# All Mouth and No Trousers? Observations Arising from the Decision on Jurisdiction in *Re Evans*

NEIL PATTERSON
Director of Vocations and Ordinands, Diocese of Hereford

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## INTRODUCTION

At the time of writing, work continues on a replacement for the Clergy Discipline Measure 2003 (CDM 2003). This comment explores some issues which have arisen in a recent disciplinary case – *Re Evans* – where, for the first time, the boundaries of the CDM jurisdiction have been considered by the tribunal. I will first identify the salient facts of the *Evans* case, before moving on to explore the specific issue of jurisdiction. I conclude with some observations about why this case is significant, especially for those working on the replacement to the CDM 2003.

The last report of the Clergy Conduct Measure Implementation Group, *Under Authority Revisited (GS 2277)*,[1] was debated by Synod in July 2022. This confirmed the direction of travel towards a Clergy Conduct Measure (CCM), incorporating a proposed process for interim-level treatment of more minor complaints by regional assessors, largely along the lines proposed by the Ecclesiastical Law Society's working group in its submission to the earlier consultation. The various papers relating to reform of the CDM 2003 do not, however, discuss the historic definition of 'reserved' cases affecting doctrine, ritual or ceremonial, which cannot be brought under the CDM 2003 for reasons explained below. I suggest that any disciplinary system is likely to be affected by the desire of those who may be tempted to 'weaponise' it in their doctrinal battles. It will therefore be important for any new Conduct Measure process to consider this issue carefully.

## THE FACTS OF *RE EVANS*

In March 2022 the long wait of the parish of Bromyard for a conclusion in relation to complaints about their vicar, the Rev'd Clive Evans, was ended. The Bishop of

1 See <https://www.churchofengland.org/sites/default/files/2022-06/GS%202277%20Report%20by%20the%20Clergy%20Conduct%20Measure%20Implementation%20Group_1.pdf>, accessed 17 August 2022.

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Hereford's Disciplinary Tribunal found that all three charges were made out[2] and imposed penalties by way of removal from office and a six-month bar on exercising his ministry.[3] An application for permission to appeal was rejected on 15 August.[4] Two of the charges, not relevant to this comment, concerned inappropriate touching, which was found to have occurred, against Mr Evans's evidence. The third related to an adult baptism conducted by Mr Evans, for reasons not entirely clear, in the bath of a private house, for which he removed all his clothing apart from his boxer shorts. For this charge the events were not in any real doubt, as a video recording exists which was used as evidence. The tribunal determined that this conduct was 'unseemly'. And it is that decision, or rather the decision of the tribunal to consider itself seized of that charge under the auspices of the CDM 2003, which gives rise to this comment.

Although some readers might feel that the entire circumstances of the baptism did not represent best practice in conduct of the sacrament, it has to be recognised that baptismal practice varies across the Church of England and through history, and in particular that the *Book of Common Prayer* explicitly provides for private baptism in 'time of necessity'. The charge therefore focused purely upon Mr Evans's state of undress. His defence was that *the dress* of a minister conducting a sacrament of the Church is a matter of 'doctrine ritual or ceremonial' explicitly reserved from the jurisdiction of the CDM 2003, and only able to be heard under the Ecclesiastical Jurisdiction Measure 1963 (EJM 1963). This necessitated a separate, preliminary, ruling on jurisdiction,[5] in which the tribunal rejected those arguments and determined that it would proceed to consider all three charges.

## THE DISTINCTION OVER DOCTRINE RITUAL AND CEREMONIAL

It is worth setting out at this point the origins of the distinction about ritual, doctrine and ceremonial.[6] From the Middle Ages down to the Church Discipline Act 1840, clergy discipline proceeded under the same framework regardless of the nature of the offence. A distinction was first introduced by

2 Decision of Tribunal in *Re Evans* [2022], paras 87–89, available at: <https://www.churchofengland.org/sites/default/files/2022-03/Tribunal%20decision%20on%20facts%20and%20conduct%2009.12.21%20FINAL.pdf>, accessed 6 April 2022.

3 Decision on Penalties, paras 34–35, available at: <https://www.churchofengland.org/sites/default/files/2022-03/Tribunal%20decision%20on%20penalty%2023.02.22%20FINAL.pdf>, accessed 6 April 2022.

4 Leave to Appeal Decision, available at: <https://www.churchofengland.org/sites/default/files/2022-08/Determination%20-%20Application%20for%20permission%20to%20appeal%2015.08.22.pdf>, accessed 25 September 2022.

5 Ruling on Jurisdiction, available at: https://www.churchofengland.org/sites/default/files/2022-03/Tribunal%20decision%20on%20Jurisdiction%2006.12.21%20FINAL.pdf, accessed 6 April 2022.

6 This section draws on N Patterson, *Ecclesiastical Law, Clergy and Laity* (Oxford, 2019), mainly Ch 6–7; see further the review of this work by P Collier KC, (2022) 24 Ecc LJ 389–392.

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the famous Public Worship Regulation Act 1874, introducing a completely new, but highly controversial, process for matters relating to worship alone. The distinction was balanced by the Clergy Discipline Act 1892, which specifically excluded matters of ritual or doctrine to allow a better process for criminal and scandalous matters. However, all three Acts remained in parallel force long into the twentieth century, even as the actual exercise of discipline in matters of liturgy and doctrine largely stayed out of the courts.

The EJM 1963 replaced all the previous legislation, and laid out in great detail the different processes for dealing with offences which either do, or do not, concern 'doctrine, ritual or ceremonial.' Those that did were to be tried only by the new Court of Ecclesiastical Causes Reserved, consisting of three bishops and two eminent judges. The historical challenge is to know whether or not those who drew up and passed the EJM 1963 genuinely expected the new procedure to be used: it certainly seems to me that they created a category covering all the sorts of matters that had given rise to such painful and expensive controversy in the mid-nineteenth century, and assigned them to a process unusually complex and difficult to implement.[7]

This has in fact turned out to be the case as far as clergy discipline matters are concerned, with none coming before the court since its foundation (and only two in the late 1980s on matters arising from faculty petitions). There was, however, an important reference to the issue in the case of *Bland v Archdeacon of Cheltenham* [1972] 1 All ER 1012, referred to in the decision on jurisdiction in *Evans* and discussed below. The proposal of the Hawker Report *Under Authority* to bring all offences under a new tribunal system was crucially modified on the floor of Synod, with an amendment by Robert Reiss in 1996 that reserved matters of doctrine, ritual and ceremonial to the 1963 process. And a renewed attempt by the House of Bishops to replace the Court of Ecclesiastical Causes Reserved in 2004 with a new doctrinal tribunal was also narrowly defeated.[8]

So there remains a division of jurisdiction between the 'normal' clergy discipline cases taken under the CDM 2003, and the 'reserved' cases taken (or not) under the EJM 1963.

## WHO DRAWS THE DISTINCTION?

Chancellor Rupert Bursell discussed the boundary between the two categories in this *Journal* in 2007,[9] and I shall refer to his article in more detail later. Bursell

7 I am extremely grateful to Dr Charlotte Smith for the snippet from her vast archival research that the letters to the judges first appointed to the Court of Ecclesiastical Causes Reserved advised them that although the Church was very grateful for their service, they need not expect ever to be asked to sit.
8 Patterson (note 6), 132–137.
9 R Bursell, 'Turbulent Priests: Clerical Misconduct under the Clergy Discipline Measure 2003' (2007) 9 Ecc LJ 250–263.

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does not, however, discuss the preliminary question, made directly relevant by *Evans*, as to whether the tribunal is the appropriate forum to determine whether the matter complained of is in fact reserved. Section 7 of the CDM 2003, does not offer an obvious answer. It provides that:

(1) The following provisions of this Measure shall have effect for the purpose of regulating proceedings against a clerk in Holy Orders who is alleged to have committed an act or omission other than one relating to matters involving doctrine, ritual or ceremonial, and references to misconduct shall be construed accordingly.
(2) Proceedings in relation to matters involving doctrine, ritual or ceremonial shall continue to be conducted in accordance with the 1963 Measure.

The final gateway through which disciplinary matters proceed to tribunal under the CDM 2003 is via the President of the Tribunals, whose role is defined in section 4 of the CDM 2003 and more extensively in rule 29 of the Clergy Discipline Rules 2005. If after formal investigation by the designated officer the President decides that there is a case for the respondent to answer '[s]he shall declare that as [her] decision and refer the complaint to a disciplinary tribunal for adjudication'.[10] This, it would seem, gives the President an opportunity to determine that some aspects of an allegation cannot proceed to tribunal on the basis that they are matters of doctrine, ritual or ceremonial.

It is interesting to note that, in *Evans*, the charge concerning the conduct of the baptism was declared by the President as suitable for adjudication, and it wasn't until a few weeks before the case management hearing that the respondent raised the issue of jurisdiction, arguing that it concerned matters of doctrine, ritual or ceremonial and thus outwith the tribunal's scope.[11] As Bursell notes, there is no power to amend this declaration in order to consider an altered, or a different, complaint: the tribunal is supposed to reach a decision on the allegations placed before it.[12] But in *Evans* the tribunal then proceeded to determine that issue on the first day of the substantive trial, it seems, without hearing any argument about whether or not it was appropriate to effectively go behind the President's initial declaration that there *was* a case for the respondent to answer on all matters, including the conduct of the baptism, and that is why it had been sent to the tribunal for adjudication in the first place. Putting that issue aside, I would like to suggest that it is on the face of it problematic, in the context of the two competing legal frameworks, to leave

10 Or, in the case of a bishop, to the Vicar General's court: CDM 2003, s 17(3).
11 Ruling on Jurisdiction, paras 1–3.
12 Bursell (note 9), 251.

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to the tribunal under the CDM 2003 the question of whether or not an allegation comprises a reserved matter.

The CDM prescribes tribunals consisting of a judicially qualified chair sitting with four other members, two clergy and two lay, drawn from a panel in the relevant province nominated by their diocesan bishops. The precise function of the different members of the tribunal is not defined in legislation or the associated Code of Practice. However, it is important that (although often nominated because of some legal knowledge or connection by role) the non-judicial members serve as representative clergy and laity, embodying the Church collectively in hearing the case. In that sense they fulfil both the function of a jury in a criminal trial, of determining the truth based on the evidence, but also in relation to clerical misconduct of judging whether specific behaviour is sufficiently unbecoming to require a penalty, and if so, what. Before this stage is reached though, it should be noted that there are a number of hurdles a complaint needs to overcome, which includes advice to the bishop from the diocesan registrar,[13] the exercise of episcopal discretion,[14] an investigation by the designated officer,[15] and then finally the declaration of the President as to whether there is a case to answer.[16]

This procedure under the CDM 2003 should be contrasted with the process under the EJM 1963 where it treats the issue of whether or not there is even a case to answer in respect of matters of doctrine, ritual or ceremonial to be of such significance to the Church as a whole that, if the bishop considers that the matter should be referred,[17] a committee is formed (consisting of, for a priest: a bishop selected by the archbishop; two members of the Lower House selected by the prolocutor; and two chancellors selected by the Dean/Auditor).[18] The committee decides by majority whether there is a case to answer. This whole elaborate process suggests a controversy of national significance, so much so that there is a need to essentially introduce a body of semi-political composition to filter the charge. Again, this contrasts markedly with the power now asserted by a single diocesan tribunal in the *Evans* case (also encompassing, in the lead-up to the adjudication, the views of the registrar, bishop and President) to determine the limits of the jurisdiction of the CDM 2003.

This all therefore begs the question: if the church is genuinely serious about treating disciplinary matters of doctrine, ritual or ceremonial with such incredible care, why has it left the boundaries of the CDM 2003 to be determined without

13 CDM 2003, s 11(1).
14 CDM 2003, ss 11(3), 12–16 and 17(1).
15 CDM 2003, s 17.
16 CDM 2003, s 17(3).
17 EJM 1963, s 39.
18 See M Hill, *Ecclesiastical Law* (4th edn) (Oxford, 2018), para 6.83; EJM 1963, s 42.

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recourse to the EJM 1963 process? I will pick up this theme again below, after considering *Evans* in more detail. But the reality seems to be that the EJM 1963 has become something of an unwieldy relic on the statute books, now largely irrelevant in light of the CDM 2003. Given that doctrinal controversy[19] has not ceased in the church, it is possible that use of the CDM 2003, or its successor, may provoke a need to define the jurisdictional boundaries more deliberately than by the preliminary process the tribunal adopted in *Re Evans*.

## THE TREATMENT OF THE DISCTINCTION IN *RE EVANS*

Returning to the actual case in *Evans*, it should be noted that the argument advanced on behalf of the respondent was simply that the dress of a minister conducting a sacrament was by its nature a ceremonial matter, and so outside the jurisdiction of the tribunal.[20] The designated officer, on the other hand, relied on the judgment in *Bland v Archdeacon of Cheltenham* [1972] 1 All ER 1012.

In *Bland*, Chancellor Moore at first instance ruled against Mr Bland's claim that he had a theological objection to indiscriminate infant baptism on the basis that there was a simple duty to baptise in the 1604 canons and the *jus commune* of the Church. But on appeal the Court of Arches found that he had failed to make adequate reference to resolutions of Convocation in 1939 and 1957, and to the recent revision of the Canons (albeit not promulged at the time of the alleged offence). They therefore allowed Mr Bland's appeal on the basis that Moore's interpretation of his duty was too rigorously drawn. However, they did uphold the position that the duty to baptise, rigorous or not, was not inherently a doctrinal matter and therefore the Court of Ecclesiastical Causes Reserved did not need to be engaged. The designated officer in *Evans* alighted on the following passage of the judgment in the Court of Arches:[21]

> Certain offences clearly involve a matter of doctrine, e.g. a public statement (as in a sermon or a book) denying the doctrine of the Trinity or of the deity of Christ. These offences would be charged as such and would be referred without hesitation to the Court of Ecclesiastical Causes Reserved. This offence is of a different nature. The act of refusal to baptise a child is not a doctrinal offence as such and is not charged as such. It is concerned with pastoral work and activity. The motive behind the refusal might be partly connected with a doctrinal view held by the person refusing but

19 At least on Twitter, which seems to be the modern equivalent of the 19th century pamphlet wars, even if not in court.
20 Ruling on Jurisdiction, para 5.
21 Ibid, para 9.

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> the act of refusing to baptise cannot be called an offence against doctrine nor was it in this case charged as such.

Secondly, the designated officer relied on the views of Chancellor Bursell in an article published in this *Journal*, written shortly after the passage of the CDM 2003.[22] In that article Bursell considers a number of possible borderline cases, such as repeat baptism or the use of the Roman rite, where he suggests it may be possible to apply the CDM 2003, especially if the matter has been referred to the bishop and the priest concerned has refused to obey episcopal direction. He went on to opine that the dress of the minister is a matter of good order (bearing in mind the breadth of the provisions in) canon C27, and so not necessarily a reserved matter.[23]

In the end the tribunal rejected the respondent's submissions on jurisdiction in *Evans*, and endorsed the designated officer's interpretation:[24]

> . . . Whilst the Tribunal accepts that in one aspect it is accurate to say that a state of undress is related to a question of being correctly vested, the Tribunal looked at the substance of what it was tasked with addressing. The issue of being in a state of undress engages more than simply the question of whether or not the correct robes and vestments were being worn, and as such the Tribunal does not accept the submission that the offence in this case ought properly to be seen as a ceremonial issue.
>
> The gravamen of the allegation is the question of pastoral propriety, or otherwise, of the state of undress of the Respondent. Any element connected with, or offence against, the ceremonial is ancillary to this. In this regard the panel finds the judgment in *Bland* instructive and notes in that case the Court of Arches' deprecation of assessing pastoral work and activity as a doctrinal offence simply because a doctrinal motive might underly the facts.

## SO WHAT IS THE POINT OF THE EJM 1963?

More significant, though, for the purposes of this discussion, is the apparent reality that 'shall be tried under the Ecclesiastical Jurisdiction Measure 1963' actually means 'shall be tried at the Greek Kalends', i.e. never. So rather than discussing which of two alternative disciplinary processes are to be used, as the EJM appears to suggest, the discussion is really about the limits of discipline altogether. If the current clergy discipline system is to adopt Bursell's argument in full, it would mean a range of additional cases coming

22 Bursell (note 9), 252–255.
23 Ibid, 255.
24 Ruling on Jurisdiction, paras 11–12.

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under the CDM 2003. This is directly relevant to the question of liturgical dress. Until the passage of Amending Canon 36 in February 2018, the Canons stated that clergy in the conduct of public worship were obliged to wear one of a choice of traditional forms of liturgical dress, and Bursell speculated that to not do so could simply be regarded as a failure to comply with good order, and not a matter of ceremonial.

However, it is well known that long before 2018 a significant number of clergy from the evangelical tradition led public worship without wearing any of the traditional garments, perhaps including readers of this *Journal*, or at least witnessed by them. If that is simply a matter of good order, then complaints from parishioners about the unseemly dress of their parsons should have been regularly passed into the CDM system and issued in tribunals. But, significantly, they have not done so, any more than complaints about Anglo-Catholic clergy making use of Marian devotions, or liberal clergy expounding their disbelief in various articles of the Creeds. Fortunately, I would argue, we have realised as a Church that there is little to be gained from such proceedings.

## CONCLUSION

The relevance of this history today is for those preparing the proposed Clergy Conduct Measure, who have not yet referred in their reports to the dilemma this poses. The present situation could be maintained, and the new Measure contain the fiction that reserved cases will be passed to the jurisdiction of the EJM 1963, in the safe knowledge that they will never be heard. Or the new Clergy Conduct Measure could be drafted to include a wide reference to neglect of duty that would oblige clergy, under pain of censure or worse, to observe the letter of the Canons in liturgy and life. Or a preamble could make it clear, together with the repeal of the relevant part of the EJM 1963, that the scope of disciplinary processes when it comes to doctrine, ritual or ceremonial can only go as far as there is a common understanding across the Church about what is and is not good conduct, subject to *de minimis* principles, and that those who are disappointed in the progress of their pet causes in Synod or elsewhere shall have to live without their costly and disruptive day in court.

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