

DIOCESAN COUNCIL 27 May 2010**Reference Notice of Motion in my name at p20 Business Papers**

Some months ago Diocesan Council appointed a sub-committee comprising Fr Stephen Williams, Mr John Cleary and myself to report to the Council as to the operation of the Professional Standards Ordinance. This arose, in part, out of concerns at what were seen as lengthy periods of suspension of certain clergy.

After the sub-committee met, Mr Cleary wrote to the Professional Standards Committee requesting details of the dates upon which certain things had been done so that the sub-committee could make some prima facie assessment for itself as to whether there had been any unreasonable delay in initiating the processes under the Ordinance. Mr Cleary sought no detail as to the subject matter of any specific complaint. The request for detail as to dates was met with a response to the effect that this information could not be given because of the confidential nature of the Committee's activities. I expressed some dissatisfaction at the response.

At a subsequent meeting of Diocesan Council the Bishop read a statement prepared by the Professional Standards Director which, as I understand it, was directed to allay some of the concerns which had been expressed about the process both within and without the Council. I expressed some dissatisfaction with the report. It appeared to me that the Committee's claims to confidentiality were preventing any effective oversight of the Committee's processes. It seemed to me then, as it does now, that effective oversight is not incompatible with confidentiality: even ASIO is subject to oversight.

I have recently had the opportunity to read the investigation report in relation to Mr Gumbley. In my view the investigatory process miscarried. An investigation far beyond the scope of anything contemplated by the Ordinance was commissioned and carried out. This magnified by a substantial factor the time taken (and the period of suspension). The investigation and report cost the Diocese about \$34000.

I understand that a similar investigation has taken place with respect to 'Fr X'. A report of a similar nature is expected.

Nothing in this document should be understood in any sense whatsoever as a reflection on the merits of any complaint, now or at any time, before the Professional Standards Committee or any aspect of the recent adjudication by the Professional Standards Board in the matter of Gumbley. I am not at all concerned to canvass those matters.

What I am concerned about are aspects of the process in relation to Gumbley which are, no doubt, to some extent, duplicated in the matter of 'FrX'.

Similarly, no part of this should be read as a criticism of ESPC Services or its investigations or reports: they have obviously been performed and produced with diligence and professionalism, having regard to the terms of reference under which they were engaged. Unfortunately they are entirely inappropriate to the scheme of our Ordinance.

Most importantly, nothing should be taken as reflecting on the bona fides of any person. While I am of the view that the process has miscarried I do not even faintly suggest that anyone has intended that that be so.

The Gumbley Investigation and Report

PSC accepted the complaint on 11 September 2009. ESPC Services was commissioned in early October to carry out an investigation according to certain terms of reference. As appropriate as those terms of reference may be in other contexts, they were not appropriate to what was required under the Ordinance.

The Report was produced on about 20 February. It occupies 72 pages not including the transcripts of interviews with witnesses. The Report formulates possible allegations of misconduct; it undertakes a very detailed analysis of the evidence and ultimately effects to sustain or uphold certain allegations.

I have seen similar reports in my professional capacity. The report is similar to reports commissioned by the Roman Catholic Diocese of Maitland-Newcastle in respect of priests in that Diocese. The great difference between that Diocese and this in the present context is that there the Bishop acts on the basis of the findings of the investigator. In such a context a detailed examination and analysis and findings sustaining allegations is entirely appropriate and necessary.

The legislative framework in this Diocese is entirely different being governed by the Professional Standards Ordinance 2005.

The scheme of this Ordinance is, broadly, as follows:

- The PSC determines that conduct is examinable and undertakes an investigation: section 30;
- The PSC has power to delegate the investigation: section 22(1);
- After investigation the PSC refers to the Board the question of fitness for office: section 59(1);
- The Board makes a determination upon the conduct 'as *it* finds it to have been.

The Ordinance imposes on the Board the obligation of considering and analysing the evidence and making findings of fact. Unlike the position in the Catholic Diocese, our Bishop acts upon the findings of the Board and not the findings of the investigator.

The sort of detailed analysis in the Gumbley report and, in particular, the purported sustaining of allegations is entirely superfluous, usurping as it does the functions of the Board.

The only investigation contemplated by our Ordinance is the gathering of the evidentiary material sufficient to enable the PSC to refer questions to the Board.

The Gumbley investigation – in the sense of the gathering of the evidence – appears to me to have been complete by early December 2009 (that is, within the 3 months period envisaged by the Ordinance for an investigation). The production of the report itself delayed

the matter until late February. The report itself – well and professionally done – was entirely otiose.

The Report cost \$34000. I have little doubt that the evidence gathering – the obtaining of the witness statements and documentary evidence – could have been achieved using the most expensive lawyers in Newcastle at a cost of \$6000-\$8000 at a maximum.

I have no details as to the cost of the 'Fr X' investigation and report. In terms of time it has taken as long. The cost is likely to be of the order of the Gumbley report.

It is plain that the process has been unduly protracted to a substantial extent. The cost has been multiplied unnecessarily.

Other Concerns

These concerns relate solely to what I have been able to discern from my examination of the Gumbley file.

Improperly Obtained Material/ Inappropriate Legal Advice

I had not intended to comment on this aspect as its ultimate resolution is likely to be a matter for the courts. However, the matter is now in the public domain (SMH & NH 22/5).

What appears to have happened is that some person appears to have accessed Mr Gumbley's private journal on his computer and printed extracts. These have ultimately been provided to the Director in 2 instalments in October 2009 and February 2010. The material was used against Mr Gumbley.

It is a criminal offence to access private material in a computer: Crimes Act s308H. It would have been apparent to anyone looking at the material that it was personal and that its production to the Director was not authorised by the Director.

It would appear to me to be axiomatic that a body concerned with professional standards should itself be seen to be upholding professional standards.

The Director asserts that he received legal advice from 'an HR lawyer in Sydney' that he was obliged to provide this material to the Board. That this advice was wrong is only one of the minor difficulties.

These questions arise: what authority has the Director to obtain legal advice from 'an HR lawyer in Sydney'? What confidential material was provided to that person? What professional or contractual relationship exists with that person (ie can the Diocese sue if advice is found to have been negligently given)? Given that the Diocese will ultimately be liable for actions of the Director, should he not be seeking legal advice from persons who have the Diocese's interests to protect such as the Diocesan solicitors or the Chancellor.

I will emphasise again that I am not concerned with the content of this material or how it impacts on the case of Mr Gumbley.

What I am saying is that the approach taken was entirely flawed and flawed in a way which may ultimately have serious consequences for the Diocese.

Excess of Power

On 11 September 2009 the Director wrote to Mr Gumbley advising him that he was suspended and directing him that he must refrain from contact with specified persons.

It would, perhaps, be useful if the Director had power under the Ordinance to give such directions. As it stands he does not. Only the Bishop has such powers.

No great mischief has been occasioned in this case by the direction. It is not inconceivable that the Director could give such a direction in circumstances which could be productive of difficulties. It is important that those administering an Ordinance comply with its terms.

These will not, I hope, be seen as mere nit-picking concerns. I record what I have been able to discern of processes from seeing only *one* of the matters before the Committee.

It is entirely clear to me that concerns expressed within and without Diocesan Council as to the process were entirely justified. There is not the slightest basis for a presumption that The PSC ought to proceed without some form of oversight.

Given the Bishop's understandable desire to remain at arms length from the process the alternatives for oversight seem to me to be either the Audit Committee or a standing committee of Diocesan Council.

The Audit Committee appears to me to be somewhat 'finance' orientated and while there is a significant financial aspect here, the main concern in terms of oversight appear to me to be process. I believe that a standing committee of this Council is the preferable course. For reasons I will offer it appears to me to be inappropriate that I remain on the Committee. I would strongly urge Diocesan Council to have some legal assistance for the committee either in membership or through power to co-opt.

Paul Rosser QC

Chancellor

24 May 2010