27

Friday, 13 December 2019

Ms Anne Hywood
Registrar Appellate Tribunal
General Synod Office
Anglican Church of Australia
Suite 4, Level 5
189 Kent St,
Sydney NSW 2000

ANGLICAN
DIOCESE OF
TASMANIA

By email: appellatetribunal@anglican.org.au

Blessing of Persons Married according to the Marriage Act 1961 Regulations 2019 (Diocese of Wangaratta)

Dear Anne,

I am pleased to **attach** the primary submissions of the Diocesan Council of the Diocese of Tasmania with respect to the recent references of 5 September and 21 October 2019 by the Primate under section 63 of the Constitution.

I note that Rule 9(6) of the *Appellate Tribunal Rules 1988* requires that "Ten copies of the submission and accompanying documents (including witness statements) shall be filed."

Can you please confirm that in the circumstances where submissions are filed electronically that the Tribunal will not also require an additional ten hard copies. If such copies are required, we please request a suitable extension of time to file such copies.

Yours faithfully,

James Oakley
General Manager/Registrar

Encl

The Blessing of Persons Married According to the Marriage Act 1961 Regulations 2019 (Diocese of Wangaratta) ("Wangaratta Regulations")

References of 5 September and 21 October 2019 under Section 63 of the Constitution ("References")

Primary Submissions of the Diocesan Council of the Diocese of Tasmania ("Tasmania")

Summary

1. Tasmania submits that the Wangaratta Regulations are invalid for the following reasons:

   (a) The Synod of the Diocese of Wangaratta does not have power to make the Wangaratta Regulations either in its own right or under the *Canon Concerning Services 1992*; and

   (b) The Wangaratta Regulations are inconsistent with the doctrine of the Church, the Fundamental Declarations and the Ruling Principles and contrary to Section 5 of the Constitution.

2. Tasmania requests and reserves the right to make further submissions in accordance with the timetable established by the Appellate Tribunal and otherwise in accordance with the *Appellate Tribunal Rules 1988*.

Questions

3. Tasmania submits that the References should be answered as follows:

5 September	**Response**
Question 1:	The Regulations are inconsistent with the Fundamental Declarations and Ruling Principles.
Question 2:	The Regulations are not validly made.
21 October	**Response**
Question 1:	The form of service in Appendix A to the Regulations is not consistent with the doctrine of this Church, the Fundamental Declarations or the Ruling Principles.
Question 2:	The use of any other form of service to bless a civil marriage which involves a union other than between one man and one

woman would not be consistent with the doctrine of this Church, the Fundamental Declarations or the Ruling Principles.

Question 3: The Regulations are not validly made.

Reasoning

The Wangaratta Regulations purport to regulate spiritual affairs

4. The Wangaratta Regulations purport to regulate the provision of blessings for certain marriages under the *Marriage Act 1961* (Cth).

5. The granting of a blessing of such a marriage is a spiritual matter, as noted by the Reverend Canon Professor Dorothy Lee in her Address to the Synod of the Diocese of Wangaratta on 31 August 2019:

> *"Blessing is an important concept in the biblical world. To be blessed by God means to receive God's favour in protection of us and provision for us….*
>
> *The same notion of blessing is found in the New Testament but with a new dimension. Blessing is still about covenant, relationship and justice but now it is also eschatological, the promise of God's kingdom finally overturning the values of the world….*
>
> *The Anglican tradition, based on Scripture, takes blessing very seriously. Liturgy and worship represent the core of our life together, grounded in God's blessing of us, and all for whom we pray, along with our responsive blessing (praise) of God….*
>
> *The question we need to ask this: why should we not grant it as part of our spiritual and pastoral care of them, so that [gay and lesbian married couples] can be blessed and also be a blessing to others? If we can bless their children, their animals, and their homes, why can we not bless them?"* (pages 1 -2)

6. A conscientious objection to the granting of such a blessing is also a spiritual matter.

7. The Wangaratta Regulations provide for both the blessing of such marriages (section 4) and the conscientious objection of a minister to such a blessing (sections 5 and 6).

8. Accordingly, the Wangaratta Regulations purport to regulate spiritual affairs.

The Wangaratta Regulations are inconsistent with the authorised standards of faith and doctrine of the Church in Victoria

9. Tasmania submits that the "authorised standards of faith and doctrine of the Church in Victoria" are those in existence as at the original creation of the Diocese of Victoria (or

at the time of enactment of the 1854 Act), subject only to the coming into effect of the national Constitution in Victoria pursuant to the *Anglican Church of Australia Constitution Act 1960* (Vic).

10. This analysis is consistent with the Constitution of the Province of Victoria as provided for in the *Province of Victoria Constitution Act 1980* (**1980 Act**) which does not contain "authorised standards of faith and doctrine" and instead provides that:

> "This Constitution shall be always subject to the Constitution of the Church of England in Australia." (Section 19)

11. The blessing of same sex marriages is (at best) novel and wholly inconsistent with authorised standards of faith and doctrine of the Church in Victoria and the Fundamental Declarations and Ruling Principles set out in the Constitution.

The Synod of the Diocese of Wangaratta does not have power to regulate spiritual affairs or to legislate in a manner inconsistent with the authorised standards of faith and doctrine of the Church in Victoria

12. The powers of the Synod of the Diocese of Wangaratta are derived upon the formation for the Diocese of Wangaratta as recognised by the *Church of England Act 1903* (Vic) (**1903 Act**).

13. Relevantly, the 1903 Act provides as follows:

> "***2. First Church assemblies in Ballarat, Bendigo and Wangaratta to be deemed duly convened and constituted***
>
> *Notwithstanding anything contained in the said Act or in any Act amending the same, the first Assembly of the licensed clergy and the laity of the diocese of Ballarat convened by the Bishop thereof and held in the year One thousand eight hundred and seventy-five and of the dioceses of Bendigo and Wangaratta respectively convened by the Bishops thereof and held in the year One thousand nine hundred and two shall as from the date of the holding of the first Assembly as aforesaid in each such diocese be deemed to have been duly convened and to have been legally held and constituted, and every lay representative taking part in or voting at any such first Assembly shall be deemed to have been duly elected and qualified as a lay member of such Assembly."*

14. The reference to the "said Act" is a reference to the *Church of England Act 1854* (Vic) (**1854 Act**).

15. Accordingly, the powers of the Synod of the Diocese of Wangaratta are derived from, and constrained by, the powers originally granted to the Synod of Victoria under the 1854 Act.

16. The fact that the Diocese of Canberra-Goulburn (for example) has transferred certain areas in NSW to the Diocese of Wangaratta does not change the legislative powers of the Synod of the Diocese of Wangaratta.

17. The 1854 Act has been the subject of much commentary and analysis, including, relevantly, by the Appellate Tribunal in its *Determination dated 2 November 1989 in a reference made pursuant to Section 63 of the Constitution concerning the validity of the Ordination of Women to the Office of Priest Act 1988 of the Synod of the Diocese of Melbourne* (**1989 Determination**): "There is no doubt at all that the 1854 Act is a most significant piece of legislation in the history of the Australian Church."(page 8).

18. Section 5 of the 1854 Act provides that:

> *"no regulation act or resolution made or passed at any Assembly shall be valid which shall alter or be at variance with the authorised standards of faith and doctrine of the United Church of England and Ireland or shall alter the oaths declarations and subscriptions now by law or canon required to be taken made and subscribed by persons to be consecrated ordained instituted or licensed within the said Church."*

19. Tasmania submits that the reference to "the authorised standards of faith and doctrine of the United Church of England and Ireland" or the "oaths declarations and subscriptions... within the said Church" refer to such as apply within the Province of Victoria. Relevantly, terms such as standards of "faith" and "doctrine" are not limited to or constrained by the corresponding definitions or usage of such terms in the Constitution.

20. The 1989 Determination determines as follows:

> *"Plainly enough, however, the terms of the 1854 Act taken as a whole carry with them a series of subordinate legislative powers to pass regulations, Acts and resolutions respecting the regulation and management of the affairs of the Church within a diocese. Equally plainly, in our opinion, the powers conferred are not plenary in the sense that they entitle synods to legislate with respect to all affairs of the Church. We are obliged definitely to reject submissions to the contrary made on behalf of Melbourne and the Movement for the Ordination of Women....*

"First, section I of the Act was designed to remove any bar to the holding of synods, constituted by Bishop, clergy and representative laity, such as was thought to be imposed by the statutes of Henry VIII and Elizabeth. It is notable, however, that section I made the holding of a synod merely lawful, not mandatory. This circumstance in itself tends to deny any contemplation of a right to legislate at large upon the affairs of the Church within Victoria. The fact that the 1854 Act was facilitating and not mandatory as to the convening of synods is inconsistent with an intention or expectation that any exercise of the legislative powers which the Act conferred could produce any lack of uniformity with the wider Church upon essential matters of faith, doctrine and discipline.

Secondly, the whole history of the 1850's shows that, both in Victoria and in England, there was a positive intention not to depart from the "firm and unalterable attachment to the Doctrine, discipline and government of the United Church of England and Ireland"; and an equal desire to see those characteristics "maintained in the colony in all their integrity": Report of the Conference held in Melbourne on 24th June 1852; Border, op cit., 201.

Thirdly, the protracted legislative history and terms of the 1854 Act show that the prime purpose of the measure was to allow voluntary regulation and management by diocesan synodical government of the ecclesiastical matters which might expediently be dealt with by that means. The essential objects were to confer self-government on the diocese and to bind the members of the Church in their capacities as such, and in particular the Bishop and his successors. The scope of the government that was contemplated was necessarily local, municipal and internal to the extent that the diocese chose to adopt the means that the Act allowed. There was a plainly expressed desire, as appears from contemporary evidence, to maintain both the stability of the Church within Victoria and its integrity and communion with the Church abroad, in England and elsewhere. Consistently with this approach the Bill for the 1854 Act was promoted by Sir William Stawell in his private capacity, not as Attorney-General, not as a "religious" one, but as "merely a Bill to enable the Church to regulate its temporal affairs".

It would be a genuinely invidious task to attempt an exhaustive catalogue of the heads of legislative power that the 1854 Act conferred on diocesan synods. Fortunately, however, there is no present need to attempt that task. It is sufficient to say that in our opinion the Act is not directed towards conferring powers to legislate upon spiritual matters. In particular, we do not consider that section V is concerned to authorise legislation dealing with faith and doctrine." (pages 11 -13)

21. The 1989 Determination also held that Section 51 of the Constitution did not grant diocesan synods legislative power:

> *"The Tribunal has reached the view that s 51 should not be interpreted as a general grant of legislative power to diocesan synods. The limiting words with which the section concludes argue against that construction. Section 51 simply spells out one of the implications in s 5 with respect to the distribution of powers within the Church under what might be called a "federal" scheme. It also makes it plain that diocesan legislation must conform with such overriding constraints as the Fundamental Declarations. The Tribunal can understand the view that s 51 provides the authority for a diocesan synod to legislate under s 30, say, or s 67 - that is, to make the essential complementary diocesan legislative responses that the Constitution in certain respects requires; in other words, to do what is necessary to make the constitution work, particularly with respect to the role of general synod. However the preferable view is that these incidental local legislative powers are necessarily implied already in those few constitutional provisions that require such an express diocesan response.*
>
> *Accordingly there is no need to spell such a legislative grant out of s 51, and the embarrassment to the opposing interpretation that is provided by the final words of limitation in the section is thus avoided. At any rate, whatever the better view might be with respect to that relatively narrow question of essential complementary powers, s 51 is certainly not to be interpreted as a general authority for a diocesan synod to make ordinances for the order and good government of the Church within the diocese. The concluding words of the section are too strong for that. It follows that Melbourne can get no assistance in the present matter from s 51, and there is no relevant legislative grant in any other section of the Constitution."* (pages 28 - 29)

22. The 1989 Determination concluded that:

> *"For the reasons expressed we are of the opinion that the 1854 Act cannot support the Act that is the subject of this reference…."* (page 14)

and also that:

> *"Accordingly it follows that there is nothing in s 51 to empower the Synod of the Diocese of Melbourne to pass the subject Act."* (page 29)

23. Tasmania submits that the reasoning of the 1989 Determination is valid and should be followed in the current References.

24. Accordingly, Tasmania submits that the Synod of the Diocese of Wangaratta does not have power to legislate:

    (a) with respect to spiritual matters (generally); or

    (b) in any way contrary to Section 5 of the 1854 Act; namely to:

    > *"alter or be at variance with the authorised standards of faith and doctrine of the United Church of England and Ireland or shall alter the oaths declarations and subscriptions now by law or canon required to be taken made and subscribed by persons to be consecrated ordained instituted or licensed within the said Church."*

25. Further, as no Victorian diocese has the power to legislate with respect to spiritual matters, no such diocese may unilaterally modify the authorised standards of faith and doctrine of the Church in Victoria. Tasmania submits that no such changes may be effected in Victoria without a change to the national Constitution or, within the constraints of Section 5 of the Constitution, a Canon of General Synod.

26. As regards the subject matter of the Wangaratta Regulations, Tasmania submits that:

    (a) no changes (as are relevant for the References) have been made to the authorised standards of faith and doctrine of the Church in Victoria since either the creation of the Diocese of Victoria or since the enactment of the 1854 Act; and

    (b) the Wangaratta Regulations are contrary to such authorised standards of faith and doctrine.

27. It follows necessarily that the Wangaratta Regulations are an invalid exercise of the powers of the Synod of the Diocese of Wangaratta.

The Synod of the Diocese of Wangaratta does not have power to make the Wangaratta Regulations under the Canon Concerning Services 1992

28. The Wangaratta Regulations purport to be made "pursuant to Section 5(2) of the *Canon Concerning Services 1992.*"

29. Section 5(2) of that Canon (in effect in the Diocese of Wangaratta) provides as follows:

    > *"Subject to any regulation made from time to time by the Synod of a diocese, a minister of that diocese may on occasions for which no provision is made use forms of service considered suitable by the minister for those occasions."*

30. The phrase "Subject to any regulation made from time to time by the Synod of a diocese" does not empower any diocese to pass regulations. Instead, the phrase is a restriction on the power granted to a minister of a diocese: that is, the minister may use a form of service except to the extent prevented from doing so by Diocesan regulation to the contrary.

31. The Canon does not elsewhere grant any diocese the power to enact regulations.

32. It follows necessarily that the Wangaratta Regulations are not validly made under any purported power to make regulations under the Canon. Hence, the Wangaratta Regulations are invalid.

The Wangaratta Regulations are inconsistent with the doctrine of the Church, the Fundamental Declarations and the Ruling Principles and contrary to Section 5 of the Constitution

33. Tasmania submits that the Wangaratta Regulations are inconsistent with the doctrine of the Church, the Fundamental Declarations and the Ruling Principles and contrary to Section 5 of the Constitution.

34. In this regard, Tasmania has had the opportunity to review the draft submissions of Ridley College and the Synod of the Diocese of Sydney. Tasmania adopts and supports such submissions in respect of this question, on the basis that the final submissions are substantially in accordance with the sighted drafts.

Conclusion

35. Tasmania thanks the Appellate Tribunal for the opportunity to make these submissions and welcomes the opportunity to clarify any aspects if that would be of assistance.

Dated: 13 December 2019

Alex Milner
Church Advocate