

ANGLICAN DIOCESE OF NEWCASTLE
PROFESSIONAL STANDARDS ORDINANCE 2012 – REVIEW BOARD

Matter: Review application by Bishop Richard Appleby

Hearing Date(s): Submissions dated 29 July 2019

Decision Date: 27 August 2019

Panel Members: C A Webster SC, Review Board Chair
The Reverend T Angert-Quilter
Mr R Turnbull

Decision: Determination set aside

Legislation Cited: Professional Standards Ordinance 2012, Diocese of Newcastle

Cases Cited: Appeal of Keith Francis Slater, Appellate Tribunal of the Anglican Church of Australia (19 January 2017; The Hon Keith Mason AC QC – President, The Hon Justice Richard Refshauge, Mrs Gillian Davidson, The Rt Rev'd John Parkes AM, The Hon Justice Clyde Croft, The Rt Rev'd Garry Weatherill)

Review Applicant: Bishop Richard Appleby

Representation: Counsel: P Skinner (Applicant)
Solicitors: M Panagoda, Carroll & O'Dea (Applicant)

File Number(s): Review 2019/01

Decision under review: Professional Standards Board
In the Matter of Professional Standards Committee and Assistant Bishop Appleby

Date of Decision: 15 February 2019

Decision delivered: 19 February 2019

Decision of: C A Elliott, President

File Number(s): PSB 04/2018

DECISION

Introduction

1 This is a review sought by Bishop Richard Appleby (**Review Applicant**) of a determination made by the President of the Professional Standards Board (**Board**) under the *Professional Standards Ordinance 2012* of the Anglican Diocese of Newcastle (**Ordinance**).

2 On 19 February 2019 the President of the Board delivered his determination (**Determination**) recommending that the Applicant be deposed from Holy Orders and that, other than as a parishioner, he have no office or licence as a Church worker. The reasons given for that conclusion were set out at pages 14 and 15 of the Determination under the headings Recommendation and Reasoning.

3 At page 14 the Board quoted from Bishop Herft's evidence to the Royal Commission wherein he acknowledged:

The Diocese had 'failed miserably' in its response to CKA by not providing pastoral care and by allowing key persons in the Diocese to act on Father Parker's behalf. He acknowledged that CKA's existing anguish would have been exacerbated by the fact that people with significant responsibility in the Diocese acted on Father Parker's behalf.¹

4 The Determination continues:

This was part of the systemic failure of the Diocese at that time. The position that the respondent occupied (as Assistant Bishop to Bishop Holland) was one of trust requiring a strong moral compass, one who might be inquisitive about conduct brought to his notice so that he could deal with it appropriately. He should have had a greater understanding of the impact such criminality can have on victims of child sexual abuse.

...

I am satisfied that because of the conduct found, the respondent is unfit permanently to hold any office.

5 We have concluded that the Review Applicant's complaint as to a denial of procedural fairness has been made out, by reason of the way in which the Board used, in the Determination, findings made in the Case Study about the Review Applicant's dealings with Mr Gray. We have determined to set aside the Determination.

6 Notwithstanding our conclusion as to Ground 1, we have considered the further

¹ Referring to report of the Case Study at page 224.

complaint, in Review Ground 2, that the recommendation was in any event manifestly excessive. In our view, the finding of the Board that the Review Applicant is unfit permanently to hold any office, and the recommendation that he be deposed from Holy Orders were excessive. We would not, however, as presently advised have found (as the Review Applicant's submissions further urged at [21]), that the Review Applicant remains fit to be employed by any Church body without *any* conditions.

- 7 We discuss below the reasons for our Determination, and our conclusions with respect to the recommendation made by the Board.

Background

- 8 The Royal Commission into Institutional Responses to Child Sexual Abuse (**Royal Commission**) conducted a study into the Anglican Diocese of Newcastle, Case Study No 42 (**Case Study**). The public hearing was held in Newcastle in August 2016 with additional sitting days in Sydney in November 2016. Amongst many others, the Review Applicant gave evidence in the Case Study. The report of the Case Study was delivered in November 2017.

- 9 Part 3.8 of the findings of the Case Study dealt with Disclosures to the Diocese of allegations against Father Parker. This was part of Section 3 – Institutional Response under Bishop Alfred Holland (1978 – 1992).

- 10 The conclusions summarised at page 22 of the Case Study Report include relevantly:

Disclosures to the Diocese of allegations against Father Parker

We are satisfied that, in 1984, CKA met with Assistant Bishop Appleby at his home and disclosed to him that he had been sexually abused by Father Parker over several years as a child. Assistant Bishop Appleby told CKA he would 'look into it', but in fact he took no further steps in relation the allegations. After this time Father Parker remained licensed as a priest in the Diocese until 1996.

The Report discussed the evidence and sets out conclusions at pages 158 – 159.

- 11 The Determination quoted this part of the findings in Part 3.8 (page 159):

We are also satisfied that Assistant Bishop Appleby took no steps in relation to Father Parker after being advised in 1984 of the allegations he had sexually abused a child many years earlier. After this time Father Parker remained licensed as a priest in the Diocese until 1996.

- 12 In reliance on Part 3.8 of the findings of the Case Study, at the direction of the Professional Standards Committee (**PSC**) the A/Director of Professional Standards (**DPS**) conducted an investigation in accordance with the Ordinance and Professional Standards Protocol 2013 (**Protocol**) as to whether the Review Applicant is fit to hold an office, licence or a position of responsibility within the Anglican Church of Australia (**Church**).
- 13 In June 2018 two allegations were put to the Review Applicant by the DPS, and the Review Applicant responded by letter. Only the second of those allegations was referred to the President of the Professional Standards Board (**Board**).

PSC reference to the Professional Standards Board

- 14 On 25 July 2018 the PSC made a reference to the President of the Board in accordance with s 32 of the *Ordinance*.
- 15 The questions referred by the PSC to the Board under Part 10 of the *Ordinance* were, reflecting s 82(a) and (b) of the *Ordinance*:

Whether temporarily or permanently, the Respondent is fit to hold a particular or any office, licence or position of responsibility in the Anglican Church or in the employment of a Church body; Or, in the alternative,

Whether in the exercise of the Respondent's employment, or in the performance of any function, he should be subject to certain conditions or restrictions.

- 16 The *allegations* the subject of the reference reflected the second only of the two allegations investigated by the DPS:²

1. The Respondent is an Assistant Bishop and as such is a member of the clergy within the meaning of Section 3 of the Professional Standards Ordinance, 2012 (as amended) – (herein, the Ordinance) in that at all material times he was engaged as a priest of the Anglican Church-Newcastle Diocese.

2. The Applicant relies on Part 3.8 of the findings of the Royal Commission into Institutional Responses to Child Sexual Abuse into the Anglican Diocese of Newcastle (Case Study 42).

3. At all material times, the Respondent was engaged and/or resided within the Diocese of Newcastle.

4. The Respondent is aware that CKA is a survivor of child sexual abuse.

² The first allegation, which was *not* referred, related to a meeting said to have taken place with CKA's father and stepmother on 12 July 1984 at which they disclosed the abuse.

5. The PSC avers that on or about the 13 August 1984, there was a meeting at the Respondent's place of residence. Present at the meeting was CKA and the Respondent.

6. It is alleged that during that meeting CKA disclosed to the Respondent that he had been sexually abused by The Reverend George Parker.

7. It is alleged that CKA told the Respondent that the sexual abuse occurred when CKA was a child.

8. It is alleged that the Respondent took no steps despite being told of those allegations and as a result The Reverend George Parker remained licensed in the Diocese until 1996.

Jurisdiction of the Board

17 As the Appellate Tribunal noted in *The Appeal of Keith Slater* at [8]-[14], with reference to the decision of the Full Court of the South Australian Full Court in *Harrington & Ors v Coote & Anor* [2013] SASCFC 154 (2013) 119 SASR 152, the *Ordinance*, like similar Ordinances passed by other Dioceses,³ is concerned with the (present) *fitness of clergy to hold office as such*.

18 The Board has jurisdiction under s 48 of the *Ordinance* in respect of a Church worker

(a) resident or licensed in the diocese; and

(b) not resident or licensed in the diocese but whose conduct or omission giving rise to the reference is alleged to have occurred in the diocese or when the Church worker was resident or licensed in the diocese.

19 The function of the Board under s 47 of the *Ordinance* is to inquire into and determine a question referred to it by the PSC pursuant to s 64 and make a determination referred to in s 82, and where appropriate make a recommendation in accordance with provisions of the *Ordinance*.

20 Section s 64(1) of the *Ordinance* sets out the questions which may be referred by the PSC. These are reflected in the terms of the PSC Reference to the Board.

21 A PSC is to investigate *information* received by it which it considers constitutes *examinable conduct*: s 32 of the *Ordinance*. These terms are defined in s 3 of the *Ordinance*, relevantly as follows:

“examinable conduct” means conduct wherever or whenever occurring the subject of *information* which, if established, might call into question:

³ See *Slater* at [5]-[6], noting that the ordinances had been recommended by resolution of the General Synod (Resolution 54/04).

- (a) the fitness of a Church worker, whether temporarily or permanently, to hold a particular or any office, licence or position of responsibility in the Church or to be or remain in Holy Orders or in the employment of a Church body; or
- (b) whether, in the exercise of a Church worker's ministry or employment, or in the performance of any function, the Church worker should be subject to certain conditions or restrictions;

"information" means information of whatever nature and from whatever source relating to:

- (a) alleged conduct of a Church worker wherever or whenever occurring involving *sexual misconduct* or *child abuse*;
- (b) alleged inappropriate or unreasonable conduct or omission of a Church worker who had knowledge of conduct of another Church worker involving sexual misconduct or child abuse;
- (c) alleged criminal conduct by a Church Worker; or
- (d) an alleged process failure;

"Church worker" means a person who is or who at any relevant time was: ...

- (a) a member of the clergy; or
- (b) a person employed by a Church body; or
- (c) a person holding a position or performing a function with the actual or apparent authority of a *Church authority* or *Church body*; but excludes a bishop subject to the jurisdiction of the Special Tribunal of the Church;

"Church authority" means the Bishop or a person or body having administrative authority of or in a Church body to license, appoint, authorise, dismiss or suspend a Church worker;

"Church body" includes a parish, school, any body corporate, organization or association that exercises ministry within, or on behalf of, the Church.

22 In a formal Acknowledgment of service and admissions dated 4 October 2018, the Review Applicant admitted that his conduct was *examinable* within the meaning of the Ordinance, but denied some of the facts asserted.

Review

23 The *Ordinance* provides, in Part 12, for a respondent who is aggrieved by a reviewable decision (of the Board) to seek review, on grounds set out in s 93 of the *Ordinance*.

24 The Review Applicant sought review of the Determination. By letter from his solicitor dated 7 June 2019 the formal grounds on which the review was sought were specified as:

1. That a breach of the rules of natural justice happened in relation to the making of the reviewable decision which materially affected the decision;

2. That in light of the evidence and submissions, the recommendation is manifestly excessive.

25 Section 105 of the *Ordinance* provides that our review is to be by way of the review of the recommendation of the Board, and expressly “not by way of a re-hearing of the merits, or a hearing de novo”.

26 Section 104 permits us to make all or any of the following determinations:

- (a) a determination quashing or setting aside the reviewable decision;
- (a1) a determination affirming the reviewable decision;⁴
- (b) a determination referring the matter to which the reviewable decision relates to the PSB for further consideration, subject to such directions (including the setting of time limits for the further consideration, and for the steps to be taken in the further consideration) as the Review Board determines;
- (c) a determination declaring the rights of the respondent in relation to any matter to which the reviewable decision relates;
- (d) a determination directing either the respondent or the PSB, to do, or to refrain from doing, anything that the Review Board considers necessary to do justice between the parties;

27 By letter from the Secretary to the Professional Standards Board dated 26 June 2019, we sought written submissions in support of the grounds of review, and such submissions as the Review Applicant may wish to make as to the review being determined on the basis of written submissions without any oral hearing.

Review Applicant’s submissions

28 We received submissions dated 29 July 2019. Having considered those submissions, we determined to proceed without an oral hearing.

29 We have considered the material before the Board as identified at [3] of the Review Applicant’s Submissions. In addition, we had a transcript of the directions hearing before the Board on 10 October 2018, and correspondence between the Secretary of the PSB and the Review Applicant’s solicitors regarding the Board hearing.⁵

30 The Review Applicant’s Submissions note at [7] that the Board concluded, as had the

⁴ Inserted 23 September 2017.

⁵ PSB letter dated 20 September 2018, and email dated 3 October 2018, letter from the Review Applicant’s solicitors dated 5 October 2018 with Acknowledgment of Service and Admissions, and Consent, executed 4 October 2018.

Royal Commission, that the Review Applicant took no steps in relation to Father Parker after being advised in 1984 (the charge was specifically, 13 August 1984) by CKA that Father Parker had assaulted CKA as a child many years before.

- 31 The Review Applicant's Submissions continue that the Board did *not* make the further determination that Father Parker remained licensed as a priest in the Diocese until February 1996 as a result of inaction on the part of the Review Applicant. The Review Applicant contends that (accordingly) the Board rejected the second part of the allegation put by the PSC in [8] of the referral.
- 32 The contention that there was a denial of procedural fairness relates to consideration by the Board of other allegations about the Review Applicant, in connection with his dealings with then Reverend Hartley Gray.
- 33 Given this ground, we have carefully considered the approach of the Board to the task entrusted to it under Part 10 of the Ordinance.

Proceedings before the Board

- 34 A hearing was held by the Board constituted by the President on 10 December 2018. The PSC relied on the Final Report of Case Study No 42 and transcripts of the evidence on days C 156, 157 and 158 (4 August, 5 August and 8 August 2016).
- 35 There was discussion in the written submissions provided to the Board and in the Determination as to the use the Board could or should make of the findings in the Case Study Report.
- 36 Section 59 to which the Board referred at (pages 4 and 5 of the Determination, referring to the earlier numbering of the Ordinance, s 60(3)) provides:
- (3) The Board must act with fairness and according to equity, good conscience and the substantial merits of the case without regard to technicalities or legal forms and is not bound by the rules of evidence but may inform itself on any matter in such manner as it thinks fit.
- (4) The Board may inform itself from the record of any court or tribunal and may adopt any findings, and accept as its own, the record of any court or tribunal.
- 37 The person known in the Case Study as CKA gave evidence in the Case Study. We shall use the same pseudonyms as appear in the Case Study. He was not required as a witness to be cross examined in the course of the hearing before the Board.

38 Written submissions were provided to the Board, on behalf of the Review Applicant dated 30 November 2018 (**Respondent's Submissions**) and on behalf of the PSC, served 5 December 2018 (**PSC Submissions**).

39 The Review Applicant gave evidence. He relied on character references provided by the Right Reverend E D (Donald) Cameron and Mr M F Horton OAM LLB, Chancellor, Anglican Diocese of the Northern Territory. In his evidence to the Board, he noted that his permission to officiate had been suspended at the time of the Case Study findings (page 14 of the transcript 10 December 2018).

Respondent's Submissions

40 At [3] of the Respondent's Submissions the hope was expressed that the Board would "fairly re-examine the evidence [from the Case Study] for itself and come to its own conclusions". It was submitted that the Royal Commission findings were flawed and should not be accepted.

41 It was submitted at [12] in relation to the contentions in [6] and [7] of the PSC Referral that "it should have been impossible for the Royal Commission to make the adverse finding that it did in Part 3.8 of its Report".

42 At [10], in relation to the causal connection implicit at [8] of the PSC Referral, it is submitted that even assuming there had been disclosure of abuse by CKA, subsequent inaction by the respondent was not the cause of Reverend Parker remaining licensed in the Diocese until 1996 was, noting that the Royal Commission report did not go that far, with reference to page 22 (see [10] above).

43 It will be recalled that [8] of the PSC Referral was:

It is alleged that the Respondent took no steps despite being told of those allegations **and as a result** The Reverend George Parker remained licensed in the Diocese until 1996. (emphasis added)

44 The Review Applicant was an Auxiliary Bishop in the Newcastle Diocese, from 1983 to early 1992, subject to the authority of the Diocesan Bishop, Bishop Holland. The Review Applicant had referred to his limited authority in answer to questions from the Chair of the Royal Commission (T 16515.31 ff). He specifically referred to the limits of his delegated authority in his evidence to the Board on 10 December 2018: he identified

the two major areas being selection and training of ordinands, and tidying up some social welfare programs of the Diocese (T 13). We accept that as an Auxiliary Bishop the Review Applicant had no power himself to take steps regarding Father Parker's licence – that was a matter for the Diocesan Bishop, Bishop Holland. The Review Applicant's position was throughout that he been informed of the allegations of abuse by Parker (as he denied occurred) he would have informed Bishop Holland.

Respondent's argument before the Board as to the facts found in the Case Study

- 45 **Place of meeting:** CKA's evidence, by his statement read into evidence, was that he had a meeting with Bishop Appleby to discuss concerns over Father Bridge (T 16444.36-.46), this was said in answer to question from counsel assisting to have been at Bishop Appleby's house, which CKA described (T 16454.35-16455.6) (Respondent's Submissions at [20]).
- 46 As Bishop Appleby noted in his evidence concerning the statement he made to police, explaining his denial to police that he had any meeting with CKA, it seemed that CKA had earlier told the Police that he met Bishop Appleby at the Diocesan office, Bishop Appleby was asked about a meeting said to have occurred at the Diocesan office (T 16522, particularly T 16522.43-46; and when cross examined by Mr O'Brien, counsel for CKA, T 16558.12-19).
- 47 The further issue was raised that there was a discrepancy not only in relation to the location of the alleged disclosure, but also the date on which it was made.
- 48 **Meeting on 6 June 1984 – D-Day:** At the end of CKA's examination by counsel assisting, he was asked by his own counsel, Mr O'Brien when he raised the concerns with the Auxiliary Bishop (T 16458.38). The answer was "June 1984 and to the best of my memory, it was 6 June" (T 16458.40). A further answer was given "It was the 40th anniversary of D-Day and that's something I recall. I found that symbolic" (T 16458.47).
- 49 The point is justifiably made in the Respondent's Submissions from [25] that this must have been the subject of specific instructions to his own counsel. It is clear from the transcript that CKA's position was that the relevant date was 6 June 1984 – there is no other meeting suggested by CKA in his evidence, nor in the Case Study Report. There was no need to be so specific in relation to a date unless that was clear in CKA's mind.

- 50 The question of Bishop Appleby's diaries came up in his evidence. The diaries when produced disclosed a meeting between CKA and Bishop Appleby at his house on 13 August 1984.
- 51 The Respondent's Submissions annexed part of the transcript of day C 230, 23 November 2016 (T 23448-23461), being the day on which Bishop Appleby was recalled to give further evidence in relation to his diaries covering the period 1984, and in particular an entry for 13 August 1984 referring to a meeting with CKA at his residence in Newcomen Street, Newcastle.
- 52 In a supplementary statement dated 31 October 2016 tendered to the Royal Commission (which the Board appeared not to have received, and which we have not seen), Bishop Appleby accepted on the basis of the diary entry that a meeting with CKA probably did take place but maintained his earlier denial that an issue of abusive behaviour of a priest was not raised with him, as it was not something he would have forgotten, and as an Assistant Bishop under authority to the Diocesan Bishop it would have been his duty to have reported it, which he would have done (T 23451.12-19; T 23458.47-23459.4).
- 53 **22 February 2010 email:** Reference is made from [28] to an email sent by CKA to Bishop Farran on 22 February 2010 regarding the dismissive treatment of his earlier complaints about his sexual abuse by Father Parker for which he sought redress. (Case Study document 192). CKA agreed in cross examination by counsel for the Review Applicant (T 16465.45 – 47) that he was angry at the time he sent the email, "I've been angry for a long time".
- 54 No reference was made to Bishop Appleby in that email. From [34] the Respondent's Submissions set out the transcript on this topic. The question was put in effect, was there a reason for not naming Bishop Appleby, and the answer was given:
- I mightn't have been as angry at Bishop Appleby as I was at that particular time at the 10 names I've named. I can't answer that fairly, I don't know (T 16467.46-16468.2).
- 55 From [39] the Respondent's Submissions develop the argument that the submissions of counsel assisting as to the Commission preferring CKA's account to that of Bishop Appleby were flawed and should not have been accepted.

56 The *Briginshaw* standard required that an affirmative allegation

is made out to the reasonable satisfaction of the Tribunal...not a state of mind...attained or established independently of the nature and consequence of the fact or facts to be proved.

The nature of the issue necessarily affects the process by which reasonable satisfaction is obtained

The Tribunal must take into account

the seriousness of an allegation made, the inherent likelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding

- the Respondent's Submissions at [12] and footnote 1 set out the relevant extract from the judgment of Dixon J in *Briginshaw v Briginshaw* (1938) 60 CLR 336. The Board did likewise at page 7 of the Determination.

57 The Respondent's Submissions criticise a submission made by counsel assisting at [407(a)] that Bishop Appleby had been insistent that he had not met with CKA.

58 Bishop Appleby had accepted, although he had no recollection of meeting with CKA at his house about Father Bridge, that it was unlikely, but he couldn't with absolute certainty say it never happened: Respondent's Submissions at [42], T 16523.39-47; and similarly when he was recalled on 23 November 2016: T 23450.29-23451.4

59 In the further evidence and supplementary statement, Bishop Appleby explained his embarrassment at having missed the diary entries referring to CKA when he had earlier reviewed them.

60 The discrepancy in dates was dealt with very briefly by the Royal Commission "nothing turns on this point after so many years": Case Study Report at page 159.6.

61 However, CKA's evidence was as to a clear recollection of the date being 6 June 1984.

62 Further, no reason appears in the evidence for the inconsistency between CKA initially telling detectives, as appeared from Bishop Appleby's evidence noted at [46], that the disclosure meeting was at the Diocesan Office rather than at the Bishop's residence.

63 The Respondent's Submissions at [38] set out from the submissions of counsel assisting at [407(d)]:

In contrast, Bishop Appleby asserted that he had no recollection of the conversation. The fact that he has no recollection makes it difficult for Bishop Appleby to deny that CKA's version of the conversation;

64 For an inability to deny the version including the disclosure of abuse to be determinative, CKA's evidence as to the meeting occurring and as to what he said (his credibility) must be accepted.

65 If the *disclosure* (as opposed to the meeting) had never occurred, that is an explanation for Bishop Appleby's lack of recollection of the disclosure, as submitted at [59] of the Respondent's Submissions.

66 He was firm in his evidence that he would not have forgotten such a disclosure, and had such a disclosure been made he would not have failed to act, by reporting the matter to Bishop Holland – he relied on the absence of any aide memoire / memorandum from him to Bishop Holland.

67 The Case Study report referred (pages 157 and 159) to CKA's evidence that in 1999 he had told then Dean Graeme Lawrence that he had disclosed the abuse to Assistant Bishop Appleby – from [60] the Respondent's Submissions considered the file note signed by Graeme Lawrence as to a telephone call from CKA to him in 1999 (see page 157), recording "that he had spoken to Bishop Appleby" with no time place or content specified.

68 As quoted at page 202 of the Case Study Report (in Part 4.6, part of Section 4, "Institutional response under Bishop Roger Herft (May 1993 – February 2005)", the relevant part of the file note stated:

CKA said that his Mother had brought this to the attention of Bishop Shevill and that he had spoken to Bishop Appleby but that 'the matter had been swept under the carpet'

69 There was no questioning of CKA at the Royal Commission about what he said to Lawrence. We do not have the transcript of Lawrence's evidence to know whether he was asked about what was said. Lawrence was criticised in the Case Study and has now been convicted of child sexual offences occurring in 1991.

70 From [63] the Respondent's Submissions take issue with the line of reasoning at page 159.4 of the Case Study Report:

No reason was suggested as to *why CKA would fabricate an account* that he disclosed his abuse to Assistant Bishop Appleby and that the assistance (sic) told CKA that he would look into it. (emphasis added)

71 There is no doubt that, as submitted on behalf of the Respondent to the Board, '*why would the complainant lie*' is not a proper line of reasoning for a Crown Prosecutor to put to a jury. The submission is made at [65] of the Respondent's submissions that Counsel Assisting the Royal Commission had never made such a submission – and hence the Respondent had never been invited to respond to such a submission.

72 Consequently, it was submitted at [66] that for the reasons summarised at [67], the Board should not accept, and then act on, the findings set out at page 159 of the Case Study Report:

During the meeting CKA disclosed to Bishop Appleby that as a child he had been sexually abused by Father Parker over a period of years.

73 **Credit and character:** It was submitted to the Board that in his evidence to the Commission, Bishop Appleby was and should be accepted by the Board to have been "at all times...frank and candid" with the benefit of his character, "of the highest integrity and honesty". Consequently, it was submitted, the allegations "cannot be made out to the reasonable satisfaction of the Board": Respondent's Submissions at [70] and accordingly the Board should find that he remains fit to hold office and remain in Holy Orders: at [71].

PSC submissions

74 The submissions on behalf of the PSC were relatively brief.

75 Much emphasis was placed on the standing and experience of the Commissioners, including at [8] the advantage of the Commissioners in having observed the witnesses giving evidence including the Review Applicant and CKA.

76 The PSC submitted that the Board should make the same findings as made by the Royal Commission in respect of the evidence of CKA and the Review Applicant, accepting CKA's contention that he had a conversation with the Review Applicant in 1984 in which he disclosed an allegation of sexual abuse by Reverend George Parker.

77 In relation to the Briginshaw standard and the manner in which the Board ought to

proceed, noting s 59(4) of the *Ordinance* (set out at [36] above - see PSC submissions at [25]), the PSC accepted at [26] that the Board should apply the *Briginshaw* test properly, and at [27]:

once the Board applies the test properly and reviews the evidence for itself, it will find that the allegations are made out to the reasonable satisfaction of the Board

and, at [36]:

...in addition to the Board being satisfied of itself from the evidence given at the Royal Commission, it can and should adopt the findings of the Royal Commission referred to in Part 3.8 of Case Study 42.

- 78 There was no engagement with the difference as to the dates ascribed to the meeting between CKA and the Review Applicant - the PSC's Submissions at [20] said 'the chair and the commissioners found that nothing turned on this point given the passage of time'. The Board was, however, being invited to consider the evidence for itself.
- 79 There is no engagement with the Respondent's proposition that the *causal* link could not be found given the Review Applicant's status as an Auxiliary Bishop, only. We noted at [44] the evidence regarding his limited authority as Auxiliary Bishop.

Board Determination

- 80 The determination of the President of the Board was delivered on 19 February 2019, as noted at [2].

Denial of procedural fairness

- 81 The Review Applicant's contention that there was a denial of procedural fairness relates to the use made by the Board of findings made in the Case Study about the Review Applicant's dealings in 1990 with Gray and the Review Applicant's knowledge of criminal charges against Gray.
- 82 The issue was raised in the PSC's Submissions, served after the Respondent's Submissions, and then orally. Attention is drawn to the transcript of the hearing on 10 December 2012 at page 17.
- 83 That is in connection with consideration of credibility of CKA and the Review Applicant. The following appears in the transcript:

You may recall, I will refer to paragraph 12 to the incident where criminal charges had been laid against a priest in the Wyong area and in effect, Bishop Appleby was given a direction to go down there and get the resignation from this particular priest. Allegations were that that particular priest had sexually assaulted a young man, a child under the age of sixteen. Without going into detail Bishop Appleby stated to the Royal Commission that the first time that he was aware that the offence and allegation of sexual assault had occurred in Wyong was during the Royal Commission. In relation to that evidence the Royal Commission rejected his evidence outright.

84 The PSC's Submissions at [12] briefly noted the Royal Commission finding:

They rejected the evidence of the respondent's account regarding his knowledge of criminal charges made against a priest of the Newcastle Anglican Diocese

referring to the Case Study report at page 159.

85 There was no cross examination of the Review Applicant in relation to this topic.

86 In the Determination, the topic of Gray's resignation was discussed at pages 11-12. The following comment appears:

This is the type of conduct that did nothing to prevent the cover up culture that, sadly, prevailed in this Diocese at that time.

Discussion

87 At page 159 in Part 3.8 of the Case Study Report, referred to in the PSC Submissions, the following appears:

Moreover, our rejection of Bishop Appleby's account regarding his knowledge of the criminal charge against Hatley Gray and his incorrect evidence about carefully reviewing his diaries and finding no evidence of the meetings with CKA and CKA's family have caused us to proceed with caution in assessing Bishop Appleby's evidence.

88 As the oral submissions made on behalf of the Review Applicant to the Board noted, that section of the Case Study Report (Part 3.4, "The knowledge of Stephen Hatley Gray's 1990 offences") treated Bishop Holland and the Review Applicant together (see pages 145-146). We note again, the nature of the Review Applicant's authority as Auxiliary Bishop (see [44] above), asked by his Bishop to obtain Gray's resignation, was not addressed by the Royal Commission.

89 The conclusion had earlier been expressed in Part 3.4 (page 145):

Their implausible denials in this respect mean that we have treated the balance of their evidence with caution.

- 90 That section of the Royal Commission report was *not* part of the material expressly relied upon by the PSC. The PSC throughout referred to only the findings in Part 3.8 of the Case Study report.
- 91 Perhaps of more significance, there was no charge against the Review Applicant regarding “the cover up culture” in the Diocese in 1990 (see [86] above), and the Review Applicant’s substantive conduct regarding Gray and his knowledge of otherwise of the criminal charges against Gray was no part of the PSC allegation brought against the Review Applicant.
- 92 In relation to the single charge brought by the PSC, the PSC submissions relied on the findings of the Royal Commission in relation to the Review Applicant and Gray’s resignation as affecting his credibility.
- 93 The Review Applicant was entitled to an opportunity to address the use to which the broader findings were to be put by the Board in the Determination. He had no such opportunity.
- 94 Further, the Review Applicant was entitled to a proper consideration of the various matters raised in his evidence and the submissions made on his behalf, to which we have referred above, as to the reasons why the Case Study findings should not be accepted. Those matters are not dealt with by the Determination.
- 95 We consider that the Determination should be set aside.

Manifestly excessive recommendation?

- 96 Before making a recommendation, the Board must first determine, in terms of s 82(a) and (b) of the *Ordinance* as noted at [15], whether it is satisfied as to the Church worker’s fitness to hold office or be or remain in Holy Orders or in the employment of the church body, or be subject to conditions or restrictions in the exercise of a Church worker’s ministry or employment.
- 97 Section 81 of the *Ordinance* provides that in making any determination the Board shall take into account:

- (a) the conduct of the Church worker as it finds it to have been;
- (b) in the material before the Board, any other fact or circumstance relevant to the determination of the question or questions before it; and
- (c) any failure of the Church worker to comply with a provision of this Ordinance or with a direction of the Board.

98 The Board may then make a recommendation as set out in s 82 of the *Ordinance*:

- (c) recommend that the Church worker be counselled;
- (d) recommend that the Church worker be suspended from office or employment or from performing the function as the case may be for such period determined by the Board;
- (e) recommend to the Church authority that the licence or authority of the Church worker be revoked;
- (f) recommend to the relevant Church authority that the Church worker's contract of employment (if any) be terminated;
- (g) recommend to the relevant Church authority that the Church worker cease to hold any office then held;
- (h) recommend to the relevant Church authority that a prohibition order be made in terms specified by the Board;
- (i) recommend to the relevant Church authority that the Church worker's holding of office or employment or performance of the function as the case may be, shall be subject to such conditions or restrictions as the Board may specify;
- (j) recommend that the operation of a determination shall be suspended for such period and upon such conditions as the Board shall specify;
- (k) recommend that the Church worker should be deposed from Holy Orders;
- (l) make such other recommendation as the Board sees fit.

99 Section 83 of the *Ordinance* empowers a relevant Church authority to give effect to the Board's recommendation. The Church authority:

- (a) may seek whatever advice or counsel the Church authority determines is necessary;
- (b) may consult with the Board; and
- (c) may take different action to that recommended by the PSB.

100 The Review Applicant complains that the Board's recommendation is manifestly excessive "light of the evidence and submissions".

Discussion

101 There is no consideration in the Determination of the further evidence given by the Review Applicant before the Board. That included evidence as to the steps that he took

later, as Bishop Administrator of the Diocese of Brisbane in 2001 (referred to in the Review Applicant's submissions at [16]) to revoke the licences and authority of two clergy, including a retired Bishop, consistent with his contention that when in a position to do so, he acted decisively in such matters.

- 102 The character references tendered were noted at page 3 of the Determination, but not in the section regarding the Recommendation.
- 103 As noted at [3], at page 14 of the Determination, under the headings Recommendation and Reasoning, the Board referred to Bishop Herft's acknowledgement in his evidence to the Royal Commission that "the Diocese had 'failed miserably' in its response to CKA" including "by allowing key persons in the Diocese to act on Father Parker's behalf".
- 104 That statement referred to the fact that the Deputy Chancellor and a former trustee and member of the Diocesan Council acted for Father Parker in his criminal proceedings (as his barrister and instructing solicitor). CKA and CKB were cross examined in the committal proceedings.
- 105 That conduct occurred later, well after the Review Applicant left the Diocese. It could not be relevant to the consideration of the *Review Applicant's* conduct.
- 106 The (later) *systemic* failures referred to in the Determination at page 14, set out at [4] were not elements of the charge brought against the Review Applicant by the PSC, which put in issue *his* conduct and *his* fitness to remain in Holy Orders, by reason of failure to act on an alleged disclosure made to him on 13 August 1984.
- 107 The reference to being 'inquisitive about conduct brought to his notice' can only refer back to the discussion of the conduct of the Review Applicant in relation to Gray discussed in the Determination at page 11. That specific conduct – again – was not any part of the charge brought against the Review Applicant.
- 108 The basis (and relevance) of the statement "He should have had a greater understanding of the impact such criminality can have on victims of child sexual abuse" is also unclear.
- 109 There is no proper foundation in this reasoning for the conclusion that 'because of the conduct found' the Review Applicant is unfit permanently to hold any office, and the

recommendation 'therefore' that he be deposed from Holy Orders. There is no reference to the evidence given before the Board, for example as to steps taken by the Review Applicant when he had power to act as Bishop Administrator.

Conclusion

- 110 In our view, the use made of the findings made in the Case Study about the Review Applicant's dealings with Gray was procedurally unfair, when the only PSC submissions touching on it related to the Review Applicant's credit. The Review Applicant was entitled to an opportunity to address the use to which the broader findings were to be put by the Board.
- 111 No allegation relating to the Gray matter, nor to broader systemic failings of the Diocese to which the Determination referred several times, as we noted, has been brought against the Review Applicant. He faced a single allegation relating to a disclosure said to have been made to him on 13 August 1984.
- 112 Review Ground 1, as to a denial of procedural fairness has been made out. We have determined to set aside the Determination.
- 113 We note, nonetheless, our view that the finding of the Board that the Review Applicant is unfit permanently to hold any office, and the recommendation that he ought be deposed from Holy Orders were excessive given the evidence before the Board, including as to the actions he did take in 2001 as Bishop Administrator of the Diocese of Brisbane. As presently advised, however, we would not have gone so far as to find, as the Review Applicant's submissions urged, that the Review Applicant would remain fit to be employed by any Church body without *any* conditions.
- 114 We shall cause a copy of this determination to be provided to the Secretary of the Board, for the respondent and the Church authority, in accordance with s 104 of the *Ordinance*. The Board should take any appropriate action in accordance with s 98 of the *Ordinance*. The decision to be made by the Church authority is then a matter for the Church authority under s 83 of the *Ordinance*, which we set out at [99].

27 August 2019
