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More Turbulence? Clerical Misconduct under the Clergy Discipline Measure 2003

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Details of complaints under the Clergy Discipline Measure 2003 are beginning to come into the public domain. In particular, they raise questions as to the appropriate penalties to be imposed on a respondent, although even more worrying may be the anecdotal misunderstanding among some of the clergy about the moral behaviour expected of them. In addition, procedural questions remain that are not addressed in the written determinations. Such questions include the proper interest in making, and the motive behind, a complaint; the admissibility of hearsay evidence to support a complaint; and episcopal intervention and the bishop's role in reaching his decision.

The Clergy Discipline Commission has recently conducted a consultation on the working of the Clergy Discipline Measure 2003 (the Measure).[1] According to this consultation, in the first two years following the full implementation of the Measure,[2] there were 137 complaints,[3] of which only 18 were referred for formal investigation by the designated officer. Of these, only 10 were ultimately referred to disciplinary tribunals for adjudication.[4] The consultation does not mention any specific cases or decisions that have been made in relation to any of these complaints, but legal questions continue to arise.

COMPLAINANT

One ongoing question relates to who may bring a complaint under the Measure. In this regard, one must bear in mind that matters of clergy discipline are now civil, and not criminal, matters. That being so, it was appropriate that the

1 Letter from the Secretary to the Clergy Discipline Commission, October 2008.
2 That is, since 1 January 2006.
3 In the relevant period, penalties of prohibition or removal from office were imposed under s 30(1) of the Measure in two cases. The total number of clergy to whom the provisions of the Measure apply is more than 22,000.
4 A comprehensive collection of the transcript of judgments delivered by Bishop's Disciplinary Tribunals may be found at <http://www.ecclaw.co.uk/clergydiscipline.php>, accessed 25 January 2009.

procedures in the Measure should in part reflect those under the Care of Churches and Ecclesiastical Jurisdiction Measure 1991.

Under section 16(1) of the 1991 Measure:

> Proceedings for a faculty may be instituted by—
>
> (a) the archdeacon of the archdeaconry in which the parish concerned is situated; or
> (b) the minister and churchwardens of the parish concerned; or
> (c) any other person appearing to the court to have sufficient interest in the matter.

Newsom and Newsom, *Faculty Jurisdiction of the Church of England* states, in relation to the law prior to the 1991 Measure:

> In the civil jurisdiction . . . the suit was only open to those 'who have a personal interest in it'. This distinction is not unimportant, for 'the preservation of the peace in the church generally, as well as in particular parishes, may in great measure be dependent upon it'. For:
>
> 'It would be a great evil if . . . the inhabitant of a parish in Cornwall could interfere in matters relating to the fabric of a church in Northumberland, in which he has no personal interest, as to which he has sustained no civil injury and as to which he may be acting in opposition to the wishes of the parishioners and incumbent'.[5]

In defining who has a proper interest under the 1991 Measure, the same authors write that 'it seems to be generally recognised that a person who is resident in the parish is qualified even if the proposals do not affect his property'.[6] In addition, any person whose name is on the electoral roll of the parish concerned but who does not reside in the parish is deemed to have an interest 'as though he were a parishioner of that parish'.[7]

As to non-parishioners, the same test of 'personal interest' as that which was applied prior to the 1991 Measure is now applied in the consistory courts under the 1991 Measure. Yet, as Mark Hill points out, 'the question of sufficient interest is one of fact and degree'.[8]

5 GH and GL Newsom, *Faculty Jurisdiction of the Church of England* (second edition, London, 1993), pp 51–52; the quotations are from *Fagg v Lee* (1873) 4 A & E 135 at p 150, *per* Sir Robert Phillimore, Dean of the Arches.

6 Newsom and Newsom, *Faculty Jurisdiction*, p 53. See, too, the Faculty Jurisdiction Rules 2000, SI 2000/2047, r 16(2)(a), by which the category of interested persons who may object to a proposed faculty includes 'any person who is resident in the ecclesiastical parish concerned'.

7 Care of Churches and Ecclesiastical Jurisdiction Measure 1991, s 16(2).

8 M Hill, *Ecclesiastical Law* (third edition, Oxford, 2007), para 7.34.

Turning to clergy discipline, section 10(1) of the 2003 Measure follows a somewhat similar wording to that in the 1991 Measure in relation to who may institute proceedings for misconduct:

> Disciplinary proceedings under this Measure may be instituted . . . only as follows—
>
> (a) in the case of a priest or deacon, by—
> (i) a person nominated by the parochial church council of any parish which has a proper interest in making the complaint . . .; or
> (ii) a churchwarden of any such parish; or
> (iii) any other person who has a proper interest in making the complaint;
>
> (b) in the case of a bishop, by—
> (i) a person nominated by the bishop's council of the diocese concerned . . .; or
> (ii) any other person who has a proper interest in making the complaint;
>
> (c) in the case of an archbishop, by—
> (i) a person nominated by the archbishop's council of his diocese . . .; or
> (ii) any other person who has a proper interest in making the complaint.

It is tempting to assume that those who have a 'sufficient interest' under the 1991 Measure must also have a 'proper interest' under the 2003 Measure. However, such an assumption appears to be fallacious. The 1991 Measure is concerned primarily with the care of churches and their fabric, although 'any person or body carrying out functions of care and conservation under [the] Measure . . . shall have due regard to the role of a church as a local centre of worship and mission'.[9] The 2003 Measure, on the other hand, is concerned with discipline. Therefore, the meaning of the words 'sufficient interest' and 'proper interest' must respectively reflect the context of the Measures in which they are used. For example, a non-Anglican has a right to be buried in the churchyard of the parish in which he or she lives, even if (for example) he or she is a Muslim.[10] That being so, any non-Anglican parishioner (of any other or no religious belief) has a right to object to proposed works in the parish churchyard.

9 Care of Churches and Ecclesiastical Jurisdiction Measure 1991, s 1.
10 See RDH Bursell *Liturgy, Order and the Law* (Oxford, 1996), p 201.

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However, it is unlikely that the same parishioner would automatically have a proper interest in instituting a disciplinary complaint against the parish priest. To do so, that non-Anglican would have to demonstrate a direct personal interest in what was alleged: for example, sexual misconduct towards a child in the local school that his or her own child also attends.

In fact, there has been a debate whether the words 'any other person who has a proper interest in making the complaint' should be widely or narrowly construed, although the former seems to be the correct approach. This is because paragraph 4 of the Code of Practice makes it clear that the administration of clerical discipline has

> a wider picture in that the administration of discipline must:
>
> i. have regard to the interests of justice for all who may be affected by the faults, failings and shortcomings of the clergy, including the complainant and the interests of the wider church,
> ii. support the collective good standing of all faithful men and women who are called to serve in the ordained ministry,
> iii. ensure the clergy continue to be worthy of the great trust that is put in them as ordained ministers.[11]

Nevertheless, this does not mean that everyone automatically has a proper interest in any shortcomings of any cleric. It is worth noting that a churchwarden is specifically given the right to institute proceedings against his parochial clergy, even though, in the past, churchwardens always had a disciplinary role.[12] Moreover, although the relatively new body called the Archbishop's Council has as its object, inter alia, 'to ... promote, aid and further the work and mission of the Church of England',[13] it is the 'the archbishops' council *of the diocese*',[14] and not the Archbishops' Council, that may nominate a person to bring proceedings against an archbishop. These two points seem to confirm that it is not everyone who has a sufficient (or 'proper') interest to institute proceedings against an Anglican cleric, even if that person is a worshipping member of the Anglican Church. Indeed, were that otherwise, any Anglican in the northern province might institute proceedings against the Archbishop of York and anyone in either the northern or southern provinces against the

11 Code of Practice (London, 2006), para 4. The Code was issued by the Clergy Discipline Commission under section 39 of the Clergy Discipline Measure 2003. The Code does not have the force of law but gives guidance for the purpose of the Measure (Code of Practice, paras 2 and 9). However, 'its provisions will be assumed to be in accordance with best practice' (ibid, para 9).

12 Code of Practice, para 33.

13 National Institutions Measure 1998, s 1(1).

14 See the Church Representation Rules, r 34(1)(k), emphasis added.

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Archbishop of Canterbury. If that had been the intention of the General Synod when passing the 2003 Measure, it could easily have said so.

The only other guidance on this question is to be found in paragraph 35 of the Code of Practice:

> Examples of others who may have a proper interest in making a complaint include anyone who personally observes or experiences the alleged misconduct, or the relevant archdeacon. A person making a complaint on behalf of anyone under a disability with a proper interest, or a parent or guardian making a complaint on behalf of a child with a proper interest, would also have a proper interest.

Its context within the Code shows that this paragraph is concerned with those seeking to institute proceedings against a priest or deacon. More particularly, it does not suggest that all parishioners, or all Anglican worshippers in the relevant parish, have a *proper* interest. However, although different considerations may come into play when considering complaints against bishops or archbishops, it also gives some help in indicating who may have a proper interest in those circumstances too.[15]

Of course, in one sense every Anglican has an 'interest' in the discipline of the clergy but that does not mean that they have a 'proper' interest on each and every occasion. It is therefore impossible to be definitive as to what that 'proper interest' may be, because the possible circumstances are so diverse. In practice, the question will always be one of fact and degree. Nonetheless, one would expect that there must be some direct personal interest in the disciplinary matter in question. For example, the complainant should be closely affected by the actual misconduct in question,[16] or threatened by the ongoing consequences of that misconduct[17] or have a close interest in the discipline of the cleric in question.[18] As Mark Hill comments in *Ecclesiastical Law*,

> there is an element of subjectivity as to what constitutes a proper interest for this purpose. It is submitted that it should be broadly interpreted to exclude the prurient busybody but admit those genuinely concerned with the subject matter of the complaint.[19]

No doubt, in practice, it will be borne in mind that a bishop or archbishop has a greater profile both within the Church and the wider world than a priest or deacon. In addition, an episcopal pronouncement or statement is likely to have a more

15 Code of Practice, para 233 points out that 'for the most part the procedure is similar' in relation to complaints against bishops and archbishops as complaints against priests and deacons.
16 See, for example, the Code of Practice, para 35.
17 See the school example above.
18 For example, the archdeacon.
19 Hill, *Ecclesiastical Law*, para 6.17, note 65.

far-reaching effect than pronouncements or statements by others. However, in spite of a bishop's greater profile, it still does not mean that anyone affected by an episcopal statement has a sufficient locus standi to make a complaint. It is suggested, rather, that an individual would be required to show some individual damage (over and above transient irritation or annoyance) or a special relationship particularly affected by the pronouncement or statement in question.

If this view is right, a non-Anglican does not have an automatic locus standi to bring a complaint against his or her parish priest, diocesan bishop or even archbishop. Indeed, the same would also be true of a regularly worshipping Anglican. But is the same true of, say, a curate in relation to his or her incumbent, or a licensed cleric in relation to a bishop of his or her diocese? A curate would certainly seem to have a proper interest in the doctrinal statements of his or her incumbent, as would any licensed cleric in relation to a bishop of his or her diocese, but such a concern cannot found a complaint under the 2003 Measure.[20] However, a curate or licensed cleric might well have a special interest in the public behaviour of his or her incumbent or bishop. Behaviour in private, on the other hand, would depend upon whether the cleric was directly affected by that behaviour.

MOTIVE

People may have any of a number of motives for making a complaint against a cleric; these may run from a genuine concern to prurience or even mischief-making. However, although outrage or distress may move someone to make a complaint, it cannot in law be relevant to any locus standi that the complainant may, or may not, have under section 10 of the 2003 Measure. Such distress or outrage must, however, be relevant to the seriousness of any alleged misconduct because it may reflect the effect of the conduct upon the general laity. The same is true of any loss of respect engendered among the laity by the alleged behaviour.[21] This is particularly important when the bishop to whom a complaint is made has to decide whether the complaint should be dismissed on the grounds that it is 'trivial' or that the alleged misconduct (if true) would 'probably not be grave enough to merit a rebuke'.[22]

EVIDENCE

It is possible that, to found his or her complaint, a complainant might rely upon newspaper reports by journalists that either summarise facts gleaned from

20 Clergy Discipline Measure 2003, s 7; rather, it would have to be the basis of proceedings under the Ecclesiastical Jurisdiction Measure 1963.
21 This may be reflected, for example, in cartoons.
22 Code of Practice, para 101. This reflects para 9: 'Minor complaints should not be the subject matter of formal disciplinary proceedings.'

others or quote persons who have been interviewed. Equally, the complainant might rely upon matters told to him or her by others.[23] In all these cases, the complainant would be relying upon second-hand evidence.

Although it is nowhere specifically stated in either the Measure or the Rules, it is very probable that the only formal rules of evidence that apply to proceedings for clerical misconduct are those set out in the Rules themselves. Form 1a in the Clergy Discipline Rules 2005 has a marginal note telling the complainant that:

> You must provide evidence in support . . . This evidence could be your own signed statement, which can be set out in this form or be in a separate document attached to it . . . All witness statements should be in form 3 of the Clergy Discipline Rules. Letters or other material such as a photograph may be submitted if relevant.

Form 3 then has a marginal note that states: 'You must explain in your statement how you know about each of the matters you describe, *unless* you know about them because you have *personally* seen or observed them'.[24] It is therefore clear that second-hand evidence is admissible. Moreover, rule 39(1)(a) states that 'The tribunal shall in accordance with the overriding objective . . . conduct the hearing in the manner it considers most appropriate to the issues before it and to the just handling of the complaint generally'. Although rule 39 does not specifically apply to the bishop considering the complaint, when he comes to make his decision under sections 11(3) and 12 of the Measure, he should proceed upon a similar basis. This being so, what is reported in a newspaper, or in other branches of the media, is evidence that he should properly consider, even if it is the only evidence before him.

Nonetheless, the weight that the bishop should give to any evidence depends upon the particular circumstances. For example, if a newspaper has paid money for information contained in its report, that would lessen the weight that might be given to such report. Moreover, as newspaper reports are at second hand and are unlikely to be supported by statements of truth under the Measure from the participants themselves, to some extent this adversely affects the weight that the bishop should give to those reports. However, where those reports are corroborated or put in question by other evidence, the weight to be given to them may respectively be enhanced or lessened; however, this is subject to the caution that a statement by the cleric complained about may be self-serving.

23 If this amounted to mere gossip, it would affect its weight rather than its actual admissibility.
24 Emphasis in original.

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BISHOP'S APPROACH IN REACHING HIS DECISION

Section 18(3)(a) of the 2003 Measure states that 'the standard of proof to be applied by the tribunal or court shall be the same as in proceedings in the High Court exercising civil jurisdiction'. Moreover, as is explained in paragraph 193 of the Code of Practice:

> The standard of proof to be applied in any disciplinary hearing is the civil standard. This means that a complaint is to be proved on a balance of probability, but there is a degree of flexibility when applying that standard. The more serious the complaint the stronger should be the evidence before the tribunal concludes that the complaint is established on the balance of probabilities.

It is to be noted that section 18 is to be applied 'by the tribunal or court'. However, the bishop does not have to decide whether the complaint is 'established'; rather, under section 11(3), his first decision is whether he should dismiss the complaint.[25] In this regard, as paragraph 101 of the Code of Practice makes clear, dismissal would be appropriate where he is satisfied that

> there appears to be no sufficient substance in the complaint to justify proceeding with it; this would apply if the complaint were trivial,[26] or if the bishop forms the view that the alleged misconduct, if true, would probably not be grave enough to merit a rebuke, or it could be dealt with more appropriately under non-disciplinary procedures.

Although it is impossible to be definitive, once the bishop has analysed and weighed the evidence it is arguable that he does not have to apply the civil standard of proof when deciding whether there is 'sufficient' substance in the complaint. However, it would be entirely inappropriate for him to seek any higher standard of proof because that would undermine the whole structure of the Clergy Discipline procedures; moreover, to apply a lower standard than the civil standard of proof would seem unfair to the respondent. On balance, therefore, it seems that the bishop must indeed apply the civil standard.

What is more, even when applying that civil standard, it is the *type* of misconduct (for example, adultery) alleged in the complaint that has to be considered before requiring stronger evidence, rather than the actual *facts* allegedly amounting to the misconduct. Although misconduct may be more serious if committed

25 Only if the complaint is not dismissed does the bishop consider the various courses open to him under section 12 of the Measure.

26 Code of Practice, para 9 also states that 'minor complaints should not be the subject matter of formal disciplinary proceedings'.

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by an office-holder (such as an incumbent or bishop) than if committed by another cleric, nevertheless, if the flexible standard were to be applied whenever an office holder was the subject of a complaint, it would mean that it would always be more difficult to bring a complaint against them. If this were so, it would be contrary to the overriding objective to deal with disciplinary cases justly.[27]

However, it is arguable that the determination in *Mrs A v Okechi* runs contrary to this suggestion, as the tribunal stated:

> The likelihood of a parish priest developing an adulterous relationship with a parishioner is inherently less likely than two ordinary adults doing so. Thus, where an adulterous relationship is alleged against a priest, the allegation requires evidence of sufficient cogency to satisfy the tribunal that the adulterous relationship is established.[28]

The first sentence of this quotation seems to contradict the argument put forward in this article; however, the next sentence apparently goes on to make it clear that the tribunal's approach is based on its view that there is an inherent unlikelihood of any priest committing adultery. If this latter interpretation is correct, it seems to depend upon the ordained state of the priest rather than the office that he or she holds as parish priest[29] and, if so, the tribunal's approach does not contradict the present argument. Nevertheless, whatever interpretation of the quotation is correct, the tribunal's view cannot be based on any evidence and it is therefore doubtful to what extent the tribunal should have taken it into account. Indeed, other tribunals might well take a different view from the hope, or gut feeling, upon which it must be based.[30]

Sexual activity, of course, tends to take place in private and the tribunal also went on to consider the position where proof of an adulterous relationship depends upon conflicting evidence of the persons concerned. It stated:

> In our judgment, that is simply another way of saying that the findings in respect of the various probabilities have to be considered and made before the tribunal of fact can be satisfied to the required standard. Of course,

27 Code of Practice, para 14.

28 Determination dated 9 December 2008, para 7. The tribunal referred to *In re H (Minors)(Sexual Abuse: Standard of Proof)* [1996] AC 563, [1996] 1 All ER 1, HL; *In re B (Children)(Care Proceedings: Standard of Proof)* [2008] 3 WLR1, [2008] 4 All ER 1.

29 What, however, of an allegation of adultery against a bishop? Is adultery even less inherently likely for someone who has been episcopally ordained?

30 This particular approach is unlikely to be contradicted by any respondent against whom there is a complaint based on adultery, as it is bound to act in the cleric's favour. The complainant cannot contravene the approach, and only the designated officer might raise any doubts about it. However, neither the designated officer nor any tribunal can have access to the Archbishops' List, which might begin to throw some light on the subject.

> there may be some cases where the only evidence comes from a complainant alone. That does not mean that such evidence cannot be accepted where it is sufficiently strong to stand alone. Nevertheless, the tribunal will always seek supporting evidence if it is available and sufficiently reliable.[31]

This, of course, is the same position that a court faces in non-ecclesiastical proceedings.

EPISCOPAL INTERVENTION

Paragraph 10 of the Code of Practice states:

> There may be occasions when no formal complaint under the Measure has yet been made but the bishop receives information about a priest or deacon which, if true, would amount to serious misconduct. The bishop will obviously wish to find out more about it. However, the bishop should be cautious about the extent of any direct involvement. The bishop should not do anything that could prejudice, or appear to prejudice, the fair handling of any formal complaint under the Measure that could be made subsequently. Instead, the bishop should consider asking an appropriate person, such as the archdeacon, to look into it.

The possibilities for problems to arise are obvious. Threats of complaints under the Measure are already being made by partners against clerics involved in divorce proceedings;[32] if the bishop has been approached by the couple as their Father in God, what should he do if, for example, adultery is alleged against, or admitted by, the cleric? On the one hand, the bishop might wish to continue to give pastoral support himself to the couple in attempting to bring about reconciliation, even though conciliation is itself an option within the proceedings under the Measure. In order not to jeopardise his position under the Measure,[33] once the bishop becomes appraised of possible grounds of complaint, he would seem best advised to draw back from direct involvement and to consider whether to initiate further investigations. Such investigations, of course, must be entirely independent of the bishop. As paragraph 11

31 Para 7.

32 This in itself may raise questions of motive. Moreover, condonation (that is, there has been resumption of cohabitation subsequent to the knowledge and detection of the guilt: see AJ Stephens, *A Practical Treatise of the Laws Relating to the Clergy* (London, 1848), vol 1, p 785) was formerly a principle of the Church courts. Presumably the fact of any such condonation would still be relevant to the question of seriousness.

33 This is particularly important because the adultery, by definition, cannot be a matter involving the couple alone.

of the Code states: 'The archdeacon or other person looking into the matter will need to form his or her own view about the appropriate action to take'.[34]

However, further episcopal pitfalls remain. In the light of what has been said above, it is not inconceivable that a complaint may be raised that has genuine substance, but that the person making that complaint lacks a 'proper interest' in law in making it. In those circumstances, as long as the complaint is not minor or trivial,[35] the bishop must himself consider instituting an enquiry into the alleged misconduct. Canon C 18, paragraph 7, states:

> Every bishop shall correct and punish all such as be unquiet, disobedient, or criminous, within his diocese, according to such authority as he has by God's Word and is committed to him by the laws and ordinances of this realm.[36]

Moreover, section 1 of the 2003 Measure itself underlines the role of the bishop in discipline. If the bishop fails to institute an investigation in an appropriate case, there is clearly a danger that he will himself become the subject of a complaint of neglect of duty under the Measure.[37]

PARTY TO THE PROCEEDINGS

It is not surprising if a non-legally qualified complainant feels that he or she should continue to have an input into the proceedings once it has been referred to a tribunal other than merely as a possible witness. Section 18 of the Measure states that, in disciplinary proceedings, 'it shall be the duty of the designated officer or a person nominated by him to conduct the case for the complainant'.[38] That does not mean, however, that the designated officer is acting on behalf of the complainant and therefore under his or her directions. Indeed, this is made clear by rule 106 of the Clergy Discipline Rules 2005, which states that the designated officer 'acts independently from the complainant'. Moreover, paragraph 172 of the Code of Practice reads: 'It is the duty of the complainant and the respondent to co-operate with the Designated Officer when inquiries are made'. In addition, rule 106 continues that '"party" and "parties" refer to the

34 On anecdotal evidence, however, it appears that this may not always occur.
35 Code of Practice, para 10 speaks of 'serious misconduct' but, within the framework of the Measure and the context of the Code itself, this must mean misconduct that is other than minor or trivial.
36 As to archbishops, Canon C 17 states: 'The archbishop has throughout his province at all times metropolitical jurisdiction ... to correct and supply all defects of other bishops'.
37 Is a complaint against a diocesan bishop that he has failed to investigate or prosecute a cleric for a breach of doctrine, ritual or ceremonial itself 'an act or omission ... relating to matters involving doctrine, ritual or ceremonial'? If it is, it could not be brought under the 2003 Measure.
38 See also s 30(4).

complainant and the respondent, except in Parts VI, VII, and VIII where they refer to the Designated Officer and the respondent': that is, the complainant is not a 'party' for the purposes of directions hearings or any hearing before the tribunal.

The complainant is nonetheless entitled to attend any hearing in private of the tribunal,[39] although they may be excluded if they disrupt the hearing or otherwise interfere with the administration of justice. In criminal proceedings in the lay courts, an injured party is entitled to make a victim impact statement to be taken into consideration by the court when passing sentence.[40] No such provision is made for tribunals in clergy discipline proceedings, although the tribunal is empowered to invite the bishop to give views about the appropriate penalty.[41] However, there seems no reason why the designated officer should not place before the tribunal a similar victim impact statement. That apart, there appears to be no mechanism by which the complainant can seek to place his or her views as to the appropriate penalty before the tribunal or, at least, to give evidence as to the trauma or damage caused by the respondent's behaviour. Nonetheless, the complainant will often be a witness in the proceedings themselves.

PENALTIES

After consultation, and pursuant to section 3(3)(a) of the 2003 Measure, the Clergy Discipline Commission issued guidance on the appropriate penalties to be imposed in cases of clerical misconduct.[42] In relation to sexual misconduct, it states, inter alia:

> Sexual misconduct is usually a deliberate and damaging failure to comply with the high standards of Christian behaviour required of clergy. . . . Clergy who commit sexual misconduct should be dealt with firmly, and in a way which will protect those who could be harmed if the respondent were otherwise to be allowed to remain in ministry. . . . Adultery is destructive of marriages, and is hurtful and disturbing for the children of the families affected. If the adultery is with a person within the cleric's area of pastoral responsibility, that can be an aggravating factor because issues of vulnerability, exploitation and abuse of position arise. Removal

39 Rule 47; it seems that this does not apply to direction hearings, which are dealt with under a different part of the Rules.

40 Practice Direction (Criminal Proceedings: Consolidation) [2002] 1 WLR 2870, [2002] 3 All ER 904, at paras III.28.1 and III.28.2.

41 Rule 51.

42 Issued on 29 March 2006 and available through <www.cofe.anglican.org/about/churchlawlegis/clergydiscipline>, accessed 27 January 2009.

from office and prohibition, either for life or for a limited time, are usually appropriate in cases of adultery.[43]

Clearly, other forms of sexual misconduct carry with them similar dangers to those affected by the cleric's behaviour. In the complaint of *Byrne v King*, the tribunal was concerned with an improper relationship involving 'some acts of physical intimacy albeit not sexual intercourse' that went 'far beyond merely holding hands or kissing'; it was 'a relationship with a high degree of inclination towards sexual activity and with an overtly expressed sexual desire'.[44] The woman concerned lived in a neighbouring parish but did attend the respondent for bereavement counselling. The tribunal imposed upon the respondent a penalty of four years' prohibition from exercising any functions of his holy orders, as well as removal from any office or preferment that he then held. On appeal to the Chancery Court of York, the respondent showed no repentance or remorse. The appellate court considered that a rebuke was an inadequate penalty but, apart from his previous 'long and much appreciated service as a priest', there was no other mitigating factor and the tribunal's penalty was upheld.[45]

In the complaint of *Cooper v Gair*, the tribunal determined that the respondent had 'on many occasions kissed and touched' a parishioner 'in a sexual manner'.[46] The relationship began when the parishioner sought pastoral advice from the respondent in relation to her marriage and continued in spite of the fact that the respondent was also counselling the woman's husband. The respondent admitted unbecoming conduct at the very last moment and expressed remorse in relation to the woman but not in relation to the husband. The tribunal regarded the latter fact as a serious aggravating factor and imposed a prohibition on the respondent for seven years.

Then, in the complaint of *Allsop v Davies*, the tribunal determined that the respondent cleric had claimed that 'she and her husband had an open sexual relationship and engaged in sexual activity with others outside their marriage'.[47] In addition, it determined that the respondent 'had been under the influence of alcohol' at three church services.[48] In relation to penalty, the respondent submitted that she had admitted and shown remorse at all times for her conduct and that the appropriate penalty should therefore be one of rebuke. The tribunal did not accept the submission as to the timing of her admissions and paid little regard to her protestations of remorse. Rather, it concluded that these

43 Clergy Discipline Measure 2003, s 5.
44 Para 157 of the determination delivered on 23 November 2007.
45 Para 33 of the determination on appeal delivered on 7 April 2008.
46 Determination delivered on 11 November 2008.
47 Para 23 of the determination delivered on 11 November 2008.
48 Para 24.

submissions indicated that she still had 'no appreciation of the seriousness of the findings against her, nor of the damage caused'.[49] The penalty imposed was therefore one of 12 years' prohibition.[50]

In the complaint of *Mrs A v Okechi*,[51] the tribunal determined that the respondent, who denied the complaint throughout the proceedings, had committed adultery with a parishioner who was also a parish employee over a period of about two years and imposed a prohibition of ten years upon the cleric. In reaching that length of prohibition, the tribunal took into consideration that the complainant had made false accusations of stalking against the respondent. In addition, the chairman stated that 'consistency as between tribunals is an important aim. It is for this reason that we have considered penalties that have been imposed by other tribunals, in particular, where the determination involved conduct of a sexual nature'. Unfortunately, however, the chairman did not spell out more of the tribunal's thinking in this regard.

In the complaint of *Lock v Tipp and Northern*,[52] two clerics deserted their respective spouses in 2008 and set up house together; in so doing, they also deserted their offices as rector and associate rector respectively of the same benefice. No prior notice of their intentions was given by either respondent. Canon Tipp had been in the parish since 1982 and had been rural dean since 1996; the Reverend Elaine Northern was ordained in 2003 and became associate rector in 2007. At the time of the decision, the rector was 63 and the associate rector was 54. Both admitted that their conduct amounted to conduct unbecoming and neglect of duty.

The diocesan bishop had wished to prohibit both respondents for life, arguing, inter alia, that he would not be able in the future to recommend either of them again for ministry. However, each respondent argued for a determinate penalty. In reaching its decision, the tribunal found it difficult to find any mitigating factor other than their apologies and the fact that by admitting their misconduct a contested case had been avoided.[53] It pointed out the hurt and scandal caused both to the respective spouses and to the Church at large; that forgiveness did not involve pretending that something had not happened; that removal from office did not amount to excommunication; and that

> Persons of their standing and intellect have a greater degree of responsibility for their actions than those without these advantages. It is also right that

49 Para 4 and 5 of the determination of penalty delivered on 11 November 2008.
50 The *Church Times* ran a blog or 'news question' regarding this case. According to the issue of 2 January 2009 (no 7607), in answer to the question 'Do you consider that the 12 year prohibition for the Revd Teresa Davies was fair?', 251 of those who replied said 'yes' and 120 said 'no'.
51 Determination delivered on 9 December 2008.
52 Determination delivered on 22 December 2008.
53 Paras 33 and 39 of the determination.

> to say that those of in public positions, whether in the church or elsewhere, must consider those positions when making decisions in their private lives.[54]

The tribunal determined that Canon Tipp had the greater responsibility as he had the cure of souls, was the rural dean and had longer experience as a priest. Both were removed from office. Canon Tipp was prohibited for life;[55] the Reverend Mrs Northern was prohibited for a period of 12 years, as the tribunal took the view that, with pastoral and other support, it should be possible for her to resume the normal duties of her ministry.[56] In so deciding, the tribunal noted that the guidance on penalties from the Clergy Discipline Commission does not cover misconduct involving desertion from office.[57]

These early determinations on penalty raise a number of questions, although each of them followed findings of inappropriate or unbecoming behaviour, as well as findings of neglect of duty in the last complaint. Clearly, in spite of the guidance on penalties already given by the Clergy Discipline Commission, the facts of individual cases mean that it is too early to forecast with any certainty the length of penalty likely to be imposed.[58] More worrying, however, is the anecdotal evidence of surprise in some clerical quarters that matters relating to the 'private lives'[59] of the clergy should be the subject of any complaint under the Clergy Discipline Measure. If this anecdote is accurate,[60] it raises questions as to the training given to ordinands about Christian morality but also in relation to the standards of behaviour expected of the clergy, and the law applicable to them once ordained.

54 Paras 28–33 and 35.

55 The tribunal did not address the fact that, once the period for any appeal has passed, the cleric cannot apply for removal of the prohibition but only for its nullification on the ground that new evidence has been discovered or that the proper legal procedures were not followed: Clergy Discipline Measure 2003, s 26(1); Clergy Discipline Rules 2005, r 97(1); Code of Practice, paras 237 and 238. Contrast the position where there is prohibition for a limited period: Clergy Discipline Measure 2003, s 27; Clergy Discipline Rules 2005, r 98; Code of Practice, paras 245 and 246. According to the *Daily Telegraph*, Canon Tipp commented that 'forgiveness does not seem to be on the agenda and in a lifetime sentence can never be on the agenda': see <http://www.telegraph.co.uk/news/newstopics/religion/4127595/Married-priest-who-ran-off-with-his-deputy-questions-life-ban.html>, accessed 27 January 2009.

56 Presumably this was in spite of the fact that the two respondents intend to marry and that this would be bound to impinge on any future ministry.

57 Para 26 of the determination.

58 There is, of course, no published information as to penalties that may have been imposed by consent.

59 This was apparently in relation to the 'swinging' conduct of the respondent in *Allsop v Davies*.

60 In fact, the author met similar surprise among a few clergy attending a CME session some years ago, before the implementation of the Measure.