

PRESIDENTIAL RULING No. 24

The Request relates to two sections of the Regulations, namely Regulation 7.11.1 (ii), and Regulation 7.9.1, and specifically, the actions of the Committee for Discipline and the Executive Committee of the NSW Synod Standing Committee. The request was brought by the Moderator of the NSW Synod as provided for under Regulation 3.6.14(a).

Background

It is useful to briefly traverse the factual background which led to this request being made, before examining the request in more detail.

- A. Initially, a complaint was made against Minister 'X' and referred to the Synod Sexual Misconduct Complaints Committee ("SSMCC"), in or about August 2003.
- B. Pursuant to Regulation 7.9.1, the then Moderator "stood aside" Minister 'X'. Relevantly the Regulation states:

"The Moderator....may, at any time following the making of a complaint...stand aside a respondent from the performance of ministerial duties pending the determination of a complaint."

This action was taken by letter from the Moderator to the Respondent dated 5 September 2003. That letter stated (in part)

"...you will be stood aside while this issue is being determined. I am informing you that, in terms of Regulation 7.9.1, I am standing you aside.....you will be stood aside while the complaint is heard..."

- C. On 14 March 2004 the SSMCC made its "determination" (though comment will be made in Section 2 below about the SSMCC and its "determinations"). After finding that an incident of sexual misconduct did occur, the Synod Sexual Misconduct Complaints Committee made eight (8) "recommendations", relevantly:
1. That Rev 'X' does not return to Ministry;
 2. That Rev 'X's' status be that of minister "Not suitable for Placement".
 3. That Rev 'X' arrange to take any accumulated leave owing to him whilst he makes arrangements for his retirement from Ministry.
 4. (deliberately omitted)
 5. (deliberately omitted)
 6. That Rev X does not attend the and the congregations in the future except for special events and that on such occasions he inform the minister of the congregation of his intention to attend.
 7. (deliberately omitted)
 8. (deliberately omitted)
- D. In April 2004 the Synod Committee for Discipline ("Committee for Discipline") received two (2) complaints in relation to Minister 'X'. These complaints related to alleged breaches of Regulation 7.8.2(b).

- E. One of these complaints was to the effect that Minister X had “wilfully failed to comply....with any lawful direction of the Moderator”, by returning to some duties after the 14 March 2004 “determination”. Those complaints were made by the Reverend Diane Anderson (Stanton) at the direction of the Synod Standing Committee.
- F. On 2 July 2004, the Committee for Discipline made its determination, dismissing the complaint that Minister X had “wilfully failed to comply....with any lawful direction of the Moderator”.
- G. On 3 August 2004 the Executive Committee of the Synod Standing Committee (“the Executive Committee”) considered an application by Reverend Anderson for a review of the 2 July 2004 determination of the Committee for Discipline, and subsequently resolved to require the Committee for Discipline to review its proceedings on the grounds set out in Regulation 7.11.1(a)(ii), namely, that “the circumstances are exceptional”.
- H. The relevant minute of the Executive Committee is set out in full:-

Resolved

“That the Executive Committee of the Council of Synod acting under the authority referred to it by the Council of Synod in Minute 9/04MA.

(vii) determine to direct the Committee for Discipline to review its proceedings in this matter, noting that, in making this directive the Executive Committee is indicating its belief that the circumstances are exceptional in that the Report undercuts the authority of the Moderator in matters concerning the oversight and discipline of Ministers, and provides unhelpful precedents in regard to the role and authority of the Committee in relation to its place within the overall discipline process.”

It is this last series of events, and in particular the purported direction from the Executive Committee, which has brought about the request for this Presidential Ruling.

SECTION ONE

Regulation 7.11.1(a)(ii)

The first part of the request for a Presidential Ruling relates to various aspects of this Regulation. Specifically, the questions raised are as follows:

- (a) In Regulation 7.11.1(ii) how are the words “the circumstances are exceptional” to be construed? (I have assumed that this is intended to mean 7.11.1(a)(ii));
- (b) Does the Executive Committee of the Standing Committee have the authority to determine the meaning of those words and to act on them or is it the responsibility of the Standing Committee itself?
- (c) Are there any threshold tests for “circumstances” to be deemed “exceptional”? Is mere disagreement with the finding and determination of the Committee for Discipline alone sufficient?
- (d) In the event of a dispute about the meaning of “exceptional”, how is such a dispute to be resolved?

The Review Mechanism in Regulation 7.11.1

It is worth analysing the way in which Regulation 7.11.1 works, on a paragraph by paragraph basis.

- 7.11.1(a) This sets out who may seek a review (the advocate, complainant or respondent), and the grounds for seeking a review ((i) absence of certain material; or (ii) the circumstances are exceptional).
- 7.11.1(b) This sets out a time limit for making an application for review (21 days after receiving report except by leave of the Standing Committee).
- 7.11.1(c) This gives power to the Standing Committee, once certain threshold tests have been met, to require the Committee for Discipline to review any of:
- (i) its findings of fact and conclusions;
 - (ii) its decision whether or not the complaint has been made out; and
 - (iii) its action taken under Regulation 7.8.16 or 7.8.17.
- 7.11.1(d) & (e) Sets out the manner in which any review shall be conducted.

Therefore, provided that:

- The review is requested by one (or more) of the persons nominated in 7.11.1(a);(being the advocate, complainant or respondent to the matter); and
- The review is requested within the timeframe set out in 7.11.1(b) (or leave is given by the Standing Committee); and
- The Standing Committee forms the opinion that either of the grounds set out in 7.11.1(a) (i) or (ii) (being absence of certain material or the circumstances are exceptional) then
- The Committee for Discipline may be required to carry out the review, in accordance with 7.11.1(d) and (e).

There is no power for the Standing Committee to request a review of the determination of the Committee for Discipline of its own power. It is my view that the character of Regulation 7.11.1(c) is not as a source of a power for the Standing Committee to independently request a review, but rather a “gatekeeper” power which allows the Standing Committee to allow or disallow an application for review which has otherwise been properly made. I am advised that the Standing Committee received an application for a review of the decision of the Committee for Discipline from the complainant who made the initial complaint to the Committee for Discipline. This satisfies the requirement of Regulation 7.11.1(a).

Having said that, it would appear that in the exercise of that power, the Standing Committee has it entirely within their power to decide whether or not “the circumstances are exceptional”. It is the “opinion” of the Standing Committee which is important here.

Because this is a “threshold” test only, the fact that the Standing Committee decides that the grounds in 7.11.1(a) (i) or (ii) have been met has no consequence except that it empowers the Standing Committee to require the Committee for Discipline to carry out the review.

That is, the fact that the Standing Committee “forms the opinion” that “the circumstances are exceptional” does not mean that the Committee for Discipline, in carrying out a review, is in any way bound by that opinion in reaching a subsequent decision.

In my view, the words “the circumstances are exceptional” do not warrant a detailed analysis or interpretation because they refer to a situation which, on its face, fulfils that meaning, “in the opinion of the Standing Committee”.

If the Standing Committee is of the view, where that view has been reached reasonably, that the “circumstances are exceptional”, then that is sufficient to enable it to require a review, provided all of the other threshold matters in 7.11.1(a) and (b) have been met.

Standing Committee or the Executive of the Standing Committee

Up to this point, I have, in accordance with 7.11.1, been referring to the “Standing Committee”.

Significantly, the issue has been raised as to whether one can effectively read the words “Standing Committee” as meaning the “Executive Committee of the Standing Committee” where they appear in this Regulation. Or, to put the question another way, can the Executive Committee exercise the power in 7.11.1(c) said to be the power of the Standing Committee?

In order to properly consider this issue, one needs to examine the Regulations as they relate to the Standing Committee.

Regulations 3.5.43 – 3.5.51

Regulations 3.5.43 to 3.5.51 set out the basis of the Standing Committee and its membership.

Regulations 3.5.46 and 3.5.47 deal with various officers of the Standing Committee.

Regulation 3.5.48 deals with the timing and conduct of meetings of the Standing Committee.

Regulation 3.5.49 sets out the Power and Responsibilities of the Standing Committee. For ease of reference I set out that Regulation in full:

- “3.5.49
- (a) The Standing Committee is empowered to act on behalf the Synod between meetings of the Synod in respect of any of the responsibilities of the Synod except as the Synod may determine.
 - (b) The Standing Committee shall deal with matters referred to it by the Synod.
 - (c) In dealing with matters which have not been referred, unless otherwise prescribed by the Synod:
 - (i) the quorum shall be the number nearest two-thirds of the members of the Standing Committee; and
 - (ii) in order to carry the relevant motion a majority of the three-fourths of those present shall be required”.

Therefore in matters not specifically referred to it by the Synod, and unless otherwise prescribed by the Synod, there is a quorum of two-thirds of the Standing Committee.

Executive Committee of the Synod Standing Committee

The notion of an “Executive Committee” of the Synod Standing Committee does not find a basis in the Regulations as such, but rather in rules created by the Synod, pursuant to Regulation 3.5.49.

Those “Rules” are set out in By-Laws N 3.22.1- N 3.22.9.

In By-Law N 3.22.8 the Synod has exercised the power conferred by the words “unless otherwise prescribed by the Synod” in Regulation 3.5.49 (c), to change the quorum for meetings and the majority required for a motion to be carried.

By-Law N 3.22.9 sets out the powers and responsibilities of the Executive Committee and this includes Paragraph (a) - “deal with matters referred to it by the Council of Synod;”

Pursuant to a resolution the Standing Committee (Council of Synod) has made a general referral of powers relating to matters before the Committee for Discipline to the Executive Committee.

If it had not done so, there would be a question as to whether the Executive Committee could rely upon the Council of Synod's inherent power to delegate. Such a power would be restricted if there is a specific provision in the Constitution or the Regulations which limits that power. One argument which might be put is that the words in 7.11.1 (c) requiring the Standing Committee to "form the opinion", is such a limitation.

However, in the absence of something further, it is my view that there is nothing in this case to detract from the general position that the Standing Committee may delegate the power to "form the opinion" (referred to in Regulation 7.11.1 (c)) to the Executive Committee.

In reaching the abovementioned conclusions I have been advised that the relevant quorum for the Executive Committee was present.

Conclusion

For the above reasons, I would respond to the questions in this section and referred to above as (a), (b), (c) and (d) as follows: *(I have suggested some variations that incorporate some elements of the question into the conclusions so that people will not need to look back through the paper. I think it will also be more user friendly if people are reading the key conclusions in the future, without access to the whole document. My new words are underlined)*

- (a) The words "the circumstances are exceptional" is simply a basis for either the advocate, the respondent or the complainant to seek a review. That is, one of these named persons, must make an application to the Standing Committee on either of the grounds set out in 7.11.1 (a), (i) or (ii). Presumably, the person seeking that review will need to make a case that either of the grounds are established.
- (b) Either the Standing Committee or its delegate, the Executive Committee, has the power to determine whether the circumstances in a particular situation are exceptional.
- (c) There are no threshold tests for when "circumstances" are to be deemed "exceptional". Whether "circumstances are exceptional" is really an issue for the Standing Committee / Executive Committee, in its "opinion".
- (d) The concept of there being a "dispute" between the Standing Committee / Executive Committee is not really relevant. Either the Standing Committee / Executive Committee "forms the opinion" in accordance with 7.11.1 (c) or it does not. If it does, then the Committee for Discipline may be required, by decision of the Standing Committee / Executive Committee, to carry out a review. That is the only consequence of the Standing Committee or Executive Committee's opinion of the existence of "exceptional circumstances", and otherwise the Committee for Discipline is free to carry out its review in accordance with Regulations 7.11.1(d) and (e).

SECTION TWO

REGULATION 7.9.1

Reference was made earlier to part of Regulation 7.9.1, in the content of Minister 'X' being stood aside by the Moderator.

In the context of the facts of this matter, the questions raised in relation to this Regulation can best be put as follows:

- (a) What is the meaning of “complaint” and “pending the determination of complaint” in the context of the period for which a minister can be stood aside pursuant to the Regulation?
- (b) Does a “Standing Aside” need to be explicitly revoked?

“Complaint” within Section 7 – Church Discipline

One can identify at least two (2) concepts of “complaint” within this Section.

- 7.1.1 In Regulations 7.1.1 to 7.13.1 “complaint” means a complaint about the conduct, teaching or ministry of a Minister.
- 7.7.4 In Regulation 7.7.4 to 7.7.20 (“the Sexual Misconduct Regulations”) “complaint” means a written, signed complaint of sexual misconduct against a minister which includes a request that the matter be investigated.

The latter definition is limited to the Sexual Misconduct Regulations, whilst the former definition is inclusive. Thus, where the term “complaint” is used in Regulation 7.9.1, it is potentially capable of meaning either a complaint under the Sexual Misconduct regulations, or generally.

When is the complaint “determined”?

I have adopted the view that in Regulation 7.9.1 the word “determination” bears its ordinary meaning of “brought to a conclusion”.

However it is by no means clear when the SSMCC process has been brought to a conclusion. For example, as noted by the Committee for Discipline in the subject proceedings, up to five (5) documents existed headed “Determination of Synod Sexual Misconduct Complaints Committee”, received by the Respondent on dates ranging from 29 January 2004 to 14 March 2004.

There are then a number of possibilities for when a complaint is “determined”, depending upon whether the complaint is pursuant to the Sexual Misconduct Regulations, or generally.

For example, in general terms a complaint (not being pursuant to the Sexual Misconduct Regulations) may be determined at the level of the Chairperson of the Presbytery, at the level of the PRC, at the level of the Committee for Counselling, or at the level of the Committee for Discipline.

However, the “complaint” in this instance is brought under the Sexual Misconduct Regulations.

The Synod Sexual Misconduct Complaints Committee Process

Again, there are a range of possibilities and it is useful to track through the relevant regulations. Where it is determined that a complaint amounts to a complaint of sexual misconduct, the following occurs:

- the matter shall be investigated;
- the Committee may determine that the complaint warrants no further action on certain grounds (7.7.12(e)(i));
- the Committee may refer for conciliation or mediation (7.7.12(e)(ii));
- the Committee may refer the matter to the Synod Committee for Discipline (7.7.12(e)(iii));
- the Committee may refer to the Pastoral Relations Committee or the Moderator (7.7.12(e)(iv)).

If the SSMCC makes a determination pursuant to 7.7.12(e)(i) then it follows that the complaint is “determined”.

If the SSMCC refers a matter pursuant to 7.7.12(e)(ii) then the complaint will be “determined” upon the successful completion of a mediation or conciliation outcome, or in the event that this process is not successful, upon the completion of any other subsequent process within the power of the SSMCC, for example pursuant to 7.7.12 (e) (iii).

If the SSMCC refers a matter pursuant to 7.7.12(e)(iii), then the complaint can only be “determined” when the Synod Committee for Discipline has completed its processes.

If the Synod Sexual Misconduct Complaints Committee refers a matter pursuant to 7.7.12(e)(iv), then the complaint will be determined upon the successful completion or implementation of the steps contemplated by or resulting from, such a referral.

In the subject case there does not appear to have been any clear indication of a referral, as contemplated by 7.7.12(e), but rather a series of “Recommendations”. It may be that this was intended to be an action pursuant to 7.7.12(e)(iv) but this is not clear.

Does a “Standing Aside” need to be explicitly revoked?

Regulation 7.9.1 in speaking of the authority of the Moderator to stand aside a Minister says, in part, “... (the Moderator) may, at any time following the making of a complaint and in such manner as the Moderator sees fit, stand aside a respondent from the performance of ministerial duties *pending the determination of the complaint ...*” (emphasis added)

It is material to answering the question put to me to consider at what point there has been a “determination of the complaint”. Regulation 7.9.1 does not specify whether a deliberate act of revoking the standing aside of a Minister is required but that it shall stand “pending the determination of the complaint.”

The important consideration is that the standing aside ends with “the determination of the complaint” and this is not necessarily the same thing as the determination of the panel appointed by the Synod Sexual Misconduct Complaints Committee.

The SSMCC has limited powers to make determinations. In Regulation 7.7.12(e)(i), there is a capacity to make a determination. The determination in this case is to “determine that the complaint warrants no further action ...”. This determination also determines the complaint.

The other determination available to the SSMCC is to determine to refer the complaint to another person or body. Regulation 7.7.12(f) specifically refers to one of these referrals subsequently leading to an action by the Chairperson of the Committee that will conclude the complaint processes. The question then arises as to whether any of these referrals might constitute a “determination of the complaint”.

7.7.12 (e)(ii) allows referral of the complaint for conciliation or mediation. Regulation 7.7.12 (f) anticipates a continuing role for the SSMCC. In respect of when the complaint of sexual misconduct is determined this takes place in the circumstances anticipated by 7.7.12 (f) (iv). However it is clear that the circumstances envisaged by 7.7.12 (f)(v) could not constitute a “determination of the complaint”.

7.7.12 (e) (iii), which permits referral to the Committee for Discipline, does not anticipate a return to the SSMCC. Therefore this referral cannot be a “determination of the complaint”.

The referral under 7.7.12 (e)(iv) leaves open the possibility that the matter will return to the SSMCC. While this subsequent action by the SSMCC may result in the “determination of the complaint” the first referral clearly does not.

While it might be argued that it is always wise to await written advice from the Moderator that a standing aside order is lifted, the expression “pending the determination of the complaint” in Regulation 7.9.1 means that it automatically ends at the point where the relevant body in the church concludes the process that is involved in the examination of a complaint of alleged sexual misconduct. However any such automatic ending of the standing aside order will only

occur in the case of the SSMCC's work if it acts under Regulation 7.7.12 (e)(i) and (f)(iv). No other action by the SSMCC can be considered to "determine the complaint" and so mean that the order of the Moderator standing aside a Minister has come to an end.

Conclusion

I therefore answer the questions in this Section as follows:

- (a) A "complaint" means a complaint either within the meaning of Regulation 7.1.1 or 7.7.4, or a combination thereof, depending upon the circumstances. Where the term "complaint" is used in Regulation 7.9.1, it is potentially capable of meaning either a complaint under the Sexual Misconduct regulations, or generally a complaint about the conduct, teaching or ministry of a Minister.
- (b) "Standing Aside" stands "pending the determination of the complaint." When the relevant Committee determines the complaint of alleged sexual misconduct then it is not necessary for the Moderator to explicitly revoke the order.

My ruling is therefore that the questions be answered as follows:

To the first series of questions related to aspects of the operation of Regulation 7.11.1

- (a) The words "the circumstances are exceptional" is simply a basis for either the advocate, the respondent or the complainant to seek a review. That is, one of these named persons, must make an application to the Standing Committee on either of the grounds set out in 7.11.1 (a), (i) or (ii). Presumably, the person seeking that review will need to make a case that either of the grounds are established.
- (b) Either the Standing Committee or its delegate, the Executive Committee, has the power to determine whether the circumstances in a particular situation are exceptional.
- (c) There are no threshold tests for when "circumstances" are to be deemed "exceptional". Whether "circumstances are exceptional" is really an issue for the Standing Committee / Executive Committee, in its "opinion".
- (d) The concept of there being a "dispute" between the Standing Committee / Executive Committee is not really relevant. Either the Standing Committee / Executive Committee "forms the opinion" in accordance with 7.11.1 (c) or it does not. If it does, then the Committee for Discipline may be required, by decision of the Standing Committee / Executive Committee, to carry out a review. That is the only consequence of the Standing Committee or Executive Committee's opinion of the existence of "exceptional circumstances", and otherwise the Committee for Discipline is free to carry out its review in accordance with Regulations 7.11.1(d) and (e).

To the second series of questions related to the meaning of "complaint" and "pending the determination of complaint", and whether a "Standing Aside" need to be explicitly revoked:

- (a) A "complaint" means a complaint either within the meaning of Regulation 7.1.1 or 7.7.4, or a combination thereof, depending upon the circumstances. Where the term "complaint" is used in Regulation 7.9.1, it is potentially capable of meaning either a complaint under the Sexual Misconduct regulations, or generally a complaint about the conduct, teaching or ministry of a Minister.
- (b) "Standing Aside" stands "pending the determination of the complaint." When the relevant Committee determines the complaint of alleged sexual misconduct then it is not necessary for the Moderator to explicitly revoke the order.

**Dean Drayton
President
(August 2005)**