

**Practical Aspects of the Clergy Discipline Measure
ELS London Lecture 11th October 2017**

**Sir Mark Hedley DL,
*Deputy Chair and Deputy President of Tribunals***

Introduction

The CDM, so I am told, was introduced to an accompaniment of suspicion and concern as to how it would work. Whatever its defects, and we must consider some of them, it is difficult from the perspective of today to deny that it is at least better than what had gone before 2003. Clergy discipline has always been a matter whose contentiousness was matched only by the uncertainty and disagreement as to how it should be addressed.

Those of us who have enjoyed roving in the cloisters of Barchester or amongst the green fields of that county may have glimpsed some of these matters. Mr. Harding's first tenure as Warden of Hiram's Hospital, the Rev Obadiah Slope's treatment of Miss Stanhope, let alone his use of women generally which may be considered to amount to spiritual abuse, a subject to which we must return, Parson Robart's financial foolishness or Mr. Crawley of Hoggstock's brush with the criminal law reveal a culture in which the only effective check on conduct was conscience and the view of those whose opinions were thought to matter. Of course in an ideal world, that would be effective enough. That is, however, not where we live.

I very much doubt that any of us want to go back to the Ecclesiastical Jurisdiction Measure 1963 with its media fests that attended the public sittings of the Chancellor's Consistory Court as it poured over the affairs of the Deans of Lincoln or Ripon, all within our own professional memories. And anybody who had anything to do with the Vacation of Benefices Measure 1977, and we had one in relation to the incapacity element in Part III in Liverpool, will have no regrets as to its passing. No, whatever our current imperfections, we are at least in a more defensible position than we were in the past.

The Clergy Discipline Measure 2003

The Measure applies to all of those who are priests or deacons, whether beneficed or licensed or not, as appears from Section 7 of the Measure – "(1) The following provisions of this Measure shall have effect for the purpose of regulating proceedings against a clerk in Holy Orders who is alleged to have committed an act or omission other than one relating to matters involving doctrine, ritual or ceremonial, and references to misconduct shall be construed accordingly." The remainder of the section applies the 1963 legislation to the excluded matters. I intend to say nothing about those since, so far as I am aware, there have been no such proceedings nor has the court for Ecclesiastical Causes Reserved ever sat, certainly not in my professional memory. In any event its powers are limited to Censure and its potentially expensive and extravagant deployment may not thought to be worthwhile.

At the heart of the Clergy Discipline Measure lies section 8 which merits citation in full –

"(1) Disciplinary proceedings under this Measure may be instituted against any Archbishop, bishop, priest or deacon alleging any of the following acts or omissions:

- (a) doing any act in contravention of the laws ecclesiastical;
- (b) failing to do any 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 work and work of a clerk in Holy Orders.

(2) In the case of the Minister licensed to serve in the diocese by the Bishop thereof, the licence shall not be terminated by reason of that person's misconduct otherwise than by way of such proceedings.

(3) No proceedings in respect of unbecoming conduct shall be taken in respect of the lawful or political opinions or activities of any bishop, priest or deacon."

Subsections (2) and (3) have not given rise to particular difficulties in practice but with the increasing proscription of organisations, the "lawful" qualification in (3) does act as some restraint on freedom of political opinion or action. This may not only affect those with right-wing views but those with passionate Palestinian or Arab sympathies. We will have to see how, if at all, these matters develop.

It is subsection (1) that attracts most attention. Paragraphs (a) and (b) are fairly straightforward and generally relate to regulated behaviour in respect of baptisms, weddings and funerals as well as the management and accounting of money. Paragraphs (c) and (d) are less straightforward not least because none of the material terms are anywhere defined, though the Code of Conduct does seek to offer some examples but it is of course only guidance and lacks statutory force. In many ways these concepts are rather like the elephant: they are hard to describe but you know it when you see it! The difficulty is that in respect of these sub-paragraphs so much can depend on the spectacles through which they are seen as, for example, whilst the Church of England may be generally united in its opposition to adultery, there is a very wide range of views over almost all other personal relationships. However, the issues raised are not unfamiliar to employment lawyers and Human Resources managers generally.

Again I do not want to say very much about paragraph (c) for, although no doubt a trial to many a bishop, it is rare for any formal disciplinary action to be taken on this ground alone. Generally the approach required is pastoral and, if that fails, some accommodation, including voluntary vacation of office, seems usually to be found. The vast majority of complaints are founded in paragraph (d).

Threshold under the measure

Given that the measure does not define "conduct unbecoming or inappropriate...", The question of threshold needs to be addressed. Standards of behaviour required of the clergy are necessarily high as Canon C. 26 demonstrates; the Code of Conduct puts it thus – "29. Canon C. 26... requires the clergy to be diligent to frame and fashion their lives according to the doctrine of Christ, and to make themselves wholesome examples and patterns to the flock of Christ. Furthermore they are not to pursue unsuitable occupations, habits or recreations which do not befit their sacred calling, or which are detrimental to the performance of their duties or justifiably cause offence to others." You will have noticed that this contains a significant number of wholly undefined terms. Even so, clergy are not required to be paragons. Lovers of *Yes Prime Minister* may remember the scene in the story of the appointment of the Bishop where a very high-minded clergyman is under discussion. "We were hoping to save him for Truro", said the Appointments Secretary. "Why?" asks Hacker. "Well, it's very remote," comes the reply. "Truro is to the Church of England as the DVLC is to the Civil Service!" That is a gross calumny on both, of course, but you get the point. Paragons do not usually make comfortable pastors.

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 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.

It seems to me that it is at least a reasonable interpretation of threshold that the conduct complained of, if not admitted, should be such as to be considered by such a Tribunal. That comprises five members, two lay and two clergy, chaired by a lawyer, usually a Diocesan Chancellor, in respect of whose procedures there are very detailed rules. The consequence of these rules, whose purpose is to ensure transparency, fairness and a proper respect for human rights, is that both delay and expense become inevitable. It is a major administrative headache to arrange a tribunal date and place convenient to everyone involved and there is the inevitable expense not only in constituting and running a tribunal but also in ensuring that there is equality of arms between the parties. 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. 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. A vicar, of otherwise unblemished record, takes a funeral whilst under the effect of alcohol. That is clearly conduct unbecoming and that equally clearly requires a pastoral approach which almost certainly will fall well short of reference to a tribunal or of dismissal. The same could be said of the clergyperson using foul language because that happened to reflect his or her temper at the moment it was uttered, unless of course they are a character of Catherine Fox in Lindchester. The difficulty clearly lies in the obdurate respondent who simply denies matters believing that no one will seriously go as far as a tribunal. It may be that the threshold can be no more than a guideline, once it is established that the subject matter is neither a grievance nor a minor matter. That said, it has to be acknowledged that because neither *grievance* nor *minor* is defined, that assertion may itself simply beg the question.

In practice tribunals remain a rarity and such matters as get to them are unquestionably serious in any real understanding of that word. The problem is the threshold used by bishops in either dismissing summarily under Section 11(3) or taking no further action under Section 12(1)(a). But those decisions do, of course, trigger the right of the complainant to seek a review, of which more anon. Since bishops have very varied practices in setting out their decisions, and in particular the detail of their reasoning, it is often difficult to discern precisely what threshold has indeed been employed.

The Route of a Complaint

It may be helpful simply to sketch out at this point the route that a complaint takes under the Measure. A complaint must be made in writing, together with any supporting evidence, addressed to the Bishop who must refer it to the Registrar for preliminary scrutiny. At this stage a respondent will know of the complaint but will not have been asked to respond to it. The registrar must at this stage do three things. First they must ensure that the complaint is in order so that it is made in time and in accordance with the Rules. Secondly they must ensure that the complainant has a proper interest in making the complaint: complaints may be made by a PCC, or churchwarden, or anyone having a proper interest. In practice having a proper interest means someone affected by the conduct complained of, or an Archdeacon who is acting formally in the role of making a complaint. Thirdly the complaint must be of sufficient substance to justify further enquiry. On receipt of that report the Bishop may either dismiss the complaint summarily or invite a response to it. Having considered the complaint and response together with any other matters thought relevant, the Bishop may take one of the courses provided for in Section 12 (1) –

- (a) he may take no further action,... Or
- (b) he may, if the respondent consents, direct that the matter remain on the record conditionally,... Or
- (c) he may direct that an attempt is made to bring about conciliation ... Or
- (d) he may impose a penalty by consent... Or
- (e) he may direct that the complaint is to be formally investigated..."

If the Bishop takes the first course, a right to a review arises. If the Bishop directs a formal investigation, this is undertaken by the Designated Officer who must investigate and report his findings confidentially to the President, who must decide whether there is a case to answer; if there is, the matter is referred on specified charges to a tribunal but, if not, the President must give reasons in writing for that view.

If the clergy person concerned is willing to accept a penalty by consent or where a Tribunal has found matters proved against the respondent, the question of penalty arises. This is dealt with in Section 24 (1) of the Measure and contains no real surprises. The penalties range from prohibition to life or limited prohibition to removal from office or revocation of license to an injunction or a rebuke. The only real controversy relates to the absence of any power to deprive a person entirely of Holy Orders; the greatest power is simply to prohibit their exercise for life. This was clearly a deliberate decision taken by the legislature.

There is one further matter that should be mentioned here namely Section 30 of the Measure. If a clergy person is either convicted of an imprisonable offence or has a decree of divorce made against him, he or she is liable to removal from office or to prohibition (or both) without any further proceedings. As you will appreciate, whilst this section is not frequently used it is not unknown. These powers are subject to three qualifications: first, care must be taken in undefended divorces; secondly, not only must the Bishop give a chance for the clergyperson to make representations but must also consult the President over the proposed penalty; and thirdly the respondent may appeal to the Archbishop.

Difficulties inherent in the Measure: Delay

That sketch raises a number of questions. Many relate to timescale and delay. The complaint must by Section 9 of the Measure be made within 12 months of the matters complained of, though the President has power to extend that time on "good reason" being shown or, where there is a prosecution to conviction, the relevant period is 12 months from the date of the conviction. However, by Section 7 of the Safeguarding and Clergy Discipline Measure 2016, further qualifications have been added to section 9 in relation to alleged sexual misconduct. No time limit applies if the victim was at the time a child or a "vulnerable person". It will immediately be apparent that the Clergy Discipline Measure is not a swift business. Although there is a timetable for each stage, not only may there be many stages (particularly if there be any successful reviews) but also time at each stage may be extended by registrar, Bishop or President though usually only after giving the parties the opportunity to make representations. It is the case that even without any extensions (and that would be unusual in a seriously contested matter), a complaint may take 12 months before being referred to a tribunal. What, however, we do not really know is whether delay is the result of the structure of the Measure itself or the way in which that Measure is in fact operated (i.e. time limits not being observed) or whether it is because of other criminal or family enquiries that are underway.

On the face of it, all this is unsatisfactory and has caused anxiety within the leadership of the church and, indeed, the Archbishop of Canterbury has asked me to investigate and report to him on the question of time and delay. On the other hand, there is always a difficult balance to be struck between dealing with complaints expeditiously and the requirements of transparency and fairness given what may be at stake for a respondent. It also has to be appreciated, and Rule 19 makes provision for this, that disciplinary proceedings may have to yield place in time both to police, local authority and family court proceedings, investigations which can each be lengthy. The rules acknowledge that bishops are not required to take substantial account of divorce proceedings involving allegations which have been

neither contested nor heard but have merely been processed on paper. The sheer complexity of the process speaks volumes as to the seriousness of the conduct intended to be covered.

Where cases are uncontentious, they may be disposed of very much more quickly, though the Rules are designed to protect the respondent from being bounced into accepting a voluntary penalty. However, there does seem to be a real case for a much speedier and less ornate process where complaints, albeit not minor, do not bring into serious question the respondent's fitness to continue in office. Some dioceses have done this and I know that the Clergy Discipline Commission has seen examples of it, as in the "six steps" approach in the Diocese of Gloucester. However, it is very important that everyone is clear whether the Measure or some other less formal process is being used. Any less formal process will depend upon its being consensual at every stage including the outcome and what is recorded of it. If it ceases at any point to be consensual, then it will be necessary to employ the formal processes of the Measure.

Appeals and Reviews

There are a number of occasions where a right to review or appeal arises quite apart from the power of the President to enlarge time in which to make a complaint or in the investigation of a complaint. I should at this stage mention the appellate court but will say no more about it because its powers relate to final decisions of tribunals and, whilst its membership is necessarily august, it is rarely employed. What I want to concentrate on are the internal appeals and reviews in the Measure. In my experience these reviews occupy more of my time than any other single matter. In addition to the right that arises on summary dismissal or a decision to take no further action, Section 36(6) affords a clergyperson the right of appeal against suspension. Under Canon C.30.2 a clergyperson may be directed to undergo a risk assessment and may under that Canon challenge that direction on a review by the President. In each case but one the process is described as a "review" and it is provided that the President may only interfere if satisfied that the decision of the bishop was "plainly wrong". Paragraph 109 of the Code makes this comment – "The decision to dismiss the complaint can be reversed only if the President is satisfied that the bishop was plainly wrong i.e. that the Bishop's decision was not within the range of reasonable decisions. It is not an appeal on the merits, and the President will not simply substitute his or her own view for that of the Bishop; the President will reverse it only if the bishop's decision to dismiss was one that could not reasonably have been made in all the circumstances before the Bishop." That is an accurate description of a review jurisdiction; it essentially exists to prevent bishops acting either unlawfully or irrationally. It is not an appeal. On the other hand the power conferred by Section 36(6) in respect of suspension does describe the right as an "appeal". Paragraph 230 of the Code is in these terms: "... The President may consider afresh the decision to suspend and substitute his or her own view for that of the Bishop, and either confirm or revoke the suspension." That describes a true appeal. It is clear that the difference is intentional even if the rationale is less clear.

In respect of dismissals or a decision to take no further action, the President originally had power only to confirm the decision or to direct the Bishop to go onto the next stage. Section 10 of the 2016 Measure empowers the President to remit the matter to the Bishop for further consideration. This is particularly appropriate where the Bishop has purported, without further reasons, merely to rely on the advice of the Registrar and the President does not accept the views of the Registrar. The matter is remitted to the Bishop in the light of the President's opinion, it being fully recognised that the Bishop may nevertheless come again to the same decision.

These powers, and especially where limited to a review, have always been understood as being exercisable on paper by the President without the need for any hearing. The Rules prohibit the adducing of any further evidence, which further supports that approach. Although to a lawyer the powers of review and appeal are reasonably clear, it has to be recognised that the very limited powers of review often come as an unpleasant shock to an applicant. However, clergy discipline is fundamentally to be exercised by bishops and not by judges and accordingly the role of the lawyer in ensuring that decisions are neither unlawful nor irrational, but no more, is probably justified.

Vulnerable Adults

I want to consider now certain specific matters that give and are likely to continue to give difficulty. The first is the concept of the "vulnerable adult". It is defined in Section 6(2) of the 2016 Measure which provides – "In this Measure, "vulnerable adult" means a person aged 18 or over whose ability to protect himself or herself from violence, abuse, neglect or exploitation is significantly impaired through physical or mental disability or illness, old age, emotional fragility or distress, or otherwise; and for that purpose, the reference to being impaired is to being temporarily or indefinitely impaired." The following subsection goes on to provide that this definition may be altered by an order of the Archbishops' Council. We have already noted its use in the extended time limits for making complaints. It may be interesting to note the exact terms of the new Section 9(3) of the Measure – "[the 12 month time limit] does not apply where the misconduct in question is conduct of a sexual nature towards an adult if the President of Tribunals considers that the adult was a vulnerable adult at the time of the conduct, having taken into account such representations as the complainant and the respondent each make on the issue of vulnerability." It will be readily apparent that there is a subjective element in this, just as it is necessary to recognise that every human being can be vulnerable given the right circumstances. The key concept is probably "significantly impaired" and we will have to see how that is actually worked out in practice. Very often it is obvious but sometimes it can be much more difficult.

Abuse of Power/Authority

A further issue is the extent to which abuse of power and/or authority by a clergyperson amounts to misconduct. Most laypeople think clergy have far more power and authority than in fact they have; at the same time many clergy think they have less power and authority than actually they do have. Thus actions or words, which to a clergyperson may simply be robust, can all too easily be perceived by the recipients as oppressive and bullying. Nor is this helped by the modern inclination to describe any uncomfortable exercise of authority as bullying. Real care has to be taken in these cases both to understand the impact on a layperson and the culpability, if any, of the clergyperson. It becomes more difficult where, as is not infrequently the case, the clergyperson acts with the knowledge and support of the churchwardens or even the PCC. They cannot, of course, relieve the ordained person of responsibility for what they in fact do or say but such support must necessarily impact on the question of culpability. I have now seen a number of these cases: complainants may have been difficult but they have also been genuinely hurt. When dealing with these cases under the Measure, the pastoral aspect remains important but the true focus is, and must be, on the conduct and culpability of the Minister. The Measure provides for professional discipline not parochial problem-solving.

A further difficulty arises where in the course of pastoral care, authority is exercised on a confidential basis in private. Of course if the Shepherd chooses to beat his flock with a cane, the position is, at least in law, straightforward. It is where relationships are subtly affected and the person under authority (who may of course also be ordained) changes their behaviour as a result of the relationship and later comes to regret that change. I mentioned earlier Mr. Slope and his influence over what the author described as "foolish women". You may remember the support groups of pliable women that he assembled. That may have been quite a good example of the misuse of spiritual authority. It is not difficult to see when spiritual power and authority is being exercised and nor is that in itself to be discouraged. When intentional use of such power or authority becomes abusive is a difficult judgment or rather, the difficulty is in drawing the line. It so much depends on the extent to which the clergyperson properly understands the impact that they are having on the other, together with their motives for exercising such power or authority.

Openness in the System

Publicity and transparency are a potential further source of difficulty. In the light of unhappy experience, there is a strong argument for transparency at least as far as any finding and penalty are concerned, whether consensual or not. Of course the findings and any consequential penalty imposed by a tribunal must be public. The problem lies more with admitted conduct and penalties by consent.

The prevailing view is that these should be made public at least on the diocesan website but that is not always the case nor is it a view that is universally shared. In my view, given that this is an administration of a system of discipline in a national church, transparency should always trump the personal embarrassment and difficulty caused by publicity. Moreover, there are questions too about the relationship of what appears in the Archbishops' list and the allegation that had in fact been made in the original complaint. If the former is less than the latter, in a case where there has been a penalty by consent, perhaps the Bishop should explain why. There are also issues about what records should be kept where informal procedures have been used though this is, by definition, outside the remit of the Measure.

The Standard of Proof

Tribunals, in approaching the evidence, must by Section 18(3)(a) apply "the standard of proof [which] shall be the same as in proceedings in the High Court exercising civil jurisdiction." Paragraph 200 of the Code says – "This means that a complaint is to be proved on the balance of probability but there is a degree of flexibility when applying that standard. The more serious the complaint the stronger should be the evidence before the tribunal concludes that the complaint is established on the balance of probability." This no longer represents the civil law as laid down by the Supreme Court. They maintain that the civil standard is the simple balance of probabilities and justify it on the basis that a mistake either way is equally serious, as indeed so often it will be. I doubt that this has a significant impact on most cases since in most cases a tribunal is likely to form a clear view one way or the other.

Conclusion

That there should be restraints on clergy behaviour is clear. That such restraints should be exercised transparently and with fairness to all involved is, I trust, also clear. However any such process repeatedly has to strike a balance between potentially conflicting objectives like expedition and fairness or risk and incursions of freedom and so on. No process is infallible, nor will ever be so, and none will please all of the people all of the time. I have long since learnt as a judge to be conscious of fallibility, both personal and systemic. The Clergy Discipline Measure, and those who administer it, are no exception to that. We owe it to all to keep the system as sound and effective as we can and to operate it as well as we can. Further than that, no guarantees can be given.

Mark Hedley
11th October 2017