

8/01 Archbishop's power to withhold assent to ordinances

(An interim report from the Standing Committee.)

Introduction

1. By resolution 8/01, the Synod requested that the Standing Committee -
 - (a) examine the nature, basis, origin, history and development of the Archbishop's power to withhold his assent to the making of ordinances duly passed by the Synod, and
 - (b) prepare a report detailing its findings, and
 - (c) if thought appropriate, consider the preparation of legislation relating to this matter for the next session of the Synod.
2. This report is an interim report which sets out the findings of the Standing Committee on the issue to date.

Requirement for the Archbishop's assent

3. By section 2 of the 1902 Constitutions, the Synod of each Diocese in the Province of New South Wales has power to make ordinances upon and in respect of all matters and things concerning the order and good government of the Anglican Church of Australia and the regulation of its affairs in the Diocese, subject only to the Anglican Church of Australia Constitution Act 1961 and any other Act in force in New South Wales.

4. In relation to the making of ordinances, section 5 of the 1902 Constitutions is relevant. Section 5(a) provides, so far as is relevant, that "Every ordinance ... of a Synod shall be made by a majority of the clergy and other members present and voting collectively ...".

5. However section 5(c) provides for the bishop of a diocese or the Provincial Synod to assent to an ordinance before it takes effect -

"No ordinance shall take effect or have any validity unless within one month after the passing of the same the Bishop shall signify assent thereto in writing provided that any ordinance to which the Bishop shall not assent may be referred by resolution of the Synod, to the Provincial Synod and if the Provincial Synod shall assent to the ordinance, the ordinance shall take effect on the Provincial Synod giving its assent."

6. Thus, by reason of section 5(c), an ordinance passed by the majority of the clergy and lay members of the Sydney Synod does not take effect unless and until it receives the Archbishop's assent or, in the absence of that assent, upon the assent of the Provincial Synod.

History of the requirement for assent

7. The genesis of section 5(c) of the 1902 Constitutions is found in the Constitutions for the Church in New South Wales authorised by the Act of the New South Wales Parliament, 30 Victoria, entitled "An Act to enable the Members of the United Church of England and Ireland to manage the property of the said Church" (also known as the *Church of England Synod Act 1866*).

8. The Constitutions authorised by the 1866 Act provided for the establishment of a Synod for each diocese in New South Wales, and specified the powers of the Synod. By clause 3 of those Constitutions, the Synod of each diocese had power to -

"make Ordinances upon and in respect of all matters and things concerning the Order and good Government of the United Church of England and Ireland [as the Church was then known] and the Regulation of its affairs within the Diocese including the management and disposal of all Church property moneys and revenues (not diverting any specifically appropriated or the subject of any specific trust nor interfering with any vested rights) and for the election or appointment of Churchwardens and Trustees of Churches Burial Grounds Church Lands and Parsonages..."

9. By clause 6 of those Constitutions -

"no such... Ordinance shall take effect or have any validity unless within one month after the passing of the same the Bishop shall signify to the Synod his assent thereto Provided also that any such ... Ordinance to which the Bishop shall not assent may be the subject of reference to any determination by any Provincial Synod composed of the Representatives of the Diocesan Synods of the Colony of New South Wales in manner hereinafter provided."

10. Thus, from the time that a Synod for each diocese in New South Wales was established and empowered to make ordinances, it has been a requirement that the bishop of the diocese assent to the ordinance before it takes any force or effect, subject to the power of the Provincial Synod to give assent if the bishop is unwilling to do so.

Why the power of assent?

11. The issue of whether an ordinance passed by a Synod should be required to receive the assent of the bishop before it took effect was a controversial issue, and was the subject of extensive debate at the time the Constitutions approved by the 1866 Act were originally drafted.

12. A bill, the *Church of England Synods Bill*, was first promoted to the New South Wales Parliament in 1859.

13. The bill sought to provide for the constitution of a Synod for each diocese in New South Wales, and to empower the Synod to make ordinances for the management and disposal of all church property, monies and revenues and generally for the order and good government of the Church within the diocese. As drafted, clause 4 of the proposed constitution provided, so far as is relevant-

“Every ...Ordinance of the Synod shall be made *with the concurrence of the Bishop of the Diocese* and a majority of the clergy and lay members of the Synod voting by orders”
(italics added)

14. The constitutions contained in the bill had been approved by a conference of prominent members of the Church held in Sydney in November and December 1858. There, the question of whether an ordinance required the concurrence the bishop of the diocese had been a prominent issue. Bishop Frederic Barker, then Bishop of Sydney, subsequently reported that the issue had been the most debated at the conference, having been debated for two and a half days.

15. Upon its introduction, the 1859 bill was referred to a Select Committee of the Legislative Council for its consideration and report. From December 1859 to February 1860, evidence was taken from a number of prominent members of the Church. It is from this evidence that we have the best understanding of the reasons for the requirement that the bishop of a diocese assent to the making of an ordinance by the Synod.

16. The main argument for requiring the concurrence of the bishop was the episcopal nature of the Church of England. It was said that the power of a bishop to exercise co-ordinate powers with the clergy and laity was a fundamental principle of the Church of England, and that withholding that power would be incompatible with the constitution of an episcopal church and inconsistent with the office of bishop. Bishop Barker expressed this view to the Select Committee in the following terms -

“It is a concurrence of the three bodies of which the Synod is composed that is required; this I believe to be in strict accordance with the ancient constitution of Synods, as well as with what I regard to be the principle of the Church of England, namely, that it is governed by Bishops. The early Synods of the Church, so far as we have any reference to them, consisted of the Bishop and his clergy, and in these Synods the maxim became embodied in a proverb which, at one time, was very much in vogue - 'Without the Bishop do nothing.' The Bishop ordinarily, did nothing without the concurrence of his clergy, but undoubtedly, the clergy never did anything against the will of the Bishop.”

17. Dean William Cowper, Dean of Sydney, in giving evidence to the Select Committee, was asked whether he thought a bishop could perform his duty if the requirement for his concurrence to the making of an ordinance was deleted from the proposed constitutions. He answered -

“I conceive that it would not be consistent with his duty. I conceive he has not the power to place himself in a position to be bound by measures passed by the other two orders without his concurrence. It would not be consistent with his own position as a ruler in the church. I can conceive cases in which it might entirely set aside his jurisdiction in the Church, and the lawful exercise of his authority.”

18. Other members of the Church gave evidence to similar effect.

19. Several other members of the Church gave evidence to the Select Committee arguing against the requirement for the bishop's concurrence to the making of an ordinance. The main concern of these members was that the requirement for the bishop's concurrence would allow the opinions of one person (namely, the bishop) to override those of the Church at large. Of particular concern was that this would effectively place the temporalities of the Church in the hands of the bishop. The wisdom of this was questioned by some. For example, Sir Alfred Stephen, then Chief Justice of New South Wales and one of the lay representatives at the 1858 conference, said -

“The Bishop's means of forming an opinion in such matters [that is, temporal matters] are, probably, not greater, and his interest in such matters is, in most cases, not more than my own, and perhaps, not so much.”

20. In response to these objections, the Select Committee considered whether it was possible to distinguish between the spiritualities and temporalities of the Church for the purpose of restricting the bishop's power to withhold his assent where an ordinance only affected the temporalities. But evidence was given that such a distinction was difficult to make. For example, Bishop Barker said -

“I think it is not possible to draw such a line; it would have been done for the satisfaction of

some gentlemen assembled in the Conference had it been possible to do so, but in my own opinion it is impossible; and in the attempt to do so we should get into all the confusion and difficulty involved in endeavouring to distinguish between temporal and spiritual things. There are many temporal things which have an important bearing on spiritual things."

21. Dean William Cowper said -

"I feel, and have felt, that there is such great difficulty in drawing the line between temporal and spiritual matters, that I think it undesirable to attempt to draw such a line. I found that difficulty in the Conference, and it weighed very much with me in the discussion that took place upon the subject."

22. In May 1860, the Select Committee reported to the Legislative Council, recommending the bill with amendments. One of the recommended amendments was to delete from the proposed clause 4 the requirement for the bishop's concurrence to the making of an ordinance, and the substitution of a provision stating that an ordinance passed by the Synod did not take effect unless it received the bishop's assent within one month after its passing.

23. As it transpired, the bill's progress was interrupted by the prorogation of Parliament in 1860. It was reintroduced into the new Parliament and passed through the Legislative Council, but was later discharged in the Legislative Assembly before having been passed.

24. Bishop Barker called a meeting of the clergy and representatives of the parishes of the Diocese in February 1865, where the proposed constitutions were again discussed. A revised form of constitutions was agreed, and a new bill, the *Church of England Synod Bill*, was promoted to the New South Wales Parliament in April 1865. It was referred to a Select Committee of the Legislative Assembly for its consideration and report.

25. While the constitutions approved in Conference in 1865 were a substantial revision of the constitutions recommended by the Select Committee of the Legislative Council in 1861, the requirement for the bishop's assent before an ordinance took effect was not revised. That issue was not referred to in the evidence given to the Select Committee of the Legislative Assembly. In 1865, the requirement for the bishop's assent no longer seemed to be an issue.

26. The Select Committee subsequently recommended the bill without amendment and the bill was passed by the New South Wales Parliament in 1866 as the *Church of England Synod Act 1866*.

Withholding of an assent to an ordinance in the Diocese of Sydney

27. It is not known whether a bishop of the Diocese, from the episcopate of Bishop Barker (in 1866) to the episcopate of Archbishop Gough (in 1965), withheld assent to an ordinance passed by the Synod.

28. During his episcopate, Archbishop Loane withheld assent to one ordinance of the Synod, being the *Parishes Ordinance 1978*. Assent was withheld because, during the committee stage, a new clause was added to the bill, the significance of which was "not easily or immediately grasped". The bill was passed again by the Synod in 1979 with the offending clause removed and Archbishop Loane then gave his assent.

29. During his episcopate, Archbishop Robinson withheld assent to four ordinances of the Synod -

- (a) *General Synod - Ordination of Women to the Office of Deacon Canon 1985 Adopting Ordinance 1985*: Assent was withheld to this ordinance because Archbishop Robinson did not believe that the relevant canon, which sought to authorise the ordination of women as deacons, had been lawfully made by the General Synod.
- (b) *Marriage of Divorced Persons Ordinance 1985*: Assent was withheld to this ordinance because Archbishop Robinson believed that it represented a significant departure from the law of the Church as it had existed for many centuries.
- (c) *General Synod - Defence Force Ministry Canon 1985 Adopting Ordinance 1985*: Assent was withheld to this ordinance because Archbishop Robinson thought that the relevant canon was unclear in several respects.
- (d) *General Synod - Constitution Alteration (Canonical Fitness) Canon and Bill 1989 Assenting Ordinance 1990*: Assent was withheld to this ordinance because Archbishop Robinson believed that the definition of the term "canonical fitness" proposed by the relevant canon and bill was deficient.

30. During his episcopate, Archbishop Goodhew withheld assent to two ordinances of the Synod -

- (a) *Preaching and Administration of Holy Communion by Lay Persons and Deacons Ordinance 1999*: Assent was withheld to this ordinance because Archbishop Goodhew was concerned about the constitutionality of the ordinance, and about unilateral action by the Synod on the subject of lay and diaconal administration of Holy Communion.

- (b) *Parish Development Review Ordinance 2000*: Assent was withheld on the basis that this ordinance was part of a package of proposed ordinances and Archbishop Goodhew was unwilling to assent to one of the ordinances without the other related ordinances also having been passed.

Final Comments

31. The scope of the power of a bishop to withhold assent to an ordinance has never been precisely defined.
32. The power in section 5(c) of the 1902 Constitutions to refer an ordinance to the Provincial Synod of New South Wales suggests that the power of a bishop to withhold assent to an ordinance is the power to be given to a constitutional leader to be exercised for the benefit of the Church, and not according to personal preference.
33. It has been suggested that a bishop should only withhold assent to an ordinance in one of 3 cases -
- (a) where he considers that the Synod may not have fully understood what it was doing, or
 - (b) where he considers that the ordinance is contrary to the fundamental principles of the Church, or
 - (c) where he considers the Synod has usurped the functions of the bishop.
34. The views in 32. and 33. have never been debated in Synod, and are noted in this interim report for information only.

For and on behalf of the Standing Committee

MARK PAYNE
Diocesan Secretary

24 September 2002