(2012) 14 Ecc LJ 43–81 © Ecclesiastical Law Society
doi:10.1017/S0956618X11000755

Synodical Government and the Legislative Process

Stephen Slack
Registrar and Chief Legal Adviser to the General Synod

This article reviews the exercise of the legislative function of the General Synod of the Church of England over the last 25 years. Beginning with a summary of the principles of synodical government in the Church of England, it goes on to describe the establishment of the Synod, its composition and its functions. The different forms of legal provision available to the Synod in exercise of its legislative function are then considered, followed by an account of the impact of the Human Rights Act, the procedures applicable to the conduct of legislative business and the role of Parliament in the legislative process. After an assessment of the general pattern of synodical legislation over the last 25 years, the main areas of legislative change during that period are reviewed. The article ends with an assessment of possible areas for future legislative activity.

SYNODICAL GOVERNMENT IN THE CHURCH OF ENGLAND

In the Anglican Communion, synodical government has for more than 100 years been understood as taking a particular form, in which representatives of the clergy and laity have joined with the bishops in overseeing the affairs of the Church. This experiment in vesting significant authority in a body consisting of bishops and representatives of the clergy and laity can be seen as a distinctive Anglican characteristic.[1]

Though some would see synodical government as offering practical advantages within the life of the Church, that is not its rationale. Rather, in the form it takes in its own governance, the Church of England sees it as reflecting important theological principles, as follows:

> (i)'. . . the ultimate authority and right of collective action lie with the whole body, the Church'; . . . and the co-operation of Clergy and Laity in Church government and discipline belongs to the true ideal of the Church.
> (ii)Subject to (i) above in an episcopal Church the matters relating to the formulation of doctrine and the sacraments and services of the Church should be submitted for Final Approval by the General Synod in terms proposed by the House of Bishops.

1 For a summary of the history, and a description of the principles, of synodical government in the Church of England, see C Podmore, *Aspects of Anglican Identity* (London, 2005), pp 103–123. For a history of the Convocations, see E Kemp, *Counsel and Consent* (London, 1961).

https://doi.org/10.1017/S0956618X11000755 Published online by Cambridge University Press

> (iii) Under the law of the Church and State, each province and every diocese has pastoral authority within its own territorial area.[2]

In the light of the embodiment of these principles in the governance of the Church of England, it has often been said that the Church is 'episcopally led and synodically governed'. However, more recently that way of describing the position has, rightly, been the subject of criticism. Characterising it as 'one of those superficially attractive but ultimately misleading pieces of shorthand', the report of the Review of Synodical Government (the Bridge Review) went on to observe in 1997 that

> It is misleading because it overlooks both the particular role of individual bishops and the House of Bishops in the Church's government (especially in relation to matters of doctrine and worship), and the potential leadership role of representative clergy and laity. It suggests that episcopal leadership is exercised outside the context of synodical government whereas it is often (though by no means solely) exercised within it. It ignores the subtlety and complexity of the relationship between bishop, clergy and laity.[3]

In addition to creating a false dichotomy, the aphorism is also misleading in so far as it may suggest that the Synod enjoys the powers of a government or executive body, rather than the legislative and deliberative powers of a parliament.

A more helpful model is that of 'bishop in synod', which better reflects the role played by diocesan bishops – not only individually in their diocesan synods but also corporately through the House of Bishops:

> The Synod cannot usurp the responsibilities which the members of the House of Bishops have, individually and collegially, by virtue of their episcopal ordination and office. The Synod's Constitution makes it possible to ensure that it does not pass resolutions or take decisions that do not enjoy the support of the House of Bishops, but the synodical structure is also intended to ensure that members of the House of Bishops hear the views of the representatives of clergy and laity.[4]

2 *Synodical Government 1970–1990: the first twenty years*, GS Misc 344 (1990), p 4.
3 *Synodical Government in the Church of England: a review*, GS 1252 (1997), p 9.
4 *The Governance of the Church of England and the Anglican Communion*, GS Misc 910 (2008), para 39.

https://doi.org/10.1017/S0956618X11000755 Published online by Cambridge University Press

THE GENERAL SYNOD

The creation of the Synod

The General Synod of the Church of England (the Synod) came into being on 4 November 1970, under the Synodical Government Measure 1969. But that Measure represented the culmination of a process effectively begun in 1953 and stimulated by the perceived need for the Convocations and the House of Laity to be joined more closely in the government of the Church: difficulties had arisen (not least in the process of canon law revision undertaken from 1947 onwards) as a result of the Convocations having retained the right to vote separately on certain kinds of legislation, to make Canons and, when they thought fit, formally to declare the Church's mind on matters of importance. The possibility of making progress was considerably advanced when the contentious issue of the role that the Convocations should have in any new body was effectively resolved by the proposals made in the report of the Synodical Government Commission (the Hodson Report) of 1966.[5]

Under the 1969 Measure the Church Assembly was renamed as the General Synod and reconstituted in accordance with the Constitution set out in Schedule 2 to the Measure. Article 1 of the Constitution provided for the Synod to consist of the Convocations, joined together in a House of Bishops and a House of Clergy, and having added to them a House of Laity. To that end, the Convocations had previously promulged Canons providing for the vesting in the Synod of their functions, authority, rights and privileges, which were henceforth to be exercised for the Church of England as a whole instead of provincially (but without prejudice to the ability to make different provision, where appropriate, for the two provinces) and for modifying the functions of the Convocations when sitting separately for their provinces. Additionally, the 1969 Measure transferred to the Synod the powers previously conferred by the Church of England Assembly (Powers) Act 1919 (the Enabling Act) in relation to the passing of Measures. Thus the 1969 Measure created, for the first time, a body with the competence to legislate by both Measure and Canon for the Church of England as a whole.

Composition of the Synod

From the Synod's inception, the aim has been to ensure that its composition is properly representative of the breadth of the Church as a whole. All 44 diocesan bishops are members of the House of Bishops, together with the Bishop of Dover and seven suffragan bishops (or other 'working' assistant bishops in diocesan houses of bishops) elected by their number in each province.[6] The great

5 *Synodical Government in the Church of England*, CA 1600 (1966).
6 Canon H 3 and the Convocations (Elections to Upper House) Rules 1989 to 1994.

https://doi.org/10.1017/S0956618X11000755 Published online by Cambridge University Press

majority of the members of the House of Clergy are elected (to their respective Convocations, rather than to the Synod as such) by beneficed, licensed and other clergy in their dioceses, in numbers (determined by the Synod, subject to a specified maximum) proportionate to the number of clerical electors in the diocese concerned.[7] Similarly, the great majority of the members of the House of Laity are elected, by members of the deanery synods, in numbers (again determined by the Synod subject to a specified maximum) proportionate to the numbers on electoral rolls in the diocese concerned – but so that the numbers elected in the Provinces of Canterbury and York are in the proportions 70:30 (or as near thereto as possible).[8] Those proportions remain favourable to York, giving it greater representation than the actual numbers on electoral rolls would justify; but suggestions that the proportions should strictly reflect the actual numbers have not yet found synodical support. The use of the lay membership of deanery synods as the electorate for the House of Laity has also attracted criticism; and though proposals made in the report of the Bridge Review for its replacement by an electoral college of 'diocesan electors' were rejected, the Synod resolved in July 2011 that the arrangements for the electorate of the House of Laity should be reviewed.

On the Synod's creation, its membership was smaller by some 200 members than the Church Assembly. Nonetheless, its potential membership remained large, the Hodson Report having argued that 500 members (in addition to the bishops) was the smallest number that would provide adequate representation for all the dioceses. Thus between 1970 and 2005 the total membership of the Synod fluctuated between 545 and 575.

Unsurprisingly, given the reduction over the intervening period in the number of clergy and laity represented by the Synod and concerns about its cost, the report of the Bridge Review recommended a reduction in the Synod's membership. Thus with effect from the beginning of the quinquennium 2005–2010 the Synod's size was reduced substantially, to a maximum of 467 – largely achieved by reducing the numbers of directly elected members. But a number of the 'special constituencies' were also reduced in size and the provision for a 'representative archdeacon' from every diocese was removed. In consequence, the Synod now has fewer members who are archdeacons than previously – an outcome that some predicted would weaken its capacity to deal effectively with legislative business.

Elections to the Convocations and House of Laity take place every five years, following the dissolution of the Convocations under the Church of England (Convocations) Act 1966. They are conducted in accordance with the principle of proportional representation by the method of the 'single transferable vote'

7 Canon H 2 and the Clergy Representation Rules 1975 to 2004.
8 Church Representation Rules, Rules 35–36.

https://doi.org/10.1017/S0956618X11000755 Published online by Cambridge University Press

(STV). That system is sometimes criticised (and more often misunderstood). But the prevailing view appears to support the judgement of the Hodson Report that

> . . . it is the only system which gives due weight to the views of minorities and . . . it does ensure that where more than one person has to be elected for a constituency, the total representation more accurately reflects the various shades of opinion than might be the case were the system to be one of straight voting.[9]

The Synod's deliberative and legislative functions

Article 6 of the Synod's Constitution confers two functions upon it, stating no formal priority as between the two. The second, deliberative, function – 'to consider and express their [sic] opinion on any other matters of religious or public interest' – need not detain us. Suffice it to say that, though that function is 'cast in such wide terms as to invite the Synod to offer a view on virtually everything',[10] in practice the necessary balance between the Synod's legislative and deliberative functions has been adequately maintained, with sufficient time being made available at each group of sessions to enable the necessary legislative business to be conducted properly.

The other function of the Synod – which, though it appears first in the Constitution, has no priority in legal terms – is to 'consider matters concerning the Church of England and to make provision in respect thereof' by Measure, by Canon, by order, regulation or other subordinate instrument authorised by Measure or Canon and 'by such Act of Synod, regulation or other instrument or proceeding as may be appropriate in cases where provision by or under a Measure or Canon is not required'. As this review will demonstrate, over the last 25 years, the Synod has employed the full range of possible provision in exercising its legislative function.

TYPES OF 'PROVISION' MADE BY THE SYNOD

Measures

The legislative function of the Church Assembly, and thus of the Synod, arose from the dissatisfaction within the Church during the nineteenth century at the way in which Parliament exercised its responsibilities in legislating for the Church – a dissatisfaction resulting not only from objections of theological principle but also from the inevitable lack of priority that (through indifference

9 *Synodical Government in the Church of England*, p 24.
10 *Synodical Government in the Church of England: a review*, p 57.

https://doi.org/10.1017/S0956618X11000755 Published online by Cambridge University Press

rather than hostility) Parliament gave to addressing the needs of the Church.[11] That dissatisfaction eventually found expression in the report of the Archbishops' Committee on Church and State, published in 1916. To allow the Church the legislative competence needed if it was to fulfil its vocation in changing times, the Committee made detailed proposals for a 'Church Council'. Parliament having accepted the substance of the case for the Church's (qualified) legislative competence, provision was made for that – albeit in a manner different in some respects from what the Committee had recommended – in the Enabling Act.

Sections 3 and 4 of the Enabling Act lay down a procedure for the consideration of Measures, leading to their submission for the Royal Assent; and section 4 provides that, on receiving the Royal Assent, a Measure 'shall have the force and effect of an Act of Parliament'. One consequence of that provision is that, as held by the Court of Appeal in *R v Archbishops of Canterbury and York ex parte Williamson*,[12] once a Measure has received the Royal Assent, it enjoys the invulnerability of an Act of Parliament and it is not open to the courts to question its *vires* or do anything other than interpret it.

As to the scope of Measures, section 3(6) of the Enabling Act provides that a Measure 'may relate to any matter concerning the Church of England, and may extend to the amendment or repeal in whole or in part of any Act of Parliament, including [the Enabling] Act'. The words 'any matter concerning the Church of England' are very wide in their import. Thus in *R v Ecclesiastical Committee of Both Houses of Parliament ex parte the Church Society* the Divisional Court held that section 3(6) was not to be construed narrowly so as to preclude the passing of a Measure that permitted a change in doctrine.[13] Additionally, reflecting the Hodson Report's statement that Measures 'could include matters concerning the Church and also concerning private rights under the general law or rights of the Crown',[14] in recent years Measures have been made that affect the prerogative rights of the Crown.[15] Similarly, with the agreement of Ministers, Measures have also amended government legislation[16] and made provision with respect to its impact.[17]

11 Thus in the period 1880–1913, out of 217 Church Bills, 183 were dropped (162 never being debated at all), one negatived and only 33 passed – of which 13 were directly sponsored by the government of the day and the rest were considered probably to owe their passage to assistance of some sort from the government. (*Report of the Archbishops' Committee on Church and State* (London, 1916), p 29).

12 (1994) *Times*, 9 March (Court of Appeal).

13 (1994) 6 Admin LR 670. This interpretation was confirmed by the Court of Appeal in *Williamson*.

14 *Synodical Government in the Church of England*, p 119. Note that the requirement is not expressed in terms of a Measure relating *only* to a matter concerning the Church of England.

15 Crown Benefices (Parish Representatives) Measure 2010 and the Vacancies in Suffragan Sees and Other Ecclesiastical Offices Measure 2010. To that end, Her Majesty consented to place her interest, so far as it was affected by the draft Measures, at the disposal of the Synod for the purpose of the draft Measures (Proc GS (July 2008), pp 138 and 140).

16 See, for example, Church of England (Miscellaneous Provisions) Measure 2006, s 12 and schedule 4.

17 For example, Priests (Ordination of Women) Measure 1993, s 6, made provision in relation to the application of the Sex Discrimination Act 1975.

https://doi.org/10.1017/S0956618X11000755 Published online by Cambridge University Press

In the latter connection the Ecclesiastical Committee of Parliament ('the Ecclesiastical Committee') has raised the question whether section 3(6) of the Enabling Act allows a Measure to provide for *an instrument made under it*, as opposed to the Measure itself, to amend an Act of Parliament. The better view (accepted by the Ecclesiastical Committee) is that it does,[18] and that is certainly the basis on which the Synod has exercised its powers.[19]

Canons

As already noted, the ancient power of the Convocations to legislate by Canon was transferred to the Synod in 1970. Under section 1(3) of the Synodical Government Measure 1969, that transfer was made on terms that preserved the requirements of both sections 1 and 3 Submission of the Clergy Act 1533. The first of those provisions requires the Royal Assent and Licence to be given before a Canon can be 'promulged' (the formal process by which it is given effect). The second provides that no Canon is to be made or executed 'which shalbe contraryaunt or repugnant to the Kynges prerogative royall or the customes lawes or statutes of this realme'.

The latter requirement effectively subordinates new provision by Canon to any provision made by Act of Parliament, Measure or the common law. Thus where it is desired to legislate by Canon in a manner that would be inconsistent with any such provision, the practice is first to confer a statutory power, by Measure, to make the Canon, so as to avoid the possibility of challenge by reference to that incompatibility.

This is done in different ways, according to the needs of the context. So, for example, section 1(1) Priests (Ordination of Women) Measure 1993 simply authorised the Synod to make provision by Canon 'enabling a woman to be ordained to the office of priest'. A more focused approach was adopted in the Church of England (Ecumenical Relations) Measure 1988, which authorised the Synod to make provision by Canon allowing participation in a local ecumenical project notwithstanding any incompatibility with section 15 of the Act of Uniformity 1662 but went on to impose restrictions on the exercise of the power – including by reserving the celebration of the Holy Communion to those episcopally ordained priest in a Church whose orders are recognised and accepted by the Church of England.

Another way in which Canons differ from Measures is that they are not subject to scrutiny by the Ecclesiastical Committee or to Parliamentary approval. However, before the Royal Assent and Licence is granted they are considered by the Ministry of Justice. That process is by no means a formal one, involving as it

18 See the 227th Report by the Ecclesiastical Committee (on the Ecclesiastical Offices (Terms of Service) Measure), para 17.

19 See Ecclesiastical Offices (Terms of Service) Measure 2009, ss 2 and 11.

https://doi.org/10.1017/S0956618X11000755 Published online by Cambridge University Press

does their being considered by counsel instructed by the Secretary of State for the purpose, particularly from the point of view of their compatibility with the general law (including the Human Rights Act 1998).

Instruments

Measures frequently provide for the making of subordinate legislation of various kinds, not least where subsequent further and more detailed provision is required than can be made by the Measure concerned. The Synod's Standing Orders require that any Measure authorising the making of a subordinate instrument 'having the force of law of general application' and which 'affects the legal rights of any person' must provide for the instrument to be approved by the Synod and (if it is not to be approved by Order in Council) to be laid before both Houses of Parliament as a statutory instrument.[20] The purpose of these requirements is to ensure that legal rights are not affected by synodical legislation without being subject to Parliamentary control.

So far as the first requirement is concerned, where an instrument is subject to approval by the Synod, the enabling legislation may or may not give the Synod power to amend the instrument. Where it does so, the practice is normally to provide for the body responsible for making it to have the option of either accepting any amendment(s) made by the Synod or withdrawing the instrument – thus effectively putting a 'dual key' arrangement in place.

As regards the second requirement, consistently with the Statutory Instruments Act 1946, the Measure conferring the power to make the instrument will provide for it to be dealt with either under the 'affirmative resolution' procedure (requiring a resolution of each House to approve the instrument) or, more usually, under the 'negative resolution' procedure (which gives either House the possibility of resolving to annul the instrument).

Synodical statutory instruments are not subject to the same controls as other statutory instruments in all respects, however: they are not subject to scrutiny by the various Parliamentary committees that consider the technical sufficiency or merits of statutory instruments.

Codes of practice

Over the period under review, ecclesiastical legislation – reflecting the position in relation to secular legislation – has been supported to a greater extent than previously by codes of practice. They offer advantages from several points of view, including their usefulness in providing helpful guidance and the ease with which they can be amended to reflect changing circumstances. The general practice where a code is thought to be needed in connection with a

20 Standing Order 46.

https://doi.org/10.1017/S0956618X11000755 Published online by Cambridge University Press

Measure is for the Measure to make express provision for it. Thus, for example, section 39 Clergy Discipline Measure 2003 requires the Clergy Discipline Commission to formulate guidance for the purposes of the Measure and (with the agreement of the Dean of the Arches) to promulgate it in a code of practice, subject to the Synod's approval. Even if no provision is made as to the force to be attached to a code of practice, non-compliance with it may be used as a basis for setting aside administrative action on the grounds of procedural unfairness or unreasonableness: as one commentator has written, in the ecclesiastical context '... quasi-legislation has ramifications in the field of judicial review. It may create rights and duties and foster legitimate expectation whereby disregard of its content might give rise to redress by way of a public law remedy in the Administrative Court.'[21] Thus in *R v Bishop of Stafford ex parte Owen*,[22] alleged non-compliance with the Code of Recommended Practice for Team and Group Ministries was prayed in aid (unsuccessfully in the event) of a claim that a bishop had acted unlawfully in not further extending a team rector's term of years.

Not least because of these possible implications, it is desirable that those who are expected to have to take decisions in accordance with a code of practice should have as much clarity as possible as to the weight that they must attach to the guidance it contains. Accordingly, in recent years the practice has been to include in a Measure that confers the power to make a code a requirement that specified persons or bodies are to 'have regard' to it.[23] Where that practice is adopted, the decision-maker is not bound by the provisions of the code, but any departure from it must be justified by cogent reasons.[24]

Acts of Synod

An Act of Synod is a collective and formal expression by the Synod of its mind on a particular matter: the Synod's Standing Orders provide that, if the Synod desires to give an instrument or resolution[25] formal publication 'as the embodiment of the will or opinion of the Church of England as expressed by the whole body of the Synod', it may affirm and proclaim it as such in accordance with the procedure prescribed by the Standing Order.[26]

21 M Hill, *Ecclesiastical Law* (third edition, Oxford, 2007), p 22.

22 (2001) 6 Ecc LJ 83.

23 So, for example, the Dioceses, Pastoral and Mission Measure 2007, s 51 required specified persons and bodies to have regard to the code issued by the House of Bishops under that provision, giving guidance in relation to mission initiatives.

24 For the advice tendered in July 2010 to the General Synod in connection with the status of the proposed code of practice under the draft legislation relating to women in the episcopate, see the *Note from the Legal Adviser*, GS Misc 899 (2010), which draws on the decision of the House of Lords in *R (on the application of Munjaz) v Mersey Care NHS Trust* [2005] UKHL 58.

25 If an instrument, it must not be, or be made pursuant to, a Measure or Canon; and if a resolution, it must not be one for the approval of, or pursuant to, a Measure or Canon.

26 Standing Order 40. Under SO 40(c), the procedure involves the Archbishops, as Presidents of the Synod, ratifying and confirming the Act of Synod for their respective provinces, consistently with the

https://doi.org/10.1017/S0956618X11000755 Published online by Cambridge University Press

An Act of Synod therefore represents 'provision' corresponding to that previously made by the Convocations for their respective provinces, in the form of an 'Act of Convocation'. It does not accordingly enjoy any greater authority than that of Acts of Convocation – which, while they were said to have 'great moral force, as the considered judgment of the highest and ancient synod of the province',[27] did not create legally enforceable rights or duties.

Although, because of its content, the Episcopal Ministry Act of Synod 1993 is well known, an Act of Synod is now – on account of its limited effect – a relatively unusual form of provision. In recent years it has most commonly been employed in the ecumenical context. Thus the Meissen Declaration (relating to the Protestant Churches in Germany) and the Porvoo Declaration (relating to the Nordic and Baltic Lutheran Churches) both received the authority of an Act of Synod.[28] Similarly, it is proposed that the Church of England should adopt the Anglican Communion Covenant by means of an Act of Synod.[29]

IMPACT OF THE HUMAN RIGHTS ACT 1998

The Human Rights Act 1998

The exercise of the Synod's powers to make legislative provision in these various forms has been significantly affected during the period under review by the enactment of the Human Rights Act 1998. On the basis that the Synod is, in the exercise of its legislative function, a 'public authority' for the purposes of the 1998 Act (because it is carrying out a function of an essentially 'governmental' nature[30]), by virtue of section 6(1) of the Act it is unlawful for it when exercising that function to act in a way that is incompatible with any right conferred by the European Convention on Human Rights. Additionally, section 3(1) of the 1998 Act requires 'primary legislation' and 'subordinate legislation' whenever enacted to be read and given effect in a way that is compatible with the Convention.[31] Measures of the Church Assembly and the Synod are 'primary legislation' for this purpose; and 'subordinate legislation' includes any instrument 'made under' a Measure.[32]

The consequences of synodical legislation not being compliant with the 1998 Act could of course be significant – not least because the power conferred on

position as regards Acts of Convocation. (As stated in Canon C 17.5, 'By ancient custom, no Act is held to be an Act of the Convocation of the Province unless it shall have received the assent of the archbishop'.)

27 *Bland v Archdeacon of Cheltenham* [1972] 1 All ER 1012 at 1018.
28 Proc GS (1991), pp 12–21; and Proc GS (1996), pp 1071–1084.
29 GS 1809 (2010).
30 See *Parochial Church Council of Aston Cantlow v Wallbank* [2004] 1 AC 546 at 555 per Lord Nicholls.
31 Human Rights Act 1998, s 3(1).
32 Ibid, s 21(1). On the question whether canons represent 'subordinate legislation' for this purpose, see Hill, *Ecclesiastical Law*, p 17.

https://doi.org/10.1017/S0956618X11000755 Published online by Cambridge University Press

ministers by section 10 of the 1998 Act to make remedial orders is not available in relation to Measures.[33] The need for its legislation to be compliant with the 1998 Act is therefore taken seriously by the Synod – and also by the Ecclesiastical Committee, whose responsibility to consider the expediency of a Measure 'especially with relation to the constitutional rights of all [Her] Majesty's subjects'[34] gives it a particular *locus* in this connection.

The implications of the 1998 Act have accordingly had an impact upon the provision made by more recent legislation. For example, account was taken of the implications of Article 6 of the European Convention on Human Rights (which confers a right to a fair trial) when framing the detail of the disciplinary processes under the Clergy Discipline Measure 2003, and of Article 1 of the First Protocol (which protects the peaceful enjoyment of possessions) when framing the Stipends (Cessation of Special Payments) Measure 2005 (which abolished guaranteed annuities and certain other payments).

The Equality Act 2010

In contrast to the position under the Human Rights Act 1998, special statutory provision has been made to free the Synod, in the exercise of its legislative function, from obligations to which it might otherwise have been subject under the Equality Act 2010. The duty not to discriminate in the exercise of a public function that is not a service, imposed by section 29(6) of the Act, does not apply to the Synod in the preparation, making, confirmation, approval or consideration of any of the types of provision referred to in paragraph 6(a) of its Constitution.[35] Similarly, the 'public sector equality duty' imposed on those exercising 'public functions' by section 149(2) Equality Act 2010 does not apply to the Synod either.[36]

THE LEGISLATIVE PROCESS

The drafting of legislation

Measures are drafted by the Synod's own Standing Counsel (who is now on the staff of the Legal Office of the National Church Institutions). Over the period under review, the style of drafting has been adjusted in various respects to take account of the changed practices of the Office of Parliamentary Counsel.

One particular issue in that connection that has caused concern to some is the use of gender-neutral language: in February 2004 the Synod passed a resolution asking that 'all future legislation of this Synod referring to offices be drafted . . .

33 Human Rights Act 1998, s 10(6).
34 Church of England Assembly (Powers) Act 1914, s 3(3).
35 Equality Act 2010, Schedule 3, para 2(4).
36 Ibid, Schedule 18, para 4.

https://doi.org/10.1017/S0956618X11000755 Published online by Cambridge University Press

so that gender neutral language is employed'.[37] In fact, the drafting of new legislation was already moving in that direction, and it now consistently uses such language – not just in relation to offices. However, for technical reasons it is not always possible to employ gender-neutral language when making amendments to earlier legislation that uses gender-specific language[38] – in which case any desired changes in that respect have to await the repeal and re-enactment or consolidation of the legislation in question.

Synodical procedure in relation to legislative business

In the course of the Bridge Review in the late 1990s considerable criticism was advanced of the fact that the Synod's procedures reflected what was referred to as 'the Westminster model'. That some should find them unsatisfactory is unsurprising, given their relative complexity – which is such that members sometimes appear to be unsure when the key decision points in the legislative process are. But the Bridge Review rightly recognised that, while there was scope for greater flexibility in relation to other types of business, the exercise of the Synod's *legislative* function required a considerable degree of rigour and formality:

> A basic function of the General Synod is to act, under the authority and scrutiny of Parliament, as the Church of England's legislature. Parliament has delegated to it certain of its responsibilities in this respect. The Synod has to demonstrate to Parliament and the world that ecclesiastical legislation has been at least as well considered by it as it would have been had it undergone full scrutiny by Parliament. It is understandable therefore that in its legislative capacity the Synod should model itself on the procedures of Parliament.

Legislation can be introduced to the Synod either by the Archbishops' Council or by the Business Committee of the Synod.[39] But before that point is reached, in the case of Measures having a significant policy content there will generally have been an earlier debate or debates (on a report from the body responsible for the policy area in question) in the course of which the principal policy issues will have been discussed. However, this too can give rise to misunderstanding: as in the case of the draft legislation relating to women in the episcopate, members of Synod can wrongly assume that preliminary debates of this kind have conclusively settled the Synod's position in relation to issues that

37 Proc GS (February 2004), pp 184–194.
38 For a fuller statement of the position, see GS Misc 704 (Revised) (2004).
39 Standing Order 48(a).

https://doi.org/10.1017/S0956618X11000755 Published online by Cambridge University Press

have been debated, when in fact they remain open for subsequent further debate and decision in the course of the legislative process itself.

In the case of Measures and Canons, that process normally involves essentially five stages – First Consideration, when the Measure is the subject of general debate; Revision Committee Stage, when a Revision Committee considers it clause by clause, together with any proposals for its amendment; Revision Stage, when it is subjected to a similar process on the floor of the Synod, but with amendments normally limited to matters addressed by the Revision Committee; Final Drafting, when the Steering Committee for the draft Measure (ie the members responsible for its progress through its synodical stages) can move certain limited types of amendment intended to put it into its final form; and Final Approval.[40]

In the case of larger Measures, the Revision Committee Stage can be a complex and lengthy process, not least because of the right enjoyed by Synod members who have made proposals for amendment to attend the meeting of the Committee at which they are considered and speak to them. Following concerns expressed in connection with the particularly lengthy and complex Revision Committee Stage for the draft legislation on women in the episcopate, the Revision Committee procedure is being reviewed. Standing Orders have already been amended to allow the publication of members' proposals for amendment on the Church of England website.

In contrast to the complex procedure for Measures and Canons, subordinate legislation requiring synodical approval can be dealt with in a range of different ways but is generally considered on a much more abbreviated procedure, which nonetheless provides for the debating of amendments (where the enabling legislation concerned permits members to propose them).

So far as voting is concerned, Article 5 of the Synod's Constitution honours in two distinct ways the synodical principle inherited from the Church Assembly of the need for the support of all three Houses for a decision of the Synod: in addition to requiring a Division by Houses[41] on the Final Approval of a Measure or Canon, it also requires such a division whenever 25 members request one (other than on a motion relating to the course of business or procedure).[42] Thus in practice it is open to members to invoke the requirement for the assent of all three Houses in relation to any matter on which they consider it should be brought to bear. That can have a significant impact upon

40 Standing Order 50 ff.

41 On a Division by Houses, the question is only carried if a majority of those voting in each House is in favour.

42 Article 5 and the Standing Orders also countenance the possibility that a Measure may require a Division by Houses and/or a special majority for some particular purpose – as, for example, do the Church of England (Worship and Doctrine) Measure 1974, s 3, and the Priests (Ordination of Women) Measure 1993, s 11.

https://doi.org/10.1017/S0956618X11000755 Published online by Cambridge University Press

the Synod's decision-making process, including in relation to legislation. So, for example, in July 2010 in the course of the Revision Stage for the draft legislation on women in the episcopate, an amendment proposed by the Archbishops of Canterbury and York was lost, even though it was supported by a majority of those present and voting, since it failed to carry in the House of Clergy.[43]

Article 7 business

The Constitution and Standing Orders of the Synod make detailed and complex provision for the conduct of business of the kind described in Article 7 of the Constitution – that is, any 'provision touching doctrinal formulae or the services or ceremonies of the Church of England or the administration of the Sacraments or sacred rites thereof'.[44] That provision represents the outcome of protracted discussions before 1970 about the powers that the Convocations should continue to enjoy following the transfer of their functions to the Synod, and was made in large part in order to assuage concerns on the part of the Convocation of York as to its minority position.[45]

The purpose and effect of Article 7 (and of the Standing Orders giving effect to it[46]) are twofold. First, Article 7 business must be referred to the House of Bishops before being finally approved by the Synod, and must be submitted for Final Approval only in terms proposed by the House. That requirement (reflecting one in the constitution of the Church Assembly) recognises the special position of the House in the polity of the Church: its members having been ordained as 'teachers' and 'guardians of the faith',[47] the House is expected to take the lead in the Synod's consideration of doctrinal and theological issues.[48] Consistently with that rationale, the power of amendment conferred on the House of Bishops when Article 7 is referred to it is an unfettered one and, while rarely used, is by no means a dead letter: in 2009 the House exercised it to amend draft Amending Canon No 28 (relating to the celebration of the Holy Communion in local ecumenical projects) to reflect ecclesiological concerns.[49]

Secondly, Article 7 confers a qualified power on the Convocations and the House of Laity to delay or veto Article 7 business – 'qualified' in that their

43 Proc GS (July 2010), p 168. The voting was: House of Bishops: for 25, against 15; House of Clergy: for 85, against 90; House of Laity: for 106, against 86.

44 Under Standing Order 82, provision falling within Article 7 is identified by a formal process of 'designation' by the Synod's Business Committee, with the possibility of objection by members to designation or non-designation and subsequent conclusive determination by the Presidents, Prolocutors and Chair and Vice-Chair of the House of Laity.

45 *Synodical Government 1970–1990*, p 3.

46 Standing Order 86 ff.

47 *Common Worship: ordination services* (London, 2007), p 67: 'Make him steadfast as a guardian of the faith and sacraments, wise as a teacher and faithful in presiding at the worship of your people'.

48 *The Governance of the Church of England and the Anglican Communion*, paras 25 and 27.

49 Proc GS (February 2009), p 79, and GS 1642Z (2008).

https://doi.org/10.1017/S0956618X11000755 Published online by Cambridge University Press

veto can be overridden by a two-thirds majority in each of the House of Bishops and the House of Clergy.[50]

In practice, the operation of these complex provisions has not, to date, led to the loss of any Article 7 business. Partly for that reason, the Bridge Review recommended that they should be repealed and that, since the Convocations would no longer in substance have any functions to perform, they should cease to exist. However, neither proposal commended itself to the Synod.[51]

There is some misunderstanding as to the scope and impact of Article 7. In particular, it is only engaged where a decision of the Synod involves the making of 'provision'. That expression when used in Article 7 should be understood as referring to the different kinds of 'provision' referred to in Article 6(a) of the Constitution. If so, it would seem that 'proceeding' would not include a simple resolution of the General Synod.[52] Accordingly, Article 7 is not engaged in relation to mere resolutions of the Synod: it only impacts once 'provision' is introduced in order to give effect to such a resolution.

There is also an issue as to what is meant by 'provision *touching* doctrinal formulae . . .' Although not as yet the subject of any judicial interpretation in the context of Article 7, the consideration by the Divisional Court of the meaning of that word where it appears in the preamble to the Enabling Act suggests that it means no more than 'relating or pertaining to'.[53] On that basis, the question whether any provision falls within the scope of Article 7 turns on whether it relates or pertains to doctrinal formulae, services and so forth of the Church of England.

Article 8 business

The other type of business for which special provision is made in the Synod's Constitution is that falling within Article 8. That provision applies to

> A Measure or Canon providing for permanent changes in the Services of Baptism or Holy Communion or in the ordinal, or a scheme for a

50 If either of the Convocations or the House of Laity so requires, Article 7 business must, once it has been approved by the House of Bishops, be referred to the Convocations and the House of Laity for consideration by each of them separately before it can be submitted for Final Approval by the Synod. If the business is rejected by two or more of the Houses of Convocation or by the House of Laity, it cannot be proposed in the same or similar form until after the election of a new Synod. But, if only one House of one Convocation has objected, the business may be referred to the Convocations (only) again and, if only one House maintains its objection, that objection can be overridden on a third reference to the House of Bishops and the House of Clergy by a two-thirds majority vote in each house.

51 *Synodical Government in the Church of England: a review*, ch 7; Proc GS (1997), pp 663–704.

52 Such a resolution would amount simply to consideration of a matter concerning the Church of England within the meaning of the first part of Article 6(a), rather than 'mak[ing] provision in respect thereof' within the meaning of the second part.

53 *R v Ecclesiastical Committee of Both Houses of Parliament, ex parte Church Society*, (1994) 6 Admin LR 670, (1993) *Times*, 4 November.

https://doi.org/10.1017/S0956618X11000755 Published online by Cambridge University Press

> constitutional union or a permanent and substantial change of relationship between the Church of England and another Christian body being a body a substantial number of whose members reside in Great Britain.[54]

Under Article 8(1A) the archbishops can also direct that Article 8 should apply to a scheme that affects the Church of England and another Christian body but that does not otherwise fall within the scope of the Article; and they did so in the case of the Porvoo Agreement.

Business to which Article 8 applies may not be finally approved by the Synod unless it has been approved by a majority of the dioceses at meetings of their diocesan synods.[55] Additionally, Final Approval of a Measure to which Article 8 applies must obtain a two-thirds majority in each House; and Final Approval of a scheme to which Article 8 applies may be made subject to the requirement of the assent of such special majorities (whether of each House or the whole Synod or both) as the Synod may provide for by resolution. (In the case of the Porvoo Agreement the Synod decided that a two-thirds majority in each house should be required.)

RELATIONSHIP WITH PARLIAMENT

The role of the Ecclesiastical Committee[56]

The Archbishops' Committee on Church and State considered that

> what Parliament will require is not an opportunity to reduplicate in the House of Commons the process already gone though in the Church Council . . . but an assurance that all measures . . . will pass under the scrutiny and criticism of a competent state authority and be subject to the exercise of an absolute veto in the event of their proving unsatisfactory from the point of view of the State.[57]

In the form in which the Enabling Act was passed, that control involves the need for consideration by the Ecclesiastical Committee and approval by both Houses.

The Ecclesiastical Committee consists of 15 members of the House of Lords nominated by the Lord Speaker and 15 members of the House of Commons nominated by the Speaker of the House of Commons. The practice since 1947

54 Article 8(1).
55 Or, in the case of the Diocese in Europe, of the bishop's council and standing committee of that diocese.
56 For a history and assessment of the role of the Ecclesiastical Committee to 1992, see the paper by Lord Bridge of Harwich (Chairman of the Committee from 1982 to 1992) published as Appendix 5 to *Synodical Government in the Church of England: a review.*
57 *Report of the Archbishops' Committee on Church and State*, p 60.

https://doi.org/10.1017/S0956618X11000755 Published online by Cambridge University Press

has been that a present or retired Lord of Appeal in Ordinary acts as the Chairman of the Committee. The Second Church Estates Commissioner is always a member of the Committee. As regards its other membership, as Lord Bridge, a former Chairman, put it:

> It is probably true to say that the remaining membership in recent times has been determined rather by the ascertainment of those willing to serve than by any careful process of selection carried out by the Lord Chancellor and the Speaker … quite naturally, the opinions of members of the Committee tend approximately to correspond to a cross-section of opinion in the Church of England at large, and are often strongly held.[58]

Members are appointed for the duration of a Parliament.[59] Thus the Committee needs to be reconstituted following the dissolution of Parliament; and since the Committee tends to be among the last committees to be re-established, there is the opportunity for substantial delay in the Parliamentary progress of Measures. (Thus, for example, the Ecclesiastical Fees (Amendment) Measure, which received Final Approval in February 2010, was not considered by the Ecclesiastical Committee until November 2010.) While the Committee's powers are those laid down by the Act, it regards its procedures as being those of a Joint Select Committee.[60]

Section 3(1) of the Enabling Act requires that every Measure be submitted by the Legislative Committee to the Ecclesiastical Committee, together with such 'comments and explanations' as the Legislative Committee may consider expedient or be required by the Synod to add. The Ecclesiastical Committee is then required to consider the Measure; and in the course of its doing so it, or the Legislative Committee, may request a joint conference of the two committees. In fact, such conferences are rare – the two most recent having been held in 1993 in connection with the Priests (Ordination of Women) Measure and in 1999 in connection with the Churchwardens Measure.

More commonly, the Legislative Committee nominates a number of members of the Synod (generally drawn from the Steering Committee for the Measure) to attend and give evidence to the Ecclesiastical Committee. In recent years it has been the Committee's practice not to allow other parties to appear before it to give evidence. But, exceptionally, the representatives of the Synod who addressed the Committee on the Priests (Ordination of Women) Measure included, at the Committee's request, members who were opposed to it.

58 *Synodical Government in the Church of England: a review*, pp 181–182.
59 Church of England Assembly (Powers) Act 1919, s 3(2).
60 'Ecclesiastical Committee', <http://www.parliament.uk/business/committees/committees-archive/ecclesiastical-committee>, accessed 17 September 2011.

https://doi.org/10.1017/S0956618X11000755 Published online by Cambridge University Press

After considering a Measure the Ecclesiastical Committee must draft a report to Parliament on it 'stating the nature and legal effect of the measure and its views as to the expediency thereof, especially with relation to the constitutional rights of all [Her] Majesty's subjects'.[61] The draft report is not communicated to Parliament unless and until the Legislative Committee agrees to that happening.[62]

To date, the Ecclesiastical Committee has not issued a report finding a Measure to be inexpedient. However, on more than one occasion it has become apparent following the Committee's initial consideration of a Measure that it would find it difficult to hold it to be expedient, with the result that the Legislative Committee (which has no power itself to amend a Measure committed to it) has withdrawn the Measure from the Ecclesiastical Committee's consideration. Thus, while the Ecclesiastical Committee has no power to amend a Measure submitted to it, in practice it is able to secure changes to a Measure.

The most significant example of that arose in connection with the Churchwardens Measure, when the Ecclesiastical Committee took objection to a provision that would have allowed the bishop to suspend a churchwarden from office. An alternative form of provision introduced in response to the concerns the Committee had expressed also failing to find favour with it, the Legislative Committee proposed to the Synod, and the Synod agreed, that the clause be withdrawn. What could have been a damaging confrontation was accordingly averted.[63]

As to the nature of the Committee's deliberations, the requirement for it to consider the question of the Measure's 'expediency' was in part a recognition that, in practice, a Measure might have an impact on interests other than those of the Church, which needed properly to be taken into account.[64] Consistently with that, section 3(3) has been said to express 'an intention that the Ecclesiastical Committee should protect the constitutional rights of all subjects by keeping an eye open for any measure which might affect those rights; and, in such an event, reporting it to the Houses of Parliament'.[65]

61 Church of England Assembly (Powers) Act 1919, s 3(3).

62 Ibid, s 3(4).

63 Proc GS (July 2000), pp 59–90. Similarly, the Ecclesiastical Committee indicated that it would not be able to find the Church of England (Pensions) Measure expedient in the form in which it was originally submitted to it, but would be able to do so if the Measure were amended so that any future extensions of the power it conferred on the Church Commissioners to resort to capital to meet pensions liabilities had to be conferred by Measure rather than by secondary legislation. The Synod was content to accept the Committee's view: see Proc GS (July 2002), pp 83–86.

64 *Synodical Government in the Church of England: a review*, p 177.

65 *R v Ecclesiastical Committee of Both Houses of Parliament ex parte the Church Society* (1994) 6 Admin LR 60 per McCowan LJ. As to the meaning of 'expediency' in s 3(3), see I Slaughter, *Functions of the Ecclesiastical Committee under section 3(3) of the Church of England Assembly (Powers) Act 1919* (unpublished), cited in N Doe, *The Legal Framework of the Church of England* (Oxford, 1996), p 65 n 68.

https://doi.org/10.1017/S0956618X11000755 Published online by Cambridge University Press

Perhaps also reflecting that analysis, Lord Bridge of Harwich considered that

> Reading the debates in both Houses of Parliament on the passage of the Bill which became the Act of 1919, it is clear that, however the Ecclesiastical Committee was to be constituted, no one on either side ever contemplated that the role of the Ecclesiastical Committee in expressing its view as to the expediency of a Measure would be to express a view contradicting or over-riding the view reached by the Church Assembly, as the Church's own representative body, on a pure issue of Church policy.[66]

However, it will be apparent from what has been said above that the Ecclesiastical Committee's scrutiny of a Measure is no mere formality; and there have been further occasions on which the Committee has entered into a substantial consideration of the merits of a Measure, particularly where the matters to which it relates are ones of controversy within the Church generally. This is particularly true of the Clergy (Ordination) Measure (which the Committee considered over 6 meetings and on which it was closely divided as to its expediency)[67] and the Measures relating to the ordination of women to the priesthood (which the Committee considered over 11 meetings).[68] Indeed some consider that in the case of the latter Measures the view that the Committee's function is 'to protect the interests of constituents who may be adversely affected by a Measure'[69] led it, through its examination of the Synod's representatives, significantly to influence the substantive position of the Church by promoting the provision of the Episcopal Ministry Act of Synod.[70]

While subsequent consideration of Measures by the Committee has generally been much less intensive (save in the case of the Churchwardens Measure), there may be thought to be some validity in the conclusion to which Lord Bridge came concerning the Committee's role:

> ... the present constitution of the Ecclesiastical Committee and the functions prescribed for it by the 1919 Act tend to promote lengthy and vigorous debate in the Committee of the most controversial issues of Church policy which have divided the Synod and eventually been resolved there. It is a question which may merit consideration whether this intermediate level of debate between the General Synod on the one hand and the two

66 *Synodical Government in the Church of England: a review*, p 180.
67 10 members of the Committee considered the Measure expedient and 9 considered it inexpedient.
68 16 members of the Committee considered the Measure expedient and 11 considered it inexpedient.
69 Frank Field MP, 203rd and 204th Reports by the Ecclesiastical Committee, p 64 Q 5 (19 April 1993).
70 For an analysis of the Committee's role to that effect see J Maltby, 'Gender and establishment: Parliament, "Erastianism" and the ordination of women 1993–2010', in M Chapman, J Maltby and W Whyte (eds), *The Established Church* (London, 2011), pp 98–123.

https://doi.org/10.1017/S0956618X11000755 Published online by Cambridge University Press

> Houses of Parliament on the other hand makes a necessary or useful contribution to the legislative process. There seems no reason to doubt, however, that the examination to which Measures are subjected by the Ecclesiastical Committee adequately provides the safeguards which were envisaged as necessary by the promoters of the 1919 legislation, albeit that those safeguards might be provided more expeditiously and economically by a body with a different constitution and different statutory terms of reference.[71]

The need for approval by both houses

Once the report of the Ecclesiastical Committee has been laid before Parliament, the way is open for the moving of motions in both Houses that the Measure be presented to Her Majesty for the Royal Assent. Neither the motion nor the Measure itself can be amended. In recent years, because of pressure of business, the practice has been for the Measure to be considered by the Commons in a Delegated Legislation Committee rather than on the floor of the House. The motion there is moved by the Second Church Estates Commissioner, and in the Lords by one of the Lords Spiritual.

During the period under review no Measures have suffered the fate of the Appointment of Bishops Measure,[72] which in 1984 failed to obtain approval in the House of Commons even though it had been found expedient by the Ecclesiastical Committee.[73] However, the Clergy (Ordination) Measure almost suffered a similar fate in 1989: the motion that it be presented for the Royal Assent was lost when moved for the first time but carried when moved again several months later.[74]

The possibility of government legislating for the Church

The fact that the Synod is able to legislate in relation to matters concerning the Church of England does not exclude the power of Parliament also to do so: Parliament remains sovereign. Fortunately, however, the Church's position in that respect is protected by what has been referred to both by ministers and by the Ecclesiastical Committee as the 'convention' that the government does not legislate for the Church of England on its internal matters *without the Church's consent*.[75]

71 *Synodical Government in the Church of England: a review*, p 184.
72 The Measure would have abolished the requirements for the election by the Dean and Chapter of the Crown's nominee for a bishopric and the ceremony of confirmation of election.
73 By 32 votes to 17, the division taking place at 12.21 am on 17 July 1984.
74 The first motion was lost by 51 votes to 45 on 18 July 1989, the debate having begun at 2.06 am and the division taking place at 3.26 am. The later vote, on 20 February 1990 was carried by 228 votes to 106 – the debate on that occasion having begun at 10.15 pm and the division being conducted at 11.45 pm.
75 See eg *Select Committee on Constitutional Affairs*, oral evidence, 29 January 2004, QQ 48–95 and the 203rd and 204th Reports by the Ecclesiastical Committee, para 37.

https://doi.org/10.1017/S0956618X11000755 Published online by Cambridge University Press

The qualification inherent in that formulation of the convention is significant. If the general law is changed in a way that requires consequential amendments to Church legislation, it may be very desirable for those changes to be made by the relevant secular legislation, in order to relieve the Synod of the need to use its own – somewhat cumbersome – legislative procedures to make the changes required. Thus in some circumstances the Church may *wish* Parliament to legislate for it, notwithstanding the availability of the Synod's own legislative powers.[76]

In fact, Church legislation has been amended by government legislation, with the Church's consent, on a number of occasions during the period under review. Thus, for example, the Cathedrals Measure 1999 was amended by the Trustee Act 2000 and the Diocesan Boards of Education Measure 1991 by the School Standards and Framework Act 1998 and the Education Act 2002. More controversially, an order made by the Secretary of State in 2005 made a number of amendments to Church legislation consequential upon the introduction of civil partnerships.[77]

What matters is that – as in all the examples cited – any amendments or repeals effected by government legislation are made with the Church's explicit agreement. The real issue that can arise in that connection is as to the identity of the body that is to give the necessary consent on behalf of the Church. But it does not follow from its role as the Church's legislative body that such consent must be given by the Synod; and indeed in many cases to seek synodical consent would be impracticable given that the Synod normally meets only twice a year. Thus to date consent has generally been given by either the Archbishops' Council or the House of Bishops.

THE PATTERN OF SYNODICAL LEGISLATION

Between 1947 and 1969 the Convocations and House of Laity gave considerable priority to the revision of canon law – to such an extent as to give rise to criticism, at the time and subsequently, that the project had distracted the Church from a number of issues that, in an era of rapid change, should have had a greater call on its attention.[78] In contrast, the Synod may be thought to have been relatively sparing in terms of the volume of legislation it has produced.

76 For a discussion as to the propriety of government legislating for the Church in relation to civil partnerships, see M Hill, 'Editorial', (2007) 9 Ecc LJ 2–3, and S Slack 'Church autonomy and the civil partnership act: a rejoinder', (2007) 9 Ecc LJ 206–207.

77 The Civil Partnership Act 2004 (Overseas Relationships and Consequential, etc Amendments) Order 2005 SI 2005/3129, Art 4(3) and Schedule 3.

78 For assessments of that process see P Welsby, *A History of the Church of England 1945–1980* (Oxford, 1984), pp 41–44; E Carpenter, *Archbishop Fisher: his life and times* (Norwich, 1991), pp 205–214; R Jasper, *George Bell: Bishop of Chichester* (London, 1967), pp 194–200; and P Boulton, 'Twentieth-century revision of canon law', (2000) 5 Ecc LJ 353–368.

https://doi.org/10.1017/S0956618X11000755 Published online by Cambridge University Press

So far as the period under review is concerned, 43 Measures have received the Royal Assent since the beginning of 1986.[79] That represents an average of under two a year; and the number passing into law each year has fluctuated between none (in four years) and four (in two years). Thus one commentator has said: 'Granted that what in an analogous voluntary association would be purely internal adjustments without recourse to a public, let alone statutory procedure, the Church of England has made regular but not prolific use of the 1919 Act arrangements.'[80]

Over the same period only 23 Canons (including Amending Canons) have been promulged. That reflects the fact that, in contrast to the legal systems of some other Anglican churches, provision made by Canon has increasingly become secondary to provision made by statute as a means of addressing the legislative needs of the Church: while the Canons continue to have significance in relation to a number of areas, notably those relating to the ecclesiology of the Church and fundamental aspects of its ministry, there are substantial parts of the life of the Church – especially its organisational structure, buildings and property – that the Canons simply do not address.

Furthermore, their often somewhat general nature has also been seen by some as unsatisfactory, in terms both of the issues they address and of the nature of the provision they make. So, for example, the group that reviewed clergy terms of service considered that, so far as the position of the clergy was concerned, 'The Canons deal in repetitious detail with some matters … but many aspects of a minister's work are hardly mentioned … It is sometimes said that the Canons are aspirational rather than prescriptive, but some seem to be neither.'[81] In consequence the group considered that provision for a number of matters relating to the terms of service of the clergy were better addressed in regulations made under a Measure than by Canon.

That statutory provision remains the dominant form by which the Church of England makes provision for its life can be seen as a continuation of a very long-standing process: the Reformation saw a widening of the field in which statute law governed the life of the Church; and that field increased rapidly from the early nineteenth century onwards, to such an extent that large sections of the canon law were swept away.[82] Thus, even though descriptive of the position before the era of canon law reform, there continues to be truth in Sir Lewis Dibdin's judgement, made in 1916, that 'the predominant instrument for enacting Church legislation since the middle of the sixteenth century has been

79 For a list of the Measures that have received the Royal Assent, see <http://www.churchofengland.org/about-us/structure/churchlawlegis/legislation/measures/list.aspx>, accessed 17 September 2010.
80 R Morris (ed), *Church and State in 21st Century Britain* (London, 2009), p 43.
81 *Review of Clergy Terms of Service: report on the first phase of the work*, GS 1527 (2004), p 38.
82 For the growth in the average numbers of ecclesiastical statutes, see *The Canon Law of the Church of England* (London, 1947), p 50.

https://doi.org/10.1017/S0956618X11000755 Published online by Cambridge University Press

statutory and not canonical'.[83] In the longer historical perspective, this might be seen as part of a process of re-embodying the law of the Church in legal forms that, not least because the law of the Church of England is part of the law of the land, is more suited to the life of the nation.

It seems unlikely therefore that, as recommended by the Archbishops' Commission on Church and State,[84] provision currently made by Measure, or by both Measure and Canon, should – because it could be amended more easily – be replaced by provision by Canon alone. But whichever legislative form is preferred, it is to be hoped that there will be no recurrence of the occasional past practice of making provision by Canon that simply reproduces provision also made by Measure.[85]

As to the form of synodical legislation in a more general sense, the report of the Archbishops' Commission on the Organisation of the Church of England (the Turnbull Review) expressed a desire for something of a change in the *style* of its statutory provision at least:

> To some extent, the style and content of [synodical] legislation takes colour from the wider legal system within which it is set; and we reject the more extreme calls in some of the evidence we received for the removal of the Church's legal system. Far from 'freeing the Church', that would subject its working wholly to the provisions of the secular law. Within those limitations, however, we would look for Synod legislation that was less prescriptive and detailed, giving more discretion to dioceses and to those in day to day charge of various aspects of the Church's work to apply it in ways which best suit their local circumstances.[86]

Fine as that aspiration is, it must be questionable whether it would ever be achievable given the range and complexity of the matters that the Church's legislation must address, and the need for local advice and interpretation to which such an approach would give rise. In any event, there will be some matters on which the Church will wish to lay down a generally applicable rule rather than allowing locally exercised discretion, particularly where there is a desire to guarantee the position of those holding to a particular tradition in the Church.

A more modest aspiration was expressed by the Archbishops' Commission on Church and State, to the effect that by 'reframing Measures so as to give … powers of subordinate legislation, we should have far less need for subsequent

83 *Report of the Archbishops' Committee on Church and State*, p 291.
84 *Church and State: report of the Archbishops' Commission* (London, 1970), p 53.
85 For an example, see Canon G 2(2), which reproduces Ecclesiastical Jurisdiction Measure 1963, s 2(2), in relation to the qualifications required for appointment as a chancellor.
86 *Working as One Body* (London, 1995), p 72.

https://doi.org/10.1017/S0956618X11000755 Published online by Cambridge University Press

amendment by Measure'.[87] Given the length of the legislative process for Measures (which generally require at least three groups of sessions, and thus normally a minimum of 12 months, to complete their synodical stages alone), the advantages of proceeding by way of subordinate legislation are clear. That course of action is therefore taken wherever possible. So, as already noted, the detailed terms of common tenure were set out in regulations made under the Ecclesiastical Offices (Terms of Service) Measure 2009 rather than in the Measure itself, so enabling any future changes to be made more quickly and easily. However, constraints such as the need to amend relevant *primary* legislation to secure the policy end in view may impose a limit on the circumstances in which secondary, rather than primary, legislation may be employed.

LEGISLATION RELATING TO THE MINISTRY OF THE CLERGY

Turning to the specific ways in which the Synod's legislative functions have been exercised over the last 25 years, of all the areas of the Church's life, that of the ministry of its clergy has perhaps been the subject of the greatest amount of synodical legislative activity during that period.

The priestly and episcopal ministry of women

Of the various changes that have taken place in relation to ministry during the period under review, many will regard the opening of the diaconate and the priesthood to women as the most significant.[88] The legal provision required to achieve that was, as such, straightforward; but in the case of the ordination of women to the priesthood the synodical process was a very protracted one. The central issue in that connection – as in the case of the current draft legislation to allow women to be consecrated to the episcopate – was the nature of the provision to be made for those conscientiously unable, on theological grounds, to accept this development. In both cases the legislative process, already complex on account of the need to comply with the Article 7 and Article 8 procedures, was preceded by a substantial period of analysis and deliberation in which the Synod sought to discern the way forward from that point of view.

In the case of the ordination of women to the priesthood that process effectively began in 1984, when the Synod passed a resolution asking for the introduction of legislation to permit it.[89] However, draft legislation was not introduced to the Synod until July 1988, because of the need to allow time

87 *Church and State: report of the Archbishops' Commission*, p 49.

88 For a full account of the process leading to the ordination of women to the priesthood, see C Podmore, *Aspects of Anglican Identity* (London, 2005), ch 8. See too J Petre, *By Sex Divided: the Church of England and women priests* (London, 1994).

89 Proc GS (1984), pp 1078–1142.

https://doi.org/10.1017/S0956618X11000755 Published online by Cambridge University Press

both to explore the relevant theological issues and to determine the nature of the provision to be made for those conscientiously opposed. Following extensive consideration by the Synod and completion of the Article 7 and Article 8 references the draft legislation received Final Approval in November 1992.[90] The two Measures (the Priests (Ordination of Women) Measure 1993 and the Ordination of Women (Financial Provisions) Measure 1993) received the Royal Assent in November 1993 and the two Canons were duly promulged in February 1994.[91]

The statutory provision for those conscientiously unable to accept the development took two forms: first, provision allowing a diocesan bishop to make declarations precluding women from being ordained or ministering in his diocese and allowing a parochial church council (PCC) or cathedral to pass resolutions preventing women from ministering or exercising authority in the parish or cathedral; and secondly, provision for compensation for full-time stipendiary clergy and other ministers who resigned within ten years of the promulgation of the Canon allowing ordination of women to the priesthood on account of its promulgation.

Additionally, however, the lengthy consideration of the two Measures by the Ecclesiastical Committee (lasting from March to July 1993) provided an opportunity for the House of Bishops to give further consideration to how best to make provision for those conscientiously opposed. The outcome was the publication of proposals[92] for what became the Episcopal Ministry Act of Synod – approved at the November 1993 groups of sessions[93] – which enabled PCCs, in addition to passing the statutory resolutions, to petition their diocesan bishop for extended episcopal care, under diocesan, regional or provincial arrangements (in the last case, by a 'Provincial Episcopal Visitor').

The current legislative process in relation to the consecration of women to the episcopate has in some respects taken a similar course, with substantial time being allowed for consideration of the underlying theological principles and for the identification of the provision to be made for those conscientiously unable to accept this further development. In this case the process began with a resolution of the Synod in July 2000 calling for theological study in preparation for debate on the consecration of women to the episcopate – a request met by the report of a group chaired by the then Bishop of Rochester, published in November 2004.[94] The Synod having resolved in July 2005 'to set in train the process for removing the legal obstacles to the ordination of women to the episcopate'[95] and in July

90 *The Ordination of Women to the Priesthood: the Synod debate, 11 November 1992: the verbatim record* (London, 1993).
91 Proc GS (1984), pp 7–9.
92 *Ordination of Women to the Priesthood: Pastoral Arrangements. Report by the House of Bishops*, GS 1074 (1993).
93 Proc GS (1993), pp 672–703 and 982–996.
94 Proc GS (July 2000), pp 199–234; *Women Bishops in the Church of England* (London, 2004).
95 Proc GS (July 2005), pp 327–377.

https://doi.org/10.1017/S0956618X11000755 Published online by Cambridge University Press

2006 that a drafting group be established to prepare draft legislation 'that would seek to maintain the highest possible degree of communion with those conscientiously unable to receive the ministry of women bishops',[96] work was undertaken on behalf of the House of Bishops and then by a Legislative Drafting Group to identify the most appropriate form of provision.[97]

That process resulted in a decision in July 2008 that the arrangements for those conscientiously opposed should be contained in a national Code of Practice to which all concerned would be required to have regard.[98] Draft legislation having that effect and providing for the provision to be made by way of delegation was given First Consideration in February 2009.[99] In the subsequent Revision Committee Stage – which was even more substantial than that for the draft legislation for the priestly ordination of women[100] – the draft legislation was altered significantly, but in such a way as still to make provision by way of delegation and in accordance with a Code of Practice. All the amendments moved to the draft legislation on its return to the Synod for the Revision Stage in July 2010 that would have altered the nature of the provision were rejected. The draft legislation accordingly now stands referred to the dioceses under Article 8 substantially in the form in which it left the Revision Committee.

The nature of the provision to be made under the draft legislation differs considerably from that made under the legislation relating to women's priestly ministry. In particular, parishes will have no legal right to decline to receive the ministry of female bishops or priests; and there is no provision for compensation for those who leave office. Much of the weight of the provision is accordingly thrown onto the Code of Practice under the Measure, to which all those exercising relevant functions are required to 'have regard'; but the final form of that Code cannot be known until after the Measure has received Final Approval, Parliamentary approval and the Royal Assent.

The final outcome of the process of course remains to be seen: a number of further stages will have to be completed successfully if the episcopate is to be opened to women, including the obtaining of a two-thirds majority in each House of the Synod at Final Approval. But, whatever the eventual outcome, it can be said at this point that the way that the matter has proceeded to date demonstrates that the synodical process provides a means by which bishops, clergy and laity can play their proper roles in discerning a way forward for the

96 Proc GS (July 2006), pp 267–309.
97 See the report of the House of Bishops' Women Bishops Working Group, GS 1605 (2006); the report from the Bishops of Guildford and Gloucester, GS Misc 826 (2006); and the reports of the Legislative Drafting Group, GS 1685 (2008) and GS 1707 (2008).
98 Proc GS (July 2008), pp 78–104 and 305–384.
99 Proc GS (February 2009), pp 167–196.
100 The committee met on 16 occasions between May 2009 and April 2010, receiving 297 submissions, of which 114 were from individual Synod members or groups including Synod members and others.

https://doi.org/10.1017/S0956618X11000755 Published online by Cambridge University Press

Church in relation to matters on which its members hold sharply differing theological views.

Clergy terms of service

A further large, and potentially very significant, legislative project in the field of ministry was that in relation to clergy terms of service – a project worth examining in more detail, as a creative and complex example of the way in which the Synod exercises its legislative powers.

Following a substantial policy review begun in 2003, in the course of which proposals were developed, from 2008 onwards the Synod approved a package of legislation that retained the historic concept of the ecclesiastical office while attaching new rights and responsibilities to it. In the context of the Church of England, this approach provides a preferable alternative to the employment model that recent judicial decisions concerning the employment status of ministers of religion seem likely to promote in the case of other churches and religions.[101] Lying behind the legislation's introduction was the recognition that it is no longer acceptable for there to be different rules as to security of tenure and housing as between parochial and other clergy, or for there to continue to be a sharp disparity within the ranks of parochial clergy between the security enjoyed by those who have the freehold and the very insecure position of others. Conversely, it was thought right that, while they should not be employees, clergy should have a number of rights corresponding to those of employees, including rights in connection with stipend and annual leave.

The resulting new form of office-holding, known as 'common tenure', was introduced by the full panoply of legislative provision: the Ecclesiastical Offices (Terms of Service) Measure 2009, the Regulations made under it, an associated Amending Canon, codes of practice and 'directions' made by the Archbishops' Council. This unusually complex package of legislative provision set up a complete framework of rights and responsibilities, on the basis of which clergy subject to common tenure hold office.

The 2009 Measure provided the basic framework, including by identifying those subject to it (notably all licensed clergy, clergy in freehold posts who opted into it when it came into force and clergy appointed thereafter). It also dealt with other issues such as the duration of appointments and the provision of housing. The Regulations made under the Measure set out the terms of common tenure in considerable detail, dealing with the sort of issues that, in the case of an employee, would be contained in their contract. Among other matters, they allow the Archbishops' Council to make provision for the ministerial review of clergy and for grievance and capability procedures.

101 See *Percy v National Mission Board of the Church of Scotland* [2005] UKHL 73; *Stewart v New Testament Church of God* [2007] EWCA Civ 1004; *Moore v President of the Methodist Conference* [2011] ICR 819.

https://doi.org/10.1017/S0956618X11000755 Published online by Cambridge University Press

Clergy discipline

Another major change in relation to ministry has been the introduction of a new disciplinary system for the clergy in relation to matters other than doctrine, ritual or ceremonial. Reflecting the outcome of a review that uncovered evidence of poor practice in this area,[102] the Clergy Discipline Measure 2003 and the Rules and Code of Practice made under it put in place a system intended to be fairer and more transparent, and to achieve a better balance between the different interests of the complainant, the cleric, the Church and the wider public. To that end the Measure provided for complaints to be made to the bishop and, in most cases, dealt with by him, but with the possibility of their being presented to a five-member 'bishop's disciplinary tribunal' in the small number of cases that could not be dealt with in that way (notably where the complaint was of serious kind and the cleric denied the allegation).[103]

Despite initial concerns on the part of some bishops and clergy, the system seems to be working well, with most cases being dealt with by the diocesan bishop and only a limited number of complaints – all of a serious kind – having to be brought before bishops' disciplinary tribunals. Again, the package of legislative provision is a complex one – comprising a Measure, two sets of procedural rules, a Code of Practice and practice directions issued by the President of Tribunals. But the fact that it is subject to active ongoing review by a specially created statutory body, in the form of the Clergy Discipline Commission, has helped to ensure that the details of the regime can be adjusted as experience develops.[104]

Other aspects of clerical ministry

Other legislative changes made in the period under review in relation to ministry included the relaxation by the Clergy (Ordination) Measure 1990 of the prohibition on the ordination of those who have remarried while a former spouse is still living, or are married to someone whose former spouse is still living, by allowing the relevant archbishop to grant a faculty permitting ordination. A highly contentious change at the time – to such an extent that it was the subject of legal challenge[105] – the faculty process seems to have become a generally accepted part of the Church's life, of which use is regularly made.

In contrast, the procedures in the Incumbents (Vacation of Benefices) Measure 1977 allowing the removal of an incumbent in cases of pastoral

102 See *Under Authority*, GS 1217 (1996).

103 Clergy who are the subject of a complaint under the 2003 Measure are, subject to an assessment of their financial resources, eligible to receive ecclesiastical legal aid, the arrangements for which were revised by the Church of England (Legal Aid) Measure 1994 and the Rules made under it.

104 Thus the Code of Practice under the Measure was amended by the Commission within five years of its first being made, following wide-ranging consultation.

105 *See R v Ecclesiastical Committee of Both Houses of Parliament ex parte the Church Society* (1994) 6 Admin LR 670.

https://doi.org/10.1017/S0956618X11000755 Published online by Cambridge University Press

breakdown or disability continue to be rarely used despite having been amended substantially by the Incumbents (Vacation of Benefices) (Amendment) Measure 1993 in order to remedy major drawbacks in the original Measure. But the procedures remain unsatisfactory in some respects notwithstanding this second bite at the cherry. With hindsight, the considerable amount of synodical activity devoted to putting them in place seems disproportionate to the use that has been, or is likely to be, made of them: their potential application will diminish further as more clergy come to hold office on common tenure.

Pastoral provision

Turning from the clergy to the pastoral framework within which their ministry is exercised, the mechanisms for pastoral reorganisation have also received attention during the period under review. The Pastoral Measure 1968 of course made substantial provision for that, allowing the making of pastoral schemes that can (inter alia) create and dissolve parishes and benefices and declare churches to be closed for regular public worship. Having been extensively amended, that Measure was consolidated by the Pastoral Measure 1983, which was in turn substantially amended (notably by the Team and Group Ministries Measure 1995 and the Dioceses, Pastoral and Mission Measure 2007) before being consolidated by the Mission and Pastoral Measure 2011.

Significant changes made in the course of this process – and directed towards meeting changing pastoral and mission needs – include refinements in relation to the nature of collaborative ministry conducted through teams and groups, simplification of processes (including the reduction of the role of the Privy Council to that of an appellate body and the effective transfer of responsibility for drafting pastoral schemes – other than pastoral church buildings schemes – from the Commissioners to the dioceses), changes of nomenclature[106] (partly in order to reflect an increased emphasis on the importance of mission in the context of pastoral reorganisation[107]) and the introduction of the new concept of a 'bishop's mission initiative'. Such initiatives represent a new form of legal structure, involving recognition, accountability and oversight, to foster or develop a form of Christian community to further mission and thus support the growing variety of 'fresh expressions'.[108] This is accordingly the area of the Church's legislative activity on which the increased emphasis in recent years on the priority of mission has had the most obvious and explicit impact.

106 For example, by referring to the diocesan 'mission and pastoral committee' rather than the 'pastoral committee', and declaring a church 'closed for regular public worship' rather than 'redundant'.

107 See in that connection the statutory duty 'to have due regard to the furtherance of the mission of the Church of England', now imposed by the Mission and Pastoral Measure 2011, s 1.

108 For an account of the 2007 Measure see I Slaughter, 'The Dioceses Pastoral and Mission Measure 2007', (2009) 11 Ecc LJ 4–35.

https://doi.org/10.1017/S0956618X11000755 Published online by Cambridge University Press

Patronage

In another ministry-related part of the legal framework, the Patronage (Benefices) Measure 1986 put in place new and simpler arrangements in relation to the registration and exercise of rights of patronage. In doing so it swept away much of the older law in that area[109] and, significantly, gave a parish – through its representatives – a right of veto over an appointment for the first time. Welcome as its reforms were to many, the 1986 Measure nonetheless represented a compromise, and thus a disappointment to those who had sought a more radical approach. But it was only arrived at after a legislative process that was particularly protracted and contentious, involving as it did the need to reconcile the different interests of patrons, bishops and parishes: although given Final Approval in February 1985, the 1986 Measure was originally introduced in 1978; and in addition to being referred to the dioceses under Article 8 it underwent two Revision Committee Stages. The lack of any desire to repeat that experience, coupled with recognition that the new arrangements work adequately in most cases, seems likely to explain the fact that subsequent legislative activity in this area has been limited.

Such amendments as have been made have been of a specific nature. Thus the Vacancies in Suffragan Sees and Other Ecclesiastical Offices Measure 2010 altered the historic rules of law in relation to Crown patronage, by abolishing the Crown's rights in relation to 'cession' (under which the Sovereign has the right to exercise patronage not normally in her gift, where a diocesan see is vacant or where the holder of a benefice is appointed to a diocesan bishopric) and allowing for the statutory delegation of the Crown's *sede vacante* patronage to a suffragan or other bishop of the relevant diocese. Similarly, the Crown Benefices (Parish Representatives) Measure 2010 extended to Crown benefices the right to appoint parish representatives.

Episcopal ministry

Finally in this area, the ministry of bishops has also been the subject of legislation. The Dioceses, Pastoral and Mission Measure 2007 made various changes in that connection, including by changing the framework in relation to bishops' powers of delegation in ways that generally put the diocese rather than the central Church in control of delegations wherever possible and, conversely, by putting in place new arrangements for the filling and creation of suffragan sees that strengthened the role of the central Church.

109 As regards statutory provisions alone, it repealed 10 Acts and Measures in their entirety and amended 25 other statutes.

https://doi.org/10.1017/S0956618X11000755 Published online by Cambridge University Press

LEGISLATION RELATING TO THE INSTITUTIONAL STRUCTURES OF THE CHURCH

The institutional structures of the Church of England being largely statutory, it should be no surprise that legislation has been required over the period under review to amend or restructure them to meet changing circumstances.

At national level, the most significant changes from that point of view were those made by the National Institutions Measure 1998. Giving effect (in a modified form) to the recommendations of the Tunbull Review,[110] the Measure established the Archbishops' Council as a focus for leadership and executive responsibility, to undertake the direction of policy and resources at the national level. To that end it transferred to the Archbishops' Council responsibility for the application of the balance on the Church Commissioners' general fund. The 1998 Measure did not alter the functions of the Synod as such but did provide for the establishment of a Business Committee for it, as well as making provision for the Council to be accountable to the Synod in various respects and for the Synod to have to approve its budget. Subsequently the Synod's Standing Committee ceased to exist, being effectively replaced by the Council, and its various boards and councils became committees of the Council.

At diocesan level, the Cathedrals Measure 1999 gave effect to the recommendations of the Howe Commission, which sought to provide greater uniformity of practice between cathedrals.[111] Chief among the changes it made, which for most practical purposes ended the distinction between 'dean and chapter cathedrals' and 'parish church cathedrals', were the introduction of new arrangements for a cathedral's governance (including the creation of a new entity – the 'council' – to review and support the conduct of its work by the chapter) and for a cathedral's constitutions and statutes.

Nor has the diocesan structure itself escaped change: the Dioceses, Pastoral and Mission Measure 2007 significantly altered the procedures for diocesan reorganisation contained in the Dioceses Measure 1978 – which had not, in practice, proved an effective instrument of change. The 2007 Measure made new provision for diocesan reorganisation schemes, under which the reconstituted Dioceses Commission can take the initiative in preparing such schemes, and proposals for them can be put to the Synod for approval without the agreement of the dioceses concerned if the relevant archbishop gives authorisation on certain specified grounds – including that there are wider considerations affecting the province or the Church as a whole that require the scheme to go before the Synod. A major aim of the 2007 Measure was therefore to enable the Dioceses Commission to take a more proactive

110 For the original recommendations of the review, see its report *Working as One Body*.
111 *Heritage and Renewal: the report of the Archbishops' commission on cathedrals* (London, 1994).

https://doi.org/10.1017/S0956618X11000755 Published online by Cambridge University Press

role and to improve the prospects of bringing projects that are in the interests of the wider Church to a successful conclusion.

In contrast, the basic structures of the Church at local level – including parochial church councils – have not been the subject of radical change. But numerous changes of detail have been made (both by the Synodical Government (Amendment) Measure 2003 and various Amendment Resolutions) to the Church Representation Rules contained in Schedule 3 to the Synodical Government Measure 1969. Dealing as they do, among other matters, with the membership and procedure of PCCs, they and the Parochial Church Councils (Powers) Measure 1957 have needed adjustment to take account, inter alia, of the fact that PCCs are now accepted as charities.

Also at parish level, the Churchwardens Measure 2001 amended the law relating to the qualifications and choosing of churchwardens and introduced new provision for their disqualification after six periods of office.

LEGISLATION RELATING TO OTHER AREAS OF THE CHURCH'S LIFE

Sacraments and other divine service

The period under review has not seen significant legislative activity in relation to the sacraments and other divine worship, as a result of the Church of England (Worship and Doctrine) Measure 1974 having effectively given the Church the freedom to make its own liturgy without reference to Parliament – a freedom that culminated in the 'Common Worship' project.

Most recent legislative attention has been largely focused on marriage. In particular, in order to encourage couples to marry according to the rites of the Church of England by removing unnecessary obstacles to such marriage, the Church of England Marriage Measure 2008 relaxed the requirements that a couple have to satisfy if they are to have a right to be married in a parish. In general, couples only have such a right in relation to the church of the parish where one or both of them are resident or are entered on the church electoral roll. But the 2008 Measure made it possible for a couple to marry, without the need for a Special Licence, in a parish with which one or both of them have a 'qualifying connection' of one of the types specified in the Measure (which include connections arising through a relative). That issues subsequently arose as to the application of the 'qualifying connection' principle in the context of multi-parish benefices and benefices held in plurality, so as to require legislative intervention in the form of the Church of England Marriage (Amendment) Measure[112] to clarify the position, is more of a testimony to the complex interface between ecclesiastical law and marriage law than anything else.

112 The Measure received Final Approval in July 2011 and at the time of writing awaits consideration by the Ecclesiastical Committee.

https://doi.org/10.1017/S0956618X11000755 Published online by Cambridge University Press

Ecumenical relations

The major item of legislation in relation to ecumenical affairs during the period under review was the Church of England (Ecumenical Relations) Measure 1988, which put in place a new framework for domestic ecumenical engagement. Enacted in response to concerns that the position on the ground had in some areas moved further ahead than was permitted by the law, the Measure authorised the making of Canons for two main purposes: to allow joint worship with other churches to which the Measure applies[113] and the use of Church of England places of worship by such churches; and to allow diocesan bishops to enter into agreements with such churches for the establishment of 'local ecumenical projects' (LEPs) and for the participation in such projects of Church of England clergy and lay ministers. The powers had to be exercised so that, inter alia, no person could preside at a celebration of the Holy Communion according to the use of the Church of England unless episcopally ordained priest in a church whose orders are recognised and accepted by the Church of England.

The Canons made under the 1988 Measure (Canons B43 and B44) were promulged in January 1989. They may be taken to have achieved their object since, although Canon B44 was adjusted in 2009 in order to give more flexibility over when services of Holy Communion according to the rites of the Church of England need to be celebrated in LEPs, the substance of the framework they laid down has not been amended subsequently.

Resources

In view of the increasing financial challenges over the last 25 years, it is hardly surprising that legislative action has been needed in connection with the resources of the Church. The most significant change required has concerned the funding of clergy pensions: the potential (unsustainable) liability of the Church Commissioners to meet the cost of the statutory Church of England Pensions Scheme led to the Pensions Measure 1997 closing that scheme. It was replaced, so far as future service was concerned, by the Church of England Funded Pensions Scheme, regulated by a trust deed and rules and funded by contributions, in the case of parochial clergy, from the dioceses. The Measure also gave the Commissioners power to spend capital to meet their past service liabilities.[114]

Another area relating to resources in which the Synod has legislated is that of ecclesiastical fees. The Ecclesiastical Fees Measure 1986 put in place new arrangements for two different types of fees: 'parochial fees' in respect of matters such as weddings and funerals; and the fees payable to ecclesiastical

113 The Measure applies to churches that are designated for the purpose by the Archbishops and that are either ones to which the Sharing of Church Buildings Act 1969 applies or that are nominated by the Synod.

114 Originally limited to a period of seven years, that power was most recently extended to 2018 by the Church of England Pensions (Amendment) Measure 2009.

https://doi.org/10.1017/S0956618X11000755 Published online by Cambridge University Press

judges and legal officers. Because of perceived difficulties with the arrangements made by the 1986 Measure for parochial fees, further legislative intervention was considered necessary. The Ecclesiastical Fees (Amendment) Measure 2011 therefore amended the 1986 Measure by providing for fees to be payable to PCCs and diocesan boards of finance (in the latter case replacing the fees previously payable to incumbents), establishing a list of services and other duties for which a fee may be prescribed, recasting the power of the Archbishops' Council to make a fees order prescribing such fees and (in the interests of consistency) giving the Council power to prescribe what costs and expenses are included within the statutory fees. However, while that new statutory framework has been put in place, the Synod has yet to reach agreement on the policy for its exercise: in July 2011 the first Order made by the Council under the new regime failed to secure synodical approval.

Finally, the Stipends (Cessation of Special Payments) Measure 2005 provided for the guaranteed annuities and other special payments formerly payable to incumbents under the Endowments and Glebe Measure 1976 to be abolished (unless the incumbent concerned opted to carry on receiving the payment) and for the sums released as a result to be 'ring-fenced' so that they became applicable only in support of clergy stipends. This change, which allowed the funds in question to be targeted on those areas where there is the greatest need for them, represents a further step in the continuing process of securing a more equitable and effective distribution of the historic endowments of the Church.

Buildings

The fact that the faculty jurisdiction is already well developed and subject to the provisions of the Faculty Jurisdiction Measure 1964 has not meant that it has escaped legislative attention. Inevitably, the Church continues to be concerned to balance the proper objective of preserving its historic buildings with that of ensuring that they can continue to be living places of worship. From the latter point of view a key consideration has been the need to retain the 'ecclesiastical exemption' – that is, the exemption from listed building control. To that end the Church needs to be able to demonstrate to the government that its own procedures provide satisfactory safeguards against inappropriate change to churches. So it should not surprise that, over the period of review, there has been significant primary and secondary legislation to refine and extend the Church's own controls.

As regards the exercise of the faculty jurisdiction, the chief changes were those made by the Care of Churches and Ecclesiastical Jurisdiction Measure 1991.[115] Imposing a new express duty on all those carrying out functions of

115 The Measure gave effect to recommendations of the Faculty Jurisdiction Commission's Report, *The Continuing Care of Churches and Cathedrals* (London, 1984), relating to the faculty jurisdiction.

https://doi.org/10.1017/S0956618X11000755 Published online by Cambridge University Press

care and conservation to 'have due regard to the role of the church as a local centre of worship and mission', it went on to strengthen the faculty jurisdiction in various ways – including by reinforcing the arrangements for the care and inspection of churches and providing for the making of costs orders, injunctions and restoration and contempt orders. On a more facilitative note, it also required chancellors to issue written guidance on minor matters that could be undertaken without a faculty and to authorise archdeacons to grant unopposed faculties in relation to specified matters.

As regards the application of the faculty jurisdiction, the Care of Places of Worship Measure 1999 provided for it to extend also to buildings included in a list maintained by what is now the Church Buildings Council, comprising buildings such as churches subject to a peculiar jurisdiction and chapels of see houses, religious communities and public or charitable institutions.

Alongside these changes to primary legislation, there have inevitably been considerable changes to the secondary legislation required to fill out the detail of the statutory framework. The Faculty Jurisdiction Rules 2000 now supply the detailed procedural provision for the exercise of the faculty jurisdiction, including by providing for the preliminary steps and the subsequent exercise of the jurisdiction by the chancellor and the archdeacon. The Faculty Jurisdiction (Care of Places of Worship) Rules 2000 laid down a broadly similar procedure for faculty proceedings involving buildings brought within the jurisdiction by the 1999 Measure.

Changes to the regulatory regime for buildings have not been restricted to churches. The Care of Cathedrals Measure 1990 (amended by, inter alia, the Care of Cathedrals (Amendment) Measure 2005) and the Rules made under it put in place new controls in relation to cathedrals and their contents comparable to, but different from, those of the faculty jurisdiction (which does not apply to cathedrals).[116] The 1990 Measure made provision for the care and conservation of cathedral churches and their precincts, providing for the establishment of bodies – the Cathedrals Fabric Commission for England and local fabric advisory committees – whose approval is required before alterations and other categories of works can be carried out in respect of a cathedral. Subsequently, the Care of Cathedrals (Supplementary Provisions) Measure 1994 made provision for the enforcement of the controls contained in the 1990 Measure by giving the bishop power to prevent or stop contraventions and to take steps to restore the status quo where necessary.

Finally in relation to buildings, in recent years the 'community' use of churches has increasingly been recognised as a valuable potential means of allowing them to be retained in use. As a means of promoting such use, the

116 The 1990 Measure gave effect to those recommendations of *The Continuing Care of Churches and Cathedrals* relating to cathedrals.

https://doi.org/10.1017/S0956618X11000755 Published online by Cambridge University Press

Pastoral (Amendment) Measure 2006 amended the Pastoral Measure 1986 so as to allow a consistory court to grant a faculty authorising a lease of a church building, rather than merely a licence, provided that the building continues, taken as a whole, to be used primarily as a place of worship. Any lease must meet certain conditions, including that the parts of the building comprised in the lease are not to be used for purposes that are, or in a way that is, inconsistent with the use of the building primarily as a place of worship. However, it seems that this Measure may not bear the fruit hoped for from it: to date, few leases have been authorised in exercise of the new power.

THE FUTURE LEGISLATIVE AGENDA

With the significant exception of the legislation relating to women in the episcopate, the 2010–2015 synodical quinquennium seems likely to see less legislative activity than the two previous quinquennia: at the time of writing there are few significant policy reviews in progress of a kind that will generate legislative outcomes. However, in the light of the perceived need to free the structures of the Church for mission, there may be increasing pressure during the quinquennium for a review of legislative provisions that impose unnecessary burdens, especially at parish and diocesan level, with a view to 'reducing the time spent by clergy and church members on the management of structures and processes'.[117] One modest possibility from that point of view might be the creation of a new power to enable members of PCCs to receive benefits from the PCC that otherwise (as 'charity trustees') they would not be entitled to receive without obtaining the agreement of the Charity Commission.

Additionally, if it does indeed transpire that the legislative programme for the quinquennium is relatively light, that would provide the opportunity for an enhanced programme of law reform and consolidation. That it was desirable to 'simplify and reduce the bulk of existing legislation' was recognised as long ago as 1970, by the Archbishops' Commission on Church and State, which went on to recommend a programme of consolidation and revision – to be promoted by a permanent commission on Church legislation and supported by Standing Orders that facilitated consolidation by restricting the scope for debate on consolidation Measures.[118] Similarly, the report of the Turnbull Review expressed the wish that the head of what became the Legal Office of the National Church Institutions 'should have a major responsibility for pursuing the revision and simplification of the ecclesiastical law, with all the potential

117 GS Misc 995 (2011), describing a proposal to carry forward the agenda set out in *Challenges for the New Quinquennium*, GS 1815 (2011).

118 *Church and State: report of the Archbishops' Commission*, pp 55–56.

https://doi.org/10.1017/S0956618X11000755 Published online by Cambridge University Press

for administrative and other savings at all levels of the Church which this would allow'.[119]

While in principle a significant project directed to this end would of course be highly desirable (and something that the Ecclesiastical Law Society itself sought to promote in the early 1990s through a series of recommendations for the revision of ecclesiastical statute law),[120] it has not to date proved possible to identify either a body or the necessary resources required to support it. Thus the process of law reform has been more limited and carried out on a more ad hoc basis.

One element in that process comprises the series of Church of England (Miscellaneous) Provisions Measures (at least one of which is taken through the Synod in each quinquennium), which, by convention, deal with matters that are non-contentious, and often of a more technical character.[121] The other element is a limited degree of consolidation of Measures that have been the subject of substantial amendment over the years, in order to arrive at a composite and coherent text. To that end, for example, the Synod enacted the Mission and Pastoral Measure 2011 (referred to above) and the Care of Cathedrals Measure 2011 (which consolidates three principal and two other Measures). The Synod's Standing Orders have also recently been amended to facilitate the passage of consolidation Measures and instruments. The current quinquennium accordingly provides an opportunity for further activity of this kind, with the legislation relating to clergy pensions and the Church Representation Rules both being possible candidates for consideration.

As regards more specific areas for possible legislative attention, one candidate may be clergy discipline in relation to matters of doctrine, ritual and ceremonial – the provision for which continues to be contained in the Ecclesiastical Jurisdiction Measure 1963. Many regard the 1963 Measure as effectively a dead letter, on account of its complexity and the fact that the maximum penalty for a first offence is only that of 'monition' – that is, an order to do, or refrain from doing, a specified act. Yet in 2004 the Synod decided (on a division by houses, lost in the House of Clergy) to reject proposals to replace the 1963 Measure with new procedures broadly modelled on those of the Clergy Discipline Measure 2003 and also to create a new doctrinal offence.[122]

To date, revised proposals have not been brought before the Synod. But it would not, perhaps, be surprising if this important area of discipline were to come before the Synod again at some point in the current quinquennium: it seems difficult to sustain indefinitely a situation in which it is so hard to take

119 *Working as One Body*, p 149.
120 See Chancellor Spafford and others, 'Revision of ecclesiastical statute law', (1990–1992), 2 Ecc LJ 42–47, 305–314 and 388–418.
121 See, during the period under review, the Church of England (Miscellaneous Provisions) Measures of 1988, 1992, 1995, 2000, 2005, 2006 and 2010.
122 Proc GS (July 2004), pp 79–103 and GS 1554 (2004).

https://doi.org/10.1017/S0956618X11000755 Published online by Cambridge University Press

formal action in the face even of serious departure from the Church's teaching. However, a restraining factor may be the need – were there to be an effective system of discipline in relation to matters of doctrine, ritual and ceremonial generally – also to consider some revision of the Canons relating to worship: the gap between practice and requirements of the 'B series' of Canons in relation to 'divine service and the administration of the sacraments' has become so wide in some places that to introduce a more usable disciplinary system while leaving the Canons untouched could be a recipe for difficult and unpredictable consequences.

CONCLUSION

The Church can claim a right to make rules for its own members, not least by reference to the commission given to the Apostles to 'bind' and to 'loose'.[123] In exercising that right the Church is, in Hooker's language, concerned with 'ordering the public spiritual affairs of the Church of God'.[124] But the Church's legislative authority is not an unlimited one:

> The Church has, in fact, authority only to make such rules as will further its purpose as an institution for the help of men in their following of our Lord, and which will prevent anything creeping into its life that may hinder it from performing its proper functions.

Thus 'in its legislative activities the Church is guided by the criterion of utility'.[125] It follows that the priorities of its legislative activity will change over time as issues are addressed or become less important and new ones emerge. That that is so will be apparent from the Synod's legislative activity during the period under review. Nonetheless, despite its rather disparate nature, certain common themes emerge from that activity, including a growing awareness of the importance of mission, the requirement for effective governance and financial rigour, and the need to reshape the Church's ministry in ways appropriate to the challenges and opportunities of the modern world.

The length of time needed to bring a Measure into law, and the resource intensiveness of the legislative process, has understandably made the Synod cautious about resorting to legislation as a means of implementing policy. But where, after due consideration, it has decided to take that course it has not been afraid to address contentious issues or technical areas of the law. It has

123 Matthew 18:18. See too Matthew 16:19 and 19:28, and Luke 22:28–30 and 10:16. For a discussion of the role of the law in the life of the Church, see *The Canon Law of the Church of England*, ch 1.

124 R Hooker, *On the Laws of Ecclesiastical Polity*, Bk III, ch 1.14 (reproduced in R Hooker, *The Works* (seventh edition, Oxford, 1888), vol I, p 352).

125 *The Canon Law of the Church of England*, p 4.

https://doi.org/10.1017/S0956618X11000755 Published online by Cambridge University Press

also been willing both to alter long-established parts of the Church's legal framework and to introduce new legal concepts.

Furthermore, in employing legislation as an instrument of policy, the Synod has shown itself willing to use the full range of provision open to it. Indeed, there has perhaps been a trend over the last 25 years for legislative change to take the form of more complex and sophisticated packages comprising a number of legislative and other instruments.

On occasion the use made of new powers introduced by legislation has, in the event, been disappointing. And sometimes legislative change has required subsequent amendment to optimise its value. Overall, however, the Synod's legislative activity of the last 25 years can be said to have delivered the change sought by the Church, in furtherance of its mission, across wide areas of its life. If so, that positive outcome must be attributable at least in part to the nature of the synodical process itself.

https://doi.org/10.1017/S0956618X11000755 Published online by Cambridge University Press