



3

In the Appellate Tribunal of the Anglican Church of Australia

References with respect to the *Clergy Discipline Ordinance 2019 Amendment Ordinance 2019* of the Synod of the Diocese of Newcastle

Primary Submissions of the Synod of the Diocese of Sydney

Introduction

1. These primary submissions set out the position of the Synod of the Diocese of Sydney (**Sydney**) with respect to:
 - (a) the questions posed by the Primate regarding the *Clergy Discipline Ordinance 2019 Amendment Ordinance 2019* of the Synod of the Diocese of Newcastle (**Amending Ordinance**) in the reference dated 31 October 2019 (**Primate's Reference**), and
 - (b) the questions posed by 25 members of the General Synod regarding the Amending Ordinance in the reference dated 6 November 2019 (**GS Member Reference**).
2. Collectively, these will be referred to as "**the References**" in this submission.
3. Sydney reserves the right to make further submissions in respect to the References in accordance with the timetable set by the Appellate Tribunal and the "Appellate Tribunal Rules 1988".

The Questions

4. Sydney submits that the Appellate Tribunal should answer the Primate's Reference as follows:

Question 1: Yes.

Question 2: No (on the basis that section 51 operates as a restriction on the legislative power of the Diocese of Newcastle under the NSW Constitution).

Question 3: No - the Amending Ordinance lapses (if the Bishop does not assent within one month of its passing).

5. Sydney submits that the Appellate Tribunal should answer the GS Members' Reference as follows:

Question 1: No.

Question 2: No.

Question 3: No.

Question 4: No.

Question 5: No.

Background concerning Diocesan Tribunals

6. The Long Title of the *Clergy Discipline Ordinance 2019 (Principal Ordinance)* states that it provides "for the Trial of Members of the Clergy for Ecclesiastical and Other Offences". The Principal Ordinance does so by making provision with respect to the hearing of charges before the Diocesan Tribunal of Newcastle.
7. The Diocesan Tribunal in Newcastle is established by section 53 of the Constitution in the Schedule of the *Anglican Church of Australia Constitution Act 1961 (NSW) (Constitution)*.
8. Section 54 of the Constitution provides for the membership and jurisdiction of Diocesan Tribunals, as well as the means by which charges can be brought and appeals made.
9. Subsection 54(1) provides for diocesan synods to prescribe the membership of the Diocesan Tribunal by ordinance.

10. Subsections 54(2) and (2A) set out the jurisdiction of the Diocesan Tribunal (emphasis added):

(2) A diocesan tribunal shall in respect of a person licensed by the bishop of the diocese, or any other person in holy orders resident in the diocese, **have jurisdiction to hear and determine charges of breaches of faith ritual ceremonial or discipline and of such offences as may be specified by any canon ordinance or rule.**

(2A) A diocesan tribunal shall also have and always be deemed to have had **jurisdiction 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 or upwards in respect of a member of clergy if -

- (a) the act of the member of clergy which gave rise to the charge occurred in the diocese;
- (b) the member of clergy was licensed by the bishop of the diocese or was resident in the diocese within two years before the charge was laid; or
- (c) the member of clergy is in prison as a convicted person at the time the charge was laid, but within two years before such imprisonment was licensed by the bishop of the diocese or was ordinarily resident therein.

11. Subsection 54(2B) provides for consultation and concurrence between diocesan bishops where a person found guilty of an offence by a diocesan tribunal resides in another diocese at the time of the finding.

12. Subsection 54(3) makes provision for certain persons to bring a charge before the Diocesan Tribunal:

(3) A person appointed by the bishop of a diocese or any five adult communicant members of this Church resident within the diocese may promote a charge against any person licensed by the bishop of the diocese or against any other person in holy orders resident in the diocese in respect of breach of faith ritual or ceremonial either before the diocesan tribunal or before the provincial tribunal in its original jurisdiction. Provided that if a charge be preferred against an incumbent of a parish with reference to an offence alleged to have been committed within that parish the aforesaid communicants shall be bona fide parishioners of that parish.

Provided further that before any charge relating to faith ritual or ceremonial be heard by the tribunal it shall be referred to a board of enquiry appointed by ordinance of the diocesan synod and may proceed to a hearing if the said board allows it as a charge proper to be heard.

13. Subsection 54(4) sets out the means of appeal from the determination of the Diocesan Tribunal.

Jurisdiction

14. The Appellate Tribunal has jurisdiction to hear the References under section 63(1) on the basis that "...a question arises under this Constitution...".
15. "The phrase 'under this Constitution' is not to be interpreted pedantically or narrowly".¹
16. Questions regarding the jurisdiction of a diocesan tribunal, as conferred by section 54 of the Constitution and as impacted by a diocesan ordinance making provision with respect to the hearing of charges within or arguably within the ambit of section 54 before the diocesan tribunal, plainly give rise to a question arising under the Constitution.

¹ *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. ("1989 Opinion") per Justice Cox at page 11.

17. The creation of and distribution of jurisdiction to tribunals under Chapter IX of the Constitution is not to be equated with the constitutional treatment of the judicial power of a sovereign state. There are particular features of the organisation of the Church including its voluntary membership to which it is important to have regard in construing the constitutional provisions. Thus, the construction of constitutional provisions does not commence with an *a priori* rule or rules, particularly as to exclusivity of jurisdiction nor constrictive construction of the power of the diocesan synods of the Church authority to provide for procedures and tribunals, for the supervision of the clergy as they see fit: *Harrington v Coote* (2013) 119 SASR 152; [2013] SASCFC 154 at [47]-[50] (*Harrington*).
18. Notwithstanding dangers in drawing close analogies between the Australian Constitution and the Constitution of the Church, situations may arise where it is appropriate to consider the application of principles of conflict and inconsistency of laws as between national and diocesan entities: *Determination of the Appellate Tribunal dated 19 January 2017 concerning the Appeal of Keith Francis Slater* at [121] (*Slater decision*).
19. By force of section 30 of the Constitution, diocesan ordinances have no effect to the extent of any inconsistency with a canon duly passed by General Synod that is in force in the diocese: see e.g., *Slater decision* at [123].
20. The same is true of any inconsistency between the provisions of the Constitution and an ordinance of a diocese.
21. Further, section 51 subjects the continuing power of diocesan synods to the provisions of the Constitution: *Harrington* at [45]-[46].
22. Section 51 of the Constitution provides:

51. **Subject to this Constitution** a diocesan synod may make ordinances for the order and good government of this Church within the diocese, in accordance with the powers in that behalf conferred upon it by the constitution of such diocese.

23. Analysis of whether two legislative provisions are inconsistent will vary, depending on the characteristics of the respective laws: *Banerjee v Commissioner of Police* (2018) 98 NSWLR 730; [2018] NSWCA 283 at [22].
24. Inconsistency may arise in direct or indirect ways. For example, direct inconsistency may arise where a State law, if valid, would alter, impair or detract from the operation of a law of the Commonwealth Parliament and indirect inconsistency occurs if it appears from the terms, the nature or the subject matter of a Federal enactment that it was intended as a complete statement of the law governing a particular matter or set of rights and duties: *Victoria v Commonwealth* e.g. (1937) 58 CLR 618 at 630 per Dixon J.

The matters at issue in the References

25. Section 54(2) empowers the Synod of a diocese to specify, either by the adoption of a canon or the passing of an ordinance, additional offences that may be the subject of a charge before the diocesan tribunal. However the Synod of a diocese has no power to alter, impair or detract from the diocesan tribunal's jurisdiction under subsections 54(2) and (2A) in respect to –
 - (a) breaches of faith ritual ceremonial or discipline, or
 - (b) the offence of unchastity,
 - (c) an offence involving sexual misconduct, or
 - (d) an offence relating to a conviction for a criminal offence that is punishable by imprisonment for twelve months or upwards.

26. Charges in relation to these offences could only be excluded from the diocesan tribunal's jurisdiction by an amendment to the Constitution made in accordance with the procedure in Chapter XI of the Constitution.
27. The Amending Ordinance purports to limit the charges that can be brought against a member of clergy in the Diocesan Tribunal of Newcastle, by excluding:
- charge[s] which allege an offence, breach or misconduct by a member of the clergy because that member of the clergy:
- (a) has participated in a service, whether or not in a church building, in which they have pronounced the blessing of a marriage solemnised in accordance with the *Marriage Act 1961* or similar Act in another jurisdiction in which the persons being married are of the same sex;
- (b) has declined to participate in a service, whether or not in a church building, or declined to pronounce a blessing of a marriage solemnised in accordance with the *Marriage Act 1961* or similar act in another jurisdiction in which the persons being married are of the same sex;
- (c) is married to a person of the same sex where such marriage has been solemnised in accordance with the *Marriage Act 1961* or similar Act in another jurisdiction.
28. The Amending Ordinance provides further that "the conduct and matters referred to in subclauses (a), (b) and (c)...shall not be considered an "offence" within the meaning set out in clause 4(1) of [the *Clergy Discipline Ordinance 2019*]."
29. Newcastle's power to "make" the amending Ordinance is "subject to the Constitution". This precludes the Newcastle Synod from preventing charges for offences that are within the jurisdiction of the Diocesan Tribunal by direct operation of the Constitution.

30. Sydney submits therefore that even if assent is given to the Amending Ordinance within one month of its otherwise being validly passed by the Newcastle Synod, the Amending Ordinance will not prevent charges being promoted to the Diocesan Tribunal under the Constitution because:

a. participation in the solemnisation of a same-sex marriage by a member of clergy is

- i. a breach of ritual and ceremonial, because it involves the use of a liturgy which is contrary to the doctrine of marriage of this church, which is not (and cannot be) authorised by a Bishop or Canon of this Church.
- ii. a breach of discipline (and a breach of faith), because it is a breach of their ordination vow to minister and teach others to uphold the doctrines of Christ, as this Church has received them, in relation to the Church's doctrine of marriage .

b. marriage to a person of the same-sex by a member of clergy is:

- i. a breach of discipline because it is a breach of the obligations in the ordinal to "live according to the teaching of Christ" with respect to marriage, and is also a breach of the obligation to minister and teach others to uphold the doctrines of Christ, as this Church has received them, in relation to the Church's doctrine of marriage, and
- ii. a breach of faith because it is inconsistent with the doctrine of the Church in respect to marriage, and
- iii. *prima facie* evidence of unchastity because a civil marriage under the *Marriage Act 1961 (Cth)* is not recognised as "marriage" under the doctrine of the Church and sexual relations outside of a marriage union constitutes unchastity for the purposes of the *Offences Canon 1962* and

s54(2A) of the Constitution . It is also evidence of sexual misconduct, for the same reasons.

The remainder of this submission articulates the arguments for this position.

Participation in a Service of Blessing (clause 3(a) of the Amending Ordinance)

(i) Blessing a Same-sex Marriage is a Breach of "Ritual and Ceremonial"

31. In its submission to the Appellate Tribunal on the Wangaratta reference, the Diocese of Newcastle has advised in paragraph (j) that "its Synod approved in principle a Bill for a regulation which is similar to the [Wangaratta] Regulation. It referred the Bill for further consideration to its Diocesan Council. The Diocesan Council has deferred further consideration of the Bill until the Appellate Tribunal makes its determination."
32. Thus, when the Amending Ordinance makes provision for ministers who have "participated in a service ... in which they have pronounced the blessing of a marriage solemnised in accordance with the *Marriage Act 1961*", a Wangaratta-style blessing is evidently in contemplation. However, the exemption in clause 3(a) provides a more extensive coverage, in that it applies to any service in which a minister "pronounces a blessing on a marriage".
33. The form of words used in the Amending Ordinance acknowledges the key issue at stake (which has sometimes been denied or obscured in other submissions) – that the liturgical act in view is a "blessing on a marriage" (which is to be distinguished from a blessing on an inanimate object or the blessing of individuals). The critical issue is whether the blessing of a marriage of a same-sex couple is consistent with the doctrine of our Church, which is that marriage is necessarily between a man and a woman.
34. The purpose of the Amending Ordinance is to override the definition of "offence" and to prevent charges being brought in relation to the blessing of a same-sex marriage. This recognises that the liturgical blessing of a same-sex marriage is (or, at least, may

be) an offence that could be referred to a tribunal. If there were no possibility that blessing a same-sex marriage may be held to constitute an offence, then there would have been no point to these provisions in the Amending Ordinance.

35. The Amending Ordinance may be viewed as an attempt to implement the “New Zealand approach” by the Diocese of Newcastle. In 2018, the New Zealand General Synod / Te Hīnota Whānui passed two key changes to facilitate the blessing of same-sex marriages.

- a. the *Canon for Authorised Services* (Title G XIV) was amended, so that a service to bless a same-sex marriage which had been authorised by a diocesan bishop was exempted from the requirement that it must not be inconsistent with the Constitution and the Formularies of that Church.
- b. two *Discipline Canons* (Title D I & II) were altered so that no member of the clergy or bishop could face disciplinary action either for conducting a same-sex blessing, or for refusing to do so, or for teaching that same-sex blessings are consistent (or not consistent) with Holy Scripture or the doctrine of the Church.

36. The Working Group that proposed this approach recognised that blessing same-sex marriages may be inconsistent with the Formularies of the Anglican Church in Aotearoa, New Zealand and Polynesia. Nonetheless, the report states “the Church is still able to regulate for itself what it does and does not discipline”.

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.²

² Final Report of the Motion 29 Working Group, page 13.

37. The Amending Ordinance passed by the Newcastle Synod seeks to implement a similar "no discipline policy". However, the key difference between the New Zealand approach and the Newcastle Amending Ordinance is that the New Zealand measure was passed by the New Zealand General Synod / Te Hīnota Whānui, whereas the Newcastle Amending Ordinance lacks the necessary General Synod canons to authorise a liturgy for same-sex blessing, or to amend the jurisdiction of the Diocesan Tribunal established by the Constitution.
38. We here refer to, and will not repeat, our submission on the Wangaratta reference, which extensively demonstrates that a liturgy to bless a same-sex marriage is contrary to the doctrine of marriage of the *Book of Common Prayer*, and therefore contrary to the doctrine of marriage of this Church. In response to the argument that section 5(4) of the *Canon Concerning Services 1992* authorises the Bishop of a diocese to authorise a minister to use a form of service which is contrary to the doctrine of this Church, we note that a General Synod Canon cannot be inconsistent with the Constitution, and therefore that if this is indeed the effect of section 5(4) – which is not accepted – then this section of the *Canon Concerning Services 1992* is invalid to the extent of its inconsistency with the Constitution.
39. Since there is no authorised service for the blessing of a same-sex marriage, and the *Canon Concerning Services 1992* (or any regulation purportedly passed in connection with this Canon) cannot authorise such a blessing since this would be contrary to the doctrine of the Church, then a minister's participation in the liturgical blessing of a same-sex marriage would be a **breach of the ritual and ceremonial** of the Church.
40. As noted above, section 54(2) of the Constitution gives jurisdiction to a diocesan tribunal to hear and determine charges of breach of ritual and ceremonial. The Amending Ordinance is inconsistent with the Constitution to the extent that it seeks to prevent the Diocesan Tribunal from hearing a charge of breach of ritual and ceremonial

in relation to a member of the clergy participating in a service which blesses a same-sex marriage.

(ii) Blessing a Same-sex Marriage is a Breach of "Discipline" (and "Faith")

41. Furthermore, the participation of a minister in a service of blessing for a same-sex marriage is also a **breach of discipline**. All priests promise at their ordination to "faithfully minister the doctrine and sacraments, and the discipline of Christ, as the Lord has commanded, and as this Church has received them". This includes a promise to "teach the people committed to your charge to keep and observe them diligently". The doctrine of Christ, as this Church has received it, is that marriage is between a man and a woman. To bless a marriage that is contrary to Christ's teaching about marriage is a failure to keep this ordination vow. (It is also a failure to "hold the faith" of this Church, which (on the basis of the argument developed in paragraphs 51-57) is liable to charge of a breach of faith.
42. Section 74(9)(b) defines "discipline", with respect to Chapter IX (i.e., the tribunals), to mean "(i) the **obligations in the ordinal** undertaken by that person [viz., clergy licensed by a bishop of a diocese or resident in a diocese]; and (ii) the ordinances in force in that diocese." Therefore, a breach of an ordination vow is a breach of discipline for the purposes of the Constitution.
43. As noted above, section 54(2) of the Constitution gives jurisdiction to the diocesan tribunal to hear and determine charges of breach of discipline. The Amending Ordinance is inconsistent with the Constitution to the extent that it seeks to prevent the Diocesan Tribunal from hearing a charge of **breach of discipline** (and/or **breach of faith**) on the basis that a member of the clergy has participated in a service which blesses a same-sex marriage.
44. Furthermore, the Amending Ordinance is inconsistent with the Fundamental Declarations and the Ruling Principles because it purports to permit a minister to

participate in a service for the blessing of a same-sex marriage, which is contrary to the authorised standard of doctrine of this church. Section 4 of the Constitution requires that "no alteration in or permitted variations from the services or Articles therein contained shall contravene any principle of doctrine or worship laid down in such standard".

A member of clergy marrying a person of the same sex, where such marriage has been solemnised in accordance with the *Marriage Act 1961* or an Act in another jurisdiction (clause 3(c) of the Amending Ordinance)

(i) A Member of the Clergy in a Same-sex Marriage is a Breach of "Discipline" – s74(9)

45. Clergy are under a canonical obligation to live in accordance with the doctrine of our Church and to teach in accordance with the doctrine of our Church. This obligation arises from both solemn oaths and ordination promises.
46. All clergy in Newcastle Diocese are required by the *Oaths Affirmations Declarations and Assents Canon 1992* to make the following three solemn oaths:

"I do swear that I will pay true and canonical obedience to [the Bishop of Newcastle] and the successors of that bishop in all things lawful and honest. So help me God!"

"I..... firmly and sincerely believe the Catholic Faith and I give my assent to the doctrine of The Anglican Church of Australia as expressed in the *Book of Common Prayer* and the Ordering of Bishops, Priests and Deacons and the Articles of Religion, as acknowledged in section 4 of the Constitution, and I believe that doctrine to be agreeable to the word of God. I declare my assent to the Fundamental Declarations of The Anglican Church of Australia as set out in sections 1, 2 and 3 of the Constitution."

"I do solemnly and sincerely declare my assent to be bound by the Constitution of the Anglican Church of Australia and the Constitution of the province of and of this diocese and by the canons, statutes, ordinances and rules, however described, from time to time of the synod of this

diocese and of the General Synod and the provincial synod (or council) which have force in this diocese."

47. All clergy promise at their ordination as deacons to live according to the teaching of Christ:

Will you strive to live according to the teaching of Christ so that you and your family may be good examples to the flock of Christ?

Answer: I will, the Lord being my helper." [AAPB, p.607]

48. All priests promise at their ordination to minister and teach others to live according to the doctrine of Christ, as received by this Church:

Will you always faithfully minister the doctrine and sacraments, and the discipline of Christ, as the Lord has commanded, and as this Church has received them, according to the commandments of God? Will you teach the people committed to your charge to keep and observe them diligently?

Answer: I will do so, by the help of the Lord. [AAPB, p.611]

49. Clergy cannot sidestep the continuing relevance of their ordination promises by claiming that the promises were genuine at the point of ordination, but that he or she has since had a change of conviction on some matters. These two ordination promises are modernised versions of the promises in the Ordinal which is part of the 1662 *Book of Common Prayer*, to which clergy have, by virtue of their solemn oaths, assented to be bound in an ongoing way.
50. The "teaching of Christ" is that marriage is between a man and a woman (Matt 19:3-12). If a member of the clergy enters into a same-sex marriage, this is not "living according to the teaching of Christ", and therefore is in breach of his or her ordination vows.

51. The "doctrine and sacraments, and the discipline of Christ, as the Lord has commanded, and as this Church has received them" with respect to marriage is that marriage is between a man and a woman. If a member of the clergy enters into a same-sex marriage, this is a failure to minister this doctrine faithfully and also a failure to "teach the people committed to your charge to keep and observe them diligently", and therefore also in breach of his or her ordination vow.
52. Section 74(9)(b) defines "discipline", with respect to Chapter IX (i.e., the tribunals), to mean "the **obligations in the ordinal** undertaken by that person [viz., clergy licensed by a bishop of a diocese or resident in a diocese]; and (ii) the ordinances in force in that diocese." Therefore, a breach of an ordination vow is a breach of discipline for the purposes of the Constitution.
53. If a member of the clergy is unable to continue to adhere to their ordination promises, the appropriate course of action is voluntary relinquishment of their holy orders. In the absence of voluntary relinquishment, section 54(2) of the Constitution gives the diocesan tribunal jurisdiction to hear and determine charges of breach of discipline.
54. The Amending Ordinance purports to prevent the Diocesan Tribunal from hearing a charge of **breach of discipline** on the basis that a member of the clergy is married to a person of the same sex. However since the Amending Ordinance cannot alter, impair or detract from the operation of section 54(2) of the Constitution, it is ineffective to the extent it purports to prevent the Diocesan Tribunal from hearing a charge of breach of discipline.

(ii) A Member of the Clergy in a same-sex marriage is a breach of "faith" – s74(1)

55. The doctrine of the Anglican Church of Australia is that marriage is between a man and a woman. We refer to our argument extensively developed in the submission in relation to the Wangaratta Regulation, which will not be repeated here.

56. Is this a “doctrine” in the sense defined in s74(1) of the Constitution? It is clear from the definition in s74(1) that not every “teaching of the Church” is a doctrine. The teaching of the Church on questions of “ritual, ceremonial or discipline” is not doctrine. The definition in section 74(1) makes clear that it is only the “teaching of this Church on any question of faith” that is to be regarded as a doctrine.
57. As demonstrated in our submission in relation to the Wangaratta Regulation, it is unsustainable to argue that “faith” in the Constitution is limited to the Christian Faith as defined in the Fundamental Declarations, so as to exclude the “doctrines” (so described) in section 4 which arise from the *Book of Common Prayer*, the Ordinal and the 39 Articles. In its submission, Wangaratta proposed a narrow interpretation of “faith” that leads to five categories, only four of which the Constitution is interested in preserving.

Faith = Common Creedal Christianity	Non-core (!?) doctrines: The distinctively Anglican doctrines and principles arising from BCP, the ordinal and the 39 articles.	Rites – the words used in liturgy	Ceremonies – the accompanying actions in liturgy	Discipline
“Faith”		“Ritual”	“Ceremonial”	“Discipline”

The Tribunals identified in Chapter IX all have jurisdiction with respect to “faith ritual ceremonial and discipline”. Wangaratta’s proposal leads to untenable result that the framers of our Constitution intended that there be no mechanism to uphold the “authorised standard of doctrine in the Church” under section 4.

58. The faith of this Church, and hence the doctrine of this Church, encompasses the doctrines established by the Fundamental Declarations and the Ruling Principles. That marriage is necessarily between a man and a woman is a matter of faith established both by the Fundamental Declarations (especially the doctrine of Christ and the teaching of the canonical Scriptures) and the Ruling Principles (especially the

“Form of Solemnisation of Holy Matrimony” in *BCP*). This doctrine of marriage is a doctrine in the sense defined in s74(1) – “a teaching of the Church on [a] question of faith”. Who may validly be parties to a marriage is a question of faith. The answer to this question of faith is that only a man and a woman may be validly married in God’s sight.

59. Section 74(1) stipulates that “Faith” includes the obligation to hold the faith. If a member of the clergy enters into a same-sex marriage, this is a breach of the faith of this Church, which holds that marriage is necessarily between a man and a woman.
60. Section 54(2) of the Constitution gives jurisdiction to the diocesan tribunal to hear and determine charges of breach of faith.
61. The Amending Ordinance purports to prevent the Diocesan Tribunal from hearing a charge of **breach of faith** on the basis that a member of the clergy is married to a person of the same sex. However since the Amending Ordinance cannot override or qualify the operation of section 54(2) of the Constitution, it is ineffective to the extent it purports to prevent the Diocesan Tribunal from hearing a charge of breach of faith.

Relevant Judicial Authority from the Church of England

62. Section 73(1) of the Constitution provides that:

In determining any question as to the faith ritual ceremonial or discipline of this Church any tribunal may take into consideration but shall not be bound to follow its previous decisions on any such questions or any decision of any judicial authority in England on any questions of the faith ritual ceremonial or discipline of the Church of England in England.

63. For this reason, we contend that the Appellate Tribunal’s consideration of this matter would be assisted by the decision of the Court of Appeal of England and Wales in *Pemberton v Inwood* [2018] EWCA Civ 564, and comments made by the relevant

employment tribunals in relation to the same-sex marriage of the Rev'd Jeremy Pemberton, who was a member of the clergy in the Church of England. The court decision and tribunal comments were reported by the Anglican Communion News Service website as follows:

The Church of England did not unlawfully discriminate against a priest by refusing to grant a licence after he entered a same-sex marriage, London's Court of Appeal said today. The Rev'd Jeremy Pemberton married his same-sex partner, Laurence Cunnington, in 2014, shortly after same-sex civil marriages were legalised in England and Wales. But the move was contrary to the C of E's doctrine of marriage and as a result, the acting bishop of Southwell and Nottingham, Richard Inwood, revoked his Permission to Officiate and denied a licence for him to take up a role as an Anglican hospital chaplain. Pemberton challenged the decision in the Employment Tribunal, the Employment Appeal Tribunal and finally the Court of Appeal. All three ruled that the bishop had acted lawfully...

The Tribunal also rejected attempts to consider whether the Church's doctrine on marriage was something the courts could adjudicate on. "If there is a clear doctrine relating to the nature of marriage and which excludes same sex marriage for the purposes of the Church, rather than the State, and that doctrine requires obedience from the Priest by way of the Canons, then that is the end of the matter for our purposes," the Employment Tribunal judgment said. "It matters not what we think about the appropriateness of the doctrines to current times. It is not for us to reconstruct the Church's doctrines. . . There is the distinction between the Church and State. The constitutional convention means that the State cannot impose same sex marriage upon the Church."³

64. This case is relevant to the question at hand, as it establishes that it is inconsistent with the doctrine of marriage of the Church of England for a member of the clergy to enter into a same-sex marriage.

³ <https://www.anglicannews.org/news/2018/03/priest-in-same-sex-marriage-loses-legal-challenge-to-bishops-discriminatory-response.aspx> ; accessed 30 Dec 2019.

65. The decision turned on the meaning and effect of two canons of the Church of England and Pastoral Guidance on Same Sex Marriage from the House of Bishops dated 15 February 2014.

Canon B30 - Of Holy Matrimony

1. The Church of England affirms, according to our Lord's teaching, that marriage is in its nature a union permanent and lifelong, for better for worse, till death them do part, of one man with one woman, to the exclusion of all others on either side, for the procreation and nurture of children, for the hallowing and right direction of the natural instincts and affections, and for the mutual society, help and comfort which the one ought to have of the other, both in prosperity and adversity.

2. The teaching of our Lord affirmed by the Church of England is expressed and maintained in the Form of Solemnization of Matrimony contained in *The Book of Common Prayer*.

3. It shall be the duty of the minister, when application is made to him for matrimony to be solemnized in the church of which he is the minister, to explain to the two persons who desire to be married the Church's doctrine of marriage as herein set forth, and the need of God's grace in order that they may discharge aright their obligations as married persons.

Canon C26 - Of the manner of life of clerks in Holy Orders

2. A clerk in Holy Orders shall ... be diligent to frame and fashion his life and that of his family according to the doctrine of Christ, and to make himself and them, as much as in him lies, wholesome examples and patterns to the flock of Christ."

House of Bishops Pastoral Guidance on Same Sex Marriage

23. At ordination clergy make a declaration that they will endeavour to fashion their own life and that of their household '*according to the way of Christ*' that they may be '*a pattern and example to Christ's people*'. A requirement as to the manner of life of the clergy is also directly imposed on the clergy by Canon C 26, which says that '*at all times he shall be diligent to frame and fashion his life and that of his family according to the doctrine of Christ, and to make himself and them, as much as in him lies, wholesome examples and patterns to the flock of Christ.*'

24. The implications of this particular responsibility of clergy to teach and exemplify in their life the teachings of the Church have been explained as follows;

'The Church is also bound to take care that the ideal is not misrepresented or obscured; and to this end the example of its ordained ministers is of crucial significance. This means that certain possibilities are not open to the clergy by comparison with the laity, something that in principle has always been accepted' (Issues in Human Sexuality, 1991, Section 5.13).

25. The Church of England will continue to place a high value on theological exploration and debate that is conducted with integrity. That is why Church of England clergy are able to argue for a change in its teaching on marriage and human sexuality, while at the same time being required to fashion their lives consistently with that teaching.

26. Getting married to someone of the same sex would, however, clearly be at variance with the teaching of the Church of England. The declarations made by clergy and the canonical requirements as to their manner of life do have real significance and need to be honoured as a matter of integrity.

27. The House is not, therefore, willing for those who are in a same sex marriage to be ordained to any of the three orders of ministry. In addition, it considers that it would not be appropriate conduct for someone in holy orders to enter into a same sex marriage, given the need for clergy to model the Church's teaching in their lives.

66. With respect the doctrine of marriage of the Church of England, the court concluded that:

The teaching and in fact, the doctrine of the Church of England (in the sense in which the Church uses the term) is quite clearly spelt out in Canon B30. Paragraph 1 of that Canon makes clear that the Church of England considers marriage to be between one man and one woman. By its very terms it delimits the concept of marriage in accordance with the teachings and doctrine of the Church in a way which excludes same sex marriage. Furthermore, it is made clear in paragraph 3 that a priest is expected to uphold what is described expressly as "the Church's doctrine of marriage." As Mr Linden pointed out, Canon B30 does not state

expressly that the Church of England's doctrine of marriage does not include polygamy but it is quite clear that it does so.⁴

67. With respect to the obligations on clergy to live in obedience with this doctrine, the court concluded that:

“the Church of England does not accept same sex marriage as "marriage" for its purposes at all. As the statement of Pastoral Guidance from the House of Bishops made clear at paragraph 9, since the 2013 Act, there has been a divergence between the general understanding and definition of marriage in law and the "doctrine of marriage held by the Church of England and reflected in the Canons and the Book of Common Prayer." A clear statement on marriage and same sex marriage is contained at paragraphs 9, 11, 12, 26, 27 and 28 of that document, including the need to obey the Church on these issues. Paragraph 26 states expressly that marrying someone of the same sex would be at variance with the teachings of the Church of England. Paragraphs 27 and 28 leave little to the imagination in relation to the effect upon a clergyman's 'good standing' of entering into a same sex marriage. This is all the more so when coupled with the form of the Preface to the Declaration of Assent and the Declaration itself contained at C15 of the Canons and the requirement to exemplify the teachings of the Church contained at C26, to which reference is also made in paragraphs 23 and 26 of the statement of Pastoral Guidance.”⁵

68. The conclusions of the Court of Appeal are relevant to the matter at hand, because the doctrine of marriage of the Church of England is not materially different to the doctrine of marriage of the Anglican Church of Australia – in particular, that marriage is the union “of one man with one woman, to the exclusion of all others”. Likewise, clergy in

⁴ <http://www.bailii.org/ew/cases/EWCA/Civ/2018/564.html>. Asplin LJ, para 63. The tribunal judgment is here: <http://southwell.anglican.org/wp-content/uploads/2015/11/document2015-11-02-104014.pdf>. The EAT decision is here: http://employmentappeals.decisions.tribunals.gov.uk/Public/Upload/16_0072rifhATBA.doc

⁵ *ibid.*, para 64.

both jurisdictions are under an obligation to live according to the “doctrine” (C of E) / “teaching” (ACA) of Christ. Therefore, the same conclusions follow. Same-sex marriage is not consistent with the doctrine of marriage in the Anglican Church of Australia, and a member of the clergy is under obligation to live in accordance with the doctrine of our Church, and therefore to enter into a same-sex marriage is at variance with the doctrine of the Church.

(iii) *A Member of the Clergy in a Same-sex Marriage is Evidence of “Unchastity”*

69. The Diocesan Tribunal constituted by the Constitution has jurisdiction to determine charges of unchastity and sexual misconduct. A member of the clergy being in a same-sex marriage is *prima facie* evidence of unchastity and sexual misconduct, because this relationship involves sexual conduct other than between a husband and a wife.

The Definition of Chastity

70. The definition of unchastity is derived from the meaning of chastity. Chastity comes from the Latin word *castitas*, which originally meant “purity,” but came to refer specifically to sexual purity. In the Vulgate, the Latin word *castitas* translates words which refer to purity/holiness.

	NIV	Greek New Testament	Vulgate	Douay Rheims
2Cor 6:6	in purity , understanding, patience and kindness; in the Holy Spirit and in sincere love;	ἐν ἀγνότητι , ἐν γνώσει, ἐν μακροθυμίᾳ, ἐν χρηστότητι, ἐν Πνεύματι Ἁγίῳ, ἐν ἀγάπῃ ἀνυποκρίτῳ,	<i>in castitate in scientia in longanimitate in suavitate in Spiritu Sancto in caritate non ficta</i>	In chastity , in knowledge, in longsuffering, in sweetness, in the Holy Ghost, in charity unfeigned,
1Tim 2:2	for kings and all those in authority, that we may live peaceful and quiet lives in all godliness and holiness .	ὑπὲρ βασιλέων καὶ πάντων τῶν ἐν ὑπεροχῇ ὄντων, ἵνα ἡρεμον καὶ ἡσύχιον βίον διάγωμεν ἐν πάσῃ εὐσεβείᾳ καὶ σεμνότητι .	<i>pro regibus et omnibus qui in sublimitate sunt ut quietam et tranquillam vitam agamus in omni pietate et castitate</i>	For kings, and for all that are in high station: that we may lead a quiet and a peaceable life in all piety and chastity .

1Tim 3:4	He must manage his own family well and see that his children obey him with proper respect [<i>lit. with all purity</i>].	τοῦ ἰδίου οἴκου καλῶς προϊστάμενον, τέκνα ἔχοντα ἐν ὑποταγῇ, μετὰ πάσης σεμνότητος	<i>suae domui bene praepositum filios habentem subditos cum omni castitate</i>	One that ruleth well his own house, having his children in subjection with all chastity .
1Tim 4:12	Don't let anyone look down on you because you are young, but set an example for the believers in speech, in life, in love, in faith and in purity .	Μηδεὶς σου τῆς νεότητος καταφρονεῖτω, ἀλλὰ τύπος γίνου τῶν πιστῶν ἐν λόγῳ, ἐν ἀναστροφῇ, ἐν ἀγάπῃ, ἐν πίστει, ἐν ἀγνεΐᾳ .	<i>nemo adolescentiam tuam contemnat sed exemplum esto fidelium in verbo in conversatione in caritate in fide in castitate</i>	Let no man despise thy youth: but be thou an example of the faithful in word, in conversation, in charity, in faith, in chastity .
1Tim 5:2	older women as mothers, and younger women as sisters, with absolute purity .	πρεσβυτέρας ὡς μητέρας, νεωτέρας ὡς ἀδελφὰς ἐν πάσῃ ἀγνεΐᾳ .	<i>anus ut matres iuuenculas ut sorores in omni castitate</i>	Old women, as mothers: young women, as sisters, in all chastity .

71. Across the Christian tradition (Roman Catholic, Orthodox and Protestant), the word chastity came to mean “sexual purity” in particular, and unchastity to mean “sexual impurity”. All Christians are called to be chaste, either in chaste marriage or chaste singleness – “Marriage should be honoured by all, and the marriage bed kept pure, for God will judge the adulterer and all the sexually immoral” (Heb 13:4).
72. “Unchastity” covers a broader field than adultery and fornication (each of which, strictly speaking, requires an act of sexual intercourse). Unchastity is equivalent to the πορν-⁶ word group in the Scriptures, which encompasses any form of sexual impurity or sexual activity outside the marriage relationship, including adultery (Hos 2:2; Sirach 23:23), fornication (Sirach 23:17; 1 Cor 7:2), prostitution (Lev 19:29), male prostitution, (Deut 23:17), incest (1 Cor 5:1), homosexual sex (Demosthenes, Letters, 4:11) and

⁶ Esp. πόρνη (prostitute); πόρνος (male sexual sinner); πορνεία (sexual impurity); πορνεύω (to sin sexually).

miscegeny (Tobit 4:12; 1 En 10:9–10) . Although there are no biblical examples, it would also include bestiality and rape.⁷

73. The RSV translates the word πορνεία as “unchastity”. For example, the RSV of Matthew 19:9 reads “whoever divorces his wife, except for unchastity (πορνεία), and marries another, commits adultery.”⁸
74. It is likely that the language of “unchastity” in the *Offences Canon 1962* is a reflection of the RSV, which was the dominant translation used by the Church in the 1960s.

The offence of “Unchastity” under the Constitution

75. The language of “unchastity” and “sexual misconduct” did not become part of the Constitution until 2003 (see further below). But even before this date, a diocesan tribunal had jurisdiction under the Constitution to hear a charge of unchastity, by the combined operation of section 54(2) and the *Offences Canon 1962*. Section 54(2) provides that:

A diocesan tribunal shall in respect of a person licensed by the bishop of the diocese, or any other person in holy orders resident in the diocese, have jurisdiction to hear and determine charges of breaches of faith ritual ceremonial or discipline and of **such offences as may be specified by any canon ordinance or rule.** [emphasis added]

76. The Offences Canon has always had an offence of unchastity. The list of offences in the Offences Canon has been modified twice since inception, as highlighted below.

Offences Canon (Original)	Offences Canon (Current)
1. Unchastity	1. Unchastity
2. Drunkenness	2. Drunkenness

⁷ See further Wheeler-Reed *et al.*, “Can a Man Commit πορνεία with His Wife?”, *JBL* 137, (2018): 383–398.

⁸ See similarly Matt 5:32; Acts 15:20, 29; Acts 21:25 and 1 Thess 4:3. The RSV also translates πορνεία as fornication (e.g., John 8:41) and immorality (e.g., 1 Cor 5:1).

3. Habitual and wilful neglect of ministerial duty after written admonition in respect thereof by the bishop of the diocese	3. Habitual and wilful neglect of ministerial duty after written admonition in respect thereof by the bishop of the diocese
4. Bankruptcy	
5. Wilful failure to pay just debts	4. Wilful failure to pay just debts
6. Conduct disgraceful in a clergyman and productive or likely to be productive of scandal or evil report	5. Conduct, whenever occurring, (a) which would be disgraceful if committed by a member of the clergy, and (b) which at the time the charge is preferred is productive, or if known publicly would be productive, of scandal or evil report
7. Any offence punishable by law being a malum in se	
8. Any other offence prescribed by an ordinance of the synod of the diocese.	6. Any other offence prescribed by an ordinance of the synod of the diocese

Bankruptcy (#4) and an offence punishable by law (#7) were deleted by Canon 7 of 1991. The scope of disgraceful conduct (#6) was widened by Canon 20 of 1998 to ensure that “hidden” disgraceful conduct (e.g., sexual abuse of children) would be an offence. The explanatory statement contemplated that some, but perhaps not all, instances of child sexual abuse would come within the definition of “unchastity”.⁹

77. In the list of offences in the Canon, the fact that there are no other offences of a sexual nature demonstrates that unchastity has its historical meaning in this Canon, and encompasses any form of sexual impurity or sexual activity outside the marriage relationship.

⁹ See the commentary in this Explanatory Statement: <https://www.sds.asn.au/general-synod-offences-canon-amendment-canon-1998-adopting-ordinance-1998>

"Unchastity" and "sexual misconduct" in section 54(2A) of the Constitution

78. Section 2A was added by the *Constitution Alteration (Tribunals) Canon 1998*, as amended by *Constitution Alteration (Tribunals) Amendment Canon 2001*, both of which came into effect on 16 June 2003.¹⁰
79. The 1998 amendment extended the jurisdiction of the diocesan tribunal to prevent clergy avoiding a charge by moving to another diocese or by relinquishing a licence. In response to objections raised by the Synod of the Diocese of Sydney, the 2001 Amendment limited the extended jurisdiction of the diocesan tribunal to such matters "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 or upwards".¹¹
80. The 1998 amendment, as further amended by the 2001 Canon (highlighted), is as follows:
- 54(2A) "A diocesan tribunal shall also have and always be deemed to have had jurisdiction ~~to hear charges 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 or upwards** in respect of a member of clergy if:
- a. the act of the member of clergy which gave rise to the charge occurred in the diocese;
 - b. the member of clergy was licensed by the bishop of the diocese or was resident in the diocese within two years before the charge was laid; or
 - c. the member of clergy is in prison as a convicted person at the time the charge was laid, but within two years before such imprisonment was licensed by the bishop of the diocese or was ordinarily resident therein."

¹⁰ <https://www.sds.asn.au/sites/default/files/synod/54GS.ConAlter.Trbi.pdf>

¹¹ <https://www.sds.asn.au/sites/default/files/synod/GS.Tribunal.rep.pdf>

81. Clearly, "unchastity" in s54(2A) is intended to mean what it means in the *Offences Canon 1962*. It seems likely that the second category of offence in s54(2A) – an offence involving sexual misconduct – was added for the same reason that the *Offences Canon* was amended in 1998, that is, to ensure that child sexual abuse and other offences of sexual misconduct that did not amount to unchastity would still be liable to a charge. The third category of offence (criminal offence leading to imprisonment) is a more restricted version of offence #7 which had been previously deleted from the *Offences Canon*.
82. The offence of "unchastity" under the *Offences Canon 1962* encompasses any form of sexual impurity or sexual activity outside the marriage relationship. Sex between two people of the same sex is an act of unchastity. A civil same-sex marriage does not change the status of the sexual act, because this is not a marriage relationship as recognised by the Scriptures or by the doctrine of our church. However, a civil same-sex marriage does have an effect – it provides *prima facie* evidence of a same-sex sexual relationship.
83. By virtue of s54(2), the diocesan tribunal has jurisdiction to hear and determine a charge of unchastity. Moreover, even if a diocese were to exclude the operation of the *Offences Canon 1962* in that diocese – and thereby prevent a charge of unchastity under s54(2) – the diocesan tribunal would still have jurisdiction to hear and determine a charge of unchastity under s54(2A). The diocesan tribunal would also have jurisdiction to hear and determine a charge of sexual misconduct on the basis of the same evidence, since same-sex sexual activity is not permitted sexual conduct.
84. The Amending Ordinance is inconsistent with the Constitution to the extent that it seeks to prevent both the referral to the Diocesan Tribunal and the Diocesan Tribunal from hearing a **charge of unchastity or sexual misconduct** on the basis that a member of the clergy is married to a person of the same sex and a **charge of breach of faith**

ritual ceremonial or discipline as a result of participation in the solemnisation of or the blessing of a Same-sex Marriage.

Dated: 3 January 2020

Michael K Meek SC

Chancellor of the Diocese of Sydney

Steven J Lucas

Senior Legal Counsel

Sydney Diocesan Services