

Church Discipline Ordinance 2002

Explanatory Statement

This statement relates to a revised version of the bill for the Church Discipline Ordinance 2002. The initial form of bill was circulated to members of the Synod with the Supplementary Report of the Standing Committee. The changes in the revised version have been made in response to comments made by persons attending meetings held on 8 and 9 October 2002 convened at the request of the Standing Committee and chaired by Deputy Chairman of Committees, Mr Robert Tong.

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Introduction

Overview of the Church Discipline Ordinance 1996

- The Church Discipline Ordinance 1996 (the "1996 Ordinance" printed on pages 144 to 152 inclusive of *Acts, Ordinances & Regulations*) provides for the discipline of Subjects, being ministers licensed by the Archbishop and persons holding positions in the Diocese, who after ordination or while holding the position, as the case may be, engage in Unacceptable Behaviour.
- The term "Unacceptable Behaviour" is defined in the 1996 Ordinance to mean -
 - in the case of an ordained person - sexual conduct after ordination which would be regarded by right thinking members of the Church as disgraceful and inconsistent with the standards to be observed by a Christian minister,
 - in the case a person who is not ordained - sexual conduct while holding a position which would be regarded by right thinking members of the Church as disgraceful and inconsistent with the standards which should be observed by a Christian lay person holding such a position, and
 - any threat, intimidation or inducement made by or at the direction of or with the consent of a person intended to persuade another person from making a complaint to the Archbishop about sexual conduct of the type referred to in paragraphs (a) or (b) by the first mentioned person.
- There is a 4 stage process under the 1996 Ordinance for dealing with allegations of Unacceptable Behaviour by a Subject where the Archbishop receives a complaint or has knowledge or reasonable suspicion of such conduct -
 - first, the Archbishop must promptly appoint a person or persons to investigate the allegations,
 - second, an experienced lawyer must report to the Archbishop on the allegations,
 - third, a Tribunal is to investigate the allegations and make recommendations to the Archbishop,
 - fourth, the Archbishop may act on the recommendations of the Tribunal.

Revised bill

- The 1996 Ordinance has generally achieved the purposes for which it was initially put in place. However the experience gained in administering the ordinance has highlighted a number of areas in which it can be improved.
- A bill for the Church Discipline Ordinance 1996 Amendment Ordinance 2001 reached the committee stage at the 2001 session of the Synod. The committee was unable to complete its consideration of this bill and by *resolution 37/01* Synod requested that further consideration of the bill be referred to the first session of the 46th Synod and that the Standing Committee give the matter a high priority on the agenda of the Synod.
- Since *resolution 37/01* the events of February 2002 affecting the Diocese of Brisbane in particular and the Anglican Church of Australia generally have added impetus for the preparation of a bill for the Church Discipline Ordinance 2002 (the "revised bill"). The revised bill seeks to address, among other things, a range of issues associated with child protection. The revised bill also seeks to address issues raised during debate

at the 2001 session of Synod as to when conduct prior to ordination or prior to holding a position will be considered Unacceptable Behaviour.

Summary of main changes

7. The revised bill provides for the following main changes to the 1996 Ordinance -
- (a) clarifying the meaning of the “right thinking member of the Church” test used in the definition of Unacceptable Behaviour by re-casting this as a “right thinking member of the Church in this Diocese” test,
 - (b) providing for sexual misconduct or child abuse after ordination or while or after holding a position as Unacceptable Behaviour,
 - (c) extending Unacceptable Behaviour to include sexual misconduct which could constitute a serious offence or child abuse prior to ordination or prior to first holding a position which causes or would cause scandal or evil report other than conduct which is declared by the Archbishop to be exempt,
 - (d) where a person is ordained after the date of assent to the revised bill, extending Unacceptable Behaviour to include sexual misconduct not covered by (c) prior to ordination which causes or would cause scandal or evil report other than conduct which prior to ordination has been fully disclosed to the Archbishop and for which any appropriate reparation has been made,
 - (e) where a person is first appointed to a position after the date of assent to the revised bill, extending Unacceptable Behaviour to include sexual misconduct not covered by (c) prior to first holding a position which causes or would cause scandal or evil report other than conduct which prior to the issue of an authority under the Deaconesses, Readers and Other Lay Person’s Ordinance 1981 has been fully disclosed to the Archbishop or Assistant Bishop and for which any appropriate reparation has been made,
 - (f) including procedures for conciliation between a person who has been or claims to have been the subject of Unacceptable Behaviour and the Subject where the allegations involve less serious conduct,
 - (g) including a mechanism to enable the Archbishop to put in place an interim suspension of a minister’s licence and/or an interim prohibition in respect of a person holding a position while allegations involving serious offences are dealt with under the ordinance,
 - (h) providing for a Director to discharge certain functions under the revised bill currently discharged by the Archbishop under the 1996 Ordinance,
 - (i) providing for the appointment of Advisers to assist the Director and the Archbishop to make certain decisions under the revised bill.

Unacceptable behaviour

The “right thinking member of the Church” test

8. The revised bill provides for a change to the “right thinking member of the Church” test which is used to define both sexual misconduct and child abuse (see clause 2(1)). This test has been re-caste as a “right thinking member of the Church in this Diocese” test. Both tests rely on a Tribunal making a judgment as to whether the conduct of a minister or a person holding a position would be regarded by a class of persons as disgraceful and inconsistent with the standards to be observed by a Christian minister or lay person as applicable. However the re-caste test limits the class of persons used to make this judgment to members of the Church *in this Diocese* rather than the Anglican Church of Australia generally.

Conduct after ordination or while or after holding a position

9. The revised bill provides that sexual misconduct or child abuse after ordination or while or after holding a position is Unacceptable Behaviour (paragraphs (a)(i) and (b)(i) in the definition of Unacceptable Behaviour in clause 2(1)).

Conduct prior to ordination or first holding a position

10. The revised bill extends Unacceptable Behaviour to include sexual misconduct or child abuse prior to ordination or prior to first holding a position which at the time the allegations are made is productive, or if known publicly would be productive, of scandal or evil report. However it excludes conduct which is declared by the Archbishop to be exempt (see below).

11. In relation to persons who are ordained or first hold a position after the date of assent to the revised bill, Unacceptable Behaviour also includes other pre-ordination or pre-position sexual misconduct which at the time the allegations are made is productive, or if known publicly would be productive, of scandal or evil report. However it excludes -

- (a) conduct by an ordained person which prior to ordination was fully disclosed in writing to the bishop of the diocese by whom or on whose behalf the person was ordained and for which any appropriate reparation has been made, and
- (b) conduct by a person who is not ordained which prior to being issued with an authority under the Deaconesses, Readers and Other Lay Persons Ordinance 1981 was fully disclosed in writing to the Archbishop or Assistant Bishop and for which any appropriate reparation has been made.

Child Abuse and Serious Offences

12. The revised bill includes child abuse and sexual misconduct which could constitute a serious offence as distinct categories of Unacceptable Behaviour.

13. There are a number of reasons for including child abuse as a distinct category of Unacceptable Behaviour including-

- (a) to address community concern about child abuse in the Anglican Church,
- (b) to recognise and seek to address the particular issues associated with certain forms of child abuse as opposed to sexual misconduct generally,
- (c) to extend particular care and protection to children as a vulnerable class of persons in the Diocese.

14. Child abuse is defined in clause 2(1) to mean conduct which would be regarded by right thinking members of the Church in this Diocese as abuse of a Child. Child is in turn defined to mean a person under the age of 18 years. The adoption of the "right thinking member of the Church in this Diocese" test in determining whether conduct is child abuse is considered the most appropriate way of ensuring that the full range of conduct that should properly be considered child abuse and therefore unacceptable is caught within the definition.

15. The definition of serious offence reflects State legislation. In general such offences are either sex offences which are punishable by penal servitude or imprisonment for 12 months or more or offences involving children which are punishable by penal servitude or imprisonment for 12 months or more.

16. The reason for treating pre-ordination and pre-position child abuse or sexual misconduct which could constitute a serious offence separately from other forms of pre-ordination or pre-position sexual misconduct is two-fold. First, it enables such conduct to be found to be Unacceptable Behaviour by a Tribunal regardless of when the Subject was ordained or first appointed to the position. Secondly, it enables a process of greater scrutiny to be put in place when determining whether to exclude such conduct from being Unacceptable Behaviour (see exempt conduct).

Exempt conduct

17. In limited circumstances, the Archbishop, with the concurrence of Advisors, can declare that certain conduct is exempt conduct and is therefore not Unacceptable Behaviour (clauses 14(1), 14(2) and 14(3)). A declaration of exempt conduct can apply to conduct -

- (a) which could constitute child abuse or a serious offence committed by -
 - (i) an ordained person prior to ordination, or
 - (ii) by a non-ordained person prior to being issued with an authority under the Deaconesses, Readers and Other Lay Persons Ordinance 1981, and
- (b) which has been fully disclosed to the Archbishop or Assistant Bishop as applicable -
 - (i) prior to ordination, or
 - (ii) prior to the authority being issued, or
 - (iii) in relation to clergy not ordained by the Archbishop, prior to the person being first licensed by the Archbishop.

18. The Archbishop is not to make a declaration of exempt conduct unless the Archbishop and a majority of a Advisors acting under clause 12A(2) consider that the person has made any appropriate reparation for the conduct, does not pose a risk to the safety of any person and is fit to be ordained, issued with an authority or licensed (clause 14(4)(b)). There are a range of matters the Archbishop and the Advisors must take into account in deciding whether a person poses a risk to the safety to any person (clause 14(5)). These matters parallel the matters to be taken into account by State tribunals in deciding whether a serious sex offence committed by a person should be taken into account in determining the person's status as a prohibited person under State child protection legislation. The Archbishop cannot however make a declaration of exempt conduct in respect of a person who is a prohibited person in terms of State child protection legislation (clause 14(4)(a)).

Conciliation

19. The form of bill considered at the 2001 session of Synod included provisions for an alternative course of action to be implemented by the Archbishop where such action had been endorsed by a meeting of 3 advisers. The revised bill retains the intended purpose behind such provisions but limits the involvement of advisers and re-castes the provisions in terms of conciliation (clause 3A).

20. Under the revised bill, the Director may implement conciliation between an injured party and the Subject if the Director considers that conciliation could properly deal with the allegations. If the Director implements conciliation, the Director must do so before appointing an experienced lawyer (clause 3A(1)).

21. The Director must not implement conciliation if the allegations -

- (a) involve child abuse; or
- (b) involve sexual misconduct which could constitute a serious offence; or
- (c) if substantiated before a Tribunal, would in the opinion of the Director be likely to result in the Tribunal making a recommendation for disciplinary action, or

- (d) are of substantially the same nature as allegations made by any person which have previously been admitted by, or substantiated against, the Subject (clause 3A(2)).
22. The Director may defer or suspend an investigation into allegations if -
- (a) each injured party and the Subject have acknowledged that there is a reasonable prospect of dealing with the allegations through conciliation and have agreed to participate in the process under clause 3A, and
 - (b) the process is likely to conclude within 1 month (clause 3A(3)).
23. The period fixed for conciliation may be extended for a period of not more than 1 month with the agreement of at least 1 injured party and the Subject (clause 3A(4)).
24. The Director is to take no further action in respect of the allegations if at the conclusion of the conciliation each Injured Party, the Subject and a majority of the Advisers acting under clause 12A(2) are satisfied that the process has properly dealt with the allegations. In any other case, the Director must appoint an experienced lawyer (clause 3A(5)).
25. Communications made during conciliation are confidential and cannot be used in relation to certain other diocesan investigatory and/or disciplinary proceedings (clause 3A(6)). The Director is however to record the outcome of the conciliation and provide a copy of the record to each person involved, the Archbishop and, as necessary for the purposes of the ordinance, any other person (clause 3A(7)).

Interim suspension and prohibition

26. The revised bill provides for a mechanism to enable the Archbishop to put in place an interim suspension of a minister's licence and/or an interim prohibition in respect of a minister or other person holding a position while allegations involving serious offences are dealt with under the ordinance (clauses 3B(1) and 3B(3)). The Archbishop may do this if -
- (a) the allegations relate to a serious offence -
 - (i) of which the Subject has been charged or convicted, or
 - (ii) in respect of which the Archbishop has received a report from an experienced lawyer that there is a prima face case of the Subject having committed the offence but which does not state that having regard to all the evidence a tribunal would be unlikely to find that the subject committed the offence, or
 - (iii) which the Subject has admitted having committed, and
 - (b) the Archbishop has -
 - (i) invited the Subject to show cause, and
 - (ii) obtained the concurrence of a majority of the Advisors acting under clause 12A(2) if the proposed suspension or prohibition is based on a report referred to in (a)(ii).

27. An interim suspension or prohibition expires at the time the allegations have been fully dealt with under the revised bill (clauses 3B(2) and 3B(4)). The Archbishop may give notice of an interim suspension or prohibition to such other persons as the Archbishop considers necessary to give proper effect to the suspension or prohibition (clause 3B(5)). A prohibition may be limited to specific positions or apply to all positions and may be subject to conditions and limitations (clause 3B(6)). A person who is subject to an interim suspension or prohibition or who voluntarily stands down from a position while allegations are dealt with under the ordinance is entitled to any stipend, salary, allowances and other benefits the Subject would otherwise be entitled to receive. The cost in respect of a Subject licensed to or employed by a parochial unit to be paid out of funds under the control of the Synod (clause 3B(7)).

28. A person who is subject to a prohibition is suspended from any position covered by the prohibition and is not able to be appointed to another position covered by the prohibition (clause 3B(8) and (9)). If a person is suspended from a position, the position may, if appropriate, be filled by a temporary appointment (clause 3B(8)).

The Director

29. The revised bill provides for the appointment of a Director to discharge certain functions currently discharged by the Archbishop under the 1996 Ordinance. The Archbishop will however continue to pronounce final and interim disciplinary measures on a Subject and will also have a role in declaring conduct which could constitute child abuse or a serious offence to be exempt conduct for the purposes of Unacceptable Behaviour (clauses 14(1), 14(2) and 14(3)).

30. The appointment of a Director to undertake certain functions currently undertaken by the Archbishop (the decision not to investigate or continue to investigate Allegations, and decisions following the receipt of the Report by the Experienced Lawyer) is considered necessary to remove a conflict of interest for the Archbishop in exercising these roles. The exercise of these roles is likely to create a real or perceived conflict with the exercise of a pastoral role to one or both of the Injured Party and the Subject where appropriate. It is suggested that these roles cannot properly be exercised by the same person.

31. The Director is to be an experienced lawyer appointed by the Archbishop (clause 11(1)). The Archbishop may appoint another experienced lawyer to exercise a function of the Director if the Director is unable or unwilling to exercise the function (clause 11(2)).

32. The Director is to keep the Archbishop fully informed of any allegations, any response to the allegations and any action he or she takes under the revised bill (clause 12(1)). The Director is also to provide the Archbishop with any other information reasonably requested by the Archbishop and is to make an annual report to the Standing Committee as to the action taken under the revised bill during the preceding year (clause 12(2)). The Archbishop and the person who appointed a Subject to the position are to provide any information reasonably requested by the Director (clause 12(3)).

Advisers

33. The revised bill provides for the appointment of Advisers to assist the Director in deciding whether the Director should -

- (a) decline to appoint or revoke the appointment of an investigator based on the circumstances referred to in clauses 3(3)(a) to (g) inclusive, and
- (b) take no further action under the revised bill in relation to allegations of Unacceptable Behaviour at the conclusion of conciliation implemented by the Director (clause 3A(6)(a)),
- (c) decide to appoint a Tribunal in circumstances where the report of the experienced lawyer states that although there is a prima facie case that the Subject has engaged in Unacceptable Behaviour, having regard to all the evidence a Tribunal is not likely to find that the Subject has engaged in Unacceptable Behaviour (clause 4(5)).

34. The Advisors also assist the Archbishop in deciding whether -

- (a) to issue an interim suspension or prohibition based on a report of an experienced lawyer that the Subject has prima facie committed a serious offence; and
- (b) to revoke a prohibition issued on the recommendation of a Tribunal under clause 9(8); and
- (c) to make a declaration of exempt conduct under clause 14.

35. When acting collectively for the purposes of this Ordinance, the advisors must include an experienced lawyer, a person who is or has been a licensed minister for at least 10 years and at least 1 man and 1 woman (clause 12A(2)).

Other matters

Notification

36. The revised bill provides for a notification procedure to be followed by the Director upon receiving or being notified of allegations of Unacceptable Behaviour (clauses 2A, 3(1) and 3(1A)). The notification procedure is intended, where appropriate, to by-pass the delay and expense of investigating allegations if the Subject is willing to admit the substance of the allegations at an early stage.

Investigation

37. The revised bill provides for an investigation of allegations which have not been admitted by the Subject during the notification procedure (clause 3(1A)). The revised bill also provides for a number of additional requirements under clause 3(2) in relation to the investigation of allegations. These include requiring the investigator -

- (a) to make a written or, with the consent of the Subject, a taped record of all interviews with the Subject and provide the Subject with a copy of any such record, and
- (b) to allow each person interviewed to have another person present who is not likely to be a witness to the allegations, and
- (c) to at the conclusion of the investigation to forward to the Director without unnecessary delay a report setting out the results of the investigation together with signed copies of all records of interviews and any other relevant material.

38. The Archbishop and the person or body who appointed the Subject to the position must provide to the investigator any information reasonably requested (clause 3(2A)).

39. The circumstances in which a Director may choose not to investigate allegations of Unacceptable Behaviour under clause 3(3) has been made subject to the Director obtaining the concurrence of Advisers acting under clause 12A(2). The circumstances in which a Director may choose not to investigate such allegations has also been changed and expanded. In particular the Director may choose not to investigate by reason of the following -

- (a) where there is insufficient evidence to warrant an investigation, and
- (b) where the allegations are withdrawn pursuant to clause 10 and there is insufficient other evidence to warrant an investigation.

Other persons

40. The revised bill extends the meaning of "other person" (see definition of other person in clause 2(1)). Under the extended meaning, other person includes a person other than a Licensed Minister who -

- (a) holds or who has held a position, or
- (b) is in holy orders, resident in the Diocese and does not hold or who has not held a position, or
- (c) has requested that the Archbishop make a declaration under clause 14.

Definition of position

41. The revised bill extends the meaning of "position" in clause 2(1) in 2 respects, namely -
- (a) by removing the qualification that a position arising by way of membership of a parish council necessarily relate to a parish council constituted under the Church Administration Ordinance 1990, and
 - (b) by including positions by way of membership of a board, council or committee established by a regional council.

False, vexatious or misconceived allegations of child abuse

42. At various points in the revised bill, provision is made for a determination as to whether allegations which involve child abuse are false, vexatious or misconceived (clauses 3(4), 4(3)(c), 6(10) and 7(3)). The purpose of these provisions is to ensure that false, vexatious or misconceived allegations of child abuse are, in accordance with State legislation, not reported to the Commission for Children and Young People for inclusion on the screening data base operated by that body.

Revocation of prohibitions

43. The revised bill enables the Archbishop at any time to revoke a prohibition issued on the recommendation of a Tribunal with the concurrence of a majority of a meeting of at least 3 Advisors (clause 9(7)).

Allegations previously dealt with, repeal and transitional

44. No action is to be taken under the revised bill in respect of allegations previously dealt with under -
- (a) the revised bill, the 1996 Ordinance or, subject to clause 4(9), the Tribunal Ordinance 1962, or
 - (b) a formal investigation or inquiry with the authority of the Archbishop which commenced prior to the date of assent to the revised bill,

if the new allegations are not materially different from such allegations and unless the new allegations are supported by apparently credible fresh facts likely to lead to a different result (clause 13).

45. The revised bill provides for the repeal of the 1996 Ordinance and provides that the revised bill applies in respect of conduct whether occurring before, on or after the date on which the revised bill receives assent (clause 15(1)). However if an investigator has been appointed in respect of any allegations before the date of assent to the revised bill, such allegations are to be dealt with under the 1996 Ordinance as if that ordinance had not been repealed (clause 15(2)).

46. The revised bill also provides for transitional arrangements for the Director (clause 15(3)).

GARTH BLAKE
15 October 2002