Special Report
WOMEN AS BISHOPS AND THE APPELLATE TRIBUNAL

In 2004, the General Synod of The Anglican Church of Australia, meeting in Fremantle, attempted for the second time to make a canon authorizing the consecration of women in priest's orders as bishops of the Australian Anglican church. The first attempt had failed as the members of the synod were divided. There were those who opposed women being made bishops. There were those who considered the provisions in the proposed canon aimed at protecting minorities were inadequate. There were those who supported the notion of women being made bishops but who objected to the protective provisions. The second attempt also failed. The debate was not pleasant. There were emotional scenes outside the synod hall. But nobody in the debate suggested that a canon to authorize women being made bishops was not needed to remove the restrictions inherited from the Church of England in England.

In an opinion issued in 1991, six of the seven members of the Appellate Tribunal of The Anglican Church of Australia had said that in the absence of a canon of the General Synod authorizing the consecration of a woman to the office of bishop, the bishop of a diocese is not empowered to consecrate a woman to the office of bishop. Although the opinion related to the Diocese of North Queensland, it was taken as applicable to all of the Australian dioceses. Hence, the belief that a canon was needed to remove the restriction.

Shortly before the General Synod meeting last October in Canberra, the Appellate Tribunal issued an opinion. It was to the effect that a canon of the General Synod was not needed as an amendment to the Constitution, which took effect in 1995, had removed the barriers in the Constitution without, one might add, anyone being aware of it!

This amendment to the Constitution had its beginnings in a report dated 15 February 1989 from the Canon Law Commission to the Standing Committee of the General Synod and the General Synod. (The Canon Law Commission was a committee established by the Standing Committee of the General Synod originally to revise the church law inherited from The Church of England in England.) The relevant part of the report is as follows:

> The Commission was asked by the Standing Committee to begin the process of reforming the 1961 Constitution. Matters being considered by the Commission include…
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> Section 8…
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> The purpose of the reform is not to change the substance of the constitution but to clarify provisions which are obscure…

Some explanation may be needed at this point. The Anglican Church of Australia is constituted by a series of similar Acts of the parliaments of the Australian States. The Constitution is a schedule to each of these Acts. It is very badly drawn - as one might expect from a document that took 30 years to be put together and was composed by a series of committees. Many of its provisions are obscure. One obscure provision was the definition of "canonical fitness". This expression is used in section 8 of the Constitution and was defined in the Constitution before the 1995 amendment to mean:

> …the qualifications required in the Church of England in England for the office of a bishop at the date when this Constitution takes effect.

In a letter to the Standing Committee sent shortly thereafter, the Canon Law Commission wrote under the heading "Section 8 and "Canonical Fitness"" as follows:

> The Commission proposed that a bill for a canon and a bill be promoted to substitute a new definition for the present definition of "canonical fitness" in Section 74(1). The proposed definition is as follows:
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> "'Canonical Fitness' means, as regards a person, that:
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> (a) that the person has attained at least 30 years of age;
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> (b) the person has been baptised; and
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> (c) the person is in priests' orders."
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> This definition records the qualifications required by the Church of England in England in 1961. It is of relevance to Section 8. Whilst Section 8 is also in need of reform it seemed

> appropriate to defer consideration of this section until after the new definition has been adopted.

The amendment proposed by the Canon Law Commission was received without debate by the Standing Committee of the General Synod and passed by it onto the General Synod for its attention. There it also received little attention. The writer's recollection is that it was dealt with as a non-controversial improvement to the Constitution. At that time, while the issue of the role of women in ministry was a lively issue, it is reasonable to conclude that nobody thought that any change of substance was being effected.

Yet in the 2007 opinion, four members of the Appellate Tribunal (Justice Keith Mason, Justice David Bleby, Archbishop Phillip Aspinall and Archbishop Roger Herft) opined that the new definition effected a significant change to the provision in the Constitution which preserves the inherited law of The Church of England in England and three members (Justice Peter Young, Mr Max Horton and Bishop Peter Brain) considered that it did not. The thinking of the Canon Law Commission and the basis on which the Standing Committee of the General Synod and the General Synod itself acted was considered by Justice Mason to be "unhelpful" and "hypothetical" and was dismissed as irrelevant, notwithstanding that, elsewhere in his opinion (see paragraph 98), Justice Mason referred to and relied on the thinking of the framers of the Constitution on a point on which there is not a scrap of evidence whatever of their thinking! It is hardly correct for Justice Mason to dismiss the thinking of the Canon Law Commission as "hypothetical".

The secular courts have generally refused to consider legislative intention in construing the meaning of legislation. Justice Mason assumed that the law in this area is applicable to the General Synod. The assumption is unstated in the opinion of Justice Mason and no justification for it is offered by him. Before making the assumption Justice Mason should have provided an analysis of the reasons for the position taken by the secular courts and a consideration as to whether the General Synod should be considered to be an equivalent to a secular parliament or congress. There are superficial resemblances but there are numerous and substantial differences – for example, the electorate, the nature of the business, the absence of any "government" or "opposition", the limited powers, and the reliance on committees.

It is unfortunate that the other three members who constituted the majority did not consider the carefully thought through views of Justice Young on the interpretation of the amendment and the consequences of the position of the majority. Several times in his opinion Justice Young observed that it was odd that alteration of a definition that only applies to a poorly understood process should be considered to work a fundamental change to our church structure.

Equally surprising is the fact that three of the four members of the Tribunal who comprised the majority were members of the General Synods that debated proposed canons to authorize the consecration of women as bishops yet none of them informed the members of those General Synods that those members were wasting their time as no authorizing canon was needed.

The basis argument of Justice Mason depended on the terms of section 8 of the 1961 Constitution. The relevant part of that section is as follows:

> There shall be a bishop of each diocese who shall be elected as may be prescribed by or under the constitution of the diocese, provided that the election shall as to the canonical fitness of the person elected be subject to confirmation as prescribed by ordinance of the provincial synod, or if the diocese is not part of a province then as prescribed by canon of General Synod.

According to Justice Mason, this part of section 8 performs two functions:

First, section 8: "…. provides for the appointment of diocesan bishops by election as prescribed under the constitution of the relevant diocese. This allows the several dioceses to decide (subject to the Constitution) upon the qualifications for their diocesan bishops and the processes for electing them." (See paragraph 43 of the Justice Mason's opinion.)

Second: "The section implies the continuing necessity for a confirmation process, while providing the means whereby that confirmation could be regulated as to "the" (ie all: see below) questions of "canonical fitness"." (See paragraph 44 of Justice Mason's opinion.)

Justice Mason's conclusion is that since 1995 the only questions to be considered in determining whether or not a person is canonically fit to be a bishop are the three matters in the new definition. The change in the definition, according to Justice Mason, had the effect of sweeping aside all other requirements apart from those three and those determined under the constitution of the relevant diocesan synod. If the diocesan synod has not prescribed any requirements, none exist. The requirements of Scripture have disappeared – unless they have been so prescribed. The requirements of the Ordinal in The Book of Common Prayer have suffered a similar fate. Significantly, nowhere in his opinion does Justice Mason refer to or pay any regard to the requirements of Scripture or the Ordinal. Nor does he mention the Fundamental Declarations or the Ruling Principles in the Constitution.

When I first read paragraphs 43 and 44 of Justice Mason's opinion (the relevant parts are quoted above), I thought that he would qualify what he said later in his opinion. But no, quite the reverse. In paragraph 87, he wrote:

> I have already indicated why the plain meaning of the amended definition in s 74(1), read in its context, is that those vested with the necessary power of confirmation as to canonical fitness of an elected diocesan bishop may only have regard to the three "qualifications" stated, namely attainment of at least 30 years of age, baptism and being in priest's orders. Other matters are irrelevant to the confirmation process regarding diocesan bishops.

A new liberalism is upon us.

Justice Bleby agreed with Justice Mason and, in particular, by the new definition:

> the Church was effectively overriding any law of the Church of England with respect to the qualification for the office of diocesan bishop imported by s 8 and the definition in s74(1) of the Constitution.

(see paragraph 32 of Justice Bleby's opinion). Unfortunately Justice Bleby did not point this out to the other members of the Canon Law Commission or to the Standing Committee of the General Synod or to the General Synod when the new definition was considered by those bodies. Nor in his opinion does he offer any explanation for this omission.

Archbishops Aspinall and Herft also expressed their agreement with Justices Mason and Bleby. One may wonder why they also omitted to put the previous General Synods out of the pain of the debate on the canons to authorize the consecration of women as bishops. Nor do they justify the abolition of the Biblical requirements or those in the Ordinal. Archbishop Herft indicated in his opinion that at least he was aware of the requirements of Scripture and of BCP. He wrote (paragraph 21 of his opinion):

> A brief overview of the historic pattern is a set of conditions or exhortations that are laid out as in Acts1:21-26, in Timothy 3:1-13. 1 Peter 5:1-11. Similar exhortations are found in the early liturgical texts and find their place in the exhortations contained in the current Ordinals, the 1662 Book of Common Prayer and in both *An Australian Prayer Book* and *A Prayer Book for Australia*. These are far ranging and the questions cover the wide range of faith, doctrine and holiness of life issues that are required in Christian leadership.

However, he seems to imply (in paragraph 27 of his opinion) that these matters might be the subject of an objection to the consecration in the course of the service. Unfortunately he gives no reason why this should or could be the case. Nor does he note that there is no mechanism for dealing with such an objection or that the law of The Church of England does not permit an objection to be made in the context of the consecration service.

The main opinion of the minority was that of Justice Young. His honour said (paragraph 12 of his opinion):

> I find it impossible to reason from possible absurdities of imputed intention of the framers of the Constitution that an amendment to the definition of canonical fitness has altered the substantial law, and has altered the fundamental rule continued in force by s 71(2).

His reasons were, in summary, as follows:

1. The 1995 change in the definition did not address what qualifications were needed to be a bishop. (paragraph 28).
2. The confirmation process has never been closely examined. His honour considered it to be "rather odd" that an alteration of a definition that only applied to a poorly understood process should be considered to work such a fundamental change to church structure (paragraph 30). In the context of this reason, it is worth remembering that the Canon Law Commission regarded the new definition as the first step only in a process of reforming s. 8.
3. His honour thought it to be strange that there is no process to challenge the election of a bishop (paragraphs 34 and 35).
4. "As to the consecration of a bishop, the Ordinal provides that the chief consecrator, who, at least by custom is the Metropolitan, must examine the bishop elect as to whether he accepts Holy Scripture, whether he will teach that nothing is relevant to salvation that is not recorded therein and that he will live a sober and good life. I cannot accept that none of these matters have ceased to have any relevance. They are given prominence in the service, which is, by section 4, held up as a basic standard of our faith. It seems most odd that an alteration to a definition section should effect such a fundamental change." (see paragraphs 39 and 40)
5. "With respect to Justice Mason, my view is that there is insufficient material from which one could conclude that at any time in its operation s 8 of the Constitution was a code as to who was eligible to be consecrated a bishop." (paragraph 47)

Various members of the Tribunal identified potential problems under provincial legislation and in relation to the consecration of assistant bishops. There will vary from province to province and diocese to diocese.

It is conceivable that a subsequent and differently composed Appellate Tribunal may reverse the majority opinion but this is unlikely. Some will hold the majority opinion to be wrong and simply ignore it – as they are entitled to do. But others will act on it and it is clear that, in time, women bishops will appear on the Australian scene.

The implications of this are not clear. Some bishops have already indicated that they may not recognize the episcopal acts (for example, confirmation and ordination) of a woman bishop and will not take part in a service conducted by a women bishop. Time will tell.

The position of such women bishops will be different from the position of women priests. The latter can appoint to a canon of the General Synod as legal authority for their office. The former will not have the benefit of that assurance.

In a number of previous opinions, various members of the Appellate Tribunal advanced the principle that, under the Constitution, significant changes to the rules governing the Anglican Church of Australia need to be made by the General Synod. The General Synod has generally proceeded on this basis. That principle has been well and truly exploded by the majority of the Tribunal. The result may be anarchy.

Of particular concern is that the opinion of the Tribunal has created an atmosphere of distrust. No longer can one rely on the assurances of a body such as the former Canon Law Commission. Nor can one rely on the assurances of a member of the Appellate Tribunal, based on previous opinions, as to the effect of a provision in the Constitution.

A clergyman from another State spoke to the writer on the opinion in the course of the Canberra meeting. He supported women in the episcopate but expressed himself to be appalled at what had happened. He is not likely to be the only one of that opinion.

What should the synod of a diocese do in these circumstances? The synod may disagree with the opinion and proceed on the basis that the majority is wrong and the requirements of the Scriptures and

the Ordinal are still applicable. A better course, to avoid any doubt, may be to re-enact those requirements by local legislation. Justice Mason seems to think that that can be done but not all diocesan synods will have the power to enact such legislation. If a diocesan synod has such power, the prudent course will be not just to re-enact the requirements but, in addition, to prohibit the bishop of the diocese from certifying canonical fitness in accordance with the new definition and from involving himself in any consecration where those requirement have not be considered and satisfied.

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