

SUMMARY

Review of Clergy Terms of Service

Summary of the report on the first phase of the work



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**Summary Version of Report on the
First Phase of the Work**

Foreword

This Review was set up by the Archbishops' Council in December 2002, following its response to the DTI's discussion document Employment Status in relation to Statutory Employment Rights.

The Group's Report on the first phase of the work GS 1527 was considered at the February 2004 sessions of General Synod.

Synod passed the following resolution.

That this Synod do take note of this report

That this Synod

- (a) welcome the recommendations summarized on pages 1 to 6 of the (main) Report;
- (b) commend the report to the dioceses and the wider church and ask dioceses and other interested parties to submit comments to the working group by July 2004;
- (c) request the Archbishops' Council to follow up the recommendations, taking account of the responses from dioceses and other interested parties, and bring forward legislation based on those recommendations; and
- (d) request the working group to make a further report to this Synod at the conclusion of the second phase of its work.

This summary version of the Report is provided to help dioceses consult internally before making comments on the Report's conclusions. The significant conclusions welcomed by the Synod are shown in the summary report in bold type and are cross referenced to the recommendations summarized on pages 1 to 6 of the Main Report.

Readers who wish to understand the detailed reasoning are recommended to read the main report, *Review of Clergy Terms of Service: Report on the first phase of the work* (ISBN: 0 7151 4030 2), Church House Publishing, 2004, £6.00 (plus £2.50 postage and packing). Copies are available from Church House Bookshop, 31 Great Smith Street, London, SW1P 3EN; 020 7898 1300; www.chbookshop.co.uk.

There is no prescription as to how dioceses are to carry out their consultations, since we accept that dioceses vary in structure and timescales are limited. However, we would welcome feedback on this first stage of our work and any submissions should be sent to:

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David McClean

Chairman of the Review of Clergy Terms of Service
February 2004

1. The reasons for the review

1. This summary of the report on the first phase of the work aims to provide an explanation for the main recommendations in the report.
2. Section 23 of the Employment Relations Act 1999 gives the Government power to confer some employment rights on people who are not technically employees (so-called atypical workers). Atypical workers include office holders (most clergy and ministers of religion come into this category) homeworkers, agency workers and casual workers. The Government has not suggested that atypical workers should become employees, only that they should have access to many of the rights that employees already have, in particular, the right to appeal to an Employment Tribunal and claim unfair dismissal.
3. In July 2002, the Department for Trade & Industry published a discussion document Employment Status in relation to Statutory Employment Rights, and invited comments. In its response, the Archbishops' Council took the following approach:

The Church of England firmly believes that the clergy...are entitled to terms and conditions of service which adequately protect their rights, recognize their responsibilities and provide proper accountability arrangements.

The response noted that parochial clergy enjoyed a wide measure of day to day autonomy and that many of them had a 'measure of independence and security of tenure which exceeds that of those in almost any other walk of life'. It also acknowledged that the present arrangements did not provide an effective framework of accountability for many clergy, or sufficient protection against possible injustice for those clergy without the freehold, who may at present be summarily removed from office.

2. The Review of Clergy Terms of Service Group

4. At the end of 2002, the Council set up a review group under Professor David McClean (Professor of Law at Sheffield University) to address the implications of section 23 for clergy, as well as other related issues such as recent calls to review the clergy freehold. The Group's membership included two members of the Archbishops' Council, three clergy, the Bishop of Exeter and a Diocesan Secretary. Its terms of reference require it:

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

to consider in this context the future of the freehold and the position of the clergy in relation to statutory employment rights.

In the review, to give priority 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 rest of the review to be completed, if possible, in 2004.

5. The Group's report on the first phase of its work was welcomed by the Council in December 2003, and by the General Synod in February 2004.
6. We have tried to keep in mind at every stage the distinctive nature of Christian ministry, aware that we are dealing with the men and women called by God to a particular form of service, of whom much is expected, and whose work is often demanding and difficult. We became aware of a perception that there was a conflict between Christian ministry as a response to divine grace alone and the elaboration of legal rules about the exercise of that ministry. Our concerns about whether this perception was soundly based led us to consult Professor Anthony Thiselton, Emeritus Professor of Christian Theology in Residence at Nottingham University.
7. Professor Anthony Thiselton points out that Luther saw the laws which operate within the structures of society as one face of divine grace on behalf of the weak and vulnerable. Professor Thiselton thus argues that it is legitimate to appeal to covenant as a basis on which to defend contractual relationships among Christian people, who worship the covenant God.
8. He identifies the following key features of the concepts of covenant and of legal agreements between Christians:
 - (1) the formulation of a defined relationship on the basis of which both parties know where they stand;
 - (2) the imposition, definition and acceptance of mutual constraints that limit deviations from what has been agreed by the parties;
 - (3) a significant measure of protection for the helpless or vulnerable;
 - (4) and the nurture of the sense of confidence that can arise only from knowing where one stands.
9. There are dangers in assimilating modern secular categories too readily into biblical ones, but it may still be argued that 'the self-constraints and protections for the weak and vulnerable embodied in covenant more closely overlap with parallel safeguards in 'contracts' than might be said to diverge from them'.
10. We have consulted widely, and two earlier reports have been debated at the General Synod: the *Review of Employment Status and the Clergy* (GS 1488) and *Review of Clergy Terms of Service: Interim Report* (GS1518). Questions were raised during the debate on the latter in July 2003. It might be appropriate to repeat here the clarification offered during that debate that neither the granting to the clergy of section 23 rights (nor the other recommendations in this report) would have any Income Tax, National Insurance or Council Tax implications for the clergy, nor would they affect the operation of the central payroll system operated by the Church Commissioners.

3. Section 23 rights

11. The principal rights that are covered by section 23 of the Employment Relations Act 1999 are as follows:
 - the right to time off for certain purposes;
 - the right to maternity, paternity, adoption and parental leave;
 - the right to an itemized pay statement;
 - the right to a written, detailed statement of terms and conditions of work;and
 - the right to apply to an Employment Tribunal in case of breach of any of the above and for redress against unfair dismissal.
12. The first three of these rights are already enjoyed by clergy as a matter of practice, but not of law. The last two raise a range of wider issues, which are addressed in this report. All of these rights are seen as good practice. The Church, as part of its commitment to social justice has urged employers to treat their employees well, it follows that clergy should enjoy the same rights and protection that the Church would urge employers to provide.

We therefore recommend that section 23 rights should be granted to the clergy (with the exception of the right not to work on Sunday) in a way that is legally binding. (i) and (ii)

4. Access to Employment Tribunals

13. The principal right to be conferred by section 23 is the right to apply to an Employment Tribunal to challenge any denial of rights or bring an claim of unfair dismissal. This would mean that clergy would be able to go to an impartial tribunal, independent of the Church, if they felt that they had been unfairly deprived of their office.
14. We carefully considered the possibility of the Church setting up its tribunals to deal with cases of unfair dismissal, but decided against it. We felt it to be essential that cases brought by clergy are heard by a body that is demonstrably independent, not least to meet the requirements of the Human Rights Act 1998 for a hearing by an impartial tribunal. There should be some opportunity of appeal to a higher tribunal on a point of law, as there is with the Employment Appeal Tribunal, and in some cases to the Court of Appeal. It is doubtful that any system of church tribunals could meet these criteria, and we feel that such a system would generate considerable (and, in our view unnecessary) additional costs.
15. We also explored the theological issues raised by the use of Employment Tribunals, in particular, the concerns that some Christians have, based on 1 Corinthians 6: 1-8 about Christians using the secular courts to settle disputes among themselves. In his commentary on 1 Corinthians, Professor Thiselton argues that Paul is talking here about the abuse of power and the use of manipulation to gain wealth and property. Whilst the Roman criminal law was relatively just and fair, the outcome of a civil case would rest on the use of wealth,

influence and social and business connections by those involved. Elsewhere Paul's attitude to the use of Roman state institutions is far more favourable. On this interpretation, there would not appear to be any intrinsic obstacle to the use of Employment Tribunals for clergy.

We therefore recommend that the Church should not attempt to set up its own system of internal tribunals and that clergy should have access to Employment Tribunals to claim unfair dismissal or a breach of section 23 rights (with the Diocesan Board of Finance as the normal respondent). (iv)

16. Where an Employment Tribunal finds in favour of an applicant, it can award compensation (currently subject to an upper limit of £53,500 (£55,000 from 1 February 2004) for all claims except discrimination (which has no upper limit) although awards are normally much below that figure. Employment Tribunals seldom order reinstatement or re-engagement, as this is rarely achievable in practice. Each party at an Employment Tribunal pays its own costs, which are much less than in a court case. Legal aid is not available in respect of proceedings before Employment Tribunals in England and Wales.

We recommend that the Church of England (Legal Aid) Measure 1994 should be amended so that limited financial assistance from the Church Legal Aid Fund should be available to clergy appearing before Employment Tribunals. (v)

17. It is intended that cases of serious misconduct would continue to be dealt with by the Church's own internal procedures under the Ecclesiastical Jurisdiction Measure 1963 and the Clergy Discipline Measure 2003.

We consider that these Measures give full protection to the interests of those accused of misconduct, and that it would not be appropriate for there to be resort to an Employment Tribunal in respect of penalties imposed under those Measures. (vi)

5. The current terms of service of the clergy

18. The overwhelming majority of clergy in the Church of England are not employed but hold office in accordance with ecclesiastical law, although some have employment contracts with the Diocesan Board of Finance or an NHS Trust.

(i) Clergy with the freehold

19. A large proportion of stipendiary clergy (currently around 5,500) hold freehold office. They include archbishops, bishops, deans, most cathedral canons, archdeacons and many parish clergy. These office-holders enjoy a very high degree of security of tenure. Once appointed, they are entitled to hold office until the compulsory retirement age of 70, and cannot be removed from office except for reasons of disciplinary offence, mental or physical incapacity, pastoral breakdown; or pastoral reorganisation. We have yet to consider in detail the terms of service of these clergy in and it is intended that there will be further consultation about this, once the Group has completed the second stage of its work.

(ii) Clergy without the freehold

20. A smaller number of stipendiary clergy (currently around 3,500) do not hold freehold office, but are licensed by the diocesan bishop. They include priests-in-charge, assistant curates, team vicars and some team rectors. The terms of the licence from the bishop vary according to the office held. Further details can be found in the Annex to this summary.
21. In very many of these cases, the minister has very limited security of tenure. He or she may be summarily removed from office, or may come to the end of a fixed term with no certainty of renewal. There are very limited rights of appeal within the Church and no access to an outside tribunal (save for an application for judicial review in the High Court).

We recommend that clergy without the freehold should be given greater security in addition to having access to Employment Tribunals. (viii)

6. Fixed-term Appointments

22. Many clergy without the freehold hold office for a fixed term (for example, most clergy in team ministries and holders of leasehold canonries in cathedrals). The provisions of the Fixed-term Employees (Prevention of Less Favourable Treatment) Regulations 2002 enshrine the right of a fixed-term employee not to be treated less favourably than a comparable permanent employee as regards the term of his or her contract, unless that treatment can be justified on objective grounds. Granting section 23 rights to clergy with fixed-term appointments would mean that they could apply to an Employment Tribunal if their appointment were not renewed after four years' continuous service and they felt their treatment was unfair, even if the appointment had come to an end.

We recommend that fixed-term appointments should not be used for clergy, except in the following cases where, subject to further legal advice, we think it could be demonstrated that the post was required to be for a limited term:

- (1) 'Training posts', principally those held by assistant curates;
- (2) Posts which are necessarily time-limited because they are related to a particular project or dependent on special funding, which is for a limited number of years, where this fact is clearly stated in the licence or deed of appointment;
- (3) Priests-in-Charge appointed to interim posts pending pastoral re-organization, with the prospect of reorganization mentioned in the instrument of appointment. (xiii)

7. Common Tenure

23. There is no doubt that many clergy without the freehold feel insecure, especially as they near the end of a fixed-term appointment. Even those whose position is legally secure may lack confidence in the fairness of assessments made of them, which can affect their future work. Our theological reflection has shown us the importance of inspiring in clergy the confidence that comes from knowing where you stand, and we believe that a balanced package of rights and responsibilities is

required, that, as well as clarifying their responsibilities, would give clergy without the freehold greater security.

We therefore recommend that future appointments of clergy without the freehold should be made on a new basis to be called common tenure .These appointments would normally be open-ended until retiring age, and only in the special circumstances already referred to, would they be for a fixed term. Those appointed with common tenure would be subject to removal on grounds of discipline, redundancy or incapacity, or after a capability procedure (see part 8 of this summary) that would be invoked where a post-holder is failing to reach minimum standards. (ix) (x)

A number of special provisions would have to be made for part-time or non-stipendiary appointments, but we think the basic model is robust enough to cover these cases. (xii)

We emphasize that these changes in the legal conditions of tenure cannot be conferred without at the same time clarifying the responsibilities of clergy. They should therefore be seen as conditional on our recommendations about clergy responsibilities and accountabilities (parts 8, 9 and 10 of this summary). (xvi)

8. Capability Procedures

24. The great majority of clergy are carrying out their ministry to a high standard. However there are some cases where problems that are not disciplinary in nature arise, where clergy are falling below an accepted minimum standard, the requirements of the post are not being met and dismissal is a real possibility. We consider that having a formal capability procedure to deal with these cases would not only help to prevent problems from becoming more serious, but would also ensure that cases were consistently and properly handled.
25. The principal concern of a capability procedure should be to help people to improve and to deal with the problems before they become too serious to be remedied. The procedure should ensure that people have been made fully aware what is required of them, and have been given the opportunity - through training and other means - to equip themselves with the resources to improve their performance (where this is necessary) and to realize their full potential.
26. Each formal stage of the procedure involves a meeting of the member of the clergy, accompanied by a friend or union representative, with a panel of consisting of both clergy and laity. Only after three stages can the member of the clergy be dismissed from office. He or she would then be at liberty to appeal to an Employment Tribunal against perceived unfair dismissal.

We recommend a capability procedure for clergy to be invoked, where a post holder is failing to reach minimum standards, with the following features:

- **the procedures adopted must ensure that proper human resource advice is taken at every stage, and must be fully in accord with the requirements of natural justice;**
- **there must be a right of appeal at every formal stage;**

- the procedures must ensure that the minister has full opportunity to respond to all points made;
- a panel should be involved at every formal stage, not a single individual;
- the procedure should be based on best secular practice;
- the minister should have the right to be supported by a friend or union representative;
- sufficient notice should be given in advance of any appearance before a panel. (xxiv) (xxv)

9. Responsibilities and Accountability

27. Like all Christians, clergy are accountable to God. Yet to be called into fellowship with Christ is to be called into fellowship with one another, and there is a mutual accountability that comes with being a member of the Body of Christ. Anyone holding office within the Church is part of a network of mutual responsibilities, and it is unhelpful if those responsibilities are unclear and ill-defined.

We consider that to identify the duties and responsibilities of the clergy involves reference both to general rules (expressed particularly in the Canons but also reflected in other rules of ecclesiastical law) and also to specific, local circumstances. (xvii)

(i) At national level

We are convinced of the need for an accessible statement of containing a realistic and flexible statement of the rights, duties and responsibilities of the clergy, easily available to both clergy and laity, which is one of the rights to be conferred by section 23. The Canons do not meet this need. We therefore recommend that national norms as to the rights and responsibilities of clergy should be expressed in Clergy Terms of Service Regulations, which would replace some of the material now in the Canons. (xviii)

(ii) At local level

28. The duties and responsibilities of the clergy also involve reference to specific local circumstances. These will flow, in the first instance, from the written material prepared in association with the process of making an appointment to a post. We are convinced of the importance of ministerial review in affirming the work of clergy, providing support, identifying training needs, developing potential and protecting clergy against unrealistic expectations of parishes.

We therefore recommend that (i) all clergy should be required to participate in diocesan ministerial review schemes and to take appropriate advantage of Continuing Ministerial Education (ii) that ministerial reviews schemes should make more active provision for lay involvement in ministerial review, and (iii) that all diocesan bishops should be required to ensure that diocesan ministerial review schemes are in place and properly followed. (xix) (xx) (xxi)

10. Implementation Issues

29. We spent a major part of discussions on the question of how the appropriate rights and responsibilities should be conferred on clergy. We concentrated on exploring the arguments for and against either giving all clergy contracts of employment (which would automatically confer the full range of employment protection) or retaining the existing legal status of clergy as office-holders and conferring section 23 rights on them by amending Church legislation.
30. Employment contracts have the advantage of being more familiar to lay people. However, there is the difficulty of finding a suitable employer: Employment contracts are about the direction of work on a daily basis and the setting of targets, whereas clergy have a degree of freedom to set their own priorities in the light of discussions with their bishops and congregations.
31. Office-holder status is instinctively preferred by many clergy, partly because it is seen as fitting better with the concept of vocation and as articulating more clearly that clergy are not called on to meet specified targets but to be faithful and preach the Gospel. An office holder model can readily provide the vehicle for additional clarification of the responsibilities of clergy, as well as ministerial review, capability procedures, access to Employment Tribunals, common tenure, adoption of better human resources practice - in short, the necessary change of culture. Office-holder status also conveys the important message that, amidst these changes, what is distinctive and important in the role of the clergy is being maintained.

After extensive reflection, we do not recommend that clergy should be made employees. Instead we recommend that the office-holder status of clergy should be retained through the medium of the common tenure by means of Church legislation. (xxx)

11. Organizational, legislative and financial implications

32. We have already referred to the need for bringing about out greater clarity about the rights and responsibilities of clergy through Clergy Terms of Service Regulations, and ensuring that ministerial reviews are carried out properly. In summary, a change of culture will be required to ensure that the Church follows the best human resource practice, whilst also adhering to the mutual expectations laid down in the Ordinal and the Canons.

We recommend that the Church must put in place proper mechanisms to encourage good practice and to foster deeper relationships of trust and partnership, including the provision of professional human resources advice and appropriate training for bishops and archdeacons. (xxiii)

33. The new arrangements will require bishops and the clergy who support them in their oversight role to take human resource advice before making many of the decisions referred to in this report. At this stage it is difficult to be too precise about the cost of these arrangements, but based on typical arrangements and costs in comparable professional areas, we estimate that additional human resources provision across the Church might be needed at a cost of £750,000 – £1,200,000

per annum, depending on how such provision is configured. However, it should be noted that there could be costs in not taking action, in the form of expensive disputes, pastoral damage and ill-health retirements. Additionally there will be costs for enhanced ministerial review, severance payments, legal and other costs associated with tribunals. A broad-brush estimate at this stage is that the total costs across the Church could be £1.5–2 million per annum. Where no disciplinary action is involved in someone leaving a post, it may be appropriate for a severance payment to be made. This will receive attention during the second phase of the Group's work.

34. Legislation will be required to bring in common tenure and resolve issues relating to fixed-term appointments. Following the second stage of the Group's work, the scope and content of the Clergy Terms of Service Regulations will need to be settled and this will require subsequent amendment to the Canons. Some complex phasing in of the new arrangements is envisaged.

We have yet to examine in detail the position of clergy with freehold (including bishops, deans, archdeacons and most residentiary canons, as well as incumbents) but we consider that our approach could be applied to them also. (x)

36. Further issues that we shall need to consider include: the implications of our work for the freehold of office and the freehold of property, the recommendations of the review of the Pastoral Measure, the proposed changes to the Ordinal, in so far as they relate to the work of the Group, and the implications of our proposals for the Channel Islands, the Isle of Man and the Diocese in Europe.

Our terms of reference were limited to clergy, but we consider that there is no reason why, with appropriate adjustment, our recommendations could not be applied to licensed layworkers also. (xxxi)

Annex

Clergy without the Freehold

The Group's Terms of Reference require it to 'give priority to consideration of clergy without the freehold or employment contracts'. It is in this area that the Archbishops' Council recognized that existing procedures do not give adequate protection against possible injustice. There are currently around 3,500 clergy in this category. They are licensed by the diocesan bishop, with the terms of the licence varying according to the office held. We set out the present position as it affects each group of clergy.

Team rectors without the freehold and team vicars

Until 1 May 1996, when the Team and Group Ministries Measure 1995 came into force and required all appointments to be for terms of years, some team rectors held freehold office, and the status of freeholders still in post is preserved. All team rectors and team vicars are now appointed for a term of years (Pastoral Measure 1983, s20(2)(3)). The team rector holds the property of the benefice, and the team vicars have the same security of tenure during that term as a freehold incumbent. The licence cannot be terminated on notice during that fixed term. The licence may be extended for a further term or terms, but there is no automatic right to such an extension. There are certain other members of team ministries, licensed under s20(3B) of the Pastoral Measure 1983, who also serve for a term of years; their licence is not subject to summary revocation.

Assistant curates

Assistant curates (which term includes all assistant staff, even if some such title as 'associate vicar' or 'associate minister' is used) are licensed by the bishop, and, under Canon C12, paragraph 1 the licence may specify a maximum term of years; practice seems to vary from diocese to diocese. The expiry of the stated term will not of itself terminate the licence: the bishop may give notice that

it will terminate at the end of the period originally specified; otherwise the licence will continue in force, but the bishop may give three months' notice of termination at any later date.

Under the present law, it is possible for the assistant curate's appointment to be terminated before the end of the original term. Apart from disciplinary and ill-health cases, there are two sets of circumstances:

- (a) An assistant curate can have his or her appointment terminated by the incumbent on six months' notice, under a power given by the Pluralities Act 1838; no reason need be given, but the giving of notice requires the consent of the bishop. There is no right of appeal by the curate, but the incumbent can appeal to the archbishop when the bishop has refused consent.

- (b) An assistant curate is also within Canon C12, paragraph 5, which gives the bishop power to revoke any licence 'summarily and without further process'. The bishop may so act 'for any cause which appears to him to be good and reasonable'; the bishop must explain his reasons before giving the minister the opportunity to show reason to the contrary. There is a right of appeal to the archbishop, acting in person or through a diocesan or suffragan bishop appointed to hear the appeal, which is conducted in accordance with 'the Elphinstone rules' approved by the archbishops.

Priests in charge

Priests in charge, who hold office while a benefice is in suspension (i.e. no incumbent may be appointed), and some other parochial clergy without any freehold office, may be licensed by the bishop for a fixed term or without limit of time. Their licences may be revoked summarily under the procedure just described. A licence granted for a fixed term may not be terminated on notice (as opposed to summarily) during the currency of that fixed term. Otherwise, if the licence so provides, it may be terminated on reasonable notice, and there is no right of appeal if such notice is given.

Parochial clergy without freehold office (with the exception of team ministers) are not subject to the compulsory age for retirement nor to the provisions for removal from office on grounds of incapacity or pastoral breakdown under the Incumbents (Vacation of Benefices) Measure 1977. They are, however, subject to the same disciplinary procedures under the Ecclesiastical Jurisdiction Measure 1963 as freeholders. However, it has been the general practice in cases of misconduct by licensed clergy for the bishop to revoke the licence rather than invoke the statutory disciplinary procedures. The Church has recognized that this position is unsatisfactory and has agreed to remedy it. The Clergy Discipline Measure 2003 will, when it comes into effect, prohibit the revocation of a licence (or the termination of the appointment of an assistant curate) on grounds of misconduct that could give rise to disciplinary proceedings. In such cases, the procedures introduced by the Measure must be followed.

Clergy given a general licence under Canon C12, paragraph 1(a) 'to preach or otherwise to minister subject to the provisions of paragraph 4 of Canon C8 in any parish or ecclesiastical district'

Such ministers hold no particular office, but issues may still arise as to the revocation of the licence. The rules stated above as to summary revocation apply in these cases.

Non-stipendiary ministers

Most NSMs fall within the last category, but some are appointed to specific posts. In these cases, we hope that the tenure rules appropriate to the office in question would apply.

House for duty posts

Again, holders of 'house for duty' hold a licence capable of being revoked by summary process. The housing element is, of course, an important and complicating factor; various different legal arrangements govern the occupation of the house.

Cathedral clergy

Leasehold canonries have existed in a number of cathedrals for many years, and a feature of the revision of cathedral constitutions and statutes after the enactment of the Cathedrals Measure 1999 was a considerable increase in the proportion of residentiary canonries to be held on a leasehold basis, that is for a term of years. Provisions as to the term of the appointment and its possible renewal are contained in the constitutions and statutes of the relevant cathedral. However, it is relevant to note in this context that many residentiary canons carry out what are effectively additional diocesan roles (for example Diocesan Missioners or Directors of Ordinands). See section (3) of the next paragraph.

Sector ministers

This is not a formal legal category, but can be used of various groups of clergy.

- (1) A significant number (typically hospital, prison and school or college chaplains) work under a contract of employment with a body outside the Church, and the terms of that contract and general employment law govern their rights and responsibilities, including the term of their appointment and the procedures for its termination. In some cases, their continued employment may depend on the employee holding a bishop's licence; whether this is the case depends on the terms of the employment contract.
- (2) Another group of clergy is employed by a Diocesan Board of Finance/Education, or work in one of the National Church Institutions; again the terms of their employment contract govern their position, though many will also hold a bishop's licence in respect of either their principal work or the assistance they may give in parishes.
- (3) Finally, there are clergy who hold a dual appointment, serving part-time in a parish, usually as priest in charge, and part-time in a diocesan role or with an outside body (for example a local charity addressing a particular social problem). Part of their work may be carried out under an employment contract, but, overall, their work for the Church will be under a bishop's licence, which should be clear as to the relationship between the two posts in terms of tenure. Similar issues arise for residentiary canons also holding diocesan posts.

Permission to Officiate

In the case of these clergy, the permission to officiate is very much at the discretion of the bishop, and this provision to maintain this discretion would need to continue under any new arrangements.

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Some thoughts on theological principles relating to the Employment Relations Act

Anthony C. Thiselton

1. When considering the question of the extent to which secular good practice should apply to clergy and whether to give the rights and responsibilities of clergy the force of law, it is right to emphasize that the vocation of clergy and their related conditions of employment retain distinctive features as over against other vocations and occupations. Nevertheless, some of the assumptions that are sometimes made in the light of these distinctive features need to be critically examined in the light of fundamental theological principles and exegetical constraints in particular:
 - (1) the distinction between originating divine action and mediate causes or channels of divine agency;
 - (2) the role of secular courts, in the light of a careful exegesis of 1 Corinthians 6.1–8 including the distinctive situation imposed by Roman civil law in first-century Corinth;
 - (3) the role of 'covenant' in biblical theology compared with modes, operations, and presuppositions of 'contracts' in modern society;
 - (4) why those theologians who most strongly expound theologies of divine grace (notably Martin Luther) also stress the necessary role of law and secular or ecclesial 'order' as a gracious constraint to protect the vulnerable.

1. Divine action and governance in the world: the role of human agency

2. The notion of God as 'employer' does not imply logical *exclusion* of the role of human agents. Augustine and Aquinas explicitly state the broader principle in the context of expounding the phenomenon of miracle. 'God' is not an *alternative* Agent, or cause, to the mediate agencies of humankind or 'nature'. For Augustine and Aquinas the action of God may be *praeter naturam* but not *contra naturam*. To illustrate: in 1959 Ninian Smart set his BD candidates the exam question: 'It is fine', said the Vicar, 'because we prayed for the fete'; 'it is fine', said the meteorologist, 'because a band of high pressure is moving over...' Discuss'. Candidates were meant to show that these do not conflict, because they refer to different levels of agency or causality. Indeed the doctrine that all divine action is immediate and direct is known as 'occasionalism', and is not the mainstream view in Christian or even Islamic thought.
3. In Lutheran and Reformed traditions, Luther and Calvin regarded chief pastors and magistrates as acting *in loco Dei*, but nonetheless as instruments through whom *divine action* may be channelled and manifested. Contrary traditions in Western Christendom seem to be largely confined to Anabaptist, Pentecostal, and Neo-charismatic circles, where divine action is too frequently construed along the lines of a two-storey worldview. 'God' is relegated to the upper realm of the supernatural, and effectively excluded from working through ordinary, everyday,

agencies. In turn, these spheres are too readily seen as purely 'natural' *alternatives* to direct divine agency. **Anglican theology** traditionally regards the use of *means* (whether human or natural) for divine action as essentially 'incarnational'. God's action in and through the incarnate Jesus Christ was no less divine action for its being subject to the constraints of time, place, and the socio-political structures and conditions of the first century.

4. The logic of exclusion by which if God is deemed to be 'employer', human institutions and agents are thereby excluded from co-sharing in this role appears to rest more readily on a dualist, Anabaptist, or charismatic view of divine governance than on an Augustinian, Lutheran, Calvinist, or Anglican theology. It would take too long to address this principle as it emerges in the New Testament writings, but I have tried to articulate this in a number of essays, one of which criticizes an over-readiness to describe some gifts of the Spirit, but not others, as 'supernatural'. I do not thereby seek to restrict the scope of divine sovereignty in the world; indeed the reverse is the case.
5. There are many reasons why Paul would not have approved of the word 'supernatural', since it opens the door precisely to the devaluation of human agency and human institutions and 'order' as chosen vehicles of the divine will that Paul is at pains to expound in 1 Corinthians in 11–14. The apostolic and ecclesial regulation to *stop* prophesying when the speaker hogs the stage too long is no less 'divine' in origin than the original prophetic inspiration (14.27–33a). 1 Corinthians 14 is not a million miles away from 'regulations for those employed in using glossolalia or prophetic speech'. Some of the Corinthians, *but not Paul*, thought it was all simply between them and God.
6. To move to the modern world, clergy who serve as chaplains in the Armed Forces, or as professors or lecturers in universities, in social services or hospitals, might be surprised to learn that submission to the ordinances and directives of their managers and of their institutions somehow *diminished or threatened* the notion that they are *primarily working for God*. Once again, Lutheran theology would stress the *vocation* of *all* committed Christian people to the work that they undertake, without such an implicit dichotomy between clerical and non-clerical callings. 'Directives' come from God *and* from institutions and agents without *logical* conflict, even if in some circumstances *contingent* conflicts may arise. In the light of all this it is difficult to infer that it would be profoundly wrong to describe ordained ministers as working for anyone else other than God whether it be the Bishop or the Diocesan Board of Finance.

2. The exegesis of 1 Corinthians 6:1–8: about law-courts or about manipulation?

7. It is essential to understand what is at issue in 1 Corinthians 6.1–8 within the context of the specific situation which Paul addresses. Recent research has demonstrated conclusively that without question the political and social setting at Corinth is Roman rather than Greek. The Greek city was virtually destroyed in the second century BC, and Julius Caesar re-founded it as a Roman colony mainly for his veterans in 44 BC. Roman freed-persons, business entrepreneurs, labourers, and slaves, swelled the population over the next century. In Paul's day, within the Roman administrative system that prevailed in Corinth, the administration of *criminal* law was relatively just and fair. However, *civil* law was a different matter. Here patronage and social influence moved to centre-stage. Judges and juries

expected reciprocal favours from both plaintiffs and defendants. What the modern world would call 'bribes' were usually expected; or if not on the spot, a debt to be paid off by pulling the right strings at the right time. Hence the outcome of a civil case rested in no small degree on the wealth, influence, and 'the right' social or business connections which the plaintiff or defendant could bring to the case.

8. I set out these issues in my commentary on 1 Corinthians (Thiselton, *The First Epistle to the Corinthians: a Commentary on the Greek Text*, Eerdmans and Paternoster, 2000, pp. 418–40). There I argued that the key point at issue between Paul and the Corinthians was *not that of using a secular court* but that of *manipulation on the basis of superior wealth, power, or influence*. No one would initiate a civil case against another Christian believer unless they relied upon superior social or financial power as one of the 'strong' at Corinth. This is why Paul is so appalled that a Christian believer should seek to outmanoeuvre another Christian on such a basis: 'But believer goes to court against believer, and before unbelievers at that' (v. 6). The opening, 'Do you dare to take it to court *before the unrighteous?*' (v. 1) alludes *not* to these being 'secular' authorities, but to those *whose stock in trade is reciprocal favours, manipulation, and power-play*.
9. Two further factors clinch the point beyond all possible doubt. First, Bruce Winter in several writings (e.g. 'Civil Litigation in Secular Corinth and the Church: the Forensic Background to 1 Corinthians 6.1–8' in *New Testament Studies* vol. 37 (1991) pp. 559–72, also reprinted in his *Seek the Welfare of the City* (Eerdmans and Paternoster, 1994, pp.105–21) argues that only these special circumstances could explain Paul's otherwise more favourable attitude to the use of Roman state institutions by Christians. Second, this entirely fits the context of chapter 5 (moral failure) and 6.9–11 (another version of moral failure). Many scholars argue that the grasping, greedy desire to own property and to control others lies in the background of both passages which precede and follow 6.1–8. The sudden intrusion of an issue about a 'secular' court would make no sense of the integrated flow of thought. On the other hand, if 6.1–8 is about *the abuse of power and the use of manipulation to gain wealth and property* the connection between the three passages makes perfect sense, and exactly fits the first-century background in Roman Corinth. This passage, therefore, *should not be used to determine the role of secular courts for Christians in modern England*.

3. Biblical covenant and modern contract

10. In the biblical writings the concept of covenant plays a prominent part in defining the relationship between God and Israel, and later between God and the Christian community. The earlier period of the Old Testament portrays a striking difference between Israelite theology and that of the surrounding nations. The actions of pagan deities were arbitrary and unpredictable. On the other hand, with the God of Israel the people of God '*know where they stand*' (W. Eichrodt). In a succession of covenants God commits himself to honour promises, to enter into a clearly defined relationship on given specified terms, and thereby by free, sovereign, choice, *to place limits or constraints* upon what he might otherwise choose to do by his sovereign will. The faithfulness of God is expressed in the covenant, and permits God's people to know *on what terms* they may worship God, approach God, seek God's blessing, and call themselves God's people.
11. In the New Testament the importance of covenant is reiterated throughout the Epistle to the Hebrews, in 2 Corinthians 3, in the institution of the Lord's Supper as

a covenant meal, and elsewhere. A principle of divine voluntary self-limitation and voluntary self-constraint runs like a thread through 'incarnational' and 'kenotic' theology. If this characterizes the nature of God, it would not be surprising if such a principle may also be discerned in the created order, in Christology, and in the structures of society. A recent book edited by John Polkinghorne traces this kenotic principle in the created order. Arguably the Davidic monarchy differed from other monarchies of the time by being based upon a covenant of a type that resonates with the modern notion of a 'constitutional' monarchy, in contrast to an unfettered one.

12. Many theologians warn us not to assimilate modern secular categories too readily into biblical ones. Professor Oliver O'Donovan, for example, has not minced his words in stating that much of the modern democratic apparatus of the state, especially in America, owes more to the secular Enlightenment than to biblical concepts. Even notions of democratic voting and the regrettable habit of paying more attention to representation than to gifts, callings, and wisdom or expertise (as is perhaps sometimes evidenced in Synodical government in the Church of England) may well call for this kind of prophetic critique. Some recent discussions of episcopal nominations may perhaps reflect such unconscious 'secularization'. On the other hand it may be argued that the self-constraints and protections for the weak and vulnerable embodied in covenant more closely *overlap* with parallel safeguards in 'contracts' than diverge from them. To be sure there are differences, but there are fundamental similarities of principle between them.
13. In the modern world there is seldom an exact one-to-one match between historical situations presupposed in the biblical writings and the specificities of modern structures. In terms of what theologians have sometimes called 'a loose fit', however, it seems to me that there is a sufficient overlap to legitimate and support an appeal to covenant as a basis to defend the value of contractual relationships among Christian people, who worship the covenant God. Key features that link both concepts include: (1) the formulation of a *defined relationship* on the basis of which both parties *know where they stand*; (2) the imposition, definition, and acceptance of *mutual constraints* that limit deviations from what has been agreed by both parties; (3) a significant measure of *protection* for the helpless or vulnerable; and (4) the nurture of the *sense of confidence* that can arise only from knowing where one stands. In my view, it is arguable that these four features model the kind of relationship that God has purposed to characterize his own relationship with his people.
14. Nevertheless, when it comes to specifying how the relationship between clergy, bishop and people might be formulated, the terms of service set might well be very different from those in non-clerical or so-called secular employment contract. Modern notions of contract are not self-validating, but depend upon the extent to which they model biblical principles and divine purposes. Nevertheless, in terms of general principle, it is very difficult to see why it should be appropriate to have a written statement of the mutual obligations of Church and minister but not a contract between them. A contract is a statement of mutual obligations.
15. All the same, just as the specificities of successive biblical covenants varied from situation to situation, any wooden literalism about terms of a covenant or contract should be avoided. It would be naive, for example, to argue that since God's relation to his people is not 'fixed term', the biblical writings could not encourage the use of fixed-term contracts. The specific form and function of covenants and

contracts may vary from case to case, as wisdom and common sense may suggest. Indeed, as the philosopher Hans-Georg Gadamer observes, 'common sense' derives from the common wisdom handed down by traditions within a community. In the Old Testament this has close connections with 'wisdom'.

4. Grace and law

16. It is of course true that what lies behind the ministry of the gospel is the freedom of divine grace. However, this applies to all forms of Christian service: 'Freely you have received, freely give'.
17. Moreover, it does not seem to follow that service in response to sheer free, sovereign, unmerited grace, excludes the possibility of a contractual response. If this argument were valid, it is difficult to explain why God's free, sovereign, gracious election of Israel was followed by a ratification by covenant in which each party, God and Israel, entered into such obligations as (in the case of Israel) *obedience* to the Decalogue. Exodus and Deuteronomy view the law precisely as a response to sovereign divine grace, made in covenantal form. However, it would be a serious mistake to regard obedience to the Decalogue as an attempt to *deserve* divine grace. Pauline scholarship today has been decisively influenced by the claims of E. P. Sanders and others that the law was for Israel part of both the gift of grace and a response to grace. Only in distorted forms of Judaism was the law regarded as 'earning one's way towards salvation', as if it provided some alternative route to divine grace.
18. Just as the first main point about divine governance of the world raised broader issues about first and mediate causality and agency, even so the present argument raises broader questions about the relationship between grace and law.
19. Luther, who stressed the centrality of grace no less vigorously than Jesus, Paul, and Augustine, perceived laws that operate within the structures of society to be *one face of divine grace* on behalf of the weak and vulnerable. In Luther's words, to abolish the law is to say to the wolves, 'Come, help yourselves to the lambs of the flock; for they have no walls to defend them'. Calvin perceived law even more positively as filling grace with specific cognitive content for the guidance of the Christian life. Looking back to the tradition of the Psalms in which the law (the *Torah*) is life-giving, he saw the commandments as offering specific embodiments concerning the living out of divine grace as this is experienced in the Christian life.
20. Thus for Luther and for Calvin, over against their Anabaptist and 'left-wing' opponents, the structures and 'orders' of the Church provide ways in which divine grace is cognitively and corporately appropriated and lived out. As has been noted in the first main point, they would have regarded the notion that these two categories represented a relationship of mutual logical exclusion as resting upon a confusion of logic, or a category mistake. In this context Ernest Kevan (I declare an interest as his nephew) wrote a volume on the Puritan theology of law under the title *The Grace of Law*.

5. Residual considerations: individualism, and the ecumenical dimension

21. First, hand-in-hand with the model of causality called into question under heading 1, we might ask whether the over-ready separation of legal and ecclesial structures from notions of the divine imperative may also rest in part on an undue

individualism. Does God direct ordained ministers as their 'employer', or 'Lord', *in abstraction from the corporate college of their co-workers and overseers*? Is not the latter an integral part of the former? Once again, more recent New Testament research has urged that Paul, among others, never regards apostleship as an *individual* calling apart from the context of 'co-workers'.

22. Although the *ecumenical dimension* may seem to reflect a partial consensus, we should perhaps note that the reasons why the different traditions arrive at their respective conclusions differ considerably. Thus, although the Roman Catholic tradition appears to move as far as possible from such notions as those of legal contracts, it is precisely because the Roman Catholic Church regards the agencies of Bishops and the Roman hierarchy as virtually *in loco Dei*, as channels of the divine imperative almost without qualification, that it adopts its distinctive approach.

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