

APPELLATE TRIBUNAL OF THE ANGLICAN CHURCH OF AUSTRALIA

Matter:	Primate's Reference re Bishop Administrators and the House of Bishops
Decision Date:	25 August 2017
Tribunal Members:	The Hon Keith Mason AC QC, President The Hon Justice Richard Refshauge, Deputy President The Most Rev'd Dr Phillip Aspinall Mrs Gillian Davidson The Rt Rev'd John Parkes AM The Hon Justice Clyde Croft The Rt Rev'd Garry Weatherill
Determination and Opinion (summary):	A person in episcopal orders who is the administrator of a Diocese during the vacancy of the see is not on that account a member of the House of Bishops
Catchwords:	House of Bishops – diocesan administrator – whether sits in the House of Bishops if he or she is a bishop

Context and questions referred

The 17th session of General Synod will commence on 3 September 2017.

The office of diocesan bishop is currently vacant in the Dioceses of Perth and Newcastle. In each instance, as provided for in the second paragraph of s 8 of the *Constitution*, an administrator has been appointed in accordance with the constitution of the diocese to administer the affairs of the diocese following the resignation of the former diocesan bishop. Perth's administrator is the Rt Rev'd Kate Wilmot and Newcastle's administrator is the Rt Rev'd Dr Peter Stuart. Each administrator is a bishop in the Church but neither has been elected and confirmed in accordance with s 8 of the *Constitution* nor installed as the *diocesan* bishop.

The Chancellor of the Diocese of Newcastle, the Hon Peter Young AO QC has submitted to the Primate, the Most Rev'd Dr Philip L Freier, that Bishops Wilmot and Stuart are entitled (perhaps obliged) to sit in the House of Bishops at the forthcoming session of General Synod.

On 13 July 2017 the Primate referred the following questions to the Appellate Tribunal pursuant to s 63 of the *Constitution*:

1. Whether a person appointed bishop administrator of a diocese for the purpose of section 8 of the *Constitution of the Anglican Church of Australia* ("the Constitution") or otherwise is, under section 16 of the Constitution or otherwise, a member of the House of Bishops.
2. Whether if a person so appointed as bishop administrator of a diocese is a member of the House of Bishops the diocese for which he or she is appointed is entitled to appoint another person to be a member of General Synod.
3. Whether the answers to the preceding questions are different depending upon whether or not the person so appointed as bishop administrator is a duly consecrated bishop of the Anglican Church of Australia and, if so, in what respect.

The dioceses of the Australian Church were invited to notify the Registrar of the Tribunal if they wished to intervene in the proceedings and to forward submissions. Newcastle notified its wish to intervene indicating its reliance upon the Hon Peter Young's submissions. Perth indicated that it did not wish to intervene. Sydney notified its wish to intervene and forwarded a submission by its Chancellor Michael Meek SC supporting the following answers to the Questions: No; Not applicable; No. The Bishop of Bathurst also provided a short submission in opposition to the Newcastle submission. No other diocese notified an intention to intervene. Submissions in reply were filed on behalf of Newcastle.

Determination and Opinion

We conclude that the Questions should be answered in the manner contended for by the Diocese of Sydney, for the following reasons.

Section 16 of the *Constitution* states that: *“The House of Bishops shall be composed of the Primate, metropolitans, the diocesan bishops and any bishop who becomes a member of General Synod pursuant to the provisions of subsection 17(8)(a)(ii).”*

No one suggests that Bishop Wilmot or Bishop Stuart fall within any of these categories in the sense that neither is the Primate nor a Metropolitan and, more relevantly, neither has been elected bishop of his or her diocese in accordance with s 8 of the *Constitution*. They are not the “bishop of [the] diocese” within the terms or intent of the opening paragraph of s 8 which reads: *“There shall be a bishop of each diocese who shall be elected as may be prescribed by or under the constitution of the diocese, provided that the election shall as to canonical fitness of the person elected be subject to confirmation as prescribed by ordinance of the provincial synod, or if the diocese is not part of a province then as prescribed by canon of General Synod.”* See also the definition of “Diocesan bishop” in s 74(1).

The suggestion that things may, however, be otherwise, developed by Mr Young, turns essentially upon the second paragraph of s 8 which states:

“During any vacancy in the office or incapacity of the bishop of any diocese or during his absence from the diocese for a period exceeding thirty days the authorities powers rights and duties conferred or imposed on him by the constitution shall be exercised by the person appointed by or under the constitution of the diocese to administer the affairs of the diocese.”

The nub of the submission is the following:

“Although to a great degree, the construction of ss 8 & 16 is a matter of impression and no great detailed argument can be made one way or the other, it is difficult to see why the words ‘right’ and ‘duty’ in s 8 should be cut down. This is reinforced when it is remembered that it is only in the House of Bishops that each of the 23 dioceses is given an equal say in the result of a ballot. In both the House of Clergy and the House of Laity the numbers of clergy in the various dioceses is the significant factor in their voting power so that the more populated dioceses have an advantage over the smaller diocese. The presence of the House of Bishops to a degree corrects this imbalance. Why should a whole diocese lose this right merely because chance operates that the see is vacant when the general synod is held?”

We respectfully accept the submission from the learned former President of this Tribunal that the construction issue is largely one of impression. But our impression tends firmly towards an opposite conclusion.

However, more can be said.

First, the submission invoking a literal and isolated reading of the second paragraph of s 8 proves more than the conclusion contended for by Newcastle, namely that *bishops* who happen to be

diocesan administrators should/must sit in the House of Bishops. On the literal and isolated reading, a lay person, or a person in priest's or deacon's orders, would also enter the House of Bishops during the vacancy of the see if such a person had been duly appointed administrator by his or her diocese. Not all dioceses will have men or women in episcopal orders who are available or chosen to become administrators.

The *Clerical Ministry Ordinance* 2009 (Newcastle) provides in s 6(c) that the person who is to administer the Diocese in the vacancy of the see or incapacity of the Bishop is to be appointed by the Bishop or, in the absence of such an appointment the Diocesan Council. It is to be noted that there is no qualification for such a person so appointed who may, it appears, not only not be a bishop but may be a member of the laity. This is consistent with the second paragraph of s 8 of the *Constitution*. It is also to be observed that the same ordinance stipulates in s 6(e) that "The Bishop of the Diocese means the Bishop and does not mean the Commissary or Administrator".

The *Archbishop's Statute* 2016 (Perth) provides in s 11.1 for the appointment of a member of the clergy as Administrator but does not require the appointee to be in episcopal orders.

Second, it must be remembered that being a diocesan bishop and thus a member of the House of Bishops triggers rights and responsibilities additional to "representing" a diocese at General Synod. These include roles in the triggering of special sessions of Synod (see *Constitution*, s 23) and references to this Tribunal (see s 29 (2)), exposure to charges in the Special Tribunal with respect to breaches of faith, ritual, ceremonial or discipline and offences specified by canon (see s 56 (6)), qualification to appointment to the Appellate Tribunal (see s 57) and a role in providing theological opinions in references involving doctrine (see s 58). These do not appear to be consistent with the role of Administrator, especially one not in episcopal orders or, indeed, in clerical orders at all.

While we must not be read as giving any definitive ruling about the interplay between any of these provisions and the second paragraph of s 8, they indicate strong reasons for favouring a limited reading of that second paragraph in contexts touching the *national* Church. It may be observed that the second paragraph has ample work to do as regards the *internal* affairs of the Church in the diocese affected by a vacancy in the office or incapacity of its diocesan bishop.

Further, the rights and duties conferred or imposed on an Administrator are in any event clearly subject to unexpressed limitations that deny a precise equivalence between the Administrator and a Diocesan Bishop. Thus, an Administrator who is not a bishop could not make a person a deacon or ordain a deacon as a priest. Similarly, an Administrator who is not a member of the clergy could not exercise any right or function reserved to clergy.

Third, as submitted by Mr Meek SC, statutory and constitutional provisions always need to be examined and construed in their broader context so as to promote consistency with the language and provisions of the whole instrument (*Certain Lloyd's Underwriters v Cross* [2012] HCA 56; (2012) 248 CLR 378 at [23]-[24]).

This approach, in our opinion, weighs strongly against the outcome contended for on Newcastle's behalf by Mr Young.

In short, s 16 speaks unambiguously about membership of the House of Bishops and there is no clear mandate to read it down by the process of reasoning invoked by Newcastle.

In its submissions in reply, Newcastle reiterated that there is no case to be made for a non-bishop to sit in the House of Bishops. It was also pointed out that a bishop is conferred with authority to ordain, to confirm etc upon his or her consecration, as distinct from appointment to a particular office such as assistant bishop or indeed installation as bishop of another diocese. It follows, so the submission goes, that *these* episcopal authorities stemming from the status acquired at consecration continue to be available to be used during tenure as an Administrator. We respectfully agree. But it does not follow, in our opinion, that the office of Administrator of an Australian diocese carries with it into the national Church the rights and duties of membership of the House of Bishops. This is for the reasons already given. We would respectfully observe that the Newcastle submission again proves too much because it does not satisfactorily explain why there will remain bishops exercising episcopal roles within the Australian Church who do not on that account become members of the House of Bishops.

We therefore provide the following determination and advice in response to the three Questions referred:

1. No
2. Not applicable
3. No.