Royal Commission into Institutional Responses to Child Sexual Abuse.

Public Inquiry into the Response of the Diocese of Grafton of the Anglican Church to Claims of Child Sexual Abuse at the North Coast Children’s Home.

Submissions on behalf of Archbishop Phillip Aspinall, Mr Martin Drevikovsky and Mr Rodney McLary.
# Index to the Submissions.

A. Scope of the Submissions. 1.

B. Available Findings as identified by Counsel Assisting. 1.

C. Available Recommendations findings as identified by Counsel Assisting. 3.

D. Response to the Submissions of Counsel Assisting. 5.

E. Available Recommendation 5. The National Register. 16.


**Attachments.**

1. List of Available Findings.
2. List of Available Recommendations.
4. Draft Bill to amend the National Register Canon 2007.
A. Scope of the Submissions.

1. The Royal Commission granted leave for Archbishop Phillip Aspinall, the Primate of the Anglican Church of Australia, Martin Drevikovsky, the General Secretary of the General Synod of the Anglican Church of Australia, and Rodney McLary, Professional Standards Director for the Diocese of Brisbane, to be legally represented during the public hearing.

2. In these submissions, in conformity with the approach adopted in the submissions of Counsel Assisting, Archbishop Aspinall will be referred to as the ‘Primate’ and Martin Drevikovsky will be referred to as the ‘General Secretary’.

3. As Rodney McLary has not been mentioned in the possible available findings outlined by Counsel Assisting, no further submissions are made on his behalf.

4. The Royal Commission is now well aware of the structure of the Anglican Church of Australia. It follows from this structure that neither the Primate, nor the General Secretary, has the authority to speak on behalf of the twenty-three dioceses of the Church in these submissions. The General Synod Standing Committee has appointed a Royal Commission Working Group with representatives from various dioceses. A meeting of the available members of this Group was convened and has provided advice and guidance in relation to these submissions.

B. Available findings as identified by Counsel Assisting.

5. Counsel Assisting has identified fifty-nine (59) Available Findings in his written submissions. For ease of reference they are set out in Attachment 1 to these submissions.
6. These submissions will not respond to most of the available findings as they relate specifically to the Diocese of Grafton and the Diocese of Newcastle. The following available findings are addressed.

32. The Primate advised the Bishop of Grafton between 2006 and 2012 that the group claimants should have their complaints properly heard and be offered counselling and pastoral support. [81 sic 78].

33. The Primate advised the Bishop of Grafton between 2006 and 2012 that he should seek out further persons who had been abused at the North Coast Children’s Home but the Bishop did not do so. [81 sic 78].

34. The Primate advised the Bishop of Grafton between 2006 and 2012 that he should inform the police of all criminal allegations which came to his attention arising out of the North Coast Children’s Home but he did not do so. [81 sic 78].

35. The Primate took steps to advise the police of criminal allegations which he was aware of having arisen from the North Coast Children’s Home. [81 sic 78].

40. The Diocese of Grafton had sufficient assets either in its name or the Corporate Trustees of the Diocese of Grafton to meet the financial component needed to settle claims of child sexual abuse. [91 sic 88].

57. The National Register of the Anglican Church does not record the [sic] all the names of persons that may be required to be registered because various dioceses have been unable to review all their files to determine whether an entry on the national register should be made. [112 sic 108].
58. The General Secretary of the General Synod, Martin Drevikovsky, was unsure in his evidence as to how many files were still to be reviewed to determine entry on the National Register. [112 sic 108].

59. The professional standards directors of a number of dioceses have had difficulty operating and entering information into the National Register on a timely basis. [112 sic 108].

7. (i) Available Findings 32 to 35 inclusive concern the conduct of the Primate in his dealings with the Bishop of Grafton. It is submitted that, based on the evidence, that the Royal Commission should accept these findings.

(ii) Available Finding 40. This finding specifically relates to the Grafton Diocese and it is for those representing it to respond. However, as the assets of all dioceses in Australia are usually held on charitable trusts the Commission should examine the terms upon which assets are held before concluding that they are available for a purpose such as paying compensation claims. These submissions make some brief observations in relation the availability of the assets of an Anglican diocese to meet such claims.

(iii) Available Findings 57 to 59 relate to the National Register.

The circumstances under which evidence about the National Register came before the Commission, and that fact that it was not comprehensive, means that the Commission should exercise particular care before reaching any findings about it.

C. Available Recommendations as identified by Counsel Assisting.

8. Counsel Assisting has identified six (6) Available Recommendations in his written submissions. They are set out in Attachment 2. In these submissions Recommendations 3, 5 and 6 will be addressed. They are:
3. That the General Synod of the Anglican Church give consideration to the best ways in which greater guidance might be given to determine which diocese has jurisdiction over a particular professional standards matter where multiple dioceses have jurisdiction. [104 sic 100].

5. That consideration be given by General Synod to the incorporation of a “red flag” system of notifications into the National Register. [112 sic 108].

6. That each diocese and the General Synod establish procedures for the use of experienced and independent mediators in professional standards matters. [116 sic 112].

9. It is anticipated that the General Synod will give careful consideration to each of these recommendations.

10. As the General Secretary explained in his evidence to the Royal Commission the National Register is currently being reviewed and refined to improve its efficacy. As indicated during the public hearing it is proposed to provide further information to the Royal Commission about the development and functioning of the National Register.

11. The evidence before the Royal Commission about the National Register is incomplete. Counsel Assisting has not had the opportunity to be briefed about it and shown how it operates on a practical level. This is not said as a criticism but an acknowledgment that the importance of the National Register to the Commission’s inquiry in relation to this case study only became fully apparent during the course of the hearing.

12. Consequently, it is submitted that the National Register should be the subject of further discussions between the General Secretary, the Professional Standards Commission and
the Commission which could include a representative of the Commission inspecting the 
register and being briefed in detail about how it operates.

D. Response to the Submissions of Counsel Assisting.

13. Outlined below are some specific responses to issues in the submissions of Counsel 
Assisting. They follow the same order as the submissions.

14. Paragraph [5] of the Submissions of Counsel Assisting says in part that the case study 
“examined the principal policies and procedures which govern the handling of claims 
of child sexual abuse within both the individual diocese of the Anglican Church and at 
the national level.” This is potentially misleading. There are models at the national 
level, but those models do not ‘govern the handling of claims.’ Only the policies and 
procedures adopted within a particular diocese govern the handling of those matters.

The following clauses of Schedule 1 of the Anglican Church of Australia Constitution 
Act 1961are relevant to this issue.

Clause 5.

Subject to the Fundamental Declarations and the provisions of this chapter this Church 
has plenary authority and power to make canons, ordinances and rules for the order and 
good government of the Church, and to administer the affairs thereof. Such authority 
and power may be exercised by the several synods and tribunals in accordance with the 
provisions of this Constitution.

Clause 26.

Subject to the terms of this Constitution Synod may make canon rules and resolutions 
relating to the order and good government of this Church, including canons in respect of 
ritual, ceremonial and discipline and make statements as to the faith of this Church and 
declare its view on any matter affecting this Church or affecting spiritual, moral or social
welfare, and may take such steps as may be necessary or expedient in furtherance of union with other Christian communions.

Clause 51.

Subject to this Constitution a diocesan synod may make ordinances the order and good government of this Church within the diocese, in accordance with the powers in that behalf conferred upon it by the constitution of such diocese.

Clause 63.

(1) Wherever a question arises under this Constitution and in the manner provided and subject to the conditions imposed by this Constitution the question is referred for determination or for an opinion to the Appellate Tribunal the tribunal shall have jurisdiction to hear and determine the same or to give its opinion as the case may require provided that if provision is not otherwise made under this Constitution for the reference of such question to the tribunal the Primate may and shall at the request of General Synod by resolution or at the written request of twenty-five members thereof or at the request by resolution of the provincial or diocesan synod affected refer the question to the tribunal which shall have jurisdiction aforesaid.

(2) The tribunal may direct that any synod person or class of persons or association claiming to be interested in the question shall be notified of the hearing and be entitled to appear or be represented thereat.

16. It follows from these provisions, and a wider analysis of the structure of the Church, that the Anglican Church of Australia may be described as a loose federation characterised by dispersed authority. Thus, the statement by Counsel Assisting in paragraph [9] that the “supreme body of the Anglican Church is the General Synod” is incorrect, or at the very least contentious.

17. Paragraphs [14]-[21] of the Submissions are entitled ‘Responses to Child Sexual Abuse in the Anglican Church.’ Paragraph [19] refers to the model Professional Standards Ordinance (the ‘Model Ordinance’). Counsel Assisting observes that the “Professional Standards Board, (“PSB”), deals with disciplinary matters and is usually engaged after an investigation has been concluded and the claim resolved.” The evidence in support
of this assertion is said to be the evidence of Philip Gerber to the Royal Commission at T1942:36 – T1943:2. In light of what Gerber actually says the words “and the claim resolved” should be deleted to reflect the process in the Model Ordinance.

18. Paragraph [20] states that “At the National level, a protocol was also adopted to supplement the Model Ordinance.” Section 6 of the Model Ordinance requires a protocol to be adopted by a diocese. The General Synod has not promulgated one. Some dioceses have drafted their own protocols.

19. Paragraphs [52]-[56] discuss ‘Clergy and Employment Screening.’ It is noted that members of the Professional Standards Commission are also subject to a National Register check.


The Anglican Diocese of Grafton was at all relevant times an unincorporated association with a fluctuating membership. At all relevant times prior to 1 January 1962 the Anglican Diocese of Grafton was part of the Church of England. The Anglican Church of Australia did not exist until 1962. It is submitted that the Commission needs to be explicit as to what is meant by the term ‘had responsibility’. If it is legal responsibility then that was with the particular Management Committee constituted from time to time. If it is ‘moral responsibility’ it raises a range of issues and circumstances in which individuals could, in good faith, reach different conclusions about what are the relevant moral principles and how they should they be applied.

21. The ‘Residents’ Experience of the Group Claim Process’ is discussed in paragraphs [166]-[187]. Available Finding 15 says “The denial of liability by the Diocese of Grafton on the basis that the Home was not controlled by the Diocese of Grafton had a
detrimental effect upon abused former residents who should have been provided with acknowledgement that the North Coast Children’s Home was the responsibility of the Church.” It is acknowledged, with regret, that the manner in which the claims were handled caused significant distress to the claimants. Without wishing to minimize this it is nonetheless necessary to raise two technical matters arising from the language in Available Finding 15. It is assumed that the reference to the ‘Church’ means the Diocese of Grafton. If this is not the case Counsel Assisting is invited to specify the meaning of ‘Church’ to enable, if necessary, the making of a supplementary submission. The second matter is what is intended by ‘responsibility’ in this context.

22. Paragraph [242] discusses the power and role of the Primate. It states in part “he was not in an analogous position to the chief executive officer of a large corporation and that he could not command a Bishop to act in a particular way, at least with respect to professional standards matters.’ The qualification ‘at least with respect to professional standards matters’ is redundant as the Primate cannot command a bishop with respect to any matter. Similarly, the phrase at the end of the paragraph ‘unaware of the niceties’ is redundant. The structure of the Church is clearly set out in various published documents and they speak for themselves. Although the Primate is the president of the General Synod, and the chair of various organisations and committees, it is overstating the position to describe him as head of the Church.

23. In paragraph [247] it is noted that “The Primate offered the services of the PSD in Brisbane, Rod McLary, to assist with counselling.’ It is more accurate to say that the offer was for Mr McLary to assist with arranging counselling. There was no suggestion that he be involved personally in providing or delivering counselling.

24. In paragraph [252] the first sentence would be more accurate if the following words were added to that sentence, ‘about who had the duty of care for residents in the Home.’ This is the issue about which Mr Campion primarily sought an explanation from the Primate.
25. Counsel Assisting summarises the evidence in relation to the ‘Intervention of the Primate’ in paragraphs [242]-[269]. In paragraph [254] he observes that even though “the Primate regretted his actions and considered them ‘tantamount to imposing’ himself in the situation …” It is submitted that this does not accurately reflect the situation. In his role as Primate, Archbishop Aspinall came to regret meeting with Mr Campion and being involved in explaining the position of the Diocese of Grafton in relation to the issue of duty of care. That was the action that he, on reflection, regarded as inappropriately interposing himself in the situation. It was the responsibility of the Diocese of Grafton to explain the position it was adopting. His regret does not relate to the other actions described in the submissions up to paragraph [254].

26. In paragraph [256] Counsel Assisting purports to outline what occurred during the meeting between the Primate and Mr Campion on 9 May 2012. The content of the fourth sentence does not relate to this meeting. Rather it concerns the proposed meeting of Mr Campion with Bishop Slater and Mr Blake to receive the Diocese of Grafton’s explanation of its position discussed in paragraph [257].

27. Paragraph [262] suggests that the Primate had formed a view about the veracity of the content of Anne Hywood’s report and concluded that Bishop Slater’s continuance as Bishop of Grafton was untenable. That is not the case as the record of the meeting shows. The Primate took great care to explain that he had not made such a judgement and repeatedly qualified what he said. It is accurate to say that during the meeting, the Primate said ‘that if the substance of the report was generally true’ then Bishop Slater’s continuance as Bishop of Grafton was ‘untenable.’

28. In the final sentence of paragraph [269] Anne Hywood is described as the ‘Registrar’ when in fact she was the ‘Acting Registrar.’

29. Paragraphs [282]-[298] discuss ‘The impact of financial considerations on the approach taken by the Diocese to claims arising from allegations of sexual abuse.’
Finding 40 states, "The Diocese of Grafton had sufficient assets either in its name or the Corporate Trustees of the Diocese of Grafton to meet the financial component needed to settle claims of child sexual abuse."

30. It is for the Diocese of Grafton to respond to this specific available finding as it has access to all the relevant information.

31. However, it is important for the Commission to understand some general matters that are likely to be relevant to many if not all dioceses throughout Australia.

32. It is submitted that Available Finding 40 does not sufficiently acknowledge the fact that most Church property is held on charitable trusts. If those trusts are for particular purposes the property may not be available to meet compensation claims. There is provision for varying charitable trusts. The constraints upon varying such trusts are illustrated by section 32 of the Anglican Church of Australia Trust Property Act (NSW) 1917. Section 32 deals with the power of a diocesan synod to vary a trust in certain circumstances. It is in the following terms:

In each case where by reason of circumstances subsequent to the creation of the trusts, including trusts declared under this section, to which any church trust property is for the time being subject, it has in the opinion of the synod of the diocese for which such property is held become impossible or inexpedient to carry out or observe such trusts, it shall be lawful for the synod of such diocese by ordinance to declare such their opinion, and by the same or any subsequent ordinance to declare other trusts for or for the use, benefit, or purposes of the Church of England within the said diocese instead of such first-mentioned trusts, and such first-mentioned trusts shall thereupon by force of the said ordinance cease and determine, and such property shall thereupon be held upon such other trusts accordingly: Provided that such property shall be dealt with and applied for the benefit of the Church of England in the parish or parishes (if any) for the benefit of which such property was immediately before such ordinance held in trust, and for the same purposes as nearly as may be as the purposes for which such property was immediately before such ordinance held unless the synod of such diocese shall by
ordinance declare that by reason of circumstances, subsequent to the creation of the first-mentioned trusts, it is, in the opinion of the synod, impossible or inexpedient to deal with or apply such property or some part thereof for the use or benefit of such parish or parishes or for the same or the like purposes, in which case such property or such part thereof may be dealt with and applied for the use and benefit of the Church of England for such other purposes and in such other parish or parishes in the said diocese or otherwise as shall be declared by ordinance of the synod of the said diocese.

33. It is arguable that insufficient evidence has been adduced in this case study to justify making Available Finding 40.

34. Paragraph [294] says that nominations for an independent oversight committee were put forward by some of the larger dioceses in the country. In fact this committee was comprised of nominees of the dioceses which had agreed, in principle, to make loans to the Diocese of Grafton, nominees of the Diocese of Grafton itself, and nominees of the Diocesan Financial Advisory Group, which was established by the General Synod Standing Committee to provide financial advice to dioceses.

35. Paragraphs [328]-[340] discuss 'Reverends Brown and Morgan.' Available Recommendation 3 states, "That the General Synod of the Anglican Church give consideration to the best ways in which greater guidance might be given to determine which diocese has jurisdiction over a particular professional standards matter where multiple dioceses have jurisdiction."

36. Section 20(2) of the Model Professional Standards Ordinance is designed to deal with this issue. It provides that:

The power and duty of the PSC to exercise its functions under [this Canon] arises in respect of:

(a) conduct wherever it is alleged to have been engaged in by a Church worker resident or licensed in the diocese, or engaged by a Church authority;
(b) an omission, whenever it is alleged to have occurred, by a Church worker resident or licensed in the diocese, or engaged by a Church authority;

(c) conduct which is alleged to have occurred within the diocese wherever the Church worker involved in the alleged conduct may reside;

(d) conduct, wherever it is alleged to have been engaged in, or an omission, wherever it is alleged to have occurred, by a Church worker, wherever the Church worker may reside—

(i) in respect of or affecting a person resident in the diocese; or

(ii) that may affect a Church body or Church authority in the diocese, or Church property or property held in trust for the benefit of or in connection with the Church or a Church body in the diocese.

37. A potential deficiency with the current system is that a particular diocese may not have an interest in undertaking disciplinary action where the relevant person no longer resides within the diocese. Section 20(2) could be amended so that matters involving more than one diocese are brought to the attention of a relevant national officer. However, such an amendment would not necessarily guarantee the implementation of effective disciplinary action. This problem could also be overcome by the implementation of an audit scheme. This issue is further considered in Part 'F' below.

38. Paragraphs [347]-[364] relate to the 'National Register.' Available Recommendation 5 provides, 'That consideration be given by General Synod to the incorporation of a "red flag" system of notifications into the National Register.'

39. It is unclear precisely what Counsel Assisting means when he uses the term 'red flag' system. In one sense the current system acts as a red flag in that it alerts those with a legitimate need to know that certain persons should not be engaged without a thorough background check. The minimum Information required for a person to be entered on the National Register comprises five (5) items designed to facilitate identification. The
upgrade system planned to be introduced in February 2014 requires a minimum of three (3) items.

40. If a 'red flag' system is meant to refer to an informal system of the exchange of information between the various Directors of Professional Standards then this would introduce too much informality and be too reliant upon the compliance of each director and without accountability.

41. By contrast, section 15 of the current National Register Canon requires an annual report and audit. It provides;

(1) The General Secretary shall, as soon as practicable after the end of each calendar year, provide a report as to the operation of the National Register to the Standing Committee for that year containing such information as the Standing Committee may determine.

(2) The Standing Committee shall:

(a) determine the scope of an audit of the operation of the National Register to verify compliance with this Canon and the protocols under this Canon; and

(b) appoint a person to undertake an audit of the operation of the National Register for each calendar year and provide a report to the Standing Committee as soon as practicable after the end of that year.

42. It is important that the National Register applies a uniform approach to all dioceses. Individual discretion is kept to a minimum. A departure from this approach will undermine the effectiveness of the system. A system which places substantial reliance on informal advice passing between bishops and professional standards directors has the potential to reduce both transparency and accountability. It is also potentially unreliable as it the collective corporate memory can be lost when a bishop or director leaves or retires. For these reasons it is potentially unfair to persons who are the subject of inquiry. This issue is further considered in Part 'E' below.
43. Paragraphs [365]-[379] discuss ‘Structural issues concerning the handling of complaints of child sexual abuse.’ This section concludes with Available Recommendation 6 “that each diocese and the General Synod establish procedures for the use of experienced and independent mediators in professional standards matters.” This suggestion is appropriate in the context of civil litigation and a pastoral care and assistance scheme. However, as the experience of the Dioceses of Adelaide and The Murray have shown, the latter in the judgment in Harrington v Coote [2013] SASCFC 154 delivered by the Full Court of the Supreme Court of South Australia, on 23 December 2013, the use of independent reviewers in professional standards matters has been accompanied by a significant amount of error resulting in a very significant delay and additional cost of litigation. Recommendation 6 is further considered in Part ‘G’ below.

44. The statement in paragraph [366] that “Accordingly it is only on very rare occasions that the law making power may be used” is not accurate and should be withdrawn. The second sentence and following in paragraph [366] are more accurately expressed as follows: If the General Synod passes a canon which affects the order and good government of the Church within a diocese, or the Church trust property of a diocese, then that canon will not come into force in a diocese unless and until it adopts it by ordinance. Section 30 of the Constitution addresses this matter.

45. In paragraph [367] Counsel Assisting says that the “Primate accepted that the Church represents itself as a unified national body …” During his oral evidence the Primate was asked by Justice McClellan, “Do you understand that for an outsider the concept of the Anglican Church of Australia carries with it a unified assumption?” The Primate responded, “I do, Your Honour, and it’s very important, I think for the Commission especially, and the general public more broadly, to understand that this is really not the case.” [T2421 – T2422]. It is submitted that it is more accurate to say that the Church may be perceived to be a unified national body rather that it represents itself as a unified national body.
46. In paragraph [372] Counsel Assisting refers to the oral evidence of the Primate when he explained the limited funds of the General Synod. His submission says “the special fund which comprises funds for membership of a number of ecumenical organisations.” The oral evidence of the Primate was that the Special Fund was voluntary and pays for Anglican Church of Australia’s membership fees for a number of ecumenical organisations and to other bodies of the Anglican Communion. [T2429].

47. Paragraph [373] refers to the Primate’s discretionary funds and asserts that his evidence was to the effect that he would have declined to contribute to Grafton’s settlements had he been asked, which he had not. The two references cited by Counsel Assisting [778-779] do not support this submission.

48. The Primate has no discretionary funds. Certain funds are held at the discretion of the General Synod Standing Committee. These funds are comprised of the Reserve Fund referred to in paragraph [372]. [T2430:2-4]. In the Primate’s opinion a request for a contribution from those funds would have been declined by the Standing Committee.

49. Paragraph [378] refers to a possible national compensation scheme and says that the “Primate indicated it would be very difficult indeed for the Anglican Church to implement such a process.” By way of further elaboration the Primate’s evidence was that “it would be very, very difficult, if not impossible, for the Church to implement that kind of system itself, because it would require every diocese to agree to it.” [T2437].

50. Paragraphs [380]-[385] set out the ‘Conclusions’ of Counsel Assisting in relation to this case study. The first sentence of paragraph [384] asserts that “The manner in which clergy are disciplined within the Anglican Church is such that clergy are likely to escape effective enforcement if they retire or relinquish the licence to officiate that they
hold,” is contentious. The evidence adduced in this hearing reveals that two dioceses did not act to discipline particular clergy.

51. However, this does not lead to the conclusion that ‘such clergy are likely to escape effective enforcement if they retire or relinquish the licence to officiate’. The relinquishment of holy orders or the surrender of a licence does not prevent disciplinary action under the model Professional Standards Ordinance. There are many examples where a Diocese has taken disciplinary action where a priest no longer holds a licence. The disciplinary action against the Reverend Graeme Lawrence the subject of the judgment in Sturt v Farren [2012] NSWSC 400 is a recent example. As the title indicates the Relinquishment of Holy Orders Canon 2004 outlines the process by which holy orders can be relinquished. The constraints under this Canon are designed to prevent the avoidance of disciplinary action.

52. The second sentence in paragraph [384] is also somewhat contentious. It asserts that the process for disciplining clergy is so legalistic and cumbersome that some senior members of the Anglican Church are reluctant to depose a member of clergy even where the person has been convicted of serious sexual offences against a child. It is acknowledged that there is evidence to support a conclusion that there was inaction by some persons in the present case study but this is not necessarily evidence of a general reluctance. There is no evidence that others had such a reluctance. It is also problematic to attribute putative reluctance to the process being legalistic and cumbersome. A summary process is not a realistic option. In fact the evidence is that the process is more accurately characterised as slow due to the requirements for a proper investigation to be undertaken and for procedural fairness to be extended. There is provision in s61(1) of the Constitution and in the Model Ordinance for suspension from duty pending investigation of a matter, in appropriate circumstances, to protect the vulnerable while due process is followed.

E. Available Recommendation 5. The National Register.
53. As set out earlier the relevant Available Findings in relation to the National Register are:

57. The National Register of the Anglican Church does not record all the names of persons that may be required to be registered because various dioceses have been unable to review all their files to determine whether an entry on the national register should be made.

58. The General Secretary of the General Synod, Martin Drevikovsky, was unsure in his evidence as to how many files were still to be reviewed to determine entry on the National Register.

59. The professional standards directors of a number of dioceses have had difficulty operating and entering information into the National Register on a timely basis.

Available Recommendation 5 is also relevant:

5. That consideration be given by General Synod to the incorporation of a “red flag” system of notifications into the National Register.

54. Available Finding 57 is in accordance with the information provided to the General Secretary by the Professional Standards Directors.

55. In respect to Available Finding 58 the General Secretary was unsure how many relevant files were still to be reviewed because not all the PSD’s were able to provide accurate up to date information.

56. Available Finding 59 is correct in a literal sense. It should be noted that some PSD’s had no difficulty in both entering information on the National Register but also being up to date in respect of the assessment of files that may lead to an entry. Table MJD4 to the Statement of the General Secretary dated 26 November 2013 indicates that half of the ten PSD’s who responded were up to date with their work in relation to the
National Register. If those who were behind were experiencing difficulties with the software they generally had not sought any assistance from the administrator of the Register. It seems that the most significant reasons for not being up to date were a combination of a lack of resources and not giving the work a high priority.

57. Since the conclusion of the public hearing, and following a request from the Commission, further information has come to light in relation to the Reverend Allan Kitchingman and the National Register. This is outlined in a letter from the General Secretary to Roderick Best, General Counsel to the Commission dated 21 January 2014. A copy of this letter is at Attachment 3. Six attempts were made to notify the National Register about Kitchingman on 14 November 2013. They were unsuccessful probably due to a deficiency in the information. From 18 November 2013 onwards information in relation to Kitchingman was successfully notified to the Register and final verification took place on 17 December 2013. Importantly, it is noted that Michael Elliott was able to make the notification, albeit with initial failure because most likely the initial information did not satisfy the requirements, without assistance from anyone at the General Synod Office. This is inconsistent with the tenor of his evidence to the Commission that tended to blame the system for the failure to place information on the Register. It suggests that a lack of application and limited resources may be a more likely explanation. Consequently, the evidence of Michael Elliott in respect to the Register should be treated with caution.

58. After the conclusion of the public hearing Sparke Helmore Lawyers, on behalf of the Diocese of Sydney, sent the Royal Commission two letters dated 16 and 20 December 2013 respectively. They referred to the two statements of the General Secretary dated 25 and 26 November 2013 which had not been previously included in the tender bundle. In particular they advised that paragraph 12 of his statement of 25 November 2013 was inaccurate. Paragraph 12 relevantly says;

... Mr Douglas Marr (Acting Director of Professional Standards in the Diocese of Sydney) informed me that they had discovered significant numbers of historical files since they commenced searching for and reviewing files relating to child
sexual abuse on advice given by the Royal Commission Working Group established by the General Synod Standing Committee when the Royal Commission was announced. ... Mr Marr confirmed that Mr Bryant, the Director of Professional Standards for the Diocese of Sydney, estimated that between about 70 and about 100 files had to be reviewed to determine whether they contain information to be entered on the National Register. Those files are part of a much larger review of about 600 files which has been outsourced to an external person who is a lawyer. That review is expected to be completed in about 2 months.

59. In summary, Sparke Helmore advised that;

(i) A total of 433 files were sent by the Sydney Diocese to an external law firm for review. One aim was to collate information based upon the Anglican Church of Australia Working Group Case File Review form.

(ii) The nature and content of the files varied significantly. Often multiple files were opened in relation to different aspects of a claim by a single victim.

(iii) It was recommended that thirteen (13) names should be entered on the National Register. A further sixty-five (65) names require a varying level of additional investigation in order to ascertain whether an entry can be made.

60. The General Secretary is not in a position either to verify or dispute, this information. It is important to remember that the information he included in paragraph 12 of his statement was provided to him by the Diocese of Sydney. He is reliant upon the information provided by each individual diocese prior to entries being made upon the National Register. He made clear in his statements, and oral evidence to the Royal Commission, that this was the case.

61. Recommendation 5 proposes that consideration be given by General Synod to the incorporation of a “red flag” system of notifications into the National Register. The merit of this proposal needs to be considered in light of the purpose and other requirements of the Register and the requirements of the professional standards
regime.

62. During the public hearing Justice McClellan observed that "the evidence we have now leaves everyone with considerable difficulty in relation to both the reliability and the practicality of the current operation of the register." [T2408].

63. In response it was stated that the "two things we were proposing to do in submissions were to deal in more detail with the proposals of the new register, which comes into force we hope early in the new year, but also to go back historically and find out why this particular model was chosen, because it may be important to know what other models were considered so the Commission isn’t placed in a situation of reinventing the wheel. Ultimately, it will be our submission that any recommendations the Commission makes will have to have a characteristic of practicality and utility, to avoid the problems of the past." [T2408- T2409].

64. The National Register was not based upon any existing model. It was designed by Church members following extensive deliberations and discussions. Recently a Draft Bill to Amend the National Register Canon 2007 has been produced. A copy of this document is at Attachment 4.


65. It is recommended that the General Synod give consideration to the best ways in which greater guidance might be given to determine which diocese has jurisdiction over a particular professional standards matter where multiple dioceses have jurisdiction.

66. The Model Ordinance already has provisions which require information to be shared and co-operation to be given where it is apparent that another diocese also has jurisdiction. It sets out a process for deciding which dioceses should handle a matter if they cannot agree between themselves. However the relevant dioceses would need to have adopted the Model Ordinance and then they need to comply with it. It is in these areas where problems are likely to arise.
67. Under the current Model Ordinance the PSC must disclose information to another diocese about alleged misconduct of a person, or alleged process failure, if the person is currently living in that particular diocese or the conduct is alleged to have occurred in that diocese. There is a requirement that dioceses must co-operate. In practice this is done between the PSD’s.

68. Section 16 of the Model Ordinance sets out this requirement.

The PSC must disclose to an equivalent body relevant details of information in its possession concerning the alleged conduct of a Church worker:

(a) which is information that is relevant to, or arising during the course of, an investigation being undertaken by the PSC where the PSC knows that the Church worker is residing in the diocese of the equivalent body; or

(b) which is information concerning conduct alleged to have occurred in the diocese of the equivalent body;

and shall co-operate with any equivalent body.

“equivalent body” means a body of another diocese exercising powers, duties or functions equivalent to those for the PSC or the Board as the case may be, or where there is no such body, the bishop of the diocese;

69. Thus, in practice the PSC of one diocese would resolve to inform the PSC or bishop of the second diocese and this would be done by the PSD informing the other diocese’s PSD, informing the relevant bishop.

70. The scheme has some complexity in that there are definitions of information, examinable conduct and misconduct. Information about misconduct must be investigated if it constitutes examinable conduct. Section 25 provides:

Subject to [this Canon], where the PSC considers that the subject matter of information constitutes examinable conduct it shall investigate the information.

“examinable conduct” means conduct wherever or whenever occurring the subject of information which, if established, might call into question:
(a) the fitness of a Church worker, whether temporarily or permanently, or now or in the future 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:

If the information was trivial and did not reach the examinable conduct threshold, then it would not be investigated and would not have to be passed on to another diocese where the person was residing. (s.16(a)).

71. Under the current Model Ordinance there are provisions set out at section 26 for deciding which diocese should conduct an investigation and generally pursue a matter where more than one diocese has an interest.

(1) The PSC may, if it thinks it appropriate to do so, refer the subject matter of information, or the investigation of information, to an equivalent body or bodies.

(2) When the PSC and an equivalent body or equivalent bodies have the power and duty to investigate information concerning the alleged conduct or omission of the same Church worker and the respective bodies cannot agree on:

(a) which body shall carry out the investigation or any parts of such investigation; or

(b) whether a question or questions specified in section 54 should be referred to the Board or to an equivalent body which has jurisdiction;

then the PSC shall refer the disagreement for decision by the Director and the persons acting in a corresponding capacity for every other dioceses acting together.

(3) The PSC shall act in accordance with the unanimous decision of the persons referred to in subsection (2) or, if such persons cannot agree within a reasonable time of the disagreement being referred, in accordance with the decision of the Primate or a member of the House of Bishops appointed by the Primate.
(4) In all matters affecting the operation of [this Canon] the PSC and the Director shall cooperate with and assist an equivalent body and a person acting in the corresponding capacity of the Director in another diocese.

(5) In making a decision under subsection (2) the Director shall not be bound by the views or instruction of the PSC but shall take into account the most convenient course for all concerned and the proper and expeditious conduct of the investigation or referral as the case may be.

72. The evidence before the Commission in relation the Dioceses of Grafton and Newcastle is that neither took steps under their professional standards ordinances in the relevant cases. It does not illustrate the jurisdictional issue.


73. It is recommended that each diocese and the General Synod establish procedures for the use of experienced and independent mediators in professional standards matters.

74. The Model Ordinance has the following sections relating to mediation:

20(1) Subject to the provisions of [this Canon] the PSC has the following powers and duties:

(e) where appropriate, to arrange for the conciliation or mediation of any complaint the subject of information;

Also the Model Ordinance says that the Protocol must set out the processes for referral for mediation and conciliation.

6(2) The protocol must include:

(g) processes for referral to mediation and conciliation in appropriate circumstances.

75. There is a difference in the roles that various individuals and bodies play in a diocese when dealing with settlements, apologies etc, and processes under the Model Ordinance.
76. The Ordinance places an obligation on the PSC to investigate information ("of whatever nature and from whatever source relating to: (a) alleged misconduct on the part of a Church worker; or (b) an alleged process failure") which it believes constitutes examinable conduct. Examinable conduct “means conduct wherever or whenever occurring the subject of information which, if established, might call into question: (a) the fitness of a Church worker, whether temporarily or permanently, now or in the future to hold a particular or any office, licence or position of responsibility in the Church or to be or remain in Holy Order 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 of restrictions”. If the Church worker is deceased then they would not need conditions or prohibitions or de-licencing etc.

77. The Ordinance sets out the responsibilities of the Director and the PSC for considering the welfare of those involved in this process, but it is at its heart a process that is considering fitness for office and safety.

78. Other processes including litigation, mediation and support and assistance programs have their focus on the injured party.

79. The use of mediators has particular utility when invoking reconciliation or settlement type processes. It is important to maintain a clear distinction between the disciplinary and settlement processes.

H. Conclusions.

80. The Church will give careful consideration to Recommendations 3, 5 and 6.
81. In formulating proposals in relation to (i) jurisdiction, (ii) a ‘red flag’ system in the National Register and (iii) the use of mediators it is important that the expertise of the Commission is drawn upon.

82. Prior to any discussion in the General Synod the Church would like the opportunity to demonstrate to the Commission how its processes and National Register operate and to have the benefit of the Commission’s advice about possible refinements or alternative approaches based upon its research and the evidence it has received about the experience of other organisations.

83. As making changes, especially constitutional ones, within the Church can be a long and sometimes difficult exercise we want to ensure that any proposals reflect best possible practice.

Patrick Griffin

7 Garfield Barwick Chambers

22 January 2013

T: 9224 5600

M: 0411 124 164

pgriffin@7gbc.com.au