

#### **Draft Scheme**

9. The draft Scheme reflects a range of provisions contained in the Ecclesiastical Offices (Terms of Service) Measure and the Ecclesiastical Offices (Terms of Service) Regulations (as variously amended) relating specifically to the grant and revocation of clergy licences. Where the Archbishop’s Instrument restores a power of revocation to the Bishop, the Scheme contains that power by restricting it to use only in limited circumstances.
10. New **Paragraph 17A** describes the circumstances in which the licence of a deacon or priest in the Diocese may be brought to an end. These are limited and may be summarised as follows:
  - a. on the resignation, retirement or death of the person holding the licence;
  - b. on reaching the age of 70 (which brings the Diocese into line with the rest of the Church of England), though with the possibility for the grant of a further licence or licences to serve beyond that age [see new Paragraph 17C];
  - c. where the office holder is removed from office following disciplinary proceedings or under the capability procedure;

- d. where the appointment falls within one of the restricted categories of fixed-term or limited-term appointments set out in new paragraph 17B, and the term expires or otherwise determines; and
  - e. where a licence is held in connection with a contract of employment (for example, as a diocesan office holder or bishop's chaplain) and that contract comes to an end.
11. New **Paragraph 17B** deals with the circumstances in which an office holder may be given a fixed or limited term licence. Only if the relevant circumstances apply may a licence be granted for a fixed or limited term. They may be summarised as follows:
- a. the post is created to cover another office holder's authorised absence from work, for example on maternity or long-term sick leave;
  - b. the post is designated as a training post where the office holder is required to undertake initial ministerial education - that is, typically, a title post [Para 17B(3)];
  - c. the appointment is designated as a post subject to sponsorship funding, that is, it is dependant wholly or partly on external funds, as described in paragraph 17B(4);
  - d. the role is designated as a probationary post, which is an appointment intended to facilitate the office holder's return to ministry where that person has not held ecclesiastical office for a year or more, or where he or she has been subject to the capability procedure or disciplinary proceedings [Para 17B(5)-(7)];
  - e. the licence is to be held in conjunction with another licence or role;
  - f. the office holder does not have the right of abode or unlimited leave to remain in the state(s) to which the appointment relates;
  - g. the office holder requires the written permission of the Archbishop of Canterbury pursuant to the Overseas and Other Clergy (Ministry and Ordination) Measure 1967 in order to be able to officiate as a priest or deacon;
  - h. the post is designated as an interim post [Para 17B(8)];
  - i. the Bishop considers the grant of a fixed or otherwise limited term licence to be necessary in order to avoid significant prejudice to the interests of the office holder or of the Diocese. The Bishop may only proceed on this basis if he is acting with the consent of the Bishop's Council.
12. Para 17B(1)(i) does not reflect a parallel provision in the Common Tenure regime: it is uniquely for use in the Diocese in Europe. The need for such a provision has arisen out of the particular situation which currently exists in respect of the membership of clergy of the Diocese in Europe of the Church of England clergy pension scheme. It is beyond the scope of this memorandum to set out the pension position in detail, but in order to ensure that clergy of the Diocese may normally continue to be, or may join, the Church of England clergy pension scheme, it has been necessary for the past decade or so to limit the term of clergy licences to 5 years. Such licences have normally been renewable.
13. The Diocese continues to engage constructively with the Church of England Pensions Board in the hope of finding a means of overcoming the need to limit the term of licences in the Diocese in this way. However, under current pensions legislation and the associated regulatory regime, the serious risk (indeed, likelihood) of not limiting the term of licences would be that clergy would automatically cease to be members of the Church of England pensions scheme. The special provision at Para 17B(1)(i) is intended, therefore, to provide a proper legal basis on which licences may be limited in such circumstances. It is the Bishop's intention to bring a paper to the Bishop's Council in October setting out the position and current approach, which has been in place for around 10 years, so that the Bishop's Council has an opportunity to give its consent prior to the Constitutional amendments coming into force.

14. Where a fixed or limited term appointment is made in the circumstances described above, it comes to an end on the expiry of the fixed term (subject to any extension of that term) or the occurrence of the limiting event.
15. Paragraph 17B(2) makes provision for all clergy who are to hold a fixed-term or otherwise limited licence to be provided, prior to the grant of the licence, with a written statement of particulars including certain specified information.
16. New **Paragraph 17C** sets out the basis on which an office holder in the Diocese may be appointed, or may continue to hold office, beyond the age of 70. The new paragraph reflects the same approach as the Ecclesiastical Offices (Terms of Service) (Amendment) Regulations 2017.
17. The present position in the Diocese is that, unlike the rest of the Church of England, there is no specified retirement age for licensed clergy other than dignitaries. Thus, a bishop, dean, archdeacon and residentiary canon cease to hold office in the Diocese on their 70<sup>th</sup> birthday, subject to the possibility of a limited extension, by virtue of the provisions of the Ecclesiastical Offices (Age Limit) Measure 1975. However, almost all other clergy of the Diocese currently have no set retirement age as they do not fall within the scope of the 1975 Measure, and do not hold their licences under Common Tenure.
18. The new provisions introduce a common retirement age of 70 for all licensed clergy in the Diocese, irrespective of role or office held. However, new paragraph 17C also makes comprehensive provision for the possibility of clergy holding office beyond the age of 70.
19. A person holding office in the Diocese as a dignitary (for these purposes, bishop, dean, chancellor of a pro-cathedral or archdeacon) may be continued in office for one or more fixed terms up to a maximum age of 75 (i.e. the day of the person's 75<sup>th</sup> birthday). In accordance with the Common Tenure arrangements in place in the rest of the Church of England, there is no provision for a person who has already attained the age of 70 to take up a new appointment to any of these offices or roles.
20. Paragraph 17C also provides for a person to be licensed to an office or role, other than as a dignitary, or for that person's licence to be extended, after he or she has attained the age of 70. Such a licence must be for a fixed term, subject to the possibility of extension for one or more further fixed terms. Again, in accordance with the Common Tenure arrangements in place in the rest of the Church of England, there is no upper age limit prescribed for the new grant or continuation of a licence which does not relate to a role as a dignitary.
21. Where the Bishop is satisfied that a person may be appointed or continue to hold office beyond the age of 70, he will issue a formal Direction which authorises the grant of a new licence, or extension of an existing licence. Any such direction must be made in accordance with the provisions of paragraph 17C.
22. A Direction may not be made in respect of a person over the age of 70 unless the Bishop (or the Archbishop of Canterbury, as the case may be) considers that the person concerned will be capable of performing their duties throughout the period for which the person is to hold office.
23. Furthermore, the Bishop may not make a Direction under sub-paragraph (5) unless he considers it to be desirable in view of the pastoral needs of the chaplaincy or congregation

concerned or of the Diocese; and has obtained the consent of the chaplaincy council (in relation to chaplaincy roles).

24. The Archbishops' Council has issued guidance in relation to holding office beyond the age of 70, and the Bishop (and the Archbishop of Canterbury, where appropriate) are required to have regard to that guidance before making a decision as to whether to make a Direction or not.
25. A Direction must always be in writing and will be prospective: it cannot take effect retrospectively or extend the term of a licence that has already expired.

*Procedure*

*(a) Archbishop's Instrument*

26. The Constitution provides a mechanism whereby the application in the Diocese of the Canons and other ecclesiastical law of the Church of England may be made subject to such modifications or exceptions as are deemed appropriate by the Archbishop of Canterbury. Proposals for any such modifications or exceptions may only be made by the Bishop after consultation with the Diocesan Synod; and the Archbishop must act with the concurrence of the Vicar-General of the Province of Canterbury. The final Instrument must be communicated to the General Synod and made available for inspection to members, following notification.
27. **The Synod is, therefore, invited to approve the form of the proposed Archbishop's Instrument and to support the submission by the Bishop to the Archbishop of Canterbury of a draft Instrument substantially in the form laid before the Synod, in accordance with paragraph 22 of the Constitution of the Diocese.**

*(b) Constitutional amendments*

28. The procedure for amending the Constitution is set out at paragraph 48. This involves setting out the precise drafting amendment proposals in a draft scheme for presentation to the Diocesan Synod. If it is approved by not less than two-thirds of the Synod, it is laid before the General Synod for approval. A negative resolution procedure applies (i.e. a formal debate is only necessary if a member of General Synod gives notice of a wish for it to be debated) other than in relation to amendments to certain provisions, which are not affected in this instance.
29. **The Synod is, therefore, invited to approve the proposed amendments to the Constitution of the Diocese embodied in the draft Scheme laid before the Synod, and to support the Bishop laying the Scheme before the General Synod, in accordance with paragraph 48 of the said Constitution.**

Aiden Hargreaves-Smith  
*Registrar and Bishop's Legal Secretary*  
May 2019