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When a doctrine is not a doctrine: understating the intersection of civil and canon law and the ‘doctrine’ of marriage in the Anglican Church of Australia

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Abstract

This article explores the interpretation and application of the term ‘doctrine’ within the Anglican Church of Australia and its implications in Australian civil law, particularly anti-discrimination legislation. It examines the tension between (1) the constitutional definition in the Church’s constitution and (2) broader interpretations found in General Synod resolutions. The anxiety evident in the General Synod resolutions underscores ongoing debates within the Church about same-sex marriage and relationships and the application of secular exemptions in anti-discrimination legislation. The article concludes that the civil law definition of the term ‘doctrine’ is wide enough to encompass both the Anglican Church of Australia’s *constitutional* definition and the *broader* meaning found in General Synod resolutions. Nevertheless, care needs to be taken by the Church to avoid the risk of civil courts being called upon to engage in their own exegesis of scripture, and thereby come to conclusions which are at odds with the avowed beliefs of the Church.

Keywords: Anglican Church of Australia; *Christian Youth Camps Ltd v Cobaw Community Health Services Ltd*; civil law; doctrine; exemptions; *OV & OW v Members of the Board of the Wesley Mission Council*

Introduction

In 2020 the Appellate Tribunal of the Anglican Church of Australia (‘Appellate Tribunal’) affirmed that in the Anglican Church of Australia’s Constitution (‘the ACA Constitution’) the word doctrine means ‘the Church’s teachings on the faith

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which is necessary to salvation'.¹ The word doctrine also, however, appears in numerous resolutions of the Anglican Church of Australia's General Synod ('General Synod'). Resolution 108/18 of the 18th session of General Synod noted that the word doctrine can be used in a 'broader sense' than the one used in the ACA Constitution. The Resolution affirmed that it was this broader sense that was being referred to in past General Synod resolutions regarding marriage. The resolution also referred to legislative exemption in Australia's civil law. These exemptions are primarily found in state, territory and federal anti-discrimination legislation which uses the term 'doctrine' to define the extent of the exemptions granted to religious organisations and bodies. In this context the word doctrine often, although not exclusively, appears as part of the phrase 'doctrine, tenets or beliefs'.² It is therefore necessary to determine the extent to which the meaning of the word doctrine in these different contexts diverge to understand the application of civil legislative exemptions to the Anglican Church of Australia.

This article will briefly outline the background to the uncertainty regarding the definition of the word doctrine and its connection to the debate regarding *same-sex relationships* within the Anglican Church of Australia before considering the meaning of doctrine within the *canon law* of the Anglican Church of Australia. It will then examine its meaning in Australian *civil law* before applying this civil law meaning to the Anglican Church of Australia in relation to the Anglican Church of Australia's doctrine of marriage.

Background

In late 2022, Peter Sanders and Peter Grace reached a private settlement with the Reverend Christopher Brennan, Dean of the Anglican Diocese of Armidale following an earlier complaint by Saunders and Grace to the Anti-Discrimination Board of New South Wales.³ Sanders and Grace alleged that, following their marriage in early 2020, Brennan had insisted that they end their marriage and live celibate lives or Saunders' role as the church organist at St Mary's Anglican Church would be terminated.⁴ Saunders and Grace ultimately left St Mary's with a significant portion of the congregation reportedly following suit in solidarity with the two men. The dispute highlighted two things. First, there was ongoing tension within the Anglican Church of Australia regarding the church's teachings on marriage and same-sex relationships. This tension has also led to the creation of a breakaway group, known as the Diocese of the Southern Cross, in August 2022.⁵

¹ Anglican Church of Australia Appellate Tribunal, *Primate's References re Wangaratta Blessing Service* (11 November 2020), paras 166–181.

² See Equal Opportunity Act 1984 (WA), s 72(d).

³ D Rogers, 'Armidale Anglican husband or job apology a cop-out', *QNews* (1 October 2022), <<https://qnews.com.au/armidale-anglican-husband-or-job-apology-a-cop-out/>>, accessed 29 January 2024.

⁴ P Bell and E Somerville, 'Congregation rallies behind gay couple who are leaving West Armidale Anglican Church' *ABC News* (7 July 2021), <https://www.abc.net.au/news/2021-07-07/gay-couple-leaves-anglican-church-after-dispute-over-marriage/100272680?fbclid=IwAR2C8uUH8dxkbgKUKJHoro159tjzpObKd2z4V8XfGbPdtT2NwIW_VoEfoZ0>, accessed 29 January 2024.

⁵ R Barker, 'Behind the split of the Anglican church in Australia over gay marriage', *The Conversation* (18 August 2022), <<https://theconversation.com/behind-the-split-of-the-anglican-church-in-australia-over-gay-marriage-188893>>, accessed 29 January 2024.

Secondly, the dispute highlighted the need to better understand the application of religious exemptions in civil anti-discrimination laws for disputes regarding same-sex marriage and relationships within the Anglican Church of Australia.

Saunders and Grace's complaint was made under the Anti-Discrimination Act 1977 (NSW) which prohibits, *inter alia*, discrimination on the grounds of a person's marital or domestic status and on the ground of homosexuality. However, section 56(d) of the 1977 Act provides a general exemption from the Act for 'a body established to propagate religion' where the alleged discrimination 'conforms to the *doctrines* of that religion or is necessary to avoid injury to the religious susceptibilities of the adherents of that religion'.⁶ This exemption requires the civil courts to make a finding of fact as to the relevant doctrines of the religious body.⁷ In the case of Saunders and Grace it would have required the court to determine the Anglican Church of Australia's doctrine in relation to marriage, same-sex marriage, and homosexual relationships more broadly. This is a matter for which there is significant tension within both the Anglican Church of Australia and the wider Anglican Communion.

Further complicating this already complex area, as will be discussed in more detail below, in November 2020 the Appellate Tribunal of the Anglican Church of Australia confirmed (by a majority) that the word doctrine, as it appears in the ACA Constitution, referred to 'the Church's teachings on the faith which is necessary to salvation' and held that there is no doctrine of marriage in the constitutional sense within the Anglican Church of Australia. Consequently, during the 18th session of the General Synod of the Anglican Church of Australia in 2022, a resolution was passed affirming that, *inter alia*, past statements of the General Synod about the church's 'doctrine' of marriage use the word in this broader sense, and therefore that 'these statements continue to describe the "doctrines, tenets, beliefs or teachings" of our church'.⁸ The purpose of the resolution appears to be to confirm that, for the purposes of legislative exemptions in Australian civil law, the term doctrine includes a doctrine of marriage as being between a man and a woman.

Doctrine in Anglican Canon law

The word 'doctrine' appears 11 times in the ACA Constitution⁹ and another 27 times in the Canons of the General Synod.¹⁰ It is defined in section 74(1) of

⁶ Emphasis added.

⁷ *OV & OW v Members of the Board of the Wesley Mission Council* (2010) 79 NSWLR 606; [2010] NSWCA 155, paras 32 and 50.

⁸ Anglican Church of Australia, 'GS Resolution 108/18' (2022), < <https://anglican.org.au/resolutions/exemptions-clauses-for-religious-bodies/>>, accessed 29 January 2024; the author is a member of General Synod and was consulted on this motion.

⁹ Anglican Church of Australia, *The Constitution, Canons and Rules of the Anglican Church of Australia* (vol 12, 2022), ss 3, 4, 58(1), 74(1), 74(3), 74(3).

¹⁰ See Anglican Church of Australia, *Alternative Tales of Lessons Canon 1985* (Canon 15, 1985) s 5(3); Anglican Church of Australia, *Australian Prayer Book Canon 1977* (Canon 1, 1977), s 5(3); Anglican Church of Australia, *Authorised Lay Ministry Canon 1992* (Canon 17, 1992), s 2; Anglican Church of Australia, *Canon Concerning Holy Orders 2004* (Canon 10, 2007), ss 5(h), 6(g); Anglican Church of Australia,

the ACA Constitution as ‘the teaching of this Church on any question of faith’. Faith is defined as including ‘the obligation to hold the faith’ while section 74(4) states that ‘any reference to faith shall extend to doctrine’.¹¹ This circular definition is, on its own, unhelpful. To understand the meaning of faith, and therefore doctrine, regard must be had to the Fundamental Declarations found in sections 1–3.¹² As Archbishop Rayner explained in the 1987 Appellate Tribunal Opinion in *Report Re Ordination of Women to the Office of Deacon Canon 1985* (‘the 1987 opinion’):

The meaning of faith must therefore be taken from s. 1 of the fundamental Declarations as being ‘the Christian Faith as professed by the Church of Christ from primitive times and in particular as set forth in the creeds known as the Nicene Creed and the Apostles’ Creed’. With this must be taken the s. 2 description of the canonical scriptures as ‘the ultimate rule and standard of faith’. Account must also be taken of the statement of Article 6 of the Thirty-nine Articles that ‘Holy Scripture containeth all things necessary to salvation: so that whatsoever is not read therein, nor may be proved thereby, is not to be required of any man, that it should be believed as an article of the Faith, or be thought required or necessary to salvation’.¹³

Appellate Tribunal decisions

The Appellate Tribunal has considered the meaning of doctrine on a number of occasions. Prior to 1985 the Tribunal did not give detailed reasons for its determinations.¹⁴ Therefore, while the Tribunal’s decision in its 1980 determination *Marriage of Divorced Persons and Admission to Holy Orders* made implicit findings as to the meaning of doctrine in the ACA Constitution, it did not give reasons for this finding.¹⁵ The first detailed examination came in its 1987 determination in *Report Re Ordination of Women to the Office of Deacon Canon 1985*.¹⁶ The Tribunal had previously given opinions in 1980, 1981 and 1985 with

Canon Concerning Services 1992 (Canon 13, 1998), ss 4(c)(i), 5(3); Anglican Church of Australia, *Holy Orders (Reception into Ministry)* Canon 2004 (Canon 17, 2007), s 2(2)(f)(i)–(ii); Anglican Church of Australia, *Marriage of Divorced Persons Canon* 1981 (Canon 7, 1985), s 4; Anglican Church of Australia, *Ministry to the Sick Canon* 1981 (Canon 5, 1981), s 4(3); Anglican Church of Australia, *Oaths Affirmations Declarations and Assents Canon* 1992 (Canon 15, 1998), ss 4, 5; Anglican Church of Australia, *Order of Deaconesses Canon* 1969 (Canon 7, 1969), ss 4(b)(iii), 5; Anglican Church of Australia, *Ordination Service for Deacons Canon* 1985 (Canon 16, 1985); Anglican Church of Australia, *Prayer Book for Australia Canon* 1995 (Canon 13, 1995), ss 4, 6(3); Anglican Church of Australia, *Reception Canon* 1981 (Canon 1, 1985); Anglican Church of Australia, *Strategic Issues, Commissions, Task Force and Networks Canon* 1998 (Canon 19, 1998).

¹¹ Anglican Church of Australia Appellate Tribunal, *Wangaratta* (note 1), paras 142–143.

¹² Anglican Church of Australia Appellate Tribunal, *Report re Ordination of Women to the office of Deaconate Canon 1985* (1987), 49.

¹³ *Ibid.*, 49; see also 155 (per Handley).

¹⁴ *Ibid.*, 8.

¹⁵ See Anglican Church of Australia Appellate Tribunal, *Wangaratta* (note 1), para 141.

¹⁶ The Tribunal had given detailed reasons in its 1985 opinion in Anglican Church of Australia Appellate Tribunal, *Admission of Women to Holy Orders re Prayer Book Usage* (14 August 1985); however, it did not consider the constitutional definition of doctrine in any detail. The reasons

respect to the ordination of women.¹⁷ However, these had been hypothetical, referred to the Appellate Tribunal by the Primate under section 63 of the ACA Constitution in order to determine the potential constitutional validity of proposed canons. By contrast, the 1987 reference referred specifically to the 1985 Canon authorising the ordination of women as Deacons¹⁸ and was made under section 31 of the ACA Constitution. While the Appellate Tribunal was prepared to reconsider the matter in light of the passage of the Canon and the reference by members of General Synod, as opposed to the Primate, they were reluctant to overturn the Tribunal's previous opinions. As the President, Cox J noted, '[f]or the signatories to succeed in their argument it is necessary for them to undermine the majority given in 1985'.¹⁹ The majority found that the ordination of women to the Diaconate was not inconsistent with the Constitution.²⁰ In doing so, several members of the majority considered the term 'doctrine' in its specific constitutional sense.

Archbishop Rayner considered that '[d]octrine must ... be understood in the Constitution as the Church's teaching on the faith which is necessary to salvation'²¹ while Young J commented, quoting in part from the 1985 Opinion, that 'principle of doctrine or worship ... connotes "A fundamental truth or position on which many others depends"'.²² He continued, this time quoting from opinion of the House of Bishops, '[a] principle of doctrine or worship is a fundamental axiom of faith ... which may form the basis of a deductive argument whereby further doctrinal or doxological statements may be articulated'.²³ He also noted that 's 74 seems to make a very definite distinction between the rules of order and conduct on the one hand, and the teachings of the Church in matters of faith on the other'.²⁴

In 1991 the Tribunal was again asked to consider the question of the Ordination of Women, this time to the Priesthood.²⁵ While, like the 1985 opinion, the Tribunal did

given in the 1985 opinion primarily concern the alterability of the use of masculine pronouns in the Ordinal and Book of Common Prayer.

¹⁷ See Anglican Church of Australia Appellate Tribunal, *Marriage of Divorced Persons and Admission of Women to Holy Orders* (8 February 1980); Anglican Church of Australia Appellate Tribunal, *Admission of Women to Holy Orders* (9 April 1981); Anglican Church of Australia Appellate Tribunal, *Admission of Women* (note 16). The Appellate Tribunal subsequently gave opinions of the ordination of women in Anglican Church of Australia Appellate Tribunal, *Ordination of Women to the Office of Priests Act 1988 of Melbourne Diocese* (2 November 1989); Anglican Church of Australia Appellate Tribunal, *Ordination of Women to Order of Priests or to Order of Bishops* (28 November 1991); Anglican Church of Australia Appellate Tribunal, *Reference on Women Bishops* (26 September 2007). See also Anglican Church of Australia Appellate Tribunal, *Women Deacons and Memberships of GS & Constitution Alteration Act 1987 of Melbourne Diocese* (6 June 1989).

¹⁸ Anglican Church of Australia Appellate Tribunal, *Report of the Appellate Tribunal: Re Ordination to Women to the Office of Deacon Canon 1985* (4 March 1987).

¹⁹ *Ibid.*, 13.

²⁰ See Anglican Church of Australia Appellate Tribunal, *Wangaratta* (note 1), paras 146–147.

²¹ Anglican Church of Australia Appellate Tribunal, *Report re Ordination of Women* (note 12), 49.

²² *Ibid.*, 108.

²³ *Ibid.*, 109.

²⁴ *Ibid.*, 108.

²⁵ Anglican Church of Australia Appellate Tribunal, *Ordination of Women to Order of Priests* (note 17).

not specifically consider the meaning of ‘doctrine’, comments were made regarding the operation of section 58, confirming that the ‘confined and compendious definition of “doctrine” applied to section 3, 4, and 58 of the Constitution’.²⁶

Most recently the Tribunal had cause to re-examine the definition of ‘doctrine’ in *Primate’s References re Wangaratta Blessing Service* (2020) (hereafter ‘*Wangaratta*’). In this case the Appellate Tribunal was asked to provide an opinion as to whether a blessing service for same-sex couples married under the Commonwealth Marriage Act 1961 (Cth), which was purported to be authorised by the Synod of the Diocese of Wangaratta under the Canon Concerning Services 1992, was consistent with the Fundamental Declarations and Ruling Principles in the ACA Constitution.²⁷

The majority affirmed the definition from previous Appellate Tribunal opinions in 1985, 1987 and 1991 that doctrine in the constitutional sense means ‘the Church’s teachings on the faith which is necessary to salvation’,²⁸ concluding that the blessing of same-sex unions did not contravene the constitution, stating:²⁹

In our view, the matters in the present reference do not involve issues of faith or doctrine properly so called any more than the dispute over female ordination. The contending views about ‘*blessing*’ same-sex marriage are strongly held. But, with respect to some of the recent rhetoric, and the actions taken abroad by some bishops of this Church, the blessing of same-sex marriage does not [necessarily] involve denial of God or repudiation of the Creeds or rejection of the *authority* of holy Scripture or apostasy on the part of bishops or synods prepared to support such measures.

In coming to this conclusion, the majority affirmed early Appellate Tribunal opinions rejecting the argument that the *Book of Common Prayer* ‘presented itself as a timeless or universal proclamation of doctrine’.³⁰ They emphasised the role of the centrality of the Nicene Creed and the Apostles’ Creed to determining faith and therefore doctrine,³¹ and confirmed the distinction between ‘scripture and Faith’ affirming, with particular reference to Article 6 of the *39 Articles*, that while the Holy Scripture contains all that is necessary for salvation, not everything in the Holy Scripture is necessary for salvation.³²

Article VI: Of the Sufficiency of the holy Scriptures for Salvation

Holy Scripture containeth all things necessary to salvation: so that whatsoever is not read therein, nor may be proved thereby, is not to be

²⁶ Anglican Church of Australia Appellate Tribunal, *Wangaratta* (note 1), paras 154–155; see also Anglican Church of Australia Appellate Tribunal, *Ordination of Women to Order of Priests* (note 17), 1.

²⁷ For a detailed summary and discussion of the case see G Blake, ‘The Constitutionality of Diocesan Legislation Relating to Same-Sex Blessings and Marriage in the Anglican Church of Australia: A Case Note’ (2022) 24 *Ecc LJ* 209–232.

²⁸ Anglican Church of Australia Appellate Tribunal, *Wangaratta* (note 1), paras 166–181.

²⁹ *Ibid*, para 180 (emphasis in original).

³⁰ *Ibid*, para 174.

³¹ *Ibid*, paras 167–174.

³² *Ibid*, paras 176–177.

required of any man, that it should be believed as an article of the Faith, or be thought requisite or necessary to salvation ...³³

The above discussion has focused on the majority opinions in each case. While a detailed discussion of the dissenting opinions is beyond the scope of this paper, it is important to note that *Wangaratta*, as well as the earlier opinions regarding the ordination of women, were not unanimous. Strong dissenting views were expressed by members of the Appellate Tribunal on those occasions.

The definitions in section 74 of the ACA Constitution, as defined by the Appellate Tribunal, apply to Canons of General Synod ‘unless the context of the subject matter therefore indicates the contrary’.³⁴ It is beyond the scope of this article to specifically consider instances where the context may import a different meaning to doctrine. However, the number of such instances, in the 27 references to doctrine in the canons of the Anglican Church of Australia, are likely to be small.

The ACA Constitution contains provision for General Synod to make statements as to the ‘faith ritual ceremony or discipline of this Church’.³⁵ At the time of the *Wangaratta* decision no such statements had been made.³⁶ At the 2022 session of General Synod, the Synod passed a statement on the ‘Definition of Unchastity’.³⁷ A statement on ‘Marriage as the union of a man and a woman’ was lost in the House of Bishops.³⁸ How the statement as to the ‘Definition of Unchastity’ will be viewed by the Tribunal as an interpretive aid to the Constitution is yet to be seen.

Other uses of doctrine by the Anglican Church of Australia

The word doctrine is also used by the Anglican Church of Australia in a more general sense. This multiplicity of use has been noted by the Appellate Tribunal. For example, Handley QC in the 1987 *Opinion* noted that ‘the question of doctrine, in the ordinary sense of that word, were central to the issues debated’.³⁹ Similarly in the *Wangaratta* opinion the Tribunal noted that, by contrast to the constitutional concept, ‘[i]n the ordinary parlance, a doctrine is a more general teaching as in the Beatitudes’⁴⁰ and the word is used in phrases, such as the ‘doctrine of marriage’.⁴¹ The possibility of

³³ Anglican Church League, ‘The Thirty Nine Articles: The Articles of Religion’ (London, 1562), <<https://acl.asn.au/the-thirty-nine-articles/>>, accessed 15 February 2024. The list of specific Canonical Books of the Old and New Testament are excluded.

³⁴ ACA Constitution (note 9), ch XII; see also Anglican Church of Australia Appellate Tribunal, ‘*Wangaratta*’ (note 1), para 138.

³⁵ ACA Constitution (note 9), ss 4 and 26.

³⁶ Anglican Church of Australia Appellate Tribunal, ‘*Wangaratta*’ (note 1), para 137.

³⁷ Anglican Church of Australia, ‘Minutes of the Third Day of the Eighteenth General Synod of the Anglican Church of Australia’ (Gold Coast, 11 May 2022), <<https://anglican.org.au/wp-content/uploads/2022/06/220511-GS18-Minutes-Day-3.pdf>>, accessed 29 January 2024.

³⁸ *Ibid*; see also Anglican Church of Australia, ‘Minutes of the Second Day of the Eighteenth General Synod of the Anglican Church of Australia’ (Gold Coast, 10 May 2022), <<https://anglican.org.au/wp-content/uploads/2022/06/220510-GS18-Minutes-Day-2.pdf>>, accessed 29 January 2024.

³⁹ Anglican Church of Australia Appellate Tribunal, *Report re Ordination of Women* (note 12), 115.

⁴⁰ Anglican Church of Australia Appellate Tribunal, *Wangaratta* (note 1), para 244, see also para 142.

⁴¹ *Ibid*, para 142.

multiple usages of the word doctrine can also be seen in the 1955 preface to the ACA Constitution, which was later dropped. The preface contained both a capitalised 'Doctrine' and an uncapitalised one suggesting a differentiation in usage.⁴² Simply using the term doctrine does not transform a teaching into a teaching that is 'necessary for salvation'.⁴³

The General Synod has regularly passed resolutions containing the word doctrine. In 2022, the Synod passed resolution *R108/18: Exemption Clauses for Religious Bodies* which, *inter alia*, notes *Wangaratta* 'distinguishes between doctrine in the technical sense in which the word is used in our Constitution ... and doctrine in the broader sense in which it is used in the church' before going on to assert that previous General Synod resolutions about marriage use the word doctrine in the broader sense and affirms that, *inter alia* marriage according to the Anglican Church of Australia 'is the voluntary union of one man and one woman arising from mutual promises of lifelong faithfulness'.⁴⁴

Previous resolutions also confirmed that 'the doctrine of our church, in line with traditional Christian teachings, is that marriage is an exclusive and lifetime union of a man and a woman'.⁴⁵ While a number of resolutions have been passed in similar terms regarding the definition of marriage and same sex unions,⁴⁶ a significant portion of the resolutions relating to marriage concern other matters such as divorce and remarriage of divorced persons,⁴⁷ *de facto* relationships,⁴⁸ civil marriage,⁴⁹ breakdown of clergy marriages,⁵⁰ and eligibility of the unbaptised for Anglican marriage.⁵¹ The word doctrine appears in 73 Resolutions of General Synod, the majority of which are references to the Doctrine Commission. However, the word doctrine has been used in the more general sense in resolutions concerning a range of matters, such as the 2007 resolution on 'Doctrine and the Environment' which requested the Doctrine Commission 'to identify those areas of doctrine and theology that support the inter-dependent relationship between humanity and the natural world'.⁵²

⁴² Quoted in J Davis, *Australian Anglicans and their Constitution* (Canberra, 1993), 154–155.

⁴³ Anglican Church of Australia Appellate Tribunal, *Wangaratta* (note 1), para 144.

⁴⁴ Anglican Church of Australia, 'Exemptions Clauses for Religious Bodies' (R108/18, 2022), para 5.

⁴⁵ Anglican Church of Australia, 'Marriage, Same Sex Marriage and the Blessing of Same-Sex Relationships' (Resolution 48/17, 2017).

⁴⁶ Anglican Church of Australia, 'Definition of Marriage' (R156/10, 2010); Anglican Church of Australia, 'Definition of Unchastity' (R81/18, 2022); Anglican Church of Australia, 'Scottish Episcopal Church' (R51/17, 2017); Anglican Church of Australia, 'Sexuality and Gender Relationships' (R64/04, 2004).

⁴⁷ Anglican Church of Australia, 'Commission on Marriage and Divorce' (R07/69, 1969); Anglican Church of Australia, 'Family Law Act' (R60/81, 1981); Anglican Church of Australia, 'Form of Solemnization of Holy Matrimony' (R30/73, 1973); Anglican Church of Australia, 'Marriage Preparation Programmes' (R52/85, 1985); Anglican Church of Australia, 'Remarriage of Divorced Persons' (R10/77, 1977).

⁴⁸ Anglican Church of Australia, 'De Facto Relationships not the Equivalent of Marriage' (R28/87, 1987).

⁴⁹ Anglican Church of Australia, 'Civil Celebrations of Marriages' (R44/69, 1969).

⁵⁰ Anglican Church of Australia, 'Clergy Marriage Breakdown' (R52/92, 1992).

⁵¹ Anglican Church of Australia, 'Sexuality and Gender Relationships' (R66/14, 2014).

⁵² Anglican Church of Australia, 'Doctrine and the Environment' (R74/07, 2007).

The *constitutional* meaning of the word doctrine within the Anglican Church of Australia is settled. However, there is clearly anxiety, as evidenced in the 2022 resolution of General Synod, that the civil courts will apply this narrower constitutional meaning rather than the more general meaning finding that the church does not have a ‘doctrine of marriage’.

Doctrine(s) in Australian civil law

The word doctrine is used throughout Australian legislation to refer to specific common law, equitable and constitutional principles. For example, numerous commonwealth statutes contain saving provisions which provide that nothing in the relevant statute is intended to abrogate the constitutional doctrine of implied freedom of political communication. These uses of the word doctrine are not directly relevant to use of the word in the ACA Constitution and Canons. However, as discussed above, the word doctrine is also used in Australian legislation to describe religious beliefs and practices. This occurs most frequently and relevantly, although not exclusively, in anti-discrimination legislation exemptions for religious bodies and organisations.

Australian anti-discrimination law at federal, state and territory level contains exemptions for religious organisations or bodies from the operation of the relevant laws.⁵³ These exemptions, also referred to as balancing⁵⁴ or freedom of religion⁵⁵ clauses, are an important component of the patch-work protection afforded to freedom of religion in Australia.⁵⁶ The scope of the exemption – and therefore discrimination – is grounded in the specific beliefs and practices of each religion. The wording of the exemptions vary between jurisdictions. However, all include the word ‘doctrine’. In the Sex Discrimination Act 1984 (Cth) the phrase is ‘doctrines, tenets, beliefs or teachings of a particular religion or creed’.⁵⁷ By contrast it is ‘doctrines, beliefs or principles’⁵⁸ in the Victorian Equal Opportunity Act 2010 and ‘doctrines of that religion’⁵⁹ in the New South Wales Anti-Discrimination Act 1977. In those jurisdictions with a wider phrasing which incorporate (in addition to doctrines) concepts such as beliefs, tenets, principles and teachings, both the *constitutional* meaning of the phrase, and more general usage of ‘doctrine’ would be covered for the purposes of the Anglican Church of Australia. However, in jurisdictions such as New South Wales, a more careful examination of how the courts have interpreted the word doctrine is required.

The courts have specifically considered the definition of doctrine in anti-discrimination legislation in *OV & OW v Members of the Board of the Wesley*

⁵³ See N Aroney, ‘Can Australian Law better Protect Freedom of Religion?’ (2019) 93 *Australian Law Journal* 708, 718–719.

⁵⁴ See N Foster, ‘Freedom of Religion and Balancing Clauses in Discrimination Legislation’ (2016) 5 *Oxford Journal of Law and Religion*, 385–430.

⁵⁵ Aroney (note 53).

⁵⁶ See further R Barker, *State and Religion: The Australian Story* (Oxford, 2019), 105–109.

⁵⁷ Sex Discrimination Act 1984 (Cth), ss 37(1)(d); 38(1)–(3).

⁵⁸ Equal Opportunity Act 2010 (VIC), s 82(2)(a).

⁵⁹ Anti-Discrimination Act 1977 (NSW), s 56(d).

*Mission Council ('Wesley Mission')*⁶⁰ and *Christian Youth Camps Ltd v Cobaw Community Health Services Ltd ('Cobaw')*.⁶¹ Both cases considered religious beliefs regarding same-sex relationships. It is important to note, however, that the circumstances of the two cases were different and the specific legislative provisions were also subtly different. These differences, however, as observed by Aroney, '[do] not explain the sharply contrasting approaches to the interpretation of the religious freedom exceptions in each case'.⁶²

Wesley Mission considered whether a foster care agency was permitted to refuse to allow a same-sex couple to become foster parents under the provisions of the Anti-Discrimination Act 1977 (NSW). The New South Wales Act prohibited discrimination on the basis of, *inter alia*, homosexuality, and, in section 56(d), provided an exemption for 'bodies established to propagate religion' where the discrimination 'conforms to the doctrine of that religion'.

Cobaw considered whether a camp operated by a religious body could refuse to take a booking from a group intending to run a camp for same-sex attracted young people under the Equal Opportunity Act 1995 (Vic). The Victorian Act prohibited, *inter alia*, discrimination on the basis of same-sex sexual orientation and personal association with persons of same-sex orientation. An exemption for 'a body established for religious purposes' was provided in section 75(2) where the discrimination 'conforms with the doctrines of the religion'. The Victorian human rights charter did not apply as the events took place before the charter came into effect.⁶³

In both cases, the court considered the nature and source of the relevant doctrine. In *Wesley Mission*, the Mission 'nominated the relevant doctrine as the belief that 'monogamous heterosexual partnerships within marriage is both the norm and ideal [of the family]'.⁶⁴ This was based on the teachings of John Wesley.⁶⁵ While the Wesley Mission comes under the umbrella of the Uniting Church which did not have any 'relevant doctrine ... which would bind the Wesley Mission, the Wesley Mission itself is entitled to propagate its own doctrines ... by teaching or other means not necessarily amounting to the formal pronouncement of doctrine'.⁶⁶

In *Cobaw* the relevant doctrine was 'Plenary Inspiration', which was listed along with other doctrines in the Christian Brethren Trust Deed.⁶⁷ This doctrine 'holds that the very words of the Bible are divinely inspired and that, accordingly, what the Bible says about how a Christian life should be led is to be strictly and literally interpreted and adhered to'.⁶⁸ Based upon this doctrine, Christian Youth Camps

⁶⁰ *OV & OW v Members of the Board of the Wesley Mission Council* [2010] NSWCA 155.

⁶¹ *Christian Youth Camps Ltd v Cobaw Community Health Services Ltd* (2014) 50 VR 256; [2014] VSCA 75.

⁶² Aroney (note 53), 716.

⁶³ *Cobaw*, para 176.

⁶⁴ *Wesley Mission*, para 42.

⁶⁵ *Ibid*, paras 24–35.

⁶⁶ *Wesley Mission*, para 33; see also N Foster, 'Respecting the Dignity of Religious Organisations: When is it Appropriate for Courts to Decide Religious Doctrine' (2020) 47 *University of Western Australia Law Review* 175, 216.

⁶⁷ *Cobaw*, para 270; see also para 203.

⁶⁸ *Ibid*, para 271.

argued that this included that ‘sexual activity must be confined to marriage; and sexual activity between members of the same sex is against God’s will’.⁶⁹

While both cases concerned teaching related to same-sex relationships, the *locus* of these doctrines and the court’s interpretation of how each doctrine should be applied was different. In *Wesley Mission*, the structure of the church was decentralised with individual units within it able to determine their own beliefs. While at first instance the Administrative Decision Tribunal found that it was the doctrines of the Uniting Church that was relevant, both the Appeal Panel and the Court of Appeal rejected this approach.⁷⁰ The Court of Appeal also rejected limiting the operation of the exemptions in section 56 to doctrines held in common by all Christian religions noting:⁷¹

there is no basis in s 56 to infer that Parliament intended to exempt from the operation of the *Anti-Discrimination Act* only those acts or practices which formed part (relevantly for present purposes) of the religion common to all Christian churches, or all branches of a particular Christian church (in the sense of denomination), to the exclusion of variants adopted by some elements within a particular Church, but not by others.⁷²

By contrast, in *Cobaw* the Christian Youth Camps were established by the Christian Brethren Trust⁷³ known as the Open Brethren.⁷⁴ The doctrines of the Open Brethren were set out in a Deed as follows:

Eternal sonship and Deity of our Lord Jesus Christ, The full efficacy of His atonement only for the Sins of whomsoever believeth: The resurrection Ascension and Coming again of Our Lord Jesus Christ: the quickening indwelling and sanctifying Power of the Holy Spirit: the Eternal Punishment of the wicked and the Plenary Inspiration of the Holy Scriptures.⁷⁵

The members of the Christian Youth Camps were required to ‘subscribe to a declaration of faith which ... is essentially the same as the fundamental beliefs and doctrines listed in the Trust Deed’.⁷⁶ The doctrine relied upon in *Cobaw* was much less specific and more formal. The reliance on the doctrine of Plenary Inspiration required the application of that doctrine to be interpreted. This led to a clash of experts as to the correct interpretation of the Bible on same-sex relationships as well as the extent to which deviations from the literal interpretation of the Bible was permitted.⁷⁷ Ultimately the court concluded that

⁶⁹ *Ibid*, para 272.

⁷⁰ *Members of the Board of the Wesley Mission Council v OV and OW (No. 2)* [2009] NSWADTAP 57 at paras 45–48, 84; and see also the first instance decision *Wesley Mission*, paras 42–45.

⁷¹ *Wesley Mission*, paras 40–41.

⁷² *Wesley Mission*, para 41. Emphasis in original.

⁷³ *Cobaw*, paras 3–4.

⁷⁴ *Ibid*, para 203.

⁷⁵ *Ibid*.

⁷⁶ *Ibid*, para 206.

⁷⁷ *Ibid*, paras 271–279.

the Open Brethren's beliefs about same-sex relationships 'were properly to be regarded as *applications* of doctrine' as opposed to doctrine themselves.⁷⁸ Furthermore, the court found that even if 'the wrongfulness of homosexual sexual activity was a doctrine of the Christian brethren' this doctrine only applied to the behaviour of the members of the religion themselves noting that all of the expert witnesses had acknowledged that 'conformity with Scripture ... would require adherents of the Christian Brethren religion to be tolerant of difference and, in particular, of people whom they might regard as sinners'.⁷⁹ As a result '[t]he majority ... made findings about the doctrine and practice of [Christian Youth Camps] ... which flatly contradicted CYC's own expressed views'.⁸⁰

This contrasts with the position of the Wesley Mission which had significant autonomy to determine its own doctrines that may differ from the Uniting Church. The relevant doctrines accepted by the court in *Wesley Mission Council* were also much more specific in nature, being directly relevant to their beliefs in relation to same-sex relationships. The Wesley Mission may have benefited from a less formal and less hierarchical structure where the beliefs were promulgated in a less formal manner. Indeed, the Court of Appeal specifically noted that, 'because, in one particular religion, doctrine is determined at a particular level in a hierarchical structure, it does not follow that other religions which do not have such hierarchical structures or definitions of authoritative statement, do not have doctrines'.⁸¹

In *Trkulja v Dorbrijevic & Anor*,⁸² the Victorian Civil Administration Tribunal, applying *Cobaw*, looked to the '[t]he doctrines, beliefs or principles of the Serbian Orthodox religion are set out in [its] Constitution'.⁸³ Like the Christian Youth Camps, the Constitution of the Serbian Orthodox Church, including the duties of members, is set out prescriptively in the Constitution. The case concerned an application to summarily dismiss the case, which was denied, and as such did not make ultimate findings on the application of the relevant exemption in the Equal Opportunity Act 2010 (Vic). That said, this is still a somewhat startling example of internal religious disputes being litigated in the civil courts.

Application of civil law to the Anglican Church of Australia

The different outcomes in *Wesley Mission* and *Cobaw* have been heavily critiqued by academics, with many criticising the majority in *Cobaw* for substituting the court's own interpretation of the Open Brethren's doctrine for their own.⁸⁴ However, in

⁷⁸ Ibid, para 278; emphasis added.

⁷⁹ Ibid, para 284.

⁸⁰ A Deagon, 'The Religious Question Doctrine: Addressing (Secular) Judicial Incompetence' (2021) 47 *Monash University Law Review* 60, 82; see also Aroney (note 53), 716.

⁸¹ *Wesley Mission*, para 57.

⁸² *Trkulja v Dorbrijevic & Anor* [2013] VCAT 925.

⁸³ Ibid, para 48.

⁸⁴ See for example Deagon (note 80); Aroney (note 53); Foster (note 66), 175.

terms of the interpretation of the word doctrine, both offer some guidance for the Anglican Church of Australia.

The Anglican Church of Australia falls between the Uniting Church and the Open Brethren in terms of both the locus of its doctrine and its hierarchical structures. Like the Open Brethren, the ACA Constitution sets out specific doctrines of the church. However, like the Uniting Church it gives flexibility and autonomy to local units within the wider church. Diocesanism,⁸⁵ which is built into the ACA Constitution, enables local dioceses to accept or reject Canons of General Synod as well as promulgate their own Ordinances.⁸⁶ As a result the doctrines, in a broad (non-constitutional) sense, are located in the ACA Constitution, the canons and motions of General Synod as well as diocesan ordinances. While a narrow reading of *Cobaw* might suggest that the court would only look to the ACA Constitution it is important to note that no other source of doctrine was available to the court in that case. Examination of the other written sources of doctrine would therefore not be inconsistent with *Cobaw* and is in line with the approach taken in the *Wesley Mission* case. Therefore, the court could consider, for example, resolutions of General Synod to determine the doctrines of the Anglican Church of Australia for the purposes of civil law. However, recourse only to assertions that the Anglican Church of Australia, or units within it, follow the Biblical or 'traditional' teaching on marriage and same-sex relationships are unlikely to be sufficient to bring them within the operation of the relevant exemption clauses. As in *Cobaw*, this would invite the court to attempt to interpret what the Bible actually says on marriage and same-sex relationships, a matter which Christians and Anglicans themselves disagree on.⁸⁷

Conclusion

The apparent inconsistencies between *Cobaw* and *Wesley Mission* continue to create anxiety for religious organisations in Australia. It is unfortunate the High Court of Australia refused leave to appeal in *Cobaw*.⁸⁸ For now the Anglican Church of Australia should continue to make their specific teachings related to marriage and same-sex relationships clear. This includes how their members should respond to those in same-sex relationships as well as the circumstances in which the religious organisation are prepared to engage in ostensibly secular activities. The civil law meaning of doctrine is wide enough to incorporate the Anglican Church of Australia's *constitutional* usage as well as the *broader* usage of the term in phrases such as 'the doctrine of marriage'. However, reliance on

⁸⁵ For a discussion of diocesanism, see A Taylor, 'Diocesanism versus Australia's Royal Commission into Institutional Responses to Child Sexual Abuse' (2021) 19 *Journal of Anglican Studies* 166, 168–170.

⁸⁶ See ACA Constitution, ss 30 and 51.

⁸⁷ See contrasting approaches in Doctrine Commission of the Anglican Church of Australia, *Marriage, Same-Sex Marriage and the Anglican Church of Australia: Essays from the Doctrine Commission* (Mulgrave, 2019).

⁸⁸ See *Christian Youth Camps Limited v Cobaw Community Health Service Ltd and Ors* [2014] HCT Trans 289 (12 December 2014).

generic statements such as a belief in the biblical or traditional meaning of marriage risks inviting the courts to engage in its own exegesis of scripture and lead the court to come to a conclusion at odds with the avowed beliefs of the Church.

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