

LEGAL ISSUES ARISING FROM THE SUSPENSION BY THE ARCHBISHOP OF CANTERBURY, ON 16 MAY 2019, OF THE BISHOP OF LINCOLN, THE RT REVD CHRISTOPHER LOWSON

INTRODUCTION

1. In an unprecedented statement (“the statement”) issued on Thursday 16 May 2019 and published on his website, the Archbishop of Canterbury, Justin Welby announced the suspension of the Bishop of Lincoln, the Rt Revd Christopher Lowson. The full terms of the statement are as follows:

"Following information provided by the police, I have suspended the Bishop of Lincoln Christopher Lowson from office, having obtained the consent of the Bishops of Birmingham and Worcester (the two longest serving bishops in the Province of Canterbury). If these matters are found to be proven I consider that the bishop would present a significant risk of harm by not adequately safeguarding children and vulnerable people. I would like to make it absolutely clear that there has been no allegation that Bishop Christopher has committed abuse of a child or vulnerable adult. The Bishop of Grimsby, David Court, will take on episcopal leadership of the diocese. It should be noted that suspension is a neutral act and nothing further can be said at this stage while matters are investigated. I ask for prayers for all affected by this matter."

2. No details were given (nor, as at the date of this post, have been published subsequently) of the information on which the archbishop based his decision. The statement ended with this paragraph, from which it would appear that, as at the date of the statement, Bishop Christopher had not been provided with a copy of the information either:

"Commenting today the Bishop of Lincoln said: 'I am bewildered by the suspension and will fully cooperate in this matter. For the sake of the diocese and the wider Church I would like this to be investigated as quickly as possible to bring the matter to a swift conclusion.'"

3. Predictably, the statement received wide media publicity.¹ It featured on BBC TV and ITN news on 16 May and led the BBC radio news bulletins during the early part of the day.

4. In the absence of knowing the information provided by the police on which the archbishop's decision was based, any comment on, or speculation as to the nature of, that information (beyond what may be inferred from the terms of the statement, or can be

¹ See the list of references included in the Church of England "Daily Media Digest" on 17 May 2019.

gleaned from a statement made the same day by Lincolnshire Police and published on the police website) would be inappropriate. Rather, the purpose of this post is to address the legal issues that arise from the suspension. It will be concluded that having regard to those legal issues, the suspension is, at the least, problematic.

5. The statement by Lincolnshire Police added this information²:

We are aware of the decision today of the Archbishop of Canterbury to suspend the Bishop of Lincoln from office and it would not be appropriate for us to comment on that decision.

The first phase of the Lincolnshire Police Operation Redstone investigation into historic sex abuse cases involving contact resulted in three men being convicted.

Phase 2 of the investigation is continuing into wider safeguarding issues and management decisions within the diocese. Because it is a live investigation and we do not want to jeopardise the outcome, we do not intend to make any further comment.

We are committed to ensuring the safeguarding of victims and continue to work with the full co-operation of the Lincoln Diocese.

There is an absolute multi-agency commitment to a transparent, survivor-focused and diligent investigation of every matter raised with the team. Anyone wanting to make contact in complete confidence can do so to the Diocese Safeguarding Adviser, Debbie Johnson who can be contacted on 01522 504081.

6. What the archbishop's statement makes clear is that "that there has been no allegation that Bishop Christopher has committed abuse of a child or vulnerable adult." Rather, the concern relates to the bishop's safeguarding duties, and this is emphasised by the words in the statement, "If these matters are found to be proven I consider that the bishop would present a significant risk of harm by not adequately safeguarding children and vulnerable people." This is consistent with the police statement that "Phase 2 of the [Operation Redstone] investigation is continuing into wider safeguarding issues and management decisions within the diocese."

THE STATUTORY GROUND FOR SUSPENSION

7. Although the statutory basis for the suspension is not given by the archbishop, it is clear from the terms of the statement that he was exercising (or purporting to exercise) the power conferred on him by section 37(1)(e) of the Clergy Discipline Measure 2003 (CDM). That paragraph was inserted by section 1(5) of the Safeguarding and Clergy Discipline Measure 2016 ("the 2016 Measure"). As inserted, section 37(1)(e) provides:

² See <https://www.lincs.police.uk/news-campaigns/news/2019/suspension-of-the-bishop-of-lincoln/>

“Where—... (e) the archbishop of the province in which a bishop holds office or, in the case of an archbishop, the other archbishop, is satisfied, on the basis of information provided by a local authority or the police, that the bishop or archbishop presents a significant risk of harm, the archbishop of the province in which the bishop holds office or, in the case of an archbishop, the other archbishop, may with the consent of the two most senior diocesan bishops in that province or the province of the other archbishop, as the case may be, by notice in writing suspend him from exercising any right or duty of or incidental to his office.”

8. Thus, for the archbishop’s decision to suspend to be lawful, it has to be on the basis that (on the information provided, in this case by the police) he is satisfied that Bishop Christopher presents (currently) “a significant risk of harm.” It is not enough that the information suggests that the bishop *may* present such a risk, or that it provides a *prima facie* case of such a risk that requires an answer. The statutory language could not be clearer: “is satisfied.”

9. It is difficult, therefore, to square the archbishop’s words that the suspension is “is a neutral act” with the terms of section 37(1)(e). The archbishop says that “If these matters are found to be proven I consider that the bishop would present a significant risk of harm by not adequately safeguarding children and vulnerable people”, but he has already had to be ‘satisfied’ of those matters in order, lawfully, to exercise the power of suspension.

10. This begs the question as to what is meant by “satisfied”. It must surely involve, at the least, being satisfied (to the civil standard of proof) of the risk of harm in the absence of any further information or evidence contradicting or explaining the information.

11. That the act of suspension under section 37(1)(e) is, therefore, not purely a “neutral act” can be demonstrated by comparing the terms of the notice required to be given in reliance on this paragraph with that appropriate when the suspension is pursuant to one of the other paragraphs of section 37(1).

12. Rule 86C of the Clergy Discipline Rules 2005 (as amended)³, which deals with the suspension of a bishop or archbishop under section 37(1)(e), provides:

“For the purposes of rule 61C a notice of suspension on a bishop or archbishop shall be— (a) in form 16b in the Schedule or in a form which is substantially to the same effect, (b) signed by the archbishop of the province in which the bishop to be suspended holds office, or, in the case of an archbishop to be suspended, signed by the other archbishop, and (c) countersigned by the two most senior diocesan bishops in that province or the province of the other archbishop, as the case may be, and rule 62(2) shall be construed accordingly.”

13. The requirement for the archbishop to obtain the consent of the two most senior bishops in the province (in this case, the bishops of Birmingham and Worcester) is set out

³ Rule 86C was inserted by rule 15 of the Clergy Discipline (Amendment) Rules 2016.

in section 37(1) and applies whichever power to suspend under that subsection is being exercised.⁴

14. Form 16b is as follows⁵:

FORM 16b (Rule 86C)

Clergy Discipline Measure 2003

Notice of suspension under section 37(1)(e) of the Measure to a bishop or archbishop

To:

I am satisfied, on the basis of information provided by the local authority or the police, that you present a significant risk of harm within the meaning of section 36(2A) of the Clergy Discipline Measure.

You are now suspended with effect from

ANY RIGHT TO A STIPEND AND HOUSING WILL NOT BE AFFECTED DURING ANY PERIOD OF SUSPENSION

Unless revoked the suspension will continue until the expiry of the period of three months following the date of service of this notice. Further successive notices of suspension, which may be in different terms from any previous notice, may be served on you for similar periods.

The effect of the suspension is that you are forbidden to exercise or perform without my permission any right or duty of or incidental to the office of *bishop or *archbishop *EXCEPT the following rights or duties:

15. This wording may be contrasted with that in Form 12b, which is the applicable form when the suspension is under section 37(1)(a), i.e. based on the receipt of a complaint against the bishop under section 10(1) of the CDM. That form includes these important words:

“SUSPENSION DOES NOT MEAN ANY VIEW HAS BEEN FORMED AS TO WHETHER THE COMPLAINT OF MISCONDUCT IS TRUE OR LIKELY TO BE TRUE

“AS A RESULT OF BEING SUSPENDED, YOU WILL NOT BE PREJUDICED IN THE STEPS WHICH WILL NOW BE TAKEN UNDER THE CLERGY DISCIPLINE MEASURE 2003 IN RESPECT OF THE COMPLAINT”

⁴ The other bases for suspension are: (a) a complaint against the bishop under section 10(1); (b) the arrest of the bishop on suspicion of committing a criminal offence; (c) conviction of any offence mentioned in section 30(1)(a) – which includes conviction after 31 January 2014 (see section 4(8) of the 2013 Measure) of any offence, other than a summary offence, committed in England and Wales; and (d) inclusion of the bishop in a barred list.

⁵ Words in bold or underlined are emboldened or underlined in the rules.

16. Similarly, when the suspension is under section 37(1)(b), following a bishop being arrested on suspicion of committing a criminal offence, the relevant form, Form 13b, contains these words:

“SUSPENSION DOES NOT MEAN ANY VIEW HAS BEEN FORMED AS TO WHETHER THE ALLEGATION OF CRIMINAL CONDUCT IS TRUE OR LIKELY TO BE TRUE

“I WILL AWAIT THE OUTCOME OF THE CRIMINAL PROCEEDINGS BEFORE DECIDING WHETHER DISCIPLINARY ACTION IS APPROPRIATE UNDER THE CLERGY DISCIPLINE MEASURE 2003”

NATURE OF THE RISK OF WHICH THE ARCHBISHOP HAS TO BE SATISFIED

17. Section 36(2A) defines what is meant by ‘a significant risk of harm’ for the purpose of section 37(1)(e).⁶

“(2A) For the purposes of subsection (1)(e), a person presents a significant risk of harm if there is a significant risk that the person may—

- (a) harm a child or vulnerable adult,
- (b) cause a child or vulnerable adult to be harmed,
- (c) put a child or vulnerable adult at risk of harm,
- (d) attempt to harm a child or vulnerable adult, or
- (e) incite another person to harm a child or vulnerable adult.”

18. In view of the archbishop’s statement that “that there has been no allegation that Bishop Christopher has committed abuse of a child or vulnerable adult”, and that (if the matters are found proven), “the bishop would present a significant risk of harm by not adequately safeguarding children and vulnerable people”, the only paragraph that would appear possibly to be applicable is (c), i.e. that by “not adequately safeguarding children and young people” the bishop has put (now) a child or vulnerable adult at risk of harm.

19. It must be arguable whether paragraph (c) was intended to cover a safeguarding risk.

20. What are now paragraphs (c) and (d) of section 36(1)⁷ (applying to the suspension of a priest or deacon) and of section 37(1) (applying to the suspension of a bishop or archbishop) were added to the CDM by sections 6 and 7 (respectively) of the Clergy Discipline (Amendment) Measure 2013. As set out in paragraph 7 above, the power to suspend based on information received from a local authority or the police, and the definition of what constitutes a significant risk of harm, were only added in 2016. These provisions were not in

⁶ Under section 36, this applies to the suspension of a priest or deacon under section 36(1)(e), but section 37(2A) provides that the reference in section 37(1)(e) to [a bishop or archbishop] presenting a significant risk of harm “is to be construed in accordance with section 36(2A).”

⁷ Conviction for an offence and inclusion in a barred list.

the draft Measure (GS 1952) presented to General Synod in July 2014. They were added by the revision committee and approved when the revised draft Measure was considered by the Synod in February 2015.⁸ They originated in a submission to the revision committee by the Revd Mark Steadman⁹ who contended that the bishop's powers of suspension of clergy in clause 6 and section 36 of the CDM were too limited and should be widened so that a bishop could suspend "when a priest or deacon was being investigated by the police or other statutory agency.": GS 1952-3Y para 80.

21. The report adds that in oral submissions Mr Steadman "confirmed that his proposal was in respect of investigations into criminal offences against children and vulnerable adults. He argued that there were currently cases where bishops had to invite clerics to step back from ministry, because they were powerless to suspend despite having real safeguarding concerns about them – which was unsatisfactory."

22. Paragraph 81 sets out the revision committee's decision:

"The Committee agreed there should be a power of suspension if the bishop received information from the police or a local authority that led the bishop to be satisfied that the person concerned presented a significant risk of harm to children or vulnerable adults, but where there had so far been no arrest or charge. The Committee therefore agreed to amend the draft Measure to give the bishop power under section 36 of the CDM to impose a suspension in these circumstances, provided the bishop had consulted the diocesan safeguarding advisor and such other person(s) as the bishop considered appropriate. The suspension would be for a period of 3 months but with a right of appeal against suspension to the President of Tribunals. A suspension would be revocable and renewable, subject on each renewal to a fresh right to appeal to the President of Tribunals."

23. There was no detailed consideration of the position of a bishop or archbishop. The committee stated simply (at paragraph 83):

"The Committee agreed that amendments similar to those described above in respect of section 36 of the CDM should be made to clause 6(2) in respect of the suspension of bishops and archbishops under section 37 of the CDM."

24. In introducing the revision committee report to General Synod on 12 February 2015, Geoffrey Tattersall QC (chairman of the committee) explained:

"Section 36(1) of the Clergy Discipline Measure already provides for the suspension of a priest or deacon where disciplinary proceedings are commenced or he or she is arrested on suspicion of committing a criminal offence, is convicted of certain criminal offences or included on a barred list. That clause 1(1) of the draft Measure adds a power to suspend where a bishop is satisfied on information provided by the police or local authority that a priest or deacon presents a significant risk of harm as defined by clause 1(2) but before suspending the bishop

⁸ See GS 1952A and the revision committee report, GS 1952-3Y.

⁹ Now the Ven Mark Steadman: Archdeacon of Stow and Lindsey in the Diocese of Lincoln.

is required to consult at the very least the diocesan safeguarding officer. Such suspension continues for three months but may be renewed.”¹⁰

25. Mr Tattersall made no separate reference to the equivalent new power to suspend bishops and the new provisions were approved without comment in the subsequent debate.

26. During the ‘final approval’ debate at General Synod in July 2015, the Bishop of Durham, the Rt Revd Paul Butler,¹¹ said:

“Section 1 fills a lacuna in the provisions of the CDM 2003. Under this a bishop cannot suspend a cleric who is being investigated by the police or local authority in respect of criminal offences against children or vulnerable adults unless there is an arrest. Section 1 will rectify that. Any suspension, unless revoked, will expire after three months, but it will be renewable for further periods of three months at a time.”¹²

27. If, as Bishop Butler averred, the new provision in section 36(1)(e) (in respect of priests and deacons) and section 37(1)(e) (for bishops and archbishops) is to empower the suspension of those who are being investigated by the police or local authority “in respect of criminal offences against children or vulnerable adults”, it raises a number of key questions:

- (1) What alleged criminal offences on the part of Bishop Christopher are Lincolnshire Police investigating, given that the archbishop has expressly stated that “there has been no allegation that Bishop Christopher has committed abuse of a child or vulnerable adult?”
- (2) What “wider safeguarding issues and management decisions within the diocese”¹³ could give rise to a possible criminal charge? The common law offence of ‘misconduct in public office’¹⁴ would seem to be the only possible

¹⁰ General Synod Record of Proceedings, Volume 46, No. 1, page 169.

¹¹ The then lead bishop on safeguarding.

¹² General Synod Record of Proceedings, Volume 46 No. 2, page 97 (11 July 2015).

¹³ See the Lincolnshire Police statement set out at paragraph 5 above.

¹⁴ Defined as: “a public officer wilfully neglecting to perform his duty and/or wilfully misconducting himself to such a degree as to amount to an abuse of the public’s trust in the office holder, without reasonable excuse or justification.” (See the summary by Pill LJ in *Attorney General’s Reference No 3 of 2003* [2004] EWCA Crim 868, [2004] 3 WLR 451, para 61.) An initial question is whether a bishop is a public officer. In the Peter Ball case in 2015, the trial judge, Wilkie J, ruled that a bishop of the Church of England held an ‘office’ because of the constitutional position of the Church of England. Bishop Ball then pleaded guilty, but the particulars of the offence charged actual abuse, the misconduct being “misusing his position in authority to manipulate and prevail upon others for his own sexual gratification” in relation to 16 young men in their late teens or early twenties. In *R v Chapman* [2015] EWCA Crim 539, [2015] 3 WLR 726, Lord Thomas CJ (at para 20) referred to the earlier case of *R v Dytham* (1979) 69 Crim App R in which the Court of Appeal had said of the culpability element that “must be of such a degree that the misconduct is **calculated to injure the public interest so as to call for condemnation and punishment.**” (Emphasis in the original.) See further a note on the Peter Ball case, “Peter Ball and Misconduct in a Public Office” by Frank Cranmer and David Pocklington (2016) 18 Ecc LJ 188-195 and the article by Alisdair Gillepsie, ‘Reforming Misconduct in Public Office’ [2017]

candidate but, as can be seen above when examining the origin of section 37(1)(e), this does not appear to have been in the contemplation of General Synod when enacting the 2016 Measure.

- (3) If these “wider safeguarding issues and management decisions” would not involve the commission of a criminal offence, has the archbishop exceeded his powers by suspending Bishop Christopher in reliance on section 37(1)(e)?

28. Further questions arise from the archbishop’s statement that “If these matters are found to be proven I consider that the bishop would present a significant risk of harm by not adequately safeguarding children and vulnerable people.” Proven by whom? If no criminal charges are brought following the police investigation, would the archbishop nevertheless be able to maintain the suspension on the basis that he is satisfied according to the civil standard of proof (balance of probabilities) that the matters of concern have been proved?

RIGHT OF APPEAL

29. These questions demonstrate, I would suggest, the need for early judicial consideration of the power to suspend contained in section 37(1)(e), including what is embraced by “put[ting] a child or vulnerable adult at risk of harm” (section 36(2A)(c)).

30. A right of appeal against the suspension of a bishop under section 37(1) is conferred by section 36(6) as applied by section 37(6). The appeal is to the President of Tribunals (Lady Justice Asplin) and notice of this right of appeal must be included in the Form 16b notice of suspension.

31. Rule 66(1) of the Clergy Discipline Rules 2005 (as amended, and as applied by rule 81(1) to an appeal against suspension by a bishop) requires that the appeal should be made in writing within 14 days of receipt of the notice of suspension and should set out the grounds of appeal, with a copy sent to the archbishop.¹⁵ The archbishop then has 14 days to provide written comments to the President in answer to the appeal, a copy of which must be delivered by the archbishop to the appellant.

32. Bishop Christopher has stated that he is “bewildered by the suspension.” As mentioned above, one infers from this that he had not been provided with a copy of the “information” on which the archbishop based his decision to suspend. Clearly, if the right of appeal is to be meaningful, and if the bishop is to be able to provide cogent grounds of appeal, as required by the rule, he must be entitled to a copy of that information, and one would hope that Bishop Christopher now has that material.

Crim LR 270-291 critiquing the Law Commission consultation paper No.229. One replacement offence proposed by the Law Commission would be based on breach of duty and would punish those who breach a duty to protect the public from harm. The public office holder would have to have a duty to prevent harm, the breach must either cause harm or have the potential to cause harm to a specified level, and the breach must occur with the necessary fault element.

¹⁵ These requirements are set out on page 2 of the Form 16b.

33. The President of Tribunals may “either confirm or revoke the suspension”: section 36(6) as applied by section 37(6). The CDM provides that the President may do so “within 28 days following the lodging of the appeal.” Rule 66(3), however, states that the President may confirm or revoke the suspension “and shall *normally* do so in writing within 28 days of the appeal being lodged and a copy of the confirmation or revocation shall be delivered to the appellant and the [arch]bishop.”¹⁶

34. Leaving aside the question of law discussed above as to the proper interpretation of section 37(1)(e) and section 36(2A), another question yet to be decided is the basis on which the President should decide any appeal. Is it (i) a reconsideration of the information provided to the archbishop and whether the President is satisfied, on the basis of that information, of the alleged current risk of harm, or (ii) whether, on the basis of that information, the archbishop was entitled to be satisfied of the alleged risk: i.e. it was a reasonable decision for him to make, even if the President would have come to a different decision, or (iii) a full ‘merits’ appeal, taking into account any evidence provided by the appellant?¹⁷

A SUBSIDIARY, BUT IMPORTANT AND POSSIBLY DETERMINATIVE POINT

35. As set out above, for the archbishop to exercise the power to suspend conferred by section 37(1)(e), he must be satisfied that the bishop “presents” (present tense) a significant risk of harm. The risk of harm on which the archbishop relies is a safeguarding risk. But Bishop Christopher had already (with effect from 18 April 2019) delegated responsibility for safeguarding in the diocese to the suffragan Bishop of Grantham, the Rt Revd Dr Nicholas Chamberlain.¹⁸ Aside from other questions discussed above, on what

¹⁶ If the word “normally” is intended to allow the President time beyond 28 days to decide the appeal (as opposed to enabling it to be done orally, while being followed up in writing), it is arguably *ultra vires* the Measure.

¹⁷ The Clergy Discipline (Appeal) Rules 2005 apply only to appeals in disciplinary proceedings pursuant to section 20 of the CDM.

¹⁸ <https://www.lincoln.anglican.org/news/news-from-edward-king-house-april-2019-7>.

The statement (on the diocesan website but said to be issued by “*the Office of the Archbishop of Canterbury and the Office of the Bishop of Lincoln*” said:

“I have asked the bishop of Grantham to lead on all safeguarding arrangements in the diocese of Lincoln and have formally delegated this responsibility to him from 18th April 2019.

A non-recent safeguarding matter reported in the diocese of Lincoln is being investigated. All appropriate information has been passed on to the police and statutory authorities.

I have taken this decision because I have discovered that my interaction with the matter will need to be part of the investigation. The investigation will be led by the National Safeguarding Team and I will be cooperating fully with its work.

Good safeguarding practice supports the development of safer expressions of care to all and underpins the love and welcome of God for all people. The diocese of Lincoln takes very seriously its safeguarding responsibilities at every level, and whilst this investigation takes place it is appropriate that I take this step.

I will continue in all other duties relating to my role as bishop of Lincoln.”

basis could Archbishop Justin be satisfied that Bishop Christopher NOW presents a safeguarding risk?

CONCLUSION

36. Whatever the nature or details of the “information” on which the Archbishop of Canterbury based his decision to suspend Bishop Christopher, in the light of the clear statement that “there has been no allegation that Bishop Christopher has committed abuse of a child or vulnerable adult”, the legal basis for the suspension is at least doubtful. An appeal to the President of Tribunals that would clarify the legal position would seem to be justified and appropriate.

David Lamming

24 May 2019