(1) ORDER PROHIBITING PUBLICATION OF NAME, ADDRESS OR IDENTIFYING PARTICULARS OF WITNESS

(2) ORDER PREVENTING SEARCH OF THE TRIBUNAL FILE WITHOUT LEAVE OF THE CHAIRPERSON

IN THE HUMAN RIGHTS REVIEW TRIBUNAL **[2013] NZHRRT 36**

Reference No. HRRT 021/2012

UNDER	**THE HUMAN RIGHTS ACT 1993**
BETWEEN	**THE GAY AND LESBIAN CLERGY ANTI-DISCRIMINATION SOCIETY INC**
	PLAINTIFF
AND	**THE BISHOP OF AUCKLAND**
	DEFENDANT

AT AUCKLAND

BEFORE:
Mr RPG Haines QC, Chairperson
Mr GJ Cook JP, Member
Dr SJ Hickey, Member

REPRESENTATION:
Mr DJ Ryken and Mr G Wong for Plaintiff
Mr BD Gray QC, Professor PT Rishworth and Ms S Holderness for Defendant

DATE OF HEARING: 6, 7, 8 and 9 May 2013

DATE OF DECISION: 17 October 2013

DECISION OF TRIBUNAL

Introduction

[1] To be ordained as a priest or deacon of the Anglican Church in Aotearoa, New Zealand and Polynesia (the Anglican Church) a person must, inter alia, "be chaste".

Chastity is defined by the Canons of the Church as "the right ordering of sexual relationships". Such relationships can only occur within a Christian marriage which is defined by the Formularies as a physical and spiritual union of a man and a woman.

[2] Thus a person seeking to enter the ordained ministry of the Anglican Church must either be single and celibate or in a heterosexual marriage. Those ineligible for entry include those in a heterosexual de facto relationship and those in a homosexual relationship which is committed and monogamous in nature. Being gay or lesbian is not in itself a bar to ordination. But any candidate not in a marriage between a man and a woman must be celibate.

[3] Believing that he may be called to ordained ministry in the Anglican Church, Mr Eugene Sisneros sought to enter a time of discernment during which his sense of call would be tested and a decision made by a bishop whether training for the ministry should begin.

[4] The Bishop of Auckland, Bishop Ross Bay, refused to allow Mr Sisneros to participate in the process of discernment because Mr Sisneros was in an unmarried relationship and could not therefore be ordained into the ministry.

[5] Mr Sisneros says he was thereby discriminated against on either or both of the following grounds:

> **[5.1]** His marital status (being in an unmarried de facto relationship) (direct discrimination).
>
> **[5.2]** Because of his sexual orientation ie being homosexual (direct or indirect discrimination).

[6] Prima facie it is unlawful under the law of New Zealand for a person seeking entry to a calling to be treated differently by reason of any of the prohibited grounds of discrimination listed in the Human Rights Act 1993, s 21. Section 38 of that Act provides:

> **38 Qualifying bodies**
>
> (1) It shall be unlawful for an authority or body empowered to confer an approval, authorisation, or qualification that is needed for, or facilitates, engagement in a profession, trade, or calling, or any person acting or purporting to act on behalf of any such authority or body,—
>
> (a) to refuse or omit to confer that approval, authorisation, or qualification on a person; or
>
> (b) to confer that approval, authorisation, or qualification on less favourable terms and conditions than would otherwise be made available; or
>
> (c) to withdraw that approval, authorisation, or qualification or vary the terms on which it is held, in circumstances in which it would not otherwise be withdrawn or varied,—
>
> by reason of any of the prohibited grounds of discrimination.
>
> (2) For the purposes of this section *confer* includes renew or extend.

[7] However, s 39 provides an exception. Discrimination is not unlawful where (inter alia) the authorisation is needed for a calling for the purposes of an organised religion and is limited to persons of that religious belief "so as to comply with the doctrines or rules or established customs of that religion". See subs (1):

> **39 Exceptions in relation to qualifying bodies**
>
> (1) Nothing in section 38 shall apply where the authorisation or qualification is needed for, or facilitates engagement in, a profession or calling for the purposes of an organised religion and is limited to one sex or to persons of that religious belief so as to comply with the doctrines or rules or established customs of that religion.

[8] The primary issue for determination by the Tribunal in this case is whether the s 39 exception applies to the facts of the case.

[9] Determination of that issue is unaffected by the Marriage (Definition of Marriage) Amendment Act 2013 which received its assent on 19 April 2013 and came into force on 19 August 2013. The purpose of that Act was to amend the Marriage Act 1955 by clarifying that for the purpose of New Zealand secular law, a marriage is between two people regardless of their sex, sexual orientation, or gender identity. The Amendment Act did not amend the doctrine of any church, including in particular that of the Anglican Church, regarding the sacrament of marriage as conceived by that church.

[10] Nor is it the function of this Tribunal to second guess the Anglican Church as to what its doctrines and teachings should be or how those doctrines and teachings should be interpreted. This is a common law principle of long standing. See for example *Gregory v Bishop of Waiapu* [1975] 1 NZLR 705 at 708, *Mabon v Conference of the Methodist Church of New Zealand* [1998] 3 NZLR 513 (CA) and *Marshall v National Spiritual Assembly of the Bahá'is of New Zealand Inc* [2003] 2 NZLR 205 at [31]-[34]. In *Mabon* at 523 it was said:

> Clearly, and reflecting the separation of church and state, Courts must be reluctant to determine what are at heart ecclesiastical disputes where matters of faith or doctrine are at issue.

[11] In *Percy v Board of National Mission of the Church of Scotland* [2005] UKHL 73, [2006] 2 AC 28 Baroness Hale at [152] stated the principle in the following terms:

> The Church is free to decide what its members should believe, how they should manifest their belief in worship and in teaching, how it should organise its internal government, and the qualifications for membership and office. But the processes whereby they make decisions about membership and office may be subject to the ordinary law of the land. It will all depend upon what that law says and means.

[12] The same principle is recognised in international human rights law. For example in *Hasan and Chaush v Bulgaria* (2002) 34 EHRR 55 (Grand Chamber, ECHR) at [78] the European Court of Human Rights said:

> … but for very exceptional cases, the right to freedom of religion as guaranteed under the [European Convention on Human Rights] excludes any discretion on the part of the State to determine whether religious beliefs or the means used to express such beliefs are legitimate.

[13] The limited nature of the enquiry before the Tribunal was properly recognised by the plaintiff society both in opening and in closing submissions. It was expressly conceded that:

> **[13.1]** The Tribunal is not asked to deliberate on what the rules, doctrines or established customs within the Anglican Church are, or ought to be.
>
> **[13.2]** The Tribunal is not asked to rule on what the meaning of the Anglican Church canons might be in relation to who may or may not be admitted to the priesthood. The plaintiff is content to have them expressed as Bishop Bay and Archbishop Richardson express them.
>
> **[13.3]** It was conceded that the Bishop of Auckland has complied with the doctrines of the Anglican Church and that such doctrines are not justiciable before the Tribunal.

[14] Given the nature of these concessions and further given that the credibility of witnesses was not in issue, we do not intend reciting the evidence at length. It will be incorporated where appropriate into the analysis of the legal issues.

[15] As the language in s 39(1) of the Act makes the "doctrines or rules or established customs" of the Anglican Church the primary focus of these proceedings, it is to them that we now turn.

THE DOCTRINES OR RULES OR ESTABLISHED CUSTOMS OF THE ANGLICAN CHURCH

[16] Archbishop Richardson gave detailed evidence as to the Constitution of the Anglican Church in Aotearoa, New Zealand and Polynesia and as to the "doctrines or rules or established customs" of the Anglican Church. As there was no challenge to those doctrines, rules or customs a summary of the main points only follow. It is necessary, however, to briefly note the Archbishop's qualifications and experience. He holds the degrees of Bachelor of Arts and Bachelor of Theology from the University of Otago and a Postgraduate Diploma in Practical Theology from that University. He was ordained to the Diaconate in November 1981 and to the Priesthood in November 1982. He has served in parishes in the Diocese of Auckland and the Diocese of Dunedin. He also served as Warden of Selwyn College at the University of Otago from 1992 to 1999 and tutored in Practical Theology at that University during those years. He is the first Bishop of Taranaki and Diocesan Bishop within the Anglican Diocese of Waikato and Taranaki. He assumed office as Bishop of Taranaki in July 1999. Since 1 May 2013 he has held the office of Archbishop of the New Zealand Dioceses and shares the Primacy of the Anglican Church in Aotearoa, New Zealand and Polynesia with the Archbishop of Aotearoa and the Archbishop of Polynesia.

[17] Unlike the Church of England, the Anglican Church in Aotearoa, New Zealand and Polynesia is not an "established" church. Rather, as recognised in *Gregory v Bishop of Waiapu* at 708, it is a voluntarily association of persons. See the Eighth recital in the Preamble to the Constitution of the Anglican Church in Aotearoa, New Zealand and Polynesia (the Constitution):

> **AND WHEREAS** (8) on the 13th day of June in the year of our Lord, 1857, at a General Conference held at Auckland, the Bishops and certain of the Clergy and Laity representing a numerous body of the members of the said United Church, and including Missionary clergy but without direct Māori participation or the inclusion of Tikanga Māori, agreed to a Constitution for the purpose of associating together by voluntary compact as a branch of the said United Church for the ordering of the affairs, the management of the property, the promotion of the discipline of the members thereof and the inculcation and maintenance of sound Doctrine and true Religion to the Glory of Almighty God and the edification and increase of the Church of Christ.

[18] The Constitution is divided into three parts. Part A contains what are described as "The Fundamental Provisions". It is not within the power of the General Synod or of any Diocesan Synod to alter, revoke, add to, or diminish any of these provisions. The first Fundamental Provision identifies the Doctrines and Sacraments of the Anglican Church:

> 1. This Branch of the United Church of England and Ireland in New Zealand doth hold and maintain the Doctrine and Sacraments of CHRIST as the LORD hath commanded in His Holy Word, and as the United Church of England and Ireland hath received and explained the same in the Book of Common Prayer, in the Form and Manner of Making, Ordaining, and Consecrating of Bishops, Priests, and Deacons, and in the Thirty-nine Articles of Religion. And the General Synod hereinafter constituted for the government of this Branch of the said Church shall also hold and maintain the said Doctrine and Sacraments of CHRIST, and shall have no power to make any alteration in the authorised version of the Holy Scriptures, or in the above-named Formularies of the Church: (1857).

[19] Part B further articulates the Doctrine and Sacraments (also known as the Formularies) in the following terms:

> Subject to the provisions of the Church of England Empowering Act, 1928 and to the Fundamental Provisions –
>
> 1. This Church holds and maintains the Doctrine and Sacraments of Christ as the Lord has commanded in Holy Scripture and as explained in
>
> The Book of Common Prayer 1662
> Te Rawiri
> The Form and Manner of Making, Ordaining, and Consecrating Bishops, Priests and Deacons
> The Thirty Nine Articles of Religion
> A New Zealand Prayer Book – He Karakia Mihinare o Aotearoa.
>
> 2. The General Synod (also known as te Hīnota Whānui) shall also hold and maintain the said Doctrine and Sacraments of Christ.

[20] While Clause 5 of Part B confers on the General Synod a limited power to alter, add to or diminish the Formularies, a proviso stipulates that this does not empower the General Synod to depart from the Doctrine and Sacraments of Christ as defined in the Fundamental Provisions of the Constitution.

[21] The centrality of the Fundamental Provisions in Part A along with the Further Provisions in Part B of the Constitution and of the Formularies is emphasised by the fact that before any person can be ordained as a bishop, he or she must make a declaration affirming allegiance to the Doctrine to which Clause 1 of the Fundamental Provisions and Clauses 1 and 2 of Part B of the Constitution refer. See Title A, Canon I of the Constitution and in particular Clause 5.6.9 and the form of the declaration set out in the Schedule:

> **SCHEDULE**
>
> **THE ANGLICAN CHURCH IN AOTEAROA, NEW ZEALAND AND POLYNESIA**
>
> **DECLARATION** (as required in terms of Clause 5.6.9)
>
> I,
>
> being about to be ordained to the holy order of bishop
> and / or instituted to the office of
>
> DO SOLEMNLY MAKE THE FOLLOWING DECLARATION:
>
> I believe in the faith, which is revealed in the Holy Scriptures and set forth in the Catholic Creeds, as this Church has received and explained it in its Formularies and its authorised worship.
>
> I assent to the Constitution / te Pouhere of the Anglican Church in Aotearoa, New Zealand and Polynesia.
>
> I affirm my allegiance to the doctrine to which clause 1 of the Fundamental Provisions, and clauses 1 and 2 of Part B bear witness.
>
> In public prayer and administration of the sacraments I will use only the forms of service which are authorised or allowed by lawful authority.
>
> I will uphold the covenant and partnership expressed in the Constitution / te Pouhere between Te Pīhopatanga o Aotearoa as a whole and through its constituent parts and the Dioceses in New Zealand together and severally and through their constituent parts and with the Diocese of Polynesia as a whole and through its constituent parts.
>
> I will be obedient to the ecclesiastical laws and regulations applicable to the above described office.

The foregoing declaration was made and subscribed by the abovenamed

on the day of in the year of our Lord Two Thousand and

Signed:

in the presence of:

[22] Before any ordained minister is appointed to any position of pastoral responsibility in the Church he or she must make a declaration in almost identical terms. See Title A, Canon II, Clause 3 of the Constitution.

[23] At the centre of the proceedings brought by the plaintiff society is the doctrine of the Anglican Church on Christian marriage and it is to that doctrine that we now turn.

The teaching of the Anglican Church on Christian marriage

[24] As earlier mentioned, the doctrine of the Anglican Church is that Christian marriage is a physical and spiritual union of a man and a woman, entered into in the community of faith, by mutual consent of heart, mind and will, and with the intent that it be lifelong. It is stated in the Constitution, Title G, Canon III, Clause 1.3 that:

> The Church's teaching on Christian marriage is enshrined in the Formularies of the Church and is expressed in all the marriage services in the Formularies and in the introduction for the congregation to Christian marriage in *A New Zealand Prayer Book – He Karakia Mihinare o Aotearoa*, (See Schedule II of this Canon).

[25] Schedule II sets out the major relevant excerpted sections from the Formularies to be read in conjunction with Canon III, clause 1.3. We reproduce here those which emphasise the heterosexual character of Christian marriage as conceived by the *New Zealand Prayer Book*:

> 1. Marriage is intended by God to be a creative relationship – God's blessing enables husband and wife to love and support each other in good times and bad. For Christians, marriage is also an invitation to share life together in the spirit of Jesus Christ. It is based upon a solemn, public and life-long covenant between a man and a woman, made and celebrated in the presence of God and before a priest and congregation. (*A New Zealand Prayer Book – He Karakia Mihinare o Aotearoa*, p. 779)
>
> 2. Marriage is a gift of God our Creator, whose intention is that husband and wife should be united in heart, body and mind. In their union they fulfil their love for each other. Marriage is given to provide the stability necessary for family life, so that children may be cared for lovingly and grow to full maturity. Marriage is a way of life to be upheld and honoured. No one should enter into it lightly. It involves a serious and life-long commitment to each other's good in a union of strength, sympathy and delight. (*A New Zealand Prayer Book – He Karakia Mihinare o Aotearoa*, p. 780)
>
> 3. …
>
> 4. Marriage is the promise of hope between a man and a woman who love each other, who trust that love, and who wish to share the future together. It enables two separate people to share their desires, longings, dreams and memories, and to help each other through their uncertainties. It provides the encouragement to risk more and thus to gain more. In marriage, husband and wife belong together, providing mutual support and a stability in which their children may grow. (*A New Zealand Prayer Book – He Karakia Mihinare o Aotearoa*, p. 790)
>
> 5. …
>
> 6. [Marriage is to be entered into in the fear of God], duly considering the causes for which Matrimony was ordained.

> First, It was ordained for the increase of mankind according to the will of God, and that children might be brought up in the fear and nurture of the Lord, and to the praise of his holy Name.
>
> Secondly, It was ordained in order that the natural instincts and affections, implanted by God, should be hallowed and directed aright; that those who are called by God to this holy estate, should continue therein in pureness of living.
>
> Thirdly, It was ordained for the mutual society, help, and comfort, that the one ought to have of the other, both in prosperity and in adversity. (*Book of Common Prayer,* 1928).

[26] Although it is necessarily implicit, it must be pointed out that the Formularies relating to marriage apply not only to the laity of the Anglican Church, but also to ministers (ie deacons or priests) and to bishops.

The obligations of office – to be an exemplar

[27] The constitution, Title D, Canon I prescribes the standards to be maintained by bishops and ministers.

[28] They are expected to lead "an exemplary way of life". See Clauses 1 and 2:

> 1. Men and woman accepting the distinctive calling of ordained Ministry, and Office Bearers in this Church must recognise they are not simply exercising a function or role. They also exercise a representative Ministry and are expected to lead an exemplary way of life.
>
> 2. Ministry in an Office in this Church requires observance of appropriate standards of behaviour in the exercising of the role of Minister, in relationships and in personal life.

[29] It follows that standards of personal behaviour are measured by the fact that "[m]inistry by any Minister is as much a function of what a Minister is as of what a Minister says or does". See Clause 10. In particular ministers are expected to be "chaste":

> 10.4 CHASTITY:
>
> Chastity is the right ordering of sexual relationships.
>
> 10.4.1 Ministers are to be chaste. Promiscuity is incompatible with chastity.

[30] It will be seen that the obligation to be an exemplar ie to "live" the doctrine taught by the Church is of significant importance to the outcome of this case.

Sexual orientation and the ordination of deacons and priests

[31] Cross-examined on the provisions of the Constitution regarding the Doctrines and Sacraments of the Anglican Church and in particular the Formularies affecting marriage and the standards expected of ministers, Archbishop Richardson said:

> **[31.1]** Gays and lesbians can be ordained into the Anglican priesthood provided they elect to be celibate. If any such candidate is in a long term committed relationship he or she would not "be chaste". Neither would a heterosexual candidate living in a de facto relationship. The Archbishop has in fact suspended the licence of an ordained minister because the individual had entered into a de facto relationship. He has also decided very early in the discernment process not to proceed with the discernment of vocation of a person who was living in a de facto relationship.
>
> **[31.2]** It is not enough for a minister of the Church to agree to a doctrine or teaching that he or she cannot live out.

[31.3] The Formularies presently recognise only a heterosexual marriage as "the right ordering of sexual relationships". For a same sex relationship to be recognised by the Anglican Church it would need to develop an appropriate rite.

[31.4] The fact that there is no prohibition by the Anglican Church on same sex marriage is not relevant as it is an argument by omission and this is not how the Anglican Church adopts a position. If the doctrine is not in the Formularies, there is no adopted doctrine.

[31.5] While it is acknowledged that some bishops have made discernment and ordination decisions inconsistent with the doctrines of the Anglican Church, these decisions do not establish anything other than the fact that they are inconsistent with Church doctrine.

[31.6] The Marriage (Definition of Marriage) Amendment Act 2013 defines for the purpose of secular law the term "marriage". However, marriage under New Zealand secular law is not a Christian understanding of marriage as presently accepted by the Anglican Church. While the state is free to determine what according to the secular law of the land is to be defined as marriage, the Anglican Church is free to decide how it will define marriage for the purposes of its own doctrine and teachings. In this context the Archbishop noted that s 6 of the Marriage (Definition of Marriage) Amendment Act 2013 explicitly recognised the divide between secular and ecclesiastical law by amending s 29 of the principal Act so that the new subs (2) provides:

> (2) Without limiting the generality of subsection (1), no celebrant who is a minister of religion recognised by a religious body enumerated in Schedule 1, and no celebrant who is a person nominated to solemnise marriages by an approved organisation, is obliged to solemnise a marriage if solemnising that marriage would contravene the religious beliefs of the religious body or the religious beliefs or philosophical or humanitarian convictions of the approved organisation.

The plaintiff's challenge to Anglican Church doctrine

[32] Notwithstanding that the plaintiff society expressly conceded that the doctrines of the Anglican Church are not justiciable before the Tribunal, it nevertheless called limited evidence challenging the interpretation of that doctrine by Archbishop Richardson and by Bishop Bay:

[32.1] The first witness was Dr John Salmon, an ordained Methodist minister currently worshipping and participating in the Anglican Church. He has a PhD degree from Otago University in Philosophy of Education and postgraduate qualifications in Theology. He is a retired Chartered Accountant with an ongoing interest in issues of management and governance in the church as a not-for-profit organisation. He has taught theology and ethics to Anglican and Methodist students preparing for ordination at St Johns-Trinity Theological Colleges in Auckland and for the University of Auckland from 1992 to 2003. The principal points made by him were:

[32.1.1] There is no explicit doctrine of the Anglican Church which denies priesthood to persons in a committed same-sex relationship.

[32.1.2] In his opinion, the term "right ordering of sexual relationships" does not require exclusive reference to marriage (heterosexual or otherwise).

[32.2] The second witness was Mr Clay Nelson, a licensed priest of the Anglican Diocese of Auckland who has served in several parishes in the United States. He has also served at St Mathew-in-the-City, Auckland in a variety of roles. His principal doctrinal point was that there is no existing doctrine, Canon or practice expressly prohibiting the ordination of gay men and women in a committed relationship.

[33] We have not found this evidence of assistance for three principal reasons:

[33.1] While it was acknowledged that it was proper for the Tribunal to hear from persons supporting those claiming to be victims of discrimination, both witnesses accepted that they were activists and advocates for the ordination of gay and lesbian candidates not living celibate lives as defined by Anglican Church doctrine. There was a real issue as to independence if the evidence was to be received as "expert" testimony.

[33.2] In view of the concessions made by the plaintiff in para [13] above, the evidence was largely, if not entirely irrelevant.

[33.3] Only Archbishop Richardson and Bishop Bay can speak for the Anglican Church. They spoke not just as experts, but as spokespersons for the Church and their evidence must be accepted. The separation of church and state must be maintained. The Tribunal cannot determine what is at heart an ecclesiastical dispute. See *Mabon* at 523.

The inconsistency argument

[34] For the plaintiff society attention was drawn to evidence that there are gay and lesbian priests in the Anglican Church, a number are in relationships and such priests continue to be re-licensed by bishops in the knowledge that they are in "non-celibate" same-sex relationships. It was submitted (inter alia) that there was "an important disconnect" between the doctrines and rules and religious beliefs of the Anglican Church.

[35] We are of the view that little, if any weight can be given to the evidence on which the inconsistency argument is based. As Archbishop Richardson said in his oral evidence, the decisions on which the plaintiff society relies are inconsistent with Anglican Church doctrine and do not establish anything other than the fact that they are inconsistent. In his written statement of evidence Archbishop Richardson stated:

> 28 It is argued that some Bishops in the past have ordained people in a committed same sex relationship or have maintained licenses of clergy who have entered into such a relationship subsequent to their ordination. The fact that this discernment was not objected to, or formally tested under Church canons does not make it correct.

[36] Archbishop Richardson went on to say that an argument from "omission" or "silence" is unsustainable:

> 36 Some argue that because the Constitution, canons and formularies *do not explicitly prohibit* the blessing of committed, lifelong, monogamous same sex relationships then such blessings can be carried out and considered to be "authorised". The argument is extended to the view that there is consequently no impediment to the ordination of people in such relationships.
>
> 37 This is an argument from "omission" or "silence", which is unsustainable. The Bishop is required to act within the parameters of the Constitution and Canons of this Church. The Constitution and Canons set out the status quo. Any significant development from the status quo requires due process. This process culminates in our General Synod.

38 There is no approved form of recognition and blessing of people in same sex relationships equivalent to the services for Christian Marriage in the New Zealand Prayer Book (these services explicitly state that *Christian* marriage is between a man and a woman and this is also clear from the marriage Canon; Title G Canon III). At very least you would expect that such a service would have been duly prepared by our Liturgical Commission and have been duly authorized by the General Synod process *if* this Church had already determined its understanding and teaching on the nature of same sex, committed, monogamous, life long relationships. There is no such General Synod determination and there are no such duly authorized services.

39 It is not possible to argue that on such a significant matter as a development in the core teaching of the Church on the nature of Christian marriage, the Church has simply come to a position of accommodating committed, life long, monogamous same-sex relationships as a kind of "inevitable development". That would be utterly inconsistent with how this Church addresses matters of such importance. And such a position ignores the reality that when many of the liturgical services of the Church were being developed and the teaching of the Church set out on Christian Marriage in our New Zealand Prayer Book the homosexual law reform process in this country had not been undertaken.

40 The argument from "omission" or "silence" doesn't mean permission. It simply means that it wasn't in people's minds when legislation such as Title D on Ministry Standards and Title G Canon III "Of Marriage" and the Marriage liturgies were written. They were assuming a heterosexual mode. Each part of our legislation has to be supported or not be contradicted by another part, and the Canon on Marriage doesn't currently have this scope, nor, as I have already stated, is there any provision for a liturgy for the blessing of same gender relationships passed by General Synod. Even if an argument from silence or "by omission", or "no exclusion written down in the canons" could be mounted, these matters are still highly contended within this church and open to challenge, and so must be addressed by General Synod. This is a process which the Church is currently engaged in doing.

[37] We accept this evidence. The inconsistency argument is untenable.

Conclusion on "doctrines or rules or established customs" of the Anglican Church

[38] We accordingly find that the doctrines or rules or established customs of the Anglican Church permit ordination into the ministry of only those who are celibate or in a Christian marriage as defined in the Formularies of the Church. Ordained ministers are also required to be "chaste".

[39] Before applying this finding in the context of the discernment process upon which Mr Sisneros hoped to embark, it is necessary to contextualise the issues within international human rights law.

RELIGIOUS LIBERTY AS A COLLECTIVE RIGHT

[40] Article 18 of the International Covenant on Civil and Political Rights, 1966 guarantees the right to freedom of thought, conscience and religion. It includes freedom to have or to adopt a religion or belief of choice and freedom, "either individually or in community with others and in public or private" to manifest religion or belief in "worship, observance, practice and teaching". As pointed out by Rivers in *The Law of Organized Religions: Between Establishment and Secularism* (Oxford, 2010) at 39, Article 18 is phrased individualistically in that it is the individual person who may manifest his or her religion in the community with others. But the fact that individuals normally require like-minded communities to be able to exercise their religious rights effectively is sufficient justification for accepting that religious associations as juridical persons are also beneficiaries of subjective rights under Article 18. The point is more fully explained by Nowak in *UN Covenant on Civil and Political Rights: CCPR Commentary* (2nd rev ed, NP Engel, Kehl, 2005) at p 411:

> Because fundamental rights of communication protect not merely the individual's spiritual existence but moreover communication of spiritual subject matter to the world at large and defence of a conviction in public (*forum externum*), they are also termed "*community rights*". This means that in order to exercise these rights effectively – in particular, the freedoms of association, assembly, trade unions and religion – the individual requires a like-minded community. This *collective character* is particularly stressed in Art. 18(1) with the words "individually or in community with others" ("individuellement ou en commun"). This means that religious societies as juridical persons are also entitled to a human right in the exercise of their belief … [footnotes and citations omitted]

[41] In Ahdar and Leigh *Religious Freedom in the Liberal State* (2nd ed, Oxford, 2013) at 138 the principle is stated in the following terms:

> Religious liberty is a collective as well as an individual right. Religious organizations seek the right to determine their own structure, personnel, policy, objectives, and so on. The UN Declaration on Religious Intolerance recognizes this, specifying, for instance, the right to "train, appoint, elect, or designate by succession appropriate leaders" (Article 6(g)) and the right to "establish and maintain appropriate charitable and humanitarian institutions" (Article 6(b)). [footnotes and citations omitted]

[42] The right of religious communities to determine and administer their own internal religious affairs without interference from the state is referred to as religious group autonomy (or "church autonomy", to use the traditional label). See *Ahdar and Leigh* op cit 374 where it is noted that the importance of religious group autonomy to any overall scheme of religious liberty has been described as "most important", "critical", and "exceptionally high":

> Religious group autonomy is the freedom asserted by religious communities as groups. This freedom is not merely a "compound" or "aggregation" of individual members' freedoms; it is the right the group asserts to its *own* religious exercise, separate and distinct from the rights and interests of its members. If religious groups are merely a combination of individual interests, a means to enhance personal autonomy, then this implies that these groups "are presumptively entitled to constitutional protection only to the extent that they do, in fact, enhance individual liberty". This in turn implies greater vulnerability to state intervention into the internal affairs of such groups since the focus would be on vindicating individuals and their interests, not the group and its interests. In our view, this characteristically liberal and atomistic way of viewing religious groups (an aggregation of individuals contingently linked by religious preferences) seriously undermines religious freedom.
>
> Religion is seldom if ever solely an individual matter. While a lone individual may clearly follow his or her own unique chosen path in matters of belief, worship, and practice, the vast majority of human beings only find it meaningful to pursue their religious objectives together with other like-minded individuals. There is an ineradicable collective or communal dimension to religion. Organizations or associations are formed to give effect to this communal aspiration. An individual's religious life is very much tied to and dependent upon the health of the religious community to which that believer belongs. It requires a religious "infrastructure". [footnotes and citations omitted]

[43] An aspect of religious liberty as a collective right is the right of a church to choose its own ministers and leaders. See for example *R v Chief Rabbi of the United Hebrew Congregations of Great Britain and the Commonwealth, ex parte Wachmann* [1993] 2 All ER 249 (QB) at 255 and *Hasan and Chaush v Bulgaria* at [62] and [82]. The selection of candidates for ministry has been described as one of the very core aspects of religious association autonomy: Ahdar & Leigh op cit 395. In *Rayburn v General Conference of Seventh-Day Adventists* 772 F 2nd 1164 (4th Cir 1985) at 1167 it was said:

> The right to choose ministers without government restriction underlies the well-being of religious community, for perpetuation of a church's existence may depend upon those whom it selects to preach its values, teach its message, and interpret its doctrines both to its own membership and to the world at large.

[44] More recently, in *Hosanna-Tabor Evangelical Lutheran Church and School v Equal Employment Opportunity Commission* 565 US _ (2012), 181 L Ed 2d 650 similar comments were made by Roberts CJ delivering the opinion of the Court but the concurring opinion of Alito J is more apposite in the current context:

> When it comes to the expression and inculcation of religious doctrine, there can be no doubt that the messenger matters. Religious teachings cover the gamut from moral conduct to metaphysical truth, and both the content and credibility of a religion's message depend vitally on the character and conduct of its teachers. A religion cannot depend on someone to be an effective advocate for its religious vision if that person's conduct fails to live up to the religious precepts that he or she espouses. For this reason, a religious body' right to self governance must include the ability to select, and to be selective about, those who will serve as the very "embodiment of its message" and "its voice to the faithful". *Petruska v Gannon Univ*., 462 F.3d 294, 306 (CA3 2006). A religious body's control over such "employees" is an essential component of its freedom to speak in its own voice, both to its own members and to the outside world.

[45] We return to the themes of religious group autonomy and of the minister as exemplar when we address the purpose of s 39(1) of the Act.

[46] We now turn to the facts of the case and the request by Mr Sisneros that he be permitted to enter the discernment process.

DISCERNMENT – THE PROCESS AND THE DECISION

[47] The discernment process is described in the following terms on the website of the Anglican Diocese of Auckland:

> Persons who believe they may be called to ordained ministry in the Church are encouraged to enter a time of discernment during which, together with the bishop and the bishops ministry advisors, the sense of call will be tested and a decision will be made by the bishop whether a period of training should begin.

[48] The document goes on to note that discerning vocation to ordained ministry is a responsibility the Church takes very seriously and that the process accordingly has a number of different phases and emphases. At each phase of discernment, the Bishop makes a decision as to whether he thinks it appropriate for the applicant to proceed. The five distinct phases to the process are the Enquiry, the Application, the Interview, the Residential phase and finally, Training for Ministry.

[49] Elaborating on the discernment process Archbishop Richardson gave evidence that:

> **[49.1]** Discerning whether someone is called to Holy Orders is primarily a spiritual exercise, a sacred task.
>
> **[49.2]** Many factors have to be weighed up. These include whether the individual adheres to a set of beliefs that are consistent with those of the Anglican Church. This includes whether the individual is prepared to conform to the current teaching and practice of the Church on a range of matters. Title G, Canon XIII, clause 5 requires the bishop to establish that the person has "sufficient knowledge of Holy Scripture and of the doctrine, discipline and worship of this Church. Although no specific reference was made by the Archbishop to the affirmation required by Title A, Canon I, clause 3 it is to be recalled that all ministers must assent to the Constitution and affirm their allegiance to the doctrine in clause 1 of the Fundamental Provisions and clauses 1 and 2 of Part B.

[49.3] He has not proceeded with the discernment of vocation in a case where the individual was living in a de facto relationship. Title D, Canon I emphasises that Ministry is as much a function of what a minister is as what a minister says or does and this includes the requirement that ministers are to be chaste.

[49.4] Such issues become extremely problematic if they manifest themselves after a person is ordained. It is therefore critical and required that at the point that someone is discerned for ordination that they conform to the teaching and practice of the Church. When a priest makes a declaration of submission to the Constitution and doctrine of the Anglican Church, he or she cannot say "I submit – but only to the bits I agree to".

[49.5] If a bishop can see that there are clear impediments to a person progressing through the discernment process it is incumbent upon that bishop to make that plain as early as possible. Any other response would be fundamentally unfair and professionally unethical. In addition, to go through the motions of the process when the outcome is clear turns a sacred task of discernment for Holy Orders into nothing more than a mechanism of selection.

[50] In 2006 Mr Sisneros embarked upon a Bachelor of Theology. At the end of that year he presented himself to the then Bishop of Auckland, the Right Rev John Paterson to discuss his calling to the ordained Ministry and to seek admission to the discernment process. For reasons which do not require recitation here, Bishop Paterson recommended that Mr Sisneros contact him (the Bishop) again on completion of his Bachelor of Theology.

[51] In November 2010, after completing his degree, Mr Sisneros met with the new Bishop of Auckland, the Right Rev Ross Bay and told him that he was once again presenting himself for entry into the discernment process for ordained ministry. It was indicated to Bishop Bay that Mr Sisneros understood that being in a same sex relationship would prevent ordination. However, he wished to know if it was possible to enter into the process for discernment in spite of knowing that ordination itself may not be the outcome. He believed that this would allow him to feel that the Church had taken his sense of vocation seriously and had been willing to test it. Bishop Bay responded that he was not closed to that possibility but would like to seek further advice on the question before making a decision.

[52] By letter dated 27 January 2011 Bishop Bay advised Mr Sisneros that at a March 2011 meeting of Bishops a legal opinion would be offered addressing (inter alia) the entry into the discernment process of individuals in a same-sex relationship.

[53] At the meeting of Bishops in March 2011 advice was given that to proceed with the ordination of a person in a same sex relationship at this time would leave the bishop and the ordinand concerned with a serious risk of having the decision to ordain and the validity of the ordination challenged through the Judicial Committee. This was seen as a less than desirable outcome for resolving the question of same sex ordinations. It would also place the ordinand in a very difficult situation of having his or her vocation challenged in a judicial procedure. The Bishops accordingly agreed that the ordination of a person in a same sex relationship was highly contestable under the Constitution and Canons and thus it could be a breach if a bishop undertook such an ordination. As the Church was engaged in a process to address those matters no precipitous action should be taken by a bishop until the General Synod came to a decision.

[54] Bishop Bay sought permission to be able to convey the legal opinion to people in the Auckland Diocese, including Mr Sisneros. A delay in clarifying the status of the paper combined with Bishop Bay's own workload led to a failure to communicate promptly with Mr Sisneros and in addition a letter from Mr Sisneros to Bishop Bay dated 11 April 2011 did not reach Bishop Bay.

[55] By letter dated 18 June 2011 Mr Sisneros wrote to Bishop Bay withdrawing from his endeavour to enter the discernment process and recording his disappointment at discrimination against gay and lesbian Anglicans.

[56] In his evidence to the Tribunal Mr Sisneros said that he has been deeply affected by this discrimination and believes that if his sexual orientation or partnership status as a gay man prevents him from entering the discernment process, he is not being treated with dignity. His feelings of humiliation and disappointment continue to this day.

[57] Bishop Bay told the Tribunal that at the point when Mr Sisneros notified his withdrawal, the Bishop had not made a formal decision whether or not Mr Sisneros should have proceeded further with the discernment process. However, when questioned about his position on this at a later time, he has indicated that it is his belief that the wisest course of action is not to invite people to participate in the wider advice-seeking stages of discernment where there are significant impediments preventing ordination itself. He added:

> A significant question for me in that is to do with the pastoral responsibility of taking someone down a path which I know to lead to a dead end. It may appear to an enquirer to be a good process to engage with in spite of knowing this. However I know the depth of disappointment that a person experiences when the Church says "no", which is compounded if the answer should have come at an earlier stage before their hopes were further raised.

[58] Against this background we turn to the provisions of the Human Rights Act.

HUMAN RIGHTS ACT 1993 – SECTION 39

[59] Section 38 of the Human Rights Act declares it unlawful for an authority performing a gatekeeper function in relation to a calling to refuse approval or authorisation by reason of any of the prohibited grounds of discrimination listed in s 21 of the Act:

> **38 Qualifying bodies**
>
> (1) It shall be unlawful for an authority or body empowered to confer an approval, authorisation, or qualification that is needed for, or facilitates, engagement in a profession, trade, or calling, or any person acting or purporting to act on behalf of any such authority or body,—
>
> (a) to refuse or omit to confer that approval, authorisation, or qualification on a person; or
>
> (b) to confer that approval, authorisation, or qualification on less favourable terms and conditions than would otherwise be made available; or
>
> (c) to withdraw that approval, authorisation, or qualification or vary the terms on which it is held, in circumstances in which it would not otherwise be withdrawn or varied,—
>
> by reason of any of the prohibited grounds of discrimination.
>
> (2) For the purposes of this section *confer* includes renew or extend.

[60] In the present case it is conceded that the reason why Mr Sisneros could not be admitted into the discernment process was because he was not celibate, that is, he was in a long term, monogamous same sex relationship.

[61] Section 38 is not, however, breached if s 39 applies. This follows from the opening words "Nothing in section 38 shall apply where …":

39 Exceptions in relation to qualifying bodies

(1) Nothing in section 38 shall apply where the authorisation or qualification is needed for, or facilitates engagement in, a profession or calling for the purposes of an organised religion and is limited to one sex or to persons of that religious belief so as to comply with the doctrines or rules or established customs of that religion.

[62] The central issue in this case is whether the exception in s 39(1) applies. It was common ground that the Anglican Church is an "organised religion".

[63] The onus of proving that the decision in question is excepted from conduct that is unlawful lies on the Bishop. See s 92F(2) of the Act. We accordingly begin with the submissions for the Bishop as to the proper interpretation of s 39(1).

Submissions for the Bishop of Auckland

[64] It is impractical to set out at length the detailed argument advanced on behalf of the Bishop of Auckland. A summary only follows.

[65] Section 39(1) establishes a specific situation in which relevant actors are unconstrained by s 38. That situation is defined by reference to a type, or category, of qualification. When a qualification in that category is involved, nothing in s 38 applies. The organisation is exempt. Section 39 is concerned to define that category of qualification. It is one that is:

> **[65.1]** "needed for a … calling for the purpose of an organised religion"; and
>
> **[65.2]** "is limited to one sex or to persons of that religious belief so as to comply with the doctrines or rules or established customs of that religion".

[66] As to [65.1], this is an important controlling or limiting phrase. It is only a qualification "for the purposes of an organised religion" that qualifies for exemption, depending on [65.2]. There then follows the conjunctive "and" which introduces two alternative possible scenarios:

- "limited to one sex"
- "limited to persons of that religious belief so as to comply with the doctrines or rules or established customs of that religion".

[67] Reference was made to the evidence of Archbishop Richardson that it is expected that Church officers will "live their doctrine". He rejected the notion that, in connection with the "right ordering of sexual relationships" requirement, it mattered only what candidates for ordination said they believed, not whether they acted in compliance with what they said they believed.

[68] The qualification involved in the present case is precisely of the type to which s 39(1) speaks. It is for the purposes of an organised religion; it is one that is limited to persons of that religious belief precisely so the Church, through its licensed priests and deacons, can live out the faith it proclaims in its doctrines. The Church can remain what it wants to be, until it decides otherwise. Were it otherwise the Church – any church – would lose its distinctiveness over time.

[69] Section 39(1) does not require that there be any inquiry into the reasons why a particular decision was made by those who bestow qualifications. Nor does it require that there be inquiry into the merits or characteristics of any particular applicant. The focus of s 39(1) is not on a particular decision but on the nature of the qualification. It

serves to exclude from the s 38 prohibition a category of cases. It provides a zone of autonomy in which the state does not interfere. Knowing that they possess such autonomy, churches do not have to contest individual cases.

[70] There are good reasons why s 39 was written in this way. It keeps the state and the state's own institutions out of religious matters that go to the heart of institutional autonomy, namely the choice of ministers and leaders. As to rank and file members, no such requirements are imposed. But the Canons make it plain that with ministers it is different. In addition, it is not a matter of mere belief in the Canons, but living according to those Canons so as, in the words of the section, "to comply with doctrines or rules or established customs of that religion". The compliance of which s 39 speaks is the ongoing compliance by the church with its doctrine in the actions of its ministers and leaders. It should not be read as limited simply to compliance with its rules about who it decides to ordain.

[71] The submissions for the Bishop of Auckland also highlighted the broader context. Reference was made to the fact that the Human Rights Act is a law of general application enacted to remedy the social harm of discrimination in certain areas of life. Its aim is equality of treatment. It was not designed to impair religious freedom. Indeed, it generally protects against religious discrimination and so benefits religious individuals, and consequently, churches.

[72] But because certain aspects of that law were seen to have a potential impact on religious institutions exemptions were included to accommodate religious freedom, particularly ss 28 and 39. Something similar was done in relation to religion and conscience in the Contraception, Sterilization and Abortion Act 1977, s 46 and reference has already been made to the fact that s 29(2) of the Marriage Act does not force on churches the obligation to solemnise marriages contrary to their religious beliefs. It was submitted that allowing some degree of religious accommodation in respect of generally applicable laws, so as to allow religious freedom is well established in New Zealand law and elsewhere. Allowing accommodation in such core matters as the choice of ministers and religious leaders is a clear case. That is the plain aim of s 39(1) and it is not controversial in any way. The section can and must be applied purposively, not narrowly as if it were an exception to the principle of equality, but purposively so as to attain its aim of promoting religious freedom, religious autonomy and so treating religion equally.

[73] While the Anglican Church cannot expect immunity from the ordinary law of the land, as with other citizens it can expect that consideration be given to fundamental rights and liberties in the design and application of that law. This is exactly what is to be found in s 39(1). That is, there is an exemption for the Church (and all organised religions) in their ordaining of ministers. The exception to the general principle is in a very limited field (religious qualifications, not all qualifications). Affected persons in that field have free choice of entry to and exit from the church.

Submissions for the plaintiff society

[74] We endeavour to list the primary statutory interpretation points made on behalf of the plaintiff society.

[75] First, it is said that the exemption in s 39(1) is expressed as **religious belief**, not as doctrines, rules or established customs. That is, s 39 is not concerned with exempting a type or category of qualification, rather, it is focussed on the reasons for refusal in an individual case. The argument is that s 39 permits a religious organisation to refuse

ordination on the basis of a particular applicant's sex or religious belief, but s 38 does apply if a refusal is based on any other prohibited ground.

[76] Because Mr Sisneros has declared himself to be of Anglican belief (which the Bishop accepts), none of the grounds of discrimination allowed by s 39(1) were involved. The operative ground (not being "chaste") was (indirectly) a proxy for sexual orientation (because of the inability of a same sex couple to enter into a Christian marriage as understood by the Formularies of the Anglican Church). Sexual orientation (unlike sex and religious belief) is not a ground of discrimination allowed to a qualifying body by s 39(1).

[77] It is conceded by the plaintiff society that in the case of clergy, the limiting clause ("so as to comply …") would appear to be "unneeded words" or "strictly tautologous".

[78] It was also said that the plaintiff and its witnesses do not accept that the doctrines, rites and Canons of the Anglican Church provide a clear prohibition against persons in same-sex relationships from being ordained into the ministry of the Anglican Church. Reliance was also placed on the fact that gay clergy already ordained have continued to have their licences renewed.

Discussion

[79] For the reasons earlier explained it is not open to the plaintiff to invite the Tribunal to determine whether the Doctrines and Formularies of the Anglican Church permit the ordination of persons in same sex relationships. The Archbishop and Bishop of Auckland have spoken authoritatively on what the Doctrines are and those Doctrines are not justiciable before the Tribunal. This much was conceded by the plaintiff. At most the argument is that some in the Church hold a different interpretation to that of the Archbishop and Bishop of Auckland. That may well be so but it is an irrelevant factor as far as the jurisdiction of this Tribunal is concerned.

[80] As to the licence renewal issue, this is not a factor to which weight can be attached for the simple reason that the decisions on which the plaintiff society relies do not establish anything other than the fact that there are inconsistencies. In this regard we accept the evidence of the Archbishop.

[81] With these preliminary points having been disposed of, we turn to the task of interpreting s 39(1).

[82] The primary rule of statutory interpretation is that contained in the Interpretation Act 1999, s 5(1). The meaning of an enactment must be ascertained from its text and in the light of its purpose. See further *Commerce Commission v Fonterra Co-operative Group Ltd* [2007] NZSC 36, [2007] 3 NZLR 767 at [22].

[83] The fundamental difficulty with the plaintiff's argument is that it not only fails to take into account the text of s 39(1), it also fails to take into account the purpose of the provision.

[84] As to the text, there are two principal objections to the plaintiff's interpretation. First, the plaintiff conceded that on its argument the elongated phrase "so as to comply with the doctrines or rules or established customs of that religion" is "unneeded" or "tautologous". The plaintiff accordingly advances an interpretation which renders superfluous the essential qualification which so significantly limits the permitted scope of application of the s 39(1) exemption.

[85] Second, at the same time the plaintiff's interpretation involves adding additional words into the section. It is to be read as providing:

> Nothing in section 38 shall apply where the authorisation or qualification is needed for, or facilitates engagement in, a profession or calling for the purposes of an organised religion and **is refused on the basis of the applicant's sex or religious belief …**.

[86] Radical surgery excising a phrase of critical importance and importing words which are not found in the section would suggest that the plaintiff's reading of s 39(1) is fundamentally misconceived.

[87] There are further difficulties to the interpretation advanced by the plaintiff. The argument is, in effect, that provided the individual seeking entry to the discernment process is of the Anglican religious belief, entry to the discernment process must be permitted notwithstanding that (say) the individual is not in a Christian (ie heterosexual) marriage and not celibate. That is, when selecting ministers for ordination the Anglican Church cannot discriminate as among those of the Anglican religious belief. In the result, the argument goes, an individual must be admitted to the discernment process (and presumably also ordained) even though the individual cannot satisfy the doctrines or rules or established customs of the Anglican Church. On this interpretation s 39(1) would be a nonsense as it clearly proceeds on precisely the opposite footing, namely that discrimination is permitted "so as to comply" with its doctrines or rules or established customs.

[88] It is not disputed that a Christian person who identifies as Anglican and is of the same sex orientation is of the Anglican religious belief and that there is no doctrine or rule or established custom that says that a gay or lesbian belief is not of Anglican religious belief. But it misses the point at the heart of this case. The Bishop does not have to point to a rule that says that gay and lesbian believers are not Anglicans. He only has to point to a rule that says that the qualification of being ordained is limited to persons who are not only of the Anglican faith, but who also comply with the doctrines of the Church.

[89] On the plaintiff's interpretation a provision which has as its purpose the preservation of religious autonomy to decide who is "called" to the ordained ministry is turned on its head. All qualifications and doctrine are reduced to one, namely whether the particular individual is "of that religious belief". This is a narrow and unsustainable reading of the phrase "so as to comply with the doctrines or rules or established customs of that religion". The practical outcome is that when a candidate for ordination makes the affirmation of allegiance to the doctrine of the Anglican Church he or she is merely affirming a duty to be an Anglican according to how the individual personally conceives that notion to be.

[90] As the submissions for the Bishop of Auckland pointed out, on the plaintiff's approach the Catholic Church's restriction on the priesthood to unmarried candidates would be unlawful because marital status is not mentioned in s 39(1). The point is not answered by referring to s 97 of the Act which empowers the Tribunal to make a declaration of genuine occupational qualification or of genuine justification. A church cannot be a suppliant for official permission to sanction a core aspect of its doctrine and teaching.

[91] As submitted by the Bishop of Auckland, the fallacy in the plaintiff's argument is that sex and religious belief are not mentioned in s 39(1) so as to prescribe them as the only allowable grounds of discrimination in ordination decisions. Rather, they are mentioned as part of the description of the type of qualification to which nothing in s 38 applies.

The plaintiff has had to reword s 39(1) to make it aimed at refusals, rather than at a type of qualification.

[92] This brings us to the second aspect of the basic principle of statutory interpretation, namely the purpose of s 39(1). For the reasons given earlier, it is clear that the purpose of s 39(1) was (in the present context) to preserve the institutional autonomy of organised religions in relation to their decisions concerning the appointment of clergy and ministers. The plaintiff's interpretation would entirely negate that purpose. The Anglican Church would be required to ordain priests who taught that the right ordering of sexual relationships can only occur within a Christian marriage (defined by the Formularies as a physical and spiritual union of a man and a woman) but who themselves did not "live" that doctrine. Ministers would not be exemplars, nor would they be bound by submission to the Constitution of the Church or by their declaration of allegiance to its doctrine and Formularies. This would undermine in the most fundamental way the religious autonomy of the Church, its right to be selective about those who will serve as the very embodiment of its message and its voice to the faithful.

[93] Although we have previously addressed the issue of institutional autonomy, it is nevertheless helpful to note the vigorous but not inaccurate vindication of the principle by Ahdar and Leigh at op cit 395:

> Article 6 of the UN Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief 1981 provides a non-exhaustive catalogue of particular freedoms within the rubric of religious freedom, including, in paragraph (g), the freedom "to train, appoint, elect, or designate by succession, appropriate leaders called for by the requirements and standards of any religion or belief".
>
> Selection of leaders is one of the very core aspects of religious association autonomy. Is such autonomy limited to decisions to hire and fire that are truly "religious" or "theological", and thus that those which are based on seemingly "extrinsic" factors – such as race, nationality, sex, sexual orientation, or other prohibited bases under anti-discrimination laws – are outside of religious group immunity? Is a church permitted to refuse to ordain a would-be priest for an insufficient grasp of trinitarian doctrine, but not because he or she insists on openly expressing their sexual orientation through living with a same-sex partner?
>
> First, to determine whether issues of race, sex, or sexual orientation are not "truly" religious or freighted with theological meaning is to embroil the courts in decisions they lack competence to decide. But the greater concern is not the comparative competency point. Rather, it is that this sort of issue is simply not the state's business. We adhere to a strong version of religious group autonomy. Religious bodies have the right to reject candidates for ministry or discipline or expel an existing pastoral minister even if the grounds for doing so appear to liberals (and others) to be archaic, illiberal, or bigoted. The grounds for selection or dismissal are matters within the province of the religious community, and it alone, to decide.

[94] The authors cite in support decisions of the European Court of Human Rights (including *Hasan and Chaush v Bulgaria*) which have made it clear that attempts by a state to interfere in the selection of ministers and leaders by religious communities will not be tolerated. Also referred to are decisions from the United States including *Rayburn* and *Hosanna-Tabor Evangelical Lutheran Church and School* and the UK decision in *Wachmann*.

[95] The institutional autonomy of which these cases speak exists in New Zealand via ss 13, 15 and 20 of the New Zealand Bill of Rights Act 1990 (NZBORA). The NZBORA is a benchmark with which other law is supposed to comply. Indeed, s 21B(2) of the Human Rights Act provides that nothing in Part 2 of the Act (where ss 38 and 39 sit) is to affect the NZBORA. As submitted by the Bishop of Auckland, this makes it plain that it is s 6 of the NZBORA that is to prevail, not s 4. A consistent meaning must be sought. In this regard both international human rights law and New Zealand domestic law provide

protection from discrimination. By virtue of ss 38 and 39 of the Human Rights Act that protection is not in conflict with religious liberty as a collective right. While there is a general right to be free from discrimination in all the areas stated in the Human Rights Act and on all grounds, the Human Rights Act itself exempts qualification decisions. The reasons for it doing so reflect the fact that the specific exemption for religious organisations in their ordination decisions and leadership selection decisions can readily sit alongside a general right, operative through society generally, to be free from discrimination. As pointed out in *R v Secretary of State for Trade and Industry* [2004] EWHC 860 at [123], the exception involves a legislative striking of the balance between competing rights. It was done deliberately in this way so as to reduce the issues that would have to be determined by courts or tribunals in such a sensitive field.

CONCLUSION

[96] It follows, in our view, that both the language and purpose of s 39(1) require the rejection of the artificial construction advanced by the plaintiff society and acceptance of the interpretation relied on by the Bishop of Auckland.

[97] Because s 39(1) of the Human Rights Act had application to the facts, there was no element of unlawfulness under the Act when the Bishop of Auckland addressed the request by Mr Sisneros that he (Mr Sisneros) be permitted to enter the discernment process.

[98] In view of this conclusion the alternative argument of indirect discrimination advanced by the plaintiff falls away as s 65 of the Act requires that the treatment in question be unlawful under some provision of the Act other than s 67 itself. We note that it was the additional submission for the Bishop that the plaintiff had failed to demonstrate a "significant disparate effect" in terms of *Haupini v SSRC Holdings Ltd* [2011] NZHRRT 20 at para [57]. In the circumstances we do not need to address the point.

[99] It follows that the proceedings by the plaintiff society must be dismissed. By consent no question of costs arises. It is to be noted that by *Minute* dated 8 May 2013 the Tribunal made a final order prohibiting publication of the name and other details of one of the witnesses in this case.

[100] We wish to add only two last points. First, at no time during these proceedings has there been any challenge to the sincerity or credibility of Mr Sisneros, his witnesses and supporters. Second, the boundary between the jurisdiction of the secular courts and tribunals of New Zealand and the autonomy of religions to adopt, interpret and apply doctrine or rules or to establish customs has been set by Parliament in the form of the Human Rights Act. Under that Act organised religions do not infringe any secular prohibition on discrimination provided such discrimination comes within the limited exception allowed by s 39. The function of this Tribunal is to apply s 39 to the factual context of the particular case. It is not the function of the Tribunal to second guess the boundaries set by Parliament. Nor is it the function of the Tribunal to serve as a forum for the exploration of the theological understanding of the nature of committed lifelong, monogamous same sex relationships. Only the Anglican Church is competent to determine that issue through its institutions of governance acting in accordance with its Constitution.

[101] From the evidence we have heard that process under the three order system of bishops, clergy and laity is well underway. The Tribunal was told that it is a slow process but as Archbishop Richardson explained, it provides for carefully considered,

widely acceptable and enduring decisions. His evidence concluded with the following statement:

> 60. What is clear is that this Church is carefully, deliberately and intentionally moving to determine if there is a basis on which the Church can bless same gender relationships and if so then the consequent possibility of the ordination of people in such relationships. What is clear from these steps is that this is not currently possible under our regulations and consequently the Bishop of Auckland's actions were correct.

[102] The pronouncement by the Archbishop that the Bishop of Auckland's actions were correct is a judgment under Anglican ecclesiastical law. Our judgment, however, is made under New Zealand secular law. For the reasons given we have reached the conclusion that the Bishop did not infringe any provision of the Human Rights Act 1993.

[103] Finally, we wish to acknowledge our debt to all counsel for their careful submissions and for the assistance they have provided to the Tribunal.

FORMAL ORDERS

[104] For the foregoing reasons the decision of the Tribunal is that:

[104.1] The proceedings by the plaintiff are dismissed.

[104.2] Costs are to lie where they fall.

[104.3] The orders under s 107(3)(b) of the Human Rights Act 1993 recorded in the *Minute* of the Tribunal issued on 8 May 2013 are confirmed and made final.

.....	.....	.....
Mr RPG Haines QC	**Mr GJ Cook JP**	**Dr SJ Hickey**
Chairperson	**Member**	**Member**