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

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This article is based on an Ecclesiastical Law Society London Lecture delivered on 17 November 2021. It builds on a previous lecture entitled 'Safeguarding in church and state over the last 50 years: "from Ball and Banks to Beech via Bell"', which also formed the basis of an article published in this Journal in 2020. That article, among other things, identified a number of significant cases of sexual abuse by clergy which were/are the subject of 'lessons learned' reviews and concluded by suggesting how investigation and fact-finding might take place in the future, independent of the bishops, but under the supervision of a 'judge', and argued that effective risk assessments could only be based on findings of fact. The author was subsequently asked to chair a working party for the Ecclesiastical Law Society aimed at addressing how the Clergy Disciplinary Measure 2003 ('CDM') should be reformed. This article now deals with events that have occurred since, from the publication of the Independent Inquiry into Child Sex Abuse (IICSA)'s investigative reports into the Anglican Church (inter alia), the Lambeth group's proposals for reform of the CDM, through to General Synod's responses to both sets of recommendations. It also surveys in some detail the approach the church has taken to the assessment of risk within its safeguarding policy in recent years, as well as its historical approach to clergy discipline. The article concludes by drawing some threads together as a result of the author's own work and research into these two subjects over the past two years, and finishes by suggesting some possible directions in which the church ought now to move.

Keywords: Clergy Discipline Measure 2003, fact-finding, IICSA, reform, risk assessment, safeguarding

INTRODUCTION

In a previous article published in this *Journal* in 2020,[1] I covered the changes in criminal law and procedure that I saw take place during my 50 years in practice as a barrister and a judge which turned a criminal justice system in which it was difficult to prosecute cases involving multiple child witnesses into one much

1 P Collier, 'Safeguarding in church and state over the last 50 years: "from Ball and Banks to Beech via Bell"' (2020) 22 Ecc LJ 156.

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better adapted to cases alleging sexual assault and the needs of vulnerable witnesses. That article reviewed, decade by decade, the major developments in people's understanding and perception of the prevalence of physical and sexual abuse. It traced the development of the Church of England's safeguarding policy, noted how it tracks the development of secular policies, and in parallel identified a number of significant cases of sexual abuse by clergy which were/are the subject of 'lessons learned' reviews. Arising from some observations I made towards the end of the article about areas that needed addressing in respect of the current framework for investigating clergy discipline matters – including in respect of the current approach to fact-finding and risk assessment, and delay – I was asked to chair a working party for the Ecclesiastical Law Society ('the ELS WP') to address how the Clergy Discipline Measure 2003 ('CDM') should be reformed.

What has happened in the intervening period? Well, in relation to clergy discipline, the ELS WP produced its report in February 2021[2] and the Bishop of Lambeth's working group ('the Lambeth WP') produced a report which went to General Synod in July 2021.[3] 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 WP proposals than the Lambeth WP 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 2022.

In relation to safeguarding, the Independent Inquiry into Child Sex Abuse (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:[4]

> '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-

2 'The Final Report of the ELS Working Party Reviewing the Clergy Discipline Measure 2003', 24 February 2021, available at <https://ecclawsoc.org.uk/wp-content/uploads/2021/02/Final-Report-of-Working-Party-Reviewing-the-Clergy-Discipline-Measure-2003-1.pdf>, accessed 5 January 2022. See also 'ELS Working Party reviewing the Clergy Discipline Measure 2003: Interim Report', September 2020, Annex 3 available at <https://ecclawsoc.org.uk/wp-content/uploads/2020/09/ELS-Interim-Report-revised.pdf>, accessed 5 January 2022.

3 'General Synod Report of the Lambeth Working Group on the Clergy Discipline Measure 2003', June 2021 (GS 2219), available at <https://www.churchofengland.org/sites/default/files/2021-06/GS%202219%20CDM%20Workng%20Group%20Report.pdf>, accessed 5 January 2022.

4 'IICSA's Terms of Reference', para 1, available at <https://www.iicsa.org.uk/about-us/terms-reference>, accessed 5 January 2022.

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> State institutions to take in order to protect children from such abuse in future; and to publish a report with recommendations.'

In all, IICSA has now produced 17 investigative reports.[5] Most recently in October 2021, it published a report about Greville Janner.[6] In September 2021 it reported on other religious organisations and settings,[7] and in July 2021 it reported on Lambeth Council.[8] In 2020 it had previously reported on other institutions as well, including the Anglican Church[9] and the Roman Catholic Church.[10] The Nottingham Councils were covered in 2019.[11] The themes that have emerged are for the most part common to each institution. To that I will return in due course.

In this article 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.

IICSA'S REPORT ON THE CHURCH OF ENGLAND

IICSA made the following criticisms of the Church of England:[12]

> 'The culture of the Church of England facilitated it becoming a place where abusers could hide. Deference to the authority of the Church and to individual priests, taboos surrounding discussion of sexuality and an

5 Which can be accessed here: <https://www.iicsa.org.uk/reports-recommendations/publications/investigation>, accessed 5 January 2022.

6 IICSA, *Institutional responses to allegations of child sexual abuse involving the late Lord Janner of Braunstone QC: Investigation Report* (Crown Copyright, October 2021), available at <https://www.iicsa.org.uk/key-documents/27541/view/institutional-responses-to-allegations-csa-involving-lord-janner-investigation-report-oct-2021.pdf>, accessed 5 January 2022.

7 IICSA, *Child protection in religious organisations and settings: Investigation Report* (Crown Copyright, September 2021), available at <https://www.iicsa.org.uk/key-documents/26895/view/child-protection-religious-organisations-settings-investigation-report-september-2021.pdf>, accessed 5 January 2022.

8 IICSA, *Children in the Care of Lambeth Council: Investigation Report* (Crown Copyright, July 2021), available at <https://www.iicsa.org.uk/key-documents/26649/view/-children-care-lambeth-council-investigation-report-july-2021.pdf>, accessed 5 January 2022.

9 IICSA, *The Anglican Church – Safeguarding in the Church of England and the Church in Wales* (Crown Copyright, October 2020) available at <https://www.iicsa.org.uk/key-documents/22519/view/anglican-church-investigation-report-6-october-2020.pdf>, accessed 5 January 2022.

10 IICSA, *The Roman Catholic Church – Safeguarding in the Roman Catholic Church in England and Wales* (Crown Copyright, November 2020), available at <https://www.iicsa.org.uk/key-documents/23357/view/catholic-church-investigation-report-4-december-2020.pdf>, accessed 5 January 2022.

11 IICSA, *Children in the care of Nottingham Councils*, (Crown Copyright, July 2019), available at <file:///Users/bha/Downloads/children-care-nottinghamshire-councils-investigation-report-31-july-2019.pdf>, accessed 8 January 2022.

12 IICSA, *The Anglican Church – Safeguarding in the Church of England and the Church in Wales* (Crown Copyright, October 2020), p vi, available at <https://www.iicsa.org.uk/key-documents/22519/view/anglican-church-investigation-report-6-october-2020.pdf>, accessed 5 January 2022.

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> environment where alleged perpetrators were treated more supportively than victims presented barriers to disclosure that many victims could not overcome. Another aspect of the Church's culture was clericalism, which meant that the moral authority of clergy was widely perceived as beyond reproach. As we have said in other reports, faith organisations such as the Anglican Church are marked out by their explicit moral purpose, in teaching right from wrong. In the context of child sexual abuse, the Church's neglect of the physical, emotional and spiritual well-being of children and young people in favour of protecting its reputation was in conflict with its mission of love and care for the innocent and the vulnerable.'

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.[13] The report was into the Church of England and the Church in Wales, so some recommendations are joint and some specific to one church. The relevant recommendations for the Church of England can be summarised as falling into five categories.

First, 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).

Secondly, there are several recommendations under the next heading – which is the revising of clergy discipline in relation to safeguarding complaints. It proposes 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 view a proper discipline scheme would cater for the issues that have arisen in relation to safeguarding complaints without the need for specific safeguarding provisions.

Thirdly, there are proposals in relation to information sharing both between the two churches and what are described as their 'statutory partners'.

Fourthly, it is recommended that both churches should introduce a church-wide policy for funding and provision of support to victims and survivors of child sexual abuse concerning clergy, church officers or those with some

13 Ibid, pp 116–119.

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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. It should be mandatory for the policy to be implemented across all dioceses.

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

One of the key criticisms running through IICSA's report is 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 into the clericalism and deference that were identified as cultural issues and barriers to a wholehearted embrace of safeguarding across the institution.

COMMON THEMES WITH OTHER SECULAR INSTITUTIONS

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.'[14]

It is worth comparing what IICSA said about Nottingham with its criticisms of the Church of England. It concluded in relation to both those councils:[15]

> '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.
>
> Over the last 30 years, the Councils have produced policies and procedures on responding to allegations of sexual abuse of children in

14 IICSA, *Children in the care of Nottingham Councils* (Crown Copyright, July 2019), p iii, available at <file:///Users/bha/Downloads/children-care-nottinghamshire-councils-investigation-report-31-july-2019.pdf>, accessed 8 January 2022.

15 Ibid, p 136, paras 4 and 5.

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> care. However, these policies were not generally made known to staff nor was there a checking process in place to verify implementation.'

It said about the City Council's approach to apologising for non-recent abuse and their past failure to protect children in their care:[16]

> '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.'

We see similar conclusions in IICSA's reports about other secular[17] and religious organisations and settings.[18]

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.

THE CHURCH OF ENGLAND'S RESPONSE TO IICSA

At the General Synod meeting in April 2021, a report was presented in relation to what the church was doing to address these issues.[19] 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 by the Archbishop's Council and a permanent Redress Scheme is currently being designed.[20]

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.

16 Ibid, p vii.

17 cf Lambeth Council: IICSA, *Children in the Care of Lambeth Council: Investigation Report* (Crown Copyright, July 2021), pp v–x, available at <https://www.iicsa.org.uk/key-documents/26649/view/-children-care-lambeth-council-investigation-report-july-2021.pdf, accessed 5 January 2022.

18 cf The Roman Catholic Church: IICSA, *The Roman Catholic Church – Safeguarding in the Roman Catholic Church in England and Wales* (Crown Copyright, November 2020), pp v–ix, available at <https://www.iicsa.org.uk/key-documents/23357/view/catholic-church-investigation-report-4-december-2020.pdf>, accessed 5 January 2022.

19 'Safeguarding: national projects and workstreams in response to recommendations made in IICSA October 2020 investigation report' (GS 2204), available at <https://www.churchofengland.org/sites/default/files/2021-04/GS%202204%20Safeguarding%20April%202021.pdf>, accessed 5 January 2021.

20 'Archbishop's Council Interim Support Scheme Terms of Reference', 28 September 2021, available at <https://www.churchofengland.org/sites/default/files/2021-11/ISS%20-%20TOR%20v1.0.pdf>, accessed 5 January 2021.

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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 including the practices of Core Groups. We will look at the practices of Core Groups in some detail shortly.

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

Paragraphs 5–8 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 was the setting up of an independent three-person Independent Safeguarding Board for which the initial 10-point remit was summarised in a paper published in February 2021.[21] It can be summarised as overseeing the work of the NST and ensuring best practice in the continuing development of safeguarding policy within the church.

CURRENT SAFEGUARDING PRACTICES INCLUDING RISK ASSESSMENTS

However, it is the future operational level of safeguarding that was not addressed by IICSA that is of concern to some. It looks as if it will be regionally based although working under national supervision and quality assurance. Subject to what might emerge from the proposals in relation to revising the operation of Core Groups, 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' and is issued by the House of Bishops.[22]

The current version is from December 2017. It has been criticised amongst others by some of the lawyer members of General Synod.

21 M Brown, 'Independent Safeguarding Structures for the Church of England Proposed Interim Arrangements – 2021 (Phase 1)', February 2021, pp 8–9, available at <https://www.churchofengland.org/sites/default/files/2021-02/Independence%20in%20Safeguarding_0.pdf>, accessed 5 January 2021.

22 'Practice Guidance: Responding to, assessing and managing safeguarding concerns or allegations against church officers' (December 2017), available at <https://www.churchofengland.org/sites/default/files/2017-12/Responding%20PG%20V2.pdf>, accessed 5 January 2022.

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The operators of 'Core Groups'–a key feature of the management system–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). 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 the case.

By contrast, the practice guidance for the Church of England states about its Core Groups 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.'[23]

If there has been no finding by a court (criminal or civil) or any statutory agency involvement then '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.'[24] I find that an interesting turn of phrase–an assessment 'on' the facts not 'of' the facts.

The function of the internal investigation is fleshed out in more detail as follows:

> '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 to establish the guilt of the respondent.'[25]

After that investigation has taken place, it spells out what then happens–the DSA prepares what is called a summary report.[26] This appears to be a key document, which contains the following:

23 Ibid, §1.6.
24 Ibid, §3.1.
25 Ibid, §3.3; emphasis in original.
26 Ibid, §4.1.

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i. 'Core details', which amount to name, rank and number of the various people involved;
ii. 'A summary of the allegations', which is essentially a list of information gathered, including the respondent's account of the matter;
iii. 'An assessment of the findings'; these 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.'

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).'[27]

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 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.

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; that is, 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,

27 Ibid, p 52, n 51.

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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. The standard of proof is, however, 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. 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.[28] The basis for such a reasonable belief is the presence of evidence capable of belief that the 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 on a pinhead, if I say that in my mind there is a difference between 'credible evidence' and 'evidence capable of belief'.[29] In my view 'credible' suggests that an assessment has been made of the evidence and the

28 Children Act 1989, s 44. Reasonable grounds for suspecting an offence has been committed by someone is also the basis for their arrest by a constable – Police and Criminal Evidence Act 1984, s 24(2).

29 An example of the phrase 'evidence capable of belief' is in the Criminal Appeal Act 1968, s 23(2), where it is part of the test applied when considering whether the Court of Appeal will allow fresh evidence to be adduced on an appeal.

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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.

RETURNING TO THE APPLICATION OF THE CURRENT GUIDANCE

It is for this reason that I find the language[30] of the current practice guidance 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, and to which I will return below.

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 alleged 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.

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 child 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

30 'Practice Guidance: Responding to, assessing and managing safeguarding concerns or allegations against church officers' (December 2017), p 52, n 51, available at <https://www.churchofengland.org/sites/default/files/2017-12/Responding%20PG%20V2.pdf>, accessed 5 January 2022.

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place. In serious cases the police may have obtained a remand in custody, but sometimes there will be bail with conditions (which can be continued until the final court hearing or until the matter in some other way concludes, such as by a decision to take no further action).

Another route that might help in interim situations is where the police or the local authority have reported to the bishop under section 36(1)(e) of the CDM that the priest presents a significant risk of harm. In this case the bishop can suspend, and there may need to be other conditions imposed as well.[31]

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. I am using what I hope will become a common distinction – serious cases being those which, in terms of misconduct and discipline, would usually result in a prohibition; less than serious being those that would not usually carry that level of sanction.

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 us 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.

31 See further M Hill, *Ecclesiastical Law* (Oxford, 2018), paras 6.38–6.44.

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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.[32] An allegation is not proof. Suspicion is not proof. Judges have said that time and again. It is trite law. 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 contained in the practice guidance 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'.

It does seem to me that if the reform of the CDM proceeds along the route proposed in the ELS WP report then we may have a way of resolving these issues. In the less than serious cases of misconduct there would 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 a conclusion would be anticipated within six 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. My hope is that we will not be waiting for other jurisdictions to complete their processes. I will return to that issue below.

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. I would suggest that there could be many advantages in piggybacking onto 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.

32 For example *Re H and R (Child Sexual Abuse: Standard of Proof)* [1996] AC 563, at 591D-E, per Lord Nicholls: 'Thus far I have concentrated on explaining that a court's conclusion that the threshold conditions are satisfied must have a factual base, and that an alleged but unproved fact, serious or trivial, is not a fact for this purpose. Nor is judicial suspicion, because that is no more than a judicial state of uncertainty about whether or not an event happened'. See further *Re B (Allegation of Sexual Abuse: Child's Evidence)* [2006] EWCA Civ 773 per Hughes LJ: 'The fact that one is in a family case sailing under the comforting colours of child protection is not a reason to afford unsatisfactory evidence a weight greater than it can properly bear. That is in nobody's interests, least of all the child's' (para 43).

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950 YEARS OF CLERGY DISCIPLINE

1066 and all that

2022 marks 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:[33]

> '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.'

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. 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. 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.

33 T Plucknett, *Taswell-Langmead's Constitutional History: from the Teutonic conquest to the present time* (London, 1960), p 43.

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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.[34] 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.

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*'.[35]

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* began to take a prominent part of the judicial workload and acquired 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.[36] 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 below.

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

34 P Clarke, 'Western Canon Law in the Central and Later Middle Ages', *The Oxford Handbook of European Legal History* (Oxford, 2018), chapter 12.

35 Ibid, p 276.

36 M Smith, *The Church Courts, 1680–1840 From Canon to Ecclesiastical Law* (New York, 2006), chapter 4.

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fornication; perjury, which included failure to pay debts as well as saying something that damaged a person's 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 not going 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[37] 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.

There is a fascinating feature of monastic discipline that relates to imprisonment. In a book on the history of prisons Edward Peters explains:[38]

> '. . . In matters of discipline, the Rule of Benedict spoke only 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 labor, "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" (c.25). . .

37 Ibid.

38 E Peters, 'Prison before Prison: The Ancient and Medieval Worlds' in N Morris and D Rothman (eds), *The Oxford History of the Prison* (Oxford, 1998), chapter 1.

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> . . . [This represents] . . . a distinctive monastic contribution to the history of prisons: the first instan-ces [sic.] of confinement for specific periods and occasionally for life for the purpose of moral correction.
>
> Monastic prisons also served for the confinement of secular clergy under discipline by their bishops. The process known as *detrusio in monasterium* ("confinement in a monastery")... During the twelfth century, bishops were expected to have their own diocesan prisons for the punishment of criminal clergy. The episcopal use of imprisonment as punishment was regularized in an executive order entitled "Quamvis" and issued by Pope Boniface VIII in his lawbook *Liber Sextus*, in 1298.'

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

In an important article marking the 850th anniversary of Becket's martyrdom, Rowan Williams touched on an important, and to me, new aspect of this dispute.[39] 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, just as much as the right to try and punish its priests. He said:[40]

> '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

39 R Williams (2021) 23 Ecc LJ 127.
40 Ibid, p 135.

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> 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.'

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 goes on to say:[41]

> 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:[42]

> 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.

41 Ibid, p 136.
42 Ibid.

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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?

Before answering that we must review the changes that have taken place since mediaeval times. As noted above, 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,[43] then probate[44] and marriage[45] in 1857 and even church rates and tithes in 1868.[46] 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 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.[47]

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

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 three statutes passed in 19th century dealing with clergy discipline, and it was the first of six such statutes in the course of 163 years.

43 Ecclesiastical Courts Act 1855, s 1.
44 Court of Probate Act 1857, ss 3 and 4.
45 Matrimonial Causes Act 1857, s 2 and 4.
46 Compulsory Church Rate Abolition Act 1868.
47 C Smith, 'Ecclesiastical Appeals in the JCPC', available at <https://privycouncilpapers.exeter.ac.uk/contexts/jurisdictions/non-territorial/>, accessed 13 January 2022.

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The six were:

i. Church Discipline Act 1840;
ii. Public Worship Regulation Act 1874 – which introduced law and procedure in relation to issues of ritual;
iii. Clergy Discipline Act 1892;
iv. Incumbents (Discipline) Act 1947;
v. Ecclesiastical Jurisdiction Act 1963;
vi. Clergy Discipline Measure 2003.

The Church Discipline Act 1840 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'.[48]

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 five statutes and the 2003 Measure in relation to particular issues. Space forbids me going into detail but the areas where there were significant differences relate to:

i. *Who could commence proceedings?* In 1840 any individual could lay a complaint,[49] but in 1947 unless you were approved by the bishop to prosecute the case or were a churchwarden or a patron then it required three communicants on the electoral roll to complain[50] and that was increased in 1963 to six people on the electoral roll.[51] As we know 2003 took us back to any one person,[52] provided they can establish a proper interest in making the complaint. 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.[53]

48 Church Discipline Act 1840, s 25. This was highlighted in the ELS WP report (above note 2) at para 2.12. Recent amendments to the Code of Practice to the CDM (it seems as a result of the ELS WP drawing attention to it) now provides for the possibility of a form of 'rebuke' even when a case has been dismissed: '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': Clergy Discipline Measure 2003: Code of Practice (revised April 2021), para 147.

49 Church Discipline 1840, s 3.

50 Incumbents (Discipline) Act 1947, s 3.

51 Ecclesiastical Jurisdiction Act 1963, s 19(b).

52 Clergy Discipline Measure 2003, s 10.

53 ELS WP Report, above note 2, Annex 13 – CDC Statistics.

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ii. *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'.[54] 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.[55] 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'.[56] 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'.[57] The 2003 provisions we know well. 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'[58] and 'serious, persistent or continuous neglect' was also widened to 'neglect or inefficiency in the performance of the duties of his office'.[59]

iii. *What, if any, preliminary assessment was there?* There is a wide variety of practice here. In 1840 there were two routes to starting a case – either a commission would hear evidence including cross-examining witnesses to decide if there was a prima facie case,[60] or the bishop could send the case himself directly to the Provincial Court for trial.[61] In 1892 there was no preliminary assessment. But in 1947 a ministerial committee of six clergy from the diocese would consider it[62] 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,[63] 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

54 Church Discipline Act 1840, s 3.
55 Clergy Discipline Act 1892, s 2.
56 Incumbents (Discipline) Act 1947, s 2.
57 Ecclesiastical Jurisdiction Act 1963, s 14(1).
58 Clergy Discipline Measure 2003, s 8(1)(d).
59 Clergy Discipline Measure 2003, s 8(1)(c).
60 Church Discipline Act 1840, s 4.
61 Church Discipline Act 1840, s 13.
62 Incumbents (Discipline) Act 1947, s 5.
63 Ecclesiastical Jurisdiction Act 1963, s 23.

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assize courts.[64] 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.[65]

iv. *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.
v. *What of the bishop's over-riding 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 three assessors[66] 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 is 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.[67]

'Modern expectations': *Under Authority* (1996)

I turn to consider the report that lay behind the CDM. *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, it was said that three contemporary trends needed to be recognised:[68]

i. we live in a more litigious society;
ii. where there is a more ready recourse to devices like judicial review;
iii. 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'.[69]

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.

64 Ecclesiastical Jurisdiction Act 1963, s 28.
65 Clergy Discipline Measure 2003, s 11.
66 Church Discipline Act 1840, s 11.
67 Ecclesiastical Jurisdiction Act 1963, s 31.
68 'Under Authority: Report on Clergy Discipline' (London, 1996), p 68.
69 Ibid, p 69.

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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'[70] 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 suggested in the ELS WP Interim Report.[71] 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.

When they said there must be no delay, we had at the date of the ELS WP interim Report an average time from complaint to tribunal hearing of 21½ months. The shortest time ever was nine months when the matter was an admitted one. The longest was 47 months, in two others it was 30 months or more, and in eight others it was two years or more.[72]

The general levels of anxiety and dissatisfaction for all concerned is now very well documented indeed, particularly through the work of the Sheldon Community.[73]

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?

70 Clergy Discipline Measure 2003: Code of Practice (revised April 2021), paras 13–21.

71 'ELS Working Party reviewing the Clergy Discipline Measure 2003: Interim Report', September 2020, Annex 3, available at <https://ecclawsoc.org.uk/wp-content/uploads/2020/09/ELS-Interim-Report-revised.pdf>, accessed 5 January 2022.

72 Ibid, Annex 1, para 11.9.

73 S Horsman, L Barley, M Wright, A Nash and C Senior, '"I was handed over to the dogs": lived experience, clerical trauma and the handling of complaints against clergy in the Church of England', (2021) available at <https://www.sheldonhub.org/usercontent/sitecontentuploads/3/E957769629F73792E9B69BA64F5F10547/handed%20over%20to%20the%20dogs%20final.pdf>, accessed 8 January 2022.

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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. 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 (Advisory, Conciliation and Arbitration Service) and the employment tribunal.

Do we in some way need to bring back into ecclesiastical legal thinking what would have happened if the bishop had been required to sit down with the HR director or the head of professional standards or ACAS? And imagine, if you can, if 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 they might they have dealt with such cases?

It is not so different from what was attempted in the 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* ('for the good of the soul'). 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 WP 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 six months and in the other cases usually within 28 days.

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But how, if at all, might such procedures relate to safeguarding and some of the problematic issues raised earlier?

DEALING WITH DELAY AND THE CAUSES OF DELAY

My main concerns around safeguarding are delay and process. One of the problems with delay, particularly in serious cases, is that currently if there are secular proceedings taking place then the church should wait for them to conclude:[74]

> '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.'

The current practice guidance does not address that issue in quite such a clear way but would seem to imply that they wait for statutory agency investigations to conclude. It says:[75]

> '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 recently about the backlog in the courts. As of 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. 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.[76]

74 Clergy Discipline Measure 2003: Code of Practice (revised April 2021), para 90.
75 'Practice Guidance: Responding to, assessing and managing safeguarding concerns or allegations against church officers' (December 2017), §2.9, available at <https://www.churchofengland.org/sites/default/files/2017-12/Responding%20PG%20V2.pdf>, accessed 5 January 2022.
76 Home Office Guidance: Police Officer Misconduct, Unsatisfactory Performance and Attendance Management Procedures (July 2014), paras 2.124–2.125, available at <https://assets.publishing.

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The Clergy Discipline Rules, as amended in April 2021 and which came into effect on 13 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.[77] 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 three 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 six months.

SUSPENSION AND RISK ASSESSMENTS

The question of risk will arise in serious cases initially when the bishop is considering whether to suspend. In the ELS WP report it is 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.

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.

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 quick fact-finding is called for. If misconduct is found then perhaps a rebuke of some sort can be given, in some cases some further training may be proposed. Again, the

service.gov.uk/government/uploads/system/uploads/attachment_data/file/330235/MisconductPerformAttendanceJuly14.pdf>, accessed 5 January 2022.

77 This power is additional to the power that existed previously for the President of Tribunals or Chair of a disciplinary tribunal to order the production of documents to a case that has been referred to a tribunal for adjudication.

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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?

CONCLUSION

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.

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.

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