

5/09 Review of Clergy Retirement Age

(A report from a committee appointed by the Standing Committee at the request of the Synod.)

Introduction

1. By resolution 5/09, the Synod requested the Standing Committee to appoint a committee to review the current practice with regard to clergy retirement age in the Diocese, the membership of the committee to comprise both laypersons and clergy, with lay membership being at least one more than the clergy membership. Synod suggested that the committee investigate, but not be limited to, the following matters –

- (a) the introduction of a retirement age for clergy in this Diocese and the reasons for it, including any changes that have been made to diocesan practice since that introduction,
- (b) whether there are still good reasons to have a fixed retirement age for clergy and what those reasons are,
- (c) if a fixed retirement age is to be retained, what that age should be, when it should be reviewed, and what procedures should be in place to extend it in individual cases,
- (d) if a fixed retirement age is no longer deemed desirable, what mechanisms would need to be put in place to ensure that both clergy and the parishes or organisations in which they serve are properly provided for,
- (e) the recommendations of the committee as to clergy retirement age or otherwise, and
- (f) what changes, if any, would need to be made to the Retirements Ordinance 1993 and any other relevant ordinances if the recommendations of the committee were to be adopted by the Synod.

2. At its meeting on 15 February 2010 the Standing Committee appointed Bishop Robert Forsyth (Chairman), the Rev Bob Cameron, Mr John Pascoe, Mr James Flavin and Mr Steve Lucas to comprise the committee. The Standing Committee also requested that the committee consider, as part of its review, the question of appointing senior and/or long term rectors to a position of Rector Emeritus.

A brief history of clergy retirement in the Diocese

3. In 1964 the Archbishop's Commission, established by Archbishop Gough, recommended in the report known as the Trigg Report, that parish clergy (or incumbents) be required to retire at 65, with a possible extension to 70 years of age. The main argument

presented was that the advent of superannuation now assisted a clergyman to make contributions to retire adequately. The report noted that in 1961 provision was made for superannuation for clergy but “no decision [had] been made as to retiring age”.

4. A special synod was held in March 1965 at which the principles in relation to the retirement of the Archbishop, clergy and other diocesan officers were accepted. In the synod of 1969, an ordinance was presented to implement the retirement of clergy and other officers. This Ordinance, No. 43 of 1969, established a retirement age of 65 with an extension to 70, except for the Archbishop. Ordinance, No. 43 of 1969 also established a Retirements Board. This Ordinance was replaced in 1993 by the Retirements Ordinance 1993 (the “Ordinance”). The Ordinance addressed some discrepancies and made some very minor changes in the retirement ages. The Ordinance is currently in force in the Diocese and has undergone little change since its introduction. The basic principle of retirement for clergy at 65 with a possible extension to 70 for those holding incumbencies therefore has been in place in the Diocese since 1969.

5. There seems to have been little discussion about the rationale for a retirement age in the respective Synod reports. It was taken for granted that at some point clergy should retire. The main discussion in the reports centred on whether superannuation made adequate provision for retirement.

6. In 1994 the Synod resolved to request the Standing Committee to review the present rules regarding retirement ages. The Standing Committee did so and reported back to the Synod at its following session. The report did not recommend or give rise to any change to the retirement provisions in force at that time.

The legal basis

Constitutional basis for retirement

7. The Ordinance relies upon section 3(4) of the Anglican Church of Australia Constitutions Act 1902. The 1902 Constitution establishes the legislative powers of the Synod. Section 3(4) states that the licence of a minister may be revoked in the following circumstances –

“The Synod of each Diocese shall have power to determine by ordinance in what cases the licence of a member of clergy licensed by the [Archbishop] may be suspended or revoked. Any such licence may be suspended or revoked by the [Archbishop] at the request of the member of the clergy, or (after opportunity given to that member of the clergy to show cause) in such of the said cases as the Synod shall by ordinance determine, save as aforesaid, the licence shall not be suspended or revoked, except as a consequence of a

judgement or finding of the tribunal or of some other court of competent jurisdiction.”

8. Therefore apart from a member of clergy requesting revocation of his or her licence or as a consequence of a finding of a Tribunal or Court, the Archbishop can only revoke the licence of a member of clergy, in accordance with an ordinance of the Synod, after inviting that member of clergy to show cause.

9. Clause 4 of the Ordinance makes it a term of the appointment or licensing of a Minister that the Minister retire at the age of 65. Clause 6 makes provision for the retirement age to be extended to an age not beyond 70 years. The retirement age does not itself bring about a termination in the licence of the Minister rather it gives rise to a circumstance or point in time at which the Archbishop may revoke a Minister's licence after providing the Minister with an opportunity to show cause.

10. The effect of an extension in the retirement age is to defer the age at which the Archbishop may consider revocation of the Minister's licence. Once the Minister has attained the age of 65, and all extensions have expired, the Archbishop may consider at any time thereafter revoking the licence. One implication of this is that a Minister is not obliged to step aside from office simply because he has reached the retirement age. The Archbishop is free to allow the Minister to continue in his present incumbency for so long as he may wish.

11. If the Minister's licence is revoked upon reaching the retirement age, clause 8(2) applies which provides for the Archbishop to license the Minister to any position in the Diocese he may determine provided it is a term of the licence that it is revocable at any time.

Age Discrimination

12. From time to time a question is asked as to whether a compulsory retirement age for incumbents offends the law proscribing age discrimination in NSW.

13. Under Part 4E of the *Anti-Discrimination Act 1977 (NSW)* it is unlawful for a person –

- (a) to retire an employee from employment, or
- (b) to require an employee to retire from employment, or
- (c) to threaten to retire an employee from employment, or
- (d) to engage in conduct with a view to causing an employee to retire from employment,

on the ground of the employee's age.

14. The *Age Discrimination Act 2004 (Cth)*, which applies in NSW by virtue of the external affairs power, provides similarly.

15. Section 351 of the *Fair Work Act 2009*, which from 1 January 2010, upon referral of power by the NSW government, applies to all employers in NSW, provides that –

“An employer must not take adverse action against a person who is an employee, or prospective employee, of the employer because of the person's race, colour, sex, sexual preference, age, physical or mental disability, marital status, family or carer's responsibilities, pregnancy, religion, political opinion, national extraction or social origin.”

16. Each piece of legislation outlined above applies only in the context of a relationship of employment save to some other matters that are not relevant to this report. The members of clergy who are subject to the Ordinance are not employees for the purposes of the above legislation. Accordingly the Ordinance does not infringe any age discrimination law in force in NSW.

Principles concerning retirement

17. Ordination to the presbyterate is for life, but not the holding of particular offices and responsibilities in the Diocese, especially that of being an incumbent. Where someone holds an office and the decision to retire is entirely theirs it is appropriate that there be an age limit on that office. This applies, for example, in the case of judges.

18. Where a person is employed the employer has the opportunity to review the performance of the employee and commence a termination process where performance is inadequate. In such circumstance there is no need for a retirement age and in fact such a stipulation would offend age discrimination laws.

19. Since Ministers hold a tenured office it is necessary to have a stipulated age at which their retirement is to be considered or alternatively a process whereby an incumbent can be removed from office if they are no longer able to adequately fulfil the duties of that office at some point in time.

20. Strictly speaking the retirement age is not the age at which it is compulsory for a Minister to retire. It is rather a point in time after which the Archbishop may revoke the licence of the Minister, after having given the Minister an opportunity to show cause. It is therefore a trigger date for the Archbishop to consider whether a Minister, who has not by that stage retired voluntarily, ought to retire. The Archbishop is at liberty to allow the Minister to continue his incumbency for so long as he may wish. The retirement age as discussed below should be understood in this sense.

The Options

21. The Committee considers the principle that clergy who are incumbents be subject to a retirement age should be maintained. The alternative of having no fixed retirement age but a process for the removal of incumbents where they are unable to adequately fulfil the duties of the office is not favoured by the Committee. Such a process would be difficult for the parish concerned and equally difficult for the incumbent. It could give rise to controversies and a rough transition to a new incumbent. A retirement age helpfully depersonalises the process.

22. If the principle that a retirement age should be maintained is accepted there are two further matters that need to be considered. Firstly, what should that retirement age be? Secondly, should provision be made for the retirement age to be extended in appropriate circumstances, and if so, up to what age and what should be the process for making such a determination?

The Retirement Age

23. The Committee considers that the retirement age should not be any younger than the age at which a person becomes eligible for a full pension from the government (disregarding whether or not the person would meet the means test for the pension). This seems to have been the principle applied in the past when compulsory retirement was introduced. Although compulsory retirement is increasingly no longer practiced in the secular sphere, there is still a notional retirement age, being the age at which a person becomes eligible to receive the pension. It is the submission of the Committee that it is unjust to force someone to retire when there is no provision in the general community for that retirement. It should not be assumed when setting a retirement age that incumbents will have sufficient superannuation independent of the pension on which to retire.

24. Based on these principles the Committee recommends that compulsory retirement at 65 years of age be maintained but be adjusted in accordance with any change in the age at which a person is eligible for the pension. The federal government has already flagged an increase in the age at which a person becomes eligible for the aged pension. By 1 July 2013 the pension age for women will have risen from 60 to 65, putting it on par with the current pension age for men. The qualifying age for the pension for both men and women will then be increased by 6 months every 2 years starting from 1 July 2017 up to 1 July 2023, when the qualifying age for both men and women will reach 67.

25. The recommendation of the Committee is that the present retirement age should be increased in line with the pension age.

Extensions to the retirement age

26. The usual expectation is that, all else being equal, the Archbishop will revoke a Minister's licence when that Minister reaches the retirement age. However the Committee acknowledges the value of not losing good people too early when they are in good health and mind and have much to give to parish ministry and therefore recommends that a facility for granting extensions be maintained.

27. An extension to the retirement age under the Ordinance is in fact an extension to the date from which the Archbishop can revoke a Minister's licence. The Archbishop therefore already has the ability to continue a Minister in an incumbency for so long as he may wish subject to the Minister also wishing to continue. However the Committee considers that the role of the Retirements Board in making recommendations to the Archbishop concerning extensions is vital and should continue. The Board is able to investigate the health and well being of the Minister (seeking medical reports etc). It is also able to interview both the Minister and parish representatives to seek their views on the ability of the Minister to continue as the incumbent of the parish.

28. The Committee considered three options for the granting of extensions –

- (a) an extension up to the age of 70 years irrespective of the retirement age,
- (b) an extension of up to 5 years after the retirement age, and
- (c) unlimited but short-term extensions with the Minister's capability to continue as an incumbent carefully assessed by the Retirements Board before each extension.

29. Until such time as a change to the pension age takes effect options (a) and (b) have the same outcome.

30. The Retirements Board has had remarkably few requests for extensions, although some of those it has received have been significant. There does not appear to be any clamouring from clergy to allow extensions in the retirement age beyond 70 years.

31. The Committee also notes, irrespective of the retirement age and the facility for its extension, that –

- (a) the retirement age does not require the Archbishop to revoke a Minister's licence and that a Minister may continue in an incumbency indefinitely if the Archbishop and Minister mutually desire this, although it is rare, and perhaps even without precedent, for a person to continue in an incumbency beyond 70 years of age, and

- (b) many Ministers who retire from incumbencies often continue working in various full-time and part-time roles within and without the Diocese under a revocable licence.

32. The Committee supports maintaining the present position that no further extensions to the retirement age be granted once a Minister reaches 70 years of age. A potential concern about ensuring that, in appropriate circumstances, Ministers who have much to give to parish ministry being allowed to continue beyond 70 years is best addressed through the Archbishop exercising his prerogative not to revoke the licence of such a Minister rather than increasing the age up to which extensions can be granted. It could also perhaps be addressed by licensing a 'retiring' Minister as Rector Emeritus in the parish. Further discussion follows.

Rector Emeritus

33. The Committee supports senior or long-term rectors being able to hold the office of Rector Emeritus in a parish in appropriate circumstances. It is expected that this may arise where a rector, by virtue of his age or some other matter, is unable to continue to undertake the full responsibilities that come with being a rector but who nonetheless has much to give to parish ministry as an assistant and is able to work effectively with the incoming rector.

34. An example of the position of Rector Emeritus working well is the Rev Dr John Stott. Dr Stott was Rector of All Soul's Langham Place from 1950 to 1975 and Rector Emeritus from 1975 to 2007. He retired from public ministry at the age of 86. Many regard Dr Stott's best ministry and scholarship to have occurred while he was Rector Emeritus.

35. The Archbishop can already license a member of clergy as Rector Emeritus in a parish should he so choose subject to that licence being revokable if the person is over 65 years of age at the time the licence is issued. It is suggested that the tenure of a Rector Emeritus be the same as that of an Assistant Minister, namely, revocable licences granted for 2 year periods at the nomination of the rector. To achieve this the Assistant Minister's Ordinance 1990 would only require a minor change to the definition of "Assistant Minister" in clause 2(2) to include a person licensed or authorised by the Archbishop to the office of Rector Emeritus.

Recommendations

36. The Committee recommends that –
- (a) the Retirements Ordinance 1993 be amended to increase the retirement age in line with increases in the age at which a person becomes eligible for the aged pension, and

- (b) the Assistant Minister's Ordinance 1990 be amended to expand the definition of "Assistant Minister" in clause 2(2) to include a person licensed or authorised by the Archbishop to the office of Rector Emeritus.

Standing Committee's response

37. The Standing Committee requested that a bill for the Clergy Retirements Amendment Ordinance 2010 be promoted to the Synod "by request of the Standing Committee".

For and on behalf of the committee

ROBERT FORSYTH
Chairman

24 August 2010