

## COMMENT

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# Mediation: An Untapped Resource for the Church of England?

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### INTRODUCTION

Churches, in common with other unincorporated associations, thrive on a healthy dynamic amongst their members whose energies and gifts, properly harnessed, can serve to promote mission and witness, to build up the community of faith and to evangelise with vigour and integrity. Not infrequently, however, in both aspiration and application, the conduct of believers (individually and corporately) can fall short of that paradigm and the result can be destructive and debilitating. This paper identifies and explores areas within the current structures of the Church of England where express provision already exists for a formal process of mediation or other Alternative Dispute Resolution (ADR), suggesting that greater use of mediation in the future would be beneficial to the Church of England functionally, spiritually and (not least) financially.<sup>1</sup>

Commenting on the secular context, the then Master of the Rolls stated that ADR:

must become an integral part of our litigation culture. It must become such a well established part of it that when considering the proper management of litigation it forms as intrinsic and as instinctive a part of our lexicon and of our thought processes, as standard considerations like

<sup>1</sup> This is a revised version of a paper given at Lincoln's Inn in July 2010 as part of the Ecclesiastical Law Society's series of London Lectures. For a complementary contribution from a distinctly theological vantage point, see S Fielding, 'Mediation in the Church of England: Theology and Practice' (2011) 13 Ecc LJ 65.

what, if any, expert evidence is required and whether a Part 36 Offer ought to be made and at what level.<sup>2</sup>

This theme is picked up in a helpful note produced by the Clergy Discipline Commission in 2006 entitled ‘Finding a Conciliator’. It makes reference to the National Mediation Helpline, the Civil Mediation Council, the London Mennonite Centre and Mediation UK. There are several opportunities for mediation in the Church of England, to each of which I now turn.

### PAROCHIAL CHURCH COUNCILS<sup>3</sup>

The Parochial Church Councils (Powers) Measure 1956 provides that ‘it shall be the duty of the minister and the parochial church council to consult together on matters of general concern and importance to the parish’.<sup>4</sup> The functions of the PCC include co-operation with the minister in promoting in the parish the whole mission of the Church, pastoral, evangelistic, social and ecumenical, and the consideration and discussions of matters concerning the Church of England, or any other matters of religious or public interest.<sup>5</sup>

Despite the enjoinder to co-operate, there remains the possibility of a disagreement between minister and PCC and the question of how any such impasse is to be resolved. In many cases, the group dynamic will settle the matter in favour of the stronger willed or more forceful. Commenting on the responsibilities of the PCC, Chancellor Forbes stated in *Re St Peter, Roydon*,<sup>6</sup> that:

in carrying out any particular duty with which they are entrusted they must pay proper regard to the wishes and suggestions of the minister if the discharge of the duty impinges on church work in respect of which the minister has expressed a wish or suggestion; but having done that they must be free to differ from him if in their view the honest discharge of the particular duty requires them to do so.<sup>7</sup>

2 Sir Anthony Clarke MR (now Lord Clarke of Stone-cum-Ebony), speaking at the Mediation Council Conference, May 2008.

3 The following text is derived in substance from M Hill, *Ecclesiastical Law* (third edition, Oxford University Press, 2007), paras 3.21ff.

4 Parochial Church Councils (Powers) Measure 1956, s 2(1), substituted by the Synodical Government Measure 1969, s 6. Prior to the substitution, this had read, ‘It shall be the primary duty of the council in every parish to co-operate with the minister in the initiation, conduct and development of church work both within the parish and outside’.

5 Parochial Church Councils (Powers) Measure 1956, s 2(2)(a), (b) (as so substituted).

6 *Re St Peter, Roydon* [1969] 1 WLR 1849, [1969] 2 All ER 1233, Chelmsford Cons Ct.

7 [1969] 1 WLR at 1852F; [1969] 2 All ER at 1235B.

Chancellor Forbes further remarked that: ‘In the true spirit of charity a clash between an incumbent and a council becomes unthinkable’,<sup>8</sup> although he emphasised that the requirement for agreement between minister and PCC must signify a genuine and informed consent, else the statutory requirement is no more than a ‘solemn farce’.<sup>9</sup>

However, anecdotal experience suggests that clashes can and do occur. The Measure therefore provides that, in the event of the minister and the PCC being unable to agree as to any matter in which their agreement or joint action is required, such matter shall be dealt with or determined in such manner as the bishop may direct.<sup>10</sup> This could take the form of conciliation involving the bishop himself or someone nominated by him, in practice usually the archdeacon or area dean. If the disagreement is particularly serious, amounting to a pastoral breakdown, then the provisions of the Incumbents (Vacation of Benefices) Measure 1977 may become relevant.<sup>11</sup> However, it may be that timely intervention by a trained mediator at this stage would assist in addressing and resolving the disagreement or unease. It takes a degree of maturity, insight and humility on the part of all concerned to recognise that healthy functionality has become impaired. Mediation will only work if the participants share a willingness to mediate.

## PASTORAL BREAKDOWN<sup>12</sup>

The Incumbents (Vacation of Benefices) Measure 1977<sup>13</sup> is concerned with occasions where there may have been (to adopt the language of the Measure) a serious breakdown in the pastoral relationship between the incumbent and the parishioners, caused by the conduct of one or the other or both, over a substantial period.<sup>14</sup> This breakdown is described as ‘a situation where the relationship between an incumbent and the parishioners . . . is such as to impede the promotion in the parish of the whole mission of the Church of England, pastoral, evangelistic, social and ecumenical’.<sup>15</sup>

8 Ibid at 1235G.

9 Ibid at 1235D.

10 Parochial Church Councils (Powers) Measure 1956, s 9(3). Note also that any question arising on the interpretation of the general provisions relating to PCCs is to be referred to the bishop and any decision given by him or by any person appointed by him on his behalf is final. See the Church Representation Rules, App II para 18.

11 This is discussed in more detail below.

12 The following text is derived in substance from Hill, *Ecclesiastical Law*, paras 4.43 ff.

13 This Measure was substantially amended by the Incumbents (Vacation of Benefices) (Amendment) Measure 1993.

14 The Measure also deals with the physical or mental incapacity of the incumbent, which is not relevant to the current discussion.

15 Incumbents (Vacation of Benefices) Measure 1977, s 19A.

The Measure allows for an inquiry to be made at the request of the incumbent, the archdeacon or two-thirds of the lay members of the PCC.<sup>16</sup> However, no inquiry may take place until the persons concerned have had the opportunity to resolve the pastoral situation in the parish. Accordingly, a request for an inquiry may only be made after a notice of intention to do so has been served on the bishop and a period of six to twelve months has elapsed.<sup>17</sup> This presents a ‘window of opportunity’ in which creative professional mediation could be put in place.<sup>18</sup> It is understood that only one inquiry under the Measure has proceeded to completion and resulted in a declaration of avoidance;<sup>19</sup> it took an extremely long time to reach a resolution at considerable cost, personal and financial, to those concerned and to the reputation of the Church locally and nationally. In a powerful dissenting opinion in the Privy Council, Lord Lloyd of Berwick recognised that although the 1977 Measure was widely considered to be ‘deeply flawed’ he considered that ‘obviously reconciliation between the incumbent and [the] parishioners should be preferred solution’.<sup>20</sup> Professional mediation is likely to be the most effective means of achieving reconciliation in cases of alleged pastoral breakdown and bishops should have recourse to it more often.

### CLERGY DISCIPLINE<sup>21</sup>

Complaints under the Clergy Discipline Measure 2003 must be referred in the first instance to the diocesan registrar,<sup>22</sup> who must scrutinise the complaint and form a view as to whether or not there is sufficient substance in the complaint to justify proceeding with it.<sup>23</sup> He must send a written report to the bishop setting out his views as to whether there is sufficient substance in it to justify proceeding with it under the Measure.<sup>24</sup> If the complaint is not dismissed (or if the president of tribunals directs the bishop to proceed with it) the bishop must determine which of several courses of action to pursue.<sup>25</sup>

16 Ibid, s 1A(1).

17 Ibid, s 1A(1A). There is no discretion to adjust this timescale.

18 I venture two reasons for this: first, reliance is generally placed on clergy who are well intentioned ‘honest brokers’ but not trained professional mediators; and second, because the protagonists see this as a ‘cease fire’ during which to make preparations for being vindicated at the Inquiry.

19 It concerned the parish of Trumpington in the diocese of Ely.

20 *Cheesman v Church Commissioners* [2000] 1 AC 19 at 39. The case concerned a proposed pastoral scheme which Lord Lloyd considered to be an attempt to get round a discontinued pastoral breakdown inquiry. He concluded that there was ‘no other plausible explanation’ (at 44). Lord Hobhouse of Woodborough and Sir Christopher Slade thought otherwise and thus Lord Lloyd found himself in the minority.

21 The following text is derived in substance from Hill, *Ecclesiastical Law*, paras 6.22 ff.

22 Clergy Discipline Measure 2003, s 11(1).

23 Clergy Discipline Measure 2003, s 11(1)(a), (b).

24 Ibid, s 11(2); Clergy Discipline Rules 2005, r 12(1).

25 Clergy Discipline Measure 2003, s 12(1). The courses of action open to the bishop at this stage are (i) he may take no further action; (ii) he may, if the respondent consents, direct that the matter remain on the file conditionally; (iii) he may direct that an attempt be made to bring about conciliation; (iv)

Two points merit a brief mention: first, no proceedings may be taken in respect of unbecoming conduct in respect of the lawful political opinions or activities of any bishop, priest or deacon.<sup>26</sup> Second, a bishop's licence may not be terminated by reason of a cleric's misconduct otherwise than by way of disciplinary proceedings under the Clergy Discipline Measure 2003.<sup>27</sup>

Where the bishop determines that an attempt should be made to bring about conciliation, he must afford the complainant and the respondent an opportunity to make representations and, if both agree to the appointment of a conciliator, such appointment is made.<sup>28</sup> A person may not be appointed conciliator unless the bishop is satisfied that there is no reason to question the impartiality of that person.<sup>29</sup> It is an express requirement under the Code that the conciliator is 'professionally qualified'.<sup>30</sup>

The role of the conciliator is to use his best endeavours to bring about a reconciliation between the complainant and the respondent.<sup>31</sup> If within three months of his appointment<sup>32</sup> a conciliation is brought about, the conciliator must submit a report on the case to the bishop together with such recommendation as he may wish to make.<sup>33</sup> If a conciliation is not brought about but the complainant and the respondent agree that another conciliator should be appointed, the bishop may appoint that other person as the conciliator.<sup>34</sup> If they do not agree either to an extension of time or the appointment of another conciliator, then the matter must be referred back to the bishop,<sup>35</sup> who may take no further action, make a conditional deferment, impose a penalty by consent, or direct the matter to be formally investigated.<sup>36</sup> The term 'conciliation' in this context

he may impose a penalty by consent; or (v) he may direct the complaint to be formally investigated. The Code of Practice expressly enjoins the bishop not to engage in 'plea-bargaining' with the respondent: para 112.

26 Clergy Discipline Measure 2003, s 8(3). The motion recently passed by General Synod concerning membership of the British National Party does not sit comfortably with this provision.

27 Clergy Discipline Measure 2003, s 8(2).

28 Clergy Discipline Measure 2003, s 15(1), (2). Detailed provisions concerning the manner in which the conciliation is to be conducted and amplifying those in the Measure are set out in the Clergy Discipline Rules 2005, r 26.

29 Clergy Discipline Measure 2003, s 15(3).

30 Code of Practice, para 133: 'It is of fundamental importance that the conciliator should be impartial, acceptable to both parties, and professionally qualified'.

31 Clergy Discipline Measure 2003, s 15(4). For further guidance as to the conduct of a conciliation, see the Code of Practice, paras 127–139.

32 Or such further period as the conciliator, with the agreement of the complainant and the respondent, may allow: Clergy Discipline Measure 2003, s 15(4)(a). There seems to be no long-stop limitation on the length of time the conciliation process may last, provided its continuance has the agreement of both complainant and respondent.

33 *Ibid*, s 15(4)(a).

34 *Ibid*, s 15(4)(b).

35 *Ibid*, s 15(4)(c).

36 *Ibid*, s 15(5)(b), specifying the options available at s 12(1)(a), (b), (d) and (e). The same courses of action are available to the bishop in the event that the complainant and the respondent do not agree to the appointment of a conciliator or as to the person to be appointed: s 15(5)(a). General guidance may be found in the Code of Practice at paras 140–156.

may offend the purist, since the context of the Measure, Rules<sup>37</sup> and Code of Practice<sup>38</sup> suggests that mediation (as it is traditionally understood) might be more appropriate. Conciliation is not compulsory; it is merely one of several options available to the bishop. A ‘whistle blower’, for example, is unlikely to wish to be reconciled with the cleric; rather he wants the matter dealt with. A long-standing parishioner with an individual grievance may well be more inclined to be reconciled, particularly if the likely end result of a tribunal hearing will leave the priest ministering in the parish.<sup>39</sup> The Code of Practice offers the following:

Conciliation can be particularly appropriate when pastoral or personal relationships have been damaged and there appears to be an opportunity for them to be restored through constructive dialogue. It may also be appropriate where it appears the complainant is seeking recognition of error by the respondent and an apology. In these circumstances conciliation offers the hope of re-establishing trust and confidence.<sup>40</sup>

Although the bishop is required by the Code to emphasise that ‘conciliation is an attempt to bring the parties together so that they themselves can agree on a suitable outcome of the complaint’,<sup>41</sup> for these purposes the term ‘parties’ covers merely the complainant and the respondent cleric and it may well be that a successfully mediated resolution will require the involvement of others. In any event there is a world of difference between the complainant and the respondent being reconciled and the underlying difficulty resolved. Anecdotal evidence suggests that use of the National Mediation Helpline in the statutory conciliation process has been limited.

## CLERGY TERMS AND CONDITIONS OF SERVICE

Quite how the Terms and Conditions of Service provisions will interrelate with the Clergy Discipline Measure remains to be seen. The most significant difference is that the latter has as a long-stop an ecclesiastical tribunal whereas the former, innovatively, leads ultimately to a secular one. Annex 2 of the *Grievance Procedure Code of Practice – Supporting Advice* deals with mediation, although this similarly tends to

<sup>37</sup> Clergy Discipline Rules 2005, SI 2005/2022.

<sup>38</sup> Code of Practice Pursuant to the Clergy Discipline Measure 2003 (2005, GS 1585): there is the warning that ‘parties will not be pressurised [sic] by the conciliator into agreeing something they may later regret’.

<sup>39</sup> The Clergy Discipline Commission has issued Guidance on Penalties which gives a broad indication of when removal from office may be relevant: see <<http://www.ecclaw.co.uk/clergydiscipline/penalties.pdf>>, accessed 22 September 2010.

<sup>40</sup> Code of Practice, para 127.

<sup>41</sup> Code of Practice, para 130.

blur the distinction with reconciliation, describing the matter as involving ‘the rebuilding of damaged relationships’. The Code itself states:

It is central to the teaching of Jesus that those who are reconciled to God must be open to being reconciled to those who have offended them or those they have offended. Reconciliation involves clarification of what has happened, how it is perceived by the other person and acknowledgment of the depth of anger and hurt. Reconciliation, for both parties, involves the rebuilding of damaged relationships. Reconciliation should be the desired outcome. It is important to consider how mediation might be used to bring this about at every stage of the procedure (for example, at the outset or where the first formal stage has not resulted in a mutually acceptable outcome).

It is expected that the Clergy Terms of Service procedure<sup>42</sup> will provide a fertile ground for mediation. For the new procedures to secure the confidence of ‘stakeholders’, judicious use of trained, experienced, professional mediators needs to be made from the outset. Little will be gained from the well-intentioned intervention of either a ‘tea and sympathy’ area dean or a ‘knock their heads together’ archdeacon.

## PASTORAL REORGANISATION

It is perhaps a little early to evaluate the effect of the far-reaching provisions of the Dioceses, Pastoral and Mission Measure 2007 in terms of strategic pastoral reorganization. However, one can envisage a place for some generic form of mediation in relation to certain of the consultative processes for which provision is made in the legislation. At the very least, a scheme forged through an open and transparent process in which all interested parties are involved and participative is more likely to come into fruition than one insensitively imposed from above. The contribution of professional mediators may prove significant and cost-effective.

## FACULTY JURISDICTION

In a recent decision in the Consistory Court of the Diocese of Chichester I indicated that, as a general rule, faculty cases were inherently unsuited to mediation.<sup>43</sup> I commented:

<sup>42</sup> The precise terms of which remain unclear at the time of writing.

<sup>43</sup> *Re St Mary, Barcombe* (24 November 2010), Chichester Cons Ct, unreported. This judgment, in common with all recent judgments of the Chichester Consistory Court, may now be found on the Diocesan website: <<http://www.diochi.org.uk/index.cfm?fuseaction=activities.content&cmid=424>>, accessed 22 September 2010.

Unlike adversarial civil proceedings in which opposing parties can (and frequently do) engage in ‘horse trading’ designed to compromise litigation, with the faculty jurisdiction the permission of the consistory court still needs to be sought irrespective of whether there have been private negotiations between the parties.<sup>44</sup>

There may well be a role for a mediator in seeking to narrow the issues between the parish and amenity societies or when different views are held in the parish with regard to specific proposals, and in some instances archdeacons have performed such a function. Care must be taken to ensure that the jurisdiction of the consistory court is not ousted and that the chancellor does not find himself compromised.<sup>45</sup>

#### MEETING THE CHALLENGE

The need for skilled, effective neutral mediation conducted by persons with a professional knowledge and experience in the subject and a sensitivity to the stresses and dynamics of the Church of England is overwhelming. Mediation in a religious environment has been the subject of some literature,<sup>46</sup> and Ripon College, Cuddesdon is supportive of an initiative to encourage mediation of church disputes. There is a hope in some quarters that the Ecclesiastical Law Society and/or the Ecclesiastical Lawyers Association will compile and maintain a list of individuals with proven expertise in mediation where religious sensibilities are engaged, particularly in relation to the structures of the Church of England, both parochial and otherwise.

Not every situation responds to mediation: it was tried in relation to proceedings under the Ecclesiastical Jurisdiction Measure 1963 which had been brought against the Dean of Ripon and those under the Incumbents (Vacation of Benefices) Measure 1977 in the parish of Trumpington although, by all accounts, it made a bad situation worse in each case. It may be that the timing was unfortunate, or that the choice of mediator was unfortunate, but even unsuccessful examples such as these serve as part of the collective learning experience. Cost may be an issue,<sup>47</sup> but a disinclination to fund the relatively modest costs of a mediation may be a false economy if it results in entrenched positions

<sup>44</sup> *Re St Mary, Barcombe* at para 5.

<sup>45</sup> See by way of example the procedural issues which formed the subject matter of a successful appeal to the Court of Arches in *Re Holy Trinity, Eccleshall* (July 2010, unreported), noted at (2011) 13 Ecc LJ 123.

<sup>46</sup> Notably J Behrens, *Church Disputes Mediation* (Leominster, 2003).

<sup>47</sup> The Clergy Discipline Commission paper, ‘Finding a Conciliator’, concludes with the charmingly enigmatic ‘Some funding is available from the Church Commissioners’.

and lengthy formal legal process.<sup>48</sup> Quite apart from the Christian imperative to be reconciled with one's neighbour, the practical and pragmatic case for mediation is compelling.

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## Mediation in the Church of England: Theology and Practice

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This paper<sup>1</sup> addresses the practical aspects of mediation. Experienced mediators will know what mediations look like and feel like and need no reminding how effective mediation has become as a means of resolving disputes. My own practice as a mediator – which tends to focus on inheritance and probate disputes, where the emotional element is often highly toxic – has some parallels with the mediation of Church disputes where an understanding of and sensitivity to theology is crucial.

My first question is a simple one: why bother to mediate at all? Why not let the instinct to dispute have its head and burn itself out? What benefits does mediation bring? In a difficult inheritance matter there were allegations that a daughter had failed to care for her father and that she had forged her father's signature or exercised undue influence over him. These were allegations made by her brothers and sisters – not uncommon but very ugly. There was substantial property involved, including works of art, and it was a very long day's mediation. It eventually settled on terms that dropped the forgery and undue influence claims, redistributed the property and acknowledged the contribution that the daughter had made to her father's care. Most unusually, the following day her husband telephoned me. He said: 'I want to thank you. My wife

<sup>48</sup> The Commission paper (ibid) advises bishops to proceed with caution with *pro bono* mediators: 'While many offers will be genuine and well motivated, some may come with an expectation of using the diocese's name and standing to promote the conciliator'.

<sup>1</sup> This is the revised text of a paper delivered in Lincoln's Inn in July 2010 as part of the Ecclesiastical Law Society's series of London Lectures.