HOUSE OF LORDS

227th Report

Ecclesiastical Committee

Ecclesiastical Offices (Terms of Service) Measure

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The Ecclesiastical Committee

The Ecclesiastical Committee is a statutory Committee appointed under the Church of England Assembly (Powers) Act 1919.

It comprises thirty members, fifteen of whom are Members of the House of Commons, appointed by the Speaker, and fifteen of whom are members of the House of Lords, appointed by the Lord Speaker. The quorum is twelve.

Appointments to the Committee are generally made early in a Parliament. Unless the Speaker or the Lord Speaker decide otherwise, members appointed by them remain on the Committee for the life of the Parliament.

While its powers are those laid down by the Act, the procedures it has adopted are those of a Joint Select Committee.

Current Membership

HOUSE OF LORDS	HOUSE OF COMMONS
Lord Davies of Coity	Sir Stuart Bell
Lord Elton	Peter Bottomley
Lord Judd	Ben Chapman
Lord Laming	Sir Patrick Cormack
Lord Lloyd of Berwick (Chairman)	Ann Cryer
Baroness Massey of Darwen	Mr David Drew
Lord Newby	Mr Frank Field
Baroness Perry of Southwark	Mr John Gummer
Lord Pilkington of Oxenford	Mrs Sharon Hodgson
Baroness Rendell of Babergh	Simon Hughes
Lord Shaw of Northstead	Robert Key
Lord Wallace of Saltaire	Mr Gordon Marsden
Lord Walpole	Mr Desmond Swayne
Baroness Wilcox	David Taylor
Lord Williams of Elvel	Steve Webb

Remit

The Ecclesiastical Committee examines draft Measures presented to it by the Legislative Committee of the General Synod of the Church of England. It reports to Parliament on whether or not it considers the measures to be expedient.

It generally asks members of the General Synod to assist it in its deliberations. In some circumstances a conference of the Ecclesiastical Committee and the Legislative Committee may be convened.

The Church of England Measure on which the Committee has reported is presented to both Houses in its final form at the same time as the Committee makes its report.

Before the Measure becomes law, both Houses must approve motions that the Measure should be presented to the Sovereign for Royal Assent in the form that it was laid before Parliament.

Once both Houses have passed the necessary approval motions, the Measure is presented for Royal Assent and becomes law.

Publications

The reports and proceedings of the Committee are published by The Stationery Office by Order of both Houses. All publications of the Committee are on the internet at www.parliament.uk

Contacts

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The Ecclesiastical Committee has met and considered the

Ecclesiastical Offices (Terms of Service) Measure

referred to it under the provisions of the Church of England Assembly (Powers) Act 1919.

1. This Measure puts in place a legislative framework to enable the introduction of new terms and conditions of service (to be known as 'common tenure') for clergy and certain lay ministers in the Church of England.

2. At present, the clergy of the Church of England can hold office in three different ways. Of the 13,600 clergy in 2006:

   - 5,000 held "freehold" offices as archbishop, bishop, dean or residentiary canon of a cathedral, archdeacon or incumbent of a benefice
   - 7,000 (including 3,000 non-stipendiary clergy) held office under a licence from a diocesan bishop, and
   - 1,600 were engaged as chaplains or in other types of ministry, usually under a contract of employment, coupled with a licence from a diocesan bishop.

3. Those clergy holding freehold offices have a high degree of security of tenure, while those holding office under licence have more limited security under the present law.

4. The Measure, together with subordinate legislation in the form of regulations and an Amending Canon, seeks to establish conditions of service which will, so far as possible, apply across the board. It retains the established office-holder status of clergy – while conferring upon them, for the first time, many of the legal rights enjoyed by employees. These include rights to stipend and housing, a statement of particulars of office, annual and other leave and continuing ministerial education. The legislation also specifies the circumstances in which an office can be terminated, and defines certain particular cases where an appointment can be made on a fixed or limited-term basis.

5. The Measure enables regulations to require office holders to take part in regular ministerial development reviews, as well as introducing a capability procedure designed to address issues of poor performance. Any office holder who, in the last resort, was removed from office under this procedure would have the right to bring a claim of unfair dismissal in an employment tribunal.

6. The Measure submitted to the Committee is the product of some six years consideration by the Church. A Review Group was established in 2003 in response to a discussion document[1] issued by the Department of Trade and

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1 *Employment Status in relation to Statutory Employment Rights*, DTI 2002

Industry in December 2002. This document explored the implications of the powers under the Employment Relations Act 1999 to confer some employment rights on "atypical workers" who are not technically employees.

7. The Measure was approved by the Synod in July 2008, with the following voting figures:

	In favour	**Against**	**Abstentions**
Bishops	20	0	0
Clergy	109	5	4
Laity	110	13	2

8. For more information about the Measure, see the Comments and Explanations and additional Comments and Explanations submitted by the Legislative Committee of the General Synod, annexed to this Report, in which the Legislative Committee gives a full explanation of the Measure's nature and legal effect and describes aspects of the subordinate legislation which it is proposed will be made under it.

VIEWS OF THE ECCLESIASTICAL COMMITTEE

9. The Ecclesiastical Committee considered the Measure on 12 November 2008. Representatives of the Synod assisted the Committee in their deliberations. These discussions ranged widely but the Committee considered in particular three issues: the abolition of the freehold, the proposed capability procedures under Section 2 and the power to make regulations under Section 2 which includes power to amend earlier legislation, including Acts of Parliament.

The freehold

10. Clause 1 of the Measure introduces the concept of "common tenure" and describes how it will apply to various categories of office holder. It also makes provision for allowing existing holders of freehold offices to "opt-in" to common tenure, but does not require them to do so. However, once this section is in force, it will not be possible to make a *new* appointment to a freehold office. Over a period of time, therefore, the number of clergy holding freehold offices will gradually reduce.

11. Some members of the Committee expressed a strong view that the Measure would have an adverse effect on the independence of the clergy, and would adversely affect the distributed authority which has been a feature of the governance of the Church of England for 400 years. They argued that abolition of the freehold and the introduction of a status similar to that of an employee, with ultimate recourse to a secular employment tribunal, was a fundamental change to the way in which the clergy operated, and would undermine the ability of the clergy to act independently according to their consciences (QQ 3, 7).

12. We discussed these concerns at length with the Synod representatives who said that the Measure was aimed at addressing the present inequalities between licensed clergy, with almost no employment-type rights, and freeholders. Under common tenure, all clergy would have a right to a stipend and to annual leave. Except in certain closely defined situations, new appointments under common tenure would not be time-limited, unlike present appointments under a licence. The retention of office-holder status, rather than the introduction of employment status, would, however, ensure that clergy in charge of parishes would continue to enjoy a large measure of autonomy in the way in which they work (QQ 3, 12, 17).

13. **The Committee, while recognising the objections of those Members and others who considered that the Measure will undermine the independence of the clergy who currently enjoy the freehold, are nevertheless of the view that the proposed move towards uniform tenure arrangements will establish a clear, consistent and transparent framework for the terms of service of the clergy as a whole and will give many clergy, for the first time, substantial employment-type rights.**

Capability procedures

14. Section 2 of the Measure makes framework provision for terms of service. The detail is left to regulations. Subsection 2(d) allows regulations to be made to "provide for procedures to assess the performance of office holders,

including remedies for inadequate performance". Section 9(1) of the Measure prevents the procedures being applied in respect of matters of doctrine or discipline, which are dealt with in other Measures. Under the proposed regulations, clergy would have the right to appeal to an employment tribunal in circumstances where there was a dispute over a capability review (QQ.3, 4, 12).

15. **The proposals in relation to capability appear to the Committee to be proportionate, and the proposed right of clergy to appeal to an employment tribunal is a substantial safeguard.**

Power to amend previous legislation under Section 2

16. Section 2 enables the Archbishops' Council to make provision by regulations for the terms of service of those holding office under common tenure. The regulations may, in particular, deal with a number of matters specified in subsection (2), including the use of employment tribunals to adjudicate on disputes. The draft regulations are amendable in, and subject to approval by, the General Synod. When made, they are treated as a statutory instrument subject to the negative resolution procedure in both Houses.

17. Section 2(3) enables the regulations to "apply, amend or adapt any enactment or instrument". Section 3(6) of the Church of England Assembly (Powers) Act 1919 provides that a Measure may extend to amendment of an Act of Parliament. It is not uncommon for a Measure itself to amend an Act of Parliament, or for a Measure to enable an instrument made under it to amend a Measure. But we are not aware of any previous Measure having expressly enabled an instrument made under a Measure to amend an Act of Parliament, nor were the Legislative Committee in their Supplementary Comments and Explanations able to point to a comparable power. They referred to Section 5 of the National Institutions Measure 1998, but that confers only a very limited power to make by order incidental, consequential and supplemental adaptations of statutory provisions relating to functions transferred to the Archbishops' Council or another body by the order. Accordingly, Section 2(3) is novel. We agree with the Legislative Committee that if this Measure is approved by both Houses of Parliament and receives Royal Assent it will have the force and effect of an Act, so the delegation of the power to amend Acts will be valid.

18. Though we were supplied with a copy of the latest draft of the regulations, this Committee has no formal role to play in these or any other regulations to be made under Section 2. Nor, under the current Standing Orders of both Houses, will any such regulations be considered by the Joint Committee on Statutory Instruments or the House of Lords Committee on the Merits of Statutory Instruments. There is an issue whether the negative procedure in Parliament is sufficient for regulations under Section 2, especially when they contain provision amending an Act. **We concluded that the use which would be likely to be made of the power to amend Acts was limited and that, on this occasion, the absence of an affirmative procedure did not render the Measure inexpedient, especially as the amending regulations will have been reviewed and, if necessary, amended by the Synod. We reached a similar conclusion on the power to make consequential provision conferred by Section 11(1).**

19. **The Committee is of the opinion that the Measure is expedient.**

MINUTES OF PROCEEDINGS

Wednesday 12 November 2008

Minutes of proceedings on the Ecclesiastical Offices (Terms of Service) Measure at the meeting of the Ecclesiastical Committee held on Wednesday 12th November 2008 at 11.00am in Committee Room 4A, House of Lords.

Present:

Lord Davies of Coity
Lord Elton
Lord Judd
Lord Laming
Lord Lloyd of Berwick
Lord Newby
Lord Pilkington of Oxenford
Lord Shaw of Northstead
Lord Wallace of Saltaire
Lord Walpole
Baroness Wilcox
Lord Williams of Elvel

Sir Stuart Bell
Ben Chapman
Ann Cryer
Sir Patrick Cormack
Frank Field
John Gummer
Sharon Hodgson
Simon Hughes
Robert Key
David Taylor

Lord Lloyd of Berwick in the Chair.

Mr Allan Roberts, Counsel to the Chairman of Committees, in attendance.

Ecclesiastical Offices (Terms of Service) Measure

The following representatives of the General Synod assisted the Committee in its deliberations:

The Rt. Rev Stephen Venner (Bishop of Dover)
The Revd Prebendary David Houlding
Mrs Anne Sloman

Mr Geoffrey Tattersall QC
Mr William Fittall – Secretary General
Mr Stephen Slack – Chief Legal Adviser

The Committee deliberated.

It was moved that the Ecclesiastical Offices (Terms of Service) Measure be deemed expedient.

The Committee divided:

Contents	Not Contents
Lord Davies of Coity	
Lord Elton	
Mr Frank Field	
Mr John Gummer	
Lord Judd	
Robert Key	
Lord Laming	
Lord Lloyd of Berwick	
Lord Newby	
Lord Shaw of Northstead	
Lord Wallace of Saltaire	
Lord Walpole	
Baroness Wilcox	
Lord Williams of Elvel	

The motion was *agreed to*.

The Committee adjourned.

LEGISLATIVE COMMITTEE OF THE GENERAL SYNOD: COMMENTS AND EXPLANATIONS ON THE ECCLESIASTICAL OFFICES (TERMS OF SERVICE) MEASURE

The Ecclesiastical Offices (Terms of Service) Measure puts in place a legislative framework to enable the introduction of new terms and conditions of service (to be known as 'Common Tenure') for clergy and certain lay ministers in the Church of England. The principal object of the legislation is to establish fair and clearly stated terms of service which will deliver the security that is needed for ministry to flourish, while also putting in place a proper measure of accountability.

The Measure, together with subordinate legislation in the form of Regulations and an Amending Canon, seeks to remedy the present inequality of tenure as between freehold clergy and others by providing conditions of service which will, so far as possible, apply across the board. It retains the established office-holder status of clergy – because, in the General Synod's view, this expresses more appropriately than employment status the way in which ministry is exercised in the Church – while conferring upon them, for the first time, many of the legal rights enjoyed by employees. These include rights relating to stipend and housing, a statement of particulars of office, annual and other leave and continuing ministerial education. The legislation also specifies the circumstances in which an office can be terminated, and defines certain particular cases where an appointment can be made on a fixed or limited-term basis.

The legislation also seeks to strengthen the accountability of office holders by requiring them to take part in regular ministerial development reviews, as well as by introducing a capability procedure designed to address issues of poor performance. Any office holder who, in the last resort, is removed from office under this procedure is given the right to bring a claim of unfair dismissal in an employment tribunal.

INTRODUCTION

1. The Legislative Committee of the General Synod, to which a Measure entitled the Ecclesiastical Offices (Terms of Service) Measure ("the Measure") has been referred, has the honour to submit the Measure to the Ecclesiastical Committee with these Comments and Explanations.

The object of the Measure

2. The Measure introduces new terms and conditions of service, referred to as 'Common Tenure', which will eventually apply to the great majority of clergy as well as to certain lay ministers of the Church of England. The principal object of the Measure is to promote the Church's ministry by providing terms of service which embody a proper balance between security of tenure and accountability, ensure parity of treatment wherever possible and, while preserving the existing status of the clergy as office holders, afford them rights broadly equivalent to those enjoyed by employees.

The need for change

3. Patterns of ministry in the Church of England have evolved over many centuries, and as a result there are presently a number of ways in which clergy can hold office, with very different degrees of security of tenure.

4. In 2006 there were some 13,600 clergy serving in the Church of England. Of these:

5. 5,000 held one of the ancient freehold offices of archbishop, bishop, dean or residentiary canon of a cathedral, archdeacon or incumbent of a benefice;

- 7,000 (including 3,000 non-stipendiary clergy) held office under licence from the diocesan bishop in team ministries, as priests-in-charge or as assistant ministers (technically described as assistant curates); and
- 1,600 were engaged as chaplains or in other types of ministry, usually under a contract of employment from a non-church body (such as an NHS Trust or educational institution) or a diocesan board of finance, coupled with a licence from the diocesan bishop.

6. Although the freehold has been gradually modified over the years, those holding freehold office retain a high degree of security of tenure. They are only obliged to leave office:

- upon reaching the statutory retirement age of 70;
- if they are removed from office under disciplinary proceedings;
- if they become unable to perform their duties because of physical or mental disability;
- if (in the case of incumbents) there is a finding by a tribunal of serious pastoral breakdown; or
- if their office is abolished as a result of pastoral reorganisation.

7. In the last three of these circumstances, compensation is payable. In addition, incumbents (but not other freeholders) hold the legal title to the parsonage house (though they do not have the responsibility of maintaining it) and have the power

to prevent its disposal, and certain other dealings with the house, while they hold office.

8. Clergy holding office under licence, on the other hand, have far more limited security under the present law. Except in the case of team ministers, the bishop has power under Canon law to terminate a licence summarily for any cause that seems to him good and reasonable (other than misconduct), subject to a right of appeal to the archbishop of the province. Team ministers are appointed for a term of years, but have no right to an extension of that term (though the bishop has power to grant one). Some residentiary canons are now also appointed for a term of years, and their terms of service are governed by the statutes of the individual cathedrals.

9. Furthermore, most clergy do not enjoy the rights that would be usual in an employment relationship; nor, equally, are they subject to the responsibilities of employees. Thus there is no legal right to a stipend or to housing; arrangements for annual holidays and maternity and related leave are made separately by each diocese; and there is no procedure to address cases where a cleric is failing to discharge the duties of his or her office to an acceptable standard.

10. The Church has recognised the deficiencies in the system as it stands, particularly in terms of the potential for inequitable differences of treatment between those with and without the freehold. Over recent years a number of debates in General Synod have addressed these problems. In 2003 an important step forward was taken with the introduction, in the Clergy Discipline Measure, of a common set of procedures for dealing with disciplinary issues amongst the clergy, which removed the bishop's power to terminate a licence summarily on grounds of misconduct.

11. The immediate impetus for the comprehensive review that gave rise to the present legislation was the discussion document *Employment Status in relation to Statutory Employment Rights* issued by the Department of Trade and Industry ("the DTI") in December 2002. This explored the implications of the Government's powers under section 23 of the Employment Relations Act 1999 to confer some employment rights on 'atypical workers' who are not technically employees. In its response to that document the Archbishops' Council stated:

> "The Church of England firmly believes that the clergy and all others who work for it are entitled to terms and conditions of service which adequately protect their rights, recognise their responsibilities and provide proper accountability arrangements."

12. The Council also emphasised, however, that any such terms and conditions must reflect the Church's understanding of the character of Christian ministry.

The Principles Governing the Legislation

13. In response to the DTI consultation, the Archbishops' Council set up a group ("the Review Group"), chaired by David McClean QC, then Professor of Law at the University of Sheffield and a member of the General Synod. The Review Group was given the following terms of reference:

- to review the terms under which Church of England clergy hold office to ensure a proper balance of rights and responsibilities, and to introduce clear procedures for resolving disputes which afford full protection against possible injustice;

- to consider in this context the future of the freehold and the position of the clergy in relation to statutory employment rights; and
- to give priority in the review to consideration of the position of clergy without the freehold or employment contracts, and to report on this aspect in 2003 with detailed proposals and a programme for their implementation, the remainder of the review to be completed, if possible, by 2004.

14. The Review Group's report on the first phase of its work, containing proposals for the introduction of 'Common Tenure' for non-freehold posts, was welcomed by the General Synod in February 2004. A second report, recommending the extension of Common Tenure to freehold posts, was debated in February 2005 and was also accepted, but the Synod expressed concerns about related proposals concerning property. As a result, the Review Group produced a further report recommending some modification of these proposals, which was debated and accepted by the Synod in November 2005.

15. By the end of this process the following governing principles had emerged, which are reflected in the legislation as subsequently drafted:

- that clergy should, so far as their different roles and responsibilities allowed, hold office under common terms and conditions of service, to be known as Common Tenure;
- that the clergy should not be given employee status, but should retain the status of office holder (this issue is explored more fully in paragraphs 13–18 below);
- that, while remaining office holders, clergy should be given a range of legal rights equivalent to those enjoyed by employees;
- that these rights should be conferred by Church legislation, to ensure that they were expressed in a manner that properly reflected the way in which ministry is exercised in the Church of England;
- that the power to remove licensed clergy from office summarily should be abolished, and that fixed-term appointments should only be permitted in specified circumstances;
- that a capability procedure should be introduced to address problems of poor performance, with clergy having the right to bring claims of unfair dismissal in an employment tribunal if they were removed from office under this procedure;
- that clergy should be obliged to take part in regular ministerial development review and continuing ministerial education, to assist them in developing their ministry; and
- that freehold offices should be phased out, but that those holding such an office when the legislation took effect should not be obliged to surrender their freehold while they continued to hold that particular office.

The Retention of Office-Holder Status

16. The Review Group gave much thought as to whether the legislation should confer employment status on the clergy. The Group recognised that an ecclesiastical office holder may also work under a contract, as indeed many chaplains already do. However, in the case of diocesan and parochial clergy it was

found to be very difficult to reconcile the essential characteristics of an employment relationship with the reality of how such ministry is exercised. Identifying an employer was a particularly problematic issue: whilst clergy take an oath of canonical obedience to their diocesan bishop, he is not primarily responsible for appointing or paying them. Nor does the bishop have that degree of control over a parochial minister's activity that is central to the relationship between employer and employee: within the general framework of responsibilities laid down in Canon law, clergy have a great deal of autonomy, the bishop having no power to control what his clergy do on a day to day basis.

17. The Review Group therefore concluded that a statutory framework which preserved office-holder status, but at the same time conferred rights and responsibilities that reflected current employment law and practice, was more consistent with the character of ministry as it was understood in the Church of England.

18. These issues were revisited by the Revision Committee and the Synod in the light of the decisions of the House of Lords in 2005 in *Percy v Church of Scotland Board of National Mission* and of the Court of Appeal in 2007 in *New Testament Church of God v Stewart*. It was noted that neither of these cases related to a minister of the Church of England, and also that neither resulted in any finding that ministers of religion in general, or in the Church of England in particular, are employees in law.

19. In *Percy*, the House of Lords affirmed the existence of common-law offices, and accepted that an office holder may work under a contract, although this will not necessarily be so in every case. The judgment also reviewed and questioned a series of older cases which had established a presumption that, where a minister of religion was appointed, the parties did not intend to create a legally binding relationship. This presumption has now, effectively, been overruled.

20. Following the decision in *Percy*, the Court of Appeal were asked to consider in *Stewart* whether an ordained minister in the New Testament Church of God held office under a contract of employment and was therefore entitled to bring a claim for unfair dismissal in an employment tribunal. On the facts, it was held that Mr Stewart was an employee. However, the Court was at pains to emphasise that this decision involved no general finding that ministers of religion were employees: it accepted that an analysis of the specific facts of each case was needed before reaching a conclusion, and that those facts would vary as between different religions and different Churches.

21. In the view of the Revision Committee and the Synod these cases have not affected the need for the present legislation. On the contrary, they have, if anything, strengthened the argument for a clearer statutory framework which will promote greater clarity and certainty.

The Shape of the Legislation

22. The complete package of legislation consists of the Measure, Regulations and an Amending Canon. The Measure provides the framework for the new terms and conditions of service. Within that framework, the legislation has been so designed that the detailed provisions for terms of service will be contained in the Regulations. This is to enable those provisions to be refined and amended as necessary from time to time in response to practical experience and changes in employment law, by a process which is somewhat simpler than that required to amend a Measure, but which requires Synodical and Parliamentary approval.

23. A set of draft Regulations was introduced into the Synod at the same time as the draft Measure, and these are appended to these Comments and Explanations as an Annex. They are in the form in which they stood following revision by the Revision Committee and in the Synod, and also incorporate some further consequential amendments which the Archbishops' Council proposes to include when the Regulations are reintroduced into the Synod, for its approval, after section 2 of the Measure comes into force.

24. A draft Amending Canon was also introduced into the Synod at the same time as the Measure. The intention is that the Amending Canon should be brought back to the Synod for final drafting and final approval after the Regulations have been made.

25. A panel appointed by the Archbishops' Council's Deployment, Remuneration and Conditions of Service Committee, under the chairmanship of the Bishop of Hull, is working on the various directions and guidance provided for in the Regulations, and in particular on the capability and grievance procedures. The essential features of the proposed capability procedure are as follows:

- the principal objective of the procedure is to provide the support and resources needed to enable an office holder to improve his or her performance. Only in the last resort, where it has not been possible to bring about such improvement, can the office holder be removed from office;
- the procedure consists of initial informal discussions followed, if necessary, by a three-stage formal process – first and second warnings and finally removal from office, with time between stages for measures to promote improved performance to be put in place;
- at each of the formal stages the office holder is notified in writing and invited to a meeting with a panel of three people – the diocesan bishop or his representative and an independent cleric and lay person. Membership of the panel changes at each stage, so the matter is never heard by the same panel more than once;
- the office holder is entitled to be accompanied at meetings, and has a right of appeal to a different panel at each stage of the process;
- an office holder who is removed from office following a capability procedure, and whose appeal against such removal has not been upheld, has the right to bring a claim for unfair dismissal to an employment tribunal.

Legislative History

26. The draft Measure, as introduced into the Synod for First Consideration in February 2007, was prepared by an Implementation Group chaired by Professor McClean, which continued the work of the Review Group. In relation to the provisions of the draft Measure and the draft Regulations that relate to the use of employment tribunals, the DTI was consulted and raised no objection.

27. The legislation was received positively by the Synod and was committed to a Revision Committee. As the Synodical process continued, the draft Measure received very careful scrutiny from the Revision Committee and then also from the Synod at the Revision stage in February 2008. The revision process resulted in a number of amendments, most significantly those arising from the Synod's decision

that the legal title in parsonage houses should remain vested in the incumbent as corporation sole rather than, as proposed by the Revision Committee, being transferred to an independently constituted parsonages board for the diocese. (More information about this is given in paragraphs 46–49 below.) However, apart from this change, the principles and objectives of the legislation remain largely unaffected. The Final Drafting stage, which dealt with some points of detail, was taken at the July 2008 group of sessions of the Synod, which then proceeded to give the Measure Final Approval by overwhelming majorities in all three Houses.

28. The voting on the Measure at the end of the Final Approval debate was as follows:

	In favour	**Against**	**Abstentions**
Bishops	20	0	0
Clergy	109	5	4
Laity	110	13	2

THE PROVISIONS OF THE MEASURE AND THE MAIN ISSUES CONSIDERED BY THE GENERAL SYNOD

SECTION 1: COMMON TENURE

29. This section introduces the concept of 'Common Tenure', the generic name for the package of terms and conditions of service governed by the legislation, and describes how it will apply to various categories of office holder.

30. The legislation will apply to all clergy who hold either a freehold office or a licence from the diocesan bishop. It will also apply to that small proportion of lay ministers who receive a stipend or other emoluments of office. It was considered appropriate to bring these particular lay ministers within the scope of Common Tenure because it was recognised that they often occupy posts of significant pastoral responsibility.

31. The legislation will not apply to the following:

- clergy who exercise their ministry under permission to officiate from the bishop. This form of authorisation is generally used for retired clergy. It enables them to assist on a voluntary basis in any parish in the diocese, at the invitation of the incumbent. In this case it was thought desirable to retain the flexibility and relative informality of the existing arrangement;
- clergy who exercise their ministry under a contract of employment, unless that employment also requires a licence from the bishop;
- non-residentiary cathedral canons, who are not licensed by the bishop and whose conditions of office will continue to be governed by the statutes of the relevant cathedral. These are essentially honorary appointments, and it was not thought appropriate to bring them within the scope of Common Tenure;
- chaplains in the three armed services, who are licensed by the Archbishop of Canterbury. Correspondence with the Archdeacon to the Army established that such chaplains were either employed or treated as 'fee earners' by the Ministry of Defence and that therefore Common Tenure ought not to apply to them;
- non-stipendiary readers and licensed lay workers. Because of the numbers involved (over 8,000 readers alone in 2006) it was decided that it would be impracticable to bring these office holders within the scope of the present legislation.

32. The legislation will apply to licensed clergy, stipendiary licensed lay ministers and those residentiary canons appointed for a term of years, with immediate effect upon the coming into force of this section. It will also apply with immediate effect to the Archbishops of Canterbury and York. Both Archbishops were consulted and agreed that it was appropriate, for practical and symbolic reasons, that their offices should be brought within Common Tenure at the earliest opportunity.

33. Those, other than the Archbishops, who hold freehold offices at the date when section 1 comes into force will be invited by letter to 'opt in' to Common Tenure. Those who elect not to do so will continue to hold office under their pre-existing terms and conditions until such time as they leave that freehold post. This provision was made in the recognition that compelling a person to surrender a freehold office (however vestigial the actual property rights associated with it)

could amount to an infringement of Article 1 of the First Protocol to the European Convention on Human Rights. However, it will not be possible, once this section is in force, to make any new appointment to a freehold office – all future appointments must be made on Common Tenure (see s.9 (2)).

Matters raised before the Revision Committee and the General Synod

34. The Revision Committee and the Synod heard submissions that the Measure should not apply to those holding freehold office. It was argued that, while the case for strengthening the protection of licensed office holders was clear, the argument for changing the terms on which freeholders held office had not been made out. The Committee and the Synod rejected these submissions, agreeing that they were contrary to one of the most important principles established by the Review Group – i.e. that clergy and stipendiary lay ministers should, so far as practicable, hold office on terms and conditions that were common to all (see paragraph 12 above).

35. The Revision Committee and the Synod also rejected a proposal that licensed clergy should be given contracts of employment, upholding the recommendation of the Review Group (see paragraphs 13–18 above) that office-holder status, coupled with a statutory framework of rights and responsibilities, embodied more accurately the way in which most ordained and licensed ministry is exercised in practice.

SECTION 2: REGULATIONS

36. This section confers upon the Archbishops' Council a duty to make, by means of regulations, provision for terms of service of those holding office under Common Tenure. Any such regulations must be laid before, and may be amended by, the General Synod, and will also be subject to the negative resolution procedure in pursuance of a resolution of either House of Parliament. Under sub-section (7) there is provision for the Synod's approval to be deemed if the Business Committee of the Synod considers a particular set of regulations to be uncontroversial, but in such a case any member of Synod has the power to override the deemed procedure by requesting a debate.

37. Sub-section (2) details certain matters which may, within the generality of the overriding obligation, be dealt with in the regulations. These include provision for:

- appointments of limited duration;
- protection against unfair dismissal;
- terms relating to the provision of housing;
- procedures to address inadequate performance; and
- the use of employment tribunals to adjudicate on disputes.

Matters raised before the Revision Committee and the General Synod

38. Some Synod members were concerned that sub-section (3), which provides that regulations may apply, amend or adapt any enactment or instrument, was too widely drawn, and this provision was therefore given particularly careful scrutiny by the Revision Committee. The considered view of both the Committee and the Synod was that it was appropriate and necessary, given the interrelationship between this legislation and employment law. An example of how this provision would work in practice can be found in regulation 33 of the draft Regulations included in the Annex, where the jurisdiction of employment tribunals under Part

X of the Employment Rights Act 1996 is applied, with certain necessary modifications, to cases where an office holder under Common Tenure has been removed from office following a capability procedure. Were this provision not in place, it would be necessary to replicate Part X of the 1996 Act in its entirety, with extensive modifications.

39. The Revision Committee and the Synod also heard some submissions which questioned the appropriateness of the provision in sub-section (4) allowing recourse to be made to employment tribunals. The objections were both theological and practical. It was suggested that it was contrary to Scripture for Christians to refer disputes to secular courts, and that employment tribunals were not equipped to deal with matters relating to the exercise of ministry: instead, a new system of Church tribunals should be set up. The Committee and the Synod noted that the Review Group had given careful consideration to the theological issues and had commissioned some reflections from a leading biblical scholar, Professor Anthony Thistleton of the University of Nottingham, who concluded that the relevant Scriptural passages were concerned with the abuse of power rather than with the use of secular courts as such. On the practical considerations, the Committee and the Synod were advised that the DTI had been consulted and had taken the view that employment tribunals should be well able to deal with claims from clergy and stipendiary lay ministers arising from dismissals for incapability. Such tribunals were already accustomed to dealing with organisations with a distinctive ethos, and they would not be called upon to decide questions of doctrine. By contrast, it would be impractical, and prohibitively expensive, to set up a system of Church tribunals and to ensure that its members acquired the necessary expertise in employment law.

40. A proposal that sub-section (8) should be revised to provide for the regulations to be subject to the affirmative resolution procedure in Parliament, rather than the negative resolution procedure, was rejected. Given that amending regulations made in the future would not necessarily be of major significance, and that any important changes would be fully debated in Synod, the Revision Committee considered that it would not be a good use of Parliamentary time to require affirmative resolution.

SECTION 3: DURATION OF APPOINTMENTS

41. This section describes the circumstances in which an office held under Common Tenure may lawfully be brought to an end. These may be summarised as follows:

- on the death, resignation or retirement of the office holder;
- where the office ceases to exist as a result of pastoral reorganisation (in which event the Regulations will provide for the payment of compensation);
- where the office holder is removed from office following disciplinary proceedings or under the capability procedure;
- where the office falls within one of the categories of fixed- or limited-term appointment prescribed by the Regulations and the term expires or is otherwise determined;
- where a licence is held in connection with a contract of employment (for example, as a hospital or prison chaplain) and that contract is terminated;

- where the office holder has been appointed as priest-in-charge during a vacancy in a benefice and that vacancy comes to an end on the appointment of a new incumbent (in which case the Regulations will provide for the payment of compensation).

42. One of the central purposes of the present legislation is to remove the present inequality of treatment between freeholders and licensed clergy as regards termination of office. The Amending Canon will remove the right of the bishop to terminate a licence summarily for any non-disciplinary cause. Once the Measure is in force, it will also no longer be possible to appoint an office holder on a fixed- or limited-term basis except as provided in the Regulations. Regulation 29 of the draft Regulations in the Annex specifies the following circumstances in which such an appointment may be made:

- where the post is created to cover another office holder's authorised absence from work (for example, on maternity or long-term sick leave);
- where the office holder is aged 70 or over and is occupying a part-time post (see paragraph 40 below as to provisions for retirement);
- where the office is designated as a training post – that is, where the post-holder is required to undertake initial ministerial training (usually for the first four years following ordination);
- where the office is subject to sponsorship funding – that is, where it is dependent wholly or partly on external funds, as described in regulation 29(4);
- where the office is designated as a probationary post, that is an appointment designed to facilitate the office holder's return to ministry where that person has not held ecclesiastical office for a year or more, or where he or she has left office following a capability procedure or disciplinary proceedings;
- where the office is created by a bishop's mission order under the Dioceses, Pastoral and Mission Measure 2007. Section 49(8) of the 2007 Measure provides that mission orders, which are intended to facilitate 'fresh expressions' of church, are to be of limited duration, initially not exceeding five years; or
- where the office is designated as a post held in conjunction with another office or employment (for example, where a residentiary canon in a cathedral also holds a post in the diocesan office), in which case the office may be terminated in the event of the other office or employment coming to an end.

Matters raised before the Revision Committee and the General Synod

43. At present, holders of freehold offices and team vicars are obliged under the Ecclesiastical Offices (Age Limit) Measure 1975 to retire when they reach the age of 70. Other office holders are not subject to any fixed retirement age, as bishops presently have the power to terminate their licence on notice or summarily. Section 3(10) of the Measure extends the retirement age of 70 to all office holders under Common Tenure, although there is provision in the Regulations, as described above, for those over 70 to be appointed to a part-time office on a fixed-term basis. A submission was made to the Revision Committee that office holders should have the right to ask to continue in the post which they held upon reaching

retirement age, to reflect the position of employees under the Employment Equality (Age) Regulations 2006. The Committee rejected this submission, and the matter was not pursued in the Synod.

44. Though the position of priests-in-charge would be greatly improved under the Measure, a question was nevertheless raised as to whether the additional security they had been given was adequate. The Synod accepted that the position of priests-in-charge was much improved under these provisions, and that it would be impossible to give them greater security without thereby adversely affecting the rights of patrons. A priest-in-charge is appointed by the bishop under licence, to minister in a benefice during a period when the bishop has suspended the right of presentation to that benefice under section 67 of the Pastoral Measure 1983. At present, the licence of a priest-in-charge can be terminated summarily by the bishop at any time, and if the benefice ceases to exist as a result of pastoral reorganisation the priest-in-charge (unlike an incumbent) receives no compensation. Section 3(4) of the Measure permits the licence of a priest-in-charge to be terminated, but only when the vacancy comes to an end. This provision is necessary because, if there were no such power and the office of priest-in-charge were simply to continue, it would be impossible for an incumbent then to be appointed under the statutory appointment processes. In many cases the priest-in-charge is in fact appointed as the new incumbent, but where that does not happen and no suitable alternative post has been found at the time when the office comes to an end, the proposed Regulations provide for compensation, limited to one year's loss of office (see draft regulation 30). Priests-in-charge will also receive compensation on the same basis if the benefice is abolished under pastoral reorganisation. It was also noted that regulation 30 would introduce a provision whereby an incumbent could be appointed, through the normal appointment processes, where proposals for pastoral reorganisation were in place at the time of appointment, and if the office were then abolished within a specified period – not exceeding five years – compensation limited to one year's loss of office would be payable. This provision should significantly reduce the frequency with which bishops will need to exercise the right to suspend presentation.

SECTION 4 – PROVISION OF HOUSING FOR OFFICE HOLDERS

45. This section grants, for the first time, a legal right to holders of full-time stipendiary offices (and part-time office holders where the particulars of office specify that housing is included) to be provided with accommodation of a reasonable standard by or through the agency of a specified housing provider. Incumbents of benefices are excluded from this provision, because the Synod voted that they should continue to own the legal title to their parsonage house (see paragraphs 46–49 below).

46. Section 4(2) provides that the right to accommodation can be waived by the office holder or modified by agreement. An example of a situation where this might be appropriate would be where a married clergy couple, both of whom hold full-time stipendiary posts, agree to occupy the same house.

47. The specified housing providers are:

- in the case of an archbishop or diocesan bishop, the Church Commissioners;
- in the case of cathedral clergy, the cathedral Chapter; and

- in the case of other office holders, the Parsonages Board of the diocese ("the Parsonages Board").

48. The Commissioners and the Chapter already in practice provide housing for the relevant categories of clergy. Housing for other office holders is at present provided from a variety of sources – some by the Diocesan Board of Finance ("the DBF") either as diocesan glebe or as part of its corporate property and others by parochial church councils, local trusts or patrons. The Parsonages Board, which is either a committee of the DBF or a separate body corporate, already has the responsibility under the Repair of Benefice Buildings Measure 1972 for maintaining and repairing parsonages and making recommendations about their sale and replacement where necessary. This therefore seemed the most appropriate body to become the relevant housing provider in the case of office holders generally. The Parsonages Board is accordingly given power under the Measure to acquire and hold property for this purpose (section 6), but it also has the power to make arrangements with another housing provider (section 4(8)) or another person or body (section 5).

49. Detailed provisions as to the terms of occupation of accommodation provided under this section are proposed to be contained in regulations and will include a procedure for resolving disputes.

Matters raised before the Revision Committee and the General Synod

50. When it was introduced into the Synod, the Measure contained provisions transferring the legal title in parsonage houses to the Parsonages Board, and giving incumbents the same rights and responsibilities under this section as other office holders. This proposal proved controversial and the Revision Committee received a substantial number of representations opposing it. The objections (briefly summarised) were as follows:

- the proposed transfer of ownership was not necessary – the basic aims of the legislation could be achieved without it ;
- it was a centralising exercise that would upset the historic balance of power between the parish and the diocese, and loosen the ties between the local community and the Church;
- it would undermine the proper independence of the incumbent and hinder him or her from exercising a prophetic ministry;
- it would materially alter the nature of the 'living' to which the patron presented the incumbent;
- it would remove a symbol – which had considerable significance for some – of the rootedness of the Church of England in its local context; and
- it could put parsonages at risk of becoming available to general creditors in the event of a DBF becoming insolvent.

51. The Revision Committee recognised the strength of feeling that underlay the opposition, but the majority of its members took the view that many of the concerns were based on mistaken perceptions. None of the objections was, in the view of the majority of the Committee, strong enough to outweigh the case for an approach based on fairness and parity between office holders in the terms on which they occupied their accommodation.

52. The Committee nonetheless acknowledged that the concerns about the vulnerability of parsonages to creditors of a DBF had some force, and it was not persuaded that the provisions of the legislation as originally drafted were adequate to address this. Therefore the Measure, when returned to the Synod at Revision stage, contained provisions requiring all Parsonages Boards to be established as independent charities, separate from the DBF, with clearly defined purposes. This proposal prompted further controversy, in that it was unwelcome to dioceses who were seeking to streamline their administrative structures.

53. At the Revision stage in full Synod, an amendment removing the provision for the transfer of parsonage houses to the Parsonages Board was carried in all three Houses. There was therefore no longer any need for Parsonages Boards to be established as independent charities, and the Synod agreed that this provision should be withdrawn.

SECTION 5 – PROVISION OF HOUSING BY PARSONAGES BOARDS AND OTHER RELEVANT HOUSING PROVIDERS

54. Section 5(1) confers a duty on the Parsonages Board to oversee the provision of housing for all office holders in the diocese for whom it is the relevant housing provider and to ensure that suitable housing is provided for all office holders who have the right to such provision under section 4. Section 5(2) confers on the Parsonages Board and other relevant housing providers a power to provide housing for office holders within their respective remits who do not have such an entitlement, so giving flexibility to meet particular needs.

55. No matters of significance were raised before the Revision Committee or the Synod in relation to this section.

SECTION 6 – POWERS TO ACQUIRE AND DISPOSE OF HOUSES OF RESIDENCE AND CARRYING OUT OF WORKS

56. Section 6(1) confers upon relevant housing providers the power to acquire land or buildings for the purpose of housing office holders, and to dispose of property no longer required for that purpose.

57. Section 6(2) gives relevant housing providers the power to carry out works of improvement, repair, demolition, reduction, enlargement or alteration to such property. In the case of repairs, section 6(3) provides that there must be prior consultation with the office holder: other such works fall within the definition of a 'regulated transaction' in section 7.

58. Section 6(4) excludes parsonage houses from the ambit of this section and section 7. In consequence of the decision of the Synod that parsonages should not be transferred to the Parsonages Board, their acquisition, disposal and maintenance will continue to be covered by the existing provisions in the Parsonages Measure 1938 and the Repair of Benefice Buildings Measure 1972.

59. No matters of significance were raised before the Revision Committee or the Synod in relation to this section.

SECTION 7 – TRANSACTIONS BY RELEVANT HOUSING PROVIDERS RELATING TO HOUSES OF RESIDENCE

60. This section provides that, where a relevant housing provider proposes to carry out certain transactions (specified in section 7(1)), that provider must first serve notice on the interested parties specified in section 7(2), who are given a right to

object. Details of how this right is to be exercised and the objection determined are set out in draft regulation 16. Office holders other than incumbents and members of team ministries do not at present have any voice in decisions relating to the house which they occupy, and this provision gives them, for the first time, the right to object and to have that objection heard by an independent body.

61. This section also provides that consent must be obtained in the case of a disposal, purchase or exchange of property where the other party is a 'connected person' as defined in section 7(6) or a trustee for or nominee of such a person, or where the transaction is made at an undervalue. Application for consent is made to the Commissioners except where the Commissioners are themselves the relevant housing provider, in which case the consenting body is the Archbishops' Council. In the case of cathedral housing, there is already a requirement to obtain the Commissioners' consent to all acquisitions and disposals, and this is preserved in section 7(7).

Matters raised before the Revision Committee and the General Synod

62. The Revision Committee considered a proposal that office holders should be given a right of veto in relation to regulated transactions, similar to that which incumbents enjoy in relation to parsonages because they hold the legal title. This proposal was rejected by the Committee and the Synod, which took the view that the regulation as drafted represented a proper balance between the respective rights and responsibilities of the office holder and the housing provider. If an objection were made, the burden would rest on the housing provider to satisfy the independent adjudicator that the transaction ought to proceed.

63. After the Synod voted against the proposed transfer of parsonage houses to the Board, submissions were made to the Steering Committee in charge of the Measure that the incumbent's veto in relation to transactions relating to the parsonage should be qualified or replaced by a right of objection. The Committee had considerable sympathy with this proposal but took the view that it would not be appropriate to bring forward such a significant change at the Final Drafting stage of the Measure, where the Synod would not have the opportunity to make further amendments.

SECTION 8 – CODES OF PRACTICE

64. This section imposes a duty on the Archbishops' Council to issue guidance in relation to the Measure, in the form of one or more Codes of Practice to which any person or body carrying out functions under the Measure will be required to have regard. It is envisaged that several such Codes will be needed, dealing for example with matters such as the standard of housing to be provided for office holders, and all will require the approval of the Synod.

65. Codes of Practice to be issued under section 8 of the Measure are to be distinguished from the 'directions' which the Regulations will enable the Council to issue in relation to certain matters (in particular the capability procedure), which, unlike Codes of Practice, will have binding effect.

66. No matters of significance were raised before the Revision Committee or the Synod in relation to this section.

SECTION 9 – SUPPLEMENTARY PROVISIONS

67. This section deals with a number of supplementary matters. In particular, section 9(6) states that nothing in the Measure shall be taken as creating a relationship of employer and employee between an office holder and any other body. This reflects the principle that office-holder status should be retained, as discussed in paragraphs 13–18 above.

68. No matters of significance were raised before the Revision Committee or the Synod in relation to this section.

SECTION 10 – INTERPRETATION

69. This section sets out the meaning of certain expressions used in the Measure.

70. No matters were raised before the Revision Committee or the Synod in relation to this section.

SECTION 11 – AMENDMENT OF ENACTMENTS

71. This section gives the Archbishops' Council the power, for a period of five years after the section comes into force, to make by Order consequential amendments to other legislation and provision for transitional matters. Such Orders are subject to the same requirements as to approval by Synod and by Parliament as are regulations made under section 2.

72. The section also provides for certain specific amendments to existing Church legislation, as set out in the section itself and also in schedule 2.

Matters raised before the Revision Committee and the General Synod

73. In response to submissions that the order-making power in sub-section (1) was too widely drawn, the Revision Committee considered that such a power was necessary. Because of the complexity and scope of the legislation it was possible that some necessary consequential amendments had not yet been identified, and there needed to be a way of dealing with such amendments promptly as and when they came to light. However, the Committee and the Synod agreed to a proposal that the exercise of the power should be limited to a period of five years.

74. Some concerns were raised at the provision in sub-section (6) that the Incumbents (Vacation of Benefices) Measure 1977 should not have effect in relation to offices held under Common Tenure. The 1977 Measure provides a mechanism whereby an inquiry can be held into cases of serious pastoral breakdown in a benefice or cases where an incumbent is unable to perform his duties due to physical or mental disability. The Committee was satisfied that disability cases and cases where the pastoral breakdown was primarily caused by the incumbent should, under Common Tenure, fall within the ambit of the capability procedure. The Committee acknowledged, however, that the capability procedure would not address situations where the conduct of parishioners was responsible for pastoral breakdown. Although the 1977 Measure provided limited sanctions against lay office holders, the Committee, and the Synod, felt that this was not sufficient reason to keep that Measure in force, given that its procedures were protracted and costly, and had been very infrequently used. Instead, the Committee recommended that the Archbishops' Council should undertake further work on the issue of pastoral breakdown generally, which would extend beyond the remit of the present Measure.

SECTION 12 – REPEALS

75. This section provides for repeals consequent on this legislation, the details of which are set out in schedule 3.

76. No matters were raised before the Revision Committee or the Synod in relation to this section.

SECTION 13 – CITATION, COMMENCEMENT AND EXTENT

77. This section provides for the citation, commencement and extent of the Measure.

78. No matters were raised before the Revision Committee or the Synod in relation to this section.

SCHEDULE 1 – MATTERS RELATING TO REGULATED TRANSACTIONS

79. Paragraph 1 of this schedule regulates the application of money received by the Parsonages Board from the sale or exchange of a house of residence. It broadly reflects the existing provisions in the Parsonages Measure 1938 as to the application of the proceeds of sale of parsonage houses. After deducting charges and expenses, the net proceeds received by the Parsonages Board are applied firstly to the exercise of any of its powers in section 6, with priority being given to the housing requirements of the office whose holder occupied the house that has been sold. Any surplus is then applied to the capital account of the diocesan stipends fund and/or the diocesan pastoral account, as the DBF may determine.

80. Paragraph 2 deals with certain formalities relating to regulated transactions.

81. No matters were raised before the Revision Committee or the Synod in relation to this schedule.

SCHEDULE 2 – AMENDMENT OF ENACTMENTS

82. This schedule contains the amendments referred to in section 11(4).

83. No matters were raised before the Revision Committee or the Synod in relation to this schedule.

SCHEDULE 3 – REPEALS

84. This schedule contains the repeals referred to in section 12.

85. No matters were raised before the Revision Committee or the Synod in relation to this schedule.

CONCLUSION

86. The Legislative Committee invites the Ecclesiastical Committee to issue a favourable report on the Measure. In the event of the Ecclesiastical Committee requiring any further information or explanation, the Legislative Committee stands ready to provide this.

On behalf of the Committee

Philip Giddings
(Deputy Chair)

23rd September 2008

SUPPLEMENTARY COMMENTS AND EXPLANATIONS ON THE ECCLESIASTICAL OFFICES (TERMS OF SERVICE) MEASURE

Introduction

87. We understand that questions have been raised by members of the Ecclesiastical Committee about the powers to make Regulations and Orders to be conferred respectively by sections 2 and 11 of the Ecclesiastical Offices (Terms of Service) Measure ('the Measure'). With a view to facilitating the Ecclesiastical Committee's consideration of the Measure, these further Comments and Explanations accordingly provide further information about the powers.

The nature of the powers

88. As explained in paragraph 33 of the Comments and Explanations produced previously, section 2 of the Measure imposes a duty on the Archbishops' Council to make, by means of Regulations, provision for the terms of service of those holding office under 'Common Tenure'. Under subsection (3) Regulations may *"apply, amend or adapt any enactment or instrument"* (which would include both Measures and Acts of Parliament, and subordinate legislation made under them). Regulations require the approval of the General Synod; and the Synod can amend any draft Regulations laid before it for that purpose (subsection (5)). The Business Committee of the General Synod may determine that draft Regulations laid before it for approval need not be debated but, if it does so, the draft Regulations will nonetheless have to be debated if even a single member of the Synod gives notice of a desire to debate them or to move an amendment to them (subsection(7)). Once approved by the Synod and made by the Archbishops' Council, the Regulations must be laid before Parliament under the negative resolution procedure.

89. As explained in paragraph 67 of the Comments and Explanations produced previously, section 11 of the Measure gives the Archbishops' Council the power, within the period of five years from the coming into force of the section, to make provision by Order for amendments of any provision of a Measure or other enactment or instrument, or for transitional provisions, as appear to the Council to be necessary or expedient in consequence of any provision of the Measure or Regulations made under it. Again, such an order could amend both Measures and Acts of Parliament, and subordinate legislation made under them; and the procedure for making such an Order is the same (by virtue of subsection (2)) as in relation to the making of Regulations under section 2.

The rationale for the powers

90. The power to make Regulations to be conferred by **section 2** is needed because the provision to be made for the terms of service comprising Common Tenure will be detailed, complex and need to be capable of being refined and amended as necessary from time to time in response to practical experience and changes in relevant law (including especially employment law) by a process which is somewhat simpler than that required to amend a Measure, but which requires Synodical and Parliamentary approval. As part of that process, the Regulations will need to be able to apply, amend or adapt enactments because the terms of service will apply within a complex and changing legal context, which may need to be adapted to meet the particular circumstances of the Church. For example, it might be desired to amend particular provisions of secular employment law which would

not otherwise be applicable to clergy so as to apply them to clergy holding office on Common Tenure, but with modifications necessary to meet the particular circumstances of the Church of England.

91. That there is a case for a power of this kind is supported, we believe, by the fact that section 23 Employment Relations Act 1999 (which allows the Secretary of State to confer certain employment rights upon 'atypical workers', including clergy) permits the Secretary of State to amend, exclude or apply any enactment.

92. As explained in paragraph 69 of the earlier Comments and Explanations, the power to make Orders to be conferred by **section 11** is needed because, given the complexity and scope of the Measure and the Regulations to be made under it, it may be necessary to make further consequential amendments to legislation which have not so far been identified; and it is desirable that there should be a way of making any such amendments promptly as and when the need for them comes to light.

93. We understand that powers of this latter kind are included in Acts of Parliament. We particularly note in that connection the 3rd report of the Delegated Powers Committee of the 2002–03 session, in which a number of such powers are identified and discussed. We also note the following statement of First Parliamentary Counsel in his letter appearing in Appendix 3 to the report:

> "[Provisions of this kind] have been included in legislation for many years. They are typically included in Bills which make significant changes to existing complex bodies of law. They are typically included because it is not possible to guarantee that the provisions of the Bill itself are complete or because (at the time of enactment) it is difficult to predict the precise transitional and other arrangements that will be needed. They generally confer power to deal with matters on which Parliament would not expect to be burdened with further primary legislation, though Parliament's ability to scrutinise the provisions made under the power concerned is not removed. While at first sight provisions of the kind you mention may seem of very wide scope, they will have to be interpreted with regard to the context of the Act in which they appear."

94. In our view this aptly describes the position as regards the power to be conferred by section 11.

The proposed manner of exercise of the powers

95. As regards the exercise of the proposed powers, it is important to bear in mind the following considerations:

- Both powers are narrow in their scope:
- The power proposed to be conferred by section 2(3) is not general in its scope: it can only be exercised for the limited purpose of making *"provision for the terms of service of persons holding office under Common Tenure"*. Provision for any wider purpose would accordingly be *ultra vires*.
- The power proposed to be conferred by section 11(3) can only be exercised for the purposes of making consequential amendments, and only during the period of five years from the coming into force of the section.

- It would be rare for either power to be used to amend or repeal secular legislation. In particular, the exercise of the power conferred by section 2(3) is likely to be restricted to situations in which it is desired to make provisions of secular employment law, to which the clergy of the Church of England would not otherwise be subject, apply to those holding office on Common Tenure, but with modifications appropriate to the circumstances of the Church. (Thus the only way in which the proposed Regulations will impact on secular legislation is by applying to clergy on Common Tenure the provisions concerning access to employment tribunals contained in Part X Employment Rights Act 1996, but with certain modifications.)
- In the event of it being intended to exercise either power in such a way as to amend or repeal secular legislation, there would be prior consultation with the relevant Government department(s) concerned (in the same way that there is, by constitutional convention, consultation with the Church of England before Ministers seek to use Parliamentary legislation to amend Church legislation with its consent); and the Church of England would not wish to proceed in the event of the department(s) objecting to what it proposed.

Questions that have been raised

96. The questions we understand to have been raised in relation to the powers, and the Legislative Committee's comments on them, are as follows:

> *Question 1:*
>
> *Does section 3(6) of the Church of England Assembly (Powers) Act 1919 ('the Enabling Act') extend to enabling an instrument made under a Measure, as opposed to the Measure itself, to amend an Act of Parliament?*

97. The Legislative Committee is advised that section 3(6) of the Enabling Act does extend to enabling an instrument made under a Measure, as opposed to the Measure itself, to amend an Act of Parliament.

Section 3(6) 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 this Act … ."

98. Additionally, section 4 of the Enabling Act provides that, upon completion of the procedures it sets out and the giving of the Royal Assent to a Measure, the Measure *"shall have the same force and effect as an Act of Parliament"*.

99. The purpose and effect of these provisions is therefore to allow the General Synod to legislate by Measure to the same effect as Parliament can legislate by Act of Parliament; and since Parliament can (and does) amend Acts of Parliament by secondary legislation, in the absence of any express provision to the contrary in section 3(6) the natural implication must be that the power of amendment or repeal it confers can, in principle, be exercised through an instrument made under a Measure as well as by a Measure itself.

100. That that is the case is certainly the basis on which the General Synod has exercised its powers in the past, without objection having been taken to it. Thus:

- Section 7 Synodical Government Measure 1969 allows the General Synod to pass resolutions amending Schedule 3 to that Measure (containing the Church Representation Rules);
- Section 1(4) National Institutions Measure 1998 allows the General Synod to pass resolutions amending Schedule 1 to that Measure (containing the provisions for the composition, proceedings etc of the Archbishops' Council); and
- Section 5 National Institutions Measure 1998 allows the Archbishops of Canterbury and York to make orders transferring functions between various national Church institutions, which can (inter alia) amend specified provisions of the Church Commissioners Measure 1947 or 'adapt' the statutory provisions relating to any function transferred in so far as necessary to enable it to be exercised by or on behalf of the transferee body.

Question 2:

If the answer to Question 1 is 'yes', is it necessary to take power to amend Acts of Parliament in the Measure or could a narrower power have been taken (e.g. to apply provisions of specific Acts which would not otherwise apply, with or without modification)?

101. It was not thought to be realistic to identify any particular Measures or Acts, or any class of Measures or Acts, which it might be necessary to apply, adapt, amend or repeal. The scope of the terms of service comprised within Common Tenure is capable of being affected by a very wide range of legislative provision. Whilst, as explained above, one of the purposes underlying the power to be conferred by section 2 is to have the ability to apply and adapt employment law derived from Acts of Parliament, it is not thought to be realistic to confine the power to some generically described category of statutory employment law lest the description adopted were inadequate to extend to a particular piece of legislation (such as a future Act or Order giving effect to a community obligation, for example) which it might be desirable to apply to clergy holding office on Common Tenure but with appropriate modifications.

Question 3:

If the answer to both Questions 1 and 2 is 'yes', why is the negative resolution procedure considered to be an adequate level of Parliamentary scrutiny?

102. This Measure is not the first to allow amendments to primary legislation to be made by delegated legislation which is subject only to the negative resolution procedure. We have identified the following earlier examples:

- The power, referred to above, conferred by section 7 Synodical Government Measure 1969, allowing the General Synod to pass resolutions amending Schedule 3 to that Measure;
- The power, referred to above, conferred by Section 1(4) National Institutions Measure 1998, allowing the General Synod to pass resolutions amending Schedule 1 to that Measure; and
- The power, referred to above, conferred by section 5 National Institutions Measure 1998, allowing the Archbishops of Canterbury and York to make orders transferring functions between various national Church institutions (unless it falls into the category described below). This power is expressed in

terms which allow the "*adaptation*" of the "*statutory provisions*" relating to the function(s) in question, the expression "statutory provisions" for this purpose being defined (by section 12(1) of the 1998 Measure) to include Acts of Parliament, and instruments made under them, as well as Measures.

103. In contrast, the only power we have identified which applies the affirmative resolution procedure is that, referred to above, conferred by section 5 National Institutions Measure 1998, allowing the Archbishops of Canterbury and York to make orders transferring functions between various national Church institutions, in any case where the order relates to certain specified functions of the Church Commissioners. We believe the reason for the imposition of a requirement to follow the affirmative resolution procedure in that particular context to have been Parliament's legitimate interest in the functions of the Commissioners as a body owing at least some of its assets to a Crown grant.

104. Furthermore, we are not aware that there is any necessary objection in principle to the amendment of primary legislation by secondary legislation which is subject only to the negative resolution procedure: we note, in particular, that that possibility is expressly included as one of the options available to Ministers under the Legislative and Regulatory Reform Act 2006.

105. As to the whether the affirmative resolution procedure should *in principle* be applicable to Regulations under section 2 or Orders under section 11 of the Measure, the following considerations seems to us to be relevant:

- such Regulations and Orders are different from instruments made by Ministers or others exercising executive powers in that they are the result of a legislative process involving both scrutiny (with the possibility of amendment) and approval by the General Synod – which is of course a legislative body in its own right;
- to impose the affirmative resolution procedure on all such Regulations or Orders could well involve a use of Parliamentary time which was disproportionate to the nature of the provision made given that:
- most such Regulations and Orders are unlikely to amend secular legislation; and
- even where they do, they will not be amending its effect <u>generally, but only in relation to clergy holding office on Common Tenure, and they</u> may well make only minor or (in the case of section 11) consequential amendments; and
- whilst, as noted above, the Church would not proceed with the making of such Regulations or Orders without the consent of the relevant Government department, it would always be open to Ministers to procure that Regulations or an Order be annulled if they considered the proposed exercise of the Synod's powers to be inappropriate.

106. The Legislative Committee hopes that the Ecclesiastical Committee will find these further comments of assistance to it in its consideration of the Measure.

On behalf of the Committee

Philip Giddings (Deputy Chair)

10th November 2008

Deliberation

WITH THE ASSISTANCE OF REPRESENTATIVES OF THE GENERAL SYNOD

WEDNESDAY 12 NOVEMBER 2008

Present	Davies of Coity, L	Sir Stuart Bell
	Elton, L	Ben Chapman
	Judd, L	Sir Patrick Cormack
	Laming, L	Mrs Ann Cryer
	Lloyd of Berwick, L (Chairman)	Mr Frank Field
	Newby, L	Mr John Gummer
	Pilkington of Oxenford, L	Mrs Sharon Hodgson
	Shaw of Northstead, L	Simon Hughes
	Wallace of Saltaire	Robert Key
	Walpole, L	David Taylor
	Wilcox, B	
	Williams of Elvel, L	

The Committee deliberated, with the assistance of:

Witnesses: The Right Reverend Stephen Venner, Bishop of Dover, The Reverend Prebendary David Houlding, Mrs Anne Sloman, Mr Geoffrey Tattersall QC, Mr William Fittall, Secretary General, and Mr Stephen Slack, Chief Legal Adviser, representatives of the General Synod, assisted the Committee.

Q1 ***Chairman:*** Bishop, could I start by welcoming you all to this meeting. Thank you very much for the Comments and Explanations which have already been provided to us. Could you perhaps start by introducing your colleagues?
Bishop of Dover: Certainly, my Lord. I am Stephen Venner, the Bishop of Dover in Canterbury. I am leading this group. I think it is probably easier if others quickly say who they are themselves.
Mr Fittall: William Fittall, Secretary General of the General Synod.
Mr Slack: Stephen Slack, Chief Legal Adviser to the General Synod.
Mr Tattersall: Geoffrey Tattersall. I am a member of the General Synod and I chaired the Revision Committee for the Measure.
Mrs Sloman: Anne Sloman, appointed member of the Archbishops' Council.
Prebendary Houlding: David Houlding. I am on the Archbishops' Council and I am a parish priest in North London. I have been working on this project since the outset with Professor David McClean.

Q2 ***Chairman:*** Thank you very much. And you have a substantial body of people behind you, in case you need to consult them also.
Bishop of Dover: Indeed.

Q3 ***Chairman:*** May I say that we are very grateful to you for coming. Perhaps I could start by declaring, in a sense, an interest. Some years ago I was involved in a case which came before the Privy Council, *Cheeseman v the Church Commissioners.* The question in that case, as I understood it, was whether the Pastoral Measure could be used to deprive an incumbent of part of his freehold. It arose, I think, in the Diocese of Leicester. In that case I was outnumbered by two of my colleagues, so that what I said does not matter at all. In any event it is a long way from what we are going to be discussing today. But I thought I ought just to mention it. Bishop, we have all read your comments and your further comments, for which we are grateful. Is there anything in general terms that you or, indeed, any of your colleagues would like to add? If so, please do that now, and thereafter I imagine we would want to take the Measure clause by clause.
Bishop of Dover: My Lord, thank you. Perhaps I could say a few opening remarks, just to put this within context from our point of view. We believe that the legislation represents a very significant step for the Church of England. We are aiming to equip and support both those who are called to the ministry and the people they serve. It has been over six years

in preparation and it represents the fruits of two major pre-legislative reports from Professor David McClean and a review group that he chaired. There has been extensive consultation several times around the Church and there has been thorough debate. The Measure that you have commands the overwhelming support of the General Synod. Final proof: there were 239 members voting in favour, 18 against, and six abstentions. My Lord, the Measure puts in place a framework to enable the introduction of new terms and conditions of service for clergy and for stipendiary lay ministers. We are going to call it "common tenure" and the intention is that it should eventually apply to clergy across the board, from the Archbishop of Canterbury to the person at the very beginning of their ministry. Why is it needed? First of all, as the word "common" suggests, it addresses the present inequalities between those clergy who have the freehold and those who are licensed and it does so by giving what is best of the freehold to everybody. The proposals also seek to secure a proper balance between rights and responsibilities. They put measures in place to ensure that ministers are properly and effectively supported in their ministry through regular development reviews and continuing education. For the first time, they give to the clergy many of the rights enjoyed by employees, including, interestingly for the first time, that clergy would have a right to a stipend and to annual leave. But we have retained and protected officer-holder status because it reflects the way in which that ministry is best exercised in practice and also because when we consulted with the clergy most of them told us that this was what they wanted. Clergy in charge of parishes enjoy a large measure of autonomy in the way in which they work and we want to preserve that for the good of the Church. If they had been employees, they would have line managers, and we do not think that the relationship between incumbents and bishops or indeed between bishops and archbishops should become one of line management—even though sometimes I am sorely tempted! We also recognise that we have until now lacked an effective means of resolving issues that arise when, for whatever reason, clergy are unable to perform their duties to an acceptable standard, or also, as happens from time to time, when lay people have unreasonable expectations of the clergy. We believe that the capability procedure which we propose to introduce will put us in a better position to meet that need through a process which is both fair and transparent and it will enable bishops to address a problem of poor performance in a constructive way very early on rather than wait until it becomes a tragic crisis. The legislation makes no change to the ownership of Church of England property. The McClean Group had originally proposed alterations to the ownership of church, churchyard and parsonage, but after much debate it was decided that it was entirely possible to create these new rights and responsibilities without breaking the historic ancient link between the benefice and the local church property. It is also perhaps worth adding that from the outset it was agreed that common tenure should be introduced without attempting to change the system of patronage. Within the framework established by the Measure, the detailed provision for common tenure will be contained in regulations. You have a copy, I think, of the draft regulations. These have already been considered in detail by the General Synod. Should the Measure be found expedient by this Committee and subsequently receive the approval of Parliament and Royal Assent, we intend to bring them back to the Synod in the course of next year and members will then have a further opportunity to debate and amend them. In their final form they will be subject to parliamentary scrutiny as a statutory instrument. My Lord Chairman, I am very much behind this Measure and I commend it to the Committee. My colleagues and I are ready to answer any questions you may have for us or to enter into any discussion with you. Thank you.

Chairman: I am grateful to you. I think we are all very grateful to you for making those introductory remarks. Rather than ask for comments on what the Bishop has just said, would it be sensible—I think one of the main points is going to arise fairly early on, when we come to clause 1—to proceed now by taking any problems, queries, questions, relating to common tenure, in particular, of course, whether it should apply to existing freeholders?

Lord Pilkington of Oxenford: The reason I am speaking on this is I was responsible for introducing appraisal and the whole matter that the Bishop has mentioned when I was High Master of St Paul's and dealing with a staff of 105. I want to say, in general—and we will need to consider this—that it is an appallingly difficult task. You do not want to be under any illusions about the difficulties. Second, it takes a large amount of time, which you have to accept does interfere with your other activities. Third, it is expensive. It is a very bureaucratic procedure. All these things need to be considered against a general background. It is very difficult defining the job even of a teacher. It varies somewhat from department to department, it varies according to which area you are in. For example, the demands made on a schoolmaster in a rural area of Dorset are very different from the demands made on a schoolmaster in a deprived area of a large city. If it is difficult for schoolmasters and schoolmistresses, it is even more difficult for parish priests and canons.

There is nothing in these papers which mentions the manner in which you are going to embark on a large appraisal and support for getting on for 8,000 people. I found it a burden dealing with 110. Further, the one thing there has to be is total trust between the appraiser and the appraisee. I do not want to dwell on the sorrows of the Church of England but no one can claim you are dealing with a united and agreed body of people. Again you have to consider that. If there is suspicion over the issues that we read about almost every day in the papers, then appraising is very difficult. I remember the famous joke in academic circles: "You must avoid saying, 'Well, he's not doing very well—he said so himself'." When you have mistrust of a doctrine, over the way you conduct services, then the task becomes terribly difficult. I hope that our questioning will touch on the way in which it will work and the difficulties. The Bishop made it seem—forgive me for saying—as though it is all going to be golden and lovely, between two people who are friends. The quarrels which have characterised religion in the last 2,000 years show that friendship is not always a characteristic of a church. On a minor point, there are about 3,000 parish priests who enjoy freehold. Are they going to move? Is the trust so complete that they will want to move parishes? Will you have over the next decade or so a blockage of priests, men and women, who will not want to move from the security they suspect they enjoy? Those are the doubts. I accept the fact of the large majority that the Measure has enjoyed, and I am sure some of these measures were mentioned, but I would like the Bishop to have mentioned how he would deal with the difficulties.

Chairman: Thank you very much. I think we might ask for one further question before asking the Bishop to reply. Sir Patrick, I think you have a question or a comment.

Sir Patrick Cormack: I have a number, if I may, my Lord Chairman. I declare an interest as Parliamentary Vice-President of the English Clergy Association which has of course written to all Members of the Committee to express its concerns about the abolition of the freehold. I would like to quote very briefly from a letter I have received from Margaret Laird, who will be known to all of our visitors from Synod, who was herself a highly respected Church Commissioner for many years and who has published on this subject. She says to me in her letter, "This Measure which intends to abolish the parson's freehold is, like others put forward recently, going to undermine even further the checks and balances and distributed authority on which the Church of England has always been able to pride itself. In 400 years that balance between Church and State, bishops and patrons, bishops and clergy, clergy and people has been maintained with the rights of each and the duties of each being recognised." Mrs Laird feels—and I am bound to say that I agree with her—that this Measure, by effectively abolishing the freehold, does undermine that historic balance and does therefore touch upon the rights, as she says, of all Her Majesty's subjects. I would have thought it was perfectly possible to provide better terms and conditions for those who do not enjoy the freehold without effectively abolishing the freehold and I am exceptionally concerned about that aspect of the Measure.

Q4 ***Chairman:*** Bishop, would you like to deal with those questions in whatever way you like?

Bishop of Dover: Thank you, my Lord. Perhaps we could deal with them individually. As I have identified, there are three different issues. One is to do with what we call appraisal but which has been referred to in the Measure as Ministerial Development Review. The second is the question of security, and, along with that, there is the question of freehold. If we think about Ministerial Development Review, I have to say that it is right that it is a complicated thing but it is already happening in almost all dioceses in the Church of England. We are not inventing something new. Most dioceses have been developing their own schemes for a number of years. We were asked what would it be based on? What is the job of the priest? How is it written down? The simple answer, and it is simple but it is not glib, is that it is written down in the Ordinal. Most of our appraisal schemes are based on the Ordinal as being what clergy undertake to try to live up to during the course of their ministry. It is already happening and we are trying in the proposals to bring a little bit more coherence and cohesion to it so that when clergy move from diocese to diocese they are not moving from one sort of animal to something else. Father David, as a parish priest, is already involved in that, and from his own personal view of ministry might like to say something.

Prebendary Houlding: I think it is easy to focus on what is being taken away when we talk about the freehold rather than seeing what is being gained by this whole Measure. I believe that the clergy stand to gain a very great deal by way of being better supported and encouraged and it will in fact make the clergy more responsible. I would like to suggest to the Committee that what we are proposing with common tenure is in fact freehold but by another name. It is not a question of what is being taken away. The checks and balances that Sir Patrick referred to will be maintained better in this Measure with the clergy being more answerable for the way in which they conduct their ministry and being better supported in

it. As far as Ministerial Development Review is concerned, in many ways we are seeking to bring the clerical profession into line with other professions. The whole business of ministerial review is not alien to us at the moment at all. As the Bishop has said, it is already being introduced in many dioceses. It is a welcome development I believe and a very necessary one. On capability, I would say to Lord Pilkington, if I may, that it is designed in this package always to be a last resort. It is not about doctrine or discipline because there is a Clergy Discipline Measure that deals with those areas. Capability will be a very difficult matter. We are under no illusion about that, because it is difficult in all areas of life, as Lord Pilkington has referred to, but we still need to have it. It needs to be there as a last resort because otherwise clergy do get themselves in very exceptional circumstances into great difficulty and there is no way of resolving that. We hope that this will enable the Church to do that.
Bishop of Dover: My Lord, might we hear a lay voice as well. We have heard from a priest and a bishop.

Q5 ***Chairman:*** Of course.
Mrs Sloman: Just a word about Ministerial Development Review. I was running a big department in the BBC when appraisal was introduced. You can imagine! Creative people are as antagonistic in many ways as anyone to the notion they should be accountable or asked to talk about anything that involved measurement. We are not suggesting measurement in anything that is being done. Dioceses run things in different ways. We would not want to take away from the creativity and the opportunity of the dioceses to build on what they have already. In many cases, it is very good. But we have set out three sorts of bottom lines and I think they are fair and necessary. One is that it should take place at least every two years. Initially, we were rather keen on it happening every one year, but taking Lord Pilkington's point on board we thought that, at least to begin with, this may not be realistic in some situations, so at least every two years. It should always be one-on-one. There is no question in any of this of a parish priest being hauled up in front of some sort of panel or representatives from the parish or what have you. It should always be a private conversation and there should always be a written record which both parties sign. From my long experience in the secular world, I think that is really essential, so that people are not going away at the end of it with different interpretations of what was said. There was initial resistance, but people, particularly in the giving professions, really welcome the chance to talk about themselves for one hour a year. People found it very helpful and creative just to have that one hour when the focus was on them.

Q6 ***Sir Patrick Cormack:*** Did you ever have a session with Jonathan Ross?
Mrs Sloman: He never worked for me!
Chairman: Could I just say on capability that we have slightly anticipated clause 2 of the Measure, because that is where it is dealt with. Are there any other questions specifically on clause 1 and on the freehold?

Q7 ***Mr Gummer:*** First of all, I have to declare an interest as the son of a clergyman who was himself a convert from the Baptist Church and for whom the parson's freehold was crucially important. I am not an Anglican and have chosen to belong to the Catholic Church and I recognise therefore the difference between the Church of Rome and the Church of England in the terms under which clergy operate. It is a very different concept. I am deeply unhappy with the process by which the parson's freehold has in fact been eroded in any case. I think it is disingenuous to think that this is not part of a long history. The history is that the parson's freehold could not be abolished because a majority could not be got and therefore we invented all sorts of mechanisms—and I was on the Synod at the time—to avoid the parson's freehold. In many dioceses nobody ever gets the parson's freehold because it is organised so that there are team ministries and other things. The argument is always that that is the better way of running it and it is more efficient and the rest of it, but in my own constituency I have a series of these and I know precisely the difficulties that do arise. But this is the end, in my view, of a long process, and the intention has always been that the parson's freehold shall be removed. I am not suggesting that those who are presenting the Measure to us today are part of a long-term plot. I am myself a believer in the cock-up theory of government rather than the plot theory of government, but I do have to say that this is an intentional process. I believe it to be entirely flawed and not to understand the nature of the Church of England—and perhaps I am in a position to say that, looking at it from outside, having looked at it from inside. It is one of the most important things about the Church of England that right the way through there is an independence of the clergy which is not shared either by the Protestant non-conformists or by Catholics. I have chosen to accept a different kind of discipline but I can still respect the reason for and the importance of a proposal of this nature in the Church of England. Sometimes it is important—and this is a committee, after all, which is there to defend not any religious issue at all but the rights of Her Majesty's subjects, from wherever they

come. It does seem to me to be a much more serious matter than it is being presented. This is not an administrating change; this is a fundamental change in the way we look at clergymen. I would say that the Anglican clergy have done more for the nature of England and the extension of the kinds of ways we look at things than any other section of society, not only because they are married and have children—I cannot say that because that would be an embarrassment—but also because of the way in which they have operated. I am not one of those who think that history can easily be thrown aside. Therefore, my Lord Chairman, I do want to say very strongly indeed that the Church of England has been grabbed by a neatness attitude. Neatness is the enemy of civilisation. It is a deeply offensive concept and it should not have a part in the Church of England's operation. The Church of England of all people should be defending the nature of the independence of the clergy because that is one of the gifts it has to give to Christendom. I know we will have it all argued in terms of management speak. If I may say to Mrs Sloman, I have heard that argument again and again. It does not, after years in business, any longer hold water. You need a society in which there is a real dispersal of power. We come back to that word "subsidiarity". When the Pope attacked Communism and Fascism equally, he did so on the basis of subsidiarity, of power being spread. I am surprised that Mrs Sloman should suggest that somehow or other an hour in every two years is not what happens at the moment. It must be an ill-run diocese if that is not what happens. As the nature of what happens today you can do all that. You can do all these bits of things, but the issue is that you should not weaken the independence of the vicar in those places in which he still has it—and I am sorry it is so few, my Lord. To weaken that is to do something fundamental about the Church of England which I think future generations will rue, and it will be done not on the basis of philosophy or theology or anything else but of administration. The bane of the Church of England—it is the thing that keeps it from its real purpose—is this huge body of all these people running it. The one thing I can tell you from the other side is that to have a Church which does not have it is enormously valuable for the mission of the Church. I beg of you: Do not do this. Do defend the one thing the Church of England in structural terms has to contribute to Christendom and do not allow this. And do not tell me it is the same thing under another name. If it is the same thing under another name, then keep it. If it is the same thing, then call it freehold and give to everybody precisely what the freehold now is. Reverse the fraudulent use of the Pastoral Measure and give everybody that freehold. If you can say that to the Committee, then I think the Committee should support you. But if you say that it is the same thing with a different name and you will not give them the freehold, then it seems to me that you do betray that this is an intention and the intention is to remove from the Church of England what is one of its glories, which drew my father into the Church of England and which meant that at the end of his life he said that that was no longer a reason for remaining an Anglican. I think that is a very sad thing.

Q8 ***Chairman:*** Bishop of Dover, that is a strong argument. How do you deal with that?

Bishop of Dover: My Lord, I deal with it by saying I wish I had made 95 per cent of Mr Gummer's speech with the same passion and the same stories from his own life. I find nothing in the speech with which I would disagree save the conclusion. I think all that is best of the freehold, to do with ensuring that the clergy have a proper independence, is enshrined in what is before you. There are no institutions, least of all the ones that you all represent, that have remained the same over the years. Everything develops and grows and changes and hopefully in the course of events improves. What we believe we have here is not freehold by another name, Mr Gummer. We are not pretending that it is. It is the best of freehold, all that is good of freehold, all that we have spoken of passionately. All that, written in and given by right to every clergyman who serves the Church of England. The other dimension that is in there, however, is that part of the way in which the Church has changed over recent years is lay people have expected, very properly, to have their own say in what the nature of the Church is. They have their own say in the way in which the ministry is exercised. We need a dialogue between the two, which we hope that we have enshrined in common tenure. One of my part-time jobs is to be Pro-Chancellor of Canterbury Christchurch University. We have one academic there who keeps on at governors' meetings, because he is a staff representative, about the absolute nature of academic freedom. I am afraid I cannot understand absolute academic freedom any more than I can understand absolute freedom of a clergyman to do exactly what he or she wants under the name of freehold. I do not suggest that that was what Mr Gummer was suggesting but I would challenge him perhaps later on to say what it is that he believes is the nature of the freehold that is really good that we are moving away from in our proposals for common tenure.

Chairman: There are a lot of Members of the Committee who would like to contribute. Mr Field, would you like to say something?

Q9 ***Mr Field:*** Could I make a comment, my Lord Chairman, and then ask a question? We are often faced at report stage with bills coming back to the House of Commons, when the Government moves pages and pages and pages and pages of amendments which we never discuss and which then go on to the statute book without discussion. I think the model you have given us today of how you have approached this over six years may be a model that we could learn from. That is my comment. Second is the question. I do think that this issue of freehold is central to all of it. I am having difficulty running with your argument that everything about freehold is in this Measure but we are abolishing freehold. I think one has to say that it is not and there are losers. If we look at what has happened to political parties, when we were bringing ourselves up to date, I was one of those who thought we should have re-selection: it would make us more accountable, put us in touch with the laity and so on. I then found that this wonderful reform was then used against those who had views which the hierarchy were not actually holding, so a measure of liberation became one of terror. De-selection after de-selection took place and we were rescued by, in a sense, the freehold which our local parties gave us against the national party. I think there is all the difference in the world between the description that Anne has given us of these rather egocentric characters who are all going to come forward and love talking about themselves for an hour or more, and the position of people who the hierarchy finds difficult but they hold views which might in the longer run prevail only because their position is secured. If we relate it to what Lord Pilkington said at the very beginning, it is not as though the Church is becalmed without any big debates going on. There will be some people with whom I totally disagree who oppose women priests and oppose women bishops. They do have the freehold which allows them the freedom to argue that position, which they may not feel they have under your common tenure proposals. Who knows, at the end of the day they may prove to me that I was wrong rather than that they were wrong. My guess is how this Committee has behaved on previous occasions. It is over these questions of rights for English men and women that we have disagreed previously with Synod. We have done it over the Church Warden's Measure and so on. I am still puzzled why the reform cannot go through alongside freehold and why the freehold has to be abolished to gain these reforms—particularly as they are so interchangeable, the concepts of common tenure and freehold.

Bishop of Dover: I will ask William, if I may, to answer. Just to clarify, however, I did not say that everything in freehold will be found in common tenure. I said that all that is important and necessary.

Q10 ***Mr Field:*** On that very point, if I was the freeholder and I was at loggerheads with my bishop, say over women bishops, would my position be protected?

Bishop of Dover: As it would under common tenure.

Q11 ***Mr Field:*** If I was found in my appraisal on other issues to have not come up to scratch, would I lose my freehold?

Bishop of Dover: With respect, that is not what Ministerial Development Review is about. It cannot be used in order to initiate discipline. Under common tenure clergy will be just as secure, if not more secure, than they would be with freehold.

Mr Field: It is not that you would say at the end of the process, "Honestly put, on the table, this is a pain in the neck," but that because there would have been a breakdown between me the freeholder and my bishop on this issue, it is likely that the whole situation is inflamed and therefore I would fail on other criteria—that I do not appear reasonable, that I am not prepared to take other views on board, and so on—which would legitimately be part of my appraisal but would come back to the doctrinal position that I might hold about women bishops.

Q12 ***Mr Gummer:*** My Lord Chairman, would it not help the Committee if the Bishop would describe to us in his own words precisely those things in the freehold which are not transferred to the common tenure?

Bishop of Dover: Let me pass over to William. I will come back to you if necessary.

Mr Fittall: To pick up on a number of points, first of all office-holder status is still preserved. These will still be office holders and not employees. Second, crucially—and I think this deals with Frank Field's point about re-selection—we have gone for arrangements which are not time-limited. These will be indefinite arrangements. There is no sense in which every two years, four years, seven years, or whatever, people will come up for renewal. That is, I think, a huge liberation for those who are currently on licence and in relation to those who are on freehold who may move to common tenure. It preserves that indefinite nature. Third, property is left untouched, as was explained earlier. The difference, I think, is that at the moment freeholders cannot be dealt with in relation to capability. Whatever their shortcomings, even if they become completely unable to fulfil their office, they become idle and disaffected—although it does not happen very often, it can happen—and there is nothing you can do, unless of course they commit a disciplinary offence. That is really the key difference. I think the question really is: Do we think it is right now that there should be a class of clergy who cannot

in any circumstances be dealt with in relation to capability? A further point, of course, is that existing clergy with the freehold are not affected by this. They do not have to move to common tenure. This will apply to all new appointments. Lord Pilkington raised the question of blockages and will people be deterred from moving. It is possible there may be some who will feel that. I would hope myself that with the archbishops moving to common tenure, a lot of people quite voluntarily moving—many clergy have indicated that they would be entirely happy moving—that will not be a huge issue, frankly. It is also worth bearing in mind that over the next 10 years about 40 per cent of our clergy come up for retirement. This will be a process of evolution going on over time. Mr Gummer is exactly right: this is part of a long process. Freehold has changed very considerably. It is no longer the right to the endowments and the glebe and earning your income from that. We have moved to a world of stipend. This gives a right to the stipend for the first time. I think it is really around this question of capability that the question arises. I think arguments about women priests and bishops are, frankly, rather to the side of this. The Church of England has already put very specific arrangements in place for people who cannot on the grounds of conscience accept women priests. We have not reached any decision yet on women bishops, but I am pretty confident, in the light of what Synod decided in July, that there will again be arrangements to safeguard the position of those with conscientious objections. Whether the arrangements prove acceptable remains to be seen, but I do not think those sorts of issues will enter at all into this question. At the end of the day, if people are dealt with under capability, we have given here the right for them to go to employment tribunals. That is a very substantial safeguard against any idea that an archdeacon or a bishop might act improperly. There is a secular check, at the end of the day.

Chairman: David Taylor is going to say something, I hope, then Robert Key, then Lord Wallace, then Lord Newby, Simon Hughes and then Sharon Hodgson.

Q13 ***Mr Taylor:*** I have a question and an observation. Why can the Measure not be amended in such a way that existing incumbents can move to new incumbencies with freehold of office rather than common tenure? The observation is to back up what Lord Pilkington said. In my pre-MP life I spent vast amounts of time doing staff appraisal, which in this Measure is called Ministerial Development Review. The effort involved should not be underestimated. I have heard what Anne Sloman has said but an awful lot of groundwork and fact-finding is necessary before that one-to-one discussion takes place and that in itself can be destabilising. People are concerned if their appraiser is talking to their parish, as it were, about performance and other issues. That is a destabilising factor in all of this process. Who is going to do the Ministerial Development Review for the Archbishop of Canterbury? Is it going to be the monarch? I do not know.

Bishop of Dover: I have put in a bid!

Lord Pilkington of Oxenford: Chairman, could I say that people with substantial views are leaving. Can we go on?

Chairman: We can go on, so long as we have a quorum. Next up is Robert Key.

Q14 ***Mr Key:*** My Lord Chairman, if this Committee decides that this Measure is not expedient, we will not be saving the historic independence of Church of England priests, we will be entrenching the historic privileges of a comparatively small number of private patrons. I will resist the temptation of making a passionate speech about my late father, the Bishop of Truro, and the circumstances in which he sometimes found himself over clergy discipline matters and, indeed, patronage many years ago. But when this process started there was great concern throughout the Church of England's structure about the implications and freehold was the largest single issue. As a member of the General Synod, it was debated exhaustively and it went to the Revision Committee, and the Synod last July had absolutely conclusive results, as the Bishop has reminded us. One of the most telling opinions for me has been the opinion of Archdeacon Alistair Magowan, the Archdeacon of Dorset in my own diocese, because from the start he fought fiercely to ensure that this Measure would take on board the concerns quite rightly expressed about freehold and he briefed me before, during, and after this process over some years. I spoke to him this morning and asked, "What is your opinion of the position we are now?" He said, to me, "All the things we wanted have gone through. This has been pretty robust work." If the Archdeacon of Dorset thinks that is the case as one of the protagonists of arguing against anything that would be destructive in the reform of the freehold and other conditions of service, then this certainly does satisfy me. It does not mean to say that there are no concerns left. On one of them I would like to ask the Bishop of Dover if he could say something. General Synod was asked to agree this Measure without seeing the details of the competency issues that would arise. They have not yet, as I understand it, been worked up. The rules are not in place. It is a bit like us being invited in either of our Houses to accept primary legislation without seeing the regulations that will flow from it. I wonder

if the Bishop of Dover could say something about the likely shape of these rules which will of course be absolutely crucial in the day-to-day workings of the Measure. But I hope with all my heart that this Committee will decide that this Measure is expedient.

Bishop of Dover: First of all, the regulations in their draft form have been seen by Synod and they have had sight of an early form of the process for capability, so it is not entirely new stuff. It is being worked on at the moment and it will be coming back to Synod in the course of the next 12 months if you find this expedient, in order that they can go through it if necessary line by line. But the process is pretty clear and the aim of the process is not to prove that clergy are incompetent but to grab hold of situations which might over a period of time and years lead them to a position of incompetence and deal with it very early on. If I might pick up Mr Taylor's thing about pictures of bishops ringing up church-wardens and PCC members to ask them to comment about their clergy, there is the possibility that clergy going through Ministerial Development Review can do have a 360 review, but that will be agreed with them and will be done locally. In some dioceses the bishop is directly involved in the Ministerial Development Review. In most dioceses the bishop oversees it and will have an agreed report at the end, but it is not exactly a fair picture to see some hardhearted bureaucrat whom we insist on calling a bishop ringing up at the dead of night to find scurrilous stories about the clergy in order somehow to put them down. These are creative ways of encouraging our clergy to be even better and more effective than they are now.

Chairman: Thank you very much. Lord Wallace is next.

Lord Wallace of Saltaire: My Lord Chairman, I am a lay member of the Church of England married to a Baptist and I must say that I have always had a certain sympathy for the way in which the Free Church has handled the relationship between the laity and ministers. I was very happy to hear the Bishop say that part of this is a process under which the laity do play a rather more active role in the Church. We have clearly evolved in a number of ways over the last 50 years or more. I am old enough to have helped the vicar feed his pigs and chickens when I was a boy, on his five acre glebe. There are not many of those around much longer. I can also remember, as a boy, some exceptionally eccentric local clergy in the rural districts in which we then lived. Much more recently I have belonged to a parish in which the problem we had to deal with was the nervous breakdown of a vicar who could not cope with the pressures of his family, of low pay, and of a very tough city parish. We are in rather different circumstances than we were 50 to 100 years ago for our parents and grandparents. I was a little nervous when I heard it said that freehold is entirely preserved in this Measure because I am not sure that I want to preserve the entire freehold. I do want to make the clergy more responsible, more answerable, as well as better supported. I do recognise that there are very exceptional circumstances in which not only support but discipline needs to be maintained, and I have to say that I am very happy with this Measure. I am supportive of all those developments in the Church of England which do increase the role of the laity in their relationship to the priest and minister and, also, very much to those who provide more support to clergy, often now in much more difficult circumstances, much less well paid than they were, very often outside the cities having to handle four to five churches at once. I therefore hope that we will agree that this Measure is expedient.

Chairman: Thank you very much. Lord Newby.

Lord Newby: I declare an interest, in that I am married to a priest in charge of a parish who has a freehold. She is also responsible for a very considerable amount of post-ordination training. Our vicarage, in which we live, has the happy chatter of a lot of curates and things on a very regular basis, and so I have a lot of dealings on a day-to-day basis with working members of the Church of England. I am not speaking for my wife but I do share some of her frustrations about being a working priest. I would have thought that this Measure would be roundly welcome. It seems to me, having read it and read the regulation that goes with it, that it begins to address some of the inchoate nature of the way in which the Church of England deals with its employees—and whether or not you want to call them employees is a semantic point, but that is what they are. I would have thought that for people coming newly into the Church of England the fact that you have clear procedures, clear contracts, if you like, is a great improvement on the situation to date. I have to say in respect of Mr Gummer's comments I just think they are romantic and completely at odds with day to day life in the Church of England today, which is very, very tough. The Church of England is a bit like an iceberg that has been detached from the Arctic ice shelf that is melting very quickly, and one of the reasons is that it just does not operate in many ways like an institution in the 21st century—barely in the 20th century—and it seems to me that this Measure begins to address some of those issues. Apart from it being very beneficial for people coming into the Church to have a clearer method of operating it does deal with the issue of capability of people who are clearly completely beyond the point of making a contribution if they are in a freehold,

which everybody knows about in the Church of England and nothing can be done, so I think that that is very beneficial. As far as ministry development review is concerned, unless I am very mistaken that is what my wife had a fortnight ago, so this is not a new sort of revolutionary thing and she welcomes it; possibly she feels that there is not enough of it, not that there is too much of it, and the fact that it might take a bit of time and it is tricky—well, life is tricky but this is what every other organisation does and so the Church of England is to be congratulated for doing this. I have only one question and it is one of those sorts of silly questions really, which is given the arguments that have been made very vociferously by some organisations within the Church against it, but given that the Synod voted overwhelmingly in favour of it, does the Bishop believe that the Synod is not representative of the broader church?

Q15 ***Chairman:*** There is a good question. You may need notice of that.
Bishop of Dover: That is an interesting question.
Mr Fittall: What it is fair to say is that this is not something which has just emerged from debates in Synod. The six-year process involved not only two reports from a group led by Professor David McClean but very extensive consultation. People went out to talk in dioceses—Anne Sloman herself went to a number of them. There has been a lot of talk in the Church, not just nationally but throughout the country over the past six years and this is a process which continues—for example, working on the capability processes and so on—and which is involving a lot of people around the Church, so it is not just 450 people in the General Synod.
Bishop of Dover: Joking apart, our feel from around the dioceses and talking with clergy and lay people is overwhelmingly in favour of this. That is not that there are not critical voices, but there are very few about the freehold and most of them are about particular issues which we are dealing with as it goes through the process.

Q16 ***Simon Hughes:*** My Lord Chairman, I am supportive of the Measure and I am not going to claim family links but I just give the example of somebody who it seems to me would benefit, who is my sister-in-law; who started as a curate, who ended up taking responsibility for the parish because the priest became very ill, who then ended up as an incumbent with a freehold, who then went to be a member of staff of the cathedral, who then ended up as a hospital chaplain and a prison chaplain and is now a hospice chaplain. It is in a way nonsense that she should have had different sorts of contractual relationships and that one of the considerations that became complex as she decided where to move should be the whole set of ancillary considerations. What she wanted and what everybody else I would think would want, if it was a permanent job—curates are maybe different—is a permanent contract until such time as you end your contract, so my questions are simple. The first is would it be an accurate description of common tenure that it is effectively for everybody a permanent contract, that is what they are getting; it is not an impermanent contract, it is a permanent contract like any other permanent contract, which can only be ended in circumstances where that contract is either ended by agreement or by due process. Secondly—and I am very grateful for the briefings, both the generic ones we have all received and the specific one that I was given as were other colleagues—we are told that just under two-fifths of current clergy serving in the Church of England have a freehold, 5,000 out of 13,600. If the new system were transferred across, what percentage of that total or what number of that total would be the beneficiaries of a permanent contract of common tenure because that is not obviously apparent from the figures we have been given?
Mrs Sloman: The answer is that we do not know for certain. The 5,000 will be given the option; they will be written to by their bishop, all of whom will take it on the vesting date, and asked if they want to. I would say at least two-thirds of those will opt into common tenure because, as you rightly say, it is a contract. As far as the ones who are chaplains and so on are concerned, they have a dual relationship as you know, so they may be employed by a secular employer—the Prison Service or National Health Service Trusts—but they need a licence from the bishop. This will apply to all the bits of their contract which are given by the Church.

Q17 ***Simon Hughes:*** You do not have a figure as to how many out of the 8,600 are likely to get it.
Mrs Sloman: They will all be offered it.
Prebendary Houlding: We have to acknowledge that this will bring about a change of culture in the Church of England and therefore that will take time, and that is why this has been built into the Measure so that no one will feel under particular pressure. At the same time we also have to remember that those who do not have the freehold at the moment have almost no rights whatsoever of employment and, therefore, the secret here is in the word common, this is the way ministry will be exercised in common across the board and this is why common tenure applies to the Archbishop of Canterbury and to a curate, right across the board.
Chairman: Thank you very much. Lord Laming is next, then Lord Elton, Lord Judd and Lord Shaw.

Q18 ***Lord Laming:*** Thank you, My Lord Chairman. I will be very brief indeed because I have been hugely impressed by the last four contributions that the Committee has received, but I would like to place on record my congratulations to Synod for seeing this through. Bringing about change in any organisation, change of this kind, is really hard grind, and to have got this far and to have got the votes that are recorded in our papers of Synod I think is a real achievement. If I have got any criticism—and I hope this will be taken in the right way—it is "Oh dear, it has taken so long" and I know that those who are here this morning will take that in the spirit in which it is meant. What I am really saying is all power to your elbow. Lord Pilkington is absolutely right that if you are going to introduce appraisal it has to be done properly, otherwise it will quickly fall into disrepute, but take courage—massive organisations across the world have done it, are doing it and it has become a valued part of organisational life, particularly by people who are in the early stages of their career, if I might say. The only other thing I would like to say is that I really strongly support this measure in relation to the freehold because I believe you cannot go forward in this day and age in an organisation where some people are in a position where they can actually isolate themselves from every other change which has taken place. It is just impossible in organisational life to have people who are in that situation who can forever isolate themselves; I just do not think that it is feasible. My question, My Lord Chairman, is simply this: I really do support this Measure and I hope that this Committee will support Synod and make the Measure expedient, but even if this Committee supports the Measure, leaving aside those people who will see things through in their careers with freehold, for the rest of it how long is it going to be before it is fully operational? It is just that you said earlier on that you have to go back to Synod and then you have to come back here.

Mr Fittall: The intention is that this will all come into force in the course of 2010. We have got further regulations to be discussed and other preparations to make, but 2010 is the intention. Of course, those who currently have the freehold have the right to retain it and, therefore, you may have the last person with the freehold in 40 years time, but 2010 is when the arrangements will begin.

Lord Laming: My Lord Chairman, that is most encouraging.

Chairman: Thank you very much. Lord Elton.

Lord Elton: Can I declare an interest as what in the diocese of Oxford we call a licensed lay minister which carries no stipend and therefore I am quite unbiased in this respect. I would like to preface my remarks by saying that I have seen at close quarters the inadequacy of the Church of England's pastoring of its own pastors. I very much hope that the introduction of appraisals is a slender chink into which a proper way of looking after these hard-pressed people is actually brought into play, because it is little short of a scandal at the moment how inadequate it is. Looking at this as one who has worked in various large organisations I very much hear what Frank Field has said about the way in which this procedure can colour the whole context in which somebody's fitness to work is conducted and it seems to me that the tenure and the capability question are linked because if somebody is incapable they can be moved and if they are not liked they may be judged incapable. My anxiety is that when we want to see how the Measure is going to work we look at the draft instrument and in the draft instrument we find, in part 4, a draft of a draft, which represents what we are asked to expect the archbishop and his council to do, which is to issue directions which actually say how this thing is going to work. We know nothing about that at the moment, what the content will be, and we come down to 31(v) and we find that the end of the process is with General Synod and not with Parliament, so it seems to me that we are right in wanting secure undertakings. We do want to know what is going to happen and I did not actually hear the answer to John Gummer's question as to what are the bits of freehold that have been excluded or will be excluded if this Measure is passed.

Q19 ***Chairman:*** That question has been dealt with in answer to Mr Gummer but please try again.

Bishop of Dover: Can I ask a lawyer to answer and it might be that they speak a language slightly different from mine.

Mr Slack: The key difference is essentially the fact that there will be the additional element of accountability through the capability procedure.

Q20 ***Lord Elton:*** I am sorry, my question is not what is kept but what is taken away.

Mr Slack: The fact is that hitherto it has not been possible to remove freeholders from office except on very limited grounds, essentially three: pastoral organisation, on disciplinary grounds or in the event of an irretrievable pastoral breakdown. The difference that this will make is that there will in future be the possibility of removing someone from office on grounds of their capability. To answer the second part of the question, on which Mr Key touched earlier, the precise nature of the capability arrangements will be set out in directions made by the Archbishop's Council but approved by the General Synod, which will also have power to amend those directions before finally approving them. There has

been, from the very beginning of the process, considerable openness about the terms of that procedure and drafts of it have been shown to Synod and discussed very widely with a large range of stakeholders; one of the earlier drafts of the capability procedure was in fact annexed to the Revision Committee report which the Synod saw. That process will carry on and Synod will ultimately have the power to approve the structure within which the capability process takes place. The capability procedure directions will themselves—this is quite an important point—give some guidance as to how to assess the minimum standards which are expected of those to whom the procedure is being applied, and it therefore refers to matters such as the general requirements of the Canons, the Ordinal, the requirements of the regulations; and I imagine account will be had to other general guidance such as the guidance produced by the two Convocations on the duties of the clergy.

Q21 ***Lord Judd:*** People have been explaining where they come from: I came from a very strong non-conformist background into the Church of England where I find myself, most of the time, very much at home. What attracted me to the Church of England was its inclusiveness, its openness, its tolerance—this, it seems to me, to be the essence of the Church of England at its best. Anything that goes against that would tend to turn it into just another sect. Of course, part of that character is related to the establishment position of the Church and also the relationship which the Church has through its clergy with the community as a whole. I believe that if you have a relationship with the community as a whole it is nothing but reassuring to feel that there are processes at work which enable consultation and evaluation to take place, and to make sure that that relationship with the community as a whole can be as real as possible. I do believe that we want integrity and outspokenness and we want strong individuals, strong characters, but I do not really believe if you look at history that that has been related in terms of the effectiveness of argument to somebody being in a secure position or not being in a secure position, sometimes quite the reverse in effect; some of the most challenging speaking comes from some of the people who had no security whatsoever. It is about integrity and what people see as truth. I just find it peculiar if we are trying to strengthen a community to have two completely different categories of clergy within it, it just does not seem to me that that is strength enhancement. I hope Lord Laming will forgive me; I recognise that I may seem full of contradictions but there is a certain element in what has been said by those who do not favour these measures which I do respect because I relate to it, and that is when we begin to talk so much—as we do in this Committee on different occasions—about the Church as an organisation and comparing the Church as an organisation with other organisations and I do not believe that that is what the Church is about. The Church should not just be an organisation. What is terribly important in any Measure of this kind—and the drift of what I am saying is obviously that I support it—is that it wins very strongly on points and I sometimes think that is the best kind of policy because it has been argued through and nobody is claiming an absolute position, but it is a better way to do things. Because I feel it is a better way to do things, having made that evaluation myself, I strongly support it. I do just want to make one point about all this, and it relates of course to what Lord Laming and others have said about organisation. I am bound to say to Mr Gummer I am interested in his own choice about where he wants to be within the Christian Church in this context; it does seem to me that for all this to work well there must be a culture in which the hierarchy is in theological terms really a service structure and not a power structure. That seems to me to be absolutely crucial to the success of everything you are doing, and it seems to me that one of the sadnesses in the Church so often is that what should theologically, in my view, be a service structure has been turned into a power structure. This will work well if the hierarchy has the spirit and the philosophy for being a service structure.

Bishop of Dover: Can I just make one little comment on that? You used the word "integrity" which I really wholeheartedly go along with. It seems to me that if we move forward in this direction which I hope and pray that we shall, there is a real challenge on bishops to have integrity. They cannot expect of their clergy what they are not doing themselves, and so many of my colleague bishops, including myself, have already voluntarily taken part in ministry development review and indeed 360° review so that I have written to members of clergy and lay people in the diocese of Canterbury and asked them in secure privacy to write to the person with whom I am doing the appraisal, asking for a fair assessment as to how I exercise my ministry. I cannot expect my clergy to do anything like that if I do not do it myself, so the point you make is very well made if I may say so.

Q22 ***Lord Shaw of Northstead:*** A brief point about the actual section itself if I may, My Lord Chairman. Under sub-sections (iv) and (v) as soon as practicable after the coming into force of this section the archbishop or the bishop, whoever it may be, has to ask for a declaration saying whether the person

concerned agrees or disagrees and after a reply the Measure shall then have an immediate effect. What happens if nobody replies?
Bishop of Dover: That is a lawyer's question to be answered.
Mr Slack: Unless a declaration of willingness to go onto the new terms of service is received then the person will stay where they are; they have positively to buy into the new arrangements.

Q23 ***Lord Shaw of Northstead:*** So he replies either yes I agree or I disagree, but once he has replied to that he is stuck, is he not? If he does not say anything then he carries on as before.
Mr Slack: Yes, a freeholder does. Sorry, I should have made it plain in my earlier answer that those holding on licence and so on go on automatically, but in terms of the declaration there has to be a positive act of choice.

Q24 ***Lord Shaw of Northstead:*** It does not say positive, it says as long as they get a reply.
Mr Slack: Sub-section (v) says as soon as the archbishop or the bishop has received a declaration in accordance with sub-section . . .

Q25 ***Lord Shaw of Northstead:*** Yes, but it does not say whether it is for or against. It is asking for a declaration as to whether he agrees or disagrees so if he gives a declaration and says he disagrees has he given a declaration.
Mr Slack: The declaration must be that they agree to the application of the Measure to them.
Lord Shaw of Northstead: Fair enough if that is the interpretation.

Q26 ***Lord Elton:*** No, actually it is either way. If you look at the bottom half of sub-section (iv) " . . . indicate whether or not that person agrees to the application of the Measure." All that (v) requires him to do is to answer, it does not say what, as long as he has answered he is caught or has agreed or whatever.
Mr Slack: I would have thought it reasonably clear, My Lord Chairman, that reading the scheme of those two sub-sections as a whole there had to be a positive declaration of assent.
Chairman: I know Frank Field wants to come back but Lord Williams has not spoken yet so perhaps he could speak first.

Q27 ***Lord Williams of Elvel:*** Thank you, My Lord Chairman. I ask this question out of complete ignorance; what is the position in other churches in the Anglican Communion and specifically what is the position in the Church in Wales, because there is a lot of *va et vient* between the Church of England and the Church in Wales.
Bishop of Dover: From the top to the bottom.
Mr Fittall: The short answer is that the freehold disappeared when the Welsh Church was disestablished by Lloyd George. I do not know as a matter of fact what their particular arrangements are for capability, for competence and so on, but the freehold has not existed in Wales since 1920.

Q28 ***Lord Williams of Elvel:*** You do accept that there is *va et vient* between the two Churches, not least at the level of Archbishop.
Mr Fittall: We have a number of clergy in the Church of England at all sorts of levels who have been ordained in other churches of the Anglican Communion, not just in Wales, Scotland and Ireland but also further afield.

Q29 ***Mr Field:*** The delegation from Synod has clearly heard the views of the Committee and the Committee is coming to a view on this, but we have been presented with another view by a group that feels that it is full of foreboding and they feel under threat. We have in our constituencies groups of people who similarly feel like that—nothing to do with the ecclesiastical matters—and who feel they have not had their day in court and would feel if only we had had our day in court at least we were allowed to put our view. I only say this so it is on the record and it is not behind your back, but when we actually go back into private session I will argue a case that we should actually receive those groups who have made representation to us. It is pretty clear what the view of the Committee is, to see whether in fact that can persuade people otherwise, but it is about how one manages politically a group that feels that they are dissidents, and one does not want to give them greater grounds for grievance than they already have, but I think the views of the Committee have quite clearly emerged from our discussions today.
Bishop of Dover: My Lord Chairman, could I ask Geoffrey Tattersall, who was Chair of the Revision Committee, to tell us the story of just how often and how many people we have met and how willingly we have heard their views.
Mr Tattersall: We feel that the way forward is to listen to them at length for as long as it takes, and we did just that. The Revision Committee met for nine days which is exceptional for a Measure of this length. We had a lot of written representations, there was quite a feeling from patrons and patrons, unless they are members of Synod, have no automatic right to appear before the Revision Committee but we invited them to come and they did come. We spent, unusually for the Church of England revision process, two adjacent

days on the very topic and we listened—and I got into a lot of trouble from the members of the Revision Committee for allowing people to talk so long, but it is necessary for them to say what they want. They may have heard it similarly, but they need to say it themselves. The Revision Committee contains committee people—the Steering Committee, and the three on the left were members of the Steering Committee—and other members such as Alastair McGowan who was not necessarily in favour of all of this. In the end we carried them with us in our discussions, and as the voting figures showed after this very lengthy process, for which I make absolutely no apology, it is more important to listen and get it right than to believe you have got it right. Synod was with us with really very, very few exceptions in the way. So we have listened and we have made it an absolute cardinal virtue that we must listen.

Chairman: We are still on clause 1. We might actually move briefly on to clause 2 because there are important things under clause 2 which have not been covered so far.

Q30 ***Mr Gummer:*** Before we do that, My Lord Chairman, could I just ask a simple question as a continuation of the Bishop's kind answer to my original question, and it is this. Listening to what has gone on I understand that under the Clergy Discipline Measure there are certain circumstances of sufficient gravity to mean that in a sense a clergyman cannot carry through the job he is supposed to do. It is not a matter of theological position or anything else, it is just that he is not able. What I have never quite understood is why we did not have a very simple Measure which went like this: that the whole of the parson's freehold was transferred to everybody so that everybody got back what they had lost in the meantime, but the Clergy Discipline measure was then extended so that there was an objective basis, one which we could all see, in which through a process incompetence could in fact result in the loss of office. My problem with all this is that I know very well what happens in these circumstances when I listen to debates in the House of Commons. We start off with something which sounds perfectly reasonable but then, gradually, people say you cannot do this job and have this view. I do not want to tread on anybody's toes but I do remember much pressure on somebody whom I thought was an extraordinarily good minister, the Minister of Transport, but when she was holding a different job they said because she had those views it was not possible for her to hold that job—in other words she excluded herself from that job, she was not competent to do that job because of her views. My worry about the word competence is that I have seen it in the House of Commons used in that way, and I am very worried lest it should be used in that way, so why could we not have had a better definition placed in the Clergy Discipline Measure so that we would all feel happy about the thing which even those who do not take my view on this will understand why in looking at my own local clergy—I have one in particular, a very good parish priest who happens to disagree with the bishop on a very fundamental issue and I can quite see that it would be possible to argue that he was not competent to do the job because of this argument.

Bishop of Dover: If I may try to answer, My Lord Chairman, the difficulty of doing what Mr Gummer suggests which, if I am understanding him right, is to bring something like the Discipline Measure to bear upon the freehold—there are two main difficulties. First of all, the Discipline Measure is just that, it is a matter of discipline of clergy who misbehave and if they are found to have misbehaved there are processes for dealing with it. So we are not talking, as I understand it, about that because that does apply to all clergy whether they have got the freehold or not. I think we are talking about the difference between a capability procedure, which is what we are proposing, which is part of a package to enable people to identify and begin to answer the question, not is the priest concerned less than perfect, because none of us are perfect, but has the standard of ministry exercised by that person fallen below an acceptable standard or are there signs that it might, in which case let us by formal conversations early on try and get to grips with it and by support and encouragement and training help that person to improve, so that hopefully we will not get anybody—or very few people—who reach the end of the process and have their incompetence proven or their competence not proven. But that can only creatively and with integrity, using that word, be done as part of a wider package where the priest feels that they are in an appropriate relationship, both with colleagues, with the bishop and with lay people. To isolate it and simply fly in that package of measures to something that has existed and we have called freehold over the years—it does not fit, it becomes far less of a fit, far less creative, far less affirming of the priest in their ministry and becomes yet another mallet with which a bishop—not that there are such bishops in the Church of England you understand—could beat a clergyman they do not like very much over the head. I actually rejoice that there are clergy such as those in other dioceses of course—

Chairman: We have dealt with clause 1 at some length; can we just move to one or two things under clause 2 which have not yet been dealt with, other than capability. The two that strike me are first of all clause 2(2)(iv), a provision which was discussed a good deal in Synod as to whether it was appropriate for employment questions to be dealt with by the

Employment Tribunals and the Employment Appeal Tribunal; the other thing clearly on clause 2 which arises is clause 2(3), whereby regulations may apply, amend or adapt an enactment or instrument. We can deal with those two things in either order; does anybody want to raise any question about the appropriateness of these matters being decided in the Employment Appeal Tribunal? It was the subject of some discussion. But if there is no worry about that can we come to the other point on which I know you have some concern, Lord Shaw.

Lord Shaw of Northstead: My Lord Chairman, I am very grateful. Looking at the Measure, sub-clause (8) Statutory Instrument Act and everything, it has been suggested and reading in the report it said that there should be an affirmative resolution procedure for Parliament rather than a negative procedure. That was denied and it was denied on the grounds that the amending regulations made in the future were not necessarily of a major significance. To me—I am afraid I have spent a number of years on the Delegated Powers Committee—as soon as you read it is not necessarily major you immediately think that means on many occasions there will be major ones and therefore I would feel that an affirmative resolution would be appropriate. The next point arising from that is that it comes back to Parliament; will any change in a regulation be subject to scrutiny in appropriate cases by the Delegated Powers Committee because I would think that they would play an important part in examining any of these changes.

Q31 ***Chairman:*** Can you deal with those?

Bishop of Dover: My Lord Chairman, I studied English for my first degree and I am well aware that I am very clear as to what the English language means except in legal terms, so if I may turn to our eminent lawyer who will try to answer these questions.

Mr Slack: If I can just perhaps start with saying something about the reason for including the regulation-making power, because that is quite important to provide the context, the point is of course that the provision that is being made will be detailed and complex and needs to be capable of being refined and amended as necessary from time to time in the light of practical experience and changes in the surrounding legal context, especially the general employment law context, by a process which is simpler than that required to amend a Measure but which still nonetheless requires Synodical and Parliamentary approval. As part of that process the regulations would need to be able to apply, adapt or amend enactments generally—that is to say including both Measures and Acts, not least because before 1920 legislation affecting the Church of England was contained in Acts of Parliament. As to the question about the degree of scrutiny required in Parliament, the question was indeed considered in the Revision Committee and the view was taken that it was not necessary to subject the regulations to the affirmative resolution procedure for a number of reasons. First of all, whilst we recognise that the exercise of powers to amend enactments by subordinate legislation is generally subject to the affirmative resolution procedure, we do not understand there to be an absolute requirement that that should be the case. We note that it is not absolutely necessary under the Legislative and Regulatory Reform Act, for example, and there are other Acts such as the Superannuation Act 1972 which confer powers on the Minister to repeal or amend Acts in circumstances quite similar to those in which provision is being made here. Secondly if, as we believe, it is therefore a question to be decided in the context of the exercise of any particular power to what degree of Parliamentary scrutiny the delegated legislation should be subject, we could not see that there was a strong case for adopting the affirmative resolution procedure here. A number of considerations pointed in that direction: first of all, the section 2 power is narrow in its scope and it can only be exercised to make provision for the terms of service of persons holding office under common tenure. Provision for any wider purpose would therefore be ultra vires and Acts of Parliament could only be altered in a way which related to the clergy. Furthermore, whilst the terms of the power under section 2 could in theory allow it we would not intend to use the power to take clergy on common tenure outside the scope of general Acts of Parliament: rather, we see the power being used to apply aspects of secular employment law, to which the clergy of the Church of England would not otherwise have been subject, to them with appropriate modifications. If you look at the draft regulations you will see that is the only way in which the power is being exercised.

Q32 ***Chairman:*** Can I just interrupt you for a moment? Of course, we have all got the further Comments and Explanations which you are dealing with at the moment and we have all read those; perhaps you have already dealt with the point that Lord Shaw has made. If I may say so, one of the points you make on the last page of your further Comments and Explanations is the point, is it not, that unlike the ordinary case where a Minister is laying an order, here the regulation will have been subject to scrutiny by the Synod; is that right or not?

Mr Slack: Yes, that is certainly the case and that scrutiny would involve the possibility of amendment at the instance of members. The Synod Standing Orders confer quite generous rights on its members to

require instruments of this kind to be debated and to move amendments to them, and that is the case in relation to these regulations. Indeed, the draft regulations that the Committee has seen have been subjected to a very substantial degree of scrutiny already.

Q33 ***Chairman:*** In the Synod.
Mr Slack: In the Synod, yes.

Q34 ***Mr Field:*** My Lord Chairman, we do not have power, do we, to send delegated legislation from Synod to our Statutory Instruments Committee; the only power we have is to consider things in this Committee and I cannot remember a time when we have actually considered a statutory instrument here.
Mr Slack: My Lord Chairman, I understand the position to be that the Standing Orders which regulate both the Statutory Instruments Committee and the Merits Committee specifically exclude from their responsibilities consideration of Measures and instruments made under Measures.

Q35 ***Chairman:*** That is right. The real question then comes down to whether there ought to be some further safeguard in the case of regulations. You say that one finds it in the fact that it has got to go back to Synod before it can come before Parliament.
Mr Slack: Yes.
Chairman: Are there any further questions on that? It is a point which was raised in that very interesting letter from a Mr Noble, which you may or may not have seen but you have now dealt with it. Is there anything on clause 3, clause 4? With clause 4 of course we have avoided what was going to be very controversial because the Synod in the end was persuaded that the legal title of the Parsonage House should remain in the incumbent. Clause 5, clause 6, clause 7, clause 8?
Lord Elton: I would just make the point, My Lord Chairman, that I raised earlier that the question we are really being asked is do we trust the Church with setting up the machinery for carrying this out. I suspect that the Committee will in the end think that it does, but has reservations about how this is done and individuals on it no doubt will watch it closely.
Mr Gummer: My Lord Chairman, I want to keep my tradition of saying this in the House of Commons but I am always very suspicious of delegated powers. It is a dangerous activity and I much sympathise with Lord Judd's comment about the fact that we are to treat the Church of England as something different from a mere organisation. I may theologically think it has become that, but that is a different issue. The fact of the matter is that that is how we should treat it, as if it were something different from that, and therefore what worries me always in the conversation is that the call is to accept what is done because this is what big businesses do, what big organisations do, which I do not think is a legitimate argument. I would like to say that apart from principle I am unhappy that we should not have seen in this Committee the process in its proper terms, what will be done. I come back to the gravamen of one's concern: if the difference between freehold and commonhold is ultimately this question of being able to remove somebody for competence, the terms that we use for what in here is incompetence is crucial for the support. I suspect that if it were defined in a way which would be reasonable you might get the unanimous support of the Committee, but if you do not have that then many of us would feel it impossible to support this legislation because of our fear of the use of the word "competence" because of recent experience of how that can so easily be used by others.
Lord Laming: My Lord Chairman, this is exactly why the conditions of service are unique before us. The conditions of service are absolutely unique, they are not like any other organisation and I frankly do not understand the point that Mr Gummer is making.
Chairman: Just to make sure we have not missed anything, we had got as far as clause 8. Clause 9?

Q36 ***Lord Wallace of Saltaire:*** A rapid question since I have an interest in one of the royal peculiars. I presume that royal peculiars, Oxford and Cambridge colleges, people who go and serve as chaplains in the Services are dealt with on a different basis so one simply has to exclude them.
Bishop of Dover: Yes.

Q37 ***Chairman:*** Clause 10. Clause 11 raises again the point on amendments which we have discussed. Clause 12, clause 13, schedules, that is everything. On behalf of us all can I thank you, Bishop, and your team very much indeed for coming and spending nearly two hours with us for which we are very grateful. It is the longest session I can remember, certainly since the Clergy Discipline Measure.
Bishop of Dover: My Lord Chairman, can I on behalf of all of us here and the General Synod thank you all for your time. Does time not fly when you are enjoying yourself?
Lord Wallace of Saltaire: May we wish the Bishop an enjoyable appraisal with his Archbishop.
Chairman: If I may say so, the time we have spent is as nothing compared with the time that you have spent, so thank you very much.

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