Judicial Innovation by the Appellate Tribunal threatens to undermine the National Church

On Wednesday 11 November, 2020 the Appellate Tribunal of the Anglican Church of Australia published two opinions, the first in relation to a regulation of the Diocese of Wangaratta for a service for the blessing of civil marriages (including same-sex marriages), and the second in relation to an ordinance of the Diocese of Newcastle to modify its discipline regime so that clergy who are in a same-sex marriage, or who participate in the blessing of a same-sex marriage cannot be subject to disciplinary charge for this reason.

The Appellate Tribunal consists of four senior lawyers and three bishops who are elected by the General Synod The Majority Opinion of the Tribunal was that neither the Wangaratta Regulation nor the Newcastle Ordinance are in conflict with the Constitution of the Anglican Church of Australia. A minority dissenting opinion by one member found that both matters are unconstitutional.

Despite its claims to the contrary, the Majority Opinion of the Appellate Tribunal is a radical redefinition and restriction of the constitutional scope of the "doctrine" of the Anglican Church of Australia.

The Majority Opinion affirms and adopts the definition of "doctrine" set out by Archbishop Rayner in 1987 (cited in para 148), that

> *'Doctrine' must therefore be understood in the Constitution as the Church's teaching on the faith which is necessary to salvation.*

The Majority Opinion develops two implications from Rayner's definition. Firstly, doctrine is limited to matters identified in the Fundamental Declarations that are "necessary to salvation". A teaching of Christ or the Church that is not necessary to salvation is not a doctrine in the Constitutional sense (even if it is a "doctrine of the Church" in common parlance). Secondly, the Ruling Principles (which mandate conformity to the Anglican formularies) are only relevant to the establishment of "doctrine" to the extent that they address matters that are necessary to salvation.

The Majority Opinion claims that this is "the settled meaning of 'doctrine' in the Constitution" (para 166). However, this is simply not the case. As noted in paragraph 31 of the Minority Opinion, Rayner's restricted definition of doctrine in 1987 was a minority view.

This restricted definition of doctrine is inconsistent with previous decisions of the Appellate Tribunal. For example, its 1974 Opinion found that the proposed *Marriage of Divorced Persons Canon 1973* was inconsistent with both the Fundamental Declarations and Ruling Principles insofar as it purported to allow a remarriage after divorce for grounds other than those permitted by the New Testament. In 1980, the Appellate Tribunal revisited this issue, in relation to a canon that allowed divorce only as permitted by Holy Scripture, and held that such a canon would not be inconsistent with either the Fundamental Declarations or the Ruling Principles. On this basis, the General Synod passed the *Marriage of Divorced Persons Canon 1981*. The key clause is clause 4.

> 4. Consent shall not be given by a bishop under this canon unless the bishop and the proposed celebrant are satisfied that the marriage of the divorced person **would not contravene the teachings of Holy Scripture or the doctrines and principles of this Church**.

This clause (and the history that led to it) contemplates the real possibility of remarriage after divorce in contravention of the teaching of Holy Scripture or the doctrine and principles of this Church. Whereas, on the logic of the Majority Opinion, the clause highlighted above is an empty set, because neither the Scriptures nor the formularies treat divorce and remarriage as a "salvation" issue.

The restricted definition of "doctrine" in the Majority Opinion opens the door to an expansive operation of the discretion conferred by the *Canon Concerning Services 1992*. Section 5(3) of that Canon seeks to limit the discretion by requiring that any variations in forms of service "must not be contrary to or a departure

from the doctrine of this Church." But, applying the Majority Opinion's narrow definition, "doctrine" in section 5(3) only applies to teachings of the faith that are necessary for salvation, which permits a minister to construct a liturgy that directly contradicts any teaching of Christ or this church that is not necessary for salvation.

If it is true that the Appellate Tribunal has always considered that the *Canon Concerning Services 1992* granted such a wide discretion, it is astounding that it did not look here in relation to the 1997 decision on "Celebration of the Holy Communion by Deacons or Lay Persons". The celebration of the Holy Communion by a lay person is "an occasion for which no provision is made", and there is no "salvific" doctrine at stake by having a liturgy that in which a lay person presides at the Lord's Supper. If this canon can authorise a same-sex blessing, it beggars belief that is cannot also authorise a Lay-led Lord's Supper.

Previous Opinions of the Appellate Tribunal have turned on fine-grained analysis of "principles" – is a matter a principle of doctrine or worship from BCP, a principle of discipline, a principle inherited from the Church of England, or none of the above? These complex arguments are now largely irrelevant relics of history, because according to the Appellate Tribunal a local diocese is not bound to use liturgies consistent with the principles (of any type) from our formularies.

The Majority Opinion is a radical restriction of the scope of "doctrine" in the Constitution, which can only lead to a profound redefinition of the shared understanding of what defines us (and binds us together) as an "Anglican" Church. Our shared understanding – that "doctrine" is much wider than salvation – is reflected in the unanimous reports of the House of Bishops and the Panel of Assessors, but this understanding has been soundly rejected in the Majority Opinion. We may think that its legal analysis of the Constitution is flawed, but there is little that can be done. The Constitution provides no avenue for appeal against a decision of the Appellate Tribunal.

So – where to from here?

An analogy from the history of "football" might help. Prior to the nineteenth century, the game of football (which involved kicking a round ball) was played for hundreds of years in England, with a commonly understood set of rules. Legend has it that in 1823, during a game of football, a student at Rugby School in Warwickshire picked up the ball and ran with it. Some parts of this story may be apocryphal, but there is no doubt that a new version of football started at the Rugby school around this time and was well established by 1843, when its rules were first codified. However, it was not until two decades later (1863) that the Football Association was formed to codify the rules for the original kind of football, to delineate between Association Football and Rugby Football. It doesn't make any sense to have two teams on the same field playing by a different set of rules.

In a sense, that it what has just happened in the Anglican Church of Australia. Previously, the Anglican Church has operated on the assumption that there were distinctively Anglican doctrines and practices that we shared in common as a national Church. However, the effect of the Majority Opinion is that there is no such thing as a distinctively Anglican "doctrine" (in the constitutional sense). Notwithstanding the fact that Anglicans have distinctive understandings about Bishops (contra Presbyterians), infant baptism (contra Baptists) and the Lord's Supper (contra the Salvation Army), we do not hold that the Anglican position on these matters is necessary to salvation. The doctrine and principles of the *Book of Common Prayer* and the 39 Articles won't be the glue that holds us together, because the Majority Opinion has concluded that the *Canon Concerning Services 1992* gives each diocese a wide discretion to allow services that are inconsistent with our Anglican formularies.

The practical outworking of this is that each local diocese has a wide discretion to do what is right in its own eyes. For example, the Anglican Church in the Diocese of Newcastle could permit its clergy to bless same-sex marriages and to enter into a same-sex marriage, and the same actions by clergy in the Anglican Church in the Diocese of Sydney could result in disciplinary proceedings. Just as there are different codes in

Australia which are all called "football", there will be different versions of the Anglican Church of Australia, which have nothing in common except the name.

While some might applaud the judicial innovation of the Appellate Tribunal for finding a way to enable an already fractured Church to remain together, they have in fact entrenched separation and division. This decision has destroyed the rationale for a national Church. There will never be a UFA - "United Footballs of Australia" – one national body that unites the FFA (soccer), the ARU, the NRL and the AFL in the promotion of "football". Rather, these bodies compete with each other for fans, sponsors and stadia, but otherwise largely operate independently of each other. There is very little interchange or inter-operability between players of different codes.

The Majority Opinion has put the Anglican Church of Australia on a trajectory towards disintegration. It remains to be seen whether the next General Synod, which is scheduled for June 2021, is able to find a way forward for us to stay together as a distinctively Anglican Church, that will "will ever obey the commands of Christ, teach His doctrine, administer His sacraments of Holy Baptism and Holy Communion, follow and uphold His discipline".

Bishop Michael Stead
16 November 2020