

The purpose of this note is to rebut factual inaccuracies relating to The Episcopal Church in General Synod paper **GS 1764A**, a briefing paper for a Private Members' Motion dealing with the relationship between the Church of England and the Anglican Church in North America (ACNA). A separate note refers to The Anglican Church of Canada.

**Acknowledgements:**

In compiling this note I have consulted David Booth Beers, Chancellor to the Presiding Bishop and Mary E. Kostel, Special Counsel to the Presiding Bishop for property litigation and discipline. I have also been assisted by: the Revd Tobias Stanislas Haller BSG, the Revd Scott Gunn, and Ms Susan Erdey of the Church Pension Group.

Simon Sarmiento

**Valuable background reading:**

Professor Bruce Mullin's Affidavit in the case of the Diocese of Ohio  
<http://thinkinganglicans.org.uk/uploads/mullin01.pdf>

Professor Bruce Mullin's Affidavit in the case of the Diocese of Fort Worth  
<http://tinyurl.com/mullin03>

Constitution and Canons of The Episcopal Church (2009)  
<http://extranet.generalconvention.org/staff/files/download/648>

The "Chapman report"  
<http://www.thinkinganglicans.org.uk/ss/archives/000405.html>

The "Barfoot memo"  
[www.thinkinganglicans.org.uk/overseasAEO.pdf](http://www.thinkinganglicans.org.uk/overseasAEO.pdf)

Following the Money  
<http://www.edow.org/follow>

The paper **GS 1764A** makes allegations concerning two main topics: clergy and property. Quotations from the paper are in italics.

**Clergy**

In relation to "the use of Canons in the depositions of bishops and clergy" the paper suggests that 12 ACNA bishops and 404 clergy have been deposed from TEC, and that

*"bishops and priests who have not left [TEC] are deposed without due canonical process because of what they might do, or that they should be formally advised that they have abandoned their ministry when they have done nothing of the kind"*

The numbers quoted in the paper and much else comes directly from a document referenced there: <http://www.americananglican.org/assets/Resources/TEC-Canonical-Abuses.pdf> produced by the American Anglican Council, a group that has campaigned relentlessly against the leadership of The Episcopal Church since at least February 2001 (although its antecedents are even older). A refutation of all its claims is beyond the scope of this note.

The numbers are incorrect. Only 3 bishops have been deposed recently (see details below) and the total of ACNA-related clergy depositions to date is 170. The number of former TEC bishops associated with ACNA is eleven.

Two key principles underlie the TEC approach to the issue of clergy movements:

- The Episcopal Church requires all clergy to subscribe to a declaration which reads: “ ... **I do solemnly engage to conform to the Doctrine, Discipline, and Worship of the Episcopal Church.**”
- The Episcopal Church takes extremely seriously the issue of provincial and diocesan geographic boundaries and, like the Church of England, does not permit any of its own bishops to perform Episcopal acts within the boundaries of any of its dioceses without the express approval of the relevant diocesan bishop.

It is important to note that the declaration, commonly known as the Declaration of Conformity, refers specifically to **the Episcopal Church** and not to any wider body, such as the Anglican Communion. Its use is mandated by Article VIII of the TEC Constitution and by the Ordinal of the American Book of Common Prayer.

The same Declaration is required of all clergy – including bishops – who come from other provinces of the Anglican Communion to minister in TEC. Canon III.10.2 reads in part (emphasis added):

Before receiving the Member of the Clergy the Bishop shall require a promise in writing to submit in all things to the Discipline of this Church, **without recourse to any foreign jurisdiction, civil or ecclesiastical**; and shall further require the person to subscribe and make in the Bishop's presence, and in the presence of two or more Presbyters, the declaration required in Article VIII of the Constitution.

All clergy – including bishops – who leave TEC for another province of the Anglican Communion, or for any other church, are required to complete a corresponding exit process under the Renunciation canons (III.9.8 priests and deacons, III.12.7 bishops). The Renunciation canons are explicit that the subject matter is “renunciation of the ordained Ministry **of this Church**” (emphasis added).

The American Anglican Council and others have repeatedly misrepresented the use of the Renunciation canons (III.9.8 priests and deacons, III.12.7 bishops) as being of similar effect to the Deposition canons (IV.9 bishops, IV.10 priests and deacons). This is wholly incorrect, and the use of the Renunciation canons has no implications with regard to the indelibility of orders. The process is purely juridical in nature, and is easily reversed if the individual changes their mind and wishes to return to TEC (as happened twice for example in the case of another former Bishop of Fort Worth, Clarence Pope). In a clear majority of cases of clergy leaving TEC for ACNA or one of its predecessors, TEC bishops have taken this pastoral approach in preference to Deposition.

TEC also has a separate canonical process for transfer of clergy between dioceses within TEC, known as Letters Dimissory (canon III.9.5 Section 4) but this process is not now used for transfers outside TEC.

Three TEC bishops were deposed recently under Canon IV.9 Of Abandonment of the Communion of This Church by a Bishop.

- Bishop William Cox, retired Bishop Suffragan of Maryland, resident in the Diocese of Kansas: performed Episcopal acts, including ordinations, on behalf of the Church of Uganda without permission of the local TEC diocesan bishop, since June 2005, deposed in March 2008.
- Bishop John-David Schofield, formerly Bishop of San Joaquin: purported to remove that diocese from TEC to affiliate with the Province of the Southern Cone, deposed in March 2008.
- Bishop Robert Duncan, formerly Bishop of Pittsburgh: purported to remove that diocese from TEC to affiliate with the Province of the Southern Cone, deposed in September 2008.

Nine other bishops now associated with ACNA were treated under Canon III.12.7 Renunciation of the Ordained Ministry. One was Bishop Jack Iker, formerly Bishop of Fort Worth, who also purported to

remove his diocese from TEC and affiliate it with the Province of the Southern Cone, in November 2008, but then announced that he had voluntarily left TEC, before the abandonment process could take its course.

Seven others were retired or resigned American bishops who voluntarily decided to leave TEC, associate with other provinces of the Anglican Communion while remaining resident in various TEC dioceses, and continuing to perform Episcopal acts without the consent of the local diocesan bishop.

Also, a former Church of England bishop, Henry Scriven, who had served as Assistant Bishop in Pittsburgh, returned to the Church of England. When Bishop Scriven became an Assistant Bishop in Pittsburgh, he was required, in accordance with normal practice, to make the Declaration of Conformity described above.

As an Assistant Bishop in the Diocese of Pittsburgh, his office ceased upon Bishop Duncan's deposition, in September 2008, by virtue of Canon III.12.5 although he conducted an Ordination after that date without the consent of the Ecclesiastical Authority of the TEC diocese. He notified the Presiding Bishop that he was returning to England and placing himself under the jurisdiction of the Bishop of Oxford. He was thus expected to make a Renunciation in accordance with Canon III.12.7 as described above. It is untrue that he was deposed.

The American Anglican Council document claims a total of 161 clergy depositions over several years – apart from bishops. This is in error. There were 9 additional ones in Quincy in November 2009 that have been omitted, so the correct number is 170. The use of depositions varies from diocese to diocese, for example in Pittsburgh there have been none apart from Bishop Duncan. To put the AAC claim in perspective the total numbers of clergy removals of all types, including depositions, for all reasons, for each of the last four years, ending December 2008 were: 70, 71, 101, and 109. The current total number of clergy in good standing in The Episcopal Church is c. 18,000.

## **Property**

The paper misleadingly claims as follows:

### *Lawsuits Concerning Property*

*At the General Convention in 1979, the Committee on Canons of the House of Bishops proposed the following Canon, which was adopted: "All real and personal property held by or for the benefit of any Parish, Mission or congregation is held in trust for this Church [i. e. the Episcopal Church in the United States, my insert] and the Diocese thereof.....". It is often known as the Dennis Canon from the name of its drafter, though more strictly it is now Title I. 7. 4 of the Canons of the Protestant Episcopal Church of the United States of America.*

*At a stroke, all parish property was transferred to the ownership of the national church. (In legal terms however, this transfer of property may not be beyond challenge as, unlike Measures of General Synod, the "laws" of TEC are not laws of the land.) In English terms, the equivalent would be the transference of all parish, parish trust and benefice property to the Archbishops' Council together with the assets of the Church Commissioners.*

*In the United States, a particularly unpleasant aspect of litigation has been the willingness of TEC and some dioceses such as San Diego and Los Angeles to sue individual vestry (the American equivalent of PCC) members of departing congregations, in addition to the parish corporations of which they were trustee members. Litigation of this kind has the consequence of putting at risk of forfeiture the personal bank accounts, savings and homes of lay church officers. Some have had difficulty in refinancing their mortgages (as defendants in a personal financial lawsuit) and have had their credit ratings put in jeopardy.*

And at the end of the paper, it also says (emphasis added):

*In asking Synod to express a desire to be in communion with ACNA, there is therefore no suggestion that we should not remain in communion with TEC or ACoC, nor am I suggesting that everyone in ACNA is a paragon of perfection. Rather, it is a recognition that there is a considerable and growing body of faithful Anglicans representing a wide range of church traditions, many of whom have been hurt, who are now members of ACNA. They would be grateful to be in communion with the Church of England as the Windsor/Covenant process works through. **In some cases it might also help parishes to retain the property they have built and paid for.***

While the lack of establishment necessitates some real differences, for all practical and canonical purposes, Episcopal parishes are substantially similar to those in England. For example, the canons regulate the definition of parish boundaries, formation of new congregations within the bounds of an existing parish (and requiring its permission) and deferring to civil divisions where church authority has not [yet] defined parish boundaries. (Canon I.13) Clergy are not to exercise ministry in another's cure without permission. (Canon III.9.6.b) The "geographical" nature of the church is well laid out in Episcopal canon law.

Getting into the details of property, the paper completely misunderstands the question of ownership versus trusteeship. It attempts to draw a contrast between the situation in England and the United States while they are in fact very similar if not identical. **The "Dennis Canon" (about which more below) did not "transfer ownership" of parish property, but clarified the trustee relationship that parish leaders have in relation to the larger church, just as in England.**

This trustee relationship has only ever meant that the national church has an enforceable interest to ensure that the property should be used only for the mission of the church. A helpful comparison may be made with the provisions of the Parochial Church Councils (Powers) Measure 1956 and The Incumbents and Churchwardens (Trusts) Measure 1964.

This clarification came at the recommendation of the Supreme Court of the United States, which reaffirmed that civil courts were not to become entangled in settling religious disputes. An 1872 case (*Watson v. Jones*) clarified that either implied trust or being part of (and answerable to) a general church (both of which applied to Episcopal parishes) were sufficient to decide in favour of the diocese or national church, and under civil law this is how the vast bulk of property dispute cases were settled for over a century. In a 1979 case (*Jones v. Wolf*) the Supreme Court ruled that "neutral principles" might also be considered. Recognizing that this was a shift in the application of civil law, the Court noted (emphasis added):

At any time before the dispute erupts, the parties can ensure, if they so desire, that **the faction loyal to the hierarchical church will retain the church property.** They can modify the deeds or the corporate charter to include a right of reversion or trust in favor of the general church. **Alternatively, the constitution of the general church can be made to recite an express trust in favor of the denominational church.**

The Episcopal Church chose to accept this invitation, and adopted the "Dennis Canon" — named for Bishop Walter D. Dennis, Suffragan of New York — as a declaration of what the church had always held to be the case, and which had been the almost universal understanding under the civil law up to that time, that is, rendering the *implied* consent or trust explicit. As the Court had stated in 1872, in defining the nature of a hierarchical church such as The Episcopal Church (which they named explicitly as an example):

All who unite themselves to such a body do so with an implied consent to this government, and are bound to submit to it. But it would be a vain consent and would lead to the total subversion of such religious bodies, if anyone aggrieved by one of their decisions could appeal to the secular courts and have them reversed. It is of the essence of these religious unions, and of their right to establish tribunals for the decision of questions arising among themselves, that those decisions should be binding in all cases of ecclesiastical cognizance, subject only to such appeals as the organism itself provides for.

Thus, what the paper perceives as some sort of novel transfer of property rights was actually a *continuation* of what had been well understood practice, and canonical requirement, for over a century, and the underlying principle has been recognized by the appellate courts of all but one American state in which cases have been tried.

It is not that the courts are reluctant to address disputes involving churches, but that the rule of law, rather than debate over doctrine, should be the controlling factor. The paper seeks to introduce just such a doctrinal debate (as to who is more faithful to “Anglican belief and practice”). By gaining a form of approval for dissident congregations from the Church of England the motion is hoping to make use of the very legal principle its proposer holds to be inappropriate — but at the level of the Communion rather than of the Diocese or Province — in order for ACNA and its parishes to succeed in their litigation.

A motion by General Synod is unlikely to have such an effect, but will *exacerbate* the lawsuits by introducing additional confusion, and likely raise false hopes that parish property will be retained by those departing from the very church whose existence made their holding property in trust as a corporate parish possible. Such an action by General Synod will represent an interference not only in the polity of the Episcopal Church, but in the civil courts — and will increase both the extent and expense of litigation.

Which brings us to the issue of natural justice. First of all it must be noted that in many cases the vote of a vestry or congregation to secede from the Episcopal Church is not unanimous — the rights of the minority who wished to remain loyal to the Episcopal Church appears not to factor into consideration in this paper. Moreover, with the exception of those few parishes actually founded and constructed by the present generation, and however “faithful” the dissident members may be, they are in point of fact alienating property that had been dedicated to the use of the Episcopal Church and its worship. (In some recent instances, dissident parishes have come to a settlement with their respective dioceses, and been able to retain property on condition they do not re-affiliate — the situation is not as black and white as the paper portrays it.)

The paper complains about the liability vestry members may encounter when their congregation moves to disassociate from the Episcopal Church. While acknowledging that this is the law in Canada, the author appears not to understand that it is also the law in much of the United States (again, such matters vary from state to state but the liability of vestry members for their corporate acts is a matter of civil law not church law.) In those states where this is the case, vestry members are generally covered by Directors and Officers Liability Insurance, for that very reason. In fact, it is contrary to the policy of The Episcopal Church to seek financial remedies from laypersons, and it has never done so.

Natural justice requires that people take responsibility for their actions. No one has forced individual clergy or laity to leave the Episcopal Church — and they do have the right to do so if their consciences are wounded by the decisions of that church. It is, however, a matter of both church and civil law — and natural justice — that they do not have any right to retain property given in support of the church when they choose to leave it.

Simon Sarmiento  
4 February 2010