In the Appellate Tribunal of the Anglican Church of Australia

References with respect to the *Blessing of Persons Married According to the Marriage Act 1961 Regulations of the Synod of Wangaratta*

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 *Blessing of Persons Married According to the Marriage Act 1961 Regulations* of the Synod of Wangaratta (**Regulations**) in the reference dated 5 September 2019, and
   (b) the questions posed by 41 members of the General Synod regarding the Regulations in the reference dated 21 October 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 33 primary submissions were received in relation to the References (excluding the earlier primary submissions made by Wangaratta which were addressed in Sydney's primary submissions).
5. Four of these submissions argue that the Regulations are a valid exercise of legislative power by the Synod of the Diocese of Wangaratta. These submissions are from the Archbishop of Perth, the Rev Associate Professor Matthew Anstey, Equal Voices Ltd and the Diocese of Newcastle.

6. There are four main arguments in these submissions (and also within the primary submissions of the Diocese of Wangaratta) –

   (a) The references do not involve a question arising under the Constitution and merely concern diocesan legislation for the order and good government of the Church in the Diocese by authority of a Canon of the General Synod.

   (b) The Church's teaching on marriage is not a doctrine for the purposes of the Constitution as it is not a teaching on a question of faith.

   (c) A civil marriage under the *Marriage Act 1961* is in a different category to marriages that are solemnised according to Anglican rites and our doctrine of marriage has no bearing on civil marriages.

   (d) The act of blessing a civil marriage or the persons in a civil marriage is such that it does not contravene the Church's doctrine of marriage.

7. Sydney's primary submissions have already addressed the matters in (b), (c) and (d) in some detail. These secondary submissions supplement the arguments in Sydney's primary submission in respect to the matter in (a).

Section 4 is a broad constitutional limitation on the legislative power of a diocesan synod

8. The Archbishop of Perth argues at paragraphs 11 and 12 of her submission that –

   (a) there is no provision in the existing formularies of the Church for the blessing of a couple other than in the course of an authorised marriage service,

   (b) the Regulations therefore "provide for something that is not provided in" the Book of Common Prayer (**BCP**) or the Thirty-nine Articles, and

   (c) the proviso in section 4 of the Constitution does not apply to the Regulations since the Regulations do not involve making alterations or variations.

9. On the basis of this argument there is no constitutional requirement that a service for the blessing of a civil marriage outside an authorised marriage service conform to the doctrine of this Church.

10. Sydney does not agree with this submission.

11. Section 5 of the Constitution assumes a federal scheme, providing that the plenary power of the Church to make canons, ordinances and rules for the order and good government of the Church is exercisable by "the several synods" and is "subject to the Fundamental Declarations and the provisions of this chapter". The nature of the federal character is further spelt out in section 51, which confirms that the legislative power of a diocesan synod under its constitution is "Subject to this Constitution".

12. Diocesan legislation must conform with the doctrine of this Church because it is subject to a constitutional framework which requires the canons, ordinances and rules of the Church to comply with the Fundamental Declarations and Ruling Principles. This framework is summarised by reference to a series of questions at paragraph 125 of Sydney's primary submissions.

13. The starting point with section 4 is that the Church "retains and approves", inter alia, the doctrine and principles of the Church of England embodied in BCP and the Articles. It has plenary authority to make statements, forms, rules, alterations of revisions thereof but these must be consistent with the Fundamental Declarations and be made as prescribed by the Constitution.

14. The proviso in the second part of the first paragraph of section 4 that any alterations or variations not contravene any principle of doctrine or worship in BCP or the Articles does not have the effect that a form of service that is not an alteration or a variation can be used in the Church irrespective of whether or not it is consistent with the doctrine of the Church. There is still a constraint that the proposed service must be consistent with the Fundamental Declarations and Ruling Principles.

15. If this were not so there would be no constitutional requirement that any new form of service not contravene the doctrine of the Church. It would be possible, for example, that a diocesan synod could make a regulation for a form of service to worship idols without offending the Constitution of the Church since this merely "fills a vacuum" or "provides for something that is not already provided for".

16. Furthermore, it is not the case that the terms *alteration* and *variation* in section 4 exclude a form of service for which no provision is made. BCP and the Articles are the "authorised standard" of worship and doctrine. The use of a service that does not conform to this standard is an *alteration* or a *variation* from "the services...therein contained". The effect of the Regulations 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 question of whether a service is contrary to or a departure from doctrine is not solely a matter for the bishop

17. The submissions supportive of Wangaratta acknowledge that the *Canon Concerning Services 1992* requires all forms of service used under clause 5(2) of the Canon to not be contrary to or a departure from the doctrine of this Church, but take the position, based on clause 5(4) of the Canon, that this question is solely a matter for the diocesan bishop to determine. It therefore follows from this argument that if a bishop does not consider that a service for the blessing of a civil marriage other than the voluntary union of one man and one woman arising from mutual promises of lifelong faithfulness is contrary to or a departure from the doctrine of this Church that is the end of the matter. The same would presumably follow in relation to other forms of service for which no provision is made that are contentious within the Church.

18. Sydney notes that section 5(4) only states that the bishop "may" make a determination concerning the observance of the provisions of the Canon. It does not require the

bishop to do so, nor provide that the bishop is the only determiner of this question. Ultimately the question of whether diocesan legislation to regulate the use of a form of service is a contrary to or a departure from the doctrine of this Church is a constitutional question and, in the case of a reference, a matter for the Tribunal.

19. If this were not the case, and the Tribunal were to accept the submission that the Regulations are merely a matter of diocesan legislation and that the bishop concerned can make exclusive determinations about these matters, there will no doubt be a further reference to the Tribunal from 25 members of the General Synod on the question of whether the *Canon Concerning Services 1992* is a valid exercise of legislative power by the General Synod.

The Regulations constitute an authorisation by diocesan legislation for a minister to conduct a service for the blessing of a same-sex marriage

20. The Archbishop of Perth argues that the source of authority for a minister to conduct a service for the blessing of a marriage is found in *Canon Concerning Services 1992* and that the Regulations are a mere limitation on the exercise of that authority made pursuant to clause 5(2) of the Canon [13-14].

21. Delegated legislation including a regulation made under a Canon is invalid not merely if it is contrary to the Canon purportedly authorising it but also if it is repugnant to the general law or some other statutory or constitutional provision: see e.g. *Halsbury's Laws of Australia* at [385-830], [385-850].

22. As noted in our primary submission, the question of inconsistency of the Regulations with the Constitution is addressed as a matter of substance by reference to the true scope and purpose of the Regulations and their nature and character: *Stevens v. Perrett* (1935) 53 CLR 449 at 462.

23. The Regulations purport to prescribe the only form of service that can be used to conduct a service for the blessing of a marriage in the Diocese of Wangaratta and

expressly prohibit the use of any other form of service by a minister in that Diocese (clause 4).

24. Furthermore, the Regulations contain a provision (clause 5) that no minister will be compelled to assent to conducting such a service if this would offend their conscience. This would seem to imply that a minister can be compelled to assent to conduct the service if doing so would not offend their conscience as the clause would otherwise have no work to do in the Regulations.

25. While the Regulations do further limit the discretion that a minister has under the Canon, in substance the effect of the Regulation is to legitimise and encourage the use of a service for the blessing of a marriage within the Diocese. This is also evidenced from the local context in which the Regulations were made (see paragraph 21 of Sydney's primary submissions). As such the Regulations are contrary to the constitution and invalid.

Further submissions

26. 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*.

27. Sydney also requests the opportunity to make submissions in any hearing that the Appellate Tribunal may wish to convene with respect to the References.

28. Sydney thanks the Tribunal for the opportunity to make these secondary submissions.

Dated: 14 February 2020

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