

## RECENT LEGISLATION

DAVID McCLEAN

*Chancellor of the Dioceses of Newcastle and Sheffield*

Anyone attempting a survey of legislation in 1998 and 1999 of some interest to ecclesiastical lawyers is soon reminded how extensive those interests can be, and into how many specialist fields ecclesiastical lawyers may wander. To examine all the provisions of potential interest would occupy several issues of the *Journal*; in the nature of things this survey cannot provide more than a pointer to issues which lurk in the small print of secular legislation.

### DATA PROTECTION

The Data Protection Act 1998 provides a prime example of a lengthy and complex statute full of potential difficulties for the non-specialist. Although similar in purpose and structure to its predecessor, the Data Protection Act 1984, which it replaces, the scope of the new legislation is notably wider. 'Data' now includes any information which is recorded as part of a relevant filing system (or with the intention that it should form part of a relevant filing system, so those who never quite get around to doing the filing are not excused).<sup>1</sup> This means that manual records now fall within the scope of data protection, though registration with the Data Protection Commissioner is not required where the data are not to be processed by computer or a similar piece of equipment.<sup>2</sup> Enhanced protection is given by the Act to 'sensitive personal data', defined to include information as to the data subject's 'religious beliefs or other beliefs of a similar nature'.<sup>3</sup>

The first of the Act's 'data protection principles' is that personal data should be processed fairly and lawfully, and should not be processed unless one of the relevant conditions is met.<sup>4</sup> These include, in the case of non-sensitive data, the consent of the data subject<sup>5</sup> and the fact that the processing is necessary for the exercise of any functions conferred on any person by or under any enactment.<sup>6</sup> Those same conditions are relevant to sensitive data (though the consent in such cases must be 'explicit'),<sup>7</sup> and it would seem that most records held by diocesan registrars or church electoral roll officers would be within that language. The 'non-disclosure' principles are dis-applied where the data consist of information which has to be published or made available to the public by or under any enactment;<sup>8</sup> the electoral roll is again an example of such material.

### SCHOOLS

Major reforms were made by the School Standards and Framework Act 1998. The churches, and especially the Church of England, have a major role in the education system, particularly in managing 'voluntary aided' and 'voluntary controlled' schools. As originally proposed, the Act would have abolished these two categories, requiring the affected schools to come under different régimes, but after very strenuous lobbying by the churches<sup>9</sup> this proposal was dropped. New provisions as to the

<sup>1</sup> Data Protection Act 1998 (c 29), s 1(1)(c).

<sup>2</sup> This is the effect of *ibid.*, s 17. There are transitional provisions in Sch 8 relating to manual data.

<sup>3</sup> *Ibid.*, s 2(c). See Sch 1, para 1(b), and Sch 3.

<sup>4</sup> See *ibid.*, Sch 1, para 1(a).

<sup>5</sup> *Ibid.*, Sch 2, para 1.

<sup>6</sup> *Ibid.*, Sch 2, para 5(b).

<sup>7</sup> *Ibid.*, Sch 3, paras 1, 7(1)(b).

<sup>8</sup> *Ibid.*, s 34.

<sup>9</sup> See the General Synod's *Report of Proceedings*, 10th February 1998, reporting a series of meetings for six hours on a single day with three different teams of government officials.

categories of maintained schools are contained in Part II of the Act,<sup>10</sup> which makes it rather easier for a school to move from controlled to aided status, the Church accepting responsibility for fifteen per cent of the cost of any building works but gaining a stronger position on the school's board of managers.<sup>11</sup> It also clarifies the right of the managers of a voluntary school to determine the use to which the building is to be put on a Sunday, facilitating its use as a place of worship.<sup>12</sup>

The Act provides for religious education as part of the basic curriculum;<sup>13</sup> enables schools to be designated as having a religious character, where denominational religious education is provided;<sup>14</sup> and for daily acts of collective worship.<sup>15</sup>

The new Act has some important provisions concerning the appointment of 'reserved teachers'. In effect, where a voluntary (that is, church) school has more than two teachers, the school must have at least one teacher appointed as competent to give religious education in accordance with the tenets of the church concerned; the numbers change with that of the total staff complement.<sup>16</sup> In non-denominational schools however it is expressly provided that religious opinions or attendance or non-attendance at religious worship may not affect appointment salary or promotion as a teacher.<sup>17</sup> In voluntary or foundation schools having 'a religious character' it is expressly provided that in appointing the head teacher regard may be had to the appointee's 'ability and fitness to preserve and develop the religious character of the school'.<sup>18</sup> In voluntary aided schools, the appointment of any teacher may take into account religious opinions, observance, and willingness to give religious education in accordance with the tenets of the church; and conduct incompatible with those tenets may be a ground for dismissal.<sup>19</sup>

#### THE NATIONAL MINIMUM WAGE

Special provision is made in the National Minimum Wage Act 1998 for voluntary workers, including, for example, those serving in charity or cathedral shops as volunteers. So long as a volunteer works for expenses only (with no benefits in kind except reasonable subsistence, which might include meals in a cathedral refectory), he or she is not entitled to the national minimum wage.<sup>20</sup> But if a wage is paid, the national minimum does apply.

#### HUMAN RIGHTS ACT 1998

A full examination of the effect of the Human Rights Act 1998 is given elsewhere in this issue. The end-result of the eventful passage of the Bill, which led to the removal in the Commons of amendments made in the Lords at the prompting of Baroness Young, was a promise by the government to introduce what became section 60 of the Schools Standards and Framework Act 1998, already referred to, on religious criteria in school appointments. The other was a fairly weak but symbolic provision which became section 13(1) of the Human Rights Act 1998:

'If a court's determination of any question arising under this Act might affect the exercise by a religious organisation (itself or its members collectively) of the Con-

<sup>10</sup> The School Standards and Framework Act 1998 (c 31), Pt 11, comprises ss 20–83.

<sup>11</sup> See *ibid.* s 35, Sch 8.

<sup>12</sup> See *ibid.* s 40, Sch 13.

<sup>13</sup> *Ibid.* s 69(1).

<sup>14</sup> *Ibid.* s 69(2)–(5), Sch 19.

<sup>15</sup> *Ibid.* s 70, Sch 20.

<sup>16</sup> *Ibid.* s 58.

<sup>17</sup> *Ibid.* s 59.

<sup>18</sup> *Ibid.* s 60(1), (4).

<sup>19</sup> *Ibid.* s 60(5).

<sup>20</sup> National Minimum Wage Act 1998 (c 39), s 44.

vention right to freedom of thought, conscience and religion, it must have particular regard to the importance of that right'.

This does not give priority to that right, for that would be contrary to the European Convention on Human Rights; hence my description of it as 'weak'. But it must mean something; only case-law will tell us what.

### WORK WITH CHILDREN

The issue of child protection has become of real importance in the context of church choirs and clubs for young people. The Protection of Children Act 1999 put on a statutory footing the Secretary of State's list of individuals considered unsuitable to work with children.<sup>21</sup> When fully implemented, the Act will provide a 'one stop shop' for checking individuals *via* the Criminal Records Bureau.<sup>22</sup>

### EMPLOYMENT RIGHTS

Section 23 of the Employment Relations Act 1999 (c 26) enables the Secretary of State to bring within the scope of employment protection legislation on 'individuals who are of a specified description' and who are not 'employees' under present law. The clergy might prove to be a group of 'individuals' to whom the section is applied. That would of course have the most profound implications for the whole law on clergy appointment and tenure.

There are related developments under consideration in the European institutions. A draft council directive dealing with discrimination in employment applies to 'employment, self-employment or occupation'; service as an ordained minister is surely an 'occupation'. The draft directive addresses discrimination on a number of grounds: racial or ethnic origin; religion or belief; disability; age; and sexual orientation, which last is likely to be the most controversial. So far as discrimination on grounds of religious belief is concerned, the draft contains some (admittedly imperfect) provisions designed to protect churches, who must be enabled in appropriate cases to insist on an appointee meeting a criterion of religious allegiance. It is clear that a church could properly refuse to ordain someone who denies the truth of Christianity; but there could be difficult issues as to the application of the principle to such persons as a cathedral administrator, a synod officer dealing with finance or property matters, or even a diocesan chancellor.

---

<sup>21</sup> Protection of Children Act 1999 (c 14), s 1.

<sup>22</sup> Police Act 1997 (c 50), s 113 (amended by the Protection of Children Act 1999, s 8).