

**ANGLICAN CHURCH OF AUSTRALIA**

**IN THE APPELLATE TRIBUNAL**

**IN THE MATTER** of a **REFERENCE** by the Primate under paragraph (iii) of proviso (c) to section 30 of the Constitution of the said Church of the question raised by the opinion of the Standing Committee of the Synod of the Diocese of Sydney concerning the **National Register Canon 2007** of General Synod.

- and -

**IN THE MATTER** of a **REFERENCE** by the Primate under paragraph (iii) of proviso (c) to section 30 of the Constitution of the said Church of the question raised by the opinion of the Standing Committee of the Synod of the Diocese of Sydney concerning the **Special Tribunal Canon 2007** of General Synod.

- and -

**IN THE MATTER** of a **REFERENCE** by the Primate under paragraph (iii) of proviso (c) to section 30 of the Constitution of the said Church of the question raised by the opinion of the Standing Committee of the Synod of the Diocese of Sydney concerning the **Offences Canon Amendment Canon 2007** of General Synod.

**DETERMINATION OF THE APPELLATE TRIBUNAL**

**To the Most Reverend Dr Phillip Aspinall, President of the General Synod of the Anglican Church of Australia**

**Greeting:**

Your Grace referred to the Appellate Tribunal pursuant to s 30(c)(iii) of the Constitution questions raised by the opinion of the Standing Committee of the Diocese of Sydney that the National Register Canon 2007, the Special Tribunal Canon 2007 and the Offences Canon Amendment Canon 2007 affect the order and good government of the Church in the Diocese of Sydney.

A copy of the reference appears as the Schedule to this determination.

I have the honour to report that the Tribunal's unanimous determination of the questions that arise on the reference are as follows:

1. In respect of the reference of the Primate dated 3 November 2009 concerning the *National Register Canon 2007*, the Tribunal determines

pursuant to s 30(c)(iii) of the Constitution that the Canon does not affect the order and good government of the Church within the Diocese of Sydney.

2. In respect of the reference of the Primate dated 3 November 2009 concerning the *Special Tribunal Canon 2007*, the Tribunal determines pursuant to s 30(c)(iii) of the Constitution that the Canon does not affect the order and good government of the Church within the Diocese of Sydney.
3. In respect of the reference of the Primate dated 3 November 2009 concerning the *Offences Canon Amendment Canon 2007*, the Tribunal determines pursuant to s 30(c)(iii) of the Constitution that the Canon does not affect the order and good government of the Church within the Diocese of Sydney.

The unanimous reasons of the Tribunal, duly certified by me, accompany this determination.

Dated this 8th day of March 2010



**The Honourable Mr Justice Peter W Young AO**  
**President of the Appellate Tribunal**

## THE SCHEDULE

3 November 2009

The Hon Mr Justice Peter Young AO  
 President, Appellate Tribunal  
 Anglican Church of Australia  
 Judges' Chambers  
 Supreme Court NSW  
 Queen's Square SYDNEY NSW 2000

Dear Justice Young,

### **Reference to the Appellate Tribunal of the Anglican Church of Australia.**

By a letter dated 3 July 2009 addressed to the President of the General Synod, the Diocesan Secretary of the Diocese of Sydney gave notice under Section 30 (c) of the Constitution of the Anglican Church of Australia that on 29 June 2009 the Standing Committee of the Diocese of Sydney declared its opinion that the provisions of the National Register Canon 2007, the Special Tribunal Canon 2007 and the Offences Canon Amendment Canon 2007 affect the order and good government of the Church within the Diocese of Sydney.

In accordance with s30(c)(ii) of the Constitution I sought the opinion of the Standing Committee in relation to the declarations. The Standing Committee of General Synod at its meeting on 16-18 October 2009 resolved as follows [SC2009/3/014] –

*The Standing Committee resolves not to advise the President that it agrees with the opinion of the Standing Committee of the Diocese of Sydney that the National Register Canon 2007, the Special Tribunal Canon 2007 and the Offences Canon Amendment Canon 2007 affect the order and good government of the Church in the Diocese of Sydney.*

As President of the General Synod of the Anglican Church of Australia, I now refer the question raised by the said opinion to the Appellate Tribunal for its determination pursuant to Section 30 (c) (iii) of the Constitution.

Yours sincerely

The Most Reverend Dr Phillip Aspinall  
 Primate of Australia

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**IN THE MATTER** of a **REFERENCE** by the Primate under paragraph (iii) of proviso (c) to section 30 of the Constitution of the said Church of the question raised by the opinion of the Standing Committee of the Synod of the Diocese of Sydney concerning the **Special Tribunal Canon 2007** of General Synod.

- and -

**IN THE MATTER** of a **REFERENCE** by the Primate under paragraph (iii) of proviso (c) to section 30 of the Constitution of the said Church of the question raised by the opinion of the Standing Committee of the Synod of the Diocese of Sydney concerning the **Offences Canon Amendment Canon 2007** of General Synod.

**REASONS FOR DETERMINATION**

The Eighth day of March 2010

**Introduction**

1. Although there are references concerning three canons of the General Synod of the Anglican Church of Australia, the question of their operation and effect is the subject of one reference by the President of the General Synod to this Tribunal for determination pursuant to s 30(c)(iii) of the Constitution. It is convenient that they be dealt with together.
2. By letter dated 3 July 2009 addressed to the President of the General Synod, the Diocesan Secretary of the Diocese of Sydney gave notice under s 30 proviso (c) of the Constitution of the Anglican Church of Australia that, on 29 June 2009, the Standing Committee of the Diocese of Sydney ("the SCDS") declared its opinion that the provisions of the *National Register Canon 2007*, the *Special Tribunal Canon 2007* and the *Offences Canon Amendment Canon 2007* affect the order and good government of the Church within the Diocese of Sydney.
3. In accordance with s 30(c)(ii) of the Constitution the President of the General Synod sought the opinion of the Standing Committee of General Synod ("the SCGS") in relation to the declarations. The SCGS, at its meeting on 16-18 October 2009, resolved as follows:

*"The Standing Committee resolves not to advise the President that it agrees with the opinion of the Standing Committee of the Diocese of Sydney that the National Register Canon 2007, the Special Tribunal Canon 2007 and the Offences Canon Amendment Canon 2007 affect the order and good government of the Church in the Diocese of Sydney."*

4. The consequence of that resolution was that the President was required to and, on 3 November 2009, did refer the questions raised by the opinion of the SCDS to the Appellate Tribunal for its determination.
5. The question raised as a result of the action of the SCDS was, by direction of the President of the Tribunal, notified to Anglican media organisations and all diocesan bishops and registrars on or about 20 November 2009. The notice required written submissions to be transmitted to reach the Registrar of the Appellate Tribunal no later than Monday 21 December 2009.
6. A submission was received from the SCGS to the effect that each of the three Canons do not affect the order and good government of the Church within the Diocese of Sydney.
7. A submission was also received from Ms Marlene Hickin, a resident of the Diocese of Sydney, expressing concern that the SCDS was challenging the uniform application of the three Canons and encouraging the Tribunal to endorse the Sydney Diocese in many of its disciplinary initiatives to date "while requiring the Diocese to function with that integrity in a fully visible and accountable manner in the future".
8. No submissions were received in support of the opinion expressed by the SCDS.
9. In declaring an opinion under section 30(c) of the Constitution, it is desirable for a Diocese to give reasons in support of that opinion and, in the event of a reference to this Tribunal, to make a submission. Not to do so is unhelpful for the process: potentially a hindrance. As far as we are aware, it is unprecedented for a body to initiate a review process and then to provide no reasons or justification for that action. In this instance it appears that the SCDS provided no reasons to the SCGS for its opinion declared under section 30(c), nor did the SCDS make any submission to this Tribunal.
10. One could be tempted to dismiss what appears to be merely an unsupported protest. However, notwithstanding a lack of any assistance from the instigators of the process, this Tribunal has a responsibility to discharge under the Constitution to consider, with or without assistance, whether the Canons in question affect the order and good government of the Church within the Diocese of Sydney. The obligation placed on the Tribunal by s 30(c)(iii) is to be distinguished from the power conferred by s 63 to give an advisory opinion, where shortcomings in the questions

can lead to a lack of authority or utility in the answers, and the Tribunal will decline to answer the questions.<sup>1</sup>

11. In this case the Tribunal has discharged its responsibility and has considered the matters raised in the dispute in depth. This should not be considered as some sort of judgment by default. There would not seem to be any escaping from the position that this decision is binding on the Diocese of Sydney. No other diocese has challenged the applicability of the relevant canons within the statutory time frame.
12. The Tribunal considered that on this reference no oral hearing was necessary, and it did not convene one.
13. The Tribunal considered that the reference did not involve doctrine and that it was not necessary to obtain the opinion of the House of Bishops or of a Board of Assessors under s 58 of the Constitution.

### **Background**

14. By its determination dated 4 April 2007 ("the 2007 Determination") the Tribunal considered similar references instigated by the SCDS in relation to the *National Register Canon 2004* and the *Special Tribunal Canon 2004*. Those canons were both repealed and replaced by the *National Register Canon 2007* and the *Special Tribunal Canon 2007* respectively. The differences between the repealed canons and the respective canons the subject of this reference are relatively minor. Much of what was said by the Tribunal in its reasons for the 2007 Determination is relevant to a consideration of these references in relation to the *National Register Canon 2007* and the *Special Tribunal Canon 2007*. However, the *Offences Canon Amendment Canon 2007* had no counterpart in the 2007 reference.

### **Legislative powers and the Constitution and the operation of Section 30**

15. In its reasons for the 2007 Determination the Tribunal, by way of background, made a number of observations concerning the legislative powers of the General Synod and of diocesan synods and concerning the operation of s 30 of the Constitution.<sup>2</sup> Those observations are relevant to this determination, and without repeating them we adopt them.
16. The Tribunal also spent some time considering the meaning of the participle "affecting" and the verb "affects" as used in s 30 of the Constitution.<sup>3</sup> We see no reason to depart from the views then expressed. The Tribunal considered that, when construed in the context of other provisions of the Constitution, a narrow rather than a wide

<sup>1</sup> See Opinion on Reference concerning various matters to do with the Conduct of Church Services, 7 May 1996.

<sup>2</sup> Reasons for the 2007 Determination, pages 8-11 inclusive.

<sup>3</sup> Reasons for the 2007 Determination, pages 11-14 inclusive.

interpretation of the word "affects" is warranted in the interpretation of s 30. The Tribunal concluded:<sup>4</sup>

*"In the context in which it is used in s 30 we consider that the verb "affect" means to influence directly the effect of; to have or produce an effect on; or to make a difference or to produce a change in. The participle "affecting" should be given a corresponding meaning."*

17. The observations to which we have referred are of general application to all three references in this case. Against that background it is necessary to consider each of the Canons in turn.

### **The National Register Canon 2007**

18. The *National Register Canon 2004*, which was the subject of the 2007 Determination, imposed an obligation upon all Diocesan Registrars and Directors of Professional Standards, including those of the Diocese of Sydney, to notify the General Secretary at certain specified intervals of all fresh matters and changes in details known to them or within their respective areas of responsibility which were required to be inserted in the National Register.<sup>5</sup>
19. In response to a submission of the Diocese of Sydney the Tribunal held that the requirement of an employee of a diocese to perform the rather mechanical task of reporting to the General Secretary what he or she knows, and not what he or she had to research or ascertain, did not "affect" the order and good government of the Church within the Diocese of Sydney.<sup>6</sup> It also held that the mere fact that a canon of General Synod will require a diocese to incur some additional expense had no effect on the order and good government of the Church within the Diocese.<sup>7</sup> For those reasons it held that the Canon did not affect the order and good government of the Church within the Diocese of Sydney.<sup>8</sup>
20. The *National Register Canon 2007* contains some additional provisions which did not appear in the 2004 Canon, but none of them have any bearing whatever on the order and good government of the Church in the Diocese Sydney. It does differ from the 2004 Canon by reason that there is now no obligation imposed on the Diocesan Registrar to supply any information to the General Secretary. The obligation is imposed on the Director of Professional Standards and is of the same nature, being information to which he or she has access in carrying out his or her responsibilities, but it also extends to what the Canon refers to as "Historical Information". That is defined in the Third Schedule as meaning "Information, other than Exempt Information, which occurred prior to the commencement of the Canon". Apart from that addition, the

<sup>4</sup> Reasons for the 2007 Determination, page 11.

<sup>5</sup> National Register Canon 2004, s 8 and the First Schedule.

<sup>6</sup> Reasons for the 2007 Determination, page 37.

<sup>7</sup> Ibid.

<sup>8</sup> Ibid.

type of information to be supplied is similar to that required in the 2004 Canon.

21. It can be inferred that the General Synod relied on the 2007 Determination in passing the *National Register Canon 2007* in repeating the requirement of the Director of Professional Standards to notify the General Secretary of the specified information. The significance of such reliance and the need for consistency in decisions of this Tribunal is referred to in more detail below.
22. There is no other obligation imposed upon an officer or employee of the Diocese of Sydney by the *National Register Canon 2007*. There is no other provision of the Canon which could be said to affect, in the sense described above, the order and good government of the Church in the Diocese of Sydney.
23. In the view of the Tribunal, there is no material difference between the obligation imposed upon the Director of Professional Standards to notify the General Secretary of certain information under the 2007 Canon and that which was imposed on the Registrar of the Diocese and the Director of Professional Standards under the 2004 Canon. Consistent with the view taken by the Tribunal on the 2007 reference, the obligation imposed upon the Director of Professional Standards under s 8 of the Canon does not affect the order and good government of the Church within the Diocese of Sydney. It does not in any direct way influence, alter or shape how the Diocese is ordered or governed.

### **The Special Tribunal Canon 2007**

24. In its reasons for the 2007 Determination the Tribunal made certain observations on the operation of ss 53, 56, 60 and 61A of the Constitution concerning the role and operation of the Special Tribunal.<sup>9</sup> Without repeating them we adopt them.
25. The SCDS, in its submission on the 2007 reference, identified eight provisions of the *Special Tribunal Canon 2004* which were said to affect the order and good government of the Church within the Diocese of Sydney. Only one of those grounds was upheld by the Tribunal, but that was sufficient for the Tribunal to rule that the 2004 Canon affected the order and good government of the Church within the Diocese of Sydney. The reason that the order and good government of the Church of the Diocese of Sydney was so affected was that the only body who could promote a charge against a Bishop in the Special Tribunal was the Episcopal Standards Commission. If the Episcopal Standards Commission refused to do so, whether there was justification for that refusal or not, the residents of a diocese had no redress. The Tribunal held that the ability or inability of persons within a diocese to promote a charge in the Tribunal against their diocesan bishop was a matter which affected how the diocese was ordered and governed. In that respect, the

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<sup>9</sup> Reasons for the 2007 Determination, pages 14-15.

Canon affected the order and good government of the Church within the Diocese.<sup>10</sup>

26. In its written submission on this reference the SCGS referred us to an extract from the Explanatory Memorandum of the Bill for a *Special Tribunal Canon 2007* from which it should be inferred that the General Synod relied upon the 2007 Determination in passing the *Special Tribunal Canon 2007*. That extract was as follows:

*"By its opinion concerning the Special Tribunal Canon 2004 dated 4 April 2007, the Appellate Tribunal effectively determined that the Special Tribunal Canon 2004 would only take effect in a diocese which adopted it. As the Canon is designed to give effect to the provisions of the Constitution setting up the Special Tribunal and providing for a system of Episcopal discipline for the whole of the Australian Church, there is now substantial uncertainty as to what provisions apply to diocesan bishops in most dioceses of the Australian Church.*

*As a result of the Appellate Tribunal's opinion, the Primate, pursuant to an earlier resolution of the Standing Committee, convened a meeting of interested persons to identify concerns about the Special Tribunal Canon, to identify possible amendments which might ensure that the Canon takes effect without the need for adoption by diocesan ordinances, and to consider what other long-term measures might need to be taken to make the Canon more effective.*

...

*At the meeting, there was a strongly expressed view that, if the Canon were to be amended to exclude the operation of provisos (a) and (c) of s 30 of the Constitution, there should not be included an "order and good government" clause (proviso (b)). This was because the subject matter of the Canon is necessary for effective implementation of an important part of the Constitution, and the ability of even one diocese to decline to adopt it would seriously prejudice that implementation.*

*In order to overcome the operation of provisos (a) and (c) of s 30 of the Constitution, and in order to ameliorate other concerns expressed at the meeting, a number of amendments of the Canon were identified which have been incorporated in a proposed new canon to be considered at the next session of the General Synod.*

*In order to avoid complications that would arise under s 30 of the Constitution if the present Canon were amended, it is proposed that the existing Canon should be repealed by one*

<sup>10</sup> Reasons for the 2007 Determination, pages 30-31.

*canon, and a separate canon should be passed embodying the revised provisions."*

27. The *Special Tribunal Canon 2007* differs from the *Special Tribunal Canon 2004* in the following respects:
  - (a) It no longer requires that a respondent:
    - (i) provide a detailed report to the Episcopal Standards Commission,
    - (ii) not mislead the Commission or its delegates, and
    - (iii) not unreasonably delay or obstruct the Commission in the exercise of its powers.
  - (b) The Episcopal Standards Commission no longer has exclusive power to promote a charge against a Bishop before the Special Tribunal. A charge may be brought by the Commission, another Bishop or, in respect of a Bishop holding office or a licence in a diocese, in accordance with the provisions of an ordinance of the synod of that diocese.<sup>11</sup>
  - (c) The synod of a diocese may by ordinance declare that a charge may not be brought by the Episcopal Standards Commission against the Bishop of that diocese.<sup>12</sup>
  - (d) Certain provisions relating to the suspension of the indigenous Bishops or a Bishop assistant to the Primate have been deleted, and the transitional provisions are, of necessity, also different. These provisions are not material to the present reference.
28. The other provisions of the *Special Tribunal Canon 2007* are in the same or substantially similar terms to the provisions of the *Special Tribunal Canon 2004*.
29. The present provisions for the promotion of a charge contained in s 43 of the 2007 Canon do not affect the order and good government of the Church within the Diocese of Sydney because the synod of that Diocese now has power, by ordinance, to prescribe provisions for the promotion of a charge against the Archbishop of Sydney and to exclude, if it wishes to do so, the power of the Episcopal Standards Commission to bring such a charge.
30. A charge may now also be brought by another Bishop. That was also the case under the *Special Tribunal Procedure Canon 1992* which was repealed by the *Special Tribunal Canon 2004*. The *Tribunals Procedure Canon 1962*, which operated until the 1992 Canon replaced it, allowed

<sup>11</sup> Special Tribunal Canon 2007, s 43(1).

<sup>12</sup> Ibid s 43(2).

any member of the Church to bring a charge against a Bishop.<sup>13</sup> It was never suggested, in 42 years of operation, that the power of a person outside the diocese of a Bishop to promote a charge against the Bishop affected the order and good government of any diocese. More significantly, however, the Tribunal in its reasons for the 2007 Determination did not find that the *Special Tribunal Canon 2004* affected the order and good government of the Diocese of Sydney because an external person or body could promote a charge against its Bishop. It did so because a person or body within the Diocese of Sydney could not promote such a charge.

31. The bringing of a charge in itself does not affect the order and good government of the Church in the diocese concerned. Consequential action which may be taken under the Constitution obviously does, but that is authorised not by the Canon but by the Constitution.
32. The Tribunal is not bound to follow its previous decisions, but it should depart from them only with great caution and in clear cases. As the SCGS pointed out in its submission, policy and practical reasons for such a rule of practice include that decisions will often have been made throughout the Church in reliance upon determinations of the Tribunal.<sup>14</sup> As can be seen, the General Synod appears to have relied upon the previous determination of this Tribunal in relation to the *Special Tribunal Canon 2004* in enacting the *Special Tribunal Canon 2007* in its present form. Not only does the Tribunal consider that there is nothing in the *Special Tribunal Canon 2007* which affects the order and good government of the Church in the Diocese of Sydney, but it also considers that there is no good reason to depart from its earlier determination in respect of other matters that were the subject of submissions in the 2007 Determination, or from its reasons in making the 2007 Determination.

### **The Offences Canon Amendment Canon 2007**

33. Section 2 of the *Offences Canon 1962*, prior to its amendment by the *Offences Canon Amendment Canon 2007* provided, in its opening words:

*"The Special Tribunal in addition to its powers under s 56(2) of the Constitution may hear and determine charges against any member of the House of Bishops made in respect of the following offences:"*

There followed a number of specified offences.

34. The *Offences Canon Amendment Canon 2007* substituted those opening words with the following:

<sup>13</sup> *Tribunals Procedure Canon 1962*, s 1.

<sup>14</sup> See 1986 Reference in the matter of The Ordination of Women to the Office of Deacon Canon 1985, Cox J President; 2005 Reference concerning The Ordination of Women as Bishops, Mason J at [66].

*"The Special Tribunal in addition to its powers under s 56(6) of the Constitution may hear and determine charges against any person referred to in s 56(6) of the Constitution made in respect of the following offences:"*

35. The Canon was not amended in any other way.
36. The reason for that amendment was set out in the Explanatory Memorandum of the Bill for the Canon:
  - "1. General Synod in 2001 passed a Canon to amend section 56 of the Constitution relating to the Special Tribunal. That amendment took effect in 2003. One of the amendments effected was to extend the jurisdiction of the Special Tribunal to include jurisdiction over any bishop assistant to the Primate in his capacity as Primate. The only bishop so affected is the Bishop to the Defence Forces.*
  - 2. Section 56(6) of the Constitution specifies the persons over whom the Special Tribunal has jurisdiction and that it has jurisdiction to hear and determine charges of breaches of faith, ritual, ceremonial or discipline and of such offences as may be specified by Canon.*
  - 3. Section 2 of the Offences Canon 1962 specifies such offences but refers to section 56(2) of the Constitution, being a subsection which was repealed and re-enacted in a different form by the 2001 Canon, and purports to limit the jurisdiction in respect of the offences listed to members of the House of Bishops only. This section should have been amended when section 56 of the Constitution was amended. This omission was an oversight.*
  - 4. The amendment proposed in section 2 of this Bill is to rectify that oversight and to make the necessary amendment to the Offences Canon consequential upon the amendment to section 56 of the Constitution."*
37. The *Offences Canon Amendment Canon 2007* neither confers nor expands jurisdiction on the Special Tribunal in respect of the Archbishop of Sydney or of any assistant bishop in the Diocese of Sydney who is also either a bishop assistant to the Primate or a member of the House of Bishops by virtue of s 17(8)(2)(i) of the Constitution. That jurisdiction is conferred by s 56(6) of the Constitution. The effect of the *Offences Canon Amendment Canon 2007* was merely to align the statement of jurisdiction of the Special Tribunal in the *Offences Canon* with the jurisdiction conferred by s 56(6) of the Constitution. The amendment did not affect in any way the position of the Diocese of Sydney as it was prior to its enactment.

38. It follows that, in the opinion of the Tribunal, the Canon does not affect the order and good government of the Church within the Diocese of Sydney. It does not in any direct way influence, alter or shape how the Diocese is ordered or governed.

### **Conclusion**

39. The formal answers of the Tribunal to the references made concerning the three canons in question are as follows:
1. In respect of the reference of the Primate dated 3 November 2009 concerning the *National Register Canon 2007*, the Tribunal determines pursuant to s 30(c)(iii) of the Constitution that the Canon does not affect the order and good government of the Church within the Diocese of Sydney.
  2. In respect of the reference of the Primate dated 3 November 2009 concerning the *Special Tribunal Canon 2007*, the Tribunal determines pursuant to s 30(c)(iii) of the Constitution that the Canon does not affect the order and good government of the Church within the Diocese of Sydney.
  3. In respect of the reference of the Primate dated 3 November 2009 concerning the *Offences Canon Amendment Canon 2007*, the Tribunal determines pursuant to s 30(c)(iii) of the Constitution that the Canon does not affect the order and good government of the Church within the Diocese of Sydney.

A handwritten signature in black ink, appearing to be 'P. J. Young', is written in a cursive style.