

Ministry (Professional Standards) Ordinance 2017

Explanatory Report

Key Points

- The Bill will provide an administrative process for the resolution of complaints concerning the fitness of Church workers to hold an office or position, to remain in Holy Orders, to exercise ministry or perform any duties or functions, whether or not subject to any conditions or restrictions.
- The Bill will replace the Discipline Ordinance 2006.
- The Bill will establish a Professional Standards Board to be the determining body under the complaints process instead of the Diocesan Tribunal or a Disciplinary Tribunal.
- Complaints regarding Church workers who are members of clergy which are fundamentally about discipline may be referred to the Diocesan Tribunal by the Professional Standards Committee or the Professional Standards Board.

Purpose of the bill

1. The purpose of the bill for the *Ministry (Professional Standards) Ordinance 2017* (“the Bill”) is to make provision for resolving complaints concerning the fitness of Church workers.

Recommendations

2. That Synod receive this report.
3. That Synod pass the Bill as an ordinance of the Synod.
4. That Synod request the Standing Committee to undertake a review of the operation of the Bill prior to the 2018 session of Synod.

Evidence Given

Introduction

4. In 2014, the Synod requested the Standing Committee to appoint a committee consisting three lay people and three members of clergy, together with a person appointed by the Archbishop, with terms of reference that included reviewing the *Discipline Ordinance 2006* (the “2006 Ordinance”) and related ordinances.

5. Subsequently the Standing Committee appointed a committee comprising Mr Michael Easton, Mr Garth Blake, Mr Lachlan Bryant, the Rev Michael Kellahan, the Rev Mark Charleston and the Rev Dr Hugh Cox. The Archbishop appointed Mr Doug Marr.

6. This report concerns the Committee’s review of the 2006 Ordinance. The Bill is recommended by the Committee to replace the 2006 Ordinance. The Committee also recommends that the Synod pass a further bill for the *Diocesan Tribunal Ordinance 2017*. This proposal is explained in more detail below.

Discipline Ordinance 2006

7. The Committee considers that, in general, the 2006 Ordinance has operated effectively in dealing with complaints concerning offences alleged to have been committed by Church workers in the Diocese.

8. However the 2006 Ordinance has weaknesses:

- (a) It is complex and the complexity has grown over the last decade as amendments have been made to widen the scope of offences covered by the ordinance and address practical difficulties in the complaints process. It is apparent that complainants and respondents (and their lawyers) find it difficult to understand the process.
- (b) The process set out in the 2006 Ordinance is linear. A more flexible process is needed for dealing with complaints to ensure they are dealt with in the most beneficial, efficient and cost effective manner.
- (c) The 2006 Ordinance is disciplinary in nature. It involves charging church workers with offences and imposing disciplinary measures or sanctions for wrongdoing. Most professions have moved away from upholding standards through disciplinary processes and have adopted administrative processes that examine a person’s fitness to practice the profession.

In substance the 2006 Ordinance has also moved in this direction over time. The list of offences

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and potential recommendations in dealing with those offences has expanded. The recommendations presently available to determining bodies under the 2006 Ordinance are not all disciplinary in nature. Many appear more relevant to the question of a Church worker's fitness to practice ministry, whether this be at all, in a limited way or only with conditions or restrictions. Yet the 2006 Ordinance does not set out the question that a determining body must ask itself concerning a Church worker – is it to impose a sentence for wrongdoing or to assess fitness based on conduct and make appropriate recommendations? This needs to be made clear since the outcome will vary depending on which question is being asked.

- (d) The range of conduct that can be dealt with under the 2006 is limited. There is conduct which, if committed by a Church worker, would call into question their fitness to practice ministry, but is not presently examinable under the 2006 Ordinance (unless it was so grievous as to amount to the offence of disgraceful conduct). In some cases there is a legal obligation to address these matters, for example bullying where it gives rise to risks to health and safety in a workplace, but presently there is little capacity to enforce compliance in relation to some Church workers. The Royal Commission has also highlighted the need for processes to hold Church workers accountable in investigating and dealing with allegations of child abuse. Presently under the 2006 Ordinance there are few options for dealing with a person who fails to discharge their responsibilities in handling such claims.

Options for reform

9. The Committee has considered an array of Ordinances used in other dioceses across Australia to assess the available options. The Committee has formed the view that neither substantially amending the 2006 Ordinance nor adopting the Model Professional Standards Ordinance endorsed by the General Synod will meet the needs of the Diocese.

10. The Bill is based on retaining the best parts of the 2006 Ordinance, whilst borrowing from some of the ordinances from other dioceses to update, improve and simplify the complaints process, and to align the complaints processes to an overriding purpose.

11. The most significant changes are:

- (a) adopting a complaints process that has the purpose of examining a Church worker's fitness for office in place of a process that imposes sentences for the commission of wrongdoing, and
- (b) constituting a Professional Standards Board as the body to make determinations on complaints that are contested by respondents.

Diocesan Tribunal Ordinance 2017

12. The recent Appellate Tribunal decision concerning the Diocese of Grafton and Bishop Keith Slater has highlighted the need to distinguish between discipline and fitness for office. There is a place for a disciplinary process, for example when dealing with the commission of past offences by Church workers who are no longer active in ministry. One of the difficulties identified by the Appellate Tribunal in that matter was where a diocese purports to have a professional standards regime but is fundamentally dealing with questions of discipline.

13. A Diocesan Tribunal operates in each diocese pursuant to Chapter IX of the 1961 Constitution and may hear charges that are promoted to it concerning alleged offences committed by clergy under the *Offences Canon 1962*. This Canon also authorises dioceses to prescribe other offences by ordinance.

14. The Bill provides for the PSC and the Board to have capacity to refer a complaint to the Tribunal if the relevant body considers it is more appropriate for the complaint to be dealt with by the Tribunal.

15. It is proposed that a further bill be passed by the Synod to provide for the operation of the Diocesan Tribunal. This bill will largely replicate the existing provisions in the 2006 Ordinance with respect to the Tribunal, with appropriate modification. This bill is the subject of a separate report.

Transitional provisions

16. The Bill will be subject to transitional provisions concerning its introduction. These will set out what happens to complaints made before commencement of the Bill as an ordinance but not yet finally dealt with under the 2006 Ordinance. They will also deem certain persons to have continuity of office, such as the Director and the members of the Professional Standards Committee.

17. The transitional provisions will be set out in a separate bill and will be the subject of a separate report. The provisions have only temporary effect and it is cleaner to provide for them separate to the main professional standards legislation.

Commencement

18. If passed, the Bill will commence on a date declared by the Standing Committee by resolution.

Review

19. If the Bill is passed, it is recommended that the Synod request the Standing Committee to review the new Ordinance prior to the 2018 session of Synod with a view to any amending legislation being brought to Synod in 2018. There are several reasons for this recommendation.

20. There will inevitably be some matters identified in the next 12 months as the Bill is put into operation that will require amendments to be made to improve the complaints process.

21. The General Synod is also considering bills for canons concerning safe ministry in 2017. Depending on whether these are passed, and the position our Synod takes with respect to them, modifications will likely be needed to the Bill to accommodate the requirements in these canons.

22. Finally, the Committee is aware of the work that has been undertaken by the Domestic Violence Response Taskforce at the request of the Synod and is also aware of Synod resolution 24/16, by which Synod requested the Committee:

“...to consider changes to the necessary ordinances which would allow victims of domestic abuse, who have brought the abuse to the attention of church-workers who have their pastoral oversight and who feel that they have received negligent, callous or otherwise improper advice or treatment by those with pastoral oversight, to have complaints referred to the Professional Standards Unit”.

23. The Committee considers that if the Guidelines prepared by the Taskforce are adopted by the Synod, a period of time should be allowed for Church workers to become familiar with these Guidelines before inserting such a ground of misconduct. The Committee has considered what may be appropriate in this regard and suggests a ground of misconduct in or to the effect of the following be inserted in the Ordinance by Synod in 2018:

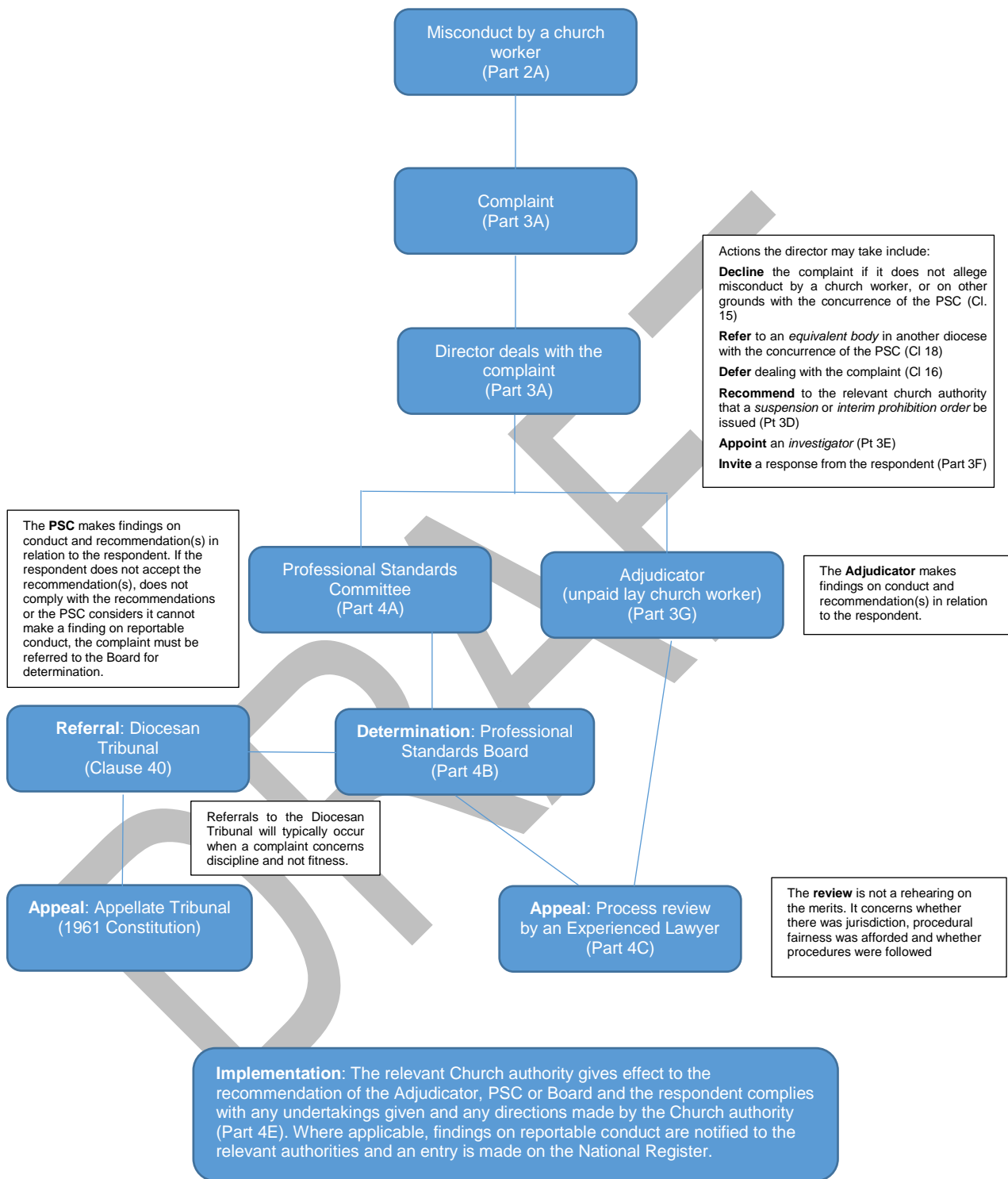
“**inappropriate pastoral care to a victim of domestic abuse**, which means providing pastoral care in a manner that puts the safety of a victim or their family at risk and demonstrates wilful or reckless disregard with the Synod’s *Responding Well to Domestic Abuse: Policy and Good Practice Guidelines*”.

For and on behalf of the Standing Committee

ROBERT WICKS
Diocesan Secretary

21 August 2017

Diagrammatic Summary of the Complaints Process



Please note: This diagram is indicative only and does not set out all possible actions or steps that may be taken under the Ordinance.

Clause Notes

Chapter 1 - Preliminary**Part 1A – Purpose and Application**

Clause 1 names the Ordinance.

Clause 2 outlines the purposes of the Ordinance. These operates as an interpretive guide to the provisions of the Ordinance.

Clause 3 limits the application of the ordinance to alleged misconduct by Church workers resident, licensed or authorised in the Diocese, or engaged by a Church authority either at the time a complaint is received or at the time misconduct was alleged to have occurred. Misconduct by such a Church worker can be dealt with under the Ordinance regardless of where or when it occurred.

Part 1B – Interpretation

Clause 4 contains a general list of terms that are defined for the purposes of the Ordinance. Many of these replicate definitions in the 2006 Ordinance. Definitions which are incorporated from *Faithfulness in Service* are based on the most recent version of the Code authorised by the General Synod Standing Committee in anticipation that the Sydney Synod will adopt those changes to the Code at its 2008 session.

Chapter 2 – Scope of the Ordinance**Part 2A – Church workers and misconduct**

Clause 5 defines “Church worker”. This definition, in conjunction with clause 3, determines the persons who can be the subject of complaints under the Ordinance. The definition is identical to the definition of “Church worker” in the 2006 Ordinance, except that it has been expanded to include a person who is a member of a body corporate by virtue of election or appointment by the Synod, Standing Committee, the Archbishop or a Church body.

The definition continues to exclude a bishop who is subject to the jurisdiction of the Special Tribunal, namely a sitting diocesan bishop. Legislation for episcopal standards is under consideration by the General Synod. The matter will be considered at a future session of our Synod.

Clause 6 defines “misconduct”, being the conduct alleged to have been committed by a Church worker that can be dealt with under the Ordinance. The conduct must be of such a nature that if it were found to have occurred, it would call into question the fitness of the Church worker to: hold office or position, to remain in Holy Orders, exercise ministry or perform any duties or functions or whether any conditions or restrictions should be imposed.

The definition includes two lists of conduct. First, a list of conduct that is excluded from being construed as misconduct. Second, a list of conduct that misconduct may include. Note that this second list is not exhaustive. It includes conduct that is presently examinable under the 2006 Ordinance but also includes other forms of conduct, such as bullying and harassment (as defined in *Faithfulness in Service*). It also includes a certain process failures in relation to abuse where a Church worker has an obligation to report or to deal with or investigate abuse.

Clause 7 defines “reportable conduct”. The *Child Protection (Working With Children) Act 2012* requires that a finding that a child-related worker has engaged in 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 must be reported to the NSW Office of the Children’s Guardian. This definition, and the use of the term “reportable conduct” throughout the Ordinance, ensures that findings are made as to whether such conduct the subject of a complaint did or did not occur.

Part 2B – Exempt Conduct

Clause 8 outlines a procedure for certain conduct to be declared exempt from being dealt with under the Ordinance by the Archbishop with the concurrence of the Professional Standards Committee (“PSC”). The conduct must be disclosed prior to ordination as a deacon or the issue of a licence/authority. The clause reflects the procedure in Chapter 7 of the 2006 Ordinance. The clause interacts with the list of excluded conduct in definition of “misconduct” in clause 6.

Chapter 3 – Processing of Complaints

Part 3A- Making Complaints

Clause 9 provides that anyone can make a complaint, including the Director. That the Director can make a complaint means that although the process is complaints-based, the Ordinance is not solely reliant on a third-party being willing to make a complaint. The Director can act on information known to him concerning a Church worker. The 2006 Ordinance provides similarly.

Clause 10 sets out how complaints are to be made, what details they should contain and the forms in which they can be made.

Clause 11 requires the Director to use reasonable endeavours to explain the complaints process to a complainant prior to investigating the complaint. This is to ensure complainants understand the process that will be undertaken before it commences. A complainant can withdraw their complaint under clause 13 if they do not wish to proceed (other than a complaint alleging reportable conduct).

Clause 12 requires a Church worker to report to the Director any knowledge of certain conduct engaged in by another Church worker constituting child abuse and related forms of misconduct. The same requirement is contained in the 2006 Ordinance.

Clause 13 outlines how a complaint can be withdrawn. A complaint alleging reportable conduct cannot be withdrawn. The nature of reportable conduct means that such a complaint must be assessed notwithstanding that a complainant may want to withdraw their complaint.

Part 3B – Handling of complaints by the Director

Clause 14 sets out the courses of action available to the Director when dealing with a complaint. This provision moves away from the linear progression found in the 2006 Ordinance and gives the Director flexibility and discretion to take different courses of action if appropriate, such as referring matters back to the complainant, or seeking further responses from a respondent and the like.

Part 3C – Declining, deferring or referring complaints

Clause 15 provides for the Director to decline complaints that do not allege misconduct which can be the subject of a complaint under the Ordinance.

Clause 16 provides for complaints (other than those alleging reportable conduct) to be declined or deferred on other grounds by the Director with the concurrence of the PSC. In summary these are complaints that: lack sufficient detail or evidence, are false etc or trivial, can properly be dealt with by other means, are under investigation or the subject of other proceedings or dealing with the complaint lacks utility.

Clause 17 provides for the notification of decisions to decline or defer complaints. Subclause (2) of this clause gives the Director discretion as to whether to notify the respondent of the decision if the Director understands that the respondent is not aware of the complaint. There is a balance here. One on level transparency suggests disclosure should be made. On the other hand disclosing a complaint that has been declined may cause considerable but unnecessary distress to a respondent.

Clause 18 sets out the circumstances in which a complaint can be referred to an equivalent body in another diocese, and how decisions for referral are to be made. Usually referrals will be made because the Church worker resides in another diocese or holds a licence or authority in another diocese.

Part 3D – Suspension and prohibition orders

Clauses 19 to 21 regulate suspension and prohibition orders. The clauses reflect the equivalent provisions in the 2006 Ordinance.

Part 3E – Investigation of complaints

Clause 22 provides for the Director of appoint a person to investigate a complaint, and to revoke that appointment in certain circumstances.

Clause 23 sets out the powers of the Investigator. These are similar to the equivalent provisions in the 2006 Ordinance, except that an additional requirement has been inserted that the Investigator must record interviews, subject to the consent of the interviewee.

Clause 24 provides for the Investigator to report the results of the investigation and provide all records to the Director.

Part 3F – Notification of and response to the complaint

Clause 25 sets out the notification that the Director must provide to the respondent concerning the complaint. Consistent with the 2006 Ordinance, the Director may decide to notify the substance of the complaint to the

respondent prior to investigation. If the respondent admits the complaint or its substance it may not be necessary to appoint an investigator.

Clause 26 sets out the responses that may be given by a respondent, and how the response is to be given. If the complaint is denied and has not been investigated, the Director may at that time appoint an investigator.

Part 3G – Special procedure for unpaid lay church workers (Adjudicators)

Clauses 27 to 33 outlines a procedure for the consideration of complaints about unpaid lay church workers by Adjudicators. An Adjudicator is a person appointed by the Registrar who is a judge or justice of an Australian court or (more commonly) a legal practitioner with at least 10 years' experience. The Adjudicator fulfils the role of both the PSC and the Board in relation to a complaint. The Adjudicator has the same powers as the Board in making recommendations. The procedure is intended to be efficient, inexpensive and procedurally fair to respondents. Respondents who are subject to a determination and recommendation by an Adjudicator will have similar review entitlements to any other Church worker. The procedure is much the same as that presently provided for in the 2006 Ordinance for complaints about unpaid lay church workers.

Chapter 4 – Resolving complaints

Part 4A – Consideration by the PSC

Clause 34 provides for the Director to refer complaints to the PSC and sets out the particulars and material that must be provided to the PSC. The clause provides for the respondent to be notified that the complaint has been referred to the PSC and provided with the same particulars and material. The respondent has 28 days to provide further material, information or written representations to the PSC in relation to the complaint. The Director can grant extensions.

Clause 35 sets out the courses of action that the PSC may take in dealing with a complaint and the matters that the PSC must consider in deciding on those courses of action.

Clause 36 sets out that the PSC is to recommend that no further action be taken with respect to a complaint if it is satisfied of certain matters.

Clause 37 requires a recommendation of no further action and a dismissal of the complaint if the PSC is satisfied that the respondent did not engage in any of the misconduct the substance of the complaint.

Clause 38 provides for the termination of suspension or prohibition orders at the direction of the PSC.

Clause 39 sets out the circumstances in which the PSC must refer a complaint to the Board. In summary these circumstances are where: the complaint alleges reportable conduct and the PSC considers it is unable to make a finding, the respondent does not accept the PSC's recommendations, or the respondent does accept the recommendations but fails to comply with them to the satisfaction of the PSC. The clause also sets out the manner for the PSC to make referrals to the Board.

Clause 40 provides for the PSC to recommend that the Archbishop appoint a person to promote a charge against the respondent before the Diocesan Tribunal. The Archbishop must comply with such a recommendation. At this point the complaint will cease to be dealt with under the Ordinance and will be dealt with in accordance with the Diocesan Tribunal Ordinance 2017 instead. A bill for this Ordinance will also be considered by the Synod at its 2017 session.

Clause 41 sets out the recommendations that can be made by the PSC in relation to the respondent. These reflect the available recommendations under the 2006 Ordinance.

Clause 42 outlines who must be given notice of the PSC's recommendations. The PSC is not required to include a statement of reasons unless it makes recommendations that include (in summary): the respondent resigning, undertaking not to seek appointment or undertake specified functions for a period of time, requesting voluntary relinquishment or deposition from holy orders, or consenting to a prohibition order (paragraphs 41(1)(e),(f) or (g)). The respondent will have 14 days to decide whether to accept and comply with the recommendations (or such longer period determined by the Director).

Clause 43 provides that no further action is to be taken with respect to the complaint if the respondent accepts and complies with the recommendation(s). The clause also provides for the PSC making findings on reportable conduct if this is relevant to the complaint.

Part 4B – Determination of complaints by the Board

Clause 44 provides for the application of Part 4B to referrals to the Board from the PSC.

Clause 45 provides for determination of the membership of the Board for a complaint and convening the Board to give directions.

Clause 46 sets out the course of action that the Board make take upon the referral of a complaint.

Clause 47 provides for the Board making findings on reportable conduct.

Clause 48 provides for when the Board must dismiss a complaint or take no further action.

Clause 49 sets out the recommendations that the Board may make to the Archbishop and/or the relevant Church authority. These recommendations may only be made if the Board is satisfied that the Church worker is not fit (in summary): to hold a role, office or position or remain in Holy Orders, exercise ministry or perform any duty or function, or should be subject to conditions or restrictions.

Clause 50 provides for notification of the Board's determination and recommendation(s).

Clause 51 enables the Board to defer making recommendations and adjourn for a period not exceeding 12 months on terms that the Church worker will undertake certain specified acts or omissions. If the Board considers the Church worker is unfit to hold office etc the undertaking must include the Church worker standing down or not undertaking certain duties. If the Church worker declines to give the undertaking or does not comply with an undertaking, the Board is to then make a final recommendation on the complaint. Non-compliance with an undertaking may be taken into account in making recommendations.

Clause 52 clarifies the effect of prohibition orders.

Part 4C – Review of Board determinations

The process for review is modelled on the existing review process in Chapter 5, Part 2 of the 2006 Ordinance.

Clause 53 provides a means for a Church worker to apply to the Registrar for a review of the Board's decision. An application can only be made if the decision of the Board, if acted upon, would or may have the effect of terminating the person's employment or removing or suspending their capacity to gain an income as a Church worker. The review is to be conducted by an "experienced lawyer" (as defined in the Ordinance) appointed by the Registrar.

Clause 54 sets out the grounds for review. In summary these are a breach of procedural fairness, a failure to observe the Ordinance, a lack of jurisdiction or unreasonableness.

Clause 55 provides that the application for review has the effect of staying the Board's decision pending the outcome of the review.

Clause 56 provides for the appointment of the experienced lawyer by the Chancellor via the Registrar to conduct the review. The respondent is required to pay half the estimated fee of the fees to be charged by the experienced lawyer.

Clause 57 sets out how the review is to be conducted and clarifies that the review is not to involve a rehearing on the merits or a new hearing. The experienced lawyer may make orders as to costs.

Clause 58 sets out what determinations the experienced lawyer may make on the review.

Part 4D – Procedural matter for the PSC and the Board

Clauses 59 to 79 make general provision for the conduct of proceedings by the PSC and the Board. The clauses provide detail on how the two bodies are to undertake their respective functions under the Ordinance.

Part 4E – Church authorities and compliance

Clause 80 requires and empowers a Church authority to give effect to a recommendation of an Adjudicator, the PSC or the Board. The Church authority may vary, modify or temporarily suspend the implementation of a recommendation consistent with the findings of the body making the recommendation and with its agreement that the substance of the recommendation is preserved.

Clause 81 requires a Church worker to comply with an undertaking and a direction given by a Church authority to give effect to a recommendation.

Chapter 5 – Persons or bodies performing functions under this Ordinance

Part 5A – The Director

Clause 82 to 86 provide for the appointment of the Director, the functions of the Director, the relationship between the Director and the Archbishop, the Director's entitlement to information and the Director's reporting obligations.

Part 5B – The PSC

Clauses 87 to 94 set out the constitution of the PSC, its functions, and power to delegate, among other matters.

Part 5C – The Board

Clauses 95 to 103 set out the constitution of the Board, its functions, and how the Board is constituted from the panel for a particular complaint, among other matters.

Chapter 6 – Miscellaneous

Part 6A – Confidentiality and Publication

Clauses 104 to 107 set out the duty of confidentiality of persons performing functions under the Ordinance and how and for what purposes information may be released.

Part 6B – Indemnity

Clause 108 provides for the indemnity of persons performing functions under the Ordinance out of funds under the control of the Synod.

Part 6C – Regulations

Clause 109 empowers the Standing Committee to make regulations not inconsistent with the provisions of the Ordinance for the purposes of administration of the Ordinance or to carry out the overriding purposes of the Ordinance.

Part 6D – Other

Clause 110 clarifies that the Ordinance does not affect the rights of employers to terminate employment.

Clause 111 provides for the findings of an equivalent body, a court, tribunal or commission of inquiry to be treated as conclusive if not overturned on appeal.

Clause 112 makes provision for the service of documents.

Clause 113 provides that the Ordinance will commence on a date to be declared by the Standing Committee.