

Ministry Standards Ordinance 2017 Amendment Ordinance 2019

Explanatory Report

Key Points

In summary, the Bill will amend the *Ministry Standards Ordinance 2017* to –

- make provision for conciliation on the recommendation of the Director of Professional Standards if the Director considers it will assist the parties
- implement recommendations of the Royal Commission with respect to complaints' processes –
 - requiring an initial risk assessment on receipt of a complaint alleging child abuse (recommendation 16.51)
 - making suspension mandatory where complaint involves allegations of serious child-related conduct (recommendation 16.52)
 - introducing mechanisms to deal with actual or perceived conflicts of interest in relation to all individuals who have a role in the complaints' process (recommendation 16.39),
 - applying the same standard for investigating all complaints of child sexual abuse (recommendation 16.54)
 - making clear that the standard of proof is to be applied having regard to the principles in *Briginshaw v Briginshaw* (recommendation 16.53), and
- make the provisions for the reimbursement of stipend and benefits paid during the period that an interim prohibition order is in force consistent with the equivalent provisions for suspension.

Purpose of the bill

1. The purpose of the bill is to amend the *Ministry Standards Ordinance 2017*.

Recommendations

2. Synod receive this report.
3. Synod pass the Bill for the Ministry Standards Ordinance 2017 Amendment Ordinance 2019 as an ordinance of the Synod.

Background

4. At its session in 2017, the Synod passed a bill for the *Ministry Standards Ordinance 2017* (the **MSO**) to replace the *Discipline Ordinance 2006*.
5. The MSO provides 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.
6. By resolution 11.1 of 2017, Synod requested the Standing Committee to undertake a review of the operation of the MSO prior to the 2018 session of the Synod. This resulted in certain amendments to the MSO at the 2018 session. The explanatory report identified the following matters requiring further work for consideration at the 2019 session of Synod –
 - (a) the processes under the MSO for resolving bullying and other complaints within a parish staff team, and

- (b) implementing the recommendations of the Royal Commission into Institutional Responses to Child Sexual Abuse (the **Royal Commission**) which relate to the complaints process.
7. The Standing Committee appointed a subcommittee to further consider these matters and make recommendations (the **Committee**). The members of this committee were Mr Michael Easton (Chair), Mr Garth Blake AM SC AO, Mr Lachlan Bryant, the Rev Mark Charleston, the Rev Tom Hargraves, the Rev Mamie Long, Mr Doug Marr and the Rev Craig Schafer. Mr Blake was unable to attend any of the meetings of the Committee.

Amendments to introduce the option of a conciliation process

8. The Committee considers that there would be merit in the Director having the capacity to formally recommend that a complainant and respondent engage in conciliation. Any conciliation would likely occur early in the complaints process, though would be possible at any time prior to the complaint being finalised. Participation would be optional.
9. The Committee recognises that the MSO is not a mechanism for resolving disputes. It sets out an administrative process to determine if a church worker is fit to hold office or undertake ministry functions.
10. The Ordinance will insert a new clause 18A to provide for a complainant and a respondent to engage in conciliation on the recommendation of the Director of Professional Standards.
11. The Director must consider whether conciliation may assist the parties in order to make a recommendation that the parties engage in conciliation (clause 18(1)). The Director will also be required to consider any power imbalance between the parties in deciding whether to recommend conciliation (clause 18(2)). The Director will not have power to recommend conciliation if the complaint alleges serious child-related conduct (clause 18A(1)(b)).
12. The Director may recommend a conciliator to the parties and otherwise facilitate the conciliation occurring (clause 19A(3)).
13. If the parties agree to engage in conciliation (Clause 18A(4)) –
- (a) the Director is not prevented from undertaking any of the other courses of action available under the MSO during the period of conciliation;
 - (b) the conciliation is to be undertaken expeditiously;
 - (c) the attendees for any conferences must be agreed upon by all parties in advance of the conciliation; and
 - (d) the costs of the conciliator are to be met from funds under the control of the Synod, subject to the Director approving those costs before they are incurred.

Amendments to implement recommendations of the Royal Commission into Institutional Responses to Child Sexual Abuse

Risk Assessment (recommendation 16.51)

14. Recommendation 16.51 of the Royal Commission is as follows –
- All religious institutions' complaint handling policies should require that, upon receiving a complaint of child sexual abuse, an initial risk assessment is conducted to identify and minimise any risks to children.
15. Presently, there is no formal requirement in the MSO to conduct a risk assessment on receipt of a complaint. The Director does, in effect, undertake a form of risk assessment when deciding whether to recommend a suspension or an interim prohibition order under clause 19 of the MSO, however the Royal Commission has recommended that a number of other matters be formally considered in a risk assessment apart from standing the person down.

16. The amendment set out in clause 3(a) of the Ordinance will require the Director to promptly carry out a risk assessment following receipt of a complaint alleging child abuse. The matters that the Director is required to consider in undertaking the risk assessment reflect the elements recommended by the Royal Commission.

Mandatory suspension where complaint involves allegations of serious child-related conduct (recommendation 16.52)

17. Recommendation 16.52 of the Royal Commission is as follows:
- All religious institutions' complaint handling policies should require that, if a complaint of child sexual abuse against a person in religious ministry is plausible, and there is a risk that person may come into contact with children in the course of their ministry, the person be stood down from ministry while the complaint is investigated.
18. Presently, the Director has discretion about whether to recommend suspension in relation to a respondent who is the subject of a complaint of child abuse.
19. The amendment in clause 3(b) of the Ordinance will make it mandatory for the Director to recommend suspension if, after giving the respondent the opportunity to be heard, the Director is satisfied that –
- the complaint or the substance of the complaint involves allegations of serious child-related conduct (as defined in the MSO),
 - the complaint is not false, vexatious or misconceived, and
 - there is a risk that the respondent may come into contact with children in the course of their functions as a church worker.

Conflicts of interest (recommendation 16.39)

20. Recommendation 16.39 of the Royal Commission is as follows:
- Consistent with Child Safe Standard 1, each religious institution should have a policy relating to the management of actual or perceived conflicts of interest that may arise in relation to allegations of child sexual abuse. The policy should cover all individuals who have a role in responding to complaints of child sexual abuse.
21. Presently, under the MSO, members of the Professional Standards Commission (the **PSC**) and Professional Standards Board (the **PSB**) are subject to clause 70 'Disqualification where personal interest', which states that –
- Where a member of the PSC or the Board has a personal interest in a matter before it the member shall be disqualified from participating in the matter.
 - The opinion of the chair of the PSC or the presiding member of the Board, as the case may be, shall be conclusive as to whether any other member of the PSC or the Board has a personal interest in a matter.
22. The gaps in the MSO are as follows –
- There is no formal conflict of interest provision in relation to the Director. There is, however, general provision for the Archbishop to appoint someone other than the Director to handle a complaint.
 - There is no formal conflict of interest provision in relation to Adjudicators.
 - There is no specific duty for members of the PSC or PSB or an Adjudicator to declare a conflict of interest, or a mechanism for determining if the Chair or presiding member has a conflict of interest.
23. The amendments set out in clauses 3(c), (g) and (h) of the Ordinance resolve these gaps.

Applying the same standard for investigating all complaints of child sexual abuse (recommendation 16.54)

24. Recommendation 16.54 of the Royal Commission is as follows –
- Religious institutions should apply the same standards for investigating complaints of child sexual abuse whether or not the subject of the complaint is a person in religious ministry.

25. Part 3H of the MSO sets out a truncated complaints process in relation to unpaid lay workers. However while Part 3H operates to the exclusion of Parts 4A to 4D in resolving complaints, the requirements in Chapter 3 in relation to the investigation of complaints apply to all complaints. The standards for the investigation of complaints are therefore already the same.
26. That said, the complaints process could meet the recommendation more fully by including –
- (a) a description of the role, powers and duties of the Adjudicator in Chapter 5, and
 - (b) similar procedural fairness provisions and standards of proof as in Part 4D.
27. The amendments set out in clauses 3(d) of the Ordinance address these matters.

The standard of proof (recommendation 16.53)

28. Recommendation 16.53 of the Royal Commission is as follows –
- The standard of proof that a religious institution should apply when deciding whether a complaint of child sexual abuse has been substantiated is the balance of probabilities, having regard to the principles in *Briginshaw v Briginshaw*.
29. In *Briginshaw v Briginshaw* [1938] HCA 34, the High Court cautioned against a “mechanical comparison of probabilities” in determining whether it is more likely than not that alleged events occurred. The High Court stated that the “nature and consequence of the fact or facts to be proved” must be considered. In short, the principle is that the more serious the allegation, the more probative or stronger the evidence needs to be to satisfy the standard of proof.
30. Although the MSO does not expressly refer to the principles in *Briginshaw v Briginshaw* those principles are reflected in the MSO, for instance clause 35(2)(a), which provides –
- In deciding upon a course of action the PSC is to take the following matters into consideration - the nature of the complaint and the seriousness of the conduct the subject of the complaint, in particular, whether that conduct comprises child abuse, grooming, inappropriate pastoral conduct involving a child or possession, production or distribution of child exploitation material.
31. The Committee does not recommend referring to *Briginshaw v Briginshaw* in the text of the Ordinance given the reference will not be understood by the ordinary reader. It is preferable to reference *Briginshaw v Briginshaw* in footnotes to clauses 29 and 68 of the MSO.
32. The amendments set out in clause 3(f) of the Ordinance address these matters.

Mandatory removal from ministry, preventing a person from holding himself or herself out as having religious authority and deposition from holy orders (recommendations 16.55 and 16.56)

33. Recommendation 16.55 of the Royal Commission is as follows –
- Any person in religious ministry who is the subject of a complaint of child sexual abuse which is substantiated on the balance of probabilities, having regard to the principles in *Briginshaw v Briginshaw*, or who is convicted of an offence relating to child sexual abuse, should be permanently removed from ministry. Religious institutions should also take all necessary steps to effectively prohibit the person from in any way holding himself or herself out as being a person with religious authority.
34. Recommendation 16.56 of the Royal Commission is as follows –
- Any person in religious ministry who is convicted of an offence relating to child sexual abuse should:
- ...
- b. in the case of Anglican clergy, be deposed from holy orders
35. Both of these recommendations are being examined by the Professional Standards Commission and Church Law Commission of the General Synod.

36. The Committee considers it prudent to wait for the recommendations from these bodies before making changes to implement these recommendations of the Royal Commission.

Other amendments

Reimbursement of stipend and benefits paid during the period that an interim prohibition order is in force

37. In 2018, the MSO was amended in relation to periods of suspension by providing that –
- (a) a respondent is not entitled to continue to receive entitlements during suspension that are provided on account of expenses incurred in undertaking their duties or functions, and
 - (b) a parish is only entitled to be reimbursed from Synod funds for the reasonable additional costs incurred by the parish for the engagement of any temporary personnel to undertake the duties of the respondent during the period of suspension.
38. These amendments prevent situations arising where there is a financial gain for the respondent or parish during the period of suspension.
39. Due to an oversight, these same limitations were not included in amendments to the interim prohibition provisions in the MSO.
40. The amendments in clause 4 of the Ordinance will bring about consistency between the reimbursement provisions applicable to suspension and interim prohibitions orders.

For and on behalf of the Standing Committee.

DANIEL GLYNN
Diocesan Secretary

29 August 2019