

Status of Diocesan Boundaries

(A report from the Legal Officer to the Standing Committee.)

Introduction

1. At the request of the Standing Committee, this report has been prepared to examine the legal implications of the report on Future Patterns of Ministry (29/96) (the "parish boundaries report"), set out on pages 430-433 of the 1999 Year Book, on the status of diocesan boundaries. This report refers only to some of the relevant legal issues and does not attempt to consider relevant questions of Anglican polity or pastoral issues.
2. The parish boundaries report concludes –
 "There is no rule in the Diocese inhibiting ministry across parish boundaries, either because there had never been such a rule or because any such rule has been repealed. There may have been a custom in the Diocese which preserved exclusive ministry to incumbents within their parishes. However no such custom has the force of law and need not be put to rest by legislation."
3. This conclusion was reached following a consideration of the rules regulating parish ministry within this Diocese. The direct implications of the parish boundaries report for ministry across diocesan boundaries arise only in respect of those rules which also have general application outside this Diocese. However, having regard to the apparent intention behind Standing Committee's request, I have broadened the scope of this report to consider how ministry within and between the 7 dioceses of the Province of New South Wales is generally regulated.
4. This report does not consider the position outside the Province of New South Wales where different constitutional arrangements may apply.

Canon Law

Licensing by Bishop

5. Under the Canons of 1603 a person must be approved or licensed by the bishop of a diocese prior to ministering in the diocese. Canon 36 provides in part –
 "No person shall hereafter be received into the ministry, nor either by institution or collation admitted to any ecclesiastical living, nor suffered to preach, to catechize, or to be a lecturer or reader of divinity in either university, or in any cathedral or collegiate church, city, or market-town, parish-church, chapel, or in any other place within this realm, except he be licensed either by the archbishop, or by the bishop of the diocese, where he is to be placed, under their hands and seals,"
6. This part of Canon 36 continues to apply in all dioceses in New South Wales.
7. A number of the other Canons of 1603 address the question of licenced and approved ministry within a diocese.

"37. Subscription before the Diocesan.

None licensed, as is aforesaid, to preach, read lecture, or catechize, coming to reside in any diocese, shall be permitted there to preach, read lecture, catechize or minister the sacraments, or to execute any other ecclesiastical function, by what authority soever he be thereunto admitted, unless he first consent and subscribe to the three articles before mentioned, in the presence of the bishop of the diocese, wherein he is to preach, read lecture, catechize, or administer the sacraments, as aforesaid.

48. None to be Curates but allowed by the Bishop

No curate or minister shall be permitted to serve in any place, without examination and admission of the bishop of the diocese, or ordinary of the place, having episcopal jurisdiction, in writing under his hand and seal, having respect to the greatness of the cure, and meetness of the party. And the said curates and ministers, if they remove from one diocese to another, shall not be by any means admitted to serve without testimony of the bishop of the diocese, or ordinary of the place, as aforesaid, whence they came, in writing of their honesty, ability and conformity to the ecclesiastical laws of the Church of England. Nor shall any serve more than one church or chapel upon one day, except that chapel be a member of the parish-church or united thereto; and unless the said church or chapel, where such a minister shall serve in two places, be not able in the judgement of the bishop or ordinary, as aforesaid, to maintain a curate.

49. Ministers, not allowed Preachers, may not expound.

No person whatsoever not examined and approved by the bishop of the diocese, or not licensed, as is aforesaid, for a sufficient or convenient preacher, shall take upon him to expound in his own cure, or elsewhere, any scripture or matter of doctrine; but shall only study to read plainly and aptly (without glossing or adding) the homilies already set forth, or hereafter to be published by lawful

2 Status of Diocesan Boundaries

authority, for the confirmation of the true faith, and for the good instruction and edification of the people.

50. *Strangers not admitted to preach without showing their License.*

Neither the minister, church-wardens, nor any other officers of the church, shall suffer any man to preach within their churches or chapels, but such as, by shewing their license to preach, shall appear unto them to be sufficiently authorized thereunto, as is aforesaid."

8. The extent to which Canon 37 continues to operate is unclear. Canon 48 generally ceased to have force in those dioceses, including Sydney, which have adopted the Canon Law Repeal Canon 1989. Canons 49 and 50 ceased to have force in those dioceses, including Sydney, which have adopted the Canon Concerning Services 1992.

Force and Effect of Canons

9. To the extent they still apply, the Canons of 1603 form part of the consensual compact and are part of the trusts on which the property of the Anglican Church of Australia is held.

Diocesan Ordinances

10. In most, if not all, dioceses the rules contained in the Canons of 1603 regulating and authorising ministry have been replaced or supplemented by rules made by way of ordinance of the diocesan synod.

1902 Constitution

11. The schedule to the Anglican Church of Australia Constitution Act 1961 (the "1961 Constitution") provides that a diocesan synod may make ordinances for the order and good government of the church within the diocese in accordance with the powers conferred upon it by the constitution of such diocese (section 51). For dioceses in the Province of New South Wales, this general constitutional power is found in clause 2(1) of the Schedule to the Anglican Church of Australia Constitutions Act 1902 (the "1902 Constitution").

12. If an ordinance were made by a diocesan synod in reliance only on the powers contained in clause 2(1), it would have effect within and not beyond the geographical boundaries of the diocese.

1917 and 1938 Acts

13. The powers under clause 2(1) of the 1902 Constitution must be read in conjunction with the Anglican Church of Australia Trust Property Act 1917 (the "1917 Act") and, by extension, the Anglican Church of Australia (Bodies Corporate) Act 1938 (the "1938 Act"). Section 3(1) of the 1917 Act provides that all legislative provisions relating to church trust property, including clause 2(1) of the 1902 Constitution (previously clause 3), shall as far as necessary for the purposes of the 1917 Act be read as amended and supplemented by the 1917 Act. Section 1(2) of the 1938 Act provides that the 1938 Act is to be read and construed with the 1917 Act.

14. "Church trust property" is defined in section 4 of the 1917 Act to include –

"All or any part of any real and personal property which may for the time being be subject to any trust whether by dedication, consecration, trust instrument, or otherwise, for or for the use, benefit, or purposes of the Anglican Church of Australia in any diocese, and each such diocese is referred to as the diocese for which the church trust property in question is held."

15. The word "purposes" is further defined in section 4 to include religious, educational, cemetery, and all other purposes of the Anglican Church of Australia, whether such purposes are within or beyond the diocese or the state. It is clear therefore that church trust property held on any trust for the purposes of a diocese may be used for those purposes outside the diocese or the state.

16. More specifically, it appears that there is no requirement that church trust property must be geographically located within a diocese in order to be considered church trust property of that diocese. The question is simply whether the trusts attaching to the property are expressed to be for the purposes of that diocese. This position is supported implicitly by section 22 of the 1917 Act which permits, if expedient, the re-allocation of church trust property from one diocese to another diocese in certain circumstances without reference to the location of the property.

Force and Effect of Ordinances

17. The parish boundaries report identifies the effect of section 4 of the Anglican Church of Australia Constitutions Act 1902 (the "1902 Act"). That section provides that any ordinance or rule made by a diocese in the Province of New South Wales is –

"for all purposes connected with or in any way relating to the property of the Anglican Church of Australia within the State of New South Wales binding upon the members of said church".

18. In order to identify the extent to which a particular ordinance is binding, it is therefore necessary to identify which property is the property of the diocese for the purposes of that ordinance.

19. If an ordinance was made in reliance only on clause 2(1) of the 1902 Constitution, such an ordinance could be binding only in respect of the church trust property of a diocese located within the diocese since an ordinance made under clause 2(1) has legislative effect only within the diocese. The position is somewhat different for an ordinance made under the 1917 Act or, by extension, the 1938 Act. If, as suggested, a diocese can hold church trust property for its purposes both within and outside the diocese, any management and dealing of such property under the 1917 or 1938 Act should be binding regardless of its location.

Diocesan Tribunal and Bishop

General Rules

20. A member of clergy ministering within a diocese may be subject to the jurisdiction of the diocesan tribunal to hear and determine charges, and to the diocesan bishop in giving effect to any recommendation of the tribunal. The 1961 Constitution establishes a diocesan tribunal for each diocese (section 53). A diocesan tribunal is the court of the bishop (section 54(1)).

21. The tribunal of a diocese has jurisdiction over members of the clergy who are licensed by the bishop of the diocese or who reside in the diocese. The tribunal is competent to hear and determine charges of breaches of faith, ritual, ceremonial, or discipline and offences specified by any canon, ordinance or rule having force in that diocese (section 54(2)). Acts which may not form the basis for a charge in one diocese may do so in another diocese.

22. Charges may be promoted by a person appointed by the bishop of the diocese or any five adult communicant members of the Church resident within the diocese (section 54(3)).

23. A tribunal shall make such recommendations as it thinks fit. However a tribunal cannot recommend any sentence other than monition, suspension from office, expulsion from office, deprivation of rights and emoluments appertaining to office, or deposition from holy orders. The recommendations of a tribunal are made to the bishop of the diocese concerned (section 60(1)). The bishop to whom the recommendation is made shall give effect to the recommendation however in respect of the recommendation of a sentence the bishop is entitled to mitigate the sentence, suspend its operation or both (section 60(2)).

Force and Effect of Rules

24. The extent to which the powers of a tribunal and bishop under the 1961 Constitution are binding on the parties involved is qualified by section 2 of the Anglican Church of Australia Constitution Act 1961 ("1961 Act"). That section provides that the provisions of the 1961 Constitution –

"shall be for all purposes connected with or in any way relating to the property of the Anglican Church of Australia binding on the Bishops, clergy and laity being members of the Church of England in Australia in the several Dioceses of the Church of England within the State of New South Wales".

25. It would therefore appear that provided the exercise of the tribunal's jurisdiction is in any way related to church property, its jurisdiction will be binding on all members of the clergy licensed by the bishop of the diocese or resident in that diocese. The jurisdiction of the tribunal does not appear to depend on whether the property is situated within or outside the relevant diocese or whether the property is held on trust for the purposes of that diocese or another diocese.

Ministry Across Diocesan Boundaries

Anglican Ministry

26. Although it is doubtful whether a parish of this Diocese could be created in another diocese under the Parishes Ordinance 1979, it may be possible to establish parish-like ministry structures from or in respect of church trust property located outside the diocese. In particular, it may be possible to provide for the management of such property pursuant to section 24 of the 1917 Act and/or by way of incorporation of a body corporate under the 1938 Act. It may also be possible to provide in detail how the property can be used by varying the trusts on which the property is held under section 32 of the 1917 Act.

27. However, there are 2 major impediments in conducting ministry across diocesan boundaries. First, because Canon 36 of the Canons of 1603 (and possibly Canon 37) forms part of the consensual compact and are therefore a part of the trusts on which church property is held, the failure to obtain the licence or approval of the bishop in whose diocese the ministry is taking place may constitute a breach of trust. It is arguable that this impediment could be overcome if the trusts of the relevant church property were varied under section 32 of the 1917 Act to exclude the need for licencing or approval of the bishop. The difficulty with this approach is that the first paragraph of section 71(1) of the 1961 Constitution suggests that the consensual compact continues in force in a diocese unless altered under the constitution of the diocese. It may be that any attempt by one diocese to alter the consensual compact in force in another diocese using the 1917 Act would not be effective.

28. Secondly, the diocesan tribunal of the diocese in which the ministry is taking place would presumably have coercive jurisdiction in respect of members of the clergy residing in the diocese in as far as the exercise of such jurisdiction related to church trust property. Unless ministry is carried out only by lay persons or unless the

4 Status of Diocesan Boundaries

members of clergy were able to reside outside the diocese, it is difficult to see how this jurisdiction could be avoided.

Independent Ministry

29. A member of the clergy who conducts non-Anglican ministry on property which is not church property is subject to the jurisdiction of the diocesan tribunal if he or she resides in that diocese. However, even if such ministry constituted an offence in that diocese for which a charge could be brought before the tribunal, the operation of clause 2 of the 1961 Act makes it difficult to see how any sentence or recommendation of the tribunal would impact on the person's ability to continue that ministry.

30. As indicated in the parish boundaries report, the operation of section 4 of the 1902 Act and, I would add, section 2 of the 1961 Act means there is –

"no law to prevent lay members of the Anglican Church establishing a church [in any diocese within New South Wales] on property which is not church property. There is also nothing to prevent those members from holding out that the church is an Anglican Church although it may only be a church of members of the Anglican Church. It would be wrong for those members to hold out that the church is officially recognised by the Anglican Church but, if they did, it is difficult to see any court intervening to stop them in the absence of damage to person or property."

ROBERT WICKS

Legal Officer

30 September 1999