



# **GENERAL SYNOD APPELLATE TRIBUNAL**

**Primate's Reference under Section 63 of the Constitution**

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

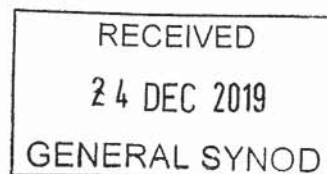
# General Synod Appellate Tribunal - Newcastle

## Appellate Tribunal - Newcastle

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IN THE APPELLATE TRIBUNAL  
ANGLICAN CHURCH OF AUSTRALIA



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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.
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- 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 beneficial construction in past decisions of the Tribunal.<sup>1</sup> 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.<sup>2</sup>
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 issues<sup>3</sup> 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

<sup>1</sup> *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

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

<sup>3</sup> *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.<sup>4</sup>

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.<sup>5</sup>
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.<sup>6</sup>
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;

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<sup>4</sup> At page 113

<sup>5</sup> *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

<sup>6</sup> *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.<sup>7</sup> 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.<sup>8</sup>
19. A Diocesan Synod in NSW has undoubted power to enact ordinances for the order and good government of the Church within that Diocese.<sup>9</sup> That power is subject to the Constitution: section 51. It is also subject to territorial limitations.<sup>10</sup>
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

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<sup>7</sup> 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

<sup>8</sup> *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

<sup>9</sup> *Appeal of Keith Francis Slater* at [8]

<sup>10</sup> *Appeal of Keith Francis Slater* at [119]



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

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).

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<sup>11</sup> 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 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".<sup>12</sup>
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.

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<sup>12</sup> 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.<sup>13</sup>
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.

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<sup>13</sup> 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**)<sup>14</sup> 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

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<sup>14</sup> 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.<sup>15</sup>
- 53.2. The existence of different biblical commentaries on disputed passages indicates that there are many different views on parts of Scripture.<sup>16</sup>
- 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".<sup>17</sup>
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.

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<sup>15</sup> *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

<sup>16</sup> *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"

<sup>17</sup> *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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Scott Puxty  
Cantle Carmichael Legal  
Diocesan Solicitor  
Diocese of Newcastle

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

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

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

**SUBMISSION BY FIONA D. McLEAN**

**Introductory remarks**

Much of the substance of my submission to the Appellate Tribunal in the Wangaratta matter is also relevant to this matter. For this reason, I have reproduced my earlier submission as an appendix to this submission and will refer to it throughout this submission.

**Response to the questions referred by the Primate**

**Question 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?

1. The answer is **Yes**, it is inconsistent with the Fundamental Declarations and the Ruling Principles of the Constitution.

**The Newcastle Ordinance is inconsistent with Scripture**

2. The Fundamental Declarations bind our Church to the authority of Scripture and commit us to teach Christ's doctrine. Clause 2 states that "This Church receives all the canonical scriptures of the Old and New Testaments as being the ultimate rule and standard of



faith given by inspiration of God”. Clause 3 states, “This Church will ever obey the commands of Christ [and] teach His doctrine”.

3. The Bible teaches us that the only right context for sexual expression is in a marriage between a man and a woman, and that therefore any same-sex sexual activity is contrary to the Bible, and inconsistent with the Fundamental Declarations. (See paragraphs 2 – 5.11.1 in the Appendix.)
4. The Church’s teaching about marriage is part of its doctrine (see paragraphs 3 – 3.11 in the Appendix).
5. Accordingly, it is inconsistent with the Fundamental Declarations and the Ruling Principles of the Constitution of the Anglican Church of Australia to:
  - 5.1 Pronounce a blessing of a marriage-like relationship in which the persons being married (in the eyes of the law) are of the same sex, as this cannot be regarded as a lawful marriage in the eyes of God.
  - 5.2 Enter into a marriage-type relationship with a person of the same sex, as such a relationship is regarded as sinful by God, and therefore forbidden.

**The Newcastle Ordinance is inconsistent with our Church’s expectations of church leaders**

6. The Newcastle Ordinance is incompatible with Biblical expectations of church leaders. Members of the clergy, as leaders of the church, are to uphold the Church’s doctrine, both in their teaching and in their lives (e.g. 1 Timothy 3:12-16). Leaders are held to higher standards than other believers (e.g. James 3:1).
7. A minister must be “above reproach” and “the husband of one wife” (1 Timothy 3:2; Titus 1:6, 7). He must be “a lover of good, self-controlled, upright, holy and disciplined. He must hold firm to the trustworthy word as taught, so that he may be able to give instruction in sound doctrine and also to rebuke those who contradict it” (Titus 1:7-9).
8. The Newcastle Ordinance is incompatible with the principles of church leadership embodied in the Book of Common Prayer (BCP), which are included (in modernised language) in *A Prayer Book for Australia* (APBA). At their ordination, deacons and priests make promises to assent to and abide to the teaching and doctrine and discipline of the

Church.

8.1 Specifically, the BCP rite “The Form and Manner of Making Ordaining and Consecrating of Bishops Priests and Deacons” is recognised in Clause 4 of our Constitution as embodying “the doctrine and principles” of the Church. These doctrine and principles include that those serving in church leadership must both hold to sound doctrine and live holy lives, as the following excerpts from the BCP and the APBA demonstrate:

- “From all false doctrine, heresy, and schism; from hardness of heart, and contempt of thy Word and Commandment, *Good Lord, deliver us.*” (BCP)
- “From fornication, and all other deadly sin; and from all the deceits of the world, the flesh and the devil, *Good Lord, deliver us.*” (BCP)
- Those being ordained priest are warned that “you cannot by any other means compass the doing of so weighty a work, pertaining to the salvation of man, but with doctrine and exhortation taken out of the holy Scriptures, and with a life agreeable to the same”. (BCP)
- They must promise to “be ready, with all faithful diligence, to banish and drive away all erroneous and strange doctrines contrary to God’s Word” (BCP). (In our context, this includes the “erroneous and strange” doctrine that seeks to revise God’s teaching about marriage and sexuality.)
- In the APBA, those being deaconed must promise to “wholeheartedly accept the canonical Scriptures of the Old and New Testaments”, “to teach the doctrine of Christ”, “to shape your own life, and that of your household, according to the way of Christ” and “to accept the order and discipline of the Anglican Church of Australia”.
- Those being priested must promise to “faithfully and humbly minister the doctrine, sacraments and discipline of Christ, as he has commanded and as this Church has received them” and “to oppose and set aside teaching that is contrary to God’s word” (APBA).

8.2 In summary, blessing or entering into a same-sex sexual relationship is contrary to



the Scriptural principles embodied in the BCP that those in Holy Orders must both teach the doctrine of Christ and live in accordance with that doctrine.

9. The Newcastle Ordinance is incompatible with the Diocese of Newcastle's own standards required of clergy, as expressed in *Faithfulness in Service* (Anglican Diocese of Newcastle, August 2019, accessed at <https://www.newcastleanglican.org.au/wp-content/uploads/2019/08/Faithfulness-in-Service-Anglican-Diocese-of-Newcastle-August-2019.pdf>). This document states:

9.1 *The Church is the fellowship that nurtures and sustains Christians as they seek to follow Christ faithfully and participate in God's mission. Its leaders especially are to be examples of Christian faith and obedience as they exercise their vocation* (from Section 1 of *Faithfulness in Service*, "About this Code")

9.2 *The personal behaviour and practices of pastoral ministry required of clergy (bishops, priests and deacons) of the Anglican Church of Australia are specified in the Holy Scriptures as well as in its Constitution, canons, ordinances, the Book of Common Prayer and the Ordinal.* (from Section 1 of *Faithfulness in Service*, "About this Code")

9.3 *The absence of any reference to particular conduct in this Code [e.g. same-sex relationships] does not imply that it is acceptable for clergy and church workers.* (*Faithfulness in Service*, 3.2)

9.4 *Clergy are bound to conform to Holy Scriptures above the law of the land: You are to observe the law, other than any law that is contrary to the Holy Scriptures* (*Faithfulness in Service*, 6.14)

9.5 *The sexual conduct of clergy and church workers has a significant impact on the Church and the community.* (*Faithfulness in Service*, 7.1)

9.6 *Sexuality is a gift from God and is integral to human nature. It is appropriate for clergy and church workers to value this gift, taking responsibility for their sexual conduct by maintaining **chastity in singleness and faithfulness in marriage**.* (*Faithfulness in Service*, 7.2; *emphasis mine*).

10. It is clear that marriage in the Anglican Church of Australia means only marriage between a man and a woman (see Appendix, especially paragraphs 3.2 – 3.10), so

blessing, or entering into, a same-sex marriage would be in violation of *Faithfulness in Service*.

**Question 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?**

**Answer:** No, it does not.

11. Section 51 of the Constitution gives a diocesan synod authority to “make ordinances for the order and good governance of this Church”, but those ordinances must be “**subject to this Constitution**” (emphasis mine). As elaborated above, this means that any ordinances made must be consistent with Scripture, the BCP, the Thirty-Nine Articles, the doctrine of this Church and the teaching of Christ. The Ordinance proposed by Newcastle is inconsistent with all of the above.
12. The Constitution “retains and approves the doctrine and principles of the Church of England embodied in ... the Articles of Religion sometimes called the Thirty-Nine Articles” (Clause 4). The 39 Articles recognise that, while Church councils have genuine authority and are part of the good governance and order of God’s church, they remain subject to the authority of Scripture. As Article XX says, “it is not lawful for the Church to ordain any thing that is contrary to God’s Word written ...” Article XXI recognises that Church Councils (including Synods) “may err, and sometimes have erred, even in things pertaining unto God”. I submit that, in the matter of this Ordinance, the Newcastle Synod has erred, and has acted contrary to God’s word.
13. The Newcastle Ordinance is inconsistent with requirements of deacons and priests laid down in the CANON CONCERNING HOLY ORDERS 2004.
  - 13.1 A person to be ordained deacon or priest must have “a sufficient knowledge of and [accept] the doctrine, discipline and principles of worship of this Church” (Clause 5(1) (h) & 6(1) (d) and (g)) [emphasis mine]



13.2 Clause 15(2) states that “a priest or deacon who has received authority from the bishop of a diocese to minister in that diocese shall declare acceptance of such codes of practice as are from time to time in force in the diocese”. Such codes of practice include *Faithfulness in Service*, which forbids sexual activity outside of marriage between a man and a woman.

13.3 Clause 18 states that “A person must not ... in submitting or offering himself or herself for ordination ... in this Church, knowingly act in contravention of this Canon” (Clause 18 (1) (b)) and “A person who breaches sub-section (1) will be taken to be in wilful violation of this Canon” (Clause 18 (2)). Any clergy person blessing or entering into a same-sex marriage would be in wilful violation of the CANON CONCERNING HOLY ORDERS and subject to discipline under the OFFENCES CANON 1962.

**Question 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?

**14. Answer:** The answer is **No**.

**15.** The Clergy Discipline Ordinance 2019 Amendment Ordinance 2019 itself states that “The Bishop shall indicate his/her support within 30 days of the conclusion of an ordinary or special session of the Synod in which the resolution is considered” (Clause 4). As the Bishop has not given his support within the required 30 days, the Ordinance has lapsed and will need to be passed again.

## Final remarks

16. A further reason that the Newcastle Ordinance should not be passed is that it is divisive and schismatic. It undermines the unity we share as Anglicans. Our Church's doctrine and principles uphold the traditional and historic view of marriage. For example, the statement from the National Bishops' Conference in March 2018, "Responding to Recent Changes in the Marriage Act", states:

*"The doctrine of this Church is that marriage is a lifelong union between a man and a woman. If we as a Church are to change this doctrine to permit same-sex marriage, the appropriate mechanism is through the framework of the Constitution and Canons of the Anglican Church of Australia. Bishops should give leadership in demonstrating trust in this framework as the way to move forward together ... The bishops commit to working together to manifest and maintain unity ... The bishops commit to act within the framework of the Constitution and Canons of this Church, and to encourage those under their episcopal oversight to do so."*

If a bishop were to give assent to the Newcastle Ordinance, this would go against the commitment expressed in this resolution.

## In conclusion

17. In response to the question whether any part of the **Clergy Discipline Ordinance 2019 Amendment Ordinance 2019** of the Diocese of Newcastle is inconsistent with the Fundamental Declarations or the Ruling Principles of the Constitution of the Anglican Church of Australia, the answer is **Yes**, it is inconsistent.

18. In response to the question whether the Synod of the Diocese of Newcastle has the authority under section 51 of the Constitution to pass the **Clergy Discipline Ordinance 2019 Amendment Ordinance 2019**, the answer is **No**, it does not have this authority.

19. In response to the question whether, 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, the Bishop may give assent to the Ordinance on receiving the opinion of the Appellate Tribunal or whether the Synod



is required to pass the ordinance again, the answer is **Yes**, the Synod would be required to pass the ordinance again.

## **APPENDIX A**

### **Fiona McLean's submission to the Appellate Tribunal in the Wangaratta Matter, December 2019**

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

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

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

#### **SUBMISSION BY FIONA D. McLEAN**

##### **1. How I am an interested party**

1.1 I am a lifelong Anglican, involved in my local Anglican church, St Stephen's, Greythorn (Diocese of Melbourne), and on staff at St Jude's, Carlton (Diocese of Melbourne) as an authorised stipendiary lay minister. In my role at St Jude's, I work with a congregation of young adults, most of whom are university students, who are confronted with questions about how their Christian faith affects their sexuality and morality. A number of them experience same-sex attraction. Those who are Christians are seeking to know and obey God's commands regarding sexuality, and so it is of vital pastoral importance that the Church is clear about what is and is not

blessed by God in this regard.

1.2 I serve the Anglican Church of Australia in various governance roles, including on the Council of the Diocese of Melbourne (Archbishop in Council), General Synod, the Standing Committee of General Synod and on the Board of Electors for the Primatial Election.

1.3 I am on the board of Gafcon Australia, and so acutely aware of how this issue has been divisive and painful in many other parts of the world. I value our connection with other Anglicans worldwide (and in centuries past) and am deeply concerned about the fact that this issue has impaired or broken fellowship in many parts of the world – including in the USA, Canada, Scotland, Brazil, and, more recently, New Zealand.<sup>1</sup> I am also concerned for those in the Anglican Church of Australia who are troubled, confused or distressed by the conflict in our church over these issues.

## Response to the questions referred by the Primate

**A. Whether the regulation *Blessing of Persons Married According to the Marriage Act 1961 Regulations 2019* made by the Synod of the Diocese of Wangaratta is consistent with the Fundamental Declarations and Ruling Principles in the Constitution of the Anglican Church of Australia.**

The Wangaratta regulation is **not** consistent with the Fundamental Declarations and Ruling Principles in the Constitution, for the following reasons, elaborated further below:

- It is contrary to Scripture and therefore not consistent with the Fundamental Declarations and Ruling Principles
- It is contrary to the Church's doctrine of marriage

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<sup>1</sup> See the book by Vaughan Roberts and Peter Jensen, *Faith in a Time of Crisis: Standing for the Truth in a Changing World* (Matthias Media, Sydney: 2017) for a clear explanation of why differences about the issue of sexuality have had such significant effects.

- It is contrary to the BCP
  - It is contrary to the Anglican doctrine of the authority of Scripture
2. The Wangaratta regulation, which allows for the blessing of same-sex couples who have entered into a civil marriage, is contrary to Scripture, and therefore not consistent with Clause 2 of our Fundamental Declarations, which states that “This Church receives all the canonical scriptures of the Old and New Testaments as being the ultimate rule and standard of faith given by inspiration of God”. These scriptures teach us that same-sex sexual practice is not in accordance with God’s word and therefore cannot be blessed.

### **The Bible’s teaching about same-sex sexual relationships**

2.1 The Bible teaches that marriage is between a man and a woman, and that the only appropriate context for sexual activity is within marriage (e.g. Genesis 2:24; Exodus 20:14; Matthew 19:4-6; Romans 7:2-3). The doctrine that marriage is between a man and a woman has been the “Christian Faith as professed by the Church of Christ from primitive times” (Clause 1, Constitution).

2.2 God is the Creator of the world, the one to whom every person is accountable, and who has the right to make laws and commands, and to punish those who disobey, ignore or defy him. He cares about sin. Fundamental to sin is the rejection of God – a failure to honour him, to listen to his word, or to obey his commandments. For example, Jesus says, “If you love me, keep my commands” (John 14:15). *Whoever believes in the Son has eternal life, but whoever rejects the Son will not see life, for God’s wrath remains on them. (John 3:18, 36).*

2.3 Sexual immorality is clearly identified in Scripture as sinful; and the Bible regards wilful persistence in sexual (and other sin) as so grave as to jeopardise one’s salvation.

*It is God’s will that you should be sanctified: that you should avoid sexual immorality ... The Lord will punish all those who commit such sins, as we told you and warned you before. <sup>7</sup> For God did not call us to be impure, but to live a holy life. <sup>8</sup> Therefore, anyone who rejects this instruction does not reject a human being but God, the very God who gives you his Holy Spirit. (1 Thess.*



4:3-8)

*For of this you can be sure: No immoral, impure or greedy person—such a person is an idolater—has any inheritance in the kingdom of Christ and of God. <sup>6</sup> Let no one deceive you with empty words, for because of such things God's wrath comes on those who are disobedient. (Ephesians 5:5-6)*

*Put to death, therefore, whatever belongs to your earthly nature: sexual immorality, impurity, lust, evil desires and greed, which is idolatry. <sup>6</sup> Because of these, the wrath of God is coming. (Colossians 3:5-6)*

*Flee from sexual immorality. (1 Corinthians 6:18)*

*Those who are victorious will inherit all this, and I will be their God and they will be my children. <sup>8</sup> But the cowardly, the unbelieving, the vile, the murderers, the sexually immoral, those who practice magic arts, the idolaters and all liars—they will be consigned to the fiery lake of burning sulphur. This is the second death. (Rev. 21:7-8)*

2.4 Any sexual activity outside of marriage is regarded by the Bible as sexual immorality, something to be avoided by God's holy people: *Marriage should be honoured by all, and the marriage bed kept pure, for God will judge the adulterer and all the sexually immoral (Hebrews 13:4)*. This includes sexual activity before marriage, adultery, homosexuality, bestiality, prostitution and cultic sexual practices.

2.5 Same-sex sexual activity is explicitly prohibited in several passages, including Leviticus 18:22; Romans 1:26-27; 1 Corinthians 6:9-10.<sup>2</sup> As the contributors to the Doctrine Commission book acknowledge (e.g. Matthew Anstey on page 69-70; cf. Dorothy Lee on page 138), the Bible doesn't say anything at all positive about homosexual sexual relationships. Both the OT and NT are clear and unequivocal about this.

2.6 We cannot bless what God has called sin. To bless an activity is to endorse and

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<sup>2</sup> For further detailed argument, see Robert A.J. Gagnon, *The Bible and Homosexual Practice: Texts and Hermeneutics*. Abingdon Press: Nashville, TN, 2001. For a brief popular treatment of the topic of homosexuality from a Christian point of view, see Sam Allberry, *Is God Anti-Gay?* (The Good Book Company: 2016).

accept it; to say that it merits God's approval; that it is good and holy. By blessing same-sex marriages (or any other forbidden sexual activity), people are calling good what God calls sinful (see Isaiah 5:20; Malachi 2:17). There are some things that God blesses, and others that merit his terrible curse (e.g. Leviticus 26; Deuteronomy 27:11-26; Psalm 37:22). We must be very careful to be acting in accordance with God's will before we pronounce either blessing (declaring that an action or doctrine is pleasing to God) or curse (declaring that an action or doctrine is not pleasing to God).

### **Scripture is the primary source of the Church's doctrine**

2.7 The Church's doctrine is derived from the Book of Common Prayer (BCP), the 39 Articles and the Creeds, but primarily from Holy Scripture, which underpins all other teaching of the Church. As Clause 2 of our Constitution says, "This Church receives all the canonical scriptures of the Old and New Testaments as being the ultimate rule and standard of faith given by inspiration of God".

2.8 While the Fundamental Declarations and the 39 Articles are vitally important, they do not and cannot elaborate every important point of doctrine, but instead point us to the authority of Scripture. The 39 Articles do not address the question of same-sex marriage, not because leaders and theologians of the time thought it best to leave this an open question, or regarded this as merely a matter of conscience, or because it was under dispute and they wished to avoid controversy, but because there was no question at the time that homosexual sexual practice could ever be endorsed by the Church. If the writers of the 39 Articles had been asked to include an Article addressing the current question before this Tribunal, we can say with confidence that they would have upheld the teaching of the Bible and the historical teaching of the church from primitive times that the only form of marriage allowed by God is between a man and a woman.

3. Secondly, the Wangaratta regulation is not consistent with Clause 3 of the Fundamental Declarations and Ruling Principles: "This Church will ever obey the commands of Christ,



teach His doctrine, ... follow and uphold His discipline ...” The doctrine of the Church includes its teaching about marriage, and the decision of the Wangaratta synod is counter to the doctrine of the church regarding marriage.

3.1 The decision of the Wangaratta synod is counter to the commands of Christ (outlined above), including Matthew 19:1-12. The Anglican Church is committed to teaching Christ’s doctrine.

3.2 It is clear from General Synod and Standing Committee of General Synod motions that the church’s teaching on marriage is regarded as doctrine:

3.3 In the General Synod resolution of 2017 regarding “Marriage, Same-Sex Marriage and the Blessing of Same-Sex Relationships” (seconded by the Rev’d Canon Professor Dorothy Lee), the General Synod:

3.3.1 “recognises that **the doctrine of our church**, in line with traditional Christian teaching, is that marriage is an exclusive and lifelong union of a man and a woman”

3.3.2 asked the Doctrine Commission to “facilitate a respectful conversation in our church ... that explores Scriptural and theological issues relating to: (a) **The doctrine of marriage** expressed in the formularies of the Anglican Church of Australia”; (b) “exploring the relationship between the State’s definition of marriage and **the church’s doctrine of marriage**”

3.4 In that same year (2017), the General Synod, in response to the decision of the Scottish Episcopal Church to change the definition of marriage, “notes with regret that this step is contrary to **the doctrine of our Church** and the teaching of Christ” and “prays that the Scottish Episcopal Church will return to **the doctrine of Christ** in this matter”.

3.5 In its meeting of 9-10 November 2018, the Standing Committee of General Synod moved a motion in response to the decision of the Anglican Church in Aotearoa, New Zealand and Polynesia to authorise clergy to bless same-sex unions. The motion read, in part: *“The Standing Committee ... noted that this step [to bless same-sex*



*unions] is contrary to Resolution I.10 of the 1998 Lambeth Conference and is **not in accordance with the teaching of Christ** in Matthew 19:1-12".*

3.6 It is also clear from the Doctrine Commission book, *Marriage, Same-Sex Marriage and the Anglican Church of Australia: Essays from the Doctrine Commission* that marriage is regarded as part of the doctrine of our church:

3.6.1 Matthew Anstey argues that "**the BCP doctrine of marriage** should be taken as pertaining only to 'the BCP **doctrine** of heterosexual marriage'" (page 50)

3.6.2 Matthew Anstey again: "we seek to interrogate the role Scripture plays in the discernment of the Anglican Church of Australia in its decision regarding **the doctrine of same-sex marriage**" (pages 59-60).

3.6.3 Stephen Pickard says "the confession of Christ as Saviour and Lord is not of the same order as belief in the church or, in the present context, **the doctrine of marriage**" (page 243)

3.7 Bishop John Parkes himself has stated that marriage is part of the doctrine of the Church:

In Bp John Parkes' open letter (dated 15th August 2019) in response to the letter from New Cranmer Society of Melbourne, he states: "*What we will put to the Wangaratta Synod has nothing to do with **the doctrine of marriage** ... [M]arriage in the church ... is between a man and a woman .... This is **the doctrine of holy matrimony** which I uphold. I accept that the marriage of two persons of the same sex cannot take place within the Anglican Church of Australia*".

3.8 Finally, this view of marriage as doctrine is held across the Anglican Communion. (The following quotes are from Michael Stead's essay in the Doctrine Commission book.)

- "*At their meeting in Canterbury in 2016, the Primates of the Anglican Communion described TEC's change in their marriage canon as 'a fundamental departure*

*from the faith and teaching held by the majority of our Provinces on **the doctrine of marriage***” (page 16).

- In Canada, the Primate’s Theological Commission advised in 2005 *“that **blessing of same-sex relationships was a matter of doctrine**”* (page 17) and needed to be considered *“in relation to **the doctrine of marriage**”* (page 17).
- The Anglican Church of Aotearoa, New Zealand and Polynesia has not altered their Church’s doctrine of marriage (page 23).
- In England in 2014, the House of Bishops affirmed *“The Church’s **doctrine of marriage** is (only) between a man and a woman. The changes of the State’s definition of marriage does not change the Church’s doctrine of marriage”* (page 27).

### **The significance of the church’s doctrine of marriage**

3.9 Marriage is a critical aspect of the Bible’s doctrine. Marriage is used throughout the Bible as a metaphor for God’s relationship with his people: see, for example, Isaiah 54:4-8; Jeremiah 3:1, 8, 20; Hosea 1-3; Mark 2:19-20; Revelation 19:6-9 and (most clearly) Ephesians 5:22-33. The significance and pervasiveness of the metaphor of marriage is seen by the way adultery is repeatedly used as a metaphor for idolatry.

3.10 Marriage is a creation ordinance. God’s design for marriage applies to all people, in every culture and time. There is no distinction in God’s eyes between Christian marriage and secular marriage: that is, there is not one form of God-approved marriage for Christians and another form for unbelievers. The Bible does not differentiate between a civil marriage and a church marriage, only between marriage in the eyes of God (which can be marriage only between a man and a woman) and other sexual relationships which are not lawful in God’s eyes (even if authorised by the state). The existence of the *Blessing of Civil Marriage* ordinance in the first place is recognition that a marriage doesn’t have to take place in a church, under Christian rites, in order to be acknowledged as a marriage in the eyes of God.



3.11 The Church cannot, therefore, authorise or bless or condone any form of sexual relationship (whether called “marriage” or not) that is not marriage as defined by God in his Word (contra. the Wangaratta submission, Clause 6.2).

3.12 **The consistent teaching of the Anglican Church of Australia is that marriage is the only appropriate context for sexual expression**

3.12.1 As the Wangaratta submission notes (para. 53), “The Church’s teaching on marriage ... can also be found in codes of conduct such as *Faithfulness in Service* ...” *Faithfulness in Service* states that clergy and church workers must maintain “chastity in singleness and faithfulness in marriage” (*Faithfulness in Service*, 7.2). The “Standards for clergy and church workers” state, “You are to be chaste and not engage in sex outside of marriage and not engage in disgraceful conduct of a sexual nature” (7.4). The Anglican Church does not allow for sexual activity in any context other than marriage between a man and woman.

3.12.2 The Wangaratta submission draws too artificial a distinction between “doctrine” and “teaching” (practical instruction about how to live). As *Faithfulness in Service* demonstrates, it is not just what one believes but how one lives that matters. “The personal behaviour and practices of pastoral ministry required of clergy (bishops, priests and deacons) of the Anglican Church of Australia are specified in the Holy Scriptures as well as in its Constitution, canons, ordinances, the Book of Common Prayer and the Ordinal.” (FIS, page 5). If the doctrine we believe does not affect how we live, then it is fair to question whether we really believe it. It matters very much to God not just what we believe but how we behave. The Bible has, for example, clear warnings about the dangers of persisting in wilful sinful behaviour (e.g. 1 Thess. 4:1-8; Hebrews 6:4-8; Jeremiah 6:10, 15, 19; 7:8-15, 23-29).

### **The Wangaratta resolution is not consistent with the doctrine and principles of the BCP**

4. Thirdly, the Wangaratta regulation is **not** consistent with the Fundamental Declarations and Ruling Principles in the Constitution because it is contrary to the BCP. As Clause 4 states, "This Church ... retains and approves the doctrine and principles of the Church of England embodied in the Book of Common Prayer [BCP] ..."

4.1 The BCP clearly upholds the principle that marriage is between a man and a woman and that "no other" form is in accordance with the teaching of Christ. The principles embodied in the BCP do not regulate only heterosexual relationships, but **all** sexual relationships. Thus when the BCP says that unlawful relationships are not joined together by God, this includes any same-sex sexual relationships.

4.2 The doctrine and principles embodied in the BCP are derived from Scripture, not from the cultural context of the time (contra Para. 59 of the Wangaratta submission).

4.3 While Clause 4 allows the Church to make changes, this is only "provided all such statements, forms, rules or alteration or revision thereof are consistent with the Fundamental Declarations contained herein" and "that the above-named Book of Common Prayer ... be regarded as the authorised standard of worship and doctrine in this Church, and no alteration in or permitted variations from the services or Articles contained therein shall contravene any principle of doctrine or worship laid down in such standard".

### **The Wangaratta regulations threaten our Anglican doctrine of the authority of Scripture**

5. Fourthly, the Wangaratta regulations are not consistent with the Fundamental Declarations and Ruling Principles of the Constitution because they are not consistent with the Anglican doctrine of the authority of Scripture.

#### **5.1 The Anglican doctrine of Scripture is that it is God's authoritative word**

5.2 This doctrine is derived from the Bible itself, which teaches us that Scripture is God's



authoritative word, breathed out by God, to which we must pay attention, and which we ignore at our peril (e.g. 2 Timothy 3:16-17; 1 Thess. 2:13; 2 Peter 1:19-21; Hebrews 4:12).

5.3 This doctrine of Scripture is affirmed in the BCP, for example, in the Collect for the Second Sunday in Advent: *Blessed Lord, who hast caused all holy Scriptures to be written for our learning: Grant that we may in such wise hear them, read, mark, learn and inwardly digest them, that by patience and comfort of thy Holy Word, we may embrace and ever hold fast the blessed hope of everlasting life, which thou hast given us in our Saviour Jesus Christ.*

5.4 This doctrine of Scripture is affirmed in the 39 Articles, which repeatedly uphold the authority of Holy Scripture: in Article VI; in Article XVII, which says, “we must receive God’s promises in such wise, as they be generally set forth to us in Holy Scripture: and, in our doings, that Will of God is to be followed, which we have expressly declared unto us in the Word of God”; and in Article XX, which says, “it is not lawful for the Church to ordain any thing that is contrary to God’s Word written, neither may it so expound one place of Scripture, that it be repugnant to another”.<sup>3</sup>

5.5 This doctrine of Scripture is affirmed in our Foundational Declarations: “This Church receives all the canonical scriptures of the Old and New Testaments as being the ultimate rule and standard of faith given by inspiration of God and containing all things necessary for salvation” (Clause 2).

#### **The doctrine of Scripture is undermined by the Wangaratta regulation**

5.6 The Wangaratta Regulations present us with a choice about whether we will uphold and submit to the Bible as God’s authoritative word to us, or whether we will reject it in favour of experience, reason and culture.

5.7 Same-sex marriage is a controversial and emotional issue. It is not just a social issue, but a profoundly theological issue; not a matter of conscience, but a matter of church discipline. What is at stake in this issue is the identity and integrity of our

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<sup>3</sup> Similarly, Article XXI states that “things ordained by [General Councils] as necessary to salvation have neither strength nor authority, unless it may be declared that they be taken out of Holy Scripture”; Article XXXIV states that “nothing be ordained against God’s Word”, distinguishing between “man’s authority” and the authority of the Bible.

church.

5.8 The Wangaratta submission undermines the perspicuity and authority of Scripture.

For example, in Para. 65, it is argued that “it is not always possible to discern from scriptural texts a single unified and consistent meaning”; that “ancient texts ... are the subject of ...widely divergent interpretation and explanation ...” (Para. 65.1); that “questions of marriage and personal relationships ...are matters about which faithful Anglican people of good conscience can differ” (Para. 66).

5.9 But if Scripture is not able to be understood, we cannot know what it means to obey

it. When a diversity of views are accepted on significant issues of doctrine, then obedience and holiness become optional and church discipline becomes toothless. When it is argued that the Bible is so unclear that it is open to completely contradictory interpretations, then confidence in the Bible as the Word of God – reliable, trustworthy and authoritative – is undermined. Thus Scripture loses its relevance and authority as a guide to our lives and as our ultimate authority in faith and practice.

5.10 As we have seen from the essays in favour of same-sex marriage in the Doctrine Commission book, and from Bishop John Parkes himself, “lived experience” has become a more important guide than God’s word to what is right. This is in contravention of our Fundamental Declarations. For example, in Bishop John Parkes’ Presidential Address to Wangaratta Synod on 30<sup>th</sup> August 2019, he emphasises experience as key to theology. While he acknowledges “the danger of subjectivism in this approach”, he talks positively about “theology from below – starting with the human experience of the holy and seeking a framework within which to articulate and make sense of that experience”. Further undermining the authority of the Bible, he introduces a false dichotomy between Jesus and the Bible, arguing that “[w]e are Christocentric and not bibliocentric”. He challenges both “the infallibility of the Bible” and its inspiration:

“Scripture is one way, an important way but not the only way by which the community of faith keeps access to the primordial revelation on which it is founded. Scripture does not automatically



lay this primordial revelation before us but *when read in conjunction with the present experience* of the community of faith, the scriptures come alive ... This is what we mean by the inspiration of scripture. *'Such inspiration does not lie in the words* (it is not 'verbal inspiration'), but belongs to the scriptures only as they are set in the context of the whole life of faith in the community'" [italics mine].

5.11 In response to this challenge to the authority of Scripture, the Tribunal must uphold the authority and relevance of the canonical Scriptures. It becomes meaningless to say that as a church we submit to the authority of Scripture if the Scriptures are seen as so unclear that they cannot guide our Church in any formulation of doctrine. It is impossible to keep our promise to obey the Scriptures if we cannot tell whether an action is obedient or disobedient. In order to honour Christ and his words, we need to trust that God is able to reveal himself; that the Bible makes sense; that it can be understood, and therefore obeyed (or disobeyed).

5.11.1 Our society's view of marriage has changed profoundly; but that does not mean that God's view has. Francis Schaeffer's warning is worth repeating here. He writes:

*[T]he Christian must resist the spirit of the world in the form it takes in his own generation. ... It is our generation of Christians more than any other who need to heed these words attributed to Martin Luther: "If I profess with the loudest voice and clearest exposition every portion of the truth of God except precisely that little point which the world and the devil are at that moment attacking, I am not confessing Christ, however boldly I may be professing Christ. Where the battle rages, there the loyalty of the soldier is proved, and to be steady on all the battlefield besides, is mere flight and disgrace if he flinches at that point".<sup>4</sup>*

<p><b>B. Whether the regulation is validly made pursuant to the <i>Canon Concerning Services 1992</i>.</b></p>
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<sup>4</sup> Quoted in Francis Schaeffer, *The God Who Is There*, IVP: Leicester, UK, 1990, page 11 (emphasis mine).



The Wangaratta regulation is **not** validly made pursuant to Canon Concerning Services 1992, for the following reasons:

6. Section 5(1) of the Canon states that variation to forms of service are permitted “which are not of substantial importance”. However, the variation introduced by Wangaratta Synod is of substantial importance, as it is counter to the doctrine and practice of our church, and has huge pastoral impact.
7. Section 5(3) states that “All variations in forms of service and all forms of service used must be reverent and edifying and must not be contrary to or a departure from the doctrine of this Church”. The Wangaratta regulation is contrary to the doctrine of this church, as shown above.
8. The Wangaratta regulation is a departure from General Synod resolution 62/04, which states that “this General Synod does not condone the liturgical blessing of SSRs”.
9. The form of service in Appendix A of the Wangaratta regulation (“A Service of Blessing for persons who have been married according to the Marriage Act 1961”) is contrary to the trial liturgy, “The Blessing of a Civil Marriage”, authorised by General Synod, in the following key ways:
  - 9.1 The Wangaratta form of service omits any mention of gender or the possibility of children. In contrast, the trial liturgy refers to the **procreative function of marriage**: “Through marriage a new family is formed where children may be born” (para. 4); and Paragraph 13b includes a prayer that “**husband and wife** may ... share with you the joy of creating new life”. This presumes a marriage between a man and a woman; a union between two men or two women cannot result in children without the introduction of a third party to the marriage.
  - 9.2 The authorised trial liturgy, “The Blessing of a Civil Marriage”, is explicitly about the blessing of a civil marriage between a man and a woman:
    - 9.2.1 In paragraph 2, the minister says, “Marriage is a gift of God our creator. It is a symbol of God’s unending love for his people, and of the union between Christ and his Church.” This symbolism is based on the difference between men and women; it is a union of one with another, not of two of the same

(cf. Ephesians 5:22-33).

9.2.2 Also in paragraph 2, the minister says, "Scripture teaches that marriage is a lifelong partnership uniting a **woman and a man** in heart, mind and body." It is very clear from this that any marriage to be blessed according to this rite is a marriage between a man and a woman. (In the next line, the minister refers to "**husband and wife**".)

9.2.3 The "Affirmations" in paragraphs 7a-8 reference "**husband**" and "**wife**", again making clear that this is a rite for marriage between a man and a woman:

9.2.3..1 "The minister asks the husband: 'N, you have taken N as your wife'" (para. 7a) ; "The minister asks the wife: 'N, you have taken N as your husband'" (para. 7b)

9.2.3..2 Alternatively, "The minister addresses the couple, 'N and N, you have taken each other as husband and wife'" (para. 8), with questions then asked "to the husband" and "to the wife"

9.2.4 In Paragraph 12, one of the prayers asks God to "Pour out the abundance of your blessing on **this man and this woman**".

**In conclusion:**

10. In response to the question whether the regulation ***Blessing of Persons Married According to the Marriage Act 1961 Regulations 2019*** made by the Synod of the Diocese of Wangaratta is consistent with the Fundamental Declarations and Ruling Principles in the Constitution of the Anglican Church of Australia, the answer is **No**.
11. In response to the question whether the regulation is validly made pursuant to the ***Canon Concerning Services 1992***, the answer is **No**.

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".<sup>1</sup>
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.

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<sup>1</sup> *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.<sup>2</sup>

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<sup>2</sup> 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."<sup>3</sup>

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.

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<sup>3</sup> <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.<sup>4</sup>

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."<sup>5</sup>

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

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<sup>4</sup> <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](http://employmentappeals.decisions.tribunals.gov.uk/Public/Upload/16_0072rifhATBA.doc)

<sup>5</sup> *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 <b>purity</b> , understanding, patience and kindness; in the Holy Spirit and in sincere love;	ἐν <b>ἀγνότητι</b> , ἐν γνώσει, ἐν μακροθυμίᾳ, ἐν χρηστότητι, ἐν Πνεύματι Ἁγίῳ, ἐν ἀγάπῃ ἀνυποκρίτως,	in <b>castitate</b> in scientia in longanimitate in suavitate in Spiritu Sancto in caritate non ficta	In <b>chastity</b> , 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 <b>holiness</b> .	ὑπὲρ βασιλέων καὶ πάντων τῶν ἐν ὑπεροχῇ ὄντων, ἵνα ἡρεμον καὶ ἡσύχιον βίον διάγωμεν ἐν πάσῃ εὐσεβείᾳ καὶ <b>σεμνότητι</b> .	pro regibus et omnibus qui in sublimitate sunt ut quietam et tranquillam vitam agamus in omni pietate et <b>castitate</b>	For kings, and for all that are in high station: that we may lead a quiet and a peaceable life in all piety and <b>chastity</b> .

1Tim 3:4	He must manage his own family well and see that his children obey him with proper respect [ <i>lit. with all <b>purity</b></i> ].	τοῦ ἰδίου οἴκου καλῶς προϊστάμενον, τέκνα ἔχοντα ἐν ὑποταγῇ, μετὰ πάσης <b>σεμνότητος</b>	<i>suae domui bene praepositum filios habentem subditos cum omni <b>castitate</b></i>	One that ruleth well his own house, having his children in subjection with all <b>chastity</b> .
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 <b>purity</b> .	Μηδεὶς σου τῆς νεότητος καταφρονεῖτω, ἀλλὰ τύπος γίνου τῶν πιστῶν ἐν λόγῳ, ἐν ἀναστροφῇ, ἐν ἀγάπῃ, ἐν πίστει, ἐν <b>ἀγνείᾳ</b> .	<i>nemo adolescentiam tuam contemnat sed exemplum esto fidelium in verbo in conversatione in caritate in fide in <b>castitate</b></i>	Let no man despise thy youth: but be thou an example of the faithful in word, in conversation, in charity, in faith, in <b>chastity</b> .
1Tim 5:2	older women as mothers, and younger women as sisters, with absolute <b>purity</b> .	πρεσβυτέρας ὡς μητέρας, νεωτέρας ὡς ἀδελφὰς ἐν πάσῃ <b>ἀγνείᾳ</b> .	<i>anus ut matres iuvenculas ut sorores in omni <b>castitate</b></i>	Old women, as mothers: young women, as sisters, in all <b>chastity</b> .

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-<sup>6</sup> 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

<sup>6</sup> 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.<sup>7</sup>

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.”<sup>8</sup>
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

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

<sup>8</sup> 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
<del>4. Bankruptcy</del>	
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
<del>7. Any offence punishable by law being a malum in se</del>	
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”.<sup>9</sup>

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.

<sup>9</sup> 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.<sup>10</sup>
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".<sup>11</sup>
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."

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

<sup>11</sup> <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

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**THE APPELLATE TRIBUNAL OF THE ANGLICAN CHURCH OF AUSTRALIA****Submission from EFAC (Evangelical Fellowship in the Anglican Communion) Australia in relation to the Newcastle Reference.**

EFAC Australia is a national body with branches in each State and Territory. EFAC Australia is a fellowship of like-minded members who are faithful Anglicans and reflect the evangelical heritage of the Anglican Church. EFAC members happily uphold the Constitution of the Anglican Church of Australia and its Canons, including the Fundamental Declarations and the Ruling Principles from the *Book of Common Prayer*, the Ordinal and the 39 Articles.

In making this submission we are conscious that many of our members serve as clergy or lay leaders in Dioceses where they, as evangelical Anglicans, are in a minority. As such they have an active interest in these matters because the outcome will have real, personal implications for them. This submission is significantly based on feedback from evangelical clergy and laity in the Diocese of Newcastle, many of whom believe that the *Clergy Discipline Ordinance 2019 Amendment Ordinance 2019* is such a significant departure from the teaching of Christ and the doctrine of our Church they would have to consider leaving their Diocese or to seek alternative episcopal oversight.

It is estimated that one third of the Newcastle clergy are traditional /conservative on the issue of same-sex marriage. This is consistent with the voting at the 2019 Newcastle Synod, where the *Amendment Ordinance 2019* was opposed by one third of the house of clergy. The evangelical Anglican parishes are, with few, if any exceptions, the strongest parishes in the Diocese of Newcastle, with over fifty percent of the laity (in terms of weekly attendance) in the Diocese attending evangelical congregations. The outcome of this decision has the potential to disenfranchise one third of the clergy and the majority of the laity of the diocese, and in particular their relationship with their Bishop.

This is because the *Clergy Discipline Ordinance 2019 Amendment Ordinance 2019* requires the Bishop's assent to come into effect. Notwithstanding clause 7 ("This Synod confirms that any assent by



the Bishop to this ordinance expresses nothing more than that the Bishop assenting to the Synod's wish that it have a process for further deliberation"), the effect of the Bishop's assent is to authorise the overriding of the proper discipline for breaches of the Church's doctrine of marriage in the diocese. The Amending Ordinance implicitly recognises that clergy blessing a same-sex marriage and/or being in a same-sex marriage is contrary to the doctrine of marriage of our Church, and seeks to prevent discipline charges for breaches of our doctrine. As a result, by giving assent to this Ordinance, the Bishop is giving express permission for departures from the doctrine of the Church. This would be deeply problematic for many clergy and lay people.

It would also be similarly problematic for many in their relationship with the Bishop of Newcastle, should the interpretation of the *Canon Concerning Services 1992* put forward by the Diocese of Newcastle in its submission on the Wangaratta Regulation be accepted by the Appellate Tribunal. In paragraph (f), the Diocese of Newcastle argues –

The General Synod in adopting the Canon [Concerning Services 1992] provided the sole mechanism for determining a question concerning the reverence, edification and doctrine of any form of service authorised under the Canon. The General Synod determined that such jurisdiction rested with the bishop of the diocese. It is the responsibility of the bishop of the diocese in this matter to ensure that the rules of the church are upheld.

If this is the case, then is it immaterial whether the Newcastle's proposed *Bill for the Blessing of Persons Married According to the Marriage Act Regulation 2019* is passed or not, in that any minister is already permitted to create a new service for those occasions for which no provision is made, and (if Newcastle's submission is valid), the Bishop of the diocese is the sole and final arbiter as to what constitutes a departure from the doctrine of the Church. This would empower the Bishop of any diocese to authorise any departure from the doctrine of the Church, including the blessing a same-sex marriage in an Anglican church. Evangelical Anglicans would find it difficult to submit to a Bishop who did this.

As a result, we urge the Appellate Tribunal to give careful consideration to the impact of any outcome which effectively



allows diocesan (or episcopal) autonomy on these matters. No single Diocese or Bishop should be allowed to make such radical changes that are not supported by a Canon of General Synod. This is especially the case for a Diocese such as Newcastle, where Anglican parishes with an evangelical heritage are in the minority in the Synod.

In every Anglican jurisdiction overseas where the blessing of same-sex marriage has been officially sanctioned in a diocese, it has led to an inevitable tear in the fabric of the Church. The most recent example of this occurred in 2018 in New Zealand, where the Churches there are dealing with the fallout of this decision. The New Zealand option was touted as a way forward that would allow people with deeply held and differing convictions about same-sex relationships to remain together in the one Church. It has manifestly failed to achieve this.

If the Diocese of Newcastle is allowed to take its own approach to the doctrine of marriage, and if the Bishop of Newcastle assents to a Canon that prevents those who depart from Christ's teaching about marriage from being disciplined, and if the Bishop gives a determination under section 5(4) of the *Canon Concerning Services 1992* that the blessing of a same-sex marriage is not a departure from the doctrine of the Church, then the likely outcome is that around a third of the clergy and half of the laity (in terms of weekly attendance) would no longer be able to submit to the authority of the Bishop of Newcastle. It will then become a significant issue for the General Synod as to how to provide a way that they could continue on as faithful members of the Anglican Church of Australia.

Evangelical Anglicans in the Diocese of Newcastle are deeply disturbed by what happened at their Synod in 2019. Two contentious ordinances came in the form of two private members Bills, which were presented in the synod papers a few weeks prior to the Synod. Due to the late notice of these Bills there was no opportunity to discuss the ordinances across the Diocese prior to the Synod. Further to this, the Bishop of Newcastle and his two Assistant Bishops provided no input into the discussions of these ordinances during synod, which is a highly unusual practice on such a significant matter.

The Anglican Church of Australia is an episcopal church. We look to our Bishops to teach the faith and to maintain good order. Bishops are bound by their oaths to uphold the Constitution of the Anglican Church of Australia. We urge the Appellate Tribunal to uphold this big-picture view of the Anglican Church of Australia, and resolve this issue in a way that will allow the national church to work through these issues together in the forum of the General Synod.

**References with the respect of the *Clergy Discipline Ordinance 2019 Amending Ordinance 2019 (Diocese of Newcastle)*.  
Submission from EFAC Australia, on behalf of EFAC Branches in each State and Territory and evangelical Parishes across Australia**

**Introduction**

1. This submission sets out the position of EFAC Australia with respect to:

- (a) the questions posed by the Primate regarding section 63 of the Constitution concerning the Clergy Discipline Ordinance 2019 Amending Ordinance 2019 (Diocese of Newcastle) in the reference dated 31 October 2019 at the request of the Bishop of Newcastle, and
- (b) the questions posed by 25 members of the General Synod regarding the Clergy Discipline Ordinance 2019 Amending Ordinance 2019 (Diocese of Newcastle) in the reference dated 7 November 2019.

**The Questions**

***Primate's Reference***

2. EFAC submits that the Appellate Tribunal should answer the Primate's Reference as follows:

**Question 1:** The *Clergy Discipline Ordinance 2019 Amendment Ordinance 2019* of the Diocese of Newcastle 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".

**Question 2:** The Synod of the Diocese of Newcastle does NOT have the authority under section 51 of the Constitution to pass the Clergy Discipline Ordinance 2019 Amendment Ordinance 2019. The legislative power recognised by Section 51 is "subject to this Constitution" and therefore must be consistent with it. However, clause 3(a) and clause 3(c) of the Amendment Ordinance 2019 are **inconsistent** with Section 54 of the Constitution, in that these clauses purport to prevent charges arising under subsections 54(2) and 54(2A) to be brought before the Diocesan Tribunal. A member of the clergy who participates in the blessing of a same-sex marriage has committed a breach of ritual and ceremonial and a breach of discipline. A member of the clergy who enters into a same-sex marriage has committed a breach of discipline, a breach of faith, and (prime facie) has committed the offences of unchastity and sexual misconduct. Clause 3(b) is not inconsistent with the Section 54, because it is not an offence under the Constitution not to participate in a same-sex blessing.

**Question 3.** Section 5(c) of the Schedule to the *Anglican Church of Australia Constitution Act 1902 (NSW)* stipulates that an ordinance passed by a Synod will not be valid or have any effect unless the Bishop of the Diocese gives assent in writing within one month. There is no provision in the Constitution to defer assent pending advice from the Appellate Tribunal. Since the one month period has now passed, the ordinance lapses and the Synod is required to pass the ordinance again.

### **GS Member Reference**

3. EFAC submits that the Appellate Tribunal should answer the Questions referred by 25 members of the General Synod as follows:

**Question 1.** If the Ordinance comes into effect, the amendment made by clause 3 of the Ordinance will **NOT** 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"). It is breach of discipline and a breach of faith for a member of the clergy to be married to a person of the same-sex. It is 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. It is a **breach of faith** because it is inconsistent with the doctrine of this Church with respect to marriage.

**Question 2.** If the Ordinance comes into effect, the amendment made by clause 3 of the Ordinance will **NOT** 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. It is an **offence of unchastity** (and also an offence involving sexual misconduct) for a member of the clergy to be in a sexual relationship other than in the context of a marriage recognised by this Church, and a same-sex marriage is *prima facie* evidence of this.



**Question 3.** If the Ordinance comes into effect, the amendment made by clause 3 of the Ordinance will **NOT** 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). Participation in the solemnisation of a same-sex marriage by a member of clergy is 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. Such participation is also a **breach of faith** (and also a breach of discipline), because it is a breach of the obligation to "hold to the faith" and a breach of the 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.

**Question 4.** If the Ordinance comes into effect, the amendment made by clause 3 of the Ordinance will **NOT** 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). For reasons, see answer to Question 3.



**Question 5.** If the Ordinance comes into effect, the amendment made by clause 3 of the Ordinance will **NOT** 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. For reasons, see answers to Question 3.

On the matter of same-sex blessings and marriage of clergy of the same sex, within the Anglican Church of Australia, see further our submission regarding the Wangaratta Resolution.

## **Conclusion**

It is untenable that the framers of our Constitution intended that any diocese should be able to unilaterally change the doctrine and practice of our Church. To do this (without at least the sanction of a General Synod Canon authorising such a change) means that Evangelical (as well as Anglo-catholic or other) clergy in a minority situation in such a diocese will find themselves in an untenable position in relation to their Bishop.

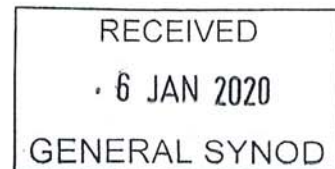
*The Clergy Discipline Ordinance 2019 Amendment Ordinance 2019 of the Diocese of Newcastle* is inconsistent with the Constitution and Canons of the Anglican Church of Australia. If it is assented to by the Bishop of Newcastle, many will feel in good conscience that they cannot submit to the authority of a Bishop who authorises actions, which are contrary to the teaching of Christ and the doctrine of the wider Anglican Church of Australia.

**Bishop Stephen Hale**

**Chair**

**EFAC Australia and EFAC Global**

IN THE APPELLATE TRIBUNAL  
ANGLICAN CHURCH OF AUSTRALIA



5

IN THE MATTER of the questions referred by the Primate under Section 63(1) of the Constitution on 31 October 2019 and 6 November 2019

AND IN THE MATTER OF the *Clergy Discipline Ordinance 2019 Amending Ordinance 2019 (Diocese of Newcastle)*

SUBMISSIONS BY EQUAL VOICES LTD (ABN 68 617 131 781)

Introduction

1. Equal Voices Ltd (**Equal Voices**) is a national not-for-profit organisation supporting LGBTIQA+ Christians and allies in seeking an 'equal place at the table' for LGBTIQA+ people in the Church and the world. This submission is made on behalf of Equal Voices Anglican, a network within the national Equal Voices organisation. Equal Voices Anglican represents, according to official Australian Government statistics, an estimated 300 000 LGBTIQA+ people in the Anglican Church of Australia.<sup>1</sup> Of this group of people a substantial number would directly benefit, now or in the future, from new provisions such as the *Clergy Discipline Ordinance 2019 Amending Ordinance 2019 (The Ordinance)*.
2. Equal Voices seeks marriage equality for its members and believes this to be God's loving will and intention. The Ordinance does represent a positive step forward in this area, but fails to offer marriage equality to LGBTIQA+ Anglicans. The Ordinance does not offer ritual and sacramental provisions that are available to other Anglicans and it fails to affirm the civil marriage and relationships of sexually and gender diverse people as equal gifts from God. Equal Voices acknowledges that the limited assistance The Ordinance gives to sexually and

<sup>1</sup> This is a conservative calculation, based on Anglican census figures (of more than 3 million Anglicans at the last census) and the findings of the Australian Federal Government's Human Rights Commission 'Face the Facts' research, which shows at least 11 in 100 Australians identifying as lesbian, gay, bisexual, transgender or intersex – see further: <https://www.humanrights.gov.au/our-work/education/face-facts-lesbian-gay-bisexual-trans-and-intersex-people>



gender diverse people and others *is* a positive step forward. However, it is a highly restrained and conservative provision which does not adequately respond to the needs of the LGBTIQA+ Anglican community.

### Summary of these submissions

#### 3. Of the questions asked by the Bishop of Newcastle on 31 October 2019:

3.1. **Question 1** - It is not the role of the Appellate Tribunal to make a ruling on an area of doctrine as contested as the civil marriage of people of the same gender.

3.1.1. The Ordinance merely removes the ability to bring a charge against a member of the clergy who blesses or does not bless a civil marriage between people of the same gender, or who has entered into a civil marriage with a person of the same gender. It does not make such behaviour legal under the Constitution. If The Ordinance is found to have made no change to marriage doctrine, the answer to this question should be 'no'.

3.1.2. If The Ordinance is regarded as a change to the current doctrinal understanding of marriage, this question is outside the jurisdiction of the Appellate Tribunal. There is no clearly defined doctrine on marriage in the Anglican Church of Australia. Most sources of doctrine are silent on relationships between people of the same gender. If the question is answered, the answer to this question should be 'no'.

3.2. **Question 2** - The Synod of the Diocese of Newcastle does have authority to implement The Ordinance. The answer to this question should be 'yes'.

3.3. **Question 3** - Equal Voices has no submissions to make on this question.

4. Of the questions asked by 25 members of General Synod on 6 November 2019:

- 4.1. **Question 1** - The only charges that are prevented are charges brought because a member of the clergy has blessed or did not bless a civil marriage between people of the same gender, or where they themselves have entered into a civil marriage with a person of the same gender. Outside of this a charge can still be brought. The answer to this question should be 'yes, dependent on the specific circumstance'.
- 4.2. **Question 2** - If the charge of an act of unchastity or an offence of sexual misconduct amounts to more than the accused person having been in a marital relationship with a person of the same gender, or having blessed or not blessed a civil marriage between people of the same gender, the charge can still be brought. The answer to this question should be 'no'.
- 4.3. **Question 3** - The Ordinance prevents charges brought because a member of the clergy has blessed or did not bless a civil marriage between people of the same gender, or where they themselves have entered into a civil marriage with a person of the same gender. The answer to this question should be 'yes'.
- 4.4. **Question 4** - The Synod of the Diocese of Newcastle did approve The Ordinance and has not made provisions for the Provincial Tribunal to have original jurisdiction in this circumstance, if the Diocesan Bishop gives assent to The Ordinance the answer to this question should be 'yes'.
- 4.5. **Question 5** - Where a charge relates to a civil marriage between people of the same gender but has not arisen solely because of the blessing of that civil marriage or a member of clergy entering into a civil marriage with a person of the same gender, a charge can still be brought to the Diocesan Tribunal. If this is the case and the Synod of the Diocese of Newcastle has made provisions for a charge to be heard by the Provincial Tribunal the charge could still proceed in the original jurisdiction of the



Provincial Tribunal. The answer to this question should be 'no, dependent on the specific circumstance'.

5. Of particular concern is the nature of The Ordinance. As an amendment to the Clergy Discipline Ordinance 2019 it does not affirm marriage between people of the same gender, or affirm the blessing of such a marriage. Instead The Ordinance merely removes the ability to bring a charge against a person in relation to a marriage between people of the same gender.
6. The wording of The Ordinance implies that the blessing of such a marriage, or the act of a clergy member engaging in such a marriage, remains an offence under canon law. This sends a very clear and harmful message to the LGBTIQA+ members of the Anglican Church of Australia and the wider community. This will perpetuate the culture of shame and silence that currently exists for LGBTIQA+ Anglicans. While The Ordinance will permit members of the clergy in the Anglican Diocese of Newcastle to enter into a civil marriage with a person of the same gender, it will also continue to emphasise the inequality of LGBTIQA+ members of the Anglican Church. It is only in comparison to the wider Anglican Church that The Ordinance could be viewed as mildly affirming.
7. The issues relating to marriage equality and marriage doctrine in the Anglican Church of Australia are much wider conversations and are not impacted by The Ordinance. These matters go well beyond the jurisdiction of the Appellate Tribunal. In so far as the Appellate Tribunal is able to rule on the legal validity of The Ordinance, it should be found to be valid diocesan legislation.

## Context

8. Equal Voices asks the Appellate Tribunal to deeply consider the difficult context in which it makes its decisions. In particular, Equal Voices notes the ongoing failure of the Anglican Church of Australia to listen to and honour LGBTIQA+ Anglicans as Gospel 'little ones', in accordance with the teaching of Jesus. Equal Voices requests that any deliberations on this matter are mindful of this and do

not exacerbate a continuing ecclesiastical culture of shame, secrecy and silence experienced by LGBTIQ+ Anglicans, to which The Ordinance offers some small redress.

9. Equal Voices notes that in relation to the issue of civil marriage between people of the same gender and marriage doctrine there has not been adequate space or acknowledgement given to the people most affected by these debates. This was evidenced in the absence of any open and community connected LGBTIQ+ contributors to *Marriage, Same-Sex Marriage and the Anglican Church of Australia*. Equal Voices further notes that it would appear few parties to this current matter are either members themselves or have consulted the LGBTIQ+ Anglican community.
10. Equal Voices refers the Appellate Tribunal to the *Open Letter of Anglican LGBTI+ Voices* for a fuller statement of this challenging context, its impact on LGBTIQ+ members of the Church, and its invitation to a more positive living together in the Anglican Church of Australia. The text of which can be found at **Appendix A** of this submission and/or online at <https://www.equalvoicesanglican.org/open-letter.html>.
11. Additionally, Equal Voices notes the current social and political climate caused by the intense drive of some religious forces in Australian politics to legislate for ongoing discrimination against LGBTIQ+ people by religious groups. This has had a very real impact on the spiritual, emotional and physical wellbeing of LGBTIQ+ people. Especially those who are members of faith communities. Equal Voices asks the Appellate Tribunal to consider how through its deliberations it may avoid reinforcing this debilitating climate and protect and care for the wellbeing of the LGBTIQ+ members of the Anglican Church of Australia.
12. In circumstances such as have arisen within this current matter and the contemporaneous matter of the *Blessing of Persons Married According to the Marriage Act 1961 Regulations 2019 (Wangaratta)*, Equal Voices is concerned



that some parties will attempt to use the Appellate Tribunal to debate the wider issue of the place of the LGBTIQA+ community in the Anglican Church. Equal Voices notes that these matters before the Appellate Tribunal relate only to the civil marriage of people of the same gender and do not allow for the voices of the rest of the community to be heard. Among other groups those who identify as transgender are unable to be represented in this matter.

13. Subsection 3c of The Ordinance highlights an ongoing concern within the clergy. In the Anglican Church of Australia there is a cultural expectation for clergy to be married. Much of the structure of Anglicanism in Australia is based on the assumption that a member of the clergy will have a spouse to provide a support system. By permitting the ordination of clergy who are not heterosexual and then denying them marriage, whether civil or sacramental, a culture of inequality is created. Many studies have shown that members of the LGBTIQA+ community experience poorer mental health compared to the wider community due to ongoing stigma. The Ordinance highlights a very clear pastoral concern which is currently impacting ordained clergy in the Anglican Church of Australia. This is a pastoral and spiritual issue that is, at best, only partially addressed by The Ordinance. It is a positive step forward and is currently the only legislation of its kind in Australia, but it does not meet the needs of the Anglican LGBTIQA+ community.

#### **Question One asked by the Bishop of Newcastle on 31 October 2019**

*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?*

14. The amendments to the *Clergy Discipline Ordinance 2019* make no changes to the current doctrinal understanding of marriage in the Anglican Church of Australia. The Ordinance does not affirm civil marriage between two people of the same gender, it only removes the option of bringing a charge or enacting disciplinary measures against a member of clergy who blesses, does not bless or

participates in such a civil marriage. The answer to this question should be ‘no’.

15. The essence of The Ordinance goes to civil disobedience. Sections 6.14 and 6.23 of *Faithfulness in Service* refer to civil disobedience and explicitly affirm such behaviour. The Ordinance does not affirm the civil marriage of people of the same gender, but it gives members of the clergy of the Diocese of Newcastle an avenue to act as their own conscience dictates in an area of doctrine that is ambiguous and heavily debated.
16. The Ordinance is consistent with the Fundamental Declarations and Ruling Principles of the Constitution of the Anglican Church of Australia. The Constitution was deliberately written to accommodate the diversity of Anglican tradition. As such, diversity of opinion is accepted and encouraged, excepting any matters essential to the nature and character of the Anglican Church as part of the One Holy Catholic and Apostolic Church. This is a common stance within Anglicanism, which has a wide variety of evidence supporting it including in Paul’s Epistle to the Ephesians 3:10 - “*Through the church the wisdom of God in its rich variety might now be made known to the rulers and authorities in the heavenly places*”. Subsections 3a and 3b of The Ordinance reflect this “rich variety” in their acceptance of diversity of opinion, ensuring that members of the clergy are free to make a decision of conscience on the blessing of civil marriages between people of the same gender.
17. The Fundamental Declarations and Ruling Principles of the Constitution speak to the purpose of the Anglican Church of Australia. The spirit and intent of these is to enable the Anglican Church of Australia to serve God and God’s people, both doctrinally and pastorally. In Australia there has been a significant change in societal attitudes towards sexuality and gender in recent years which has led to the passing of civil marriage equality legislation in 2017. This new affirmation and welcome of LGBTIQ+ people by wider society has not been reflected in the Anglican Church of Australia.



18. While The Ordinance does provide some benefit to the LGBTIQA+ community, it does not reflect the attitudes of the wider society. It fails to affirm members of the LGBTIQA+ community and continues to imply that the civil marriage of people of the same gender is an offence under canon law, even if The Ordinance prevents a charge being brought.
19. If The Ordinance is regarded as affirming marriage between people of the same gender it is still unlikely to contravene the Constitution. The Anglican Church of Australia has not defined its doctrine of marriage, nor has it defined the difference between civil and sacramental marriage.
20. Common sources of doctrine are unable to provide a definitive answer on marriage between people of the same gender. Some sources of doctrine such as the Creeds and the Thirty Nine Articles are entirely silent on marriage.
21. The 1662 Book of Common Prayer is a product of very different historical and cultural circumstances. It reflects culturally limited understandings of sex and gender which were drawn from the societal attitudes and legalities of the time. The Anglican Church of Australia faced a similar issue when deliberating on the doctrinal validity of the ordination of women. It was able to conclude that despite the ambiguity or silence of all sources of doctrine, women could be ordained in the Anglican church. While the issue of women's ordination and the issue of the civil marriage of people of the same gender are not equatable, the principle still applies.
22. There is very little Scriptural evidence which speaks against the civil marriage of, or relationships between, people of the same gender. Just six verses negatively reference such relationships. These are Genesis 19:4-11, Leviticus 18:22, Leviticus 20:13, Romans 1:26-27, 1 Corinthians 6:9-11 and 1 Timothy 1:8-10. All of these verses could be regarded as speaking against sexual abuse or against a specific sexual act, rather than the loving, respectful and faith filled marriage between two people of the same gender.

23. If these verses are believed to be speaking against sodomy, it does not make a case for the doctrinal invalidity of the civil marriage of people of the same gender. Such a sexual act is not confined to relationships between men. Even if the verses are believed to speak against sodomy and it was possible to make a case against any relationship between two men, it would then implicitly permit relationships between two women.
24. There is Scriptural evidence that could be read as supporting relationships and even marriage between people of the same gender. Matthew 19:12 can be read as affirming that people should live as they were born to live and accept who they are. In his First Letter to the Corinthians 7:8-9 Paul encourages Christians to remain celibate, and explicitly refers to heterosexual celibacy. Yet Paul also encourages people to marry if they need to "*for it is better to marry than to be aflame with passion*". In addition, throughout both the Old and New Testaments a range of relationships are described. Very few of these relationships could be regarded as loving, respectful and faith filled marriages. Perhaps the question to be debated is whether loving, respectful and faith filled heterosexual relationships are Scripturally supported.
25. While the Ordinance may be regarded as the first of its kind in Australia, the issue it touches on is not unique in the global Anglican Communion. Provinces in the United States of America, Scotland, New Zealand and Brazil have been able to legislate for blessing or sacramental marriage of people of the same gender. Compared to the work of some of these provinces The Ordinance is limited and very restrictive.
26. It is not the role of the Appellate Tribunal to make a ruling on an area of doctrine as contested as this. If The Ordinance is regarded as a change to the current doctrinal understanding of marriage, the Appellate Tribunal does not have the jurisdiction to answer this question. If The Ordinance is found to have made no change to marriage doctrine, the answer to this question should be 'no'.



**Question Two asked by the Bishop of Newcastle on 31 October 2019**

*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?*

27. Dioceses are empowered by their own constitutions to make regulations for their own good order and governance. Whether such regulations fulfil this purpose is a matter of judgement for the Synod of that diocese. The answer to this question should be 'yes'.

**Question Three asked by the Bishop of Newcastle on 31 October 2019**

*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?*

28. Equal Voices has no further submissions to make on this particular question.

**Question One asked by 25 members of General Synod on 6 November 2019**

*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?*

29. A plain reading of the text of The Ordinance suggests that the only charge that is prevented is a charge which alleges an offence, breach or misconduct by a member of the clergy **because** that member of the clergy has participated in a service of blessing, has refused to participate in a service of blessing or has married a person of the same gender. Outside of this if the charge does not arise because of one of the three circumstances but is tangentially related to them, the charge can still be brought. The answer to this question should be 'yes, dependant on the specific circumstance'.

**Question Two asked by 25 members of General Synod on 6 November 2019**

*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?*

30. A plain reading of the text of The Ordinance suggests that the only charge that is prevented is a charge which alleges an offence, breach or misconduct by a member of the clergy **because** that member of the clergy has participated in a service of blessing, has refused to participate in a service of blessing or has married a person of the same gender. Outside of this if the charge does not arise because of one of these three circumstances but is tangentially related to them, the charge can still be brought. If the charge of an act of unchastity or an offence of sexual misconduct amounts to more than the accused person having been in a marital relationship with a person of the same gender, or having blessed a civil marriage between people of the same gender, the charge can still be brought. The answer to this question should be 'no'.



**Question Three asked by 25 members of General Synod on 6 November 2019**

*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)?*

31. A plain reading of the text of The Ordinance shows that the only charge that is prevented is a charge which alleges an offence, breach or misconduct by a member of the clergy **because** that member of the clergy has participated in a service of blessing, has refused to participate in a service of blessing or has married a person of the same gender. The answer to this question should be 'yes'.

**Question Four asked by 25 members of General Synod on 6 November 2019**

*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)?*

32. A plain reading of the text of The Ordinance shows that the only charge that is prevented is a charge which alleges an offence, breach or misconduct by a member of the clergy **because** that member of the clergy has participated in a service of blessing, has refused to participate in a service of blessing or has married a person of the same gender. Under section 55(3) of the Constitution the Provincial Tribunal only has original jurisdiction "*provided that such original jurisdiction shall not be exercised except as prescribed by ordinance of the synod of the diocese*". The Synod of the Diocese of Newcastle did approve the Ordinance and has not made provisions for the Provincial Tribunal to have original jurisdiction in this circumstance, if the Diocesan Bishop gives assent to The Ordinance the answer to this question should be 'yes'.

**Question Five asked by 25 members of General Synod on 6 November 2019**

*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?*

33. A plain reading of the text of The Ordinance shows that the only charge that is prevented is a charge which alleges an offence, breach or misconduct by a member of the clergy **because** that member of the clergy has participated in a service of blessing, has refused to participate in a service of blessing or has married a person of the same gender. Where a charge relates to a civil marriage between people of the same gender but has not arisen solely because of the blessing of that civil marriage or a member of clergy entering into a civil marriage with a person of the same gender, a charge can still be brought to the Diocesan Tribunal. If this is the case and the Synod of the Diocese of Newcastle has made provisions for a charge to be heard by the Provincial Tribunal the charge could still proceed in the original jurisdiction of the Provincial Tribunal.



The answer to this question should be 'no, dependent on the specific circumstance'.

## Conclusion

The questions should therefore be answered as follows:

Of the questions asked by the Bishop of Newcastle on 31 October 2019:

Question 1 - 'no'

Question 2 - 'yes'

Question 3 - Equal Voices has no submission to make on this question.

Of the questions asked by 25 members of General Synod on 6 November 2019:

Question 1 - 'yes, dependant on the specific circumstance'

Question 2 - 'no'

Question 3 - 'yes'

Question 4 - 'yes'

Question 5 - 'no, dependent on the specific circumstance'



EMMA CLARK

on behalf of Equal Voices Ltd

6 January 2020

*It's Time to Embrace Us*

OPEN LETTER TO

THE ANGLICAN CHURCH OF AUSTRALIA

from Anglican LGBTI+ Voices

**We speak out**

*We speak out* today as deeply committed Anglicans who are also LGBTI+ (that is: Lesbian Gay, Bisexual, Transgender, Intersex and other sexually and gender diverse) people. We speak out as your siblings who have personally suffered shame and silence because of our sexuality and/or gender. We speak out on behalf of so many other similar Anglicans who are still unable to speak due to fear and pain. We speak out of sorrow at the mistreatment of sexually and gender diverse people by the Church we love, but with hope and an invitation to renewed vision and relationships. We speak out so that everyone may at last be embraced with the love that God in Jesus Christ has for all of us.

**We grieve**

For *we grieve*. We grieve for the sins of homophobia and transphobia which continue to bedevil the Church, and in which we too, as members of it, are complicit. We grieve for so many lives which have been lost, hearts which have been broken, and precious souls which have been horribly marred. We grieve that the Church is adrift in the midst of today's sea-change in societal understanding and affirmation of sexually and gender diverse people. We grieve above all that the love of Christ is obscured by so much Christian hardness of heart and slowness to respond.

**We protest**

*We protest* the silencing, repression and denial of our religious and wider freedom. Some parts of the Anglican Church of Australia appear actively hostile. We therefore vigorously protest the exclusion of debate, and the resistance to the removal of religious privileges which impact on the health and welfare of LGBTI+



children, families, teachers and other church staff. We also protest the silence of so many other parts of our Church, the hesitant leadership that will not commit itself to us. Martin Luther King said that 'In the End, we will remember not the words of our enemies but the silence of our friends.' We feel this keenly. For whilst we give thanks to God for the wonderful examples of Australian Anglican inclusion - in the fine work of so many parishes, schools, welfare projects and individuals - we lament the profound corporate institutional inertia, and the pernicious silence and lack of empathy that persists towards us. 'Nothing about us without us' is a widely understood precept in our world today. Yet in our church 'almost everything about us without us' seems to be the rule. We therefore invite participation, the sharing of our experience and faith stories, and the development of affirming policies and education.

### **We respect difference**

*We profoundly respect difference*, including the genuinely held views of other Anglicans who oppose us. We recognise that growth in theological understanding and change is complex. We approach with humility our common scriptures, tradition and reason. Yet, just as we cannot speak from the experience of others, we ask that we are heard, and our own difference valued. We ask that decades of affirming biblical interpretation and enquiry be honoured and options provided for liturgical blessings and for the sacrament of marriage for LGBTI+ people. We ask for our place at the table and full opportunity to use our God-given gifts.

### **We demand address of spiritual abuse**

*Above all, we demand address for the spiritual abuse faced by sexually and gender diverse people.* The appalling revelations of child abuse in which our churches have been complicit should surely teach us about the horrific consequences of silencing and ignoring vulnerable people, and the vital importance of listening, transparency and restorative justice. Typically however, LGBTI+ Anglicans are ignored or kept at arms length, even when issues of huge importance to us are discussed or determined. Due to overt hostility, covert disapproval and

uncertainty, genuinely safe spaces are so often hard to find and many LGBTIQA Anglicans do not feel able to be themselves (the persons God loves so much) in church settings. Churches often talk about being 'welcoming' to us, but it is positive affirmation and empowerment - not mere toleration - at Christ's open table, that is required. For our sexualities and genders are not aspects of the Fall, but diverse expressions of the divine image and continuing divine creation and gifts to enlarge the life and freedom of all.

### **We speak out for our Faith**

*We speak out as faithful members of the Anglican Church of Australia.* We speak out as Christians with different theological, ecclesiological and liturgical emphases, yet as one voice. We speak out with profound concern for the future of the Church whose credibility and mission are now at stake because of how it treats us and others on its margins. We believe the soul of Anglicanism is at stake in the way our lives and bodies are treated. For centuries, the best spirit of the Anglican tradition, being both Catholic and Reformed, has held profound differences in creative tension and approached new issues of human dignity (from the questioning of slavery to the emancipation of women) with attitudes of openness and reception. It is at the heart of the Anglican Reformation settlement that 'it is not necessary that Traditions and ceremonies be in all places one and utterly alike'. With such a spirit of generous love, the Anglican Communion has spread worldwide, taking different forms whilst holding to the essentials of faith. Today this is in jeopardy as a sectarian spirit of exclusion is among us, rejecting the fruitful developments of LGBTI+ affirmation in other parts of the Anglican Communion and leaving little or no place for differences among us in Australia. Like the Gentiles in the early Church, we wait in faith, hope and love for the recognition by others of God's equal calling to us, different in some aspects of lifestyle, but one in Christ. The Holy Spirit is doing great things among us and in the wider world through sexually and gender diverse people. We believe they can be as sources of renewal to a weary and defensive Church. Like the Gentiles in the early Church, we therefore call today's Peter and Paul to account, that we may all join as one in the transforming love of God. May those who have ears to hear, hear.



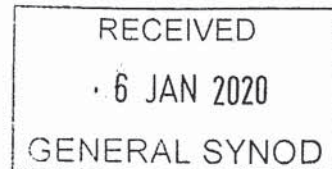
## **We call for repentance**

*We call for repentance* by the Church for its part in the violence, abuse and lack of acceptance of LGBTIQ people. We call for a recognition of our full humanity and for equal participation in church and society. We call for a full gospel which embodies the good news Jesus brought to the poor and marginalised and which centres on God's grace, not narrow religious traditions of human law. We call for dignity, justice and renewal. May those who have ears to hear, hear.

*Anglican LGBTI+ Voices is the confidential LGBTI+ network of Equal Voices*

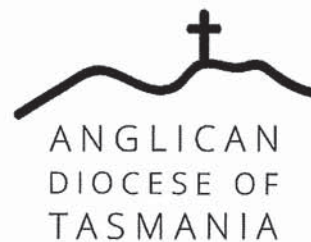
*Anglicans:*

*a part of Equal Voices (the national movement of LGBTI+ Christians and allies)*



Monday, 6 January 2020

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



*By email: [appellatetribunal@anglican.org.au](mailto:appellatetribunal@anglican.org.au)*

**Clergy Discipline Ordinance 2019 Amendment Ordinance 2019 (Diocese of Newcastle)**

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 31 October and 6 November 2019 by the Primate under section 63 of the Constitution.

We understand that, notwithstanding that Rule 9(6) of the *Appellate Tribunal Rules 1988*, the Tribunal does not require additional copies where submissions are filed electronically. Please advise us if this understanding is incorrect.

Yours faithfully,

**James Oakley**  
General Manager/Registrar

Encl

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**Clergy Discipline Ordinance 2019 Amendment Ordinance 2019 (Diocese of Newcastle)  
("Newcastle Amendment")**

**References of 31 October and 6 November 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 Newcastle Amendment is invalid and/or ineffective for the following reasons:
  - (a) The Newcastle Amendment is inconsistent with the doctrine of the Church, the Fundamental Declarations and the Ruling Principles and contrary to Section 5 of the Constitution;
  - (b) The Newcastle Amendment is inconsistent with the limits placed upon the powers of the Newcastle Synod by Section 51 of the Constitution (and such limitations expressly restrict the powers of the Newcastle Synod pursuant to Section 4 of the *Anglican Church of Australia Constitution Act 1961* (NSW));
  - (c) The Bishop of Newcastle has not assented to the Newcastle Amendment within the one month period required by Clause 5(3) of the constitution of the Diocese of Newcastle nor has the amendment been referred to, or approved by, the Synod of the Province of NSW.
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:

<b>31 October</b>	<b>Response</b>
<u>Question 1:</u>	Yes.
<u>Question 2:</u>	No.
<u>Question 3:</u>	The ordinance lapses in accordance with Clause 5(3) of the constitution of the Diocese of Newcastle.

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6 November	Response
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<u>Question 1:</u>	No.
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<u>Question 2:</u>	No.
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<u>Question 3:</u>	No.
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<u>Question 4:</u>	No.
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<u>Question 5:</u>	No.
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### Reasoning

4. In addition to the arguments outlined in the Summary (above), Tasmania refers to the submissions:

(a) with respect to the recent references of 5 September and 21 October 2019 (in connection with the Blessing of Persons Married according to the Marriage Act 1961 Regulations 2019 (Diocese of Wangaratta)) of:

1. Tasmania;
2. Ridley College; and
3. Synod of the Diocese of Sydney; and

(b) with respect to the current References by the Synod of the Diocese of Sydney (of which Tasmania has sighted a draft).

5. Tasmania adopts and supports such submissions for the current References.

### Conclusion

6. 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: 6 January 2020

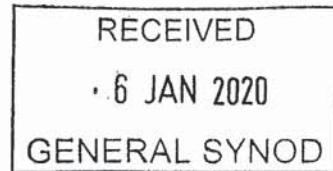
**Alex Milner**  
Church Advocate

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IN THE APPELLATE TRIBUNAL

ANGLICAN CHURCH OF AUSTRALIA

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

AND IN THE MATTER OF the *Clergy Discipline Ordinance 2019 Amending Ordinance 2019* of the Synod of the Diocese of Newcastle

**SUBMISSIONS OF THE REVEREND ASSOCIATE PROFESSOR MATTHEW ANSTEY AND  
THE REVEREND DOCTOR STEVEN OGDEN<sup>1</sup>**

**1. The appropriateness of the questions referred**

- 1.1 As to the original reference by the Primate of 31 October 2019 of three questions pursuant to section 63(1) of the Constitution, it is submitted that the first two questions are capable of constituting questions arising under this Constitution. If the answer to the first question is "Yes", there is no need to consider the second question. Similarly, if the answer to the first question is "No", nor is there any need to consider the second question. It is not proposed to address in these submissions the third question or any of the questions remitted by the Primate on 6 November 2019.
- 1.2 Section 51 of the Constitution imposes a limitation on the power of the Synod of a Diocese to pass legislation inconsistent with the Constitution. This follows from the express words of section 51. Section 51 provides that the legislative power of a Diocese is "*Subject to this Constitution...*". These are words of limitation. If Diocesan legislation, or some aspect of it, is inconsistent with the Constitution it must be invalid to the extent of that inconsistency.
- 1.3 This follows from the fact that the presumption of legislative validity places the onus firmly on those opposing the validity of the *Clergy Discipline Ordinance 2019 Amending Ordinance 2019* to make out their case. A Diocese has power to legislate for the "*order and good government*" of the Church in its Diocese. These are expansive words, limited only by the terms of the Constitution (i.e., section 51). Any legislation passed by a Diocesan Synod must be presumed to be for the "*order and good government*" of the Diocese. As such, consistent with the opening words of Section 51, any question of validity can only be determined by whether the legislation is inconsistent with the Constitution. If it is not inconsistent, it must otherwise be valid. This approach also mirrors the language of section 29(4) of the Constitution. Further, it is the only logical way in which section 4 of the Constitution can be applied,

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<sup>1</sup> Matthew is an Honorary Associate Priest in the Parish of Holy Innocents, Belair (Adelaide) and a member of the Doctrine Commission, Anglican Church of Australia. He is Director of Higher Degree Research, Alphacrucis College. Matthew is also a Research Fellow, Charles Sturt University, Public and Contextual Theology Strategic Research Centre; Visiting Research Fellow, University of Adelaide, School of Humanities (Linguistics); Honorary Research Associate Professor, University of Queensland, School of Historical and Philosophical Inquiry; and Associate Professor (Full Academic Status), Flinders University, The College of Humanities, Arts and Social Sciences (Language, Literature and Culture). Steven is parish priest at St Oswald's Parkside, adjunct lecturer in theology at Charles Sturt University, and Research Fellow with the Centre for Public and Contextual Theology CSU. He is formerly Dean of St Peter's Cathedral Adelaide and Parish Priest at St Oswald's Parkside and previous and Principal of St Francis Theological College, Brisbane.



particularly having regard to the language of the second to fourth Provisos which talk in terms of “*variations*” to or “*deviations*” from the Ruling Principles.

- 1.4 This is not to say that the *Clergy Discipline Ordinance 2019 Amending Ordinance 2019* is invalid as lacking a source of power. Clearly, it was within the power of the Synod of the Diocese of Newcastle to pass this legislation “*for the order and good government of this Church*” within its Diocese. The legislative power of the Synod of the Diocese of Newcastle remains, and always remains, subject to section 51 of the Constitution.
- 1.5 In summary, it is only proposed to address the first of the three questions referred pursuant to section 63(1) of the Constitution on 31 October 2019.

## 2. The Fundamental Declarations and Ruling Principles

- 2.1 On the assumption that the Appellate Tribunal decides that it has jurisdiction in the matter, then effectively the one question is: “*Whether the Clergy Discipline Ordinance 2019 Amending Ordinance 2019 made by the Synod of the Diocese of Newcastle is inconsistent with the Fundamental Declarations and Ruling Principles in the Constitution of the Anglican Church of Australia*”.
- 2.2 These submissions now address that question. We refer to and rely upon the submissions made by The Reverend Associate Professor Matthew Anstey on the subject matter of the *Blessing of Persons Married According to the Marriage Act 1961 Regulations 2019 of the Diocese of Newcastle, mutatis mutandis*, sections 2.3 to 8.10, to assert that the first question should be answered in the negative, that is, it is not inconsistent.
- 2.3 We reserve the right to make further responsive submissions by **Friday 14 February 2020** as directed by the Tribunal.