



R2

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*.¹ 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?

¹ 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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