Safeguarding and the law – a lecture in which their historic and current relationship is explored.

An expanded text based on an ELS Northern Province Lecture delivered on 20 March January 2025 in Leeds by His Honour Peter Collier QC, Retired Senior Circuit Judge & Honorary Recorder of Leeds; Former Deputy High Court Judge (Family Division). And with hyperlinks to many of the documents referred to.

The origins of this lecture

The origins of this lecture are that just before I was asked if I would be willing to kick start a new series of Northern Province lectures, I had been in email correspondence with a group of people arising from something that one of them had spotted in the Makin Report. Towards the end of his report, Makin identifies a number of areas of church life that he says need addressing, and in relation to which he makes various recommendations. The first area is the abuse of power. The second is deference, particularly, in the context of Smyth – deference to his theological beliefs, and his attempts to justify his abusive activity by reference to God and the scriptures in an aberrated way. Makin goes on to say (emphasis added):

> The learning from this is that safeguarding should take prime place in the order of decision-making and actions [*sic*] prevent abuse. **Legislation, Government guidance and safeguarding policies within the Church of England take precedence over individual beliefs and Church and Canon Law.** (17.1.12)

It seemed to me and to others that in that passage there was a significant lack of clarity about the relationship between law, safeguarding, and people's opinions and beliefs that should be explored further.

What I want to do this evening is to look at the concept of safeguarding in its widest sense and its relationship to the law. I must emphasise at the start of this lecture that all the views expressed tonight are my own and do not represent the views of the Society as such.

I should also say at the start that this is a sensitive area – statistically there are very likely to be among us those who are victims and survivors of abuse, and I am conscious that any talk of abuse can act as a trigger and can lead to people being traumatised afresh. So can we please have that in mind, especially when we come to questions and discussion at the end.

That relationship between the law and safeguarding had hit the headlines prior to Makin when the former Archbishop of York released a statement on the publication of the Lessons Learned Review into the case of the late Trevor Devamanikkam. As you will no doubt recall Lord Sentamu said towards the end of his written response: "Safeguarding is very important, but it does not trump Church Law (which is part of the Common Law of England)".

Safeguarding – origins and development

So where should we begin tonight? I think the obvious place is the concept of "safeguarding".

Safeguarding is hugely important in the Church of England today. It occupied a major part of the recent General Synod group of sessions. And the way ahead is now set, in that Synod decided to outsource the scrutiny of its safeguarding to a new independent third party organisation and also to place much of the work of the National Safeguarding Team into a third party body independent of the National Church Institutions, whilst still leaving the operational coalface safeguarding work in the hands of 'safeguarding advisers' who will soon become 'safeguarding officers' employed by DBFs and cathedral chapters, along with parish safeguarding officers who are mostly volunteers.

But the word "safeguarding" as it is currently used is very much of this twenty-first century.

As many of you will know I addressed the history of safeguarding in a previous lecture in January 2020. I don't intend to repeat that history now, but I do need to remind you of some of the headlines.

Prior to end of the 1990s the phrase that was most commonly used for what we now refer to as safeguarding was "child protection". From the 1960s there had been a developing awareness of the reality of physical child abuse. What had until then been known to medical professionals and others as "unexplained infant trauma syndrome" began to be referred to as "battered child syndrome" following the work of Henry Kempe in the USA. In 1973 in this country the killing of Maria Colwell was the start for us of an understanding of the seriousness of the issue. And it was physical abuse that was the real focus of concern for the next 10 years or more.

A Dept of Health report on *Child Abuse* in 1982 examined the 18 inquiries that had looked into instances of abuse between 1973 and 1981. All were cases of physical abuse. A subsequent similar report was produced in 1991 looking at a further 20 inquiries between 1980 and 1989. In its 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 has increased and critical in this was the emergence of child sexual abuse as a problem which shocked, but possibly not surprised, the public.

The word "safeguarding" does not appear in any of those reports. And that time frame also gives us a context for the initial disclosures about John Smyth.

In the 1980s again it was work done in the USA and published here about child sexual abuse that raised awareness amongst professionals dealing with such cases.

But it was in 1986 when Esther Rantzen established the Childline telephone helpline that things began to take off in the UK.

1987 saw a lot of controversy in relation to the activities of two doctors in Leeds who developed what they regarded as technique for determining if children had been anally abused. The use of that technique in Teesside led to the Cleveland Inquiry. And that in itself led to the Children Act 1989 which came into force in 1991.

That Act gave every child the right to protection from abuse and established the key principles which now govern the way decisions concerning the welfare and safety of children are made. The Act uses the word "safeguard" or "safeguarding" 10 times – usually in the context of "promoting or safeguarding a child's welfare".

As I have indicated the phrases most commonly used in in the 70s and 80s in relation to what we would now generically term safeguarding were child abuse, child sexual abuse, child protection, promoting children's safety and welfare, and keeping children safe.

A document entitled '*Child Abuse – Working Together for the Protection of Children'* had been issued by the Department of Health and Social Security as national guidance in draft form in May 1986 and it was finalised in 1988. When a subsequent document was published in 1999 it was entitled – *Working Together to Safeguard Children.*

Since then in this century "safeguarding" has become the generic word to deal with issues of protecting not only children but also others who are vulnerable to abuse of one sort or another. "Keeping people safe" or "ensuring our churches are safe places" is clearly a laudable objective.

That is particularly so in the context of a society where in 2020 the Office for National Statistics reported that the Crime Survey for England and Wales (CSEW) estimated that one in five adults aged 18 to 74 years had experienced some form of child abuse before the age of 16, that is 8.5 million people; and that an estimated 3.1 million adults aged 18-74 had been victims of sexual abuse before the age of 16.

And of course we need to acknowledge the massive damage done within the church by those who should have been able to be trusted but who abused that trust and did a huge amount of harm to many people.

The Role of Law – of various types

The 1986 *Working Together* document described itself as giving "guidance". We shall see further subsequent documents speaking about "guidance" and about "recommendations". These are not hard law. And the greater part of the material that has been issued by government about safeguarding is very much in what we would call the soft law category.

What do I mean by referring to hard law and soft law? Hard law can be defined as law which is binding on everyone, represented in the UK by statutes and regulations; whereas soft law is comprised of guidance, recommendations, codes of good practice and the like which may be persuasive, but which is not legally binding.

Hard law

In the **Secular** world in the UK this is statute law, whether that be in Acts of Parliament or Regulations – it is binding on all. Some of it is primary legislation, enacted directly by parliament; some of it is secondary legislation, which is made by others who derive their authority to make those laws under some piece of primary legislation.

In the **Ecclesiastical** world in England it is often not recognised or remembered that the laws of the Church of England are a part of UK statutory law. In times past the laws governing the Church of England were made by parliament, but more recently the church has been given power to make its own laws. This goes back to the Church of England Assembly (Powers) Act 1919, often referred to as the "Enabling Act".

These primary laws passed by General Synod are now entitled "Measures". A Measure can also, as in the secular world, enable the creation of secondary legislation in various ways. However, it is worth noting that all such primary and secondary church legislation is approved by parliament before coming into force.

The canons of the Church of England, until 1970, were made by the Convocations of Canterbury and York. Since 1970, under the Synodical Government Measure 1969, the power to legislate by canon now lies with the General Synod. It should also be noted that royal assent and licence are necessary before the making, executing and promulging of any canon. So the hard law nature of our canons is also very clear.

And so to the extent that Makin and others set church law and canon law against government law, that is an inaccurate and unhelpful distinction. Measures, Regulations, and Canons in relation to the church are in exactly the same category as Acts of Parliament and Regulations in the secular world. Both are equally binding on all people.

Soft law

In contrast to all that hard law we also have soft law in both the secular and the ecclesiastical realms. That consists of guidance, recommendations and other documents such as Codes of Practice all of which set out what would be good practice but do not in and of themselves make that guidance binding.

Quite a lot of current safeguarding material falls into this soft law category, although obviously there is some of it that is now mandatory. I will explore that shortly.

However, safeguarding has no real meaning outside the hard and soft law which either requires or recommends certain things to be done or not done. 'Keeping people safe' is in part aspirational, in part intentional, and is a phrase that covers the contents of all those requirements and recommendations, but it doesn't really exist outside them as a free standing thing on its own. If it isn't written in either the hard or the soft law, then it isn't really there in any meaningful way. To that we shall also return.

How safeguarding developed in the secular state

I have already referred to what happened in the late 80s culminating in The Children Act 1989.

There were however continuing failures to protect children not only in the church but in many other agencies and institutions.

In 1993 – *Safe from Harm* – a Home Office document was published with 13 guidelines about how to keep children safe. It was subtitled "*A Code of Practice for Safeguarding the Welfare of Children in Voluntary Organisations in England and Wales"*.

In 1999 the Dept of Health published *Working Together to Safeguard Children* which was subtitled - *A guide to inter-agency working to safeguard and promote the welfare of children.* This dealt with the importance of inter-agency working, information sharing and working together.

As I said previously the titles and/or subtitles of the various secular world documents show that they are about "guidance", and "recommendations". They are not hard law.

The church's response

In July 1995 the Church of England produced a "*Policy on Child Abuse*". It set out how the church would implement the 13 Home Office guidelines (which are set out in Annex 1D of the document). It saw the introduction of Bishop's representatives "to advise and support him in his dealing with issues of child abuse". That was the beginning of the role of the Diocesan Safeguarding Adviser.

But it is to be noted that this was again all in the language of "recommendations". Work was also done at this time in relation to other outworkings of this policy. Some of which was incorporated in the next document to be published, which was in 1999 – a *"Policy on Child Protection".* Some of the particular issues dealt with then were around voluntary declarations because there was still no national secular policy on the provision of criminal record checks. There was a lot more about "good practice".

In 2002 the Church of England appointed a lead bishop for safeguarding, and a National Child Protection Officer, and The Church Central Safeguarding Liaison Group was created.

In 2003 the first version of *Guidelines for the Professional Conduct of Clergy* was published. It provided in paragraph 2.13 that every ordained person should have training in child protection; in paragraph 3.14 that a child or vulnerable adult who discloses abuse is to be taken seriously and referred to appropriate agencies; and in paragraph 7.2 it dealt with the seal of the confessional. In paragraph 7.3 it provides that:

> … where abuse of children or vulnerable adults is admitted in the context of confession, the priest should urge the person to report his or her behaviour to the police or social services, and should also make this a condition of absolution, or withhold absolution until this evidence of repentance has been demonstrated.

In February 2004 the church's third overall policy document was issued. This was entitled *"Protecting All God's Children"*. It is described as "The House of Bishops' Child Protection Policy". It had greater status than the previous policies as all dioceses and parishes were required to accept it as their key policy, although they could add to it. Paragraph 1.1 says:

> The House of Bishops, will also approve a handbook of good practice, collated from the experience of dioceses and parishes. It is expected that future guidance from dioceses and parishes will be based on these documents.

Further steps were taken in relation to "diocesan safeguarding children advisers" and people described as "coordinators" "to work with the incumbent and the PCC to implement policies and procedures" were introduced; they were the forerunner of the Parish Safeguarding Officer (PSO).

But again it is to be noted that the emphasis is on expectation, good practice and guidance; Appendix 6 is headed "Managing child protection in a diocese: a model of good practice". And although it says at 3.3 that "All those who work with or are in regular contact with such children must comply with this policy", it should be noted that this is a statement of expectation in a policy document. It still does not have the force of hard law.

In 2006 the Church expanded its policy to include vulnerable adults in *"Promoting a Safe Church"*. This saw the development of the parish coordinator into something more like the current PSO (section 2.5) – "it is recommended that a named individual be appointed by the PCC to act as the key person to speak on behalf of vulnerable people both within the congregation and to outside bodies."

In 2015 the *Professional Guidelines* for the clergy were revised.

First introduction of hard law

In 2016 the Safeguarding and Clergy Discipline Measure 2016 was enacted. Section 5 imposed a duty on clergy, churchwardens and PCCs to have due regard to guidance issued by the House of Bishops on matters relating to the safeguarding of children and vulnerable adults. And it made failure to comply with that duty a specific offence under s.8 of the Clergy Discipline Measure 2003 (CDM).

As members of the ELS, you are people with some degree of legal understanding and so you will have no difficulty comprehending the concept of "due regard". The Code of Practice to the CDM sets it out very well. In paragraphs 38 and 39 it says:

> Where a person is subject to a duty to have 'due regard' to guidance the law requires that person to follow that guidance *unless* there are cogent reasons for not doing so. This does not mean that the person is free to choose whether or not to follow the guidance. 'Cogent reasons' are ones that are clear, logical and convincing. When applied, which will be rare, they must be based on case-specific advice from both the diocesan safeguarding adviser and the diocesan registrar. A disciplinary tribunal will scrutinise the reasons given with great care. The onus will be on the respondent to show that they had cogent reasons for not following the guidance.

This was the first time that the church really showed its teeth in relation to making any aspect of safeguarding a matter of hard law. And it was also the beginning of the move away from the postcode lottery, much complained about by survivors, where different dioceses implemented the guidance in different ways.

The background to that legislation is quite interesting. We are able to see the clear move away from soft to hard law, but also the recognition that not all guidance can be made a matter of hard law.

In December 2011 Archbishop Rowan Williams appointed Bishop John Gladwin and HH Rupert Bursell QC as commissaries to undertake a visitation of the Diocese of Chichester to report on how safeguarding had operated (or not operated) in that Diocese. They produced an interim report in August 2012 and a final report (not apparently currently available online) in May 2013.

That resulted in the Archbishops' Council bringing a paper to General Synod in July 2013 – it was GS1896 in which they rehearsed the matters and recommendations that were contained in the visitation report. Amongst other things it set out:

> 14. The motion before the Synod accordingly acknowledges and apologises for past wrongs and seeks endorsement from the Synod for legislative and non-legislative progress to be made during the period of this Quinquennium.
>
> 15. If the Synod passes the motion, it is expected that the consultation on possible legislative changes will run until the end of September 2013. Draft legislation will then be finalised during the remaining 3 months of the year. The aim is to bring the draft legislation in its final form for approval by the Synod in February 2014.

Synod did vote in favour of that and so draft legislation was drawn up which came back with an explanatory note – GS 1941. That dealt with the various matters, such as clergy risk assessments and the disqualification of church wardens and PCC members who were on barred lists, and also with the proposed duty to have due regard to House of Bishops' policy documents, about which it said (emphasis added):

> **E. Other ways of reducing risk**
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> 48. The Council has approved three additional suggestions for reform. These were not canvassed in the consultation document because they did not arise from the Chichester Commissaries' report, but they would strengthen present safeguarding arrangements:

(i) **The imposition of a duty on relevant persons to have due regard to the House of Bishops' current safeguarding policies**;
(ii) The imposition of a duty on all diocesan bishops to appoint a safeguarding advisor;
(iii) The imposition of a duty on relevant persons to undergo safeguarding training when required to do so by the bishop.

49. The focus of these three suggestions is prevention – i.e. trying to prevent or reduce the risk of harm to children or vulnerable adults, rather than responding to the consequences afterwards if something has gone wrong.
50. **Duty to have due regard to the House of Bishops' safeguarding policies:** The House's policies are set out in publications such as Promoting a Safe Church and Protecting All God's Children. **They are couched in terms of being guidance, and they aim to highlight good practice and standards. It is not at present mandatory for clergy to follow them.**
51. A 'duty to have due regard' is a concept used in at least six other Measures. **Where there is a duty to have due regard to guidance, the person under the duty is not free to disregard it as (s)he chooses but is required to follow the guidance unless there are cogent reasons for not doing so.** The requirement that cogent reasons must be shown for any departure from it sets a high standard that is not easily satisfied. **Such a duty would need to be introduced by Measure, rather than by Amending Canon, so that it can bind laity as well as those in Holy Orders.**
52. It would not be practicable to impose a stricter duty than a 'duty to have due regard' because the safeguarding policies of the House cover a range of matters, including some that are good practice and advice, rather than being mandatory – they would therefore be problematic to enforce strictly.
53. **A duty to have due regard to the House's various safeguarding policies would be imposed on all clerks in Holy Orders authorised to officiate under Canon C 8.2 and C 8.3, all diocesan, suffragan and assistant bishops, all licensed lay readers and lay workers, all churchwardens and PCCs.**

The draft Measure then went through the Revision process and came back for approval in February 2015, and for final approval in July 2015, eventually becoming the Safeguarding and Clergy Discipline Measure 2016.

Independent Inquiry into Child Sexual abuse (IICSA)

In October 2020 IICSA published its report into Safeguarding in the Church of England and the Church in Wales. It made a number of recommendations including a number about the Clergy Discipline Measure 2003. They were particularly critical of the "due regard" phraseology considering that it was not sufficiently clear. Their recommendations included (emphasis added):

> **42. The CDM needs to be reviewed in respect of** how it manages allegations of child sexual abuse by clergy and **how it treats complaints about a failure to have "*due regard*" to safeguarding guidance in responding to allegations of abuse**. The most significant flaws are:
>
> - The initial investigation of complaints which concern safeguarding that would merit 'rebuke' (a warning) or more serious disciplinary action is not independent of the diocese.
> - There are no alternative processes, similar to capability reviews, through which concerns that someone is struggling to manage safeguarding issues effectively could be dealt with outside of the CDM.
> - There is no suitable pastoral support, guidance and counselling available for victims and survivors if they have to engage in the CDM process as complainants or witnesses.
> - Case management does not effectively ensure that CDM cases, particularly those involving safeguarding, are dealt with expeditiously.
> - Individuals carrying out fact-finding investigations, which involve taking evidence from complainants, victims and survivors, do not have specialist training in interviewing complainants.

Consequently, draft legislation was drawn up to give effect to recommendation 42 and what were felt to be other necessary changes. The report of the steering committee (chaired by Morag Ellis KC) which presented the proposals to Synod in February 2021, said in their report about the draft Safeguarding (Code of Practice) Measure 2021 – GS Misc 1271:

> 21. The draft Measure is intended to give effect to the recommendation made by the Independent Inquiry into Child Sexual Abuse that the current duty to have due regard to guidance be replaced."

And it said about the legal status of guidance to be contained in the codes (emphasis added):

> 31. Subsections (3) and (4) of the new section 5A provide:
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> (3) **The code may impose requirements** on, and give guidance to, relevant persons.
>
> (4) **A relevant person must, accordingly, comply with a requirement** imposed on that person by the code.
>
> The **code will, therefore, not only impose requirements on a relevant person, but will also give guidance** to relevant persons.

The final version is now contained in s.5A of the 2016 Measure:

> 5A Code of Practice
>
> (1) The House of Bishops must issue, and may from time to time revise, a code of practice for relevant persons on safeguarding children and vulnerable adults.
>
> (2) Each of the following is a relevant person— ……
>
> (3) The code may impose requirements on relevant persons and may give guidance to relevant persons on compliance with those requirements.
>
> (4) A relevant person must, accordingly, comply with a requirement imposed on that person by the code.

There are of course some earlier Codes which still fall under the Due Regard provisions, and they are:

- Declaration of Conflict of Interest (September 2021)
- Responding Well to Victims and Survivors of Abuse (September 2021)
- Safeguarding Children, Young People and Vulnerable Adults (December 2021)
- Safeguarding in Religious Communities (November 2020)
- Safer Recruitment and People Management (April 2021)

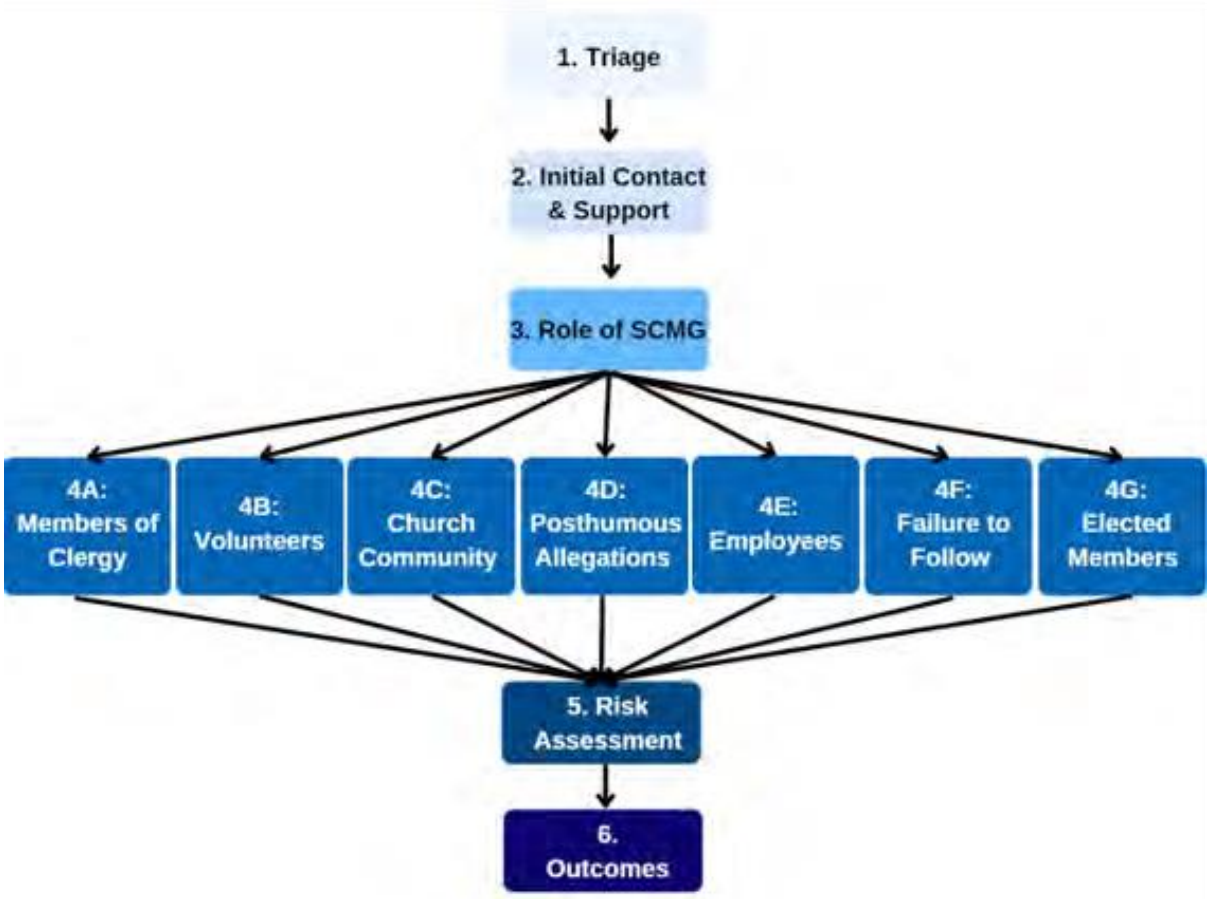
Until recently there were two codes produced under the new provisions:

- Safeguarding Practice Reviews
- Safeguarding Learning and Development Framework

In February 2025 General Synod approved two further Codes, to come into force on 01.09.25:

- Safeguarding Code of Practice: Managing Allegations
- Safeguarding Code of Practice: Religious Communities

The Codes are becoming increasingly sophisticated. So the most recent one for managing allegations begins with a triage process and describes the processes to be followed diagrammatically:



They begin by asking whether the concern is a safeguarding matter, or should it be signposted elsewhere? If it is safeguarding, is it about a church officer? And if so should it be sent to the NST and/or referred elsewhere, whether to the police for criminal investigation and/or sending a Serious Incident Report to the Charity Commission. And then it sets out the processes for the Safeguarding Case Management Group (SCMG), formerly known as a Core Group, with different pathways for clergy, volunteers, posthumous cases and others. Particularly interesting is pathway 4F which is for people who have failed to follow guidelines as against those who have perpetrated some form of direct abuse. In these cases the SCMG becomes a 'Safeguarding code of Practice meeting' with a view to developing a 'Safeguarding Development Plan'. There are also sections on risk assessments and on closing cases including resolutions and apologies.

Requirements and Guidance

The practice in both the older due regard Codes and the newer requirement Codes is the use of blue boxes. Wording in the blue box is something to which due regard is to be had or something which relevant persons are now required to do, whereas everything else is at the level of guidance, good practice, or as it is said "why and how to deliver the requirements".

So the position is that historically safeguarding advice and guidance has simply been that – advice and guidance. The first time that there was hard law involved was in 2016 when the Safeguarding and Clergy Discipline Measure 2016 was enacted when due regard had to be had to what was set out in the codes.

Prior to 2016, of course someone might be criticised for not following the guidance, and it would be a factor taken into account in CDM proceedings in any allegation that a cleric had behaved in a manner unbecoming the office and work of a clerk in Holy Orders. But it would be quite possible to mount a defence to the failure to follow the guidance by saying that other factors also needed to be taken into account.

That of course was the position in 2013 when the complainant in the Jane Humphries LLR was in communication with a number of people including Archbishop Sentamu. I will return to that matter shortly.

It was also the position in 2010 when the Rt Rev Stephen Cottrell became Bishop of Chelmsford and inherited the position where the Rev David Tudor was in post and also when Tudor became a canon of the cathedral in 2015.

Various suggestions have been made particularly on social media as to what should have been done to remove Tudor from office. But they do not grapple with some of the complexities that follow from the alleged perpetrators of abuse being licensed clerics in the established church. Not only do we have the case of Tudor, we have also recently had the case of Canon Andrew Hindley at Blackburn Cathedral. Hindley not only had a freehold post, but he was also resident within the parish of this parish church cathedral and so had a common law right to attend services.

Ordination and Ministry in the Church of England

So, we need next to address the position of those who are ordained into the ministry of the Church of England, and who hold various positions after being so ordained.

The first matter is that of Holy Orders. This is a matter of Canon Law (which is hard law) and Canon C1 provides:

1. The Church of England holds and teaches that from the apostles' time there have been these orders in Christ's Church: bishops, priests, and deacons; and no man shall be accounted or taken to be a lawful bishop, priest, or deacon in the Church of England, or suffered to execute any of the said offices, except he be called, tried, examined, and admitted thereunto according to the Ordinal or any form of service alternative thereto approved by the General Synod under Canon B 2, authorized by the Archbishops of Canterbury and York under Canon C 4A or has had formerly episcopal consecration or ordination in some Church whose orders are recognized and accepted by the Church of England.
2. No person who has been admitted to the order of bishop, priest, or deacon can ever be divested of the character of his order, but a minister may either by legal process voluntarily relinquish the exercise of his orders and use himself as a layman, or may by legal and canonical process be deprived of the exercise of his orders or deposed therefrom.

3. According to the ancient law and usage of this Church and Realm of England, the priests and deacons who have received authority to minister in any diocese owe canonical obedience in all things lawful and honest to the bishop of the same, and the bishop of each diocese owes due allegiance to the archbishop of the province as his metropolitan.
4. Where any bishop, priest or deacon ceases to hold office in the Church of England or otherwise ceases to serve in any place he continues to owe canonical obedience in all things lawful and honest to the archbishop of the province or the bishop of the diocese (as the case may be) in which he resides for the time being.

The canon therefore provides how someone becomes ordained to Holy Orders and make clear that once so ordained, the ordained person may **voluntarily relinquish the** exercise of their **order by a legal process**, but otherwise cannot be divested of their order other than by being **'deprived' of the exercise of their order** or **deposed from their order**, in each case **by a legal and canonical process.**

However once ordained a deacon or priest is not free to come and go ministering wherever and whenever they please. Where and how they minister is also directed by canon law.

Canon C8 provides that a minister duly ordained as priest or deacon may officiate in any place only after he or she has received authority to do so from the diocesan bishop in which that place is situated.

Under C8.3 The diocesan bishop confers such authority on a minister either by:

- instituting the minister to a benefice (whether by virtue of freehold or common tenure);
- admitting the minister to serve within the diocese by licence under hand and seal; or
- giving the minister written permission to officiate (PTO)within the diocese.

Office holders

There has been some discussion recently as to whether all clergy should become employees. The position is that clergy are principally office holders, although a small percentage may be employed by organisations, whether the armed forces, or hospital trusts, or schools by way of examples.

Holding office is different from being in Holy Orders, although you cannot hold an office without having been ordained to one of the orders.

Those referred to in the first two bullet points above – Beneficed clergy (whether by virtue of Common Tenure or the very few still holding a freehold) and clergy licensed under seal cannot be deprived of their office apart from through a lawful and canonical process. Currently those processes are either the CDM or the capability procedures under the Ecclesiastical Offices (Terms of Service) Regulations 2009 (which are very rarely used because of their complexity).

When I say that there are very few clergy still holding freehold, by way of example in the diocese of York, there are 6, and many of them are close to retirement.

Licences and Permission to Officiate

As compared with beneficed clergy, and unbeneficed clergy who hold a bishop's license, there are those who hold the bishop's PTO. Whereas a licence cannot be withdrawn or cancelled except by legal and canonical process; a written PTO is now governed by the House of Bishops' policy. PTO can be revoked summarily, thereby depriving the cleric of any ability lawfully to exercise ministry in that (and therefore any other) diocese.

Paragraph 6 of those PTO regulations provides (emphasis added):

> 6.2 The diocesan bishop is **not expressly required to give a reason** for withdrawing PTO, although it should not be done without good reason.
>
> 6.3 There is **no right of appeal** against a withdrawal or refusal or non-renewal of PTO, but the cleric should be given an opportunity to put the case for why the PTO should be continued, granted or renewed.

All the above is part of the law of the Church of England, which is part of the hard law of the land. It is enforceable not only in ecclesiastical courts and tribunals, but also where relevant through the secular courts also.

Clergy as employees

In the light of the issues around the removal of clergy not proved to have been guilty of something for which they can be prohibited or removed, the previous consideration as to whether clergy should all be made employees has been revisited. That suggestion initially arose in 2002 when the Department of Trade and Industry issued a discussion document as to whether section 23 employment rights (see the Employment Relations Act 1999) should be granted to clergy. The direct question then was not whether clergy (and others) should become employees but whether they should have access to many of the rights enjoyed by employees, in particular the right to make a claim to an Employment Tribunal for unfair dismissal.

A group led by Prof David McClean looked into the matter and produced various reports in stages for General Synod.

GS 1564 (the second stage) reviewed GS 1527 (first stage) and said about the first stage at paragraph 11:

> We gave much time to the question whether clergy should become employees, and reflected on the particular relationship between the bishop and his clergy. We concluded that the employer's entitlement - and also opportunity - to control the work of an employee (if necessary on a day to day basis) was alien to the relationship between a bishop and his clergy. Largely for this reason, we ultimately rejected the idea of making clergy employees, and recommended that the office-holder status of clergy should be retained through the medium of common tenure by means of Church legislation.

And at paragraph 19 they reflected on the responses received to that first stage:

> The general tenor of the discussions and comments was one welcoming our approach, and of widespread support for the main features of our proposals: the granting of section 23 rights, the continuance of office-holder status, the notion of common tenure, and the introduction of a capability procedure.

And so the current situation came about with introduction of common tenure and a capability process amongst other things. This may again become a live issue if the Charity Commission pick up as an impediment to safeguarding the inability to remove a cleric from office if attempts to do so through the current legal processes fail, as a finding of serious misconduct will, for now at any rate, remain the only effective way of removing from ministry someone, such as Tudor or Hindley, who has common tenure or who holds a bishop's licence.

Clergy Conduct Measure

One other very recent development has been the passing of the Clergy Conduct Measure 2025 (CCM) which in about a year will replace the CDM. One of the features of the CCM is the express relationship it creates for safeguarding professionals with the discipline system. Consequently, in the near future the DSO will become a party when a case involves safeguarding features. It is also intended that the safeguarding professionals will move their concerns into the discipline process much more quickly than has hitherto been the case.

What will be interesting to see will be the extent to which the church's safeguarding professionals do in fact move quickly to put cases into the discipline system. One of the obvious benefits of doing so will be that at the conclusion of the discipline case there will be a report or a judgment which will have found facts in relation to the issues.

Risk assessments

As those familiar with my 2020 lecture will know, towards the conclusion of the lecture I expressed concern about a number of matters which in my view needed resolution, and one of those was the problem that I felt the church had in making risk assessments in safeguarding cases without going through a fact finding process. That remains a matter of great concern to me.

However, the investigation by independent 'case assessors' under ss.24 and 25 of the CCM will provide a factual basis for risk assessing cases that amount to misconduct other than serious misconduct. I anticipate, in the light of the 4F Pathway spoken of in the Safeguarding Code of Practice Managing Allegations document referred to earlier, that cases where people have failed to follow guidance will be dealt with in this way. I would also anticipate that the risk assessments that will now in many cases be able to be completed by the DSO will be able to come quickly to sensible conclusions and recommendations about risk on the basis of such case reports.

And in the serious misconduct cases, which will certainly include all allegations of abuse, there will be a full written judgment following the tribunal hearing, whether it has been a fact finding tribunal in contested cases, or a sentence hearing in admitted cases, which will similarly give a clear basis for making risk assessments.

Balance of probabilities

The requirement that a case against a respondent is proved on the balance of probabilities will continue.

In so far as the authors of various reviews of safeguarding cases are concerned, and in many cases the lead author is leading a multi-disciplinary team, they sometimes refer to any findings of fact they make as being based on "the balance of probabilities".

This is another phrase well understood by those of us who are lawyers, but I have my doubts that is always understood by those who conduct these reviews. In English law, in criminal cases, the standard of proof is "so that the fact finder is sure that guilt has been established". The phrase "beyond reasonable doubt", much loved by scriptwriters and the wider public, has not been used in criminal courts, other than to disclaim it, for many years. However the standard of proof in civil cases is "the balance of probabilities", which means that it must be established that something is more likely than not to be the case.

But how is that balance achieved? The answer is by weighing the evidence on each side and asking which is more likely to be the case. But that exercise requires there to be some evidence to place in the scales. If there is no evidence about something then there is nothing to place in the scale and the exercise cannot be carried out.

To apply that to what Makin says about Justin Welby's knowledge of Smyth being an abuser, Makin says at 16.10:

> He did know of John Smyth and, on balance, did have reason to have some concern about him, but that is not the same as suspecting that John Smyth had committed severe abuses. Based on this evidence, it is not possible to establish whether Justin Welby knew of the severity of the abuses in the UK prior to 2013.

The highest it gets is that Justin Welby was told in Paris that Smyth was not a nice man and that he should stay away from him (11.3.84). To say that "it is not possible to say whether he knew of the severity of the abuses ..." is an unfortunate way of expressing it. There is no evidence at all to suggest he did know of any abuse prior to 2013, let alone severe abuse, so there was no way of positing that he might have done other than by groundless speculation.

Lessons Learnt Reviews

From an early stage there has been the recognition that when things have been seen to go wrong, the church needs to know why it happened, what might have been done to prevent it happening, and what might be done differently in the future.

There was a well-established pattern in the secular world of holding serious case reviews. Those were the types of review drawn together in the Department of Health Reports of 1982 and 1991 to which I referred very early on in this lecture.

A number of such reports were commissioned by the church and were initially described as Independent Reports, the first being the one often referred to as "The Carmi Report". That was commissioned in 2001 and reported to the commissioning bishop in 2004, although it was not made public until 2014. It was a report about the case of Terence Banks, a steward at Chichester Cathedral.

The church, as in so many other aspects of this subject, was replicating what the secular world did. As the 2014 covering note to the Carmi Report says:

> Following the trial, the former Bishop of Chichester, the Rt Rev Dr John Hind, commissioned an independent author, Edi Carmi, to provide him with a report. Edi Carmi worked with a multi-agency steering group that was chaired independently by His Honour Judge Peter Collier QC. This process was designed to replicate the standard of Serious Case Reviews at the time, as defined in the government guidance, Working Together to Safeguard Children 1999.

Quite a number, although by no means all, of the other early reports were also into matters that had occurred in the diocese of Chichester.

In particular we should note Roger Meekings into Roy Cotton and Colin Pritchard in January 2009; followed by Dame Elizabeth Butler-Sloss also into Cotton and Pritchard commissioned in 2011; the Bursell/Gladwin visitation of the Diocese of Chichester (interim report in 2012 and final report in 2013); HHJ Cahill KC into Dean Robert Waddington in 2014; Ian Elliott into Garth Moore in 2016; Dame Moira Gibb into Bishop Peter Ball in 2017; and Alex Carlile KC into Bishop George Bell in 2017.

By 2017 the phrase "Lessons Learnt Case Reviews" was often being used in relation to this type of review and that was the phrase formally adopted in the 2017 Practice Guidance known as *Responding to, assessing and managing safeguarding concerns or allegations against church officers*.

At paragraph 9.2 it says:

> Once all matters relating to the safeguarding concern or allegation against a church officer have been completed, the core group should consider how best to identify and learn lessons from the case.

It contains detailed guidance about how the review should be set up and undertaken and to whom any outcomes should be made known.

Lessons Learnt Reviews that were commissioned under that Practice Guidance included: HHJ Pearl into Bishop Whitsey, commissioned in April 2019 and reporting in Oct 2020; Jane Humphries into Trevor Devamanikkam, commissioned in February 2020 and reporting in May 2023. And Keith Makin into John Smyth, commissioned in 2019 and not reporting until October 2024.

They all fell within the 2017 practice guidance.

One of the key principles is said to be:

> The case review should be conducted in a way that recognises the complexity of circumstances in which people and organisations work, seeks to understand who did what and the underlying reasons that led to individuals and organisations to act as they did, and **seeks to understand practice from the viewpoint of the individuals and organisations at the time rather than using hindsight**. (emphasis added)

In July 2023 Synod approved a new Code of Practice in relation to Safeguarding Practice Reviews (SPRs being the new acronym to replace LLRs). This goes into much greater detail about the process, as would be expected in a dedicated Code.

In the General Synod explanatory material provided with the draft Code, there was set out what was described as a three step process where step one is identifying and managing the risk through the core group process, step two focusses on responsibility and accountability and includes the making of CDM complaints and

> The third process, "learning lessons", is about taking a step back to try to understand **why** the events happened in the way they did, and what were any underlying organisational and contextual issues which contributed to them. Answering the "why" question enables an organisation to learn and make improvements that will keep people safe in the future. Without these underlying issues being identified and addressed, there remains a risk that unsafe practice and organisational factors continue.

And importantly it underlined that:

> Safeguarding Practice Reviews are not judicial processes designed to establish guilt. If people think they are, they will inevitably be disappointed and frustrated, therefore it is important to prevent that by providing absolute clarity about their purpose.

This is repeated in the Code itself in Section 1.2 where it is said that the final outcome of such a Review will be:

> A set of priority, Specific, Measurable, Achievable, Realistic, Time-bound (SMART), evidence-based recommendations designed to improve safeguarding arrangements, practice and outcomes in respect of the Church body concerned and at whole Church level, specifically focussing on what these recommendations will achieve.

Some more recent reports are:

- Fiona Scolding KC into Soul Survivor (commissioned in November 2023) – "An independent review into the culture and practices of Soul Survivor as they relate to the allegations made concerning Mike Pilavachi". This was commissioned by the Soul Survivor Church Trustees.

- Sarah Wilkinson (commissioned in August 2023) – "A review of the creation, work and termination of the ISB".

What is clear in all this history and has become clearer as time has developed is that these LLRs or SPRs are about learning lessons with recommendations being made as to future practice and are not about attributing responsibility or delivering accountability. As the most recent iteration of the guidance (2023) spells out:

> If people think they are *(about establishing guilt)*, they will inevitably be disappointed and frustrated, therefore it is important to prevent that by providing absolute clarity about their purpose.

Sadly, it is clear that many victims and survivors do look at these LLRs with that hope and even expectation, particularly if for whatever reason they have not been able to lay such guilt on their abusers through other parts of the process.

Top Trump

Against that background I would like just for a few moments to look again at the Humphries review and the role of the former Archbishop of York. The terms of reference for that review are set out in the report, and they are very clearly to consider people's actions or inactions against the standards of practice which applied at the relevant time, rather than using hindsight.

From what it appears the reviewer was told, it appears that the Archbishop was dealing with the survivor having been put on the Archbishop's list. That would have been as a result of his resigning after a CDM complaint was lodged against him, as provided for in s.38(1)(d) of the CDM. The fact that the President of Tribunals became involved suggests that this was a contested matter. It is also clear that the Archbishop was provided with legal advice by his Provincial Registrar in accordance with the Code of Practice at the time to the effect that he must not compromise his judicial role in that matter by getting involved at other levels. Consequently he did no more than acknowledge the letter.

In the review, the reviewer makes no findings about what the standards of practice were at the time, and therefore makes no assessment of his behaviour against such standards.

That can be contrasted with an earlier review by the NST in March 2018 in which they did not deal specifically with the judicial independence point, but more generally said that the Archbishop had followed the relevant practices of the time.

What the reviewer says is that "no Church law excuses responsibility of individuals to act on matters of a safeguarding nature". She then goes on to say what she would have done without any reference to any contemporary standards of practice. So she is talking about what "safeguarding" as an abstract concept requires without reference to any soft law policies or guidance let alone any hard law requirements. She says what as a safeguarding professional she thinks required to be done, but without any chapter or verse as an authority as to why the Archbishop should have done that in his circumstances.

Earlier today I was reading The Principles of Canon Law Common to the Churches of the Anglican Communion. At the end there is a reflection by the Bishop of Lesotho, Vicentia Kgabe. In it she says that she had been told quite recently at a seminar on church governance that "the Church is governed by law and not by whimsy". She says that has since become something of a mantra for her.

Conclusion – coming full circle

Which brings us full circle to where we started. Safeguarding is not a "thing" to be contrasted with law, whether secular or ecclesiastical. Safeguarding is simply about how we keep people safe so that we can worship together, work together and thrive. We do that by prevention and by intervention. In part it is done by obeying what is mandatory for all, and in part it is done by following guidance which you do as best you can often balancing out various factors.

We have over 30 years moved from only having guidance which did allow for a postcode lottery, to one that now clearly identifies what is required practice. What is very unclear in Professor Jay's report about the future of safeguarding in the church of England is the time frame of the many issues people complained about. There is very little, if any, evidence that they are necessarily of recent origin. We now have evidence from INEQE, who are carrying out the current safeguarding audits in all dioceses and cathedrals, and who stated in the press release accompanying their annual report published in February that

> Our findings highlight a positive trajectory, reflecting improved safeguarding practices led by Diocesan Safeguarding Teams. These teams comprise individuals with significant experience of working in statutory agencies and other relevant organisations, ensuring a robust and informed approach to safeguarding within church settings.

Of course there are important decisions that still have to be made about the structure of operational safeguarding. But I hope that we have seen tonight how matters have developed over 30 years, and how there is now a national set of enforceable requirements which bishops and others can only ignore at their peril. We now have in place proper systems for dealing with matters that emerge whether they are of recent or non-recent origin.

However, we need to acknowledge that nothing will take away the trauma and pain of those who were abused and/or whose abuse when it was disclosed was mishandled in the past. To them we owe not only apologies and such recompense as may be required, but the assurance that the systems now in place will so far as humanly possible significantly reduce the likelihood of what happened to them happening to others in the future. Absolute assurances can never be given because of the nature of abuse and the sinfulness of humankind. But as we have seen over the last 30 years, step by step we, along with other agencies and institutions, have made significant changes to our safeguarding practices which in turn have produced changes to our culture. It will be clear from all that I have said that you never reach an end point in relation to safeguarding and we shall need to continue learning and changing in the future.