

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

### **Explanatory Statement**

#### **Introduction**

1. The Bill for the Preaching and Administration of Holy Communion by Lay Persons and Deacons Ordinance 1995 is at the third reading. It provides for, and regulates, preaching and the administration of Holy Communion by deacons and lay persons in churches and other buildings on church property in the Diocese of Sydney. A report entitled *Lay and Diaconal Administration of The Lord's Supper* outlines the background to the bill and is printed on pages 427 to 444 of the 1995 Year Book.

2. The Bill was passed to the third reading at the second session of this Synod when the following resolutions were passed.

2/95 "That the third reading of the Preaching and Administration of Holy Communion by Lay Persons and Deacons Ordinance 1995 be made an order of the day for as soon as possible in the third ordinary session of the Synod."

3/95 "Synod requests the Primate, under section 63(1) of the Constitution of the Anglican Church of Australia, to refer to the Appellate Tribunal for its opinion the following question -

Would the Preaching and Administration of Holy Communion by Lay Persons and Deacons Ordinance 1995, if passed by the Synod of the Diocese of Sydney and assented to by the Archbishop of Sydney in the form now before the Synod, be consistent with the provisions of the Constitution of the Anglican Church of Australia?"

#### **Effect of the Bill**

##### *Deacons*

3. The Bill provides that the minister of a church must not allow a deacon to preach a sermon in that church unless the deacon holds an appropriate authority from the Archbishop.

4. In relation to the administration of Holy Communion by a deacon the Bill provides that the minister of a church must not permit a deacon to administer Holy Communion during a service in that church unless -

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- (a) the deacon holds an authority from the Archbishop to preach and administer Holy Communion in that church; and
  - (b) the majority of the parish council (if any) of the parochial unit in which the church is situated and the majority of the churchwardens have given their approval to a deacon administering Holy Communion during that service.
5. The parish council and the churchwardens can give the approval referred to in 4(b) either generally or specifically. An approval can be withdrawn.
6. The Bill empowers the Archbishop to issue to a deacon an authority to preach or to preach and administer Holy Communion. An authority, which must not be contained in a licence, can be revoked at any time.

#### *Lay Persons*

7. The Bill provides that a minister of a church must not permit a lay person to preach a sermon in a church unless the lay person holds an authority to preach and administer Holy Communion in that church or an authority to preach which extends to that church.
8. In relation to the administration of Holy Communion by lay persons the Bill provides that the minister of a church must not permit a lay person to administer Holy Communion during a service in that church unless -
- (a) that lay person holds an authority which permit the lay person to administer Holy Communion that church; and
  - (b) the majority of the parish council (if any) of the parochial unit in which the church is situated and the majority of the churchwardens of that church have given their approval to *that* lay person administering Holy Communion during *that* service; and
  - (c) the persons who normally attend that service have been consulted by the churchwardens regarding the administration of Holy Communion by a lay person during that service.
9. The parish council and the churchwardens can give the approval referred to in 7(b) either generally or specifically. An approval can be withdrawn.
10. The Bill empowers the Archbishop, or an Assistant Bishop on behalf of the Archbishop if authorised by the Archbishop, to issue to a lay person an authority to preach or to preach and administer Holy Communion. An authority can be revoked at any time.

#### *Other Matters*

11. The Bill also applies to St Andrew's Cathedral and other buildings not situated in a parochial unit, with certain modifications.
12. The Bill will not affect any authority issued by the Archbishop prior to the date on which it is passed and may receive assent.

### **Referral to the Appellate Tribunal**

13. The question in Synod resolution 3/95 was sent to the Primate who referred it to the Appellate Tribunal.

14. A preliminary conference of the Appellate Tribunal was held on 2 August 1995 presided over by Mr Justice P.W. Young and Bishop P. Chiswell. Mr N.M. Cameron represented the Diocese of Sydney, with instructions to request an adjournment until after the Sydney Synod session in October 1995.

15. A number of others also appeared or sought leave to appear -

Diocese of Ballarat	Diocese of Riverina
Diocese of Bathurst	Diocese of Wangaratta
Diocese of Melbourne	Anglicans Together
Diocese of Newcastle	Professor Michael Horsburgh

16. Some of these parties wished to present cases against the validity of the Bill, while others "registered interest" but gave no indication of the position they would take.

17. The proceedings were adjourned to 4.30 pm on 26 October 1995. No decision was taken on whether Anglicans Together or Professor Horsburgh will be allowed to appear.

18. The degree of involvement in these proceedings by the Diocese of Sydney must be determined.

### **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 cost.

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

MARK PAYNE (Items 1 and 3-12)  
*Legal Officer*

WARREN GOTLEY (Items 2 and 13-34)  
*Diocesan Secretary*

8 August 1995