

AUSTRALIA AND THE ANGLICAN COVENANT

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'This Commission recommends, therefore, and urges the primates to consider, the adoption by the churches of the Communion of a common Anglican Covenant which would make explicit and forceful the loyalty and bonds of affection which govern the relationships between the churches of the Communion... The Covenant could be signed by the primates.'

The Windsor Report²

INTRODUCTION

A recent article in this Journal by Professor Norman Doe³ explained the background to, and desirability of, an Anglican covenant, given the present contested issues of theology and discipline. This article examines how such a covenant might be dealt with in Australia.

A previous Australian primate said,

William Temple whose fame is in all the Churches is credited with having said: 'When people say that the Church should do something, they usually mean that the Bishops should say something'. The trouble is that the Bishops seldom agree among themselves, and in any case the Bishops are not the Church. The Church is made up of people: it is governed by an elected General Synod; when the Synod is not in session, its Standing Committee acts on its behalf. That is as democratic a system of church government as can easily be devised, but it makes it impossible for the Church to speak with a single authoritative voice. Therefore what the Primate should choose to say, or what the Bishops decide to say may be no more than a personal utterance and

¹ Member of the Australian General Synod Church Law Commission and Archbishop of Canterbury's Panel of Reference, previously member Anglican Consultative Council: Panama 1996, Lambeth Conference 1998 and Dundee 1999. This is a revised version of an essay in P Bolt, M Thompson and R Tong (eds) *The Faith Once For All Delivered - An Australian Evangelical Response to the Windsor Report*. (Australian Church Record, 2005).

² *The Windsor Report* (Anglican Communion Office, London, 2004) was produced by the Lambeth Commission on Communion chaired by Archbishop Robin Eames. This quotation is from para 118. The text of the draft covenant appears as an appendix to the Report.

³ N Doe 'The Anglican Covenant Proposed by the Lambeth Commission' (2005) 8 Ecc LJ 147.

may command no more support than those whose views it happens to reflect.⁴

Constitutionally, Australia is a federation of States⁵ and several Commonwealth Territories. In Australia, the Anglican Church is a voluntary association organised on a consensual basis. The law concerning voluntary associations is a matter for State and Territory parliaments. Thus, the Constitution⁶ of the Anglican Church of Australia (ACA) can be found as a schedule to a similar but not identical Act of each State and Territory parliament.⁷ The effect of the 'covering Acts' is to make dealings in property binding on bishops, clergy and laity; facilitate the conduct of tribunals and allow the administration of oaths.

Section 10 of the ACA Constitution provides for a Primate who shall be elected and hold office as may be prescribed by canon of the General Synod. The Primate of the ACA must be a diocesan bishop.⁸ Various functions are given by the ACA Constitution to the Primate, for example, the Primate is a member of the House of Bishops (section 16); presides at General Synod (section 20); convenes General Synod (section 23); and acts on the recommendation of tribunals as to sentence (section 60). A canon may give a specific task to the Primate.⁹

⁴ Presidential Address to the Sixth Australian General Synod 24 August 1981 by The Most Revd Sir Marcus Loane KBE, MA, DD Archbishop of Sydney and Primate. *Proceedings Sixth General Synod Anglican Church of Australia 1981*. (The General Synod Office, Sydney 1982).

⁵ The Australian States (New South Wales 1788, Tasmania 1825, Western Australia 1829, South Australia 1836, Victoria 1851, and Queensland 1859) existed as separate colonies of the United Kingdom before Federation in 1900. Law making power is shared between the Commonwealth and State and Territory Parliaments depending on the subject matter.

⁶ The text of the Constitution can be found on the General Synod website www.anglican.org.au/

⁷ Anglican Church of Australia Act 1980 (ACT); Anglican Church of Australia Act 1976 (NT); Anglican Church of Australia Constitution Act 1961 (NSW); Anglican Church of Australia Constitution Act 1961 (Qld); Anglican Church of Australia Constitution Act 1961 (SA); Anglican Church of Australia Constitution Act 1977 (Tas); Anglican Church of Australia Constitution Act 1985 (Vic); Anglican Church of Australia Constitution Act 1960 (WA).

⁸ Primate Canon 1985-2004. Unlike Canada or the United States of America the Australian Primate is not full-time. So far only bishops of metropolitan sees have been elected: Gough (Sydney), Woods (Melbourne), Loane (Sydney), Grindrod (Brisbane), Rayner (Melbourne), Carnley (Perth) and Aspinall (Brisbane). Before the 1961 constitutional arrangements, WG Broughton (1836-1853) was styled Bishop of Australia and from 1847 Bishop of Sydney and Metropolitan of Australasia. His successor, F Barker (1854-1882) was styled Metropolitan of Australia and from 1872, Primate. Thereafter, the Bishop of Sydney, (styled Archbishop from 1897), Barry, Saumarez-Smith, Wright, Mowl and Gough with one exception, was Primate. That exception was Le Fanu of Perth, Primate 1935-1947.

⁹ For example: the Defence Force Ministry Canon 1985-2001 where the Primate can issue a Licence for a Defence Force chaplain or appoint, with the approval of a majority of the Metropolitans, a bishop to the Defence Force. Not all dioceses have adopted the canon. In those dioceses the chaplain must have the licence of the diocesan to function. Even where the canon has been adopted, some dioceses endorse the Primate's licence or issue a parallel licence.

THE PROBLEM

Windsor 117 urges that a brief law be enacted in each province to enable a commitment to the covenant. An example is given: The Governing Body of the Church in Wales authorises the Archbishop of Wales to enter on behalf of this church the Anglican Covenant and commits the Church in Wales to comply and act in a manner compatible with the Covenant so entered.¹⁰

At present, there is no existing provision in the ACA Constitution or in any canon of the General Synod authorising the Primate to represent the ACA at large or specifically to sign a document such as the Anglican Covenant as proposed by paragraph 118 of Windsor.

AUTHORISING THE AUSTRALIAN PRIMATE

This lack of legal foundation for an Australian Primate to sign a covenant could be remedied by amending the ACA Constitution, or by passing a General Synod canon, or by a diocese by ordinance authorising the Primate to sign on behalf of that diocese. Each has problems. First, amending the ACA Constitution is neither quick nor easy. Generally, changes to core provisions of the Constitution require majorities in each of the Houses of Bishops, Clergy and Laity and subsequently, the assent of three quarters of the diocesan synods including all the metropolitan sees.¹¹ While diocesan synods meet annually, General Synod meets every three years, the next being 2007.

Secondly, if a canon was promoted to authorise the Primate to sign the covenant then as the subject matter of the covenant 'concerns the ritual ceremonial or discipline of this Church' (section 28), a special majority is required, being two thirds of the members of each house, to pass the canon. Even then, the canon does not become effective until every diocesan synod assents to it.

Thirdly, a diocesan synod could by ordinance cede to the Primate power to enter into the covenant on its behalf. In Australia, an ordinance of a diocesan synod is not made until the diocesan bishop assents to it.¹² As a matter of political reality why would a diocesan synod or its bishop cede power to the Primate in this case?

OTHER POSSIBILITIES

Putting to one side the question of authorising the Primate, the ACA Constitution could be amended to add new sections to Chapter II, Ruling Principles. Thus the terms of the covenant are incorporated into

¹⁰ *The Windsor Report*, n 79.

¹¹ Section 67 sets out how the Constitution can be changed. There are 23 dioceses in Australia. Metropolitan sees are Brisbane, Sydney, Melbourne, Adelaide and Perth.

¹² Contrast this with General Synod where a canon is passed by the votes of members. The Primate has no assent to give or withhold.

the constitution and become a constitutional imperative. The complex requirements for constitutional alteration have been indicated above.

Secondly, General Synod could by canon adopt the covenant but because the subject matter relates to ritual, ceremonial or discipline (section 28), special majorities are required. If passed by General Synod the provisional canon must then be assented to by all diocesan synods by ordinance. Once made, the canon does not take effect in a diocese until adopted by ordinance of the diocese because it affects the order and good government of the Church within a diocese (section 30).

IF ADOPTED, HOW BINDING WOULD THE COVENANT BE?

Assume the Primate is authorised to sign the covenant or the ACA Constitution is amended or General Synod passes a canon to adopt the covenant. How would the terms of a covenant bind the ACA, the individual dioceses, diocesan bishops or the clergy?

If the Australian Primate is authorised to sign the covenant in the terms suggested, the commitment to comply is not part of the law of the diocese until adopted by ordinance of the synod of that diocese. If the General Synod passed a canon contrary to the terms of the covenant the ultimate sanction on the ACA would be withdrawal from membership¹³ of the Anglican Communion. There would be no invitation to Lambeth, ACC or Primates' Meetings.

At the diocesan level the Offences Canon 1962-1998 could be used to charge clergy and bishops¹⁴ but only in those dioceses where the synod has adopted the covenant. For example, in the internal province of New South Wales some dioceses, given their history, would adopt the covenant and others would not. Further, for the seven diocese¹⁵ in the State of New South Wales, church tribunal rulings on charges against clergy may have no ultimate legal effect unless church trust property is involved.¹⁶ Surely an absurd situation.

¹³ *The Windsor Report*, Para 157.

¹⁴ Clause 1 of the canon sets out various offences including: Conduct, whenever occurring, (a) which would be disgraceful if committed by a member of the clergy, and (b) which at the time the charge is preferred is productive, or if known publicly would be productive, of scandal or evil report. In addition a bishop may be charged with violation of the Constitution or of the canons or ordinances of his synod, (clause 2).

¹⁵ Armidale, Bathurst, Canberra/Goulburn, Grafton, Newcastle, Riverina and the Metropolitan See, Sydney.

¹⁶ In *Scandrett v Dowling* 27 NSWLR 483 the New South Wales Court of Appeal refused to grant an injunction to restrain the Bishop of Canberra/Goulburn from ordaining women as priests without an authorising canon from General Synod. The court held that the Constitution of the ACA in force in the State of New South Wales was binding in conscience only and not justiciable in a civil court unless a matter concerned church property. The leading High Court of Australia case of *Cameron v Hogan* 51 CLR 358 was applied. In that case the Premier of Victoria (Hogan) had been expelled from the state branch of the Australian Labor Party. As Hogan had no proprietary interest in the property of the association the High

Of course these are general observations made about a general proposition. A strict legal analysis must await a firm and precise proposal.

SOME POLITICAL REALITIES

Any proposal to enlarge the powers of the Primate or General Synod will be strongly resisted by significant parts of the ACA. First, the history of the making of the Constitution of the ACA¹⁷ revealed diocesan, churchmanship and theological fault lines across the foundations of Australian Anglicanism. Those fault lines remain, and are exacerbated by census figures over the last decade¹⁸ which indicate evangelical growth, liberal stagnation and Anglo-Catholic invisibility. The covenant process enlarges the function of the Primate and at least on paper, tightens constitutional bonds. The call is for the opposite.¹⁹

Secondly, as indicated above, changes to core provisions of the ACA Constitution require all metropolitan sees to assent by ordinance to the change. Given past history, the synod of the diocese of Sydney is most unlikely to pass any ordinance to enlarge the powers of the Primate or to amend the Constitution to include the terms of the proposed covenant. Thirdly, allegations about the theological orthodoxy of the Sydney synod and the theological leadership of the diocese by the recently retired Primate are strong arguments against enhancing the office of Primate.²⁰ Fourthly, even if it was possible to make the covenant part of the General Synod legislative framework, without Sydney agreement, the covenant would have no effect on a bishop of a diocese or in a diocese unless and until that diocese, by ordinance of its synod, adopted the covenant. Thus the covenant would apply in some dioceses but not in others.

Fifthly, before the ordination of women, bishops generally accepted the validity of an ordination by another bishop. It was entirely a matter for the bishop's discretion whether the ordained person was licensed to function in the diocese. No bishop could be compelled to recognise an ordination by another bishop or compelled to licence clergy ordained elsewhere. The covenant does not change this. Sixthly, the extent to which laypersons are

Court held that he had no entitlement to a declaration or injunction in respect of his expulsion. Further the rules of the association did not act as an enforceable contract between members. See also *Wylde v Attorney-General (NSW)* 78 CLR 224.

¹⁷ See J Davis *Australian Anglicans and their Constitution*. (Acorn Press, Canberra, 1993); BN Kaye *Anglicanism in Australia* (Melbourne University Press 2002).

¹⁸ General Synod website search 'church attendance' or see www.anglican.org.au and search 'church attendance'.

¹⁹ See for example, Letter from Australia by Bishop David Chislett in New Directions December 2004 and essay by Archbishop Peter Jensen 'The Archbishop of Canterbury: Accountability and Unity' in *The Faith Once For All Delivered* see n 1.

²⁰ See P F Carnley, *Reflections in Glass: trends and tensions in the contemporary Anglican Church* (Harper Collins, Sydney, 2003) and Colloquium on Subordinationism and the Doctrine of the Trinity especially essay by the Revd Dr Peter Adam, 20 August 2004. Trinity College Melbourne. www.trinity.unimelb.edu.au/. See also St Mark's Review vol 1 2005.

bound by an Anglican covenant is uncertain. In the State of New South Wales, synod decisions are only binding on laity if the decision relates to property.²¹ Seventhly, it is unlikely that the reformed, evangelical, protestant and biblically literate laity found in several Australian dioceses will cede to Canterbury what is in the end coercive power.

CONCLUSION

Paragraph 118 of the Windsor Report includes the following:

To the extent that this (the draft Covenant) is largely descriptive of existing principles, it is hoped that its adoption might be regarded as relatively uncontroversial.²²

As drafted the covenant is objectionable to evangelicals. Its language and thought forms are Catholic; many of its assertions cannot be properly grounded in scripture; laity continue to be excluded from international Anglican decision making; loyalty is to structures and organisational unity rather than the apostolic faith; and worst of all, Canterbury becomes papal.²³ Given the synodical arrangements in Australia, generations may pass before a covenant text is approved, let alone adopted and even then, not in every diocese of the Australian church.

Is there another way? Exclusion from fellowship, is the response of the New Testament churches to those who depart from the apostolic faith. Some have taken that step (see Windsor 28–30 and the Primates' Meeting 2005). As invitations to Lambeth are solely in the discretion of the Archbishop of Canterbury,²⁴ some bishops could be left off the list.²⁵ Archbishop Williams could rest on New Testament principles and practices. Biblical leadership of this character would immediately lift the morale of the Anglican Communion in its most populous provinces. It would be akin to George Carey's leadership at Lambeth 1998 when he joined the debate and made a major speech, from the floor, in favour of Lambeth resolution 1.10.²⁶ It made a lasting impression on those who were present.

The covenant is a *cul de sac*.

²¹ Anglican Church of Australia Constitutions Act 1902 (NSW) s 4; Anglican Church of Australia Constitution Act 1961 (NSW) s 2.

²² *The Windsor Report*, para 118.

²³ See the proposed Anglican Covenant Article 27: Interpretation and Periodic Review. The Archbishop of Canterbury shall decide all questions of interpretation of this Covenant ... the decision of the Archbishop shall be regarded as authoritative in the Communion.

²⁴ In 1958 only diocesans were invited; some assistant bishops were invited in 1968; in 1978 the ACC Standing Committee were included; in 1988 and 1998 the whole ACC and all active bishops were invited.

²⁵ Fisher, (Archbishop 1945-1961) did not invite Bishop Fred Morris to Lambeth 1958. Morris had been consecrated in 1943 in St Paul's Cathedral by Temple as Bishop of North Africa. When Morris retired in 1955 he was elected bishop of the Church of England in South Africa.

²⁶ See G Carey, *Know the Truth* (HarperCollins, 2004), p 328.