

Proposed Amendment of Section 26 of the 1917 Act

(A report from the Standing Committee)

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Introduction

1. Synod Resolution 29/92 reads -

“Noting the view expressed in the report on the Development of Parish Property and Ministry, concerning the need for Section 26 of the Anglican Church of Australia Trust Property Act 1917 to be more flexible, this Synod requests Standing Committee to promote whatever amendments may be necessary to that Act to allow the Synod of the diocese in some cases to determine on matters relating to property held for the benefit of a particular parish and to prepare for consideration at the first ordinary session of the next Synod an ordinance embodying the principles to be observed and procedures to be adopted in the exercise by Synod of the power envisaged to be conferred by the amendments to the Act.”
2. The Standing Committee appointed a committee (the “Committee”) consisting of the Revs S.N. Abrahams, B.A. Ballantine-Jones, Mr B.R. Davies and Bishop (now Archbishop) R.H. Goodhew to help carry out the requirements of the resolution by -
 - (a) giving consideration to any possible aspects of the proposal which may require consultation with the other dioceses in the Province of New South Wales;
 - (b) indicating in what ways Section 26 of the Anglican Church of Australia Trust Property Act 1917 (“1917 Act”) should be made more flexible;

- (c) recommending the text of a bill for an Act of Parliament and procedures for having the bill considered;
- (d) preparing a draft ordinance which the Standing Committee can promote to the Synod; and
- (e) investigating, if possible, the extent to which the proviso has, in practice, prevented the Synod or the Standing Committee from acting under Section 26.

3. The Committee has reported to the Standing Committee. The Committee's conclusions are summarised in paragraphs 4 to 9 of this report. The Committee's comments are summarised in paragraphs 10 to 50. The Committee's recommendations are set out in paragraph 51 and the Standing Committee's response to those recommendations is set out in paragraph 52.

Summary of the conclusions of the Committee

4. The Committee was of the view that Section 26 should be made more flexible by repealing the proviso to that section. The deletion of the proviso would enable ordinances to be passed under Section 26 in respect of church trust property held for the sole benefit of the parish even where the consent of the majority of the parish council is not obtained.

5. The Committee also noted that the repeal of the proviso to Section 26 would enable ordinances to be passed without the consent of the donor of that property where less than 20 years has elapsed since any gift of property was made.

6. As the proviso to Section 26 applies only to the Dioceses of Sydney and Canberra/Goulburn, it was the Committee's view that consultation should be undertaken with the Diocese of Canberra/Goulburn with a view to obtaining that diocese's support for the repeal of the proviso.

7. It was recommended that an application be made to the Attorney-General asking if the Attorney-General would consider promoting a public bill to repeal the proviso (this being a simpler and cheaper process than promoting a private bill).

8. If the Attorney-General agrees to promote the amending legislation, the Committee advised that it would not be necessary for the diocese to draft the text of the bill. The diocese would be consulted in the course of the drafting of the bill by the Parliamentary Counsel's Office.

9. If the proviso to Section 26 is deleted, the Committee was of the view that Synod should be the only body which has power to pass an ordinance in respect of property held for the benefit of a parochial unit if the consent of the majority of the parish council of that parochial unit is not forthcoming. Amendments to the Delegation of Powers and Ordinance Procedure Ordinance 1973 to this effect have been suggested.

The present legislative position regarding dealings with Church Trust Property

10. Section 24 of the 1917 Act empowers the synod of each diocese in New South Wales to make provision, by ordinance, for governing and controlling the management and use of church trust property.

11. Section 26 empowers the Synod of each diocese in New South Wales to direct, by ordinance, that such property be sold, etc. However, the section goes on to provide that in the case of the Dioceses of Sydney and Canberra/Goulburn no such ordinance in respect of property held for the sole benefit of a particular parish shall be assented to -

- (a) without the consent in writing of a majority of the members of the parish council (if any) for the time being of the parish; and
- (b) in the case of property gratuitously granted or assured within the twenty years preceding by any private donor, without the consent of such donor if living.

12. Section 32 of the 1917 Act empowers the synods of all dioceses, by ordinance, to vary the trusts on which church trust property is held where it is impossible or inexpedient to carry out or observe such trusts.

How the present legislative position arose

13. The genesis of the proviso to Section 26 is found in the Sydney Bishopric and Church Property Act 1887 ("1887 Act").

14. The bill for the 1887 Act was presented to the New South Wales Parliament during the 1885-1886 session of Parliament. Under this bill the Sydney Synod was to be given extensive powers by rule or ordinance to vary trusts and to authorise dealings with church trust property. These powers had not existed previously.

15. When introduced into Parliament the bill provided that any exercise of the powers to be given to the Sydney Synod was to be subject to a proviso to the effect that if the relevant property had been gratuitously granted to the church, the consent of the donor, his heirs or assigns was to be obtained before the property could be dealt with by the Sydney Synod. The reason for this proviso appears to have been to induce people to give land for church and school purposes in connection with the Church of England. The parliamentary debates suggest concern that without the proviso a person could give land to the Church for a certain purpose and immediately thereafter the Synod could apply the property for another purpose, thus defeating the intention of the grantor. When introduced, this proviso was without a time limitation. The time limitation of twenty years was inserted as the bill was passing through Parliament as a compromise between the interests of the grantor and the interests of the Church.

16. The Legislative Assembly received a number of petitions (in all with 219 signatures of members of the church in the Diocese of Sydney) to the effect that the 1885-1886 bill was unfair since, in the view of the petitioners, the wide powers to be given to the Sydney Synod to deal with church trust property tended to destroy the legal independence and individuality of parishes. The petitioners requested that the proviso in the bill be amended so as to also provide that no property of any parish could be disposed of by the Synod without the concurrence or consent of the incumbent and a majority of the churchwardens of the parish.

17. Sections 2 and 4 of the 1887 Act gave the Synod wide powers to deal with church trust property. Section 5 of the 1887 Act contained the following proviso to the exercise by Synod of its powers under Sections 2 and 4 -

“Provided always and it is hereby enacted that it shall not be lawful for the Synod to pass any rule or ordinance in the second or fourth sections of this Act mentioned without the consent in writing of the Incumbent and a majority of the churchwardens for the time being of the parish or ecclesiastical district in which such lands, buildings or hereditaments are situate and in the case of lands, buildings or hereditaments or of proceeds, rents, or moneys arising from lands, buildings, hereditaments which have been within twenty years gratuitously granted or assured upon trust for or for the use and benefit of the Church of England by any private donor without the consent previously had and obtained of such donor, his heirs or assigns.”

18. The 1887 Act only applied to the Diocese of Sydney. The synods of the other dioceses in New South Wales did not have the powers granted to the Sydney Synod by the 1887 Act.

19. The Church of England Property Act of 1889 (“1889 Act”) purported, among other things, to give the synod of each diocese in New South Wales, then existing or thereafter created, the same powers in relation to the sale, lease, mortgaging and other specified dealings with church trust property as had been granted to the Sydney Synod under the 1887 Act. These powers of the Synod were subject to the following proviso -

“Provided always, and it is hereby enacted that it shall not be lawful for the Synod to pass any such rule or ordinance in respect of extra parochial lands and Diocesan moneys without the consent in writing of the Bishop of any such Diocese, or of his Commissary duly appointed under his Episcopal seal and in the case of other lands, moneys, buildings or hereditaments, without the like consent of the Incumbent and a majority of the churchwardens and Parochial Council if any for the time being of the parish or ecclesiastical district for the benefit of which such lands,

buildings or hereditaments may be or may have been held in trust, and in the case of lands, buildings or hereditaments, or proceeds, rents, or moneys arising from lands, buildings or hereditaments which have been gratuitously granted or assured upon trust for or for the use and benefit of the Church of England by any private donor without the consent previously had and obtained of such donor, if living, or without the like consent of his lawful personal representatives, if he be dead, and if his gratuitous grant or assurance upon trust shall have been made within twenty years.”

20. The proviso under the 1889 Act, in so far as it applied to land held for the purposes of a parochial unit, differed from the proviso under the 1887 Act in that under the 1887 Act only the written consent of the Incumbent and the majority of the churchwardens was required. In the 1889 Act, the consent of the majority of the Parish Council (if any) was also required. The parliamentary debates for the 1889 Act do not indicate why the requirement for the consent of the majority of the parochial council was introduced.

21. The 1889 Act applied to the Diocese of Sydney. However the 1889 Act specifically provided that its provisions did not repeal, or in any way cut down or abridge, the provisions of the 1887 Act and was to be read as supplementary to and enlarging the provisions of that Act.

22. The 1917 Act was substantially a measure to consolidate the existing legislation which conferred powers upon the synods of dioceses in New South Wales. However, the 1917 Act altered the effect of that legislation. In relation to the limitation set out in the 1889 Act on the powers of the synod of a diocese to pass a rule or ordinance in relation to the property held in trust for a parochial unit the following changes were made -

- (a) the 1917 Act did not prevent the synod passing the rule or ordinance, it only prevented the bishop from assenting to that rule or ordinance;
- (b) the consent of the majority of the churchwardens was no longer required;
- (c) the consent of the donor was only required if the property was gratuitously granted within twenty years and if the donor was still living; and
- (d) the limitations only applied in the cases of the diocese of Sydney and Goulburn (now Canberra/Goulburn).

23. The Parliamentary debates for the 1917 Act do not indicate why the changes to the proviso referred to in paragraph 22. were made.

24. Although the bill for the 1917 Act was referred to a Select Committee of the Legislative Assembly, the Committee did not report to the Parliament. Further, the provisions of Section 26, including the

proviso, were not referred to in the parliamentary speeches relating to the bill.

How this Diocese exercises its powers under Section 26

25. The powers of the Synod under Section 26 are generally exercised by the Standing Committee pursuant to the power of delegation set out in Section 40 of the 1917 Act and clause 4 of the Delegation of Powers and Ordinance Procedure Ordinance 1973 (the "Delegation Ordinance").

26. Under clause 4 of the Delegation Ordinance, during the recess of the Synod the Standing Committee may exercise in the place of the Synod a range of powers and functions including those conferred by Sections 26 and 32 of the 1917 Act. In the case of powers conferred by Section 32, clause 4 of the Delegation Ordinance makes provision for a proposed ordinance to be referred to Synod, before assent, in certain circumstances.

27. Clauses 11 and 12 of the Delegation Ordinance provide for the making of applications for ordinances. Clause 11 requires a petition to be lodged with the Secretary of the Standing Committee setting out the names and addresses of the petitioners and which is signed by them. A copy of the proposed ordinance must accompany the petition. There is no restriction on the identity of persons who may promote an ordinance. Under Clause 12, the petitioners must, among other things, pay the necessary ordinance fee and provide a statement of evidence.

28. Clauses 13, 16 and 17 of the Delegation Ordinance detail the procedural requirements which generally must be dealt with before an ordinance (including an ordinance to authorise the sale etc of land under Section 26) can be considered by the Standing Committee.

29. If the proposed ordinance relates to church trust property held or to be held on trust partly or wholly for a parish, clause 13 requires notice of the ordinance in the prescribed form to be posted in each church in the parish for at least two Sundays on which services are held in the church.

30. The attention of the congregation must be drawn to the notice at each service in the church. A procedure enabling persons to object to an ordinance exists under clause 16. Clause 17 requires the Standing Committee or a committee appointed by Standing Committee to hear the parties and to report on the matters specified in that clause.

31. Under clause 9 of the Delegation Ordinance the procedural requirements can be waived in urgent cases. The requirement for the consent of the majority of the parish council under Section 26 cannot be waived. Nor can the requirement for the consent of a donor under that Section.

How the other Dioceses exercise their powers under Section 26

32. With the exception of the Diocese of Canberra-Goulburn the other dioceses in the Province are not subject to the proviso to Section 26. Contact has been made with those dioceses to determine the procedures for the making of an ordinance under Section 26 of the 1917 Act in respect of church trust property held on trust for the benefit of a parish. Each of the dioceses operates under a property ordinance dealing with the procedure for the sale, etc., of church trust property pursuant to Section 26. A summary of the relevant provisions is set out in the table annexure "A".

33. It is to be noted that in all cases, but Bathurst, an ordinance to direct the dealing with church trust property held for a parish need not be promoted for or on behalf of the parish. Further, in all cases, but Armidale, the consent of the parish is not required. In each of the dioceses there are notice requirements which generally are more extensive than under the Delegation Ordinance.

34. In the case of the Diocese of Canberra-Goulburn the matters which are the subject of our Synod resolution have been communicated to the Registrar and it was the Committee's understanding that they have been discussed in Bishop-in-Council. Indications are that Canberra/Goulburn may be willing to support the proposal to have the proviso to Section 26 varied or removed. It is further understood that the matter has been referred to their Legal Committee for further consideration.

Difficulties arising under the present legislation

35. Details have not been recorded of instances where the presence of the proviso to Section 26 has prevented the Synod or the Standing Committee from acting under Section 26. But there have been occasions where parish amalgamation proposals have been abandoned when it has become clear that the necessary parish council consent to sale would not be forthcoming.

36. The existence of the proviso has had an inhibiting effect on the Diocese in taking a positive initiating role in areas where ministry is languishing and parishes are no longer viable.

37. Information was provided to the Committee going back to the time of Archdeacon Delbridge when negotiations to centralise ministry on one site in the Eastlakes/Rosebery/Botany area were frustrated by sectional interests. A similar situation existed years ago with South Canterbury. In these instances, small minority interests opposed the proposals. The writer stated - "... a small group of parishioners stacked the vestry meeting and it could be argued that they perjured themselves when they signed the declaration form". It took another fifteen years to finalise South Canterbury.

38. Bishop Short had a proposal to invigorate church life which involved amalgamating Rose Bay with Vaucluse in the 1970's. In the

main, two parishioners opposed this on the ground that they did not want to have An Australian Prayer Book used in St Paul's.

39. Other instances were referred to the Committee. The Committee noted that at present, in the diocese an amalgamation of three churches is being negotiated and is opposed by a small minority in one of the churches.

40. In 1990 the committee which produced the report "Development of Parish Property and Ministry" was re-appointed and asked to consider, among other things, the effect of the proposals in the report bearing in mind the provisions of the 1917 Act, including Section 26. The committee reported to Synod in 1992 that in its view Section 26, as it now stands, restricts the powers of the Synod to the extent that implementation of some of the major changes proposed, and already accepted in principle by the Synod, could be jeopardised. It considered that in respect of important ministry developments across the Diocese the final decision-making power should be vested in the Synod.

The legislative change required

41. The main need is to have removed from the proviso to Section 26 the requirement for consent by the majority of members of parish council. But it is also desirable to have removed from the proviso the other requirement that the consent of a donor, where less than twenty years have elapsed since the gift of property was made, must be obtained if the donor is living. This latter requirement has less relevance today as few, if any, people donate land, as such, to the church, but if such a situation should arise it could present considerable difficulty in a major parish-restructuring.

42. The Synod resolution indicates that Synod is of the view that, by reason of changed circumstances the absolute requirements embodied in the 1917 Act are no longer desirable. This Committee considered that the flexibility desired by Synod will best be achieved by amending Section 26 to exclude Sydney Diocese from the application of the whole proviso.

43. The Committee considered that it would be preferable to have the proviso removed from the Section so that the Section is of general application in the whole Province. That would require the Diocese of Canberra-Goulburn to join in the request. The Government may, in fact, require this to avoid any second amendment. In any event, it is thought that the joining in of the Diocese of Canberra-Goulburn would strengthen our hand and could eliminate any need to obtain the consent of the Provincial Synod.

44. If the proviso were to be removed consequential amendments would be required to Section 27A of the 1917 Act.

Procedure to have the amending bill promoted

45. The Committee recommended that an application be made to the Attorney General asking if the Attorney General would promote a

bill to make the necessary amendments to Section 26. It would be appropriate and desirable for the letter to go under the signature of the Archbishop.

46. The letter would need to be accompanied by a submission containing all necessary background material (including why the proviso to Section 26 exists) and setting out the reasons for seeking the amendment along the lines of the information contained in this report. It would also need to be accompanied by evidence that the Synod of the Diocese supports the request. Formal advice of Synod Resolution 29/92 and of an appropriate decision of the Standing Committee pursuant to that resolution should suffice.

47. It is not necessary for the Diocese to draft the Bill. That would be done by Parliamentary Counsel on instructions from the Attorney General's Department. The Parliamentary Counsel's Office would consult with the Diocese in relation to the terms of the Bill.

The ordinance changes required

48. Synod Resolution 29/92 included a request to Standing Committee - "to prepare for consideration at the first ordinary session of the next Synod an ordinance embodying the principles to be observed and procedures to be adopted in the exercise by Synod of the power envisaged to be conferred by the amendment to the Act".

49. The Committee believed that the only ordinance which requires amendment is the Delegation Ordinance. In the speech by the mover of the motion which was passed as Resolution 29/92 it was indicated that in cases where the consent of a parish council is not forthcoming, but the Diocese considers it important in the interest of wider ministry needs that the ordinance be passed, the ordinance would be considered by the Synod itself, and not by the Standing Committee under delegation.

50. It is considered that the Delegation Ordinance should be amended to remove the power of Standing Committee to make ordinances under Section 26 in respect of church trust property held for the sole purpose of a particular parish unless the consent of the majority of the Parish Council (if any) of the parish is obtained.

Recommendations of the Committee

51. The Committee recommended that the Standing Committee -

- (a) request that the Archbishop make a formal approach to the Diocese of Canberra/Goulburn in the terms of the Committee's report with a view to that Diocese either joining in the request to the Attorney General for the removal of the proviso, or agreeing to this Diocese's request that it be excluded from the application of the proviso.
- (b) submit an ordinance in terms of the bill for the Delegation of Powers and Ordinance Procedure Ordinance 1973 Further Amendment Ordinance 1993 to the next ordinary

session of the Synod to provide for the removal of the power of Standing Committee to make ordinances under Section 26 in respect of church trust property held for the sole purpose of a particular parish unless the consent of the majority of the Parish Council (if any) of the parish is obtained.

- (c) request that the Archbishop write to the Attorney General seeking -
 - (i) removal of the proviso to Section 26 of the 1917 Act, with a consequential amendment of sub-sections (2) and (3) of Section 27A, if the Diocese of Canberra/Goulburn is prepared to join in the request; or
 - (ii) amendment of the proviso to Section 26 to exclude the Diocese of Sydney from its application if the Diocese of Canberra/Goulburn is not prepared to join in the request for the removal of the proviso.

Response of the Standing Committee

52. The Standing Committee has adopted the recommendations of the Committee in paragraph 51.

For and on behalf of the Standing Committee

MARK PAYNE
Legal Officer

24 August 1993

Annexure "A"

This table summarises the procedural requirements for an ordinance in respect of church trust property held for the benefit of a parish in a diocese where the proviso to s.26 is not applicable.

<i>Diocese and Relevant Ordinance</i>	<i>Who can Petition for an Ordinance?</i>	<i>Is Consent of Parish Council Required?</i>	<i>What Notice is Required?</i>	<i>Is there Provision for Objections?</i>	<i>Can Standing Committee etc pass the Ordinance?</i>	<i>Does a Subcommittee Examine the Ordinance?</i>
<i>Armidale - Church Property Act Procedure Ordinance 1935</i>	No restriction	Yes - 2/3 Members of Parish Council	Notice in Parish paper or notice at services on 2 Sundays	Yes - at least 30 days from date of notice to objection	Yes	Yes
<i>Bathurst - Church Trust Property Ordinance 1990-1991</i>	Petition must be signed by at least 12 parishioners of the parish affected by the proposal	No	21 days notice in the principal church in parish and other church affected by the proposal. Attention of congregation must be drawn to the notice.	Yes - within 21 days of the posting of the notice	Yes	Yes
<i>Grafton - Church Trust Property Ordinance Amendment Ordinance 1962</i>	No restriction	No	21 days notice in the principal church in parish and other church affected by the proposal. Attention of congregation must be drawn to the notice.	Not expressly stated	Yes	Yes
<i>Newcastle - Church Trust Property Ordinance 1929-1978</i>	No restriction	No	21 days notice in the principal church in parish and other church affected by the proposal. Attention of congregation must be drawn to the notice.	Not expressly stated	Yes	Yes
<i>Riverina - Ordinances Initiation Ordinance of 1923</i>	No restriction	No	Notice to be published in a newspaper circulating in the parish. 21 days notice in the principal church in parish and other church affected by the proposal. Attention of congregation must be drawn to the notice.	Yes - minimum 8 weeks object	Yes	Yes