(2022) 24 Ecc LJ 209–238 © Ecclesiastical Law Society, 2021

COMMENT

The Constitutionality of Diocesan Legislation Relating to Same-Sex Blessings and Marriage in the Anglican Church of Australia: A Case Note

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Keywords: diocesan legislation, same-sex marriage, same-sex blessings, Anglican Church of Australia, Thirty-Nine Articles, *Book of Common Prayer*, doctrine, discipline

INTRODUCTION

In November 2020, the Appellate Tribunal (the Tribunal) of the Anglican Church of Australia (ACA) provided its opinion on references as to the constitutionality of diocesan legislation relating to same-sex blessings and marriage.[1] There were two concurrent references about a marriage blessing service intended for use in the Diocese of Wangaratta (the Wangaratta references). There were also two concurrent references about the Clergy Discipline Ordinance 2019 Amending Ordinance 2019 of the Diocese of Newcastle (the Newcastle references).

In the Wangaratta references, the Tribunal determined by a majority of five members to one member that the marriage blessing service is not inconsistent with the Constitution of the ACA (the ACA Constitution) and is authorised by its enabling legislation (the Wangaratta Majority Opinion and the Wangaratta Minority Opinion respectively).[2] In the Newcastle references, the Tribunal in the first reference determined by a majority of five members to one member

1 The Appellate Tribunal has seven members, four of whom are lay persons who are current or former lawyers, and three of whom are diocesan bishops.

2 ACA Constitution available at <https://anglican.org.au/wp-content/uploads/2019/12/Constitution-update-011219-for-web.pdf>; Wangaratta Majority and Minority opinions available at <https://anglican.org.au/wp-content/uploads/2020/11/AT-Wangaratta-formatted-11112020FINAL.pdf>, both accessed 14 January 2021. The members in the majority were 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. The member in the minority was Ms Gillian Davidson. One of the diocesan bishops, Bishop John Parkes of Wangaratta, took no part in the Wangaratta references.

https://doi.org/10.1017/S0956618X21000624 Published online by Cambridge University Press

that 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 (the Newcastle Majority Opinion and the Newcastle Minority Opinion respectively).[3] But this would not affect the constitutional jurisdiction of diocesan tribunals to determine charges for offences created by the ACA Constitution or by any canon of the General Synod that is in force in the diocese. The majority of the Appellate Tribunal in the second reference declined to answer the questions as there was insufficient practical utility in doing so.

In this case note, I summarise the reasons of the majority and minority of the Tribunal on the substantive issues in the Wangaratta and Newcastle references, and make some brief concluding comments. As will be seen, there is a difference between the majority and minority in relation to several points of legal principle as to the meaning and application of provisions of the ACA Constitution and the Thirty-Nine Articles, and the status and exegesis of earlier opinions of the Tribunal.

THE WANGARATTA REFERENCES

The background

The Marriage Act 1961 (Cth) (Marriage Act), an enactment of the Commonwealth Parliament, governs the formation of marriages within Australia and the recognition of overseas marriages. Since its inception the Marriage Act has authorised marriages to be 'solemnized' by a 'minister of religion' in any recognised denomination, a registered civil celebrant, chaplains and others. Effective from 9 December 2017, pursuant to the Marriage Amendment (Definition and Religious Freedoms) Act 2017 (Cth), the Marriage Act was amended to permit the formation or recognition of marriages other than between a man and a woman.

Since its establishment on 1 January 1962, the canon law of the ACA has restricted solemnisation of matrimony to the wedding of one man and one woman.[4] In 1992 the General Synod provisionally passed the Canon Concerning Services 1992 (the 1992 Canon). There were various assents, dissents and reports by the dioceses. In 1998 these were considered by the General Synod and the 1992 Canon passed unanimously in each house. It was subsequently amended in 2017.[5]

3 Newcastle Majority and Minority opinions available at<https://anglican.org.au/wp-content/uploads/2020/12/AT-Newcastle-formatted-11112020-FINAL.pdf>, accessed 14 January 2021. The same members who heard the Wangaratta references heard the Newcastle references. There was the same majority and minority as in the Wangaratta references.

4 Wangaratta Majority Opinion at para 39.

5 Available at <https://anglican.org.au/wp-content/uploads/2019/06/Canon-Concerning-Services-1992-updated-GS17.pdf>, accessed on 14 January 2021.

https://doi.org/10.1017/S0956618X21000624 Published online by Cambridge University Press

The 1992 Canon, but not the 2017 amendments, has been adopted by ordinance of the Synod of the Diocese of Wangaratta. Sections 4 and 5 of the 1992 Canon as in force in the Diocese of Wangaratta provide:

> 4. (1) The following forms of service are authorised:
>
> (a) the forms of service contained in the Book of Common Prayer;
>
> (b) such forms as may have been authorised, as regards a parish, pursuant to the Constitution of a canon of the General Synod in force in the diocese of which that parish is part.
>
> (2) Every minister must use only the authorised forms of service, except so far as the minister may exercise the discretion allowed by section 5.
>
> 5. (1) The minister may make and use variations which are not of substantial importance in any form of service authorised by section 4 according to particular circumstances.
>
> (2) *Subject to any regulation made from time to time by the Synod of a diocese*, a minister of that diocese may on occasions for which no provision is made use forms of service considered suitable by the minister for those occasions.
>
> (3) All variations in forms of service and all forms of service used must be reverent and edifying and must not be contrary to or a departure from the doctrine of this Church.
>
> (4) A question concerning the observance of the provisions of sub-section 5 (3) may be determined by the bishop of the diocese.[6]

Section 10 of the 1992 Canon provides that Canons 14, 18, 19, 43, 45, 46, 47, 49–57, 64, 67 and 72 of the Canons of 1603, in so far as the same may have any force, have no operation or effect in a diocese which adopts the 1992 Canon.

The Synod of the Diocese of Wangaratta made the Blessing of Persons Married According to the Marriage Act Regulations 2019 (Wangaratta Regulations), reliant upon section 5(2) of the 1992 Canon.[7] The Regulations came into operation on 1 September 2019 but the service had not been used pending the outcome of the Wangaratta references. The central provision is Regulation 4, which 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 no other form of service.

6 The 1992 Canon as in force in the Diocese of Wangaratta is available at <https://anglican.org.au/wp-content/uploads/2019/10/1590-Canon-Concerning-Services-in-effect-in-Wangaratta-2019.pdf>, accessed 14 January 2021; emphasis added in quotation.

7 The Wangaratta Regulations are available at <https://anglican.org.au/wp-content/uploads/2019/10/1590-Wangaratta-Legislation-Blessing-Regulation-Bill.pdf>, accessed 14 January 2021.

https://doi.org/10.1017/S0956618X21000624 Published online by Cambridge University Press

The questions and answers

The first of the concurrent references was by the Primate of his own motion and contained the following questions, to which the majority (and the minority) gave the following answers:

> 1. Q: Whether the regulation Blessing of Persons Married According to the Marriage Act 1961 Regulations 2019 made by the Synod of the Diocese of Wangaratta is consistent with the Fundamental Declarations and Ruling Principles in the Constitution of the Anglican Church of Australia?
>
> A: [Majority:] The regulation is not inconsistent with the Fundamental Declarations or the Ruling Principles. [Minority:] No, the Regulations are not consistent with the Fundamental Declarations and Ruling Principles.
>
> 2. Q: Whether the regulation is validly made pursuant to the Canon Concerning Services 1992?
>
> A: [Majority:] No ground of invalidity has been established. [Minority:] No, the Regulations are not validly made.

The second of the concurrent references was by the Primate at the request of 41 members of the General Synod and comprised three questions, the second of which the majority declined to answer because of its general and hypothetical nature. As the first and third questions and answers are similar to the two questions answered in the first reference, I have not set them out. The minority gave the following answer to the second question:

> 2. Whether the use of any other form of service, purportedly made in accordance with section 5 of the Canon Concerning Services 1992, to bless a civil marriage which involved a union other than between one man and one woman is consistent with the doctrine of this Church and consistent with the Fundamental Declarations and Ruling Principles in the Constitution of the Anglican Church of Australia.
>
> A: No, such a form of service would not be consistent with the Fundamental Declarations and Ruling Principles.

The hearing

The references were decided without an oral hearing. In response to a general invitation from the Tribunal, 47 groups, dioceses and individuals elected to participate, 34 of which filed written submissions, and 7 of which filed written submissions in reply.[8] Submissions were also received from the

8 The consolidated written submissions are available at <https://anglican.org.au/wp-content/uploads/2020/01/Appellate-Tribunal-Wangaratta-Submissions.pdf>; the consolidated written submissions

https://doi.org/10.1017/S0956618X21000624 Published online by Cambridge University Press

House of Bishops and the Board of Assessors in response to the request for their opinions from the Tribunal pursuant to section 58 of the ACA Constitution.[9] The majority noted that it was aided by the spectrum of theological and legal viewpoints published recently by the Doctrine Commission, *Marriage, Same-Sex Marriage and the Anglican Church of Australia*.[10]

The applicable provisions of the ACA Constitution

Part 1 of the ACA Constitution consists of Chapter 1, Fundamental Declarations (ss 1–3), and Chapter II, Ruling Principles (ss 4–6). The applicable Fundamental Declarations are that the ACA 'holds the Christian Faith as professed by the Church of Christ from primitive times' (s 1); receives the canonical Scriptures 'as being the ultimate rule and standard of faith given by inspiration of God and containing all things necessary for salvation' (s 2); and 'will ever obey the commands of Christ [and] teach His doctrine' (s 3).

Section 4 (in the Ruling Principles) confers and qualifies authority in the ACA to deal with matters of faith, ritual, ceremonial and discipline. As regards ritual and ceremony, the section first declares that the ACA 'retains and approves the doctrine and principles of the Church of England embodied in' the *Book of Common Prayer* (BCP), the Ordinal and the Thirty-Nine Articles. Then it declares that the ACA

> has plenary authority at its own discretion to make statements as to ritual and to order its forms of worship and to alter or revise such statements and forms provided that all such statements, forms or alteration or revision thereof are consistent with the Fundamental Declarations and made as prescribed by the Constitution.

Further, the BCP, together with the Thirty-Nine Articles, is to be regarded as the authorised standard of worship and doctrine in the ACA, and no alteration in or permitted variations from the services of the BCP or the Thirty-Nine Articles shall contravene any principle of doctrine or worship laid down in such standard.

in reply are available at <https://anglican.org.au/wp-content/uploads/2020/03/Appellate-Tribunal-%E2%80%93-Wangaratta-%E2%80%93-Submissions-14-February-2020-updated-5-March-2020.pdf>, both accessed 14 January 2021.

9 The submission from the House of Bishops is available at <https://anglican.org.au/wp-content/uploads/2020/11/Response-of-the-House-of-Bishops-to-Four-Questions-posed-by-the-Appellate-Tribunal.pdf>; that from the Board of Assessors is available at<https://anglican.org.au/wp-content/uploads/2020/11/Final-Report-of-Board-of-Assessors-20200901.pdf>, both accessed 14 January 2021.

10 Wangaratta Majority Opinion at para 3. Doctrine Commission, *Marriage, Same-Sex Marriage and the Anglican Church of Australia*, 2019, <https://anglican.org.au/wp-content/uploads/2019/07/Marriage-Doctrine-Essays-Final.pdf>, accessed 15 January 2021.

https://doi.org/10.1017/S0956618X21000624 Published online by Cambridge University Press

Section 58(1) of the ACA Constitution provides that, before giving an opinion on any reference, the Tribunal shall in any matter involving a point of doctrine upon which the members are not unanimous obtain the opinion of the House of Bishops, and of a board of assessors consisting of priests appointed by or under canon of the General Synod. Section 63(1) confers jurisdiction on the Tribunal to give an opinion on any question which arises under the ACA Constitution. Section 66 provides that there is no power to alter the Fundamental Declarations (ss 1–3). Section 71(1) provides in part that: 'Nothing in this Constitution shall authorise the synod of a diocese to make any alteration in the ritual or ceremonial of this Church except in conformity with an alteration made by General Synod.'

The meaning of 'doctrine' in the ACA Constitution is defined in section 74(1). Unless the context or subject matter otherwise dictates, it means 'the teaching of this Church on any question of faith'. 'Faith' is there defined to include 'the obligation to hold the faith'. 'Ritual' is also there defined to include 'rites according to the use of this Church'. References to faith 'extend to doctrine' unless the context or subject matter otherwise indicates (s 74(4)). Section 74 (2) defines the BCP to mean the *Book of Common Prayer* as received by the Church of England in the dioceses of Australia and Tasmania before and in 1955.

The majority opinion

The majority set out their reasons under a series of headings which I have largely used or adapted in this case note. To avoid unnecessary repetition, I have noted one instance where the minority agreed with the majority.

The (limited) role of law in Church and State: drawing lines

At the outset, the majority noted that the Tribunal only decides theological issues for the purpose of, or in the course of determining, legal questions arising under the ACA Constitution.[11]

The jurisdiction to entertain this reference

The majority and minority accepted that the Tribunal had jurisdiction because the questions arose 'under' the ACA Constitution.[12]

Marriage in Church, State and society

There have been varieties of marriage over time and place. Church, State and private conscience have (within limits) constantly shaped and altered the parameters of the institution.[13]

11 Wangaratta Majority Opinion at para 7.
12 Ibid at paras 9, 13; Wangaratta Minority Opinion at paras 5–7.
13 Wangaratta Majority Opinion at para 16.

https://doi.org/10.1017/S0956618X21000624 Published online by Cambridge University Press

Same-sex relationships and same-sex marriages

There are also varieties of enduring same-sex relationships. The changing response of the civil law to same-sex relationships was summarised.[14] As long as constitutional boundaries are respected and existing laws obeyed, it will be up to the clergy and laity of the ACA to determine the Church's interaction with people attracted to the same sex and with their families.[15]

The Canon Concerning Services 1992 and the Wangaratta blessing service

The General Synod has power under sections 4 and 71(1) of the ACA Constitution to alter the BCP (including the Ordinal). This plenary authority, which 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. The provisions of section 4 dealing with (1) alterations in, or variations from, the services contained in the BCP and (2) 'deviations' from existing orders of service to be authorised by the bishop of the diocese on various conditions are not engaged by the Wangaratta blessing service. The exercise of this plenary authority is subject only to consistency with the Fundamental Declarations and the 1992 Canon being made as prescribed by the ACA Constitution.[16]

The majority rejected the submission that section 5(2) of the 1992 Canon did not provide a power to proscribe or condition the exercise of the minister's discretion because the Wangaratta Synod does not have independent power to legislate on spiritual matters. The submission depended on the debatable assumption that liturgies are exclusively of a spiritual nature, even if they are contemplated for use on Church trust property. Further, the Constitution of the Province of Victoria operates subject to the ACA Constitution. Here, the 1992 Canon itself conferred on the diocesan synod conditional authority to 'regulate' a sphere of liturgical activity which is not framed by reference to the particular legislative competence of the diocesan synod.[17]

The majority rejected submissions that the Wangaratta blessing service did not satisfy the conditions in section 5(2) and the first limb of section 5(3) of the 1992 Canon.[18] They noted that the submissions mainly divided as to whether the Wangaratta Regulations contravene section 5(3)'s requirement that the form of the service 'must not be contrary to or a departure from the doctrine of this Church'.[19]

14 Ibid at paras 29–36.
15 Ibid at para 38.
16 Ibid at paras 45–47, 54, 57.
17 Ibid at para 59.
18 Ibid at paras 65–67.
19 Ibid at para 69.

https://doi.org/10.1017/S0956618X21000624 Published online by Cambridge University Press

The law and doctrine of marriage in the Church of England, 1662–1962

On 1 January 1962, when the ACA Constitution came into force, it was the canon law of the ACA that holy matrimony could only be solemnised in the ACA as between one man and one woman and that law has not yet been altered. It was the law because, as at 1962, it was the law of the Church of England in England and that law was in force throughout Australia (ACA Constitution, s 71(2)).[20]

Many of the biblically justified incidents of what was sometimes called 'Christian marriage' have since 1662 been varied by the Church of England and/or by the ACA and/or by the State with the acquiescence of those Churches. This pattern made it well-nigh impossible, in the majority's view, for those contending that the Church's complete 'doctrine of marriage' as at 1662 was part of the 'Faith' as professed by the Church of Christ from primitive times (see ACA Constitution, s 1) or that the full BCP teaching entailed matters necessary for salvation. And it presented the question of identifying why the teaching about a monogamous heterosexual union was in a different legal category.[21] The elision of the expressions 'doctrine of marriage' and 'the doctrine [of the ACA]' (as defined in s 74(1) of the ACA Constitution) had been productive of much confusion in the actions and debates leading up to and continued in the Wangaratta references.

The majority then examined the Church of England's doctrine of marriage as found in the Thirty-Nine Articles (1562), the Catechism (1662), the marriage service in the BCP (1662) and teachings and rules therein, the Canons of 1603 and the general law, including statutes and applicable cases as to banns of marriage, the requirement of an episcopally ordained priest, the recognition of the validity of non-conforming marriages by ecclesiastical courts, the prohibited degrees of consanguinity and affinity, the legal doctrines built upon the 'one flesh' metaphor taken from Genesis 2:24 and a wife's duty to 'obey' her husband, and the continuing preclusion of solemnising same-sex marriages carried across into the ACA by section 71(2) of the ACA Constitution.[22] They conclude that the ACA's inherited 'doctrine of marriage', as expounded in the BCP at many points in time between 1662 and the present day, was changed in response to different understandings of Scripture, changing perceptions about the respective roles of men and women, and the need to accommodate the law of the land as well as the laws of other lands where couples marry abroad.[23] This pattern of change continued after the commencement of the ACA Constitution in 1962 with its

20 Ibid at para 72.
21 Ibid at para 74.
22 Ibid at paras 78–124.
23 Ibid at para 140.

https://doi.org/10.1017/S0956618X21000624 Published online by Cambridge University Press

preclusion of departure from the Fundamental Declarations and its limited entrenchment of the BCP 'principle(s) of doctrine or worship' in the Ruling Principles.[24]

While logic does not demand that the BCP teachings about the union of one man and one woman must be treated in a similar conceptual framework, the majority held that this cannot be done by simplistic assertions about the inalterability of the BCP 'doctrine of marriage' or an insistence upon acceptance of the totality of the Scriptural teachings about marriage that were endorsed and enforced in 1662 or even 1962.[25]

The Wangaratta blessing service is not 'contrary to or a departure from the doctrine of this Church'

The majority considered whether the aspect of the Church's 'doctrine of marriage' about the union of one man and one woman is doctrinal in the constitutional sense; and what (if any) bearing this has on the constitutional validity of a service of blessing that extends to the civil marriage of a same-sex couple.[26]

The Fundamental Declarations (ss 1–3) and the Ruling Principles (ss 4–6) of the ACA Constitution point to several authoritative sources from which the tribunals and synods of the ACA ascertain the doctrine (including 'any principle of doctrine' (see s 4)) of the ACA that may inform and control their various jurisdictions. Those sources do not include bodies outside the ACA, whether or not they are the Church of England, the Lambeth Conference, or Anglican Churches or bodies which may or may not be in communion with the Church of England or participants at the Lambeth Conference. This does not preclude consulting such 'external' sources for their informative or persuasive effect, so long as care is taken to avoid the distorting effect of the different constitutional or institutional settings from which statements or declarations by such entities proceed.[27]

Pursuant to Rule XIX, Re Interpretation which was in force when the 1992 Canon was passed, the expression 'the doctrine of this Church' in section 5(3) of the 1992 Canon has the same meaning as in section 74(1) of the ACA Constitution.[28] 'Doctrine' is a constitutional concept which (where it applies) has a quite different meaning to the non-constitutional concept of the ACA's (or the Church of England's) 'doctrine of marriage'.[29] The meaning of 'doctrine' in the Constitution is closely defined in section 74(1). Unless the

24 Ibid at para 141.
25 Ibid at para 129.
26 Ibid at para 131.
27 Ibid at paras 134–135.
28 Ibid at paras 138–139.
29 Ibid at para 142.

https://doi.org/10.1017/S0956618X21000624 Published online by Cambridge University Press

context or subject matter otherwise dictates, it means 'the teaching of this Church on any question of faith'.[30]

The settled meaning of 'doctrine' in the ACA Constitution is 'the Church's teaching on the faith which is necessary to salvation'. In the view of the majority, this was the view of several members of the Tribunal in their opinions with respect to the ordination of women to the priesthood in 1987 and 1991.[31] There was no justification for departing from the settled meaning of 'doctrine'.[32] The ACA Constitution distinguishes between the Scriptures and the 'Faith', confirming that not every proposition sought to be drawn from Scripture is itself the 'Faith'.[33]

The plain words of the constitutional definition, the pattern of action taken over the centuries in relation to the 1662 'doctrine of marriage' and the earlier rulings and actions of the Tribunal showed that it is impossible to take the teachings in the BCP solemnisation liturgy and require that they be regarded as themselves 'doctrine'. That would not only ignore the prescriptive definitional language of section 74 but it would effectively prevent the ACA from discerning new insights from the Holy Scriptures and the (better parts of) the history of the Christian Church.[34] Accordingly, based upon the ACA Constitution's meaning of 'doctrine', there was no inconsistency with the 'doctrine' components of the Fundamental Declarations. There was no contravention of section 5(3) of the 1992 Canon either.[35]

The Wangaratta Regulations and their authorised blessing service are not otherwise inconsistent with the Fundamental Declarations

A contestable and contested corollary of a 'command' or of a 'doctrine' of Christ could not, in the view of the majority, be the basis for the Tribunal purporting to intervene to settle a debate by an appeal to the Fundamental Declarations. The problems were compounded in the Wangaratta references since there was a need to explore the linkage between the posited teaching/doctrine about the solemnisation of marriage and any teaching/doctrine about blessing in a constitutional context.[36]

30 Ibid at para 143.
31 'Report of the Appellate Tribunal re the Ordination of Women to the Office of Deacon Canon 1985', 1987 (1987 Opinion), available at <https://anglican.org.au/wp-content/uploads/2019/06/Ordination-of-Women-to-the-Office-of-Deacon-Canon-1985-.pdf>, accessed 21 August 2021; 'Report and opinion of the Tribunal on the eleven questions appertaining to the ordination of a woman to the order of priests or the consecration of a woman to the order of bishops', 1991 (1991 Opinion), available at <https://anglican.org.au/wp-content/uploads/2019/06/Ordination-of-Woman-to-Order-of-Priests-or-to-Order-of-Bishops.pdf>, accessed 14 January 2021.
32 Wangaratta Majority Opinion at paras 145–158.
33 Ibid at para 173.
34 Ibid at para 179.
35 Ibid at para 181.
36 Ibid at para 184.

https://doi.org/10.1017/S0956618X21000624 Published online by Cambridge University Press

There is no constitutional inconsistency with the Christian faith as professed from primitive times specified in section 1 of the ACA Constitution. There is and always has been a distinction between the teaching and practice of the Christian (or Anglican) Church about marriage and its 'profession' of the 'Faith', particularly as set forth in the creeds.[37]

The submissions showed that Anglicans of good faith hold sharply diverging attitudes on the teaching (if any) of Holy Scripture about same-sex marriage in its modern context, and the function of Church blessings generally. The references to 'faith' and 'things necessary for salvation' in section 2 of the ACA Constitution focus attention on what is and what (by implication) is not declared to be 'fundamental' as to the authority of the Holy Scriptures so far as concerns the ACA Constitution. The Tribunal does not make definitive rulings on such matters as the messages in the Holy Scriptures about marriage and homosexuality unless essential to do so in the exercise of its constitutional functions. The call for the Tribunal to discover in the Scriptures, particularly 1 Corinthians 6:9–10, and to apply a direct constitutional preclusion must be declined, consistently with the past jurisprudence of the Tribunal. History has shown time and again that resort to law is rarely the effective or even the Scriptural way to resolve 'doctrinal' disagreements between believers.[38]

There is no 'command of Christ' within section 3 of the ACA Constitution directly referable to the issues of the Wangaratta blessing service or what it purports or seeks to do. The link between Jesus' teaching about the indissolubility of marriage between a man and a woman in Matthew 19:3–8, 11–12 and Mark 10:2–12 and the contested corollaries concerning same-sex marriages and blessings of the same are not of such a nature or clarity that it would lead the Tribunal to rule that the Wangaratta Regulations and the Wangaratta blessing service offend the Fundamental Declarations.[39]

The Tribunal does not have to address the detailed arguments about the consistency of the blessing service with contested propositions about the 'doctrine of blessing'

Within the four corners of the 1992 Canon the General Synod has conferred a liturgical discretion that is available according to its terms, most importantly so long as the service is not inconsistent with or a departure from the doctrine of the ACA. Those discretions are not for the Tribunal to second guess, any more than they are for persons outside the Diocese of Wangaratta to challenge in the Tribunal except on demonstrably constitutional grounds.[40]

37 Ibid at paras 185–192.
38 Ibid at paras 193–239.
39 Ibid at paras 240–253.
40 Ibid at para 255.

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There was debate about the theology of blessing, and in particular whether a blessing must be contingent upon confession of relevant sin and that the blessing of a same-sex marriage can never involve this. The Tribunal did not have to take a position on this theological debate because the majority had not been persuaded that the Wangaratta blessing service contravened any commands of Christ, doctrines in the canonical Scriptures or even doctrines recognised in the formularies of the ACA in such a way as to reveal inconsistency with the Fundamental Declarations. It should be left for General Synod if it wishes to amend the 1992 Canon or take other action.[41]

Matters formal, procedural and dispositive

The majority specifically disagreed with the minority that the Tribunal might judge the legality of synodical legislation by reference to *The Principles of Canon Law Common to the Churches of the Anglican Communion* (Canon Law Principles).[42]

The minority opinion

The minority member set out her reasons under a series of headings which, again, I have largely used or adapted in this case note.

Executive summary

The Wangaratta Regulations are invalid in the minority view because they are:

i. Inconsistent with the Fundamental Declarations as the doctrine of the ACA is that marriage is only permitted between one woman and one man, Scripture teaches that same-sex practice is not permitted and the witness of the Church Universal is opposed to same-sex practice;
ii. Inconsistent with the Ruling Principles as they are contrary to the Fundamental Declarations and therefore also the Ruling Principles (Article XX), they seek to bless same-sex civil unions which would not qualify for Christian marriage (as such civil unions are contrary to the Church's teaching on marriage), they seek to bless sinful practice, contrary to the ACA's teaching that persistence in sexual immorality endangers salvation, and they contravene the principle that practice and worship should be consistent in furtherance of the good order of the ACA; and
iii. Not validly made under the 1992 Canon as they are contrary to the doctrine of the ACA, the 1992 Canon does not empower a synod to

41 Ibid at paras 257–258.
42 Ibid at para 289. Anglican Communion Legal Advisers' Network, *The Principles of Canon Law Common to the Churches of the Anglican Communion* (London, 2008).

https://doi.org/10.1017/S0956618X21000624 Published online by Cambridge University Press

make regulations and the Synod of Wangaratta does not otherwise have power to make regulations with respect to non-temporal matters by virtue of the Church of England Act 1854 (Vic) (the 1854 Act).[43]

Approach to previous opinions of the Tribunal

The minority disagreed with the opinion of the majority that the meaning of 'doctrine' in the ACA Constitution is 'the Church's teaching on the faith which is necessary to salvation'. The majority applied the phrase 'which is necessary to salvation' as qualifying the word 'teaching' and therefore constraining its meaning. However, this is a misunderstanding of Article VI of the Thirty-Nine Articles on which Archbishop Rayner is relying in the 1987 Opinion. Read in context, the phrase 'which is necessary to salvation' must qualify the word 'faith' rather than the word 'teaching'.[44]

Are the Wangaratta Regulations inconsistent with the Fundamental Declarations?

The 'Christian faith' in section 1 of the ACA Constitution means the teaching or doctrine which is the substance of the faith 'once and for all delivered to the saints' (Jude 3). It includes 'the whole counsel of God, both Law and Gospel as it has been revealed'.[45] The phrase 'containing all things necessary for salvation' with respect to the canonical Holy Scriptures in section 2 of the ACA Constitution cannot properly be construed as stating that only some of the Scripture has the authority of 'the ultimate rule and standard of faith'.[46] The reach of the authority of Scripture is made even clearer in section 3 of the ACA Constitution.[47]

The unanimous view of both the House of Bishops and the Board of Assessors was that Scripture teaches that homosexual practice is sinful, that persistent, unrepentant, sin threatens salvation and that such behaviour should not be blessed by the ACA.[48] The Wangaratta Regulations do not reflect Christian truth as understood by 'the One Holy Catholic and Apostolic Church of Christ' or as taught by Scripture, and accordingly are inconsistent with the Fundamental Declarations.[49]

Are the Wangaratta Regulations inconsistent with the Ruling Principles?

The minority emphasised that marriage in the BCP is only between a man and a woman; this is applied in a multitude of ways, has been professed by the Church

43 Wangaratta Minority Opinion at para 27.
44 Ibid at paras 31–37.
45 Ibid at paras 60–61.
46 Ibid at paras 73, 75, 77.
47 Ibid at para 78.
48 Ibid at paras 87–91.
49 Ibid at para 92–93.

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since primitive times and has been clearly taught by Scripture. It is a 'principle of doctrine' within section 4 of the ACA Constitution. That the marriage service may have changed in parts, either before or after adoption of the ACA Constitution in 1962, does not affect the conclusion that the ACA's doctrine of marriage is a principle of doctrine contained in the BCP. The Wangaratta Regulations are inconsistent with a principle of doctrine contained in the BCP and are therefore invalid.[50]

That persistence in sexual immorality endangers salvation has been applied in many ways, has been professed by the Church since primitive times and has been clearly taught by Scripture. It is a 'principle of doctrine' within section 4 of the ACA Constitution. The ACA cannot bless behaviour which is sinful or sexually immoral; in particular, it cannot bless or encourage behaviour which, if persisted with, endangers salvation. The Wangaratta Regulations seek to create a service of blessing for a same-sex civil union which involves sexual practice outside that which is taught or contemplated by Scripture and the doctrine of the ACA, and which is intended for life. The Wangaratta Regulations are inconsistent with a principle of doctrine contained in the BCP and are therefore invalid.[51] Article XX of the Thirty-Nine Articles provides that the ACA cannot authorise anything contrary to Scripture. This is a 'principle of doctrine' which the Wangaratta Regulations contravene.[52]

Consistency of practice and worship, in furtherance of the good order of the ACA, is a principle of doctrine and worship contained in the Thirty-Nine Articles and the BCP. Consistency does not require rote conformity but it does require a sufficient level of coherence that practice and worship can function as part of a single unified whole. By contrast, the Wangaratta Regulations expressly contemplate that a minister may refuse to use the service, and will allow one parish to conduct the service and another to refuse to do so, on the grounds of conscience. Viewed nationally, the inconsistencies in practice on a fundamental point of whether the Church may bless a same-sex civil union are divisive. The Wangaratta Regulations do not further the good order, consistency of practice and worship within the Diocese of Wangaratta or the ACA; rather, they endanger the unity of the ACA. They also contravene Principles 1, 2 and 3 of the Canon Law Principles. Therefore the Wangaratta Regulations are inconsistent with a principle of doctrine and worship contained in the Thirty-Nine Articles and the BCP.[53]

50 Ibid at paras 150–153.
51 Ibid at paras 154–160.
52 Ibid at paras 161–162.
53 Ibid at paras 163–174.

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Are the Wangaratta Regulations validly made under the 1992 Canon or the 1854 Act?

The minority accepted submissions that the Wangaratta blessing service did not satisfy the conditions in section 5(2) and the second limb of section 5(3) of the 1992 Canon. Section 5(4) does not grant a diocesan bishop exclusive power to determine a question concerning the observance of the provisions of section 5(3) as the 1992 Canon must be construed in a manner consistent with the Fundamental Declarations and the Ruling Principles.[54]

The 1854 Act limits the powers of the Synod of Wangaratta (and all Victorian Synods) to 'temporal matters' only. The Wangaratta Regulations provide for a spiritual blessing and, as such, extend to spiritual matters. The Synod of Wangaratta does not have power to legislate with respect to such matters under the 1854 Act.[55]

THE NEWCASTLE REFERENCES

The background

The Synod of the Diocese of Newcastle passed the Clergy Discipline Ordinance 2019 (CDO or the principal ordinance) to replace a 1966 ordinance of a similar name. It received the bishop's assent on 25 October 2019.[56] The following day the Synod passed the Clergy Discipline Ordinance 2019 Amending Ordinance 2019 (the proposed ordinance) which relevantly provides:

> 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 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;

54 Ibid at paras 179–183.
55 Ibid.
56 Available at <https://anglican.org.au/wp-content/uploads/2019/10/Clergy-Discipline-Ordinance-2019.pdf>, accessed on 14 January 2021.

https://doi.org/10.1017/S0956618X21000624 Published online by Cambridge University Press

(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.[57]

As far as was known to the Tribunal, the proposed ordinance was yet to receive assent by the bishop.

The questions and answers

The first of the concurrent references was by the Primate at the request of the Bishop of Newcastle and comprised three questions, the third of which the majority declined to answer because it did not arise under section 63 of the ACA Constitution. The majority (and the minority) gave the following answers to the first two questions:

1. Q: 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?

   A: [Majority:] No, having regard to the limited operation of the Ordinance were it assented to. [Minority:] Yes.

2. Q: 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?

   A: [Majority:] 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. [Minority:] No.

The minority gave the following answer to the third question:

3. Q. 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,

   (a) may the Bishop give assent to the Ordinance on receiving the opinion of the Appellate Tribunal; or

57 Clergy Discipline Ordinance 2019 Amending Ordinance 2019, available at <https://anglican.org.au/wp-content/uploads/2019/10/Clergy-Discipline-Ordinance-2019-Amendment-Ordinance-2019.pdf>, accessed 14 January 2021.

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(b) is the Synod required to pass the ordinance again?

A: (a) No. (b) 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 second of the concurrent references was by the Primate at the request of 25 members of the General Synod and it comprised five questions, which the majority declined to answer because there was insufficient practical utility in doing so.

The minority gave the answer 'In my view, the proper and correct answer to this question is "Yes", and hence, the [proposed ordinance] would be inconsistent with the Constitution' to the five questions (from which the prefatory words are omitted):

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

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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?

The hearing

The references were decided without an oral hearing. In response to a general invitation from the Tribunal, eight groups, dioceses and individuals elected to participate, seven of which filed written submissions and three of which filed written submissions in reply.[58]

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

The ACA 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 ACA Constitution and to any canon of the General Synod operating in the diocese. Subject to this framework, diocesan synods may create additional offences. Appeals lie to the Tribunal. The system is supplemented by the authority of the bishops

58 The consolidated written submissions are available at <https://anglican.org.au/wp-content/uploads/2020/01/Appellate-Tribunal-Newcastle.pdf>; the consolidated written submissions in reply are available at <https://anglican.org.au/wp-content/uploads/2020/02/Appellate-Tribunal-Newcastle-14-February-2020.pdf>, both accessed 14 January 2021.

https://doi.org/10.1017/S0956618X21000624 Published online by Cambridge University Press

to license and de-license clergy and by the interlocking professional standards regime.[59] Section 51 of the ACA Constitution provides that '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.' 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 section 53 has jurisdiction to hear and determine charges:

i. Of 'breaches of faith ritual ceremonial or discipline' (s 54(2));
ii. Of such offences as may be specified by any canon ordinance or rule (s 54(2)); and
iii. 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)).

The Special Tribunal has jurisdiction to hear and determine charges against current and former diocesan bishops and bishops assistant to the Primate in his capacity as Primate (s 56(6)).

The Offences Canon 1962 (Offences Canon), which has been adopted in the Diocese of Newcastle, specifies offences which may be committed by a member of the clergy and by a current or former diocesan bishop.[60] The offences include 'unchastity' and 'any other offence prescribed by ordinance of the synod of the diocese'.

For the ACA Constitution, with regard to Chapter IX (which includes section 54), 'discipline' is defined in section 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: (i) the obligations in the ordinal undertaken by that person; and (ii) the ordinances in force in that diocese'.

The CDO defines 'discipline' as including 'the rules of the Church and the rules of good conduct' (s 4). Those rules are not further defined. Many of the rules of

59 Alongside the tribunals constituted by the ACA Constitution there is a professional standards regime which has been established to examine the fitness of clergy including bishops and lay leaders to hold office. This complimentary system has been established due to perceived difficulties in taking disciplinary action against clergy in the constitutional tribunals.

60 Available at <https://anglican.org.au/wp-content/uploads/2019/03/Offences_Canon_1962_updated_GS17.pdf>, accessed on 14 January 2021.

https://doi.org/10.1017/S0956618X21000624 Published online by Cambridge University Press

the ACA and of good conduct are derived from the law of the Church of England in 1962 because section 71(2) of the ACA Constitution declares that

> The 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 section 71(2) (in Chapter XII), 'discipline' is defined in section 74(9)(a) of the ACA 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.

The majority opinion

The majority held that the ACA Constitution as regards charges of breaches of faith, ritual, ceremonial or 'discipline' (s 54(2) and charges otherwise falling within s 54(2) and (2A)) confers the diocesan tribunal with jurisdiction that cannot be precluded by a diocesan synod or even by a canon of the General Synod.[61]

The Synod of the Diocese of Newcastle is free to introduce a 'no discipline policy' with regard to putative offending that does not entail a breach of faith, ritual, ceremonial or discipline as defined in section 74(9)(b) of the ACA Constitution or otherwise entail an offence against the Offences Canon or any other canon of the General Synod in force in the diocese.[62] To the extent that the Newcastle Synod has untrammelled authority to make particular conduct the subject of a disciplinary charge, 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 the Tribunal in the exercise of its appellate authority.[63] However, a diocesan ordinance that impairs or detracts from the jurisdiction conferred upon diocesan tribunals by section 54(2) and (2A) of the ACA Constitution, and by section 1 of the Offences Canon (so long as that Canon is in force in the diocese), will be null and void at least to the extent of the inconsistency.[64]

61 Newcastle Majority Opinion at para 33.
62 Ibid at paras 34–35.
63 Ibid at para 36.
64 Ibid at para 41.

https://doi.org/10.1017/S0956618X21000624 Published online by Cambridge University Press

The majority held that section 3 of the proposed ordinance purports in large part to detract from the jurisdiction conferred upon diocesan tribunals to the extent 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. This was for two reasons. First, 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) of the proposed ordinance. Secondly, it declares that the conduct and matters referred to in clause 7(3)(a), (b) or (c) 'shall not be considered an 'offence' within the meaning set out in' section 4(1) of the CDO.[65] It was noted that the Newcastle Synod, in passing the proposed ordinance, 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, and that the constitutional constraints are different in the ACA.[66]

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 the 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. Nor does the Tribunal purport to declare the scope of clause 7(3)(c).[67]

The final words of the proposed clause 7(3) purport to amend the scope of the term 'offence' as it is defined in the CDO. In addition, 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. At this point, the majority noted that 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 ACA 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

65 Ibid at para 42.
66 Ibid at para 43.
67 Ibid at para 47.

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ACA 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 section 74(9)(b) of the ACA Constitution, then the diocesan synod can choose to preclude its enforcement.[68]

The minority opinion

The minority said that her opinion in the Wangaratta references about the following matters was important and relevant also to her opinion in the Newcastle references:

i. The place of the ACA Constitution;
ii. The Fundamental Declarations, including the place of the Holy Scriptures as the 'ultimate rule and standard of faith' and the basis for the doctrine of the ACA regarding marriage, the impermissibility of same-sex practice and the risk to salvation of persistence in sexual immorality; and
iii. The Ruling Principles, including the principle that the ACA's practice and worship should be consistent and coherent, in furtherance of the good order of the ACA.[69]

The minority set out her reasons under a series of headings which I have largely used or adapted in this case note.

The first reference: is any part of the proposed ordinance inconsistent with the Fundamental Declarations or the Ruling Principles of the ACA Constitution?

The answer to the question is 'Yes'. The effect of the proposed ordinance is to modify the grant of jurisdiction given by Chapter IX of the ACA Constitution. It would create an inconsistency between the laws of the Diocese of Newcastle and those of the ACA as it would alter, impair and detract from the operation of the Offences Canon as it has been adopted by the Diocese of Newcastle. By effectively removing the ability of the Diocesan Tribunal of Newcastle to hear any complaints of such offences, it would remove the ability of the Tribunal or the Provincial Tribunal to hear and determine an appeal from any determination of the Diocesan Tribunal. It would lead to an inconsistency in how such offences would be heard and dealt with in the ACA as a whole, impairing and detracting from the Offences Canon, by creating differences between offences applicable to clergy in the Diocese of Newcastle compared to other dioceses, and offences applicable to the Bishop of Newcastle compared to other bishops subject to the jurisdiction of the Special Tribunal.[70]

68 Ibid at paras 49–50.
69 Newcastle Minority Opinion at para 19.
70 Ibid at paras 20, 35, 36, 39–41.

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The first reference: does the Synod of the Diocese of Newcastle have the authority under section 51 of the ACA Constitution to pass the proposed ordinance?
The answer to the question is 'No'. The proposed ordinance is not consistent with the Fundamental Declarations. The legislative powers of the Newcastle Synod do not extend to matters which are the exclusive domain of the General Synod. Where the 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 has adopted it to assert that no action may be taken in the diocese to prosecute such offences. These legislative powers are subject to the limitation in section 51 of the ACA Constitution and so must also be 'for the order and good governance of this Church within the diocese'. This limitation has been held to mean that a diocese cannot legislate upon matters relating to the order and good government of the ACA as a whole, or the order and good government of the ACA within another diocese.[71] The proposed ordinance allows a person to avoid charges for certain offences committed in other dioceses by relocating residency to the Diocese of Newcastle. Further, it would be beyond the legislative powers of the Newcastle Synod because it would not be 'for the order and good governance of this Church within the diocese'. It would harm the core principles and order of the ACA and would contravene Principle 2 of the Canon Law Principles.[72]

The first reference: may a bishop give assent to an ordinance on receiving the opinion of the Tribunal?
The answer to the question is 'No'. Nothing in the Constitution of the Diocese of Newcastle allows the bishop to delay or postpone giving assent.[73]

The first reference: is the Synod required to pass the ordinance again?
The answer to the question is 'Yes'. The same considerations set out in the answers to the first and second questions would apply to any such ordinance.[74]

The second reference
The answer to the question is 'Yes'. The same considerations set out in the answers to the first and second questions of the first reference would apply if the proposed ordinance came into effect.[75]

71 *Harrington & Ors v Coote* (2013) 119 SASR 152 at 156; [2013] SASCFC 154.
72 Newcastle Minority Opinion at paras 44–65.
73 Ibid at para 67.
74 Ibid at para 68.
75 Ibid at para 69.

https://doi.org/10.1017/S0956618X21000624 Published online by Cambridge University Press

CONCLUSION

There are parallels between the opposition on constitutional grounds to diocesan legislation relating to same-sex blessings which were the subject of the Wangaratta and Newcastle references and the opposition on constitutional grounds to the ordination of women to the priesthood a generation earlier.[76] If successful in each case on the basis of inconsistency with the Fundamental Declarations, then the effect of section 66 of the ACA Constitution would have been effectively to preclude these innovations. The Tribunal in each case rejected submissions of inconsistency with the Fundamental Declarations. The reasons of the majority of the Tribunal in the Wangaratta references indicate a narrow approach in interpreting the Fundamental Declarations.

However, there is a substantial difference in the outcome of these earlier and current references. This is because the power of a diocese to provide for the ordination of women to the priesthood required legislation of the General Synod (being the Law of the Church of England Clarification Canon 1992[77]), whereas the power of a diocese to provide for same-sex blessings was authorised by the 1992 Canon (which was part of the modernisation of the canon law of the ACA by the repeal of the Canons of 1603). This authorisation does not extend to same-sex marriage. Legislation of the General Synod will be required to amend the principle that marriage is between a man and a woman.

As the majority in the Wangaratta references made clear, the Tribunal is an unsuitable forum to decide disputed theological questions and will only do so where it is necessary to decide constitutional questions.[78] The eighteenth General Synod is scheduled to be held in May 2022, having been postponed twice from June 2020 because of the COVID-19 pandemic. That General Synod will be held in the context of the Wangaratta and Newcastle references and it is likely that there will be debate about same-sex blessings and same-sex marriage. Even if the 1992 Canon were amended to preclude same-sex blessings, the amended Canon would not have any force and effect in a diocese unless it was adopted in the diocese.

Of particular interest to canon lawyers is the different approach of the majority and the minority to the appropriateness of reference to the *Canon Law Principles Common to the Churches of the Anglican Communion* to decide the legality of synodical legislation.

doi:10.1017/S0956618X21000624

76 1991 Opinion.
77 Available at <https://anglican.org.au/wp-content/uploads/2019/03/Law_of_the_Church_of_England_Clarification_Canon_1992.pdf>, accessed 14 January 2021.
78 Wangaratta Majority Opinion at para 258.