

IN THE APPELLATE TRIBUNAL

ANGLICAN CHURCH OF AUSTRALIA

IN THE MATTER OF questions referred by the Primate under section 63(1) of the Constitution

AND IN THE MATTER OF the *Blessing of Persons Married According to the Marriage Act 1961 Regulations 2019* of the Synod of Wangaratta

PRIMARY SUBMISSIONS BY SYNOD OF DIOCESE OF WANGARATTA

Introduction

1. These submissions set out the position of the Synod of the Diocese of Wangaratta (**Wangaratta**) with regard to the questions posed by the Primate regarding the *Blessing of Persons Married According to the Marriage Act 1961 Regulations 2019* (**Regulations**) in the reference dated made on 5 September 2019.
2. Wangaratta reserves the right to add to these submissions following receipt of submissions from other interested parties, including at any oral hearing set down by the Tribunal.
3. While these submissions anticipate some of the matters raised by the Primate's subsequent reference made 14 October 2019, Wangaratta will make further submissions directed to that subsequent reference in accordance with the timetable set by the Tribunal in its directions dated 7 November 2019.

Summary of these submissions

4. Question 1 does not raise a matter under the Constitution and should not be answered. In the alternative, if answered, it should be answered "yes".
5. Question 2 can be understood as asking one of two quite distinct but related questions:
 - 5.1. Whether the *Canon Concerning Services* provided a source of legislative power for the making of the Regulations; or
 - 5.2. Whether the form of blessing specified for use by the Regulations can be said to be consistent with the discretion given to ministers and the Bishop by

section 5 of the *Canon Concerning Services*, and more specifically, whether the form of blessing is “reverent, edifying, and not contrary to doctrine”.

6. In circumstances where it is not clear which meaning was intended by the Primate in proposing question 2, these submissions address both the legislative competence of Wangaratta under the *Canon Concerning Services* and the compatibility of the Regulation and its schedule with the doctrine (as that term is defined for the purposes of the *Canon Concerning Services*). On either construction of the question, question 2 should be answered “Yes” because -
 - 6.1. The *Canon Concerning Services* contemplates regulations being made by a Synod in circumstances where there are no authorised forms for a particular occasion. There being no authorised form for the occasion of persons in a civil marriage who seek a blessing, it was open to Wangaratta to legislate on the question.
 - 6.2. The Church’s teaching on marriage as reflected in the BCP marriage service is not doctrine because it is not teaching on a question of faith but instead teaching on a question of (variously) ceremonial, ritual and discipline. No question of inconsistency with doctrine thus arises. In the alternative, to the extent that the Church’s teaching on marriage is properly characterised as doctrine, it is necessarily teaching confined to what constitutes a Christian marriage and does not extend to the question of the Church extending a blessing to persons in relationships that are recognised by the civil law but which do not have the status of Christian marriage.
7. Strictly, question 2 does not raise a matter under the Constitution either. However, Wangaratta invites the Tribunal to deal with question 2 as a matter arising under the Constitution on the basis that the question raises the proper definition of doctrine in the Constitution and by necessary extension requires consideration of the meaning of faith for the purposes of the Constitution. It makes that invitation with the aim of enabling the Tribunal to deal with the substance of the referral rather than dismissing the entirety of the referral on the basis of the way the questions have been framed. In making that invitation Wangaratta anticipate some of the matters likely to be raised in the Primate’s subsequent reference dated 14 October 2019.

The Regulations

8. The questions posed by the Primate must be considered and answered by reference to the text of the Regulations and to the text of the form of service which the Regulations adopt.
9. The Regulations -

- 9.1. specify the form of service to be used if a minister is asked, and wishes, to conduct a service of blessing of persons already married under the *Marriage Act*;
 - 9.2. provide for freedom of conscience for those ministers who do not wish to conduct such a service; and
 - 9.3. require records to be kept of the number of such services.
10. The form of service authorised for use under the Regulations -
- 10.1. is not a marriage service;
 - 10.2. is confined for use where the persons involved are not already married in a Christian service;
 - 10.3. does not purport to give the civil marriage that has previously occurred the status of Christian marriage;
 - 10.4. is a service blessing the persons in the civil marriage; and
 - 10.5. does not specify the sex of the persons who have been married.

The Appellate Tribunal's jurisdiction

11. The Appellate Tribunal has jurisdiction where a matter arises under the Constitution (section 63) or where an Act or Proposal of the General Synod is referred (section 29).
12. The Regulations are not an Act or a proposed Act of the General Synod and so the section 29 jurisdiction does not arise. They are made under a Canon of the General Synod but that Canon itself is not sought to be impugned by the questions.
13. The present referral seeks to enliven the Appellate Tribunal's jurisdiction to consider under section 63(1) of the Constitution. Such jurisdiction will only exist if the Regulations themselves give rise to a question under the Constitution.
14. Section 63 has been given a beneficent construction in past decisions of the Tribunal:

The purpose of s 63 is to enable the Primate... to require the Appellate Tribunal to give an advisory opinion with respect to a possible constitutional issue – a question arising “under this Constitution” either in the narrow sense of a question arising pursuant to the Constitution (for example, in virtue of some right granted by the Constitution) or in the broader sense of a question arising with respect to the Constitution or its interpretation....IN

short, it gives the Primate...the power to obtain an advisory opinion on a constitutional question.¹

15. However, a question does not necessarily arise under the Constitution merely because a person or body of persons wishes to know whether something is or is not "consistent with" the Constitution. Nor is it appropriate to seek to use the Tribunal as a sounding board for matters of theological contention between different traditions and emphases within the Anglican Church of Australia.²
16. In references under section 63 the Appellate Tribunal only decides theological issues for the purposes of, or in the course of determining legal questions arising under the Constitution. It is not, and cannot as constituted be, a final court of appeal for the Church on theological issues³ and should act in accordance with the views of Handley QC (as he then was) in the *Report of the Appellate Tribunal Opinion on the Ordination of Women to the Office of Deacon Canon 1985*:

Once it becomes clear that there are powerful and respectable arguments on both sides of a theological question, and that question has not been authoritatively settled for the Church, then in my opinion it is impossible for us [the Appellate Tribunal] to "finally" decide such issues. If both views are reasonably open the question ceases to be a legal one. The question is and remains a theological one to be decided elsewhere in the Church.... This Tribunal does not exist to correct highly debatable theological errors on the part of our Bishops, Assessors and General Synod.⁴
17. The task of the Tribunal is find an answer to the questions it is asked within the four corners of the Constitution after duly considering what that Constitution permits, what it requires and what it prohibits.⁵
18. The **content** of doctrine is a matter upon which the Tribunal may seek the opinion of the House of Bishops or the board of assessors⁶. However, whether or not a particular teaching of the Church has the constitutional status of doctrine is a legal question which only the Tribunal can answer.
19. Section 59(1) applies to this reference as a matter involving any question of ritual, ceremonial and discipline.

¹ *Report of the Appellate Tribunal Opinion on the Ordination of Women to the Office of Deacon Canon 1985* 4 March 1987: reasons of the President at page 11

² *Appellate Tribunal Opinion concerning certain matters to do with the conduct of church services* 7 May 1996, at page 7.

³ *Opinion of the Appellate Tribunal on two references in 1990 relating to the Ordination of Women* reasons of Handley J at pages 2 and 4

⁴ At page 113

⁵ *Report of the Appellate Tribunal Opinion on the Ordination of Women to the Office of Deacon Canon 1985* 4 March 1987: reasons of the Vice President at page 78

⁶ Section 58 of the Constitution

20. The Tribunal is not bound to follow its previous decisions but it should be slow to depart from them.⁷

Question 1 does not raise a matter arising under the Constitution

21. Question 1 does not ask a constitutional question. The Regulations are not an Act or Proposal to which the procedure in section 29 applies. They are an exercise of legislative power by Wangaratta under the provisions of the *Canon Concerning Services*. Whether they are a valid and proper exercise of that power depends on the terms of the Canon, which requires that any form of service used for an occasion not otherwise provided for must be reverent, edifying and not contrary to or a departure from the doctrine of the Church.
22. The question does not call for the interpretation of any provision of the Constitution. It should not be answered. To the extent that the definition of doctrine is raised by the Regulations, question 2 includes that issue and it can be considered in the context of the *Canon Concerning Services*.
23. Question 1 also poses a test (of consistency with the Fundamental Declarations and Ruling Principles) that is too high. A diocese is empowered by its own Constitution, and subject only to the limitations of the Constitution, to make regulations with respect to order and good government of the Church within the diocese.⁸ Whether a particular ordinance is in fact conducive to the order and good government of a diocese is matter solely for the judgement of the relevant Synod.⁹ If a question were to be posed by reference to the Fundamental Declarations and Ruling Principles it ought be posed by reference to whether any part of the Regulations are *inconsistent* with those Declarations and Principles.
24. For the avoidance of doubt, there is nothing in the Regulations that is inconsistent with the Fundamental Principles or the Ruling Principles. For the reasons set out in response to question 2 below, the Regulations -
- 24.1. do not contain anything that is inconsistent with sections 1 to 3 of the Constitution;

⁷ *Report of the Appellate Tribunal: Reference on Women Bishops* 26 September 2007 reasons of Mason J at [66]

⁸ See section 51 of the Constitution and the reasons of the President (at page 20) Deputy President in *Report and Opinion of the Appellate Tribunal on Two References in 1990 relating to the ordination of women* 28 November 1991

⁹ *Opinion of the Appellate Tribunal on two references in 1990 relating to the ordination of women* 28 November 1991, reasons of the President at page 7

24.2. do not deal with any principle of doctrine or worship such that they might contravene the Ruling Principles; and

24.3. are accordingly not contrary to or a departure from the doctrine of the Church.

Question 2 – the source of power

25. If question 2 is directed to whether Wangaratta had power under the *Canon Concerning Services* to pass the Regulations, question 2 also fails to identify a matter arising under the Constitution.

26. However, for the avoidance of doubt, Wangaratta plainly did have that power. The power exercised by the Wangaratta Synod to make the Regulation was derived from the *Canon Concerning Services*:

27. The Regulations do not purport to make an alteration to ritual or ceremonial and accordingly they do not transgress section 71(2) of the Constitution. They are a valid exercise of Wangaratta's power to make ordinances for the order and good government of the diocese and to make regulations as contemplated by section 5(2) of the *Canon Concerning Services*.

The meaning of 'doctrine'

28. If question 2 is directed to whether the substance of the Regulations comply with the requirements of the *Canon Concerning Services* then this calls for consideration of the meaning of doctrine as defined in the Constitution.

29. Section 74(1) of the Constitution defines **doctrine** as meaning "the teaching of this Church on any question of faith".¹⁰ Whilst other subjects of the Church's teaching will include questions of ritual, worship, ceremonial and discipline, none of those teachings are **doctrine** for the purposes of the Constitution.

30. As the definition of doctrine in the Constitution applies to Canons made by General Synod¹¹, it follows that only teaching on questions of faith will be doctrine for the purposes of section 5(3) of the *Canon Concerning Services*.

31. This definition of doctrine makes it necessary to consider the definition of faith in section 74(1) of the Constitution:

¹⁰ Section 74(1) says "unless the context or subject matter otherwise indicates" and indeed the context and subject matter of section 4 suggest that the initial references to doctrine in that section should not be understood as being references to the Anglican Church's teaching on questions of faith but to the statements it has inherited from the Church of England. See the reasons of Tadjell JA and of Young J (as he then was) in *Report of the Appellate Tribunal Opinion on the Ordination of Women to the Office of Deacon Canon 1985* 4 March 1987

¹¹ *Interpretation Canon 1995*, section 4

Faith includes the obligation to hold the faith.

32. As “breach of faith” is a ground on which a charge may be brought against a bishop or any other person on holy orders¹², the term must be capable of a clear definition for constitutional purposes. Section 74(4) provides that references in the Constitution (though not in Canons) to faith “shall extend to doctrine”. This appears to ensure that charges of breach of faith can include breaches of doctrine, but this circular definition is of no assistance in divining the precise meaning of **faith** for the purposes of the definition of **doctrine**.
33. The learned author of *Canon Law in the Anglican Communion*, having noted the exceptional situation of Australia in having any sort of formal definition of the term doctrine, notes that:
- Doctrine... may be understood in a general sense as that body of faith or teaching which is received and believed by those comprising a religious community. The legal treatment of discrete subjects associated with belief suggests that doctrinal law in Anglican churches has four basic functions: to ensure the public presentation of the faith; to define and to protect the faith; to empower the church to develop and reformulate the faith; and to enable a degree of doctrinal discipline.¹³
34. Faith and doctrine are thus related and can be understood to exist in a hierarchical relationship where faith is higher than doctrine, because the subject and purpose of doctrine is faith.
35. In construing terms used in the Constitution, it is proper for the Tribunal to have regard to the history of the Church and, in particular, to earlier drafts of the Constitution.¹⁴
36. The history of the development of what became the Constitution includes the “Red Book” controversy in which proceedings were taken in the civil courts in NSW in the 1940s to restrain the use of a service booklet which had been authorised by the Bishop of Bathurst and which included prayers, occasional offices and a service for the Holy Eucharist which differed from the forms in the BCP. It was argued by those bringing the proceeding that the changes were not permitted as a matter of canon and civil law. The ultimate outcome of the case in the High Court in 1948¹⁵ was that

¹² See sections 54, 55 and 56 of the Constitution

¹³ Norman Doe *Canon Law in the Anglican Communion*, Clarendon Press Oxford, at page 187-188

¹⁴ *Report and Opinion of the Tribunal on the “Ordination of Women to the Office of Priest Act 1988” of the Synod of the Diocese of Melbourne* 2 November 1989, at page 7

¹⁵ *Wylde v Attorney-General (NSW)* (1948) 78 CLR 224

use of the service booklet was forbidden¹⁶ but considerable concern was expressed within the Church regarding the implications of a bishop having no authority in their own diocese to authorise or permit departures from the BCP, especially since the evidence was that such departures were common both in the United Kingdom and in Australian dioceses.¹⁷

37. A review of the history of the Constitutional Committee's drafts of what became the Constitution reveals that, whilst every draft from 1926 to 1946 had included the BCP and the 39 Articles in Chapter I, the 1951 draft (that is, the draft prepared and circulated in the years following the conclusion of the Red Book case) moved those references to Chapter II.
38. A review of debates at the subsequent general synod in 1955 and in the subsequent diocesan synods confirm that it was understood that there were many areas of dispute amongst and within dioceses and that the Constitution represented an attempt to create a national body that could accommodate those disputes since they could not possibly be resolved. Part of the compromise made on all sides was a compromise on the status of the BCP and 39 Articles in the Constitution.¹⁸
39. As the Appellate Tribunal noted in 2010:

The Anglican Church is so structured that despite wide ranging views on a number of matters, all its members should be able to worship together in accordance with the rules of the church.¹⁹
40. In other words, the Constitution was crafted in the context of deep divisions within the Church on a range of theological and liturgical matters, including as to the very nature of Anglicanism. It was designed to accommodate those divisions save on matters essential to the nature and character of the Anglican Church as part of the One Holy Catholic and Apostolic Church. This history and context informs what is meant by "faith" and by extension what is meant by "doctrine" for constitutional purposes.
41. In considering the meaning of faith and doctrine it is also relevant to note that section 54 of the Constitution provides for charges to be brought in respect of (relevantly)

¹⁶ The ruling (an evenly divided Court in which the Chief Justice therefore had a casting vote) was on the basis of the use of the book being a breach of the trusts on which Church property was held. The reasoning of the minority, particularly Dixon J as he then was, is likely to be more persuasive now: see the reasons of the President in *In the matter of two references to the Appellate Tribunal in 1990 relating to the ordination of women* 28 November 1991 at page 5

¹⁷ See the review of the available material in Chapter 5 John Davis's book *Australian Anglicans and their Constitution* (1993) Acorn Press (**Davis**)

¹⁸ See discussion in *Report of the Appellate Tribunal Opinion on the Ordination of Women to the Office of Deacon Canon 1985* 4 March 1987: reasons of the Archbishop of Adelaide at page 50

¹⁹ *Opinion of the Appellate Tribunal on the reference on the Legality of the Administration of Holy Communion by Deacons or Laypersons* 10 August 2010 at [21]

breach of faith against clergy or bishops. Given the history of the Constitution and the wide range of views held within the Church, it cannot have been the intention of those adopting the Constitution that matters in respect of which there were long-held divergences of view could form the basis of charges brought by holders of one view against the holders of another view. This had been the precise context of the Red Book case. It is much more consistent with the history and context of the Constitution that faith (and therefore doctrine) had a meaning confined to matters contained in the Fundamental Declarations from which no departure or divergence was permitted. For instance, belief in the Holy Trinity, the continued administration of the sacraments, the maintenance of the three orders of ministry and the Old and New Testaments containing all things necessary for salvation.

42. The Appellate Tribunal has previously considered the question of the scope of the term 'doctrine' in the context of its series of opinions between 1980 and 1987 all of which concluded by majority that there was no doctrine preventing the ordination of women. Handley QC (as he then was) said:

While questions of doctrine, in the ordinary sense of the word, were central to the issues debated before us, doctrine is defined in Section 74(1) of the Constitution as meaning the teaching of this Church on any question of faith. The definition of faith in Section 74(1) is not at all helpful but the sense in which the word is used in the Constitution appears from Section 1. This refers to the Christian faith as professed by the Church of Christ from primitive times and in particular as set forth in the creeds.

Notwithstanding the importance of the issues before us, the strongly held views on all sides, and the fundamental nature of the theological and biblical arguments which have been raised, in my opinion the questions involved are not part of the Christian faith professed by the Church, they are not dealt with in the Creeds, and do not directly involve matters necessary for salvation. This question before us therefore does not involve any principle of "doctrine" as that expression is used in the Constitution.²⁰

43. In the same decision, Young J said -

..[I]t is necessary to digress and consider the definition of "doctrine" in s74(1) of the Constitution. The word is defined as meaning "The teaching of this Church on any question of faith". "Faith" is then defined as including "the obligation to hold the faith". The word is used in contradistinction to "discipline" which is said to include "the rules of this Church and the rules of good conduct".²¹ The definitions are not completely in point because "this Church" means "the autocephalous Anglican Church of Australia" whereas in section 4 the doctrine of the Church is the doctrine of the Church of England in England as at 1955. Nevertheless, s 74 seems to me to make a

²⁰ *Report of the Appellate Tribunal Opinion on the Ordination of Women to the Office of Deacon Canon 1985* 4 March 1987: reasons of Handley QC at page 115-116

²¹ Note that the definition of discipline has since been altered by constitutional amendment and is now contained in section 74(9) but the distinction between doctrine and discipline still exists

very definition division between the rules of order and conduct on the one hand, and the teaching of the Church on matters of faith on the other.²²

44. The history of the Constitution supports this conclusion previously reached by the Appellate Tribunal that references to **faith** in the Constitution are to be understood as references as to those matters about which there was and is no dispute. That is, the matters contained in the Fundamental Declarations. Chapter I contains the fundamental truths of the Apostolic Faith while Chapter II, including section 4, represents the particular Anglican development of those truths.²³
45. The meaning of the phrase “principle of doctrine or worship” was usefully summarised in an extract from a report from the Bishops to the Appellate Tribunal in the *Ordination of Women to the Office of Deacon* reference in 1985²⁴:
- The first thing to be said is that a ‘principle of doctrine or worship’ is to be distinguished from a moral or behavioural principle or rule of conduct or discipline. A moral behavioural principle is a statement of universal hypothetical form such as: ‘Whenever you are in a situation of kind X you should behave in way Y’. A principle of doctrine or worship is a fundamental axiom of faith (expressed propositionally or doxologically) which may form the basis of a deductive argument whereby further doctrinal or doxological statements may be articulated. It is precisely such basic principles of doctrine or worship which govern the revision or alteration of forms of worship or behavioural rules of discipline.
46. In other words, while principles of doctrine may inform or underpin rules of conduct and discipline, those rules of conduct and discipline will not have the same status as the doctrine of faith from which they take their inspiration. This distinction between doctrine and discipline is “a familiar one in Anglican teaching.”²⁵
47. ‘Faith’ for the purposes of the definition of doctrine in the Constitution and in the *Canon Concerning Services* means the “Christian Faith as professed by the Church of Christ from primitive times” referred to in section 1 and as understood in the context of sections 2 and 3.²⁶ It means the matters contained in the Fundamental Declarations about which there is no dispute and to which there can, by virtue of

²² *Report of the Appellate Tribunal Opinion on the Ordination of Women to the Office of Deacon Canon 1985 4 March 1987*: reasons of Young J at page 108

²³ See for instance *Opinion of the Appellate Tribunal concerning diaconal and lay presidency 7 May 1996* (decision of Bleby J)

²⁴ At page 109 in the reasons of Young J

²⁵ *Report of the Appellate Tribunal Opinion on the Ordination of Women to the Office of Deacon Canon 1985 4 March 1987*: reasons of the President at page 33

²⁶ See the reasons of Tadgell JA in *Opinion of the Appellate Tribunal Concerning Diaconal and Lay Presidency 7 March 1996* and His Honour’s comments on the need to read sections 1, 2 and 3 together.

section 66 of the Constitution, be no change. The faith of the Church, about which it teaches, is the faith in sections 1, 2 and 3.

48. It may also be noted that this view of what constitutes faith and doctrine is also expressed in the BCP Catechism which sets out, together with the Creeds, the Lord's Prayer, and the Ten Commandments, the matters about which a child being brought to be confirmed should be instructed. The Catechism contains the doctrine which must be known before being received as a communicating member of the Church. It reflects the matters in the Fundamental Declarations. It says nothing of marriage.
49. Section 26 of the Constitution permits the General Synod to make statements about the faith of the Church but also provides for it to declare its views on matters affecting spiritual, moral or social welfare. The General Synod has seen fit to do so on many matters of public and moral controversy, including on the question of marriage and same sex relationships, and the views so expressed were doubtless grounded in the General Synod's understanding of what the faith of the Church is. But it does not follow that those statements are doctrine for the purposes of the Constitution or the *Canon Concerning Services* merely because they were faith-based.
50. The teaching of the Church on any topic will thus only be doctrine for the purposes of the *Canon Concerning Services* if it is teaching about the faith of the Church as contained in sections 1, 2 and 3 of the Constitution.
51. To the extent that the 39 Articles and the BCP contain teaching on questions of the faith of the Church, they contain doctrine.
 - 51.1. A substantial number of the Articles do indeed teach on matters of faith, while some are better characterised as relating to ceremonial or discipline: see for example Article 37 on the power of civil magistrates and Article 38 which is about godly living.
 - 51.2. The liturgies in the BCP include the Creeds and the Catechism which represent part of the Fundamental Declarations and which are doctrine. They also contain ritual and ceremonial, and, to the extent that they set limits on when and how certain rites may be used, they represent teaching on discipline.
52. Because the *Canon Concerning Services* limits the potential for the use of forms of service to forms that are not contrary to or a departure from the doctrine of the Church, question 2 (if construed as being directed to the substance of the Regulations rather than their form) requires the Tribunal to consider whether there is any doctrine

with which the Regulations might be inconsistent. What is the Church's teaching on marriage and on blessings, and is that teaching on a question of faith?

The Church's teaching on marriage

53. The Church's teaching on marriage is to be found in its forms of service for marriage, most particularly in the BCP, and in the three Canons of General Synod dealing with the question of matrimony. It can also be found in codes of conduct such as *Faithfulness in Service* which contain advice or directives about sex and intimacy within marriage. None of the 39 Articles deal expressly with marriage.
54. The BCP marriage service is expressly confined to marriage between a man and a woman. There is no authorised Anglican rite for any form of Christian marriage other than a marriage between a man and a woman. The General Synod, in exercising its powers under section 26 of the Constitution, has expressed the view that marriage is between a man and a woman.
55. There are 3 Canons of General Synod that relate to marriage.
 - 55.1. All three are confined to Christian marriage, that is to, marriages being solemnised using the rites and ceremonial of the Anglican church;
 - 55.2. All three deal with matters of discipline and ritual and do not contain any reference to faith. They relate to how and when the marriage rites of the church may be used, and to who may participate in those rites, including divorced persons.
56. Taken all together, and having regard to past statements of the Tribunal on the distinction between doctrine and other forms of Church teaching on matters of ritual, ceremonial and discipline, the Church's teaching on marriage does not have the status of doctrine as that term is defined in the Constitution. It is not referred to in the Fundamental Declarations. It is not the subject of any teaching in the 39 Articles. The BCP and the Canons of General Synod deal with marriage as a rite of the Church and as matter relating to ceremonial and discipline. Codes of Conduct such as *Faithfulness in Service* deal with marriage as part of guidance about godly living and conduct.
57. A argument might be made that the BCP marriage service does expressly prohibit relationships other than Christian marriage because of the words in the service" *so many as are coupled together otherwise than God's Word doth allow are not joined together by God; neither is their Matrimony lawful*". The argument is that those words represent a statement which excludes any form of relationship other than Christian marriage between a man and a woman as being a relationship capable of sanctioned by God.

58. This argument still requires consideration of whether any such prohibition, if it exists, represents the teaching of the Church on a *question of faith* rather than of ritual or ceremonial, or whether it merely reflects matters of tradition or secular law. It is important to consider the context in which the liturgies and formularies in the BCP were created. As was noted by Vice President Tadgell JA in the context of debate on whether women could be ordained to any of the orders of ministry :

The social and constitutional milieu in which the Book of Common Prayer was produced required that its compilers proceed upon the footing that women were ineligible for ordination. No-one doubts that they were ineligible both by the common law and by the canon law, for by neither the common law from its commencement nor the Constitution of England was a woman entitled to exercise any public function...What Lord Haldane in Viscountess Rhondda's Claim [1922] 2 AC 339, 387 called "the general disability which the law regarded as attaching to the exercise by women of public functions" cannot be supposed to have depended upon the canon law or any religious doctrine or religious principle, for it extended much beyond the Church in its application. Inasmuch as the common law exclusion of women overlapped the religious exclusion, I should be unwilling to ascribe to any position adopted or enshrined or embodied or laid down in the Ordinal the character of a principle of doctrine or worship unless there were other evidence to justify it being treated as such. ²⁷

59. Whether dealing (as this reference does not) with a form of service purporting to solemnise a marriage according to Christian rites, or whether (as here) with a form of blessing only, the Tribunal can adopt this reasoning with respect to the blessing of civil marriages, including same sex marriages: to the extent that the BCP marriage rite provides for only marriages between men and women, that can be seen as reflecting the reality of the common law position and attitudes extending well beyond the Church rather than being derived from any doctrine. At the time the BCP was prepared, there was no possibility of same sex marriages, and no "civil marriage" in the sense of ceremonies conducted other than by priests. Just as the historical absence of women as clergy does not represent a doctrinal principle that women cannot be ordained, so too the historical absence of civilly conducted marriages or forms of rite for same sex marriages does not arise from a point of doctrine but from past social attitudes and legal constraints unrelated to, if overlapping with, the rituals and discipline of the Church.
60. So too, the words "*so many as are coupled together otherwise than God's word doth allow are not joined together by God*" in the BCP marriage service must be seen in the context of their place in the service. That context is the section dealing whether there are any impediments at law to the marriage. The reference to "other than God's

²⁷ See *Report of the Appellate Tribunal Opinion on the Ordination of Women to the Office of Deacon Canon 1985* 4 March 1987: reasons of the Vice President at page 90

word doth allow” is a reference to circumstances in which marriage was prohibited by both civil and canon law – such as cases where one party was already married or where the parties stood in a prohibited relationship to each other.

61. Even if this teaching is construed as doctrine, it is still necessary to consider the implications of that doctrine for how the Church is to regard other forms of relationship, such as civil marriages. If the Church’s position on marriage is one of faith and not of ritual, ceremonial or discipline, then by necessary implication it is a position confined to Anglicans. It is teaching governing the practice of the central tenets of the Anglican faith. It cannot then purport to cover the field with regard to civil law or be a universal statement about the morality of other kinds of relationships.
62. The Appellate Tribunal has previously found that a canon providing for the marriage of divorced persons, regardless of the cause of the breakdown of the marriage, would not contravene either the Fundamental Declarations or the Ruling Principles.²⁸ This would indicate that the teaching of the Church on marriage as contained in the BCP, at least insofar as it relates to the principle of “to the exclusion of all others for life” is not the teaching of the Church on a question of faith and therefore not doctrine for the purposes of section 4 of the Constitution.
63. Accordingly the BCP marriage service does not speak to the question of whether persons in a civil marriage may be blessed by the Church. The marriage service does reflect the Church’s teaching on what constitutes a Christian marriage but, even if that teaching is **doctrine** for the purposes of section 4 (which the Tribunal should find it is not) it does not represent a binding statement of whether persons in other kinds of relationship can be blessed or otherwise regarded as worthy of God’s favour.

Scripture

64. It can be readily acknowledged that there is a body of opinion that would consider the blessing of same sex civil marriages contrary to Holy Scripture, and therefore contrary to the faith of the Church as reflected in section 2 of the Fundamental Declarations, because of the presence of certain Biblical verses which are interpreted by some scholars as prohibiting homosexual relationships. However, given the extent of learned debate amongst biblical scholars and theologians regarding the proper meaning and weight to be attached to those few phrases²⁹, and having regard to the need for questions of faith to be capable of clear definition because they can form the basis for charges in diocesan and Special Tribunals, the

²⁸ *Opinion of the Appellate Tribunal on the Marriage of Divorced Persons and admission of women to Holy Orders* 8 February 1980,

²⁹ A similar argument from certain texts was made in the context of the ordination of women and rejected in the light of biblical scholarship: see the reasons of the majority in *Opinion of the Appellate Tribunal on the Ordination of Women* August 1985.

Tribunal should be slow to reach a conclusion that those verses of themselves are sufficient to support a conclusion that the Fundamental Declarations prevent the creation of a service of blessing for persons who are married under the *Marriage Act*, including persons in a same sex civil marriage.

65. As the Appellate Tribunal has had occasion to remark in cases relating to the ordination of women, it is not always possible to discern from scriptural texts a single unified and consistent meaning.
- 65.1. Ancient texts are far from unambiguous, are sometimes no less than obscure, and are the subject of such widely divergent interpretation and explanation by exponents of the arts of hermeneutics and scriptural exegesis that the quotation back and forth of scriptural texts is of little assistance in the legal task which confronts the Tribunal.³⁰
- 65.2. The existence of different biblical commentaries on disputed passages indicates that there are many different views on parts of Scripture.³¹
- 65.3. While the interpretation of Scripture does not change with every whim and win, the Tribunal ought not ignore 150 years of biblical critical scholarship and its results, nor 300 years scientific investigation and discovery.³²
- 65.4. Differences of interpretation sometimes result from differences in detailed exegesis, sometimes from the application of differing hermeneutical principles. "While the Constitution binds the Church to holy scripture as the ultimate rule and standard of faith, and while the 39 Articles make important statements about the place of Holy Scripture in the Church, the Church has not bound itself to one particular set of principles in the interpretation of Scripture".³³
66. Such texts as exist on the topic of marriage, sexual relationships and same sex relationships are the subject of profound and continuing debates amongst scholars and form the basis for widely diverging views amongst Anglican clergy and laity. The Tribunal is not equipped to resolve that debate. Indeed, the very existence of that debate is itself evidence that questions of marriage and personal relationships are questions which are not questions about the faith as contained in the Fundamental

³⁰ *Report of the Appellate Tribunal Opinion on the Ordination of Women to the Office of Deacon Canon 1985 4 March 1987: reasons of the Vice President at page 80-81*

³¹ *Report of the Appellate Tribunal Opinion on the Ordination of Women to the Office of Deacon Canon 1985 4 March 1987: reasons of Mr Justice Young at page 98 where His Honour notes there are "as many different views on parts of Scripture as there are views about the meaning of section 92 of the Australian Constitution"*

³² *Report of the Appellate Tribunal Opinion on the Ordination of Women to the Office of Deacon Canon 1985 4 March 1987: reasons of the Bishop of Newcastle at page 69*

³³ *Report of the Appellate Tribunal Opinion on the Ordination of Women to the Office of Deacon Canon 1985 4 March 1987: reasons of the Archbishop of Adelaide at page 43*

Declarations. They are matters about which faithful Anglican people of good conscience can differ. They are not of the same order as matters relating to the faith of the Church as held from ancient times. Strong views may be held on either side of the debate without either side ceasing to uphold that Christian faith as it is reflected in the Creeds and in the 39 Articles and BCP. This is amply evidenced by the variety of arguments and views expressed in the Doctrine Commission's essays in *Marriage, Same Sex Marriage and the Anglican Church of Australia*, as well as in the contents of debates within and between dioceses and other church organisations.

67. Accordingly, any argument about the content of the Church's teaching which is based on disputed interpretations of Scripture cannot meet the definition of doctrine under the Constitution. Anglicans are able to hold divergent views on many matters and still be Anglicans. Individual consciences may regard the teachings of the Scripture as leading to differing conclusions on matters of personal behaviour and morality. The fact that those differing views are faith-informed and held with great sincerity cannot convert matters of ritual or discipline or moral or social welfare³⁴ into matters of doctrine.

Blessings

68. As set out in the attached essay from Revd Canon Professor Dorothy Lee, blessings are at the heart of the common life of Anglicans.
69. The Regulations adopt a form of service for blessing people who have been married in a civil ceremony. There is no doctrine contained in the 39 Articles that limit the circumstances in which a blessing may be given to a person. The prayers upon diverse occasions in the BCP and other authorised prayer books do not purport to cover the field such that blessings or prayers in other contexts are not permitted. Whilst not all Anglican traditions favour the use of blessings to the same extent, there are well established practices in many parts of the Church which bless people, pets, meetings, buildings and personal endeavours.
70. Accordingly, nothing in the doctrine of the Church prevents the offering of a blessing to persons who seek that blessing in the context of their having been party to a civil marriage.

Conclusion

71. The result of this analysis is that

71.1. The Church's teaching on marriage is not doctrine;

³⁴ Section 26 of the Constitution empowers the General Synod to declare its view on many matters including matters of spiritual, moral and social welfare. Resolutions from General Synod made in exercise of that power are not doctrine.

71.2. If it is, it is confined in its scope to what constitutes a Christian marriage, and not to whether people in other kinds of relationships are worthy of God's blessing;

71.3. In either case, the Regulations and the form of service they adopt are not contrary to or a departure from doctrine; and

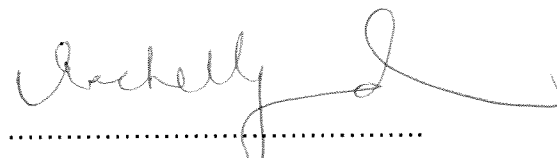
71.4. Accordingly, they are validly made under the *Canon Concerning Services*.

72. The questions should be answered as follows:

Question 1 – unnecessary to answer, but if answered, yes.

Question 2 – yes.

8 November 2019



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Advocate for the Diocese of Wangaratta

