

Professional Standards Amendment Bill 2019

EXPLANATORY MEMORANDUM

3 September 2019

Summary

1. This Bill introduces a number of amendments to the *Professional Standards Uniform Act 2016* (**the Act**), that cover the following broad areas—
 - A. **Ensuring timeliness PSC and Board:** They aim to improve the timeliness with which matters are handled and to clarify the powers of the Professional Standards Committee to deal with some matters without referral to the Professional Standards Board: clauses 9 – 14, 32. They also seek to expedite the Professional Standards Board and Review Board dealing with a matter: clauses 40, 46.
 - B. **Persons of concern and safe ministry:** They introduce provisions contemplated by the General Synod Policy on safe ministry with persons of concern to ensure a legislative framework to facilitate a clear process for regulating such ministry and authorising and indemnifying those involved: clauses 8, 19, 30, 31, 37, 48.
 - C. **Clearance for Service:** They simplify the requirements for clearance for service so that the one certificate of clearance can cover multiple roles: clauses 22 – 29.
 - D. **Mandatory recommendation for deposition from Holy Orders:** They introduce amendments intended to reflect the approach recommended by the Safe Ministry Commission with respect to deposition from Holy Orders on the commission of a prescribed serious criminal offence: clauses 38, 44.
 - E. **Audit:** They amend the requirements for audit of compliance with the Act, amongst other things, to dovetail them with the requirement of General Synod for a triennial audit of safe ministry standards: clauses 51 - 56.
 - F. **Technical drafting issues:** They address gaps in the legislation and remove uncertainty: clauses 31, 34, 35, 43, 50.

Background

2. In October 2016, Synod enacted the *Professional Standards Uniform Act 2016*. The following year 2017, Synod enacted the [Professional Standards Amendment Act 2017](#) largely to give effect to the Canons passed by General Synod that year, in particular the *Safe Ministry to Children Canon 2017*. Details of the legislative history of this legislation, including the 2017

amendments, can be found on the Kooyoora [website](https://www.kooyoora.org.au/client-institutions/anglican-diocese-of-melbourne/resources/) - <https://www.kooyoora.org.au/client-institutions/anglican-diocese-of-melbourne/resources/>.

3. The Act, with the exception of Part 4.2, commenced operation on 1 July 2017. The [Kooyoora Office of Professional Standards](#) for the Diocese of Melbourne likewise commenced operations that day. It inherited from the then sole Director of Professional Standards, Claire Sargent, all the complaint matters and redress matters then held by the Director.
4. Claire Sargent continued as Director until the end of August 2017. Vincent Lucas succeeded her in that role until June 2018. Marcia Arthur and Richard Connelly served as Deputy Director and Acting Director respectively, albeit on a contract basis until December 2018. The present Director, Patrice Galgano and Deputy Director, Katrina Thomas commenced in December 2018 and continue in their roles as employees, reporting to the Executive Director, Fiona Boyle. Fiona succeeded Anne Baker as Executive Director from 4 September 2018.
5. During this establishment period, there were unfortunate delays in both the PSC considering matters and once matters were referred, in the Professional Standards Board adjudicating on them. These arose in part out of perceived statutory constraints on the PSC dealing with a matter itself or promptly referring a matter to the Board and in part the Board responding promptly to that reference. The staff turnover during 2018 may also have been a factor. In the light of this experience since July 2017, it has been timely to review the operation of the Act and how complaints have been handled. Consultation has taken place with the Office of Professional Standards, the Episcopate, the Bishop of Bendigo, the Professional Standards Committee, the Melbourne Anglican Diocesan Corporation Ltd and the Provincial Legal Committee.

Proposed amendments in more detail

6. More detailed explanation of the proposed amendments follows:
 - A. **Ensuring timeliness**
7. **Clauses 9 – 14, 32: Section 27** gives the Professional Standards Committee (**the PSC**) summary jurisdiction to dismiss a complaint or take no further action in relation to a complaint. These proposed amendments are intended to broaden the scope of complaints and matters which the PSC can deal with, other than by referral to the Professional Standards Board (**the PSB**). They make for greater flexibility in responding to a complaint or matter. Broad details of the process under the Act to be followed by the PSC and the PSB are set out on the Kooyoora [website](#).

8. **Clause 32: Procedure for referral.** Currently, when referring a complaint or matter to the PSB, the PSC must prepare and serve a written report of its investigation: s71(1) of the Act. This requirement has caused significant delays in the process as considerable time was taken in its preparation. This amendment would delete that requirement. The change does not affect the procedural fairness to be afforded to the respondent; the Act already requires the PSC to provide witness statements and submissions where appropriate so that the respondent knows the case to be met: s73.
9. **Clause 40:** The amendments proposed here to s79 seek to give the PSB in an appropriate case further flexibility to deal with a matter by making a non-binding recommendation to the Church authority.
10. **Clause 46: Preliminary conferences:** The change here to s101(1) is to require a presidential member of the PSB or the Professional Standards Review Board (**the PSRB**) to hold a preliminary conference either in person or by phone within 14 days from referral or application to set a procedural timetable for the matter. This is to encourage the PSB and PSRB to be expeditious in dealing with the matter.

B. Persons of concern and safe ministry

11. **Clauses 8, 19, 30, 31, 37, 48:** When a person wishes to participate in the life of the parish or congregation and their presence may constitute a risk of physical or sexual abuse to people there, such as when they are a person convicted of a criminal sexual offence, a special process needs to apply to their participation. This person is called a Person of Concern.
12. **The General Synod policy:** In October 2017, the Diocese of Melbourne adopted the [Safe Ministry to Children Canon 2017](#) and the standards of the General Synod of the Anglican Church of Australia for safe ministry with a Person of Concern in a parish or congregation: s8(1), second schedule, Part 4. These standards are the actions required to implement the process specified in section 5 of the [General Synod Persons of Concern Policy](#) and are directed to persons who have engaged in sexual abuse.
13. The policy recognises that, in the exercise of its powers for the order and good government of the Church in the diocese, a diocesan synod may adopt this policy and, to facilitate its implementation, pass an ordinance giving requisite powers and protections to those involved in the implementation of the process: [section 6 Legal Framework](#). Neither the General Synod nor its Standing Committee has prepared any legislative framework for consideration.
14. **The General Law:** Under the general law, the right of a Person of Concern, whether as a member of the Church or as an attendee, to attend public worship

and otherwise participate in the activities of a parish is that of a licensee.¹ The General Synod Policy, section 6.2, recognises this. A licence can be granted on both explicit and/or implicit terms and conditions. These terms and conditions can limit or regulate entry on to property for such public worship and/or activities.

15. The General Synod policy also refers to the [Holy Communion Canon 2001](#) which is in force in every diocese. The canon, in s6 provides for the circumstances in which the minister who has the cure of souls may refuse to admit a person to the Holy Communion. An ordained minister must not refuse to admit a person to Holy Communion unless directed by the Bishop to do so. In the case of 'grave and immediate scandal', an ordained minister may in their discretion refuse to admit the person concerned, pending receipt of a direction from the Bishop.
16. The Diocese of Melbourne needs to have this legislative framework for its process of dealing with Persons of Concern:
 - (a) It would promote certainty and give the authority of Synod for the office holders in the process to act. Without this legislative framework, the Archbishop, the local minister and Church wardens, the Director and the PSC have no clear authority to act against the Person of Concern and no clear indemnity for any litigation or other taken against them by that person. It is unfair, in taking steps to uphold child safe standards, to expect those office holders to act without that clear authority.
 - (b) It would give those office holders in so acting the benefit of an indemnity by the Diocesan Corporation that is already available to office holders under the Act in respect of other matters: s181 of the Act.
 - (c) With such a legislative framework, in answer to any claim against the Church of failure to take reasonable care in connection with harm caused by a person associated with the Church, the Diocese can point to the legislated process as constituting reasonable precautions to deal with persons of concern. The Diocese can meet the reverse onus of proof that the *Wrongs Act 1958* (Vic), [s91](#) places on organisations whose people may have wrongfully caused injury as a result of child abuse, whether sexual or physical.

These Church legislative provisions would operate in conjunction with a protocol for Safe Ministry in a parish where there is a risk of abuse by a Person of Concern that would be approved by the Directors of Kooyoora Ltd, the scheme corporation. That protocol would be published on its website under [Safety Agreements](#).

¹ See for example [Gallagher v McClintock & Ors](#) [2014] QCA 224 at [23] to [30].

17. **Clause 30, s67C: Definition of Person of Concern.** The proposed legislative framework is directed to a Person of Concern, defined as – a person whose presence may constitute an unacceptable risk of harm to people in the parish as a result of sexual abuse or physical abuse and includes specified classes of people. The suggested definition is wider than the definition in the General Synod policy because it extends to physical abuse. The organisational liability under Victorian legislation covers both physical and sexual abuse of a child by a person associated with the organisation.
18. **Clause 6: Mandatory duty to report a Person of Concern.** It is proposed to amend s17 of the Act so that a prescribed Church worker (as defined, including clergy and lay leaders) will have a duty to report to the Director if they believe on reasonable grounds that a Person of Concern is participating or wishes to participate in the life of a parish and have no reason to believe that the Director is aware of those facts. This ensures that the Director can become aware of the participation of a Person of Concern in a parish and deal with the matter in accordance with the mandated process. This duty is consistent with stage 2 of the process mandated by the General Synod policy to notify the Director “As soon as practicable after you suspect or know that someone who may be a Person of Concern is participating or wishes to participate in the life of the parish...”.
19. **Clause 30: Clearance for participation, new Part 4.3.** A concern raised by the Office of Professional Standards is the difficulty of obtaining information about a Person of Concern. When a person is released from prison after serving their sentence, their privacy is respected and the Government will not notify Church organisations even if they know that the person intends to attend a particular church. When confronted, the Person of Concern can be defensive and secretive about their background. For this reason, where the PSC determines in their absolute discretion (after first hearing from the person) that a person should be declared to be a prescribed Person of Concern, that person must if they wish to participate, apply for a clearance for participation in the life of a parish: proposed s67H. If they fail to apply, in effect they are taken to opt out of that participation.
20. The PSC, assisted by the Director of Professional Standards, is given jurisdiction to determine at a preliminary stage issues associated with the Person of Concern and their participation: proposed s67M. They may refer matters to the PSB under s69 on the happening of any of the events referred to s67O. They include–
- where the Person of Concern contests the determination of the PSC to refuse an application for a clearance or to insist on a Safety Plan or Safety Agreement; or
 - where that person is in breach of the agreement or plan or

- where that person is participating without having obtained a clearance for participation.

The provisions of Part 4.3 follow the pattern of the earlier parts of the Act dealing with clearance for ministry and clearance for service.

21. If the Church authority (the vicar and churchwardens) receive notice from the Director that a Person of Concern has failed to apply for a clearance or has been refused a clearance or had their clearance cancelled, they have a duty to take all reasonable steps to prevent that person from having entry or access to premises or activities of the Church either generally or in a specified location or circumstances, except to be admitted to the Holy Communion or the Lord's Supper in circumstances approved in advance in writing by the Diocesan Bishop: proposed s67S.
22. **Clause 37: recommendation of the PSB.** Proposed amended paragraph (g) of s78(1) states a recommendation that the PSB can make in relation to a Person of Concern. It reflects more closely the operation of the *Holy Communion Canon 2001* which the diocese has adopted: proposed s78(g).

C. Clearance for Service

23. Clauses 22 – 29: A new subsection (3) is added to s60 to provide that a Church worker is exempt from having to apply for a clearance for service if they already hold–
- (a) a clearance for service for any class of roles offices or positions that include the one to which the person has been elected or appointed; or
 - (b) a clearance for ministry for any role office or position.
24. The other amendments to Part 4.2 are intended to facilitate the issue of a certificate of clearance for service for a class of specified roles so that the one clearance covers all the specified roles and avoids multiple applications.

D. Mandatory recommendation for deposition from Holy Orders

25. **Clauses 38, 44:** Proposed new subsection (3) of s78 reflects a recommendation from the Royal Commission (16.56) and provides for mandatory deposition where the Board is satisfied that the respondent has been convicted of a sexual offence relating to a child, committed when a member of the clergy. Section 3 contains the definition of a sexual offence relating to a child. Recommendation 16.56 was in the following terms–
- 16.56 – 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.

E. Audit

26. **Clauses 51 - 56:** Proposed amendments to s184 amend the requirements for an audit of compliance with the Act, amongst other things, to dovetail them with the requirement of General Synod for a triennial audit of safe ministry standards.

F. Technical drafting issues

27. **Clauses 31, 34, 35, 43, 50:** Even if a Church worker resigns and at the time of consideration by the PSC no longer holds a particular role office or position, the PSC may still deal with the matter and consider the person's fitness to hold a role office or position in the future. The amendment to s69(a) makes this clear with the addition of the words 'now or in the future': clause 31. See also clause 35 and the amendment to s74.

Transitional Provisions

28. **Clauses 57 – 60:** These contain transitional provisions to provide for the orderly introduction of the proposed amendments. A complaint or matter already before the Professional Standards Board as at the commencement of this Amending Act is to be dealt with under the Act as in place prior to the amendments.

Clause notes

- Clause 1 states the short title of the Act.
- Clause 2 provides that a reference to the Principal Act is a reference to the *Professional Standards Uniform Act 2016* as amended.
- Clause 3 states the purpose of the Bill, to amend the Principal Act.
- Clause 4 provides for the Act to come into operation on the day on which it receives the assent of the Archbishop.
- Clause 5 inserts definitions of some new terms and substitutes a definition of some existing terms.
- Clause 6 inserts in s17 a duty to report to the Director in relation to a Person of Concern.
- Clause 7 amends the heading to Chapter 3.
- Clause 8 introduces the right to lodge a complaint in relation to a Person of Concern and makes applicable the provisions of the Act as if a complaint against a Church worker.
- Clause 9 amends the heading to Part 3.2 and s27(1).
- Clause 10 amends s27(1) to give the PSC the option to take limited action, short of a reference to the Board.

amends s27(1)(a) (iii) to provide that the PSC may act under the section if the evidence is not of sufficient weight to warrant an investigation or further investigation, using language consistent with paragraph (iv);

inserts new s27(1)(a) (iv) to provide that the PSC may act under the section if the evidence is not of sufficient weight to support a determination of the Board that the alleged conduct occurred².

Clauses 11 - 14 clarify when the PSC can act other than by referral to the Board.

Clause 15, 16 makes technical drafting amendments.

Clause 17 amends s30 to substitute “investigator” for “delegate” to bring greater clarity to the provision.

Clause 18 makes a technical drafting amendment.

Clause 19 amends s37 by re-casting the recommendation that can be made in relation to a person of concern, consistent with the *Holy Communion Canon 2001*.

Clause 20 amends s44(1) to refer to introduce the defined term – “sexual offence relating to a child”.

Clause 21 makes a technical drafting amendment.

Clauses 22 – 29 amends the provisions of Part 4.2 of the Act to enable a clearance for service to cover beyond a proposed role to the roles or classes of roles specified in the clearance. This gives greater utility to the clearance.

Clause 29 makes a technical amendment to s67(1)(a) to delete the words “for a prescribed role office of position”.

Clause 30 inserts a new Part 4.3 Clearance for Participation.

s67A states the purpose of this Part, to regulate the participation in the life of any parish of a Person of Concern.

s67B defines “clearance for participation”.

s67C defines a “Person of Concern”.

s67D states the duties of the Director if the Director receives a report under section 17(2) or otherwise becomes aware that a Person of Concern is participating or wishes to participate in the life of a parish.

s67E empowers the Director to determine an Interim Safety Arrangement pending determination by the PSC as to whether the Person of Concern may participate in the life of the parish.

s67F provides that the PSC must consider the report of the Director under section 67D and any submission from the Person of Concern given within the time allowed by the Director.

s67G provides that the PSC may in its absolute discretion by resolution declare that a Person of Concern is a prescribed Person of Concern for the purposes of the Act.

² Criminal Procedure Act 2009, s141(4)(a) – “to support a conviction for any indictable offence...”

- s67H requires a prescribed Person of Concern to—
- (a) apply to the Office of Professional Standards for a clearance for participation; and
 - (b) apply for a National Police Check at the expense of the Diocesan Corporation.
- s67I requires the Director, the PSC and the Office of Professional Standards to deal with the application in accordance with the Act and any applicable protocol.
- s67J provides that it shall be a condition of eligibility for the grant of a clearance for participation that the Person of Concern does not constitute an unacceptable risk of harm to any person engaged in the activities of the parish whether unconditionally or subject to a satisfactory Safety Plan or Safety Agreement or other condition or restriction.
- s67K subclause (1) provides that if to the best of its knowledge information or belief, the PSC is of the opinion that the applicant does not constitute an unacceptable risk of harm to any person, the PSC shall determine accordingly and the Office of Professional Standards must grant to the applicant a clearance for participation.
- s67L provides for a determination by the PSC adverse to the Person of Concern.
- s67M sets out powers of the PSC.
- s67N sets out the mandatory terms of the Safety Agreement or Safety Plan.
- s67O sets out when the PSC may refer a matter to the Board.
- s67P prescribes the duration of the clearance for participation.
- s67Q prohibits the prescribed Person of Concern from participating in the life of the parish to the extent there prescribed.
- s67R empowers the vicar and churchwardens to establish a Parish Accountability Group.
- s67S prescribes the duty of the Church authority in relation to the prescribed Person of Concern.
- Clause 31 amends s69 inter alia by paragraph (c) to give the Professional Standards Board jurisdiction in relation to a prescribed Person of Concern.
- Clause 32 deletes the requirement in s71(1) to provide a report of the investigation.
- Clause 33 make a technical drafting amendment.
- Clauses 34 and 35 provides that the Professional Standards Board may enquire into and determine a complaint or matter if before any determination, the respondent resigns from or fails to take up his or her role office or position or abstains from participation in the process by which the complaint or application is dealt with under the Act.

- Clause 36 amends the heading to section 76 to refer to an enquiry on a complaint.
- Clause 37 substitutes for the existing paragraph (g) of section 78 a more detailed recommendation in relation to a Person of Concern, recognising the operation of the *Holy Communion Canon 2001*.
- Clause 38 inserts a new subsection (3) in s78 which provides that where the Board is satisfied to the required standard of proof that the respondent has been convicted of a sexual offence relating to a child committed when a member of the clergy, the Professional Standards Board must recommend that the respondent be deposed from the exercise of Holy Orders.
- Clauses 39 - 42 extends the powers of the Professional Standards Board beyond the power to dismiss or take no further action to the power to take limited action in relation to a complaint or matter by way of a non binding recommendation to the Church authority, as provided by a new paragraph (c) of subsection 79(1).
- Clause 43 amends the heading to s84 to “standard” of proof.
- Clause 44 mirrors clause 38 above in relation to a recommendation of mandatory deposition from Holy Orders by the Review Board.
- Clause 45 amends s98(1)(c) to permit the Professional Standards Board to inform itself from the transcript or other record of a Royal Commission.
- Clause 46 amends s101 to give more flexibility as to who may convene the preliminary conference and make directions so as to expedite matters.
- Clause 47 makes a consequential amendment to s102.
- Clause 48 amends existing paragraph (k) of section 173 to specify with more particularity who in the Cathedral and otherwise is the Church authority in relation to a Person of Concern.
- Clause 49, 50 recognises the need for the Director or Executive Director to report to a local Church authority in a particular case.
- Clauses 51 – 55 amends the audit provisions in s184.
- Clause 56 introduces a new subsection (5) to provide that the person appointed to conduct the audit may also act as the auditor appointed by the General Secretary of General Synod to conduct an audit in respect of the Diocese under the *Safe Ministry to Children Canon 2017*.
- Clauses 57 – 59 are transitional provisions for the amendments effected.
- Clause 60 provides for the repeal of this Amendment Act on the anniversary of the day on which it came into force.
-