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# Do We Still Need the Faculty System?

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*Following a brief history and explanation of the extent and role of the faculty jurisdiction, the article considers various reviews of its working, and that of the ecclesiastical exemption, starting with the Report of the Faculty Jurisdiction Commission in 1984 and the Newman Report in 1997. The Department for Culture, Media and Sport stated in 2005 that the operation of the ecclesiastical exemption would be monitored periodically, and in 2010 that it would be kept under review to ensure the required standards of protection were maintained. The article argues that a no-holds-barred review of the faculty system would now be appropriate, with a view to achieving a less cumbrous structural apparatus, with a markedly less restrictive approach to changes within unlisted churches and a more rigorous and expert approach to changes affecting listed churches.*

**Keywords:** faculty jurisdiction, ecclesiastical exemption, Newman Report, simplification

## INTRODUCTION

First, some mediaeval history. There is evidence of the assertion of the bishop's power of control over the fabric of churches in his diocese as long ago as the thirteenth century. Both Cripps and Bursell refer to a constitution of Otho, the legate in England of Pope Gregory IX, made in a national synod in 1237, which contained the following injunction:

> We strictly forbid ... rectors of churches to pull down ancient consecrated churches without the consent and licence of the bishop of the diocese, under pretence of raising a more ample and fair fabric. Let the diocesan consider whether it will be more expedient to grant or deny a licence.[2]

However, according to Professor Helmholz, 'the practical beginnings of the exercise of faculty jurisdiction by today's ecclesiastical courts' are to be found only after the introduction, and then proliferation, of pews in the sixteenth century.[3]

1 This article was originally delivered as an Ecclesiastical Law Society Leeds Lecture on 6 November 2019, repeated as an ELS London Lecture on 19 February 2020. A few additions have been made, some in response to comments made on those two occasions.

2 H Cripps, *Practical Treatise on the Law Relating to Church and Clergy* (eighth edition, London, 1937), p 147; R Bursell and R Kaye (eds), *Halsbury's Laws of England*, vol 34 (fifth edition, London, 2011), para 1068, n 1.

3 R Helmholz, *The Profession of Ecclesiastical Lawyers: an historical introduction* (Cambridge, 2019), p 83.

The position today, leaving aside Lists A and B as provided for in the Faculty Jurisdiction Rules 2015[4] and the very limited archdeacon's jurisdiction under Part 8, remains as expressed in the late nineteenth century by Phillimore, that:

> No alteration, ether by way of addition or diminution in the fabric or utensils or ornaments of the church, ought, according to strict law, to be made without the legal sanction of the ordinary. That legal sanction is expressed by the issue of an instrument called a faculty, and in no other way.[5]

The canonical expression of this is Canon F 13(3):

> It shall be the duty of the minister and churchwardens, if any alterations, additions, removals, or repairs are proposed to be made in the fabric, ornaments, or furniture of the church, to obtain the faculty or licence of the Ordinary before proceeding to execute the same.

In some ways the reach of the faculty system has grown. I give two examples. First, whether or not a building licensed for public worship by the diocesan bishop is consecrated, it automatically falls within the faculty jurisdiction, although the bishop can exclude such buildings, whether or not consecrated, from the faculty jurisdiction by order.[6] This therefore caters for buildings such as the former Vibe night club in Bradford, soon to become a worship centre called the Fountain Church.[7] A second example of the growth is that previously ecclesiastical courts were dependent on the civil courts for the grant of an injunction to restrain an alteration to the fabric of a church or the walls of a churchyard in the absence of a faculty. Now, however, since the enactment of section 13 of the Care of Churches and Ecclesiastical Jurisdiction Measure 1991,[8] the ecclesiastical courts can grant injunctions and restoration orders themselves, a change strongly urged by the Department of the Environment at a late stage of the synodical proceedings relating to the 1991 Measure[9] and exemplified by the Court of Arches' decision in the *Spitalfields* case.[10] And, despite Phillimore, I have little doubt that many of the matters now found in

4 SI/2015/1568, rule 3(2)–(3) and Schedule 1.
5 R Phillimore, *The Ecclesiastical Law of the Church of England* (second edition, London, 1895), vol II, p 1419.
6 Ecclesiastical Jurisdiction and Care of Churches Measure 2018, s 58(1) and (2).
7 *Church Times*, 19 July 2019.
8 Now replaced by the Ecclesiastical Jurisdiction and Care of Churches Measure 2018, ss 71–72.
9 See letter of 3 February 1990 to the Bishop of Chichester from Chris Patten, Secretary of State for the Environment, and follow-up letter of 13 February 1990 from the Heritage Director, Department of the Environment, in the Church of England Archives, shortly to be moved to the new Lambeth Palace Library.
10 *Spitalfields Open Space Ltd v Governing Body of Christ Church Primary School* [2019] EACC 1; [2019] Fam 343.

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Lists A and B would not have been regarded as important enough to justify petitioning for a faculty at the start of the nineteenth century or even the twentieth. For, as appears from the Dean's judgment in *Parham v Templar*[11] a distinction was drawn between important and trifling alterations, for the latter of which no faculty was needed.[12]

## THE MODERN FACULTY SYSTEM

There are, broadly speaking, two aspects to the modern faculty system. The first aspect has nothing to do with whether a church is a nationally listed building. As the then Deputy Legal Adviser, the Reverend Alexander McGregor, stated in a report to the Archbishops' Council's Simplification Group in January 2012:

> The Church of England does not have the faculty system in order to qualify for the ecclesiastical exemption. It has the faculty system because, as a matter of principle, in an episcopally-ordered church, the Ordinary has a proper interest in what happens to, and in, the churches in the diocese. That is why the faculty system came into existence in the first place and why it continues to exist today.[13]

That is entirely consistent with the rationale for the faculty jurisdiction contained in a memorandum of Sir Alfred Kempe, then Chancellor of the Diocese of London, and printed as an appendix to the report of the Archbishops' Ancient Monuments (Churches) Committee (July 1914), which was chaired by my predecessor Sir Lewis Dibdin.[14]

The Church Buildings Review Group reported in 2015 that 22 per cent of Anglican church buildings were unlisted, ranging from 5 per cent in St Edmundsbury and Ipswich to 55 per cent of churches in Liverpool, and with five other dioceses (Southwark, Manchester, Blackburn, Birmingham and Durham) having more than 40 per cent of their buildings unlisted. Further, even where listed buildings are concerned, there are many alterations for which a faculty is needed, notwithstanding that what is at issue has nothing whatever to do with the special character of the listed building: for example, permissions for temporary events (such as exhibitions); changes concerning moveable items, which do not, unlike fixtures, form part of the building; and many

11 (1821) 3 Phil 515, 527.

12 I owe that reference to a most interesting book, acquired in 2018 by Lambeth Palace Library, L Wilford, *The Law of Faculties* (Carlisle, 1911), the work of an erudite clergyman in the Diocese of Carlisle, written for the benefit of his fellow clergy.

13 Repeated in identical terms in his appendix to the Report on Simplification of the Faculty Process, 3 September 2012, <https://www.churchofengland.org/sites/default/files/2018-11/CCB_Report-on-Simplification-of-the-Faculty-Process_Appendix1_Jan-2012.pdf>, para 26, accessed 25 June 2020.

14 This is set out extensively in Cripps, *Law Relating to Church and Clergy*, pp 147–149.

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other matters which do not impinge on the special character or interest of the building (and thus would not in the secular system require listed building consent). The vast majority of works to churchyards, even in the case of Grade I or Grade II* listed churches, are not works which in the secular system would require listed building consent (for even works which affect the setting of a listed building do not require listed building consent).[15]

The second aspect of the faculty system concerns the 78 per cent of church buildings which are listed. Overall, 54 per cent of church buildings are Grade I or Grade II* listed, as are more than 80 per cent of those in the dioceses of Norwich, St Edmundsbury and Ipswich, Ely and Peterborough. The result of the ecclesiastical exemption is that no secular listed building consent is needed for works to listed churches which would otherwise require it, because (and provided that) the faculty system applies a commensurate rigour in maintaining the significant part of the national heritage that church buildings represent. Cathedrals also benefit from the ecclesiastical exemption, but traditionally have fallen outside the faculty system.

It would be wrong to think of the faculty system as an avoidance of dual control. Many works to listed and unlisted churches require planning consent, as well as a faculty. Almost all alterations to the exterior of both listed and unlisted churches require planning permission, as many churches seeking to add an external toilet or a modest extension have found out to their cost, when planning permission has been refused. Where ancient monuments are involved, an entirely separate control system applies.

## REVIEWS OF THE FACULTY SYSTEM

Now a little more history. The Ancient Monuments Consolidation and Amendment Act 1913 conferred an exemption from scheduling for all ecclesiastical buildings. This was accompanied by Archbishop Randall Davidson's announcement that the Church of England's internal procedures would be reviewed with a view to securing 'that no harm shall arise to the ecclesiastical buildings whose value is immeasurable'.[16] This led to the establishment of diocesan advisory committees (DACs) and of what became known as the Council for the Care of Churches, now the Church Buildings Council (CBC).[17] The

15 See *Spitalfields*, para 112.

16 The background is set out in J Newman, *A Review of the Ecclesiastical Exemption from Listed Building Controls* (London, 1997), pp 5–6.

17 DACs were first established on a voluntary basis and became statutory in 1938. In 1928 the Church Assembly formally took over the Central Council of Diocesan Advisory Committees, forerunner of the Council for the Care of Churches: see *The Continuing Care of Churches and Cathedrals, Report of the Faculty Jurisdiction Commission* (London, 1984), para 22.

ecclesiastical exemption from listed building control was first specified in the Town and Country Planning Act 1971.

There have been a number of reviews of the working of the ecclesiastical exemption in the past 25 years, starting with the review conducted for the Department for Culture, Media and Sport (hereafter DCMS, renamed the Department for Digital, Culture, Media and Sport in 2017) and the Welsh Office by the distinguished architectural historian John Newman in 1997 (hereafter, the Newman Report). This followed the enactment of the Care of Churches and Ecclesiastical Jurisdiction Measure 1991 (together with the making of the Faculty Jurisdiction Rules 1992, which widened and strengthened the involvement of the secular amenity bodies in the Church of England's decision-making system); and also the making of the Ecclesiastical Exemption (Listed Buildings and Conservation Areas) Order 1994.

Newman recognised that objectors as well as petitioners could appeal under the faculty system, 'making the system more even-handed than the secular system'.[18] He also recorded the perception of the amenity bodies 'that it is harder for them to win consistory court cases than to win at a secular public enquiry', and considered that recent cases 'do tend to support their perception'.[19] Newman reported concern 'whether judges have the appropriate expertise to adjudicate in cases which turn on conservation issues', and recommended that General Synod, in collaboration with the Ecclesiastical Judges' Association, DCMS and the Planning Inspectorate, 'consider whether 'certain types of cases … should be taken out of the hands of the Chancellor altogether, and adjudicated by the equivalent of a planning inspector'.[20] More fundamentally, he criticised the faculty system as 'still an unwieldy and heavily legalistic mechanism for controlling works to sensitive listed buildings and their furnishings'; he considered that 'the streamlined efficiency of the newly devised system for controlling works to cathedrals may in the longer term provide a model for reforming the way the Church of England deals with its listed churches'; and he recommended 'that the Church of England should in the long term consider the radical step of removing the control of listed buildings from the faculty jurisdiction and instituting a control system for them more in line with modern procedures'.[21]

In 2004 the DCMS published a short consultation paper entitled 'The future of the ecclesiastical exemption'. Paragraph 18 said:

> The Government accepts the strengths of the exemption, e.g. the individual denominations having built up systems which balance the needs of

18 Newman, *Review of the Ecclesiastical Exemption*, para 6.22.
19 Ibid.
20 Ibid, para 6.23.
21 Ibid, para 6.25.

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> worship in a building with the conservation of its historic fabric, have stood the test of time since the making of the Order in 1994. Moreover, it is recognised, for example, that the Faculty Jurisdiction system … provides for a level of protection which is demonstrably in excess of what is offered by the secular system of controls (in that it covers fixtures and fittings, positioning and improvement of artefacts, and artistic judgement).
>
> However, there are weaknesses in all the exempt denominations' systems of control in terms of insufficient external accountability and transparency.[22]

In addition to a proposal for 'high-level management agreements to be reached with each denomination' to last for five-year periods, the agreements being with a designated body, it was proposed that 'an appropriate body be given the statutory power to validate the systems of control used by exempt denominations in England' and 'to monitor the operation of the exemption'.[23] The proposal was that English Heritage should carry out these roles.[24] The monitoring body was to be given 'real teeth when it came to enforcement', so that breach of any management agreement would put 'the relevant denominations … at risk, ultimately, of defaulting to the secular system of controls'.[25] It was suggested that, 'in the case of the Church of England, this could result in all listed places of worship in the diocese concerned defaulting to secular control'.[26]

Review of the consultation responses led to the DCMS decisions contained in 'The Ecclesiastical Exemption: the way forward' (2005). The formerly proposed compulsory five-year high-level management agreements were dropped, replaced by 'a new voluntary management option, provisionally called Heritage Partnership Agreements'; but the operation of the ecclesiastical exemption was to 'continue to be monitored periodically'.[27]

In July 2010 there followed the Ecclesiastical Exemption (Listed Buildings and Conservation Areas) (England) Order 2010, together with the DCMS guidance contained in 'The operation of the ecclesiastical exemption and related planning matters for places of worship in England'. This stated that:

> The Ecclesiastical Exemption reduces burdens on the planning system while maintaining an appropriate level of protection and reflecting the particular needs of listed buildings in use as places of worship to be able to

22 DCMS, 'The future of the ecclesiastical exemption', September 2004.
23 Ibid, paras 19, 20, 23.
24 Ibid, paras 22–23.
25 Ibid, para 30.
26 Ibid.
27 DCMS, 'The Ecclesiastical Exemption: the way forward' (London, 2005), p 4, 'Summary of decisions'. Later in the publication (p 9), it was declared that 'The future of the Ecclesiastical Exemption will remain under review by DCMS, as recommended in the Newman Report.'

adapt to changing needs over time to ensure their survival in their intended use.[28]

It was further explained that:

> The 2010 Order limits the Ecclesiastical Exemption to certain buildings within the care of specified denominations which have demonstrated that they operate acceptable internal procedures for dealing with proposed works to listed buildings and unlisted buildings in conservation areas. The internal procedures for such exempt denominations must be as stringent as the procedure required within the secular heritage protection system. Equivalence of protection is a key principle underpinning the Ecclesiastical Exemption and will be kept under review by [DCMS], in order to ensure that those denominations which benefit from the Ecclesiastical Exemption maintain the required standards of protection.
>
> Denominational systems of control need to be open and transparent. The systems should provide similar levels of consultation and engagement with local communities, and with the statutory consultees – planning authorities, English Heritage and the national amenity societies – as is required in relation to the secular control system and they must comply with the provisions of the Code of Practice (Annex A to this document).[29]

Sometimes forgotten is the section of the 2010 guidance setting out 'some broad principles regarding the standards of care expected of denominational systems of control':

> Proposals for works should:
>
> - be based on a full but proportionate analytical understanding of, and respect [for] the historic, archaeological, architectural or artistic interest of the building, its contents and setting;
> - be founded on a clearly stated, demonstrable and sustainable, medium to long term need;
> - minimise intervention in or alteration or removal of significant historic fabric, features or furnishings;
> - achieve high standards of design, craftsmanship and materials.

28 DCMS, 'The operation of the ecclesiastical exemption and related planning matters for places of worship in England', July 2010, para 7.
29 Ibid, paras 9–10.

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> In all cases, decisions about proposals and works should be based on a balanced judgment between the need for the works proposed and the significance of the structure or feature which would be altered or lost … When change is contemplated, those responsible for making decisions [should] have special regard to the desirability of preserving the asset, its setting and any special features that it may possess.[30]

The annexed code of practice provided:

> The decision-making body, when considering proposals for works, should be under a specific duty to take into account, along with other factors, the desirability of preserving ecclesiastical listed buildings, the importance of protecting features of special historic, archaeological, architectural or artistic interest and any impact on the setting of the church.[31]

This, together with the *National Planning Policy Framework*'s approach to secular listed buildings,[32] lay behind the formulation by the Court of Arches in 2013 of the *Duffield* guidelines[33] for petitions relating to listed buildings, and the further refinements culminating in *In re St Peter, Shipton Bellinger*.[34]

Whether in relation to listed or to unlisted buildings, I can think of no better recent justification of the faculty system than that of the Chancellor of the Diocese of Sheffield, HHJ Sarah Singleton QC, in *Re All Saints, Hooton Pagnell*:

> It is important in the circumstances of this judgment that I say something about the purpose of the law and the motives of those involved in its operation and enforcement. They are not 'jobsworth apparatchiks' doing their work because they like telling people what to do. What is done is done because churches, particularly listed churches, constitute a tangible and spiritual history which touches everyone including the people of the past, the present and the future including those from within and from outside our church communities and from within and outside their geographical area. They connect us to each other and to those who went before us and to those yet to come by our mutual and continuing appreciation and enjoyment of their beauty and history. These buildings need and deserve to be preserved, renewed and improved, expertly, professionally and within a process open to public scrutiny. That is my understanding

30 Ibid, paras 34–35.
31 Ibid, annex A, para 2.
32 See now Ministry of Housing, Communities & Local Government, *National Planning Policy Framework*, February 2019, ch 16, 'Conserving and enhancing the historic environment'.
33 *Re St Alkmund, Duffield* [2013] Fam 158 at para 87.
34 *In re St Peter, Shipton Bellinger* [2016] Fam 193 at paras 34–48.

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> of the purpose of the strict law which applies to listed buildings generally and within the Faculty Jurisdiction as applied to listed churches generally and Grade 1 and 2* listed in particular. Within the church the preservation and development of beauty and history is undertaken to the glory of God.[35]

## DO WE STILL NEED A FACULTY SYSTEM?

After that overlong introduction, let me come back to the question posed in my title. I anticipate that some may expect from me a resoundingly affirmative answer, whether the reference to 'we' in the title is to the public at large, or to parishioners, most of whom do not go to church but for many of whom the church building stands for treasured values, spiritual as well as historic and architectural, as well as contributing significantly to the local landscape and townscape; or to the community of worshipping congregations, increasingly many of whom are not parishioners, and the clergy (and often lay people) who minister to them. So my conclusions may come as rather a surprise.

In brief I am now satisfied that a no-holds-barred review of the faculty system would be appropriate. My concerns are threefold. First, whether the church building is listed or unlisted, I question the need for the structural apparatus which constitutes the modern faculty system. Second, in the case of unlisted buildings, I question whether anything but the very lightest touch is needed – something difficult to achieve within the system as it now stands. Third, in the case of listed buildings, I believe there is a case for an altogether different system of control from that which now operates, although I am not advocating that secular listed building control should apply.

### Structural apparatus

First let me turn to the question of structural apparatus, and why I consider that it is still unduly complex and cumbrous, and questionably fit for purpose. There are several strands to my critique. First, it is a special feature of the faculty system that it is a 'heavily legalistic mechanism' (to use the phrase of the Newman Report in 1997). All petitions for faculty are determined by the diocesan chancellor (or his or her deputy), who must be legally qualified. Of the 40 dioceses, excluding Europe and Sodor & Man, 16 have as chancellors practising barristers and 6 retired barristers, 11 have circuit judges and 3 have retired circuit judges, 1 has a Court of Appeal judge, 2 have immigration judges and 1 has a solicitor. Whatever the merits of this – and they are in my view considerable – two criticisms can be made.

35 *Re All Saints, Hooton Pagnell* [2017] ECC She 1 at para 20. A forceful defence of the faculty system was made by my predecessor, Sheila Cameron QC, in a letter published in the *Church Times*, 6 November 1998.

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The first is that (to use another of Newman's descriptions) it makes the system 'unwieldy', and the opposite of 'user-friendly' to those promoting or opposing changes to churches. In a series of revisions to the Faculty Jurisdiction Rules since 2013, the Rule Committee which I chair has tried to simplify the language and procedures, including most recently reference generally to 'the chancellor' rather than to 'the court'.[36] And, whatever may be the practice of individual chancellors, the members of the Court of Arches have never during my term of office worn robes or wigs (what is good enough for the Supreme Court is good enough for us). Nevertheless, even the forthcoming amended faculty rules look very similar to the rules in the Civil Procedure Rules, and are not readily comprehensible to many, perhaps most, lay people (nor, I suspect, to the clergy). Is it sensible to retain the concept that in seeking changes to a church the procedure is a form of judicial proceedings, and that if the proposal is opposed there is a *lis inter partes* (legal suit between the parties)? The consistory court is merely a form of administrative tribunal and in my view the time may have come to recognise this. Take, for example, the recent decision in *North Stoneham, St Nicholas* in Winchester Diocese.[37] Is a legally qualified chancellor really needed to decide whether new chairs should be metal-framed or wooden, and whether temporary carpeting in the aisle is acceptable, even in a Grade II* listed church?

The second criticism is that chancellors, however conscientious and well intentioned, are imperfectly equipped to deal with some of the technical and conservation matters concerning church buildings. Newman was of the view that certain controversial cases which turned exclusively on conservation issues should be adjudicated by someone with conservation (rather than legal) expertise. I accept that, as Mynors Ch, himself a former local planning officer, said in *Re Holy Cross, Pershore*: '[Chancellors] will certainly see far more proposals for [works to mediaeval and other church buildings] than would ever come the way of the planning authority in a decade (even if the ecclesiastical exemption were to be withdrawn).'[38] But only a small minority of chancellors (four at the present time) will have encountered planning law in their professional lives, and are chancellors really the best people to decide whether internal re-orderings or extensions to churches or repairs to monuments (internal or external) should proceed, whether or not the proposal is opposed? And, relatedly, how does this jurisdiction appear to users and to third parties?

The conclusion of the Faculty Jurisdiction Commission in 1984, following an examination of this aspect of the faculty system, was that:

36 See the Faculty Jurisdiction (Amendment) Rules 2019, SI/2019/1184, Rule 5(e)–(g).
37 [2019] ECC Win 2.
38 [2002] Fam 1.

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> the involvement of a lawyer is normally advisable in those cases where a dispute exists, and since it may be advantageous to have the same person taking decisions both in uncontroversial and controversial cases so that common standards may be applied, it would follow that the whole jurisdiction should be entrusted to a lawyer's overall control. The faculty jurisdiction as it stands at present provides for the involvement of a judge qualified to rule on points of law without reference to a civil court, and this is a great advantage to the Church. We are satisfied that the Church still requires a system of control which remains fundamentally a legal system, albeit with a humane and equitable approach.[39]

The commission went on to consider whether the chancellor should sit alone or with others. Its conclusion was that: 'The chancellor should remain sole judge in the consistory court without voting co-judges or non-voting assessors. However ... we believe that he should in future have wider powers and opportunities to call in expert "court witnesses".'[40] That is of course provided for by what is now Rule 13(4) of the Faculty Jurisdiction Rules 2015 ('Judge's witness'), although very few chancellors have chosen to use this power, an exception being the controversial first-instance decision in *St Stephen, Walbrook*, concerning a painting by Benjamin West.[41] But is it still the case that a system which is 'fundamentally a legal system' remains appropriate?

In 2012, the Simplification Task Group was set up by the Archbishops' Council and the House of Bishops' Standing Committee to make recommendations for modernising and streamlining the faculty system. It comprised a working group, headed by the then chair of the CBC. Its recommendations led to the enactment of the Care of Churches and Ecclesiastical Jurisdiction (Amendment) Measure 2015 and to Lists A and B in the Faculty Jurisdiction Rules 2015. Its report stated in its introduction that:

> It was not part of our brief to question the overall value of the Faculty Jurisdiction. Indeed we were pleased to discover from all our research how valued it is and that it was considered to be more fit for purpose than the secular system.[42]

39 See *Report of the Faculty Jurisdiction Commission*, para 154. The Faculty Jurisdiction Commission was influenced by advice received from David Williams, a member of the Council on Tribunals, and from Peter Boydell QC ('an experienced practitioner in the field of planning law and a distinguished diocesan chancellor'; para 152).

40 Ibid, para 209.

41 10 July 2013, unreported. Permission to appeal was granted by the Court of Arches, but not pursued.

42 'Report on Simplification of the faculty process', September 2012, p 1, https://www.churchofengland.org/sites/default/files/2018-11/CCB_Report-on-Simplification-of-the-Faculty-Process_Sep-2012.pdf>, accessed 25 June 2020.

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But that is to ignore the possibility of a 'third way', something other than leaving everything to the secular (presumably planning) system.

We should never forget that the Church of England does not stand alone in regulating changes within churches. We seem to be reluctant to examine how change is handled by other major churches, all of which have some historic churches – even though the Church of England has most of the listed church buildings, particularly of the higher gradings. Above all, their systems are markedly simpler, and avoid our panoply of legalism. I shall return to these in a moment.

**Unlisted churches**

I come then to the question of unlisted churches. I recognise that historically the faculty jurisdiction had nothing to do with the aesthetic quality of the individual churches concerned and was all about episcopal oversight. I recognise also that others have been persuaded that, broadly speaking, the faculty jurisdiction should apply to churches whether or not they are listed. Indeed, the working group stated in section 9 of its 2012 report:

> There has been some suggestion that unlisted churches should operate under a different procedure, or even be excluded from the Faculty system altogether. Interestingly, this suggestion did not surface at all from our parish research or expert witness sessions. After careful consideration the Group did not think this was a helpful way forward ...
>
> Repairs and improvements can involve spending large amounts of money. There is no logic in depriving the PCCs caring for unlisted churches of the advice of the DAC, particularly where large scale re-ordering is involved. Indeed, some unlisted churches are likely to be listed in the future. The system should help people in parishes make good decisions and to get the best long-term value for money, not least to avoid wasting money on cheap but ineffective repairs. There is every reason why these church buildings should be beacons for quality and good practice in the local community. Our evidence suggests, not least from those who have advocated a different procedure for unlisted churches in the past, that the way forward is to leave it to the experience and discretion of both the DAC and the Chancellor to simply operate less strict criteria within the system when recommending/granting a Faculty for unlisted churches.

I question this reasoning. Unlisted churches contemplating changes to their buildings could still be allowed access to the DAC, or indeed compelled to seek the DAC's advice. The fact that some unlisted churches may eventually be listed is equally true of secular unlisted buildings, but these are not required to endure a more elaborate form of control merely on account of that possibility.

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Nor am I persuaded that the fact that large amounts of money may be involved is really relevant, when that money will almost always be locally derived, and it should be for parochial church councils, as charities, to decide what is value for money – not a matter on which legally qualified chancellors have any particular expertise.

A slightly different approach was enunciated in the course of the debate at the July 1989 Group of Sessions of General Synod, when the Care of Churches Measure was under consideration. The then Bishop of Chichester, the Rt Revd Eric Kemp, a celebrated canon lawyer and first president of this Society, said this:

> It is necessary ... to have a system of control which will ensure that our churches are cared for and that in the making of alterations there is a proper conciliation between the needs of present use and proper conservation. We must remember also that churches exist to point to God and to glorify him, so that what we do to them and in them ought to be of the highest quality.[43]

But removal of unlisted buildings from the faculty system would not require their exclusion from the system for quinquennial inspections[44] and is there a need for 'proper conservation' in the case of unlisted buildings? I suspect that many church-goers would question the (Anglo-Catholic) bishop's view that 'churches exist to point to God and to glorify him' and already we find many congregations choosing to escape the rigour of the faculty jurisdiction by conducting their gatherings in secular buildings more readily adaptable to their particular worship needs. Furthermore, external changes to unlisted churches would still require secular planning permission.

So as a start I personally would place most changes to unlisted buildings into List A in the Faculty Jurisdiction Rules, subject to a requirement in certain cases to seek (but not necessarily to follow) the advice of the DAC. Control over demolition should be retained, and I recognise that there may be a case for retaining control over sacramental items, such as fonts and altars, but even there I believe that flexibility should be the guiding principle.

## Listed churches

I turn finally to the question of listed churches, and in particular the operation of the ecclesiastical exemption and Newman's recommendation in 1997: 'that the

43 A fuller extract from his speech is contained in the Report by the Ecclesiastical Committee upon the Care of Churches and Ecclesiastical Jurisdiction Measure, para 6, printed 2 May 1991, HL Paper 49-II; HC 419.

44 Under the Inspection of Churches Measure 1955, as qualified by s 45 of the Ecclesiastical Jurisdiction and Care of Churches Measure 2018 and s 7 of the imminent Care of Churches (Miscellaneous Provisions) Measure 2020.

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Church of England should in the long term consider the radical step of removing the control of listed buildings from the faculty jurisdiction and instituting a control system for them more in line with modern procedures'. So far as I am aware this is not a matter that the high command of the Church of England, namely the Archbishops' Council or the House of Bishops or General Synod, has considered in any detail, if at all, in the time since 1997. But while the Church of England (along with other exempt denominations) passed, as it were, the examination following the DCMS 2004 round of consultations, the DCMS 2010 guidance said that 'the operation of the Ecclesiastical Exemption will continue to be monitored periodically', so that the question of fundamental review should not, and cannot be, endlessly postponed.

The Victorian Society coherently expressed its view in its petition to the Judicial Committee of the Privy Council (13 April 2015, unsuccessfully seeking permission to appeal in *Penshurst*[45]), from which I shall quote at length:

> 30. The Victorian Society opposes the ecclesiastical exemption in its current form. This is essentially for two linked reasons:
>
> (i) the lack of appropriate professional qualification of Chancellors; and
> (ii) the fact that Chancellors are members of the Church of England appointed by the Church of England.
>
> 31. As regards (i), Chancellors are not required to have any architectural qualifications or expertise. In the secular system, the Inspector at a public inquiry would invariably be an architect or allied professional such as town planner. They would have had extensive training in matters of architectural understanding and the planning system. They would be intimately familiar with the NPPF. They would be monitored in their performance by the Planning Inspectorate. They would undertake regular CPD to ensure that their skills and knowledge were up to date. Their day to day work would involve the making of complex architectural and planning judgments.
>
> 32. In the ecclesiastical courts the position is different. Chancellors are lawyers by profession. They do not usually have architectural training or experience. For many chancellors a contested faculty that turns on architectural matters will be very rare; some dioceses have not had one for many years. They are therefore operating at a severe disadvantage

45 *In re St John the Baptist, Penshurst* (9 March 2015) (unreported). The application to the Judicial Committee was numbered JCPC 2015/0049. It was refused on 16 July 2015. I am grateful to Chancellor Philip Petchey for supplying a copy of the petition to appeal, which he drafted for the Victorian Society.

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compared to planning inspectors. This is not a blanket criticism of all chancellors. One does have appropriate qualifications, and no doubt some, by diligent study, overcome the disadvantage that they are unqualified in the way identified by the Victorian Society. They do have the assistance of the advice of the Diocesan Advisory Committee. But it is the view of the Victorian Society that, in comparative terms, the disadvantages under which Chancellors labour increase the chances of mistakes occurring as compared with the secular system. This threatens the principle of equivalence of protection.

33. As regards (ii), Chancellors have to be communicants of the Church of England. Typically in reordering cases they have to sit in judgment between the wishes of a parish (i.e. part of the Church of England) and the architectural concerns of (usually) an amenity society. Although, as articulated, in the church courts

- there is no presumption in favour of alterations which further the role of the church building as a local centre of worship and mission
- there is a strong presumption against the issuing of a faculty that would result in harm to a listed building with serious harm only being permitted exceptionally

the perception of the Victorian Society is otherwise, with it being very difficult for the case of an amenity society to prevail against what is, objectively considered, a relatively weak case on need.

This is not of course to argue that Chancellors are biased in the sense that they are intellectually dishonest – giving what they appreciate to be undue weight to the arguments in favour of granting a faculty – but that their backgrounds tend to lead them to fail to appreciate architectural arguments and make them too ready to attach weight on arguments on need put forward by the Church.

One wonders what the Victorian Society would make of the recent advertisement by Gloucester Diocese for a new chancellor who would 'offer . . . legal judgments in clear, supportive and collaborative ways'.[46]

The statutory amenity societies were unhappy about the working of the ecclesiastical exemption in 1997. Despite the attempts made by my predecessor and myself to make more rigorous the scrutiny of proposed changes to listed churches by the issuing of guidelines which most chancellors have properly recited in their judgments, their judgments in finely balanced cases do not always fully reflect the 'strong presumption against proposals which will

46 *Church Times*, 14 February 2020. Absent is any reference to independent judgment.

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adversely affect the character of the building' (*Duffield* Question 5), and the related conservation principle that 'the desirability of preserving the listed church or its setting or any features of special architectural interest which it possesses is a consideration of considerable importance or weight'.[47] Refusals of a faculty in contested listed building cases remain surprisingly few, recent heroic exceptions being, in the Southern Province, *St John's Church, Waterloo*[48] and, in the Northern Province, *Christ Church, Fulwood*[49] and *Re St Anne, Aigburth*.[50] I hope that a stricter approach may follow from recent judgments in the Oxford and Lichfield consistory courts that, in applying the *Duffield* guidelines, the court had to consider whether the same or substantially the same benefit could be obtained by other works which would cause less harm to the character or special significance of a church.[51]

I recognise the irony here that there is a prevailing view, in the highest quarters of the Church of England, as well as at parish level, that the statutory amenity societies are meddlesome trouble-makers, who too often get their way to the detriment of the evangelistic mission of the Church. But the evidence simply does not support this view. Rather the amenity societies (among which I include Historic England) frequently and properly highlight conservation issues which would otherwise go unnoticed, yet for understandable reasons they seldom choose to become parties opponent; even where they do, time and again relatively weak cases of need prevail in the decisions of chancellors. As the Director of the Victorian Society is quoted on its website as saying in relation to the first-instance decision in *Re St Botolph, Longthorpe*,[52] allowing an extensive re-ordering of the Grade I listed church:

> We appealed against the Longthorpe decision partly because we felt that the proposed stripping out of the chancel had not been adequately justified, and partly because the Chancellor ignored serious heritage concerns raised by a number of statutory heritage consultees without giving any reasons why. If a Chancellor can do this, it raises the question of whether there is any point in us taking part.[53]

47 *In re St Peter, Shipton Bellinger*, at para 48, echoing Sullivan LJ's words in *East Northamptonshire DC v SCLG* [2014] EWCA Civ 137 at para 23.
48 [2017] ECC Swk 1.
49 [2013] ECC She 3.
50 [2019] ECC Liv 1.
51 For example, *St Peter and St Paul, Aston Rowant* [2019] ECC Oxf 3; *Re St Chad, Longdona* [2019] ECC Lic 5. This line of reasoning merits a short article in itself.
52 [2017] ECC Pet 1.
53 See <https://www.victoriansociety.org.uk/news/grade-i-st-botolphs-to-keep-chancel-fixtures-following-heritage-battle>, accessed 25 June 2020.

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The permitted scheme was later revised to the satisfaction of the Victorian Society, following my grant of permission to appeal the original decision.

The same sort of balancing exercise has to be carried out in the case of secular listed buildings, but my hunch (not informed by detailed study of comparable instances) is that the analysis of claimed need for change is generally more thorough in the case of secular buildings, leading to greater protection for secular listed buildings than is afforded by the faculty system to churches.[54] If my hunch is right, then this runs contrary to Archbishop Davidson's ambition, and to the rationale of the ecclesiastical exemption.

## SYSTEMS IN OTHER CHURCHES

I return to what other churches currently do. In the Roman Catholic Church, decisions in relation to listed buildings are taken by the relevant Historic Churches Committee (sometimes common to neighbouring dioceses), with appeal to a commission of three to which the relevant bishop delegates jurisdiction.[55] Thus, instead of our four-stage procedure – DAC, consistory court, appellate court and (if only rarely) the Judicial Committee of the Privy Council – there are only two stages. Or take the United Reformed Church (URC), whose Procedure of Control of Works to Buildings involves processing of the application by the local synod's Listed Building Advisory Committee (LBAC) and then decision by the Synod Property Committee, with an appeal to the Appeals Commission.[56] This provides both a simpler and a more expert tribunal at all stages than does the faculty system. The URC appeal system has an in-built 'policy of negotiation' designed to achieve 'reconciliation or compromise' before any case comes to a formal appeal. The Methodist Church of Great Britain also has detailed processes for the control of works to buildings, including their many listed buildings: the Connexional Conservation Officer and, in some cases, the Listed Buildings Advisory Committee play key roles, with decisions by the Methodist Council and an appeal procedure.[57]

This is all vastly simpler, and more lay-friendly, than the faculty system. And are there not lessons to be learned from the way in which our own cathedrals are regulated so successfully, and simply, through Faculty Advisory Committees and

54 Many unsatisfactory features of parish proposals are eliminated at the consultation stage, and thus never reach the chancellor. This is a partial explanation of the rarity of ultimate refusal of petitions.

55 The Bishops' Conference Directory on Ecclesiastical Exemption, <https://familyofsites.bishopsconference.org.uk/plain/wp-content/uploads/sites/3/2018/11/Directory-on-the-Ecclesiastical-Exemption-from-Listed-Building-Control_Jan2019-.pdf>, accessed 25 June 2020.

56 This consists of three persons appointed by the officers of General Synod, of whom two must be past or present members of an LBAC other than the one from which the appeal emanates.

57 Under Standing Order 332 of the Methodist Council, the LBAC is appointed to provide expert knowledge of historic church buildings, in order, under Standing Order 982, to provide advice to the Connexional Conservation Officer on all applications for listed building works. It is not a decision-making body.

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the Cathedrals Fabric Commission? The Church of England, if set free to contemplate something other than what we presently have, should (or at least may), while retaining the ecclesiastical exemption, be able to devise something quicker, cheaper and both more expert and more flexible – not to mention less legalistic – than the present faculty system. That is what the Draft Care of Churches Measure (Isle of Man), brought forward by its Legislative Committee in 2013–14, sought to achieve, through the establishment of a Care of Churches Committee, taking over most of the faculty jurisdiction of its vicar general at a time when, according to the chairman of its Legislative Committee, 'the faculty system was viewed by parishes in the Isle of Man with a mixture of incomprehension, fury and ridicule' (a view which I am authoritatively informed no longer continues, though it was prevalent in the Church of England 40 years ago).[58]

One fairly straightforward possibility might be to transfer most decision-making from chancellors to DACs, which can properly claim to have the expertise to do this, although whether this would be compatible with retention of the ecclesiastical exemption would need to be explored.

## CONCLUSION

I venture four final observations. First, a huge amount of time on the part of my judicial colleagues, and others at DAC level, is put into trying to make the faculty jurisdiction operate as well as it can. The benefits of the present system should be recognised, and only be replaced if a better system can be devised – as I believe it probably can; but that belief deserves to be tested against the sound (and formerly conservative) principle of holding fast to what you have unless you are sure you have identified something better.

Second, the much-needed fully fledged review should be chaired by an independent person, combining conservation expertise with knowledge of how the Church of England and the existing faculty system work. Otherwise there is a risk that any new system is even more Church-biased than the existing one, with consequent risks to detached, independent scrutiny.

Third, I recognise that enforcement, whether by injunction or restoration order, is more properly carried out by a legal tribunal, and that there are a few, but only relatively few, other areas where a judicial ruling is called for (where, for example, doctrinal issues arise, or especially sensitive pastoral

58 A key factor behind the establishment in 1980 of the Faculty Jurisdiction Commission was a private member's motion tabled for General Synod 'That this Synod considers that the Faculty Jurisdiction of the Ecclesiastical Courts should be abolished', which by 1979 had attracted 111 signatures: see *Report of the Faculty Jurisdiction Commission*, para 2. Since that time, the way in which the faculty system operates has been transformed, including enhanced consultation, Lists A and B, the online system, and enhanced training for chancellors and deputies.

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issues, such as exhumation). These matters could be dealt with by a small panel, or perhaps by the provincial vicars general.

Fourth, I also recognise that the Church of England at the present time faces a multitude of pressing existential problems, more important than the conservation of the fabric of its churches.[59] What I am calling for in respect of the faculty system is long overdue, but I am not optimistic that it is likely to be a priority for the Archbishops' Council or General Synod for some while yet. By the time of publication I shall have retired as dean and auditor, but my successor's applecart is unlikely to be speedily upset. In any event, I have said nothing about the future role of the ecclesiastical appellate courts, whose jurisdiction, possibly inconsistently, I in no way seek to question.

59 Quite apart from the present firefighting over safeguarding and gender issues, a major centralisation of administrative functions is called for, together with a review of the whole system of diocesan fiefdoms.

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