

# RECENT LEGISLATION

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The end of a Parliament often sees a veritable tidal wave of legislation. No Government facing a General Election wants to attract controversy, so we are treated to a diet of useful but essentially undramatic legislation. No fewer than fifty-five Bills received the Royal Assent in the first three months of 1997, together with one Measure; the Church's electoral timetable having been disconnected from that of Parliament in 1966.<sup>1</sup> And we cannot ignore European developments, notably the negotiation and signature of the Treaty of Amsterdam. The purpose of this article is to draw attention to developments of interest to ecclesiastical lawyers.

## Pensions Measure 1997

The background to the Pensions Measure 1997 is well-known, and it creates the framework for the two schemes, the Church of England Pensions Scheme in respect of 'past service' and the Church of England Funded Pensions Scheme relating to 'future service'.<sup>2</sup> The most interesting feature is the legal duty imposed on diocesan boards of finance and other 'responsible bodies'<sup>3</sup> to pay contributions at a level determined by the Church of England Pensions Board. The Measure makes no provision for what should happen were there to be any default in payments, but the Church of England Pensions Regulations 1997, made by the Synod in July under the Clergy Pensions (Amendment) Measure 1972<sup>4</sup>, make provision for the payment of interest on arrears.<sup>5</sup> The 1997 Measure provides that, in determining the level of contributions, the Board must obtain actuarial advice, and the determination must be consistent with that advice.<sup>6</sup> The Regulations, however, require additional consultations, with the archbishops and the responsible bodies;<sup>7</sup> the outcome of those consultations could not, of course, override the duty of the Board to take and act on actuarial advice.

It is greatly to be hoped that the legislation governing clergy pensions will be consolidated in the near future, as the number of amending instruments has become inconveniently large.

## Treasure Act 1996

An important piece of secular legislation in its potential effect on property found in or about churches and churchyards is the Treasure Act 1996 (c 24). During the debates on the Treasure Bill in the House of Lords, the Bishop of Bristol raised the question of items on consecrated land, such as valuables buried with bishops or abbots. At that time the Government answer was simply that were 'the church' the owner, its 'prior rights' would be protected under clause 4 of the Bill (now s 4). After further discussions with staff of the General Synod, which made it clear that 'ownership' was a difficult concept in this area and there were other, but related, issues to do with the faculty jurisdiction, Baroness Trumpington gave an assurance that an order would be made under what is now section 2(2) of

<sup>1</sup> Church of England Convocations Act 1966 (c 2), s 1(1). The Church's legislation is, however, subject to the delays, seemingly inevitable, in establishing a new Ecclesiastical Committee of Parliament. The Churchwardens Measure heads the queue.

<sup>2</sup> Pensions Measure 1997 (No. 1), s 1. For definitions, see s 9.

<sup>3</sup> These are principally the Church Commissioners and the capitular bodies of cathedral churches: *ibid.* s 4(4).

<sup>4</sup> Clergy Pensions (Amendment) Measure 1972 (No 5), s 6.

<sup>5</sup> Church of England Pensions Regulations 1997. SI 1997/1929, reg 9(2).

<sup>6</sup> Pensions Measure 1997, s 4(2).

<sup>7</sup> Church of England Pensions Regulations 1997, reg 9(1).

the Act excluding (a) objects found in association with human burials in consecrated land; and (b) objects (except for treasure trove) subject to the faculty jurisdiction.<sup>8</sup>

The Act came fully into force in September 1997, but there is as yet no sign of the promised Order. Baroness Trumpington's statement indicated that the precise terms of the exemption were not then clear, and it is believed that those terms are the subject of continuing negotiations. It seems best to postpone any analysis of the situation until the Order appears.

### Trusts of Land and Appointment of Trustees Act 1996

The Trusts of Land and Appointment of Trustees Act 1996 will awaken uneasy memories amongst readers whose daily practice is in matters other than land, but who have distant and perhaps painful recollections of settlements, trusts for sale and the doctrine of conversion, and other such delights. Its relevance here is that it applies, inter alia, to land held on charitable and ecclesiastical trusts. Such land will now be held under a 'trust of land', which is something of a term of art, and the trustees will have the general powers set out in section 6 of the Act.

Charitable trustees, and indeed bodies like the Church Commissioners, often speak of their 'beneficiaries'. This is loose language, for the function of charitable trustees is always to further the purposes of the trust. So in the new Act, 'beneficiaries', to whose rights the trustees are directed to have regard before exercising their powers,<sup>9</sup> are defined as persons who under a trust have an interest in property subject to the trust.<sup>10</sup> This is an illustration of the fact that, while the Act clearly applies to charity land, it is necessarily drafted with non-charitable trusts primarily in mind.

Section 6(1) provides that 'For the purpose of exercising their functions as trustees, the trustees of land have in relation to the land subject to the trust all the powers of an absolute owner'. They can, the section makes clear, purchase additional land, whether by way of investment or for other reasons.<sup>11</sup> This power to purchase must therefore cover both land held for 'functional purposes' and land held to generate an income, a familiar distinction clearly explained by Nicholls V-C in *Harries v Church Commissioners for England*.<sup>12</sup> It would seem that a power of sale similarly extends to land held for either purpose, provided of course that the trustees in disposing of functional land do not disable themselves from carrying out the objects of the charity. If that is right, the opening words, referring to the 'purpose of exercising their functions as trustees', do not qualify the general powers given by the section.<sup>13</sup>

### The Treaty of Amsterdam

Although not yet in force, the Treaty of Amsterdam,<sup>14</sup> like other parts of the legislative output of the European institutions, will have an important influence on English law, and it seems appropriate to draw attention to some of its features of concern or interest to the churches.<sup>15</sup>

#### *The Declaration on the Status of Churches and Non Confessional Organisations*

The Churches have made considerable efforts to secure a 'Church clause' in the text of the Treaty of Amsterdam. The object was two-fold: to incorporate a reference

<sup>8</sup> 573 House of Lords Official Report, col 927.

<sup>9</sup> Trusts of Land and Appointment of Trustees Act 1996 (c 47), s 6(5).

<sup>10</sup> *Ibid.* s 22(1).

<sup>11</sup> *Ibid.* s 6(3), (4).

<sup>12</sup> *Harries v Church Commissioners for England* [1993] 2 All ER 300, [1992] 1 WLR 1241.

<sup>13</sup> Cf N Richens, in the October 1997 issue of the Newsletter of the Ecclesiastical Law Association.

<sup>14</sup> The Treaty of Amsterdam was signed at Amsterdam on 2 October 1997; see OJ C 340, 10.11.97.

<sup>15</sup> This material draws heavily on discussions in the Working Group on relations between the Churches and the European Union of the European Ecumenical Commission on Church and Society (EECCS), of which I am a member.

to the Churches and religious factors in the text of the European treaties, which largely lack that dimension, and also to ensure that the constitutional position of the Churches (whatever it might be, and whether this involved Establishment or the total separation of Church and State) remained a matter for the national law of each Member State.<sup>16</sup> In the event, the Inter-Governmental Conference included a Declaration in its Final Act, which reads (in the English text)

'The European Union respects and does not prejudice the status under national law of churches and religious associations or communities in the Member States. The European Union equally respects the status of philosophical and non-confessional organisations.'

The eventual text differs from the various proposals which had been on the table for some months, and the second sentence was the result of a last-minute proposal by the Belgian Government. In one sense it contains a mistake. The Belgian concern was a constitutional one, but by oversight the text does not reflect that of the Belgian Constitution, where the reference is to 'philosophical non-confessional' bodies, with no 'and' between the two adjectives. The German text speaks of '*Status von weltanschaulichen Gemeinschaften*', neatly avoiding any ambiguity, but the French text does have the 'and': '*organisations philosophiques et non confessionnelles*'. Taken by itself, nothing very much seems to turn on this point in practice, as the text aims to preserve whatever 'status' the various bodies have under national law, and has no mandatory effect.

There is a further awkwardness in the texts which just might have a less satisfactory aspect. The word 'equally' in the second sentence is clearly meant to mean 'in the same way', 'likewise', and the German text has '*in gleicher Weise*'; but it just could convey a hint of equal treatment, which was not in fact intended.<sup>17</sup>

The Declaration, unlike the Treaty itself, has immediate effect. It has already persuaded the European Commission that it must in future, in the context of grants for the restoration of major public buildings which involve reliance on the 'listed' status of such buildings, recognise the independent authority of the Churches under national law (in that context, where some Churches apply their own listing, independently of the secular authorities; in England the faculty jurisdiction might become relevant).

More generally, the Declaration will enable the Churches to claim more extensive rights of consultation, a matter of potentially growing importance; it is for example stressed in the new Protocol on the Application of the Principles of Subsidiarity and Proportionality (point (9)).

### *Provisions of the Treaty*

A number of features of the new Treaty are of interest, in a broad sense, to the churches. These include:

A new text of what was Art. F, para. 1 of the Treaty on European Union (the Maastricht text),<sup>18</sup> declares that the Union is founded on the principles of 'liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law', with enhanced procedures for the suspension of Member States in breach of these rights; all in preparation for the future enlargement of the Union/Community;

<sup>16</sup> This was not intended to 'freeze' matters: it allows for the position to change under the normal processes of a national legal system. The devolution of some powers to the future Scottish Parliament may provide an illustration, although constitutional matters (including, it would seem, the constitutional protection of the Church of Scotland) will remain matters for the Westminster Parliament.

<sup>17</sup> The French text has *également*.

<sup>18</sup> All the Articles in the EC Treaty (the Treaty of Rome) and of the Treaty on European Union are to be renumbered in consequence of the Treaty of Amsterdam. Article F of the Treaty on European Union will become art 6.

similarly the formal competence of the European Court of Justice in respect of human rights issues raised by actions of the European institutions is asserted.<sup>19</sup>

Article 3 of the EC Treaty is amended to add a new provision, that in all the activities listed in the article (a comprehensive list) 'the Community shall aim to eliminate inequalities, and to promote equality, between men and women'.<sup>20</sup> There is also a new reference to the activities of the Community in 'the promotion of co-ordination between employment policies of the Member States'.<sup>21</sup> A new Article,<sup>22</sup> which has already raised some concerns among Church groups in England reads as follows:

'Without prejudice to the other provisions of this Treaty and within the limits of the powers conferred by it on the Community, the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.'

This has raised a number of concerns. The reference to religion and belief raises sensitive issues concerning the rights of New Religious Movements and of the issues so familiar in Northern Ireland; that to sexual orientation raises other, obvious concerns. A particular issue of concern to many churches is the position with regard to their recruitment policy, and their continued ability to insist, for example, that staff working in a church school or a church-sponsored residential home should have a church affiliation. In fact the text is much weaker than some feared, giving merely consultative rights to the Parliament and requiring unanimity in the Council, so giving a veto to every Government.

It will be interesting to follow the impact on English law both of these new provisions and of the new status to be given to the European Convention on Human Rights by legislation now before Parliament.

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<sup>19</sup> Ibid. art L(d) (to become art 46(d)).

<sup>20</sup> EC Treaty, art 3(2). The numbering of art 3 is unchanged in the consolidated text.

<sup>21</sup> Ibid. art 3(1)(h).

<sup>22</sup> Ibid. art 6a (to become art 13).