



# Anglican Church of Australia

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## Appellate Tribunal

### PRIMATE'S REFERENCE UNDER SECTION 63 OF THE CONSTITUTION

#### Clergy Discipline Ordinance 2019 Amending Ordinance 2019 (Diocese of Newcastle)

#### Notification of Proceedings and Preliminary Directions

**On 31 October 2019 the Primate made the following reference to the Appellate Tribunal at the request of the Bishop of Newcastle.**

The Bishop of Newcastle has advised that he has not exercised his right to assent or not to assent to the **Clergy Discipline Ordinance 2019 Amending Ordinance 2019** passed at the session of Synod of the Diocese of Newcastle in October 2019.

1. Is any part of the **Clergy Discipline Ordinance 2019 Amendment Ordinance 2019** of the Diocese of Newcastle inconsistent with the Fundamental Declarations or the Ruling Principles of the Constitution of the Anglican Church of Australia?
2. Does the Synod of the Diocese of Newcastle have the authority under section 51 of the Constitution to pass the **Clergy Discipline Ordinance 2019 Amendment Ordinance 2019**?
3. Where an Ordinance is passed by a Synod of a Diocese in the Province of New South Wales and referred to the Appellate Tribunal prior to the Bishop giving her/his assent in accordance with Constitution 5(c) of the Schedule of the Anglican Church of Australia Constitution Act 1902, may the Bishop give assent to the Ordinance on receiving the opinion of the Appellate Tribunal or is the Synod required to pass the ordinance again?

**On 6 November 2019 the Primate made the following reference to the Appellate Tribunal at the request of 25 members of the General Synod.**

The questions raised by the 25 members of the General Synod were received prior to the meeting of the Synod of the Diocese of Newcastle in October and make reference to the *Clergy Discipline Ordinance of 1966 Amending Ordinance 2019*. Prior to considering the amendment ordinance, the synod adopted a new Clergy Discipline Ordinance 2019. The questions will be considered in relation to the final form of the ordinance adopted by the Synod of Newcastle.

## **GIVEN THAT**

- A. At the next ordinary session of the Synod of the Diocese of Newcastle in October 2019 there is a proposal to pass the **Clergy Discipline Ordinance of 1966 Amending Ordinance 2019** (the "Ordinance").
- B. Section 54(2) of the Constitution of the Anglican Church of Australia (the "Constitution") provides that a diocesan tribunal shall in respect of a person licensed by the bishop of the diocese, or any other person in holy orders resident in the diocese, have jurisdiction to hear and determine charges of breaches of faith, ritual, ceremonial or discipline and of such offences as may be specified by any canon, ordinance or rule.
- C. Section 54(2A) of the Constitution provides that a diocesan tribunal shall also have and shall always be deemed to have had jurisdiction to hear a charge relating to an offence of unchastity or an offence involving sexual misconduct in respect of a member of clergy if the act of the member of clergy which gave rise to the charge occurred in the diocese or the member of clergy was licensed by the bishop of the diocese or was resident in the diocese within two years before the charge was laid.
- D. Section 54(3) of the Constitution provides that a person appointed by the bishop of a diocese or any five adult communicant members of the Church resident in the diocese may promote a charge against a person licensed by the bishop of the diocese or against any other person in holy orders resident in the diocese in respect of a breach of faith, ritual or ceremonial either before the diocesan tribunal or before the provincial tribunal in its original jurisdiction. Provided that if a charge be preferred against an incumbent of a parish with reference to an offence alleged to have been committed within that parish the aforesaid communicants shall be bona fide parishioners of that parish.
- E. The further proviso under section 54(3) of the Constitution requires that before any charge relating to faith ritual or ceremonial be heard by the tribunal it shall be referred to a board of enquiry appointed by ordinance of the diocesan synod and may proceed to a hearing if the said board allows it as a charge proper to be heard.

**THE FOLLOWING QUESTIONS** arising under the Constitution are referred to the Appellate Tribunal.

- 1. If the Ordinance comes into effect, will the amendment made by clause 3 of the Ordinance prevent the Diocesan Tribunal of the Diocese of Newcastle (the "Diocesan Tribunal") from hearing and determining under section 54(2) of the Constitution a charge of breach of faith or discipline in respect of a person licensed by the Bishop of the Diocese of Newcastle (the "Bishop"), or any other person in holy orders resident in the Diocese of Newcastle (the "Diocese"), where the act giving rise to the charge relates to such a person marrying or being married to another person of the same sex?
- 2. If the Ordinance comes into effect, will the amendment made by clause 3 of the Ordinance prevent the Diocesan Tribunal from hearing a charge under section 54(2A) of the Constitution relating to an offence of unchastity or an offence involving sexual misconduct against a member of clergy where the act of the member of clergy which gave rise to the charge relates to the member of clergy marrying or being married to a person of the same sex, in circumstances where the act occurred in the Diocese or the member of clergy was licensed by the Bishop or was resident in the Diocese within two years before the charge was laid?

3. If the Ordinance comes into effect, will the amendment made by clause 3 of the Ordinance prevent the Bishop or any five adult communicant members of this Church resident within the Diocese promoting a charge to the Diocesan Tribunal under section 54(3) of the Constitution against a person licensed by the Bishop or against any other person in holy orders resident in the Diocese alleging a breach of faith, ritual or ceremonial by such a person because that person has participated in a service in which they have pronounced the blessing of a marriage solemnised in accordance with the Marriage Act 1961 in which the persons being married are of the same sex (assuming the first proviso in section 54(3) has been fulfilled)?
4. If the Ordinance comes into effect, will the amendment made by clause 3 of the Ordinance prevent the Bishop or any five adult communicant members of this Church resident within the Diocese promoting a charge to the Provincial Tribunal in its original jurisdiction under section 54(3) of the Constitution against a person licensed by the Bishop or against any other person in holy orders resident in the Diocese alleging a breach of faith, ritual or ceremonial by such a person because that person has participated in a service in which they have pronounced the blessing of a marriage solemnised in accordance with the Marriage Act 1961 in which the persons being married are of the same sex (and assuming the first proviso in section 54(3) has been fulfilled)?
5. If the Ordinance comes into effect, will the amendment made by clause 3 of the Ordinance prevent a board of enquiry, appointed by ordinance of the Synod of the Diocese and in exercise of its function under the second proviso in section 54(3) of the Constitution, from allowing a charge relating to a breach of faith, ritual or ceremonial arising from an act mentioned in 1, 2, 3 or 4 above proceeding to be heard by the Diocesan Tribunal or the Provincial Tribunal in its original jurisdiction as a charge proper to be heard?

The Tribunal now gives notice that both references will be considered by the Tribunal concurrently.

Pursuant to the *Appellate Tribunal Rules 1988*, the Tribunal gives notice that any diocese, synod, person, class of persons or association claiming to be interested in the questions before the Tribunal should notify that interest and apply for leave to appear or to be represented at any hearing of the matter.

Notices must be given to The Registrar of the Tribunal at the address set out below on or before **Wednesday 18 December 2019** and supply an address for service, an email address for communication and the names and contact details of an agent for communication.

Documentation relevant to the questions before the Tribunal can be accessed at the website of the General Synod of the Anglican Church of Australia's on the page *Appellate Tribunal Current Matters*.

<https://anglican.org.au/governance/tribunals/appellate-tribunal-current-matters/>

Documentation supporting this notification includes:

- Appellate Tribunal Rules 1988
- Clergy Discipline Ordinance 2019 (Newcastle)
- Clergy Discipline Ordinance 2019 Amending Ordinance 2019 (Newcastle)

The Tribunal hereby issues the following directions:

1. Any diocese, synod, person, class of persons or association that wishes to participate in either Reference and that has filed the said notification of interest is to file primary submissions on or before **Monday 6 January 2020** that include proposed answers to the questions referred.
2. Any diocese etc that has filed primary submissions is permitted to file further submissions provided that they are responsive to the submissions of others such further submissions to be filed on or before **Friday 14 February 2020**.
3. Submissions will be posted by the Registrar on the General Synod website page for *Appellate Tribunal Current Matters*.

To enable all parties to file any further, responsive submissions on or before 14 February 2020, any primary submissions that are filed after 6 January 2020 will not be posted on the website or considered by the Tribunal unless a member of the Tribunal determines that it is appropriate to do so.

For ease of reference, all submissions referable to either Reference will be posted by the Registrar on the portion of the General Synod website page for Appellate Tribunal Current Matters that relates to the Reference of 31 October 2019.

The Tribunal will determine at a later date whether to convene a Preliminary Conference and/or to hold a hearing as distinct from determining the questions on the papers. Intending participants should indicate in their submissions whether they wish to seek leave to appear and/or be represented at any hearing and state reasons in support.


The scope of the Reference is confined by the Constitution and the Questions referred.

Notifications in accordance with these directions should be forwarded to the Registrar of the Appellate Tribunal at:

Email: [appellatetribunal@anglican.org.au](mailto:appellatetribunal@anglican.org.au)

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**Anne Hywood**  
**Registrar Appellate Tribunal**

7 November 2019