

Response to December 2020 Consultation by ELS
On proposals to replace the Clergy Discipline Measure
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Preamble

We express our concern that process details are being discussed and consulted upon without prior agreement on the purpose(s) of the replacement to CDM, and proper scoping of how it will relate to existing processes such as Safeguarding and Capability Procedure. Our view is that the new system should replace and simplify all related procedures. Processes should be rooted in restoration of relationship, protection of the vulnerable (who may at times be the clergy themselves), and correction of error where needed. Such process(es) should be managing the lower limit of unfitness to practice ministry, not the human falling short of the highest standards to which those in ministry may aspire.

We are very aware that this is a response to ELS proposals which are themselves responding to the report of the ‘Lambeth Review Group’, which is currently consulting on its own proposals which differ in a number of significant respects from those of the ELS group, on a different timeline. Our response to that consultation will be made in its own right, but elements of that will clearly be apparent in this document.

Our respective organisations have deep involvement with people who bear the personal costs and scars of the CDM. Their voices are significant but some will have difficulty fully contributing to the consultation. Appendix 1 is extracts from the last 2 weeks on the private CDM forum in the Hub (published with permission)

“I am struggling to read and make sense of both reports at present, due to PTSD, COVID lockdown problems, Christmas and everything else”

“It is the fear, the self-doubt, the erosion of confidence that is particularly lasting.”

“I am now back from the wilderness but still, over a decade later, find I am living under a shadow of fear”

We continue to call for the establishment of a channel for redress for those whose health and/or ministry has been harmed by a flawed system.

We continue to call for a moratorium on new CDM cases for all but the most serious allegations.

Overview

The framework proposed by the ELS has potential to reasonably address the following issues we have identified with the CDM

- *Nobody should be in a process which risks home and livelihood unless the allegation, if proved, warrants such a penalty – the triage should be allocating to completely separate systems not an escalating ladder of procedures*
- *Justice delayed is justice denied – rapid response is essential*
- *Investigation and triaging should be completely independent of the Respondent’s natural sources of pastoral support and any ‘line management’ in the diocese – there is very particular need for rebuilding of trust in this respect*
- *Respondents facing potential loss of home and livelihood should have a system of automatic funding for their legal defence*

We have not yet seen enough detail on other areas of concern, including but not limited to

- *Accountability of senior clergy, officials (such as DSOs), and lay office holders in the local church – we believe the system can only work if there is appropriate accountability at all levels*
- *Arrangements and safeguards around suspension*
- *Clarity, consistency and humanity in route(s) back to ministry after prohibition*
- *Addressing long term consequences of having been ‘in the system’ whatever the determination of the case. These include apparent automatic “blemish” of blue files affecting PTO and job applications, plus details of spent cases being retained on church websites*

Responses to the Consultation Questions

Key

Blue	Explanatory text from the ELS proposals
Black	ELS consultation questions with reference numbers
Red	CECA + Sheldon replies

Proposal for Assessment and triage by Regional Panels

1. Would such a panel meet the need for it to be independent of the bishop and the diocesan structure where the priest complained about was located?

Yes. We consider this is located at an appropriate middle ground between the diocese and national institutions.

2. Do you agree that these regional panels should be made up of a mixture of archdeacons and suitably qualified lay people?

We agree there should be a mixture of clergy and lay people on the Panels. We also recognise that Archdeacons have traditionally had a judicial element to their role, but we are unsure why that role would be singled out as necessary here where the sole purpose is initial assessment in order to triage into the correct channel. We are concerned that the rapid response time may not be compatible with typical archidiaconal workloads. Some archdeacons will be well prepared and equipped for this role, but so too may many experienced clergy who should be encouraged to put themselves forward to be considered for selection by the CDC for training. We propose that clergy membership of the Panel should be open to all 'ranks'.

Each Panel should include a suitably qualified legal person to be provide advice on any potential legal implications of decisions made. However, this triaging stage is not itself a legal process.

3. Do you have any other observations on this key proposal?

- a) Clarity of language is essential in these proposals. This Assessor/Panel is a triage process only. It has no powers to pass judgement or determine the case – simply to decide on the correct process under which it will be assessed and determined.
- b) Safeguards are needed to ensure the 28 day turnround is consistently achieved. This will entail having enough members of the Panel to be able to convene quickly, and members able to prioritise time if they have the role of Assessor reporting to the panel. If the Complainant unreasonably fails to make date(s) available for the Assessor interview in a reasonable timeframe, there should be provision for the Panel to strike down the Complaint under such circumstances.
- c) Nobody should be in the role of Assessor to a Respondent with whom they have defined relationship (particularly from same diocese). Assessment should be by one member of the Panel who makes a written recommendation. We do not consider it safe for a single Assessor making this triaging decision alone. We also recognise the need to turn cases round swiftly.
- d) It may be that all Panel members are trained and available for Assessor role, but not necessarily as we are identifying two separate roles here. One is the accurate and pastorally sensitive front line interviewing of Respondent and Complainant and writing up a fact-

based report for the Panel. The second role is the Panel making the decision as to which of the 3 routes to recommend to the Bishop for handling the case. In each case, this decision should be taken by a sub-Panel comprising a minimum number of members with minimum composition rules (eg one clerical, one lay).

- e) Expenses should include loss of earnings (along the lines of lay magistracy)
- f) CDC should provide a clear description of the skills needed by Assessors, especially interviewing in a pastorally sensitive manner and to write clear factual reports.
- g) We observe that we have not yet seen enough detail on the oversight of Panel process, to whom the Panel's findings will be distributed, and the level of reporting to the wider church.
- h) Much more clarity is required over who can suspend the Respondent and at what stage in the process and what safeguards and review processes are put in place.
- i) We would like clarity what happens if the Panel recommends there is no case to answer but the Bishop takes a different view?
- j) Are there any proposals for handling the circumstances of vexatious Complainants? Such as a time bar on bringing another complaint, and/or a higher threshold (as with vexatious litigants in law), and/or barring from holding lay office for a period?
- k) We recognise that the current prevalence of 'irregular disciplinary processes' outside the CDM framework may be partly a reflection of an inadequate legislative framework. How will this be avoided/prevented in future?
- l) We are assuming that bishops and archdeacons would be accountable through the same process, but have not seen sufficient detail on this.

4. Should complaints brought by DSOs, archdeacons or others on behalf of the institution as a whole be subjected to this initial assessment, or is it a better use of resources for such complaints to proceed directly to the next stage?

Yes, they should undergo similar scrutiny. Part of the wider picture here is the accountability of DSOs and senior staff under the new framework which is as yet unspecified. We have seen cases where treatment of a Respondent appears to be manifestly inappropriate and require scrutiny. There is also the pastoral value of the Respondent having the opportunity to be interviewed and give their side of the story at an early opportunity.

Our proposal involves a Complainant setting out their Complaint in writing and the Respondent providing their factual response in writing, prior to each being seen by the Assessor. Each would have the right to be accompanied at such meeting(s) but not by a family member or a lawyer at that point in the proceedings. That is in conformity with normal ACAS procedures and was one of the matters which we indicated in the Interim Report we would consult more widely about – para 118.

5. Is that description of who could and could not accompany someone being seen by the Assessor appropriate for that stage of a clergy disciplinary procedure?

Language is vital here. At this point it is NOT a disciplinary procedure. It is an initial assessment of a complaint to decide whether or not there is substance that would, if proved, be misconduct (serious or less-than-serious). It is essential that this is communicated at every stage of the development and roll-out of the process.

Agreed that it is appropriate to exclude lawyers.

For those not familiar with ACAS procedures it would be helpful to have a brief summary of the role and expectations on the Accompanier and who *is* considered appropriate to accompany.

It would assist if reference to accompaniment by a Union rep was explicitly included as that is also standard practice from an ACAS perspective.

We recognise that the accompanier role requires both adequate empathy and adequate emotional distance which may not normally make a family member the best placed, but we are hesitant to exclude the possibility and think this needs careful consultation.

One of our proposals is that the investigation might lead the assessor to conclude that the respondent priest has needs in relation to capacity or capability that should be addressed (quite independently of the merits of the complaint and whether there has been misconduct).

6. Is that appropriate?

These issues do need highlighting – and should include the ability to note where they may be judged to extend further than the individual cleric, and be more systemic in nature. The initial Assessment should include a requirement to have regard to the physical and mental health of the Respondent, and Assessors should be trained in the appropriate ways to ensure this is properly explored and appropriate referrals made if needed. Much rests here on the aptitudes, training and presumably access to (professional supervision if needed) of the Assessor.

7. And is it appropriate that such matters are addressed in parallel with the consideration of the complaint with relevant liaison taking place with diocesan HR and other relevant people?

Yes, addressing matters in parallel mitigates against undue delay which is itself distressing. There should be written clarity over which matters are being addressed by which means.

Proposal for Bishop's consideration of the assessment report

After the Assessor interviews the Respondent and Complainant the Panel makes a written report. This may be

- Recommending into the Grievance channel
- Recommending to the Respondent's Diocesan Bishop that there is no case to answer
- Identifying the case as belonging in the "Misconduct (less than serious) and referring it to the Respondent's Diocesan Bishop.
- Identifying the case as belonging in the "Serious Misconduct" channel and referring it to the Respondent's Diocesan Bishop to send to Tribunal.

We propose that on receipt of the report, if it says that there is no substance to the complaint and that it should be dismissed, then the bishop should dismiss it setting out the reasons for doing so. Clearly in those circumstances the Complainant should be entitled to a review of that decision.

8. Should such a review be by the same bishop or by a different bishop? And if a different bishop is there any reason why it should not be a suffragan or area bishop rather than another diocesan bishop?

(This question is about who carries out the review if the Complainant is unhappy that the Bishop has dismissed the case on the advice of the Panel after initial Assessment)

The review should be carried out by a different bishop but it would have most credibility to both Complainant and Respondent if it was one having jurisdiction and so responsibility in the relevant ecclesiastical area. That suggests a suffragan or area bishop would be a preferable route.

Proposal for cases where Serious Misconduct is admitted

We propose that in cases of misconduct that are considered to be serious if established, the bishop should send the matter to a tribunal so that very quickly an experienced judge can hold a hearing at which the plea will be entered and directions given about the evidence that will be required to enable a tribunal hearing to determine whether or not the case has been established.

Those directions would include directions about any special measures needed in relation to the evidence to be given at trial, such as screening witnesses so as not to be face to face with the respondent.

9. If the respondent admits the conduct and admits that it is Serious Misconduct during the course of the assessment, should the matter still go before a tribunal judge or should the matter stay with the bishop who would proceed to impose a penalty on the basis of the admission and in accordance with penalty guidelines issued by the CDC (and see Q11 below)?

If the Respondent and the Bishop agree, then the matter should stay with the bishop for penalty, to expedite matters.

The respondent should also have the right to ask that it be considered by a Tribunal Judge. A Respondent may feel they do not have confidence in their bishop to assess the matter with due impartiality. It would also potentially provide a safeguard for vulnerable Respondents who may be tempted to agree an excessive penalty that is not in their best interests.

10. If the matter is not admitted or not fully admitted in the course of the assessment but is admitted at the plea hearing, do you agree that the matter should be returned to the bishop to impose a penalty (see para 138 of Interim Report)?

If admitted at the hearing, the same should apply. The Respondent should have the right to ask that the Tribunal decide on penalty.

11. Do you agree that whenever the bishop imposes a penalty in a case of serious misconduct that they should deal with the matter together with a tribunal judge?

Agreed that the bishop should impose a penalty in conjunction with the tribunal judge.

12. And if they cannot agree do you agree that the bishop should have the final say?

We suggest the tribunal judge could be asked to set a maximum and minimum penalty framework within which the Bishop could determine. If they still cannot agree then there should be an interim process for seeking to resolve the difference of view, perhaps by it being a requirement that they seek advice from the President of Tribunals.

We have not seen any detail on the route back into ministry after a period of prohibition has expired. This is a pastorally and practically problematic area at the moment that must be addressed as part of the replacement of CDM.

Proposal for Appeals against penalties

We would propose that the route of appeal from a tribunal hearing or from a bishop's penalty in a serious misconduct case should be to the Court of Arches where the Dean of the Arches (or their delegate) would sit with 2 tribunal panel members (one lay and one clerical). Any appeal would be only with leave (the application for leave being determined by the Dean alone).

13. Should there be a right of appeal by the Designated Officer in cases of unduly lenient penalties?

No, the Designated Officer should not have a right of Appeal. Appeal is relevant for the Respondent as their livelihood may well be at risk. What is at stake in the case of an allegedly unduly lenient penalty is more a question of institutional reputation, which the bishop (or tribunal judge) should be deemed to have considered. The cost of this to the Respondent (and others) would be to add a further uncertain prolonging of the process where they would have to wait before they know matters are determined, with all the further collateral damage this would cause.

Proposal for Contested cases

We have considered the matter of who should conduct the subsequent enquiries and collect the evidence for the 'prosecution' identified as required at the plea hearing. We see a role for the CDC and the Designated Officer (DO) here. We have considered further the matters raised in para 121 of the Interim Report and intend to keep the administrative function of the CDC as light touch as possible. It will clearly, as now, need some administrative staff, currently that is a member of the Church's Legal Office giving part of his time to the work and the DO who is full time. We would retain the DO and have any necessary admin operating on the same basis as now out of the Legal Office, but the extent of their time, will depend on the work load. The intention is for it to be as light touch as possible.

The DO would represent the 'prosecution' at the plea hearing (but not at the subsequent tribunal hearing). In answer to the questions we posed in para 132 about who would collect the evidence, we would now propose that the DO would be responsible for collecting evidence to be called before the tribunal, other than evidence called by the respondent, which would be the responsibility of the respondent's representative. The DO would then 'brief out' to an advocate for the tribunal hearing.

We propose that the final tribunal hearing should consist of an experienced secular trial judge (which would mean salaried or significant fee paid judicial work) sitting with 2 other members drawn from a panel appointed and maintained by the CDC, one lay and one clerical (as per para 137 of our Interim Report).

14. Do you agree with our proposals for the role that the CDC would play in employing clerical/administrative staff and the DO based in the Legal Office?

We do not have enough information/experience to comment meaningfully on this, beyond to affirm the need for the CDC to be properly staffed and resourced to operate the central aspects of this provision.

15. Do you agree that the DO should (a) be the person responsible for collecting together the 'prosecution' evidence identified by the judge as relevant and admissible and (b) that having done that the DO should brief out the advocacy role?

It is clear that somebody needs to do an effective (accurate and swift) job of collecting evidence in cases that are proceeding to Tribunal. Historically the problem with this person being the DO is that it has led to this role being seen as 'proving' the offences alleged, whereas there must be strict

neutrality in this role. It is therefore particularly important in rebuilding trust in the system that the Advocacy role in the hearing be carried out by a different person.

16. Do you agree that a panel of 3 is sufficient?

Yes, a panel of three is sufficient. But given this is a small number, Respondents should have any option of one appeal against a non-legally qualified panel member. This would give a measure of protection in cases where they fear undue conflict of interest or compromised position.

17. Individual dioceses would lack the experience and facilities to organise tribunal hearings, but should they be arranged by the Provincial Registrar as now, or run by the CDC through its administrative staff operating as now from the Legal Office of the Church of England?

No strong views, but there would seem to be some merit in this role being conducted centrally, to avoid the risk of postcode Provincial justice. Expertise and experience are relevant issues for cases such as these where the absolute numbers are relatively small but the stakes extremely high for those involved.

Proposal for Criminal matters

One of the matters we raised in para 145 was whether the disciplinary process needs to wait for the outcome of any criminal investigation and/or prosecution. Currently there is what many regard as inordinate delay in the investigation and prosecution of serious criminal offences. In a number of professional settings the disciplinary process does not wait for the completion of other investigations or prosecutions.

18. Should it be a hard and fast rule that we should wait for such investigations and subsequent prosecutions to be concluded before progressing the assessment of the complaint and its 'prosecution' before a tribunal if the assessment shows that there is a case to answer?

It should be possible to proceed with the church process while criminal proceedings are still pending. Criminal proceedings can be subject to long drawn-out delays which exacerbate stress for all parties. However, it would be pastorally wise not to begin a church process immediately, so perhaps a minimum delay should be built into the system. Church decisions could be made subject to recall if the eventual outcome of criminal proceedings casts a significant new light on the church's view of a matter (in either direction).

Proposal for Cases of less-than-serious Misconduct

Following the IICSA report and recommendations about reform of the CDM which included that there should no longer be penalty by consent it must follow that in cases of misconduct falling short of serious misconduct the bishop should, in accordance with the penalty guidelines, impose an appropriate penalty. We think that there should be a right of review and would pose the same question as for the review of a dismissal.

19. Should such a review be by the same bishop or by a different bishop? And if a different bishop is there any reason why it should not be a suffragan or area bishop rather than another diocesan bishop?

Presumably the right of review applies to both Complainant and Respondent in this situation? As with Q8 – the review should be undertaken by a different bishop. Any review should be accompanied by a written rationale for the decision to either vary the penalty or retain it.

Proposal for Legal Aid (para 123 of Sep 20 interim report)

Our broad view is that there should be legal aid available on a non-merits, non-means-tested basis for all who face serious misconduct charges. We would envisage a fixed fee to cover initial advice and representation at the Plea hearing. Thereafter the judge having directed what work needs to be done to collect evidence and prepare for trial we envisage it being possible to provide a realistic estimate of work that needs to be done and generally it should be accepted by the legal aid authority who would allow an hourly rate for that work and a daily rate for appearances before the tribunal. We propose that there should be a panel of solicitors and barristers (who can accept direct access work) who would be prepared to advise and act in such cases and that admission to that list should be through the CDC which would be able to ensure that only those with appropriate experience were on the list.

20. Do you agree that there should be a list of appropriate legal representatives?

Yes. Our expectation would be that a system that drastically simplifies the labyrinthine nature of the old CDM means that this list can and should include a fairly wide range of solicitors with employment and/or ecclesiastical backgrounds from which Respondents may select.

Respondents should also be able to put forward a legal representative of their own choice from outside the list, subject to approval by the CDC on the grounds of appropriate qualifications and experience.

Union members would be free to choose whether to use the Legal Aid and approved list route OR the entitlement included in Union membership.

21. Do you have any observations on our initial broad brush approach to remuneration for such work?

Broad brush approach to remuneration seems appropriate.

Voices from CDM

Extracts from December 2020 thread in private forum for members in or been through CDM
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"I am struggling to read and make sense of both reports at present, due to PTSD, COVID lockdown problems, Christmas and everything else"

"Accountability systems only work when EVERYONE in the system is properly accountable. Until there is real accountability for bishops and archdeacons at every stage, the process will still be misused, even if independent assessors are used. This also goes for complainants - it's just too easy for them to make a complaint and there are no real consequences for vexatious or malicious complaints. Likewise, how accountable are diocesan registrars and ecclesiastical lawyers in reality?"

"The CDM is routinely misused to bully parish clergy and there is a lot of evidence of this. Sorting complaints into grievances and more serious misconduct will not address this. Bullies just make things up to intimidate or get rid of clergy. That means that a complaint will be regarded as serious and still go a long way before being dismissed."

"My PTSD continues not least because I remain incredulous at the injustice and my own powerlessness and continued vulnerability"

"...especially concerned about the ways in which respondents to CDM are given little to no indication of what is about to happen to them. This administrative heavy handedness utterly undermines any capacity to think straight and I am convinced that I still struggle with mild PTSD when I see a Diocesan logo or any paperwork from any hierarchy... even when being offered an interview..."

"I am now back from the wilderness but still, over a decade later, find I am living under a shadow of fear: I have no idea how widely my situation is known, who I can trust and that I am unsure if I am really forgiven by the church."

"I feel as though it doesn't matter what the outcome of the enquiry because the damage has been done. I've been weighed and found wanting. It's not at all logical, or reasonable, but I still feel so stressed at times I find myself shaking, and my rheumatism keeps flaring up, so there are days I can't walk without pain. I keep forgetting things, and am then frightened I'll forget something important. Just being alone can tip me into a feeling of panic."

"I feel that I was - indeed *am* - deemed guilty until /if I can prove myself innocent. No matter what does actually happen next in the process I think I will be scared of saying boo to a goose after this, and it has been such heartbreak that I am worried that even if I resign the pain won't go. Not even being able to talk to my Archdeacon about it is appalling. I had to speak to them about something entirely different today, and also deal with something else that the registrar will have to decide on. After the calls I became a jibbering wreck again."

"The removal of our Archdeacons and Bishops from the CDM process, in order to allow them to care for their clergy better, is I think a vitally needed alteration in the proposals."

"We know the truth and mercy of God which the church has forgotten and chooses to ignore. We may be 'tainted' in the eyes and mind of the church (I was reminded that even if I chose to resign by CDM would stand - and remain on my 'record' until after my death), but in the eyes of Christ we remain his children, loved, wounded and wondrous. Christ is the tiny spark in the darkness that keeps our faith alive."

Links to relevant documents

Sheldon/Aston findings from research survey 2020	https://www.sheldonhub.org/resources/topics/cdm
Sheldon 'roadmap' open letter to +Tim Thornton January 2020	https://www.sheldonhub.org/resources/4633
ELS interim report (Sep 20) and Consultation (Dec 20)	https://www.sheldonhub.org/resources/5084
Lambeth Working Group	https://www.sheldonhub.org/resources/4674
Comparison ELS v Lambeth proposals	Link to document
Sheldon Hub – doing healthy ministry together	www.sheldonhub.org
Sheldon Retreat – heart & soul for ministry	www.sheldon.uk.com
Unite Faithworkers (cf Church of England Clergy Advocates - CECA)	facebook.com/UniteFaithworkers/ https://unitetheunion.org/what-we-do/unite-in-your-sector/community-youth-workers-and-not-for-profit/faith-organisations/