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CONSULTATION ON THE LAW COMMISSION'S 14TH PROGRAMME OF LAW REFORM

About us

1. This response is made on behalf of the Churches' Legislation Advisory Service [CLAS].
2. CLAS is the successor to the Churches' Main Committee, which was set up in 1944 to coordinate action by the Churches on war damage claims and which evolved into a body which monitors policy insofar as it affects its member organisations and makes representations to Government. The membership of CLAS includes most of the major denominations in the United Kingdom and, for historical reasons, the United Synagogue; and many of the smaller denominations have links with CLAS through ecumenical groups such as Churches Together in Britain and Ireland. CLAS operates through Governors, chaired by a senior bishop of the Church of England, who together constitute the trustees of the charity. It is serviced by a part-time secretariat which discharges its day-to-day responsibilities subject to policy control and guidance given by the Governors.

Our proposal for reform

3. We wish to raise a small but extremely confused area of local government law: **whether or not a parish or town council in England or a community council in Wales may grant-aid a place of worship.**

The problem with the current law

4. Parish, town and community councils raise a precept that enables money to be spent on matters that are important to, and benefit, the local community. Some time ago, we became aware that the Society of Local Council Clerks (SLCC) took the view that parish and town councils in England and community councils in Wales were prohibited from giving money to places of worship. The SLCC believes that s.8(1)(i) Local Government Act 1894 prohibits such financial support and that – unlike other aspects of that Act – there has been no subsequent legislation that overrides that prohibition. Similarly, the National Association of Local Councils (NALC) in England issued a briefing note in 2017

advising its members that the 1894 Act prevented parish and town councils from grant-aiding places of worship.

5. Section 8 of the 1894 Act enumerates the powers of parish councils; and 8(1)(i) reads as follows:

‘(i) to execute any works (including works of maintenance or improvement) incidental to or consequential on the exercise of any of the foregoing powers, or in relation to any parish property, *not being property relating to affairs of the church or held for an ecclesiastical charity.*” [emphasis added].

6. A letter dated 6 May 2014 from Brandon Lewis MP, at the time Parliamentary Under Secretary of State at DCMS, confirmed that the Government agreed that the 1894 prohibition was still in force, though it did not offer any analysis of the relationship between the 1894 Act and subsequent legislation. Mr Lewis suggested that the possibility of changing the legislation would be looked at but, so far as we know, there has been no progress on the matter.

7. Others take a different view. The Church of England has argued in the past that parish and town councils already have the necessary powers to make such grants under the powers in s.137(1) or (3) Local Government Act 1972; and an earlier version of its *Funding Guide* stated that:

‘Section 137 of the Local Government Act 1972 permits a Local Authority (whether at county, district or parish council level) to contribute towards the maintenance, repair or adaptation of churches on the basis that the expenditure would be in the interests of, and bring benefits to, some or all of the inhabitants of the area.’

The Church of England’s current *Funding Guide*,¹ however, makes no reference to the issue whatsoever.

8. In March 2016, the Government commissioned an independent *English Churches and Cathedrals Sustainability Review* chaired by Bernard Taylor – generally known as the Taylor Review. Its final report published in December 2017, *Sustainability of English Churches and Cathedrals*,² dealt with the issue under consideration at p 31, as follows:

‘3. Legal clarification

The law should be clarified, whether through legislative change or the issue of guidance, to establish that local authorities are not prohibited from awarding funding to churches.

Section 8 of the Local Government Act 1894 confers a number of additional powers on a parish council. Among these is the power to execute works subject to the condition that they do not relate to property relating to the affairs of the church.

¹ Available at <<https://www.parishresources.org.uk/wp-content/uploads/FG13-Local-authorities-and-funding.pdf>>, accessed 26 June.

² Available at <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/669667/Taylor_Review_Final.pdf> accessed 14 July.

The Local Government Act 1972, however, permits a local authority (whether at county, district or parish council level) to contribute towards the maintenance, repair or adaptation of churches and even possibly levy a parish rate on the basis that the expenditure would be in the interests of, and bring benefits to, some or all of the inhabitants of the area.

Evidence submitted to the Review suggested that there is considerable confusion as to whether the 1972 Act supersedes the Local Government Act 1894, and that the 1894 Act is still perceived as a barrier, preventing investment in church buildings by local authorities.

Clarification on this point should be given, whether by repealing section 8 of the 1894 Act, or by the issue of guidance. This should clarify that local authorities can invest in church buildings in accordance with Section 137 of the Local Government Act 1972.

Additionally, repeal or the issue of guidance should clarify that certain parish councils are also able to fund church buildings using powers contained in the Localism Act 2011. The Act allows certain parish councils, as long as they meet certain criteria, to pass a resolution which allows them to have the benefit of the so-called “General Power of Competence”. An eligible parish council is one in which at least two-thirds of the members have been elected (ie not co-opted), and in which the clerk has completed one of a specified range of training courses. Having passed such a resolution, the relevant parish council would have the power to fund repairs and improvements and changes to church property (albeit it would have to take such a decision in line with its proper internal processes).’

9. In March 2017, the Church of England’s Church Buildings Council posted an opinion, *Local Authority Investment in Church Property*,³ in which it cast doubt on advice on the matter issued by the NALC, as follows:

‘1. The Church Buildings Council is aware that the National Association of Local Councils has recently circulated a briefing note in which they re-state their belief that the 1894 Local Government Act prevents parish councils from spending money on churches. This document lays out the views of the Church Buildings Council on this matter.

2. The Church Buildings Council, following legal advice, has concluded that the provisions of the Localism Act 2011 and the Local Government Act 1972 allow for all local authorities, including parish councils, to contribute to the upkeep of church property under certain circumstances – mainly related to the public benefit achieved.

3. Our view is supported by the 2017 English Cathedral and Church Buildings Sustainability Review (p.31-32), [*the Taylor Review*] commissioned by HM Government.’

10. The Church Buildings Council’s opinion went on to say that it was ‘working with the Government to implement this recommendation. In the meantime, we believe the intent behind it clearly indicates that parish councils and local authorities can invest in church buildings under two separate Acts, both of which supersede the 1894 Act.’

³ Available at <https://www.churchofengland.org/sites/default/files/2019-02/CCB_Local-Authority-Investment-in-Church-Buildings-Guidance.pdf> accessed 26 June.

11. The House of Commons Library's Briefing Paper of 25 February 2019, *Parish and town councils: recent issues*,⁴ sums up the position at page 18:

'6.2 Parish council funding of churches

An issue arose in the late 2010s regarding the legal power of parish councils to fund repairs to local churches. This is a grey area in the law, with two statutory provisions pointing in opposite directions.

Section 8 of the Local Government Act 1894 provides that parish and town councils cannot give funding to ecclesiastical charities. There is a competing provision in section 137 (3) of the Local Government Act 1972 that allows parish and town councils to give funding to charitable bodies. Awareness that the law is unclear has discouraged many parish councils from providing funding for churches, in case they attract a legal challenge. Councils concerned over the legality of proposed donations should take legal advice.'

12. We are not aware of any case-law on the issue. That is hardly surprising, because no parish or town council is likely to risk incurring the costs of an unsuccessful legal challenge.

13. Various issues arise.

14. First, the extent of the prohibition in the 1894 Act is not clear. It has been suggested that the 1894 Act was enacted in the context of the powers and duties of the ecclesiastical parish vestry being transferred to the civil parish, except for the parish vestry's powers and duties relating to the church – meaning the Church of England building in the parish.⁵ But the 1894 Act also prohibits spending on the property of an ecclesiastical charity, which under s.75(2) includes:

'a charity, the endowment whereof is held for some one or more of the following purposes:—

- (a) for any spiritual purpose which is a legal purpose; or
- (b) for the benefit of any spiritual person or ecclesiastical officer as such; or
- (c) for use, if a building, as a church, chapel, mission room, or Sunday school, or otherwise by any particular church or denomination; or
- (d) for the maintenance, repair, or improvement of any such building as aforesaid, or for the maintenance of divine service therein; or
- (e) otherwise for the benefit of any particular church or denomination, or of any members thereof as such.'

15. Secondly, the opinion of the Church Buildings Council – however carefully researched – cannot be regarded as definitive. And even if it is correct, the issue continues to inhibit parish and town councils, some of which are reluctant to grant-aid places of worship for fear of adverse comment

⁴ Available at <<https://researchbriefings.files.parliament.uk/documents/SN04827/SN04827.pdf>> accessed 26 June.

⁵ Or what is now the Church in Wales: the 1894 Act predating the Welsh Church Act 1914.

from their auditors. It is impossible to say how widespread the problem is because very few parish and town councils publish their minutes online; however, a non-comprehensive Internet search revealed three recent examples of parish and town councils refusing funding on the basis of the NALC's advice:

- for a grant towards making safe a dangerous flagpole on a church tower: Tutbury PC, 22 October 2018;
- for a grant towards cutting the grass in the churchyard of Kirklington with Hethersgill: Kirklington PC, 14 July 2020;
- for a grant (purpose unspecified) to St Wendrona's church, Helston: Helston TC, 21 September 2017.

16. *Thirdly, in respect of England* it has been suggested that if a parish or town council is "eligible" and has adopted the power of general competence under s.1 Localism Act 2011, there is no limit on the amount that it may spend on church repairs. However, the paragraph from the report of the Taylor Review quoted above casts doubt on that position, and the Historic Religious Buildings Alliance is aware of two cases in which an auditor has told a parish council that because of the bar in the 1894 Act, it cannot give money to a local church despite its express wish to do so. Apparently, the SLCC has raised the issue with the Government and has asked for the removal of what the SLCC regards as a prohibition.

17. *In respect of Wales*, s.30 of the Local Government and Elections (Wales) Act 2021 introduced a similar general power of competence for community councils which are "eligible" under the criteria set out in that section. S. 25(1) of the Act states, however, that 'The general power does not enable a qualifying local authority to do anything that the authority is unable to do by virtue of a pre-commencement limitation', and s.24(4) clarifies that such a limitation 'means a prohibition, restriction or other limitation expressly imposed by a provision of ... any other primary legislation passed before, or on the same day as, the day on which this Act was passed;'. Schedule 3 Part 2 of the 2021 Act amends or repeals (for Wales) some pre-commencement legislation so as to obviate some pre-existing restrictions, but neither the 1894 Act nor s.137 of the 1972 Act are included in that list. It should be noted that s.28(1) of the 2021 Act provides that 'If the Welsh Ministers consider that an enactment prevents qualifying local authorities from exercising the general power, or obstructs them in exercising the general power, the Welsh Ministers may by regulations amend, modify, repeal, revoke or disapply that enactment' – which seems to provide a secondary legislative route to remove the ambiguity for Wales.

Are burial grounds a special case?

18. In its advice dated March 2018, *Spending parish council money on your local church (including burials): what are parish councils legally allowed to do?*,⁶ Leicestershire and Rutland Association of Local Councils pointed out that the Local Government Act 1894 'expressly prohibits councils from

⁶ Available at <<https://www.leicestershireandrutlandalc.gov.uk/news/2018/03/spending-parish-council-money-on-your-local-church-including-burials--what-are-parish-councils-legally-allowed-to-do>> accessed 26 June.

spending any money on maintaining or improving church property. In practice, this includes the church building itself, the churchyard and the church hall'. As to burial grounds, however, it suggests that subsequent legislation appears to contradict the 1894 Act:

'For example, s.214(6) of the Local Government Act 1972 permits a parish council to contribute towards the expenses incurred by any person in providing or maintaining a cemetery and s.215 of the Local Government Act 1972 permits a parish council to maintain a closed churchyard ...'

But though it is widely accepted that a parish or town council can legally maintain a closed churchyard (and many in fact do so):

'... there remains a difference of opinion ... over whether a parish council is permitted to maintain or contribute to the maintenance of an open churchyard: the debate being, does s.214(6) of the Local Government Act 1972 override the provisions of the 1894 Act?'

19. Current guidance from the NALC accepts that in the absence of case law and specific clarification from the Government there is no definitive answer to the question as to whether or not a council can legitimately maintain or contribute to the maintenance of an open churchyard. However, the NALC briefing states that the Government's current view is that there is no need for any further legislation on the point because it believes that the restrictions in the 1894 Act do not override the provisions in the later Acts.

Conclusion

20. As we hope the foregoing demonstrates, the current law is simply unclear. It may seem to be a very small matter, but it is one of great importance both to places of worship and to parish, town and community councils.

21. We would argue that the current lack of clarity is unsatisfactory. The Government's view on the matter, however welcome it may be to the National Association of Local Councils, cannot be regarded as definitive in law. In our view, a lack of clarity in the law to this extent is simply wrong in principle.

22. We would hope that it might be possible to include the issue in the Commission's 14th Programme, perhaps under the Environment limb, for two reasons:

- as the very fact of their listing recognises, listed places of worship are an important part of the built environment for their own sake, irrespective of their primary function, and small grants can often make a considerable contribution to basic building maintenance; and
- in rural areas in particular, a local (Anglican) parish church or a place of worship of another religious denomination, whether listed or not, is often the largest public building in the community, and its role as a venue for non-religious community activities is often just as important as its purpose as a place of worship – if not more so.

23. We suggest that clarifying the law in this area would meet at least some of the Law Commission's criteria for law reform, specifically:

- *fairness,*
- *improving the efficiency and/or simplicity of the law by ensuring the law is clearly drafted and coherent to those who need to use it, and*
- *supporting the rule of law by ensuring that the law is transparent.*

24. As to why the Commission is the appropriate body to undertake this work, the answer is simply that neither the Westminster Government nor the Welsh Government has shown the slightest interest in reforming or clarifying the law in their respective jurisdictions.

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