

How does the Lutheran Church of Australia re-constitute itself today to reflect regulatory and governance requirements while enabling focus of activities to align with the mission and ministry objects of the Church?

Key issues Assessment Paper

Constitutional restructure of
the Lutheran Church of
Australia

July 2019

1. BACKGROUND

There are a number of factors that have led to the conclusion a significant review of the LCA Constitution and By-laws is warranted:

1. There are important questions about the risks and benefits of LCA's current single constitution model, which holds together both its ecclesial-related provisions and legal identity as an incorporated association. Other churches have made a distinction between their ecclesiastical character and practice (expressed in a constitution based on an unincorporated association of members) and their organisational functions (reflected in a constitution that serves to meet legal requirements and in a suitable legal entity to carry out governance, administrative and operational tasks)
2. In 1966 any management or operational 'policy' of the Church was documented by means of By-Laws. By-Laws are generally no longer used in modern institutional constitutions. Given the regular changes to the By-laws (a number of changes were adopted at the Convention of General Synod in 2018) it is considered an appropriate time to consider the application of this modern practice.
3. The culture of the Church has changed. In 1966 there was a stronger understanding by members, and in particular Convention Delegates, of the teachings of the Church and its practices. Although there is no reference to the Theses of Agreement in the Church's constitution, its role as a basis for much of the Church's practice was well understood.
4. The constitution contains no definitions so members today are unable to ascertain what is a confessional, theological or doctrinal matter – all these words are used in the constitution and are often interpreted as being inter-changeable.
5. The Synod-approved review of the Church's Ecclesiastical Discipline policies and processes will include an assessment of Article 10 in the Constitution and related By-Laws, which deal with Church Discipline.
6. As a general observation, the constitution as it is currently written has evolved and contains, as a consequence, contradictions and lack of clarity in regard to key governance, management, operational and practice matters.
7. Changes in the external environment also impact on the LCA. In latter years, the Federal and State Government authorities that have oversight of incorporated bodies (SA Associations Incorporation Act and establishment of the Australian Charities and Not-for-Profit Commission (ACNC)), have required a stronger emphasis on governance principles in institutional constitutions and the development of policies that demonstrate governance and consistency over management and operations of an entity.
8. The recommendations of the Royal Commission into the Institutional Sexual Abuse of Children will also require further policy development to ensure the Church's compliance with any legislation the Federal Government will introduce.

In summary, the exercise of providing further band-aids to the current constitution may only result in further risk of confusion and non-alignment with current governance and management principles.

The aim should be for a Constitutional structure that has longevity and reflects who we are, why we exist, how we are governed, and be of such a nature that would require minimal changes over time.

2. INITIAL FRAMEWORK FOR DISCUSSION

At a meeting of the Standing Committee of Constitutions Committee meeting in June 2018, Dr Matthew Turnour of Neumann & Turnour Lawyers, proposed a structure (cf point 1 above) whereby the churchwide governance of the LCA would be undertaken through a company limited by guarantee, and the mission and ministry continues through an unincorporated structure.

This proposal would require the development of two constitutional streams with the alignment of mission and ministry being focussed within the unincorporated structure with the constitutions providing clear alignment that does not impede the unity of the Church. Whilst recognising the benefits of the proposal, it is considered good governance to examine the impact of such a 'split' structure would have on the Church and where there may be gaps or issues that should be addressed prior to proceeding with any documentation development and commitment.

Even if this model isn't considered to be the most appropriate one, the issues are still pertinent in any consideration of the development of a new constitution.

The following sections of this document raise a range of issues under the following four categories:

- Governance and accountability
- Relationships
- Legalities
- Operations.

These categories are relevant at the Synodical, District, Congregational and Agency (schools, aged care, community services) levels of the Church.

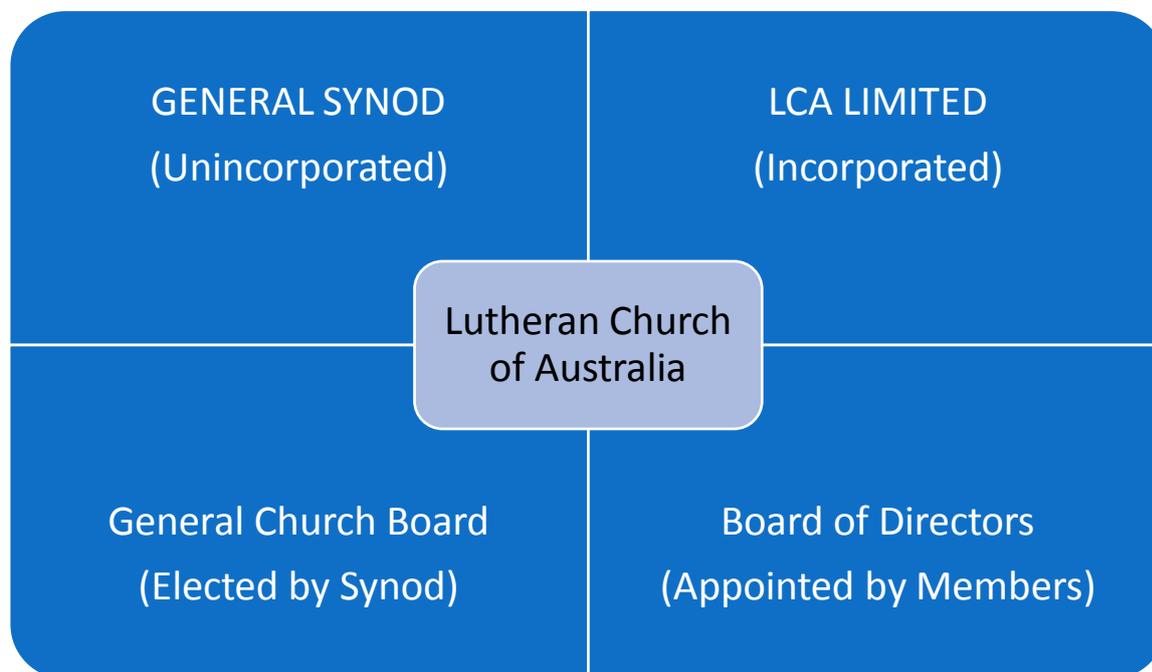
Of course, there are many other matters that will need to be considered including:

- Identifying the key content of the current constitution that must be retained (for example Article 2 "Confession");
- Discerning the most appropriate constitutional and structural arrangements (e.g. one constitution or two; incorporated association or company limited by guarantee; reflects churchwide/district relationships);
- Identifying those matters that should be removed from the constitution and by-laws and developed as Policy and Procedure, e.g. Transaction of Business at Convention;
- Developing the required Policies and Procedures to align with the current constitution's intent while updating to reflect the current legal requirements of the Federal and State laws;
- Removing all By-Laws from the constitution and simplifying the document that can, as required by legislation, only be amended with a ¾ majority vote.
- Ensuring that documentation is in place, e.g. Doctrinal Statements, that are stand-alone in regard to an issue and reflect the current teaching of the Church and such documents are defined in the constitution that would require a 2/3 majority for any amendment.

There may be other issues that are identified during the life of the project itself.

3. PRIMARY LEVEL STRUCTURE

This paper is based on the following high-level arrangement at the primary level of the Church:



	Option & Issues	Comments
1	Lutheran Church of Australia Inc, incorporated under the SA Incorporations Act, transfers to a Company Limited by Guarantee under the Commonwealth Incorporations Act. 1.1 What are the legal and operational impacts of this transfer in structure?	
2	LCA Unincorporated – would it be required to register with the ACNC? 2.1 Will the unincorporated entity still be a trading entity with an ABN or is it proposed that all financial activity be through LCA Limited? 2.2 If it is registered as a trading entity, are there are any minimum requirements to be met in retaining its registration (eg financial activity, demonstrably meeting its objects)?	
3	The Members of the incorporated entity would be the Districts. This would require the Districts to be incorporated. 3.1 Would the Districts be required to also	Not all districts are incorporated.

	Option & Issues	Comments
	<p>be a Company Limited by Guarantee?</p> <p>3.2 What will be the impact for NSW which is currently unincorporated?</p> <p>3.3 Will the status of NZ be sufficient for it to be a Member in law?</p> <p>3.4 How do we protect the authority of LCA Limited over the members, rather than the members being seen as having authority over LCA Limited?</p> <p>3.5 Instead of having Districts as members, would it be preferable to have a representative (person) as the member?</p> <p>3.6 Is there benefit of the members and the directors being the same persons?</p> <p>3.7 If the members were district individuals or districts and they were unsatisfied with the way the LCA Ltd Board was acting could they call a special general meeting to express their dissatisfaction?</p>	<p>Depending on the issue it could be a special meeting of the General Synod, or of the LCA Ltd.</p>
4	<p>Districts as Members of LCA Limited</p> <p>4.1 Current structure is that the Districts act as the LCA Inc in carrying out its activities in specific regions and the Constitution of the Districts (Part A) forms part of the By-Laws of LCA Inc. – does the new arrangement reverse this position by Members having authority to provide direction to the LCA Limited Board?</p> <p>4.2 Does the ‘acting in the best interests of the shareholders (members)’ principle for company boards apply? If so, what satisfies that test in this type of “two-part” constitutional set-up? Who needs to be satisfied?</p>	<p>This is on the same issue as point 3.4</p>
5	<p>Directors - Synod will elect the GCB. The same people would then be appointed to the Board of LCA Limited as Directors.</p> <p>5.1 How will this be reflected in the two constitutions?</p> <p>5.2 Will this require two sets of record keeping and accountability in relation to activities undertaken as Synod and those as LCA Limited?</p> <p>5.3 Will we require provisions for removal / replacement of Directors – procedures.</p> <p>5.4 General Synod elects GCB – in the constitution of Church will it state that</p>	

	Option & Issues	Comments
	the GCB are then elected as the Directors of LCA Ltd?	
6	<p>LCA Limited – Agenda.</p> <p>6.1 What items would fall within the agenda of LCA Limited that would not / could not be part of the agenda of the GCB.</p> <p>6.2 Comment on interaction between GCB and Directors in respect to their distinct roles and responsibilities.</p> <p>6.3 Would there be an overlapping?</p> <p>6.4 What scope (and protection) is there for the Directors of LCA Limited to not implement a direction/resolution of the General Synod on the grounds it places the directors at risk of legal liability?</p> <p>6.5 How could this be reflected in the unincorporated constitution?</p>	
7	<p>LCA as an Auspicing Body for Federal Govt funding?</p> <p>7.1 Will the structure enable LCA Limited, if agreed to at any time in the future, to be the auspicing authority for Federal funding to Schools and Aged Care?</p> <p>7.2 Would it be more effective for the auspicing body be one of the ‘child’ companies?</p>	
8	<p>‘Child’ legal entities</p> <p>8.1 Will it be necessary for the constitutions of these entities to be changed to reflect the new structure?</p> <p>8.2 Or, is it just a matter of reflecting the structure in ACNC records in regard to the parent/child relationship?</p>	
9	<p>Deductible Gifts Register (DGR status)</p> <p>9.1 Does the revised structure have any impact on our current or future status as a DGR?</p>	
10	<p>FBT Provisions for Pastors and other tax:</p> <p>10.1 Will the revised structure have any impact on the current FBT arrangements for pastor salary entitlements?</p> <p>10.2 Will private rulings on tax matters be transferrable/rolled over, or new ruling</p>	

	Option & Issues	Comments
	<p>sought for the new entity? 10.3 Will current exemptions be transferrable/rolled over, or new exemptions sought for the new entity? What risks are there in losing concessions etc during the transition in the current legislative/regulatory environment?</p>	
11	<p>Regulatory and reporting requirements 11.1 Will the revised structure require any additional regulatory compliance requirements on LCA Limited not currently required under SA incorporation?</p>	
12	<p>Role of Directors in LCA Limited 12.1 Are there any additional requirements in regard to the appointment and reporting of Directors under LCA Limited not currently required under SA incorporation?</p>	

4. DISTRICTS

It will be essential to confirm the position of Districts within this framework and the relationships should be seamless in operation from the perspective of the Districts and the congregations within their boundaries. The 'division' of accountability will rest at the primary level of the structure.



	Proposal	Impact/issues
1	<p>1.1 What will be the required amendments of the constitutions of each of the Districts to be amended?</p> <p>1.2 Is this an opportunity to review and evaluate the relationship of the Church and its Districts?</p> <p>1.3 Will the revised District constitutions be adopted prior to adoption of the LCA revised constitutions or as a consequence of the adoption of the new constitutions for LCA Ltd and General Synod?</p>	Define/affirm the nature and role of the Districts into the future.
2	<p>2.1 If the Districts are the Members of LCA Limited, how are they represented as such when required to interact with the company?</p> <p>2.2 Do all members of the District Church Council (DCC) attend the AGM of the</p>	This is on the basis the District is the member of LCA

	Proposal	Impact/issues
	<p>Company to elect the Board?</p> <p>2.3 Does this arrangement mean that the Company is accountable to the Districts?</p> <p>2.3 Are decisions of DCC in relation to acting as Members of LCA Limited require endorsement of District Synod?</p> <p>2.4 What limitations can be placed on the members as to which decisions they can make – appointment of Directors, Auditor and adoption of financial reports?</p>	<p>Ltd. The question is will the full DCC/B membership, as the governance body of the District need to be involved, or just their nominated representative?</p> <p>This links back to questions 3.4 and 4.1 in Section 2 above.</p> <p>DCC/B is accountable to District Synod, so hence the question.</p>
3	<p>3.1 Property currently held by Districts Should this change?</p> <p>3.2 Are there any benefits to all property being held by LCA Property Ltd in trust?</p>	
4	<p>Loans/Mortgages – capstone agreements between Districts (as land owners) and LLL being put in place.</p> <p>How does the proposed structure impact on the LCA Limited exercising its rights and obligations under the capstone agreement? (governance, risk,)</p>	<p>The capstone agreement outlines the roles and responsibilities of all entities that are parties to loans.</p>
5	<p>Relationship of congregations to Districts.</p> <p>5.1 Currently all congregations under constitutions are members of LCA Inc. located in a District. Will this continue?</p> <p>5.2 Currently they are members of the Church with a constitution acceptable by the District.</p>	<p>There may need to be clarification if there is ambiguity about the dual membership of congregations/parishes (district and churchwide)</p>
6	<p>Authority of LCA Limited in regard to governance over Districts.</p> <p>6.1 What are the mechanisms that will require Districts to adhere to LCA Limited policies?</p> <p>6.2 What are the mechanisms that will require Districts to have oversight of congregations in relation to policies?</p>	<p>Congregations constitutions?</p>

4 CONGREGATIONS

	Proposal	Impact/issues
1	<p>How will congregations be aligned to both the unincorporated General Synod and the LCA Limited?</p> <p>1.1 Is there any necessity to establish a relationship between congregations and LCA Limited or is that done through the Districts?</p>	
2	<p>Employment</p> <p>2.1 Proposed that all employment be through LCA Limited – what impact will this have, if any, on pastors and lay workers? How might the 1,500 employees in Qld under the Letters Patent be accommodated?</p> <p>2.2 How do we retain the position of pastors as called servants, and not employees?</p> <p>2.3 Will employment be under National Fair Work Australia guidelines or State based?</p>	<p>Will need to be clear what we mean by 'all employment'. Churchwide functions only? Or employed at all levels? What are the costs and benefits of 'an all' in approach? (at the moment the Human Resource System as a bureau is as far as it goes at the churchwide level).</p>
3	<p>Incorporated congregations</p> <p>3.1 Should incorporated congregations be encouraged to become unincorporated in line with General Synod structure?</p> <p>3.2 Are there any implications of having some congregations incorporated when the primary body is unincorporated?</p> <p>3.3 Should a congregation adopt the same constitution as the General Synod constitution or does it need its own constitution?</p>	
4	<p>Accountability – under law, will the Directors of LCA Limited be held liable for actions at a congregation level that is in breach of the law, e.g. Worksafe, protection of children?</p>	
5	<p>Congregation constitutions</p> <p>5.1 Should LCA Limited be the approving body for all model constitutions for congregations? (Based on the current process whereby the General Synod approves all congregation model constitutions.)</p>	<p>The relevance of this question will depend on the answer/outcome of question posed at 3.3 above.</p>

5. SCHOOLS / AGED CARE / COMMUNITY SERVICES (AGENCIES)

	Proposal	Impact/issues
1	<p>Link to LCA Limited</p> <ul style="list-style-type: none"> Is there any way in which all the agencies constitutionally can be linked to LCA Limited? Would this be a good thing to do - if possible and why/why not? 	
2	<p>Compliance with LCA policies</p> <ul style="list-style-type: none"> What would be the best methodology to require all the agencies (staff, parents, students) to align with LCA policies? 	
3	<p>LCA Directors accountability</p> <ul style="list-style-type: none"> What onus of responsibility do the Directors of LCA Limited take on in regard to agencies? (e.g. failure to report abuse of a child). 	

Note 1: Should schools be part of the current scope or to be a future consideration once the synod-approved resolutions (2018) have been worked through?

Note 2: Aged Care and Community Services have recently completed a governance review process. A number of agreements and recommendations were adopted in that process and are currently being implemented. The review of the Constitution will need to take this into account.

6. ARTICLES OF CURRENT CONSTITUTION TO BE CONSIDERED IN DEVELOPING ANY NEW CONSTITUTION

Article	Description	Impact/issues
1.1	<p>Name</p> <p>1.1.1 Is the name of the Church defined here as “the name of the Church is Lutheran Church of Australia” without any reference to LCA Limited?</p> <p>1.1.2 Or, is the name “LCA Limited” hereinafter referred to as “the Church”?</p> <p>1.1.3 Is the name to be consistent with the General Synod unincorporated constitution or different? Distinct?</p>	
1.2	<p>Interpretation</p> <p>1.2.1 This is an opportunity to review some of the ‘definitions’ and ‘interpretations’ and to ensure that the same descriptors are used in both constitutions.</p>	
2	Confession – unchanged	YES
3	<p>Objects – unchanged</p> <p>3.1 Are there additional objects that will be required under the Corporations Act for compliance purposes?</p> <p>3.2 Should the objects be truncated to ensure the entity has charity status?</p>	
4	<p>Membership – not applicable</p> <p>4.1 Members to be the Districts each of which is to be an incorporated entity.</p> <p>4.2 Is there still to be a reference to congregations/parishes? Synod will be part of the unincorporated constitution.</p> <p>4.3 If funding to LCA Limited comes from congregations should there be something in the constitution?</p>	
5	<p>The Ministry</p> <p>5.1 No changes are anticipated within the context of this specific project – but may be influenced by changes as a result of other processes.</p> <p>5.2 For any legal action by a pastor against</p>	

Article	Description	Impact/issues
	<p>the LCA or where the LCA may wish to take an action against a pastor, should there be some reference to the ministry/pastors being under LCA Limited for litigation purposes?</p> <p>5.3 Can there be a provision that pastors are under the governance of LCA Limited?</p> <p>5.4 Or, for church discipline reasons, is it better that pastors are aligned to the unincorporated entity only? – difference between confessional and administrative/behaviour.</p>	
6 6.1 6.2- 6.7	<p>Authority and Powers Any changes required?</p> <p>It is expected these clauses will need to be re-written to reflect the relationship with General Synod.</p>	
7	<p>The General Synod 7.1 To be re-written to reflect the constitution of the unincorporated entity and the relationship.</p>	
8	<p>Officers and Administration 8.1 To be re-written to reflect the constitution of the unincorporated entity and the relationship.</p>	
9	<p>Districts – determination 9.1 Are the Districts to form part of the constitution of LCA Limited or just the unincorporated entity.</p>	
10	<p>Discipline, Adjudication and Appeals – determination 10.1 Is this issue to form part of the constitution of LCA Limited? 10.2 If so, in what form?</p>	
11	<p>Dissolution – included as required under the Corporations Act.</p>	
12	<p>By-Laws – to be removed from LCA Limited constitution – policies to be identified – see section 7 below</p>	
13	<p>Amendments to Constitution – included as required under the Corporations Act and to reflect relationship with unincorporated body.</p>	

7. BY-LAWS – HOW ARE THEY TO BE DIRECTED?

No.	Title	Incorporated in Constitution		Policy	Procedure
		LCA Limited	Unincorporated		
4	Membership		Yes	Yes	Yes
	Preaching Centres		Yes	Yes	
	Aboriginal communities		Yes	Yes	Yes
5	Ministry		Yes	Yes	Yes
	Roll of Pastors			Yes	Yes
	Leave of absence, withdrawal, dismissal			Yes	Yes
	Calls and Transfers		No	Yes	Yes
	General		Yes?	Yes	
	Procedure in Calls			Yes	Yes
	General Pastors Conference		Yes	Yes	Yes
7	The General Synod				
	Delegates		Yes	Yes	Yes
	Alternate		Yes	Yes	Yes
	Consultant		Yes	Yes	Yes
	Synodical term		Yes		
	Convening of General Synod			Yes	Yes
	Procedure in Transacting Business			Yes	Yes
	Nominations and Elections			Yes	Yes
7.4.5.1	Nominations in General		Yes		
	Elections in General			Yes	Yes
	Sessional Committees			Yes	Yes
	Method of Voting between Conventions			Yes	Yes
	Appointments		Yes	Yes	Yes
8	Officers and Administration			Yes	Yes
	The General Church Board		Yes	Yes	Yes
	Financial Year	Yes	Yes		
	College of Bishops		Yes	Yes	Yes
	Boards of the Church		Yes	Yes	Yes
	Executive Officers of Boards		Yes	Yes	Yes
	Lay Workers			Yes	Yes
	Auxiliaries		Yes	Yes	Yes
9	The Districts		Yes	Yes	Yes
10	Discipline, Adjudication and Appeals	Yes?	Yes	Yes	Yes