

Discipline Amendment Ordinance 2014

Explanatory Report

Purpose

1. The purpose of this report is to provide explanatory notes for the bill for the Discipline Amendment Ordinance 2014 (the “bill”) which is being promoted to the 1st session of the 50th Synod in 2014 pursuant to resolution 18/13 which is as follows –

“Synod requests the Standing Committee to review the Discipline Ordinance 2006 and the Relinquishment of Holy Orders Ordinance 1994, with particular regard to their interaction with the Child Protection (Working With Children) Act 2012 (NSW), and to bring a report and any proposed amending ordinance or ordinances to the 1st ordinary session of the 50th Synod.”

Recommendation

2. The Synod pass the bill as an ordinance of the Synod.

Summary of amendments

3. The main amendments proposed to be made to the *Discipline Ordinance 2006* are –

- Expand the definition of “child abuse”
- Include new offences for making threats, intimidation or inducement for breaking a suppression order
- Enable complaints which lack utility to be declined
- Enable certain complaints related to child abuse to be re-opened for the purpose of making a finding
- Enable the Professional Standards Committee (PSC) to recommend prohibition orders with the consent of respondents
- Provide for a new disciplinary process for complaints against unpaid lay church workers
- Treat findings made by other disciplinary bodies as conclusive
- Clarify the effect of prohibition orders on the appointment or election of a person to a position in the Diocese

Consequential or related amendments are proposed to be made to the *Discipline Ordinance 2006 Amendment Ordinance 2013* and the *Relinquishment of Holy Orders Ordinance 1994*.

Meaning of terms

4. In this report –

“FIS” means *Faithfulness in Service: A National Code for personal behaviour and the practice of pastoral ministry by clergy and church workers*.

“PSC” means Professional Standards Committee.

“Reportable Conduct” means sexual misconduct committed against, with or in the presence of a child, including grooming of a child, or any serious physical assault of a child.

Amendments to the Discipline Ordinance 2006

Clause 2: Definitions

5. Currently the definition of “child abuse” in the Ordinance has the same meaning as in FIS. Its ambit is unclear. For example it is not clear whether grooming would constitute “sexual abuse” and thereby come within one of the categories of “child abuse” listed in FIS.

6. It is therefore proposed to create the following new offences: “grooming”, “inappropriate pastoral conduct involving a child and possession”, “production or distribution of child exploitation material”. See paragraphs 28 and 29 with respect to proposed amendments to the *Offences Ordinance 1962*.

7. “Grooming” and “child exploitation material” will have the same meaning as in FIS.

8. On occasions a complaint may allege conduct that is inappropriate but there is insufficient evidence of intent to establish grooming. In order to ensure such complaints can be addressed, it is proposed to include the new category of “inappropriate pastoral conduct involving a child”. It is proposed that this be defined as: “engaging in a pattern of conduct involving a child or a group of children that is inconsistent with the standards and guidelines of Faithfulness in Service”. It is not intended that this capture one-off

mistakes or errors of judgment but patterns of behaviour that are inappropriate by reference to the standards and guidelines in FIS that are expected of church workers.

Clauses 4 and 6: New offences for making threats, intimidation or inducement or for breaching suppression order

9. Clause 4 sets out the offences that a complaint may allege a member of clergy to have committed. Clause 6 is the equivalent clause with respect to lay church workers.

10. It is proposed to include new offences for attempting by threat, intimidation or inducement to dissuade a person from making a complaint, persuade a person to withdraw a complaint or persuade a person to consent to the withdrawal of a complaint. It is also proposed to include a new offence for knowingly or recklessly breaching a tribunal order that names or other information be suppressed.

Clause 13: Declining complaints which lack utility

11. Clause 13(2) sets out circumstances in which the Director, with the concurrence of the PSC, may decline to deal with a complaint. It is proposed to add a new ground in 13(2)(e) that a complaint may be declined if the PSC is of the opinion that there would be no utility in dealing with the complaint and the complaint does not allege Reportable Conduct. A new clause 13(3) will require the PSC to consider the practicability and likely effectiveness of available outcomes if the complaint is sustained when assessing whether or not a complaint lacks utility. This may include factors such as positions held, time since a position was held, age, health, among others.

Clause 14: Re-opening complaints that have already been dealt with under the Ordinance

12. Prior to 2012 complaints alleging child abuse were reportable to the predecessor to the Office of Children's Guardian unless they were found to be vexatious or misconceived. When the *Child Protection (Working with Children) Act 2012* came into effect this was narrowed to only those matters where findings had been made that the person had engaged in the conduct. Amendments to the *Discipline Ordinance 2006* passed by the Synod last year require the PSC or the relevant tribunal to make findings in respect to Reportable Conduct. There was no requirement for express findings to be made prior to these amendments. There are a small number of matters that may need to be re-opened for the purpose of making findings in order to ensure valid reports can be made to the Office of the Children's Guardian. In such cases any prior findings of fact would be treated as conclusive.

Clause 34 and subclause 36(8): PSC recommendations

13. In many cases the strongest recommendation that a tribunal can make against a church worker is that the relevant Church authority issue a prohibition order which prohibits the person from holding a specified position or office in or being employed by a church body or church authority or from exercising any specified functions. Presently, other than on a temporary basis, prohibition orders can only be recommended by a tribunal. It is proposed to insert a new clause 34(1)(j) to allow the PSC to recommend that the person consent to a prohibition order being issued. This will avoid the need for a tribunal in a circumstance where the person is willing to consent to the order.

14. A new clause 36(8) makes clear that if the a recommendation is made under 34(1)(j) and the person accepts the recommendation, that the relevant Church authority is empowered to make the prohibition order.

15. It is proposed that the current criteria to be satisfied before the PSC can make a recommendation under clause 34(1)(h) or (i) that the Archbishop appoint a person to promote a charge to the relevant tribunal be removed from these clauses and set out in a new 34(1A).

Chapter 4: New disciplinary process for complaints against lay church workers who are unpaid

16. A number of amendments have been made, or attempted, to the Ordinance since its inception to refine the process for the consideration of complaints against unpaid lay church workers. The primary reasons for these amendments have been that –

- (a) any referral of a complaint to a tribunal has the potential to be very costly in terms of time and money for both the person concerned and the Diocese, and
- (b) such costs cannot be justified in circumstances where issues of employment or livelihood are not directly at stake as is the case with clergy or employed church workers.

17. In 2009 amendments were made to clauses 36(3) and (4) to give the Archbishop the option of not referring certain complaints against unpaid lay church workers to the Disciplinary Tribunal but instead refer them back to the PSC under a new clause 37A. This change was made to address the situation of complaints proceeding to tribunal hearings by default where an unpaid lay church worker failed to respond to or did not accept the recommendations of the PSC.

18. In 2012 further amendments were proposed to completely remove unpaid lay church workers from the jurisdiction of the Disciplinary Tribunal. Under these proposed amendments if a person did not respond to, accept or comply with the recommendations of the PSC, the Archbishop would have been required to refer the matter back to the PSC for a determination. These amendments were not passed by the Synod.

19. It is again proposed to completely remove unpaid lay church workers from the jurisdiction of the Disciplinary Tribunal, but this time to provide a separate process in a new Chapter 4 of the Ordinance for the adjudication of complaints made against unpaid lay church workers (referred to in the Ordinance as “unpaid church workers”).

20. The adjudication process in Chapter 4 would operate as follows –

- (a) Complaints against “unpaid church workers” are to be considered by an “experienced lawyer” appointed by the Registrar, referred to in the Ordinance as the “Adjudicator”.
- (b) If the complaint or the substance of the complaint is admitted, the Director is to refer the complaint to the Adjudicator rather than to the PSC. The Adjudicator may then proceed to make recommendations in relation to the respondent under clause 47.
- (c) If the complaint or the substance of the complaint is not admitted, the usual processes for investigation in Part 2 of Chapter 2 apply but the Director is to refer the investigator’s report and other material to the Adjudicator rather than to the PSC.
- (d) If the unpaid church worker does not admit the complaint or the substance of the complaint, the Director will invite the unpaid church worker to provide, within 28 days or a longer agreed period, any further information or material, and to make representations to the Adjudicator relating to the complaint. The Adjudicator is required to apply the rules of procedural fairness and otherwise determine a procedure for resolution of the complaint. The Adjudicator may then proceed to make recommendations in relation to the respondent under clause 47.
- (e) The Adjudicator may make recommendations to: the respondent and/or the Archbishop/relevant church authority. In making recommendations to the respondent the Adjudicator has the same powers of recommendation as the PSC under clause 34(1), except that the Adjudicator cannot refer the complaint to a tribunal. In making recommendations to the Archbishop/relevant church authority the Adjudicator has the same powers as the Disciplinary Tribunal under clause 74.
- (f) The Adjudicator will have discretion as to whether or not to put recommendations to the respondent or to the Archbishop/relevant church authority in the first instance. If the Adjudicator puts recommendations to the respondent and the respondent does not accept the recommendations, the Adjudicator is not precluded from making further recommendations to the Archbishop/relevant church authority in relation to the respondent.
- (g) Where it is alleged, the Adjudicator must make findings on whether any Reportable Conduct was engaged in by the respondent.
- (h) The Adjudicator has no power to award costs. The respondent is responsible for their own costs of responding to a complaint.
- (i) The Adjudicator’s decisions and recommendations are not appellable or subject to review, except that provision is made for a respondent to make an application under clause 81 to another “experienced lawyer” appointed by the chancellor for review on the grounds of a breach of procedural fairness etc.

Clause 100: Findings made by other bodies

21. New clause 100 will provide that any findings made by the disciplinary body of another diocese or a state administrative or judicial body, that have not been overturned on appeal, may be treated as conclusive by a person performing functions under the Ordinance.

Clause 101: Clarifying the effect of prohibition orders on appointment or election

22. New clause 101 will provide that a person who is subject to a prohibition order is ineligible for election or appointment to any position or office to which the order applies and that a vacancy arises in any office or position held at the time the order is made, despite the provisions of any other ordinance.

Amendments to the Discipline Ordinance 2006 Amendment Ordinance 2013

23. Clause 3 omits a sunset clause in the Discipline Ordinance 2006 Amendment Ordinance 2013 which provides that the amendments in clauses 3(e) and (f) of that ordinance apply only until the end of the 1st ordinary session of the 50th Synod.

24. The amendment made by clause 3(e) requires that if the complaint alleges Reportable Conduct and the Professional Standards Committee considers that it is unable to make a finding on the material

before it that the person has or has not engaged in any or all of such conduct the subject of the complaint, it must recommend that the Archbishop appoint a person to promote a charge before the relevant tribunal.

25. Clause 3(f) provides that if the complaint alleges Reportable Conduct and the person admits the complaint or its substance, accepts the recommendations of the PSC or the PSC recommends that no further action be taken, and the PSC is satisfied that the person engaged in any or all of the conduct, it must make findings that the person engaged in that conduct.

26. The amendments ensure that if a complaint alleges conduct that is reportable to the Office of the Children's Guardian, the PSC or the relevant tribunal make findings on whether or not the person engaged in the conduct. This is necessary in order to ensure proper reports can be submitted to the Office of the Children's Guardian to discharge our obligations under the *Child Protection (Working with Children) Act 2012*.

27. The sunset provision was inserted to provide an opportunity to consider the operation of the clauses. There was potential for an escalation of complaints proceeding to tribunals if the PSC could not make findings on the material before it. There has not been any increase in tribunals in the last year due to the operation of the clause. It is proposed that the sunset clause be omitted but the matter be kept under general review.

Amendments to the Offences Ordinance 1962

28. Clause 4 inserts the following three new offences into the *Offences Ordinance 1962* –

- (a) Grooming.
- (b) Inappropriate pastoral conduct involving a child.
- (c) Possession, production or distribution of child exploitation material.

29. The terms "grooming", "inappropriate pastoral conduct involving a child" and "child exploitation material" are defined by reference to the *Discipline Ordinance 2006*.

Amendments to the Relinquishment of Holy Orders Ordinance 1994

30. Clause 5 amends the Relinquishment of Holy Orders Ordinance 1994 to require –

- (a) a person requesting relinquishment to provide a statement to the Archbishop setting out any conduct they have committed that may constitute an offence under clause 4 of the Discipline Ordinance 2006, and
- (b) the Archbishop to inform the Director of Professional Standards if he has reason to believe that a person requesting relinquishment may have committed Reportable Conduct and provide him with any relevant evidence so as to allow the Director to determine if a complaint should be made against the person under the Discipline Ordinance 2006 or any other action be taken in respect to the person.

31. The first amendment requires a person seeking relinquishment to be transparent about any conduct they may have committed that may constitute an offence under clause 4 of the Discipline Ordinance 2006.

32. The second amendment is aimed at preventing a person from voluntarily relinquishing their holy orders in an attempt to escape scrutiny and discipline for misconduct. The Archbishop will still have the capacity to accede to a request for relinquishment where there is knowledge that a person has or may have committed Reportable Conduct. However the Archbishop must inform the Director of Professional Standards of what he knows and provide the Director with any relevant evidence so that he can determine if any disciplinary action can or should be taken against the person. If disciplinary proceedings were initiated and the person was found to have engaged in Reportable Conduct, a notification could then be made to the Office of the Children's Guardian and this material would be taken into account if the person was to apply for a Working with Children Check. The disciplinary process could also lead to a recommendation for a prohibition order or other diocesan sanction against the person.

33. Clause 4(1) of the Relinquishment of Holy Orders Ordinance 1994 provides that a person who has relinquished their holy orders will be considered to be a lay person for the purposes of all ordinances, rules and regulations having effect in the Diocese, except the Discipline Ordinance 2006. This means that, notwithstanding the relinquishment of holy orders, the person would be disciplined under the Discipline Ordinance 2006 as a member of clergy.

For and on behalf of the Standing Committee

ROBERT WICKS
Diocesan Secretary

17 September 2014