



Diocese of Wangaratta

POWER AND TRUST IN THE CHURCH

A PROTOCOL UNDER THE EPISCOPAL STANDARDS ACT 2012

**FOR RESPONDING TO COMPLAINTS OF
ABUSE HARASSMENT AND OTHER MISCONDUCT AGAINST
THE BISHOP OF WANGARATTA**

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NOTE:

The Office of Episcopal Standards is established by the Council of the Diocese to provide support to people who make complaints about abuse and other misconduct by the Bishop of Wangaratta. The Director of Episcopal Standards is as independent as possible from the Church but is paid by the Church.

- We take all complaints very seriously.
- We will do all we can to lessen harm by providing the best care possible.
- We offer respect, pastoral care and on-going long-term support to anyone who makes a complaint.
- We also offer support to the person who is accused of abuse or harassment or other misconduct. The rights of the person accused of misconduct will be respected.

1 Introduction

- 1.1 This protocol is made by the Bishop-in-Council pursuant to the *Episcopal Standards Act 2012* of the Diocese of Wangaratta (**the Act**) and relates only to that diocese and its Bishop. It is intended:
- (a) to identify key aspects of the Act under which a complaint of misconduct against the Diocesan Bishop is dealt with;
 - (b) to confirm the appointment of those serving as Director and a member of the Episcopal Standards Committee; and
 - (c) to give useful information and guidelines about the way a complaint will be handled.
- The guidelines relating to correspondence with a party to a complaint are highlighted with a line in the margin for convenience.
- 1.2 The overriding purposes of the Act and of this Protocol, in their application to any complaint under the Act, are to facilitate the just, quick and inexpensive resolution of the real issues in the complaint and to regulate fitness for ministry for the protection of the community.
- 1.3 Using this protocol we will:
- (a) promptly respond and provide support to every complainant, victim or informant;
 - (b) document the allegation, complaint or information;
 - (c) offer conciliation if appropriate;
 - (d) investigate the circumstances;
 - (e) determine, as far as possible, the truth of the matter;
 - (f) assess what action should be taken to resolve the allegation, complaint or information and to prevent further harm;
 - (g) deal fairly with and facilitate support of the respondent; and
 - (h) identify opportunities for improving the way we prevent, detect and hold ourselves to account for the conduct to which this protocol relates.

Statement of Basic Principles

- 1.4 The Diocesan Bishop is the spiritual and administrative leader of the Church in the Diocese and the guardian of the faith. In the 'Exhortation and Examination' for the consecration of bishops in the ordinal in *A Prayer Book for Australia*¹, a bishop is called-
- to maintain the Church's witness to the resurrection of Christ from the dead,*
- to protect the purity of the gospel, and to proclaim Jesus Christ as Lord.*
- As a chief minister and pastor in Christ's Church, ... to guard its faith, unity and discipline, and promote its mission in the world.*
- ... to ensure that God's word is faithfully proclaimed, Christ's discipline applied justly, with mercy.*

¹ *A Prayer Book for Australia* (Broughton Books 1999), page 802

... to lead and guide the priests and deacons under your care, and be faithful in the choosing and ordaining of ministers.

... to watch over, protect and serve the people of God, to teach and govern them, and to be hospitable.

... know and be known by them, and be a good example to all.

These are the duties of a bishop, and they are weighty.

- 1.5 This Protocol for responding to abuse, harassment and other misconduct within the Church is intended to operate in conjunction with both:
- (a) the Code of Good Practice for Clergy; and
 - (b) Faithfulness in Service, the National code of personal behaviour and practice of pastoral ministry by clergy and church workers.

These codes provide a positive framework for conduct by the Diocesan bishop.

The Protocol adopts the following principles:

- 1.6 We, the Diocese of Wangaratta within the Anglican Church of Australia, will not tolerate abuse or harassment or other misconduct within our communities.
- (a) We take all complaints very seriously and any lessons learnt from individual complaints will be taken into account in deciding whether and if so how the Church might do things better.
 - (b) We will offer respect, pastoral care and ongoing long-term or episodic support, including professional counselling where appropriate, to anyone who makes a complaint and to those who have suffered as a result of misconduct. We will do all we can to lessen harm by providing the best care possible.
 - (c) We will also offer support to the Diocesan Bishop who is accused of misconduct. The rights of a person accused will be respected.
 - (d) We will be as open, transparent and accountable as possible while respecting the rights of complainants, victims and the respondent to privacy. We will respect the right of a complainant or victim to make their own informed choices about whether to engage with Diocesan processes or to seek assistance elsewhere.
 - (e) We will respect and not abuse confidentiality and will not use confidentiality in a way that seeks to protect the Church.
 - (f) Where allegations of abuse involve behaviour that may constitute a criminal offence, we will support complainants if they decide to report those matters to police. We will ourselves report serious criminal offences including child abuse.
 - (g) We will continue to invite any person who has been abused, no matter when, to come forward and make the matter known, so

that his or her ongoing needs can be addressed and appropriate action taken.

- (h) Any person, including the Diocesan Bishop, engaged in ministry or leadership or in our employ who is alleged to have committed misconduct must face the appropriate Church process.
- (i) No one should interfere with or attempt to have an improper influence on Professional Support Persons, respondent Carers, any investigator, the Director, the Committee, the Board or the Review Board in the exercise of their functions.

1.7 Nothing in this Protocol shall exclude the jurisdiction of a secular court or tribunal or prevent any person from pursuing other actions and procedures which are available at law. It is not intended that this Protocol shall protect people from the law.

1.8 **Definitions:** In this Protocol, expressions used have the same meaning as in s 3 of the Act. The expression 'the Diocesan bishop' means the Bishop of the Diocese, in the case of the Diocese of Wangaratta, the Bishop of Wangaratta.

2 The Church authority

2.1 The Diocesan Bishop is accountable to the Church authority for misconduct found proven under the Act by the Board or Review Board. The Church authority receives a recommendation and determines whether to accept and give effect to the recommendation as presented or as varied or modified: s84 of the Act.

2.2 The Church authority in relation to a complaint against the Diocesan bishop, means a board of Bishops comprising-

- (a) the Primate (the head of the Anglican Church of Australia); and
- (b) the two most senior Bishops of a Diocese as at the date of the complaint (seniority being determined by date of consecration), one of whom shall be a Metropolitan, if willing and able -

each of whom shall have consented in writing to act as a member of the board of Bishops in relation to the complaint and to abide by the provisions of Part 17 (Confidentiality and Publication): s3(3) of the Act².

2.3 The Bishop of a Diocese is ineligible to be a member of the Church authority in the circumstances specified in s3(4) of the Act.

2.4 A question before the Church authority may be decided by a majority of the votes of the members of the Church authority. (s85)

2.5 If the Director receives or makes a complaint against the Diocesan bishop, the Director must request the Registrar to, and the Registrar must, constitute the Church authority in accordance with the Act and

² There are 23 dioceses in the Anglican Church of Australia, each of which has a diocesan bishop.

the Regulations³. This may mean in practice that the composition of the Church authority in relation to one complaint may vary from that in relation to a later complaint.

3 The Director of Episcopal Standards

- 3.1 The Director of Episcopal Standards -
- (a) is independent of the Church administration and structures;
 - (b) has investigative skills and qualifications or experience in legal practice or procedure, or in counselling or an associated area;
 - (c) is neither a person in bishop's orders nor a parent sibling spouse or child of a person in bishop's orders; and
 - (d) will not act in a matter in which the Director has a personal interest.
- 3.2 The Director assists the Diocese in providing a central focus in matters involving personal ethics and behaviour including advice and training about appropriate standards and enforcement, in managing and implementing the processes necessary to give effect to the Act and this Protocol and performing other functions prescribed in s 12(3) of the Act.

4 The Episcopal Standards Committee

- 4.1 The Episcopal Standards Committee (**ESC**) comprises at least 3 people including its chair (s 10(3)). Its role includes –
- (a) to implement the Act and the protocol to the extent that the protocol is not inconsistent with the Act;
 - (b) to receive a complaint against the Diocesan Bishop;
 - (c) to review and monitor the work of the Director;
 - (d) to refer a matter to the Episcopal Standards Board in an appropriate case; and
 - (e) to perform other functions prescribed by the Act or any protocol.

The powers and duties of the Committee are more completely set out in s 10(6) of the Act.

- 4.2 The ESC must in connection with any reference to the Board present to the Board in accordance with directions made by the Board –
- (a) the evidence on which it relies in support of the reference;
 - (b) any findings and recommendations it proposes that the Board should make; and
 - (c) any submissions in support.
- 4.3 Subject to any contrary direction of the Board, the ESC must serve on the respondent a reasonable time prior to any hearing conducted by the Board –
- (a) any witness statements, summary of proposed evidence or other documents on which it intends to rely at any hearing of the Board;

³ See s3(6) of the Act and reg 5 of the *Episcopal Standards Regulations* 2012.

- (b) any findings and recommendations it proposes that the Board should make; and
 - (c) any submissions in support.
- 4.4 The ESC must appear by its Director or other authorized representative at any hearing of the Board to assist the Board in its enquiry into the reference.
- 4.5 The ESC may take independent professional advice as it considers necessary in the discharge of its functions.
- 4.6 The membership of the ESC is constituted so as collectively to provide experience and appropriate professional qualifications in:
- (a) law;
 - (b) ministry as the bishop of a Diocese; and
 - (c) child protection, investigations, social work, ethics or counselling (s 10(4)).

The ESC includes at least one person who is not a member of this Church and so far as it is reasonably practicable shall have at least one man and at least one woman (s10(5)). The bishop of a Diocese is not eligible to be a member of the ESC.

- 4.7 The Director attends the meetings of the Committee and provides such assistance to the Committee as it may request but may not vote (s 12(3)(d)).

5 Commencing the Process

- 5.1 The Director on behalf of the ESC will be the first point of contact for a complaint of misconduct by the Diocesan Bishop.
- 5.2 When a complaint of abuse or other misconduct is made, the matter remains confidential until and unless the Director has obtained informed consent from the complainant to provide information to other participants in the process. The Director, a member of the ESC, a member of the Board or the Review Board or the Church authority are subject to particular confidentiality obligations under s86 of the Act.
- 5.3 The Director shall as soon as practicable make a preliminary assessment whether the complaint relates to misconduct as defined in the Act and shall report to the ESC.

6 The complaint of misconduct

- 6.1 An eligible person may make a complaint to the ESC in relation to the Diocesan Bishop of misconduct (s 13(1)). An eligible person is –
- (a) the Director;
 - (b) a person resident in the Diocese; or
 - (c) a person who was at the time of the events the subject of the complaint either in the Diocese or in the same diocese as that in which the Diocesan bishop was then in ministry in any orders.

- 6.2 A complaint may be in any form, oral or in writing, whether by electronic means or otherwise (s 14(1)). The ESC may not act on an anonymous complaint (s 14(3)).
- 6.3 The Act defines what is 'misconduct': s3. Not all behaviour that may ordinarily be considered bad will necessarily be 'misconduct'. The behaviour in question must both answer the description of one or other of the categories in the definition⁴ and be conduct which, if established, would on its face call into question:
- (i) the fitness of the Diocesan Bishop, whether temporarily or permanently, to hold office, or to be or remain in Holy Orders; or
 - (ii) whether, in the exercise of ministry or in the performance of any duty or function, the Diocesan Bishop should be entitled to act free of any condition or restriction.
- 6.4 The Diocesan Bishop will not generally be accountable for an act or omission or refusal to ordain appoint correct discipline counsel admonish transfer demote suspend retrench or dismiss a person or for any decision of the Diocesan bishop to do so if the Diocesan Bishop has acted or omitted or refused to act or has decided –
- (a) in good faith;
 - (b) reasonably; and
 - (c) in the normal and lawful discharge of the duties and functions of the Diocesan Bishop⁵.
- 6.5 A breach of faith ritual or ceremonial falls outside the definition of misconduct and the scope of the Act (s75).⁶

⁴ The categories are –

- ⁴(a) bullying;
- ⁴(b) emotional abuse;
- ⁴(c) harassment;
- ⁴(d) physical abuse;
- ⁴(e) neglect of a child;
- ⁴(f) sexual abuse;
- ⁴(g) spiritual abuse;
- ⁴(h) any offence under an ordinance of the Diocese or under the Offences Canon 1962 or any canon in substitution or amendment of that canon;
- ⁴(i) wilful or reckless failure to comply with a condition imposed by a Church authority under section 84 of this Act;
- ⁴(j) wilful or reckless failure to comply with an undertaking given to a Church authority;
- ⁴(k) any other conduct unbecoming or inappropriate to the office and duties and functions of the Bishop of a Diocese

⁵ See the definition of 'excluded conduct' in s3 of the Act.

⁶ The Special Tribunal of the Anglican Church of Australia may hear a charge of a breach of faith ritual or ceremonial against the Diocesan Bishop of the Diocese of Wangaratta: *Constitution of the Anglican Church of Australia*, s56(6). Another Diocesan bishop may bring such a charge, but not the ESC nor the Episcopal Standards Commission: see *Special Tribunal Canon 2007*, s43 and the *Exclusion of the Episcopal Standards Commission from bringing Charges before the Special Tribunal Act 2011* (Wangaratta).

- 6.6 The ESC may decide to dismiss a complaint or to take no further action in relation to a complaint if—
- (a) the ESC is of opinion that the complaint does not fall within the provisions of this Act;
 - (b) the complainant has failed to provide further details to the ESC or to verify the allegations by statutory declaration when requested by the Director to do so;
 - (c) the ESC is of opinion that the complaint is false, vexatious, misconceived, frivolous or lacking in substance; or
 - (d) the ESC is of opinion that there is insufficient reliable evidence to warrant an investigation or further investigation
- and may take no further action in relation to a complaint if—
- (e) the behaviour the subject matter of the complaint can properly be dealt with by other means; or
 - (f) the subject matter of a complaint is under investigation by some other competent person or body or is the subject of legal proceedings. (s16)
- 6.7 If a complaint is dealt with by the ESC under the preceding paragraph, the Director must give the complainant a written notice of the outcome including the reasons for the outcome (s17).

7 The complainant

- 7.1 If you are a complainant, you must provide details of the complaint (s 14(2)).
- 7.2 When you make a complaint to the ESC, the Director will contact you to find out about the complaint⁷. The Director will advise you that he or she is required to keep a record of the complaint. The Director will also advise you if the matter is to be referred to the police or child protection authorities in the circumstances described below in paragraph 21.
- 7.3 The Director shall provide you with a copy of the Act and this Protocol if you have lodged a complaint and have consented to the complaint being dealt with by the ESC under the Act or are contemplating doing so.
- 7.4 **Consent:** The Director will explain to you the processes available under the Act and seek your written consent to give notice of the complaint to the respondent and for the ESC to deal with the complaint under the Act. The Director will also explain to you how it is your choice whether to make a complaint and proceed with this Protocol and will advise you of alternative avenues of formal and informal redress that are open to you e.g. dealing with the complaint informally, making a report to the police, or complaining to the Equal Opportunity Commission or instituting other legal action.

⁷ The guidelines relating to correspondence with a party to a complaint are highlighted with a line in the margin for convenience.

- 7.5 If you have not given written consent to the Director giving notice of the complaint to the respondent and to the ESC dealing with it under the Act, the ESC is not required to investigate the complaint or to refer it to the Board and the ESC or the Director may dismiss the complaint or take no action in relation to the complaint (s 18(3)).
- 7.6 **Professional Support Person:** If you agree, the Director may refer you to counselling or other services as appropriate from a Professional Support Person, irrespective of whether you make a formal complaint. This Support Person will usually be a contact person throughout the process. See below section 9.
- 7.7 **Victim impact statement:** You may if you wish provide a victim impact statement to help the ESC and the Board understand how you have been affected by the misconduct the subject of your complaint. The Director can provide further information to you about this statement and your Professional Support Person can assist you with its preparation.
- 7.8 The Director will inform you if the complaint does not concern a matter which is dealt with under the Act.

8 The Diocesan Bishop, the respondent

- 8.1 If a complaint of misconduct has been made against you, unless it is impracticable in the particular circumstances, within a week from the complainant giving written consent to the Director giving you notice of the complaint and to the ESC dealing with it under the Act, the Director or a ESC delegate will contact you, as provided in the following paragraph.
- 8.2 The Director (or a ESC delegate) will provide you with a copy of the complaint and any further particulars provided, together with a copy of the Act and this Protocol. You have the right –
- (a) to obtain independent legal or other professional advice, at your cost, before responding to the complaint; and
 - (b) to make submissions (with or without evidence) as to why the ESC without embarking on any investigation should not entertain the complaint or should dismiss it or take no further action in relation to it.
- 8.3 The Director will inform you of these rights when contacting you about the complaint. You will be offered the services of a Professional Support Person chosen by the Director to provide professional counseling or other services. See below section 9. The Diocese will meet the reasonable costs of these services if you decide to take up the offer.
- 8.4 The ESC may investigate your conduct if the ESC has reason to believe that the conduct may amount to misconduct under this Act even though no complaint has been made about the conduct or a complaint about the conduct is anonymous or has been withdrawn (s 18(2)). The Director may at his or her discretion contact you in those circumstances.

- 8.5 **Respondent Carer:** The Director will select an appropriate person to act as your Carer in the process of dealing with the complaint. If you agree, that person will liaise with the Director on your behalf and will be given a copy of the complaint. The Director will send a copy of all notices and letters which he or she sends to you to the respondent Carer so that the latter receives them in time to give you support when you receive them.
- 8.6 The respondent Carer will contact you within 24 hours of accepting the role and will follow up on the initial offer of professional counselling support.
- 8.7 As respondent, you must provide the ESC with a written response to the complaint within 3 weeks (or such longer period as the Director specifies in writing) of your receiving a copy of the complaint and any accompanying particulars. The Director will write to you about this time line and what happens if you do not respond.
- 8.8 If you choose not to respond, the Director and the ESC (as the case may be) may continue the process under the Act, the ESC may refer the complaint to the Episcopal Standards Board which may make any finding of fact and recommendation to the Church authority as the Board sees fit. See Part 11 below.
- 8.9 The respondent Carer will be in regular contact with you, and if appropriate with the Professional Support Person about the progress of the complaint and options which are available.
- 8.10 The respondent Carer will keep things strictly confidential.
- 8.11 The complainant should not be questioned by anyone about their right to make a complaint.
- 8.12 Neither you nor anyone acting on your behalf should have any contact with the complainant about his or her complaint against you except through the Director or the ESC or otherwise in accordance with the Act.

9 Professional Support Persons

- 9.1 The Director may engage suitably qualified professionals ("Professional Support Persons") to provide assistance to complainants, the respondent, informants and victims involved in disclosures of misconduct. Professional Support Persons may also provide informal advice to the Director and the ESC from time to time as requested.
- 9.2 Professional Support Persons will act in their individual capacity in their work for the Diocese. Their duty is to the person for whom they are providing services, and they are required to act always in that person's best interests even when those interests conflict with their own personal interests or those of the Diocese or other parties involved in the matter.

- 9.3 Professional Support Persons will be independent of Diocesan organisations, structures, and office holders and not have any other role under the Protocol in respect of a current matter.
- 9.4 The complainant's Professional Support Person will assist the complainant by providing counselling, explaining the process, and clarifying what outcomes are possible and what the complainant may expect to achieve from making a complaint. They may also assist the complainant where this is requested, to document the complaint. The Professional Support Person will also provide acknowledgement to the Director of the complainant's informed consent to the process.
- 9.5 Professional Support Persons' services are available to all parties involved in this process. A Professional Support Person may not provide services to, or receive information from, a complainant and respondent in the same matter.

10 Suspension from duties

- 10.1 The Church authority may determine to do any act to give effect to a recommendation of the ESC, the Board or if applicable, the Review Board that-
- (a) the Diocesan Bishop be suspended from the duties of office or certain of those duties; or
 - (b) such other action be taken as may be thought fit (s 37, read with s 30).
- 10.2 The provisions of the Act, Part 10, prescribe the role of the ESC and the Board in this regard and their jurisdiction is enlivened where there is an unacceptable risk of harm to any person if the Diocesan bishop remains in office pending the outcome of the complaint.

11 The Investigation

- 11.1 The ESC shall investigate each complaint as expeditiously as possible (s 18(1)) and may for that purpose appoint any suitable person including the Director on such terms and conditions as it thinks fit (s18(4)).
- 11.2 If the subject matter is under investigation by some other competent body or is the subject of legal proceedings, the investigation may be discontinued or deferred until these other proceedings are concluded. The Director may however continue to provide Support Persons' services to all parties.
- 11.3 The role of the investigator is to gather information about a complaint and the allegations, make recommendations on findings on relevant questions of fact and to make a confidential report to the ESC.
- 11.4 An investigator shall not present herself or himself as a counsellor or advocate for the complainant or respondent.
- 11.5 An investigator shall, where the nature and gravity of the complaint warrants it –

- (a) make a written record of each interview with a person and may, with the consent of the person, make an audio record of the same;
 - (b) provide the person with a copy of the record; and
 - (c) have the person, if willing, verify the record by signing a copy of it or, in the case of an audio record, by signing a statement to the effect that the audio record is a true record of the interview.
- 11.6 An investigator shall be independent, objective and impartial and shall not have nor be perceived to have any conflict of interest in relation to the matter, the parties or the outcome.
- 11.7 The complainant and the respondent will be given a reasonable opportunity to present to the investigator any relevant facts or circumstances on which they wish to rely.
- 11.8 Before completing the investigation, the investigator through the Director shall inform the complainant in writing of the substance of any proposed recommendations on findings on any relevant questions of fact and shall give the complainant a reasonable period to respond in writing, not being greater than 14 days.
- 11.9 The investigator through the Director shall inform the respondent in writing of the substance of any proposed recommendations on findings on any relevant questions of fact and any response from the complainant and shall give the respondent a reasonable period to respond in writing, not being greater than 14 days.
- 11.10 Once the investigator has any responses from the complainant and the respondent within the prescribed period and is satisfied that the matter has been adequately investigated, he or she shall prepare a final report including –
- (a) the complaint;
 - (b) the steps taken in the investigation;
 - (c) any responses from the complainant and the respondent;
 - (d) any statements, records of interview and other relevant material; and
 - (e) his or her recommendations on findings on any relevant questions of fact and a statement of the weight given to various accounts of the allegations.

12 Outcomes

- 12.1 At any time after the ESC receives a complaint, the ESC may:
- (a) recommend mediation, conciliation, neutral evaluation or other alternative resolution of the complaint;
 - (b) if it considers on reasonable grounds that the Diocesan Bishop may be incapable, report the matter in writing in accordance with the *Bishop (Incapacity) Canon 1995*⁸;

⁸

The Synod of the Diocese of Wangaratta has adopted the *Bishop (Incapacity) Canon 1995*.

- (c) if the Diocesan Bishop whose conduct is under investigation ceases to be the Diocesan bishop, refer the complaint, together with such information as it shall have received, to the equivalent body having jurisdiction in the Diocese by whose Bishop the former Diocesan Bishop is licensed or, where the former Diocesan Bishop is not licensed, in which the former Diocesan Bishop resides;
- (d) exercise its powers under section 16 to dismiss a complaint or to take no further action in relation to a complaint. (s21)

12.2 At any time after investigation of a complaint in accordance with Part 7, the ESC:

- (a) must, if required under section 39 of this Act to do so, refer the complaint to the Board; and
- (b) may institute, amend or withdraw proceedings by way of charge against the Diocesan Bishop before the Special Tribunal⁹. (s22)

13 Alternative Dispute Resolution

13.1 If the ESC determines that mediation or some other means of dispute resolution is likely to resolve the issues raised by the complainant, the Director will seek the consent of the parties to that course of action.

13.2 Alternative dispute resolution proceedings (including mediation) are confidential, and all communications made by you and the respondent and other participants in the course of them are without prejudice and may not be used by any party in subsequent legal proceedings.

13.3 The fact that the subject matter of a complaint may be settled or resolved in whole or in part between the parties affected thereby does not prevent the ESC from taking steps under the Act in respect of the subject matter of the complaint. (s23)

14 The Episcopal Standards Board

14.1 The Episcopal Standards Board (**the Board**) comprises 3 persons including a President and is constituted so as collectively to provide experience and appropriate professional qualifications in -

- (a) law;
- (b) ministry as the bishop of a Diocese; and
- (c) child protection, investigations, social work, ethics or counselling

and shall so far as reasonably practicable have -

- (d) one member of the clergy who is or has been the bishop of a Diocese;
- (e) at least one man and at least one woman; and
- (f) two members who are lay members of the Church (s26).

⁹ *Special Tribunal Canon 2007*, s43(1)(c).

- 14.2 The Board may appoint a Secretary to assist it enquire into the reference of a complaint, including on its behalf to communicate with the Committee, the complainant and the respondent (s66).

15 Referral to the Episcopal Standards Board

- 15.1 If the ESC has formed the opinion that the conduct the subject of the complaint if established would call into question whether -
- (a) the Diocesan Bishop is unfit, whether temporarily or permanently, to hold office or to be or remain in Holy Orders; or
 - (b) in the exercise of ministry or in the performance of any duty or function, the Diocesan Bishop should be subject to any condition or restriction
- the ESC must refer the matter to the Board (s 39).
- 15.2 The Director –
- (a) must give the Diocesan Bishop a copy of the report of the investigation and any opinion of the ESC and the grounds relied on and notice that the respondent may advance any submissions to the Board if he or she wishes to do so (s 41(2)); and
 - (b) must also give the complainant a copy of the report of the investigation and any opinion of the ESC and the grounds relied on.
- 15.3 The ESC has specific functions in connection with the reference to the Board that are prescribed under section 4 of this Protocol.
- 15.4 Where a matter is referred to the Board, the Board shall consider the matter and make any finding on any relevant question of fact, taking into account-
- (a) the final report (if any) of the investigator including any attachments;
 - (b) such report of the ESC as may be submitted;
 - (c) any further material received from the complainant and the Bishop relevant to its consideration;
 - (d) any other relevant evidentiary material;
 - (e) any applicable standards prescribed by any code of conduct approved under this Act;
 - (f) the conduct of the Diocesan Bishop as it finds it to have been;
 - (g) any failure of the Diocesan Bishop to comply with a provision of this Act; and
 - (h) in the case of the Review Board, the determination and reasons of the Board. (s76)
- 15.5 The Board may at any time and from time to time give directions:
- (a) as to the inspection by and supply of copies to the respondent or any other person of the documents or material relevant to the reference; and

- (b) as to the conduct of its inquiry into the reference (s 65).
- 15.6 The Board shall deal with a complaint as expeditiously as possible (s 45).
- 15.7 If the Board is satisfied that the Diocesan Bishop did commit any misconduct and –
- (a) is unfit, whether temporarily or permanently, to hold office or to be or remain in Holy Orders; or
 - (b) in the exercise of ministry or in the performance of any duty or function, the Diocesan Bishop should be subject to any condition or restriction
- the Board may determine in writing accordingly and may recommend to the Church authority what action should be taken in relation to the Diocesan Bishop as set out in s 42 of the Act.
- 15.8 (1) If the Board makes a finding that the Diocesan Bishop did not commit any misconduct or that the complaint is false vexatious or misconceived, the Board may determine accordingly and shall dismiss the complaint. (s43(1))
- (2) If the Board is satisfied that the Diocesan Bishop did commit misconduct but is not satisfied as to any of the matters in paragraphs (a) and (b) of section 42(1), the Board may determine accordingly and shall take no further action in relation to the complaint. (s43(2))
- 15.9 Within 7 days of the Board making any final finding of fact or recommendation on the complaint (**the decision**), if the finding of fact or recommendation is adverse to the respondent, the Director shall inform the respondent-
- (a) that he or she may within 30 days from the date of the decision or such further period as the Episcopal Standards Review Board may allow, apply to the Episcopal Standards Review Board for a fresh administrative reconsideration of the matter; and
 - (b) that if he or she does not apply to the Review Board for a review, the Director will give notice of the decision and the reasons for making it to the Church authority and that he or she has the opportunity within a further 14 days to address any submissions to the Church authority¹⁰.

16 Episcopal Standards Review Board

- 16.1 The Episcopal Standards Review Board comprises 5 persons appointed by the President from a panel of 10 persons comprising -

¹⁰ Under s 83 of the *Episcopal Standards Act*, each of the Board and the Review Board shall cause a copy of each determination and recommendation to be provided to-

- ¹⁰(a) the Church authority;
- ¹⁰(b) the complainant;
- ¹⁰(c) the respondent; and
- ¹⁰(d) the Director and the ESC.

- (a) a President and a Deputy President, both of whom shall be or shall have been either a judicial officer or a practising barrister or solicitor of at least 10 years' standing of the Supreme Court of a State or Territory; and
 - (b) eight other persons of whom at least -
 - (i) two shall be clergy who are or have been the bishop of a Diocese;
 - (ii) two shall be clergy not in Bishop's orders; and
 - (iii) four shall be lay persons. (s48)
- 16.2 For the purpose of any application to the Review Board, the Review Board shall consist of the President or Deputy President, who shall be the presiding member, one clergy person in bishop's orders, one clergy person not in bishop's orders and two lay persons. So far as it is reasonably practicable, the Review Board shall include at least one man and at least one woman. (s51 (2) and (3))

17 Application for review

- 17.1 In this part, "decision" means any finding of fact, determination or recommendation by the Board under either section 35 (suspension or like action) or section 42 (final action). (s 55)
- 17.2 If the respondent is aggrieved by a decision of the Board, he or she may within 30 days from the date of the decision or such further period as the Episcopal Standards Review Board may allow, apply to the Review Board for a fresh administrative reconsideration of the matter. The ESC may also make an application for review if it thinks fit (s 56).
- 17.3 If you are a complainant, the Secretary to the Review Board must give you notice of any application by the respondent or the ESC to the Review Board for a fresh administrative reconsideration of the matter.
- 17.4 The Secretary to the Review Board must give both the complainant and the respondent by notice the opportunity within 14 days to address any further submissions to the Review Board.
- 17.5 The Review Board may exercise all the powers of the Board under the Act and may –
- (a) affirm the decision under review; or
 - (b) vary the decision under review; or
 - (c) set aside the decision under review and make another decision in substitution for it; or
 - (d) set aside the decision under review and remit the matter for reconsideration by the Board in accordance with any directions or recommendations of the Review Board (s 59).
- 17.6 The Review Board shall deal with the application as expeditiously as possible and shall consider any further submissions from either the complainant or the respondent (s 60).

- 17.7 Within 7 days of the Review Board making a decision on the review, if the decision on the review is adverse to the respondent, the Director shall inform the respondent -
- (a) that the Director will refer the decision including recommendations or advice to the Church authority; and
 - (c) that he or she has the opportunity within 14 days to address any submissions to the Church authority.

18 The review – relevant principles

- 18.1 The Review Board is to undertake a fresh administrative reconsideration of the matter (s56). Consistent with well established principles applicable to the Victorian Civil and Administrative Tribunal and like bodies, the following features of that process are offered as guidance¹¹:
- 18.2 First, when exercising its review jurisdiction, the Review Board reviews a decision of the Board on the merits. It stands in the shoes of the Board and must decide whether the decision of the Board was the correct or preferable one.
- 18.3 Second, the review by the Review Board must take place without any presumption as to the correctness of the decision under review. The Review Board must conduct its own independent assessment and determination of the matters necessary to be addressed¹² – a ‘fresh administrative reconsideration of the matter’ to adopt the language of s56 of the Act¹³.
- 18.4 Third, the Review Board will usually have to consider the factual findings upon which the decision under review was based in order to decide whether that decision was the correct or preferable one. The Review Board must make its own findings of facts and is in no way bound by the Board’s findings of fact. It is not obliged to but may hold a hearing at which evidence is adduced or evidence heard orally (s63(4)). It may be appropriate in a particular case for the Review Board to give some weight to the findings and determination of the Board.
- 18.5 Fourth, the Review Board reaches its own decision on the merits of the matter before it rather than reviewing the propriety or legality of the decision made by the Board. The Review Board re-exercises the function of the Board.¹⁴
- 18.6 Fifth, the Review Board does not conduct a judicial review of the actions of the Board; its function is not to review the decision making

¹¹ See the discussion in *Pizer’s Annotated VCAT Act* (4th ed) at [VCAT 42.80].

¹² *Shi v Migration Agents Registration Authority* (2008) 235 CLR 286 at [141] per Kiefel J (with whom Crennan J agreed).

¹³ See the discussion in *Kracke v Mental Health Review Board* (2009) 29 VAR 1 at [323]. The reconsideration is administrative rather than judicial in the sense that the Review Board does not determine contractual, tortious or other legal rights of the parties; it determines the question of fitness: *Kracke* at [310].

¹⁴ See *Shi v Migration Agents Registration Authority* per Kiefel at [134].

process of the Board as such but to determine the correct or preferable decision in the matter.

- 18.7 Sixth, the Review Board may only review a 'decision' of the Board, that is to say, any finding of fact, determination or recommendation by the Board under either section 35 (suspension or like action) or section 42 (final action). (s 55)
- 18.8 Seventh, when the decision of the Board is under review, the whole of the decision is under review – the applicant cannot, by accepting parts of the decision and rejecting others constrain the Review Board to reviewing only those parts with which the applicant is dissatisfied.
- 18.9 Eighth, the nature of the review by the Review Board will depend on the controversy between the ESC and the respondent. It may involve the Review Board going over the same ground as that travelled by the Board when the issues remain – whether the events complained of occurred and whether the respondent for fit for office or duties. If there is no longer controversy over what occurred, the question of fitness may still be in controversy.
- 18.10 Ninth, generally the review of the matter will involve a complete reassessment, and the exercise of a judgment, in respect of the matter, and not just the acceptance of one side or the other.
- 18.11 Tenth, as a rule, bearing in mind the ultimate question of fitness, the Review Board has regard to the facts as they exist at the time the matter is before the Review Board, rather than at an earlier time when the matter was before the Board.

19 Proceedings of the Board and the Review Board

- 19.1 Each of the Board and the Review Board –
- (a) must act with fairness and according to equity, good conscience, natural justice and the substantial merits of the case without regard to technicalities or legal forms; and
 - (b) is not bound by the rules of evidence but may inform itself on any matter in such manner as it thinks fit (s 62).
- 19.2 Part 15 of the Act contains provisions dealing with the proceedings of the Board and the Review Board. They include that each of the Board and the Review Board:
- (a) must hold its meetings in private and permit such persons to attend as each may in its discretion direct; (s63(1)(b))
 - (b) must give written reasons for any determination and recommendation, other than by way of directions in the course of an application, unless the determination is made by consent of the respondent and the ESC. (s63(1)(d))
- 19.3 Generally, the Board and the Review Board can be expected to hold a directions hearing to make directions for the presentation of evidence and submissions as to proposed findings and recommendations (s65). The immediate parties are the ESC and the respondent (s63(2)).

The Board may give any other person to whom notice of the proceedings was given or who satisfies the Board that he or she has a proper interest in the matter a reasonable opportunity to make submissions to the Board (s63(3)).

- 19.4 The Act prescribes as the standard of proof to establish an allegation that of a reasonable satisfaction on the balance of probabilities (s70(1)).
- 19.5 Each of the Board and the Review Board must scrutinize evidence with greater care if there is a serious allegation to be established, or an inherent unlikelihood of an occurrence of a given description or if there are grave consequences that would flow from a particular finding (s70(2)).
- 19.6 Neither the Board nor the Review Board shall, in the course of considering a complaint or reconsidering a decision respectively:
- (a) inquire into any matter which is the subject of any completed formal investigation or enquiry and determination conducted—
 - (i) under or pursuant to any provision of the Constitution; or
 - (ii) under or pursuant to this Act or the Episcopal Standards Canon 2007, a Canon or an Ordinance of a diocese in any case relating to the discipline or professional standards of Church workers by a board of enquiry, tribunal or other body—

save to the extent of any fresh evidence that was not reasonably available during the previous formal investigation or enquiry, but may take into account the finding of any such formal investigation or enquiry; or
 - (b) inquire into, make any findings in relation to or take into account any alleged breach of—
 - (i) faith of the Church, including the obligation to hold the faith;
 - (ii) ritual of the Church, including the rites according to the use of the Church and the obligation to abide by such use; or
 - (iii) ceremonial of the Church, including ceremonial according to the use of the Church and the obligation to abide by such use¹⁵. (s75)

20 The role of the Church authority

- 20.1 Where any recommendation is made under the Act to the Church authority by the ESC, the Board or the Review Board (as the case may be), they shall give to the Church authority –
- (a) the findings of facts and recommendations constituting the decision of the ESC, the Board or the Review Board, as the case may be;

¹⁵ See footnote 5 above.

- (b) the reasons relied on in support of the decision;
 - (c) the final report if any of the investigator and attachments;
 - (d) any further material received from either the respondent or the complainant and any other relevant material; and
 - (e) any applicable professional standards prescribed by a code of conduct.
- 20.2. The Church authority is empowered to do any act to give effect to –
- (a) a recommendation of the ESC, the Board or if applicable, the Review Board or an equivalent body having jurisdiction to make a recommendation to the Church authority; or
 - (b) any variation or modification of that recommendation, consistent with any facts found by the body making the recommendation, as the Church authority sees fit (s 84).
- 20.3 The Church authority should not have any contact with the Diocesan Bishop or the complainant in relation to the complaint except through the Director or the ESC until the Church authority has received a recommendation from the ESC and/or the Board or the Review Board, as the case may be¹⁶.
- 20.4 The Church authority may have contact with the Diocesan Bishop in relation to the complaint after the Church authority has received a recommendation for suspension or other temporary action from the ESC and/or the Board or the Review Board, as the case may be but only in connection with the decision whether to accept that recommendation.
- 20.5 The Church authority must consider any submissions received from the Diocesan Bishop before making any decision on any recommendation.
- 20.6 The Church authority will communicate its decision to the Diocesan Bishop, the ESC, the Director and the complainant.

21 Pastoral Response

- 21.1 Where appropriate, the Director and the ESC will develop a pastoral response for the care of any church community or congregation affected by the matter.

22 Completion of the Process

- 22.1 As appropriate the Director will liaise with those involved in this Protocol at the completion of the case and will seek comment about the process and may discuss possible improvements.
- 22.2 Proposals regarding any changes within the structures of the Church which may assist to prevent further occasions of abuse will be considered.

¹⁶ For a discussion of the rationale for this approach, see the paper by Bishop Keith Rayner, *Pastor and Disciplinarian, the Bishop's Dilemmas*, St Mark's Review, 2003(3).

- 22.3 Any recommendations resulting from this activity will be provided to the Primate, the Bishop, the Diocesan Council and the Registrar.

23 Confidentiality

- 23.1 Part 17 of the Act imposes strict confidentiality obligations in connection with a complaint but authorizes disclosure in the circumstances prescribed by the Act or any protocol. In Parts 24 and 25 of this Protocol, the Director is given specific authority to make disclosure in the circumstances referred to.

24 Records

- 24.1 The ESC must ensure that the Director establishes a file in relation to each matter that is dealt with under this protocol and that the file includes the names of the informant and the respondent, the history of the matter, and the outcome.
- 24.2 A file prepared for the purposes of this protocol will be kept apart from any other file within the Church, or held by any other body.
- 24.3 The Director will be responsible for ensuring the proper confidentiality and security of these files.

25 Co-operation with Government Authorities

- 25.1 If arising from a complaint the Director or the ESC forms the belief on reasonable grounds that a child is in need of protection within the meaning of that expression in the *Children, Youth and Young Families Act 2005*, the Director must notify the relevant child protection authorities.
- 25.2 The Director must notify the Police if the conduct disclosed in connection with a complaint may constitute an offence whether committed in or outside Victoria that is an indictable offence against a law of the Commonwealth or any jurisdiction in Australia punishable by imprisonment for not less than five years (whether or not the offence is or may be dealt with summarily).¹⁷
- 25.3 The Director may notify the Police if the conduct disclosed may constitute any other criminal offence.

26 Co-operation with other Dioceses, other Denominations and other Child Related Employers

- 26.1 The Director is authorised to disclose to an equivalent body information in its possession concerning alleged misconduct of a former Diocesan Bishop:

¹⁷ This would generally include sexual offences under the *Crimes Act 1958* (Vic). See also s325.

- (a) which is information relevant to, or coming to notice during the course of an investigation undertaken by the equivalent body of the Diocese by whose Bishop the former Diocesan Bishop is licensed or in which the Diocesan Bishop is residing; or
- (b) which is information concerning misconduct alleged to have occurred in the diocese of the equivalent body—

and must co-operate with the equivalent body.

- 26.2 The Director is authorised to disclose to a person or body of another church exercising powers, duties or functions similar to those of the ESC, in relation to clergy, details of information in its possession concerning the alleged misconduct of a former Diocesan bishop and the ESC must co-operate with such person or body to whom the information is disclosed.

27 Grievance procedure

- 27.1 Any complaint or grievance about the operation of this Protocol should be addressed in writing to the Primate and the Chair of the Episcopal Standards Committee marked confidential care of 209 Flinders Lane, Melbourne Victoria 3000.
- 27.2 The Chair shall forward the complaint or grievance to the Director and to the investigator or other staff member if any involved for a written response within 14 days and otherwise consider the matter, with or without assistance from the Committee as he or she judges appropriate to the circumstances.
- 27.3 The Chair will provide the complainant and the Primate and the Registrar with a written response and an outline of any proposed action.