



## APPELLATE TRIBUNAL - NEWCASTLE

Primate's Reference under Section 63 of the Constitution

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

Submissions in Response - 14 February 2020

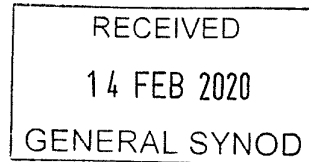
# Meeting Book - APPELLATE TRIBUNAL - NEWCASTLE

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IN THE APPELLATE TRIBUNAL  
ANGLICAN CHURCH OF AUSTRALIA



R1

IN THE MATTER OF two references under s63(1) of the Constitution concerning the *Clergy Discipline Ordinance Amendment Ordinance 2019* of the Diocese of Newcastle

SUBMISSIONS IN REPLY FROM THE DIOCESE OF NEWCASTLE

**Jurisdiction of the Appellate Tribunal to deal with the Referral**

1. Submissions have been made by other Dioceses and interested parties to the effect that the Appellate Tribunal should not deal with the referral as the *Clergy Discipline Ordinance Amendment Ordinance 2019* of the Diocese of Newcastle (**the Amending Ordinance**) was passed by the Diocesan Synod but was not assented to by the diocesan Bishop prior to the referral.
2. The Diocese of Newcastle (**Newcastle**) has addressed this point in paragraphs 67 to 69 of its Primary Submission.
3. Should the Appellate Tribunal be inclined to consider this jurisdictional objection, Newcastle submits that the Appellate Tribunal should follow its approach in *Slater*<sup>1</sup> where it recognised the need for guidance on important subject matter and proceeded to answer the questions posed in the reference despite the recognition of the limits of the Tribunal's appellate or dispositive jurisdiction.

**The Amending Ordinance does not seek to redefine marriage in this Church**

4. Newcastle submits that the subject matter of the Amending Ordinance is directed at clergy discipline and not of marriage or the definition of marriage.
5. In the Amending Ordinance, Newcastle is seeking to define the disciplinary environment for clergy within its diocese who respond pastorally to people who have been married under the amendments to the *Marriage Act 1961* (Cth) (**the Marriage Act**).
6. The passing of the Amending Ordinance reflects the changed ministerial environment following the passing of the *Marriage Amendment (Definition and Religious Freedoms) Act 2017* (Cth) (**the Amendment Act**) and the decision of the High Court in *Commonwealth –v- Australian Capital Territory*<sup>2</sup>.
7. In passing the Amendment Act, the Commonwealth Parliament repealed amendments introduced in 2004 and introduced a new definition of the term “marriage” as “the union

<sup>1</sup> In the matter of Keith Francis Slater – Decision of the Appellate Tribunal 19 January 2017 at 167

<sup>2</sup> *the Commonwealth v Australian Capital Territory* [2013] HCA 55 12 December 2013

of 2 people to the exclusion of all others, voluntarily entered into for life.”<sup>3</sup> This amendment reflects the High Court decision in Commonwealth –v- Australian Capital Territory which affirmed that marriage “includes a marriage between persons of the same sex.”<sup>4</sup>

8. Newcastle observes with interest that in Commonwealth –v- Australian Capital Territory the High Court addressed critical issues of statutory interpretation in relation to marriage stating that:

*“marriage law is not a matter of precise demarcation”.*

It is, instead, “a recognized topic of juristic classification”, and:

*“that neither the social institution of marriage nor the rights and obligations attaching to the status of marriage (or condition of being married) were immutable”<sup>5</sup>.*

9. In its deliberation upon marriage in the context of this referral, Newcastle submits that the Appellate Tribunal should be guided by the principles of interpretation applied by the High Court in Commonwealth –v- Australian Capital Territory.

In doing so, the Appellate Tribunal would be aware of the substantial body of statute, canon and case law directly in the United Kingdom and in Australia impacting on the law of marriage in this Church beginning, at least, with the Canons of 1603.

Consequently, the Appellate Tribunal should apply the same caution as the Supreme Court of NSW where Priestly JA observed, in Scandrett -v- Dowling, the:

*“impossibility of recapturing anything like the full meaning of some of the things said by bishops, lawyers and others in the mid-nineteenth century without becoming more immersed in the abundant surviving materials of the times than practical use of time permits...What they said would be more easily understandable if a modern reader had a detailed knowledge of the personalities, policies and factions of the time, both in government and the Church. I suspect that similar complications of understanding surround much of what was said both in judicial statements of the time and contemporary argument and comment about them.”<sup>6</sup>*

10. Newcastle also acknowledges the fervent expression of views in some submissions. Both Equal Voices and EFAC variously rebuke the Synod of the Diocese of Newcastle but in different ways. This tension demonstrates the exact context envisaged by Handley J<sup>7</sup> that there may be powerful and respectful arguments on both sides of a

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<sup>3</sup> The amended definition of “marriage” in s5 of the Marriage Act 1961 (Cth)

<sup>4</sup> *the Commonwealth v Australian Capital Territory* [2013] HCA 55 12 December 2013 at [38]

<sup>5</sup> *the Commonwealth v Australian Capital Territory* [2013] HCA 55 12 December 2013 at [19]

<sup>6</sup> *Scandrett & Ots v Dowling & Ots* [1992] 27 NSWLR 564

<sup>7</sup> *Opinion of the Appellate Tribunal on two references in 1990 relating to the Ordination of Women* as quoted in the Newcastle primary submission at para 9.

theological question which should generate caution on the part of the Appellate Tribunal in the exercise of its jurisdiction.

**The Amending Ordinance does not offend this Church's administration of Marriage**

11. This Church regulates, by way of Canon, who is or is not qualified to be married in this Church, the forms of service that can be used in this Church and who may perform a marriage in this Church.
12. The forms of service for marriage in this Church are found in the Book of Common Prayer (**BCP**), An Australian Prayer Book (**AAPB**) and A Prayer Book for Australia (**APBA**).
13. In her submissions for the Wangaratta referral, the Archbishop of Perth stated:

*"It is beyond dispute that none of the authorised rituals of this Church make provision for the blessing of [a range of other marriages]"<sup>8</sup>*
14. Since the passing of the Canon Concerning Services 1992, it has been beyond doubt that a minister in this Church has the authority to use forms of service considered suitable by the minister for occasions where no liturgical provision is made in the authorised prayer books of this church. That authority is subject to regulation by the Diocese and the requirement that the form of service is reverent and edifying and must not be contrary to or a departure from the doctrine of this Church. The Canon Concerning Services 1992 makes the diocesan Bishop responsible for determining the sufficiency of the doctrine in the authorised liturgy.
15. A minister of this Church may encounter the pastoral situation where a person has been married in a context other than a service conducted in accordance with the Canons of this Church. That minister has authority derived from the Canon Concerning Services 1992 to use a form of service to recognise and/or bless that marriage.
16. The Amendment Ordinance does not seek to affect the operation of *the Solemnisation of Matrimony Canon 1981, the Marriage of Divorced Persons Canon 1981 or the Matrimony (Prohibited Persons) Canon 1981*.
17. The Amending Ordinance does not seek to give a member of clergy authority to solemnise a marriage where both parties are of the same sex.
18. The submission of the Diocese of Sydney (**Sydney**) suggests that "blessing of a marriage" is to be distinguished from the "blessing of individuals"<sup>9</sup> but does not proceed to satisfactorily develop the distinction. Newcastle submits that this simply demonstrates a further area of theological argument.

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<sup>8</sup> Submission from the Archbishop of Perth in the Wangaratta matter at para 4.

<sup>9</sup> Submission from the Diocese of Sydney at para 33

**The Amending Ordinance is directed at the scope of clergy discipline within a Diocese**

19. As is contemplated by s30 of the Constitution, each diocese has autonomy to determine matters of “ritual, ceremonial or discipline” within that diocese, subject to the Constitution.
20. This Church has not passed a Professional Standards Canon to apply across all dioceses. The General Synod has passed a model Professional Standards Ordinance that may be adopted by each diocese. However, that remains a decision for each diocese individually.
21. Further, the national model code of conduct *Faithfulness in Service* does not form part of the formal teaching of this Church. Each individual diocese has the autonomy to establish its own code of conduct providing advice or directives for clergy discipline as it relates to matters such as sex and intimacy.
22. The operation of the Amending Ordinance reflects this understanding.

**Contrasting the governance of the Australian Church with the New Zealand Church**

23. Sydney correctly identifies that the Amending Ordinance seeks to emulate the canons of the New Zealand Church<sup>10</sup>. Sydney then suggests that the Amending Ordinance is invalid because it lacks the relevant authority from the General Synod<sup>11</sup>.
24. Sydney's comparison between the governance of this Church and the New Zealand Church is erroneous. The governance of the Anglican Church of Aotearoa, New Zealand and Polynesia (**ACANZP**) is different to that of this Church. The General Synod of ACANZP has:

*“full power to make all such regulations, not inconsistent with this Constitution, as it shall consider necessary for the order, good government and efficiency of [that] Church”<sup>12</sup>*

and a Diocese may make regulations:

*“not inconsistent with this Constitution or with any Canon or Regulation of the General Synod / te Hīnota Whānui, as may be necessary for the order and good government of the Church in such Diocese”<sup>13</sup>.*

25. Diocesan Synods in this Church have much wider legislative autonomy as conferred by the operation of, particularly, ss30 and 51 of the Constitution in relation to the order and good government of this Church within the Diocese itself.

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<sup>10</sup> Submission from the Diocese of Sydney at para 35 – 37 and Newcastle Primary Submission at para 9.

<sup>11</sup> Submission from the Diocese of Sydney at para 37.

<sup>12</sup> Constitution of ACANZP Part C 9.

<sup>13</sup> Constitution of ACANZP Part E 7.

### **The role of the Diocesan Tribunal in hearing and determining charges under s54 of the Constitution**

26. Newcastle submits that the Appellate Tribunal should exercise caution in its interpretation and application of sections 54(2A) and 54(2B) of the Constitution in the consideration of this referral.
27. Section 54(2) gives the Diocesan Tribunal power to “hear and determine” charges of breaches of faith, ritual, ceremonial or discipline and of such offences as may be specified in a canon, ordinance or rule.
28. However, s54(2A) provides that the Diocesan Tribunal only has power to “hear” charges (as compared with “hear and determine” under s54(2)) relating to an offence of unchastity, an offence involving sexual misconduct or an offence relating to certain criminal convictions.
29. The offences of “unchastity” and “sexual misconduct” are not defined in the Constitution. Their interpretation relies on statutory law, common law and Canon law.
30. It is also arguable that in the absence of a reference to “determine” in the powers provided to the Diocesan Tribunal under s54(2A), the provisions of s54(2B) cannot be enlivened because they first require a determination of a charge under s54(2A) which it would seem is not available.
31. Newcastle submits that a responsibility of a Diocese is to pass ordinances which give effect to Part IX of the Constitution. The Constitution enables a Diocese to exercise that function.
32. In the Diocese of Newcastle, the Clergy Discipline Ordinance 1966 and its various amendments, and the Clergy Discipline Ordinance 2019 and its amendment (the Amending Ordinance) provide clarity around what may constitute an offence within the Diocese.
33. The passing of these instruments demonstrates that Newcastle is not seeking to limit the work of the Diocesan Tribunal. Rather, the ordinances demonstrate the exercise of the Diocese’s duty to give effect to the constitution and ensure order and good government within the diocese.

### **Faith, Ritual and Ceremonial – Participation in a Service or Blessing of a same sex marriage or being in a same sex marriage**

34. Section 54(3) of the Constitution states 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.”*

35. So the Constitution requires that any charge relating to faith, ritual or ceremonial be referred to a diocese's Board of Enquiry before being heard by the diocesan tribunal.
36. The Constitution does not stipulate how the Board of Enquiry is to be established nor how it is to undertake its work.
37. Further, the Constitution does not stipulate what constitutes "a charge proper to be heard".
38. The Amending Ordinance is an instrument by which the Diocese is exercising its duty to give effect to the constitution and ensure order and good government and by providing direction as to matters which should result in a Board of Enquiry being able to determine whether a proposed breach of faith, ritual and ceremonial is "a charge proper to be heard".

#### **Blessing of a same sex marriage is not a breach of Faith**

39. Newcastle submits that the consideration of "faith" insofar as it relates to the subject matter of the referral has already been advanced in the submissions of the Diocese of Wangaratta and Diocese of Perth in the Wangaratta referral. Newcastle adopts those submissions here.
40. As is advanced by Wangaratta<sup>14</sup>, examination of definition of "faith" also requires the consideration of the definition of "doctrine" and consideration of teachings. Once again, Newcastle submits that these matters have been well considered in the submissions of the Diocese of Wangaratta and the Diocese of Perth in the Wangaratta referral. Accordingly, Newcastle adopts those submissions here.

#### **Being in a same sex marriage – the offence of Unchastity**

41. Sydney submits that "it is likely that the language of 'unchastity' in the *Offences Canon* 1962 is a reflection of the Revised Standard Version of the Bible, which was the dominant translation used by the Church in the 1960s<sup>15</sup>."
42. The Offences Canon originally came into force in 1962.
43. Sydney creates a circular argument relying on the Offences Canon to provide an interpretation of the meaning of unchastity in the Constitution<sup>16</sup>.
44. This argument is flawed because a canon affecting discipline in this Church is a Canon which also affects the order and good government in a Diocese. For instance, the Offences Canon can be excluded by the Diocese, but can otherwise be utilised by the

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<sup>14</sup> Primary Submissions of Wangaratta in its referral from para 28

<sup>15</sup> Submission from the Diocese of Sydney at para 74.

<sup>16</sup> Submission from the Diocese of Sydney at para 76



Diocese to provide a framework for an alternate set of offences by Ordinance within that Diocese.

45. Newcastle submits that the wide definition of unchastity proposed by Sydney submission should be rejected. Sydney contends that the definition is to be supported from the Scriptures and would extend to miscegeny<sup>17</sup> which right-thinking members of this Church would reject as an example of unchastity in a similar way that right-thinking members of this church reject slavery. Sydney then seeks to expand that definition by citing other examples of unchastity not referenced in the Scriptures. Sydney then does not address the wide variety of arrangements for marriage and sexual intimacy within the scripture, such as concubinage and polygamy, many of which would no longer be condoned. The Sydney submission highlights the dangers of framing this definition in the manner Sydney proposes. The reference to miscegeny being the most potent example of a most unattractive approach to the interpretation of unchastity.
46. Sydney's examples of acts of unchastity also result in some most extraordinary practical outcomes. Sydney's interpretation would propose that the Church designate someone who is lawfully married (under the Marriage Act) guilty of unchastity or sexual misconduct simply from the fact of being married to another person of the same gender or engaging in consensual and sexual acts with that person whilst in that lawful marriage. The Church does not require someone, who was lawfully married before converting to Christianity (whether having previously practised a different religion or having had no religion), to then solemnise their marriage in the Christian faith. Such a pre-existing marriage is simply accepted. Further it is ludicrous for the Church to consider that it is entitled to declare someone unchaste in circumstances where they are lawfully married.

#### **Being in a same sex marriage is not a breach of Ordination vows**

47. Sydney submits that "The 'teaching of Christ' is that marriage is between a man and a woman" (Matthew 19: 3 – 12). And that 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<sup>18</sup>.
48. The Appellate Tribunal will be aware that in Matthew 19, Jesus was responding to a particular set of circumstances involving a further attempt by the Pharisees to test or trap him, on this occasion around the question of a man initiating divorce.
49. The proposition is put strongly by some that it is impossible and inappropriate to suggest that this response represents the breadth of Jesus' view on loving relationships and the expressions of human sexual intimacy. Jesus' forbearance on the ambiguous sexual circumstances of the Samaritan woman at the well in John 4, together with the record of her apostolic and evangelistic ministry is put forward as one example of a broader response to sexual intimacy.

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<sup>17</sup> Submission from the Diocese of Sydney at para 72.

<sup>18</sup> Submission from the Diocese of Sydney at para 50

50. Simply put, the Gospels do not record Jesus addressing same-sex love, same-sex sexual intimacy and same-sex marriage. This responsibility rests with the Church, and as is evident, this is open to theological contest in parts of the Anglican Communion.
51. Sydney seeks to have the Appellate Tribunal make a blanket ruling that the conduct described is contrary to a person's ordination vows. The Appellate Tribunal should refrain from making such a ruling.
52. Sydney submits to the Appellate Tribunal that clergy may breach their ordination vows, citing the vow in *An Australian Prayer Book* :

"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?"<sup>19</sup>

This is one of three alternative forms of this question available in this Church.

*The BCP Ordinal for deacons* provides that the candidate will be asked:

*"Will you apply all your diligence to frame and fashion your own lives, and the lives of your families, according to the Doctrine of Christ; and to make both yourselves and them, as much as in you lieth, wholesome examples of the flock of Christ?"*

*The Ordinal for Deacons in A Prayer Book for Australia* provides another:

*"Will you strive to shape your own life, and that of your household, according to the way of Christ?"*

Each authorised form of service recognises that God's grace or help is required to fulfil this vow giving the attendant reminder that a high ideal is being set before the candidate.

53. In Newcastle, as with many other dioceses, the *BCP Ordinal* has not been used in living memory. Generally, the ordination service in *APBA* has been used in those dioceses since it was permitted for use in this Church.
54. Newcastle submits that simply the fact of a person being married to a person of the same-sex does not constitute a breach of a person's vow to shape their own life, and that of their household, according to the way of Christ. Living the way of Christ must be read more broadly as a call to:

*"study the Bible, to take part in the life of the Church, to share in the Holy Communion, and to pray faithfully and regularly ... to share with others, by word and example, the love of Christ and his gospel of reconciliation and hope ... to love our neighbours as ourselves, to honour all people and to pray and work for peace and justice"*<sup>20</sup>

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<sup>19</sup> Submission from the Diocese of Sydney at para 47

<sup>20</sup> Bishop's injunction to all who have been baptised and confirmed from *APBA* part 42 page 69.

### The application of the Laws of the Church of England

55. Sections 71 to 73 of the Constitution make clear the intent to sever the direct relationship between the Church and the Church of England.
56. In its submissions, the Diocese of Sydney refers to section 73(1) of the Constitution. This section makes it abundantly clear that the Appellate Tribunal shall not be bound by the laws of the Church or England.
57. It follows that Sydney's reference to the decision in Pemberton –v- Inwood<sup>21</sup> carries no greater weight in this Church than decisions in other churches of the Anglican Communion which have affirmed the recognition of same sex marriage in those churches. All this decision does is affirm that the Church of England is engaged in a similar debate about same sex partnerships, civil union and marriage as is occurring in this Church.

### Other Submissions

58. The Diocese of Newcastle urges the Appellate Tribunal not to address the submission of EFAC relating to the capacity of clergy and parishioners within the Diocese of Newcastle to reject the lawful authority of the Bishop.
59. The attempt by EFAC to add greater weight to its submission by reference to numerical data without an objective source for that data similarly should not be addressed.
60. For the purposes of responding to this point and for the sake of accuracy, the outcome of the votes in both houses of the Synod of the Diocese of Newcastle in passing the Amending Ordinance was as follows:
  - 60.1 41 of 64 clergy in favour; and
  - 60.2 103 of 153 laity in favour,providing a overall majority of 66.3%, where only a simple majority is required.
61. It is important to note that upon their ordination or first licensing, clergy in the Diocese of Newcastle assent to be bound:

*"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"*<sup>22</sup>

and give an oath or affirm that they will:

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<sup>21</sup> [2018] EWCA Civ 564

<sup>22</sup> Clerical Ministry Ordinance 2009 section 21(vii)

*"pay true and canonical obedience to the Bishop of Newcastle and the successors of that bishop in all things lawful and honest."*<sup>23</sup>

62. This reflects Anglican polity that the scope of the godly counsel and expectation of obedience that a bishop may give is fashioned by the canon law of this church as in force in a diocese and the ordinances of the diocese which the clergy (as a whole) have agreed to as part of the Synod.
63. Anglican polity recognises that clergy and bishops may disagree. Anglican polity also affirms that there are aspects of ministerial life in which the bishop can and should be able to give binding direction.
64. The Amending Ordinance specifically seeks to address the differences of view which may exist within a Diocese and ensure the lawfulness of those who would decline to bless a same-sex marriage.
65. The Synod and the Bishop may agree other ordinances in relation to the order and good government of the Diocese should the Amending Ordinance come into effect.
66. Further, the logic of the EFAC submission has not been properly considered in a practical context. The same contention could be applied to parishes in the Diocese of Sydney choosing to reject the lawful authority of the Archbishop if they disagreed with the Archbishop on the doctrine of Holy Communion.
67. Accordingly, the proposition from EFAC is contrary to Anglican polity and should be rejected. Further, the Diocese of Newcastle submits that EFAC's submission does not appear to respond to a question arising under the Constitution and, as such, should not be addressed by the Appellate Tribunal.

DATED: 14 February 2020



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Scott Puxty  
Cantle Carmichael Legal  
Diocesan Solicitor  
Diocese of Newcastle

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<sup>23</sup> Oaths, Affirmations, Declarations and Assents Canon 1992 section 3(1)

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

Secondary Submissions of the Synod of the Diocese of Sydney

## Introduction

1. These secondary submissions of the Synod of the Diocese of Sydney (**Sydney**) reply to certain primary submissions made 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 in the reference dated 31 October 2019, and
  - (b) the questions posed by 25 members of the General Synod regarding the Amending Ordinance in the reference dated 6 November 2019.
2. Collectively, these will be referred to as “**the References**” in this secondary submission.
3. We submit that the questions posed in the References should be answered by the Appellate Tribunal in the manner set out in Sydney’s primary submission.

## The Primary Submissions

4. Sydney notes that 7 primary submissions were received in relation to the References. Four submissions argue that the Ordinance is invalid due to inconsistency with the Constitution (Diocese of Sydney, Diocese of Tasmania, EFAC Australia and Fiona McLean). Sydney is broadly in support of the arguments advanced in these submissions.
5. Three submissions argue that the Ordinance is valid (Diocese of Newcastle, Equal Voices Ltd and a combined submission from the Rev Associate Professor Matthew

Anstey and the Rev Dr Stephen Ogden). Of these three submissions, only the submission from the Diocese of Newcastle is the subject of a further response.

6. In the process of review of our own submission, we detected an error which we now correct. In the summary in paragraph 30 of our primary submission, the heading '(a) participation in **the solemnisation of** a same-sex marriage by a member ...' should read -

'(a) participation in **a service to bless** a same-sex marriage by a member ...'

7. The argument in paragraph 31, of which paragraph 30 is the summary, does not need correction.

#### **Secondary Submissions in Response to the Primary Submission of the Diocese of Newcastle.**

8. The submission from the Diocese of Newcastle answers the first set of questions as follows:
  - (a) No - No part of the Ordinance is inconsistent with the Fundamental Declarations and Ruling Principles.
  - (b) Yes - The Synod has power under section 51 to pass the Ordinance.
  - (c) The Bishop can give assent once the Appellate Tribunal has delivered its opinion.
9. The Newcastle Submission argues that the Appellate Tribunal should decline to answer all 5 questions submitted by the 25 members of the General Synod, on the basis that 'none of the questions properly raise a matter under the Constitution' [72].
10. The Submission argues that 'questions of the disciplining of clergy under the Constitution are questions for determination at the diocesan level' [37] and that only

limit on the power of a diocesan synod with respect to discipline is “consistency with the Fundamental Declarations” [39].

11. The Newcastle Submission argues for a construction of the Constitution that is untenable. It argues that the **only** limit on the power of a diocesan synod with respect to discipline ordinances is ‘consistency with the Fundamental Declarations’ [39]. This argument is advanced in paragraphs 25 and 26 of the Newcastle submission -

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.

12. The flaw in the argument is that it fails to take into account the opening words of the section 51 – ‘Subject to this Constitution’. As will be demonstrated below, section 51 does not merely ‘preserve’ the power of diocesan synods. It also places a limit on the power of diocesan synods, such that ordinances must be consistent with the Constitution (NOT merely ‘consistent with the Fundamental Declarations’): see Slater decision of the Appellate Tribunal at [119].

#### **The limit in Section 51 – ‘Subject to this Constitution’**

13. 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.

14. The proper construction of the Constitution is that a diocesan synod is not able to make ordinances that are inconsistent with the Constitution of the Anglican Church of Australia or which are inconsistent with a canon of General Synod in force in that diocese.
15. When the Anglican Church of Australia came into being, the effect of s.71(1) was to ensure that diocesan ordinances and other enactments continued in force 'insofar as they are not inconsistent with this Constitution'.
16. 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].
17. The proviso 'Subject to this Constitution' in Section 51 imposes a limit on power of a Diocesan Synod that is similar in effect to section 71(1) and section 30 – that is, an ordinance of a diocese must not be inconsistent with the provisions of the Constitution. Section 51 subjects the continuing power of diocesan synods to the provisions of the Constitution: Harrington at [45]-[46].
18. It is unsustainable to argue that, notwithstanding the fact that section 30 requires diocesan ordinances to be consistent with the canons of General Synod in force in the diocese, there is no requirement in the Constitution that diocesan ordinances be consistent with the Constitution itself (which is also in force in the diocese).
19. Accordingly, the test for the validity of the *Clergy Discipline Ordinance 2019 Amending Ordinance 2019* is not 'consistency with the Fundamental Declarations' (as per the Newcastle Submission at [26]). Rather, the test is 'consistency with the provisions of the Constitution'.



### Assessing Consistency with the Provisions of the Constitution

20. The Newcastle Ordinance is inconsistent with the Constitution at three levels. It is inconsistent with the ***Fundamental Declarations***. It is inconsistent with the ***Ruling Principles***. And it is inconsistent with the ***Discipline provisions of Part IX of the Constitution***.
21. The Newcastle Submission argues that there is no inconsistency with the ***Fundamental Declarations***, because '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' [54] and the other interpretation of Scriptures on this matter 'are the subject of profound and continuing debates amongst scholars and form the basis for widely diverging views amongst Anglican clergy and laity' [55].
22. The form of words in para [54] blurs the issue, by framing it as a matter of 'same sex relationships and their compatibility with godly living'. It is, rather, a matter of 'marriage' and whether a same-sex marriage is consistent with 'Christ's own teaching as directly quoted in the Gospels'. As is demonstrated in our primary submissions, Christ teaches that marriage is only between a man and a woman, and that the only alternative to this is abstinence in singleness. Same-sex marriage is inconsistent with the teaching of Christ. Since one of the effects of the Ordinance is to permit clergy to enter into a same-sex marriage, it is inconsistent with the Fundamental Declarations.
23. The Newcastle Submission argues that there is no inconsistency with the ***Ruling Principles***, because 'the Church's teaching on marriage is not a doctrine or principle of doctrine to which the restrictions in the Ruling Principles apply' [57.2].
24. This submission depends on the argument that the Ordinance only involves a change of 'discipline' not a change of 'doctrine'. The Newcastle Submission:

- (a) argues that '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.';
  - (b) acknowledges that this approach is modelled on that taken by Anglican Church in Aotearoa, New Zealand and Polynesia (ACANZP) in 2018; and
  - (c) quotes a report to the 2018 ACANZP Synod, which stated 'even if it was generally accepted that the Formularies were clear on this issue, the Church is still able to regulate for itself what it does and does not discipline' [46].
25. However, the Newcastle Submission loses sight of the fact that this was only possible for the ACANZP because of changes passed by its General Synod to the Discipline Canons of the ACANZP.
26. The Newcastle submission is incorrect, at two levels.
27. Firstly, because it wrongly focuses the question on 'the **Church's teaching** on marriage' (*per* Newcastle) instead of 'the doctrine and principles of the Church of England embodied in the Book of Common Prayer (etc.)' (*per* section 4 of the Constitution). As demonstrated in our primary submissions, it is a principle of doctrine of *BCP* that marriage is only between a man and woman. The Ordinance is inconsistent with the doctrine of marriage in *BCP* because it purports to allow the blessing of same-sex marriage and to allow clergy to enter into same-sex marriages.
28. Secondly, it is also inconsistent with the Ruling Principles, in as much that the ordinance permits an impermissible variation in service from that which is established by the principles of doctrine in *BCP*. Section 4 requires that

'no alteration or permitted variations from the services ... contained [*in the formularies*] shall contravene any principle of doctrine or worship laid down in such standard.'

29. The effect of the Ordinance is to permit the use of a 'variation' – a service to bless a same-sex marriage – which contravenes the principle of doctrine of *BCP* that marriage is only between a man and a woman. The ordinance is therefore inconsistent with the Ruling Principles.
30. The Newcastle Submission does not directly address the issue of inconsistency between the Ordinance and the *Discipline provisions in Part IX of the Constitution*.<sup>1</sup> This matter was foregrounded by the 5 supplementary questions that were put at the request of 25 members of the General Synod.
31. The purpose of these questions was to direct attention to inconsistencies between the Ordinance and relevant provisions of the Constitution. In summary, these questions asked -
  - (a) Does the Ordinance prevent the Diocesan Tribunal from hearing and determining under section 54(2) of the Constitution a **charge of breach of faith or discipline** where the act giving rise to the charge relates to such a person marrying or being married to another person of the same sex?
  - (b) Does the Ordinance prevent the Tribunal from hearing a charge under section 54(2A) of the Constitution relating to an **offence of unchastity** or an **offence involving sexual misconduct** where the act giving rise to the charge relates to the member of clergy marrying or being married to a person of the same sex?

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<sup>1</sup> In passing, the Newcastle Submission argues that there is no inconsistency with s.54(2A), because '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' [31]. This argument is addressed in paragraphs 38-42 in this submission.

- (c) Does the Ordinance prevent a charge being promoted to the *Diocesan Tribunal* under section 54(3) by any five adult communicant members 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 same-sex marriage?
  - (d) Does the Ordinance prevent a charge being promoted to the *Provincial Tribunal* under section 54(3) by any five adult communicant members 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 same-sex marriage?
  - (e) Does the Ordinance prevent a **board of enquiry** 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 where that charge related to any of the above?
32. The Newcastle Submission does not address these 5 questions, on the basis 'none of the questions properly raise a matter under the Constitution.' [para 72] In light of the analysis above, this is manifestly incorrect.
33. To be valid, the Ordinance must be consistent with the discipline provisions in Part IX of the Constitution. For example, if a diocesan ordinance were to provide that 'There shall not be a Diocesan Tribunal in this diocese', that ordinance would be inconsistent with s.53 which provides that 'There shall be a diocesan tribunal of each diocese'. Similarly, if a diocesan ordinance provided that the diocesan tribunal did not have jurisdiction to hear and determine charges of breaches of faith ritual ceremonial or discipline, this would be inconsistent with s.54(2), which provides that 'A diocesan tribunal shall ... have jurisdiction to hear and determine charges of breaches of faith ritual ceremonial or discipline". The five questions address specific inconsistencies.

34. In our primary submission, we argue that clause 3(a) and clause 3(c) of the Ordinance are inconsistent with the discipline provisions of Part IX, because these clauses purport to prevent charges arising under subsections 54(2) and 54(2A) to be brought before the Diocesan Tribunal. 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 breaches of **faith ritual ceremonial or discipline**, or the offence of **unchastity**, an offence involving **sexual misconduct**. Members of the clergy who participate in a service to bless a same-sex marriage (clause 3(a)) or themselves enter into a same-sex marriage (clause 3(c)) are liable to charges under subsections 54(2) and (2A), for the following reasons.

35. Participation by a member of clergy in a service which blesses a same-sex marriage is -

- (a) 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; and
- (b) 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.

36. Marriage to a person of the same-sex by a member of clergy is:

- (a) 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
- (b) a **breach of faith** because it is inconsistent with the doctrine of the Church in respect to marriage, and

(c) 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.

37. The Constitution provides the context for determining what constitutes a breach of faith ritual ceremonial or discipline. This cannot be redefined by an individual diocese.

38. The assertion in the Newcastle Submission at para 31 that, since the offences of unchastity and sexual misconduct are not defined in the Constitution, 'the content of these offences will therefore fall to be determined by reference to the codes of conduct applicable in a particular diocese' should not be accepted. There is nothing in the Constitution that would support this devolution of interpretation. Rather, it would thwart the clear intention of the Constitution. Section 54(2A) provides that

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...

39. If the definition of 'unchastity' and 'sexual misconduct' lies entirely in the hands of a diocese, then the plenary jurisdiction in s.54(2A) becomes meaningless, because these offences could be redefined into oblivion.

40. Could a diocese define a civil same-sex marriage as a valid marriage for the purposes of the Church, and therefore not be an act of 'unchastity' under s.54(2A)? To do so would be inconsistent with the argument advanced in several of the submissions supportive of the Wangaratta Regulation, that a civil same-sex marriage is **not** a Christian marriage (and therefore does not overlap with the Church's doctrine of marriage). For example, the Primary Submission of the Diocese of Wangaratta argues that -

to the extent that the Church's teaching on marriage is properly characterised as doctrine, it is necessarily teaching confined to what constitutes a Christian marriage and does not extend to the question of the Church extending a blessing to persons in relationships that are recognised by the civil law but which do not have the status of Christian marriage. [6.2]

Proponents of same-sex marriage are caught on the horns of a dilemma. If a same-sex marriage 'does not have the status of a Christian marriage', then same-sex sexual intimacy is unchastity. Conversely, if a same-sex marriage does have the status of Christian marriage, then this is inconsistent with the Church's doctrine of marriage, which is that marriage is only between a man and a woman.

41. The meaning of the offences of the 'unchastity' and 'sexual misconduct' should be determined in accordance with the ordinary principles of statutory interpretation. Unchastity was a word with a common and agreed meaning in 1962, when the word was used in the Offences Canon. The word came from the RSV translation of Matthew 19:9. This meaning cannot be changed by a diocesan code of conduct.
42. In summary, the Newcastle Ordinance is inconsistent with the Fundamental Declarations, the Ruling Principles and the discipline provisions of part IX of the Constitution. It is not validly made under Section 51, since it is not 'subject to this constitution'.

#### **Diocesan autonomy**

43. The Newcastle submission argues for a construction of the Constitution that can only lead to significant disruption in the national church. If each diocese has absolute autonomy over whether to discipline any breach of faith, ritual, ceremonial or discipline, then it becomes practically meaningless to speak of an Anglican Church of Australia, because each diocese is able to decide for itself which matters of faith, ritual, ceremonial and discipline are binding on its clergy.

44. This is inconsistent with the definition of discipline in section 74(9)(b). In this subsection, discipline is defined to include the obligations in the Ordinal undertaken by a member of the clergy. The ordinal, being derived from the Ordinal in *BCP*, cannot be changed by an individual diocese. Whether ordained under *BCP* or modern versions of the ordinal, all clergy across the national church are subject to the same obligations. One practical implication is that Australian dioceses recognises the validity of clergy ordained in another diocese, because all clergy are bound by the same promises.
45. The Newcastle Submission rightly notes in paragraph 40 that there are different approaches to aspects of clergy discipline between dioceses, for example in relation to licencing divorced persons. However, none of the examples cited at [40] go to faith, ritual, ceremonial or discipline, nor do they constitute unchastity or sexual immorality. The framework established by Part IX of the Constitution establishes a minimal agreed practice as to discipline across the national church. Beyond this, each diocese has freedom to add additional requirements expected of its clergy. But a diocese cannot subtract from, or act inconsistently with, this framework.
46. Contrary to the Newcastle Submission, it is not always the case that 'questions of the disciplining of clergy under the Constitution are questions for determination at the diocesan level' [37]. While many issues of clergy discipline are rightly in the domain of the local diocese, the Constitution requires all clergy, regardless of diocesan regulations, to live and teach in accordance with their ordination vows, to uphold the faith, ritual and ceremonial of the church.

#### **Further submissions**

47. Sydney 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*.



48. Sydney also requests the opportunity to make submissions in any hearing that the Appellate Tribunal may wish to convene with respect to the References.
49. Sydney thanks the Tribunal for the opportunity to make these secondary submissions.

Dated: 14 February 2020

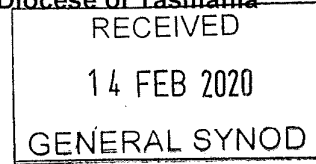
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**Clergy Discipline Ordinance 2019 Amendment Ordinance 2019 (Diocese of Newcastle)  
("Newcastle Amendment")**

**References of 31 October and 6 November 2019 under Section 63 of the Constitution  
("References")**

**Further Submissions of the Diocesan Council of the Diocese of Tasmania  
("Tasmania")**



**Background**

1. Tasmania made its primary submissions to the Appellate Tribunal with respect to the References on 6 January 2020.
2. Tasmania has now had the opportunity to review and consider the primary submissions made by others. Tasmania has also had the opportunity to sight a draft of the proposed further submission made by the Synod of the Diocese of Sydney.

**Further submission**

3. Tasmania confirms that it supports and adopts the primary and further submissions of the Synod of the Diocese of Sydney.
4. At this stage, Tasmania does not intend to seek leave to appear at any hearing of this matter. However, it would welcome the opportunity to clarify any aspects if that would be of assistance.
5. Tasmania thanks the Appellate Tribunal for the opportunity to make these submissions.

Dated: 14 February 2020

**Alex Milner**  
Church Advocate

*A church for Tasmania, making disciples of Jesus.*