50 Years of Safeguarding – 950 Years of Clergy Discipline: Where do we go from here?

An expanded text based on an ELS London Lecture delivered by His Honour Peter Collier QC, Retired Senior Circuit Judge & Honorary Recorder of Leeds; Former Deputy High Court Judge (Family Division) on 17 November 2021 at the London Offices of Winckworth Sherwood LLP

Background to the title of the lecture

On 29th February 2020 I spoke to the Society about "50 years of safeguarding in church and state". Those years covered my 50 years in practice as a barrister and a judge. Arising from some observations I made towards the end of the lecture about areas that needed addressing I was asked to chair a working party (WP) for the Society to address how the Clergy Discipline Measure 2003 (CDM) should be reformed. We reported in February 2021.

It was long before that, nearly 18 months ago, that I was asked to provide the title to which I would be speaking tonight. At that time as far as clergy discipline was concerned the WP had not even published its interim report, and it was very unclear what would emerge from another working party, the "Lambeth Working Group", set up by the House of Bishops under the chairmanship of Bishop Tim Thornton. That group was also looking at the reform of the CDM. As far as safeguarding was concerned we were awaiting the IICSA report. So, 18 months ago I wanted to leave myself plenty of wriggle room and wait to see what developments if any there were in relation to both clergy discipline and safeguarding before deciding in what direction to go this evening.

The last 18 months

What has happened in the intervening period? Well in relation to clergy discipline the ELS WP produced its report in February. Bishop Tim's group produced a report which went to General Synod in July – GS 2219. Synod agreed that there should be significant change to the CDM but also backed an additional motion urging the implementation group to adopt a system more akin to the ELS proposals than the Lambeth Working Group proposals. That implementation group has started work. I am a member. We are at a very early stage in our work. But it is hoped that we will present proposals to General Synod during the course of next year.

In relation to safeguarding, IICSA has reported. It has criticised the church in relation to how it has dealt or not dealt with safeguarding in the last 50 years. I want however to flag up that its remit is much wider than just looking at the church of England. Its purpose is:

> "To consider the extent to which State and non-State institutions have failed in their duty of care to protect children from sexual abuse and exploitation; to consider the extent to which those failings have since been addressed; to identify further action needed to address any failings identified; to consider the steps which it is necessary for State and non-State institutions to take in order to protect children from such abuse in future; and to publish a report with recommendations."

Just over a month ago it published two reports on the same day. The one that drew all the headlines was about Greville Janner, but the other was about Lambeth Council. A month before that it reported on other religious organisations and settings, and it had previously reported on other institutions as well. In all IICSA has now produced 17 investigative reports. The themes that have emerged are for the most part common to each institution. To that I will return.

Tonight I want to draw some threads together as a result of my own work and research into these two subjects over the last two years and to suggest some possible directions in which, in my view, the church ought to move. Any opinions or suggestions I make are of course entirely my own.

50 years of safeguarding.

I begin by referring the listener or reader to what I said in February 2020. Nothing that has emerged since has challenged what I said then. I then gave an account of what I had observed first-hand in both state and church over my 50 years in practice at the bar and on the bench.

You may recall that I began by sketching out the developing understanding of the realities of the physical abuse of children in the 1960s. We noted the work of Henry Kempe in America in relation to "battered child syndrome". Then the significant change in understanding and practice in this country following the report into the case of Maria Colwell in 1973. Area Child Protection Committees were set up as a consequence of that report. That was the start of the state beginning to organise itself to deal with issues of child abuse.

There then followed during the 1980s a developing understanding of the reality of child sexual abuse. There had been some work in the 1920s to attempt to discover the extent of the prevalence of sexual offending against children and young people. But the proposals resulting from that work were resisted by the legal professions and so were not taken up by the government of the day. It was in the 1980s that again work in America was published here and taken note of by professionals who were dealing with child sexual abuse.

In March 1986 Esther Rantzen invited viewers of the television programme *That's Life* to send her details of their personal experience of abuse and over 3,000 responded. She

established the telephone helpline *Childline* in October 1986 and 50,000 calls were received within the first 24 hours of it opening.

In 1987 we had the concerns raised about children in Cleveland being taken into care as the result of questionable diagnoses of child sexual abuse being made by doctors. That led to the Cleveland enquiry under Dame Butler-Sloss. Her report resulted in proposals about how cases raising a suspicion of child sexual abuse should be investigated. New laws were introduced in 1986 and 1991. The Pigot report in 1987 made wide reaching proposals in relation to changes to the laws of criminal evidence which it has taken over 30 years to fully implement, and the last leg of that – s.28 of the Youth Justice and Criminal Evidence Act 1999 – is still only in the pilot phase.

A Department of Health Report in 1991[1] reported on 19 cases of abuse in the period 1980-1989. In the introduction it said:

> "The mid-1980s saw an increase in the reporting of child abuse. It is not known whether or not the actual incidence of abuse has increased. Public awareness of child abuse increased and critical in this was the emergence of child sexual abuse as a problem which shocked, but possibly not surprised the public. Among other things the emergence of child sexual abuse has led to increased recognition of power and gender as factors inherent in the abuse of children."

In 1995 The child psychiatrist, Eileen Vizard, and the senior civil servant responsible for childcare policy at the Department of Health, Rupert Hughes, described the response of professionals to child sexual abuse in the following terms:

> "… even the most sophisticated practitioners were taken by surprise with the emergence of an apparently new phenomenon in the early 1980s – child sexual abuse. Most shocking of all was the fact that this was yet another sort of secret abuse inflicted upon children within their own families. As the 1980s progressed, child sexual abuse victims of ever younger ages and both sexes started to come forward with evermore complex stories of mostly, intra-familial abuse."[2]

That perhaps indicates how the recognition of abuse taking place within institutional settings as well as in families began to emerge and be accepted as something of significance that was happening.

In 1993 the Home Office published a document entitled *"Safe from Harm"*. It was subtitled "*A Code of Practice for Safeguarding the Welfare of Children in Voluntary Organisations in England and Wales"*. And in July 1995 the Church of England published its own *Policy on Child Abuse* specifically following the 13 guidelines set out in the Home Office report.

[1] Child Abuse: A study of Inquiry Reports 1980-1989. HMSO. 1991

[2] Vizard, E. And Hughes, R. (1995) 'Introductory Comments for Children in the Crossfire Conference, 4th and 5th April 1995.' In: The Michael Sieff Foundation Children in the Crossfire Conference Handbook. The Michael Sieff Foundation: Surbiton, Surrey.

As we noted last time many of the cases that are currently the subject of much angst and self-examination in the church are cases that relate to offending in the 70s and 80s. And we are or ought to be aware that the state, the secular world, was experiencing similar incidences of child abuse by its employees, particularly in children's homes. The most notorious of those were in North Wales and were reported on by Sir Ronald Waterhouse in 2000. We are now aware of similar instances within the world of professional football. For completeness we should not overlook the institutional response or lack of response by state agencies (including various police forces) to the grooming gangs which have only been taken seriously in the last 10 years.

It was in January 2011 that Andrew Norfolk revealed the extent of those grooming gangs which had been operating for years in plain sight; and how police and social workers had failed to come to grips with this extensive abuse.

In October 2012[3] the exposure of Jimmy Savile opened the flood gates through which have poured the many people now making complaints of non-recent sexual abuse as they perceive that there is greater likelihood that they will be believed.

I shall not repeat what I said last time about how the state responded and how the church tracked the state as the state developed policies for organisations to follow to ensure children's safety and how such organisations should respond to complaints or concerns about abuse.

The IICSA Report on the Church of England and the Church in Wales

Tonight we must look at what IICSA has had to say about the Church of England. Listen to these words from IICSA:

> "Its actions and decisions made it easy for the sexual abuse of children to occur, in four principal ways. It knowingly retained … *those* … who posed a risk to children; it failed to investigate … when they … suspected … child sexual abuse; it exposed children to situations where they were at risk of sexual abuse despite, in several cases, having full knowledge of these risks; and it allowed adults suspected of sexual abuse to …*move* … and sexually offend elsewhere, without alerting any known employers. In respect of volunteers, it appears that … it ... opened its doors to anyone from the community who expressed an interest in befriending children – for example playing sports with them or taking them out – without any checks on their suitability. In other words, a potential licence for child sexual abuse."

Does that sound like the Church of England? I have in fact removed a few words, which would have revealed that it is what IICSA said in its recent report about children in the care of Lambeth Council[4]. But note how similar the themes are to those which we have heard time and again were the inadequate response of the church to disclosure allegations.

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[3] *Exposure: The Other Side of Jimmy Savile* ITV Broadcast, 3 October 2012

[4] The above quotation is from page vi of the Executive Summary

IICSA also investigated and reported on the Nottingham City and County Councils, which it says it chose because of "the high level of allegations of sexual abuse of children in their care over many years. The Inquiry received evidence of around 350 complainants who made allegations of sexual abuse whilst in the care of the Councils from the 1960s onwards, though the true scale is likely to be higher. This is the largest number of specific allegations of sexual abuse in a single investigation that the Inquiry has considered to date."[5]

It concluded[6] in relation to both those councils:

"4. Neither of the Councils learned from their mistakes despite decades of evidence of failure to protect children in care. Successive reviews, both internal and external, identified weaknesses in policy and practice relating to the protection of children in residential care, in foster care and in the area of harmful sexual behaviour. Many of these reviews included recommendations for change which were accepted but rarely acted upon.

5. Over the last 30 years, the Councils have produced policies and procedures on responding to allegations of sexual abuse of children in care. However, these policies were not generally made known to staff nor was there a checking process in place to verify implementation."

And it said about the City Council's approach to apologising for non-recent abuse and their past failure to protect children in their care:

> "The City have been guarded and slow to appreciate the level of distress felt by complainants. Their approach has caused understandable upset and anger, which could have been avoided." [7]

We could also look at the report into other religious organisations and settings and see the criticisms made of the Church of England written again and in larger and bolder type.

None of this is intended to lessen the criticisms made of the Church of England. The church should have been marked by its difference from other institutions rather than its similarity. But this background does set the context, which is the context of IICSA's scope which I quoted earlier.

In relation to the specific criticisms and recommendations made about the Church of England, significant steps have already been taken to address the criticisms and to implement the recommendations.

IICSA's recommendations are set out in section D4. of their Report. The report was into the Church of England and the Church in Wales, so some recommendations are joint and some

[5] Page iii of the Executive Summary
[6] The following quotations are from page 136 of the Report
[7] Quotation from page vii of the Executive Summary

specific to one church. The relevant recommendations for the Church of England were under six headings.

Firstly, to create a new role – the Designated Safeguarding Officer (DSO) who will replace the Designated Safeguarding Adviser (DSA); the significant difference being that the Officers will be independent of the Bishop in respect of key safeguarding tasks, including advising on suspension, investigating and/or commissioning investigations, and carrying out risk assessments. They would be employed locally by the Diocesan Board of Finance but professionally supervised and quality assured by the National Safeguarding Team (NST).

There are several recommendations under the second heading – which is the revising of clergy discipline in relation to safeguarding complaints. It proposed a mandatory code of practice in relation to such complaints, along with several specific proposed amendments in relation to deposition from holy orders, abolition of penalty by consent, no confidentiality agreements to be put in place in relation to safeguarding complaints, and adequate and regular training for those handling safeguarding complaints. None of that is controversial. In my judgement a proper discipline scheme would cater for the issues that have arisen in relation to safeguarding complaints without the need for specific safeguarding provisions.

There are proposals in relation to information sharing both between the two churches and between the Church of England and what are described as its "statutory partners".

It is recommended that both churches should introduce a churchwide policy for funding and provision of support to victims and survivors of child sexual abuse concerning clergy, church officers or those with some connection to the church. The policy should clearly set out the circumstances in which different types of support, including counselling, should be offered and make clear that support should always be offered as quickly as possible, taking into account the needs of the victim over time.

Finally, it is recommended that independent external auditing should continue.

One of the key criticisms running through the Inquiry was the lack of any independent oversight of the church's safeguarding processes. That of course links directly to a number of the recommendations, significantly the relationship between bishops and their safeguarding advisers. It also ties in to the clericalism and deference that were identified as cultural issues and barriers to a wholehearted embrace of safeguarding across the institution.

The Church of England's response to IICSA

At the General Synod meeting in April 2021 a report GS 2204 was presented in relation to what the church was doing to address these issues.

Given the early stage we were then at, a number of these changes were at the proposal stage or in the planning phase. But the report gives a clear indication of the intended direction of travel.

Paragraph 1 deals with the Interim Support Scheme which commenced in October 2020. This is an interim scheme; its Terms of Reference have been published very recently and a permanent Redress Scheme is currently being designed.

Paragraph 2 describes the new patterns of learning that have now been introduced for safeguarding training. They are described as “pathways”, and there are several of them for different groups of people.

Paragraph 3 talks about how safeguarding policy is being developed in a number of areas. It is at pains to stress the part being played by survivors and victims in these developments. The developments are basically a review of a number of the documents that already exist in relation to policy. Perhaps of most interest to us this evening is para 3.4 which describes how the NST has established working groups to explore the revision of core groups.

Paragraph 4 describes the proposal to pilot a regional model for the creation of the DSOs who will replace the DSAs.

Paragraphs 5-7 deal with Safe Spaces, Past Cases Review 2, Lessons Learned Reviews, and the Redress Scheme for Victims and Survivors.

Paragraph 9 describes the proposals for creating an Independent Safeguarding Board (ISB), which has now been done.

Finally, paragraph 10 describes the proposals for a National Case Management System which was then in the plan and design phase.

It perhaps makes sense that the first of those to be completed is the setting up of an independent three-person Independent Safeguarding Board for which the initial remit will be:

a) Provide professional supervision to the Director of Safeguarding who will be accountable to the ISB for matters of professional conduct for themselves and all NST staff.
b) Responsibility for ensuring best practice in handling case work and for managing cases that are escalated to the ISB from the NST.
c) Receive complaints referring to the NST’s handling of cases, investigate the complaint with support from the National Church Institutions, and decide the appropriate response. (Exceptions would include complaints about legal advice given to the NST and other matters outside the ISB’s professional competence).
d) Quality assure national safeguarding practice requirements issued by the House of Bishops under the Safeguarding and Clergy Discipline Measure 2016.
e) Ensure that victims and survivors, and all others who are affected by safeguarding cases, are heard and enabled to inform policy and practice.
f) Make any recommendations the Chair deems necessary to enable the Church of England to prevent safeguarding lapses and ensure that processes for responding to allegations and complaints are just to all involved, timely and in line with best practice.

g) Advise on the continuing development of a core curriculum for training undertaken by dioceses.
h) Advise on good practice models which will set the standard for the work of DSOs (with particular emphasis on enabling the conceptual shift from Adviser to Officer status), support DSOs in applying these principles in their local context and intervene on behalf of DSOs if dioceses do not enable DSOs to discharge their responsibility for directing safeguarding activities in the diocese.
i) Accompany the relevant parts of the church to advise on the development from Phase 1 to more long-term measures in subsequent Phases, including working with the NSSG and NSP to draw on their wisdom and define their future roles in relation to the ISB in Phase 2.
j) Hold the church publicly to account for any failure to respond to the ISB's recommendations.

Current safeguarding practices including risk assessments

But it is the future operational level of safeguarding that was not addressed by IICSA that concerns many of us. It looks as if it will be regionally based although working under national supervision and quality assurance. However subject to what might emerge from the proposals in relation to revising the operation of core groups (3.4), there would not appear to be any major proposal to alter the basic principles upon which the current investigations and risk assessments take place.

The policy document that describes the current management system is entitled "Practice Guidance: Responding to, assessing and managing safeguarding concerns or allegations against church officers".

The current version is from December 2017. It has been criticised amongst others by some of the lawyer members of General Synod. The operators of Core Groups would say that that criticism arises because their role is misunderstood. It is with that in mind that Core Groups will be renamed when an updated version of that guidance is produced. They will then be known as Safeguarding Case Management Groups - SCMGs. And that is a phrase or acronym that I imagine will be used from now onwards even before the revised document is produced.

In the outside world of child protection when a Core Group is established following the initial child protection conference it is the group of people consisting of the relevant professionals, the parents/carers and even the child when appropriate who are together responsible for developing and implementing the child protection plan in being in the case.

The Church Guidance states about its Core Groups in section 1.6 that "The purpose of the core group is to oversee and manage the response to a safeguarding concern or allegation in line with House of Bishops' policy and practice guidance, ensuring that the rights of the victim/survivor and the respondent to a fair and thorough investigation can be preserved."[8]

[8] page17

If there has been no finding by a court (criminal or civil) or any statutory agency involvement then section 3.1 states "the Church should conduct its own investigation; the core group should establish a process for this to gather information and make an assessment on the facts."[9] I find that an interesting turn of phrase – "An assessment on the facts" not "of the facts"

That is explained further a little later on. About what it calls the 'internal investigation' it says in section 3.3: "The aim of an Internal Church Investigation is to establish whether or not there are ongoing safeguarding concerns and whether the respondent is suitable to fulfil a Church role which carries the potential for engagement with children, young people and/or vulnerable adults. The aim is NOT *(their capitalisation)* to establish the guilt of the respondent."[10]

After that investigation has taken place it spells out what then happens – The DSA prepares what is called a summary report (section 4.1)[11]. This appears to be a key document. What does it contain?

1. "Core details" which amount to name, rank and number of the various people involved.

2. "A summary of the allegations" which is essentially a list of information gathered including the respondent's account of the matter.

3. "An assessment of the findings". They are itemised as "which could include recommendations for further enquiries. And will include a clear statement, in their opinion, on whether the DSA believes the case is substantiated or unsubstantiated, unfounded, malicious or false and/or whether there are ongoing safeguarding concerns."[12]

And in a footnote about the meaning of "substantiated" it says:

> "examples of substantiated allegations would include for instance a criminal conviction or a finding of fact in a civil court, or where there has been no criminal conviction or finding of fact, where credible and identifiable evidence has been found (without implying guilt or innocence)."[13]

It is this that I find most troubling as there seems to me as a lawyer with both criminal and childcare experience that there is a lack of the clarity that I would have hoped for. I think it is that lack of clarity that leads to many of the frustrations and also the delays that I have often observed in the church's safeguarding world.

[9] page 39
[10] page 41
[11] page 50
[12] numbered point 3 on page 50
[13] page 52

A comparison with the practices of the secular courts

Criminal Courts

In the secular world there is of course a difference between what happens in criminal and civil cases. They are doing very different things. The criminal court is deciding whether a crime has been committed and if so deciding what the appropriate punishment is for that crime. In serious cases it means the deprivation of liberty for the defendant. The criminal court is not concerned with consequences or outcomes for other people. The burden of proving the case is on the prosecution and the standard of proof is so that a magistrate or jury is sure that the elements the prosecution has to prove have been established so that they are sure about them. A not guilty verdict does not mean that what is alleged did not happen, just that the jury is not sure that guilt was established, ie that they were not sure that the essential elements of the offence were proved against the defendant. It is not proof of innocence. From time to time we see on the television the acquitted defendant on the steps of the court declaring they have been proved innocent, by which they mean "it's been proved I didn't do it". No such thing has been proved at all. "Innocence" is no more than a legal presumption that you are not guilty until guilt is established so that a jury is sure. It is a circular argument.

Civil Courts

A non-criminal case operates differently. Whoever brings the case has the burden of proving it. However the standard of proof is different, it is known as the balance of probabilities. The test is – is the judge satisfied that what is alleged is more likely to have happened than not to have happened? If so the case has been proved, if it is not more likely to have happened then it has not been proved.

The courts, both criminal and civil, decide their cases on the evidence presented to them and there is always a right for the other side to test the evidence, challenge it in cross examination and present evidence of their own.

Interim decision making in secular courts

However in both criminal and civil cases there are occasions when the courts have to make interim decisions before that final determination takes place. In criminal cases magistrates and judges have to make decisions about whether bail should be denied and a defendant remanded into custody pending that final determination. In civil cases courts sometimes issue injunctions preventing someone doing what they would otherwise be entitled to do. And in childcare cases courts sometimes remove a child from the care of their parents because they consider that it is in the best interests of the child to do so, which in that context means it is necessary to ensure the child is protected from the risk of being caused significant harm, pending a final decision being made.

"Reasonable cause to suspect" and "evidence capable of belief"

The test in those childcare cases is whether there are reasonable grounds for believing that a child has suffered significant harm or is at risk of suffering significant harm. The basis for such a reasonable belief is the presence of evidence capable of belief that child has suffered or is at risk of suffering significant harm if that intervention does not take place.

I may be thought to be dancing a pinhead, if I say that in my mind there is a difference between credible evidence and evidence capable of belief. In my view 'credible' suggests that an assessment has been made of the evidence and the witness has been believed. Whereas evidence that is capable of belief does not require any assessment other than that is 'not incapable of belief'. I cannot think of any good reason for departing from the long used and well understood phrase "evidence capable of belief" unless it was intended to mean something different.

It is for this reason that I find the language of the Management document rather confusing. It speaks about the evidence being credible (ie we accept it is true) and yet in the same breath it says we are not making any determination of guilt or innocence. Similarly risk assessors are told they must make no determination about whether something happened or not which I find a remarkable basis for any proper risk assessment, but I will say more of that in a moment.

I appreciate that what I am suggesting has huge ramifications for resources and therefore for cost, but if we could do this differently, I believe we could have a much better system.

There will be situations in the church when a decision has to be made in order to put in place some interim protection for children or other vulnerable people. Obviously that falls to be considered when there is a real possibility that there has been significant harm or that there is a risk of significant harm. That will arise in different situations and they have differing degrees of urgency and seriousness which will determine what would be a proportionate response.

If someone is arrested in relation to child sexual assault we are at one end of the spectrum. If someone has allegedly failed to comply with some aspect of safeguarding policy (and there is a range within that) it usually carries a much lower risk of causing or putting people at risk of significant harm.

But in both cases, the test must surely be whether there is evidence capable of belief that something has occurred that either has caused significant harm or that puts someone at risk of such harm.

In the children cases it may be a disclosure interview, or a hospital admission with a report that injuries have been found, or some other evidence that something causing harm or risking harm has happened. In the failure to comply cases there will be some evidence, usually not in dispute that, something was done that should not have been done or not done that should have been done.

On the basis of that material a decision must be made about what if anything is necessary to prevent harm in the future pending the final determination of the matter and any long-term protection plan being put in place. In serious cases the police may have obtained a remand in custody, but sometimes there will be bail with conditions.

One of the more recent problematic situations is “release under investigation” – in such instances there are no conditions, and there is no time frame.

Another route that might help in interim situations is where the police or the local authority have reported to the bishop under s.36(1)(e) of the CDM 2003 that the priest presents a significant risk of harm. In which case the bishop can suspend, and there may need to be other conditions imposed as well. But in the absence of such a report from the local authority or the police, there will hopefully have been sufficient information sharing in serious cases to enable the imposition of a safeguarding agreement on the priest in question as may be necessary.

In the less than serious cases there may not be such a degree of urgency and any restraint of the suspected priest is likely to be much less restrictive.

There is no need for earnest soul searching if this is recognised as a temporary measure pending a subsequent final determination of the allegation. We need to recognise that there can be no full risk assessment at this early stage, it is the imposition of an interim restraint of a proportionate nature to the potential risk.

Final assessments

The real problem comes with any final assessment. I believe that a fact-finding exercise is essential when there has been no external investigation in serious cases, and also in most of the less than serious cases. And I am using what I hope will become a common distinction – serious cases are those which in terms of misconduct and discipline would usually result in a prohibition; less than serious are those that would not usually carry that level of sanction.

And you would also need a full risk assessment in other situations where what is required is more than a temporary holding position. Why do I say that you need to have a fact-finding exercise in all such full risk assessments?

Well, let’s ask an earlier question. How do you assess risk? Risk is a combination of harm and likelihood. To assess risk you look at the degree of potential harm and the likelihood of it happening. The degree of harm following any inappropriate sexual behaviour is very high indeed. Some of us in our professional lives have met many people whose lives have been irreparably damaged by sexual abuse. The real question in these risk assessments is therefore not the potential degree of harm, but the likelihood of that harm being occasioned and occasioned by this individual. Ask any expert in this area and they will tell you that the only real predictor of future harm is past conduct. That is why the first step in any risk assessment has to be a proper fact-finding exercise about the past conduct, ie on the balance of probabilities is it more likely than not that someone has behaved in a way indicating that they did abuse someone, or has for some other reason been found to be capable of abusing someone.

Not “allegations” or “suspicions” but “facts found to be established by the evidence”

I could quote case after case in relation to child protection in the family courts that state this principle. An allegation is not proof. Suspicion is not proof. Judges have said that time and again. At the moment there are many cases where the church is trying to resolve these

issues on an unsatisfactory basis. Proposals that will affect someone's life, ministry, and much else in the long term are being founded on what is not expressed as more than an allegation.

What is absent from the management process at the moment is any real fact finding if there has been no criminal or civil finding. Could that change? Well clearly the answer to that is "yes". But it would require resources and resources cost money. Should that money be spent? I would say yes.

On 23rd July 2021 the Church Times had an opinion piece prompted by the suicide of Father Alan Griffin and surrounding matters, it said that there was a need for movement in 3 areas in relation to the CDM – disclosure, support & speed. Charles George QC, former Dean of the Arches and Auditor, wrote a letter in response (6 August2021) endorsing their leader and saying "in my view what is not fit for purpose is the present safeguarding system, which operates largely outside the CDM. This is where attention needs to be focused on the three matters addressed so succinctly in your editorial comment."

It does seem to me that that if the reform of the CDM proceeds along the route proposed in the ELS Working Party report then we may have a way of resolving the issues I have raised and those to which Charles George referred. In the less than serious cases of misconduct there will be a report within 28 days of the complaint being laid setting out the investigator's findings of fact where there are disputed issues. In the serious cases we anticipate a conclusion within 6 months with a narrative verdict about what was found to have happened and/or not happened. The decision in both less than serious and serious cases will be on the balance of probabilities. And my hope is that we will not be waiting for other jurisdictions to complete their processes. I will come back to that issue later.

Is there any reason for not doing that or something like it? I have to confess that I am not aware of how and why the current processes evolved into what we have. But I would suggest that there could be many advantages in piggybacking on the CDM fact finding processes.

I hope that some discussion can take place about this possibility in the months ahead. Not that it should hold up the revision of the CDM – that must proceed apace. But there may well be something that emerges from the future CDM processes that could be of use as a process for assessing risk in safeguarding cases.

950 years of clergy discipline

1066 and all that

I wonder what you made in anticipation of the lecture of that part of the title. My real marker is in fact next year, when it will be 950 years since the 'Ordinance of William'. That is of course William the Conqueror. The Ordinance said:

> I have ordained that the episcopal laws shall be amended, because before my time these were not properly administered in England according to the precepts of the holy canons. Wherefore I order, and by my royal authority I command, that no bishop or archdeacon shall henceforth hold pleas relating to the episcopal laws in the hundred court; nor shall they bring to the judgment of secular men any matter which concerns the rule of souls; but anyone cited under the episcopal laws in respect of any cause or fault shall come to the place which the bishop shall choose and name, and there he shall plead his case, or answer for the crime.

I still have on my bookshelves a textbook I bought in my first year at university in 1966. *Taswell-Langmead's Constitutional History*, then and I think still, in its 11th edition. I don't think I noted this particular passage back in 1966. But it reads

> "The church and state had been practically identical, earls and bishops were alike elected and deposed, and laws spiritual and temporal were enacted by the king in cooperation with the witan. The bishop and ealdorman sat side-by-side at the gemot of the shire or hundred, deciding all causes, ecclesiastical as well as civil."[14]

Pollock and Maitland in their *History of English Law* put it this way:

> "One certain and very well-known peculiarity of the Anglo-Saxon period is that secular and ecclesiastical courts were not separated and the two jurisdictions were hardly distinguished. The bishop sat in the county court; the church claimed for him a large share in the direction of even secular justice, and the claim was fully allowed by princes who could not be charged with weakness. Probably the bishop was the only member of the court who possessed any learning or any systematic training in public affairs"[15]

That working together goes back to Constantine. Before Constantine the church would meet together in synods and councils. There they would clarify and define what they believed and how they expected believers to live. That was expressed in the canons. And at those synods or councils, judgment would be pronounced on those who erred whether doctrinally or behaviourally.

Post Constantine the civil law (which was essentially Roman law) the canon law of the church and the historic local law were often taken together when judicial decisions were made. In England it worked well as Taswell-Langmead described.

The Ordinance of William was a big break with that.

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[14] Taswell-Langmead's Constitutional History, 11th Ed. page 43. (Sweet & Maxwell 1960)
[15] Pollock and Maitland, History of English Law, Bk I, c.III, 57 (Cambridge 1895)

Separating off the church courts meant that after 1072 both the European civil law and also the Catholic canon law became more influential in the ecclesiastical courts as they developed.

In the early 12th century Justinian's 6th century codification of Roman law was rediscovered. This began to be taught in the universities of Europe. The canon law was not codified but was more a random collection of texts sometimes in rivalry with one another. It was in 1140 that Gratian at Bologna compiled his *Decretum* which enabled canon law also to be taught as an organised collection of law. Canon law was however more of a living instrument as new texts emerged and fresh decretals arising from appeals to Rome were issued. Gratian's *Decretum* emphasised the Pope's role as 'universal ordinary' which inevitably encouraged an increasing number of appeals to Rome. Often that appellate jurisdiction would be delegated to local clergy by papal mandate. This all resulted in many further decretals being issued.

The *Decretum* also sharpened the distinction between the internal forum (confession with its associated theological interest in sin and penance) and the external forum (church courts which focussed on canonical crime and punishment). Canon lawyers borrowed many rules of procedure from Roman law and these became adopted in the ecclesiastical courts; they became known as 'Romano-canonical' procedure and were compiled in juristic literature called '*ordines iudiciorum*'.

Until the middle of the 12th century a bishop exercised his judicial functions in his *curia* which consisted of the leading clerks of his diocese. Thereafter partial separation of the person of the bishop from the exercise of his judicial functions along with the formation of different courts to deal with different types of case developed. From 1150 onwards one of the clerks in the *curia* begins to take a prominent part of the judicial workload and acquires the title 'official'. By the 13th century he had become the judge of a permanent court dealing with much of the bishop's judicial business and he became known as the bishop's 'official principal'. The court became known as the Consistory Court. The bishop could still sit as judge in his Consistory Court if and when he wished.

One development in the Consistory Court was the introduction of "office case" jurisdiction. Originally all complaints were personal. If you made a complaint you ran the risk that if you did not prove your case you were liable to the same punishment that you had demanded against the defendant. As time progressed the accuser was able to 'implore' the judge to lend the authority of his **office** to the prosecution. These were then known as 'office prosecutions' and no such personal liability fell on the accuser. I will return to what we might learn from that practice later.

Over the centuries that followed William's Ordinance, the church courts developed a significant jurisdiction in quasi spiritual matters – marriage along with separation and annulments; sexual behaviour along with adultery and fornication; perjury, which included failure to pay debts as well as saying something that damaged a person reputation; testamentary issues; and finally cases about spiritual goods, meaning cases about tithes and alms.

Those jurisdictions continued and grew significantly in their extent until the 19th century.

The reformation had no effect upon either the substance or procedure of the church courts, it simply resulted in final appeals going not to Rome, but to the king. There was an intention to draw up a new code of ecclesiastical discipline, and a draft was prepared by a Royal Commission appointed by Edward VI and led by Archbishop Cranmer in 1551. However its proposals did not get through parliament when they were presented in 1553. A further attempt in 1571 was again rejected by parliament.

Emendatio

In relation to complaints about the conduct of clergy, the emphasis in the church had always been on *emendatio* - the reformation and the restoration of the priest. The intention and purpose of reconciliation, of restoring the priest, and of returning him to the community has been at the heart of discipline within the church since New Testament times. *Pro salute animæ* – for the good of the soul – has long been seen as the object of ecclesiastical discipline. So priests when penitent would be admonished or required to do penance.

Research done by Michael Smith[16] in the dioceses of Exeter and London between 1680 and 1839 shows that Admonition was the most common penalty imposed on priests. Most ecclesiastical offences were dealt with in that way. Suspension and inhibition were possible as was deprivation. The ultimate penalty was excommunication, but even that could be removed following repentance. If you were not penitent then you could be confined in prison until you were.

In a book on the history of prisons Edward Peters says:

> "There is a fascinating feature of monastic discipline that relates to imprisonment. In matters of discipline, the Rule of Benedict spoke of the isolation of serious offenders, banning them from the common table and the collective liturgical services that constituted the centre of monastic life and forbidding them both the company and the speech of other monks. The isolated monk was made to labour, "persisting in the struggle of penitence; knowing that terrible sentence of the Apostle Paul, (1 Corinthians 5:5) who said that such a man was given over to the destruction of the flesh in order that his soul might be saved at the day of the Lord". A letter from Pope Siricius (384-98) to Himerius, Bishop of Tarragona, stated that delinquent monks and nuns should be separated from their fellows and confined in an *ergastulum*, a disciplinary cell within the monastery in which forced labour took place, thus moving the old Roman punitive domestic work cell for slaves and household dependents into the institutional setting of the monastery. It is thought that this is the first use of imprisonment as a punishment, but one designed as always to bring about repentance and restoration. Monastic prisons were also used for the confinement of secular clergy and their discipline by their bishops - a process known as *detrusio in monasterium.* By the 12th century bishops were expected to have their own

[16] Chapter 6, *The Church Courts, 1680-1840 From Canon to Ecclesiastical Law*, The Edward Mellen Press (2006).

> diocesan prisons for the punishment of criminal clergy. A practice regularised in 1298 by Pope Boniface VIII in *Liber Sextus*."[17]

In that extract about the history of prisons the concept that the purpose of ecclesiastical incarceration was reformation and restoration is very clearly stated.

An Act of Parliament was passed in 1485 which had as its title 'an Act to punish priests for incontinency by their ordinaries'. It began in this way: "for the more sure and likely reformation of priests, clerks and religious men, culpable, or by their demerits, openly reported, of incontinent living in their bodies, contrary to their order …". It went on to declare lawful the imprisonment of such men "to abide for such time as shall be thought to their discretions convenient", and it exempted the ordinary from action for false or wrongful imprisonment.

We need to understand that as time went by other developments had taken place in the wider church. The reforms under Pope Gregory had emphasised the need for clerics to lead holy lives. But there was also a growing emphasis on clerical independence. That led to a battle between church and state, the church asserting its independence and the state asserting its right to judge clerics.

Saving our Order

A lecture by Rowan Williams to the Society last December entitled *"'Saving our Order': Becket and the Law"*[18] and marking the 850th anniversary of Becket's martyrdom touched on an important and to me new aspect of this dispute.

He reminded us that the issues between Becket and the King were much wider than just who could try criminous clerks. In particular there were issues of property and the church's freedom to dispose of its property lying at the heart of the dispute as much as the right to try and punish its priests. He said:

> Becket's reluctance to compromise in any way about immunity reflects a canonical/theological position in which the cleric's *person* is defined as sacrosanct, in a way that makes case-by-case adjudications virtually impossible; whatever the merits or demerits of a specific plea, and whatever the seriousness of a specific offence, the ordained person is to be granted the presumption of an independent ecclesiastical trial and the grace of reformatory punishment. Only this absolutist position is seen as securing the crucial twin liberties of appeal and of freedom in disposing of property. And the difficulty for a lay legislator lies in the definition of certain subjects as *persons who in virtue of their office or order* are – as it were – separated from any particular acts for which they may be responsible: their actions are not 'available' to be judged like those of others.

[17] Edward M Peters: Prison before Prison: chapter 1 in *The Oxford History of the Prison* (1998). OUP
[18] https://www.youtube.com/watch?v=m--AqC0Whc4;
Ecclesiastical Law Journal Vol 23 No 2 p.127 (CUP)

I discussed this issue recently with a group of clergy, asking them what they thought were the consequences that flowed from being ordained. A fascinating discussion followed. No conclusions were reached. But it is a matter that the church will have to address as we look again at the issue of clergy discipline in the very near future. In discussions about clergy discipline it is often stated that we must remember that clerics are office holders and not employees. The underlying and very important question is in what way, if at all, should a cleric be dealt with differently from the way another professional might expect to be dealt with for misconduct as a consequence of being ordained a priest in the church of God and having taken vows of obedience to the bishop.

Rowan Williams went on to say:

> The price of 'clerical immunity' is an idea of clerical accountability which ignores the 'lateral' dimension: the cleric is answerable to God and to canonical superiors, but it is not clear what their answerability is to an injured neighbour or community.

He also said:

> As we know with painful clarity after the revelations of the last decade and more, there has long prevailed a sense that the ecclesiastical superior's first duty is to the spiritual welfare, the *emendatio*, of the individual office-holder. Penalties are conceived as penances – moving to a new area, retreat and isolation for a period. It is as if what has been broken is not the bond of trust between members of a single community (or rather both religious and 'secular' communities in the modern setting) but the obligations for which a cleric is responsible to a superior; and so what has to be restored is not a wrecked and destructive relationship but a pattern of conformity to duties required.

The idea in Genesis 4:10 of a brother's blood crying out from the ground has been lost. The state in Becket's time dealt with offences by corporal/physical punishment and/or the payment of money. The church had none of that it focused on the respondent priest and their *emendatio*.

Parliamentary intervention

Has that changed now? Are there 21st century expectations that need to be met? We will come back to that.

We need to quickly review the changes that have taken place since mediaeval times. As noted there was no real change over several hundred years. Change did come, as in so many other areas in the 19th century. First the state pulled back within the jurisdiction of the King's courts much of the jurisdiction of the church courts. The first area to go was

defamation in 1855[19], then probate[20] and marriage[21] in 1857 and even church rates and tithes in 1868[22].The work of the church courts dramatically declined in that period, as did the income of its practitioners, and so Doctors Commons which had been in existence since the 16th century was dissolved in 1865.

Parliament had also been altering some of the substantive church law as well. The Residence of Benefices Act in 1817 adjusted the way in which the financial penalty for non-residence was distributed, something which until then had been distributed according to the constitution of Othobon in 1268.

As for clergy discipline the 18th century had seen the evangelical revival and the rise of Methodism and non-conformity. Those interests were represented in parliament. The mid 19th century onwards also saw the rise of the Tractarian movement. All in all there was an expectation of high standards from clergy. There were also many disputes about doctrine and ritual.

It was evident to all that the ecclesiastical courts were not equipped to deal with these new issues in an effective way.

Parliament cracks the disciplinary whip

There were a number of Commissions into how the ecclesiastical courts operated. Perhaps the most significant was the one appointed in 1830 which resulted in the Privy Council Appeal Act 1832 and the Church Discipline Act 1840. The latter of those was the first of 3 statutes passed in 19th century dealing with clergy discipline. And it was the first of 6 such statutes in the course of 163 years.

The 6 were:

Church Discipline Act 1840
Public Worship Regulation Act 1874 – which introduced law and procedure in relation to issues of ritual
Clergy Discipline Act 1892
Incumbents (Discipline) Act 1947
Ecclesiastical Jurisdiction Act 1963
Clergy Discipline Measure 2003

The 1840 CDA provided a new procedure for the hearing of complaints against clergy. It was from its commencement date the only way of proceeding against a cleric for an offence against the laws ecclesiastical. However it also stated that it did not "affect any authority over the clergy of their respective provinces or dioceses which archbishops or bishops of England and Wales may now according to law exercise personally and without process in court" (s.25). It would seem that drawing that to people's attention in our report has

[19] Ecclesiastical Courts Act 1855, section 1
[20] Court of Probate Act 1857, sections 3 and 4
[21] Matrimonial Causes Act 1857, sections 2 and 4
[22] The Compulsory Church Rate Abolition Act 1868

resulted in recent amendments to the Clergy Discipline Measure 2003: Code of Practice as it now provides for the possibility of a form of 'rebuke' even when a case has been dismissed: para 147 – "if the conduct of the cleric in question nevertheless raises cause for concern, the bishop may take appropriate and proportionate action outside of the Measure. This might include advice or an informal warning as to future behaviour".

Each successive statute or Measure was brought in because the previous one was felt not to be working as intended – often the same problems were cited. Usually they were said to be cost, delay and the difficulty of proving cases.

It is interesting to look at some of the differences between those 5 statutes and the 2003 Measure in relation to particular issues. Time forbids me going into detail but the areas where there were significant differences relate to:

1. Who could commence proceedings? In 1840 any individual could lay a complaint, but in 1892 unless you were approved by the bishop to prosecute the case it required 3 parishioners to complain and that was increased in 1963 to 6 people on the electoral roll. As we know 2003 took us back to any one person, provided they could establish a proper interest in making the complaint.

2. What could you complain about? We see a steady development and widening of the scope of complaint. In 1840 that was simply stated as "an offence against the laws ecclesiastical or where there was scandal or evil report that cleric had offended the said laws". The 1874 Act brought in ritual offences. But in 1892 the Act spoke about an immoral act or habit or an offence against the laws ecclesiastical being an offence against morality, not doctrine or ritual. In 1947 they moved away from reference to laws ecclesiastical and immorality to the ideas of "conduct unbecoming the character of a clerk in holy orders" and "serious, persistent or continuous neglect of duty". In 1963 the wording was "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". And the 2003 provisions we know well. It is of note that we have gone back to any single individual making a complaint and it is now the case that 65% of complaints are laid by individuals who hold no official church position. Also in 2003 the base for a complaint was widened to say not "conduct unbecoming" but "conduct unbecoming or inappropriate to the office and work of a clerk in holy orders" and "serious, persistent or continuous neglect" was also widened to "neglect or inefficiency in the performance of the duties of his office".

3. What if any preliminary assessment was there? There is a wide variety of practice here. In 1840 there were 2 routes to starting a case – either a commission would hear evidence including cross examining witnesses to decide if there was a prima facie case, or the bishop could send the case himself directly to the Provincial Court for trial. In 1892 there was no preliminary assessment. But in 1947 a committee of 6 clergy from the diocese would consider it and could dismiss it; if it was not dismissed by them it went to the bishop who could dismiss it or send it for trial. In 1963 the matter was considered by the bishop who could interview either or both sides, he

would then either take no action or send it for an enquiry by an examiner who could require people to attend and give evidence on oath. If the examiner established that there was a prima facie case a promoter would be appointed to prosecute the matter before the chancellor sitting with four assessors. The trial before them was to be modelled on the procedure before the assize courts. Since 2003 there is no enquiry into the facts just an assessment as to whether the complainant has a proper interest and whether the allegation, taken at face value, is of sufficient substance to justify proceeding under the Measure.

4. Who passed sentence? I have referred to the different tribunals that made the final decision as to whether the case was established. The trial court/judge has usually been the sentencer after a contested hearing, but in 1947 the matter went back to the bishop for sentence.

5. What of the bishop's overriding powers? We have seen that the bishop had a lot of power to intervene and stop proceedings. In 1840 the bishop tried the case sitting with 3 assessors and it is to be noted that the bishop could decide the case contrary to the views of the assessors if he saw fit to do so. Ever after that a judge who was legally qualified always sat with others, whether they were termed assessors or as now panel members. Penalty by consent was introduced in 1963 where it was provided that at any stage of proceedings the bishop could intervene and impose a penalty with the consent of the cleric.

Our ELS working party report sets out the working party's views about the current measure and its faults. I am not going to say more about those now. You can read about our views on the DM's main problems in both an annex to the interim report[23] and in the final report.

Under Authority (1996)

But I do want to look back briefly to the report that lay behind the CDM 2003. *Under Authority* in 1996 did address the fact that "modern expectations" must be met to an extent. In particular when looking at whether their proposals might encourage the making of complaints they said (page 93) that three contemporary trends needed to be recognised:

- we live in a more litigious society
- where there is a more ready recourse to devices like judicial review
- our society has a strong economic emphasis and a desire for value for money

They concluded that "These three features of national and church life suggest that the possibility of complaints being made is going to grow in the immediate future, whatever action we take or fail to take".

However it is now a matter of grave concern that Synod did not implement what was actually proposed in a number of significant respects. The draft and final legislation made significant alterations to the original 1996 proposals.

[23] ELS Interim Report: Annex 1 – a reflective walk through the CDM process

Whereas a quick initial investigation was proposed to do all the triaging that is now being spoken about, although that is mentioned in the Code of Practice, the rest of the provisions of the Measure mean that it does not happen. The "Stage 1: Before Formal Proceedings" which is at paras 13-21 depends upon people not filing a Form 1A but raising the complaint in some other way. The Code has also been amended recently to suggest that dioceses might adopt a system for dealing with such informal complaints by adopting the process we suggested in Annex 3 of our Interim Report. I am not aware that any dioceses have as yet done that although a few dioceses say that they already have an informal policy. The problem is that most complaints are commenced by filing a Form 1A and that does not allow for an initial investigation and filtering process to take place.

They intended to sort out the vexatious claims and dismiss them quickly – but the enacted legislation encouraged such claims by widening the scope of misconduct to include "inappropriate conduct" and "inefficiency", and as noted it provided no early investigation to identify such and dismiss them.

Whereas the report spoke of natural justice, and specifically transparency with open and observable procedures, what we have is a system culminating in a secret report and an unpublished decision leading to a tribunal hearing.

And when they said there must be no delay, we had at the date of our Report an average time from complaint to tribunal hearing of 21 ½ months. The shortest time ever 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.

The general levels of anxiety and dissatisfaction for all concerned is now very well documented indeed, particularly through the work of the Sheldon Community.

Possible ways forward (or backwards?)

Can we briefly imagine where we might be today if William had not separated off the bishop's court and had not forbidden the bishops sitting down together with secular leaders, speaking together and working out what to do in each case?

I don't have time to rethink how it would have unfolded at different times. But fast forwarding to today, what would be the equivalent of the bishop sitting down with the ealdorman in the gemot? We have many different jurisdictions dealing with different areas of law. And so there are many different people involved in the delivery of justice in different 'gemots' depending on the issue. When professional people are said to fall short in some way it is the professional standards body of the particular profession which is the modern-day equivalent of the earldorman, or more generally in employment terms it is ACAS and the employment tribunal.

Do we in some way need to bring back into ecclesiastical legal think what would have happened if the bishop had been required to sit down with HR director or the head of professional standards or ACAS. And imagine if you can that they had looked together at the

canon law and the local historic law of professional standards or employment law, and taking the best of both, how might they have dealt with such cases.

It is not so different from what was attempted in 19th century or again in 1964. Both were significant times of law reform, and each time the church did look over the parapet and paid some regard to the other contemporary reforms taking place. But it was always overshadowed by the principle *Pro salute animæ*. So the bishop usually had a discretion as to whether proceedings should go ahead or continue, and it has always lacked a true recognition of the horizontal relationships involved in clergy misconduct.

We wait to see what the current implementation group will propose.

But if it should be anything like the ELS proposals, as Synod has requested that it should be, then in reality all it will be doing is setting up a system very similar to that which was proposed by *Under Authority* but which was bowdlerised by the law making process.

What we must have is a speedy investigation to determine whether there is an allegation of serious misconduct; if there is a prima facie case of serious misconduct then a charge should be laid and the case put immediately before a tribunal where a judge can give directions leading to a speedy trial. That would be the modern equivalent of office jurisdiction where the church/court takes over the 'prosecution'.

If the investigation does not suggest there may have been serious misconduct then there can be a rapid summary dismissal of vexatious and malicious complaints or those allegations that have no substance. If however a real grievance is disclosed an attempt should be made to resolve broken relationships, put right what went wrong and if there has been misconduct less than serious some form of rebuke and advice or requirement for specific training should be imposed by the bishop. But all must done openly and transparently with appropriate safeguards and rights of review or appeal. Everything should be concluded quickly, in serious cases within 6 months and in the other cases usually within 28 days.

We will watch this space!

But how if at all might such procedures relate to safeguarding and some of the problematic issues I spoke about earlier?

Dealing with delay and the causes of delay

My main concerns around safeguarding are delay and process. First delay.

One of the problems with delay particularly in serious cases is that currently the CDM guidance in the Code is that if there are secular proceedings taking place then the church should wait for them to conclude.

> "90. Any criminal matters should be investigated and resolved by the relevant secular authorities (e.g. the police, child protection agencies, HM Revenue & Customs) before any related disciplinary proceedings under the Measure are resolved."

Safeguarding management guidance does not address that issue in quite such a clear way but para 2.9 would seem to imply that they wait for statutory agency investigations to conclude. It says:

> "Any internal safeguarding investigation remains sub-judicial until the conclusion of any statutory agency investigation."

I am not sure about the word 'sub-judicial' – I think it means sub judice and that the authors of the policy document do not really understand the concept.

My concern about waiting and going second is the current timescale for criminal investigations and prosecutions. There has been quite a bit of publicity in recent weeks about the backlog in the courts. Currently (ie in November 2021) when a case of sexual assault arrives at the Crown Court it is likely to be late in 2022 or more likely in 2023 that the trial will be listed to take place. And all that is on top of increased times from the first report of the crime to the point of charge – often now about a year.

We cannot and should not wait that long to deal with disciplinary matters. It is in no one's interest to do so. The logical thing to do would seem to be to reverse the presumption and to say that the discipline matter should proceed unless to do so might interfere with the course of justice in the criminal investigation. I note that even investigations into misconduct by police officers permit such parallel investigations – see para 2.124 of the Home Office Guidance on police officer misconduct.

The Clergy Discipline Rules as amended in April 2021 and which came into effect on 13th July 2021, by Rule 28A enable either the Designated Officer or the respondent to apply to the President of Tribunals for an order for the production of documents by a person who is not a party to the allegation of misconduct. That has limited scope at the moment as it can only be done between the matter being referred to the Designated Officer for investigation and the President deciding under Rule 29 whether there is a case to answer. But it is a step in the right direction.

This Rule goes to the root of the rationale which I believe lies behind waiting for other investigations to complete their course. If we can obtain some of the information they hold there is no reason at all for waiting perhaps for 3 years for a criminal case to conclude. We have a different purpose and a different standard of proof. It is in everyone's interest that we move quickly to a conclusion that will resolve questions about the cleric's future and bring closure for all, including the complainant and the parish.

Serious cases should have completed their passage to and through a tribunal within 6 months.

Suspension and risk assessments

The question of risk will arise in serious cases initially when the bishop is considering whether to suspend. In our report we proposed that "necessity" should be the test in all cases. ACAS guidance about when an employee should be suspended and its emphasis that it is a matter of last resort is helpful and could be imported as the test.

But following the tribunal hearing there will be a narrative verdict; facts will have been found whatever the outcome. If allegations have been proved then usually a prohibition will follow; but risk will still need assessing and it can be done by professionals – a forensic psychologist would be the obvious person to use.

But if the allegation is not proved the question will arise as to whether there is a risk on the facts found. If there is, then again the question of assessment of that risk falls to made. How? Again it must be on the basis of those found facts.

What about less than serious cases. Many of the current safeguarding cases arise from a cleric failing to abide by guidelines etc. The vast majority of those cases are clearly not serious misconduct – they are never going to call into question whether ministry should continue. In those cases a quick fact finding is called for. If misconduct is then found then perhaps a rebuke of some sort can be given, in some cases some further training may be proposed. And again the question of risk can be looked at. On the facts is there a risk? What is necessary and proportionate to guard against those risks?

All this potentially changes the rules of the game in relation to risk assessments. It does away with the problems around the idea that "credible and identifiable evidence has been found (without implying guilt or innocence)."

There is no reason at all that I can see why the safeguarding professionals should not buy into this. Of course, sometimes when a disclosure is made there has to be an external referral, but let us assume that that has been done and the initial police interviews have taken place. Why should reference not be made by way of laying a complaint under these new procedures?

So we have looked back over 950 years of clergy discipline and 50 years of safeguarding. The safeguarding policies and practices have developed quite independently of the clergy discipline processes.

Perhaps the time has come for them to come much closer together. As we have seen discipline needs to have a proper regard to the cleric's horizontal relationships and to any harm or damage that has been done by their misconduct. The safeguarding processes need a securer legal route particularly in relation to risk assessments than they have managed to construct so far.

The Archbishop of Canterbury's agreement to the suggestion by Counsel for IICSA that the CDM was not fit for purpose in relation to safeguarding has been overtaken by a perception that it is generally not fit for purpose and is in need of not just refreshing but reinventing.

It seems to me that it would be to the benefit of both if the early and speedy investigation that discipline requires could also encompass an early and speedy investigation properly to inform risk assessments and the associated issue of suspension.

We shall have to see whether these two work streams can come together, talk together and design something together that will transform both clergy discipline and safeguarding, each of which are currently viewed with great suspicion by lawyers whether ecclesiastical or otherwise.

His Honour Peter Collier QC
Vicar-General, Province of York
Retired Senior Circuit Judge

17th November 2021