



R1

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

**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 In passing the Amendment Act, the Commonwealth Parliament repealed amendments introduced in 2004 and introduced a new definition of the term "marriage" as "the union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

---

<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.

---

<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.

---

<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

---

<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.

---

<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>

---

<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:

---

<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



.....  
Scott Puxty  
Cantle Carmichael Legal  
Diocesan Solicitor  
Diocese of Newcastle

---

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