DOCTRINE AND DISCIPLINE

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In a concluding article as co-patron of the Ecclesiastical Law Society,[1] *the Most Reverend and Right Honourable Dr David Hope offers a reflection on his personal experiences of the interplay between doctrine and discipline encountered during his period of office as Archbishop of York. He focuses on censures of deprivation and disqualification under section 55 of the Ecclesiastical Jurisdiction Measure 1963; deposition appeals; summary revocation of clerical licences; and the Lambeth and Bishopthorpe Register.*

Whilst I recognise that the title of this day conference is 'Doctrine and Discipline', with an obvious focus on the proposals emerging in relation to doctrinal matters and discipline, I felt nevertheless it might be helpful and indeed informative to members here today for me to share with you some reflections in the area of discipline more generally in the light of my experience as Archbishop over these last eight years.

And right at the start I might as well confess that on becoming Archbishop and therefore taking on the role of being a decision-maker and judge in matters of discipline this is not something for which I had received either preparation or training. Furthermore, I had not anticipated just how many cases would come before me over these last eight years nor the time needed to devote to them, nor the difficulty and complexity on issues both of fact and of law which have arisen in dealing with them. I must therefore put on record straight away my huge indebtedness to the Provincial Registrar, Mr Lionel Lennox, and to the Vicar-General, Judge Coningsby, for their patience and forbearance with me as one unlearned in the law and their care, wise counsel and guidance as well as their ready availability so to assist.

Having just mentioned my own ignorance and now with the coming into force of the new Clergy Discipline Measure, I hope that any new bishop will be properly informed and prepared for its administration and operation. For the purposes of the brief time I have at my disposal I intend to comment on four main areas: (1) observations on censures of deprivation and disqualification under section 55 of the Ecclesiastical

[1] For an earlier contribution, see D Hope, 'The Letter Killeth, But The Spirit Giveth Life' (1997) 4 Ecc LJ 694, an address given to the Society's Residential Conference in Manchester on 14 March 1997.

Jurisdiction Measure 1963; (2) deposition appeals; (3) the appeal by the Reverend Harry Brown against summary revocation of his licence by the Bishop of Carlisle, and finally (4) a brief word about the Lambeth and Bishopthorpe Register.

CENSURES OF DEPRIVATION AND DISQUALIFICATION

Section 55 of the Ecclesiastical Jurisdiction Measure 1963 requires that:

> the bishop of the relevant diocese shall refer the case to the archbishop of the relevant province with his own recommendation as to the action to be taken and send him a copy of any representations which the priest or deacon may have made to him in writing. ... [and] the archbishop to whom a case is referred ... shall ... make a declaration ... unless on consideration of all the circumstances, including the recommendation of the bishop ..., he determines that no such declaration shall be made.[2]

I have had to deal with a considerable number of cases falling within section 55. All but one of the cases so referred have been where the priest has first of all been tried in the criminal courts and been found guilty and given a sentence of imprisonment or a suspended sentence.

I make my decision on papers—the priest does not appear before me—but my task is no less difficult. The Provincial Registrar takes considerable care in preparing the bundle of papers for me to consider. Any typical bundle will consist of the diocesan bishop's formal letter of recommendation; a copy of the certificate of conviction; a transcript of the judge's remarks on passing sentence; in some cases, an altogether fuller transcript of the trial itself; in one case which went to appeal a transcript of the appeal hearing and of the appeal judges' remarks in dismissing the appeal. In addition to any representations which the priest concerned may have made to his or her diocesan bishop, the Provincial Registrar always seeks to ensure that the priest in question is given every opportunity if he or she so wishes to make any further representations direct to me in considering the recommendation of the bishop.

It has been my practice to write a determination setting out the diocesan bishop's recommendation and his reasons for making it as well as the representations by the priest concerned and my own reasons either for upholding or dismissing the bishop's recommendation. After I have made my decision and sent my written determination to the priest and bishop concerned, then on a convenient day and time agreed with the Provincial Registrar and in accordance with the provisions of section 55, and always with the priest concerned invited to attend, the registrar joins me in my

[2] Ecclesiastical Jurisdiction Measure 1963, s 55(2), (3) (substituted by the Ecclesiastical Jurisdiction (Amendment) Measure 1974, ss 1, 3(2), and amended by the Church of England (Miscellaneous Provisions) Measure 1992, s 7(a)).

chapel at Bishopthorpe where I read out the formal censure and commend the priest concerned in prayer before concluding the formalities.

DEPOSITION APPEALS

I have dealt with a number of appeals following the issue of a bishop's notice of intention to depose. On one such appeal the priest requested that he should appear before me in person. Clearly I needed to give careful consideration as to how I would handle the matter. The rules concerning the procedure were made in 1965 and are brief to say the least, just one rule with eight paragraphs. But the rules do say that the defendant may either appear in person at the hearing of the appeal or be represented by a solicitor or counsel.

So on this occasion I needed to decide on matters such as: should I allow oral evidence from the appellant and could he be cross-examined by the bishop or his representative and vice versa? Should the appeal be restricted to speeches and addresses only from the parties and their legal representatives? What documents should be made available to me? The rules said that the diocesan registrar of the diocese concerned should supply my Provincial Registrar with 'the record of the case', but it is not clear what this might comprise. And the most important question: was this hearing a full hearing or was it a court of appeal type of hearing where the court or tribunal does not re-hear the case but looks at the question whether the bishop erred?

The Ecclesiastical Jurisdiction Measure 1963 and its rules do not assist answering this important question. The Vicars General in 1996 were consulted and they were both of the view that the appeal is not of the restricted type but is a fresh hearing. I accepted this view. Because it was to be a fresh hearing I would be required to make my own decision on questions of the gravity of the offence and therefore the need for or otherwise deposition from holy orders uninhibited by the diocesan bishop's view of the matter, and so I wanted to have available *all* relevant available material and I decided I should not be confined to that which the parties decided to put before me.

A bundle of papers and documents was prepared by my Provincial Registrar and circulated before the hearing. After consultation with the parties to the appeal this bundle included the Crown Prosecution Service papers, the priest's proof of evidence which was prepared for use by his counsel in the Crown Court proceedings, the judge's sentencing remarks and the police interview of the priest himself.

I set aside an afternoon when I sat with the Vicar-General as my legal adviser and my Provincial Registrar as the Clerk of Appeal and Proceedings. The appellant appeared in person and was represented by his solicitor and the bishop's Legal Secretary appeared for the bishop, who was not present.

The priest had been convicted, on his own admission, of a very serious

indecent sexual assault on a female aged 15 at the time of the offence and had been sentenced to four months imprisonment. Much of the concern on the appeal was about whether this was a single incident—a momentary fall from grace from an otherwise distinguished ministry of a long serving priest, or was this an incident where the priest had groomed the person over a number of meetings. Issues such as breach of the pastoral relationship (the girl first came for confirmation classes and the incident took place in the vicarage), and breach of basic principles of counselling arose.

A couple of issues were raised by the appellant and his solicitor. First, the *House of Bishops Policy on Child Protection* (1999 edition) stated on page 12 at paragraph 48 that 'the presumption is therefore that a Schedule 1 offender ... will not be allowed to return to active ministry, and that where the question of deposition from Holy Orders arises, the offender should be deposed'. The appellant sought to distinguish his case on the basis that the policy document did not rule out absolutely the possibility of a return to active ministry in 'exceptional circumstances'. Secondly, the appellant stated that the bishop's decision to depose him was wrong and by challenging the bishop's decision by his appeal he asked for a reasoned decision. This was putting the onus and obligation on me to think through the principle of the issue of whether the priest should be deposed—and not merely reviewing the reasonableness (or otherwise) of the bishop's decision.

The reason that the bishop had given notice to depose the priest was betrayal of trust and the fact of sexual abuse. These were issues recognised by the trial judge and in the bishop's submission had caused grave scandal to the Church and to his holy orders. In my assessment of all the evidence, and the appellant's arguments in support of his appeal, I set out very clearly in forty-three paragraphs my written judgement and decision. My concluding paragraph 61 reads as follows:

> Having therefore considered the whole matter of this appeal as carefully and prayerfully as I am able, I have come to the conclusion that (a) the reasons which the Bishop has given in his Notice of Intention to Depose are sound, and (b) having considered also all the evidence which has been set before me as well as that which was presented during the appeal hearing ... I am unable to conclude that the appellant's grounds for appeal against deposition have been sustained. I am therefore unable to allow this appeal.

Among other matters, I measured the gravity of the criminal offence against the precepts of conduct and behaviour that I, as Archbishop, and the people in our congregations to whom our priests minister, should expect from a person ordained into holy orders. With that in mind one can draw on a variety of sources: Scripture—the Pastoral Epistles, for example; Canon C 26 'Of the manner of life of ministers'; the Ordinal; and perhaps in the future the recent publication of the Convocations entitled *Guidelines for the Professional Conduct of the Clergy*.

THE APPEAL BY THE REVD HARRY BROWN AGAINST THE SUMMARY REVOCATION OF HIS LICENCE BY THE BISHOP OF CARLISLE

This matter took a very high profile in the media. This was an appeal under Canon C 12, paragraph 5, which provides:

> The bishop of a diocese may by notice in writing revoke summarily, and without further process, any licence granted to any minister within his diocese for any cause which appears to him to be good and reasonable after having given the minister sufficient opportunity of showing reason to the contrary; and the notice shall notify the minister that he may, within 28 days from the date on which he receives the notice, appeal to the archbishop of the province in which that diocese is situated ....

On such an appeal the archbishop may hear the appeal himself and after hearing the appeal the archbishop may 'confirm, vary or cancel the revocation of the licence as he considers just and proper; and there shall be no appeal from the decision of the archbishop'.

On first sight this may appear to be a comparatively straightforward procedure. As with the deposition appeal the rules for the conduct of any such appeal are brief—a page and a half or so—the *Elphinstone Rules*, so named after Chancellor Elphinstone who formulated them many years ago now. In my view these rules are now inadequate for today's circumstances: from the very start I needed to resort to advice from my Vicar-General and Provincial Registrar to assist me in dealing with particular points of procedure and law which arose in the matter and on which the existing rules are silent. Some were complex, others touched on human rights and European law. These were testing or difficult matters for me to decide.

The issues in the case set out in the Bishop of Carlisle's notice of revocation were sexual harassment; intimidating behaviour and mental abuse; and financial irregularities. The Provincial Registrar held a case management conference in order to provide a timetable for preparation for the hearing, including the determination of various preliminary issues, an agreement on documentation to be available to me and for the process of the actual hearing to be as smooth as it could be. The bishop needed to particularise his findings on which he made his decision summarily to revoke the licence, and this he was required to do in the course of preparing for the hearing.

On the matter of the summary revocation, it would of course have been perfectly possible for the bishop to have given the appellant a revocation on notice, say of six months or so, thereby ensuring no appeal procedure was open to him.[3] Clearly, the bishop had thought through carefully what his decision should be since in the course of his giving evidence he made

[3] See M Hill, *Ecclesiastical Law* (2nd edn, Oxford University Press, 2001), para 4.30, particularly n 141.

the point that in order to ensure as fair and equitable a process as possible he did not go down the route of a six-month revocation but rather the summary revocation procedure with the right of appeal.

There were a number of points arising. The venue and location of the hearing, decided and agreed by the parties and myself, would be in York and not either in the Diocese of Carlisle or indeed in either of the two parishes involved. In my view, there needed to be some clear distancing. I directed that the hearing should not be in a courtroom but in a church in York with accompanying hall facilities for refreshments—and this worked well. There was the right dynamic and feel about the hearings—legal formality combined with a sense that the Church was doing its business in a pastoral, prayerful and sensitive manner. There was the question also as to whether the hearing be in public or in private. In view of the nature of the case my own preference from the very beginning was that this should be a fully public hearing. This was agreed by the parties.

There was the fundamental question as to whether my role was merely to review the decision of the bishop and decide whether he had acted reasonably and within the rules, or was it to hear the evidence of the complaints and decide whether the licence should be revoked? It was the latter. This therefore meant that I had to hear the evidence of the complaints, with witnesses being the complainants themselves. This was no easy matter for the complainants.

However, before the actual appeal hearing there were a number of preliminary issues to be resolved which meant that I had to arrange for a hearing at Bishopthorpe on two matters in particular: first, it was alleged that the bishop's procedures were contrary to the rules of natural justice and/or in breach of section 6 of the Human Rights Act 1998, and Article 6 of the European Convention on Human Rights, by relying on evidence of incidents which occurred more than three years prior to the date of complaint; secondly, that the bishop acted wrongly in relying on evidence of incidents which had been the subject of earlier investigations and on which a final decision had been taken by or on behalf of the bishop's predecessor.

The first matter revolved in the first instance around whether the three-year time limitation period under section 16 of the Ecclesiastical Jurisdiction Measure 1963 in respect of proceedings under that Measure could be 'read over' as it were to the Canon. In paragraph 10 of my judgement I wrote as follows:

> In my view it is clear that section 16 applies only to Ecclesiastical Jurisdiction Measure proceedings. It is a Measure which deals only with disciplinary proceedings under that Measure and not with Canon C 12. Canon C 12 is a discrete and separate procedure available in the case of clergy who are licensed rather than beneficed.

I did, however, add that the bishop should bear in mind that part of the material which he was considering was five to six years old and that he should take that into account in deciding what weight to give it.

However, that was not the end of the matter in relation to section 16, because counsel appearing for the appellant argued that if section 16 does not apply directly, it applies by analogy, the argument being based on principles of natural justice and also upon the Human Rights Act 1998. My finding was the same on this matter whether the appellant's argument is based on principles of natural justice or upon the Human Rights Act 1998. I found that the Bishop of Carlisle was not bound to apply section 16 of the Measure either directly or by analogy. I also found that he was not obliged to construe Canon C 12 as if it included a provision similar to section 16 either on the basis of a natural rights argument or on the basis of section 3 of the Human Rights Act 1998.

The second issue was the assertion by the appellant that the bishop acted wrongly in relying on evidence of incidents which had been the subject of earlier investigations and on which it was suggested that a final decision had been taken by or on behalf of the bishop's predecessor in a letter dated 15 March 2000 which the then Bishop of Carlisle had written to a complainant. It was important to note that the letter concerned was written to a complainant, not to the appellant, and I took the view that it was a pastoral rather than a legal letter since certainly there were no proceedings either under the Measure or Canon C 12 in progress at that time. I took the view that the letter could not be used so as to debar any subsequent bishop from exercising his own jurisdiction in relation to renewed complaints which he was receiving. Thus I ruled adversely on the two points set before me.

Another preliminary matter arose which in the event proved to be of significant importance but one which the Vicar-General, and not I, dealt with. The bishop gave notice that he wanted to include a complaint of a new witness who had only written to the bishop in April 2002, several months after the licence had been revoked. It was submitted very late, but of the witness's own volition. It had not been requested. This letter contained serious allegations, and was within the scope of one of the areas of complaint (inappropriate behaviour with women parishioners). Not surprisingly the appellant opposed the introduction of an additional serious allegation which would strengthen the bishop's case on appeal. He was concerned that I should not read this serious new complaint until it had been decided whether it should or could be admissible. Both parties agreed at the case management conference that the Vicar-General's decision on the matter would be final. The Vicar-General gave a written decision on the point, and admitted what proved to be an important piece of evidence—the complainant's letter—and a convincing witness.

I should like to make a brief comment on the judgment and decision, a document which runs to some sixty-two pages and one hundred and eighty

paragraphs.[4] This was a full written report dealing with the evidence and all the legal issues. At the end of the day I had to decide for myself whose evidence I should accept and believe in respect of the complaints—the complainants or the appellant. I believe it is important for all concerned and not least the individual priest involved that I should give a formal and reasoned account both of my conclusions and the way in which I have reached them. Interestingly there has been no legal challenge either in the secular courts of England or in the European Court of Justice, there having been suggestions outside the appeal by the appellant that this would happen. A further observation would be that I think the time from the beginning to the end of the process was too long. The timetable from the summary revocation of the licence by the bishop in October 2001 to the issuing of my decision and judgment was nearly eighteen months. In my view, this is too long and it ought to be possible to aim for at the most twelve months between the notice of appeal and the final decision.

THE LAMBETH AND BISHOPTHORPE REGISTER

Thankfully long gone are the days when a name would be placed on the Register without the person being notified of it. Section 38 of the Clergy Discipline Measure 2003 now puts the Register for the first time on a statutory basis. So far as the Province of York is concerned, I am reasonably satisfied that the Register is up to date and that any names which should no longer be on it have been removed.

Throughout my time as archbishop I have been careful to observe a clear process in placing names of those under pastoral discipline on the Register in Part 2. As and when any diocesan bishop has referred a matter to me he will usually either suggest a category and/or seek advice about an appropriate category for the case referred. I will then respond requesting that the diocesan bishop notify the priest concerned of his intention so to place the name on the Register. A copy of this letter comes to me. I then write to the priest concerned asking whether he or she has any objection to his name being placed on the Register, carefully explaining the category and its implications, and if he or she does have any objections then he or she must respond within fourteen days. If such objections are made I will consider them carefully and make my decision, then notifying both priest and bishop. Whenever anyone is placed on the Register in whatever category I always offer the services of a pastoral adviser.

Again I am hugely indebted to the pastoral advisers for their regular six-monthly meetings with those whose names are on the Register. This enables me to keep in touch with their progress and where appropriate to begin to enable any priest concerned to re-start his or her ministry.

[4] The case is briefly noted as *Brown v Bishop of Carlisle* at (2003) 7 Ecc LJ 239.

CONCLUSION

In conclusion I make a general remark about all four of the areas of clergy discipline which I have discussed. In recent years we have all become more conscious of the need for even handedness and fair consideration of discipline matters. It is right and just that the priest concerned has every opportunity to put his or her case and to have the assurance that it is heard. The process and procedures need to be transparent, and the rules of natural justice observed. Anything less now that we have the European Convention on Human Rights enshrined in our law is not worthy of the Church of England, and probably not lawful. In any case surely the Church ought to be a model of excellence in such matters and not least those of us entrusted with an episcopal ministry in the Church of God 'to be merciful, but with firmness and to minister discipline but with mercy'. Such is the challenge well set out in the Ordinal—a charge and a responsibility not only to the bishop but to the whole Church in any matter of discipline for the sake of the Gospel.