

## **Preaching and Administration of Holy Communion by Lay Persons and Deacons Ordinance 1995**

(This report adds to the report on pages 194 to 196 of the Standing Committee's Annual Report.)

### **A problem of Representation?**

19. The referral of this bill to the Appellate Tribunal was made by the Primate, after a request from the Sydney Synod, under Section 29(2)(e) of the 1961 Constitution (page 129 of the *7th Handbook*). But resolution 3/95 of the Sydney Synod left several important questions.

- (a) Is the Sydney Synod to be represented?
- (b) If so, are we to argue the case for the bill, the case against, or the cases both for and against?
- (c) How much are we to spend?

### **Nature of the Appellate Tribunal's Proceedings**

20. The Appellate Tribunal's proceedings are usually adversarial: a representative of an interested party can present a case and later respond to any submissions. Over several months there may be a preliminary conference, an opinion from the House of Bishops an opinion from a Panel of Triers, and meetings of the full Appellate Tribunal to hear interested parties and consider responses before an opinion is given.

21. The Appellate Tribunal's costs have to be met by the General Synod, or by assessment on the dioceses, or by the parties, or through a combination of the foregoing. The parties must expect to meet their own costs but the Appellate Tribunal can require a party or parties to pay the costs of others.

22. We have no idea what costs will be incurred and what (if any) costs may be awarded against parties which are represented, including Sydney.

23. A preliminary estimate of the cost to argue the case for the bill is \$100,000, based on a lawyer for 8 weeks (4 to prepare and present, 4 to prepare and respond) and a theologian for 12 weeks. This cost may be reduced if it takes less time, or if the lawyer and theologian work for reduced fees or for nothing.

24. Even reducing the \$100,000 to \$60,000, the cost to present cases for and against the bill would be \$120,000. So far the Synod has not allocated funds for any of these costs and the Contingencies amount is clearly inadequate.

25. It follows that the more parties that are represented, the longer the Appellate Tribunal's proceedings will be, and the higher the costs will be.

### **Jurisdiction**

26. We have been advised that, if it wishes, the Appellate Tribunal could decline to answer the question referred to it by the Primate on the grounds of either or both of the following.

- (a) It has no jurisdiction.
  - (b) It is not required to give opinions on measures which may or may not be pursued.
27. Several matters need to be kept in mind.
- (a) Until now, we have taken the position that the 1961 Constitution does not confer jurisdiction on the Appellate Tribunal to intervene in the internal affairs of any Diocese. Asking the question on this bill abandons this position.
  - (b) The Appellate Tribunal can only give an opinion, which is not binding.
  - (c) The secular courts can overrule or disregard the Appellate Tribunal on questions which the secular courts are willing to entertain.
  - (d) If we need a conclusive answer, we may need to go to the secular courts.

28. The question referred to the Appellate Tribunal assumes that if the Tribunal finds the bill to be inconsistent with the 1961 Constitution, it will be illegal for the bill to be passed and receive assent. In light of the decision of the New South Wales Court of Appeal in *Scandrett v Dowling*, that assumption may be doubtful. We are advised that the wide powers given to the Synod under the Anglican Church of Australia Trust Property Act 1917 are not constrained by the 1961

Constitution and, in making the Ordinance, the Synod will be relying on its powers under the 1917 Act.

### **Should Sydney be Represented?**

29. It may be implicit in the Synod's resolution that Sydney will be represented. If that is so, on what basis do we appear: do we argue for the bill, against it, both for and against, or simply maintain a watching brief. The other option is not to be represented at all.

30. A decision to not be represented may limit Sydney's exposure to costs to a possible share of the Appellate Tribunal's costs?

31. There is no guarantee that the Appellate Tribunal will reach a decision on the question. Is there any justification in spending a large amount on costs if this is a possible outcome?

32. We have been advised that if the Synod and the Archbishop are so minded, the bill could be passed and receive assent even if an adverse Appellate Tribunal opinion follows. Is there then any justification in pursuing the matter before the Appellate Tribunal and incurring substantial costs?

### **The Alternatives**

33. It seems to the Standing Committee that there are 3 practical alternatives.

- (a) To withdraw the reference, if this is possible, with the goodwill of the Appellate Tribunal and the Primate. This will require at least, a resolution of the Sydney Synod and the resolution may be ineffective for it may be that a question, once asked, cannot be withdrawn. Nevertheless, the resolution would indicate clearly that the Synod no longer wishes to have the question answered.
- (b) To not be represented. Should the Synod decide in favour of this course, it is possible that no one will argue for the bill.
- (c) To argue for the bill and to make provision to meet the cost.

### **Conclusion**

34. To enable the Synod to consider the matter of representation and costs, a notice of motion has been placed on the Synod business paper, seeking to withdraw the question asked in resolution 3/95.

For and on behalf of the Standing Committee

WARREN GOTLEY  
*Diocesan Secretary*

8 September 1995