RESPONSE TO 'UNDER AUTHORITY'

Report of Working Party on Clergy Discipline and the Ecclesiastical Courts

Introduction

1.1 This paper is produced by the Ecclesiastical Law Society Working Party on Clergy Discipline and Ecclesiastical Courts ('the Working Party') in response to the report of the General Synod Working Party Reviewing Clergy Discipline and the Working of the Ecclesiastical Courts, 'Under Authority' (GS 1217) ('the Report').

1.2 This paper is intended to assist the follow-up group charged with preparing draft legislation by flagging up points meriting particular attention. References in parentheses are to paragraph numbers in the Report.

Positive Elements of the Report

2.1 The Working Party welcomes the Report and commends Canon Alan Hawker and his colleagues upon the thoroughness of their preparation, the detail of their discussion and the vision and integrity of their proposals. In particular, the following aspects are warmly welcomed:

(i) that the operation of clergy discipline is not to be governed by economic criteria and the saving of costs (10.3);
(ii) that, as a general rule, proceedings should be heard in private (5.34, 11.8);
(iii) that the recommendations are based upon a full discussion of the Scriptures and, to a slightly lesser extent, appropriate ecclesiology;
(iv) that procedures for dealing with minor complaints are to be put on a more formal footing (8.23, Appendix C);
(v) that the list of ecclesiastical offences is to be enlarged and clarified (6.15, 11.13);
(vi) that offences involving doctrine, ritual and ceremonial ought to be dealt with in identical manner to other offences (6.18, 7.25);
(vii) that the tribunal is to be collegiate in its decision-making, contrary to previous practice based on the judge and jury model (7.13);
(viii) that the mystique of the 'caution list' should be removed, its existence properly acknowledged and its operation discussed candidly and openly. Proposals for its regulation are to be welcomed;
(ix) that the same system of clergy discipline is to apply to both beneficed and unbeneficed clergy, whether in office or retired, and that equal rights are to be extended to licensed clergy (5.19).

Conceptual Aspects

3.1 The Report evidences some muddled thinking in relation to the nature and functioning of clergy discipline procedures which has led to some infelicity of expression and to recommendations founded upon misunderstandings.

3.2 For example, Chapter 3, whilst quite properly referring to rules of natural justice which originate in part from the development of a Christian understanding of justice, moves almost imperceptibly from a discussion of such general principles into a recitation of points of substantive positive law which have grown up more recently in the common law tradition and practice. This error derives from assuming too close an analogy between the criminal courts and the consistory courts. The systems are in essence different.

3.3 Equally, whilst it is true that no one shall be a judge in his own case (3.34), one must take care to note that the bishop in promoting his office and in adjudicating

is merely fulfilling his historical and ecclesiological functions as representative of the whole Church within his diocese. That the promotion of the complaint and the determination of the same is conducted by different individuals on the bishop's behalf is sufficient to ensure scrupulous fairness. Rather than pander to the myth of the bishop being judge and accuser in his own court, the myth should be exploded.

3.4 The recommendation that proceedings will in future be heard in private is welcomed. One must, however, be under no illusion that this will lead to an elimination of the media circus which is always attendant upon the cases of this nature. Witnesses cannot nor reasonably should they be silenced, although this is a practice which is adopted in the Roman Catholic tradition. Equally, it is important that the judgment (together with reasons) be publicised so that the principle of transparency (enunciated in chapter 3) be satisfied. That the proceedings will no longer be public will affect precedent and this needs some thought. See below at 7.1.

3.5 It would be prudent for the draft legislation to move away from the terminology of the criminal courts, particularly 'prosecution' and 'accused'.

3.6 It would also be helpful to address what is meant by canonical obedience and what consequences flow from a breach thereof. On this matter the Report is silent. See 10.1 below.

National Tribunal

4.1 The Working Party recognises the real difficulties identified in the Report in relation to the infrequent use of the consistory court in its disciplinary function and the relative inexperience of its staff. The Working Party is however unconvinced that the creation of a national tribunal is the appropriate way forward. The better course, it is suggested, is to modify the constitution and functioning of the consistory court so that it may be staffed, on a diocesan level, by individuals drawn from small national panels who have the requisite ability.

4.2 The benefits of adopting the latter as follows:

(i) A significant saving in cost and manpower by not creating an additional Court or Tribunal nor, arguably a Commission at all. It has not gone unnoticed that the proposed tribunal would be *in addition to* all existing courts and not in substitution for any;

(ii) Discipline will continue to be the function of the bishop acting in his court, albeit through the medium of a more appropriately trained and selected personnel;

(iii) Proceedings will remain 'court proceedings', thereby obviating the operation of the Tribunals and Inquiries Act 1992;

(iv) The court would retain its powers to commit for contempt of court and in relation to the compellability of witnesses;

(v) If the practice directions are deemed necessary, the Dean of the Arches is perfectly placed to issue them;

(vi) The costs of the Commission, President, Tribunal and Legal Department would be avoided or, at least, reduced;

(vii) The system would be less bureaucratic, unwieldy and top heavy;

(viii) It would better reflect the appropriate ecclesiology.

4.3 Whilst this reformation would involve new legislation, all that need be done is to impose upon the bishop a duty to appoint individuals from specific panels with appropriate expertise but unconnected with the diocese or clerk concerned.

Independence of central structures

5.1 Quite properly the Report acknowledges that the Tribunal should be independent of the central structures of the Church of England (7.6). Having said that,

the Report proceeds to state that the membership of the commission should comprise appointees from among members of General Synod (7.15). This is constitutionally unacceptable under the doctrine of separation of powers as between the executive, legislature and judiciary. Furthermore, the functioning of the Commission (and presumably also the Tribunal) would be better served if the net for its membership were cast more widely.

Power of Bishop

6.1 The Report recommends that certain decisions made by a diocesan bishop in the disciplinary process should fall to be reviewed by the Commission who may refer it to the Legal Department (8.29). The difficulty with this is that a bishop, by the nature of his office, makes decisions on, inter alia, pastoral grounds. It is doubtful whether the Commission, being a legal body, will be in a position to explore issues of pastoralia. In this regard, the better course would be for decisions of the diocesan bishop to be reviewable by the archbishop. This system would mirror what is in place for readers under canon E6 para 3, lay-workers under canon E 8 and, at present, licensed clergy under canon C 12 para 5.

Code of Practice

7.1 In the Church of England there is a growing jurisprudence dealing with different tiers of regulation. One sees this in the way in which the faculty procedure presently works and also as regards the vacation of benefices. Any procedures produced as a result of the Report must be clear as to what is to be contained by way of Measure, by way of rule, by way of code of practice and by way of guidance. It must also be entirely clear as to whether such material is mandatory or merely advisory. What is the status of any practice direction which might be issued by the President (7.8)? Are the decisions of the Tribunal to create precedent? Since the Report envisages a wholly fresh procedure (7.4, 7.5), will decisions under the old procedure be of no application, of persuasive authority or have some other and if so what status?

Investigation

8.1 There appears to be some element of inconsistency between the recommendations at 11.26 and 11.27. The consequence of those two recommendations when read together may place upon the bishop a requirement to undertake two forms of investigation. The first is the taking of what is called soundings (8.8). The second is the form of investigation which will be taken when formal disciplinary processes are invoked (8.31). Some thought needs to be given as to how these two processes are to sit together. It may well be that there is an unnecessary duplication.

8.2 The recommendation at 11.27(d) does not follow entirely from what is said in the Report at paragraph 8.40. On a reading of the Report it seems that it is the intention that the bishop decides whether a complaint should be investigated and the Legal Department then decides whether or not there is evidence to justify a prosecution. The decision on whether or not to promote a complaint (to use more appropriate language) ought properly to vest in the bishop, subject to an appeal to the archbishop.

8.3 What is troubling about this particular recommendation is that it gives to the Legal Department an unfettered discretion to decide whether or not there is evidence to justify prosecution against which, it would appear, there is no right of any appeal or review whether to the Commission or otherwise (3.35). It seems odd to give the Legal Department an unfettered discretion but to emasculate the bishop through review by the Commission.

Investigation and Prosecution

9.1 It is not clear from the Report how complaints are to be investigated and how such investigation is to be dealt with by the Legal Department. A recent trend in criminal matters has been to ensure a clear division of role between the police (being the investigators of alleged crime) and the Crown Prosecution Service (being the prosecutors). It is the latter which makes a decision on whether or not to prosecute, although such decision is reviewable by the Divisional Court (see *R v Director of Public Prosecutions, ex parte C* [1995] 1 Cr App Rep 136) as are other disciplinary bodies such as the Bar Council (see *R v General Council of the Bar, ex parte Percival* [1991] 1 QB 212, [1990 3 All ER 137).

9.2 Again, it is unfortunate that at 8.41 the decision on whether or not to prosecute is one which appears to be made purely on evidential grounds and with no regard to pastoral concerns.

Ecclesiastical Offences

10.1 It would be helpful to have a fuller exposition as to the nature of ecclesiastical offences. In particular, is the offence against the Church or against a specific individual who represents the Church? Is it merely an action which brings about scandal and discredit? Is it a breach of promise founded (in quasi-contract) on the oath of obedience and/or declaration of assent? How are notions of forgiveness to be imported? The specific matters detailed in paragraphs 6.15 to 6.18 are to be welcomed. It would equally be helpful to spell out what consequences follow from breaches of different types of legislation, for example Measures, Canons, episcopal directions, rules of practice etc. Is a failure to follow an Act of Synod to be regarded as a breach of the oath of canonical obedience? Equally, what defences are available to clerks accused of ecclesiastical offences? Is there to be a general principle of reasonableness or notions of justification and excuse? How are concepts such as neglect, culpable carelessness or gross inefficiency to be defined?

10.2 As to the holding and/or exercise of political opinions, this Working Party concurs with the amendment tabled to 11.9 by the Reverend Peter Broadbent whereby no disciplinary procedures ought to be brought in relation to political activity. Having said that, it would be appropriate nonetheless to make clear that were any political activity to amount to neglect of duty or to the breaking of the secular law then disciplinary process might follow.

10.3 As to teaching, preaching, publishing or professing doctrine or belief incompatible with that of the Church of England and the narrowly successful amendment to 11.13(d) tabled by the Archdeacon of Surrey, this working Party (though probably not the General Committee of the ELS) is of the opinion that these matters *should* be dealt with in exactly the same way as any other disciplinary matter. Not to do so would render the General Synod complicit in producing a superabundance of courts and tribunals. It is already recognised that the Court of Ecclesiastical Causes Reserved is a practical dead letter and to retain it in any form would be a meaningless gesture.

Penalties

11.1 Ecclesiastical penalties amount to the curtailment of an individual clerk's ability to exercise powers conferred on him by a bishop at ordination, institution, licensing etc. That being so, an essential symmetry ought to be maintained whereby it is the bishop who both gives and inhibits such exercise. The description in 9.9 of inhibition amounting to a finite period of disqualification is unfortunate. Inhibition may affect one or more ministerial functions such as preaching, teaching or the hearing of confessions. It may also refer to the exercise of priest's orders leaving a clerk free to act as deacon. 9.11 ignores the fact that historically a penalty of suspension amounted to a fine whereby the sums ordinarily due to the clerk

were sequestrated. Equally 9.12 is dismissive of what might be called 'good conduct'. One of the purposes of discipline is rehabilitation and the lifting of a suspension (or indeed any censure) upon the clerk's repentance or his making satisfaction or restitution is a proper ecclesiological model of forgiveness and reconciliation.

11.2 It is equally surprising that in 9.15 the Report reads 'a prosecution that leads only to a rebuke will probably be a prosecution which should not have been brought'. This is a bizarre conclusion particularly in the light of the Matthean model for the correction of error (Matt 18: 15–17).

11.3 There is no need to re-invent (or even rename) existing ecclesiastical penalties. They should however, be better explained so that they are more widely understood.

11.4 It may be thought useful to take this opportunity to consider making express provision for the reversibility of deposition, bringing this in line with current provisions enabling reversibility of relinquishment of orders.

Caution List

12.1 The recognition given to the Caution List and its open discussion is to be welcomed. It will be helpful to know to whom the list is to be circulated. Would this include social services and other institutions or would the list be private to the Church? Would parochial officers, for example churchwardens, and patrons have a right of access to the Caution List? What will be the effect of the Data Protection Act 1984 or recent European Law developments on access to personal information?

Standard of Proof

13.1 Regrettably the Report on occasion confuses burden of proof with standard of proof (3.38). The Working Party agrees that the standard of proof should remain the criminal standard. However it has difficulty in reconciling the concept of proof beyond reasonable doubt with the existence of majority decisions in which each of three tribunal members has an equal voice (7.13). Even in the criminal courts, majority verdicts (which are rare) require at least 10 out of 12 to agree.

Appeals

14.1 Unless there is a proper and effective appeal procedure the tribunal might lay itself open to frequent challenge by way of judicial review. The recommendation in 11.32 that an appeal will lie 'where it is alleged that the decision is unreasonable' seems to be an ill-defined and unworkable form of words.

Legal Aid

15.1 The Working Party notes with some gratification that the Report holds back from advising that the Legal Aid Commission be abolished. What the Report does not address is at what stage and for what purposes will legal aid be granted. Will it be available to challenge decisions made by bishops by way of review by the Commission? Will it be available to a complainant as well as a clerk?

Resignation

16.1 The Working Party agrees that the broader interests of justice may often require a disciplinary process to be taken rather than the 'easy option' of accepting a clerk's resignation. This aspect needs to be fully thought out and expressed in clear terms.

Dispensation

17.1 There is a well established, though poorly discussed, power on the part of the

bishop to dispense with the strict operation of Canon Law. This ought properly to be preserved and put on a more formal footing, although care should be taken to avoid the public perception of individuals escaping justice through an episcopal cover-up.

Peculiars

18.1 There exists in the Church of England a number of peculiars. It would be unfortunate if these were to be ignored in the drafting of the legislation. The ordinary is not always the bishop.

Conclusions

19.1 The Working Party endorses the broad thrust of the Report and readily acknowledges the hard work and productivity of Canon Hawker and his colleagues. This paper is not intended to be destructive but represents a considered response to the policy and detail of the Report. It is to be hoped that by identifying these areas of concern, those charged with drafting the proposed legislation will be better able to formulate it to meet the needs of a responsible and pastoral Church in an increasingly secular and litigious society. To them the members of this Working Party extend their support and encouragement.

APPENDIX

The Working Party established by the Ecclesiastical Law Society for the purpose of drafting this paper comprised the following:

Convener:

Mark Hill, LL B, LL M (Canon Law), AKC, barrister, Deputy Chancellor of the Diocese of Winchester

Members:

Paul Barber, MA (Cantab), barrister

Fr Richard Barrett, BD, JCL, tribunal officer of the Diocese of Northampton

Revd Paul Benfield, LL B, B Th, barrister, Vicar in the United Benefice of All Saints, St Anne, St Michael and St Thomas, Lewes

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Revd David Sherwood, LL M (Canon Law), solicitor, Vicar of St Mary's, Kenton

Revd Michael Smith, MA, BD (Oxon), formerly Rector of Silverton.

The Working Party, with the exception of Fr Barrett and Mr Sherwood, met on 8 January 1997. The contents of this paper are unanimous. The Working Party's initial submission to Canon Hawker is reproduced at (1996) 4 Ecc LJ 510.

Note: This Response is commended as the responsible views of one of the Society's Working Parties but cannot be taken to represent the views of the General Committee or the Society as a whole. If members wish to express their own views to those responsible for bringing 'Under Authority' back to General Synod in 1998, they should write to *The Secretary, 'Under Authority' Implementation Group, Church House, Great Smith Street, London SW1P 3NZ*—Editor.