

SUBMISSION

TO: THE APPELLATE TRIBUNAL OF THE ANGLICAN CHURCH OF AUSTRALIA

ON BEHALF OF: THE DIOCESE OF NEWCASTLE

**IN THE MATTER OF: DIACONAL PRESIDENCY OF THE HOLY COMMUNION
LAY PRESIDENCY OF THE HOLY COMMUNION**

Summary:

- 1. This Diocese disagrees, in part, with the Opinion of the Appellate Tribunal issued on 7 March 1996**
- 2. This Diocese disagrees with interpretation of the *Ordination Service for Deacons Canon 1985* proposed by the Right Reverend Glenn Davies.**
- 3. This Diocese expresses the view that a Canon of General Synod is required to authorize diaconal or lay presidency of the Holy Communion and that such Canon has not been passed.**
- 4. The Diocese expresses the view that such Canon should put beyond doubt the law of this Church relating to the Act of Uniformity of 1662.**

Argument:

1. The Opinion of the Appellate Tribunal of 7 March 1996

The Appellate Tribunal in 1996 in a majority opinion (4:3) stated that it is consistent with the Constitution of the Anglican Church of Australia to permit or authorize make provision for the deacons to preside at, administer or celebrate the Holy Communion and lay persons to do the same.

The Diocese respectfully disagrees with this opinion. The Diocese affirms the distinct function and nature of each office and takes the view that maintaining this distinction is one of the responsibilities conferred by the Fundamental Declarations.

The Tribunal in a majority opinion (6:1) stated that it is inconsistent with the Constitution of the Anglican Church of Australia for a diocesan Synod, otherwise than under and in accordance with a Canon of General Synod, to permit, authorize or make provision for deacons and lay persons to preside at, administer or celebrate the Holy Communion. The Diocese agrees with this opinion.

2. The Principles of Statutory Interpretation

This section deals with the argument foreshadowed by Bishop Glenn Davies¹ that the provisions of the *Ordination Service for Deacons Canon 1985* has given to deacons the authority to preside at Holy Communion.

Bishop Davies argument relies upon the words of Mason J that '... the impact of an enacted law depends upon what it states, fairly construed, not upon what may or may not have been in the minds of those voting in the legislative body. A principled approach to the task of interpretation of legislative measures such as the Canon, the Bill and the amended Constitution requires their meaning to be based upon what they provide, fairly construed according to the principles of statutory interpretation'.²

Those words were used in the context of meeting submissions that, because it did not appear that the promoters of Canon 9 of 1989 changing the Constitutional definition of 'canonical fitness' had contemplated that this would open the bishopric to women, the effect of that alteration must be read so as to exclude its operation to such an effect.

Bishop Davies argument is to the effect that, whatever the promoters or, for that matter, General Synod, actually intended in enacting the *Ordination Service for Deacons Canon 1985*, the words used have the effect of permitting deacons to preside at Holy Communion.

With respect, this is to misinterpret the words of Mason J quoted above. His Honour's words should be understood as drawing a distinction between the subjective aims and intentions of individual promoters of legislation on the one hand and the intention of the legislature *as evidenced by the words it has used* and the context in which they have been used on the other. As His Honour said at a later point: 'The primary source of the presumed "intention" of a legislative body is the language it uses'.³

In the case of the Constitutional amendment to section 74 General Synod manifestly intended to do what it did: to substitute a definition of 'canonical fitness' and to express the definition in gender

neutral terms. That it was not within the contemplation of individual members of General Synod that the amendment would ever open the door to woman bishops is legally irrelevant. The amendment was in unambiguous terms and expressed an unambiguous legislative intent.

From the commencement of the amendment to section 74⁴ 'canonical fitness' was defined in gender neutral terms. This, however, of itself did not enable women to be appointed bishops. It was the *Law of the Church of England Clarification Canon 1992* which permitted the ordination of women as priests – and consequently to fulfil one of the section 74 requirements for canonical fitness – that has brought women into a position of eligibility for election as bishops.

The suggestion that that eligibility is an unintended consequence of the words used in the Canon amending section 74 does not bear analysis.

The suggestion that the words of the *Ordination Service for Deacons Canon 1985* have the effect contended for by Bishop Davies is to ignore context entirely. While the words used by a legislative body are the best guide to legislative intention context cannot be ignored.

*Of course it is true that the words used, even in their literal sense, are the primary, and ordinarily the most reliable, source of interpreting the meaning of any writing: be it a statute, a contract or anything else. But it is one of the surest indexes of a mature developed jurisprudence not to make a fortress out of the dictionary; but to remember that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning.*⁵

The Chief Justice of New South Wales describes this approach as 'literal in total context'. 'Whatever words are used it is always to be remembered that a statute has a context, it has a background and it reflects assumptions as to the circumstances in which it will operate.'⁶ The words of a statute do not exist in limbo.⁷

The context of the *Ordination Service for Deacons Ordinance 1985* is clear beyond argument; it was to prescribe a form of service for the ordination of deacons. To suggest that the form of words authorised in that service provides Canonical authority of General Synod for deacons to preside at Holy Communion is to impute to General Synod a legislative intention that neither the words used nor, more importantly, the context permits.

There is no analogy at all between what is said to have been an unintended outcome of the amendment of section 74 of the Constitution and what is now sought to be promoted as a similarly unintended consequence of the 1985 Canon. The amending Canon took effect according to a clearly expressed legislative intention. There were no unintended consequences.

The 1985 Canon was a canon for a particular purpose. No rule of statutory construction permits it to bear the meaning contended for by Bishop Davies.

3. A Canon of General Synod is required

Reluctantly, the Diocese recognizes that the force of the 1996 Appellate Tribunal Opinion is that this Church acting through General Synod could pass a Canon to allow Diaconal and Lay Presidency in a Diocese which adopted such Canon.

The action of presiding, administering or celebrating the Holy Communion is a matter of ritual and ceremonial and can only be varied by an alteration made by General Synod in accordance with section 71(1) of the Constitution.

We assert that each of the

- Lay Assistants at Holy Communion Canon 1973
- The Authorised Lay Ministry Canon 1992
- The Ordination Service for Deacons Canon 1985
- The Canon Concerning Services 1992
- The Prayer Book for Australia Canon 1995

were passed to attend to specific matters and cannot be construed as authorizing Diaconal and Lay Presidency.

We assert that the General Synod has not passed any Canon in accordance with section 71(1) of the Constitution to authorize Diaconal or Lay Presidency.

4. Clarifying the law of this Church relating to the Act of Uniformity 1662

The Diocese recognizes that the Appellate Tribunal in 1976 when considering the Canon for *An Australian Prayer Book 1977* gave the Opinion that the Act of Uniformity of 1662 does not now apply to this Church. The issue before the Tribunal at that time was the extent to which the Act of Uniformity 1662 provided a bar to the revised ordinal set out in the proposed *An Australian Prayer Book*. To the extent that the opinion with respect to the application of the Act of Uniformity 1662 as a whole was expressed more generally, it is submitted that the issue was not before the Tribunal.

We note that Justice Bleby, in his 1996 opinion stated, that answer “was in a somewhat different context, and it is not entirely clear whether the answer was directed to the Act as part of the civil law of the various states of Australia or in some other capacity, whether the Tribunal then had its


attention directed to s71(2) of the Constitution or whether the observations in *Wylde v Attorney General* were considered.”⁸

We note that the Standing Committee of the Synod of the Diocese of Sydney, exercising a lawful delegation from the Synod, adopted the Act of Uniformity (Section 10) Repeal Ordinance 2003. We assert that it is beyond the power of the Synod of the Diocese of Sydney to pass this Ordinance and that it is a matter which must be first resolved by General Synod.

The Diocese believes that it is arguable that when the Constitution of the Anglican Church of Australia took legal effect that, by virtue of Section 71(2) of the Constitution, section 10 of the Act of Uniformity 1662 still had legal effect in Australia in 1962 because it still had legal effect in the Church of England. The Act of Uniformity 1662, at section 10, prescribes that only a priest may administer the Holy Communion.

Should the Anglican Church of Australia wish to permit diaconal and lay presidency we suggest that the General Synod should put beyond doubt the application of section 10 of the Act of Uniformity of 1662 in this Church.

On behalf of the Diocese of Newcastle



Paul Rosser QC
Chancellor

References

- 1 'The Authorisation of a Deacon to Administer the Holy Communion' essay Bishop G Davies
- 2 Report of the Appellate Tribunal on Women Bishops pars 53-54
- 3 Ibid. par 61
- 4 5 June 1995
- 5 Cabell v Markham (1945) 148 F2d 737,739 cited by the Hon J J Spigelman Sir Ninian Stephen Lecture 23 March 1999
- 6 Ibid.
- 7 Morris v Beardmore [1981] AC 446,449
- 8 Report of the Appellate Tribunal on Diaconal and Lay Presidency page 39