

## Legal practice note on issues arising from Living in Love and Faith

*This practice note has been prepared by the Provincial Registrars to assist diocesan registrars and others involved in addressing legal issues that could arise from recent House of Bishops' decisions relating to prayers etc. for same-sex couples that are part of the Living in Love and Faith workstream. It is not a substitute for case-specific legal advice.*

**Part 1** provides information and guidance on how to approach legal issues that are likely to be raised in two different scenarios. Each involves congregations and clergy distancing themselves from the structures of the Church of England.

**Scenario 1** covers the situation where a parish declares itself to be out of communion/fellowship with diocesan Bishop etc. but otherwise carries on.

Issues covered include:

- parish share, stipend etc., pastoral reorganisation
- PCC property and the role of the diocesan authority
- transfer/diversion of funds

**Scenario 2** covers the situation where clergy/a congregation cease to be part of the Church of England.

Issues covered include:

- clergy and laity: how they might leave the Church of England
- resulting vacancies in benefices
- PCC membership
- use of church buildings and parsonages
- PCC funds and parochial trusts

**Part 2** provides information and guidance on legal challenges that might be brought in relation to the use of the Prayers of Love and Faith.

Issues covered include:

- proceedings under the Clergy Discipline Measure 2003
- proceedings under the Ecclesiastical Jurisdiction Measure 1963
- legal aid
- non-use of the Prayers.

Version 1

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## Part 1 – Scenarios

### Scenario 1: parish declares itself to be out of communion/fellowship with diocesan Bishop etc. but otherwise carries on

1. In this scenario the clergy and parochial church council (or possibly annual parochial church meeting) resolve that they are no longer in communion/fellowship with the diocesan bishop as a result of his/her position on a particular issue. This might involve the PCC and clergy–
  - declaring that the parish is not in communion/fellowship with the diocesan and that they do not recognise him/her as having legitimate authority (whether morally, pastorally or otherwise);
  - declining to make payments to the diocese by way of parish share and not participating in diocesan structures (e.g. deanery synod);
  - inviting bishops from elsewhere to conduct episcopal functions (confirmation, ordination) in the parish.<sup>1</sup>
2. Although this scenario would result in considerable strain in the relationship between the parish and the institutional Church of England, it would not of itself<sup>2</sup> have legal implications<sup>3</sup>. The incumbent would not have resigned and would, so long as he/she remained in office, continue to share in the bishop's cure of souls and continue to be entitled to occupy the parsonage house (which would remain vested in the incumbent as a corporation sole). The church building would continue to be vested in and under the legal control of the incumbent (subject to the faculty jurisdiction and other forms of legal regulation).

#### ***PCC funds and parish share***

3. **PCC funds** would be contributed to and used by the PCC for its lawful purposes as previously, except to the extent that they were no longer used to make contributions to diocesan funds.
4. The payment of **parish share** (also known as 'common fund' contributions) to the DBF is not a legal obligation of a PCC. It is not referred to in the Parochial Church Councils (Powers) Measure 1956 or other relevant legislation. Legally, it is a voluntary payment. As the majority of the sums raised through parish share contribute to ministry costs (clergy stipends and pensions), a diocese might wish to

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<sup>1</sup> Unless the diocesan gave permission, this would be unlawful and might be made the subject of proceedings in the High Court for an injunction and/or dealt with after the event by proceedings under the Clergy Discipline Measure 2003 against the clergy (possibly including the outside bishop) concerned. Detailed consideration of this issue is beyond the scope of this note. A bishop who was faced with such a situation and needed to take legal advice – and potentially legal action – should immediately ask his or her registrar to contact the Deputy Official Solicitor to the Church Commissioners with a view to obtaining the necessary funding for the bishop's legal costs.

<sup>2</sup> The position would be different if a disregard for the diocesan bishop's legal authority resulted in a failure to comply with lawful directions and the duty of Canonical Obedience

<sup>3</sup> Subject to footnote 1, above.

consider whether it can take steps to **reduce or cease payment of an incumbent's stipend** and pension contributions where a PCC refused to pay parish share. While in principle the payment of stipend is subject to directions given by the bishop under section 5(2) of the Diocesan Stipends Funds Measure 1953, the bishop's freedom of action has been curtailed in respect of stipends paid to clergy who hold office on common tenure. Regulation 11(1) of the Ecclesiastical Offices (Terms of Service) Regulations 2009 confers a right on every full-time stipendiary office holder to receive a stipend of not less than the national minimum stipend. And regulation 11(5) provides that any direction given by the bishop under section 5(2) of the 1953 Measure must be consistent with the provisions of that regulation. As most clergy stipends are in fact higher than the national minimum stipend, there would be scope for the bishop to give a direction reducing the stipend of a common tenure office holder where the PCC had refused to pay its parish share. But – unless the minister was one of the diminishing number who still hold a freehold office – it would not be possible for the bishop to direct that the DBF cease paying the stipend altogether.

5. So far as **pension contributions** are concerned, the Diocesan Board of Finance is required by section 9(2) of the Church of England Pensions Measure 2018 to make contributions in such sums as the Church of England Pensions Board determines to the Church of England Pensions Fund in respect of every member of that fund who receives a stipend from the diocesan stipends fund income account. This statutory liability of the DBF is not dependent upon parish share being paid by the relevant PCC(s). There is therefore no scope for a DBF to cease the making of pension contributions for clergy in parishes where the PCC refuses to pay common fund.
6. The duties of the DBF/Parsonages Board to maintain the parsonage are also statutory (under the Repair of Benefice Buildings Measure 1972) and would not cease were a PCC to cease paying parish share.
7. However, it would be open to take into account non-payment of parish share when deciding how to allocate discretionary funding and the provision of non-statutory services. These might include central services such as HR, support for missional projects, grants from Diocesan funds towards roof alarms, carbon net zero adviser, etc. Specific advice from the Diocesan Registrar should be obtained when considering these matters to ensure that a refusal to provide financial support does not breach the terms of any grant or similar scheme.
8. Other steps a diocese might decide to consider in relation to a parish whose PCC was withholding parish share could include **pastoral reorganisation**. Presumably, that would be on the basis that parishes who are able to do so are expected to pay parish share to cover their costs (at least) and that any parish which could not or would not do so might be considered unviable financially. Section 3 of the Mission and Pastoral Measure 2011 requires a diocesan mission and pastoral committee, in carrying out its functions, to have regard to “the financial implications for the diocese and the Church of England as a whole”.

9. However that is only one of a number of matters to which the mission and pastoral committee – and the Church Commissioners when deciding whether a pastoral scheme should be made – are required to have regard. In *Cheesman v Church Commissioners* [2000] 1 AC 19, the Judicial Committee of the Privy Council held that a reorganisation scheme needs to be justified on its merits as making better provision for the cure of souls. A pastoral scheme “cannot properly be invoked as a device where the real purpose is to deprive an incumbent of his benefice or to punish him ...”. It is not obvious that dissolving or uniting a benefice where the PCC(s) are refusing to pay parish share would make better provision for the cure of souls if doing so was based primarily on financial factors, particularly if – as might well be the case – the parish in question was performing an effective ministry. It might appear that the real purpose of proposing a reorganisation scheme in those circumstances was to punish the incumbent. The scope for resorting to pastoral reorganisation in such cases may be limited.

### ***PCC property under scenario 1***

10. Any **buildings and land owned by the PCC** (e.g. church halls) would continue to be controlled by the PCC and used for the mission of the Church of England in the parish, and in accordance with the terms of any special trusts that apply to the property<sup>4</sup>. The same would be the case in relation to any other buildings – such as church halls – vested in local trustees: these would remain available for the same purposes as previously.
11. As a result of the operation of section 6 of the Parochial Church Councils (Powers) Measure 1956, **the legal title to land, and to other PCC assets that are held on permanent trusts, is automatically vested in the ‘diocesan authority’** (either the diocesan board of finance or another body established by the diocesan synod for the purpose). But the diocesan authority is effectively in the position only of a custodian trustee; management of the property remains with the PCC.
12. While the **consent of the diocesan authority** is required for certain transactions relating to the land or other property that is vested in it under section 6, the circumstances in which it could legally refuse such consent are very limited. According to the Legal Advisory Commission, “the consent of the DBF should be given (even where the DBF might itself have taken a different view of the matter) unless the PCC is acting beyond the scope of its legal powers or in bad faith, has been guilty of some procedural or other irregularity (such as basing its decision on considerations which were irrelevant) or has reached a decision which is so far beyond the range of reasonable options that no reasonable PCC could have made it; i.e. the DBF should apply similar principles to those set out in the well known test in

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<sup>4</sup> It may be necessary to identify and construe the relevant trust documents to ascertain precisely what the terms of such a trust are.

*Associated Provincial Picture Houses Limited v Wednesbury Corporation* [1948] 1 KB 223.”<sup>5</sup>

13. Were a PCC to seek consent so that it could **transfer its property to another body** outside the Church of England, and whose objects were not consistent with the legal duties of a PCC and/or not consistent with the trusts (if any) on which the property was held, the diocesan authority would have to decline to consent to such a transaction, as the PCC would be acting beyond the scope of its powers. But a diocesan authority could not decline to give its consent to a transaction simply on the basis that the parish in question was not paying its parish share etc, as that would amount to taking account of an irrelevant consideration. In deciding whether to give its consent, the diocesan authority would have to consider the question in the same way as it would in the case of any other parish in the diocese.
14. **A PCC’s funds** are not vested in the diocesan authority and a PCC does not need the consent of the diocesan authority to transfer or otherwise deal with its funds. However, it would be outside the powers of a PCC to **transfer its funds to another body or fund**, if:
  - the objects of that other body or fund were not consistent with the legal duties of a PCC (including both its general duty under section 2 of the Parochial Church Councils (Powers) Measure 1956 and any specific duties, such as the care, maintenance, preservation and insurance of the fabric of the church under section 4); or
  - the objects of that other body or fund were not consistent with the trusts (if any) on which the property was held by the PCC (for example, a trust for the upkeep of a churchyard); or
  - doing so would leave the PCC in a position where it was unable, or less able, properly to discharge its obligations.

Members of the PCC who participated in such a transfer (including by voting for it) would be in breach of their duty as charity trustees. Were the DBF to discover that a PCC had made such a transfer, or was proposing to do so, the DBF could be advised to report the matter to the Charity Commission as a potential breach of trust by PCC members.

Were members of the PCC to arrange for or encourage members of a congregation or other donors to donate to a another body or fund instead of to the PCC, those members would likely be in breach of their duty as charity trustees of the PCC on the basis that they would not be acting in the best interests of the PCC as a charity. A member of a PCC who agreed to serve as a trustee of such a body or fund would also be in breach of his or her duty not to create a conflict of loyalty between his or her role as a trustee of the PCC and of the other body or fund. It may be helpful to

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<sup>5</sup> Opinion entitled ‘Seeking the consent of the DBF to the sale of PCC property’: [https://www.churchofengland.org/about/leadership-and-governance/legal-resources/legal-opinions-and-other-guidance/legal-opinions#calibre link-525](https://www.churchofengland.org/about/leadership-and-governance/legal-resources/legal-opinions-and-other-guidance/legal-opinions#calibre_link-525).

draw a PCC's attention to the nature of the role and duties – and potential liability – of individual PCC members as charity trustees.<sup>6</sup>

## Scenario 2: clergy/congregation cease to be part of the Church of England

15. A **parish** cannot leave the Church of England; a parish is a geographical sub-division of a diocese. Whatever steps people in a parish might take, *the parish* remains part of the diocese and, thereby, part of the Church of England.
16. Nor can a **PCC** leave the Church of England. A PCC is a statutory corporation<sup>7</sup> and therefore exists independently of the individuals who at any point in time form its membership. A PCC's powers and duties – which expressly relate to the parish for which it is constituted and to the wider, institutional Church of England – are prescribed by law<sup>8</sup> (and therefore cannot be altered except by legislation).
17. **Individuals** – clergy and laity – can leave the Church of England.
18. Clergy leave the Church of England by resigning any preferment they hold and then executing and registering a **deed of relinquishment** under the Clerical Disabilities Act 1870. Having done so, they are no longer treated by the law as clerks in holy orders and they cease to be subject to any of the legal provision concerned with clergy discipline. As a result they are free to declare themselves to be members of any non-conformist body they see fit.<sup>9</sup>
19. Were the incumbent (and other clergy) to resign in this scenario, the Bishop would need to decide **whether the vacancy should be filled**. If the Bishop decided that it should be filled, the appointment process would take its usual course.
20. If the Bishop decided the vacancy should not be filled, he/she would need to **suspend the right of presentation** (and consider whether to appoint a priest in charge). He/she would then, in consultation with the Mission and Pastoral Committee of the diocese, decide whether there should be some pastoral reorganisation. For example, the parish might become part of another, existing parish. Its church might be closed for regular public worship and disposed of.

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<sup>6</sup> Reference could be made to the Charity Commission guidance *The essential trustee: what you need to know, what you need to do* [CC3 feb20.pdf \(publishing.service.gov.uk\)](#). See also the Charity Commission's operational guidance at [Index - Charity Commission Operational Guidance - Knowledge Hub \(khub.net\)](#), especially OG404 *Official Warnings by the Commission* and OG565 *Disputes in Charities*.

<sup>7</sup> Parochial Church Councils (Powers) Measure 1956, s. 3(1).

<sup>8</sup> Parochial Church Councils (Powers) Measure 1956, ss. 2 and 7.

<sup>9</sup> Where a clerk in holy orders does not execute and register a deed of relinquishment, it is not strictly lawful for that clerk to become a minister of another church. See *Barnes v Shore* (1846) 8 QB 638; *Bishop of St Albans v Fillingham* [1906] P 163. In any event, a bishop should exercise caution in allowing a priest who has joined a church not in communion with the Church of England continuing to have permission to officiate in the bishop's diocese. The Church on behalf of which a clerk exercises ministry should be clear to those who are likely to receive that ministry.

21. So far as the **laity** generally are concerned, they can leave the Church of England simply by declaring that they are no longer members. Joining or forming a non-conformist body which rejected the teaching of the Church of England and was not in communion with it would implicitly amount to leaving the Church of England.
22. A **lay member of a PCC** or other organ of synodical government (e.g. deanery synod) may leave that body by resigning from it. An individual who is a member of a PCC and who has decided to leave the Church of England in the circumstances envisaged here will, presumably, wish to resign his/her membership of the PCC given that membership of the PCC involves the person concerned acting as a charity trustee for certain Church of England purposes. If he/she did not resign, his/her membership would in any event cease in due course either when his/her name was removed from the roll of the parish or when the new roll was prepared without his/her name being included in it.<sup>10</sup>

### ***Continued use of the church building under scenario 2***

23. If those clergy and laity who had left the Church of England under this scenario simply went and worshipped in a building elsewhere, the bishop and the diocesan mission and pastoral committee might need to consider whether the parish remained viable or whether to pursue pastoral reorganisation as mentioned above.
24. However, in the event that the bishop wished to enable the departing clergy and laity to continue to worship in the church building, there are various mechanisms which would be available to facilitate this. Four options – A to D – are considered in what follows.

#### *Option A: Closure and appropriation of church building for use by departing congregation*

25. A **pastoral scheme** might be made providing for the **closure of the church** and for its appropriation for use by the congregation which has left the Church of England.<sup>11</sup> (This might be part of a more extensive scheme which provided for pastoral reorganisation as mentioned above.)
26. The scheme might provide for the closed church to be **sold or given to the congregation** concerned<sup>12</sup> (who would need to establish a trustee body for the purpose). They would then be responsible for maintaining it. They could use it as they saw fit, subject to any restrictive covenants that might be imposed by the scheme. An advantage of this sort of arrangement would be that no Church of England body – PCC or DBF – would any longer have any responsibility for maintaining the building. A downside might be that the building would be permanently lost to the Church of England.

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<sup>10</sup> Church Representation Rules, r. 4.

<sup>11</sup> Under Part 4 of the Mission and Pastoral Measure 2011.

<sup>12</sup> Under section 59 of the Mission and Pastoral Measure 2011.



27. Alternatively, the church might be closed and vested in the diocesan board of finance<sup>13</sup> who could then **let** it to the congregation on such terms as were consistent with the scheme as it thought fit and which the congregation were prepared to agree. This would mean that if the situation changed in the future, the building could be available again for the mission of the Church of England in the diocese. The downside for the DBF would be that if the congregation gave notice under the lease and left, the DBF could be left with a building it did not want.

*Option B: Building remains an open Church of England church – lease granted to congregation*

28. An incumbent – or where a benefice is vacant the Bishop – can, if authorised by faculty, grant a **lease of part of a church**. The only statutory restriction is that the building as a whole must be used primarily as a place of worship.<sup>14</sup> The part of the church let under such a lease may be almost all of it – for example everything except the porch – provided that the requirement as to the primary use of the building is met. A lease could, in addition to requiring the payment of rent, impose obligations on the lessee as to the maintenance and repair of the building.
29. An advantage of this mechanism is that it could provide an interim arrangement while it was still becoming clear what the future of the congregation and of the church building were to be. During that period, the lease could impose maintenance and repairing obligations on the congregation, thereby ensuring that the church building remained in a reasonable condition while its longer term future was under consideration.
30. A possible disadvantage of this approach – arising from the need for a lease to be authorised by faculty – might be that it would provide an opportunity for any parishioners who did not like what had happened to object to the grant of the faculty. Moreover, the outcome of the faculty proceedings could not be guaranteed. That said, if the faculty proceedings were unopposed a faculty could be obtained quickly.

*Option C: Building remains an open Church of England church – congregation given some use of building under licence*

31. While a **licence** does not provide the licensee with a property right in the way that a lease does, it is nevertheless a potentially flexible arrangement which might well be helpful in certain cases.
32. Because a licence does not confer ownership rights, the grant of a licence is compatible with another person – the owner – continuing to exercise their own rights in respect of the building. A licence could, therefore, be useful where a congregation had split so that part of it had left the Church of England while part remained. The incumbent (possibly a new incumbent if the previous incumbent had left the Church of England along with part of the congregation) or, in the absence of an incumbent,

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<sup>13</sup> Under section 63(2) (as applied by section 59) of the Mission and Pastoral Measure 2011.

<sup>14</sup> Section 68(3) of the Mission and Pastoral Measure 2011.

the bishop would grant the licence to representatives of the congregation which had left the Church of England. The licence would set out the times when the leaving congregation would be able to use the church for worship and the other terms (e.g. payment of rent, share of utilities etc.) of their occupation.

33. Like a lease, a licence needs to be authorised by faculty. But if the relationship between the congregation remaining in the Church of England and the leaving congregation remained good – and a licence arrangement would only be viable if that were the case – it seems unlikely that there would be opposition to the grant of the faculty. This should mean that a faculty could be granted quickly.
34. An arrangement involving the grant of a licence to the leaving congregation by the remaining congregation might be suitable either as a interim arrangement or on a long term basis.
35. Such an arrangement might also be useful where an entire congregation had left the Church of England, the diocese wished to use the church building for the mission of the Church of England but was also willing for the leaving congregation to continue to use it for their worship.

*Option D: Building shared under the Sharing of Church Buildings Act 1969*

36. **The Sharing of Church Buildings Act 1969** provides a special statutory framework for the sharing of church buildings by different denominations, including the Church of England. The procedure for entering into agreements under the Act are somewhat burdensome, involving the bishop, DBF, diocesan mission and pastoral committee as well as the incumbent and PCC. A non-Church of England party to a sharing agreement under the Act has to be a formally constituted denomination to which the Act applies. (These are set out in the Act but there is provision in the Act for additions to be made to the list without the need for further legislation.) A sharing agreement under the Act cannot be entered into while a benefice is vacant unless a priest in charge holds office.<sup>15</sup>
37. Most of what the respective parties wish to achieve is likely to be possible under a lease or licence (see above) without the need for an agreement under the 1969 Act. The only substantial advantage to a non-Church of England denomination in having a 1969 Act agreement is that they can then apply to have the shared church building registered for marriages according to the use of that denomination – something which is not otherwise legally possible in relation to a Church of England church building.
38. Were the leaving congregation to have become well organised – or to have become part of a larger denominational grouping – an agreement under the 1969 Act might

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<sup>15</sup> When section 14 of the Church of England (Miscellaneous Provisions) Measure 2024 comes into force the bishop will be able to enter into the relevant agreement in the absence of a priest in charge.

be an option worth considering. But if that was not the case, a lease or licence is more likely to be a better basis for a sharing arrangement.

### ***Occupation and use of parsonage house under scenario 2***

39. Parsonage houses are **benefice property** and belong the incumbent in his/her corporate capacity. That remains the case even if the benefice is vacant. During a vacancy, legal responsibility for the parsonage falls on the **sequestrators** of the benefice – normally the churchwardens and the rural dean. If there are no churchwardens – because they have resigned and not been replaced – the bishop could exercise his power to appoint other sequestrators or could leave the sequestration solely in the hands of the rural dean.
40. An **incumbent who resigned** would automatically lose all rights in relation to the use and occupation of the parsonage house. Were it desired to enable an incumbent who resigned under scenario 2 to **remain in occupation**, what was possible would depend on various factors.
41. If a **new incumbent** were appointed – either because part of the congregation remained or because the diocese wished to build a new Church of England congregation in the parish – it is likely that the parsonage house would be needed for the new incumbent.
42. If the **benefice ceased to exist** – as a result of pastoral reorganisation – the parsonage house would either become the property of another benefice or diocesan property. If it became the property of another benefice – e.g. where the area of the parish was incorporated into that benefice – it might be required as the residence of the incumbent of that benefice. If it became diocesan property, it could be let by the DBF but the DBF would probably only be able to let it to a non-Church of England religious body at a commercial rent. This is because DBFs hold their property “for purposes connected with the Church of England” (Diocesan Boards of Finance Measure 1925, section 1). Providing free housing to a minister who had left the Church of England would not amount to applying that property for purposes connected with the Church of England and would therefore be unlawful.
43. Where neither of those two possibilities – new incumbent appointed; benefice ceasing to exist – was the case, and the **benefice remained in existence but vacant**, it would be possible for the sequestrators to grant a lease or licence of the parsonage house to the former incumbent. Unlike the DBF, the sequestrators are not charity trustees and would not therefore be subject to the same restrictions as to the purposes for which they might make the parsonage house available.
44. A lease or licence of the parsonage house granted by the DBF to the former incumbent might, in certain circumstances, be a sensible arrangement in conjunction with option B above (building remains an open Church of England church – lease granted to congregation). The terms of the former incumbent’s occupation (e.g. rent, repairs etc.) would need to be agreed and set out in the lease or licence. Such an

arrangement could, in principle, continue for so long as the benefice remained in existence and unfilled.

### ***PCC funds under scenario 2***

45. PCC funds would remain the property of the corporate body to which they belonged before the incumbent and congregation left the Church of England. **It would not be legally possible for the departing congregation to take the PCC funds with them.** It is for that reason (so we understand) that a number of parishes have established **separate charitable trusts** whose objects are not restricted to Church of England purposes and whose trustees are not the PCC. These trusts are likely to have been set up in such a way that were a congregation to leave the Church of England, they would retain control of these funds. However, the use of such a trust, if it involved the incumbent and other members of the PCC encouraging members of the congregation to give to the trust instead of to the PCC, might mean that those PCC members were acting in **breach of their duties as charity trustees** of the PCC (in particular, the duty to act in the best interests of the PCC and properly to manage conflicts of interest/loyalty). If a diocese was concerned about giving being diverted in this way, it would be open to the DBF to raise the matter with the Charity Commission.
46. If the departing congregation had unlawfully diverted PCC funds to another body – whether in the manner described above or by a wholesale transfer of funds from the PCC – the new members of the PCC would, in principle, be under a legal obligation to take steps to recover those funds. They would need to obtain legal advice – and ideally the formal advice of the Charity Commission – before deciding whether to do so.
47. If the parish remained active following the departure of the congregation – either because part of the congregation remained or because the diocese established a new congregation there – the PCC would have new members and they would control the PCC’s funds. In default of the PCC having any members, the bishop might be able to give directions under rule 78 of the Church Representation Rules to deal within the situation. Failing that a PCC’s funds would be controlled by trustees specially appointed by the Charity Commission.
48. In the event that, as a result of pastoral reorganisation following the departure of the congregation, the parish was united with another parish, the funds would become funds of the PCC that parish.<sup>16</sup>
49. There is **no scope for PCC funds lawfully to be given away** by a PCC to a body of persons who had left the Church of England. A PCC’s funds are held by the PCC for the furtherance of the mission of the Church of England. A departing congregation would have no legal claim to a share of such funds.

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<sup>16</sup> Mission and Pastoral Measure 2011, Schedule 3, paragraph 9(2).

### ***Parochial trusts under scenario 2***

50. Any trust which existed in relation to the parish would – so far as its purposes are concerned – be unaffected by the departure of the congregation. The trustees of such trusts are often the **incumbent and churchwardens, or the churchwardens, ex officio**. Such trusts are likely to be interests to which the Incumbents and Churchwardens (Trusts) Measure 1964 applies. Where that is the case the interest in question is vested in the diocesan authority (in a similar way to PCC property held on trust).
51. It would be **unlawful for the trustees to transfer the funds** to a different – non-parochial charity – in contemplation of their departure. If – as scenario 2 envisages – the incumbent and churchwardens resigned, they would automatically cease to be trustees of any trusts where the trustees were the incumbent and churchwardens ex officio. Any incoming incumbent and churchwardens would automatically replace them. They would be under an equivalent legal obligation to the PCC (described above) in relation to the recovery of any funds which had been unlawfully transferred by their predecessors.
52. There is no Church of England body which could give permission for the funds of a parochial trust to be transferred to a trust established for the purposes of the leaving congregation. Nor could the Charity Commission authorise such a transfer.
53. In so far as any parochial trusts that were established for ecclesiastical purposes are concerned, in the event of pastoral reorganisation, the incumbent and churchwardens of the parish of which the former parish became a part would automatically become the trustees.<sup>17</sup>

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<sup>17</sup> Mission and Pastoral Measure 2011, Schedule 3, paragraph 9(2).

## **Part 2 – dealing with legal challenges in relation to the Prayers of Love and Faith**

54. An individual – or conceivably a parochial church council – might seek to bring proceedings against a minister who used the Prayers of Love and Faith on the basis that – despite what the House of Bishops has stated – the prayers are “contrary to, or indicative of a departure from the doctrine of the Church of England in an essential matter”, contrary to Canon B 5.

### ***Complaints under the Clergy Discipline Measure 2003***

55. Such a complaint would almost certainly be outside the scope of the Clergy Discipline Measure 2003 (CDM). The CDM is concerned with “proceedings against a clerk in Holy Orders who is alleged to have committed an act or omission other than one relating to matters involving doctrine, ritual or ceremonial” (section 7). References to “misconduct” in the CDM are to be construed in accordance with that provision and proceeding in relation to matters involving doctrine, ritual or ceremonial must be conducted in accordance with the Ecclesiastical Jurisdiction Measure 1963 (EJM). (CDM, section 7; and see the ruling on jurisdiction in [Chedzey v Evans](#).) Were such a complaint to be instituted under the CDM, the matter of jurisdiction ought to be considered at the preliminary scrutiny stage, as it is material to the question of “whether or not there is sufficient substance in the complaint to justify proceeding with it in accordance with the following provisions of this Measure” (CDM, section 11). If the act alleged was in substance (see *Chedzey v Evans*) one relating to matters involving doctrine etc., there would not be sufficient substance in the complaint to justify proceeding with it under the CDM.

### ***Complaints under the Ecclesiastical Jurisdiction Measure 1963***

56. A complaint under the EJM is laid before the registrar of the diocese (in the case of a priest or deacon) and before the provincial registrar (in the case of an archbishop or bishop) (EJM, section 18). A complaint under the EJM against a priest or deacon may be laid in any case by “an authorised complainant” (i.e. a person authorised by the bishop to lay a complaint); in the case of an incumbent, by a stipendiary curate or by six or more adults whose names are on the electoral roll; and in the case of a stipendiary curate, by the incumbent (EJM, section 19).
57. Once a complaint has been laid and a copy served on the accused, the bishop must afford the accused and the complainant an opportunity of being interviewed by the bishop in private (separately or together). The bishop must then either (a) decide that no further step be taken in respect of the complaint; or (b) refer the complaint for inquiry by a committee of convocation (EJM, section 39). Neither the EJM nor the Rules made under it provide any guidance to the bishop on what should be taken into account in taking that decision. Nevertheless, as a general principle, the bishop must take into account only relevant considerations and disregard any irrelevant considerations. A relevant consideration might be that the accused clerk was doing no more than the House of Bishops had invited him or her to do in commending the

Prayers. The bishop should seek detailed advice from the diocesan registrar on how to handle any complaint under the EJM.

58. The further stages of the EJM process are beyond the scope of this paper.

***Legal costs of the respondent/accused***

59. Ecclesiastical legal aid is available to a respondent under the CDM and to an accused under the EJM (Schedule 1, Church of England (Legal Aid) Measure 1994). A diocesan board of finance should not therefore be asked to assist with such funding.

***Non-use of the Prayers of Love and Faith***

60. As the published Prayers themselves make clear, their use is entirely optional. The House of Bishops has commended them for use *in the minister's discretion* (either where an authorised form of service itself provides for the minister to use material in the minister's discretion or under Canon B 5). There is no basis in ecclesiastical law for saying that any minister is obliged to use the prayers or to provide them if requested to do so. (This is wholly different from the case of marriage services, where there is a common law duty to marry parishioners and others.)
61. So far as the general law is concerned, the provisions of the Equality Act 2010 do not regulate acts of worship. There is therefore no scope for a disappointed couple to resort to the Act in the event of a refusal by a minister to use the Prayers.