STATUTE LAW REVISION

A further Report of the Society's Working Party
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THE WORKING PARTY'S TASK

Ecclesiastical law is a small subject, as branches of the law go. For all its historical importance, it must be recognised that the contents of Halsbury's *Statutes,* volume 14, deal largely with the internal affairs of what is today one religious tradition among many. It is therefore quite striking that volume 14 (*Ecclesiastical law*) should be one of the heaviest volumes in the series.

The age of many ecclesiastical statutes means that amongst other factors, they suffer from the incurable verbosity of the Georgian and Victorian draftsmen. It means that they contain some thoroughly impractical provisions (a daily monetary penalty for certain clerical failings of a continuing nature, for example). It also means that while the Church has moved on, and modern legislators have not hesitated to make changes where the need was greatest, the lack of staff resources for any major codifying effort has meant that these changes are only comprehensible by reading sections from two or three statutes into each other, and it is seldom possible to get a complete picture of any one topic of ecclesiastical law from one Act or Measure.

This is where the Society's working party under Chancellor Spafford's convenorship felt we could help. Members of the General Synod are not unmindful of the need to simplify the way the Church is run; but they are not, as a rule, legal draftsmen, and cannot fairly be expected to produce the necessary changes unaided. Most legislation originates in Synod committees, which have the aid of extremely skilled lawyers and draftsmen; but the team is small, and new law makes so many demands on its time that scope for codification and revision work is limited. The Society brings together those with first-hand experience of how the present law works in practice, and those qualified to draft such alterations as seem desirable. From a wide membership it has been possible to assemble a small group with the necessary interest and the willingness to devote some spare time to the task.

Our one drawback, of course, is that we are self-appointed. Our interest and qualifications do not make us representative of the Church at large. We recognise, therefore, that we cannot *make* the changes we put forward; at best they can only be suggestions for consideration. But we hope that when our task is completed and our efforts are presented (with some very necessary polishing) to the Society as a whole, it will become possible to present these as suggestions with the Society's authority behind them: suggestions which Synod members, less than happy at the law's present state, would do well to promote.

OUR PARAMETERS

Using Halsbury volume 14 as our basic source has helped to limit our field of endeavour. Two areas of law which intimately concern the Church (Marriage and Burial) appear under other Titles of Halsbury, and were therefore excluded from our remit.

When we started, we also had the idea that we should not touch legislation later than 1969, since the General Synod itself was responsible for Measures after this date and might not take kindly to the idea of its own work being ripe for revision. However, in some fields where recent legislation fits into a pattern dating from before 1969, we have had no choice if our stated aim of codification was to be achieved.

To consolidate, to codify or to break new ground? Initially we thought we were not there to make law: new law and new policy initiatives should come from those in Synod whose consecration (or representative status) gave them that right. But consolidation of laws from very different periods is not easy; and to restate in modern language such a hotchpotch of provisions (some of very limited scope) as is found, say, in ecclesiastical property statutes would have been of little use to today's Church.

So in some fields we have sought to codify: to produce a single statute in which the law on a topic may be found. It will be as close to the existing law as reason allows; some may feel too close. (Why do we retain the acreage limits on some gifts of land for church sites? Because statutes in this field give some freedom from normal controls over charity property, and the extension of such freedom might be controversial with authorities outside the Church.) In other fields we are indeed suggesting provision that has not existed before; the remainder of this article gives three examples of this. But in many cases we would leave statutes as they are, repealing what is redundant and clarifying what is difficult to comprehend. Examples of this last aspect of our work can be found in Chancellor Spafford's article at (1990) 2 Ecc LJ 42.

PLURALITIES

The Pluralities Act 1838, once one of the longest ecclesiastical statutes in the book, has already suffered drastic and well-deserved pruning. But it remains a worthy candidate for our attention. For a start its name is misleading: holding of benefices in plurality is now exclusively regulated by the Pastoral Measure 1978. What the surviving provisions are concerned with is the duty of parish clergy to reside on their cures. Other aspects flow from this: exemptions, leave of absence, enforcement and appeals, and the position of the bereaved clergy spouse. The Act also contains the provisions for recovering possession of a tenanted parsonage which have been so valuable to the Church in persuading the courts that Parliament cannot have intended to allow the creation of protected tenancies in parsonage houses.

While retaining the framework of the Act's provisions, the working party felt its cumbersome language and impractical procedures called for re-writing; and one of our major proposals will therefore be the replacement of the Act by a *Clergy Residence Measure*. Section 1 will require an incumbent to reside in the parsonage or another house approved by the bishop; section 2 will cover stipendiary curates; section 3 will allow the bishop to change his mind, subject to safeguards. Our section 4 is already redundant, a good example of how quickly new law can be superseded: it was to have dealt with appeals from bishops' decisions (as to which now see below). Section 5 allows for clergy who combine parish work with other offices. In section 6 (enforcement) the old monetary penalties

have gone, but there is still power to suspend after notice and to make alternative arrangements for parish duties. (We have dealt with the problem of the non-resident incumbent who opts to return just after a 'caretaker' has gone to the trouble of moving in). Defiance of a monition to reside is also expressly declared to be an ecclesiastical offence. Section 7 deals with bereaved spouses, section 8 with tenancies (a modern and clearer version of the old section 59, with streamlined enforcement mechanism); while section 9 formalises the fairly new concept of leave of absence, stating how it affects the duty to reside.

CHURCH PROPERTY

The ecclesiastical conveyancer knows only too well how many different types of church ownership he has to cope with, each with its own rules. There are rules for acquiring property, changing its status, consents to dealing with it, the effects of consecration and the like. A sub-group of the working party has been engaged in the preparation of a codifying *Church Property Measure*, to obviate the need to skip from one part of Halsbury to another quite so frequently.

The new Measure, as originally planned, had eight parts. Parochial churches and churchyards; guild churches; the faculty jurisdiction; cathedral property; clergy residences; glebe; parochial trust property; and a final miscellaneous part. So far three of these have been tackled in depth. (Work on the faculty jurisdiction has been suspended, in view of the comprehensive treatment that this subject is currently receiving in Synod – though it may yet be felt that the question of how land becomes (or ceases to be) subject to the jurisdiction would be more appropriately covered in a statute on types of church property than in one about the consistory court's powers and procedures.)

Part I of the Measure owes most to the New Parishes Measure 1943, the most modern statute on church sites. But additional useful powers can still be found in legislation starting with the Gifts for Churches Act 1803, so these powers have all found places in Part I. Section 5 contains (for the first time) statutory provisions governing consecration, defining *(inter alia)* who can apply for land to be consecrated.

Part IV completes the work of earlier Cathedrals Measures by vesting all cathedral property in the capitular body; but subject to this, simply carries forward and restates existing provisions of those Measures as to acquisition and disposal of Cathedral land.

Part VII replaces the 'diocesan authority' provisions of the Incumbents & Churchwardens (Trusts) Measure 1964 and the Parochial Church Councils (Powers) Measure 1956. It provides a uniform régime for parish property held by church officers, in which vesting in the diocesan authority is now automatic and the same consents to dealing are required throughout. The only alternative to using the new Measure's framework will be to create a charitable trust with no *ex officio* Church of England members; in future it will not be possible to claim the Church's name for a trust, by using an *ex officio* trustee who is a Church officer, while evading the Church's safeguards. Part VII also contains transitional provisions for vesting, to bring existing property within the new régime.

EPISCOPAL FUNCTIONS AND APPEALS

It was inevitable, while going through so many statutes on diverse topics, that we should be struck by the many and varied ways in which draftsmen have coped with – or sometimes overlooked – the possibilities that a see might be vacant, or that a person might be justly aggrieved by a bishop's decision. If

ever consistent provision was necessary, it was here, even though any blanket provision would involve making a substantial quantity of new law. The working party will therefore be offering drafts of an *Episcopal Acts (Appeals) Measure* and an *Episcopal Functions Measure*.

The Appeals measure is designed to replace existing statutory provisions, but not to create new rights of appeal. A simple form of words, inserted into any new legislation where a right of appeal is desirable, should be sufficient to incorporate our Measure's mechanism by reference. The basic proposition is simple; appeal will lie from a diocesan bishop's acts to the archbishop. If the archbishop is acting as diocesan, appeal lies from him to a tribunal consisting of the senior bishop of the province and two others. We have not sought to introduce appeals from an archbishop in his metropolitical capacity.

The Functions measure is concerned with all statutory functions which diocesan bishops are unable to perform, because of a vacancy in see or otherwise. (Their non-statutory functions, almost all in the nature of 'spiritualities', pass to the Guardian of the Spiritualities whose time-honoured role we have not sought to affect). There are of course two major provisions of the existing law which solve the problem in most cases; the Dioceses Measure 1978, s.10, under which a suffragan's delegated powers continue over a vacancy, and the Church of England (Miscellaneous Provisions) Measure 1983, s.8, which allows for emergency delegation. We have not sought to interfere with these provisions, but rather to plug some of the gaps; for instance when a s.10 instrument leaves out some vital function, when a responsible person needs to be identified quickly without waiting for an appointment to be made under the 1983 Measure, or when an archbishop's see is vacant. The Measure's solution is normally simple; the Archbishop or senior bishop of the province concerned may perform the function in question. The Measure also addresses the question of overlapping jurisdictions and unpopular functions, when the question is not so much who has the power to do something, as whose duty it is.

Many provisions are common to both these Measures. There is a similar definition of 'senior bishop'; similar provisions for delegation, and for acting on the reports of commissioners of enquiry. The greatest possible flexibility is given on appeals procedure. Finally, we have given some statutory recognition to the concept of a bishop's sabbatical leave: provided a period of absence has been agreed first with those on whom his duties would fall under the Functions measure, a bishop may opt during that period to be treated as incapable of acting, so that the provisions of the Functions measure operate to cover for him in his diocese and he is discounted when ascertaining the 'senior bishop' for the purposes of either statute.

CONCLUSION

The four new Measures outlined above provide examples of the working party's more adventurous recommendations. New legislation, taken alongside our proposals for streamlining existing Measures and for blanket repeals, will constitute a package capable of thinning down Halsbury volume 14 quite considerably, and solving a few current problems on the way. But we have not yet finished. When each topic has been tackled on its own, we will need to review our work as a whole, iron out inconsistencies, perhaps provide a new Interpretation Measure for common technical terms, and so on. Only when this is completed can we ask the wider Society to bless our efforts and commend them to a possible audience in Church House. In the meantime, though, our task is an interesting and rewarding one, and certainly a bonus from our membership of the Society.