

SPECIAL AGENDA IV

DIOCESAN SYNOD MOTIONS

CLERGY DISCIPLINE MEASURE

A note from the Designated Officer

1. The Clergy Discipline Commission, aware of concerns about the practical operation of the Clergy Discipline Measure, prepared a discussion paper in October 2008 setting out its views on five key issues. The paper was distributed by way of consultation to diocesan bishops and the Bishop of Dover, diocesan registrars and secretaries, archdeacons, chairs of diocesan houses of clergy and laity, tribunal chairs, the provincial registrars of tribunals, the Dean of the Arches and Auditor and the Vicars-General. They were invited to take part in the consultation by responding to the paper.
2. Having considered the many replies it received, the Commission has now prepared a response to the consultation and is circulating it to all bishops and others mentioned above.
3. A copy of that response is attached for members of Synod by way of background for the debate on the London Diocesan Synod Motion.

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June 2009

From the Clergy Discipline Commission

To: Diocesan bishops and the Bishop of Dover
Suffragan bishops
Diocesan registrars
Diocesan secretaries
Archdeacons
Chairs of diocesan Houses of Clergy and Laity
Tribunal Chairs
Provincial Registrars of Tribunals
Dean of the Arches and Auditor
Vicars-General of the Provinces of Canterbury and York

June 2009

1. Introduction

The Clergy Discipline Commission, aware of concerns about the practical operation of the Clergy Discipline Measure, prepared a discussion paper in October 2008 setting out its views on five key issues. The paper was distributed by way of consultation to diocesan bishops and the Bishop of Dover, diocesan registrars and secretaries, archdeacons, chairs of diocesan houses of clergy and laity, tribunal chairs, the provincial registrars of tribunals, the Dean of the Arches and Auditor and the Vicars-General. They were invited to take part in the consultation by responding to the paper. The Commission received 66 responses, including many which were submitted on behalf of dioceses after discussions at senior diocesan staff level. The Ecclesiastical Law Association sent a response having considered the paper at its annual meeting, and responses were also received from the union Unite and a few interested individuals who had not been on the original circulation list.

The five key issues and the questions the Commission asked were:

Separation between the bishop's pastoral and disciplinary functions:

- To what extent, if at all, do you consider that concerns over the new procedures are being driven by their unfamiliarity?
- Do you agree that failure to separate a bishop's pastoral and disciplinary functions carries the risks identified by the Commission? If not, why not? If so, how would you propose that those risks be avoided or minimised?

- How would you respond to a lay complainant's perception that the exercise by a bishop of both pastoral and disciplinary responsibilities in connection with a particular formal complaint under the Measure calls the impartiality of the process into question?
- Is there any specific information you would like the Commission to include in a guidance leaflet for respondents?
- What are your views on how pastoral care for clergy facing disciplinary proceedings should be arranged?

Delay:

- Where do you see delay occurring, what do you think causes it and how do you believe it could be mitigated?
- Do you agree with the Commission's views on summary procedures? If not, how would you address the Commission's reservations?

Relationship between CDM and other proceedings:

- Do you see any problems caused by parallel jurisdictions? If so, please describe them and how you believe they might be avoided.

Non-custodial sentences for criminal offences:

- Do you agree with the Commission's view that section 30(1) should be amended to extend to non-custodial sentences for serious offences the option of removal from office and/or prohibition without further proceedings?

Right of appeal against tribunal's findings and penalty:

- Would you support the Commission's suggestion that section 20 should be amended so that appellants are required to obtain permission to appeal? If not, what are your reasons for opposing it?

An analysis of the major points raised in the responses follows, together with the Commission's further views:

2. *Separation between the bishop's pastoral and disciplinary functions*

1. The Commission recognises and acknowledges that the relationship between bishops and priests is one which goes to the heart of their respective ministries. The exercise of discipline by the bishop is part of that relationship, and disciplinary procedures should support it by providing clear guidelines on what is required when a disciplinary situation arises. Disciplinary procedures should provide certainty and consistency, without which justice cannot be done. In this context, failing to separate the bishop's pastoral and disciplinary roles risks undermining the credibility of the disciplinary process and militates against rehabilitation and the rebuilding of relationships after the disciplinary process has run its course. For instance:
 - if a bishop has close personal pastoral involvement in the circumstances of a particular complaint, he lays his decisions in respect of that complaint open to accusations of partiality, and therefore to legal challenge;

- serious misunderstandings can result if a bishop provides personal pastoral care to a respondent, for example over the extent to which matters disclosed to the bishop in the course of a pastoral meeting should properly be taken into account in disciplinary proceedings; and
 - if the perception of a complainant, particularly a layperson, is that his or her complaint has not been dealt with fairly, there is a danger that a sense of grievance may endure long after the original complaint has been decided.
2. The need to separate the pastoral and disciplinary functions (or the need to *distinguish* between those functions) at certain points in the procedures under the Measure is not a requirement deriving from the Measure itself, but from general principles of law. English common law has for many years allowed the decisions of decision-makers, tribunals and courts to be challenged on grounds of actual or apparent bias. The common-law test for apparent bias is whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased. Moreover, in the Human Rights Act 1998, English law has incorporated the principle enshrined in Article 6 of the European Convention on Human Rights, that in the determination of civil rights and obligations, every individual is entitled to a judgment from “*an independent and impartial tribunal established by law*”. Where this applies (and the policy behind the Measure was to ensure that the requirements of the Human Rights Act should be met at every stage of the disciplinary process), the courts have given effect to it using the same common-law test for bias. Against this background, what matters is not whether a bishop believes he is able to distinguish effectively between his pastoral and disciplinary roles, but how the exercise of the pastoral function could be perceived as impacting on the bishop’s disciplinary role.

2.1 *To what extent, if at all, do you consider that concerns over the new procedures are being driven by their unfamiliarity?*

3. Some respondents felt that unfamiliarity with the new procedures was no longer a significant factor now that the Measure had been in force for three years. A majority, however, considered that unfamiliarity did still play a part, but there was a recognition that the introduction of any new procedure would be bound to give rise to concerns. There was an expectation that the Measure would ‘bed down’ in due course.
4. Where there is unfamiliarity it seems to be worst amongst clergy. For example, one response (a diocesan Clergy Chair) referred to “*an alarming level of ignorance amongst clergy as to the nature and purpose of CDM*” and another (on behalf of a diocese) described the problem amongst clergy as “*not one of unfamiliarity but rather total lack of awareness of the Measure*”. A number agreed that the proposed guidance leaflet for respondents would serve a useful purpose in this respect, and a bishop’s chaplain suggested that the guidance leaflet should be routinely given to all clergy during their diocesan training and the procedures explained to them at that stage; this would help clergy to become familiar with the procedures in a relaxed setting rather than attempting to understand them for the first time as respondents to a complaint.

5. A common strand in some responses was a feeling that concerns were being driven not so much by unfamiliarity with the procedures themselves as by anxiety over the shift to *“a system of legal process which is outwith the experience of the Church to date”* (on behalf of a diocese). For example, an archdeacon commented that: *“once ‘the law’ becomes involved the normal patterns for pastoral practice are inevitably suspended. The Church is unfamiliar with this and therefore we are quickly catching up”*. But there was an acknowledgment in some responses, for example from the Lay Chair of a diocesan synod, that there was *“a necessity for clear processes and procedure in order to benefit everyone concerned”*.
6. The area which causes the most concern is the requirement for the visible distinction between the bishop’s pastoral and disciplinary functions. Some responses referred to unfamiliarity with the Measure as the cause for these concerns and the reason why the availability of pastoral care and support for clergy was often misunderstood and misrepresented. A Chancellor commented *“I have recently heard it said that the Measure etc even prohibits an Area Dean from providing pastoral care for clergy in his own deanery”*, which of course, it does not. Nonetheless, the Commission detects that, certainly at senior diocesan level, there is a growing recognition that suitable care and support can in practice be provided to clergy on behalf of the bishop in the exercise of *episcopate* without compromising his disciplinary role.
7. **The Commission believes that as the Measure continues to ‘bed down’ and become more familiar to all concerned, there will in time be less concern and anxiety about it.** Explanatory guidance aimed specifically at clergy would help this process, and the Commission has recently produced such guidance and is encouraging dioceses to distribute it to all clergy.
8. **As the Measure has bedded down the Commission has become aware that parts of the Code of Practice have sometimes been interpreted in ways that were not intended or envisaged with regard to the practical way in which the bishop’s disciplinary and pastoral functions should be kept distinct. The Commission recognises that some revision to the Code is therefore needed to provide clearer guidance on this.**

2.2(i) Do you agree that failure to separate a bishop’s pastoral and disciplinary functions carries the risks identified by the Commission? If not, why not?

9. As noted above, the need to distinguish between the bishop’s pastoral and disciplinary functions was the root cause of most concerns expressed over the new procedures. The Commission had anticipated that this would be the case which is why the issue was central to the consultation exercise as a whole. One diocesan bishop put the concern particularly starkly: *“The separation of the Diocesan Bishop’s disciplinary and pastoral functions remains a deep concern across the diocese – a concern most decidedly shared by me. Nevertheless, that concept is clearly at the heart of the CDM”*, and *“the overwhelming view in the Diocese of [-----] is of the utmost regret about the way in which the CDM drives a ‘coach and horses’ through the traditionally combined pastoral and disciplinary role that,*

under God, the Diocesan Bishops of the Church of England have for so long exercised.” Nonetheless, the Bishop and his senior staff acknowledged that the Measure is likely to remain integral to the Church’s disciplinary procedures.

10. A diocesan bishop commented: *“I feel that it is inherently wrong that, at the very point when a priest needs the support of his Bishop, the Bishop has to withdraw from offering pastoral care because of his disciplinary functions....it can be seen by those facing disciplinary proceedings under the Measure, that, rather than the bishop providing pastoral care, he is being required to pass his pastoral responsibility on to others..”* He believed that: *“bishops with their wide experience of ministry ought to be trusted to identify the boundaries, and, as with the previous legislation, exercise both parts of their ministry....I continue to feel that pastoral care is rightly provided by the bishop himself, in his role as chief pastor and Father in God.”*
11. A clear majority of responses however agreed with the Commission that there are risks if the bishop’s disciplinary and pastoral roles are not kept distinct. The majority accepted that it was necessary to distinguish between the roles, and that in practice this could be achieved.
12. The theology behind the bishop’s disciplinary and pastoral roles was referred to in a number of submissions, and there was a consensus that distinguishing between those two roles was not inconsistent with theology. Thus one diocesan bishop wrote: *My own starting point with this issue is for us as a Church to try to begin with our understanding of God Himself. He is the one true pastor and he is also our judge to whom we are all accountable...He is who He is. He is who He is consistently, totally, all the time. This means that who God is as pastor and shepherd is who He also is as judge. The one is part of the other and consistent with the other....The consequence of this is that our vision, which comes from God Himself for his Church, is that pastoral care and discipline (which is after all growing in discipleship) are, in God, a part of one and the same character of his love....The fact that what we choose to call pastoral care and discipline are held together within the unity of who God is, at least gives an aspiration and vision, but it does not necessarily of itself mean that anyone of us as a human being can aspire to that same unity. It is worth establishing, though, that the vision itself is a good and right one. Having said all that, I do acknowledge that appearances matter in terms of common law and justice and that Bishops not only need to act justly but be seen to do so.”*
13. Another bishop wrote: *“The idea of someone being both shepherd and judge is rooted in the ministry of Jesus, and is therefore an appropriate task for a bishop.....The full and clear way in which the October [consultation] letter communicates the legal background behind the necessity to separate these roles is helpful...Even though the bishop cannot be the pastoral agent in CDM cases, he is responsible for ensuring that all parties have pastoral care. Those who exercise this care do so, and should be known to do so, on his behalf. The whole disciplinary process should be within a pastoral context. All of our respondents in this diocese to date have felt that they have been dealt with fairly and lovingly – even those ultimately deposed and prohibited.”*

14. This theme that the bishop must ensure that all parties have pastoral care was taken up by a diocesan bishop on behalf of all senior staff in his diocese: *“I have always maintained that in theory there can and should be no separation between pastoral and disciplinary functions. The bishop’s exercise of discipline is part of his pastoral care not only for individuals but for the Church as a whole. In the God-head there is no separation between God’s justice and his mercy. Nevertheless I am entirely convinced that it is right in particular cases for the bishop to use his (in my case) area bishops as those through whom compassion and friendship is exercised, and with them the rural dean concerned...But it is important that those who are looking at the working of the Measure recognize the theological importance of the bishop continuing to hold the pastoral and juridical functions absolutely together and of recognizing that theologically they cannot be separated even if in practice, in a particular case and with a particular priest or complainant in mind, the bishop may wish to assign different functions to different people within his staff or Chapter.”*
15. Another diocesan bishop “whole heartedly” agreed with the Commission that distinguishing between the two functions is vital in the true interests of justice. A second noted *“the massive cultural shift and great improvement in our procedures”* and believed *“the key issue is that of Bishops learning better professional practice, and skills of appropriate delegation”*. A third commented: *“I have never been particularly anxious about this business of the separation between the Bishop’s pastoral and disciplinary functions. The common sense approach in [the Commission’s consultation] paper is the one that I have assumed to be the case.”*
16. A submission from one diocese agreed on the need to distinguish between the bishop’s roles: *“We agree that failure to separate a Bishop’s pastoral and disciplinary functions does carry the risks identified by the Commission.... We believe that a Bishop should not under any circumstances attempt to provide both pastoral care and carry out disciplinary responsibilities in connection with any formal complaint under the Measure.”* Another diocese indicated that *“Whilst regretting the need to make some degree of separation we agree that failure to do so does carry the risks identified by the Commission”*. The bishops of another diocese wrote: *“We agree with the analysis contained in the [consultation] paper concerning the separation of a bishop’s pastoral and disciplinary functions and the need for clarity for respondents.”*
17. **The Commission’s view is that it is helpful and important to keep in mind that a bishop is responsible for the pastoral care not just of his clergy, but of the whole people of God within his diocese or area, laity as well as clergy. It is against this background that the need for the diocesan bishop to exercise through others pastoral care for respondents to disciplinary complaints should be seen. Concentrating on the concept of the bishop as *pastor parvorum* neglects the bishop’s pastoral care for the laity of the parishes of his diocese. The bishop as chief pastor of the diocese has a pastoral care – the ‘cure of souls’ – for the parish as well as the priest, and must take care not to be seen to take sides.** A suffragan bishop referred to it in this way: *“the relationship which exists in a diocese is nearly always three not two dimensional; the questions concern the priest, the parish or benefice, and the bishop”*. This

was taken up in the response from a different diocese, which noted that “*according to the Ordinal, the Bishop has both pastoral and disciplinary functions and discipline was part of the pastoral function. The Bishop’s pastoral responsibility was to the whole church.*”

18. It should be noted that it is not just the bishop’s pastoral role that is performed by others on his behalf, but that there is also delegation of the disciplinary function when a bishop directs that a complaint is to be formally investigated. At the end of a formal investigation it is the President of Tribunals who decides if the complaint should be referred to a tribunal, and if a tribunal is convened it is known as the ‘*bishop’s disciplinary tribunal*’ because it carries out its work on his behalf.

2.2(ii) How would you propose to avoid or minimise the risks identified by the Commission?

19. In the responses there were only three alternative proposals put forward to the Commission’s guidance about distinguishing between the bishop’s roles.
20. First, one diocesan bishop believed that bishops could be trusted to perform both roles. This also seemed to be the view of the diocesan synod of a different diocese which wished to restore to the bishop personally the pastoral role during disciplinary proceedings. The Commission’s view remains, however, that the relevant issue is not whether the bishop can be trusted, but whether he is seen to be impartial; the bishop’s responsibility for pastoral care can be appropriately and properly met through others on his behalf.
21. Second, one diocesan bishop wondered if the diocesan chancellor could perform the disciplinary role (a possibility also raised by a parish priest). The Commission believes this would be an inappropriate retrograde step, and would not be welcomed by the majority of clergy.
22. Third, a small minority of responses recognised the need to distinguish between the bishop’s roles but suggested that the disciplinary rather than the pastoral function should normally be delegated, preferably to a bishop from outside the diocese. The Commission rejects this suggestion for two reasons. First, since the bishop as Father in God has inherent responsibilities for his diocese, the Commission believes it would be inappropriate to delegate routinely the disciplinary function outside the diocese. Second, it does not take account of the fact that the bishop’s cure of souls is for both clergy and laity alike. The bishop’s position could easily be compromised if he attempted to provide pastoral care personally to both sides in a complaint, and he could be open to criticism if he chose one party rather than the other.

2.3 How would you respond to a lay complainant’s perception that the exercise by a bishop of both pastoral and disciplinary responsibilities in connection with a particular formal complaint under the Measure calls the impartiality of the process into question?

23. The responses to this were closely linked to the way in which the previous question was answered. Generally it was accepted that a complainant could form such a perception where there was no distinction between the two functions, but it was also pointed out empirically that so far there had been no criticisms relating to a bishop's impartiality. An archdeacon provided a practical insight: *"Many laity are far more familiar with the idea of delegation than we are. To visit someone as archdeacon and tell them that I am seeing them because the bishop needs to be out of the system for the moment is entirely acceptable. In addition they are quite happy with the Bishop designating someone else to care for the priest."*
24. One diocesan bishop was not convinced about the efficacy of distinguishing between the bishop's pastoral and disciplinary functions: *"Any bishop has a close pastoral relationship with clergy anyway, so I fail to see how apparent partiality can be avoided."* However, he believes that the various appeal procedures and reviews provide some impartiality, and others responded by stating that there are sufficient safeguards in the system through appeals to meet any lay complainant's perceptions about lack of impartiality.
25. Nonetheless, there may always be a risk that the impartiality of the process could be called into question. The explanation for this, in the words of a diocesan secretary, is because *"the average lay person holds a view that professional bodies tend to 'close ranks' when dealing with matters of professional misconduct. Bodies such as the General Medical Council, the Bar [Council], and Police Authorities are often criticised in the media for not being independent enough when considering alleged failures amongst their colleagues"*. One diocesan bishop was even more direct *"The terrible truth is that many laity perceive clergy as being 'chummy and collusive; members of the same club'. Perceptions are indeed important and can be dangerous."*
- 26. The Commission is convinced that all reasonable steps to minimise the risk of misconceptions about the impartiality of the process should be taken; keeping a clear distinction between the bishop's pastoral and disciplinary roles is an essential part of that.**

2.4 Is there any specific information you would like the Commission to include in a guidance leaflet for respondents?

27. There was widespread agreement that it would be helpful for the proposed guidance leaflet for respondents to include the following:
- a summary of the various stages of the complaint procedures, with timescales;
 - a statement of the Commission's policy on distinguishing between the bishop's pastoral and disciplinary functions and the reasons for that distinction, emphasising that this does not mean the bishop is unconcerned about the respondent's circumstances but that it is important to satisfy the requirement for impartiality and fairness in order to protect the integrity of the disciplinary process from challenge;

- information on the bishop’s responsibility to ensure pastoral care is made available to the respondent and the respondent’s family, and how it will be provided;
 - an explanation of the role of the archdeacon as complainant;
 - guidance on obtaining legal advice;
 - details of the availability of Legal Aid and how to apply for it.
28. It was also suggested that guidance should be given about whether and to what extent churchwardens and fellow clergy in the parish would be informed by the diocese about the complaint. A diocesan bishop hoped that the guidance leaflet would include an explanation of the role of the pastor, so that it can be understood that that person is not an advocate or interlocutor. The Registrar of Tribunals for Canterbury recommended that there should be information about suspensions. One response asked that respondents be reminded in the leaflet that they can seek representation and advice from their union.
29. **The Commission has now produced a leaflet for respondents which can be adapted to individual diocesan circumstances, providing local information. The Commission accepts that the leaflet should convey the message that presentation of a complaint does not mean that the respondent is assumed to be in the wrong until shown otherwise, but on the contrary, that the onus is on the complainant to prove misconduct under the Measure, and that the respondent will continue to receive the support of the bishop, his staff and the diocese.**
30. The Commission intends to look at the standard letters of notification and acknowledgement set out in the Code of Practice, to see if improvements can be made. In particular the Commission will consider the current position whereby a respondent is informed by the registrar that a complaint has been made, and whether it would be more appropriate for the initial notification to come from the bishop.

2.5 What are your views on how pastoral care for clergy facing disciplinary proceedings should be arranged?

31. Various helpful suggestions were made in response to this question. Overall, there was broad support for the Commission’s position that pastoral care can properly be exercised by others on the bishop’s behalf. A typical response came from an archdeacon: *“It is important to emphasise that persons appointed to exercise pastoral care are doing it on behalf of the bishop. We need to find a way of communicating this so that this point is heard...”* **The Commission agrees that it is crucial that whatever pastoral care is provided to respondents and their families, the fact that it is being provided by the bishop, even though he is not able to exercise it personally, needs to be made absolutely clear.**
32. A very wide range of views was expressed as to how pastoral care and support could best be provided in practice. Suffragan bishops, honorary assistant bishops, archdeacons, rural deans, other senior clergy and lay people with appropriate experience, whether from the same or another diocese, were all thought to be

suiting in principle to providing pastoral care, depending on the exact circumstances of a complaint. Local flexibility was seen to be important, with each case needing to be dealt with on its own merits, and in the light of the resources of the particular diocese. A diocesan bishop embraced the idea of flexibility: *“We have had only two cases to process under the Measure, and whereas in one case it was clearly appropriate to use someone from outside the Bishop’s Staff group to provide pastoral support to the respondent, in the other case I formed the opinion that the Archdeacon would be the best person to act in this capacity, and that went well. So operating a mixed economy makes sense.”* It was appreciated in many other responses that although for some cases it might be appropriate for senior staff to provide pastoral care, in others it might not for the reasons set out in the Commission’s consultation paper.

33. Responses which favoured suffragan or area bishops delivering the appropriate pastoral care and support did so for reasons such as *“the whole Church of England system implies pastoral care by bishops”* (a diocesan bishop); *“the Area Bishop as a matter of course exercises more day to day pastoral care of the clergy in the Area, and can be seen to be doing so”* (an archdeacon); *“clergy can feel very isolated and indeed insecure during CDM proceedings”* (a diocesan bishop); *“so that there is a real sense of ongoing care within the ‘diocesan family’* (Chair of the House of Clergy of a diocesan synod).
34. A number of responses suggested that retired senior clergy and honorary assistant bishops could be called upon to provide care. A diocesan bishop wrote: *“There is one other category of person that I feel can offer the sort of senior support that would prevent a feeling of isolation and that is where there are honorary assistant bishops within the diocese. I of course realise that not every diocese has the benefit of retired bishops who are still active in ministry but where that is the case, they can be people who give both a sense of episcopal care but are wholly independent of the senior staff.”* Against this was the risk noted by a diocesan bishop that respondents might believe they were not getting good support just when they needed it most if they perceive retired bishops and archdeacons to be ‘second best’ and out of touch with current practice.
35. The need for complete confidentiality in pastoral care was stressed in various responses, as was the fact that those nominated should have a full understanding of CDM procedures and of the context in which they would be providing care and support. Appropriate training was felt likely to be key in this respect. The point was made that respondents should be consulted about who would be suitable to provide care and support, or be given a choice, because it was important that the person concerned should be acceptable, and that respondents should be free, if they so wished, to make their own pastoral care arrangements or indeed to elect to have no formal arrangements at all.
36. **Having considered all the different contributions the Commission’s view remains unchanged from its consultation paper, namely that in practice it should be up to the bishop himself in the context of the resources of his own diocese to use his judgment when deciding in any given case whom to offer as a pastoral advisor, and that the cleric concerned is not obliged to accept that person.** In some circumstances it may be appropriate to offer a suffragan bishop

or archdeacon, provided that he or she has not been previously involved in the complaint or in the problems behind the complaint. It is, however, important that all dioceses should plan ahead, so that when the bishop needs to make an appointment for the offer of pastoral care and support, there are in place suitable and experienced people from the episcopate, clergy and laity who are familiar with the disciplinary process and who are ready willing and able to help respondents pastorally. A reciprocal arrangement with neighbouring dioceses may prove useful, especially in the smaller dioceses. The Commission therefore welcomes the proposal from the House of Bishops that pastoral care for a respondent to a complaint should be provided by Pastors on behalf of the diocesan bishop, who would be responsible for the Pastors' appointment and training.

3. *Delay in proceedings*

3.1 *Where do you see delay occurring, what do you think causes it and how do you believe it could be mitigated?*

37. For cases disposed of at diocesan level by the bishop, the majority of responses indicated that there were no major delays, and that no significant changes in the procedures were called for. A minority view was that there were delays, that they were inevitable, and that it was unrealistic to expect the current time limits to be strictly adhered to because of the frequent unavailability of the bishop or one of the parties at a crucial time. One response, on the other hand, suggested that the 28 day period allowed for the preliminary scrutiny report was too long, since the registrar was only required to advise in respect of just two questions, and there were clear pastoral reasons for establishing as quickly as possible whether there was a case for the clergy member to answer. Others observed that time limits were sometimes treated as the starting point for work to be done in relation to a complaint, rather than a deadline to be complied with.

38. For cases that are dealt with by the bishop, the Commission believes that there is insufficient evidence to call for any changes to the present time limits and procedures.

39. Cases that are investigated by the Designated Officer and then subsequently referred to a tribunal for hearing take significantly longer to determine. A majority of responses recognised that if complaints were to be dealt with fairly and thoroughly then proper procedures must be followed, and this means that there would inevitably be some delay before a complaint was resolved. Many responses acknowledged that there was no simple way of preventing delay, but all cases needed to be monitored and appropriate case management directions given to ensure delays were kept to a minimum once they were referred to a tribunal. Some of those who had been involved in cases dealt with by tribunals commented on the delays that could be caused by uncooperative respondents. A diocesan bishop and a chancellor commented on the same case involving a particularly difficult respondent. Another Chancellor was conscious that the case he chaired took longer to complete than it should because of the approach taken by the respondent, but he warned that if the case had been driven on more quickly it "*would have led to a very messy hearing and even more pastoral disquiet*"; he

believed “*it is difficult to legislate for each individual case*”. The worst delay in a case so far was attributable to an unfortunate combination of successive causes which are unlikely to reoccur.

40. Suggestions for reducing delay included giving fixed dates by which the parties to complaints must adhere, fixing the date of the hearing early in the proceedings so that the parties must work towards that, fixing a provisional date for the disposal hearing at the same time the trial hearing was fixed in case the tribunal needed to reconvene to consider a penalty, reducing from five to three the number of members of the tribunal hearing a case, and appointing two additional members of a tribunal in reserve, one lay and one ordained, in case there were difficulties in fixing a date for a hearing.
41. **The Commission believes that the most effective way to eliminate avoidable delay is for the Registrars of Tribunals and Chairs to use their case management powers and take a firm line against parties who attempt to delay the progress of tribunal proceedings unreasonably. The Commission recognises that no two cases are the same, and believes therefore that timetables for each case to come to trial should be set by the individual tribunal in the light of the issues involved.** It would be unrealistic and self-defeating to impose uniform case management directions. Nonetheless, it would encourage tribunals to fix dates for the final hearing as soon as reasonably practicable. The Commission also accepts the benefits of appointing in reserve two additional members of tribunals in case there are difficulties in finding dates for hearings that were suitable for all the other five. It does not favour a reduction from five to three in the membership of the tribunal; having a total of five members reflects the serious nature of the proceedings where a respondent’s professional livelihood is at stake. Furthermore, experience so far indicates that the current make-up of tribunals achieves the right balance between the Chair, the lay members and the clergy members. When the draft Clergy Discipline Measure was before the General Synod at Revision Stage Synod rejected a proposed three member tribunal in favour of five members.

3.2 Do you agree with the Commission’s views on summary procedures? If not, how would you address the Commission’s reservations?

42. The vast majority of responses agreed that there should be no summary or small claims procedure for the following reasons identified by the Commission:
- there is already a relatively quick route for bishops to dismiss unmeritorious complaints under section 11 of the Measure;
 - summary procedures may not necessarily be fair or reasonable where the imposition of a penalty is being considered;
 - a summary procedure might encourage formal complaints to be made about minor matters, which are better handled without recourse to the Measure;
 - a separate procedure would introduce further potential for delay, as disputes could easily arise over which procedure was most appropriate for a particular complaint. Such disputes would have to be decided in some way and possibly be subject to a right of appeal.

43. The Commission can understand the reasons why some advocated the introduction of a summary procedure for cases of misconduct that merited a rebuke or a conditional discharge. **Nonetheless, the Commission remains of the view that summary procedures would not be appropriate for resolving factual disputes, and should be rejected.** Disputed issues of fact are normally difficult to resolve without holding oral hearings, and if such hearings take place, then the procedures become more complicated and expensive, and cease to be summary.
44. There were some suggestions that a small claims procedure would be useful if based on informal dispute resolution procedures. One respondent was in favour of extending informal dispute resolution to cover all complaints, so that a complaint would only proceed to the formal stages under the Measure once there had been an attempt to resolve matters in a non-adversarial way. An archdeacon suggested that archdeacons in all cases should be invited to see if they could resolve a complaint informally before the formal procedures of the Measure were invoked, and a diocesan bishop also wished to see a mediation or conciliation exercise undertaken in all cases before the bishop had to make any determination under the Measure – *“that would enable the Bishop to ensure that he is able, through others, to fulfil his pastoral role in relation to priest and people before being locked into a legal procedure.”*
45. **The Commission wishes to encourage attempts at conciliation, but believes it would not be appropriate to force parties to engage in alternative dispute resolution procedures.** It is, of course, always open to a bishop to encourage the parties to conciliate outside the terms of the Measure if they are willing, and in any event there is an opportunity after the bishop has decided that the complaint is of sufficient substance for the parties at that stage in appropriate cases to explore conciliation within the formal structures of the Measure.

4. Relationship between CDM and other proceedings

4.1 Do you see any problems caused by parallel jurisdictions? If so, please describe them and how you believe they might be avoided.

46. Many respondents saw no problems in this area at all. Of those who did, the major issue mentioned was of delay where the substance of a complaint under the CDM could not be resolved because of related secular proceedings; however, there was general acceptance that criminal proceedings in particular should always take priority. The Commission accepts that if an incumbent is suspended pending criminal proceedings, any delay until those proceedings are concluded can potentially cause serious difficulties for parishes, but it is difficult to see how that can be avoided.
47. The only other clear point of concern in this area was the possible confusion over the relationship between proceedings under the Measure and the proposed capability procedure to be introduced under the Ecclesiastical Offices (Terms of Service) Measure. **The Commission proposes to explore this issue further with the Terms of Service Implementation Group. In earlier preliminary**

discussions that the Commission had with the Clergy Terms of Service Review Group, a need for flexibility was identified to ensure that cases of neglect or inefficiency were dealt with under the most appropriate procedure, so that if necessary a case could switch track from capability to discipline, or vice versa. A starting point to differentiate between the two procedures could be whether there was blameworthy conduct. If the person concerned were not performing to the required professional standard but there was no blameworthy conduct, then capability proceedings could be more appropriate; where there was an element of blameworthiness (for example because of wilful or deliberate failure) then disciplinary proceedings could be considered to be more appropriate.

48. A small number of responses made observations on disciplinary action being taken under section 30 of the Measure following a matrimonial decree absolute against the priest. They pointed out that bishops should be made aware that it can be dangerous to attribute blame in a matrimonial breakdown, and that respondents to petitions may be advised by their legal advisors not to defend in order to speed up the process of divorce and to keep down legal costs. The Commission is well aware of this practice, and draws attention to paragraph 166 of the Code of Practice which deals with the problem.

5. *Non-custodial sentences for criminal offences*

5.1 *Do you agree with the Commission's view that section 30(1) should be amended to extend to non-custodial sentences for serious offences the option of removal from office and/or prohibition without further proceedings?*

49. A very large majority of the responses welcomed this proposal. Some of those in favour, however, emphasised that it would be important to identify the type of criminal offence which would be regarded as serious enough to merit disciplinary action under section 30(1). Only five responses were opposed to an extension of section 30(1), principally because there were fears there would be certain offences for which imprisonment could theoretically be imposed but which in practice would not merit removal from office or prohibition.

50. In some answers, both in favour and against, the Commission detects a degree of misapprehension of the basis upon which section 30(1) operates. At present, where an offence is committed and a sentence of imprisonment imposed (whether or not suspended) it is not obligatory for the bishop to remove the priest from office or impose a penalty of prohibition. As paragraph 159 of the Code of Practice makes clear: "*Removal from office or prohibition will not automatically result from a sentence of imprisonment. The bishop retains a discretion at all times, but must first of all consult the President of Tribunals to ascertain his views about the seriousness of the criminal charge and the matters relating to it.*" Furthermore, the bishop must take into account any written representations from the priest and should meet the priest if requested to do so with the priest's advisor present. All relevant circumstances must be taken into account by the bishop, including the seriousness of the offence, when deciding whether to use his powers under section 30(1).

51. The Commission is aware that a priest convicted of a criminal offence will usually have no previous convictions and under current penal policies, even when convicted of serious offences, may avoid a sentence of imprisonment. **The Commission believes that for convictions of all serious offences the bishop should have the option of taking action under section 30(1).** It recognises that there will be differing views about what would be regarded as ‘serious’ for these purposes. One possibility would be to widen sections 30(1) and 31(1) to include all offences except those that can be tried only in the Magistrates Court.

6. Right of appeal against tribunal’s findings and penalty

6.1 Would you support the Commission’s suggestion that section 20 should be amended so that appellants are required to obtain permission to appeal? If not, what are your reasons for opposing it?

52. The great majority of responses were in favour of restricting the automatic right of appeal for the reasons put forward by the Commission in its consultation paper. Two responses, although in favour of the general proposal, cautioned against an application for permission to appeal being determined by only one person, namely the Dean of the Arches and Auditor; an alternative suggestion was that an application for permission should be heard by two people, and permission should be given if either person considered there were merits in the proposed appeal.

53. There were only a few responses which were opposed to amending section 20. The reasons provided were that it was too early in the life of the Measure to make such a decision, particularly since there had so far only been one appeal; that it would be an unnecessary or bureaucratic complication especially when the number of appeals was expected to be small; and that an absolute right to appeal was an important safeguard against injustice.

54. **The Commission is satisfied that it would be desirable from the point of view of both the protection of the church’s resources and the interests of justice for there to be a requirement that a party must first obtain permission to appeal before a full hearing could be heard.** Where a proposed appeal is without merit it would result in its being prevented expeditiously and efficiently from proceeding further. If permission to appeal were granted, rather than being an unnecessary extra bureaucratic step, the application process would lead parties at an early stage to identify the real issues in the appeal and help to ensure that the appeal is dealt with more efficiently.

55. **The Commission is sympathetic to the suggestion that an application to appeal should be considered by two people, one of whom would be the Dean of the Arches and Auditor, and that permission should be granted if either member of the court considers there are reasonable grounds to appeal.** It suggests that the second judge of the court should be an ordained member in the case of an application for permission to appeal by the Designated Officer, and a lay member for an application by a respondent member of the clergy.

56. Some responses, both those in favour of limiting the right to appeal and those against, suggested that the appellate court for a full hearing could be reduced to three members comprising the Dean of the Arches or Auditor, and a member of the laity and a member of the clergy. The Commission is opposed to this – it does not regard it as appropriate or desirable that a court of three could by a majority overturn a decision of a tribunal of five members, especially if the tribunal had been unanimous.

7. *Miscellaneous points raised in response to the consultation*

57. A number of additional points were raised in responses to the Commission's consultation. They included:

- the need to emphasise to complainants that proceedings under the Measure were disciplinary, and should therefore only be taken where there was misconduct that was serious: the Measure should not be used as a consumer forum to air grievances;
- it would be advisable if “complaints” were known by another name or term, to reflect their gravity and the possible serious consequences for the respondent;
- a separate grievance procedure was needed so that minor disputes could be resolved outside a disciplinary context;
- Complaints against uncooperative respondents could be stalemated when they denied misconduct knowing that it was not sufficiently serious to be referred to a tribunal. One bishop described this as a “black hole”. There were proposals that a limited range of penalties in these circumstances, such as rebuke or conditional discharge, should be available to the bishop if he were satisfied that there had been misconduct, with a right of appeal for the respondent to the President of Tribunals or to a tribunal Chair. Alternatively, it was suggested that such complaints if not proceeded with under the Measure could lead to an official reproof or warning or to a note being recorded on the respondent's file for a specified time;
- conciliation or mediation should be used as soon as difficulties arise, and before a formal complaint was made under the Measure: problems could then be resolved satisfactorily without having to bring a complaint;
- the limitation period of one year for making a complaint was too short, especially for cases involving children;
- the limitation period of two years for imposing a penalty under section 30(1) of the Measure was too short;
- there should be a nationally trained team of complaints support officers;
- in cases involving children, the bishop should have power to suspend a priest before an arrest is made, and before a complaint was made: the trigger for such a power would be when the bishop was informed by the police or social services that they were investigating the conduct of the priest;
- only the summary of a registrar's preliminary scrutiny report should be served on the complainant, so that confidential matters could not be leaked to the local press;

- the bishop, not the registrar, should notify a respondent that a complaint had been made – at present, the procedure was too cold and the respondent could be made to feel isolated from the bishop at a time that could be quite distressing or worrying;
- stipends should be stopped immediately if clergy were imprisoned;
- a conditional discharge imposed by a tribunal should be for a period of up to five years, not two, thereby bringing it more into line with a conditional deferment under section 14 of the Measure;
- the bishop should be entitled in every case to send submissions on penalty to the bishop's disciplinary tribunal;
- the bishop should receive in advance of the public pronouncement a copy of the tribunal's determination;
- the Clergy Discipline Rules should be amended so that a bishop who was not able to be present at a hearing should have the right to nominate someone to attend on his behalf;
- there should be more monitoring by the Commission of disciplinary outcomes, to check on consistency between dioceses.

The Commission will be giving further consideration to all these suggestions as it goes about its work.

8.	<i>Summary of the Commission's views</i>	<u>paragraph</u>
(i)	The Commission believes that as the Measure continues to 'bed down' and become more familiar to all concerned, there will in time be less concern and anxiety about it.	7
(ii)	The Commission has become aware that parts of the Code of Practice have sometimes been interpreted in ways that were not intended or envisaged with regard to the practical way in which the bishop's disciplinary and pastoral functions should be kept distinct. The Commission recognises that some revision to the Code is therefore needed to provide clearer guidance on this.	8
(iii)	The Commission's view is that it is helpful and important to keep in mind that a bishop is responsible for the pastoral care not just of his clergy, but of the whole people of God within his diocese or area, laity as well as clergy. It is against this background that the need for the diocesan bishop to exercise through others pastoral care for respondents to disciplinary complaints should be seen. Concentrating on the concept of the bishop as <i>pastor parvorum</i> neglects the bishop's pastoral care for the laity of the parishes of his diocese. The bishop as chief pastor of the diocese has a pastoral care – the 'cure of souls' – for the parish as well as the priest, and must take care not to be seen to take sides.	17
(iv)	It is crucial that whatever pastoral care is provided to respondents and their families, the fact that it is being provided <u>by the bishop</u> , even though he is not able to exercise it personally, needs to be made absolutely clear.	31
(v)	Having considered all the different contributions the Commission's view remains unchanged from its consultation paper, namely that in practice it should be up to the bishop himself in the context of the resources of his own diocese to use his judgment when deciding in any given case whom to offer as a pastoral advisor, and that the cleric concerned is not obliged to accept that person.	36
(vi)	The Commission is convinced that all reasonable steps should be taken to minimise the risk of misconceptions about the impartiality of the process; keeping a clear distinction between the bishop's pastoral and disciplinary roles is an essential part of that.	26
(vii)	The Commission has produced a leaflet for respondents which can be adapted to individual diocesan circumstances, providing local information. The Commission accepts that the leaflet should convey the message that presentation of a complaint does not mean that the respondent is assumed to be in the wrong until shown otherwise, but on the contrary, that the onus is on the complainant to prove misconduct under the Measure, and that the respondent	29

will continue to receive the support of the bishop, his staff and the diocese.

- (viii) For cases that are dealt with by the bishop, the Commission believes that there is insufficient evidence to call for any changes to the present time limits and procedures. 38
- (ix) The Commission believes that the most effective way to eliminate avoidable delay in cases that are referred to a tribunal is for the Registrars of Tribunals and Chairs to use their case management powers and take a firm line against parties who attempt to delay the progress of the proceedings unreasonably. The Commission recognises that no two cases are the same, and believes therefore that timetables for each case to come to trial should be set by the individual tribunal in the light of the issues involved. 41
- (x) The Commission is firmly of the view that summary procedures would not be appropriate for resolving factual disputes, and should be rejected. 43
- (xi) The Commission wishes to encourage attempts at conciliation, but believes it would not be appropriate to force parties to engage in alternative dispute resolution procedures. 45
- (xii) The Commission proposes to explore further with the Terms of Service Implementation Group the relationship between proceedings under the Measure and the proposed capability procedure to be introduced under the Ecclesiastical Offices (Terms of Service) Measure. In earlier preliminary discussions that the Commission had with the Clergy Terms of Service Review Group, a need for flexibility was identified to ensure that cases of neglect or inefficiency were dealt with under the most appropriate procedure, so that if necessary a case could switch track from capability to discipline, or vice versa. 47
- (xiii) The Commission believes that for all serious offences the bishop should have the option of taking action under section 30(1) of the Clergy Discipline Measure. 51
- (xiv) The Commission is satisfied that it would be desirable from the point of view of both the protection of the church's resources and the interests of justice for there to be a requirement that a party must first obtain permission to appeal before a full hearing could heard. The Commission is sympathetic to the suggestion that an application to appeal should be considered by two people, one of whom would be the Dean of the Arches and Auditor, and that permission should be granted if either member of the court considers there are reasonable grounds to appeal. 54 & 55