

CHANCEL REPAIRS BILL [HL]

EXPLANATORY NOTES

What these notes do

These Explanatory Notes relate to the Chancel Repairs Bill [HL] as introduced in the House of Lords on 3 June 2015 (HLBill 21).

- These Explanatory Notes have been prepared by Lord Avebury in order to assist the reader of the Bill and to help inform debate on it. They do not form part of the Bill and have not been endorsed by Parliament.
- These Explanatory Notes explain what each part of the Bill will mean in practice; provide background information on the development of policy; and provide additional information on how the Bill will affect existing legislation in this area.
- These Explanatory Notes might best be read alongside the Bill. They are not, and are not intended to be, a comprehensive description of the Bill. So where a provision of the Bill does not seem to require any explanation or comment, the Notes simply say in relation to it that the provision is self-explanatory.

Background

- 1 Chancel repair liability has existed at common law from before the accession of King Richard I in 1189. The office of rector, effectively parish priest, derived from ownership of rectorial land. This entitled the owner to income from tithes etc. but also made them responsible for the chancel at the east end of the church. Until the reformation much of the rectorial land was assumed by monasteries, subsequently dissolved and passed into both ecclesiastical and lay hands. In the latter case, the owner became a lay rector and hence responsible for chancel repair liability. Some chancel repair liability was also later formalised in the enclosure acts and tithe acts. The apportionment of chancel repair liability has been set out for some, but not all, affected parishes by a Commission set up under the Tithe Act 1936. Appendix B of the Law Commission's 1985 Report, *Liability for Chancel Repairs* (Law Com. No. 152), details the history of chancel repair liability.
- 2 Chancel repair liability was, at least originally, an ecclesiastical liability under the jurisdiction of the ecclesiastical courts. Jurisdiction was transferred to the civil courts by the Chancel Repairs Act 1932, following a prison sentence being handed down in 1929 by the High Court for contempt of ecclesiastical court for non-payment of chancel repair liability in the case of *Hauxton PCC v Stevens*.
- 3 A mechanism for the compounding, i.e. buying out, of chancel repair liability is provided for in the Ecclesiastical Dilapidations Measure 1923. The mechanism is little used as it is regarded as too expensive and complicated for most affected title owners.
- 4 In 1982, the General Synod of the Church of England concluded that liability should be phased out, as did the Law Society in 2006. The Law Commission, in its 1985 Report, recommended "that in cases where [chancel repair] liability is an incident of the ownership of particular pieces of the land ... it should be abolished in ten years' time".
- 5 This Bill is based on the one proposed in the Law Commission's Report, save that the ten-year grace period has been removed in the light of the ten-year period of retention of chancel repair liabilities as overriding interests provided for under the Land Registration Act 2002 (Transitional Provisions) (No 2) Order 2003, which ended on 12th October 2013.

Commentary

Clause 1

- 6 Clause 1 abolishes the liability of lay rectors for chancel repairs in England. Most lay rectors are owners of particular pieces of land in England and Wales who, by reason of that ownership, are lay rectors, and consequently liable to pay for the repair of the chancel of a parish church of the Church of England and the Church in Wales built before the Reformation. Some 5,200 parish churches could benefit from this liability, about one third of the total number. Not all land carries the liability; one estimate is that in England some 3,780,500 acres are involved. Liability claimed by the Church may no longer be extant, for example where predecessor in title has compounded it (bought out the liability), which may be difficult to ascertain, or if the church has been substantially modified without the permission of the lay rectors.
- 7 The Law Commission's 1985 Report also suggested possible abolition of the rentcharge-based chancel repair liability of certain ecclesiastical corporations and educational institutions as lay rectors. The Law Commission's rationale was "because it does not affect our major concerns on behalf of the general public: it has no general repercussions ... it does not jeopardise or inhibit efficient conveyancing, and there is no apportionment problem." This Bill excludes that liability from the effect of the Bill. This is explained in paragraphs 2.3 and 6.6 of the Report,

shown below. Those lay rectors received compensation stock under the proviso to section 31(2) of the Tithe Act 1936, for the extinguishment of their tithe rentcharges. That Act therefore provided for their chancel repair liability to continue. Their liability is not based on the ownership of land.

- 8 After the Act is passed, no lay rector shall have any liability for the repair of the chancel of a church or chapel, based on his ownership of land.
- 9 The abolition of liability not only takes away the duty to repair, but also removes any liability to pay in whole or part for the cost of such repairs.
- 10 As noted above, the Report proposed a ten-year delay for the abolition of chancel repair liability in paragraph 4.18. The Land Registration Act 2002 (Transitional Provisions) (No 2) Order 2003 however later extended the overriding status of this interest for a transitional period of ten years. A delay is not therefore now thought necessary.
- 11 At the end of this transitional period, chancel repair liability registrations have only been filed with the Land Registry by a few hundred parishes, around one twentieth of those thought to be able to do so. It is unlikely that even in these parishes that all land subject to chancel repair liability has been registered. Most owners of titles subject to chancel repair liability may therefore still not be aware of their liability, the amount of which is unquantifiable in advance.

Clause 2

- 12 Clause 2 makes limited exceptions to the abolition of liability effected by clause 1 in certain cases in which the need for repair arose before the Act is passed.
- 13 These exceptions arise in connection with what the Law Commission described in paragraphs 3.5 and 3.6 of their Report as a second problem over chancel repair liability, several liability: “in most cases in which there is more than one lay rector and the liability is not rentcharge liability, each is liable for the whole repair costs.” Subsection (1) (b) and (c) provide for an additional two years for the resolution of several liability proceedings.

Subsection (1)

- 14 Subsection (1) provides that the lay rectors' liability is preserved in three cases—
 - a. Where proceedings are brought against a lay rector before the Act is passed;
 - b. Where, within two years of the Act being passed, one lay rector brings proceedings against another to enforce the latter's towards chancel repairs; and
 - c. Where, within two years of the Act being passed, a lay rector is made party to proceedings which had been brought against another lay rector before the Act was passed.

Subsection (2)

- 15 Subsection (2) specifies that the time limits in subsection (1) apply to the date of the service of process on the lay rector concerned, whether that service is personal, by post or substituted service permitted by order of the court.

Subsection (3)

- 16 Subsection (3) makes clear that no proceedings for contribution to expenditure by one lay rector can be brought against another person who only becomes a lay rector after the Act is passed.

Clause 3

17 This clause provides for the extent, commencement and short title of the Act.

Appendix

Selected extracts of Law Commission Report including the references in the Explanatory Notes

Ecclesiastical and other corporations

2:3 When tithe rentcharges were extinguished in 1936, the connected chancel repair liability was preserved for certain ecclesiastical and educational bodies which were issued with Government stock in lieu of the whole of the rentcharges they lost. The bodies in question are the Church Commissioners, 4 ecclesiastical corporations such as the deans and chapters of cathedrals, the universities of Oxford, Cambridge and Durham, their constituent Colleges, and Winchester College and Eton College. In this report, we refer to this as "rentcharge liability". It should be made clear that those bodies who can be subject to rentcharge liability can equally, if they happen to own relevant land, be affected by landowners' liability. When they are liable as landowners, rather than as former rentcharge owners, the rules which relate to landowners' liability apply.

Several liability

3.5 There is a second problem which we are concerned to solve. An aspect of the liability for chancel repairs which gives rise to resentment is that, in most cases in which there is more than one lay rector and the liability is not rentcharge liability, each is liable for the whole repair costs. While anyone facing a demand for a large sum, for only a proportion of which he is ultimately responsible, may not relish the position, the rule exacerbates the conveyancing trap. The recipient of the completely unexpected demand may justifiably feel that the several liability makes his position even worse.

3.6 The lay rector who is presented with the claim is entitled to contributions from the other lay rectors but he faces a series of problems. He must first identify the other lay rectors, he is responsible for demanding contributions, he has to finance any action to recover the shares of others, and he runs the risk of loss if any of them is unable to pay his share.

Delay

4:18 It is clear that if there is now to be a determined effort to remove the conveyancing trap, little delay can be justified. Were the conveyancing issue the only one to be considered, immediate abolition would be the appropriate action. However, as other matters must also be weighed in the balance, a view has to be taken as to the length of delay which is acceptable before abolition if the alternative solution to eliminate the conveyancing trap--registration-is not to be adopted. Clearly, there would inevitably be delay before any registration system could be effective, because of the need to establish administrative procedures and to allow an initial registration period. On the other side, it seems fair to allow Church authorities a final opportunity to put their chancels in good repair before the landowners' liability is abolished. Churches are inspected by the diocesan architect every five years, and it follows that there should be enough time for making at least one of those inspections and for implementing any recommendations which follow from it. Taking these factors into account, we favour the liability being abolished in ten years' time. To perpetuate the uncertainty within the

conveyancing system for any longer period would not be tolerable. For the same reason we urge that there be no more than the minimum delay in introducing the necessary legislation.

4:19 We also recommend that the Act states the actual abolition date, rather than providing that chancel repair liability be abolished ten years after the date on which it was passed. A statute can always be more readily understood when the date is given, but it is particularly important when the provisions will not have practical effect for a considerable period. For the same reason, it is helpful if an easily memorable date be chosen. The draft bill in Appendix A is drawn on this basis. It provides, by way of illustration, that chancel repair liability cease to have effect on 1 January 1996.

Operation of abolition

4.20 When the date for abolition of chancel repair liability arrives, it is obviously essential to be able to determine which claims, if any, can still be pursued. Any claim in which court proceedings claiming payment have already been served should not be affected; otherwise there is an invitation to lay rectors to delay payments which are legitimately due and to prevaricate in the litigation. On the other hand, abolition must be effective as soon as possible after the date decided upon, so that it should no longer be possible after the operative date to take proceedings to claim a payment for chancel repairs.

4.21 There will have to be one exception to this bar on proceedings. Unless by then all chancel repairs have been apportioned - and we would not recommend that there be apportionment if the abolition solution is adopted - there may be cases in which proceedings are taken for the whole of the repair costs against one lay rector, who has a right to seek contribution from others, but has not yet done so. To allow the impact of abolition to increase the liability of the lay rector who happens to be chosen by the PCC as the defendant to their proceedings, by releasing his fellow lay rectors, would be an unacceptable discrimination. Potential contributories must therefore remain liable to pay towards claims validly made before abolition is effective.

4.22 Even if abolition is agreed, we are nevertheless anxious that the inconveniences caused by chancel liability should linger no longer than necessary. The precise rules governing the liability of lay rectors called upon to contribute to sums paid by another lay rector are not clear. To make the position certain after abolition, we propose that the liability be limited to those who were lay rectors immediately prior to the abolition date whether or not they subsequently part with the land in question. This would avoid any further innocent purchasers being caught in the conveyancing trap. We further suggest that claims for contribution by one lay rector against another be limited, by analogy with the limitation of action rules which apply to contributions recovered under section 1 of the Civil Liability (Contribution) Act 1978, to proceedings brought within two years of the date on which the right accrued.' We accordingly recommend that, to be effective, proceedings to recover one lay rector's contribution to a payment by another should be served within two years of the abolition date (i.e. before 1 January 1998, if the liability ceased to have effect on 1 January 1996).

Rentcharge Liability

6.1 The provisional conclusion in the Working Paper was that all chancel repair liabilities should be abolished at the same time.' However, because rentcharge liability' and landowners' liability now rest on different bases, and their respective effects vary, we have reconsidered whether they should be treated in the same way.

6.2 Rentcharge chancel repair liability is now fundamentally different from the landowners' liability, because it in no way relates to the ownership of land. Accordingly, the conveyancing trap

cannot apply to it, nor does it have either of the other detrimental effects on conveyancing. Furthermore, the liability has been legally apportioned.' Rentcharge liability is limited to certain corporations,' but they may also, separately, be liable as landowners. In such cases, the conveyancing difficulties associated with landowners' chancel repair liability apply and the recommendations made earlier in this Report extend to them. This section of our report is confined to rentcharge liability, where different considerations apply.

6.3 It is undoubtedly the case that the way in which chancel repair liability now operates is capricious; not every old and architecturally distinguished chancel has the benefit of the liability, and not every chancel which has the benefit falls into that category. This applies as much to rentcharge liability as to landowners' liability, and if the latter were abolished but not the former, the effect would be even more capricious. To abolish landowners' liability could in some cases undermine the effectiveness of the rentcharge liability. In those parishes where both currently apply, the residual rentcharge lay rector might only be responsible for a part of the repair expenses and the remainder would have to be found by the parish.

6.4 On the other hand, a number of those who responded to the Working Paper expressed satisfaction about the way in which the corporate bodies discharged their chancel repair liabilities.' They spend substantial sums annually, and, as both parishes and the lay rectors are fully aware of the responsibilities, there are no disputes about liability. The chancels in question are generally ancient and frequently of architectural beauty; some of those who commented to us felt that these payments for their maintenance not only help the Church but make a positive contribution to the national heritage. This liability is not regarded as unfair, because the corporations were issued with stock for the purpose of continuing the endowments from which they have always funded chancel repairs. Against that, it was pointed out to us that the income from the stock has not kept pace with the increasing cost of the repairs.

6.5 The financial consequences of abolition of the rentcharge chancel repair liability would be serious to those parishes involved. The corporations relieved of the liability would benefit to the same degree, a benefit which some who commented on the Working Paper would regard as an unjustifiable windfall. In judging whether this relief is appropriate, the nature of the corporations in question should be borne in mind. The primary concern of the Church Commissioners is the payment of clergy stipends. Presumably, any additional funds which became available would be devoted to that purpose. Cathedral chapters have their own responsibilities, and it has been suggested that it is ironic that a chapter sometimes has to allocate funds to repair a parish church-not necessarily even in the same diocese-when at the same time appealing for considerable sums for the upkeep of its cathedral. The educational corporations may be thought by some to be adequately endowed; but they are all charities and any funds which would otherwise have been spent on chancel repairs would all necessarily be devoted to their primary objects.

6.6 Because it has no general repercussions, we consider that rentcharge chancel repair liability can, and perhaps should, be dealt with separately from landowners' liability. It does not jeopardise or inhibit efficient conveyancing, and there is no apportionment problem. In sum, it does not affect our major concerns on behalf of the general public. For that reason, we do not make a recommendation that it be abolished. On the other hand, we recognise that there are reasons why some of those most closely concerned, and in particular a strong body of opinion within the Church of England, would wish it to be abolished, and we have sought to summarise these reasons. If it is accepted that the rentcharge liability should be abolished, it could well be convenient for it to be done at the same time and in the

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same way as landowners' liability. The draft bill in Appendix A [not reproduced in these explanatory notes] illustrates how this might be done, simply by omitting section I (2) which appears in square brackets.

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