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WILL THE TIES THAT BIND BREAK UNDER THE STRAIN?

The Future for the Constitution of the Anglican Church of Australia

The Honourable Justice Debra Mullins AO

The Fourth Sharwood Lecture in Church Law: March 2021

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The Honourable Justice Debra Mullins AO is a judge of the Court of Appeal of the Supreme Court of Queensland. She was appointed to that Court in 2000 and to the Court of Appeal in January 2020. She is a Doctor of the University of Griffith University.

Justice Mullins served as the Deputy Chancellor of the Diocese of Brisbane from 2004 to 2014, and was in that year appointed as Chancellor, a position that she still holds. She has served in the Church Law Commission of the General Synod since 2008 and is its current Chair. She has been a member of the Standing Committee of General Synod since 2014.

Introduction

[1] I did not know Professor Robin Sharwood AM personally, but I know of his achievements and the esteem in which he was held by his colleagues and students and the devoted contribution he made to the Anglican Church of Australia. I am honoured to follow in the footsteps of The Honourable Keith Mason AC QC, Professor Mark Hill QC and The Rev'd Dr Bruce Kaye AM in giving this lecture in the memory of Robin Sharwood on the topic of Church law.

[2] The Constitution of the Anglican Church of Australia[1] had a lengthy gestation period[2] before it came into effect on 1 January 1962 and Australia became an autonomous province of the Anglican Communion. At various stages since then, there have been pressures within the Anglican Church that caused some to wonder whether the Constitution could survive.[3] It has. We are in the midst of another period where there are issues that cause polarisation within the Church. This has made me contemplate on two aspects of the Constitution. Is the Constitution sufficiently flexible to keep on meeting the challenges that successive issues throw up to the unity of the Church? Will it ever be possible for there to be agreement amongst Anglicans in Australia for substantial amendments to the Constitution or for another Constitution?

What is Canon Law?

[3] In the Anglican Church of Australia, canon law or Church law is the law that is the internal law of the Church and is found in, and as a result of, the constituent documents, internal laws (usually referred to as canons or ordinances) and the rules or regulations that apply to units within the Anglican Church of Australia. In interpreting Church laws, lawyers tend to apply the same methods and principles of interpretation that apply to equivalent documents in the secular community, but in the context of the Christian faith, the scriptures, the standards or principles of worship and the doctrine of the Church and with some understanding of how the Church functions in practice.

[4] The preparation of this lecture gave me an opportunity to contemplate on my role over the years as a Deputy Chancellor and then as Chancellor and being a member of the General Synod's Church Law Commission. Tasks include advising on the application of Church law or possible legislative solutions to issues that arise within the Church and drafting of canons and explanatory memoranda. But those tasks are not the purpose of the role. Those tasks carried out by Church lawyers are a contribution, in a small way, to the mission of the Church.

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1 *The Constitution of the Anglican Church of Australia* <https://anglican.org.au/wp-content/uploads/2019/12/Constitution-update-011219-for-web.pdf> ('the Constitution').

2 John Davis, *Australian Anglicans and their Constitution* (Acorn Press, Canberra, 1993) at p 3.

3 A prime example is the ordination of women priests which was the subject of litigation in the civil courts by some Church members: *Scandrett v Dowling* (1992) 27 NSWLR 483

[5] Professor Hill in the second annual Sharwood lecture[4] explained the development and purpose of "The Principles of Canon Law Common to the Churches of the Anglican Communion". [5] It is a useful resource of principles (not laws) where each principle was considered to fall within the description[6]:

> A 'principle of canon law' is a foundational proposition or maxim of general applicability which has a strong dimension of weight, is induced from the similarities of the legal system of churches, derives from the canonical tradition or other practices of the church, expresses a basic theological truth or ethical value, and is about, is implicit in, underlies canon law'.

[6] Principle 1 dealing with "Law in Ecclesial Society" makes this point that became apparent to me in putting this lecture together:

1. Law exists to assist a church in its mission and witness to Jesus Christ.
2. A church needs within it 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.

[7] It is appropriate that this is the first principle of the Principles of Canon Law. This principle is uncontroversial and provides an important context for any commentary on Church Law.

The Constitution

[8] I have great respect for the drafters of the Constitution and for the significant amendments that have been enacted since 1962. The Constitution provides for a structure for the Church preserving Diocesan independence, but acknowledging the reality of the Australian nation which demands a national face of the Church that operates in all parts of Australia.

[9] The Fundamental Declarations are set out in chapter I which comprises sections 1 to 3. The Ruling Principles are set out in chapter II which comprises sections 4 to 6. Section 4 begins with a declaration that 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 (BCP) together with the Form and Manner of Making Ordaining and Consecrating of Bishops, Priests and Deacons and the Thirty-nine Articles, but has plenary power, at its own discretion to make statements as to the faith ritual ceremonial or discipline of the Church and to order its forms of worship and rules of discipline and to alter or revise such statements, forms and rules. The exercise of this plenary authority is subject to the four provisos that are then set out in section 4. It is only relevant to mention the first and second provisos. The first provides that all such statements, forms and rules are consistent with the Fundamental Declarations and are made as prescribed by the Constitution. The second is a declaration that the BCP together with the Thirty-nine Articles "be

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4 Professor Mark Hill QC, 'Anglican Canon Law: Identity, Ecclesiology and Ecumenism' (The second Sharwood Lecture in Church Law, February 2019) ('Anglican Canon Law').

5 Anglican Canon Law at pp 7-9.

6 *The Principles of Canon Law Common to the Churches of the Anglican Communion* (Anglican Communion Office, London, 2008) at p 103 ('Principles of Canon Law').

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".

[10] Of relevance to my topic is chapter XI that regulates the alteration of the Constitution. Section 66 provides:

> This Church takes no power under this Constitution to alter sections one, two and three and this section other than the name of this Church.

[11] That makes sections 1, 2, 3 and 66 (other than the name of the Church) entrenched provisions. It makes sections 1, 2 and 3 immutable and critical to any review of the Constitution. Section 67 then sets out the manner in which other sections of the Constitution may be altered by canon of the General Synod. There are two modes of alteration that apply to one set of provisions[7] depending on whether the alteration deals with, concerns or affects the ritual ceremonial or discipline of the Church and another two modes for alteration that apply to another two sets of provisions of the Constitution.[8] Whenever an amendment is proposed to the Constitution the manner in which that amendment must be passed and assented to in order to be effective has to be determined. An illustration of the careful drafting of the Constitution is found in section 67(1)(c) where the mode of alteration applies to the addition of a new provision not being one that alters a provision referred to in paragraphs (a) and (b). It is worth noting that any alteration to section 4 has to be in accordance with section 67(1)(c). It has to be done by canon passed at a General Synod by the majority of the members of each House and does not come into effect until at least three-quarters of all Diocesan Synods, including all the Metropolitan sees, have assented to it by ordinance and all such assents are in force at the same time.

[12] The Constitution applies in all Dioceses in Australia. That is not the position, however, for all canons of the General Synod. Pursuant to section 26 of the Constitution, but subject to the terms of the Constitution, the General Synod may make canons, rules and resolutions relating to the order and good government of the Church including canons in respect of ritual, ceremonial and discipline and make statements as to the faith of this Church and declare its view on any matter affecting this Church or affecting spiritual, moral or social welfare. There are also restrictions on the General Synod making any canon or rule imposing any financial liability on any Diocese, unless there is compliance with section 32.

[13] The proviso to section 30 of the Constitution is important. Paragraph (a) of the proviso means that any canon affecting the ritual, ceremonial or discipline of the Church shall be deemed to affect the order and good government of the Church within a Diocese and shall not come into force in any Diocese unless and until the Diocese by ordinance adopts the canon. Under paragraph (b), if the General Synod declares that the provisions of any other canon affect the order and good government

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7 Section 67(1)(a)(i) and (ii) of the Constitution.
8 Section 67(1)(b) and (c) of the Constitution.

of the Church within, or the Church trust property of, a Diocese, such canon shall not come into force in any Diocese unless and until the Diocese by ordinance adopts the canon. There is then provision in paragraph (c) for a Diocese to invoke a procedure if the relevant Diocese declares its opinion that the provisions of the relevant canon affect the order and good government of the Church within or the Church trust property of the Diocese. Paragraph (d) permits a Diocesan Synod by ordinance to exclude at a subsequent date any canon adopted by a Diocesan Synod.

[14] As section 30 preserves Diocesan independence in respect of the canons of the General Synod that affect the order and good government of the Church within a Diocese, there are varied mosaics of General Synod canons in force in the Dioceses.

[15] Section 52(1) of the Constitution is of note, as another provision that ensures the General Synod does not interfere with the standing of a Diocese without the concurrence of the Diocese. The General Synod is precluded without the assent by ordinance of the Diocese concerned to alter, or permit the alteration, of the Constitution or boundaries of a Diocese or any of the powers, rights or duties of the Synod of a Diocese or the qualifications or mode of election of the representatives of a Diocese in General Synod.

[16] As it is relevant to matters to which I refer later in this lecture, I will explain briefly the tribunals established under chapter IX of the Constitution. Sections 53 and 54 provide for the tribunal that is required in each Diocese for the hearing of charges against a member of the clergy (the Diocesan Tribunal). The jurisdiction of a Diocesan Tribunal is conferred by section 54(2) and (2A) of the Constitution. Sections 53 to 55 provide that there may be a Provincial Tribunal in any province within Australia to hear appeals from any determination of any Diocesan Tribunal of the province and with original jurisdiction to hear and determine charges of faith, ritual, ceremonial or discipline or such offences as may be specified by any canon ordinance or rule. Sections 53 and 57 provide for the establishment of the Appellate Tribunal. If no appeal is provided for from the Diocesan Tribunal to a Provincial Tribunal, an appeal from the Diocesan Tribunal in matters involving any question of faith ritual ceremonial or discipline is to the Appellate Tribunal. An appeal from the Provincial Tribunal exercising appellate jurisdiction in matters involving any question of faith ritual ceremonial or discipline or exercising original jurisdiction also lies to the Appellate Tribunal.

[17] The Special Tribunal is established pursuant to sections 53 and 56 of the Constitution. Until the amendment effected by the *Constitution (Jurisdiction of Special Tribunal) Amendment Canon 2017* (Canon 6 of 2017) (to which I will refer later) the Special Tribunal's jurisdiction was to hear and determine charges against any member of the House of Bishops and any bishop assistant to the Primate in the Primate's capacity as Primate (assistant to the Primate) whilst they remained in those roles of breaches of faith, ritual, ceremonial or discipline and of such offences as may be specified by Canon. The Appellate Tribunal has jurisdiction to hear and determine appeals from any determination of the Special Tribunal.

[18] The General Synod's *Offences Canon 1962* specifies offences for the purposes of sections 54, 55 and 56 of the Constitution. The disciplinary system set up under chapter IX of the Constitution applies only to clergy and bishops and not to laity.

Lessons from the Royal Commission into Institutional Responses to Child Sexual Abuse

[19] The structure of the Church under the Constitution, the governance of the Church and institutional cultural factors were scrutinised in connection with the case studies undertaken by the Royal Commission[9] that involved the Church.[10] Much to the shame of the Church, the Royal Commission focused on the failings of the Church to prevent sexual abuse of children in Churches and Church controlled institutions and schools, deal appropriately with the survivors of sexual abuse when complaints were made to the Church and take action against the perpetrators to ensure they did not commit further abuse. I chose the word "shame" on purpose, as it reflected the evidence given by Ms Anne Hywood, General Secretary of the General Synod, to the Royal Commission that is quoted in part D of chapter 12[11]:

> In confronting our failings, we are ashamed. We have had to face that we have not always protected the children we were trusted to care for. It is clear that there were times when we did not act as we should and we allowed harm to continue; we did not believe those who came forward, and we tried to silence them; we cared more about the church's reputation than those who had been harmed.

[20] The attention of the Royal Commission was on the failures of governance and structures of the Church over many years and the Royal Commission made a number of recommendations for legislative change and practice within the Church.[12]

[21] Even before the Royal Commission, and as acknowledged in the Final Report:[13]

> In the late 1900s and early 2000s, a number of high-profile child sex abuse cases brought the problem of child sexual abuse in a number of Anglican Church Institutions into sharp focus and led to church-initiated inquiries at a diocesan level.

[22] Legislative changes by the General Synod also commenced. Subsections (2A) and (2B) of section 54 were inserted into the Constitution with effect on 16 June 2003. Section 54(2A) is a deeming provision in relation to the jurisdiction of a Diocesan Tribunal in a Diocese (where the conduct was alleged to occur or where the member of clergy was licensed or resided within two years before the

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9 Royal Commission into Institutional Responses to Child Sexual Abuse.

10 *Royal Commission into Institutional Responses to Child Sexual Abuse* (Final Report: Religious Institutions, Vol 16, December 2017) ('Final Report') at pt D ch 12; *Case Study 3 (North Coast Children's Home); Case Study 12 (Perth independent school); Case Study 20 (The Hutchins School); Case Study 32 (Geelong Grammar School); Case Study 34 (Brisbane Grammar School and St Paul's School); Case Study 36 (Church of England Boys' Society); Case Study 42 (Anglican Diocese of Newcastle); Case Study 45 (Harmful sexual behaviours of children in schools);* and *Case Study 52 (Institutional review of Anglican Church institutions).*

11 Final Report at p 559.

12 Final Report at p 72 ('Recommendations to the Anglican Church'); and Final Report at pp 78-82 ('Recommendations to all religious institutions in Australia').

13 Final Report at p 587.

charge was laid) 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 12 months or more.

[23] At the 13th Session of the General Synod, resolution 54/04[14] was passed that urged all Diocesan Synods which had not done so to pass the model Professional Standards Ordinance (PSO) and amendments suggested from time to time by the Standing Committee or implement equivalent provisions. The model PSO provided for a professional standards structure that included a director to receive complaints against Church workers (both clergy and lay) in respect of sexual misconduct, a committee to oversee the investigation and decide whether the complaint should be referred to a board that would hear the complaint to determine the fitness of the Church worker for any office, licence or position within the Church. Most Dioceses did enact an ordinance based on the model PSO which made it easier to deal with complaints of sexual misconduct against clergy than the Tribunal process. Some Dioceses provided for a review process of a Professional Standards Board decision, but there was no recourse to a national body such as the Appellate Tribunal in respect of the decision made under a PSO where deposition may have been the outcome of the finding that the member of the clergy was not fit to remain in Holy Orders. The success of the Diocesan PSOs for protecting children and vulnerable persons from unacceptable sexual misconduct committed by Church workers depends on a system for sharing information about complaints and determinations among Dioceses at an appropriate level. That resulted in the setting up of the National Register under the *National Register Canon 2007*.

[24] The General Synod passed the *Episcopal Standards Canon 2007* (the 2007 Canon) which regulates professional standards for bishops referred to in section 56(6) of the Constitution and is not limited to complaints about sexual misconduct or failure to act in a professional standards process (process failure), but covers the whole range of conduct (other than any breach of faith, ritual or ceremonial) that might call into question the fitness of the bishop to hold office or remain in Holy Orders. (Currently 12 of the 23 Dioceses have adopted the 2007 Canon.) A model Episcopal Standards Ordinance[15] was promoted at the 16th Session of the General Synod, because it was accepted that there would never be the support of all Dioceses for the 2007 Canon and, pursuant to resolution 47/14[16], the model Episcopal Standards Ordinance was commended for enactment by every Diocese. A number of Dioceses enacted their own Diocesan legislation on episcopal standards. It is not necessary for the purpose of this lecture to explore the reasons for the different approaches. What is relevant is that going into the 17th Session of the General Synod the Dioceses were not agreed on a uniform approach to an episcopal standards fitness for office regime.

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14 <https://anglican.org.au/wp-content/uploads/2019/05/2004-Proceedings.pdf> at p 61.

15 <https://anglican.org.au/wp-content/uploads/2019/05/2014-Book-7-Supplementary-Materials.pdf> at pp 63-100.

16 <https://anglican.org.au/wp-content/uploads/2019/05/2014-Proceedings.pdf> at pp 63-64.

[25] As a result of the lessons learned during the preparation for, and the hearing of, the case studies and in anticipation of the final recommendations of the Royal Commission, the Church implemented significant legislative changes at the 17th Session of the General Synod held in September 2017. Of particular note was the *Safe Ministry to Children Canon 2017* that prescribes a code of conduct and minimum standards and guidelines for safe ministry to children. There was also a suite of legislation[17] enacted to ensure that a Diocesan Bishop remains accountable for any lack of supervision during the Bishop's tenure as a Diocesan Bishop that resulted in child sex offences being committed in the relevant Diocese or for process failure. The cooperation amongst the members of the 17th Session of the General Synod to achieve uniformity of reform in areas where the Church had failed in the past was notable.

[26] Before Canon 6 of 2017 came into effect, the limitation that had applied to the jurisdiction of the Special Tribunal was that the jurisdiction ceased upon a bishop no longer being a member of the House of Bishops or in the role of assistant to the Primate. Canon 6 of 2017 extended the jurisdiction of the Special Tribunal by inserting an additional paragraph at the end of section 56(6) of the Constitution, so that it also applies to:

> (c) any former member of the House of Bishops and any former bishop assistant to the Primate in the Primate's capacity as Primate of such offences as may be specified by canon in respect of conduct while a member of the House of bishops or assistant to the Primate.

[27] The concomitant amendment to the *Offences Canon 1962* inserted a new section 2A which provided for offences committed by a Bishop while a member of the House of Bishops or in the role of assistant to the Primate being child abuse and process failure offences.

[28] At the 17th Session of the General Synod, the different approaches amongst the Dioceses to episcopal standards, however, were subservient to the Church's need to respond to the scrutiny of the Royal Commission with Australia wide legislation that applied to Diocesan Bishops (and former Diocesan Bishops) in relation to child sexual abuse or dereliction of duty in relation to professional standards processes in that regard. It was no surprise that Recommendation 16.1 of the Royal Commission was:

> The Anglican Church of Australia should adopt a uniform episcopal standards framework that ensures that bishops and former bishops are accountable to an appropriate authority or body in relation to their response to complaints of child sexual abuse.

[29] The 2017 Canon was passed by the General Synod with overwhelming support that is also reflected by the subsequent adoption of the 2017 Canon in 22 of the 23 Dioceses. It provides for a complaint system in respect of misconduct in the nature of child abuse or process failure against a member of the House of Bishops or assistant to the Primate whenever occurring or against a former member of the House of Bishops or assistant to the Primate whilst in that role that brings into question the fitness of the Bishop to hold office or to remain in Holy Orders. Any breach of faith ritual or

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17 *Episcopal Standards (Child Protection) Canon 2017* ('2017 Canon'); Canon 6 of 2017; and *Offences Amendment Canon 2017*.

ceremonial is excluded from the definition of "examinable conduct" in section 2(1) of the 2017 Canon.

[30] I therefore consider that the experience of responding to the Royal Commission and receiving the benefit of the Royal Commission's conclusions in respect of case studies and the general conclusions reached by the Royal Commission about the Anglican Church and other religious bodies, the following observations can be made that remain relevant to the Church going forward:

(a) When the Church is under scrutiny, the strength of the response from the Church is more effective from a united Church than a fractured Church.

(b) The expectation of the Australian public is that the Church addresses issues that affect the safety of persons within Churches and Church institutions in a cohesive and consistent way.

(c) The Church functions within, and as part of, Australian society and must be open to being judged by that society.

Wangaratta Blessing Service and Newcastle Discipline Ordinance Opinions

[31] The recent Appellate Tribunal opinions given on 11 November 2020[18] illustrate the interplay between legal interpretation and doctrinal interpretation. It is with some hesitancy that I use the expression "doctrinal interpretation". As those readers of the Appellate Tribunal opinions will understand, the question of what is "doctrine" is at the forefront of the debate in respect of the blessing of a couple in a same sex marriage.

[32] The Appellate Tribunal had a reference from the Primate and a further reference by the Primate made at the request of 41 members of the General Synod made pursuant to section 63(1) of the Constitution, as a result of the Diocese of Wangaratta's authorisation of a service for the blessing of persons married according to the *Marriage Act* 1961 (Cth).

[33] The Diocese of Wangaratta had adopted the *Canon Concerning Services 1992* passed by the General Synod, but had not adopted the amendment made by Canon 19 of 2017. The Synod of the Diocese of Wangaratta made the *Blessing of Persons Married According to the Marriage Act Regulations 2019* (to which the then Bishop of Wangaratta gave his assent) in reliance on s 5(2) of the unamended 1992 Canon on the basis no provision was made in the presently authorised services for such a service. Regulation 4 provides:

> Where a minister is asked to and agrees to conduct a Service of Blessing for persons married according to the Marriage Act 1961 the minister will use the form of service at Appendix A to these Regulations and at no other form of service.

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18 <https://anglican.org.au/wp-content/uploads/2020/11/AT-Wangaratta-formatted-11112020FINAL.pdf> ('Wangaratta Blessing Service Opinion'); <https://anglican.org.au/wp-content/uploads/2020/12/AT-Newcastle-formatted-11112020-FINAL.pdf> ('Newcastle Discipline Ordinance Opinion').

The Regulations therefore give rise to the possibility that the blessing could be performed in respect of a married same sex couple.

[34] All but one of the members of the Appellate Tribunal joined the one opinion[19] (and I will refer to them as "the majority") on the issue of whether the Diocese of Wangaratta had authority to initiate this liturgy. There is a separate opinion from member Ms Davidson (to whom I will refer as "the minority").

[35] It was common ground before the Appellate Tribunal that it is not lawful for a same sex marriage to be solemnised in the Anglican Church of Australia, as when the Constitution came into force, it was the canon law of the Church that matrimony was solemnised in the Church as between one man and one woman and that law has remained unchanged.[20] The majority opinion left open the question whether that was a law that was "doctrine" in a relevant Constitutional sense.

[36] The majority found[21] that the plenary authority conferred on the General Synod pursuant to section 4 of Constitution that was exercised by the General Synod in 1992 in passing the 1992 Canon is the source of the authority to conduct the Wangaratta Blessing Service on the basis they discerned there was no inconsistency with the Fundamental Declarations and the Wangaratta Blessing Service was not an alteration in, or variation from, any BCP service.

[37] Critical to the majority's reasoning is the meaning of "Doctrine". In section 74(1) the Constitution, the definition of "Doctrine" is "the teaching of this Church on any question of faith". The word "Faith" is then defined as "includes the obligation to hold the faith". Section 74(4) then provides that in the Constitution, unless the context or subject matter otherwise indicates, "any reference to faith shall extend to doctrine". The majority relied on the Appellate Tribunal's 1987 Report *Re Ordination of Women to the Office of Deacon Canon 1985*[22] and the reasons of Archbishop Rayner (that were generally adopted by Cox J) that explained the meaning of doctrine in the constitutional sense as[23]:

> 'Doctrine' must therefore be understood in the Constitution as the Church's teaching on the faith which is necessary to salvation. That faith is grounded in scripture and set forth in the creeds; and the Church's doctrine or teaching on that faith may be explicated and developed, provided it is always subject to the test of scripture.

[38] The majority considered[24] that not every proposition sought to be drawn from the scriptures is itself the Faith. The majority confined their opinion to Constitutional issues, stating that they were

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19 The majority was constituted by The Hon Keith Mason AC QC (President), The Hon Richard Refshauge (Deputy President), The Most Rev'd Dr Phillip Aspinall, Professor the Hon Clyde Croft AM SC and The Rt Rev'd Garry Weatherill.

20 Wangaratta Blessing Service Opinion at paragraphs 39 and 72 of the majority opinion and paragraph 18 of the minority opinion.

21 Wangaratta Blessing Service Opinion at paragraphs 45 and 46 of the majority opinion.

22 <https://anglican.org.au/wp-content/uploads/2019/06/Ordination-of-Women-to-the-Office-of-Deacon-Canon-1985-.pdf>.

23 Wangaratta Blessing Service Opinion at paragraph 148 of the majority opinion.

24 Wangaratta Blessing Service Opinion at paragraph 173 of the majority opinion.

deciding only what was necessary to deal with the reference[25] and not departing from their view of the settled meaning of "Doctrine" in the Constitution.[26] The majority concluded[27] that the matters in the reference did not involve issues of faith or doctrine, none of the BCP teachings about marriage is a teaching on the faith necessary for salvation, there is no inconsistency with the "Doctrine" components of the Fundamental Declarations, there was no contravention of s 5(3) of the 1992 Canon and no ground of invalidity of the Regulations had been established.

[39] The minority considered the issue in the context of broader issues raised by the blessing of a civil marriage of a couple not comprised of one man and one woman on the basis that the sexual practice of a same sex couple was "persistent, unrepentant sin" and contrary to scripture and the teaching of the Church.[28] The minority found[29] that the Regulations are inconsistent with the Fundamental Declarations and the Ruling Principles and therefore that the Regulations are invalid.

[40] The majority helpfully highlighted[30] the differences between the majority and the minority, including the application (or non-application) of section 4 of the Constitution, the meaning and application of Article VI of the Thirty-nine Articles and the status and exegesis of earlier Opinions of the Appellate Tribunal.

[41] The minority interpreted[31] Archbishop Rayner's explanation in the 1987 Opinion of the meaning of "Doctrine" in the constitutional sense by reference to Article VI and concluded that Archbishop Rayner was dealing in the quote relied on by the majority with development of Doctrine and not the Doctrine which is an expression of the scriptures and the creeds. The minority considered[32] that the phrase "containing all things" in section 2 of the Constitution should not be construed as though the scriptures also contain other things which are not necessary for salvation. The minority pointed out[33] that the discipline of the Church as expressed in the BCP would not be to bless a same sex union, but rather call for repentance.

[42] The other opinion given on 11 November 2020 arose from the referral made by the Primate to the Appellate Tribunal pursuant to section 63(1) of the Constitution at the request of the Bishop of Newcastle in respect of the passing of the *Clergy Discipline Ordinance 2019 Amending Ordinance 2019* by the Synod of the Diocese of Newcastle. The reference sought answers to whether any part of the Amending Discipline Ordinance is inconsistent with the Fundamental Declarations or the Ruling Principles of the Constitution and whether the Newcastle Synod had the authority under s 51 of the Constitution to pass the Amending Discipline Ordinance. There was also a second reference of

25 Wangaratta Blessing Service Opinion at paragraphs 14 and 28 of the majority opinion.
26 Wangaratta Blessing Service Opinion at paragraphs 142 and 166 of the majority opinion
27 Wangaratta Blessing Service Opinion at paragraphs 180, 181 and 284 of the majority opinion.
28 Wangaratta Blessing Service Opinion at paragraph 55 of the minority opinion.
29 Wangaratta Blessing Service Opinion at paragraphs 93, 174 and 178 of the minority opinion.
30 Wangaratta Blessing Service Opinion at paragraph 288 of the majority opinion.
31 Wangaratta Blessing Service Opinion at paragraphs 31-37 of the minority opinion.
32 Wangaratta Blessing Service Opinion at paragraph 73 of the minority opinion.
33 Wangaratta Blessing Service Opinion at paragraph 79 of the minority opinion.

further questions in respect of the same Ordinance made at the request of 25 members of the General Synod.

[43] The Amending Discipline Ordinance purported to amend the *Clergy Discipline Ordinance 2019* by including a provision that precluded any charge being referred to, or being heard by, the Diocesan Tribunal which alleged an offence, breach or misconduct by a member of the clergy because that member of the clergy, participated in a service (whether or not in a Church building) in which they 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 were of the same sex or declined to participate in a service 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 were of the same sex, or is married to a person of the same sex where such marriage had been solemnised in accordance with the *Marriage Act* 1961 (or similar Act in another jurisdiction). The relevant provision also deemed that the conduct and matters that were precluded from being the subject of a charge or being heard by the Diocesan Tribunal must not be considered an "offence" within the meaning of the *Clergy Discipline Ordinance 2019*.

[44] The Bishop of Newcastle had not exercised his right to assent or not to assent to the Amending Discipline Ordinance. Even if the Bishop had assented, the Amending Discipline Ordinance contained a provision postponing its coming into effect until the Synod passed a resolution declaring that the Ordinance shall come into effect and the Bishop indicated his or her decision for the Ordinance coming into effect.

[45] The same members of the Appellate Tribunal who constituted the majority in the Wangaratta Blessing Service Opinion also constituted the majority in Newcastle Discipline Ordinance Opinion. Ms Davidson constituted the minority in that opinion.

[46] The majority noted[34] that, under section 54(2) and (2A) of the Constitution, the Diocesan Tribunal is armed with jurisdiction that cannot be precluded by a Diocesan Synod or by a canon of the General Synod. The key to the opinion of the majority is found in the following statement:[35]

> … 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.

[47] The majority considered,[36] however, that it was not useful for the Appellate Tribunal to go beyond what the majority had written in the Wangaratta Blessing Service opinion or to address a range of hypothetical liturgical outcomes in the area of same sex blessing services.

[48] The majority also made the point[37] that:

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34 Newcastle Discipline Ordinance Opinion at paragraph 33 of the majority opinion.
35 Newcastle Discipline Ordinance Opinion at paragraph 41 of the majority opinion.
36 Newcastle Discipline Ordinance Opinion at paragraph 46 of the majority opinion.
37 Newcastle Discipline Ordinance Opinion at paragraph 50 of the majority opinion.

> 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.

[49] On the basis of the limited operation that the Amending Discipline Ordinance would have to offences that were prescribed neither by the Constitution nor the *Offences Canon* 1962, had it been assented to, the majority was of the opinion[38] that the Amending Discipline Ordinance was not inconsistent with the Fundamental Declarations or the Ruling Principles of the Constitution. Subject to the assent of the Bishop and having regard to the limited operation of the Amending Discipline Ordinance, the majority was also of the opinion[39] that the Synod of the Diocese of Newcastle did have the authority under s 51 of the Constitution to pass the *Clergy Discipline Ordinance*. The majority considered there was insufficient practical utility in answering five questions in the second reference on the same topic and declined to do so.

[50] The minority incorporated the comments made at paragraphs 38-178 of the minority opinion of the Wangaratta Blessing Service Opinion. The minority found[40] the Amending Discipline Ordinance is inconsistent with the Fundamental Declarations and the Ruling Principles and that it was invalid as the Diocesan Synod could not modify the grant of jurisdiction given by the Constitution to the Diocesan Tribunal. The minority also found[41] the Synod of the Diocese of Newcastle did not have the authority under section 51 of the Constitution to pass the Amending Diocesan Ordinance. The minority then proceeded[42] to answer the questions in the second reference consistently with the opinion given in respect of the first reference.

[51] I have concluded from my analysis of the recent Appellate Tribunal opinions that those who identify with the minority opinion will not be persuaded by the arguments that prevailed with the majority opinion and vice versa. That was anticipated by the opposing views reflected in the Doctrine Commission's publication *Marriage, Same-Sex Marriage and the Anglican Church of Australia*.[43] It is not surprising that the determinations made in the Wangaratta Blessing Opinion by virtue of the majority opinion have not settled the debate.

Is the Constitution sufficiently flexible to meet the challenges going forward?

[52] The first step is to identify the challenges going forward. The majority and the minority opinions in the recent Appellate Tribunal opinions reflect the different approaches within the Church to the

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38 Newcastle Discipline Ordinance Opinion at paragraph 53 of the majority opinion.
39 Newcastle Discipline Ordinance Opinion at paragraph 55 of the majority opinion.
40 Newcastle Discipline Ordinance Opinion at paragraphs 20-35 of the minority opinion.
41 Newcastle Discipline Ordinance Opinion at paragraphs 44-53 of the minority opinion.
42 Newcastle Discipline Ordinance Opinion at paragraph 69 of the minority opinion.
43 The Anglican Church of Australia, *Marriage, Same-Sex Marriage and the Anglican Church of Australia* (Broughton Publishing, Melbourne, 2019).

blessing of a same sex couple who are legally married under the *Marriage Act* 1961. It can be anticipated with confidence that there will be challenges for the Church from this and other issues that may arise as a result of the 2017 amendment to *Marriage Act* 1961.

[53] There are a host of financial challenges for the existing Diocesan structure going forward with implications for Constitutional change that can be anticipated from the work that was undertaken for the 16th Session of the General Synod that produced the Report of the Viability & Structures Task Force[44] and the ongoing consideration of those issues by the General Synod and the Dioceses. That is the subject for another lecture.

[54] Another challenge that is not pressing, but concerns me as a lawyer, is reform of the Tribunal disciplinary system. It remains operative, but has been largely displaced by the Diocesan legislation on professional standards. In view of the possibility under the PSOs that a member of the clergy can be removed from the right to the exercise of ministry in all of the Holy Orders to which the person is ordained, the question arises whether there should be a national review system by the Appellate Tribunal or another Tribunal for that purpose of consistency in decisions made under PSOs at least in the more serious cases. After all, under the Constitution a member of the clergy who is found guilty of a charge by a Diocesan Tribunal has a right of appeal to the Appellate Tribunal, either directly or via the Provincial Tribunal.

[55] The short answer to the question about the flexibility of the Constitution to meet these challenges is that it depends on sufficient goodwill from those who hold the views across the spectrum within the Church to enable solutions to be reached to maintain the unity of the Church (which I consider is important for the mission of the Church), but at the same time acknowledging, respecting and accommodating the differences in approach within the Church to contentious issues.

[56] The 17th Session of the General Synod exemplified that goodwill can be found in a conciliatory way to maintain unity and the respect and support of the Australian community. The 23 Dioceses were never going to agree on a common approach to episcopal standards in relation to all aspects of episcopal conduct. The challenge presented to the Church by the Royal Commission was to enact consistent legislation applicable to all Dioceses that regulated episcopal standards in child protection matters. That has largely been achieved by the adoption in 22 of the 23 Dioceses of the 2017 Canon.

Do I foresee agreement amongst Anglicans in Australia for substantial amendments to the Constitution?

[57] When I prepared the questions about the future of the Constitution, I did not appreciate fully the significance of the provisions entrenched by section 66 of the Constitution. That is not to say that there are not ways of achieving a new Constitution, if that were desirable, with the assistance of the legislatures in each of the Commonwealth, States and Territories. It is more likely that the future may call for substantial amendments to the Constitution as the Church works through the present

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44 <https://anglican.org.au/wp-content/uploads/2019/05/2014-Book-8-Report-of-the-Viability-Structures-Task-Force.pdf>.

challenges and those that will inevitably arise in the future. (That is one of the reasons I drew attention to the modes of alteration of the different sets of provisions of the Constitution found in section 67.)

[58] What is required for the effective carrying out of the mission of the Church in an Australian society that is not itself static will influence ultimately whether there is an appetite among Australian Anglicans for Constitutional change to meet the ongoing challenges.

Conclusion

[59] I end this lecture as I began with a reminder that canon lawyers are small cogs in facilitating the mission of the Church. This may be achieved by providing assistance in advising on the application of Church law and legislative solutions to the issues that arise within the Church (including creative solutions to maintain the unity of the Church) and the drafting of Church legislation to facilitate responsible, accountable and respectful governance in carrying out the mission of the Church.