

EPISCOPAL STANDARDS (CHILD PROTECTION) CANON 2017 (Revised)
EXPLANATORY MEMORANDUM

General Background

There are many reasons why there is not presently uniform episcopal standards legislation across the 23 dioceses of the Anglican Church of Australia. Within the church where we are privy to the organisation of the Church on a diocesan basis, many of the reasons for lack of uniformity make sense to us. The Church exists, however, within the context of an Australian society that has turned attention to the operation of the Anglican Church of Australia and other churches, as a result of the Royal Commission into Institutional Responses to Child Sexual Abuse.

The public hearing in Case Study 52 heard evidence on the lack of uniformity of episcopal standards legislation across the 23 dioceses. Attached to this explanatory memorandum circulated with the original Bill 20 were the documents prepared by Mr Michael Shand QC of the Diocese of Melbourne for the Royal Commission that summarised the state of episcopal standards legislation. One lesson learned from the Royal Commission is that when it comes to the protection of children from sexual abuse, there is no room for compromise on standards. That extends to episcopal standards in relation to protecting children from child sexual abuse and responding to allegations of child sexual abuse.

Because it was apparent that the Episcopal Standards Canon 2007 (the 2007 Canon) was unlikely to be adopted by all dioceses, the Standing Committee at its October 2010 meeting set up the Episcopal Ministry Task Force (EMTF) that reported to the 16th General Synod. The EMTF included in its report a Model Episcopal Standards Ordinance.

Resolution 47/14 of the 16th General Synod commended for enactment by every diocese the proposed Model Episcopal Standards Ordinance attached to the Supplementary Report of the Standing Committee concerning a Model Episcopal Standards Ordinance. That has not been taken up by at least 11 of the 23 dioceses. The reality of that together with the imminence of Case Study 52 and the decision of the Appellate Tribunal in the matter of Bishop Slater and the Diocese of Grafton prompted the Standing Committee at the February 2017 meeting to set up an Episcopal Standards Task Force (Task Force) to assist the church to move towards the implementation of a national episcopal standards process.

The Standing Committee asked the Task Force to:

- define the scope of the conduct to be subject to a National Episcopal Standards Scheme that is likely to receive broad national support
- give consideration to an independent body to be responsible for the investigation and prosecution of action under a National Episcopal Standards Scheme
- give consideration to the best means to implement a National Episcopal Standard Scheme including the applicability of the existing Canons – The Offences Canon 1962, the Episcopal Standards Canon 2007 and the Special Tribunal Canon 2007

- give consideration to an effective means for the discipline of bishops formerly subject to the Special Tribunal including extending the jurisdiction of the Special Tribunal.

The members of the Task Force are: Archbishop Davies, Bishop Goldsworthy, Archdeacons Copeman and Snell, Mr Blake SC, Mr Shand QC and Justice Mullins (as convenor).

The Task Force (apart from Mr Shand QC's dissent in respect of the recommendation in paragraph (a)) recommended to the Standing Committee at its May 2017 meeting:

- “(a) enactment of the Episcopal Standards (Child Protection) Canon 2017 ... that is confined to child protection matters, deals with fitness for office, and applies to both current and former diocesan bishops, but as far as the latter are concerned only in respect of conduct occurring while a diocesan bishop;
- (b) amendment of s 56(6) of the Constitution to extend the jurisdiction of the Special Tribunal to former members of the House of Bishops or former bishop assistant to the Primate for offences specified by canon in respect of conduct while a member of the House of Bishops;
- (c) amendment of the Offences Canon 1962 to insert a new section 2A that lists the offences that can apply to a former member of the House of Bishops or former bishop assistant to the Primate and be dealt with by the Special Tribunal and which specifically makes child abuse and failure to comply with the laws of a State or Territory requiring the reporting of child abuse to the police or other authority an offence under both sections 1 and 2 of the Offences Canon 1962.”

At its May 2017 meeting Standing Committee received the Task Force's report and, in general terms, endorsed the three Bills for presentation to the 17th General Synod.

The rationale for the Bill for Episcopal Standards (Child Protection) Canon 2017 (Episcopal Standards Bill) is that it is imperative for the reputation of the church to implement a national approach to episcopal standards at the very least in respect of child protection matters. That will require cooperation among the dioceses and a willingness for those dioceses that enacted diocesan legislation based on the Model Episcopal Standards Ordinance that covers the same subject matter as the Episcopal Standards Bill to cede the regulation of this discrete area of episcopal standards to the proposed national legislation, or at the least, when dealing with a complaint involving a child protection matter against a current or former bishop subject to section 56(6) of the Constitution, to refer the complaint for hearing to the national Episcopal Standards Board (ESB) from which time the matter would then be dealt with under the Episcopal Standards Bill.

It was originally proposed that the Episcopal Standards Bill proceed on the basis that it dealt with fitness for office and not discipline, so that it could take effect as a canon under section 30 of the Constitution and commence on and from a date appointed by the President within one month from the date on which the canon was passed. To facilitate the commencement of the Bill, there was therefore no clause in Bill 20 as originally circulated that declared that its provisions affect the order and good government of the Church within a diocese. This was on the basis that if all dioceses

were supportive of the rationale and requirement for this Bill, then it would be unlikely that any diocese would seek to rely on paragraph (c) of s 30 of the Constitution. The feedback on the original Bill 20 suggested that, commendable though the aim was for seeking an early commencement for the Bill, integrity in applying the provisions of the Constitution in enacting canons was also important. The Bill now provides expressly that its provisions affect the order and good government of the Church within a diocese, so the Bill will not come into force in a diocese until adopted by the diocese by ordinance.

There will be costs associated with this proposal that will be borne by the General Synod (and ultimately the dioceses), as a result of using processes and structures set up under the 2007 Canon (and extending the jurisdiction of the Special Tribunal), but that is a consequence of endeavouring to meet the anticipated criticism from the Royal Commission of a lack of a national approach to episcopal standards in child protection matters.

Whether or not a diocese has adopted the 2007 Canon, it is a canon that has been passed by the General Synod, with the Episcopal Standards Commission (ESC) in place as the investigator of information about relevant conduct and the ESB set up to hear questions that are referred by the ESC. The Episcopal Standards Bill is confined to defined examinable conduct and would take advantage of the existing processes and structures under the 2007 Canon for determining fitness for office. The Bill does not require dioceses to adopt the 2007 Canon.

When Bill 20 was circulated originally, in order to ensure that it dealt with fitness for office and did not affect the discipline of this Church that would otherwise attract the application of proviso (a) to s 30 of the Constitution, it modified some provisions in the 2007 Canon. On that basis section 12(1) of the 2007 Canon was modified, so that the relevant bishop was not compelled to provide a detailed report to the ESC in response to an investigation, but instead was allowed to provide a detailed report. Sections 12(2), 16(c), 48(c) and 51 of the 2007 Canon could not apply. Feedback on the original draft raised concern that there remained an argument that the Bill affected discipline and attracted the operation of s 28(1) of the Constitution. To avoid a challenge to the validity of the Bill on that basis, the Bill should be enacted following the procedure for a special Bill, unless the General Synod by votes of at least three-fourths of the members present in each house decide that it need not proceed as a special Bill. It will therefore now not be necessary to exclude the provisions of the 2007 Canon that affected discipline.

If the Episcopal Standards Bill is passed by the Synod, it is proposed that the canon apply to a current member of the House of Bishops or a bishop assistant to the Primate in the Primate's capacity as Primate (assistant to the Primate) for any conduct that falls within examinable conduct, wherever or whenever that conduct occurred, but that examinable conduct for a former member of the House of Bishops or assistant to the Primate (former Bishop) be confined to the same categories of conduct, but further confined to that which occurred while a member of the House of Bishops or assistant to the Primate, but whether before or after the commencement of the canon, and subject to the extension of the definition of examinable conduct for a former Bishop that is covered by clause 2(2) of the Bill.

It is a commonly held view that bishops who were formerly the subject of section 56(6) of the Constitution are amenable to the jurisdiction of the diocesan tribunal in the diocese in which they currently reside or are licensed. Although the Appellate Tribunal in its decision dated 19 January 2017 on the appeal by Bishop Slater decided it lacked appellate jurisdiction in that matter, it did make some observations at paragraphs [115] to [123] on possible limitations on diocesan legislative authority in relation to bishops. In particular, it noted at [115], in the context that more than one diocese may have a direct concern with issues of the status or fitness of a former diocesan bishop, the appropriateness of a common approach to the issue through a canon of the General Synod, it queried at [117] the possible limitations on the power of one bishop to depose another from Holy Orders, and at [122] it sounded the need for caution when addressing the validity of a diocesan ordinance not supported by a canon of the General Synod with respect to the deposition of a bishop from Holy Orders. That is why in the area of episcopal standards relating to child protection, it is proposed that there be a national approach in dealing with both fitness for office and discipline of bishops who are or were the subject of s 56(6) of the Constitution.

When the original Bill was circulated, some concern was expressed by dioceses that had enacted diocesan Episcopal Standards legislation based on the 2014 Model Episcopal Standards Ordinance and have in place structures for investigating and determining episcopal complaints that the Bill is based on the 2007 Canon. There is a benefit for those dioceses, however, if there were a General Synod canon that authorised their Episcopal Standards ordinances, at least in respect of child protection.

The revised Episcopal Standards Bill which is now presented to the General Synod reflects some compromises to address the various concerns that have been raised since the original Bill circulated. It is proposed to recognise that a diocese may have in place what is referred to as a “complying ordinance” relating to episcopal standards or professional standards in which examinable conduct or misconduct which may give rise to a question of fitness of a bishop be determined by the board constituted under that ordinance that includes examinable conduct as defined in the Episcopal Standards Bill and which applies to a bishop who is or was the subject of section 56(6) of the Constitution.

Where a complaint involving a child protection matter under a complying ordinance would have been referred to the diocesan episcopal standards board or professional standards board, it may be referred instead to the national ESB to be dealt with under the Episcopal Standards Bill together with any other complaints against the same bishop (whether relating to child protection or not) which would have otherwise been heard by the diocesan board to determine the bishop’s fitness for office, and therefore avoiding bifurcation. From the date of the referral arising under the complying ordinance to the national ESB, the national ESC would then take over the matter in presenting it to the ESB and for the Episcopal Standards Bill to then apply for all processes from the referral onward.

The other compromise that is incorporated in this revised Episcopal Standards Bill is in respect of an appeal from the ESB. In lieu of the barrister reviewing the determination of the Board for procedural or jurisdictional error that is provided for presently in Part 8 of the 2007 Canon, the Bill now proposes modifications to the 2007 Canon for child protection matters, so that an appeal by way of rehearing to a

Review Board that is constituted from the same panel that is used for constituting the ESB (and using the same process used for constituting the ESB) will be available.

If the President presides at the ESB hearing, then the Deputy President will preside at the Review Board hearing. Any panel member who was on the ESB for the hearing of the matter that is the subject of the appeal cannot be chosen for the Review Board hearing. As it is proposed that there will be an appeal, rather than a limited review, it is appropriate to give both the bishop and the ESC (if aggrieved by the determination) the right to appeal by giving notice to the General Secretary.

Under section 23(2) of the 2007 Canon the ESB consists of the President or Deputy President and “an equal number not exceeding two of the Episcopal and other members of the panel” which means that the ESB will comprise three members in total. Recognising the significance of an appeal in some instances may justify having a Review Board constituted by more than three members, it is proposed to give the President or Deputy President the power to constitute a board of either three or five members.

The national consistency in dealing with episcopal standards involving child protection will follow from all matters being able to be referred to the ESB and governed from that point in the process by the Episcopal Standards Bill (if enacted by the General Synod and then adopted by the diocese).

Notes on Clauses

Clause 1 provides for the title of the canon.

Clause 2 sets out in subclause (1) the definitions that apply to the canon.

The definition of **assistant to the Primate** is based on section 56(6)(b) of the Constitution.

The definition of **Bishop** covers existing and former bishops and assistants to the Primate within paragraphs (a) and (b) of section 56(6) of the Constitution.

The definitions of **child** and **child abuse** are the same as those in the National Register Canon 2007.

The definition of **complying ordinance** specifies the minimum requirements for an ordinance of a diocese relating to episcopal standards or professional standards to be treated as a complying ordinance for the purpose of the canon.

There is a definition of **examinable conduct** that applies to a Bishop who is currently covered by paragraphs (a) or (b) of section 56(6) of the Constitution.

There is a definition of **examinable conduct** that applies to a Bishop

who was formerly covered by paragraphs (a) or (b) of section 56(6) of the Constitution and is limited to the specified conduct that occurred while a member of the House of Bishops or assistant to the Primate, but whether before or after the commencement of the canon.

The definition of **exempt conduct** relates to a category of conduct that would otherwise be examinable conduct if it had not been disclosed to the ordaining bishop prior to the subject Bishop's ordination as a deacon.

The definition of **former Bishop** applies to a Bishop whose conduct falls within paragraph (b) of the definition of examinable conduct.

As one of the areas of conduct that can fall within the definition of examinable conduct is the failure without reasonable excuse to perform a function under a professional standards process, there is a definition of **professional standards process**. It covers a process for determining the fitness for office of clergy or lay persons and a disciplinary process under Chapter IX of the Constitution where the conduct that is the subject of the process relates to child abuse.

There is a definition of **relevant diocesan bishop** that will be relevant where the canon applies to a former Bishop.

sets out in subclause (2) the circumstances in which the definition of examinable conduct in relation to a former Bishop could extend to other conduct that falls within subparagraphs (i) to (iv) of paragraph (b) of the definition of examinable conduct, but occurring before or after any period in which the Bishop was subject to section 56(6) of the Constitution that, together with the examinable conduct occurring while subject to section 56(6) of the Constitution, might call into question the fitness of the Bishop for office.

Clause 3 specifies in subclause (1) which provisions of the Episcopal Standards Canon 2007 are incorporated in this canon and the modifications that are made to their operation to reflect the confined scope of episcopal conduct that is regulated by this canon, that it applies to former Bishops in addition to bishops who are subject to s 56(6) of the Constitution and that there will be right of appeal from the decision of the Board to the Review Board.

clarifies in subclause (2) that the Episcopal Standards Board established by Part 6 of the 2007 Canon is the same Board that will have jurisdiction for the purpose of the canon.

Clause 4 states that the provisions of this canon affect the order and good government of this Church within a diocese and the canon requires adoption by the diocese in order to come into force in a diocese.