



## ELS Working Party reviewing the Clergy Discipline Measure 2003

Interim Report/September 2020

## **Interim Report of ELS Working Party Reviewing the Clergy Discipline Measure 2003**

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## Introduction and Background

1. On 29 January 2020 the chair of this working party gave a lecture to the Ecclesiastical Law Society (ELS) entitled 'Safeguarding in Church and State over the last 50 years'<sup>1</sup>. Towards the end of the lecture he ventured a few suggestions as to how the current Clergy Discipline Measure 2003 needed to be improved. Having made a few specific proposals, he said:

"If there is any merit in any of these proposals then they will need much more work to refine them. I am conscious of some objections that can be raised about some aspects of my proposal. But I want trigger thinking and discussion to find a better way forward. I am aware that there is a CDM Working Group looking at these matters and I commend these proposals for them to add into their considerations.

My own experience as a Judge involved in devising and then establishing changed procedures was that a multi-disciplinary working party of practitioners sitting down round a table and doing "process mapping" can generate new working practices much more efficiently than something imposed from on high or devised by managers who are now too far removed from the day by day doing of the work."

2. Not so very long after that he was asked by the Chair of the ELS if he would be willing to chair a working party for the ELS to carry out that task. He agreed and adopting his previous secular employment practice described in the above quotation he sought to draw together a group of members who had everyday working experience of the CDM in different roles. On that basis he brought together a group consisting of a bishop, a bishop's chaplain, an archdeacon, an incumbent, an ordained member of the Clergy Discipline Commission (CDC), a provincial registrar, a diocesan registrar, a litigation solicitor, an experienced tribunal chair, an appellate judge, and a barrister with wide experience of other professional disciplinary systems; we had a lawyer turned priest to act as our researcher and secretary. One of the members has been the subject of multiple CDM complaints which continued for 23 months before being finally dismissed.
3. We have so far met as a full group on 4 occasions. We have had a theology sub group looking at the theology of discipline and punishment and the role of bishops as it bears on the issues we have been considering. Another small group has met to consider the outcome of our consultation process and to flesh out the draft of this interim report.
4. The consultation we carried out was initially circulated to the ELS membership, but through social media and other means, including a paragraph in the Church Times, it became more widely known about and there were some 46 separate responses.

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<sup>1</sup> <https://ecclawsoc.org.uk/wp-content/uploads/2020/01/Collier-From-Ball-and-Banks-decade-by-decade-1.pdf>

5. Following on from that consultation, it became clear that there was substantial support for our initial view that the current CDM process is having to cope with a large number of complaints about clergy concerning matters which whilst of significance to the complainants are of a lower level of complaint than (a) was anticipated when the 2003 Measure was introduced and (b) the system is designed to cope with. There have been a number of reports and proposals suggesting that a way needs to be found for dealing with these lower level matters outside the CDM process.
6. We have taken a long hard look at the Measure and its operation. There are a number of issues that we have identified in a paper entitled "A reflective walk through the CDM process" which is appended to this interim report (Annex 1). They include:
  - a. The high number of cases brought by individuals who were neither parochial nor diocesan officers
  - b. The absence of any early enquiry into the allegation or the seeking of a response from the cleric
  - c. The absence of any recognition of the need to identify and dismiss allegations of a frivolous or vexatious character
  - d. The absence of any filtration process for examining complaints before deciding how to proceed
  - e. The high percentage of cases that are dismissed
  - f. The frequency with which timetables are not complied with
  - g. The delay in bringing cases to a conclusion
  - h. The role of the Designated Officer (DO)
  - i. The anxiety and stress that is caused to many who are complained about who fear loss of home and livelihood
  - j. The failure of dioceses to work with prohibited clergy in helping them return to ministry (or into some new walk of life)
  - k. Confusion as to the role of the bishop
7. We have noted that the Measure differed in a number of material respects from the proposals in *Under Authority (UA)* which was the report of the working party that led to its introduction. In particular the Stage One process proposed in *UA* was not introduced. That in our judgement was a major error which has been compounded by other differences between *UA* and the Measure including the widening of the ambit of several of the "ecclesiastical offences".
8. We were very much helped in our early thinking by work done by the Sheldon Hub which has been working with a large number of priests who have been damaged by their experiences of being subject to a complaint under the Measure. For many they did not know the nature of the complaint against them for a long time after being told that there was a complaint. They laboured under fear that the complaint might lead to loss of home and livelihood. The time taken to bring complaints to a resolution was in many cases unconscionable. For those who have been subject to penalty there has been little attempt to restore them to ministry thereafter. The

Sheldon Hub in conjunction with Aston University carried out a survey of those who had been subject to a CDM complaint and we have been given access to some of the data compiled in that survey, for which we are enormously grateful. The Sheldon Hub also responded to our survey with an extensive submission to which we have had significant regard.

9. We are also aware that the Bishop at Lambeth has been leading a Working Group looking at the review of the CDM; with his consent two members of his group are also members of our working party. We know that when the Archbishop of Canterbury gave evidence to the Independent Inquiry into Child Sexual Abuse (IICSA) he stated that the CDM was not fit for purpose in relation to safeguarding. We are also conscious that there is an argument being advanced in some quarters that the Church should hand over discipline, particularly in relation to safeguarding, to an outside agency as it cannot be trusted to deal with matters itself. We are not persuaded that that is the case. How the Church's policy and practice in relation to safeguarding is dealt with in the future is not something that will or could be entirely managed through the disciplinary process, but the disciplinary process in the future must be able to deal with priests and bishops who have failed in relation to safeguarding. Even under the CDM, bishop's disciplinary tribunals, are, despite the nomenclature, truly independent bodies over whose decisions, whether as to finding or penalty, the bishop has no control. We are aware of significant failings in the current procedures but consider that a proper system based upon sound principles could deliver justice for victims and ensure due process in the disciplinary aspects of safeguarding matters without the expense and complexity involved in setting up an external agency for discipline and standards.
10. We have also looked at the history of clergy discipline, beginning with what we learn from scripture. We then traced the developing role of the bishop in discipline matters: we tracked how it developed in England with separate church courts being instituted by William the Conqueror in about 1072, and noted that the Reformation brought about no significant change apart from transferring final appeals from Rome to the Court of High Commission and the High Court of Delegates in England. We then examined the various changes made in the 180 years from 1840 when a series of Statutes and Measures introduced new offences and new processes in relation to clergy discipline. We found a repeated pattern over those 180 years: dissatisfaction with the then current system led to the introduction of a new one only for that itself to be subject of criticism not long after it was brought into effect. We are acutely aware of the risk of our adding to the repetition of this pattern. Therefore we have again and again asked ourselves questions about the underlying issues of theology as well as what is practicable to ensure the fair and timely resolution of complaints and disciplinary matters. We have also tried to keep in mind that our contemporary society has high levels of expectation of those in authority and/or those in the service professions and requires them to be accountable. However we have also recognised that sometimes our theology will require us specifically not to follow contemporary trends and patterns.

11. One of the themes that emerged from examining the history of clergy discipline was that of *Pro salute animæ* – for the good of the soul – which has long been seen as the object of ecclesiastical discipline. That has involved both the soul of the individual believer and the soul of the body corporate – the Body of Christ. That has caused us to reflect on the purpose of discipline in the Christian tradition.

### **The purpose of Christian discipline**

12. The starting point is often taken as Matt. 18: 15-17. However, that passage is not often set in its greater context, namely the exchange between Jesus and Peter which immediately follows, in which Jesus says that we must be always prepared to forgive those who sin against us (Matt. 18:22). There then follows the parable of the unforgiving servant (Matt. 18:23-35), which vividly illustrates the consequences of withholding mercy by those who have received mercy and forgiveness from God. It is also important to recognise that this model for discipline and correction appears to be based on a passage from Leviticus, Lev. 19:15-18, which forms part of the so-called 'Holiness Code' which seeks to regulate conduct so as to live rightly before God. This passage calls on individuals to determine disputes justly and not to bear hatred against any who have wronged us, but rather reprove them openly; this is seen to flow directly from the divine command to "love your neighbour as yourself" (Lev. 19:18).
13. The following themes emerged as we reflected on the nature and purpose of discipline within the Church. First of all, it is clear that the exercise of discipline is not about retribution or punishing wrongdoing. As Lev. 19 reveals, the purpose of confronting the wrongdoer is to bring any fault into the open rather than allow it to fester and build into a cause for vengeance; it is part of the practical outworking of the love we are to have for our neighbours, and must be read alongside Christ's command in Matt. 18 to never stop forgiving sinners no matter how many times they wrong us. We noticed that Jesus places the onus on the wronged party to instigate the process – they are called to lay aside their rights as the injured party in order to approach the sinner in a spirit of openness and forgiveness. This gets to the heart of what discipline in the Church is really about – reconciliation and the restoration to right relationship within and across the Body of Christ. In Matt. 18 that the process is only escalated, and the sinner only put at risk of exclusion from the Church, if they persistently refuse to acknowledge their fault and the wrong they have caused to another, with the grave hurt and damage this can cause to individuals and to the community. It is a measure of last resort to maintain the health of the whole Body, and always works with the proviso that the Church must welcome back the wrongdoer if and when they finally repent and seek to repair their relationship with the injured party and the wider community.
14. We find such an act of exclusion in 1 Corinthians, when Paul orders the local church to hand one notorious sinner "over to Satan for the destruction of the flesh, so that his spirit may be saved on the day of the Lord" (1 Cor. 5:5). Again, this is not punishment out of spite or vengeance; rather it gets to the second theme of

Christian discipline within the Bible, which is that the power to correct wrongdoing should be directed at leading the sinner to repentance and spiritual growth. It is the wellbeing of all parties to a dispute, victims and wrongdoers, which concerns the Church in the exercise of its disciplinary authority, as it works to promote reconciliation and right relationship and to build up all members of the community in holiness.

15. The third and final major theme of the theology of discipline evident in the Bible, is vividly illustrated by the parable of the unforgiving servant which follows Jesus's admonition to Peter in Matt. 18 (Matt. 18:23-35). This is that the Church must always exercise discipline hand-in-hand with mercy, it must always be prepared to forgive as it has itself received forgiveness from God.
16. Through these reflections we came to appreciate how the three themes of reconciliation, repentance and forgiveness, hold together within the wider biblical themes of redemption for sin, sanctification and the unity of Christians in the Spirit.
17. It is integral to the Church's calling as the Body of Christ and God's holy people to uncover and confront sin in its midst, and it has received real authority to do so effectively (Matt. 18:18). Yet the Church must never forget that God has granted it this authority "for building up and not for tearing down" (2 Cor. 13:10), and that every act of discipline is an opportunity to make right what has gone wrong, to help liberate those who have become caught in a self-destructive cycle of sin, and to lead its members together into new and more abundant life in Christ.

### **The role of the bishop**

18. We think it important to maintain the central role of the bishop in these processes. From the earliest days of the episcopate, part of the role of bishops has been to administer and enforce discipline within their dioceses. But this disciplinary authority has always been seen as one part of the overarching pastoral function of the episcopal office. As the opening paragraph to Canon C18 puts it, the diocesan 'is the chief pastor of all that are within his diocese.' The Canon then sets out the teaching, liturgical, sacramental and disciplinary aspects of that role. All these functions are part of the primary responsibility as shepherd and steward of Christ's flock, caring for God's people and building them up in faith and good works. Good stewardship entails the correction of wrongdoing; it also involves identifying its causes and supporting those in need. All of this requires wisdom and discernment, gifts integral to the episcopal calling and for which the Church prays for at the service of consecration.
19. In short, the bishop's role in discipline does not undermine his or her pastoral ministry: on the contrary, it is an essential part of that ministry. There are strong theological arguments for holding the two together. Proverbs 3.12, later cited by the author of the letter to the Hebrews (Heb. 12.6) is an essential insight: 'the Lord reproves the one he loves.' From earliest days the Church has resisted any tendency

to drive a wedge between divine justice and mercy: Irenaeus of Lyons, for example, is severe on those who speak of ‘what great things the Lord had done at His coming to save those who received Him, taking compassion upon them; while they keep silence with regard to His judgment.’<sup>2</sup> Episcopal discipline and pastoral care reflect this holding together of judgement and mercy. Discipline untempered by pastoral concern and an understanding of the individual risks being abstract and harsh; pastoral care that parts company with correcting wrong behaviour is shallow and relativistic.

20. It must be acknowledged that this role of the Bishop, holding together both the pastoral and the disciplinary, runs counter to some modern preconceptions about quasi-judicial processes. In the early days of the CDM, the concern was that the bishops’ pastoral role could undermine impartiality. More recently, this concern has turned on its head as clergy express the concern that the role of the diocesan in the CDM process undermines their relationship with their chief pastor.
21. Given the strong theological and ecclesial reasons for holding discipline and pastoral care together, however, it is important to be clear on where this critique gets its footing. How we think depends on the concepts with which we are furnished by the thought world in which we live. We can think beyond those concepts, but only with some effort. Many concepts taken for granted today, though they often have roots in Christianity, are not concepts that are particularly helpful in the Church. We must make an effort not to be constrained by them. The current preference is for value-neutral processes, in which judgement drawing on experience and personal acquaintance is minimised. But this outlook is culturally specific and time-bound. It arises from a process of thought in the Western world in the last two or three hundred years. Charles Taylor thinks this began in earnest with Descartes (though he traces the roots much further back) who made truth something arrived at by an ordered internal process of doubt, rather than something received, communally, from without. Taylor characterises this as ‘The move from substance to procedure, from found to constructed orders.’<sup>3</sup>
22. Of course, there is great value in this way of thinking. Any new Measure will need to show that it has the necessary safeguards in place to meet the secular standard of fairness – probably built into the appeal processes. At the same time, even in the secular frame of reference there are signs that the trend toward a narrow value neutrality may be reaching a reversion point. Take the example of the machine-learning algorithms increasingly used for ‘predictive policing’<sup>4</sup> in which a computer determines when there is an increased likelihood of an individual offending, allowing police resources to be deployed to prevent the offence. The authors of a recent report note the argument that ‘the algorithm is neutral in that it has no self-interest, and to that extent it can be expected to treat all similar data in a similar

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<sup>2</sup> Irenaeus of Lyons, *Against Heresies*, Book IV, Chapter 28.1  
(<https://www.newadvent.org/fathers/0103428.htm> accessed 6th September 2020)

<sup>3</sup> Taylor, C., *Sources of the Self* (Cambridge: University Press, 1989) p. 156

<sup>4</sup> Babuta, A., Oswald, M., and Rinik, C., ‘Machine Learning Algorithms and Police Decision-Making: Legal, Ethical and Regulatory Challenges’ (Royal United Services Institute, 2018) p 3. *et seq.*



fashion.’<sup>5</sup> But they go on to observe that, for example, as more crimes are committed by men than by women, an individual man is more likely to be targeted by the algorithm. The result is an unexpected form of unfairness that would not arise if the situation were assessed by a human being, since ‘the police officer dealing with the person before them can assess the specific characteristics and circumstances of the individual in question.’<sup>6</sup> Likewise a reformed Measure should have a place for wisdom, for relationships and personalities, for the experience of age and the acceptance of difference. Fairness is a matter of ‘rendering what is due’ when ‘What is due persons is “not same” ... not a matter of strict equality in the modern egalitarian sense but of proportion. Like are treated alike, but unlike are treated differently and this is just.’ The processes of the Church should never part company with relationships and the particularity of human life: and this is a strength rather than a weakness.

23. To sum up: value neutral processes do not necessarily produce fairer outcomes than those decided by actors who are in some way interested or involved in the process. The clearest example is the role of the judge, who as a citizen has a personal interest in the good running of society and yet we do not say that interest recuses them from adjudicating between parties. Good judgement requires wisdom and experience, and the ability to acknowledge and discount one’s own inherent bias, and this is why judicial authority is reserved to individuals of proven professional and personal ability and integrity. The diocesan bishop is in just such a position of trust, with even higher expectations given the mixed functions of their role and the belief that they will be held accountable to God for the exercise of their office. They are to know and love their flock like the Good Shepherd, and so the exercise of discipline will always be tempered by pastoral concern, just as the desire to promote discipline and justice will shape the particular care offered to individuals and groups.
24. The mixed functions held by the bishop also reflect their role as the symbol and guarantor of unity for all the faithful in the diocese. This marks another departure from the modern secular mindset, which would seek to treat the Church as an institution when in reality it is a relational entity, a community, *the Body of Christ*. The Church encompasses people of all backgrounds, experiences and faith traditions, united in a common vision of the Kingdom and our ultimate end in Christ; it is therefore the bishop’s responsibility to promote that common vision and to lead the faithful forward together even as they grow in individual vocation. This role as guarantor of unity also colours the bishop’s role as shepherd and steward, ensuring the exercise of the episcopal office is never static and procedural but rather dynamic and dialectic, rewarding and punishing not solely on individual merit but for the greater good of all. For all these reasons, we feel that whilst it is of course necessary to ensure fairness and proper pastoral support in the disciplinary process, this will not be achieved simply by divesting the diocesan bishop of all disciplinary authority which rather risks undermining the bishop’s role as chief shepherd and guarantor of unity in the diocese. Other safeguards can be put in place (and we will explore these below), but given the history of the Church and its nature as a relational

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<sup>5</sup> Babuta, Oswald, and Rinik p.25

<sup>6</sup> Babuta, Oswald, and Rinik p.26

community it is right that the diocesan bishop retains some authority and role in how discipline is administered within their diocese.

## **Terms of Reference**

25. Against all that background we set our Terms of Reference as follows:

1. To review the history of how clergy have been disciplined within the Church of England.
2. To determine the principles (both theological and otherwise) upon which any system of discipline should operate; looking in particular at the theology around the role of the bishop and the theology of discipline.
3. To identify both design flaws and regular operational flaws in the current CDM processes.
4. To design systems for dealing with
  - a. Grievances about clergy of the type that in other professions would be classed as service level complaints which should be capable of being handled with a view to a speedy resolution; and to consider whether it would be appropriate
    - i. to expect the aggrieved to say what they were looking for by way of an outcome to their complaint and
    - ii. to require the priest to respond immediately and
    - iii. for someone acting under the auspices of the bishop to seek to bring about a resolution?
    - iv. If not how should such a system operate?
  - b. Misconduct of a serious nature the outcome of which might involve prohibition or other significant intervention in the life or ministry of a priest. This should again be dealt with speedily, openly and supportively. The system that does that must be one that is not only appropriate theologically but one that commands the respect of the organisation, respondents and the wider public (both churchgoing and non-churchgoing).
5. To consider the relationship between disciplinary processes and safeguarding particularly in relation to risk assessments and if appropriate to recommend how safeguarding risks should be assessed and managed in the context of new disciplinary processes.

## **Responses to Public Consultation**

26. Having drawn up our Terms of Reference, we decided that it would be important to consult beyond our own number about some of the key questions we were facing. We therefore launched our consultation initially circulated to the ELS membership but as noted above through the Church Times and other media its existence became more widely known and so attracted a helpful range of responses from a variety of constituencies.

27. In addition to 'corporate responses' from the Sheldon Hub, CECA (see below) and Broken Rites we had 43 individual responses (from 5 bishops, 2 bishop's chaplains, 5 archdeacons, 19 priests or retired priests, 5 lay persons, one litigator, 4 ecclesiastical judges and one diocesan registrar).

28. We posed 4 questions:

1. Are there any reasons why priests should not be approached immediately for their response after a complaint has been laid (whether a grievance or a case of serious misconduct)? ie moving away from the holding your cards close to your chest for as long as possible. Is it the same answer in both cases?
2. Do you agree that the process should be divided into two separate streams as suggested in the terms of reference, and broadly along those lines?
3. What should be the test for misconduct falling within the second stream?
4. Should cases of serious misconduct be dealt with along the lines of "in-house misconduct proceedings" as per ACAS processes, or by an "external tribunal" along the lines of many professions with a legally qualified chair and other panel members.

29. The responses were as follows:

Q1: 37 in favour of immediate disclosure; none against and 9 did not respond

Q2: 38 in favour of 2 streams; (plus 3 in favour of 3 streams as proposed by the Sheldon Hub) and 5 no response

Q3: 31 responded: basically split as follows: test by penalty – 7; test by suitability/fitness to minister – 10; those who attempted to define what the seriousness threshold in conduct should be – 14.

Q4: 16 did not respond; 25 favoured an external tribunal, 3 an inhouse system and 2 had some other proposal.

30. We would anticipate identifying and acknowledging all those who have responded to this and any subsequent consultations in our final report.

31. We were very pleased to see the overwhelming support for the view we formed very early on that there need to be two separate streams/systems for dealing on one hand with cases alleging serious misconduct, and on the other with a variety of matters some of which could be described as personal grievances against clerics, some of which in the secular professions would be termed service level complaints and some matters of less serious misconduct.
32. However, although that idea would seem to have general agreement, a much more difficult question is how you identify what complaints are of a nature that means they should proceed on the serious misconduct route rather than being dealt with in some other way.
33. As indicated above, in their responses to our consultation some felt that the answer was “if the conduct is such that the outcome will be permanent or limited prohibition (ie removal permanently or temporarily from ministry)”. Of course, the problem with that is that different people and even different bishops will not share identical views on what level of conduct should lead to such removal. Some felt that the test should be whether the priest was fit to continue in ministry. To some extent that is the same test but could lead to broader examination of character and other things, rather than simply the seriousness of the misconduct. We are aware that some confusion with matters of capability might well arise here.
34. Others did attempt to define the conduct itself. Some said that we should be looking at what other professions do and follow their patterns; some said that breach of the Guidelines for Conduct of the Clergy should be the basis. Other suggestions were: “Safeguarding, sexual misconduct, gross financial misconduct, serious manipulative behaviour and spiritual abuse”; “Criminal behaviour and serious unprofessional behaviour falling short of criminality”; “Something similar to the current s.8 but specifying ‘persistent’ neglect or inefficiency and clearer definition of what is serious ‘conduct unbecoming’”.
35. The Sheldon Hub’s proposals can be summarised in this way:
- Criminal activity related to clergy practice meets the test; (although not happy about church pursuing if the criminal investigation is dropped);
  - Except in cases of criminal activity there should be a test of persistence or recklessness (right to make mistakes);
  - Variants of opinion exist on moral issues - a better reference might be that of ‘trustworthiness’ of an office-holder;
  - A test of ‘reasonableness recognisable to a layperson’ should be included;
  - Adultery and other non-criminal sexual misconduct should not fall within the second stream on grounds of morality, but be subject to other tests such as persistence or recklessness or clear breach of professional ethical code of conduct (eg within context of power/authority or direct pastoral relationships).
36. We have also been helped by submissions from CECA which were also of great value, given that they represent over 1000 clergy and have assisted a significant number

of clergy going through CDM processes. They consulted their 61 representatives about our questions and so the response has had significant weight in our considerations. CECA'S response was as follows:

"The 18 respondents to this question clearly found this a difficult question to answer in simple terms – indeed in the words of one *"this is far too complicated to deal with in a sentence or two"* but substantive points made were as follows:

- Criminal activity was mentioned by the majority (10 - for some as a matter of allegation or charge, for others it would require conviction);
- Five others focussed on the quality of evidence, and the standard of proof;
- Three highlighted moral failure relevant to "what is expected of a Christian lifestyle";
- Three cited breach of trust (*"eg adultery with a church member"*);
- Two referenced what would be comparable tests in the secular world;
- Two mentioned 'previous history' and 'serious and persistent behaviour';
- One stated *"Damage or potential damage to people before damage to the organisation"*.

37. It is apparent from the above review of the responses that identification of criteria for differentiating between serious misconduct and lesser levels of misconduct is far from easy. We are also aware from the different approaches proposed, that whatever we recommend will not meet with universal approval.

### **Working Group under the Bishop at Lambeth**

38. We have also had regard to the position taken by the Bishop at Lambeth's working group that in the future "we need to set all we do in the broader frame of professional standards." Their report to the House of Bishops refers to the Guidelines for the Professional Conduct of the Clergy and to the reflection appended to those by Francis Bridger which links "professing Christ" and "talking about ourselves as professionals with all implications the shift brings, both in terms of regulation and accountability." The Bishop at Lambeth says that this is "not merely a clever semantic trick", but "by means of a theology of vocation it becomes possible to reinvest the idea of professionalism with transcendent moral dimension". Later, he says "This profession should however give rise to a desire to live personal and professional lives (both of which become innately connected in ordination) in line with proper rules and regulations to ensure standards are maintained in pursuance of an effective propagation of the gospel. Such rules and regulations are based on values which find their foundations in the ordinal and primarily in the gospels."

39. That proposal at this early stage is rather broad in its terms and could be described as 'aspirational'. It needs much greater detail and flesh putting on its bones. It proposes that "the Guidelines and the Clergy Covenant could be used to map out the standards in various areas and against them can be set potential consequences if standards are not met." It then says that "one important element in all of this is

clarity in what the standards are and what they mean.” The suggestion would appear to involve a significant writing of rules and regulations.

40. In our reflections we have like the Bishop at Lambeth’s group come back again and again to the vows made at ordination. It is clear from the ordination declarations that the Church is concerned not only with what clergy ‘do’ but also with who clergy ‘are’ – more prominently than in any other profession, there are real and pressing expectations as to the principles and standards which govern all aspects of their lives.
41. The *Guidelines for the Professional Conduct of the Clergy*, describes itself in its preface as “an elaboration of the text of the Ordinal.” As such it is also ‘aspirational’ and not an exhaustive legal code but rather a reflective framework designed to help clergy live out the declarations made at their ordination, and conversely to help the Church determine when clergy conduct has undermined the trust and responsibility which ordination brings. It is really a foil against which actual standards would need to be developed as in other professions as we will explore below.
42. We consider that the proposed ‘mapping out’ will require detailed rules and regulations and the fleshing out of the principles with many examples being given. How will distinctions be drawn between those matters that are very much more about who the cleric is before God rather than what he or she does in public. However this is resolved we do not think that the result will endear itself to clergy who may feel that it is too interventionist in their personal lives and too restrictive in their practice of ministry so that that they will constantly be needing to check out what they are doing against it for fear of breaching some provision or other. Clergy in different situations have quite different modes of pastoral practice – what is appropriate and even expected in a small rural parish would be impossible in a large city centred “gathered congregation”.
43. We note the proposal for an Office for Regulation working at a national level. We consider that this would end up being a large bureaucratic body if it had to define, promulgate, review, and enforce these professional standards, given the wide range of conduct that could potentially breach the Guidelines, some of which breaches would be serious misconduct and some would be not so serious.
44. Some of us on the working party have over the course of our professional lives watched the development of similar processes to what we think is being proposed by the Bishop at Lambeth’s group within the legal professions. Forty years ago the Code of Conduct for the self-regulating Bar contained 183 paragraphs within 22 pages; The current professional regulations, now contained in the Bar Standards Handbook, consist of 182 pages of detailed regulations.
45. And of course when you go down this route the independent regulator imposes the standards without needing the consent of the regulated body. This would take away from General Synod any say over how the clergy would be regulated and the standards that would be applied to them.

46. We fear that another of the results of such “professionalisation” would be the creation of an industry of “professional expertise”. We are aware that in other areas of professional misconduct there are always those who will offer themselves as experts to assist courts/tribunals in assessing whether some conduct was or was not done in accordance with accepted methods of practice. We think this would be an unwelcome development.
47. We are also unclear, as we think is the proposal, as to how matters would be concluded. Para. 26 of the Lambeth group’s report says that “Once a determination has been agreed the matter would then need to be concluded in the diocese and the bishop would be involved in agreeing the consequences with the people concerned and implementing the decisions”. We are not sure the extent to which the bishop would have any discretion at that stage, or whether the bishop is simply the executive arm of the Office for Regulation.
48. One significant feature of prosecutions under the CDM is that of those which have resulted in a tribunal hearing all have alleged either conduct unbecoming and/or neglect and inefficiency. Of the 30 cases, 27 have alleged conduct unbecoming of which 3 have also alleged neglect and inefficiency, and 3 just neglect or inefficiency. The cases involving sexual immorality, which historically would have been charged as ‘fornication’, have all been charged as conduct unbecoming. The money cases have all been charged as neglect or inefficiency (and some as conduct unbecoming as well). Of the 30 cases, 9 were listed for penalty only following admission of misconduct and so did not address the meaning of conduct unbecoming, while 2 were dismissed and the judgments deal only with the factual matters that led to dismissal. Of the remaining 19 cases, 14 of them do in their judgments address the meaning of conduct unbecoming – 6 referring to both Canon C26 and the *Guidelines for the Professional Conduct of Clergy*, one just to Canon C26 and 7 just to the *Guidelines*.

### **How other professions deal with complaints and discipline**

49. It was not just the existence of these proposals by the Bishop at Lambeth’s group that caused us to look closely at how other professions regulate themselves and deal with complaints, misconduct and issues of fitness to practice. Looking at other professions had been one aspect of the work behind *UA*; it was also something considered during several earlier revisions of clergy discipline. It was clearly something the Working Party needed to consider and it was the reason that Charles George QC who as former Dean of the Arches had been the Regulator for the Profession of Notaries and David Etherington QC who has extensive knowledge and experience of the regulation of various professions were recruited as members of the working party, so that they could share their knowledge and experience of how regulation and discipline is conducted in the secular professions. Their combined preliminary research led to a paper by David Etherington which looks at how different professions in England and Wales approach questions of complaints and

serious misconduct. It has been a significant document in influencing our approach and so we append it in full to this report (Annex 2). In summary (which necessarily omits the detailed differences between professions that the paper highlights (with colour coding to assist)):

- a. All secular professions have over many years developed systems for regulating their memberships, including removing from membership those who have either committed serious misconduct and/or are deemed no longer fit to practice. The healthcare professions have concentrated on fitness to practice whereas the legal and other professions have tended to focus on misconduct although they also recognise issues of fitness to practice might arise from health or other concerns. Equally the healthcare professions will also at times regard serious misconduct, even historic cases, as disqualifying from practice.
- b. All the professions recognise the difference between what they often call 'service level complaints' which they usually expect to be resolved at a very local level, often within a particular practice team, and matters which are serious enough to call in question whether the member should be allowed to continue to practice, which will be dealt with formally and on behalf of the profession.
- c. Each has different ways of deciding what falls within the category that can be left for local resolution and what requires to be dealt with by the national body. Some have a third intermediate track. The decision is usually made by considering together the seriousness of the issue judged objectively and the adequacy of the penalty available at each level. Cases at the two ends of the spectrum are easily allocated, others not so. The relevant code of professional standards for the particular profession is usually used to help reach that decision.
- d. All of them have rights of review and/or appeal against decisions made, particularly when they are final decisions for one party or the other.
- e. It will not be easy for the Church to move quickly to a fully described professional standards-based approach, although it would not be impossible. Such fully described systems of standards in other professions have been developed over many years; they have occurred in professions where standardisation of key functions and behaviours is generally recognised, although often that process of identification has not been free of controversy and so has taken time to be achieved; it is also costly to maintain such a system by the necessary regular review and revision of the standards by the independent regulators by which each profession is now governed. That cost is borne by the practitioners' annual subscription fees which are significant. There is a real issue about the extent to which a ministry in Holy Orders is capable of standardisation in that way
- f. Learning from the secular professions it should not be difficult to devise a system that aims to separate out grievances and minor misconduct issues from those that allege serious misconduct about which the Church must become concerned and involved. Identifying the point of separation might well be done by the bishop considering the following factors:



- i. sanction – should it principally be designed to assist the cleric perform their role properly and resolve any grievance with the complainant?
- ii. process – is a quick and informal process appropriate for dealing with this allegation?
- iii. involvement – who is involved here? is it just two or a few people or the wider Church?
- iv. aggravating features – does the case lack them? ie conduct neither serious nor repeated; not a criminal offence; no dishonesty, lack of integrity or breach of trust; not scandalous; does not erode confidence in Church or teaching; respondent not aware of any vulnerability in complainant; impact (objectively assessed) on complainant low;
- v. mitigating features – cooperation; insight; already addressing issue; personal circumstances.

These factors tend towards a case being dealt with more appropriately on the less serious track; the converse are indicative of matters of serious misconduct which should be dealt with as such. Of course, each complaint will have to be assessed on its own circumstances and the presence, absence or combination of different factors.

50. It is against that background, as well as considering the matters mentioned in paras 38 to 48 above that we considered that there would be significant difficulties in adopting the proposals in the Bishop at Lambeth's report that definition of professional standards should form the basis of future clergy discipline practice.

51. This again is a theological matter. Right conduct for a cleric (and perhaps for anyone) cannot be exhaustively defined, but will depend on context and the individuals and communities among whom the cleric lives and serves. A code of conduct that specifies what must and must not be done in a range of situations could never be detailed enough to cover all cases, so that there would continue to be a residual ambiguity; it would also leave a void beyond what it did define where conduct would remain unregulated. The theological analogy is with the succession from Law to Grace. St Paul famously speaks of the Law as a *paidagogos* (Galatians 3.24). This is sometimes translated 'disciplinarian' (e.g. NRSV) but the image is of the slave employed in the noble household to care for and guide the children. The implication is that the Law is a simplification, first approximation, of right living, through which we grow up into true righteousness. The Christian is not exempt from the Ten Commandments: Jesus came not to abolish the Law but to fulfil it (Matt. 5: 17). But just as the safety barriers on a hairpin bend do stop us going off the cliff, yet good driving does not consist merely in driving within the safety barriers; so the Christian is called to cultivate, by Grace, a holistic maturity of life. This is capable of being assessed and judged. The cleric can be held accountable for not living this life. But this judgement and accountability has to be rooted in a community that practices these virtues, and the assessment needs to be made by someone committed to practising them. There will be a place for boundaries and for some regulation, but it is not essentially a regulated body, in the way that our

professions are. Indeed it is noteworthy that, though not stating it in these terms, many of the professional bodies surveyed for the purpose of this report have to a greater or lesser degree taken this more holistic, lived approach to standards, rather than opting for a detailed body of regulations.

### **Our journey into serious misconduct**

52. Against that background we set out to try to define the cases that would come within the “serious misconduct’ category.
53. Again and again we found ourselves coming back to the fact that **at ordination clergy make a number of vows** about their future lives including their conduct. Clear breach of those vows consequently gives a basis for making complaint or alleging misconduct. The vow of canonical obedience also reinforces the long accepted jurisdiction of bishops to deal with complaints and misconduct.
54. However the extent of those vows is very wide ranging and reaches into private as well as public aspects of the minister’s life and ministry. It would not be possible on the basis of the vows alone to define what is serious misconduct.
55. **What of the Canons?** The only Canon that deals with general conduct (as against particular ecclesiastical duties) is C26(2) which provides that “A clerk in Holy Orders shall not give himself to such occupations, habits, or recreations as do not befit his sacred calling, or may be detrimental to the performance of the duties of his office, or tend to be a just cause of offence to others; and at all times he shall be diligent to frame and fashion his life and that of his family according to the doctrine of Christ, and to make himself and them, as much as in him lies, wholesome examples and patterns to the flock of Christ.”
56. The difficulty about this is that although it would encompass serious misconduct it could also be used for bringing trivial complaints as anyone could allege that thing such as forgetfulness by a cleric had caused offence to others. It would also open up the possibility of vexatious allegations based on behaviour of other family members, which is very far from what an appropriate disciplinary system should deal with. It shows that we must be very careful about our definitions of misconduct and very conscious of how malicious complainants might seek to misapply them.
57. These considerations make it clear that any definition must make clear what is excluded from its scope.
58. **Our historical survey noted the steady widening of the ambit of offences since the first statutory definition of prosecutable offences was enacted in 1840.** Prior to that clergy were prosecuted for “ecclesiastical offences” and the specificity of those was well known. It is significant to see what were the offences that were most often prosecuted prior to 1840. Matters such as drunkenness and neglect of

duty, fornication, not being licensed, non-residence, and conducting clandestine marriages were the stuff of the ecclesiastical courts over several centuries prior to that date<sup>7</sup>. Their different levels of culpability resulted in different levels of sentence.

59. The 1832 Report of the Royal Commission into the Practice and Jurisdiction of the Ecclesiastical Courts in England and Wales said of the jurisdiction in relation to clergy discipline: "The Third Class includes Church Discipline, and the Correction of offences of a *Spiritual* kind. They are proceeded upon in the way of criminal suits *pro salute animæ*, and for the lawful correction of manners. Among these are offences committed by the Clergy themselves, such as neglect of duty, immoral conduct, advancing doctrines not conformable to the Articles of the Church, suffering dilapidations, and the like offences". It is interesting to note that neglect of duty and fornication/immoral conduct remain very much at the heart of serious complaints today.
60. By the Church Discipline Act 1840 in addition to offences against the laws ecclesiastical Parliament added notoriety arising from suspicion of an offence. The starting point for proceedings under the Act was a complaint being made that a cleric had committed any offence against the laws ecclesiastical or that there was "scandal or evil report as (*to his*) having offended against the said laws". We understand that this was introduced because it was often difficult to prove matters that were alleged and so the starting point of being reputed to have offended was introduced.
61. The next development was in 1892. The problems with the 1840 Act were said to be (i) that it was required to prove once again before the ecclesiastical court things that had already been established before a civil court; (ii) that there were rights of appeal at every stage of the proceedings that added to the delay in concluding them as well as the overall expense; and (iii) that in relation to sentence too much regard was had to precedent and that had led to the gradual reduction in sentencing levels.
62. The Clergy Discipline Act 1892 provided that any conviction before a temporal court for an act constituting an ecclesiastical offence, or any allegation that the cleric had "been guilty of any immoral act, immoral conduct or immoral habit, or of any offence against the laws ecclesiastical, being an offence against morality and not being a question of doctrine or ritual" enabled him to be prosecuted. The focus here was on immorality.
63. In 1945 and 1947 attempts were made to address the problem of disability and neglect of duty. The Incumbents (Disability) Act 1945 replaced a 1926 Measure in relation to cases of mental or physical capability. And the Incumbents (Discipline) Measure 1947 was introduced to deal with "those rare but distressing cases in which there is a complaint against an incumbent of serious, persistent or continuous

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<sup>7</sup>Ronald A Marchant: *The Church under the Law, Justice Administration and Discipline in the Diocese of York 1560-1640*; Martin Ingram: *Church Courts, Sex and Marriage in England, 1570-1640*.  
Michael G Smith: *the Church Courts, 1680-1840 From Canon to Ecclesiastical Law*.

neglect of duty, or of conduct unbecoming the character of the clerk in Holy Orders”<sup>8</sup>. It is convenient to mention here that the 1945 Measure was replaced by the Incumbents (Vacation of Benefices) Measure 1977 which instituted a new system of Provincial Panels for dealing with cases where (a) “there has been a serious breakdown of the pastoral relationship between the incumbent and the parishioners to which the conduct of the incumbent or of the parishioners or of both has contributed over a substantial period” and (b) where there is an issue “as to whether the incumbent of a benefice in the diocese is unable by reason of age or infirmity of mind or body to discharge adequately the duties attaching to his benefice and, if so, whether it is desirable that he should resign his benefice or be given assistance in discharging those duties.” It is widely accepted that this Measure does not work. It has not been used for many years despite the circumstances it was designed to address continuing to occur.

64. The Ecclesiastical jurisdiction Measure 1963 provided that “any ... offence against the laws ecclesiastical, including (i) conduct unbecoming the office and work of a clerk in Holy Orders, or (ii) serious, persistent, or continuous neglect of duty” would be capable of being prosecuted before the Court.

65. That was how the law had developed over 150 years.

66. **In 1996 the UA report looked again at what should be the matters that should be capable of being brought before a tribunal.** They proposed in relation to neglect, that “neglect, culpable carelessness or gross inefficiency ...” should be the level of offending before proceedings would be launched. That was no doubt because they were seeing this as a level of inefficiency that would lead to loss of office. As they said (para 6.16) - “In any other profession, if you fail to do your job properly, then inevitably, and however sadly, it means you will not be able to practice in the profession, with all the attendant loss that follows.” However, they clearly intended that the neglect should involve a measure of ‘culpability’. They therefore spoke of “culpable carelessness” and of “gross inefficiency”.

67. Ordinary employment law would recognise such levels of failure to do the job as meriting discipline. We venture to suggest however that they would not contemplate discipline for any neglect or inefficiency. And yet the CDM 2003 significantly widened this particular limb so that it now reads “neglect or inefficiency in the performance of the duties of his office”. This has enabled complaints to be made on the basis of forgetfulness or mistake falling very far below the level of culpable carelessness or gross inefficiency envisaged by UA.

68. The phrase “conduct unbecoming the office and work of a clerk in Holy Orders” which had been included in the definition of ecclesiastical offences since 1947 was also altered and extended to “conduct unbecoming or inappropriate to the office and work of a clerk in Holy Orders”. Again a significant widening of scope. Conduct

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<sup>8</sup> Quotation from Archbishop of Canterbury’s introduction of the Measure to the House of Lords - See Hansard Debate <https://api.parliament.uk/historic-hansard/lords/1947/feb/05/incumbents-discipline-measure-1946>

unbecoming has now not only become the most common offence to be prosecuted before tribunals but has also become the 'catch all offence' which has enabled minor complaints to be brought on the basis for example that it is unbecoming for a priest to be rude to a parishioner, or for a vicar to forget to allow person A up for communion before person B as verbally agreed. And we note that even when other specific 'offences' are alleged under the CDM, such as failing to have regard to the Bishops' Safeguarding Guidance, an allegation of conduct unbecoming is often added as well as a back-up/make-weight offence.

69. We noted with some interest what *UA* said about this particular phrase: "The 1963 Measure places most discipline under the phrase 'conduct unbecoming the office and work of a clerk in Holy Orders'. We have noticed with interest that most recent disciplinary reforms in other provinces of the Anglican Communion have tended to move away from this generalised and non-specific terminology, to list offences in greater detail. We found ourselves in some sympathy with this trend. Whilst a more specific statement of offences risks becoming too rigid and exclusive, it does assist in clarifying what sorts of behaviour are acceptable or unacceptable. So we have attempted to offer a few more tightly worded offences, whilst retaining something of the older wording to allow for offences that might otherwise become excluded." (paras 6.11 & 12).
70. It is to be noted that "conduct unbecoming" is no longer an offence against British military law. The reason why in most jurisdictions it has been abolished in service law is because there is a desire for clarity about what conduct will amount to the commission of an offence as *UA* observed (see above).
71. That is how we came to have the present Measure. The complaint about the 1965 Measure was that its procedures were so complex that prosecutions were exceedingly rare – only 3 people were prosecuted in 30 years. On the other hand under the CDM it is easy to bring a complaint, and by the end of 2018 (13 years of operation) there had been 959 complaints, 27 of which resulted in tribunal hearings. However there is no realistic initial filter and the process which inexorably takes over once a complaint lands on the bishop's desk carries the case along during which time 33% are dismissed, 12 % result in a formal investigation and eventually fewer than 3% end up being referred to a tribunal.
72. There has to be a better way of dealing with cases so that while cases of serious misconduct are prosecuted, cases of lesser misconduct and of personal grievance (what would be termed 'service level complaints' in most professions) are dealt with in a simpler and quicker way, and cases that are frivolous, vexatious and malicious or otherwise without substance are quickly dismissed.
73. A speedy assessment of the case at the start, including asking the person complained about what they have to say about the allegation, would enable those cases that should be dismissed to be dealt with quickly. Of course there would need to be a right of review of that decision for the complainant.

74. But the fundamental question which we set out to answer was how you identify the cases that are not so serious that they must be dealt with in the serious misconduct track and those that must be dealt with in that track.
75. **We considered first whether we could clearly identify those serious charges by name, type or description.**
76. We noted with some care the proposals made by the Sheldon Hub and CECA arising from their own consultations and reflections. We noted that both make reference first of all to criminal offences (although even then they immediately qualify it – relevance of secular prosecution/acquittal and whether related to clergy practice). To say that a criminal offence of sufficient seriousness would qualify as serious misconduct is almost self-evident, but a line still needs to be drawn. Clearly there would be offences of which summary motoring matters such as speeding are the most obvious examples which would not so qualify; but more difficult would be for example driving over the prescribed limit. Criminal offences punishable by imprisonment may be said to be a suitable test, but the potential of imprisonment is there for many quite minor offences.
77. Questions of morality were seen as more difficult. Sheldon suggested that adultery and other non-criminal sexual misconduct should be “subject to other tests such as persistence or recklessness or clear breach of professional ethical code of conduct (eg within context of power/authority or direct pastoral relationships)”. Some of CECA’s respondents had suggested moral failure relevant to “what is expected of a Christian lifestyle” or breach of trust (“*eg adultery with a church member*”)
78. Persistent conduct was also mentioned by both – Sheldon: Except in cases of criminal activity there should be a test of persistence or recklessness (right to make mistakes); CECA: Two mentioned ‘previous history’ and ‘serious and persistent behaviour’.
79. It seemed to us that there were a number of underlying assumptions in all this. Perhaps the key was that everyone both inside and outside the Church would recognise that conduct which was not acceptable in a Christian minister is serious misconduct. Expressly stated by Sheldon: “A test of ‘reasonableness recognisable to a layperson’ should be included” (see para 35 above); and by CECA: “Two referenced what would be comparable tests in the secular world” (see para 36 above).
80. We were also very aware that when it is impossible to give a list of exhaustive specific offences, a modern tendency in statutes is to give “non-exhaustive examples” of general propositions. Something along those lines could perhaps be attempted, but in our view that approach may better be dealt with through Codes of Conduct and Practice rather than in the primary legislation.
81. Our difficulty in all this was that every type of description left you with a scale. For example there is no exhaustive set of criminal offences that could be drawn up. Clearly some could unexceptionably be relied on as being serious misconduct eg

murder and rape. But what of theft? Would it be all theft or would it be theft of a qualifying amount or theft in certain circumstances or theft with particular aggravating features? And then when you move into the realm of sexual morality, would it be every case of adultery? Is there not a distinction between on the one hand a cleric who comes to the bishop and confesses a brief affair, over and repented of, forgiven by their spouse and other party's spouse and where both couples are anxious to restore their marriages, and on the other hand a cleric who continues to live adulterously with a church officer's spouse claiming that God led them to be together.

82. If you intend, as it is widely accepted must be done, to have two tracks – one for serious misconduct and one for lesser misconduct and grievances – then our clear and considered judgement is that you cannot draw up lists of offences that will determine in all circumstances into which track a particular piece of misconduct should go.
83. So, it became clear to us that the only way to achieve a satisfactory outcome was by defining the process by which a series of decisions would be made so that we would end up with cases only being allocated to the serious misconduct track where a decision had been made that they were serious cases. We are aware that this might sound a bit like “You will know it when you see it”, but we actually think that there is a lot in that and that provided the process is right and grounded in a proper understanding of discipline in the Church then it is not only an acceptable approach but the only correct one.
84. We are also conscious that some will say the Church cannot be trusted to do this. In the current climate we can understand why that is being said. We know that many are anxious about what IICSA will say and what it will recommend. However we are looking at the wider issue of church discipline and how we deal with allegations of misconduct by those in Holy Orders, not just at how the Church has responded to allegations of the abuse of children and vulnerable adults in the past. The number of cases that by any stretch of the imagination can be classed as safeguarding cases and that have come before tribunals is very few – two in fact. One concerned failure to follow national and diocesan policy in appointing a youth worker with a manslaughter conviction (Robinson, 2008); and one the abuse of spiritual power (Davis, 2017). There have of course been other cases which have been dealt with other than through tribunals – cases of failing to follow the bishops' guidelines on safeguarding have usually resulted in admissions and penalties by consent; other cases where there have been convictions for sexual or other assaults have resulted in automatic prohibitions under section 30. Those appear in reality to be the sorts of case where the CDM has worked quite well.
85. We consider that any new system should see all those cases resulting in very similar outcomes, but the ones resulting in penalty by consent could be resolved even more quickly and as we shall suggest later not always require the consent of the cleric concerned.

86. We regard the bishop as having a critical role to play in this process. The bishop has responsibility for the Church, its welfare and its reputation and the bishop is the chief shepherd of the under shepherds with their responsibility made clear in the service of consecration – “as chief pastors it is their duty to share with their fellow presbyters the oversight of the church, speaking in the name of God and expanding the gospel of salvation. With the Shepherd’s love, they are to be merciful, but with firmness; to administer discipline, but with compassion.”
87. We were entirely persuaded that we must restore to the bishop clarity of role in relationship to administering discipline as part of their overall pastoral responsibility. We know that this will be said by some to blur distinctions that are now usually drawn between various roles and tasks. We have described earlier why the history and theology of the episcopate have led us to reject that criticism and approach. It is sometimes said that a person cannot be both pastor and judge. However a pastor has to exercise judgement and make judgements in the ordinary course of their everyday pastoral work. They cannot escape from that. There may be occasions when it will be better for the bishop to delegate a particular decision-making task to someone who has specialist training and experience in the matters concerned, but we believe that those will be very few in number. This is what currently happens when a matter investigated under the CDM is referred to a bishop’s disciplinary tribunal. It is we note also the practice in the Roman Catholic Church. Essentially the bishop in order to effectively exercise their role as chief pastor, cannot shy away from making judgments in disciplinary matters.

**So by what process or processes should decisions be made that arise from complaints made about a cleric or from allegations of misconduct?**

88. We begin by saying that all complaints or allegations should be made in writing to the bishop who will consider them and act on them.
89. Having taken in the substance of the complaint, the bishop will then cause enquiries to be made into what has been alleged by a person we have called ‘the assessor’.
90. Like many of the details along the route we describe there are options as to exactly what is done and/or how it is done and/or by whom it is done. We will attempt to resolve these when we issue our final report and when we hear what people say would be the better of the options at each of those points. We expect to carry out a further public consultation posing particular questions and/or giving options asking people to state their preference and reason for that preference.
91. This is the first such point. We can see many advantages in that enquiry being carried out by a lay person who from their own secular work experience has skills that would enable them to carry out such an enquiry, and seek where possible to resolve issues between a cleric and a member or members of their flock. It would mean that if the assessor advises the dismissal of the complaint as vexatious, it would answer any contention by the complainant that “s/he was protected by one of their own”. Each diocese could have a panel of such people, or several



neighbouring dioceses could share a panel. Another option would be that the enquiry could be carried out by an archdeacon, perhaps from another archdeaconry or even another diocese, so that the 'line managing' archdeacon can maintain their relationship and continue to conduct their normal business with the priest. Archdeacons' involvement in discipline goes back to the 4<sup>th</sup> century and they were specifically referred to in William's Ordinance of c1072 in relation to their roles in church courts. We have no strong views about exactly who should carry out this initial enquiry, but we have a very strong view that such an enquiry should be carried out as early as possible.

92. We remind ourselves of two things at this point: first the large number of complaints we have heard about (some from Sheldon, but others as well) where there has been no such early enquiry, contrary to the *UA* proposals, second that this will not be an over burdensome task for any particular diocese. The CDC annual statistics show that between one quarter and one third of dioceses have no complaints in a given year; about half have between one and five; and up to four about six or more. The total annual number of complaints is now running at between 90 and 100 – so an average of under 2.5 per diocese.
93. We would envisage the assessor speaking with the complainant to ascertain that they had correctly understood what was being complained about and what was being sought by way of redress/resolution. We understand that quite often under the current system complainants do say what they are looking for. Sometimes they say they would like an apology, sometimes they just “want to be able to go back to church”, sometimes for “things to go back to how they were”. But once the complaint is launched the likelihood of some sort of resolution being achieved is currently minimal. In 13 years only 32 cases were referred for conciliation and only 10 of those had a successful outcome. We believe that many of the lesser complaints that end up being dismissed, and thereby leaving the complainant even more dissatisfied, might well benefit from early intervention directed at conciliation between the parties.
94. It is also important that the cleric should be provided with the full details of what is complained about and/or alleged at the earliest opportunity. They would also be seen and spoken to by the assessor and asked for their response. Ideally they would provide a written response within a short time of being provided with the written complaint. We have already referred to the question we asked about this in our consultation and noted that of the 46 responders 37 were in favour of immediate disclosure, none were against and 9 did not respond. Due process requires first that there should be early disclosure of the complaint to the respondent and also that they be given an early opportunity to answer the complainant's allegations. The only exception to this would be cases where the very first disclosure of criminal behaviour was reported to the bishop who then needed to inform the statutory authorities. Any communication between bishop and respondent would have to give way to the criminal investigation until the police had conducted their initial interview with the respondent or had told the bishop that they would not be investigating the matter further.

95. Both complainant and respondent would be asked to provide the assessor with evidence in support of their respective contentions. It may be documentary evidence, or it may be names and contact details of others who can speak to the issue concerned. Where possible that evidence should be examined or enquired into.
96. Having completed their initial enquiry the assessor, who ultimately will report back to the bishop, will be faced with a number of options depending on the view they have formed about what has or has not taken place.
97. Those are: 1 attempting conciliation/resolution; 2 dismissing the allegation as frivolous, vexatious and malicious, or lacking in substance; 3 having concerns about the health of the cleric; 4 having concerns about the capability of the cleric; 5 finding whether culpable misconduct has taken place. We will consider them in turn.

#### Conciliation / Resolution

98. We would expect that the assessor would take steps, so far as they could, to bring about a resolution of grievances. That might involve arranging a face-to-face meeting and even being present to facilitate it. They might make proposals to the parties about what could be done to heal hurts and work together in the future. Any such successful resolution would be reported to the bishop.
99. Some grievances cannot be resolved. Sometimes one party is intractable. That would also be reported back to the bishop with any recommendation the assessor had to make. They might suggest the bishop could possibly achieve a resolution, perhaps by having one or both the parties in and speaking to them directly.

#### Dismissal

100. There will be cases where it will become apparent that there is no substance to the complaint, perhaps even that it is frivolous or vexatious and malicious. Occasionally that might be apparent to the bishop when they receive the complaint; more often it will be a conclusion reached by the assessor. In either event, the bishop must not hesitate to dismiss the complaint, giving brief reasons for doing so. In 1926 the Church Assembly Commission on the Ecclesiastical Courts especially emphasised the importance of retaining the bishop's veto in cases of alleged misconduct on the part of a cleric, on the grounds that "painful experience shows that the clergy in the fulfilment of their duties are peculiarly liable to malicious charges and prosecutions from which the bishop's veto is their only protection". This is not a new problem.
101. A controversial area is whether the bishop should have the power to inhibit the laity in any way. We are aware of some strong feelings amongst a number of clerics who have been the subject of vexatious complaints that the bishop should have power at least to prohibit laity who have behaved badly towards clergy from

holding office. We will be interested to learn in due course what the wider community feel about that.

#### Review/Appeal from dismissal

102. Most professions provide for a review of any decision to summarily dismiss a complaint of the service level/grievance type. The manner of that varies, although we note that it is generally a review rather than an appeal. This is another issue where at this stage we have no concluded view as to how this should happen and will look for help before finalising our proposals. Some professions provide for a request for a review either by the decision taker, some by someone at the same level (e.g. at the Bar by the head of another set of chambers). We would recommend providing some such course here. The Bar tends to use other sets of chambers to deal with a dispute of fact where referring the matter to members of the same chambers might look partisan; review of the actual decision made may be to the head of the barrister's own chambers but more usually complainants approach the Legal Ombudsman who has the power to review service complaints.

#### Concerns about the cleric's health

103. The investigation might have revealed that the cleric was unwell and in need of treatment or some other form of pastoral support. We note that in the Sheldon survey 52 of their respondents said that the complaint arose from something they know they did wrong, and of those 36 also said that it arose from something they did when they were vulnerable or under pressure themselves. The enquiry may well raise sensitive matters requiring sensitive handling, but in most cases the assessor (and ultimately the bishop) will need to consult with others including diocesan HR about how the situation should be addressed so that appropriate treatment (where appropriate) and/or support and other help can be provided.

#### Concerns about the cleric's capability

104. Equally the investigation might have revealed that the cleric is in need of support and/or training either instead of or sometimes as well as having their misconduct marked by a penalty. They may be struggling for any number of reasons and in need of support or even a break. They may be out of their depth, again for a variety of reasons, and thought may need to be given as to how they can best be helped.

105. We are aware that the current capability procedures set out in the Ecclesiastical Offices (Terms of Service) Regulations 2009 and the Code of Practice made under s.8 of Ecclesiastical Offices (Terms of Service) Measure 2009 are not well understood and appear to be rarely used. We have been told that this is because of the difficulty of moving from the Informal Stage to the Formal Stage. We are also aware that Sheldon has unearthed a number of instances of people saying that they were threatened with capability proceedings or a CDM if they did not agree to come to terms with the senior staff and resign or retire. If that has taken place it is very

unsatisfactory and we must find better ways of dealing with situations such as those.

106. We acknowledge that there is a real issue for the Church about clergy who are not suited to their particular post and who in their own interests as well as those of the parish may need to retire or move on to another post. In some cases resolution has been impossible as the cleric has freehold and was unwilling to engage in any discussions. We are told that on occasion people in these circumstances have been threatened with, or have even been subjected to, proceedings under the CDM. This is clearly not how disciplinary proceedings should be used and would represent a real failure in pastoral responsibility of bishop and diocese towards the clergy. We are mindful that how the Church deals with these cases is outside our terms of reference, but it ought to be addressed at the same time as any new Discipline Measure is brought forward so that there is a clear route for dealing with such matters without the need to allege misconduct.

#### Misconduct generally and deciding whether it is serious or lesser misconduct

107. There will be cases where the complaint is not of a grievance but of misconduct. The cleric may admit such, and they may offer mitigation as to why they acted as they did. Sometimes there will be misconduct but arising from ill health or lack of capability.
108. The key question at this point is going to be whether this is misconduct which is so serious that it cannot be addressed locally but is something that concerns the wider Church and that the Church must deal with as a disciplinary matter.
109. As we said earlier most people will know such cases when they see them. Usually serious misconduct will be apparent the moment the matter first arrives with the bishop. The diversion of marriage fees into the cleric's own bank account to pay for a holiday would be such; the grooming and sexual abuse of a child or vulnerable adult would be another; the cleric who has moved in to live with the churchwarden's spouse would be a third. There will be others and they will often concern "the big three" – money, sex and power. Alongside these would be instances of serious and/or persistent neglect of duty. But the essence of our argument is that the matter would be pursued and investigated as an allegation of "serious misconduct" against the respondent, the particulars of which would state what the cleric was said to have or not have done. If we were looking at criminal indictment the "Statement of Offence" would always be "serious misconduct" and the "Particulars of Offence" would be what the cleric was alleged to have or not have done.
110. We have already noted (para 68 above) that currently most offences are charged as conduct unbecoming with the particulars spelling out the detail of the conduct. The test of whether it is unbecoming conduct is then assessed by looking at the canons and the *Guide for Professional Conduct*. There would really be very little difference in approach if this proposal of ours were adopted.

111. Even in cases as serious as these the cleric must be told what has been alleged and asked for their response. But the enquiry will not be lengthy and the bishop will quickly allocate them to the serious misconduct track, about which we will say more shortly.
112. But there will be cases that are more difficult to define on paper, although we suspect they will be easier to identify when they appear, as to whether it will amount to serious misconduct if proved or to lesser misconduct.
113. It is the matters we identified earlier when trying to find a succinct definition for serious misconduct that the bishop will have in mind. Is this a criminal offence of some weight? Is this obviously entirely inappropriate conduct for someone in holy orders to engage in? Is there a degree of persistence? Is this the sort of matter for which someone should be prohibited either permanently or temporarily or might a lesser penalty be sufficient? Bishops would be provided with a template of questions of this type which they should ask themselves. On the basis of the answers they came up with they would decide whether the allegation if proved would amount to serious misconduct which the church should take upon itself to prosecute in the name of the church. Para 14 of David Etherington QC's paper is helpful here.
114. There would be a remedy for the cleric in relation to that decision as they would be able, as we propose, to apply at the first hearing of the case either for the allegation to be dismissed or for it to be remitted from the serious track to the lesser track.

#### Lesser misconduct track

115. If the matter proceeds along the less serious track we can see no reason why the report from the assessor should not be the basis for what the bishop then does. The report would set out in some detail what the allegation was, what evidence had been provided in support of it, what the cleric had said in response and what evidence the cleric had provided in rebuttal or explanation of the allegation. The assessor would then set out the conclusions to which they had come and the reasons for doing so. In so far as they concluded that misconduct was established they would set out the aggravating and mitigating factors and could if appropriate suggest what the bishop might consider doing.
116. We consider that at this stage the bishop should have the power to impose, without consent, penalties falling short of prohibition. Those would be principally rebuke and injunction, and might also include conditional deferment. We would propose that such penalties would not be put on the Archbishops' List but would be recorded in the cleric's Blue File.
117. Of course the cleric would be given notice that these were the findings of the assessor and that this was the bishop's proposed course of action. They would be called to a meeting with the bishop at which they could be accompanied by a supporter, as they would also at meetings with the assessor. We would not see

either of those meetings as places where the respondent or the bishop would need to be accompanied by a legal representative. The respondent could make representations as to why the bishop should not proceed as proposed. They could also make representations that the bishop should not accept the assessor's conclusions. The bishop would consider all that was put forward and would then come to their conclusions and announce them. All outcomes should be in writing with reasons provided for decisions made and penalties pronounced.

118. We appreciate that our proposal to keep out lawyers on both sides may be seen as controversial, especially as it comes from a Working Party established by a 'Law Society'. However employment law and ACAS guidelines regard this as the usual approach in disciplinary hearings and we think it applies equally to the relationship between a cleric and their chief pastor in the disciplinary context. Again we will be very interested to see the responses that we receive when we consult about this in due course.
119. There would need to be a right of review/appeal from these decisions of the bishop. Again we are open-minded as to precisely the form and route of such a review/appeal.

#### Serious misconduct track

120. A complaint of serious misconduct, likely to result in prohibition either temporary or permanent, would be allocated to the serious misconduct track.
121. The charge would need to be clearly defined with some level of input by a suitably experienced lawyer. Precisely who would depend on decisions yet to be made about what centralised personnel will be required to run the tribunals and provide support services to the new system. There would clearly need to be some central administrative body dealing with the arranging of the tribunal panels at the very least. But we are very uncertain as to how big a body is needed, and what roles, including any investigative or prosecutorial ones, that its personnel should have. We favour as light an administrative touch as possible. Again we shall consult more widely about that, including looking closely at costings.
122. The respondent cleric would then be provided with the charge and such evidence as had been gathered by the assessor.
123. We are aware that the Church which brings the charge will also have to fund proper representation for the cleric it charges. There are issues about the current legal aid system which we are aware need to be addressed so that proper advice and representation can be provided. Again we will consult about that.
124. The respondent cleric would be required in a short space of time to indicate in writing whether they admitted the charge. If they did then one way to proceed would be for the bishop to hold a meeting to hear representations by way of

mitigation and then proceed to impose a penalty. It may be that some will want to argue that penalty in these cases should not be left to the bishop. Again we will consider reactions and responses before making a final proposal about this.

125. If the cleric does not admit the charge or is equivocal about it they would be required to attend a directions hearing before one of the tribunal judges. There should be a modest-sized panel of experienced secular trial judges who are accustomed to dealing with both directions hearings and with tribunal hearings. If it is considered that the bishop should not deal with penalties for serious misconduct then all cases would need to be listed before a judge for plea. If there was a guilty plea then the judge could deal with it or a panel could be convened to deal with penalty if that was thought more appropriate.
126. We have modelled what then follows on current procedures that take place in criminal cases in England and Wales since the introduction of the 'Better Case Management' reforms in 2016.
127. The hearing would normally be conducted remotely over a videoconferencing link.
128. There would be a right for the cleric to apply to dismiss the charge as being without foundation<sup>9</sup>. There would also be a right for the cleric to argue that this had been wrongly allocated by the bishop to the serious track and should be dealt with on the lower track. The bishop would obviously have the right to be heard on this matter.
129. If notice of either of the above applications were given at or in advance of the hearing a timetable would be set in relation to service of a full application and a response and a date fixed for determination of the application.
130. At the directions hearing the cleric would be required to enter their plea and to identify what the issues were which they contested. Depending on the issues identified the judge with the assistance of the advocates would identify what evidence would assist the tribunal to determine the issues and limit the evidence to be called.
131. The judge would give directions about the service of evidence by both sides, and the time within which such evidence should be served (a bit like the four stages in a criminal matter before the Crown Court).
132. As to the gathering of that evidence, much will depend ultimately on what central body exists for managing this process. We want to keep it small and light-touch. Indeed, it would be entirely feasible where the judge had identified that additional evidence was required, for this to be gathered by a private detective, of which there are many around the country, many being former police officers. Again we will consider this matter more closely and shall consult about it before issuing a final report.

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<sup>9</sup>The basis for ruling on this would be the principles set out in *R. (on the application of Inland Revenue Commissioners) v. Kingston Crown Court* [2001] 4 All E.R. 721, DC.

133. The judge would also set a date for the tribunal hearing, aiming to do so for a final hearing no later than six months after the directions hearing.
134. Other directions would be given in relation to matters such as special measures for witnesses. No variation to the timetable would be permitted without judicial sanction which would normally only be given at a hearing (again usually remotely) so the judge could continue to ensure that everything is on track.
135. The tribunal judge and panel would then be identified from those able to meet the tribunal date set.
136. The standard of proof would be on the balance of probabilities as at present. It is usually said, following *In Re H*<sup>10</sup> that the more serious the charge the more cogent would be the need for the evidence to establish it. However there is another line of authority<sup>11</sup> where it is expressed rather differently. It is said that such cases “do not require a different standard of proof or especially cogent standard of evidence, merely appropriately careful consideration by the tribunal before it is satisfied of the matter which has to be established.” Whatever, the precise formulation is, we have no hesitation in saying that it is the civil standard that should apply not the criminal standard. In relation to the criminal standard we would add that the phrase “beyond reasonable doubt” has not been used by English criminal judges for over 40 years – they simply speak about “being sure of guilt”.
137. The decision of the panel would be by a majority. We think a panel of three would be sufficient and that there would be no advantage in a panel of five. The panel should contain at least one cleric and one lay person. There is another issue we shall consult about namely from whom and how the panels would be composed.
138. At the conclusion of the hearing, if the charge of serious misconduct was found proved, then the tribunal would decide on the penalty. If the respondent had admitted guilt at the plea and directions hearing it would be possible that they be returned to the bishop for sentence, subject to what is said above about bishops and penalties in serious misconduct case. Again we have no strong view about that and will consult and make a later decision as to what we recommend.
139. There would be provision for appeal. We consider the current system of a right of appeal on the facts to the respondent and on the law to both sides, but such appeal only to proceed with the leave of the appeal court, should continue. We will consider in due course how that appeal court should be constituted.
140. Other matters, in addition to those mentioned in the body of this interim report that will need to be considered and on which we will report in due course include:

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<sup>10</sup> *In Re H* [1996] AC 563 per Lord Nicholls

<sup>11</sup> *R (IPCC) v Hayman* [2008] EWHC 2191 (Admin) para 18



- Ensuring that all clergy fall within the jurisdiction, including ‘peculiar’ cases ie clergy who fall outside the jurisdiction of a diocesan bishop.
- Complaints against bishops – we think it would be a similar process but with different personnel investigating and deciding matters; and possibly the Vicar-General of the Province being the legally qualified chair/judge presiding at each tribunal stage.
- Complaints against deacons – we assume that they will be dealt with in the same manner as priests, as under the current CDM.
- Limitation Periods – should there be limitation periods, if so of what length and with what exceptions?
- Who would deal with applications to proceed out of time?
- What to do about suspension pending outcome, especially in serious misconduct cases.
- Questions of ‘conflict of interest’ or arch/bishops recusing themselves – in what circumstances should this happen, other than obvious ones such as the respondent is the spouse/child of the arch/bishop?
- Whether the disciplinary process needs to wait for the outcome of any criminal investigation and/or prosecution. The current inordinate delays in the secular system militate against that, but if we are to proceed in advance then we would probably need some agreed procedure for information sharing with the police and other agencies. High-level consultations would be required to effect that.
- The provision of Legal Aid for accused clerics – how to be administered so that it provides realistic remuneration for those who will have to work at some pressure to be trial ready
- Of crucial importance is determining the relationship of this new system to the Church’s safeguarding regime. We need to ensure that whatever system is in place in the future can adequately deal with the disciplinary impact of safeguarding breaches in a way which promotes justice for the victim as for the respondent cleric, and is not concerned more with the institutional reputation of the church than either the victim or the respondent.
- How this system might also relate to risk assessments in cases where such are required.
- How better to work with prohibited clergy in helping them return to ministry (or into some new walk of life)
- There is also the question about how matters of doctrine ritual and ceremonial will be dealt with. *UA* proposed including them in the new Measure but with differently constituted tribunals. That was not taken up in the 2003 Measure and they continue to be dealt with under the 1963 Measure. There was a proposal to alter that in the Bishop of Chester’s Working Party Report in 2004, which did model itself on the CDM, but that was not carried forward. We must look at whether it would be possible to use whatever we eventually propose to replace the CDM in terms of a tribunal, appropriately weighted with theologically qualified people, to also take on such complaints; however that needs a lot more thought.
- We have been critical of the Incumbents (Vacation of Benefices) Measure 1977 and the Ecclesiastical Offices (Terms of Service) Regulations 2009 [Part VII - capability procedures] along with the Code of Practice issued under Regs 8 &

32. We have been told that both of these are regarded as not serving their intended purposes. So there is a question as to whether these can survive the introduction of a new Measure or whether they should be repealed and relevant provision made in the new Measure or by other parallel provision.

- We also know that the Sheldon Hub are very concerned that the grant and/or withdrawal of “Permission to Officiate” granted to the retired or otherwise unlicensed clergy is entirely at the bishop’s discretion with no due process for clerics and no apparent accountability for the bishop.

## **In conclusion**

141. In recent years the Church of England has been carrying forward a Simplification Agenda. We commend this interim report as being very much a part of that agenda. We believe that we have identified a number of serious lacunae in the current Measure, a number of which have arisen because the recommendations made in *UA* were not carried forward. We believe that it will be possible to remove from the complexities of Preliminary Scrutiny Reports (PSRs) and potential tribunal hearings a huge number of cases that are currently caught up by the CDM process. We believe that having removed them, because they are really either grievances or involve less serious misconduct, they can be dealt with speedily and in a way that properly reflects how the Good Shepherd said we should live, in relationship with one another as fallen beings fully redeemed but still in the process of sanctification, and being made whole by grace. We believe also that matters of serious misconduct must be dealt with on behalf of the Church, but that that can also be done in a more efficient and more effective manner than at present. There are many fine details to which we will turn our attention when we know that there is broad agreement with our proposals that we need two tracks, with an early investigation to help determine into which track cases should go and that the bishop should have a key role in all that takes place.

## **In the meantime ...**

142. One immediate issue is that even if there were to be substantial agreement about what should be done to replace the CDM, the process of doing so would take about 2 years to pass through the various legislative processes in Synod and Parliament. If that were to start in February 2021 it would be the end of 2022 at the earliest before any new Measure would be able to take effect. In the meantime matters would continue as now unless some suitable method could be found to circumvent the current procedures.

143. If a way could be found to divert people away from completing Form 1A or from actioning Form 1A by the bishop immediately asking for a PSR then it may be possible to channel a significant number of complaints into a more informal process so that they never need to become formal CDM complaints.

144. That would be possible if for example the first indication of a complaint was not signed or was not accompanied by evidence. Then, rather than sending the complainant a Form 1A and instructions about the formal requirements of a complaint, there could be a standard letter sent enquiring as to what they were looking for in making their complaint and explaining that there was an alternative informal procedure by which they might get a speedier and more appropriate resolution of their complaint than by utilising the CDM process.
145. We understand that the CDC is setting up an online procedure to help people who wish to make complaints under the CDM. There is every possibility that that could steer people into such an informal process for matters that are less serious and for which some simple resolution such as an apology for forgetfulness would be an acceptable outcome.
146. For this to be effective it would be necessary for each diocese to have a system for dealing efficiently with such complaints. There is no such standard system at present. Less than half of dioceses have any such system at all, and those that do have systems that differ from the others, although a few dioceses have adopted systems similar to that originated by the Diocese of Gloucester.
147. It is therefore proposed that there should be a standard system, that it should be adopted by all dioceses and that each diocese should advertise it plainly on its website.
148. This system could then be monitored and tweaked as necessary and in due course could form a part of the overall system of clergy discipline to be enacted in a new Measure.
149. We attach a draft of what might form the basis of such a standard system – “The bare bones of a new interim grievance/complaints procedure”. This is very much a first draft of how such a system could work. If there is enthusiasm for it, we will be able to consult with others and work it up into something that could be adopted by all dioceses.

**The ELS Working Party:**

**The Venerable Moira Astin** – Archdeacon of Reigate and Member of the Clergy Discipline Commission

**The Venerable Elwin Cockett** – Archdeacon of West Ham

**The Revd Stephen Coleman** – Vicar, St Peter Grange Park, London N21 and PhD Student in Law, Cardiff University.

**HH Peter Collier QC** – Retired Senior Circuit Judge; Vicar-General (York); Convenor and Chair of the Working Party

**Louise Connacher** – Provincial Registrar (York); Diocesan Registrar - York

**David Etherington QC** – Barrister; Crown Court Recorder; Diocesan Chancellor - St. Edmundsbury and Ipswich & Norwich

**The Right Revd Viv Faull** – Bishop of Bristol

**Charles George QC** – Former Dean of the Arches and Auditor

**Ed Henderson** – Solicitor, Lee Bolton Monier-Williams – CDM litigator

**Stuart Jones** – Diocesan Registrar – London & Norwich

**The Revd Samuel Maginnis** – Curate; Researcher and Secretary to the Working Party

**The Revd Joshua Rey** – Until August 2020 Chaplain to the Bishop of Southwark

**Geoffrey Tattersall QC** – Retired Barrister; Former CDM Tribunal Chair; Diocesan Chancellor - Carlisle and Manchester

9<sup>th</sup> September 2020

## Annex 1

### A reflective walk through the CDM process

The purpose of this document is to describe the main features of the CDM as it operates in practice and to note the issues which we understand are regularly raised by way of criticism of the Measure and to raise some that have struck us as we have considered the operation of the Measure. We reflect also on what needs to be done to deal with such criticism.

All members of the working party have had quite regular dealings with the Measure in operation and we between us have fulfilled many of the of the roles envisaged in the Measure. We also have the perspective of gaining this experience through a mix of ordained and lay roles.

#### 1. The CDM Suite

- 1.1 The Clergy Discipline Measure 2003 (“CDM”) came into force on 1<sup>st</sup> January 2006. As is common these days it is part of a legislative suite of materials consisting of
  - the Measure;
  - the Clergy Discipline Rules 2005 (as amended) (“CDR”), made by the Rule Committee;
  - the Clergy Discipline Measure 2003 Code of Practice (“the Code”) issued by the Clergy Discipline Commission (CDC) under s.3 of the Measure in January 2006 and revised in February 2011, July 2013 and July 2016; and
  - Guidance on Penalties issued by the CDC in March 2006 and revised in January 2009, April 2012 and April 2016
- 1.2 The Measure was the outcome of a Working Party instituted by General Synod whose report *Under Authority* (“UA”) was published in 1996.
- 1.3 The Measure replaced the Ecclesiastical Jurisdiction Measure 1963 in so far as that concerned clergy discipline in relation to matters other than doctrine, ritual or ceremonial matters.

#### 2. The complainant

- 2.1 The process begins with a complaint by a complainant.
- 2.2 The Measure specifically recognises that a PCC might by a 2/3 vote of its lay members nominate a member to make a complaint or that a churchwarden might make a complaint – s.10(1)(a). However, it is of note that not many complaints are begun by such persons. In the 13 years between 2006-2018 the figures published by the CDC show that of 959 complaints 16 were commenced by a PCC nominee and 30 by churchwardens.

- 2.3 There is always a danger in relying on anecdotal evidence, but in the absence or specific data there is no alternative in attempting to build up a picture of what has been happening under the Measure except by reported stories. We are aware from cases which our members have knowledge of that in one instance speaking of a complaint by a church officer he said “This was one of the two most vexatious and needlessly vituperative complaints I have seen.” Another is aware of several complaints by PCC members or officers, but only in their personal capacity in relation to personal grievances.
- 2.4 It does seem to us that the bringing of a complaint by church officers indicates a degree of breakdown in the parish. In those circumstances there is a real likelihood that the breakdown is likely to be causing the officers to see the CDM as a route to get rid of the priest, which amounts to the weaponising of the CDM process. Breakdowns are not usually as simple as being all the fault of the priest. They may arise because of a mismatch of priest and parish from the moment of institution or licensing. Such breakdowns should be tackled in some other way than by weaponising the CDM against the priest. The fact that such cases arise is in part because of the ineffectiveness of other ways of addressing the breakdown. There should be appropriate alternative ways of dealing with such pastoral breakdowns. That is outside the scope of our review but we flag it up as needing attention, but also to warn against any replacement for the Measure being used in this way.
- 2.5 There is no recognition in the Measure of the fact that an archdeacon will often be the one laying the complaint. Some 285 complaints (30%) have been laid by archdeacons in that 13 year period. We understand that archdeacons have brought complaints for a wide variety of matters, but amongst them have been some regular issues. They will often initiate complaints following clerics being charged with criminal offences, or because of safeguarding matters raised by the DSA, or because of violent behaviour, perhaps towards a partner, or because of other issues of serious conduct without a personal victim such as the dishonest appropriation of funds. One of our number has seen 5 recent complaints laid by archdeacons “all concerned clergy against whom crimes or safeguarding infractions have been alleged ... These five thus follow a fairly standard pattern, of corporate response, personified by the archdeacon, to fairly clear breaches of safeguarding / legal / financial boundaries”.
- 2.6 Sometimes there have been issues when the archdeacon has brought a complaint and the Designated Officer (“DO”) has wanted to use the archdeacon to present hearsay evidence from the true complainant. This is clearly unsatisfactory, particularly from the perspective of the respondent who may deny the behaviour alleged.
- 2.7 One of the issues arising from an archdeacon being the complainant is that there will be almost certainly be difficulties in restoring a constructive working relationship with the cleric post-proceedings.

- 2.8 Then there are the 628 (65%) brought by some other individual. There is no data bank from which we can ascertain what these have been about, or if there are common issues that are regularly complained about. Our understanding is that it is rare for complaints by PCCs, churchwardens or archdeacons to be dismissed by the bishop following the preliminary scrutiny report (PSR). But it is noteworthy that there is an overall dismissal rate of 33%. The complaint will usually be dismissed if the registrar has advised that the complaint is out of time, that the complainant lacks a proper interest or that the complaint is of insufficient substance to justify proceeding under the Measure – s.11(1). The Code of Practice (para 104) suggests that this would be appropriate “if the complaint were trivial, or if the bishop forms the view that the alleged misconduct, if true, would probably not be grave enough to merit a formal rebuke under the Measure, or it could be dealt with more appropriately under non- disciplinary procedures outside the Measure.”
- 2.9 It is noteworthy, and in our view unfortunate, that neither the Measure nor the Code refer to the possibility of frivolous, vexatious or malicious claims being made. It does refer to ‘trivial’ matters (paras 68 and 104), but that is different. Of those who responded to a survey carried out by the Sheldon Hub, 109 out of 197 respondents described the complaint against themselves as “trivial or vexatious charges without foundation”. If there were recognition of this possibility then there would need to be provision for identifying those cases at an early stage and dismissing them. There is no such anticipation and no such provision. It is a major weakness in the current system.
- 2.10 The obvious question that arises at this point is whether it is right and/or appropriate to permit anyone to launch a formal complaint against a cleric that immediately precipitates formal proceedings. 33% of complaints were dismissed but not before the cleric had been notified that there was a complaint against them with a potential consequence of losing their home and livelihood. The likelihood is that one third of complaints will go nowhere but will be determined by a dismissal. But that does not discount the serious anxiety and more that may have been occasioned to the cleric. Furthermore, on occasions a malicious complainant may have intended exactly that to happen.
- 2.11 It is worth noting that this is the first time for over 100 years that such freedom to launch complaints has been given to individuals. In 1840 anyone could lay a complaint but only if alleging the commission of an ecclesiastical offence which set of offences were quite clearly defined. When the scope was widened in 1892 to include being “guilty of immoral act, conduct or habit” the laying of a complaint could only be done by 3 parishioners or a bishop. In 1947 unless you were a bishop, a churchwarden or a patron you again needed 3 persons (aged 21 or over and on the electoral roll) to lay a complaint. It was then that “conduct unbecoming” was also first introduced. And under the 1963 Measure unless authorised by the bishop you needed 6 persons to complain. And under each of those provisions the bishop could refuse to accept the complaint, giving protection against frivolous and vexatious allegations.

- 2.12 *UA* considered (para 8.10 ff) whether their proposals would encourage the making of complaints. They recognised three contemporary trends: that we live in a more litigious society; that there is a more ready recourse to such devices as judicial review when people are aggrieved or offended by decisions or procedures; our society has a strong economic emphasis and desire for ‘value for money’. However, weighing the likelihood of an increase in the number of complaints they considered that “a disciplinary procedure that makes complaining quite difficult is immoral”. They concluded “So after a careful weighing of the issues and in the light of the context in which we live, we have concluded that what some might consider a freeing of the ability to lay a complaint is the best way forward. We wish to avoid obstacles that generate frustration or suspicion of those authorised to act. Equally, we wish to see complaints stated clearly and dealt with without undue delay. For alongside easier access to making a complaint must go appropriate measures to handle the complaint, and especially to reject it where it is found to be frivolous or malicious”.
- 2.13 It must be noted that the some of the changes that were made in not introducing the full scope of the *UA* proposals has effectively removed their proposed filtration process that would have enabled frivolous and malicious complaints to be identified and dismissed before becoming official complaints.
- 2.14 There is clearly scope to look again at who should be able to launch a formal disciplinary complaint, which may well be different from seeking to resolve a grievance. Also to ensure that the frivolous and malicious complaints are rapidly rejected.

### **3. The complaint**

- 3.1 The matter that might be the subject of complaint is misconduct which is defined in s.8 as:
- (a) doing any act in contravention of the laws ecclesiastical;
  - (aa) failing to comply with the duty under section 5 of the Safeguarding and Clergy Discipline Measure 2016 (duty to have due regard to House of Bishops' guidance on safeguarding children and vulnerable adults);
  - (b) failing to do any other act required by the laws ecclesiastical;
  - (c) neglect or inefficiency in the performance of the duties of his office;
  - (d) conduct unbecoming or inappropriate to the office and work of a clerk in Holy Orders.
- 3.2 (a) contravening ecclesiastical law has always been a matter for the exercise of clergy discipline. Traditionally it covered matters such as drunkenness and neglect of duty, fornication, not being licensed, non-residence, and conducting clandestine marriages.



- 3.3 (aa) was added in 2016 as part of the enhancement of safeguarding procedures generally in the Safeguarding and Clergy Discipline Measure 2016
- 3.4 (b) deals with the sins of omission in relation to the laws ecclesiastical.
- 3.5 (c) and (d) were first introduced by the Incumbents Discipline Measure 1947. Introducing the Measure to the House of Lords, The Archbishop of Canterbury said “Quite briefly, the Measure deals with those rare but distressing cases in which there is a complaint against an incumbent of serious, persistent or continuous neglect of duty, or of conduct unbecoming the character of the clerk in Holy Orders. The Measure is very largely the work of the House of Clergy in the Church Assembly, who devoted over a long period their constant attention to it ... the Measure contains a multiplicity of provisions and safeguards to secure three things: first, that any frivolous or unsubstantial complaint shall be ruled out before the stage of a regular charge is reached at all; secondly, that no charge shall go forward to the trial of an incumbent unless in the judgment of a ministerial committee of six clergymen, elected by the clergy of the diocese, there is a true bill to be tried; thirdly, that, so far as is humanly possible, there shall be no chance of any miscarriage of justice.”
- 3.6 These safeguards were introduced because of the anxieties about how this provision could be misused. There had over a number of years been a number of statutes aimed at dealing with capability falling short of an ecclesiastical offence, the last of which was the Incumbents (Disability) Measure 1945. The 1947 Measure dealt with such cases of neglect as could be said to be culpable and also added the concept of conduct unbecoming. The latter had been the cause of much debate and was the ground of much opposition to the Measure.
- 3.7 *UA* said at 6.11 and 12: “The 1963 Measure places most discipline under the phrase ‘conduct unbecoming the office and work of a clerk in Holy Orders’. We have noticed with interest that most recent disciplinary reforms in other provinces of the Anglican Communion have tended to move away from this generalised and non-specific terminology, to list offences in greater detail. We found ourselves in some sympathy with this trend. Whilst a more specific statement of offences risks becoming too rigid and exclusive, it does assist in clarifying what sorts of behaviour are acceptable or unacceptable. So we have attempted to offer a few more tightly worded offences, whilst retaining something of the older wording to allow for offences that might otherwise become excluded.”.
- 3.8 Conduct unbecoming has now become the ‘catch all offence’ and has enabled minor complaints to be brought on the basis for example that it is unbecoming for a priest to be rude to a parishioner, or a vicar forgetting to allow person A up for communion before person B as verbally agreed (seriously!).
- 3.9 There is clearly scope to re-examine what are the appropriate matters that could give rise to disciplinary complaints against clerics. And whether the most serious and the least serious require the same process.

#### 4. Initial procedure

- 4.1 The Code envisages a “Stage 1” “Before formal proceedings are instituted”, saying (para 9) that “a bishop will receive complaints from people who do not wish to invoke formal disciplinary procedures. Often, such complaints or grievances are not about serious matters of misconduct, and can be resolved informally without recourse to law if they are handled with sensitivity and without undue delay. **Minor complaints should not be the subject matter of formal disciplinary proceedings.**” (bold emphasis is given in the code).
- 4.2 However, there is no provision for making such complaints other than by writing to the bishop saying you have a complaint but do not wish at this stage to complain formally. There is no encouragement anywhere that we can see for that to happen. Diocesan websites if they even deal with how grievances against clergy can be addressed tend to point in the direction of the CDM process. Less than half of the websites have any provision dealing with complaints other than by making a CDM complaint.
- 4.3 The remainder of the Stage 1 commentary in the Code is about bishops and archdeacons learning of misconduct and making enquiries about it before instigating a complaint under the Measure.
- 4.4 The concept of a filtering stage being a regular part of examining a complaint before a formal complaint is lodged which was envisaged in *UA* in all reality has been lost.
- 4.5 This is a matter that clearly needs to be addressed and proper provision made for minor grievances to be formally addressed in a standard way across all dioceses in both provinces.
- 4.6 A complaint under the Measure must be filed by submitting Form 1A – Rule 4 of the CDR, or in a document setting out the information required on Form 1A
- 4.7 It must include not only “in summary form the details of the acts or omissions alleged to be misconduct” but also “the evidence in support that the complainant relies upon, which shall be in writing signed and dated by the maker of the statement in each case.” – Rule 4
- 4.8 What it does not require is for the complainant to indicate what they are wanting to achieve by their complaint. We understand that quite often complainants do say what they are looking for. Sometimes they say they would like an apology, sometimes they just “want to be able to go back to church”, sometimes for “things to go back to how they were”. But once the complaint is launched the likelihood of some sort of resolution being achieved is minimal. In 13 years only 32 cases were referred for conciliation and only 10 of those had a successful outcome.

- 4.9 *UA* was published in 1996. It was a further 7 years before the Measure completed its progress through Synod and Parliament. The Measure that we have is different from the proposals in *UA* in so far as the Working Party envisaged a 28 day period after a complaint was intimated in which there would be a filtering process to seek to resolve what could be resolved, to dismiss what was clearly frivolous or vexatious and only formally to present a complaint when that filtering had taken place.
- 4.10 The process of turning the proposals into a Measure resulted in the loss of that filtration process. The 28 day filtering period which they proposed in which an initial investigation would lead to a decision whether to go down a pastoral route or disciplinary route was replaced by a nodding assent to the possibility of an informal attempt at resolution (see para 4.1 above) but in most cases going straight to a legal assessment of the capacity of the complainant and of whether the complaint revealed a *prima facie* case meriting being dealt with under the Measure. It is unclear to us why that happened but the result has been that many complaints are now the subject of an expensive legal filtration with no real examination of what a complainant is looking for and no understanding as to what the attitude of the respondent is to the complaint – whether it is admitted, explained or denied.
- 4.11 The injunction of Matthew 18 seems to have got lost. It is perhaps unfortunate that the first of six stated objects of discipline in the Code (para 4) is said to be “the imposition of an appropriate penalty”. Historically discipline was seen as being for the good of the soul (*Pro salute animæ*) and that was not just the soul of the individual but the soul of the community as well. Reconciliation and restoration was at the historic heart of discipline within the church. That purpose surely needs to be restored to our processes.

## **5. Preliminary Scrutiny Report (“PSR”)**

- 5.1 Once the complaint has been laid before the bishop, the bishop has no alternative but to refer it to the registrar for a PSR.
- 5.2 The bishop must acknowledge receipt within 7 days (Code para 68) and indicate that the matter will be referred to the registrar for a PSR and that that should be received within 28 days. An indication should also be given that the bishop would hope to decide the appropriate course, the options being explained to the complainant, within 28 days of receiving the PSR.
- 5.3 We understand that a frequent cause of complaint and of anxiety is that frequently those timescales are not met.
- 5.4 Within seven days of receiving the complaint, the registrar should inform the respondent about the complaint, sending them a copy of it (contact details of complainant and witnesses having been redacted). Which will also provide a letter

from the Bishop explaining the care and support will be provided to the respondent on the bishop's behalf.

- 5.5 Research by the Sheldon Hub indicates that both being informed about the nature of the complaints and being provided with care and support are points where respondents often feel let down. It is said that practices vary across the country as to whether details of the complaint are provided at that initial stage. We are surprised by that but have no reason to doubt that it is the case that many respondents have not been told the details of the allegation against them when first being informed there was a complaint.
- 5.6 The registrar has to consider two matters only – first, whether the complainant has a proper interest in making the complaint and second, whether or not there is sufficient substance in the complaint to justify proceeding with it in accordance with the following provisions of this Measure.
- 5.7 The registrar will also no doubt have regard to whether or not the complaint is out of time and if it is out of time whether or not the complainant has obtained permission to proceed from the President of Tribunals (PoT).
- 5.8 Payment for preparing the PSR is not covered by the registrar's retainer but is paid for by the Church Commissioners. The charge is made on a time spent basis. There is a cap of £4,000 per case which can be extended and sometimes is. The figures for 2019 show that the Church Commissioners received invoices from registrars for PSRs totalling £438,530.56. We do not have an average figure per case, because registrars' fees are paid by invoice and there can be numerous invoices for each case. However, we are told that the **average invoice** for PSRs for 2019 was **£2,595.66**.
- 5.9 It must be the case that it was never foreseen that this detailed and costly scrutiny would occur in anything like this number of cases, but without an effective stage one, and with the requirement for all complaints lodged to be subject to legal scrutiny, it is an unavoidable result of the system as designed.
- 5.10 That would suggest that the cost over the 14 years has been perhaps in excess of £2 million. Given that one of the concerns about the 1963 Measure was the cost of the few cases, there seems to have been no assessment that we are aware of of the likely number of cases that there would be and of the likely overall cost of these PSRs, required as they would be in all cases.
- 5.11 The code asks 'what happens if the complaint concerns criminal conduct?'. It says (paras 58-60) that any criminal matters should be investigated and resolved by the relevant secular authorities before any related disciplinary proceedings under the Measure are resolved.
- 5.12 One of the problems about that is that the current timescale for investigating and prosecuting criminal allegations particularly sexual ones is quite unacceptable.

Police investigations and consultations with the CPS regularly take over a year and if a defendant has been released under investigation or is bailed it may be a further 18 months after they have been charged before they have a trial date, and that is being significantly lengthened following the 2020 pandemic.

5.13 This issue of whether a criminal trial should always take priority requires review.

## **6. Options open to the bishop**

6.1 The bishop can dismiss the claim under s.11(3). The only bases upon which the Code (para 104) suggests that this can be done is if the complainant does not have a proper interest; or there is insufficient substance to justify proceedings. The latter is said to be such cases as a trivial complaint, or one which if true would not be grave enough to merit a rebuke under the Measure or one that could be dealt with more appropriately under non-disciplinary procedures. Clearly it should also be dismissed if out of time and no leave to proceed has been given. We have already noted that in fact 33% of claims are dismissed.

6.2 One registrar said “I am surprised the dismissal figure is so high because I feel that registrar's typically err on the side of caution and recommend a bishop ask the respondent for their side of the story so that a balanced decision can be taken. I would have expected 'no further action' to be higher than dismissals.” In fact 18% of claims in that period resulted in no further action

6.3 The experience of dismissed cases within the working party is that many “were poorly framed ... many simply repeated anecdotal material about which the complainant had no direct knowledge. The complaints were largely about rudeness or pastoral issues rather than clear misconduct.” We also know of allegations of libel, which were not considered appropriate for resolution in a CDM tribunal. But all these cases have been received by the bishop who has no option but to refer them to the registrar for advice, incurring significant cost. There has to be a better way of dealing with this level of complaint.

6.3.1 There is a right of appeal to the PoT from a dismissal, but the determination is not a fresh consideration but a consideration of whether the bishop was plainly wrong (para 109).

6.3.2 It must be the case that of the 277 out of 959 complainants whose complaints have been dismissed many will be left feeling very unsatisfied often believing that there is no other course available to them to resolve their grievance. Further there will often be increased antagonism towards the respondent as the complainant will no doubt feel that “They are all sticking together”.

6.4 If the bishop does not dismiss the case the respondent will then be asked to respond to the complaint; being asked whether all or any of the complaint is admitted and if not what they wish to say about it, setting out any defence and

providing if they wish evidence in support. Whatever the respondent provides to the bishop should be copied to the complainant

- 6.5 The bishop can then decide to take no further action (“NFA”). The bishop may not take this course if the complaint is one of substance and is denied (para 163 Code). The Code suggests that this will be appropriate where the misconduct is minor, or of a technical nature. 18% of cases (153 out of 959) were dealt with in this way.
- 6.6 Para 117 says that “A decision to take no further action under the Measure is suitable where the misconduct is admitted by the respondent but is of a technical or minor nature, or where, having seen the respondent’s answer and evidence in support, the bishop decides there was clearly no misconduct”.
- 6.7 One of our number has observed: “it might be that some of these cases might have qualified for a ‘verbal’ or written warning, and been dealt with informally that way outside the CDM – the Bishop might have said to the respondent, ‘I’m going to take no further action on this occasion, but please be more careful how you behave in future’. My perception is that it is very rare for a bishop to make a decision on which side to prefer unless the complaint is obviously nonsense or the respondent admits it. Therefore a referral for formal investigation will be made.”
- 6.8 On the other hand another one of us who has handled a significant number of cases said “, I think there are many complaints where it is fairly obvious there was no misconduct but the bishop prefers to ask the respondent for an answer so they can be seen to have made the NFA decision having weighed up both sides whereas a straight-up dismissal can aggravate a complainant. One bishop admits as much when meeting the respondent before making the decision. I think this is a reasonable way to go.”
- 6.9 There is again a right of appeal to the PoT, and again the test for the PoT is whether the bishop was plainly wrong.
- 6.10 We have become aware of recent case where the Deputy PoT dealt with an application to review a bishop’s decision to take no further action having considered what was said on paper by the complainant, the respondent and also the associate minister in support of the respondent. Sir Mark Hedley said:

“The bishop has explained the basis of his decision in terms of indicating his view of the evidence as a whole, preferring that of the respondent and his associate minister. He has decided that on that basis it was right to take no further action under the Measure. Was that a decision that was reasonably open to him in the circumstances of this case?”

I have considered this matter with great care having endeavoured fully to appreciate the ambit and substance of the submissions that have been put before me. I have to say that the decision that the bishop made, whilst not the only one available to him, was one that was reasonably open to him given his conclusions on the evidence, that being a matter for him and not for me.”

- 6.11 This will seem unsatisfactory to some complainants as the bishop is deciding to do nothing without any hearing having taken place. Of course, it can be argued that there should be a power for a bishop to dismiss frivolous and vexatious complaints, but this is not provided for in this way under the Measure.
- 6.12 We have no doubt that this mixed practice and confusion in relation to NFA arises with bishops attempting to do their best to resolve the problems that they face given the absence of any clear and specific power to dismiss cases that are frivolous or vexatious.
- 6.13 One of us who had seen several cases which passed the s.11 threshold and in which the bishop having asked for the respondent's answer decided that the appropriate course was NFA remarks "These cases ... are examples of how an energetic and well-resourced complainant can use the Measure to inflict distress on a respondent by bringing a large, incendiary and complex case, even though it be ultimately baseless. The extended process of consideration is very trying for some priests, perhaps the more so when they know themselves to be innocent."
- 6.14 Conditional deferment 5%. (42 cases) is another option for the bishop. This is only open if the respondent consents. The Code gives no indication of when this would be appropriate, but it is usually for matters that are technical or at the less serious end of the spectrum. It may be accompanied by the cleric agreeing to undergo further training or the like.
- 6.15 A bishop can direct that an attempt is made to bring about conciliation. This has been used rarely – 32 cases have been referred for such attempts in the course of 13 years, of which only 10 were successful. In cases where it is unsuccessful the matter has to be referred back to the bishop to decide which of the other options in s.12 should be taken.
- 6.16 Penalty by consent is the second most common outcome – 214 cases (26%). Only dismissal is a higher figure. This depends on an admission of at least part of the allegation. It would appear that it is the commonest outcome of s.30 cases (i.e. following a criminal conviction).
- 6.17 Any proposal by the bishop has to be put to the complainant and the respondent each of whom is invited to make representations. If the respondent does not agree then the matter has to be referred for investigation.
- 6.18 One of our number said "In my experience this is often sexual misconduct, ranging from the less serious – texts and other behaviour full of innuendo (resignation + rebuke); flirting and sexual contact falling short of intercourse (2 year prohibition); adultery (2 year prohibition in one case, rebuke and injunction in another); viewing child pornography (10 year prohibition).

- 6.19 Another said: “It is difficult to pick out trends here. It is so fact and circumstance specific. My comments:-
- i) you are more likely to find admissions from the respondent where the gravity of the offence is low level – ie. a rebuke;
  - ii) a penalty by consent is likely to be rebuke; rebuke with conditions (eg. undertaking some training); or prohibition up to 2 years.
  - iii) the CDC figures do not show the number of removal from office penalties that have been accompanied by a settlement agreement (compensation, accommodation, moving costs, legal fees). There can be tactical reasons for accepting a removal/prohibition penalty if it comes with a 'deal' rather than taking chances with a tribunal and having the same penalty imposed on you but without the settlement package.”
- 6.20 We understand that there is a lot of dissatisfaction about this latter course amongst those who have gone down this route. It has often been accompanied by a financial package and a non-disclosure agreement (“NDA”). They say that they have felt under intolerable pressure to accept what was offered in order to provide for themselves and their families.
- 6.21 The final option for the bishop is to refer the matter to the DO for formal investigation. 101 cases (21%) were referred in 13 years. The DO is tasked with investigating the matter and presenting a report to the PoT within 3 months of receiving a full set of documents (complaint, PSR, respondent’s answer and all evidence submitted by either complainant or respondent).

## **7. Formal investigation**

- 7.1 There has been significant criticism of the investigative process. There are complaints that the 3 months is often exceeded. We understand that there has been some improvement recently but that until that improvement it was quite usual to wait 3 months from referral to the DO before he would see the respondent and then another few weeks before he had concluded his report and another 1-2 months before a decision by the PoT.
- 7.2 The PoT can extend time on application from the DO. There is only one DO who is responsible for all investigations as well as being the prosecutor in those cases that are referred to a tribunal. Clearly there is a need for greater resource if this level of cases is to continue and the DO is to remain responsible as now.
- 7.3 Many respondents feel uncomfortable that the DO is a 'neutral' investigator at this stage yet becomes the prosecuting barrister at the tribunal hearing.
- 7.4 There are issues about the fact that the DO’s report goes to the PoT and is confidential, not being revealed to the parties. As a result the respondent has no idea who has been seen by the DO, what witness statements have been taken or even what people have said to the DO if he does not use them as witnesses in the



case he presents. There seems to have been a lack of transparency about disclosure of material and there have been contests about this before tribunals. This is a matter that also clearly needs attention and we will return to it later.

## 8. The decision of the PoT

- 8.1 On receipt of the DO's report the PoT decides whether there is a case to answer in respect of which a disciplinary tribunal or the Vicar-General's court, as the case may be, should be requested to adjudicate.
- 8.2 On the 11<sup>th</sup> October 2017 the Deputy Chair and Deputy President of Tribunals, Sir Mark Hedley, gave a lecture to the Ecclesiastical Law Society entitled *Practical Aspects of the Clergy Discipline Measure*<sup>12</sup>. In his talk the Deputy President pointed out that

“Given that the Measure does not define ‘conduct unbecoming or inappropriate ...’ the question of threshold needs to be addressed” ....

And so one must address directly the question of the relevant threshold of conduct. The Code of Conduct does seek to do that, though the Measure and the Rules do not. In the preface to the Code one reads: "... It does not cover minor complaints or grievances..."; paragraph 8 says: "proceedings under the Measure are not for the determination of grievances." Paragraph 9 contains this: "Minor complaints should not be the subject matter of formal disciplinary proceedings". One then goes on to paragraphs 14 and 15 that deal with the "Overriding Objective of Clergy Discipline procedures" and they include these words: "the overriding objective... is to deal with all complaints justly" which includes "... dealing with the complaint in ways that are proportionate to the nature and seriousness of the issues raised... avoiding undue delay...[and] expense." This is a fair commentary on Rule 1 of the Clergy Discipline Rules 2005. In paragraph 22 (entitled: on what grounds can disciplinary proceedings be brought?) one reads: "A complaint should only be about misconduct that is potentially sufficiently serious for referral to a bishop's disciplinary tribunal". Paragraph 183 is instructive, dealing, as it does, with the duties of the President on receipt of a report from the Designated Officer pursuant to the investigation of a complaint –

“183. The President of Tribunals will consider the Designated Officer's report and decide whether there is a case for the respondent to answer, taking into account whether the alleged misconduct is potentially sufficiently serious for referral to a bishop's disciplinary tribunal. If there is a case to answer and the alleged conduct is sufficiently serious, the President will refer the complaint to a disciplinary tribunal.” I should add that, wherever the President is mentioned it includes the deputy President.  
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<sup>12</sup> <https://ecclawsoc.org.uk/wp-content/uploads/2017/10/Sir-Mark-Hedley-CDM-11-Oct-2017.pdf>

It is in this context that I have formed the view that paragraph 183, which spells out Section 17(3) and (4) and Rule 29, is to be interpreted as generally requiring **a degree of seriousness that, if conduct is proved, will render the respondent liable at least to removal from office or revocation of license** (our emphasis). Whether that is a threshold that should apply at every stage of the Measure is a matter that we will need to consider further.

Now, of course, all that is seriously open to the objection that such a reading places an unwarranted and unjustifiable gloss on Section 8 (1)(d) of the Measure. I fully acknowledge the strength of that objection.”

- 8.3 His acknowledgment raises an issue that cannot be ducked and is yet another example of the problems that come from having such a broad entry gate for launching complaints.
- 8.4 Of those cases referred to the PoT, the method of collecting statistics leaves a lacuna – they are compiled annually and record what happened to cases referred to PoT within the year. Over the 13 years, 32 cases were in the course of investigation and 16 were awaiting the PoT’s decision at the end of the year, and it appears that many of those did not get picked up in the following year. The statistics show that of 101 cases referred for investigation – in 34 cases there was a decision that there was “no case to answer”, 37 were referred to a tribunal and 4 cases were resolved with a penalty by consent, leaving 26 cases unaccounted for.
- 8.5 There is provision for the PoT to direct that a case be withdrawn s.18(2)(a) or that an attempt or further attempt is made at conciliation s.18(2)(b). These directions are rarely given.
- 8.6 One of the issues that causes much concern is the fact that the DO’s report to the PoT is said to be a private and confidential document. The Code (paras 178 and 182) says that the DO’s records are privileged and relies on Rule 28(4) for that proposition, although the Rule does not use that word. As a matter of fact the report is never revealed to the parties. As a consequence some of the things that the DO has heard from witnesses or potential witnesses he may decide not to use and they are never revealed to a respondent and his advisers. There are serious concerns about transparency and about due process in this way of doing things.
- 8.7 These issues and other similar ones concerned the tribunal in the case of *Bulloch*<sup>13</sup> and at the conclusion of their judgment the panel at paragraphs 113 to 120 passed comment on how these serious issues might be dealt with in the future.

## 9. Reference to a tribunal

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<sup>13</sup> <https://www.churchofengland.org/sites/default/files/2020-04/Bulloch-REDACTED-Decision-20.01.2020.pdf>

9.1 The tribunal decides matters applying the civil standard of proof – namely whether they are satisfied that something is more likely than not to have happened. We are aware that there is a great deal of dissatisfaction with this and desire to return to what is described as the standard of “beyond reasonable doubt”. It is said that this is the approach in criminal courts. Of course “beyond reasonable doubt” is a phrase that has not been used in the criminal courts for many years. In 1984 when our chair was trained as a fee paid judge he was told that that was not a phrase that should be used, juries should be directed to convict only if they were “sure of guilt”.

9.2 The approach in the civil courts has often been stated thus:

"The balance of probability standard means when a court is satisfied that an event occurred if the court considers that on the evidence the occurrence of the event was more likely than not. In assessing the probabilities the court will have in mind as a fact, to whatever extent is appropriate in the particular case, that the more serious the allegation the less likely it is that the event occurred .... the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability."<sup>14</sup>

9.3 However panels will also have to have regard to the case of *R (IPCC) v Hayman*<sup>15</sup> where Mitting J ruled that the correct statement of the law is:

"It is recognised by these statements that a possible source of confusion was the failure to bear in mind with sufficient clarity the fact that in some contexts the court or tribunal has to look at the facts more critically or more anxiously than in others before it can be satisfied to the requisite standard. The standard itself is however finite and unvaried .... The seriousness of the allegation requires no elaboration. A tribunal of fact will look closely into the facts grounding an allegation before it before accepting that it has been established. The seriousness of consequences is another facet of the same proposition. If it is alleged that the bank manager has committed a minor peculation that could entail very serious consequences for his career, so making it the less likely that he would risk doing such a thing. These are all matters of ordinary experience requiring the application of good sense on the part of those who have to decide such issues. They do not require a different standard of proof or especially cogent standard of evidence, merely appropriately careful consideration by the tribunal before it is satisfied of the matter which has to be established."

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<sup>14</sup> *In Re H* [1996] AC 563 per Lord Nicolls

<sup>15</sup> [2008] EWHC 2191 (Admin) para 18

- 9.4 Majority decision and panel of 5. We understand that the *UA* proposal of a tribunal of 3 members was extended to 5 by General Synod effectively as a condition for accepting the use of the civil standard of proof.
- 9.5 The hearing of the matter is usually in a private hearing, followed by a public judgment.

## **10. The Tribunal**

- 10.1 s.22 – the chair and members of a tribunal panel are appointed by the PoT from the panel lists of members and chairs. Parties are then given 14 days to object to any of them. No date can be fixed for a hearing until the panel has been identified and we understand that it is often the case that finding a date, particularly for a 2 or more day hearing proves difficult and is usually a long way ahead.
- 10.2 Rule 38 (2) states that the panel should be selected “with due regard being paid to the convenience of the complainant, the respondent, the DO and the witnesses”.
- 10.3 This matter of identifying a panel and a date for the hearing clearly needs to be revisited to find a way of more expeditiously appointing tribunals that can hear cases soon after their appointment. It may be that the date could be identified early and then a panel found who can be available on the identified date(s). Is there any reason that something like Doodle Poll shouldn’t be used to find early dates that would suit the chair and 2 panellists perhaps 10 panellists being asked to participate in the Doodle Poll?
- 10.4 Rule 43 provides that if, after referral of the complaint under rule 29, the respondent makes an admission before or at the hearing, the tribunal may make a finding of misconduct on the basis of that admission without considering any or any further evidence, and the tribunal may then proceed under section 19 of the Measure.

## **11. Management of cases**

- 11.1 The case is generally managed by the Registrar of Tribunals who may hold a preliminary hearing to identify issues and give directions. Either party can ask for a hearing. The Registrar or Chair can give directions without a hearing. There is provision for telephone hearings if they will last under 30 minutes. There is currently no specific provision for video link hearings.
- 11.2 There is scope for improving this in a number of respects. We believe that we can learn a lot from modern court practices which have moved on significantly in terms of proactive case management since the CDM was enacted. It is now no longer acceptable for a defendant in a criminal case to sit tight and say to the prosecution

– ‘I am not telling you what my defence to this case is, you have the duty of proving it, go ahead and do so’. Once a charge has been laid the defendant is now put before a judge very quickly, in serious cases it will be within a week of being charged. The defendant is then expected not only to enter a plea but if the plea is not guilty to say what the issues will be at trial. The judge then makes orders about the preparation of the case, setting a timetable by when each side must complete various stages. Also a trial date is set at that first hearing. Any variation in that timetable that might affect the trial date cannot be made without the permission of the judge.

- 11.3 Huge improvements in the timeliness of dealing with misconduct cases would be delivered if once the charge has been laid and the respondent has had proper notice of it they were required to come (legally represented of course) before an experienced panel chair and indicate whether the allegation was admitted in whole or in part. And to say in so far as it was denied, what was denied and why it was denied, and if a positive case was to be asserted about something what that positive case was.
- 11.4 This could all be done by appointing for each case a legally qualified chair who would deal with this initial case management hearing and with all subsequent case management hearings until a trial chair was appointed.
- 11.5 At that initial hearing other orders could be made such as the provision of special measures (screening and the attendance of IDSVAs or like accompaniers) for vulnerable witnesses so that they can be given assurances that those measures will be in place for any hearing.
- 11.6 These case management hearings could be held using video link to bring together on screen the judge with advocates who will almost certainly be in different locations. This will be convenient for all involved and will make short notice hearings when issues arise very easy to arrange. They will also save significant travel and other expense.
- 11.7 One of the matters that causes concern to the National Safeguarding Team goes beyond providing special measures for vulnerable and intimidated witnesses – it is the cross examination of complainant witnesses by respondents in person. We are aware that in GS 2092 they said that one of the things they were seeking was “The amendment of the Clergy Discipline Rules so as to prevent a respondent who is unrepresented from cross-examining a survivor witness.”
- 11.8 Of course that should never be permitted. We do not believe that any chair of a panel would permit it to happen. Our examination of all the 30 cases conducted before tribunals shows that the only "safeguarding" case in which a respondent represented themselves was *Re Paul Robinson* (2008) – this concerned a failure to follow diocesan child protection procedures and involved no allegations of abuse or vulnerable witnesses.

11.9 We have already dealt with the question of delay. We have analysed the delay in the cases that have been before tribunals. It is not possible in all of them, from the judgments, to identify the date of the laying of the complaint, but in the 23 where that is possible, the average time from complaint to tribunal hearing has been 21 ½ months. The shortest was 9 months when the matter was an admitted one. The longest was 47 months, in 2 others it was 30 months or more, and in 8 others it was 2 years or more. These delays are quite unacceptable and they clearly arise because there is no proper oversight of the management of the cases.

## **12. Penalty**

12.1 The decision of the tribunal if it finds the allegations proved then moves to penalty.

12.2 Guidance has been issued by the CDC in relation to penalties. Although the guidance was issued in 2006 and subsequently revised in January 2009, April 2012 and April 2016 it has yet to deal with penalties for safeguarding issues. Given that failure to comply with the House of Bishops' Guidance on Safeguarding is now a specific offence it is unfortunate that such guidance has not been provided.

12.3 Although section 19(2) of the Measure provides that before imposing a penalty a tribunal may ask the bishop to express his views in writing, this power rarely seems to have been exercised by a tribunal before imposing a penalty, that in principle such an approach seems correct given that the bishop has not heard any of the evidence before the tribunal and that it therefore serves little useful purpose.

## **13. Other matters**

13.1 One of the matters we are aware of that is referred to by those who have been respondents to complaints and who have been suspended is that the recommended course of the bishop meeting with the respondent (para 217 of the Code) is often not followed. Given the matters that are to be considered prior to imposing a suspension and in considering whether it is necessary (para 220) it is surprising that such meetings are not routinely held.

August 2020

## Annex 2

### Secular Disciplinary Processes

1. The purpose of this note is to examine some of the issues involved in reforming and simplifying the CDM system by reference to and comparison with secular disciplinary processes.
2. The following aims are held in common with the secular systems:
  - a. Separating out complaints of a frivolous or vexatious nature or which, even if established factually, would not amount to any category susceptible of action by the bishop or a national complaints tribunal.
  - b. Removing complaints of a more minor nature from the national tribunal process altogether. This could be done by having two processes, one which deals with the minor complaints (MIN) and one which deals only with serious, major ones (MAJ). It could also be done by having three levels of complaint: the two just mentioned and an intermediate one (INT) which could either be dealt with by the local process for minor complaints provided sufficient remedies or sanctions were available or by the national tribunal which would consider the case either using the same powers as for MAJ but with a lower sanction ceiling and probably adopt other procedural changes (such as fewer tribunal members or the like) in order to facilitate a speedier resolution.
  - c. Increasing the efficiency of the whole process so that Respondents are not left dangling with cases that might affect their lives very considerably in MAJ (although there will be a minority who may not wish to have a complaint resolved so speedily) and so that Complainants are not left feeling that there is a never-ending wait for resolution of their complaint (although a minority of Complainants will contribute to the delay themselves).
3. In order to achieve these aims the secular systems have also had to address issues arising out of their reformed processes.
4. Extrapolating those issues into the ecclesiastical context, they include these:
  - a. *Does the Complainant or the Respondent have a right to have the decision which tracks a complaint (or dismisses it outright) into one of the two (or three) pathways reviewed and, if so, what form should that review take?*
  - b. *What powers should the bishop have at MIN and should the exercise of these be conditional upon consent by either the Respondent or the Complainant?*
  - c. *Is the final determination of the MIN complaint open to appeal by either party and, if so, what form should that appeal take?*
  - d. *What is the test for placing something in MIN, INT or MAJ? Should it be set around the likely sanction that would be imposed or categorised because it is a particular type of allegation, should it be looked at solely on its specific*

*facts or should it be mixture? Who would make that decision and with what tools? What is the ultimate broad charge that encompasses the specific behaviour – is it trying to establish Fitness to Practise (as in the case of the healthcare professions) or Misconduct?*

- e. *Who should bring the complaint at the MIN, INT and MAJ levels respectively?*
  - f. *Should there be a right of appeal from any decision of the tribunal?*
5. Secular tribunals have in recent times largely divided into two different pathways. The first is the traditional Misconduct one. The second is Fitness to Practise. The healthcare professions have largely taken the second route. Thus, the traditional Misconduct pathway is still favoured by [the Bar \(Bar Standards Board -BSB\)](#), [Solicitors \(Solicitors Regulatory Authority – SRA\)](#), [Notaries and Surveyors \(RICS\)](#); whereas the [Doctors \(General Medical Council – GMC\)](#), [Dentists \(General Dental Council – GDC\)](#), [Opticians \(General Optical Council – GOC\)](#) and [Nurses/Midwives \(General Nursing Council – GNC\)](#) have changed to a Fitness to Practise test.
  6. FITNESS TO PRACTISE – the word is used in two different contexts. *All* secular disciplinary processes have fitness to practise components. However, in the healthcare professions/vocations, the question of Fitness to Practise is the ultimate issue in their regulatory processes dealing with serious allegations, whereas the ultimate issue for the serious cases in other professions is whether the practitioner has committed Misconduct.
  7. This distinction has its limitations. All secular tribunals have to deal with unfitness to practise caused through mental and medical issues. And healthcare professions have to consider cases where practitioners have committed gross professional misconduct in the general sense of the word (for instance, committed a crime) and where the fact the practitioner should no longer practise has to be expressed in terms of, or fitted into, a concept of impairment of fitness to practise. In other words, what is really meant is that the previous misconduct (the crime, for instance) has impaired the fitness of the practitioner to practise (even if there is no fear it will be repeated) because its gravity is such is that any other decision would erode confidence in the profession as a whole.
  8. Fitness to practise regimes can, of course, deal with specific medical/mental unfitness like any other issue, whereas those taking the misconduct path will need to channel health issues separately although, as it happens, the healthcare professions generally use a separate committee to decide a case where the impairment is primarily a medical or mental issue. Most secular disciplinary bodies also have a system of interim suspension for serious cases where the safety of others (particularly clients or patients) is involved or for permitting the practitioner to continue only on conditions which may be of such a nature to make carrying out the particular occupation practically impossible.



9. There is no doubt, however, that there is a different tone and emphasis in Fitness to Practise regimes from those concerned with Misconduct.
  
10. DETERMINING FITNESS TO PRACTISE (other than in health cases) and SERIOUS MISCONDUCT.
  - a. In modern secular systems, there is a much greater emphasis on establishing the breaching of proper professional standards and most professions and vocations now have a considerable body of guidance and standards - departure from which can form a basis for alleging Fitness to Practise or Misconduct.
  - b. However, there is inevitably some variation in the degree to which a breach or variation of a standard constitutes either impairment of fitness to practise or professional misconduct.
  - c. First, the occupation, profession, vocation or calling may be more or less susceptible of substantial standardisation. This seems to me to be a real issue with clerical misconduct. It is comparatively easy to say when a healthcare professional has performed a procedure that constitutes a breach of a peer-reviewed and regulatory-approved standard that this amounts to impairment of fitness to practise. In some professions, some of the areas are more difficult to identify in that way. At **the Bar**, and also with **Solicitors**, there are a number of areas (advocacy to name but one) where, whilst training recommends particular techniques, there are wide variations that would only become a regulatory concern if they had crossed very bold red lines such as deliberately misleading a court or refusing to accept a judicial ruling.
  - d. **The Bar Handbook and Code of Conduct defines a barrister's behaviour by an examination of Core Duties, Rules, Guidance and Desired Outcomes.** Surveyors talks about "serious breaches". They have five Global Professional Ethical Standards: "Acting with Integrity" (where standards are set out and non-exhaustive examples are given and which also include key questions the practitioner should ask him or herself) "Providing a High Standard of Service" (same as above – non-exclusive examples given), "Acting in a Way that Promotes Trust in the Profession", "Treating Others with Respect" and "Taking Responsibility" (which relates to regulatory compliance and cooperation).
  
11. SEPARATING MINOR FROM MAJOR IN CLERICAL COMPLAINTS. Before turning to what the pointers could be used in deciding whether an ecclesiastical complaint is serious, it is useful to remember how the secular system deals with minor complaints.
  - a. WHAT IS A MINOR COMPLAINT - MIN? As with major matters, identifying it is a mixture of an assessment of the issue itself and what remedies are likely to be considered adequate to deal with it.
  - b. Within the secular system these would equate to matters that the regulators would wish to be dealt with in-house by a practice, firm, chambers or whatever. **At the Bar, all "service complaints" must be dealt**

with in-house by sets of chambers (right of appeal to the Legal Ombudsman by the Complainant). This resembles more of an employment-style situation (despite the fact the barristers are self-employed). It will be dealt with by the chambers, and, if the complaint is upheld, the barrister is effectively directed by chambers to apologise, return fees, or the like. Failure to do so may in extreme cases result in being asked to leave the set. Misconduct *outside* of a service or other minor complaint must be referred to the first-tier regulator – the BSB.

- c. Joshua's Rey's distinction between complaints that would be adopted by an Archdeacon or those that simply lie between the Complainant and the Respondent refers to a similar principle.
- d. Most healthcare bodies draw a line between minor personal complaints which can be dealt with by the practice, either under the auspices of the NHS or by a private patient of his or her own initiative. For example, the GDC also funds a Dental Complaints Service to try and facilitate informal resolution. This is particularly important for private patients as they will not be able to access assistance from NHS England. *A review is taking place called "Shifting the Balance" which is trying to ensure that only matters that are sufficiently serious to raise questions about Fitness to Practise are referred to the GDC.*
- e. WHAT IS A MAJOR COMPLAINT – MAJ? The secular systems look at this usually with respect to one or more of the following features: breach of the criminal law (other than simple motoring/parking offences), lack of integrity – including breaching confidentiality, breach of a core duty, acting in such a way as to diminish public confidence in the profession etc., repeated failure to co-operate with the regulator, serious negligence or repeated lesser negligence, failure to comply with sanctions and the like. This will be assessed by a number of professions together with whether the complaint, if proved, would likely lead to very serious professional consequences such as removal from the profession or suspension for a substantial period of time.
- f. INTERMEDIATE COMPLAINTS – INT. Some regulatory bodies have a pathway for complaints that are sufficiently serious to merit attention by the tribunal element of the process but do not require some of the protections merited by consideration of a more serious matter. This will usually be marked by limiting the sanctions available to, say, suspension for a limited period and in some cases by a speedier or more streamlined process. **The Bar, for instance has these dealt with by a three-person tribunal instead of five-person one and with a limit on the length of suspensions and the amount of fines.** It is potentially a useful device for two reasons: first, because it allows the complaint to be dealt with more speedily and, second, because it reassures a Respondent as to what is the worst that can happen. This second feature may lead to a speedier resolution in the case of Respondents who would like to resolve the matter and who accept a degree of fault. The sort of cases that might be suitable for this pathway would include repeated minor/moderate negligence; slipping from remedial action already agreed (but not to a degree justifying

a full tribunal) and cases where the behaviour alleged does involve some more general damage to the Church rather than simply the feelings of one individual complainant (and therefore not the MIN level) but not to a point that would justify the full force of the MAJ level because the damage would not substantially erode confidence in the Church.

## 12. FINDING THE RIGHT LEVEL – A STANDARDS BASED APPROACH

- a. There seem to me to be a number of objections to developing an approach to clerical misconduct that is based on a breach of proper standards that are set out in detailed and cohesive rules and guidance to the clergy.
  - i. The development of these standards in secular disciplinary processes has taken place over many years with much consideration, revision and extension, so it will slow up considerably any attempt to reform the CDM mechanism, at any rate for the near future. *This does not in itself make it an unworthy project to consider in the longer term. However, I suspect that a longer review may reveal some other issues with this approach.*
  - ii. The setting of standards is both a time-consuming and sometimes controversial process. It is dynamic and needs regular review. It requires consultation, validation and approval before coming into force. It is more easily suited to a regulator than a general ‘parliamentary’ body such as Synod.
  - iii. It follows from ii. above that it can be costly. The present system strains limited resources already, so is this a good use of money and are the standards going to be easy to set out or mired in endless debate?
  - iv. The setting of standards in secular disciplinary processes is also not free of controversy but it is easier to see what, for instance, the standard might be in respect of a healthcare professional whose practising work is very specific and circumscribed, as opposed to that of a priest, which contains many variants and involves his or her whole life and seems to me to encompass that which would be difficult to categorise in specific and detailed standards. Even in the secular system (as already mentioned) this has not proved to be without difficulty for some professions.
  - v. My fear is that a standards-based approach, as taken (in various degrees) by the secular systems may prove here to complicate the issues rather than clarify them and lead to cul-de-sacs of fierce and interesting debate that do not improve the system of dealing with complaints.
  - vi. I should add one very important caveat. It is possible with any system to create specific rules and standards that apply to a particular area of concern. These may be specific to the profession or vocation (the prohibition on barristers holding a client’s money for instance) or general, such as rules protecting the vulnerable and cases involving safeguarding. They can be discrete, wholly separate, and can be developed much more speedily. And they can extend

right up to and including the rules of evidence and the way any hearing is conducted – this is now commonplace in the criminal courts.

- b. I would be very cautious, however, at this stage before predicating the whole complaints system upon detailed and (somehow) agreed standards.
- c. There are, doubtless, particular aspects of a cleric's work that do require a tightly drawn system of rules and standards – as with safeguarding above – and there is nothing inconsistent in having such rules to deal with a specific and discrete area without necessarily having to introduce it globally.

13. PUTTING COMPLAINTS ONTO THE PROPER PATHWAY

- a. If it is any consolation, this is not a precise science in the secular system. At the MAJ end of the spectrum some conduct is obviously grave, if proved, and at the MIN end some is clearly trivial. However, there are numerous grey areas. Correct placement involves judgment of the gravity of the allegation and the specific facts surrounding it. The secular system, as has been seen, mostly hives off one level of complaint – the “service” complaint – away from its national regulatory bodies to the the entity that has the most immediate local connection to both the Respondent and Complainant. This can be the Respondent him or herself, directly through to his or her firm, company or practice grouping (such as a set of chambers). In some professions the hiving off is optional and up to the Complainant to choose and in others it is mandatory.
- b. Most complaints are doubtless dealt with at this lower level. They are resolved quickly and life goes on. They have not damaged the profession concerned and often result in the practitioner (or his or her immediate organisation) taking them as a wake-up call either to examine how he or she is performing or, as often, how she or he is communicating.
- c. The advantages of “in-house” resolution are obvious. The disadvantage is that they are not always susceptible of resolution and a Complainant may feel justifiably aggrieved (particularly in the case of a less competent practitioner, firm or company) if the perception is created that the complaint is just being brushed away. Therefore, most if not all secular systems have a way of having service complaints being reviewed if the complaints process has or may have gone wrong. This can be by reference to the national complaints body or often by a specific Ombudsman. Subject to resources, the Ombudsman has one particular advantage: it still keeps the whole matter in the territory of a service complaint and avoids clogging up the national complaints body with trivial complaints. There are other alternatives, such as review by another person independent of the original decision-maker (this can vary from someone else in the same firm etc through to someone completely independent). In the ecclesiastical system, this could be another Bishop, the Registrar, the DBF or another diocese (which may want a mutual arrangement for its own reviews) or something specifically set up for the purpose. The really important thing is that there *is* a review and that a reasonable person properly informed would not

conclude that the reviewer would be (or might reasonably appear to be) inhibited from questioning the decision made by the original decision-maker. My view is that the only good reason for placing a service complaint with the regulatory arm of a disciplinary process, as opposed to the alternatives canvassed above, is if it is not really a service complaint at all, but involves graver issues.

- d. The hallmark of dealing with complaints at the “service” level in the secular system is that they should be resolved quickly and informally - concentrating on the remedy. That should, in my view, be the aim here too.
- e. However, there is a real issue about who decides what is a service complaint as opposed to genuine misconduct (or impairment of fitness to practise).
  - i. The first person (often forgotten in this context) who should be required to consider that issue is the Respondent. Complaints are often made in the secular system to the Respondent first of all. It is a duty in all secular disciplinary processes that where a practitioner Respondent identifies a complaint as being an allegation of misconduct he or she should report the matter to the regulatory body. Self-reporting is an obligation in most secular disciplinary processes.
  - ii. Second, someone else dealing with the complaint, irrespective of the Complainant’s view of its seriousness, *must* consider the question of whether actual misconduct is involved if that question arises, which, in the secular system, would involve reporting the matter to the relevant disciplinary body.
  - iii. Third, the Complainant will obviously have a view as to the gravity of what is alleged and the appropriate remedy. It cannot be conclusive of the issue for obvious reasons, but it must be considered carefully.
  - iv. I think it would also be helpful for the bishop to have a template of factors to look out for in placing a complaint properly and one could be easily drafted.
- f. If the matter is what I am calling a service complaint, then it goes into the MIN process automatically. The actual determination should be subject to some potential for review (as discussed) particularly if it is dismissed. If it is not a service complaint, then the proper pathway has to be selected. If the issue is still minor then it stays in the MIN process. The MIN process can have a local panel to resolve disputed issues of fact and ought to have one if there are significant and relevant disputes of fact that would potentially affect the outcome and any penalty to be imposed.
- g. There is nothing unusual in a determination within the service/minor end of complaints *requiring* a Respondent to do (or forbear from doing) something. However, the more onerous the requirement, the less suitable it would be for summary judgment. Requirements that impaired a person’s ability to carry out his or her profession, vocation etc altogether would not generally be suitable for the MIN process. Failure to abide by lawful requirements imposed under this mechanism might be rectified

(particularly if there was some reason for the failure other than simple refusal) in the MIN process itself by a stern warning or whatever, but it would be a definite indicator that potentially it might need elevating as a complaint in its own right to at least the INT level.

- h. If the complaint involves more serious issues of concern (INT or MAJ) then it would go into the tribunal process. It is helpful if a tribunal system can also refer the complaint back to the MIN track if it concludes that this course is appropriate. This gives the Respondent a remedy against any mistaken characterisations of seriousness. The ability to dismiss, compromise on terms or elevate a complaint within the disciplinary process is present in most secular disciplinary systems. Where the complaint is dismissed, there would normally be some method of review at the request of the person bringing it, which, by then, ought to be some one acting on behalf of the Complainant such as a regulator in the secular system or a DO in the ecclesiastical one, because the complaint will have been “adopted” by the regulator. It is usual for the Complainant in the secular system to be consulted by the regulator to explain those options but the regulator makes the final decision as to whether or not to seek a review. Where it is dealt with in any compromise or where undertakings have been given, best practice would be to have a similar review as for dismissal or, at the least, consultation with the person bringing the complaint who will doubtless discuss it with the original Complainant. However secular disciplinary processes vary on this aspect.
- i. Dentists have a process which shows the ability to be flexible about the way in which Complaints can be handled in the stages where impairment is under consideration: The GDC has a four-stage process:
  - i. STAGE 1. (REGISTRAR) Assess the information and allocate to CASEWORK for consideration or dismiss telling Complainant why. Dismissal may only happen if the complaint does not amount to an allegation.
  - ii. STAGE 2. CASEWORK (REGISTRAR) notifies the Respondent, collects the relevant information, obtains necessary evidence, in “health” cases obtains medical/psychological reports, in criminal cases obtains certificates of conviction or police reports. CASEWORK may then close (i.e. dismiss) the case at this stage or move to STAGE 3. The relevant question is not whether the allegation is true but whether it needs to be considered in more depth.
  - iii. STAGE 3. Referred to CASE EXAMINERS. Two CE’s consider each case (one lay, one practitioner). The CE’s will consider the allegations, take the Respondent’s comments and send a complete copy of the evidence to both sides. It may decide to refer the allegations for a full public inquiry (hearing) or to agree a set of undertakings with the Respondent. If not referred for a full hearing the CE may also simply send a letter of advice or warning or take no action at all.

- iv. STAGE 4. Full public hearing before PROFESSIONAL CONDUCT COMMITTEE or PROFESSIONAL PERFORMANCE COMMITTEE or the HEALTH COMMITTEE.
- v. At any stage the Registrar (of the GDC) or the CE's may refer the Respondent to the Interim Orders Committee which may impose conditions on the Respondent's practice or even suspend the Respondent from practising until the disciplinary procedure is complete.
- j. The BSB only deals with complaints that involve Professional Misconduct or a serious breach of proper professional standards. It investigates complaints, first by a Contact and Assessment Team which puts the complaint in order and also conducts a risk assessment as to how the behaviour alleged might have impacted on the profession and the public. If satisfied that there is some evidence of potential misconduct the case moves to the Investigation and Enforcement Team which, having put together the evidence and sought the Respondent's account, can either dismiss the complaint as misconceived / without any proper evidential foundation or report to the Independent Decision-Making Body (IDB) which, unlike the Conduct Committee it replaced, pays its members (17 barristers and 23 lay members) to decide whether to dismiss the complaint or refer it on to BTAS (the Bar Tribunal and Adjudication Service). If it takes that course, the BSB will instruct counsel to bring its case and a series of case directions will be given very quickly including whether it is to be a 3-person Tribunal with more limited sanctions or a 5-person Tribunal which can disbar the barrister. Cases only go to the 5-person Tribunal if disbarment or suspension for more than 12 months is a realistic and likely prospect.
- k. Although both professions have differences, both are investigated by a dedicated body charged with doing so and the system is expensive. It is paid for by practitioners. In my experience, it is not unusual for there to be a delay of 9 months or so in hearing the most serious cases and sometimes longer.
- l. Compelling attendance (much easier in a criminal court for instance) is often a problem and a minority of those facing secular disciplinary processes string the proceedings out considerably. At the MIN stage, it is easier to be much tougher about moving things along. However, I agree with Peter Collier that this is not an excuse for doing nothing and a tough 'directions' regime both in the criminal courts and the secular disciplinary process has improved matters. However, that too has cost implications: someone has to administer it, chase people up and enforce it.
- m. Most secular disciplinary processes have a lawyer conducting the "prosecution" of a MAJ or INT case in front of a Tribunal. The prosecutor is responsible for considering the allegation made or the preliminary charge that has been proffered and (a) making sure it is correct and in proper form (b) amending it if necessary and (c) considering the sufficiency of the evidence to support it. This role is, in my view, important.

14. Summarising then:
- a. I am not myself very exercised about whether the more serious cases fall into INT/MAJ pathways or just MAJ, although I think INT might assist in focussing the cases where the line of demarcation between between MIN and MAJ starts.
  - b. I think something analogous to the “service complaint system plus minor negligence etc” provides the framework for complaints that do not leave the diocesan level – MIN complaints. Their hallmarks will be:
    - i. SANCTION: the sanctions will be those best designed to assist the Respondent perform his or her role properly and to resolve any sense of grievance between the Complainant and the Respondent. However, these cannot be dependent on the consent of the Respondent in my view otherwise they lack ‘teeth’.
    - ii. PROCESS: the process, being more informal and aimed at reconciliation and moving forward not looking backward, will be suited to deal with what has happened.
    - iii. INVOLVEMENT: the complaint will be seen by reasonable people as being between the Complainant and the Respondent and not involve any wider concern with public safety or any likely loss of confidence or reputational damage to the Church of England.
    - iv. LACK OF AGGRAVATING FEATURES. For instance (and not exhaustive):
      1. Conduct not serious in itself (e.g. inattention to something, minor negligence, poor communication) and not repeated.
      2. Conduct not amounting to any criminal offence (save parking, minor speeding etc) or any substantial breach of ecclesiastical law.
      3. Conduct not involving any dishonesty, lack of integrity, or breach of trust.
      4. Conduct not clearly scandalous or not clearly unbecoming.
      5. Conduct not such as to erode public confidence in the Church or its teachings.
      6. Respondent not aware (and reasonably so) of any vulnerability in the Complainant if there is such. If aware this would be a distinct aggravating feature.
      7. Impact (objectively assessed) on the Complainant is low.
    - v. PRESENCE OF MITIGATING FEATURES (this may serve to lessen any Aggravating Features) such as:
      1. Cooperation with the process.
      2. Insight into any admitted faults.
      3. Steps already taken to address the issue underlying the complaint.
      4. Particular personal circumstances that might reasonably explain the behaviour (dependent on its inherent gravity).
    - vi. AGGRAVATING FEATURES. Conduct that would lift the complaint into INT or MAJ would be the reverse of the “LACK” features or the mitigating factors.



- vii. SANCTIONS would involve likely prohibition or other very serious sanction at the MAJ level and involve the necessity for a formal procedure to be fair to both sides and the involvement would be with the Church as a whole. Aggravating features would be present and, by reason of the seriousness, the mitigating features would necessarily carry less, if any, weight.
  - viii. The INT level would still have features of seriousness but the gravity of the conduct itself would be lower and the aggravating features less pronounced. Above all, the lesser sanctions open to the tribunal would be sufficient both to mark the behaviour, prevent its repetition and maintain public confidence in the process.
- c. At all levels, I see no reason against (and many for) the Registrar advising briefly on the issues to be looked for in a particular complaint in order to decide the correct pathway for its resolution and disposal. I do not see why in the initial consideration much more than a summary of the facts is required plus an initial brief assessment of gravity. The Respondent need only be involved if the complaint discloses some genuine grievance (at whatever level). If it will likely stay at the MIN level, the Respondent can be invited to give a response to the matter causing concern. If the case is potentially going to move to INT/MAJ then a more detailed evidence-gathering exercise will be needed and both the original Complainant and the Respondent invited to give detailed statements of what they say in the form of a witness statement or, at the least, in a document that attests to its truth.
  - d. I agree with Sam Maginnis and Joshua Rey's interesting approach as to defining the core duty, breach of which may cause an allegation of Misconduct to be alleged.
  - e. Finally, assessing gravity should not simply be a tick-box exercise. Most cases will be obviously MAJ or obviously MIN but in the middle it requires a sensible analysis of the important factors in the round to find the correct pathway.
15. ADMISSIONS OF LIABILITY. Under the present system the Bishop may conclude that a penalty by consent is appropriate. In comparison with the secular systems this has some unusual features and seems to encompass two different things: the first is the imposition of a penalty by consent after having determined it in the MIN system. It would be the sanction following a finding. This should not require the "consent" of the Respondent, surely. However, where there is an agreement that a certain penalty will be imposed if the Respondent agrees to it, thus, for instance, meaning a case does not have to go forward to a tribunal, that clearly would require the Respondent's consent otherwise the case would need to be resolved before that tribunal. This second situation is nearer to an advance indication of sentence in the criminal system, upon knowing which a defendant might wish to admit guilt and take that sentence to avoid further proceedings and delay. Obviously, he or she would not be obliged to do that. That does require the Respondent's consent, because he or she is foregoing a right to have the case heard by the tribunal.

16. APPEALS. All secular tribunal systems have a right of appeal (often involving the High Court) generally for the Respondent, and usually one for the Prosecutor (or DO) on a question of law from the decision of the tribunal. Therefore, a system of appeal to the Court of Arches is consistent with the principles of appeal in the secular systems.
17. OTHER DIOCESAN COMPLAINT SYSTEMS. Most (if not all) dioceses have a complaints procedure to deal with complaints against those others than clergy, e.g. diocesan staff, but I agree that the bishop's particular role precludes fusion of this with the MIN track. There will usually be a separate tracking for safeguarding within the general diocesan complaints process. There is a separate system (the CDM) for clergy, usually with separate tracking for safeguarding even within that. If there are separate entry points, separate forms of consideration and wholly separate processes applying to each, that can present quite a complex appearance to anyone outside those directly involved with them, and probably to not a few inside. In the processes as they apply to clergy, the bishop is the first point of reference with the process which, in the majority of cases, begins and ends under episcopal control. In the diocesan (non-clerical) complaints' process, although the bishop might forward complaints that understandably people have sent to him or her, the episcopal involvement will often in reality be as a final port of call, if the Complainant remains dissatisfied after a body such as the DBF has dealt with the complaint. Simplifying the system of making a complaint greatly benefits both Complainants and Respondents alike.
18. Finally, I agree with everyone that the commencement of every complaint with a CDM is wrong. Most complaints are dealt with at the MIN level and the CDM is perceived as having escalated the complaint to a charge before the process has even begun. That is not what was intended but I can see how it supercharges the complaint in the Respondent's eyes when we know that a large majority of complaints never would or should get as far as the tribunal process.

David Etherington QC,

17.08.20,  
revised 07.09.20.

## **Annex 3**

### **The bare bones of an interim grievance procedure pending legislation**

Any grievance/complaint (other than one of gross misconduct) shall be sent to the diocesan bishop, marked “grievance”.

Each diocese shall have a panel of “assessors” who shall be selected on account of their recognised skills and experience in dealing with matters of conflict and/or grievance.

Any such complaint shall be in writing and signed by the complainant and must:

- set out specific details of the complaint, including what occurred and when it occurred; or what was not done and when it should have been done
- set out what it is the complainant is looking for by way of resolution of the complaint
- be accompanied by a statement of truth
- be delivered in a non-combative manner
- not include any deliberately false or misleading information
- not make frivolous or vexatious or false complaints

The bishop on receipt of the complaint must within 7 days:

- acknowledge receipt
- supply a copy of the written complaint to the respondent asking for their written response within 7 days
- identify an assessor who does not know the parties and who will seek on behalf of the bishop to resolve the grievance

The respondent’s written response shall be in writing and signed and must:

- set out in detail the respondent’s account about what did or did not happen
- set out how the respondent believes that the matter can be resolved
- be accompanied by a statement of truth
- be delivered in a non-combative manner
- not include any deliberately false or misleading information
- not make frivolous or vexatious or false complaints

The assessor will on receipt of the two written accounts arrange to meet separately with the complainant and the respondent. Each may be accompanied by a supporter (not a family member or a lawyer) at those meetings if they wish. Those meetings will be to ensure that the concerns and wishes of the complainant have been fully and correctly understood and that the respondent’s account is also understood, along with how the respondent feels that the matter could be resolved. The assessor will be able in those meetings to seek any clarification of the parties’ accounts they feel is necessary. The assessor will also want to try and enable each of the parties to see and understand the other person’s perspective on the issues.

The assessor will make a judgement about whether:

- what they have heard about is a matter where there is some prospect of achieving a reconciliation between the parties and/or some other resolution of the matter or

- whether in their view the complaint is frivolous, vexatious or malicious or
- whether there is no substance to the complaint or
- whether the complaint amounts to misconduct and if so whether in their view it amounts to gross misconduct.

If it is a case that in their opinion should be dismissed as being frivolous, vexatious, malicious or of no substance then they shall report that to the bishop immediately and if the bishop accepts that view the bishop shall dismiss the complaint.

The complainant shall be entitled to ask for a review of such a dismissal (details of manner of review yet to be finalised).

If the case is considered to be susceptible of resolution, the assessor will attempt to bring about such resolution by using one or more of the following means:

- arranging a face to face meeting between the complainant and respondent – such a meeting might be appropriate for a respondent to apologise or to explain what happened from their perspective or to agree how things will be in the future
- facilitating a round table discussion to explore ways of resolving the issues that have arisen
- making arrangements for a conciliator or mediator to attempt to resolve the issues between the parties if they are willing to cooperate in such a process.

The assessor shall produce a report within 28 days of being appointed to inform the bishop of what steps have been taken, what the outcome has been and what conclusions the assessor formed about the seriousness of the matter. In the event that the matter has not been resolved, the assessor shall recommend to the bishop what course of action the bishop should consider taking and the reasons for making that recommendation.

If it is a case that in the opinion of the assessor amounts to misconduct on the part of the cleric they shall report that to the bishop, and if the bishop agrees the complainant shall be invited to complete a Form 1A to commence the formal disciplinary process.

September 2020