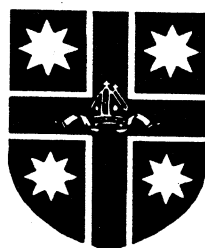


THE ANGLICAN CHURCH OF AUSTRALIA

GENERAL SYNOD



APPELLATE TRIBUNAL

OPINION

**REFERENCE AT THE REQUEST OF MORE THAN
25 MEMBERS OF GENERAL SYNOD
CONCERNING VARIOUS MATTERS TO DO WITH THE CONDUCT OF
CHURCH SERVICES**

7 May, 1996

I certify that this is a copy of the Opinion of the Appellate Tribunal signed by the President, the Hon Mr Justice C Tadgell.

The Reverend Dr B.N. Kaye
Registrar to the Appellate Tribunal

Published 1997

Copies of this document may be obtained from:

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**APPELLATE TRIBUNAL OF THE ANGLICAN CHURCH
OF AUSTRALIA**

TO: The Most Reverend Dr Keith Rayner, A.O., Ph.D., Th.D., Primate
of the Anglican Church of Australia

May it please Your Grace:

REPORT OF THE APPELLATE TRIBUNAL

I have the honour to make this report of the Appellate Tribunal with respect to the questions set forth in Schedule "A" to the reference under your hand and seal dated the 7th day of May 1996 requesting the Appellate Tribunal, to the extent that it has jurisdiction to do so, to give its opinion on those questions, namely:

1. In the opinion of the Appellate Tribunal is the practice of prayers for the dead at Divine Service consistent with the fundamental declarations and ruling principles of this Church?
2. In the opinion of the Appellate Tribunal is the practice of reservation of the elements either as objects of devotion in the church or for the later use of worshippers not present at the time of consecration of the elements consistent with the fundamental declarations and ruling principles of this Church?
3. In the opinion of the Appellate Tribunal are any manual acts in relation to the consecration of the elements at the Holy Communion, not specifically allowed for, in the Book of Common Prayer, consistent with the fundamental declarations and ruling principles of this Church?
4. In the opinion of the Appellate Tribunal is it consistent with the fundamental declarations and ruling principles of this Church for:
 - (1) A lay person to read the lesson at Divine Service.
 - (2) A lay person to read prayers at Divine Service.
 - (3) A lay person to assist in the distribution of the elements at Holy Communion.
 - (4) A lay person to say the prayer of consecration of the elements at the Holy communion.
 - (5) A lay person to preach a sermon at Divine Service.
 - (6) A lay person to pronounce the absolution at Divine Service.

The reference was made under section 63 of the Constitution at the request made to Your Grace by more than 25 members of the General Synod. The Tribunal did not seek the opinion of the House of Bishops or the opinion of the Board of Assessors with respect to any of the said questions.

No interested person or body indicated a wish to present oral submissions to the Tribunal but written submissions were received as indicated in the annexed reasons of the Tribunal.

The Tribunal respectfully declines to give its opinion on any of the questions the subject of this reference. Annexed are the unanimous reasons of the members of the Tribunal, namely -

The Honourable Mr Justice Tadgell (President)
The Honourable Mr Justice Handley, A.O. (Deputy President)
The Honourable Mr Justice Young
The Honourable Justice Bleby
The Most Reverend Ian George, A.M., (Archbishop of Adelaide)
The Right Reverend Peter Chiswell (Bishop of Armidale)
The Right Reverend B.W. Wilson (Bishop of Bathurst).

The Tribunal makes no order as to the costs of this reference.

The Tribunal gratefully acknowledges the valuable assistance received from the Registrar of the Tribunal, the Reverend Dr B.N. Kaye, and his staff in connection with this reference and the publication of this report and the Tribunal's reasons.

Pursuant to the provisions of Rule XVIII made under section 63 of the Constitution, I now forward three copies of this report and its annexure. The Rule requires that a certified copy be filed in the Registry of the Primate and that a certified copy be sent from the Registry to each diocesan bishop and to such other persons as the Primate may direct.

Given under my hand at Melbourne in the State of Victoria
this 24th day of December 1997.



R.C. TADGELL
President,
Appellate Tribunal

APPELLATE TRIBUNAL
1996 REFERENCE AT THE REQUEST OF MORE THAN
25 MEMBERS OF GENERAL SYNOD

REASONS OF THE TRIBUNAL

On 7th May 1996, pursuant to section 63 of the Constitution, the Primate referred the following questions to the Appellate Tribunal with the request that it give its opinion on the questions "to the extent that it has jurisdiction to do so":

1. In the opinion of the Appellate Tribunal is the practice of prayers for the dead at Divine Service consistent with the fundamental declarations and ruling principles of this church?
2. In the opinion of the Appellate Tribunal is the practice of reservation of the elements either as objects of devotion in the church or for the later use of worshippers not present at the time of consecration of the elements consistent with the fundamental declarations and ruling principles of this church?
3. In the opinion of the Appellate Tribunal are any manual acts in relation to the consecration of the elements at the Holy Communion, not specifically allowed for, in the Book of Common Prayer, consistent with the fundamental declarations and ruling principles of this church?
4. In the opinion of the Appellate Tribunal is it consistent with the fundamental declarations and ruling principles of this church for:
 - (1) A lay person to read the lesson at Divine Service.
 - (2) A lay person to read prayers at Divine Service.
 - (3) A lay person to assist in the distribution of the elements at Holy Communion.

- (4) A lay person to say the prayer of consecration of the elements at the Holy Communion.
- (5) A lay person to preach a sermon at Divine Service.
- (6) A lay person to pronounce the absolution at Divine Service."

The questions had been submitted to the Primate under the provisions of section 63 by more than 25 members of the General Synod with the request that the questions be referred to the Tribunal.

At a preliminary hearing in Sydney Mr Justice Young, sitting alone, gave directions on behalf of the Tribunal with respect to the Reference. There was representation at the directions hearing on behalf of the following:

- The Standing Committee of the Diocese of Sydney;
- The Diocese of Melbourne;
- The Dioceses of Ballarat, Riverina, The Murray and Newcastle;
- The Bishop in Council of the Diocese of Bathurst;
- The Bishop in Council of the Diocese of Wangaratta;
- The Diocesan Council of the Diocese of Adelaide;
- The Diocesan Council of the Diocese of Riverina.

Mr Robert Tong appeared as agent for the Synod members who had submitted the questions to the Primate. Although they did not attend and were not represented at the directions hearing, the Reverend R.L. Dowling (a member of the General Synod Liturgical Commission and Chairman of the Steering Committee of the International Anglican Liturgical Commission) and the Reverend Dr C.H. Sherlock (a member of the General Synod

Liturgical Commission, teacher of liturgy and theology and a member of A.R.C.I.C.-II) lodged written indications of interest. At the hearing possible objections were foreshadowed on behalf of the Standing Committee of the Diocese of Sydney and by Mr Tong to participation in the Reference by members of the Appellate Tribunal being bishops who engaged in the so-called practices or acts referred to in questions numbered 1, 2, and 3. No interested person or body indicated a desire to present oral submissions. The Tribunal accordingly invited written submissions and received them from the following -

The Dioceses of Ballarat, Newcastle, Riverina, The Murray and Wangaratta;

The Synod of the Diocese of Brisbane;

The Diocese of Newcastle (supplementary submission);

The Reverend Dr C.H. Sherlock.

It is notable that there was no submission from the Standing Committee of the Diocese of Sydney. Nor was there a submission of any kind made to the Tribunal by or on behalf of any of the members of the General Synod who were responsible for the Primate's Reference. We note with regret that this is a case in which members of General Synod have chosen to trouble the Primate to refer under section 63 of the Constitution questions of their own formulation, without offering assistance to the Tribunal in an understanding of the questions or in the provision of appropriate answers to them.

The manner of formulation of the questions that have been referred leaves a great deal to be desired. It is remarkable,

first of all, that all the questions are posed without any context or frame of reference. Several of them are vague or imprecise. How, for example, is "the practice of prayers for the dead at Divine Service" in question 1 to be understood? The question is asked without context or content. In the absence of concrete example a useful answer cannot be given. Again, for example, the vagueness of question 3 prevents the Tribunal from giving a useful answer.

Moreover, most of the questions are of a character quite different from that of any question the Tribunal has been asked to consider during the course of its 35-year history. Previous references have in general concerned the interpretation of one provision or more of the Constitution or the constitutional validity of actual, proposed or contemplated legislation of a synod.

The Appellate Tribunal derives jurisdiction under section 63(1) of the Constitution upon the reference of a question that "arises under this Constitution". The Tribunal has given section 63 a beneficent construction. In his reasons given in 1987, following the Reference upon the Ordination of Women to the Office of Deacon Canon, the President (Mr Justice Cox) expressed the view that -

"The purpose of s.63 is to enable the Primate, or in certain circumstances other bodies or persons, to require the Appellate Tribunal to give an advisory opinion with respect to a possible constitutional issue - a question arising 'under this Constitution' either in the narrow sense of a question arising pursuant to the Constitution (for example, in virtue of some right granted by the Constitution) or in the

broader sense of a question arising with respect to the Constitution or its interpretation."

The whole of the Appellate Tribunal agreed with that passage in 1989 in the joint opinion upon Melbourne's "Ordination of Women to the Office of Priest Act 1988". Even accepting that view of the breadth of section 63, the Tribunal is not satisfied that a question necessarily "arises under" the Constitution for the purpose of section 63(1) merely because someone, or some body of persons, or some organisation, wishes to know whether something is or is not "consistent with" the Constitution or any particular provision or provisions of it. The form of the present Reference appears to recognise that the Tribunal's jurisdiction is not necessarily obvious, for it makes no assumption that any of the questions referred "arises under" the Constitution.

When (as in this case) a question is not referred to the Tribunal for "determination" under section 63 the exercise of jurisdiction under that section results only in an advisory opinion. There is accordingly much to be said for regarding the jurisdiction with circumspection when questions are asked for opinion about established procedures or usages within the Church changes to which are not evidently in prospect. Several of the questions covered by the present Reference are in this category. The Tribunal thinks it necessary to distinguish carefully between its being used, on the one hand, in aid of the resolution of genuine constitutional issues and, on the other, as a sounding board for matters of theological contention between different traditions and emphases within the Anglican Church of Australia.

An attempt to query existing usage by means of a reference under section 63 runs into further difficulty when the usage is provided for or countenanced by existing synodical legislation. This consideration affects, or may affect, several questions under the present Reference. Some of the usages enquired about (e.g. in question 1) may be covered by *A Prayer Book for Australia* (e.g. pp.722, 727) authorized by the Prayer Book for Australia Canon 1995 (No. 13 of 1995). Other usages referred to in the questions may be otherwise affected by, e.g., the Lay Assistants at Holy Communion Canon 1973 (No. 12 of 1973); the Authorised Lay Ministry Canon 1992 (No. 17 of 1992); an Australian Prayer Book Canon 1977 (No. 1 of 1977) and the Prayer Book for Australia Canon 1995. If a challenge is sought to be made to existing legislation of General Synod it should be made openly and with precision under section 29 of the Constitution: a reference requesting an advisory opinion under section 63 is not a proper vehicle for doing so.

Although some members of the Tribunal have serious doubts whether, in relation to some at least of the questions the subject of the present Reference, it has jurisdiction under section 63, it becomes unnecessary finally to determine the matter of jurisdiction. We are unanimously satisfied that because of the shortcomings of the questions, to some of which we have referred, we should not answer any of the questions. Rule 17 of the Appellate Tribunal Rules 1988 provides that -

"Nothing in these Rules shall require the Tribunal to give its opinion on a question referred to it under s.63 of the Constitution if in the judgement of the Tribunal there would be insufficient practical utility in doing so."

Of course this Rule cannot override section 63 itself. Unlike section 29 of the Constitution section 63(1), however, is not mandatory in terms. Section 29 provides in sub-s.(6) that, subject to sub-s.(7), the Appellate Tribunal shall give its opinion or determination with respect to a reference made to it under that section. Even then, sub-s.(7) contemplates that the Tribunal might be unable to provide an answer; and see s.59(1). Although the present Reference is couched in terms of a request, section 63(1) no doubt assumes that (subject to section 59(1)) the Tribunal will give its opinion upon a question or questions that are referred to it. The section cannot be understood, however, to require the provision of an advisory opinion which, as in this case, the Tribunal conscientiously believes will lack authority and utility. Apart from the vague, imprecise and hypothetical nature of some of the questions, we are seriously disadvantaged upon the present Reference by the absence of a contradictor of the several arguments that have been advanced to us urging that we should not provide answers. Remarkably, there is not any question contained in the Reference that has not been the subject of a submission to the Tribunal that it should not be answered. Because we have dealt in some detail with the Reference dated 7th March 1996 concerning lay and diaconal presidency, it might be thought possible to answer question 4(4) (and perhaps question 4(6)) of the present Reference without undue ceremony. We are nevertheless unwilling to do so merely by way of duplication, for we should not wish to be taken thereby to denigrate or underestimate our role or, by implication, to trivialise any of the questions that have been referred. Indeed, we draw attention to a submission we received (with which we

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have some sympathy) that "... the inclusion of paragraph 4 in the list of items referred to the Tribunal in question 4 is breathtaking in its trivialisation of such an important issue".

Because we are agreed, for the reasons we have given, that we should not give an opinion on any of the questions contained in the Reference, no "matter involving doctrine" within the meaning of section 58(1) of the Constitution arises; and we have had no need to trouble the House of Bishops or the Board of Assessors for an opinion.

Accordingly, the Tribunal respectfully declines to give its opinion on any of the questions the subject of this Reference.