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**IN THE APPELLATE TRIBUNAL
ANGLICAN CHURCH OF AUSTRALIA**

IN THE MATTER OF two references under section 63(1) of the Constitution concerning the *Clergy Discipline Ordinance 2019 Amendment Ordinance 2019* of the Diocese of Newcastle

SUBMISSIONS ON BEHALF OF THE DIOCESE OF NEWCASTLE

Summary of submissions

1. The two references before the Tribunal propose the following questions in relation to the *Clergy Discipline Ordinance 2019 Amendment Ordinance 2019* (**the Amending Ordinance**) that was passed by the Synod of the Diocese of Newcastle (**Synod**).
2. The questions posed in each reference are as follows:

Reference 1 – from the Primate at the request of the Bishop of Newcastle

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?*

Reference 2 – from the Primate at the request of 25 members of General Synod

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?*
3. These submissions address both references and should be taken as the primary submissions of the Diocese of Newcastle (**Newcastle**).
 4. Newcastle submits that the Appellate Tribunal should answer the questions posed by the two references as follows:

Reference 1.1	No
Reference 1.2	Yes
Reference 1.3	The Bishop can consider their assent once the Appellate Tribunal has delivered its opinion.
Reference 2.1	The Appellate Tribunal should decline to answer the question.

- Reference 2.2 The Appellate Tribunal should decline to answer the question.
 Reference 2.3 The Appellate Tribunal should decline to answer the question.
 Reference 2.3 The Appellate Tribunal should decline to answer the question.
 Reference 2.5 The Appellate Tribunal should decline to answer the question.

The jurisdiction of the Appellate Tribunal

5. 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).
6. The Amending Ordinance is not an Act or a proposed Act of the General Synod and so the section 29 jurisdiction does not arise. Rather, it is made in exercise of the Synod's legislative powers under its Constitution, as confirmed and retained by section 51 of the Constitution.
7. The present referrals seek to enliven the Appellate Tribunal's jurisdiction to consider a referral under section 63(1) of the Constitution. Such jurisdiction will only exist if the Amending Ordinance gives rise to a question under the Constitution.
8. Section 63 has been given a beneficent construction in past decisions of the Tribunal.¹ 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
9. 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

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

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

10. The task of the Tribunal is to 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
11. It is not the role of the Tribunal to express any position on the merits of any ordinance or canon whose validity is in question.⁶
12. In the present references the Tribunal is being asked for its opinion rather than for a determination. Section 59(1) applies to these references as matters involving any question of ritual, ceremonial and discipline.

The Amending Ordinance

13. The Amending Ordinance does not purport to make any alteration to the teaching of the Church on the question of marriage. It does not authorise any form of marriage service or authorise any member of the clergy to solemnise the marriage of two persons of the same sex.
14. Rather, the Amending Ordinance excludes certain actions by clergy from the operation of the *Clergy Discipline Ordinance* by -
 - 14.1. Limiting the power to refer, or the Diocesan Tribunal's power to hear, a charge arising out of certain actions taken by clergy relating to same sex marriages; and
 - 14.2. Excluding those actions from the scope of conduct capable of constituting an offence under that Ordinance.
15. Those actions are -
 - 15.1. participating in a service, for the purposes of pronouncing a blessing, of a marriage solemnised in accordance with the Marriage Act in which the persons being married are of the same sex;

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 *Reference on the Affiliated Churches Ordinance 2005 of the Diocese of Sydney* 26 November 2018

- 15.2. declining to participate in such a service; and
- 15.3. being married to a person of the same sex in a marriage solemnised in accordance with the *Marriage Act*.
16. As there is no Anglican rite for the marriage of two persons of the same sex, the Amending Ordinance does not purport to authorise clergy to solemnise or to enter into a same sex Christian marriage since no such marriage can be solemnised under the Solemnisation of Matrimony Canon or under the Marriage Act.
17. The Amending Ordinance deals with matters of clergy discipline within the diocese of Newcastle. It does not purport to alter the ritual or ceremonial of the Church, to alter any question of doctrine, or to affect the way in which any other diocese approaches the question of clergy participation in same sex civil marriages, whether as the pronouncer of a blessing or as one of the persons being married.

The powers of the Synod

18. 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.⁷ Whether a particular ordinance is in fact conducive to the order and good government of a Diocese is a matter solely for the judgement of the relevant Synod.⁸
19. A Diocesan Synod in NSW has undoubted power to enact ordinances for the order and good government of the Church within that Diocese.⁹ That power is subject to the Constitution: section 51. It is also subject to territorial limitations.¹⁰
20. Matters relating to discipline are deemed by the Constitution to relate to order and good government: section 30(a).

Constitutional principles and provisions

21. The Constitution establishes the faith of the Church in sections 1 to 3. The Fundamental Declarations represent fundamental truths of the Apostolic Faith while

⁷ 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

⁸ *Report and 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

⁹ *Appeal of Keith Francis Slater* at [8]

¹⁰ *Appeal of Keith Francis Slater* at [119]

the Ruling Principles in Chapter II, including section 4, represent the particular Anglican development of those truths.¹¹

22. Section 4 provides that the Church has plenary authority [relevantly] to make and order rules of discipline, provided that all such statements and rules are consistent with the Fundamental Declarations and are made as prescribed by the Constitution.
23. For the purposes of what is prescribed by the Constitution for the purposes of section 4, the Constitution contemplates two means by which rules of discipline may be made for the Church in a diocese:
 - 23.1. By way of a Canon of General Synod which is then adopted by the synod of a diocese; or
 - 23.2. By way of an ordinance of a diocesan Synod exercising its powers under its constitution, as articulated and confirmed by section 51 of the Constitution.
24. Section 26 of the Constitution gives General Synod the power to make canons relating to the order and good government of the Church, including as to discipline. However, by reason of section 30(a), any such canon does not come into effect in a diocese unless it is adopted by ordinance of the diocesan synod.
25. Section 51 of the Constitution preserves the power of diocesan synods to make ordinances for the order and good government of the Church within the diocese in accordance with the powers conferred upon that synod by the diocese's constitution.
26. Accordingly, the Ruling Principles have the effect that rules of discipline, as matters of order and good government, are to be made by the synod of a diocese, with the only restriction being consistency with the Fundamental Declarations.
27. The Constitution establishes a Diocesan Tribunal for each Diocese of this Church "in respect of a person licensed by the bishop of the diocese, or any other person in holy orders resident in the diocese": section 54(2).
28. The jurisdiction of the Diocesan Tribunal has always been "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": section 54(2).

¹¹ See for instance *Opinion of the Appellate Tribunal concerning diaconal and lay presidency* 7 May 1996 (decision of Bleby J)

29. The Offences Canon establishes the offences which can be tried under sections 54 to 56 of the Constitution. It has been adopted by Newcastle.
30. Since 2003, the Constitution has provided for the Diocesan Tribunal to have the power, in relation to clergy, "to hear a charge relating to an offence of unchastity, an offence involving sexual misconduct or an offence relating to a conviction for a criminal offence that is punishable by imprisonment for twelve months" (section 54(2A)).
31. The Constitution does not define the offences of unchastity or sexual misconduct for the purposes of section 54(2A). The content of those offences will therefore fall to be determined by reference to the codes of conduct applicable in a particular diocese.

Discipline – definitions and responsibilities

32. Within the structures of this Church, the synod of a diocese and its Bishop have joint responsibility for ordering and governing the diocese in a manner consistent with the Fundamental Declarations. In exercising this responsibility, the synod and the Bishop give an expression of episcopate.
33. The Bishop and the synod in exercising their episcopate accept the responsibility to discern what is the discipline of Christ. They accept the function of episcopate which is to watch over the living memory of the church for the well-being and mission of the church and the reception of tradition in fresh ways. In exercising this responsibility, they are responsive to the Holy Spirit as the Holy Spirit "keeps alive in the Church the memory of what God did and revealed, and the hope of what God will do to bring all things into unity in Christ".¹²
34. Within this Church, the Synod of a Diocese with its Bishop may be required to wait until the General Synod has passed a Canon which may then be adopted to enable a Diocesan Synod to give expression to a proposed practice (for example diaconal and lay administration of Holy Communion). In other matters, no Canon of General Synod is required before a Diocesan Synod may exercise its jurisdiction. Discipline is such a matter.
35. There are two different definitions of discipline in the Constitution.

¹² See ARCIC *The Gift of Authority* at 29 and 30

36. Provisions relating to the Diocesan Tribunal and other tribunals are contained in Chapter IX of the Constitution. Accordingly, references to discipline are references to (in relation to those in Holy Orders) -
- 36.1. the obligations in the Ordinal undertaken by that person; and
 - 36.2. the ordinances in force in that diocese.¹³
37. Consistent with that definition, questions of the disciplining of clergy under the Constitution are questions for determination at the diocesan level. It is the relevant diocese which enacts the ordinances, including adopting where deemed appropriate any relevant canon of General Synod. It is the relevant diocesan tribunal which hears and determines any charge brought under those ordinances.
38. The broader definition of discipline which applies to Chapters II to VII and X to XII includes “the other rules of this Church which impose on the members of the clergy obligations regarding the religious and moral life of this Church” (section 74(9)(a)). That more expansive definition applies to the question of whether canons of General Synod affect order and good government, thus expanding the role of the diocesan synod in considering whether or not to adopt such canons.
39. These constitutional provisions, taken together, make questions of clergy discipline questions that are to be determined at a diocesan level, subject only to consistency with the Fundamental Declarations.
40. That discipline is a matter for the bishop and synod of each diocese can be plainly seen in the differing approaches taken to aspects of clergy discipline across the National Church. For example -
- 40.1. Some dioceses do not license divorced persons or do so only in certain circumstances;
 - 40.2. Some dioceses do not ordain or license women to the orders of priest or bishop;
 - 40.3. Some dioceses require persons being ordained to make additional oaths and assents to those provided by the *Oaths and Affirmations Canon*; and
 - 40.4. *Faithfulness in Service* as a code of conduct has been adopted by most but not all dioceses, and some diocesan synods have seen fit to make amendments to the text.

¹³ See section 74(9)(b)

41. The Constitution expressly contemplates and authorises this degree of diocesan and episcopal autonomy.
42. In keeping with the principle enshrined in the Constitution that a diocese has the responsibility to determine the order and good government of the Church in that diocese, each diocese is responsible for passing an ordinance or an Act to give effect to enable the Diocesan Tribunal to undertake its work.
43. In 1966, the Synod passed the *Clergy Discipline Ordinance 1966* which received the assent of the Bishop. In 2019, the Synod repealed the *Clergy Discipline Ordinance 1966* and passed the *Clergy Discipline Ordinance 2019* which received the assent of the Bishop. The 2019 Ordinance is modelled on the 1966 Ordinance. It creates the structure and processes for the bringing of charges in the Diocesan Tribunal.

The context of the Amending Ordinance

44. The Anglican Church in Aotearoa, New Zealand and Polynesia (**ACANZP**) sought to establish a pastoral way forward to enable the blessing of same gender couples. This resulted in reports to its General Synod in 2016 and 2018 and legislative steps which would affirm the Church's teaching on the nature of marriage as between a man and a woman and enable that Church to provide for the blessing of same gender relationships on the other.
45. The 2018 report entitled "Final Report of the Motion 29 Working Group" to the General Synod /Te Hīnota Whānui (GSTHW) of ACANZP (**2018 ACANZP Report**)¹⁴ proposed that the ministry of the Diocesan Bishop in consultation with their Synod would be the best way of enabling the peaceful co-existence of differing convictions concerning the blessing of same-sex relationships (p 9 – 10).
46. The 2018 ACANZP Report stated,
- "The reality is that there are differences in this Church over whether blessing same-gender i is consistent with the Formularies or not. GSTHW is entitled to have regard to such differences in opinion when deciding what matters will be disciplined. Second, the Working Group is satisfied that the changes are constitutional for two reasons. Firstly, even if it was generally accepted that the

¹⁴ The report may be found at <https://www.anglicantaonga.org.nz/content/download/53746/272235/file/That%20report,%20in%20full,%20can%20be%20read%20here.pdf>

Formularies were clear on this issue, the Church is still able to regulate for itself what it does and does not discipline. Secondly, granting immunity for the authorisation and use of services blessing same-gender relationships is not, in and of itself, unconstitutional” (p 3 – 4).

47. The 2018 ACANZP Report stated further,

“The Working Group considers that a ‘no discipline’ policy is the best way to safeguard the consciences of clergy and bishops. In order for each viewpoint to safely co-exist within this Church each needs to acknowledge that the other must have freedom of conscience and action that aligns with their theological convictions and within the ministry standards of this Church.”

48. The 2018 ACANZP report affirmed an expectation that clergy would satisfy themselves that “the relationship is loving, monogamous, faithful and the couple are committed to a life-long relationship” (p3).

49. The Amending Ordinance seeks to emulate amendments to ACANZP Canons arising from the 2018 ACANZP Report but within the context of this Church.

The Amending Ordinance is consistent with the Fundamental Declarations and Ruling Principles

50. The Fundamental Declarations set out in Chapter I of the Constitution require that this Church will “follow and uphold [Christ’s] discipline” (section 3). This is set in the context of obeying the commands of Christ, teaching His doctrine, administering His sacraments of Holy Baptism and Holy Communion, and preserving the three orders of bishops, priests and deacons in the sacred ministry.”

51. The Amending Ordinance is consistent with the faith of the Church as held from ancient times. Nothing in that ancient faith, as expressed in sections 1 to 3 of the Constitution, prevents a diocese from ordering its rules of discipline so as to permit certain forms of participation by clergy in same sex civil marriages and the blessing of such marriages.

52. It might be suggested that, to the extent the Amending Ordinance countenances same sex civil marriages, it is contrary to the Fundamental Declarations because it is contrary to teaching of Scripture (section 2) or to Christ’s doctrine (section 3).

53. Such an argument should not be accepted. As the 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.

- 53.1. 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.¹⁵
- 53.2. The existence of different biblical commentaries on disputed passages indicates that there are many different views on parts of Scripture.¹⁶
- 53.3. 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".¹⁷
54. Christ's own teaching as directly quoted in the Gospels does not include any teaching on the particular question of same sex relationships and their compatibility with godly living.
55. Such texts as exist on the topic of marriage, sexual relationships and same sex relationships, whether in the Gospels or elsewhere, are the subject of profound and continuing debates amongst scholars and form the basis for widely diverging views amongst Anglican clergy and laity. 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.
56. Accordingly, any argument about the content of the Church's teaching which is based on disputed interpretations of Christ's commands or of Scripture more generally cannot form a proper or sufficient basis for a conclusion that an ordinance of a diocesan Synod which adopts a particular view of the morality of civil same sex marriages is inconsistent with the Fundamental Declarations.

¹⁵ *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*

¹⁶ *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"*

¹⁷ *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*

57. Similarly, to the extent that it is suggested that the Amending Ordinance is contrary to the Fundamental Declarations or Ruling Principles because it contravenes the Church's teaching on marriage, that argument should also be rejected.
- 57.1. The Church's teaching on marriage is not teaching on a question of faith as contained in the Fundamental Declarations;
- 57.2. The Church's teaching on marriage is not a doctrine or principle of doctrine to which the restrictions in the Ruling Principles apply; and
- 57.3. In any event, the Amending Ordinance does not purport to change the Church's teaching on marriage but rather is confined to the question of whether certain actions by clergy in relation to civil marriages will have disciplinary consequences. In circumstances where the Constitution expressly provides for matters of discipline to be the remit of a diocese and the diocesan tribunal, the Amending Ordinance is entirely consistent with the Fundamental Declarations and Ruling Principles.
58. The ability in this Church for a priest or bishop to pronounce a blessing is consistent with both the Holy Scriptures and the doctrine contained in the 1662 Book of Common Prayer. The Amending Ordinance has been made in accordance with the powers contemplated in the Constitution and by a means consistent with the Ruling Principles.
59. The Amending Ordinance provides that similar pastoral arrangements as are available to the laity should be available to the clergy. That is, a member of the clergy who is married as a matter of civil law to a person of the same sex should not by reason of that fact alone be regarded as being liable to a charge in the diocesan tribunal.
60. No part of the Amending Ordinance is inconsistent with the Fundamental Declarations or the Ruling Principles of the Constitution. The answer to reference question 1.1 should be "no".

The power to enact the Amending Ordinance

61. In establishing an ordinance for clergy discipline in the Diocese of Newcastle, Synod applied the definition of discipline in section 74(9)(b) of the Constitution which relates to discipline for those purposes in Chapter IX of the Constitution.
62. The Synod of the Diocese of Newcastle received notice of amendment to the *Clergy Discipline Ordinance* 1966 with an explanatory memorandum stating, "The amendments allow that a member of the clergy cannot be charged with an offence

by choosing to participate or not participate in the blessing of a legally solemnised marriage of two persons of the same sex. The amendments further provide that the legal marriage of a member of the clergy to a person of the same sex, is not grounds for a charge of offence.”

63. In accordance with the Standing Orders of the Synod, the mover of the motion to accept the Bill in principle sought leave to introduce the Bill. Leave was given by the Synod. There was no amendment to the Explanatory Memorandum. The Ordinance was passed.
64. By passing the *Clergy Discipline Ordinances* 1966 and 2019, the Synod exercised its power to determine which aspects of conduct by members of the clergy should give rise to an offence and be subject to the jurisdiction of the Diocesan Tribunal.
65. By passing the Amending Ordinance, the Synod is continuing to exercise its discretion to determine which aspects of conduct by members of the clergy should give rise to an offence and be subject to the jurisdiction of the Diocesan Tribunal.
66. Synod has properly exercised the powers conferred by the *Anglican Church of Australia Constitutions Act* 1902, as confirmed by section 51 of the Constitution in passing the Amending Ordinance. The answer to reference question 1.2 should be “Yes”.

Question 1.3 – the effect of a reference to the Appellate Tribunal on the Bishop’s capacity to assent to the Amending Ordinance

67. Clause 5(c) of the Schedule to the Anglican Church of Australia Constitution Act 1902 provides, “no ordinance shall take effect or have any validity unless within one month after the passing of the same the Bishop shall signify assent thereto in writing ...”.
68. In the present case, the Appellate Tribunal should not make any final determination as to the impact of a reference to the Appellate Tribunal on the time period specified in clause 5(c). For the avoidance of doubt, Newcastle considers that the purpose of section 63(1) is best given effect if a referral -
 - 68.1. has the effect of suspending further consideration of the Ordinance by the Bishop; and

- 68.2. enables the Bishop to give further consideration to the Ordinance within the relevant timeframe once the Appellate Tribunal has given its opinion if such opinion leads the Bishop to consider assenting to the Ordinance.
69. However, the question is one which requires careful construction of the constitution of the Newcastle diocese rather than any question arising under the Constitution. Accordingly, the Appellate Tribunal should find that the question is a matter for the Bishop following the conclusion of the reference.

Reference from the members of the General Synod

70. The Tribunal should decline to answer any of the questions posed by the 25 members of the Synod in the second reference.
71. For the reasons set out in these submissions, the Amending Ordinance is consistent with the Fundamental Declarations and a valid exercise of the legislative authority of the Synod as contained in the constitution of the Diocese and in the Constitution (including the Ruling Principles and section 51).
72. None of the questions properly raise a matter under the Constitution. They are better understood as questions about the precise legislative effect of the Amending Ordinance within the Diocese of Newcastle. The precise impact, within the disciplinary framework of a diocese, of diocesan legislation that has been validly made by a diocesan synod is not a matter on which the Appellate Tribunal ought to express any opinion.
73. Further -
- 73.1. Question 2 invites the Tribunal to consider a hypothetical question which would turn on the facts of any particular case, given the absence of any legislative definition of unchastity or sexual misconduct;
- 73.2. To the extent that questions 4 and 5 refer to a Provincial Tribunal, they are also hypothetical because no such tribunal has been established in the province of NSW; and
- 73.3. All of the questions appear to be framed by reference to an earlier iteration of the Bill which became the Amending Ordinance and to that extent are of no practical application.

74. The proper forum, if any, for consideration of the questions in the second reference is the Diocese of Newcastle and the various bodies and persons exercising functions and powers under the *Clergy Discipline Ordinance* as amended (if amended it ultimately be).
75. Accordingly, the questions invite the Tribunal to descend into the management of the affairs of the Diocese in a manner that is not contemplated or authorised by the Constitution.

Conclusion

76. The questions should be answered as set out in these submissions.

DATED 24 December 2019



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Diocese of Newcastle