Anglican Church of Australia

Appellate Tribunal

APPELLATE TRIBUNAL OF THE ANGLICAN CHURCH OF AUSTRALIA

Primate's References re Newcastle Discipline Ordinance

Date: 11 November 2020

Tribunal Members:	The Hon Keith Mason AC QC, President
	The Hon Richard Refshauge, Deputy President
	The Most Rev'd Dr Phillip Aspinall
	Ms Gillian Davidson
	Professor the Hon Clyde Croft AM SC
	The Rt Rev'd Garry Weatherill

Summary: The Synod of the Diocese of Newcastle has authority to amend its own diocesan clergy discipline regime in relation to clergy who bless or are party to a same-sex marriage. But this would not affect the constitutional jurisdiction of diocesan tribunals to determine charges for offences created by the Constitution of the Anglican Church of Australia or by any Canon of the General Synod that is in force in the Diocese.

Determination and Opinion: See paras 52-60 of the attached joint reasons of the majority. The dissenting reasons of Ms Davidson are also attached at page 16.

REASONS OF THE PRESIDENT, DEPUTY PRESIDENT, ARCHBISHOP ASPINALL, PROFESSOR CROFT AND BISHOP WEATHERILL: OPINION OF THE TRIBUNAL

Summary

1. The Synod of the Diocese of Newcastle passed the *Clergy Discipline Ordinance 2019* ("CDO") to replace a 1966 ordinance of similar name. It received the Bishop's assent on 25 October 2019. On 26 October 2019 the Synod passed the *Clergy Discipline Ordinance 2019 Amending Ordinance 2019* ("the proposed ordinance") but, as far as is known, it has yet to receive assent. The Bishop requested the Primate to refer three questions touching its validity to this Tribunal pursuant to s 63 of the *Constitution* and the Primate made this Reference on 31 October 2019.

2. On 6 November 2019, the Primate also referred five related questions at the request of 25 members of the General Synod.

3. The Tribunal issued a general invitation for interested groups, synods and individuals to participate. Seven did so. The Tribunal is grateful for this assistance. Abbreviated citations of particular submissions refer to the paginated volume of submissions posted online by the Registrar.

4. These Newcastle References are associated with the Wangaratta References concerning a service for the blessing of marriages solemnised according to the *Marriage Act 1961.* The Tribunal's Opinion in that matter provides background to the somewhat narrower jurisdictional questions arising in this one.

The clergy discipline regime under the Constitution and in the Diocese of Newcastle

5. The *Constitution* entrenches a regime for dealing with ecclesiastical offences by clergy. Authority is devolved to the diocesan synods, diocesan tribunals and diocesan Bishops, but this is subject to the *Constitution* and to any canon of General Synod operating in the diocese. Subject to this framework, diocesan synods may create additional offences. Appeals lie to this Tribunal. The system is supplemented by the authority of the Bishops to license and de-license clergy and by the interlocking professional standards regime.

6. Some of the broad categories of clergy offences are very ancient. Jurisdiction to try them is now sourced to the *Constitution*; the *Offences Canon 1962*; and diocesan ordinances made by the synods according to their respective constitutional competencies, which vary from State to State, but always subject to the requirements of the *Constitution* (see s 51).

7. The *Constitution* provides that, in respect of a person licensed by the bishop of a diocese or any other person in holy orders resident in the diocese, the diocesan tribunal constituted by s 53 has jurisdiction to hear and determine charges:

- of “breaches of faith ritual ceremonial or discipline” (s 54 (2), set out below);
- of such offences as may be specified by any canon ordinance or rule (s 54 (2)); and
- relating to an offence of unchastity, an offence involving sexual misconduct, or an offence relating to a conviction for a criminal offence that is punishable by imprisonment for twelve months or upwards, if certain criteria linking the offence to the diocese and of a limitation nature are met (s 54 (2A)).

8. Some of these terms are partially defined (see s 74 (1) (“faith”, “ritual”, “ceremonial”), s 74 (9) (b) (“discipline”, set out below). The parameters of an “offence of unchastity” and an “offence involving sexual misconduct” are undefined.

9. The *Offences Canon 1962* (adopted in the Diocese of Newcastle) confers upon diocesan tribunals further jurisdiction to hear and determine charges made in respect of eight offences alleged to have been committed by a person who, at the time the charge is preferred, is licensed by the bishop of a diocese or is in holy orders resident in the diocese. The offences include “unchastity” and “any other offence prescribed by ordinance of the synod of the diocese”.

10. Newcastle’s CDO also vests jurisdiction in its diocesan tribunal to try charges of “breach of faith ritual or ceremonial” (see esp s 7 (1)); and charges of “an offence other than a breach of faith, ritual or ceremonial” (see esp s 7 (2)). For the purposes of that ordinance “offence” is defined in s 4 to mean any of the following:
    a. breach of faith ritual ceremonial or discipline;
    b. an offence specified in the *Offences Canon 1962;* or
    c. conviction of any offence punishable by imprisonment of 12 months or more if the offence was committed in New South Wales or if the offence was committed outside New South Wales, such offence would be so punishable had it been committed within New South Wales.

11. Subsections (1) and (2) of s 7 of the CDO partially mirror the pattern of s 54 (2) of the *Constitution* which provides:

    “A diocesan tribunal shall in respect of a person licensed by the bishop of the diocese, or any other person in holy orders resident in the diocese, have jurisdiction to hear and determine charges of breaches of faith ritual ceremonial or discipline and of such offences as may be specified by any canon ordinance or rule.”

12. The *Constitution* (in its s 74) and the CDO (in its s 4) define “faith”, “ritual” and ”ceremonial” in similar terms. But there is a material difference in the meanings

respectively assigned to "discipline" in the context of s 54 (2) of the *Constitution* and "discipline" in the context of s 4 of the CDO.

13. For the *Constitution* as regards Chapter IX (which includes s 54), "discipline" is defined in s 74 (9) (b) to mean:

> *"as regards a person in Holy Orders licensed by the bishop of a diocese or resident in a diocese both:*
>
> - *the obligations in the ordinal undertaken by that person; and*
> - *the ordinances in force in that diocese."*

14. In *The Appeal of Keith Francis Slater* at [140] it was suggested by this Tribunal that the elliptical language of (ii) is to be construed as if it read "the obligations derived from the ordinances in force in the diocese in which the person in Holy Orders is licensed or resident".

15. By contrast to the *Constitution*, the CDO (in s 4) defines "discipline" to "include...the rules of the Church and the rules of good conduct". Those rules are not further defined.

16. Many of the rules of the Church and of good conduct are derived from the law of the Church of England in 1962 because s 71 (2) of the *Constitution* declares that "[t]he law of the Church of England including the law relating to ...discipline applicable to and in force in the several dioceses...at the date upon which this Constitution takes effect shall apply to and be in force in such dioceses of this Church unless and until the same be varied or dealt with in accordance with this Constitution". For the purpose of s 71 (2) (which is in Chapter XII), "discipline" is defined in s 74 (9) (a) of the *Constitution* to mean "*the obligation to adhere to, to observe and to carry out (as appropriate)...:*
    i. *the faith, ritual and ceremonial of this Church; and*
    ii. *the other rules of this Church which impose on the members of the clergy obligations regarding the religious and moral life of this Church."*

17. The concluding words of s 71 (2) when read with s 51 and the Schedule to the *Anglican Church of Australia Constitutions Act 1902 (NSW)* provide authority for the Newcastle Synod to pass and amend the CDO, subject of course to the *Constitution* and to any canon of the General Synod in force in the diocese.

18. The impact of the different definitions of "discipline" will be considered below. Definitions in constitutions and statutes are not free-standing, substantive enactments. They merely indicate that when particular words are found in the substantive parts of the constitutions and statutes they are to be understood in the defined sense unless the context or subject matter otherwise indicates.

19. Whenever offences are created, so too is jurisdiction to try them. The *Constitution* establishes a diocesan tribunal for each diocese (s 53) and stipulates that it “shall be the court of the bishop and shall consist of a president appointed by the bishop and not less than two other members as may be prescribed by ordinance of the diocese” (s 54 (1)). The bishop is ineligible to be a member of the tribunal. Other provisions about the formation of this tribunal are found in that sub-section and also, for Newcastle, in ss 28-29 of the CDO.

20. Standing to promote charges of breaches of faith ritual or ceremonial is conferred by s 54 (3) of the *Constitution* upon a person appointed by the Bishop or any five communicant members of the Church resident within the diocese. (The communicant members must be bona fide parishioners of the parish if the charge is to be laid against a parish incumbent with respect to an offence alleged to have been committed within the parish.) For Newcastle, these stipulations are repeated in s 7 (1) (a) of the CDO (set out below).

21. The hearing of such charges by the diocesan tribunal is precluded unless a board of enquiry appointed by ordinance of the diocesan synod has allowed it “as a charge proper to be heard” (*Constitution,* s 54 (3)). In Newcastle, that board is drawn from an elected Clergy Discipline Panel (ss 10-14) constituted for each particular matter in accordance with s 15 of the CDO.

22. The *Constitution* provides for but does not mandate a provincial tribunal (s 55). Where it exists it has a limited appellate jurisdiction from any determination by a diocesan tribunal of the province (s 55 (2)). It also has original jurisdiction to hear and determine a wide range of charges but only if such jurisdiction has been prescribed by ordinance of the synod of the diocese in question (ss 54 (3), 55 (3)). There is currently no provincial tribunal in New South Wales and Newcastle has not passed any such ordinance. It has also declared that there is no appeal from its diocesan tribunal to the provincial tribunal (see CDO*,* s 50).

23. The *Constitution* is silent as to standing to promote charges other than breaches of faith, ritual or ceremonial. Newcastle’s CDO stipulates that a charge of an offence other than breach of faith, ritual or ceremonial may be made by a person appointed by the Bishop, any other adult member of the Church resident within the diocese or the Director of Professional Standards (CDO*,* s 7).

24. The CDO replicates some of the provisions in the *Constitution.* It also supplements them, for example in spelling out how and when charges are to be made (ss 6, 8-9), matters of procedure (ss 16, 20-24, 30-37), how charges are to be determined and how the determination is to be notified (ss 38-43).

25. Section 8 (1) of the CDO states that a charge of breach of faith ritual or ceremonial may only be made within one year after the alleged commission of the

alleged breach. Section 8 (2) states that there shall be no time limit for the making of any charge other than for breach of faith, ritual or ceremonial. Cf *Constitution,* s 54 (2A) (b) and (c).

26. The *Constitution* provides that a tribunal shall make such recommendation as it thinks just in the circumstances but shall not recommend any sentence other than one or more of deposition from orders, prohibition from functioning, removal from office or rebuke (s 60 (1)). For diocesan tribunals, such recommendations shall be made to the Bishop (ibid). Section 60 (2) stipulates the parameters within which the Bishop may respond to any recommendation and exercise his or her "prerogative of mercy". This provision is fleshed out somewhat in ss 45-47 of the CDO.

27. In the absence of any Newcastle ordinance permitting an appeal to the provincial tribunal, an appeal lies to the Appellate Tribunal from any decision or recommendation of the Newcastle diocesan tribunal (see *Constitution,* ss 54 (4), 57 (2) and CDO, s 49). This right may be exercised by the person who brought the charge against the tribunal's determination or recommendation or by the person charged against the recommendation or sentence (s 59 (4)). Cf the second sentence in s 50 of the CDO.). Every appeal to the Appellate Tribunal shall be by way of re-hearing (s 57 (2)).

The key issue in the current References

28. If valid and assented to, the proposed ordinance provides:

> *"1. This Ordinance may be cited as the Clergy Discipline Ordinance 2019 Amendment Ordinance 2019.*
>
> *2. The principal ordinance is the Clergy Discipline Ordinance 2019.*
>
> *3. The principal ordinance is amended by the addition of subclause 7 (3) in Part II to read:*
>
> *(3) Notwithstanding the provisions of clause 7 and clause 16 and 17 no charge shall be referred to the Diocesan Tribunal and it shall not be proper for a* [sic] *Diocesan Tribunal to hear a charge which alleges an offence, breach or misconduct by a member of the clergy because that member of the clergy*
>
> *(a) has participated in a service, whether or not in a church building, in which they have pronounced the blessing of a marriage solemnised in accordance with the Marriage Act 1961 or similar Act in another jurisdiction in which the persons being married are of the same sex;*
>
> *(b) has declined to participate in a service, whether or not in a church building, or declined to pronounce a blessing of a*

marriage solemnised in accordance with the Marriage Act 1961 or similar Act in another jurisdiction in which the persons being married are of the same sex;

(c) is married to a person of the same sex where such marriage has been solemnised in accordance with the Marriage Act 1961 or similar Act in another jurisdiction;

and further the conduct and matters referred to in subclauses (a), (b) and (c) of this clause shall not be considered an "offence" within the meaning of clause 4 (1) of this Ordinance.

4. This Ordinance shall come into effect at such time as the Synod passes a resolution declaring that this Ordinance shall come into effect and the Bishop indicates in writing his/her decision for the Ordinance coming into effect. The Bishop shall indicate his/her support within 30 days of the conclusion of an ordinary or special session of the Synod in which the resolution is considered.

5. No resolution declaring that this Ordinance shall come into effect may be considered by this Synod prior to the Fifty Third Synod being summoned by the Bishop.

6. The Synod may consider a resolution that this Ordinance comes into effect on more than one occasion.

7. This Synod confirms that any assent by the Bishop to this ordinance expresses nothing more than that the Bishop assenting to the Synod's wish that it have a process for further deliberation.

Passed by Synod on 26 October 2019."

29. As at 31 October 2019 when the Primate was asked by the Bishop to refer three questions to this Tribunal, the Bishop of Newcastle had not exercised his right to assent or not to assent to the proposed ordinance. So far as is known, this situation has not changed. Section 6 of the Schedule to the *Anglican Church of Australia Constitutions Act 1902 (NSW)* states that no ordinance [of a diocese in New South Wales] shall take effect or have any validity unless within one month after the passing of the same the Bishop shall signify his assent thereto in writing. Sections 4 to 7 of the proposed ordinance and the pendency of the Primate's References may possibly bear on the matter. The third of the Primate's Questions referred at the request of the Bishop asks whether the Bishop may give assent on receiving the (presumably favourable) Opinion of the Appellate Tribunal or is the Synod required to pass the ordinance again. We are not persuaded that this question arises under the *Constitution* and therefore we decline to address it.

30. Clause s 7 (3) of the proposed ordinance is designed to be inserted into "the principal ordinance" (ie the CDO). It refers expressly to three sections of the CDO,

calling them clauses to reflect their status at the time that the proposed ordinance was drafted. The clauses are 7, 16 and 17 and the proposed 7 (3) declares its intent to operate "notwithstanding the provisions of clause 7 and clauses 16 and 17" of the CDO.

31. The identified provisions of the CDO state:

> *7. (1) A charge of breach of faith ritual or ceremonial may be made:*
>
> *(a) against an incumbent of a parish with reference to an offence alleged to have been committed within that parish only by:*
>
> *(i) a person appointed by the Bishop; or*
>
> *(ii) any five adult communicant members of the Church who are both resident and also bona fide parishioners of that parish; and*
>
> *(b) in any other case – only by:*
>
> *(i) a person appointed by the Bishop; or*
>
> *(ii) any five adult communicant members of the Church who are resident within the diocese.*
>
> *(2) A charge of an offence other than a breach of faith, ritual or ceremonial may be made by:*
>
> *(a) a person appointed by the Bishop; or*
>
> *(b) any other adult member of the church resident within the diocese; or*
>
> *(c) the Director of Professional Standards.*
>
> *16. (1) This clause shall apply only where the charge is a charge of breach of faith, ritual or ceremonial and is not made by a person appointed by the Bishop.*
>
> *(2) When the charge is presented to the Bishop, the Bishop shall determine in his or her absolute discretion whether the requirements of clause 7 (1) and 8 (1) have been satisfied.*
>
> *(3) If the Bishop determines that the charge does not satisfy the requirements of clauses 7 (1) and 8 (1), the informant shall be notified of the Bishop's determination by the Tribunal Secretary and the reasons for that determination. Thereafter, no further action shall be taken under this Ordinance with respect to that charge unless and until the requirements of clauses 7 (1) and or 8 (1) are satisfied.*

> (4) *If the Bishop determines that charge satisfies the requirements of clauses 7 (1) and/or 8 (1) the Bishop shall refer the charge to the Board with all attached documents.*
>
> 17. *For any charge of breach of faith ritual or ceremonial to which clause 16 does not apply, the Bishop shall refer the charge to the Board with all attached documents.*

32. If the Newcastle Synod had untrammelled legislative authority in the matter there would be no problem with s 3 of the proposed ordinance which qualifies or winds back what would otherwise be the scope of Newcastle's CDO. Use of the drafting device "Notwithstanding clauses A, B and C, the following regime operates in categories X, Y and Z" ensures that A, B and C are not impliedly repealed in their totality. They will continue to operate outside categories X, Y and Z.

33. But the *Constitution* intrudes as regards charges of breaches of faith, ritual, ceremonial or "discipline" (s 54 (2)) and charges otherwise falling within s 54 (2) and (2A), arming the diocesan tribunal with jurisdiction that cannot be precluded by a diocesan synod or even by a canon of the General Synod.

34. Newcastle ((14-15)) submits that what one may term the constitutional jurisdiction conferred by s 54 (2) in relation to "charges of breaches of...discipline" is limited to "discipline" as defined in s 74 (9) (b) (set out in para 13 above). It follows, so the submission goes, that the Synod of the Diocese of Newcastle is free to introduce a "no discipline policy" as regards putative offending that did not entail a breach of faith ritual ceremonial or (narrowly defined) discipline or otherwise entail an offence against the *Offences Canon 1962* or any other canon of the General Synod in force in the diocese.

35. We agree, but for the reasons that follow, which emphasise the relatively narrow field within which such a policy may operate consistently with the *Constitution*.

36. We start by rejecting the proposition that the Newcastle Synod is authorising or sanctioning a substantive non-disciplinary change of any nature by the proposed ordinance which merely attempts to preclude categories of conduct from being the subject of a charge in its diocesan tribunal (see McLean (19-23), Sydney (51-52), EFAC (71-74)) (Indeed, Equal Voices expresses concern that the proposed ordinance is limited in this manner (79).). To the extent that the Newcastle Synod has untrammelled authority to make particular conduct the subject of a disciplinary charge, then it may choose not to do so, thereby keeping a contentious issue away from the toils, expenses and uncertainties of litigious disputation and from the ultimate ruling of this Tribunal in the exercise of its appellate authority. We have not been referred to any material to show that any member of the clergy in Newcastle is contemplating participating in the *solemnisation* of a same-sex marriage, as EFAC suggests (74), unless we have misunderstood its submission.

37. The *Constitution* does not mandate an identical disciplinary system across the dioceses. Indeed, it contemplates the opposite when it recognises that any canon affecting the discipline of the Church (as "discipline" is defined in s 74 (9) (a)) shall not come into force in any diocese unless and until the diocese by ordinance adopts the canon (s 30 (a)).

38. Like its counterpart in many dioceses, the CDO does double duty, both as legislating internally for the disciplinary affairs of the Newcastle diocese **and** as accommodating and fleshing out the disciplinary scheme mandated by the *Constitution* (including for "charges of breaches of ...discipline [as defined in s 74 (9) (b)] and of such offences as may be specified by any canon") (s 54 (2)).

39. An ordinance relating to the discipline of clergy is obviously a measure falling within the legislative authority of the diocesan synod (see *Anglican Church of Australia Constitutions Act 1902, Schedule*, clauses 3, 21). But such authority must be exercised subject to the *Constitution* (see s 51). No ordinance of a diocese may validly operate inconsistently with the *Constitution* or a canon of General Synod to the extent that the canon is in force in the diocese (see s 30).

40. Legislative inconsistency may be discerned in different ways. There is no single test, but in *Slater* (at [133]) this Tribunal analogised from a well-known statement by Dixon J in *Victoria v Commonwealth* (1937) 58 CLR 618 at 630:

> *"Where a State law, if valid, would alter, impair or detract from the operation of a law of the Commonwealth Parliament, then to that extent it is invalid."*

41. In light of these general principles, a diocesan ordinance that impaired or detracted from the jurisdiction conferred upon diocesan tribunals by s 54 (2) and (2A) of the *Constitution* and by s 1 of the *Offences Canon 1962* (so long as that Canon is in force in the diocese) will be null and void at least to the extent of the inconsistency.

42. Yet this is precisely what s 3 of the proposed ordinance purports in large part to do once it is recognised that charges laid with respect to participation in a same-sex blessing service or the entry into and/or perhaps the failure to abandon a same-sex marriage by a member of the clergy in the diocese are triable offences within these parameters, at least according to the submissions of Sydney and others (see 47-61, 72-74). Firstly, the proposed ordinance declares that "no charge shall be referred to the Diocesan Tribunal and it shall not be proper for a Diocesan Tribunal to hear a charge which alleges" an offence by a member of the clergy because that member of the clergy has done any of the things referred to in clause 7 (3) (a), (b) or (c). Secondly, it declares that the conduct and matters referred to in the said (a), (b) or (c) "shall not be considered an 'offence' within the meaning set out in" s 4 (1) of the CDO.

43. It is common ground that the Newcastle Synod was attempting to emulate developments in the Anglican Church in Aotearoa, New Zealand and Polynesia that were designed to introduce a “no discipline” policy in areas of acute disagreement (see Newcastle (11-12), Sydney (49-50)). Some of the pros and cons of the New Zealand model are debated in the *Marriage, Same-Sex Marriage and the Anglican Church of Australia Essays from the Doctrine Commission*. However, the measure across the Tasman Sea was passed by the General Synod there, and the constitutional constraints are different here. Under the *Constitution* of the ACA not even the General Synod may ignore the imperatives of s 54.

44. Nevertheless, the scope of the presently relevant offences mentioned in the *Constitution* and the *Offences Canon* is not infinite. Those limits are not to be defined in this Reference and only indirect light is thrown on the scope of “breaches of faith ritual or ceremonial” by the reasons supplied in our Opinion in the Wangaratta matter.

45. EFAC has expressed concerns about the possible range of same-sex blessing liturgies that the Bishop of Newcastle might be prepared to sanction were he minded to do so, perhaps in a similar framework to the Wangaratta situation, perhaps not (69-71). The Synod of the Diocese of Newcastle has not yet followed Wangaratta in taking up the options available under the *Canon Concerning Services 1992* or closely regulating the scope of any such liturgy.

46. We do not think that it is useful for this Tribunal to go beyond what we have written in the Wangaratta Reference or to address a range of hypothetical liturgical outcomes in the area of same-sex blessing services. This is also one of the reasons why we decline to address the related Questions referred at the request of 25 members of General Synod.

47. It remains to be decided by any tribunal whether, in the ACA, the mere entry into a same-sex marriage by a member of the clergy entails “a breach of faith”, “unchastity”, or a breach of “obligations in the ordinal undertaken by” the particular member of clergy charged. If failure to comply with a particular oath is to be relied upon, then its content and breach needs to be established, subject to any valid preclusive operation of the proposed ordinance. It also remains to be decided by any tribunal whether, assuming that particular sexual activity is charged and established, the fact that it takes place within a (civil) “marriage” alters anything. The Tribunal takes no position either way on any of these matters beyond referring generally to its Opinion in the Wangaratta Reference and the matters indicated in paras 63-64 below. Nor does the Tribunal hereby purport to declare the scope of clause 7 (3) (c).

48. The *Offences Canon 1962* only comes into force in a diocese when the diocese adopts it (see *Constitution,* s 30 (a)) and its operation in a diocese may later be excluded. The concluding words of s 54 (2) of the *Constitution* and the corresponding phrase in s 1 of the *Offences Canon* also make plain that a diocesan synod may add (and subtract) particular ecclesiastical offences additional to those found in those places. If additional offences are added then so long as they remain on the diocesan statute book the jurisdiction of a diocesan tribunal to try them declared in s 54 of the *Constitution* and s 1 of the *Offences Canon* could not be taken away by a diocesan ordinance, as we have endeavoured to demonstrate already. But the diocesan synod is also free, within limits, to amend the local disciplinary regime.

49. The final words of the proposed s 7 (3) purport to amend the scope of the term "offence" as it is defined in the CDO. And (to the extent of their validity) they preclude the particular conduct identified from being an offence capable of grounding any charge that is reliant solely upon diocesan legislative authority. Subject to the *Constitution,* the diocesan synod may do this under the provisions in the Schedule to the *Anglican Church of Australia Constitutions Act 1902* already adverted to.

50. At this point, the difference between the definitions of "discipline" becomes critical. If a charge of misconduct involves an offence that is a breach of discipline in the sense attributed under the *Constitution* then the diocesan synod cannot validly preclude proceedings in the diocesan tribunal relating to it. But if the conduct does not fall within the scope of any of the specific offences in the *Constitution* or any canon of the General Synod in force in the diocese and if it would be a "discipline" offence falling outside the scope of "discipline" as defined in s 74 (9) (b) of the *Constitution,* then the diocesan synod can choose to preclude its enforcement.

51. This can be illustrated by a hypothetical example. Assume for the sake of argument that two women living in a life-long companionate, chaste relationship chose to marry in a civil registry. One of them is a member of the clergy. Assume for the sake of argument that this action does not breach the obligations in the Ordinal that she undertook or any ordinance in force in the diocese (cf *Constitution,* s 74 (9) (b)). What if those wishing to lay a charge against her might want to contend that her entry into the marriage breached some other aspect of the broader disciplinary regime inherited from the Church of England? On these hypotheses, the synod of the diocese could validly choose to declare in advance that such action will not be a breach of discipline in the diocese and do so along the lines of the proposed s 7 (3). The latter provision would be valid to that extent, but it would not preclude the laying of charges based on alleged breach of ordination obligations if they are open.

Disposition of the References

52. The first of the Primate's Questions referred at the request of the Bishop of Newcastle asks:

> *Is any part of the Clergy Discipline Ordinance 2019 Amendment Ordinance 2019 of the Diocese of Newcastle inconsistent with the Fundamental Declarations or the Ruling Principles of the Constitution of the Anglican Church of Australia?*

53. Our Opinion is:

> *No, having regard to the limited operation of the Ordinance were it assented to.*

54. The second of those Questions asks:

> *Does the Synod of the Diocese of Newcastle have the authority under section 51 of the Constitution to pass the Clergy Discipline Ordinance 2019 Amending Ordinance 2019?*

55. Our Opinion is:

> *Yes, subject to the assent of the bishop and having regard to the limited sphere of valid operation of the ordinance as explained in our reasons.*

56. In our evaluation, jurisdiction to address these questions under s 63 of the *Constitution* arose because the issues touch the consistency with the *Constitution* of a specific measure supported by the synod of the diocese which the bishop may or may not at his discretion assent to if it is lawful to do so, either at this stage or if the ordinance is passed again. None of the participants in this reference has suggested that the issues posed in the questions are academic.

57. As indicated in para 29 above, we are not persuaded that the third of the Primate's Questions engages our jurisdiction under s 63. We decline to answer it.

58. The five Questions referred at the request of the members of General Synod are all framed contingently upon a different version of the proposed ordinance coming into effect (in light of the concluding words of clause 3 commencing "and further" that were added during the Synod). This in itself would not deprive the Tribunal of jurisdiction under s 63 if live issues not addressed by those raised in the Primate's questions were raised and the Tribunal were satisfied as to the utility of answering the questions on top of the answers proffered above and in the Wangaratta Reference.

59. Leaving aside their preamble, the five Questions ask:

> - *If the Ordinance comes into effect, will the amendment made by clause 3 of the Ordinance prevent the Diocesan Tribunal of the*

Diocese of Newcastle (the 'Diocesan Tribunal') from hearing and determining under section 54 (2) of the Constitution a charge of breach of faith or discipline in respect of a person licensed by the Bishop of the Diocese of Newcastle (the 'Bishop'), or any other person in holy orders resident in the Diocese of Newcastle (the 'Diocese'), where the act giving rise to the charge relates to such a person marrying or being married to another person of the same sex?

- *If the Ordinance comes into effect, will the amendment made by clause 3 of the Ordinance prevent the Diocesan Tribunal from hearing a charge under section 54 (2A) of the Constitution relating to an offence of unchastity or an offence involving sexual misconduct against a member of the clergy where the act of the member of the clergy which gave rise to the charge relates to the member of the clergy marrying or being married to a person of the same sex, in circumstances where the act occurred in the Diocese or the member of clergy was licensed by the Bishop or was resident in the Diocese within two years before the charge was laid?*
- *If the Ordinance comes into effect, will the amendment made by clause 3 of the Ordinance prevent the Bishop or any five communicant members of this Church resident within the Diocese promoting a charge to the Diocesan Tribunal under section 54 (3) of the Constitution against a person licensed by the Bishop or against any other person in holy order resident in the Diocese alleging a breach of faith, ritual or ceremonial by such a person because that person has participated in a service in which they pronounced the blessing of a marriage solemnised in accordance with the Marriage Act 1961 in which the persons being married are of the same sex (assuming the first proviso in section 54 (3) has been fulfilled?*
- *If the Ordinance comes into effect, will the amendment made by clause 3 of the Ordinance prevent the Bishop or any five communicant members of this Church resident within the Diocese promoting a charge to the Provincial Tribunal under section 54 (3) of the Constitution against a person licensed by the Bishop or against any other person in holy order resident in the Diocese alleging a breach of faith, ritual or ceremonial by such a person because that person has participated in a service in which they pronounced the blessing of a marriage solemnised in accordance with the Marriage Act 1961 in which the persons being married are of the same sex (assuming the first proviso in section 54 (3) has been fulfilled?*

1. *If the Ordinance comes into effect, will the amendment made by clause 3 of the Ordinance prevent a board of enquiry, appointed by ordinance of the Synod of the Diocese and in exercise of its function under the second proviso*

in section 54 (3) of the Constitution, from allowing a charge in relation to a breach of faith, ritual or ceremonial arising from an act mentioned in 1, 2, 3 or 4 above proceeding to be heard by the Diocesan Tribunal or the Provincial Tribunal in its original jurisdiction as a charge proper to be heard?

60. There is insufficient practical utility in the Tribunal answering these Questions and we decline to do so, under rule 17 of the *Appellate Tribunal Rules.*

61. The submissions filed in support of these Questions by the Synod of the Diocese of Sydney and others seek reasoned answers going well beyond the jurisdictional issues we have already addressed under the second of the Questions referred by the Primate at the request of the Bishop of Newcastle. In essence, the Tribunal has been invited to declare that conduct falling within paras (a), (b) and (c) of the impugned subclause 7 (3) will constitute breaches of ritual and ceremonial, of discipline, and of faith. All this, without considering the variety of conduct potentially embraced by "the blessing of a marriage" in the Diocese of Newcastle which, unlike the Diocese of Wangaratta, has not yet "regulated" such activity.

62. Sydney has also argued that entry into a same-sex marriage will provide "prima facie evidence of unchastity", the offence proscribed by s 1 of the *Offences Canon.*

63. Were this Tribunal to embark upon such an unfocussed exercise at this point of time it would in effect be doing the very thing that, in our opinion, the Synod of the Diocese of Newcastle is constitutionally restricted from doing. The Newcastle diocesan tribunal has been given the original jurisdiction in these matters if particular charges are properly laid and, in the case of charges of breach of faith, ritual or ceremonial, allowed to proceed to a hearing in accordance with s 54 (3) of the *Constitution*.

64. That original jurisdiction is to be exercised in accordance with the constitutional mandates as to procedure and process, as expanded by the *Newcastle Clergy Discipline Ordinance 2019,* and the obligations of procedural fairness. These processes entail the timely laying of a specific charge by a person with standing to do so; sifting by a board of enquiry if the charge relates to faith ritual or ceremonial; the presentation of evidence and the hearing of submissions on behalf of the parties directly affected in the diocesan tribunal; proof to the requisite standard; the role of the bishop as to sentence; exposure to costs sanctions; and rights of appeal to this Tribunal.

65. By parity of reasoning we have declined to be drawn into ruling on general arguments in each direction by Newcastle (13-14) and Sydney (50-51) as to unconditional diocesan authority to authorise a liturgy for solemnising a same-sex marriage or the blessing of a same-sex marriage. The proposed ordinance does not purport to do either, in our view.

66. These are the reasons of the President (the Hon Keith Mason AC QC), the Deputy President (the Hon Richard Refshauge), the Most Revd Phillip Aspinall, the Right Revd Garry Weatherill and Professor the Hon Clyde Croft AM SC. They constitute the Opinion of the Tribunal, in accordance with s 59 (1) of the *Constitution.*

Opinion of Ms Gillian Davidson

Part 1 – Background

Questions before the Tribunal

1. The current matter arises due to two separate referrals by the Primate to this Tribunal under section 63(1) of the Constitution of the Anglican Church of Australia (**Constitution**) made on 31 October 2019 and 6 November 2019 (**Referred Questions**). The referrals relate to Diocese the *Clergy Discipline Ordinance 2019 Amending Ordinance 2019* (**Amending Ordinance**) to the Clergy Discipline Ordinance of 2019 (**Principal Ordinance**) of the Diocese of Newcastle (**Diocese**).

2. The 31 October 2019 referral (**Bishop's Questions**) provides as follows:

> ***Referral to the Appellate Tribunal at the request of the Bishop of Newcastle***
>
> ***Clergy Discipline Ordinance 2019 Amending Ordinance 2019 (Diocese of Newcastle)***
>
> *The Synod of the Diocese of Newcastle has passed the Clergy Discipline Ordinance 2019 Amending Ordinance 2019*
>
> *The amendments have the effect of ensuring that there could be no disciplinary action where:*
>
> - *a member of the clergy prayed a blessing for a couple who were married under the Marriage Act 1961 who were of the same sex*
> - *a member of the clergy declined to pray a blessing for blessing for a couple who were married under the Marriage Act 1961 who were of the same sex*
> - *a member of the clergy was married under the Marriage Act 1961 to a person of the same sex.*
>
> *The Bishop of Newcastle has not exercised his right to assent or withhold assent to the Ordinance*
>
> *On 31 October 2019 the Primate referred to the Appellate Tribunal the following questions:*
>
> - *Is any part of the Clergy Discipline Ordinance 2019 Amendment Ordinance 2019 of the Diocese of Newcastle inconsistent with the Fundamental Declarations or the Ruling Principles of the Constitution of the Anglican Church of Australia?*
> - *Does the Synod of the Diocese of Newcastle have the authority under section 51 of the Constitution to pass the Clergy Discipline Ordinance 2019 Amendment Ordinance 2019?*

- *Where an Ordinance is passed by a Synod of a Diocese in the Province of New South Wales and referred to the Appellate Tribunal prior to the Bishop giving her/his assent in accordance with Constitution 5(c) of the Schedule of the Anglican Church of Australia Constitution Act 1902, may the Bishop give assent to the Ordinance on receiving the opinion of the Appellate Tribunal or is the Synod required to pass the ordinance again?*

3. The 6 November 2019 referral (**General Synod Members' Questions**) provides as follows:

Referral to the Appellate Tribunal at the request of 25 Members of General Synod

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

The Synod of the Diocese of Newcastle has passed the Clergy Discipline Ordinance 2019 Amending Ordinance 2019

The amendments have the effect of ensuring that there could be no disciplinary action where:

- *a member of the clergy prayed a blessing for a couple who were married under the Marriage Act 1961 who were of the same sex*
- *a member of the clergy declined to pray a blessing for blessing for a couple who were married under the Marriage Act 1961 who were of the same sex*
- *a member of the clergy was married under the Marriage Act 1961to a person of the same sex.*

The Bishop of Newcastle has not exercised his right to assent or withhold assent to the Ordinance.

On 6 November 2019 the Primate referred to the Appellate Tribunal the following questions at the request of 25 members of the General Synod:

GIVEN THAT

A. At the next ordinary session of the Synod of the Diocese of Newcastle in October 2019 there is a proposal to pass the Clergy Discipline Ordinance of 1966 Amending Ordinance 2019 (the "Ordinance").

B. Section 54(2) of the Constitution of the Anglican Church of Australia (the "Constitution") provides that a diocesan tribunal shall in respect of a person licensed by the bishop of the diocese, or any other person in holy orders resident in the diocese, have jurisdiction to hear and determine charges of breaches of faith, ritual, ceremonial or discipline and of such offences as may be specified by any canon, ordinance or rule.

C. Section 54(2A) of the Constitution provides that a diocesan tribunal shall also have and shall always be deemed to have had jurisdiction to hear a charge relating to an offence of unchastity or an offence involving sexual misconduct in respect of a member of clergy if the act of the member of clergy which gave rise to the charge occurred in the diocese or the member of clergy was licensed by the bishop of the diocese or was resident in the diocese within two years before the charge was laid.

D. Section 54(3) of the Constitution provides that a person appointed by the bishop of a diocese or any five adult communicant members of the Church resident in the diocese may promote a charge against a person licensed by the bishop of the diocese or against any other person in holy orders resident in the diocese in respect of a breach of faith, ritual or ceremonial either before the diocesan tribunal or before the provincial tribunal in its original jurisdiction. Provided that if a charge be preferred against an incumbent of a parish with reference to an offence alleged to have been committed within that parish the aforesaid communicants shall be bona fide parishioners of that parish.

E. The further proviso under section 54(3) of the Constitution requires 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.

THE FOLLOWING QUESTIONS arising under the Constitution are referred to the Appellate Tribunal.

1. If the Ordinance comes into effect, will the amendment made by clause 3 of the Ordinance prevent the Diocesan Tribunal of the Diocese of Newcastle (the "Diocesan Tribunal") from hearing and determining under section 54(2) of the Constitution a charge of breach of faith or discipline in respect of a person licensed by the Bishop of the Diocese of Newcastle (the "Bishop"), or any other person in holy orders resident in the Diocese of Newcastle (the "Diocese"), where the act giving rise to the charge relates to such a person marrying or being married to another person of the same sex?

2. If the Ordinance comes into effect, will the amendment made by clause 3 of the Ordinance prevent the Diocesan Tribunal from hearing a charge under section 54(2A) of the Constitution relating to an offence of unchastity or an offence involving sexual misconduct against a member of clergy where the act of the member of clergy which gave rise to the charge relates to the member of clergy marrying or being married to a person of the same sex, in circumstances where the act occurred in the Diocese or the member of clergy was licensed by the Bishop or was resident in the Diocese within two years before the charge was laid?

3. If the Ordinance comes into effect, will the amendment made by clause 3 of the Ordinance prevent the Bishop or any five adult communicant members of this

Church resident within the Diocese promoting a charge to the Diocesan Tribunal under section 54(3) of the Constitution against a person licensed by the Bishop or against any other person in holy orders resident in the Diocese alleging a breach of faith, ritual or ceremonial by such a person because that person has participated in a service in which they have pronounced the blessing of a marriage solemnised in accordance with the Marriage Act 1961 in which the persons being married are of the same sex (assuming the first proviso in section 54(3) has been fulfilled)?

4. If the Ordinance comes into effect, will the amendment made by clause 3 of the Ordinance prevent the Bishop or any five adult communicant members of this Church resident within the Diocese promoting a charge to the Provincial Tribunal in its original jurisdiction under section 54(3) of the Constitution against a person licensed by the Bishop or against any other person in holy orders resident in the Diocese alleging a breach of faith, ritual or ceremonial by such a person because that person has participated in a service in which they have pronounced the blessing of a marriage solemnised in accordance with the Marriage Act 1961 in which the persons being married are of the same sex (and assuming the first proviso in section 54(3) has been fulfilled)?

5. If the Ordinance comes into effect, will the amendment made by clause 3 of the Ordinance prevent a board of enquiry, appointed by ordinance of the Synod of the Diocese and in exercise of its function under the second proviso in section 54(3) of the Constitution, from allowing a charge relating to a breach of faith, ritual or ceremonial arising from an act mentioned in 1, 2, 3 or 4 above proceeding to be heard by the Diocesan Tribunal or the Provincial Tribunal in its original jurisdiction as a charge proper to be heard?

4. The Tribunal determined to consider both referrals concurrently.

5. The jurisdiction of the Tribunal under section 63(1) of the Constitution extends to any question which is properly referred to the Tribunal and which "arises under this Constitution". I see no reason to consider that any of the current Referred Questions are not questions which arise under the Constitution.

6. The referral of these questions to this Tribunal coincides with the referral of questions to this Tribunal made on 5 September and 21 October 2019 in relation to the Diocese of Wangaratta's Blessing of Persons Married According to the Marriage Act 1961 Regulations 2019 (**Wangaratta Regulations**) which includes a form of service for the blessing of civil union other than between one man and one woman (**Wangaratta References**).[1] There, the question was also raised as to whether the Wangaratta Regulations are consistent with the Fundamental Declarations and the Ruling Principles in the Constitution.

7. Finally, I note that the Bishop of the Diocese did not assent to the ordinance within the 30 days as provided for by the 1902 Act and therefore the Amending Ordinance has already lapsed and has no effect. This is discussed further at paragraph 67 below.

Constitutional framework

[1] Refer https://anglican.org.au/governance/tribunals/appellate-tribunal-current-matters/appellate-tribunal-reference1/ and https://anglican.org.au/governance/tribunals/appellate-tribunal-current-matters/reference-21-october-2019/.

8. The Fundamental Declarations are set out in Chapter I of the Constitution as follows:

> 1. *The Anglican Church of Australia, being a part of the One Holy Catholic and Apostolic Church of Christ, holds the Christian Faith as professed by the Church of Christ from primitive times and in particular as set forth in the creeds known as the Nicene Creed and the Apostles' Creed.*
>
> 2. *This Church receives all the canonical scriptures of the Old and New Testaments as being the ultimate rule and standard of faith given by inspiration of God and containing all things necessary for salvation.*
>
> 3. *This Church will ever obey the commands of Christ, teach His doctrine, administer His sacraments of Holy Baptism and Holy Communion, follow and uphold His discipline and preserve the three orders of bishops, priests and deacons in the sacred ministry.*

9. The Ruling Principles are set out in Chapter II of the Constitution and provide, relevantly, as follows:

> 4. *This Church, being derived from the Church of England, retains and approves the doctrine and principles of the Church of England embodied in the Book of Common Prayer together with the Form and Manner of Making Ordaining and Consecrating of Bishops, Priests and Deacons and in the Articles of Religion sometimes called the Thirty-nine Articles but has plenary authority at its own discretion to make statements as to the faith ritual ceremonial or discipline of this Church and to order its forms of worship and rules of discipline and to alter or revise such statements, forms and rules, provided that all such statements, forms, rules or alteration or revision thereof are consistent with the Fundamental Declarations contained herein and are made as prescribed by this Constitution. Provided, and it is hereby further declared, that the above-named Book of Common Prayer, together with the Thirty-nine Articles, be regarded as the authorised standard of worship and doctrine in this Church, and no alteration in or permitted variations from the services or Articles therein contained shall contravene any principle of doctrine or worship laid down in such standard….*
>
> 5. *Subject to the Fundamental Declarations and the provisions of this chapter this Church has plenary authority and power to make canons, ordinances and rules for the order and good government of the Church, and to administer the affairs thereof. Such authority and power may be exercised by the several synods and tribunals in accordance with the provisions of this Constitution.*
>
> 6. *This Church will remain and be in communion with the Church of England in England and with churches in communion therewith so long as communion is consistent with the Fundamental Declarations contained in this Constitution.*

10. The Constitution is binding on the Diocese by operation of the *Anglican Church of Australia Constitution Act 1961* (NSW) (**1961 Act**). Section 2 of the 1961 Act provides as follows:

> *The several articles and provisions of the Constitution contained in the Schedule to this Act (hereinafter called the Constitution) and any canons and rules to be made under or by virtue or in pursuance thereof are and as provided in the Constitution shall be for all purposes connected with or in any way relating to the property of the Church of England in Australia binding on the Bishops, clergy and laity being members of the Church of England in Australia in the several Dioceses of the Church of England within the State of New South Wales.*

11. The words of this provision are very similar to that of section 4 of the *Anglican Church of Australia Constitution Act 1902* (NSW) (**1902 Act**), which provides:

> *The several articles and provisions of the constitutions contained in the Schedule to this Act, and any ordinances and rules to be made under or by virtue or in pursuance thereof, are and shall be for all purposes connected with or in any way relating to the property of the Church of England within the State of New South Wales binding upon the members of the said Church.*

12. The operation of the 1902 Act has been restricted by section 4 of the 1961 Act which provides that any provision of the 1902 Act:

> *which is inconsistent with the provisions of [the 1961 Act] and the Constitution shall to the extent of such inconsistency be inoperative in the several Dioceses of the Church of England within New South Wales.*

13. Section 51 of the Constitution clarifies that legislative powers of all dioceses are subject to the Constitution:

> *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 Tribunal in its 1989 Report confirmed that section 51 did not constitute a grant of power to diocesan synods:

> *The Tribunal has reached the view that s 51 should not be interpreted as a general grant of legislative power to diocesan synods. The limiting words with which the section concludes argue against that construction. Section 51 simply spells out one of the implications in s 5 with respect to the distribution of powers within the Church under what might be called a "federal" scheme. It also makes it plain that diocesan legislation must conform with such overriding constraints as the Fundamental Declarations….*

s 51 is certainly not to be interpreted as a general authority for a diocesan synod to make ordinances for the order and good government of the Church within the diocese. The concluding words of the section are too strong for that.[2]

Place of Tribunals under the Constitution

15. As part of the 1961 Constitution , a new discipline regime of tribunals and their jurisdiction was put in place by 'Chapter IX-The Tribunals' of the Constitution. The place and role of diocesan tribunals is defined in section 54 of the Constitution, as follows:

    There shall be a diocesan tribunal of each diocese, the Special Tribunal and the Appellate Tribunal, and there may be a provincial tribunal of any province….

    (2) A diocesan tribunal shall in respect of a person licensed by the bishop of the diocese, or any other person in holy orders resident in the diocese, have jurisdiction to hear and determine charges of breaches of faith ritual ceremonial or discipline and of such offences as may be specified by any canon ordinance or rule.

    (2A) A diocesan tribunal shall also have and always be deemed to have had jurisdiction to hear a charge relating to an offence of unchastity, an offence involving sexual misconduct or an offence relating to a conviction for a criminal offence that is punishable by imprisonment for twelve months or upwards in respect of a member of clergy if:-

    (a) the act of the member of clergy which gave rise to the charge occurred in the diocese;

    (b) the member of clergy was licensed by the bishop of the diocese or was resident in the diocese within two years before the charge was laid; or

    (c) the member of clergy is in prison as a convicted person at the time the charge was laid, but within two years before such imprisonment was licensed by the bishop of the diocese or was ordinarily resident therein.

16. Sub-sections 54(4) and 55(2) of the Constitution provide for appeals to be made from the diocesan tribunal to this Tribunal or the provincial tribunal (respectively).

Part 2 – Preliminary issues

17. I have had the advantage of considering the draft opinion that has been prepared, reviewed and discussed by the majority of this Tribunal. I do not agree with the reasoning of the majority and determined that my best response to the opinion of the

[2] Report and Opinion of Tribunal on the "Ordination of Women to the Office of Priest Act 1988" of the Synod or the Diocese of Melbourne, dated 2 November 1989, pages 28-29.

majority are the reasons contained in this separate opinion. I have also considered the many submissions made to this Tribunal in relation to the Referred Questions.

18. Similarly to my separate opinion in the matter of the Wangaratta References, I know that this separate opinion will cause unease and pain to some, particularly to those who have felt saddened, denied or malnourished by their experience of the church. I lament any pain in the same way I lament having to break the news of a hard or difficult truth to someone I love. And I also want to repeat here that in coming to the conclusions that I have in these reasons I am mindful that God is a merciful God who delights to bless his people graciously and faithfully and any decisions or opinions of this Tribunal will not alter that fact.

19. The comments I have made in paragraphs 38 - 178 of my opinion in relation to the Wangaratta References about the following matters are important and relevant also to this opinion:

    a. the place of the Constitution;

    b. the Fundamental Declarations, including the place of the Holy Scriptures as the "ultimate rule and standard of faith" and the basis for our doctrine of the Church regarding marriage, the impermissibility of same sex practice, and the risk to salvation of persistence in sexual immorality; and

    c. the Ruling Principles, including the principle that the Church's practice and worship should be consistent and coherent, in furtherance of the good order of the Church.

Part 3 – Bishop's Questions

Is any part of the Amending Ordinance inconsistent with the Fundamental Declarations or the Ruling Principles of the Constitution?

20. The answer to this question is "Yes", for the reasons set out below.

21. This question echoes the proviso to the plenary authority of the Church to make laws which is set out in section 4 of the Constitution:

> *This Church has plenary authority at its own discretion to make statements as to the … discipline of this Church and to order its … rules of discipline and to alter or revise such statements, forms and rules, <u>provided that all such statements, forms, rules or alteration or revision thereof are consistent with the Fundamental Declarations contained herein and are made as prescribed by this Constitution</u>. (<u>emphasis added</u>)*

22. The proviso is confirmed in section 5 of the Constitution:

> *<u>Subject to the Fundamental Declarations and the provisions of this chapter</u> this Church has plenary authority and power to make canons, ordinances and rules for the order and good government of the Church, and to administer the affairs thereof. <u>Such authority and power may be exercised by the several synods and tribunals in accordance with the provisions of this Constitution</u>. (<u>emphasis added</u>)*

23. Relevantly as regards the Amending Ordinance, the Fundamental Declarations declare that the Anglican Church of Australia :

> *holds the Christian Faith as professed by the Church of Christ from primitive times …. (Section 1)*
>
> *receives all the canonical scriptures of the Old and New Testaments as being the ultimate rule and standard of faith given by inspiration of God and containing all things necessary for salvation.... (Section 2)*
>
> *will ever obey the commands of Christ, teach His doctrine, administer His sacraments of Holy Baptism and Holy Communion, follow and uphold His discipline and preserve the three orders of bishops, priests and deacons in the sacred ministry. (Section 3).*

24. The question is therefore whether the Amending Ordinance is consistent with the Fundamental Declarations. In this regard, it is settled that the current teaching of this Church (including the Diocese) is that marriage is expressly confined to marriage between a man and a woman.

25. This position was affirmed in the most recent General Synod in 2017, in a motion passed which notes with regret that in amending its Canon on Marriage to change the definition of marriage, the Scottish Episcopal Church had taken a step that is contrary to the doctrine of our Church and the teaching of Christ that, in marriage, "a man will leave his father and mother and be united to his wife, and the two will become one flesh" (Matthew 19:6).[3]

26. Subsequently, the Bishops Agreement of 2018 (the **Bishops Agreement**) also affirmed that:

> *[t]he doctrine of this Church is that marriage is a lifelong union between a man and a woman (paragraph 1).*[4]

27. Section 3 of the Constitution states that the Church:

> *will ever obey the commands of Christ, teach His doctrine, administer His sacraments of Holy Baptism and Holy Communion, follow and uphold His discipline. (emphasis added)*

28. Section 2 of the Principal Ordinance states:

> *The Offences Canon of General Synod as approved by the General Synod in the period 1966 – 2017 is adopted as the Offences Canon for the Diocese together with such other amendments to that Canon as are adopted by Ordinance.*

[3] General Synod 2017, Minutes of Day 4, Item 14, page 13.
[4] As reported by The Melbourne Anglican, "Bishops' pledge on SSM rite" on 5 May 2018, pages 1 -2.

29. The Principal Ordinance has two functions:

    a. First, it is the ordinance by which the Diocese adopted the *Offences Canon 1962* (**Offences Canon**) and accepts the offences as set out in that canon. All dioceses of the Church have adopted the Offences Canon.

    b. Secondly, it establishes a framework at the Diocesan level for complaints in relation to ecclesiastical and other offences which are defined under the Offences Canon and the trial of clergy by the Diocesan Tribunal for such offences. In effect it enacts the mechanisms for the operation of what is provided for under Chapter IX of the Constitution.

30. The Amending Ordinance purports to nullify an important disciplinary process that has been introduced by this Church and adopted by the Diocese through the Principal Ordinance:

    a. The Amending Ordinance accepts that it would be an offence, a breach or misconduct for a member of clergy in the Diocese to participate in a services in which they pronounce a blessing on a couple who are of the same sex or to be married to a person of the same sex.

    b. But the Amending Ordinance provides that no such offence, breach or misconduct "shall be referred to the Diocesan Tribunal and it shall not be proper for a Diocesan Tribunal to hear a charge which alleges [such] an offence, breach or misconduct (new subclause 7(3) to be inserted into the Principal Ordinance) and further that such offence, breach or misconduct "shall not be considered an 'offence'" under the Principal Ordinance.

31. By nullifying the disciplinary process for an offence, breach or misconduct, the effect of the Amending Ordinance is to take away the very mechanism by which clergy discipline is to be upheld in respect of those matters, in the broad sense, contained in the Fundamental Declarations – see extracted in 23 above.

32. The Amending Ordinance also restricts the operation of the grant of jurisdiction provided under section 54(2) of the Constitution (set out in 15 above). That provision provides that a diocesan tribunal is to:

    > *hear and determine charges of breaches of faith ritual ceremonial or discipline and of such offences as may be specified by any canon ordinance or rule.*

33. Section 54, as part of Chapter IX of the Constitution, creates a uniform framework for discipline throughout the Australian Church. This framework was extended and implemented by the adoption of the Offences Canon by all dioceses.

34. While section 30(d) of the Constitution permits a diocese to exclude a canon of General Synod which has been previously adopted by that diocese, the Amending Ordinance does not purport to do so. Indeed, to attempt to undermine the operation of the Offences Canon cannot be for the good order and government for the Church in that diocese (nor the National Church).

35. Further, the effect of the Amending Ordinance is to modify the grant of jurisdiction given by Chapter IX of the Constitution. It cannot be reasonable that a diocese could

validly do so. If there is to be any restriction, it is properly the role of General Synod to provide for amendment to the Constitution .

Inconsistent legislation

36. The Amending Ordinance would create an inconsistency as between the laws of the Diocese and those of the Church.

37. The relevant test when considering if there is unacceptable inconsistency between the laws of the Commonwealth of Australia and that of States is that of Justice Dixon in *Victoria v Commonwealth* (1937) 58 CLR 618. I consider that this test should be applied to the current circumstances.

38. There are two limbs to Justice Dixon's test, the second elaborating on the first:

    a. when a State law, if valid, would alter, impair or detract from the operation of a law of the Commonwealth Parliament, then to that extent it is invalid; and

    b. if it appears from the terms, the nature of the subject matter of a Federal enactment that it was intended as a complete statement of the law governing a particular matter or set of rights and duties, then for a State law to regulate or apply to the same matter or relation is regarded as a detraction from the full operation of the Commonwealth law and so as inconsistent.[5]

39. The Amending Ordinance would alter, impair and detract from the operation of the Offences Canon as it has been adopted by the Diocese for the reasons I have given above (see 30 - 32 above).

40. By effectively removing the ability of the Diocesan Tribunal to hear any complaints of such offences, it would remove the ability of this Tribunal or the provincial tribunal to hear and determine an appeal from any determination of the diocesan tribunal (section 54(4) and 55(2) of the Constitution).

41. The Amending Ordinance would lead to an inconsistency in how such offences would be heard and dealt within this Church as a whole, impairing and detracting from a key canon of this Church, the Offences Canon, by creating differences as between:

    a. first, what would constitute offences of clergy in the Diocese (those licensed by the Bishop or is in holy orders resident in the diocese) (sections 1 and 2 of the Offences Canon) which are the be heard by the Diocesan Tribunal or a Provincial Tribunal in its original jurisdiction and

    b. secondly, offences of bishops in the Diocese (those who are members of the House of Bishops or assistant to the Primate) (section 3 of the Offences Canon) which are to be heard by the Special Tribunal.

42. Within this Church, the proposed Amending Ordinance would also be contradictory to the Bishops Agreement in which it was stated that:

    If we as a Church are to change this doctrine to permit same-sex marriage, the appropriate mechanism is through the framework of the Constitution and Canons

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[5] *Victoria v Commonwealth* (1937) 58 CLR 618 at 630 (Dixon J).

of the Anglican Church of Australia.... The bishops commit to working together to manifest and maintain unity, as we together discern the truth."

and:

The bishops commit to act within the framework of the Constitution and Canons of this Church, and to encourage those under their episcopal oversight to do so.[6]

43. The Amending Ordinance would not encourage those under the oversight of the Bishop to act within that framework. On the contrary, they would be free to engage in activities which would be an offence or misconduct without sanction and without recourse to the diocesan tribunal which is empowered under the Constitution to "hear and determine charges of breaches of faith ritual ceremonial or discipline and of such offences as may be specified by any canon ordinance or rule." (Section 54(2))

Does the Synod of the Diocese have the authority under section 51 of the Constitution to pass the Amending Ordinance?

44. The answer to this question is "No", for the reasons set out below.

45. As discussed above in paragraphs 13 – 14, section 51 of the Constitution does not grant plenary power to diocesan synods; rather it limits the powers of a synod under its constituting legislation (relevantly, the 1902 Act):

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.

46. The Constitution limits the powers of a diocesan synod as detailed below.

47. Firstly, the exercise of power must be consistent with the Fundamental Declarations (Sections 4 and 5 of the Constitution). I have provided my reasons for the conclusion that the Amending Ordinance is not consistent with the Fundamental Declarations above.

48. Secondly, the exercise of power must not extend to matters which are the exclusive domain of General Synod, as stated in the 2018 Report:

To the extent that s 26 (and perhaps other provisions) of the Constitution vest exclusive power in the General Synod..., the correlative preclusion of individual diocesan activity could not lawfully be avoided by a single diocese purporting to limit the intrusion to operate "only" within that diocese.[7]

49. Where General Synod has declared under the Offences Canon that certain conduct amounts to an offence, it is no longer within the legislative power of a diocese which

[6] The Melbourne Anglican, see above footnote 4.

[7] Primate's Reference Re Affiliated Churches Ordinance 2005 of the Diocese Of Sydney; Opinion Of The Appellate Tribunal dated 26 November 2018, paragraph 65, page 14.

has adopted the Offences Canon, to assert that no action may be taken in the diocese to prosecute such offences.

50. Thirdly, the exercise of power must be "for the order and good governance of this Church *within the diocese*" (*emphasis added*), noting *Harrington & Ors v Coote* (2013) 119 SASR 152, [2013] SASCFC 154 at 156:

> *A diocese cannot legislate upon matters relating to the order and good government of the Anglican Church as a whole, or the order and good government of the Anglican Church within another diocese.*

51. By contrast, the Amending Ordinance allows a person to avoid charges for certain offences committed in other dioceses by relocating residency to the Diocese.

52. Fourthly, as section 51 does not extend the powers of a diocesan synod, its powers are constrained by its constituting legislation; in the case of the Diocese, the 1902 Act and the Newcastle Constitution:

> *The Synod of [the] Diocese may make ordinances upon and in respect of all matters and things concerning the order and good government of the Church … and the regulation of its affairs within the Diocese, including the management and disposal of all Church property, moneys, and revenues (not diverting any specifically appropriated, or the subject of any specific trust, nor interfering with any vested rights), except in accordance with the provisions of any Act of Parliament, and for the election or appointment of churchwardens and trustees of churches, burial grounds, church lands, and parsonages.*[8]

53. Fifthly, the synod's power may only be exercised "for the order and good governance of this Church within the diocese". I have already concluded above in paragraphs 30 – 35 that the Amending Ordinance would alter, impair or detract from the operation of the Constitution and a canon of the General Synod and hence is not in furtherance of the order and good governance of this Church.

54. Further, the words "order and good governance" (or alternatively "peace, order and good government") are commonly used in legislation granting plenary powers such as constitutions.

55. This phrase's first recorded use was in 1689, a year after the Glorious Revolution in England when the question of Parliament's supremacy, including its powers to make laws, over the Crown was established. While some consider the phrase to be "surplasage",[9] the alternative view is to give effect to words as constituting a general limitation on legislative power.

56. This view is supported by Justice Evatt in *Trustees Executors & Agency Co. Ltd v. FCT* that:

> *The [Australian] Constitution then requires that it must be possible to predicate of every valid law that it is for the peace, order and good government of, the Dominion with respect to a granted subject*[10]

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[8] Newcastle Constitution, clause 3.

[9] See Andrew Inglis Clark and Sir Neil Elliott Lewis in their speeches at the 1897 Constitutional Convention; see also *Amalgamated Society of Engineers v. Adelaide Steamship Co. Ltd* (1920) 28 CLR 129.

[10] *Trustees Executors & Agency Co. Ltd v. FCT* (1933) 49 CLR 220 at 236

57. Likewise, Chief Justice Barwick in *Robinson v Western Australian Museum* stated:

> *laws must first be seen to be laws which are for the peace, order and good government of the State and thereafter when they answer that criterion they may operate extra-territorially so long as the extra-territorial operation is still something which can be said to be for the peace, order and good government of the State.*[11]

58. Justice Menzies in *R v Foster* stated:

> *To be within power a law under section 51 must be "for the peace, order and good government of Australia".*[12]

59. Chief Justice Street in *Building Constructions Employees and Builder's Labourers Federation of NSW v Minister for Industrial Relations* (1986) 7 NSWLR 372 where his Honour stated that the phrase 'peace, order and good government' applied as a limit on plenary powers, and a warning to the legislature that the scope of its powers is not absolute; acting beyond this yardstick is an abuse of powers which the courts will intervene to prevent:

> *This is a significant demonstration that a legislature may have "plenary powers of legislation, as large, and of the same nature, as those of Parliament itself" (ie the English Parliament) but may at the same time be subject to "limits which circumscribe these powers". This, in my view, is the position in which the New South Wales Parliament stands. It has plenary or sovereign powers. But they are circumscribed or limited by the requirement of "the peace, welfare, and good government of New South Wales". The limit may well be wide and extensive. Ultimately, however, it is a binding limit. Laws inimical to, or which do not serve, the peace, welfare, and good government of our parliamentary democracy, perceived in the sense I have previously indicated, will be struck down by the courts as unconstitutional.*[13]

60. Specifically in relation to the expression "good government" (or more comprehensively, "peace, order and good governance"), Stephen Eggleston wrote:

> *By definition, good government is effective and efficient and contributes to the health, happiness and welfare of the individuals by whom it is chosen and to whom it is ultimately responsible. To quote Locke … the legislative power "can nev'r be suppos'd to extend further than the common good. … And … to no other end, but the Peace, Safety and Publick good of the people."*[14]

[11] *Robinson v. Western Australian Museum* (1977) 138 CLR 283 at 295.
[12] *The Queen v Foster; Ex Parte Eastern and Australian Steamship Co Ltd* (1959) 103 CLR 256, Menzies J, paragraph 12.
[13] *Building Constructions Employees and Builder's Labourers Federation of NSW v Minister for Industrial Relations* (1986) 7 NSWLR 372 at 384 (Street CJ).
[14] Stephen Eggleston "The Myth and Mystery of POgG" (1996-97) 31 Journal of Canadian Studies 80 at 86.

61. Applying the above, it can be said that a law is for the order and good governance *of this Church,* if the law is effective, efficient and contributes to the common good of this Church.

62. Applying this test would exclude from the scope of the legislative powers of any of the law-making bodies of this Church, including the Synod of the Diocese, any laws which harm the core principles and order of this Church.

63. Professor Doe in his *Christian Laws: Contemporary Principles* (Cambridge University Press, 2013) says about doctrinal discipline:

> *It is a fundamental principle of Anglican canon law that: "The church has authority in controversies of faith". Doctrinal discipline applies primarily to ordained and lay ministers … At ordination and consecration, candidates must subscribe, assent or otherwise affirm in public their belied in or loyalty to the doctrine of their church. … ministers (ordained and lay) must not teach, preach, publish or profess doctrine or belief incompatible with that of their own church. A person who engages in unlawful doctrinal dissent may be subject to disciplinary process in church courts or tribunals in the manner and to the extent provided by law.*[15]

64. The Anglican Communion Office published the "*The Principles of Canon Law common to the churches of the Anglican communion"*[16] (**Principles**). These Principles provide useful guidance regarding the purpose of law within the Church:

> ***Principle 1: Law in ecclesial society***
>
> 1. *Law exists to assist a church in its mission and witness to Jesus Christ.*
> 2. *A church needs within its laws to order, and so facilitate, its public life and to regulate its own affairs for the common good.*
> 3. *Law is not an end in itself.*
>
> ***Principle 2: Law as servant***
>
> 1. *Law is the servant of the church.*
> 2. *Law should reflect the revealed will of God.*
> 3. *Law has a historical basis and a theological foundation, rationale and end.*
> 4. *Law is intended to express publicly the theological self-understanding and practical policies of a church.*
> 5. *Law in a church exists to uphold the integrity of the faith, sacraments and mission, to provide good order, to support communion amongst the faithful, to put into action Christian values, and to prevent and resolve conflict.*

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[15] Pages 211-212.

[16] Anglican Communion Legal Advisers' Network, "*The Principles of Canon Law common to the churches of the Anglican communion",* Published by The Anglican Communion Office, London, UK (2008).

Principle 3: The limits of law

1. *Laws should reflect but cannot change Christian truths….*

6. *Some laws articulate immutable truths and values.*[17]

65. The Amending Ordinance would be contrary to every statement under Principle 2 as listed above. The Amending Ordinance would not reflect Christian truths as this Church accepts them to be.

Where an Ordinance is passed by a Synod of a Diocese in the Province of New South Wales and referred to the Appellate Tribunal prior to the Bishop giving her/his assent in accordance with Constitution 5(c) of the Schedule of the 1902 Act, may the Bishop give assent to the Ordinance on receiving the opinion of the Appellate Tribunal or is the Synod required to pass the ordinance again?

66. This question contains two elements:

    a. May the Bishop give assent to the Ordinance to which the Bishop has not given assent within the period required under the Newcastle Constitution on receiving the opinion of the Appellate Tribunal?

    b. Is the Synod required to pass the ordinance again?

67. The answer to question (a) is “No” for the following reasons:

    a. The relevant provision of the Newcastle Constitution is procedural in nature, setting out the process by which the Diocese can make rules and ordinances.

    b. The process that is there laid out for the making of rules and ordinances in the Diocese are as follows:

        i. Every rule or ordinance of a Synod shall be made by a majority of the clergy and representative members present and voting collectively.

        ii. No such rule or ordinance shall take effect or have any validity unless within one month after the passing of the same the Bishop shall signify his assent in writing.

        iii. Any such rule or ordinance to which the Bishop shall not assent may be the subject of reference to and determination by any Provincial Synod composed of the representatives of the Diocesan Synods of the State of New South Wales.

    c. Nothing in the Newcastle Constitution allows the Bishop to delay or postpone giving assent. The words are simply that a rule or ordinance has no effect or validity unless the Bishop has signified his assent within the one month period. This is also supported by Standing Order 51(r) of the Standing Orders of the Synod of the Diocese which states simply that “The ordinance shall come into

[17] Ibid, page 19.

effect upon assent being given by the President" (the President here, of course, being the Bishop presiding over Synod).

d. Nothing in the Newcastle Constitution provides that, absent assent within the requisite one month period, the Bishop may refer any question to this Tribunal, and may then give (or indeed withhold assent) after a response to such question is provided by this Tribunal.

68. As for question (b), my response is "Yes" but a new Bill in the same form as the Amending Ordinance would not be consistent with the Fundamental Declarations or the Ruling Principles or be one which the Synod has authority under section 51 of the Constitution to pass. The rationale for this is as follows:

a. While the Newcastle Constitution provides for determination by a Provincial Synod composed of members of the various Synods in the Dioceses in New South Wales in respect of a rule or ordinance to which the Bishop has not provided assent within the requisite one-month period, seeking such a determination is not compulsory. This is signified by the words "may be" in the relevant provision: "any such rule or ordinance to which the Bishop shall not assent may be the subject of reference to and determination by any Provincial Synod".

b. Generally, there is nothing in the Newcastle Constitution that would prevent an Ordinance which has been passed by the Synod but to which the Bishop has not given assent to be reintroduced at Synod again. However, for the reasons I have provided in responding to the first two Referred Questions above, a Bill in the form of the Amending Ordinance would not be one that is consistent with the Fundamental Declarations or the Ruling Principles and hence violate sections 5 and 51 of the Constitution.

Part 4 – The General Synod Members' Questions

69. For the reasons outlined above, I answer the questions in the referral of 6 November 2019 as follows:

Question 1: If the Amending Ordinance comes into effect, will the amendment made by clause 3 of the Amending Ordinance prevent the Diocesan Tribunal of the Diocese from hearing and determining under section 54(2) of the Constitution a charge of breach of faith or discipline in respect of a person licensed by the Bishop, or any other person in holy orders resident in the Diocese, where the act giving rise to the charge relates to such a person marrying or being married to another person of the same sex?

ANSWER: In my view, the proper and correct answer to this question is "Yes", and hence, the Amending Ordinance would be inconsistent with the Constitution.

Question 2: If the Amending Ordinance comes into effect, will the amendment made by clause 3 of the Amending Ordinance prevent the Diocesan Tribunal from hearing a charge under section 54(2A) of the Constitution relating to an offence of unchastity or an offence involving sexual misconduct against a member of clergy where the act of the member of clergy which gave rise to the charge

relates to the member of clergy marrying or being married to a person of the same sex, in circumstances where the act occurred in the Diocese or the member of clergy was licensed by the Bishop or was resident in the Diocese within two years before the charge was laid?

ANSWER: In my view, the proper and correct answer to this question is "Yes", and hence, the Amending Ordinance would be inconsistent with the Constitution.

Question 3" If the Ordinance comes into effect, will the amendment made by clause 3 of the Ordinance prevent the Bishop or any five adult communicant members of this Church resident within the Diocese promoting a charge to the Diocesan Tribunal under section 54(3) of the Constitution against a person licensed by the Bishop or against any other person in holy orders resident in the Diocese alleging a breach of faith, ritual or ceremonial by such a person because that person has participated in a service in which they have pronounced the blessing of a marriage solemnised in accordance with the Marriage Act 1961 in which the persons being married are of the same sex (assuming the first proviso in section 54(3) has been fulfilled)?

ANSWER: In my view, the proper and correct answer to this question is "Yes", and hence, the Amending Ordinance would be inconsistent with the Constitution.

Question 4: If the Amending Ordinance comes into effect, will the amendment made by clause 3 of the Amending Ordinance prevent the Bishop or any five adult communicant members of this Church resident within the Diocese promoting a charge to the Diocesan Tribunal under section 54(3) of the Constitution against a person licensed by the Bishop or against any other person in holy orders resident in the Diocese alleging a breach of faith, ritual or ceremonial by such a person because that person has participated in a service in which they have pronounced the blessing of a marriage solemnised in accordance with the Marriage Act 1961 in which the persons being married are of the same sex (assuming the first proviso in section 54(3) has been fulfilled)?