ANGLICAN CHURCH OF AUSTRALIA

APPELLATE TRIBUNAL 1991

Report and Opinion of the Tribunal
on the eleven questions
appertaining to the ordination of a woman to the order of priests
or the consecration of a woman to the order of bishops
referred by the Primate on 31 August, 1990

General Synod Office
Box Q190, Queen Victoria Post Office
SYDNEY NSW 2000

APPELLATE TRIBUNAL OF THE ANGLICAN CHURCH OF AUSTRALIA

To the Most Reverend K. Rayner, A.O., Primate of the Anglican Church of Australia.

OPINION OF THE APPELLATE TRIBUNAL

1. On 31 August 1990, as Acting Primate, you referred to the Tribunal four questions relating to the ordination of a woman to the office of priest or the consecration of a woman to the office of bishop, and later you referred a further seven questions to the Tribunal dealing with the same subjects. The references were made under Section 63 of the Constitution. Copies of the eleven questions, and of the two diocesan ordinances to which certain of them relate, are appended to this report.

The Tribunal obtained, under s.58 of the Constitution, the opinions of the House of Bishops and the Board of Assessors on certain issues that were raised by the questions. In the opinion of a majority of the Tribunal the referred questions, independently of those issues, do not involve any points of doctrine upon which the Tribunal was obliged to obtain opinions under s.58 before giving its opinion on the questions.

The Tribunal received written submissions from interested persons and on 4 May 1991 it met at Sydney to consider the matter further. All members of the Tribunal attended that meeting, namely -

The Honourable Justice Cox (President)
The Honourable Mr Justice Handley, A.O.
The Right Reverend A.C. Holland, Bishop of Newcastle
The Most Reverend K. Rayner, A.O., Archbishop of Melbourne
The Most Reverend D.W.B. Robinson, A.O., Archbishop of Sydney
The Honourable Mr Justice Tadgell (Deputy President)
The Honourable Mr Justice Young.

The Tribunal heard oral submissions from counsel and others representing interested groups that had been recognized as parties or been given leave to intervene. The Tribunal then adjourned to consider its decision.

The ordination of women as priests or bishops is a subject upon which strong and divergent views are held within this Church. It need hardly be said that the Tribunal is not concerned with the advisability or otherwise of such ordinations but only with the question whether under the Constitution of the Church such ordinations are permissible.

In the opinion of the Tribunal the references raise matters involving questions of ritual and discipline so that, pursuant to s.59 of the Constitution, the concurrence of at least two bishops and two laymen is necessary for the giving of any opinion. As will be seen, the necessary concurrence has not been achieved in the case of some of the questions. For your information we append a table showing the answers proposed by the individual members of the Tribunal to the 11 questions.

2. The formal opinions of the Tribunal upon the questions referred to it are -

Question 1: No (the Bishop of Newcastle dissenting).

Question 2: Yes, section 71(2) (the Bishop of Newcastle dissenting).

Question 3: Yes (the Bishop of Newcastle dissenting).

Question 4: No (the Bishop of Newcastle dissenting).

Question 5: No (the Bishop of Newcastle dissenting).

Question 6: No (the Bishop of Newcastle dissenting).

Question 7: No (the Bishop of Newcastle dissenting).

Question 8(1): *

(2): *

Question 9(a): No (the Bishop of Newcastle dissenting).

Question 9(b): No (the Bishop of Newcastle dissenting).

Question 10: *

Question 11: *

* A concurrence of opinions required by section 59(1) of the Constitution has not been achieved in the case of Questions 8(1), 8(2), 10 and 11.

3. The Tribunal makes no order as to the costs of these proceedings.

Pursuant to the provisions of Rule XVIII made under Section 63 of the Constitution, I now forward three copies of this opinion and its annexures. The Rule requires that a certified copy of the opinion 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. I also enclose a copy of the reasons of the individual members of the Tribunal.

Dated this 28th day of November 1991.

President

Question	Abp Rayner	Abp Robinson	Bp Holland	Presdt.	Dep. Presdt.	Young J.	Handley J.A.
1	No	No	Yes	No	No	No	No
2	Yes	Yes	No	Yes	Yes	Yes	Yes
3	Yes	Yes	No	Yes	Yes	Yes	Yes
4	No	No	Yes	No	No	No	No
5	No	No	Yes	No	No	No	No
6	No	No	Yes	No	No	No	No
7	No	No	Yes	No	No	No	No
8(1)	Possibly	Yes	No	Possibly	Yes	Yes	Yes
8(2)	No	Yes	No	No	Yes	Yes	Yes
9(a)	No	No	Yes	No	No	No	No
9(b)	No	No	Yes	No	No	No	No
10	Yes	No	Yes	Yes	No	No	No
11	Yes	No	Yes	Yes	No	No	No

SCHEDULE "A"

Question 1.

In the absence of any canon of General Synod authorising the ordination of a woman to the office of priest or the consecration of a woman to the office of bishop, is the Bishop of the Diocese of North Queensland empowered to ordain a woman to the office of priest or consecrate a woman to the office of bishop?

Question 2.

In the absence of any canon of General Synod authorising the ordination of a woman to the office of priest or the consecration of a woman to the office of bishop, is the Bishop of the Diocese of North Queensland prevented by any provision or provisions of the Constitution from so ordaining or consecrating a woman, and if so by which provision or provisions?

Question 3.

Does S. 71(2) or any other provision or provisions of the Constitution prevent the Bishop of the Diocese of North Queensland from so ordaining or consecrating a woman?

Question 4.

Does S. 51 of the Constitution enable the Synod of the Diocese of North Queensland to make an ordinance empowering the bishop of the diocese so to ordain or consecrate a woman?

+ Keith, Adelaide

SCHEDULE "B"

Question 5.

Does a diocesan bishop have authority to ordain a canonically fit deacon who is a woman to the priesthood if he believes that it is contrary to the command of Christ to refuse to ordain a canonically fit deacon to the priesthood solely on the ground that the deacon is a woman ?

Question 6.

Does the diocesan bishop of a diocese that has adopted the Ordination of Women to the Office of Deacon Canon 1985 have authority to ordain to the priesthood a woman who was ordained deacon after the adoption of that Canon by his diocese ?

+ Keith Addlands

SCHEDULE "C"

Question 7.

Does any provision of the Constitution of the Anglican Church of Australia (the "Constitution") confer power on the synod of a diocese to:

(1) enact an ordinance (or equivalent measure) containing the provisions of the Ordination of Women to the office of Priest Ordinance 1989 made or purporting to have been made by the synod of the Diocese of Canberra - Goulburn;

(2) enact an ordinance (or like measure) with substantially equivalent provisions to those in that ordinance; or

(3) otherwise authorise the bishop of the diocese to ordain a woman to the order of priests or to consecrate a woman to to order of bishops in that church ?

Question 8.

Does any provision in:

(a) sections 1, 2 or 3 of the Constitution,

(b) section 4 of the Constitution, or

(c) section 71 (2) of the Constitution and any law referred to in section 71 (2) of the Constitution, or

(d) any other section of the Constitution (and if so, which section) :

do either of the following:

(1) Make it unlawful for a bishop of a diocese of the Anglican Church of Australia to ordain a woman to the order of priests or to consecrate a woman to the order of bishops in that church ?

(2) Preclude the synod of a diocese from:

(a) validly enacting an ordinance (or equivalent measure) containing the provisions of the Ordination of Women to the Office of Priest Ordinance 1989 made or purporting to have been made by the synod of the diocese of Canberra - Goulburn;

(b) validly enacting an ordinance (or like measure) with substantially equivalent provisions to those in that ordinance;or

(c) otherwise purporting to authorise the bishop of such a diocese to ordain a woman to the order of priests or to consecrate a woman to the order of bishops in that church ?

Question 9.

Does the unqualified adoption by ordinance of the synod of a diocese of the Ordination of Women to the Office of Deacon Canon 1985 of the General Synod -

(a) authorise the Synod of that diocese to:

(1) enact an ordinance (or equivalent measure) containing the provisions of the Ordination of Women to the Office of Priest Ordinance 1989 made or purporting to have been made by the synod of the Diocese of Canberra - Goulburn;

(2) enact an ordinance (or like measure) with substantially equivalent provisions to those in that ordinance; or

(3) otherwise authorise the bishop of the diocese to ordain a woman to the order of priests or to consecrate a woman to the order of bishops in that diocese ?

(b) authorise the bishop of that diocese to ordain a woman to the order of priests or to consecrate a woman to the order of bishops in that diocese ?

Question 10.

Is the Ordination of Women to the Office of Priest Ordinance 1989 of the Diocese of Canberra and Goulburn an ordinance duly made for the order and good government of the church within the Diocese of Canberra and Goulburn in accordance with the powers conferred upon it by the Constitution of the said diocese ?

Question 11.

Is the Ordination of Women to the Office of Priest Ordinance 1990 of the Diocese of Adelaide an ordinance duly made for the order and good government of the church within the Diocese of Adelaide in accordance with the powers conferred upon it by the Constitution of the said diocese ?

+ Keith Adelaide

X

THE SYNOD OF THE DIOCESE OF CANBERRA AND GOULBURN

ORDINATION OF WOMEN TO THE OFFICE OF PRIEST ORDINANCE 1989

AN ORDINANCE

To provide for the ordination of women to the office of priest, and for purposes connected therewith.

Be it ordained by the Synod of the Diocese of Canberra and Goulburn, as follows:

Short Title

1. This Ordinance may be cited as the Ordination of Women to the Office of Priest Ordinance 1989.

Commencement

2. This Ordinance shall come into operation on a date to be fixed by the Standing Committee of Synod, being a date after the Appellate Tribunal has given its decision on the reference by the Primate to that Tribunal concerning the Ordination of Women to the Office of Priest Act 1988 of the Synod of the Diocese of Melbourne.

Interpretation

3. In this ordinance:

"Bishop" means the Bishop of the Diocese;

"Diocese" means the Diocese of Canberra and Goulburn.

Women may be ordained in the diocese as priests

4. The Bishop, or an Assistant Bishop of the Diocese authorized by the bishop to do so, may, within the Diocese, ordain a woman to the office of priest.

Form of ordination

5. A woman may be ordained in the Diocese to the office of priest in accordance with the appropriate order of service set out in the Ordinal included in the Book of Common Prayer or the Ordinal included in An Australian Prayer Book or in accordance with any other appropriate order of service approved for use in the Diocese.

Savings

6. The power conferred by this Ordinance is in addition to, and not in substitution for, any power vested in the Bishop immediately before the commencement of this Ordinance.

Pastoral Guidelines

7 (1) The Bishop, after consultation, with the Standing Committee of Synod, may issue, from time to time, pastoral guidelines related to the ordination of women as priests.

(2) Pastoral guidelines shall be taken into account by members of the Church within the Diocese but shall not be taken to confer any rights or impose any duties on any members of the Church within the Diocese.

Y

THE SYNOD OF THE DIOCESE OF ADELAIDE OF THE ANGLICAN CHURCH OF AUSTRALIA INC.

AN ORDINANCE to provide for the Ordination of Women to the office of Priest and for related purposes.

THE SYNOD HEREBY DETERMINES:

1. Title

   This Ordinance may be cited as the "Ordination of Women to the Office of Priest Ordinance 1990".

2. Authority to Ordain

   The Bishop or with the mandate of the Bishop any other bishop of the Anglican Church of Australia or of any Church in communion therewith may within the Diocese of Adelaide ordain a woman to the office of priest.

3. Form of Ordination

   The form of office to be used for the ordination of a woman to the office of priest shall be the form appropriate to that office set out in the Ordinal included in the Book of Common Prayer or in the Ordinal included in An Australian Prayer Book or in accordance with any other form appropriate to that office and approved for use in this Diocese, the language of any such form being adapted for the purpose so far as may be necessary for the admission of a woman to that office.

4. Licensing of Women

   The Bishop may grant to any woman who has been ordained in Australia or elsewhere to the office of priest a licence to perform the duties of a priest in this Diocese.

5. Savings

   Nothing in the Ordinance shall limit any power or authority possessed by the Bishop prior to the making of this Ordinance.

6. Pastoral Guidelines

   Pastoral guidelines which may be issued by the Bishop consequent upon this Ordinance should be taken into account by those concerned but no rights or duties at law will be conferred or imposed by them or arise out of non-compliance with them.

In the matter of two References to the Appellate Tribunal in 1990 relating to the Ordination of Women

REASONS OF THE PRESIDENT

Towards the end of last year the Acting Primate referred to the Tribunal under s.63 of the Constitution certain questions relating directly or indirectly to the ordination of women as priests and the consecration of women as bishops. (For economy I shall generally refer to ordination and consecration compendiously as "ordination".) The text of the two references is annexed to the Tribunal's formal opinion. It is lengthy and I shall not set it out again here.

The eleven questions cover a large number of topics in an attempt, no doubt, to anticipate every likely eventuality in this long debate about women's ordination. I think it better to examine the separate topics first and then apply my conclusions to the particular questions we have been asked.

Jurisdiction

The Diocese of Sydney challenges the jurisdiction of the Tribunal to answer questions 1, 5, 6, 9, 10 and 11, presumably on the ground that none of them deals with a question that "arises under this Constitution" within the meaning of s.63. I said something about s.63 in my 1987 reasons and the Tribunal itself in its 1989 Opinion explained how the phrase "under this Constitution" is to be interpreted. While some of the questions do not refer directly to the Constitution they all involve on proper analysis the interpretation of one or more provisions of the Constitution. I am satisfied that the Tribunal has jurisdiction to answer all of the questions.

The Tribunal's previous opinions on this subject

The Tribunal has now given several Opinions on the subject of the ordination of women, on the last four references giving detailed reasons for its answers. In 1987 we decided to hear argument upon and consider afresh certain topics that we had dealt with on previous occasions, and now we are being asked to reconsider our views on these topics

again. I expressed the opinion in 1987 that it is undesirable that considered decisions about the Church's Constitution should be regarded as perpetually liable to revision. It is necessary, in the interests of the Church, that there be finality about these important matters. Some of the arguments addressed to us called in effect for a repudiation of the Tribunal's previous opinions about the ordination of women to the diaconate. The consequences of accepting those submissions would be very serious. We were told that 139 women have been ordained already under the Ordination of Women to the Office of Deacon Canon 1985. In my view, the Tribunal should decline to re-examine its earlier decisions on specific aspects of this debate - the ordination of women as deacons, for instance, or the question whether s.51 of the Constitution makes a general grant of legislative power to the dioceses - unless some compelling ground for doing so has been clearly established. No such justification emerged on the present references.

I might add, to avoid any misunderstanding, that my taking this stand does not imply that I have changed my mind about the Ordinal and the Book of Common Prayer containing a principle of discipline opposed to the ordination of women. See my 1985 and 1987 reasons. The convenient legal principle of stare decisis, which I think we should now apply in this case, means that the majority view on that point in 1985 and 1987 should as a matter of policy be accepted by the Tribunal as a whole as correct, and thus the starting point for any further discussion, regardless of the contrary view hitherto taken by the minority of which I was one.

The eleven questions before us relate, broadly speaking, to the powers of a diocesan synod and of a diocesan bishop in the Anglican Church of Australia. I start with some general observations from an historical point of view about the former.

Australian dioceses before 1962

Much has been written about the position of the Australian bishops in the 19th century and their

unsatisfactory and ill-defined relation to the Church and Parliament in England. In New South Wales (and perhaps elsewhere) the Church of England was at first considered to be the Church of the Colony established by law and it was understandable that throughout Australia each diocese, established or not, should regard itself as simply an overseas diocese within the one Church of England. The same attitude survived the dissolution of the Church's status as an established Church in any particular colony. The doctrine and formularies of the Church of England were the same at home and abroad, and the Australian bishops looked to English models when organizing their dioceses here. However, they learned in time that in many respects they were mistaken in assuming that what was done in England could be mirrored in this country. The Privy Council told the overseas Churches that, so far as the local law was concerned, they were merely voluntary associations, like any social or sporting body (Long v. Bishop of Cape Town (1863) 1 Moore NS 411; 15 ER 756, Bishop of Natal v. Gladstone (1866) LR 3 Eq 1), and they were left to organize themselves as best they could. Appeals to England for help did not bring results. The response of the Church and State authorities in England throughout the 19th century was often indecisive, if not actually antipathetic, and always exasperatingly slow. They simply could not accommodate themselves or the existing Church structure to the phenomenon of colonial dioceses. It became plain even before Long v. Bishop of Cape Town that, if the Australian dioceses needed legislative help in creating a satisfactory constitutional framework for organizational and disciplinary matters, they would have to get it from the colonial Parliaments, not from Westminster. So the bishops set about establishing their own separate diocesan constitutions, with synodal government as the central feature, sometimes underpinned by an Act of Parliament of the colony in which the diocese was situated, sometimes simply by means of a consensual compact, as it was called, between the bishop and his clergy and laity - a voluntary and continuing agreement

whereby each of the participants held himself bound to the constitution of the diocese of which the compact formed an essential part. There was always an express or implied nexus, or bond, with the Church of England in England, sometimes with a statement that the diocese was "a part of" the Church of England and perhaps also that the ecclesiastical law of the Church of England was binding on the diocese. So far as trust property was concerned, the maintenance unimpaired within the diocese of Church of England doctrine and formularies was usually essential, because the typical trust deed tied the use of Church buildings to the BCP services or the purposes of the Church of England, but it is not obvious that in other respects these self-imposed constraints created any legal impediment to the synod's power to legislate for the order and good government of the diocese. As a matter of legal principle, unless there was something in the local Act of Parliament or the consensual compact itself to prevent it - and sometimes this was the case -, an Australian diocese so established was probably at liberty to depart from English ecclesiastical law and practices if it chose to do so. The fact that its bishop and people were most unlikely to want to do anything of the sort, particularly if it might compromise their use of Church property and even in an extreme case communion with the Church in England, should not be allowed to obscure the general legal independence of the diocese, as a self-governing entity, from the mother Church. There are statements in some of the Privy Council cases and the opinions of counsel and in Wylde v. Attorney-General for New South Wales (1948) 78 CLR 224 (the Red Book Case) that suggest otherwise, but it must be borne in mind that for the most part those cases and opinions were concerned with the interpretation of trust deeds or express statutory provisions about Church of England formularies such as art. 24 of the New South Wales Church Constitutions Act Amendment Act of 1902 and s.5 of the Victorian Church Constitution Act of 1854. Sometimes, as in Merriman v. Williams (1882) 7 App.Cas.484, the interpretation proceeded

with a narrowness and a persistent concern with form to the exclusion of substance that a later generation of lawyers might possibly find unconvincing. (I might add, with respect, that the judgements of Latham C.J. and Williams J. in the Red Book Case make strange reading today. The unqualified statement that the Diocese of Bathurst was in the nineteen forties "an integral part of the Church of England" was so obviously at variance with the long-standing organizational fact of the matter - so far as appears, there was simply no organic connection with the Church in England at all and never had been - that it is difficult to understand how it could possibly have been held, on the exclusively Australian documents before the Court, that this was nevertheless the legal position. I find the reasoning of Rich J. and Dixon J. more persuasive. The case is best regarded as the decision of an evenly-divided Court about the interpretation of a trust deed, not as an authoritative guide to the legislative competence of Australian dioceses prior to 1962.)

We are not directly concerned in these references with the position of the Australian dioceses before 1962. However, in examining the powers of the dioceses after 1962 it is important to distinguish between constitutional limitations carried into that period that affected the diocese's general law-making powers and could not be removed by the synod itself (the Melbourne position) and those constraints, particularly of the "purposes of the Church of England" kind, that the synod may or may not have been at liberty to abrogate and that may in any event have been confined to the use of Church property. To what extent, if any, those latter constraints survived the coming into force of the Constitution in 1962 is not a matter that we are required to decide.

The constitution of the Diocese of Melbourne was established by the Act of 1854 but, as the Tribunal held in 1989, the Diocese was given only very limited powers. The position in some of the other Australian dioceses appears to

have been quite different. I turn to the constitutions of the three dioceses with which we are concerned here.

Diocese of Adelaide

The first of these dioceses was the Diocese of Adelaide. It was formed in 1847. Bishop Short was a vigorous and innovative leader. After the Bishops' Meeting in Sydney in 1850 he set about providing for his diocese the constitutional structure, suitable to its needs, that all the Australian dioceses so conspicuously lacked. He warmly embraced the idea of synodal government and he saw, sooner than most, that an indigenous solution was the only way forward. Parliamentary assistance was not necessary. As a result, the Adelaide Synod was established by consensual compact in 1855. There was a Preamble which recited the need for "local regulation" and provided for the expression of assent by all parties to the compact. This was followed by a Declaration that the Diocese "is a part of the United Church of England and Ireland" and maintains the doctrine and sacraments as received by that Church, together with the Book of Common Prayer and Ordinal. By s.2 of the Fundamental Provisions the Synod took power to make Fundamental Provisions and regulations from time to time for the Diocesan Church, not being repugnant to the Declaration. However, s.2 was not entrenched; it could be amended in the same way that any other section of the new constitution could be amended. It was therefore legally open to the Synod to legislate inconsistently with the Declaration. The Synod was to meet at least annually. The Trusts of the See of Adelaide provided some restraints on the Synod but not on its general legislative powers. In 1926 the constitution of the Synod was extensively revised but within the framework of the original Preamble and Declaration. By s.1 of new Canon I the Synod was to be "a governing body for the management of the affairs of the Church of England in the Diocese." By s.3 of Canon I any canons made by the Synod had to conform with the Declaration but, again, Canon I could be altered in accordance with Regulation VI in the same way as any other canon. Canon IV

dealt extensively with clergy discipline and Canon III with the election of a bishop. The revised constitution of 1926 was affirmed by the continuing synodal compact. In 1979 a Canon was made that established an entirely new Constitution for the Diocese. Most of the earlier constitutional documents and legislation, including the 1855 Declaration, were repealed. The "authority and power to provide for the life and growth, the order and good government and the management of the affairs of the Diocese" were vested in the Bishop and the Synod, and the stipulated powers of the Synod included passing motions "upon any matter concerning or affecting the Church of God or any part thereof and its members whether within or outside the Diocese."

I see no reason to doubt the validity of Adelaide's 1979 Constitution. It has not been called in question by any of the parties to these references. I shall say more later about a power to pass ordinances for the "order and good government" of a diocese. It is sufficient now to say that that expression is conventional. Whether a particular ordinance is, in fact, conducive to the order and good government of the diocese is a matter solely for the judgement of the synod that passed it. Cf. The Queen v. Foster; Ex p. Eastern and Australian Steamship Co. Ltd (1959) 103 CLR 256, at 306-8; Union Steamship Co. of Australia Pty Ltd v. King (1988) 166 CLR 1, at 9-14. Even so, the words "order and good government" in this context are not altogether meaningless. They convey the idea that a diocese may not make an ordinance on a subject that does not concern it. There must be a territorial connexion between the ordinance and the affairs, the "order and good government", of the diocese. However, an ordinance dealing with the qualifications of local candidates for ordination, or (put more directly) the power of the bishop to ordain women in his diocese, cannot possibly fail on this ground. It is true that persons are not ordained within the threefold ministry simply for the local diocese. Priests are ordained in the Church of God. A woman priest ordained in Adelaide will be as much a priest of the Anglican Church,

and as entitled to be recognised as such in any other Australian diocese, as will a male priest. (She will only be entitled to officiate as a priest in another diocese if she has permission to do so from the bishop of that diocese, but her position in that respect will be the same as any male priest.) So it is clear that the ordination of a woman as priest or bishop will have national ramifications within the Church. However, an ordinance that has the required connexion with the diocese where it was made is not invalid merely because its effects may be felt elsewhere. The powers of the Synod of the Diocese of Adelaide, taken at face value, are clearly adequate, in my opinion, to support the Ordination of Women to the Office of Priest Ordinance 1990.

Diocese of North Queensland

The position in this Diocese appears to be essentially the same as in Adelaide. The Diocese was constituted by letters patent in 1883 by a document called The Constitution, with the following sub-heading -

> "The Constitution for associating together as a branch of the Church of England, the members of the said Church resident in the Diocese of North Queensland in the Colony of Queensland agreed to at a Synod of the Bishop, the Clergy and the Laity of the said Diocese assembled at Townsville this 13th day of June 1883."

This and the Preamble, with its reference to a "voluntary compact", indicate that the Diocese operates under a consensual compact.

The Constitution contains a Declaration of Doctrine somewhat along the lines of s.4 of the Constitution of the Anglican Church of Australia. If the ordination of women to the priesthood or the episcopate is not contrary to s.4, it will not be contrary to the North Queensland Declaration. The Constitution establishes a Synod which must meet at least once every two years. Its stated powers include provision for the election of a bishop, the creation of a judicial tribunal and other specified topics, concluding -

"And generally to make such regulations as shall be necessary or advisable for the order and good government and efficiency of the Church and Diocese."

In my opinion, so far as subject matter is concerned, vis-a-vis its own Constitution, the Diocese of North Queensland has the authority to make an ordinance empowering its bishop to ordain a woman to the office of priest or consecrate a woman to the office of bishop.

Diocese of Canberra and Goulburn

The Diocese of Canberra and Goulburn was established (originally as the Diocese of Goulburn) in 1863. We have not been supplied with a detailed history of the Diocese's constitution. It appears sufficient to start with the Church of England Constitutions Act Amendment Act 1902 (NSW) which repealed the earlier constitutional legislation applicable to all New South Wales dioceses. Sections 4 and 5 of the Act emphasized the importance of these legal provisions for all purposes connected with Church property. The diocesan constitutions were set out in 28 numbered "Constitutions for the Management and Good Government of the Church of England within the State of New South Wales" that formed the Schedule of the Act. They provided for a diocesan synod in each diocese to meet annually. Article 3 of the Constitution, dealing with the power of a synod generally, reads -

"The Synod of each Diocese may make ordinances upon and in respect of all matters and things concerning the order and good government of the Church of England and the regulation of its affairs within the Diocese, including the management and disposal of all Church property, moneys, and revenues (not diverting any specifically appropriated, or the subject of any specific trust, nor interfering with any vested rights), except in accordance with the provisions of any Act of Parliament, and for the election or appointment of churchwardens and trustees of churches, burial grounds, church lands,

and parsonages. And all ordinances of the Synod shall be binding upon the Bishop and his successors, and all other members of the Church within the Diocese, but only so far as the same may concern their respective rights, duties, and liabilities as holding any office in the said Church within the Diocese."

Article 24 (since repealed) read -

"No rule, ordinance, or determination of any Diocesan or Provincial Synod shall make any alteration in the article, liturgy, or formularies of the Church, except in conformity with any alteration which may be made therein by any competent authority of the Church of England in England."

That last provision received a good deal of attention in the Red Book Case. The word "article" must be an inartistic reference to the Thirty-nine Articles of Religion of 1603. Obviously art.24 was an instance of a diocesan constitution being expressly limited in its powers to change the doctrine or formularies of the Church and it was not itself confined to matters of Church property. It is unnecessary to decide what effect the 1961 Constitution had upon the article or whether, regardless of that question, the words of art.24 would prohibit legislation authorizing the ordination of women, because the article was repealed in 1976: Church of England Constitutions Act (Amendment) Act 1976.

The very wide terms of art.3 were, in my opinion, adequate to support the Ordination of Women to the Office of Priest Ordinance 1989 of the Diocese of Canberra and Goulburn.

It would appear, then, that the nature and terms of the constitution of each of these dioceses (unlike Melbourne) were a sufficient warrant for any diocesan legislation authorizing the ordination of a woman as priest or bishop. However, it is said that there are several reasons why any such legislation must inevitably be held invalid. I shall examine these in turn.

Fundamental Declarations and Ruling Principles

In 1985 the Tribunal held, as it had in 1980 and 1981 but this time with reasons, that the ordination of women as deacons was not inconsistent with the Fundamental Declarations and Ruling Principles laid down in Part I of the Constitution of the Anglican Church of Australia. The Tribunal affirmed that advice in 1987. As I have indicated I am of the opinion that those two decisions, with all their necessary implications, should not now be reopened. Furthermore, the reasoning of the majority in 1985 and 1987 did not distinguish, with respect to the Fundamental Declarations and Ruling Principles, between the ordination of women as deacons and their ordination as priests or bishops, and nothing that has been put to us on these latest references has persuaded me that any relevant distinction can be demonstrated. In other words, whatever differences there are between the three orders do not require a different conclusion as far as this part of the Constitution is concerned. I would therefore overrule objections that have been raised, in the case of certain of the questions before us, in so far as those objections are based on the Fundamental Declarations and Ruling Principles.

Perhaps I should add a word here about the so-called principle of advancement, or progression. Appeal has been made to this principle or rule on the one hand to invalidate the General Synod's Ordination of Women to the Office of Deacon Canon 1985 on the ground that it impliedly violates the principle, because it does not provide as well for the ordination of women as priests and bishops, and on the other hand to show that specific legislation authorizing the ordination of women as priests and bishops is now unnecessary because, by virtue of the same principle, authority to ordain a woman as deacon necessarily carries with it, without more, authority to ordain her in due course as priest or bishop. I do not want to add to what I wrote on this subject in 1987 other than to say that I am not satisfied that any principle of advancement can assist in providing the answers in these references.

Section 71(2)

Sub-section (2) of s.71 of the Constitution reads -

"The law of the Church of England including the law relating to faith ritual ceremonial or discipline applicable to and in force in the several dioceses of the Church of England in Australia and Tasmania at the date upon which this Constitution takes effect shall apply to and be in force in such dioceses of this Church unless and until the same be varied or dealt with in accordance with this Constitution."

I am satisfied, for the reasons I gave in the Tribunal's 1985 and 1987 Opinions, that on 1 January 1962 (the date upon which the Constitution took effect) only men could be ordained to the diaconate or the priesthood or the episcopate in the Church of England in England. This was the combined effect of the language of the Ordinal, the Act of Uniformity, the Canons of 1603, the influence perhaps of custom and the old common law disqualification of women from public office, and conceivably though improbably a few scattered judicial statements about the interpretation of Scripture. The Sex Disqualification (Removal) Act, 1919, despite the generality of its language, did not affect the position. The disqualification was a part of the law of the Church of England in England relating to discipline. The first question, then, is whether it was "applicable to and in force" in any of the Dioceses of Adelaide, North Queensland, and Canberra and Goulburn on 1 January 1962.

Precisely what is meant by "the law of the Church of England" in s.71(2) is not clear. I wrote something about this sub-section in my 1987 reasons. Further consideration leads me to make the following observations about the possible ways of interpreting the section.

(1) The primary meaning of "law" is the express and mandatory precept of a lawgiver. (Cf. SOED: "The body of rules, whether formally enacted or customary, which a state or community recognizes as binding on its members or subjects. (In this sense usually the

law.)..."). On this strict interpretation of the word the main repositories of the law referred to in s.71(2) will be English Acts of Parliament, the Canons of 1603, some customary law and the other types of canon law described in Canon Law in Australia (General Synod, n.d.), ch.10.

(2) It is also possible to give the word "law" in s.71(2) a more expansive interpretation and to include within it any principles of faith, ritual, ceremonial or discipline that may be inferred from such non-legal texts as the Book of Common Prayer and the Ordinal and the Thirty-nine Articles. Cf. s.4 of the Constitution.

(3) So far as the expression "applicable to and in force in the several dioceses" is concerned, this may require some express legal statement in an Act of Parliament or other legal document such as a consensual compact. Depending what is meant by "law", art. 24 of the New South Wales Constitutions of 1902 may be an example of this. In other words, the English law only comes into force in a diocese when it is expressly applied in some formal legislative fashion.

(4) Another possible view is that the sub-section refers to so much of English ecclesiastical law as was suitable to the needs of Church of England dioceses in this country upon their foundation and that may therefore be taken to have been adopted by a diocese, expressly or tacitly, for its own purposes. This must be what happened, at least temporarily, in the case of New South Wales and any other colony where the Church of England was at first the established Church, but there is evidence that churchmen generally in Australia last century assumed that English ecclesiastical law was in force in Australian dioceses whether the dioceses had ever been a part of a local established Church or not. Compare the reference of Lord Romilly M.R. in Bishop of Natal v. Gladstone to an "implied agreement" of the members of the colonial Church to be bound by all the laws of the Church of England - its doctrines, rights,

rules and ordinances of general application -, and see also the statement of the Bishops' Meeting of 1850 about the Canons of 1603 (Canon Law in Australia, 119), and the resolution of the Bishops' Meeting of 1868 -

> "The relation of the Church of England in Australia to the Church at home is one of identity of doctrine and worship and subjection as far as practicable to the law of the Church of England." (ibid.122)

It is unlikely that such statements as these, and the general attitude that they reflected, left the law applicable within the dioceses unaffected. Compare Gent v. Robin [1958] SASR 328, a case about the rights of a priest-in-charge in the Diocese of Adelaide , where Piper A.J. said -

> "Although Mr Dunstan opened that he would argue that the preamble, Declaration, Canons, Regulations and Compact together with the Trust Deed contained the whole of the applicable law, it was inevitable that in his final address he should cite to me a number of authorities not only as to the position of the Church of England in the Dominions (where the Church is not 'established'), but also as to the position of Rectors and others in England (where it is); and that Mr Millhouse, in his reply, should also have resorted to authorities of a like nature. Whilst it is true, as was accepted by all parties, that the rights of the parties rest upon the 'consensual contract' created by the Compact and embodied in the documents referred to by Mr Dunstan, it must be borne in mind that that Compact was made, and the Canons and Regulations enacted, against the background of the ecclesiastical law relating to the established Church of England, and that it is that law which will provide not only the

> dictionary for the interpretation of the documents, but also the established customs which, mutatis mutandis, the documents are presumably designed to preserve". (at 347-8)

There is no doubt that the dioceses generally have regarded the Canons of 1603, or so many of them as are plainly applicable here, as part of the inherited ecclesiastical law. If this view of s.71(2) is correct, the process of assimilation resembled in many respects the automatic reception of English common law and statute law into the Australian colonies upon their foundation. It was a rule of the common law that the colonies acquired so much of English law as was applicable to the particular colonial situation, that is, suitable for the colony and capable of applying in it, but that they were free to vary or repeal the law so received at any time thereafter. The alternative to applying some principle of this sort was a vacuum which would have been inconvenient, to say the least, for the infant political organization and hardly less so for the ecclesiastical. (There is a question whether, in contrast to the operation of the common law rule, changes in the ecclesiastical law in England subsequent to the establishment of an Australian diocese were automatically applied here as well, but there is no need to decide that now.) If this is what happened in the ecclesiastical situation, the law of the Church of England referred to in s.71(2) will include all of the ecclesiastical law of England that was suitable to local needs at the time. (It is not to the point, of course, that English ecclesiastic law did not come to the colonies as part of the common law of England, that is, as part of the ordinary law of the land. See Long v. Bishop of Cape Town and In re Lord Bishop of Natal (1865) 3 Moore NS 115; 16 ER 43. The question here is of the reception of English ecclesiastical law as part of a colonial diocese's domestic law, as it were.) The inherited law may also, perhaps, have included such

principles as those referred to in s.4 of the Constitution. On either view of that last question the disqualification of women from ordination must be considered, I think, if s.71(2) is to be interpreted in the way postulated in this paragraph, to have been a part of the "law of the Church of England" adopted by the Australian dioceses as suitable to local needs, in the legal sense of that expression, and there is no evidence of any attempt to exclude it until recently.

Those are some of the possibilities. While I have been much assisted on this issue by the substantial written submissions of the parties to these references, the correct interpretation of sub-s.(2) of s.71 is difficult and I should be reluctant to express a firm opinion about it without a more thorough examination of the historical and legal position than I have found possible here. My tentative view is that "the law of the Church of England" in sub-s.(2) refers to the ecclesiastical law, strictly so-called, described in par.(1) above, that became the ecclesiastical law of an Australian diocese in either of two ways - by express legislative adoption by the diocese itself (or, of course, by means of a local Act of Parliament) or by virtue of its silent reception as inherited law in accordance with the process described in para.(4). I think the expression "applicable to and in force", a familiar one in the analogous field of civil law, supports that view. However, it is unnecessary for me to take a committed stand on the subject. Given the plenitude of synodal power enjoyed by the Dioceses of Adelaide and North Queensland under their consensual compacts, the received law prohibiting the ordination of women could, legally speaking, have been abrogated by either diocese at any time before 1962, though possibly with troublesome consequences so far as its trust property was concerned. However, there is no evidence that any abrogation was attempted in Adelaide or North Queensland before 1962.

So far as the period after 1962 is concerned, the concluding words of sub-s.(2) provide that a law of the

Church of England applied and in force in a diocese on 1 January 1962 shall continue to be in force in the diocese "unless and until the same be varied or dealt with in accordance with this Constitution." General Synod may abrogate such a law, exercising its powers under ss.5 and 26, and in the case of the Ordination of Women to the Office of Deacons Canon 1985 has done so. The effect of the Canon was to qualify severely the authority in this country of Phillimore's oft-cited statement, made with respect to all three orders -

> "There are only two classes of persons absolutely incapable of ordination; namely, unbaptised persons and women. Ordination of such persons is wholly inoperative. The former, because baptism is the condition of belonging to the church at all. The latter, because by nature, Holy Scripture and Catholic usage they are disqualified."
> (Ecclesiastical Law of the Church of England, 1873, vol.I, 114-5)

However, I would not interpret the Canon as working a general abrogation in Australia of the inherited disqualification of women from ordination so that the dioceses are now free of the s.71(2) restraint so far as women priests and women bishops are concerned. At the same time I see no reason, at least on the face of s.71(2) itself, for confining the power to vary or abrogate the particular inherited law that I am discussing to General Synod. Such a restriction is implicit in the last paragraph of sub-s.(1) of s.71 in the case of a law in force relating to ritual or ceremonial, but not in the case of a law relating to discipline, and the Tribunal has held that any possible rules or practices the Church may have about the disqualification of ordination candidates on sexual grounds are in the area of discipline. The concluding words of sub-s.(2), therefore, are apt to allow the Synods of the Dioceses of Adelaide and North Queensland to vary or otherwise deal with such a disciplinary law if they choose to do so. See ss.5 and 51. By contrast, as I have said,

laws altering ritual or ceremonial may only be made by General Synod or in conformity with an alteration made by General Synod. The distribution of legislative authority within the Australian Church implied in the last paragraph of s.71(1) explains why the draftsman found it appropriate to state in s.71(2) that the variation or repeal must be made "in accordance with the Constitution" and not simply by a particular designated body.

The law of the Church of England in question in this case is, as I have said, a law relating to discipline. It follows that s.71(2) is not an obstacle to the abrogation of that law by the Dioceses of Adelaide and North Queensland.

The position of the Diocese of Canberra and Goulburn is a little different but the result is the same. It might be argued that in 1962 the Diocese was still bound by art.24 of the 1902 Constitutions. Let it be supposed that the article inhibited diocesan legislation on the ordination of women. It does not matter, because the restraint was removed in 1976, as we have seen, and the Canberra and Goulburn Ordinance was not passed until 1990. Article 3 of the 1902 Constitutions provides ample support for the Ordinance so far as the Diocese's general law-making powers are concerned.

General Synod only?

Paragraph 1 of the Miscellaneous Observations made at the end of the Tribunal's 1989 reasons remarked that s.26 of the Constitution might operate to deny a diocesan synod power to legislate with respect to the discipline of the Anglican Church of Australia as a whole. The implication was that the ordination of women might thus be a subject upon which only General Synod could lawfully legislate. The point has been taken up in these proceedings by a number of parties. In a carefully reasoned submission the Diocese of Wangaratta argues that the history and provisions of the national Constitution support the view that General Synod is the only constitutionally appropriate legislative body within the Anglican Church of Australia to pass legislation

authorizing the ordination of women for any of the three orders. It was a General Synod canon that provided for the ordination of women as deacons in 1985, and (it is said) similar legislation by General Synod will be required - if (as the Diocese denies) any synod or person can lawfully do anything at all about it - in the case of women priests and women bishops.

I should clarify here a point that I sought to make in my 1987 reasons (at page 36) when discussing the principle of advancement. I pointed out that if there is a principle of advancement, the question arises whether the Ordination of Women to the Office of Deacon Canon 1985 contravenes it because it permits a woman to be made a deacon but does not also permit a woman deacon to be made a priest, and I added - "I say that because there is no guarantee that General Synod will ever authorize the ordination of women to the priesthood (or the episcopate), and in my opinion such an ordination cannot take place without legislative authority." The Wangaratta submission interprets that statement as "particularly strong" support for its argument that the removal of the legal disqualification of women for ordination to the office of priest, if achievable at all under the Constitution, would require legislation by General Synod and could not be achieved by the synod of a diocese. Perhaps my words are open to this interpretation but that was not my intention. I was envisaging a possible legislative vacuum on the subject and I did not think it necessary to spell out, indeed I probably did not stop to consider at that point, the possible competing claims of General Synod and the diocesan synods in this respect. What I said was not intended to indicate a view as to whether General Synod alone could legislate to authorize the ordination of women to the priesthood or the episcopate. (Compare the observation, at p.20 of my 1987 reasons, that recognized the power of diocesan synods after 1962 to abrogate the operation of (at least some of) the Canons of 1603 within their dioceses.)

The 1962 Constitution created a sort of federation between the existing separated dioceses. There are obvious similarities to the Commonwealth Constitution which organized the Australian colonies into a federation in 1901, but there are important differences as well. I mention but two of them. First, while the view has been expressed in the High Court that the States owe their existence to the federating document, the same cannot be said of the Australian dioceses. They preceded the Constitution and their structure remains unchanged by it, and there is certainly little explicit evidence in the Constitution itself of any effective impairment to their previously existing powers apart from the overriding authority of General Synod in the event of a conflict. Section 71(1) is such a case, but it is exceptional. Section 47 expressly continues the diocesan constitutions and s.71, generally speaking, diocesan legislation. Even if one sees the Constitution as itself the source of all legislative power within the Australian Church since 1962, the result is not significantly different so far as the dioceses are concerned. Section 5 makes the distribution of authority and power between the General Synod and diocesan synods and s.51, read with s.26, completes the devolution by acknowledging the power of a diocesan synod to continue to legislate for the Church within the diocese in accordance with its own particular constitution. Of course, as I have indicated, any diocesan legislation must yield if need be to a valid law of the General Synod, but that is another matter.

Secondly, there is the way in which the respective legislative powers are divided - or, more accurately, are not divided. In the Commonwealth Constitution, certain specified subjects are made exclusive to the Commonwealth Parliament. The States may not make laws on those subjects at all. Other Commonwealth powers, most of them in fact, are powers the Commonwealth enjoys concurrently with the States. The States may legislate on them if they wish, but any State law will be invalid if it conflicts with a

Commonwealth law on the same subject. There is nothing like this systematic, formal division of legislative authority in the Church's Constitution. The result, in my view, is that there is a broad overlap in the legislative powers of General Synod and the diocesan synods. Certain subjects will be exclusive to one synod or the other, from the very nature of the respective bodies - General Synod could hardly make the standing orders of a diocesan synod, or a diocesan synod legislate to define the office of Primate or the national Church's relations with other religious bodies - but most subjects will be concurrent to both. In the event of a conflict, the General Synod law will prevail (s.30), but that is unlikely to be of great moment in practice as I shall explain presently.

I cannot read s.26, with its reference to specific legislative subjects, as conferring expressly any exclusive law-making power on the General Synod. So interpreted, it would leave very little to the dioceses, and if there is one thing that the history and internal evidence of this Constitution make very clear it is the intention, one might say the determination, to preserve substantially the independence and powers of the dioceses. Section 26 simply repeats with respect to General Synod the operative words of the legislative grant made with respect to both General Synod and diocesan synods in s.5. The argument that General Synod has power to make laws "in respect of ritual, ceremonial and discipline" because those words are to be found in s.26, and that the dioceses lack such power because the same words do not appear in s.5 and s.51, is untenable. The necessary implication of s.26 is that power to make such laws was already included in the preceding words "order and good government" - the traditional language of plenary grant that is used with respect to all synods in s.5 and to diocesan synods in s.51. It is unthinkable that the framers of the Constitution intended to remove in such an oblique fashion the power of the dioceses to legislate with respect to discipline - one of the subjects on which they had legislated from the outset and, indeed, one of the pressing

reasons (cf. Long v. Bishop of Cape Town) for the setting up of some of the diocesan synods in the first place. Section 71(1), as I have said, carries a clear implication that the dioceses may legislate as to discipline, though not generally as to ritual or ceremonial, and that alone would appear to dispose of the argument that all of the specified subjects in s.26 are exclusively for General Synod. The Wangaratta submission that "discipline" in s.26 has one meaning, and the discipline left by implication to the dioceses in s.71(1) another, is in my opinion arbitrary and unconvincing. It is most unlikely that the word in both s.26 and s.71(2) does not at least include its "rules of good conduct" sense, and I have already examined the close interrelation of s.71(2) and the immediately preceding paragraph of s.71(1). I see no good reason to limit the meaning of "discipline", expressed or implied, in any of these provisions.

It has also been argued that some division of powers between General Synod and the diocesan synods, or at least a difference in permissible legislative range, is implicit in the use of the expressions "relating to the order and good government of this Church" and "affecting this Church" in s.26, with respect to General Synod canons and statements, and by contrast of the expression "for the order and good government of this Church within the diocese" when describing the power of the diocesan synods to make ordinances in s.51. In my opinion, the difference between these various phrases is not significant. Any draftsman who sets out to create a grant of legislative power has a variety of expressions of this sort available to him, all meaning practically the same thing, and which one he selects is likely to be a matter of precedent or drafting fashion or personal whim. As has been observed on other occasions, consistency of expression is not a feature of the Constitution, and that is hardly surprising when one considers the period of its evolution and the number of people who had a hand in it. Section 51 of the Australian Constitution gives the Commonwealth Parliament power to make

laws "for the peace, order, and good government of the Commonwealth" with respect to certain specified subjects. It has been consistently held by the High Court that this constitutes as full a grant of legislative authority as the Imperial Parliament, which enacted the Commonwealth Constitution, in the plenitude of its power possessed and could bestow. See, for example, Amalgamated Society of Engineers v. Adelaide Steamship Co. Ltd (1920) 28 CLR 129, at 153. The grant would not have been any wider, in my opinion, had s.51 of the Commonwealth Constitution conferred instead a power to make laws "relating to" the peace, order and good government of the Commonwealth with respect to the prescribed subjects, or had it authorized laws "affecting" the Commonwealth. And so it is, in my view, with s.51 of the Church's Constitution. The words of the section simply pick up the language of s.5 ("of the Church") and adapt it to the case of the individual diocese. If, instead of the combined phrases "of this Church within the diocese", s.51 has said merely "of the diocese", or had used the expression "relating to the diocese", the meaning of the section would have been, in my opinion, exactly the same. The only feature of s.51 that is in any sense limiting in this respect is the requirement that diocesan ordinances should be made "for the order and good government" of the Church within the diocese. As I have indicated earlier, such words as these are the conventional legal expression of a full grant of legislative power subject only to the territorial limitation that is inherent in the law-making power of any constituent part of a federation. They are to be interpreted in the same way, in my opinion, as they are in the analogous context of the several Constitutions of the Australian States. Those Constitutions refer to the peace (or welfare), order and good government of the State concerned, and recent decisions of the High Court emphasize the plenary nature of this terminology - hardly less so than in the case of s.51 of the Commonwealth Constitution. See, for example, Union Steamship Co. of Australia Pty Ltd v. King where the High Court held that the only limitation

implied in such a definition of State legislative power is a territorial one, and even that is very slight. A remote and general connexion between the subject-matter of the legislation and the State in question will suffice. The reasoning of the High Court makes it clear that there is no limitation implied in the legislative grant as to subject-matter itself. Section 51 of our Constitution is to be interpreted, in my opinion, in the same way. It requires a nexus between a diocesan ordinance and the diocese for the order and good government of which it is made, but the nexus is purely territorial. In particular, the section does not imply some broad distribution of powers between General Synod and diocesan synods based upon subject-matter. The differences in terminology in ss.26 and 51 are quite inadequate, in my view, to convey such a subtle and far reaching implication.

It was put to us that there are certain "national" topics which should be seen to be exclusively within the province of General Synod, and that an intention to withdraw such topics from the legislative purview of the dioceses may be discerned in the Constitution generally, irrespective of the particular language used in ss.26 and 51. The submission must fail, in my opinion, for several reasons. First, the obvious way to provide for such exclusive national topics would be to designate them in so many words in the Constitution itself, but the Constitution does not do that. I have already touched on this matter. The draftsmen of our Constitution plainly modelled the document on the Commonwealth Constitution in several respects, including an inconsistency provision in s.30 which is directly related to the division of legislative powers, and their failure to adopt as well the Commonwealth Constitution's method of distributing those powers, including the nomination of some as exclusive to the federal body, must be significant.

Secondly, forming a judgement that a particular subject relates in the required manner and degree to the Australian Church as a whole would often, I should think, be quite difficult and could certainly be contentious. If the

ordination of women to the priesthood is a national topic in the relevant sense, so surely, in point of principle, is a prescribed minimum educational standard for an ordinand. A reasonable case could be made out for regarding stipends and superannuation and insurance and long service leave for the clergy as subjects of national importance upon which uniform legislation would be desirable and therefore, it could be argued, exclusively by reason of this interpretative policy within the legislative power of General Synod. Every diocese, I expect, has a disciplinary ordinance creating clerical offences and providing, in an extreme case, for suspension or degradation, yet a diocesan ordinance that declares the circumstances under which a person shall cease to exercise priestly functions is for practical purposes no less national in subject-matter and operation, no less a matter affecting the Australian Church as a whole, than an ordinance that declares the qualifications whereby a person may start to exercise priestly functions. If the Wangaratta submission is correct, any attempt by a diocese to legislate on that subject since 1962 may well be invalid. Examples could be multiplied. The consequences of the adoption of a doctrine of implied exclusive General Synod powers on subjects of concern to dioceses generally would be far reaching and would certainly be fraught with uncertainty and difficulty. It is a further reason, I think, for concluding that it was not intended that the Constitution should be interpreted in this manner.

Thirdly, the power of any diocese to exclude in most cases the operation within the diocese of any General Synod canons on the postulated exclusive national subjects - see the long proviso to s.30 - would be likely to frustrate any such interpretative policy, anyway, as the draftsmen must have realized from the outset. It takes only one diocese to reject an otherwise operative canon, and another diocese to accept it, and all national uniformity vanishes. Plainly those who approved this Constitution were not setting out to create a strong, dominant national Church.

In my opinion, the Constitution does not provide, so far as subject-matter is concerned, that legislation authorizing the ordination of women may be enacted only by General Synod.

Inconsistency and the 1985 Canon

Section 30 of the Constitution provides that where a canon of General Synod is inconsistent with an ordinance of a diocesan synod, the ordinance shall to the extent of the inconsistency have no effect. This is a normal mechanism in a federal system for resolving conflicts between the central and local law-making authorities on a subject on which each is entitled to make laws. See Commonwealth Constitution s.109 on which, as I have indicated, s.30 of our Constitution was modelled. The Ordination of Women to the Office of Deacon Canon 1985 was a valid enactment of General Synod. There is a question whether the diocesan Ordinances under consideration are inconsistent with the Canon.

What is inconsistency? Obviously there will be an inconsistency between two laws when they say contradictory things - when, for instance, to obey one law is to disobey the other. In Australian constitutional law the High Court has evolved a rule of interpretation which provides that there is also an inconsistency where it can be seen that the Commonwealth law was intended to "cover the field", that is, to be the only law on the subject. A State law that intrudes on the field will thus be invalid, in the sense of inoperative, whether there is a direct conflict with the Commonwealth law or not. There is a dispute as to whether this rule can have any application to the Constitution of the Anglican Church.

The remarkable feature of s.30 (apart from its astonishing complexity) are the great practical obstacles that are put in the way of ever getting a canon of General Synod accepted by the dioceses in which it was intended to operate. Any canon affecting the order and good government of the Church within a diocese, or the Church trust property of the diocese, and any canon affecting the ritual, ceremonial or discipline of the Church, will not come into

force in the diocese without the diocese's consent. The diocese must, by its own ordinance, adopt the canon. What is more a canon, once adopted by a diocese, may later be excluded by the diocese. Contrast the position under the Commonwealth Constitution where the Commonwealth's laws are paramount and the States have no power at all to reject them. In the light of the handicaps thus created for a large proportion of General Synod legislation there is not much room, from a practical point of view, for the operation of the inconsistency provision. If when a General Synod canon is passed there is already in existence an inconsistent diocesan ordinance, the diocese will be able in most cases to avoid having its ordinance invalidated by simply declining to adopt the canon. If it does decide to adopt the canon, it may later by another ordinance exclude it. (Whether such exclusion must be explicit, and whether it may exclude only a part of the operation of the original adoption ordinance, are not matters upon which I need to express an opinion.) So paradoxically the effective paramountcy of the dioceses is assured, at least in a negative or veto sense, notwithstanding the inconsistency provision, on almost all subjects that are likely to concern them. Nevertheless, the "covering the field" test is a general rule of legislative construction, an aid in discerning the intention of the law-maker, and in my opinion it can apply to a General Synod canon no less than to an Act of the Commonwealth Parliament. However, given the ability of any diocese to avoid a canon's operation in the first place, or to exclude it at some later stage, one may expect that General Synod will not be as inclined as the Commonwealth Parliament to assume control of a particular legislative subject indirectly and wholly - it might lessen the chances of the canon being adopted by the dioceses - and so one would, I think, be less readily disposed to interpret a General Synod canon as implying more than it actually states, that is, as taking over the whole range of a particular subject and thereby, in theory at least, excluding the dioceses from it.

There is no direct conflict between the Ordination of Women to the Office of Deacon Canon and the diocesan Ordinances of Adelaide and Canberra and Goulburn that have been referred to us. In terms, the Canon deals only with the ordination of women to the diaconate and the Ordinances only with their ordination to the priesthood. I do not think that the Canon evinces an intention by General Synod to cover the whole field of ordination, or even of women's ordination. Compare s.4 of the Canon which preserves (if that is needed) the power and authority of the bishops. It is possible that some members of General Synod in 1985 considered that, if the disqualification of women from holy orders generally was to be removed, it should be done by General Synod, in the hope that it would operate uniformly throughout Australia and not be left to the individual dioceses. However, I do not find any such intention on the part of General Synod indicated by the terms of the Canon itself. Any argument that the subject-matter plainly demands uniform laws throughout the Australian Church is weakened, as I have said, by the avoidance mechanism created by the proviso to s.30. I think the Tribunal is also entitled to notice that, from a practical point of view, a General Synod canon authorizing the ordination of women to the priesthood is most unlikely on present evidence to be adopted by all diocesan synods. This was the position, and would have been generally seen to be the position, in 1985 also. I observe that the majority of the House of Bishops, in advising us in this matter in accordance with s.58 of the Constitution, state -

> "A strict uniformity of discipline and order such as might be thought to be secured and guaranteed by a universally valid and enforceable General Synod enabling Canon is not even a possibility in this Church".

Obviously there is no uniformity of practice or attitude now with respect to women deacons. There is uniformity of a kind with respect to women priests - no woman may be

ordained to the priesthood in any diocese - but it is a negative sort of uniformity and to that extent, as it seems to me, provides a less persuasive argument for applying the 'covering the field' test to the 1985 Canon than would be available under the more rigorous regime of the Commonwealth Constitution. However, the significance of that last consideration is, I acknowledge, debateable.

For these reasons I would not hold that the Ordinances of the Dioceses of Adelaide and Canberra and Goulburn are inconsistent with the Ordination of Women to the Office of Deacon Canon 1985.

Section 8 and "canonical fitness"

The first paragraph of s.8 of the Constitution reads -

> "There shall be a bishop of each diocese who shall be elected as may be prescribed by or under the constitution of the diocese, provided that the election shall as to the canonical fitness of the person elected be subject to confirmation as prescribed by ordinance of the provincial synod, or if the diocese is not part of a province then as prescribed by canon of general synod."

The expression "canonical fitness" is defined in s.74 to mean (unless the context or subject matter otherwise indicates)

> "the qualifications required in the Church of England in England for the office of a bishop, at the date when this Constitution takes effect."

I am satisfied, for the reasons I have given, that only a man could be lawfully consecrated as a bishop in the Church of England in England in 1962. I think the candidate's male sex may be accounted a "qualification" - that is, "a necessary condition, which must be fulfilled before a certain right can be acquired, an office held, or the like" (SOED) - no less than his being in priest's orders and of the age of 30 years or more. It follows that while the definition remains it will not be possible for a woman,

otherwise qualified, to be elected as bishop of an Australian diocese. However, not all bishops are diocesan bishops. Some are, and are appointed at the outset to be, assistant bishops. Section 8 says nothing about a woman's qualifications to be consecrated as a bishop. Presumably this is another instance of the draftsmen of the Constitution assuming that all persons in orders would be men but not so providing as a general rule. Compare s.74(6). The sex qualification is created in this case through the implication of the definition of canonical fitness, by a side-wind as it were, and I should not interpret this as indicating an intention by the framers of the Constitution that only men may be ordained. No-one, indeed, had suggested as much, in all the submissions the Tribunal received in this and related references, prior to the Tribunal itself raising the point with the parties after the public hearing in this matter.

Ritual

I have already referred to the final paragraph of s.71(1) -

> "Nothing in this Constitution shall authorise the synod of a diocese or of a province to make any alteration in the ritual or ceremonial of this Church except in conformity with an alteration made by general synod."

As I have indicated above, I think this can only be interpreted as a prohibition of any diocesan ordinance purporting to make any such unauthorized alteration.

The word "ritual" is not defined exhaustively in s.74, but by virtue of that section it

> "includes rites according to the use of this Church, and also the obligation to abide by such use."

The relevant definition of "rite" in the Shorter Oxford English Dictionary is "a formal procedure or act in a religious or other solemn observance," and the definition of "ritual" is "a prescribed order of performing religious or other devotional service." The Oxford Dictionary of the Christian Church (ed. Cross, 1957) defines "ritual" as

"strictly the prescribed form of words of a liturgical function", although commonly used also as a synonym for 'ceremonial'. It is plain that the Ordinal is part of the ritual of the Anglican Church.

Section 3 of the Adelaide Ordinance reads -

> "The form of office to be used for the ordination of a woman to the office of priest shall be the form appropriate to that office set out in the Ordinal included in the Book of Common prayer or in the Ordinal included in An Australian Prayer book or in accordance with any other form appropriate to that office and approved for use in this Diocese, the language of any such form being adapted for the purpose so far as may be necessary for the admission of a woman to that office."

The final part of that section ("the language ...") would appear, at least at first sight, to authorize a bishop officiating under the Ordinance to alter the words of the Ordinal - I include in that expression both of the authorized texts -, most obviously by altering the personal pronouns from "him" to "her" as the case may require. Prima facie this will be an alteration in the ritual of the Church. We have not been referred to any warrant from General Synod for this apparent breach of s.71. Compare s.3 of the Ordination of Women to the Office of Deacon Canon 1985 which authorized the adaptation of the language of the two Ordinals to meet the case of women deacons. General Synod had power under s.4 of the Constitution to make that alteration but General Synod, of course, is not restricted by the last paragraph of s.71(1). Accordingly the Diocese of Sydney has submitted that s.3 of the Adelaide Ordinance is invalid.

I do not find this an easy question. If (as I consider) the rest of the Adelaide Ordinance is valid, so that the ordination of women to the priesthood may proceed in that diocese, it would not only be incongruous but border on the absurd to conduct the service using exclusively male pronouns. Perhaps the power to vary the pronouns is

inherent in the power to ordain women. Perhaps it is always permissible to make necessary alterations of this sort as, for example, with the change from one Sovereign to another. Perhaps it is a matter of degree, although that is always a rather dangerous path to tread. It may be that the problem could be overcome by the diocesan Bishop treating the alteration instead as a deviation within the meaning of s.4 of the Constitution and proceeding under that section. The matter was not fully explored in the submissions and, as a majority of the Tribunal are of the opinion that the Adelaide Ordinance is invalid for other reasons, it is unnecessary for me to express a final opinion about s.3. Even if the section is invalid, it is plainly severable from the rest of the Ordinance. I shall therefore answer Question 11 by saying that the Ordinance is valid, but that is not intended to foreclose debate, so far as I am concerned, should any similar question under s.71(1) arise in the future.

The inherent powers of a bishop

I accept the view of the House of Bishops that a bishop of the Church has an inherent power to ordain a woman to the office of priest or to consecrate a woman to the office of bishop. I also accept the distinction that is made by the Bishops between that power and the authority to exercise it. In my opinion, the authority of a bishop of the Anglican Church of Australia to ordain or consecrate is circumscribed by the 1962 Constitution which is binding upon him. See s.70. In particular, he is as a bishop, no less than his synod, bound by the provisions of s.71(2) and he cannot of his own motion remove or ignore such constraints as that sub-section continues, with respect to the ordination and consecration of women, in the dioceses generally. I agree with the reasons of Archbishop Rayner on this subject.

Section 3 of the Constitution and "the commands of Christ"

I am in general agreement with Archbishop Rayner's reasons on this subject also.

The very helpful material that has been placed before us, from the House of Bishops and the Board of Assessors as well as the numerous parties, is voluminous. It would not be possible to deal with all of the points it raises without extending these reasons to quite inordinate length. I have considered all of the arguments, but have thought it necessary to confine my remarks to those that have played a direct part in my reasoning.

Conclusion

For the reasons I have given I am of the opinion that a bishop of the Anglican Church of Australia may not, merely of his own authority, ordain a woman as priest or consecrate a woman as bishop, because s.71(2) of the Constitution imposes a constraint upon such ordination or consecration that can only be removed by legislation. Legislation authorizing a bishop to ordain or consecrate a woman may be validly enacted by General Synod. As there is no inconsistent General Synod canon on the subject, such enabling legislation may also be validly enacted by the synod of a diocese with respect to its own bishop provided that the constitution of the diocese empowers the synod to make an ordinance to that effect. The respective constitutions of the Dioceses of North Queensland, Adelaide and Canberra and Goulburn do give that power. Accordingly the Ordination of Women to the Office of Priest Ordinance 1989 (Canberra and Goulburn) and the Ordination of Women to the Office of Priest Ordinance 1990 (Adelaide) are valid.

I would answer the eleven questions that have been referred to the Tribunal as follows :

Question 1: No.

Question 2: Yes, section 71(2).

Question 3: Yes.

Question 4: No.

Question 5: No.

Question 6: No.

Question 7: No - in the sense that there is no provision of the Constitution of the Anglican Church of Australia that, taken alone, confers the

powers described in this question. Authority must be sought in the constitution of the Diocese itself.

Question 8: Section 71(2) and the law of the Church of England applicable to and in force in the diocese may make it unlawful for the bishop to ordain a woman as priest or consecrate a woman as bishop, but would not - as also s.51 would not - preclude the synod of the diocese, if the constitution of the diocese permitted it, from enacting legislation of the kind described in par.(2)(a) or (b) of this question. There is no other way in which the diocesan synod could give the authority to the bishop. My short answers to this question are therefore -

(1) Possibly

(2) No.

Question 9: (a) No, in each case.

(b) No.

Question 10: Yes.

Question 11: Yes.

IN THE MATTER of Two Reference to the Appellate Tribunal in 1990 relating to the Ordination of Women

REASONS OF MR. JUSTICE HANDLEY

It is appropriate at the outset to remind myself and to state clearly for the benefit of others the functions of this Tribunal in this and similar references.

Under s 63 of the Constitution questions which arise under the Constitution of the Anglican Church of Australia may be referred to this Tribunal either for determination or for its opinion. See also ss 29, 30(c)(iii) and s 31. The Tribunal then has jurisdiction "to hear and determine the same or give its opinion as the case may require".

The Tribunal comprises three Diocesan Bishops and four lawyers elected by the three houses of General Synod. (s57(1)). Under s 57 the Tribunal in some cases must, and in all other cases may, consult the House of Bishops and the Board of Assessors.

It is apparent therefore that the Tribunal has been established to hear and determine, or give opinions on legal questions arising under the Constitution of the Church. In order to do so it may have to decide theological questions involving doctrine, faith, ritual, ceremonial or discipline. However in references such as

the present the Tribunal only decides theological issues for the purposes of or in the course of determining legal questions arising under the Constitution. It is not, and cannot as constituted, be a "final" court of appeal for the Australian Church on theological issues.

The Constitution was a Federal compact between the dioceses of the Church of England in Australia. It embodied a compromise which was the price of union. Some matters were seen as absolutely fundamental and unalterable. These are set out in ss 1-3. The Church therefore needed some means for the resolution of disputes or doubts as to whether a particular measure did or did not conflict with the Fundamental Declarations in ss 1-3.

The Constitution also contained provisions to protect dioceses in certain cases from action by General Synod with which they did not agree, to divide legislative powers between General, Provincial and Diocesan Synods, and to prevent particular provisions of the Constitution from being altered by simple majorities in General Synod.

The Constitution also contained in s 28 a special procedure for bills dealing with ritual, ceremonial or discipline. General Synod can only pass such bills, known as Special Bills, if they are supported by a two

thirds majority in every house.

The Constitution therefore embodies a compact that the law of the Church on these important matters, as it existed on 1 January 1962 when the Constitution came into force, should not be altered by General Synod without a clear mandate from the whole Church established by the existence of these two thirds majorities.

The division of powers between the various Synods, the provisions of the Constitution requiring special majorities, and the need to follow special procedures before some proposed legislation can take effect also generated the potential for disputes and doubts and the need for their resolution within the Church. The Tribunal was established to fulfil this function.

The present references have been brought on behalf of minorities large enough to block legislative change through General Synod. They relate to the lawfulness of ordaining women to the priesthood and episcopate on the authority of diocesan legislation or episcopal initiative independently of legislation by General Synod.

The issues under the Fundamental Declarations have again

been argued. This Tribunal cannot finally determine theological disputes. I see no reason why the episcopal members of the Tribunal or anyone else should be bound by or accept my views or the views of the other lawyers on this Tribunal on any theological question. However within limits this Tribunal can finally determine legal disputes under the Constitution. I agree with the majority of the Tribunal that the legal issues under the Fundamental Declarations should not be reopened.

The thrust of the cases for the complainants is that under the Constitution the proposed changes to the law or practice of the Church governing the ordination of women can only be made by General Synod. That contention raises a legal issue as to the powers of General Synod and of Diocesan Synods under the Constitution. This issue should, indeed must, be determined by arriving at the proper meaning of the Constitution. The issue does not depend upon the perceived merits or demerits of the positions of the contestants. It is a question of the powers of General Synod. Such a question does not depend on how those powers have or have not been exercised.

It is once again appropriate that I should refer to the remarks of Sir Owen Dixon when he was sworn in as Chief Justice of the High Court of Australia in 1952 as recorded in 85 CLR at xiv that "There is no other safe

guide to judicial decisions in great conflicts than a strict and complete legalism". I note that Mr. Justice Young has also referred to this statement in his reasons in the present references.

I agree for the reasons given by a majority of the other members of the Tribunal that:-

(1) The Tribunal has jurisdiction to answer all the questions referred to it by the Acting Primate.

(2) On 1 January 1962 it was the law of the Church of England that only men could be ordained to the Diaconate, the Priesthood or the Episcopate.

(3) On 1 January 1962 this was part of the law of the Church of England in force in all the Dioceses of the Australian Church.

(4) The ordination of women to the office of Deacon Canon 1985 (the 1985 Canon) did not repeal the law in force on 1 January 1962 that only men could be ordained to the Priesthood and Episcopate.

(5) If a principle of progression was

enshrined in the Ordinal of the Book of Common Prayer, its status was no higher than that of a ruling principle within s 4 and as such was subject to alteration by legislation of General Synod.

(6) The necessary legal effect of the 1985 Canon was to modify any such principle by making it inapplicable to women Deacons ordained under that Canon. I would add for myself that the 1985 Canon represents the law as stated by General Synod "both as to what was granted and what was refused". See Clyde Engineering v Cowburn (1926) 37 CLR 466 at 491. There is no basis for concluding that the 1985 Canon itself authorised the ordination of women to the Priesthood or Episcopate.

(7) Section 51 of the Constitution is not a grant of power to Diocesan Synods which authorises them to legislate on the subject of the ordination of women. I agree that the Tribunal's 1989 Opinion in the Melbourne Reference as to the scope of s 51 of the Constitution should not be reopened.

I also agree with the reasons of Mr. Justice Tadgell and his conclusion that legislation of General Synod is required to authorise the ordination of women to the Priesthood and the Episcopate of the Australian Church. I wish to add only some further brief remarks of my own.

Prior to 1 January 1962 no Diocese had power through its Diocesan Synod to unilaterally alter the accepted law stated by Phillimore that women could not be ordained to any of the orders of the three fold ministry in the Church. I need not consider whether legislation in England altering that law would have flowed through to the Dioceses in Australia or whether individual Dioceses could have adopted any such changes. One of the purposes of the compact embodied in the Constitution was to establish a national Synod which would have power to legislate on such matters for the whole Church, subject however to the power of a Diocese in some circumstances to opt out of such legislation pursuant to s 30.

It is not surprising that the initial attempts to change the inherited law on the ordination of women took place at the General Synods of 1981, 1985, and 1987. These moves reflected an existing understanding that the matter was one for General Synod and not for individual Dioceses acting unilaterally. The attempt to achieve the ordination of women through action by individual Dioceses is essentially a reaction, although an

understandable one, to successive failures to achieve the required two thirds majorities in General Synod. It should not be a matter of surprise if these attempts to circumvent General Synod prove unsuccessful. In my opinion it was never envisaged for one moment that the 1961 Constitution would authorise unilateral Diocesan action on such a matter as this.

The Australian Church is declared by s 1 to be part of the one Holy Catholic and Apostolic Church of Christ. It is a national, not an international Church. Its General Council can only be the General Synod. The Australian Church is not bound to await change in other parts of the Catholic Church to the current position relating to the ordination of women to the Priesthood. On the other hand within this Church the issue is naturally one for its General Council, and not for individual Dioceses or Diocesan Bishops. Ours is not a congregational church, and individual Dioceses are not separate Churches, but only "the unit of organisation of this Church" (s 7).

In my opinion the ordination of women to the Priesthood is a matter for "this Church" and hence for General Synod, and General Synod alone.

It is true as some members of the Tribunal have pointed out that individual Dioceses which are opposed to the

ordination of women to the priesthood would be entitled to opt out of General Synod legislation authorising such ordinations. The result across the Church would then be a mosaic of the old and the new law on this topic. While such a mosaic would be regrettable the change to the new law would have been supported by the required two thirds majorities in General Synod, and those Dioceses which opted out would simply be adhering to the 1962 law which formed the basis of the union.

If Diocesan initiative is available in this area, it would also be available to a single diocese, acting in defiance of the rest of the Church and not only on the present issue, but on others as well. In my opinion the Constitution requires a change of this kind to be endorsed by General Synod with the special majorities required. The only option available to an individual Diocese is adherence to the existing law. An individual Diocese cannot initiate change on a matter such as this.

I agree that the questions referred should be answered as proposed by Mr. Justice Tadgell.

THE REASONS OF THE BISHOP OF NEWCASTLE WITH RESPECT TO THE TWO REFERENCES TO THE APPELLATE TRIBUNAL IN 1990 RELATING TO THE ORDINATION OF WOMEN

Sections

1. The substance and heart of the matter relating to the eleven questions before the Tribunal is profoundly theological.

It is to be regretted therefore that the jigsaw-like legal complexities have overshadowed and made the running in the attempt to bring resolution to the question of the possibility or otherwise for the ordination of women to the threefold order. The history and process of the matter has been to answer a predominantly theological issue by using legal means. This has produced confusion and uncertainty in the minds of many members of this Church. This is not to undervalue or underestimate the legal questions to be resolved. Nevertheless they must be seen as being secondary to the primary theological concerns.

2. In the previous decisions of the Tribunal the theological appropriateness of the ordination of women to the threefold order has been affirmed. I do not resile from those decisions.

However, in a number of the submissions received, the theological (and particularly the scriptural) evidence was again comprehensively rehearsed, and I believe courtesy should be done to those submissions in again examining the evidence in some detail.

3. (a) The kernel of the theological debate is that the redemptive and salvific works of Christ have an all-embracing effect, nowadays referred to as "being inclusive".

(b) In the early centuries of the Church's history much time and effort centred on the relationship between the two natures of Jesus: His human nature and His divine nature. Eventually orthodoxy came to define the Person of Jesus as fully God and fully man. The word "man" is to be understood as the word "human" rather than the sense of gender, that is "male".

(c) Jesus is therefore fully God and fully human.

(d) The distinction is very important. The redemptive and salvific character of the work of Jesus relates to the whole of humanity, and that is possible only because He is both human and divine.

Many early heresies stressed either the humanity of Jesus or the divinity of Jesus to the detriment of the other. Jesus Himself was necessarily male, a first century Palestinian, and Jewish. The redemptive and salvific works of Jesus involved all mankind, or humankind as T.S. Eliot suggested and foretold. In other words, the saving activity of Jesus is inclusive. If this were not so, if it was His maleness that brought redemption, then logically only males could be saved. What is of significance in the argument is that it is not the maleness of Jesus but the humanity of Jesus that effects the saving and redemptive activity.

(e) This is a theological truth and statement which I believe all would accept.

4. It is inferred from this theological statement that if salvation is inclusive, then as a necessary corollary, equal opportunities of function and service would be given to all - both male and female - by virtue of their baptism within the Body of Christ.

5. (a) A key and hierarchical text is Galatians 3:27-28.

27 ὅσοι γὰρ εἰς Χριστὸν ἐβαπτίσ-
for as many as [2]into [3]Christ [1]ye were
θητε, Χριστὸν ἐνεδύσασθε. 28 οὐκ ἔνι
baptized, [2]Christ [1]ye put on. There cannot be
Ἰουδαῖος οὐδὲ Ἕλλην, οὐκ ἔνι δοῦλος
Jew nor Greek, there cannot be slave
οὐδὲ ἐλεύθερος, οὐκ ἔνι ἄρσεν καὶ θῆλυ·
nor freeman, there cannot be male and female;
πάντες γὰρ ὑμεῖς εἷς ἐστε ἐν Χριστῷ
for [3]all [1]ye [4]one [2]are in Christ
Ἰησοῦ.
Jesus.

(b) In parenthesis, I repeat my earlier argument (in the 1987 Reasons), that certain texts are to be interpreted in an hierarchical status. It appears to make a nonsense of any interpretation of the Scriptures to suggest that a hierarchy is not involved. For example, it is not possible to view on the same level Galatians 3:27-28 with a statement of Paul in the same letter at Galatians 5:12. There are clearly statements and teaching in the hierarchic strand that are true for all times and all places. There are other statements of a lesser character which are culturally related and conditioned, and cannot be transferred from one context and historical culture to another.

(c) The background of the letter to the Galatians appears to be an attempt by Paul, somewhat vehement and violent in his writing, to combat influences amongst the churches in Galatia that were seeking to proclaim that Gentiles should become good Jews before they could become Christians. It was part of the Gentile-Jewish controversy: and whether even Gentiles were included in Christ's redemptive and salvific acts. The letters of Paul and the Acts of the Apostles resonate with this controversy.

(d) The statement under consideration 3:27-28 is a statement of the inclusiveness and equality of all who are baptised into the Body of Christ. It was a formula of freedom which occurs over and again in the Pauline letters: "You were bought with a price, do not become slaves of men" (1 Corinthians 6:20 and 7:23). Or "For freedom Christ has set us free ... do not submit again to a yoke of slavery." (Galatians 5:1) "You were called to freedom..." (Galatians 5:13).

(e) It is difficult to appreciate the impact that such "freedom" statements would have had on those first hearing them: Gentiles, slaves and women. It has a radical and revolutionary character, reminding us of the radical and revolutionary teaching and attitudes of Jesus, which is difficult for contemporary society to fully appreciate.

A modern analogy might be the utter sense of joy, freedom, openness, acceptance and self-worth that a person experiences when the truth of Christ dawns in his or her life: "For I was blind, now I see."

(f) The institution of slavery was entrenched in first century Roman, Greek and Palestinian cultures.

The position of women was subordinate in all those cultures, although there are instances of some few women, powerful and rich, who appear to take leading roles in certain circumstances.

It is not to be unexpected that a slave or a woman being told of their freedom in Christ would naturally expect that that freedom transcended ecclesial boundaries, and applied equally in societal and economic terms.

Christian baptism accomplishes both the salvation of the individual and initiation into membership of a community, into the Body of Christ. It is scarcely credible that that salvation and membership of the Church would not at the same time flow over into all political, social, cultural and economic relationships. We are not 'of the world' but we are certainly 'in the world'.

6. (a) This argument is borne out by examining the background of the writing of Paul's first letter to the Corinthians. The "freedoms" adumbrated in Paul's hierarchic statements have been taken too literally by the Christians at Corinth. He appears to be dealing with a whole series of irregularities which have been reported to him.

There are divisions at Corinth, immorality including incest, the possibility of excommunication, the shame of Christians using secular courts to determine disputes, questions concerning marriage, prostitution, conjugal rights, celibacy, relationships between men and women, attitudes to idols, marriage as a means of controlling lust, divorce, virginity, the superiority of the unmarried state, the inferiority of the married state compared with the unmarried state in terms of being available for God's work, questions of the role of women in worship, prophecy and public worship, disorder

and drunkenness at the Lord's Table, gifts of the Spirit given to Christians and their discernment, the need for obedience and order in corporate worship, a statement about the great gift of love, prophesy and speaking in tongues, questions about the resurrection, and a financial appeal for the Christians of Judea.

The whole letter gives the impression of what modern commentators might describe as Paul being in "damage control" mode.

(b) Two passages in the letter effect the matter before us and require our consideration. 1 Corinthians 11:2-16

2 Ἐπαινῶ δὲ ὑμᾶς ὅτι πάντα μου
But I praise you because [2]all things [3]of me
μέμνησθε καὶ καθὼς παρέδωκα ὑμῖν τὰς
[1]ye have remembered and [4]as [5]I delivered [6]to you [7]the
παραδόσεις κατέχετε. 3 Θέλω δὲ ὑμᾶς
[8]traditions [1]ye hold fast. But I wish you
εἰδέναι ὅτι παντὸς ἀνδρὸς ἡ κεφαλὴ ὁ
to know that [5]of every [6]man [3]the [4]head –
Χριστός ἐστιν, κεφαλὴ δὲ γυναικὸς ὁ
[1]Christ [2]is, and [the] head of a woman the
ἀνήρ, κεφαλὴ δὲ τοῦ Χριστοῦ ὁ θεός.
man, and [the] head – of Christ – God.
4 πᾶς ἀνὴρ προσευχόμενος ἢ προφητεύων
Every man praying or prophesying
κατὰ κεφαλῆς ἔχων καταισχύνει τὴν
[3]down over [4][his] head [1]having [2][anything] shames the
κεφαλὴν αὐτοῦ. 5 πᾶσα δὲ γυνὴ προσ-
head of him. But every woman pray-
ευχομένη ἢ προφητεύουσα ἀκατακαλύπτῳ
ing or prophesying [3]unveiled
τῇ κεφαλῇ καταισχύνει τὴν κεφαλὴν αὐτῆς·
[1]with [2]head shames the head of her; the(her)
ἓν γάρ ἐστιν καὶ τὸ αὐτὸ τῇ ἐξυρημένῃ.
for [2]one [1]it is and the same thing with the woman having been shaved.
6 εἰ γὰρ οὐ κατακαλύπτεται γυνή, καὶ
For if [2]is not veiled [1]a woman, also
κειράσθω· εἰ δὲ αἰσχρὸν γυναικὶ τὸ
let her be shorn; but if shameful for a woman –
κείρασθαι ἢ ξυρᾶσθαι, κατακαλυπτέσθω.
to be shorn or *to be* shaved, let her be veiled.

7 ἀνὴρ μὲν γὰρ οὐκ ὀφείλει κατα-
For a man indeed ought not to be

καλύπτεσθαι τὴν κεφαλήν, εἰκὼν καὶ δόξα
veiled the head,[b] [2][the] image [3]and [4]glory

θεοῦ ὑπάρχων· ἡ γυνὴ δὲ δόξα ἀνδρός
[5]of God [1]being; but the woman [2][the] glory [3]of a man

ἐστιν. 8 οὐ γάρ ἐστιν ἀνὴρ ἐκ γυναικός,
[1]is. For [3]not [2]is [1]man of woman,

ἀλλὰ γυνὴ ἐξ ἀνδρός· 9 καὶ γὰρ οὐκ
but woman of man; for indeed [3]not

ἐκτίσθη ἀνὴρ διὰ τὴν γυναῖκα, ἀλλὰ
[2]was [4]created [1]man because of the woman, but

γυνὴ διὰ τὸν ἄνδρα. 10 διὰ τοῦτο
woman because of the man. Therefore

ὀφείλει ἡ γυνὴ ἐξουσίαν ἔχειν ἐπὶ τῆς
ought the woman authority to have on the

κεφαλῆς διὰ τοὺς ἀγγέλους. 11 πλὴν
head because of the angels. Nevertheless

οὔτε γυνὴ χωρὶς ἀνδρὸς οὔτε ἀνὴρ χωρὶς
neither woman without man nor man without

γυναικὸς ἐν κυρίῳ· 12 ὥσπερ γὰρ ἡ
woman in [the] Lord; for as the

γυνὴ ἐκ τοῦ ἀνδρός, οὕτως καὶ ὁ ἀνὴρ
woman of the man, so also the man

διὰ τῆς γυναικός· τὰ δὲ πάντα ἐκ τοῦ
through the woman; – but all things of –

θεοῦ. 13 Ἐν ὑμῖν αὐτοῖς κρίνατε· πρέπον
God. Among you [your]selves judge: [1]fitting

ἐστὶν γυναῖκα ἀκατακάλυπτον τῷ θεῷ
[1]is it [3][for] [4]a woman [7]unveiled – [6]to God

προσεύχεσθαι; 14 οὐδὲ ἡ φύσις αὐτὴ
[5]to pray? Not – nature [her]self

διδάσκει ὑμᾶς ὅτι ἀνὴρ μὲν ἐὰν κομᾷ,
teaches you that a man indeed if he wears his hair long,

ἀτιμία αὐτῷ ἐστιν, 15 γυνὴ δὲ ἐὰν
[2]a dishonour [3]to him [1]it is, but a woman if

κομᾷ, δόξα αὐτῇ ἐστιν; ὅτι ἡ κόμη
she wears [2]a glory [3]to her [1]it is? because the long hair her hair long,

ἀντὶ περιβολαίου δέδοται αὐτῇ. 16 Εἰ
instead of a veil has been given to her. if

δέ τις δοκεῖ φιλόνεικος εἶναι, ἡμεῖς
But anyone thinks [2]contentious [1]to be, we

τοιαύτην συνήθειαν οὐκ ἔχομεν, οὐδὲ αἱ
[3]such [3]a custom [1]have not, neither the

ἐκκλησίαι τοῦ θεοῦ.
churches – of God.

and 1 Corinthians 14:33-36

33 οὐ γάρ ἐστιν ἀκαταστασίας
for[3]not [2]is [4]of tumult
ὁ θεὸς ἀλλὰ εἰρήνης. Ὡς ἐν πάσαις
– [1]God but of peace. As in all
ταῖς ἐκκλησίαις τῶν ἁγίων, 34 αἱ γυναῖκες
the churches of the saints, [1]the [2]women
ἐν ταῖς ἐκκλησίαις σιγάτωσαν· οὐ γὰρ
[5]in [6]the [7]churches [1]let [4]be silent; [3]not [2]for
ἐπιτρέπεται αὐταῖς λαλεῖν, ἀλλὰ ὑποτασ-
[2]it is [4]permitted to them to speak, but let them
σέσθωσαν, καθὼς καὶ ὁ νόμος λέγει.
be subject, as also the law says.
35 εἰ δέ τι μαθεῖν θέλουσιν, ἐν οἴκῳ
But if [3]anything [2]to learn [1]they wish, [5]at home
τοὺς ἰδίους ἄνδρας ἐπερωτάτωσαν· αἰσχρὸν
[2]the(ir) [3]own [4]husbands [1]let them question; [3]a shame
γάρ ἐστιν γυναικὶ λαλεῖν ἐν ἐκκλησίᾳ.
[1]for [2]it is for a woman to speak in a church.
36 ἢ ἀφ' ὑμῶν ὁ λόγος τοῦ θεοῦ ἐξῆλθεν,
Or from you [2]the [3]word – [4]of God [1]went forth,
ἢ εἰς ὑμᾶς μόνους κατήντησεν;
or to you only did it reach?

(c) In both passages Paul appears to be pressing for decency and decorum in public worship. The women may well have overstepped those bounds. To support his arguments Paul refers to the creation principle of male headship. Clearly he is not denying (in the first passage) the right of women to pray and prophesy in public: and what is prophesying if it is not proclaiming and teaching the action of God in contemporary church and society?

There is also an apparent inconsistency in allowing the prophesying and praying of women in the earlier passage which is denied in the latter passage.

(d) The important question is whether what Paul says about the subordination of woman to man is a permanent principle. One must reach the conclusion that Paul's "freedom" statement of Galatians 3:27-28 squares uneasily with his comments in the Corinthian passages.

The Galatian comment does not read "male nor female" but rather male and female picking up the reference from Genesis 1:27: both male and female in His own image. The context and sense of both these Corinthian passages is that Paul had been informed of feminist pressure or of feminist chatter which was effecting some disorder in Christian worship in Corinth, and that he took stern damage-control measures to eradicate it. It is clear he did not have a principle of denying women the right to contribute to Christian worship because of 11:5, but in the interests of good order he might well decide that they should be silent: and he used the heavy guns of the so-called creation principle of male headship to bolster his teaching. That may resolve the contradiction between 11:5 and 14:34.

(e) Yet finally the hierarchic Galatian statement is superior. The problems of the exegesis of the two passages suggest that one should look for the overriding and permanent principle of Galatians 3:27-28 to be the guiding principle in this matter. Only by such a hermeneutic principle can we avoid the danger of calling into question the consistency of the Scriptures.

7. (a) There is a similar complex exegesis of 1 Timothy 2:8-15.

8 Βούλομαι	οὖν	προσεύχεσθαι			
I desire	therefore	[3]to pray			
τοὺς	ἄνδρας	ἐν	παντὶ	τόπῳ	ἐπαίροντας
[1]the	[2]men	in	every	place	lifting up
ὁσίους	χεῖρας	χωρὶς	ὀργῆς	καὶ	διαλογισμοῦ.
holy	hands	without	wrath	and	doubting.
9 Ὡσαύτως	γυναῖκας	ἐν	καταστολῇ	κοσμίῳ,	
Similarly	women	in	clothing	orderly,	
μετὰ	αἰδοῦς	καὶ	σωφροσύνης	κοσμεῖν	
[3]with	[4]modesty	[5]and	[6]sobriety	[1]to adorn	
ἑαυτάς,	μὴ	ἐν	πλέγμασιν	καὶ	χρυσίῳ
[1]themselves,	not	with	plaiting	and	gold
ἢ	μαργαρίταις	ἢ	ἱματισμῷ	πολυτελεῖ,	
or	pearls	or	raiment	costly,	
10 ἀλλ'	ὃ	πρέπει	γυναιξὶν	ἐπαγγελλομέναις	
but	what	suits	women	professing	

θεοσέβειαν, δι' ἔργων ἀγαθῶν. 11 γυνὴ
reverence, by means of [2]works [1]good. A woman
ἐν ἡσυχίᾳ μανθανέτω ἐν πάσῃ ὑποταγῇ·
in silence let learn in all subjection;
12 διδάσκειν δὲ γυναικὶ οὐκ ἐπιτρέπω,
but [3]to teach [2]a woman [1]I do not permit,
οὐδὲ αὐθεντεῖν ἀνδρός, ἀλλ' εἶναι ἐν
nor to exercise authority of(over) a man, but to be in
ἡσυχίᾳ. 13 Ἀδὰμ γὰρ πρῶτος ἐπλάσθη,
silence. For Adam first was formed,
εἶτα Εὔα. 14 καὶ Ἀδὰμ οὐκ ἠπατήθη,
then Eve. And Adam was not deceived,
ἡ δὲ γυνὴ ἐξαπατηθεῖσα ἐν παραβάσει
but the woman being deceived [3]in [2]transgression
γέγονεν· 15 σωθήσεται δὲ διὰ τῆς
[1]has become; but she will be saved through the(her)
τεκνογονίας, ἐὰν μείνωσιν ἐν πίστει καὶ
childbearing, if they remain in faith and
ἀγάπῃ καὶ ἁγιασμῷ μετὰ σωφροσύνης.
love and sanctification with sobriety.

One might regard this passage in a similar context to the Corinthian passages. The Pastorals are usually given a late first century date, and suggest a context where the Church is beginning to organise its structures and ministry. "The Churches the Apostles left behind" by Raymond Brown (1984) is typical of this point of view. We may well be receiving temporary regulations laid down to meet a developing situation. The whole epistle has the feel of "order and good government".

(b) But again we have difficulties in squaring this passage with other New Testament passages which clearly state that women are teaching and have authority. For example, Prisca/Priscilla is a valued teacher who leads Apollos to the truth (Acts 18:26), Euodia and Syntyche were women who, although now under a cloud, had laboured with Paul as fellow workers in the Gospel (Philippians 4:2-3), Philip the Evangelist had four daughters who were prophetesses (Acts 21:9). Aged women were to teach (Titus 2:3-5). Paul held Lois and Eunice in the highest honour (2 Timothy 1:5), and there are the women named and held in respect and honour in Romans 16 as 'fellow workers': Phoebe, Priscilla, Mary, Junia (an apostle), Tryphena and Tryphosa et al.

(c) I draw attention to splendid exegesis from Giles **"Women in their Ministry"** page 33ff: and Barnett **"Wives and Women's Ministry"**, an article in the Evangelical Quarterly of July, 1989.

I quote Barnett's conclusion:

"It hardly needs to be stated that the matter of women's ministry is deeply divisive within the Christian community. If this passage is held to be applicable today, the implication would be that a woman may not be the principal teacher in the congregation. Paul appears to be concerned to hold in due equilibrium the delicate balance of husbands and wives within the families of the churches. The view taken here is that Paul's concerns are not purely cultural to be confined in their application to his era.

However, not all congregations today are family churches. Many are youth congregations in schools and universities; many are single-sex congregations in girls' schools and women's colleges, hospitals and prisons. Moreover, team ministry is increasingly seen to be the way forward in our modern industrialised cities; the value of the mono-ministry is increasingly questioned.

If women prayed and prophesied in the churches, if they were encouraged to learn - as they are in this passage - if the older taught the younger, if they worked alongside Paul in the work of evangelism - then there is no good reason of exegesis or hermeneutics which would limit their ministries in those and related areas today. If 1 Timothy 2:11-15 restricts women from becoming the senior teacher to the family congregation there appears to be no reason why they should be prevented from the whole range of pastoral, didactic or sacramental ministry under the leadership of the senior teacher in a team, or in their own right in specialist, single-sex congregations."

(d) This lengthy quotation clearly answers the question raised by the Archbishop of Melbourne in the May 1991 Hearing whether women could serve as priests as members of a team ministry, although not in charge of the team, or as assistant priests on a parish staff. There was no answer given by Counsel representing the Diocese of Sydney at the Hearing. While I do not hold that women may only be priests as assistants in a team, the very fact that the possibility exists per se suggests that this particular passage cannot deny women playing a leadership role in the teaching, didactic and sacramental ministry of the Church.

(e) I have also examined Hebrews 13:17, 1 Timothy 3:1-15, Ephesians 5:22-28, Colossians 3:18-19, Titus 2:5, 1 Peter 3:1-6, and Acts 2:13-18.

There is no major indication in any of these passages (which are concerned with husband/wife relationships mainly and requirements for overseers/bishops and deacons) that would prevent a woman teaching and leading in the Church. The "mutuality" of the relationships within marriage is the thrust of the passages: and the bishops/deacons as male being part of a culturally conditioned context at odds with the Galatian statement.

8. (a) It is a fact that for nearly 1900 years and up to this present century there has been a male priesthood within the Christian Church. It is only now in this century that there has appeared a dramatic shift in relationship attitudes with and toward women. This has been brought about by cultural and social change. If the humanity of Jesus is to be understood as inclusive (and if priesthood represents His presence in the Church in a unique way, particularly in the celebration of Holy Communion), then priests need not be, indeed should not be, exclusively male. The inclusive humanity of Jesus inevitably and logically means an inclusive priesthood.

(b) In recent centuries when the cultural and social position of women was inferior and subordinate, and where they did not have equality of status as persons in their own right, the logic of the argument that both could be represented in an inclusive priesthood was lost. It could well be held that that logic is now being rediscovered in this century based on solid scriptural interpretation, using an exegetical and hermeneutical method which does theological thinking in a contemporary context.

9. (a) It is disappointing to note that none of the submissions referred specifically to the teaching of Jesus, and His attitudes toward women, as a pointer in this debate. Indeed, at the 1991 Hearing in reply to a question from the Tribunal, the speaker on behalf of the anti-ordination side suggested that Jesus had nothing to say in the matter.

(b) It should be possible to determine from the teachings of Jesus what His attitude might be toward the ordination of women. Certainly it is true to say that His attitudes toward women were radically different to those generally held in His own culture and context.

Take a simple example from the teaching of Christ: the command to "love one another" from John 13:34. The Greek is *agapaw* (verb) and *agapé* (noun). Raymond Brown, Roman Catholic Professor at the largely Protestant Union Theological Seminary in New York, in his magisterial two-volume commentary on St. John's Gospel calls it "the new commandment of the new covenant". There is some doubt that it was a novel teaching but nevertheless it was still a radical and revolutionary concept given the cultural conditions of the day.

But what does love/agapé mean?

The **Analytical Greek Lexicon** published by Samuel Bagster defines the verb "to love" as "to value, to esteem, to feel or manifest general concern for, to be faithful towards, to delight in, to set store upon"; and the noun is defined as "love, generosity, kindly concern, and devotedness."

C.S. Lewis defined agapé as "wanting the best for others"; other definitions might be "having the utmost respect for", "regarding another as of equal value in the eyes of God", "the desire to serve and to care for another", "recognising that there could be no barriers of race, sex, economic status or even religion that would deny being generous, and having a kindly concern for others".

Clearly the concept of agapé includes within it the concept of justice and the rights of each individual. The whole tenor and ethos of the teaching of Jesus is immediately brought to mind.

If this argument is correct and put into practice in today's society (and we are speaking to today's society and not to the first or sixteenth century) then to allow the ordination of women to be priests becomes a matter of justice worked out through the concept of agapé, a teaching and command that comes from Jesus Himself. This is not fanciful speculation: if we are seriously to determine the meaning of Christ's command to "love one another" in the twentieth century (and not treat it as in the realm of the sentimental and impractical), then the above reasoning linking justice with love is an appropriate deduction to be made.

Further, what is to be made, for example, of the place of Mary as mother and giver to the world of the Saviour: or of the intriguing conversation of Jesus with the woman at the well in Samaria - an incident that broke all the rules of male/female behaviour (John 4:27) and Jew/Samaritan relationships (4:9); and concludes with the woman bringing the evangel to her own town (4:29-30)?

What of the statements of Martha recognising the Person of Jesus as Messiah, Son of God, (John 11:25-27) - and which can be parallelled to Peter's confession at Caesarea Philippi?

What of the command to Mary Magdalene on the day of the resurrection to "go tell my disciples" (John 20:17-18) - where a case could be made out to see her as the first authoritative teacher to the disciples of the truth of the resurrection?

Such an argument derived from the actions and teaching of Jesus is cumulative: and it is more than probable that from the teaching and activity of Jesus a case can be made for the "freedom" statements of Paul to be substantiated.

(c) Section 3 of the Constitution contains "This Church will ever obey the commands of Christ, teach His doctrine, administer his sacraments .... follow and uphold His discipline ....". If we were to ask the question whether the "commands of Christ" lie in the direction of Galatians 3:27-28 or with the "damage control" statements of Paul in Corinthians; and

given the known attitudes of Jesus in the Gospels towards women, is it not tenable that He would demand the right and indeed moral obligation of women to minister alongside men as priests in His church?

(d) Although I will argue later in Section 12 of these Reasons about the bishop's inherent authority and power to ordain, I conclude this Section by pointing out that we must not see Question 5, in the Reference before the Tribunal, as an individual maverick bishop with a bee-in-his-bonnet private-belief about the ordination of women: that is to misunderstand the import and seriousness of the question. As I understand it, the question is whether a bishop is directed or compelled by the command of Christ to ordain a canonically-fit female deacon to the priesthood: and that he would be in rank disobedience to the command of Christ if he did not do so.

It is a real, pertinent and trying question facing many bishops today: it must be answered in a coherent and proper manner.

It is not therefore a question of an individual bishop believing that he may be commanded by Christ to ordain women into the threefold order, but a question whether all bishops are commanded to do so. And indeed, are failing in their responsibility to the commands of Christ if they do not do so.

10. (a) The matter of male headship stemming from the creation narratives of Genesis has already been alluded to.

(b) At the May Hearing Dr. Woodhouse, representing Sydney and the Group of 26, in answer to questions from the Tribunal, stated that ordination was of man's creation and not God's: that the headship principle from Genesis was a universal principle in the "nature" of male-female relationships; and that it applied in the husband-wife relationship and in the leadership of the congregation.

I have already mentioned the matter of women priests being part of a team or staff ministry within a parish as being acceptable.

(c) If the headship principle is to make any sense its ambit should cover every kind of position of authority in church, community and society. If the woman is by "nature" inferior and subordinate to men: if she is the first to be deceived and by inference the cause of man's fall, then headship principle must be all embracing. However, it is a fact that in church, community and society that principle does neither hold nor work.

(d) The exegesis of the Genesis passages is not clear. In 1:27 male and female, that is humankind, is created in the image of God. The male and female expression is taken up in Galatians 3:28, to which we have already referred. There is a scholarly debate about the "head" meaning "source", and which places a difficult connotation on the matter.

Genesis 3:16 is taken up in 1 Timothy 2:15 but the exact interpretation of this latter verse seems to baffle all scholars.

In addition the Pauline texts speaking of marriage understand the husband's role as one of outpouring love and service for his wife (Ephesians 5:22 ff).

Overarching all this is the concept in Paul of Christ as the second Adam who inaugurates a new creation. It is one of Paul's significant theological themes. Christ replaces Adam in the new creation: and it follows that the new creation is superior to and indeed replaces the old creation. Even if it be granted (and I do not necessarily grant it) that there is in the first creation a subordination of the woman to the man, the new creation would entirely do away with that principle. "As in Adam all die, even so in Christ shall all be made alive."

(e) One must also take into account that the exclusion of women from the priesthood is regarded as a discriminatory practice, although legal, in our society. Discrimination against women per se is illegal, regarded as sexist, and not just the mood and empathetic feelings of contemporary men and women. If, as mentioned earlier, Jesus is acknowledged to have treated women in a more rational and loving way than in the usual attitudes of His time, then it is a logical corollary that the Church should

be encouraging the abandonment of its present exemption from the sex discrimination legislation.

11. (a) There is the argument put forward in several Submissions concerning the priest as the ikon of Christ. Underlying the claim is that because Jesus chose males as apostles, only males can represent Christ particularly at the celebration of the Holy Communion.

(b) We have already referred to Romans 16:7 where Junia/Junias- a woman - is referred to as a kinsman and fellow captive and is "... among the apostles and they were in Christ before me". Granted there is some dispute about the term Junia/Junias: what is not disputed is that there was great diversity of apostleship in the New Testament.

It may well have been that in the first century there were certain powerful and wealthy women who assumed a matriarchal status and who were accepted as leaders in society. Texts such as Romans 16:1-3 or 16:7 suggest that there were women in the early Christian missionary movement who rose to positions of leadership. They may or may not have had the authority of Paul - more likely their own congregations chose them. Paul seems to have co-operated with such women and to have acknowledged their authority within the communities. Women like Phoebe, Priscilla, or Junia/Junias raise at least a question mark about all apostolic leadership being male.

(c) But the reference to males as apostles in the submissions is clearly directed to the twelve apostles. The appointing of the Twelve may have more to do with establishing the "right markers" of the new Israel in the Kingdom of God than necessarily to be a deliberate choice for male apostles as leaders. Nevertheless, the so-called catholic view (I point out that *catholic* means inclusive and all-embracing, not universal or found everywhere) deduces from that that only males can operate as leaders in the church and particularly to preside at the Holy Communion. What does it mean therefore to be an ikon of Christ at the Eucharist and "representing" Him there?

Surely on the most catholic view the priest does not "represent Christ" in any specialised or unique way when he presides at Holy Communion. If there are to be "representations" of Christ at the Eucharist, they are:

(i) the eucharistic elements themselves; or
(ii) the whole body of believers taking part in the worship.

When the priest (on the most catholic of premises) genuflects before the consecrated elements, is he not genuflecting as a sinful human being on the part of all in the congregation? Does he not offer the eucharistic sacrifice on behalf of the gathered Church, and not as a single representative of Christ or a window into Christ? Is not the *alter Christus*, or the ikon of Christ, the privilege and responsibility of every baptised Christian?

(d) Archbishop Cramner writing "On the Lord's Supper" said *"... the difference that is between the priest and the lay man in this matter is only in the ministration; that the priest, as a common minister of the Church, doth minister and distribute the Lord's supper unto the other, and other receive it at his hands."*

Being the ikon of Christ and 'representing Christ at the altar', as far as this statement is concerned, is in the distributing of the elements to the people: and it would be a parallel to speak of Christ delivering His word through the hands of a priest and thus giving Himself to the people.

(e) In the A.R.C.I.C. statement on Ordination (Paragraph 13), it says that Christian ministers are *"particularly in presiding at the eucharist - representative of the whole Church in the fulfilment of its priestly vocation ..."*. Here the priesthood represents the whole Church. It is not being said that the priest represents Christ at the eucharist: and the implication of such representation cannot be gender specific for the priest represents the whole Church male and female: and as a consequence male and female priesthood is therefore theologically appropriate.

12. (a) We now turn to the bishop's inherent power to ordain. I note in passing that Section 3 of the Constitution requires the preservation of the threefold order: the only way that can be accomplished is through the ministry and work of the bishops.

(b) Bishops alone have the power to ordain and consecrate, and this power is inherent through their Order and by virtue of their consecration and ordination as a bishop.

The seventh question in the 1662 Ordinal addressed to the bishop states

"Will you be faithful in ordaining, sending, or laying hands upon others? Answer: I will so be by the help of God."

This power is confirmed in the prayer that follows the questions and answers and in the words which accompany the laying on of hands. The inherent and God-given power to ordain is given to the bishop.

(c) It should be noted that this power and authority to ordain is not conditioned by, or constrained, or granted by his diocesan Synod. No Ordinance of his Synod or Canon of General Synod is the source of the bishop's authority to ordain.

It can be argued that the 1985 General Synod Canon for the Ordination of Women to the Diaconate was not strictly speaking necessary. Given the conditions of the time and the controversial views in both national and international church, it was perhaps desirable that debate and a degree of consensus be reached before such a step be taken. But the bishop's power and authority to ordain is not sourced by General Synod. Nor does a bishop require an Ordinance of his own Synod to source authority and power to ordain. It is, of course, reasonable in today's national Church for a bishop not to proceed with a controversial matter without the encouragement and support by Resolution of his Synod. But I repeat, the authority and power to ordain given to a bishop comes from his Order.

(d) It is within the grounds of possibility that a General Synod Canon or an Ordinance of the Synod of a bishop's diocese might be passed to restrict him in the exercise of his power and authority to ordain. This would have the effect of creating a rule not to allow the bishop to proceed in a certain matter.

(e) There are already a number of "rules" that constrain the bishop from an absolute use of his power and authority to ordain.

In the Form for the Ordering of Priests, a candidate is presented to the bishop for ordination, and the "good people" in the congregation have an opportunity to disclose if there is any "impediment or notable Crime in any of them for which he ought not be received into this holy ministry ...".

It is necessary for the archdeacon, or in his absence, one appointed in his stead to present the candidates to the bishop.

Canons 33 and 36 of 1603 have a number of "rules" defining the canonical fitness of a candidate. Not all these rules are maintained today, and by custom, have fallen into desuetude. The pronoun "he" in Canon 34 suggests only males can be ordained to the priesthood, but the use of pronouns and their use in the national Constitution have already been decided by the Appellate Tribunal as being in an inclusive mode.

A bishop's power and authority to ordain is restricted to his own diocese, although there may be circumstances in which he is given permission to ordain elsewhere.

(f) A bishop is a symbol of Unity and Order within his diocese. At the same time he represents that Unity and Order to the wider church, and in this sense the word *church* means, legally the national church, and morally the other Provinces of the Anglican Communion. A bishop therefore should move extremely hesitantly in an area where he does not have a majority support from brother bishops. John Henry Newman said "Inter-communion between dioceses is a duty (and the breach of it a sin)". To break

communion therefore between the dioceses of the national Church is not a thing to be lightly considered. However, in this national Church and through its Constitution, we already have a unity-in-diversity in practice which still maintains a communion with each other. Any Canon of General Synod affecting the order and good government of the Church does not come into effect until adopted by Ordinance of the Synod of a diocese. It means the creation of a unity-in-diversity of practice in matters of order acceptable by the framers of the Constitution in the national Church. This diversity in unity principle is well known in our national Church: and the important Canon No. 6 of 1985 - admission of children to Holy Communion - is a classic example of this.

(g) Given this reasoning in this Section (12) it is therefore possible for a majority group of diocesan bishops, believing that they are commanded by Christ to proceed to the ordination of women to the priesthood, to take such action: and this is precisely the intent of the House of Bishops' advice to the President of the Appellate Tribunal in the matter of the Melbourne Reference of 1988, dated 5 July 1989.

The Submission entitled **Advice to the President** was signed by seventeen diocesan bishops, four bishops abstained, none were against, and the three episcopal members of the Appellate Tribunal took no part in the exercise. All diocesan bishops were therefore present. (At a later stage my recollection is that the Bishop of Ballarat withdrew his affirmation.)

Sections 1 and 2 of the Submission contain the Introduction and a rehearsal of the history of the ordination of women issue up to the 5 July, 1989.

Section 3 of the Submission is of importance in the argument being pursued here. Section 3 is lengthy and I apologise for reproducing it here but it is worth having in full to determine what the bishops were saying at that time.

3. THE AUTHORITY OF THE DIOCESE AND ITS BISHOP

3.1 The opening words of the Constitution of the Anglican Church of Australia define that Church as -

> "being a part of the One Holy Catholic and Apostolic Church of Christ ....."

and the same definition is repeated in Section 7 -

> "a diocese shall in accordance with the historic custom of the One Holy Catholic and Apostolic Church continue to be the unit of organisation of this Church and shall be the see of a bishop."

3.2 The antiquity of this understanding of the nature of the Church is shown in the early Christian Fathers such as Ignatius of Antioch, Tertullian and particularly in Cyprian of Carthage who states -

> "These form a Church, the people united to their high priest and the flock following its shepherd. Wherefore you must know that a bishop is constituted by his Church and a Church by its bishop." (Epistle 66.7)

It is important to note the use of "Church" in the singular. In early Christian centuries it is clear that each diocese under its bishop had the status of a "Church", being its own authority, but being required to consult with other Churches through its bishop.

3.3 In "The Apostolic Ministry" ed. K.E. Kirk 1946 Dom Gregory Dix writes -

> "The pre-Nicene bishop is, indeed, in a singular sense 'the man' of his own Church ..... and the minister, in person or by delegation, of all sacraments to its members. He is also by his liturgical sermon, the guardian and spokesman to itself and to the world without of his own Church's doctrinal tradition, by which the apostolic function of 'witness to revelation' is discharged. He is the creator of lesser ministries ....."
>
> A 'Church' implied a 'bishop' as the sine qua non of its organic life, just as one 'bishop' implied a 'Church' in which he fulfilled the episcope".

3.4 It is argued, therefore, that each individual diocese through its bishop from whom it cannot be distinguished, has authority as "the unit of organisation of this Church" to make its own decisions in the matter of who shall be ordained.

3.5 The Preface to the Ordinal of 1662 gives to the bishop the authority to decide who shall be ordained -

> "And the Bishop, knowing either by himself, or by sufficient testimony, any Person to be a man of virtuous conversation ..... may ..... in the face of the Church admit him a Deacon ....."

The same authority is recognised by Hooker "Ecclesiastical Polity" Book 3 VII ch. viii 3 -

> "The church where the bishop is set with his college of presbyters about him we call a 'see'; the local compass of his authority we term a 'diocess'. Unto a bishop within the compass of his own both see and diocess, it hath by right of his place evermore appertained to ordain presbyters, to make deacons, and with judgment to dispose of all things of weight"

Hooker argues from a position in which he is justifying the existence of a 'national' Church, but he still maintains the authority of the individual bishop and diocese in the matter of ordination.

3.6 A leading contemporary, theologian in the Orthodox Church, Bishop John Zizioulas also maintains that the individual diocese has an authority prior to that of a national Church -

> "I maintain that the view that the ecclesial status of any unit in the Orthodox Church other than the episcopal diocese does not derive from the unit itself but from the episcopal diocese or dioceses involved. This applies not only to units smaller than the diocese (e.g. the parish) but also to larger ones. Thus a metropolis, an archdiocese or a patriarchate cannot be called a 'Church' in itself, but only by 'extension' i.e. by virtue of the fact that it is based on one or more episcopal dioceses - local Churches which are the only ones on account of the episcopal eucharist properly called Churches".
>
> (Being as Communion 1985 pp252-3)

3.7 This same point is clearly recognised throughout the Constitution of the Anglican Church of Australia; as in S 7 quoted above; and in the sections relating to the powers of General Synod, particularly S 30 which required that in matters which either the General Synod itself or an individual diocese declares to be "affecting the vital ceremonial or discipline of this Church" or "the order and good government of the Church" the decision of the individual diocese shall be required before the decision of General Synod can take effect in that diocese.

3.8 From the earliest days of the Christian Church the bishops have represented their dioceses in the councils of the Church both local and universal.

> "Their main purpose has been to provide occasions for the sharing and exploration of the common faith of the churches, and each bishop contributes to the council not simply his own personal understanding of the Christian religion but the corporate belief of the people of his diocese."
>
> (J. Halliburton "The Authority of a Bishop" 1987 p.38)

3.9 Particularly in the case of some new concept of deep theological significance, in which the evidence of scripture is inconclusive, the bishop must consult with his fellow bishops. The A.R.C.I.C. Statement on Authority (Section 5) referring to the ordained ministry says -

> "This pastoral authority belongs primarily to the bishop, who is responsible for preserving and promoting the integrity of the 'koinonia' ..... He does not, however, act alone. All those who have ministerial authority must recognise their mutual responsibility and interdependence".

However, history shows that neither unanimous agreement, nor even a majority vote, can require a bishop to act contrary to the truth as he (and his diocese) perceive it. Bishop Alexander of Alexandria opposed Arius at the Council of Nicaea. His diocese elected Athanasius to succeed him because he was seen to be "the man of the same faith" as Alexander. Despite being exiled for his beliefs he retained the support of his people, and in the end their theological stand became the orthodoxy of the whole Church.

3.10 It is a characteristic of the Anglican Communion that mutual recognition of orders has been one of the major signs of our unity. The situation has now developed where the orders of some who have been ordained are not recognized by others because of their sex. It is argued by those who oppose the ordination of women to the priesthood that these women were not eligible to be ordained, but the inherent right of the bishop to decide on who he should ordain is not disputed.

Section 4 of the Submission contains the Summary and it reads:

4. SUMMARY

It is the view of the bishops that the ancient authority of their office to ordain need not be subject to acts or resolutions of Synods though in ordaining women to the priesthood the support of the diocese would give strength to the decision.

It is possible therefore that given a majority of the diocesan bishops believe they are obeying the commands of Christ to proceed to the ordination of women: and given that the minority diocesan bishops would not oppose their majority bishop brothers, but accept that they could live in a unity-in-diversity situation; then I believe this Church could proceed in the matter.

13. The question of the principle of progression or advancement has again been raised.

I do not resile from the majority opinion of the Appellate Tribunal of 1985 which said:

"We are of the opinion that one of the principles of the Church of England embodied in the Ordinal is that the three Orders stand together and that any person ordained deacon must be capable of proceeding to the higher Orders. Only so can the relationship of the three Orders to one another be preserved. This does not mean that every deacon must be ordained priest any more than it requires that every priest be consecrated a bishop. There must, however, be no inherent disqualification from advancing to the higher Orders. This principle is embodied in one of the Closing Collects and the concluding Rubric of the Service for the Ordering of Deacons. We hold that it would be contrary to this principle if women were to be eligible for admission to the Order of Deacon but not to the Orders of Priest and Bishop."

The Canon for the Ordination of Women to the Office of Deacon of General Synod 1985, although I have already stated that it was not strictly necessary, nevertheless reinforces the point that no further legislation is necessary to authorise a bishop in the Anglican Church of Australia to exercise his inherent power to ordain a canonically fit woman deacon to the Office of Priest.

14. As a member of the Appellate Tribunal not trained as a lawyer I am intrigued by the reliance in some Submissions placed on Phillimore as an authority. As I understand it his work is a textbook, revered and learned, entitled "The Ecclesiastical Law of the Church of England", the latest edition of which is 1895.

Submissions draw attention to his statement *"There are only two classes of person absolutely incapable of ordination: namely, unbaptised persons and women. Ordination of such persons is wholly inoperative. The former because baptism is a condition of belonging to the Church at all. The latter because by*

nature holy Scripture and catholic usage they are disqualified."

I have argued in these Reasons so far that by nature, holy Scripture, and catholic usage women are absolutely capable of being ordained. Even if we grant Phillimore an absolute authority, would it not be true that since General Synod has already passed a Canon to ordain women to the diaconate that the Phillimore injunction has been abrogated? Further, if women have already been ordained as priests in many parts of the Anglican Communion - member Provinces - who would claim, as we claim, to be part of the one holy catholic and apostolic church - does this not also make the Phillimore statement now irrelevant?

15. A number of Submissions raise the question that the Anglican Church as part of the one holy catholic and apostolic church should not take action in a controversial area such as the ordination of women to the priesthood unless it achieves a degree of consensus about the matter with the Roman Catholic and the Orthodox Churches.

The Anglican Church is both catholic and reformed. A consequence of the reformed nature is that we accepted the Book of Common Prayer and worship forms in the vernacular; and a married priesthood was permitted. It is unworthy of me to point out that it took the Roman Catholic Church some four hundred years to reach the same stage in their liturgies.

It is at least a possible scenario that similar action might be taken in that Church about married clergy and the ordination of women to the priesthood. It is unlikely that they will seek to confer with us.

The crucial facts, however, are that Anglican Orders are not recognised by the Roman Catholic Church. Pope Leo XIII in 1896 declared Anglican ordinations null and void. To press home his point he used the adjectives totally and utterly.

Nor is the situation any brighter with the Orthodox churches. Recently a priest from this Diocese moved to Orthodoxy and was re-ordained as a priest in the Orthodox Church. (To complete the story, after three years he has returned!)

Clearly, the Orthodox do not accept our Orders either.

In the light of this, it seems unreal that such a proposed consensus of Anglican, Roman Catholic and Orthodox Churches could come together and make a common decision about the ordination of women: and in any case one can still claim to be part of the one holy catholic and apostolic church without necessarily having to achieve a full communion status with other such groups who have a similar claim. In some ways the situation resembles the unity-in-diversity premiss again.

16. In Section 1 reference was made to the primacy of theological concern above the legal concern in the matter of the ordination of women. It is a fact now that legal answers have dominated and supplanted the proper theological debate. It is my view now - and I am very grateful for the comprehensive and competent work done by those presenting Submissions - that this Church is, and has been, on the wrong track in attempting to resolve the issue through Ordinances of dioceses and Canons of General Synod. The ordination of women is not a legal issue. I believe I have demonstrated through my Reasons that it is in the authority and power of the bishops through their Order, and supported by Scripture, to make a decision about the matter.

That inherent power and authority of the Bishop to ordain canonically-fit candidates has always been in place (compare Section 12). When the Constitution was enacted in 1961 that authority and power was confirmed in Section 3 "preserve ... the three orders of bishops, priests and deacons in the sacred ministry". The fact that at that time only males were ordained is due to the customary and common usage and understanding of the time. The inherent authority and power of the Bishop to ordain canonically-fit persons, male and female, has been present from the beginning, although latent and unused for many centuries in the case of females. I therefore believe that the bishops have the proper authority to exercise leadership in this matter. This does not mean authoritative and dictatorial decision-making but involves widespread consultation with priests and people at all levels of diocesan life; and further consultation with brother diocesan bishops; but it does not require legal enactment of either the diocese or General Synod.

In the light of these conclusions supported by my Reasons, I am able to answer the questions as follows:

1. Yes.
2. No.
3. No - the inherent power and authority of the bishop to ordain canonically fit candidates has always been in place (compare Section 12), although in 1961 it was by custom and usage confined to males.
4. Yes - in the sense that s.51 would be reaffirming and consolidating the bishop's already existing power and authority to ordain a woman; yet strictly speaking, such an Ordinance would not be necessary, the bishop's power and authority to ordain is not sourced from either General Synod or his own diocesan Synod.
5. Yes.
6. Yes.
7. Yes - see the qualifying notes to answers 3 and 4.
8. No - in both (1) and (2).
9. Yes - in both (a) and (b).
10. Yes.
11. Yes.

†Arthur Holland

October 28 1991

Ss Simon & Jude

Appellate Tribunal: 1990 Reference
Opinions and Reasons of Archbishop Donald Robinson

INTRODUCTORY

Jurisdiction

The advisory opinion of the Tribunal has been sought on eleven questions under section 63 of the Constitution. For the Tribunal to entertain these questions they must be such as "arise under this Constitution". The submission of the Diocese of Sydney "does not concede that questions 1, 5, 6, 9, 10 or 11 fall within s.63 of the Constitution or that the opinion expressed by the Tribunal on the ambit of its jurisdiction under s.63 in its opinion on the Melbourne Act is correct".

Question 1 asks whether in the absence of an appropriate canon of General Synod authorizing it the Bishop of North Queensland is empowered to ordain a woman to the office of priest or consecrate a woman to the office of bishop. This question arises under the Constitution only to the extent that there may be a provision or provisions in the Constitution which prevent a diocesan bishop from ordaining or consecrating a woman. Since this possibility is specifically the subject of question 2, question 1 should not be entertained as a separate question by the Tribunal. It is not within the jurisdiction of the Tribunal to interpret a diocesan constitution per se. For this reason questions 10 and 11 are also beyond the jurisdiction of the Tribunal. It is not for the Tribunal to decide whether an ordinance of a diocesan synod has been duly made in accordance with the powers conferred upon it by the constitution of that diocese; such a question does not arise under the National Constitution.

It is true that in the Melbourne reference of 1989 the Tribunal entertained a question in similar terms to the present questions 10 and 11 regarding the validity of an ordinance of that synod. However, Melbourne sought directly to support its Act "as an exercise of a power purportedly given to it by s.51 of the Constitution". The Tribunal

consequently agreed that "where an alleged source of the right relied on to support an ordinance is a section of the Constitution it is clear that the matter arises under the Constitution". This reasoning does not apply to questions 10 and 11, where the supporting argument is that the power to pass the ordinances lies solely in the respective diocesan constitutions independently of the national Constitution and is a power the diocesan synods possessed, in some cases, before 1962. In this case the questions do not arise under the Constitution. Answers to other questions will have bearing on the situation in Canberra and Goulburn and in Adelaide, but in their present form questions 10 and 11 cannot be entertained by the Tribunal.

The responses of the Tribunal under s.63 are advisory opinions only, and it would not serve the good of the Church that the Tribunal should in addition offer gratuitous advice as to the interpretation of individual diocesan constitutions which might subsequently be the subject of proper litigation in appropriate civil courts.

Questions 5, 6 and 9 will be considered separately.

Questions Related to the Fundamental Declarations

The Tribunal has been urged by some submissions not to re-open questions relating to sections 1-3 of the Constitution. It is alleged by Mr Mason that "the Appellate Tribunal has repeatedly held (1980, 1981, 1985, 1987) that the ordination of women to holy orders is not inconsistent with Holy Scripture, the commands of Christ, or the Church's commitment to preserve the three orders of bishops, priests and deacons in the sacred ministry" (submission p.2). However, the position of the Tribunal and the extent of its opinions as given in accordance with the Constitution are not as Mr Mason alleges. (A more accurate statement of the Tribunal's opinions is given in 2(b) (i) to (v) of Mr Ellicott's submission on p.2).

No question was referred to the Tribunal in 1985 or 1987 as to the consistency of women priests or bishops with sections 1-3 of the Constitution (the Fundamental Declarations) and no opinion was given by the Tribunal on this subject. In the reasons furnished by members of the Tribunal for their opinion on the questions asked, views were expressed

about sections 1-3 by some members. These views, however, did not constitute an opinion or opinions of the Tribunal in the terms required by the Constitution. The only opinion of the Tribunal on sections 1-3 was given in 1980 and repeated verbatim in 1981. However, the circumstances of the giving of this opinion were such as to render reliance on it unsafe. No parties were notified of the hearing, no submissions were made to the Tribunal, no reasons for the opinion were furnished, and the Tribunal indicated that "there was no matter involving doctrine within the meaning of section 58(1) of the Constitution which required the Tribunal to obtain the opinions of the House of Bishops and the Board of Assessors". There is no evidence that the Tribunal in its 1980 opinion gave consideration to the meaning of "the commands of Christ, "his doctrine" and "his discipline" which this Church is pledged to "obey", "teach", and "follow and uphold". "Doctrine" appears to have been interpreted narrowly (presumably as, in accordance with s.74(1), "the teaching of this Church on any question of faith"), and "discipline" was likewise defined narrowly. Also, it must be recognized that the debate on the biblical roots of the issue has vastly expanded throughout the church since 1980, as Mr Lindsay observed, and it would seem entirely appropriate that the present reference from the Acting Primate should contain a question relating to sections 1-3 of the Constitution (Question 8).

Questions 1 and 2

The Bishop of North Queensland is empowered to ordain or consecrate only canonically fit persons and to do so only in accordance with the Constitution of the Anglican Church of Australia and the Constitution of his own diocese. These conditions include adherence to the requirements of the Ordinal and the law of the Church of England as embodied in the consensual compact of members of the Church of England (now the Anglican Church of Australia) in the Diocese of North Queensland, except insofar as this compact may have been modified in accordance with the Constitution of the Anglican Church of Australia or the diocesan constitution of North Queensland.

Insofar as Question 1 is asking whether in its own terms the constitution of the Diocese of North Queensland empowers its bishop to ordain or

consecrate a woman, it is not a question which arises under the Constitution. However, the national Constitution overrides any diocesan constitution where the Fundamental Declarations and Ruling Principles of the national Constitution are concerned, and I agree with the opinion of the Deputy President to the extent he holds that the national Constitution precludes the ordination of a woman as a priest in the sacred ministry referred to in s.3 of the Constitution. The answer to Question 1, therefore, if answer is required, must be No.

It is my opinion that the prohibition of the Constitution arising from s.5 includes not only the absence of a canon authorizing such ordination, but the inconsistency of such ordination with both the Fundamental Declarations and also the Ruling Principles thereof. Insofar as such ordination is inconsistent with the Fundamental Declarations it cannot be secured under the Constitution at all; a canon purporting to authorize it would be invalid. If such ordination is inconsistent with the Ruling Principles only, it cannot be secured except by an amendment to s.4 itself. If the ordination to the priesthood of men only belongs to "the doctrine and principles of the Church of England embodied in the Book of Common Prayer" together with the Ordinal and Articles, which "this Church retains and approves", then the ordination of women cannot be authorized under s.4; only the amendment of s.4 could secure such a change. It has been argued by some that the restriction of the priesthood and episcopate to men is in our Church a "rule of discipline" only, in terms of s.4, and is therefore alterable by canon or rule as provided in s.4. I do not accept this view. The only things that can be "ordered" under s.4 are "forms of worship and rules of discipline". These are in their nature alterable, but the doctrine and principles of the Church which underlie them are not alterable under this section as it stands. Since the male character of the priesthood and episcopate is part of the doctrine and principles of the Church of England retained and approved by the Anglican Church of Australia, and not a mere rule of discipline which can be made, altered or revised by General Synod, it is not open to alteration by a canon or rule of General Synod under s.4.

In 1981 the Tribunal gave its opinion that if there was a doctrine or principle of the Church of the kind referred to in s.4 with which the ordination of women was inconsistent, an amendment to s.4 (such as was

then being proposed) would remove the difficulty and enable a canon to be passed authorizing the ordaining of women as bishops, priests and deacons. In 1985 the Tribunal gave its opinion, by a majority of 4 to 3, that no such inconsistency existed. However, I adhere to the minority opinion that there is such an inconsistency in relation to the ordination of women as priests and bishops, and that only an amendment to s.4 could enable a canon to be passed to authorize it, even if the greater obstacle of the Fundamental Declarations did not exist.

I agree with the reasons given by the Deputy President as to the further provisions of the Constitution which prevent the Bishop of North Queensland from ordaining or consecrating a woman.

The answer to Question 2 is Yes: sections 1-4, 71(2).

Question 3: Yes.
I agree with the reasons given by the Deputy Chairman.

Question 4: No.
I agree with the reasons given by the Deputy Chairman.

Question 5: No.
The question is confused. "Canonically fit deacon who is a woman" is a contradiction in terms if it means 'canonically fit for the priesthood', since under the present law of the Church canonical fitness includes the qualification of being male.

The Sydney submission does not concede that Question 5 arises under the Constitution. It could, however, be thought to arise under the Constitution at least to the extent that it implicitly invokes s.3 of the Constitution which, according to some submissions, positively requires a diocesan bishop to ordain a woman as a priest in some circumstances. However, I dismiss this argument on the ground that "the commands of Christ" referred to in s.3 cannot be held to be new commands or old commands newly identified. The commands of Christ referred to in s.3 must be, like Christ's teaching, sacraments, and discipline, what the Catholic and Apostolic Church has already received as such. The

Fundamental Declarations are stating an existing agreed position: they are not in the Constitution to authorize novelties or the individual inspiration of bishops or - whatever is to be said for the concept - the development of doctrine. S.3 is reiterating the position of the Church as every priest (including those who become bishops) has accepted it at his ordination. Having declared his acceptance of the holy scriptures and the limitation of his teaching to what may be concluded and proved by the scriptures, the candidate is asked:

> Will you then give your faithful diligence always so to minister the doctrine and sacraments and the discipline of Christ, as the Lord hath commanded and as this Church has received the same ...? (my emphasis).

For an individual bishop to act on what he took to be a special revelation of the Lord regarding the doctrine and discipline of Christ, contrary to what his Church had received, would be 'a very horrid thing'. No bishop may ordain a woman (or anyone else) leaning on his own understanding, unless this has the endorsement and recognition of the whole Church of God in which he is a bishop. The answer to Question 5, insofar as it may be an admissible question, must be No.

Questions 6: No.

The Appellate Tribunal determined in 1987 that the Ordination of Women to the Office of Deacon Canon 1985 was validly passed by the General Synod in accordance with the Constitution. This canon, inter alia, permitted the bishop of a diocese to ordain a woman to the office of deacon, and to license as a deacon in his diocese any woman who had been ordained elsewhere to the office of deacon. This has been the only "determination" of the Tribunal on the subject of women's ordination. The question was referred to the Tribunal under s.31 of the Constitution, and the Tribunal's opinion thereon is therefore "final". The canon has to be taken as the present law of this Church.

There was some argument at the time, repeated since, that there is an implied "principle of progression" in the canons and Ordinal of the Church of England whereby a person ordained deacon is qualified (subject

to having been found "faithful and diligent in executing the things appertaining to the ecclesiastical administration") to be a candidate for priesthood in due time, and that therefore the admission of a woman to the diaconate ipso facto opened the way for her ordination as priest and her general eligibility to be a bishop. However, it is not my view that this "principle of progression" is of such a kind, or is so fixed, as to compel the conclusion drawn by some. No such expectation or provision is found in the 1985 canon itself, and it has not been assumed in other parts of the world where women have been admitted as deacons. Although progression is an expectation reflected in the canons of 1603 and the Ordinal, the expectation as there embodied presupposes a wholly male diaconate. It cannot be assumed that there is a principle which, by itself, would hold good following the admission of women to the diaconate.

It is my opinion that nothing in the 1985 canon authorizes a bishop to ordain a woman to the priesthood, with or without an ordinance of the diocese to that effect. The canon permits the language of the Ordinal of the Book of Common Prayer or other authorized ordination service for deacons to be "adapted for the purpose so far as may be necessary for the admission of a woman to that office". A similar adaptation would be necessary if women were to be made priests, and canonical authority given for the adaptation; but there is no provision for any such liturgical change in the 1985 canon.

Question 7: No

I agree with the reasons given by the Deputy Chairman.

Question 8 (1): Yes
(2): Yes

I concur with the Deputy Chairman and Mr Justice Handley as to the restriction on diocesan synods imposed by s.71(2) and certain other sections of the Constitution, and I agree with their reasons for this.

In addition it is my opinion that sections 1, 2, 3 and 4, which set out the Fundamental Declarations and Ruling Principles of this Church under

the Constitution, make it unlawful for a bishop or a diocesan synod to do either of the things indicated in (1) and (2) of the question.

In my view this is the crucial question of the present reference, upon whose answer the most serious consequences for the nature and character of the Church depend. In giving my opinion I refer to what I said in 1986 (opinion in the matter of the Ordination of Women to the Office of Deacon Canon 1985: reference under s.31) as to my own role as an episcopal member of the Tribunal and as to the purpose and function of the Fundamental Declarations in the Constitution in relation to the Church's ministry. What I bring to the questions relates primarily to the concerns of a bishop. As a bishop I have a paramount responsibility to understand, teach and preserve the tradition of the church.

The ordination of priests is represented in our Anglican Ordinal as the proper equivalent or continuance, in our Church, of the appointment and recognition of elders or bishops in the congregations of the New Testament Church. Both in the New Testament and in the Ordinal the task of presbyters is the oversight of congregations and their "governance" by means of the Word of God as received from the apostles of Christ. This "sure word" (Titus 1:9) which the presbyter receives, and in turn transmits, is regarded as having the authority of Christ. It comprises "the sound words of our Lord Jesus Christ" (1 Tim. 6:3). The requirement of the Ordinal that a priest minister "the doctrine and sacraments and the discipline of Christ, as the Lord hath commanded and as this Church hath reeceived the same" is designed to put him in the same position as a New Testament presbyter who similarly received the apostolic charge as the commandment of the Lord, and as having the same content.

The point I want to emphasize here is that in identifying "the commands of Christ ... his doctrine ... and ... his discipline" we are bound to look not only to the Gospels, but to what was transmitted by the apostles to their churches as recorded in the Epistles.

Let me elaborate.

Our Ordinal reflects, deliberately, the paramount teaching role of the presbyter as seen in the New Testament and the absolute commitment of

that role to the doctrine received from the apostles: "a bishop (i.e. an elder) as God's steward ... must hold firm to the sure word as taught (kata ten didachen), so that he may be able to give instruction in sound doctrine ..." (Titus 1:7-9). J.N.D. Kelly comments: "He must be heart and soul devoted to, and by implication convinced of, the truth of the apostolic message. That message is trustworthy, i.e. it can be relied upon, when it agrees with the teaching, i.e. faithfully reflects 'the pattern of teaching' (Rom. 6:17) which the Apostle himself had delivered" (Black's New Testament Commentary The Pastoral Epistles, p.232f).

This "pattern of teaching" is, as I set out in 1986, an ascertainble body of doctrine which rests on "the sound words of our Lord Jesus Christ" (1 Tim. 6:3). We know that the apostles were required to "teach them (new disciples) to observe" what Jesus "commanded"" (Matthew 28:20). Naturally, much of this teaching is recorded in the Gospels. But it is not confined to the Gospel records. The teaching laid on his churches by St Paul is also what Jesus commanded. Sometimes this teaching is parallel to, or can be generally related to, sayings in the Gospels. 1 Cor 7:11f, for instance, records a "charge" of the Lord (paraggello) "that the wife should not separate from her husband, and that the husband should not divorce his wife". Neither command is identical with any command recorded in the Gospels, though it is consonant with teaching given in Mark 10:2-9 and parallels. 1 Thess. 4:1-8 (on abstinence from fornication, porneia) is "instruction through the Lord Jesus" (NIV: "instructions by the authority of the Lord Jesus"), and 1 Thess. 4:15-18 is a declaration "by the word of the Lord" (NIV: "according to the Lord's own word") regarding the parousia. St Paul's teaching regarding the Lord's Supper in 1 Cor. 11:33ff - which, incidentally, contains our primary source of the command to "do this in remembrance of me" - is what, he says, "I received from the Lord" and "what I also delivered to you".

It is not too much to say that what St Paul delivered to all his churches as "the traditions" (see e.g. 1 Cor. 11:2 and 2 Thess. 2:15, 3:6) - which he himself "received" - was so delivered as, in varying aspects, the commands, the teaching, the sacraments, and the discipline of Christ, and that we, through our ministries, are committed to "receive" and "observe"

or "obey" these traditions as the Word of Christ. Our acceptance of the canonical scriptures carries this implication and determines for us the limits of the scriptures which contain such apostolic traditions.

Two segments of the apostolic traditions are of special importance as touching the place of women in the church. The so-called "household tables" in Ephesians 5 and Colossians 3 (and also in 1 Peter) are among the apostolic traditions to the churches. That which concerns the relation of man and woman in marriage is sanctioned as part of a "mystery", or revealed truth, concerning Christ and his church. The subjection of wives to husbands is specifically bound up with wives' obedience to Christ, i.e. to their observance of his teaching, commands and discipline. "Wives, be subject to your husbands as to the Lord" (Eph. 5:22); "Wives, be subject to your husbands, as is fitting in the Lord" (Col. 3:18).

Paul's injunction in 1 Tim. 2:12, "I permit no woman to teach or to have authority over men: she is to keep silent" - i.e. she is not to have the role of an elder/bishop - occurs in a passage where he is giving instructions as to "how one ought to behave in the household of God, which is the church of the living God, the pillar and bulwark of the truth". In it, Paul claims to have been "appointed a preacher and apostle (I am telling the truth, I am not lying) a teacher of the Gentiles in faith and truth". He goes on to say to Timothy: "If you put these instructions before the brethren you will be a good minister of Christ Jesus, nourished on the words of the faith and of the good doctrine which you have followed ... take heed to yourself and to your teaching: hold to that, for by so doing you will save both yourself and your hearers". We are dealing with teaching "necessary to salvation".

1 Cor. 12 to 14 is, like 1 Tim. 2 and 3, a "package" on church "order". Paul concludes the section with these words: "If anyone thinks that he is a prophet, or spiritual, he should acknowledge that what I am writing to you is a command of the Lord. If any one does not recognize this, he is not recognized" (1 Cor. 14:37f). The final item in this "order" relates to the subordination of women and their consequent silence in church. Whatever the precise implication of this: "as in all the churches of the saints, the women should keep silence in the churches.

For they are not permitted to speak, but should be subordinate, as even the law says": it is part of the tradition of all the churches which comes under the authority of "the command of the Lord". It follows that it is part of the commands, teaching and discipline of Christ which, under our Constitution, this Church is committed to obey and observe. At the very least, this injunction, supported as it is by the pastoral epistles and by the household-tables of Ephesians, Colossians and 1 Peter, prevents us from ordaining women presbyters whose role, according to our Ordinal, would be that of the oversight - the cure and charge - of the congregation, with responsibility for the authoritative teaching of the congregation.

I would add that the strength of the subsequent universal practice of both Eastern and Western Christendom in not ordaining women as priests, lies in their acceptance of the apostolic rule, and, through this, their obedience to the commands, teaching, and discipline of Christ.

The Church which departs from this rule does so at very great peril to its relationship to the Lord of the Church and to its adherence to the apostolic witness by which alone we have access to the mind of Christ.

With regard to the Ruling Principles of the Constitution and s.4 in particular, I will only say that the question of ordination to the priesthood must be a question of doctrine (and not only of discipline) if the Ordinal, in which the doctrine and principles of the Church of England is embodied (along with the Book of Common Prayer and 39 Articles) reflects the commands and teaching of Christ, and his discipline, as I have argued above.

As has been pointed out in submissions, "discipline" must refer to more than the internal discipline applicable (e.g. to the clergy) under ordinance of a particular diocese. There is also the discipline of the national church which is what s.4 refers to. This is the application of, and adherence to, the doctrine and principles of the Church. Beyond both is the discipline of Christ, i.e. the "yoke" he lays on his disciples, which is integrally related to his commands and his teaching.
If the admission of women as priests is inconsistent with sections 1 to 3, it is, a fortiori, inconsistent with s.4.

Question 9 (a): No

(b): No

In answer to question 6 I expressed the opinion that "nothing in the 1985 Canon authorizes a bishop to ordain a woman to the priesthood, with or without an ordinance of the diocese to that effect".

With regard to that part of question 9 which relates to the consecration of a woman to the order of bishops, such an action would apparently be excluded by the definition of canonical fitness in respect of a bishop given in section 74(1) of the Constitution. The qualifications required in the Church of England in England for the office of a bishop at the date when the Constitution took effect certainly included being a man and not a woman.

The Constitution explicitly refers to canonical fitness only in the case of election to be a diocesan bishop. Indeed the Constitution makes no mention anywhere of assistant bishops. However, the Canon to Regulate the Appointment of Assistant Bishops 1966, which is the head of power for the creation of this office, provides that "no priest appointed to the office of an assistant bishop in a diocese within a province shall be consecrated unless his (sic) appointment as to canonical fitness has been confirmed as prescribed by ordinance of the provincial synod". This formula for confirmation of canonical fitness is identical to that in the case of the election of a person to be a diocesan bishop as required in s.8 of the Constitution and though it is not required that the procedure for confirmation be the same in the two cases there is no hint that the meaning of, or qualifications for, canonical fitness itself could be different in the two cases of diocesan bishop and assistant bishop. It would be a serious breach in the integrity of the episcopate if the canonical fitness of an assistant bishop were different from the canonical fitness of a diocesan bishop, and there is no historical or constitutional evidence to support the idea that they could be different.

Questions 10 and 11.

It does not lie with the Appellate Tribunal to consider whether a diocesan ordinance has been duly made in accordance with powers conferred on the synod by the constitution of that diocese. This is not in itself a question which "arises under the Constitution" as required by s.63. Questions 10 and 11 therefore are in their precise form inadmissible. However, since "the national Constitution precludes the ordination of a woman as a priest in the sacred ministry referred to in s.3 of the Constitution" (see answer to Questions 1 and 2) it is ultra vires the powers of a diocesan constitution to confer on a diocesan synod the power to pass an ordinance authorizing the ordination of women to the office of priest. For practical purposes the answer to questions 10 and 11 must be taken to be No.

Donald Robinson

(The Most Rev) Donald Robinson

17 October 1991

THE APPELLATE TRIBUNAL

REASONS OF ARCHBISHOP RAYNER

I agree with the answers given by the President, and in general I concur in the reasons he has given for those answers. There are, however, certain additional considerations which I wish to add under three of the headings used in the President's Reasons.

Ritual

Section 3 of the Adelaide ordinance purports to authorise the adaptation of the language of the ordinals of the Book of Common Prayer or of An Australian Prayer Book "so far as may be necessary for the admission of a woman to that office" (of priest). It is submitted by the Diocese of Sydney that this involves an alteration of ritual and is contrary to s.71(1) of the Constitution which states:

> Nothing in this Constitution shall authorise the synod of a diocese or of a province to make any alteration in the ritual or ceremonial of this Church except in conformity with an alteration made by general synod.

In the ordinal attached to the Book of Common Prayer there appears to be only one specifically male reference which would need to be altered. This occurs in the bishop's opening statement to the congregation inviting information as to any impediment or notable crime in any of the ordinands "for the which he ought not to be received into this holy ministry". (The word "brethren" is also used in the bishop's exhortation to the ordinands, but this word commonly had inclusive, not gender-specific, connotations). In An Australian Prayer Book the male pronoun is used in the parallel invitation and in a rubric that follows, and "brethren" is modernised to "brothers". There is no other

specifically male reference in either ordinal, and certainly none in the prayers or in the words associated with the central act of laying on of hands.

Two considerations lead me to conclude that it is not contrary to s.71(1) for the Adelaide ordinance to authorise these minimal alterations in language. If the Adelaide ordinance is otherwise valid, as I believe it to be, these alterations of language should be understood as a commonsense modification of the rite. There is a parallel of long standing which has never been questioned, namely the much more extensive modification of the language of the rite necessary when only one candidate is being ordained. The entire rite in the ordinal is in the plural, and considerable modification has to be made to suit it for one ordinand. Once the principle is accepted that a woman can be ordained, the change of language is of the same kind involved in the change from plural to singular.

The other consideration relates to the requirement of s.71(1) for "conformity with an alteration made by general synod". The principle of a change in language in the rite for admitting a woman to one of the holy orders has already been accepted by General Synod in the Ordination of Women to the Office of Deacon Canon 1985. It is this principle which is enacted in the Adelaide ordinance with respect to the rite for admission to another order of ministry. If the authorisation of the ordination of women to the priesthood by the Adelaide ordinance is itself valid, the authorisation to adapt the language of the rite is in my opinion in conformity with the principle accepted by General Synod in a parallel case. It may well be that the inclusion of this provision in the Adelaide ordinance is unnecessary, but it is not of itself invalid.

Accordingly, I agree with the Reasons of the President in upholding the validity of the Adelaide ordinance, but without the reservations which he expresses with respect to section 3 of that ordinance.

The Inherent Powers of a Bishop

There is no doubt that a bishop by virtue of his consecration is given the power to ordain. In the Ordinal the candidate is asked by the consecrating archbishop, "Will you be faithful in ordaining, sending, or laying hands upon others?". This power is inherent in the episcopal office and is not granted by any constitution or synod.

The power to ordain is not, however, unfettered and the law has consistently placed limits on the exercise of that power. These limits are of two kinds. One is fundamental and concerns the subject of ordination. An unbaptized person, for example, cannot be ordained and the ordination of such a person would be invalid.

Other limits placed on the exercise of a bishop's power to ordain are of a different character. A bishop can only lawfully ordain within the sphere of his own jurisdiction. The candidate must be of a certain age, and there are other requirements in the canons and the ordinal. The bishop has lawful authority to exercise his power of ordination only within these limits. These limits are not in themselves irrevocable and they might be varied from time to time by the constitutional process of the Church. If a bishop were to ordain a person outside those limits, the ordination would be irregular but not necessarily invalid.

If the law of this Church inhibits the ordination of women to the priesthood, then constitutionally a bishop of this Church does not have the authority to exercise his power of ordination to ordain a woman. In my opinion, for reasons set out by the President and other members of the Tribunal with which I agree, the law of the Church of England on 31 December 1961 did not permit the ordination of women to the priesthood. Under s.71(2) of the Constitution this law continues to be in force in the Anglican Church of Australia "unless or until the same be varied or dealt with in accordance with this Constitution". The Constitution does not permit a bishop on his own authority to vary the law, and as a bishop of this Church he is bound by the Constitution and Canons of this Church (see s.70).

The question arises whether the ordination of women to the priesthood and consecration to the episcopate is subject to the first or second kind of limit listed above. Phillimore's opinion that women, like the unbaptized, are "absolutely incapable of ordination" because "by nature, Holy Scripture and catholic usage they are disqualified" has been frequently quoted in the submissions made to the Tribunal in this and previous hearings. I have already indicated my agreement with the view that Phillimore was correct in stating that the law of the Church of England at the time did not permit the ordination of women (to any of the three orders). In its determination on the validity of the Ordination of Women to the Office of Deacon Canon 1985 the Tribunal has already indicated its opinion, however, that Phillimore's explanation of the reasons for the existing law was not binding on this Church. None of the arguments presented to us cause me to alter that opinion. It follows that the limitation on the power of a bishop to ordain women to the priesthood or the episcopate is of a kind that could be varied by the

constitutional process of this Church. That process requires synodical legislation; it does not lie with a bishop (or even the House of Bishops) alone.

Section 3 of the Constitution and the Commands of Christ

As part of the Fundamental Declarations of the Constitution, s.3 states that "This Church will ever obey the commands of Christ". This statement appears straightforward, but its apparent simplicity is deceptive. It implies that there are certain clearly identifiable commands of Christ, presumably to be found in holy scripture, which this Church and its members are bound to obey. That the simplicity is deceptive is indicated by the fact that on the one hand it has been argued before us that for women to speak in the congregation (and therefore for women to be ordained) is contrary to the command of Christ, and on the other hand it has been argued that to refuse to ordain a canonically fit woman deacon to the priesthood solely on the ground that she is a woman is contrary to the command of Christ.

There is no problem with certain broad and universally applicable commands of Christ such as the command to love (as expressed for example in Mark 12:28-31 and John 15:12). There are, however, other instructions of Christ which have the character of commands, but whose universal application is not nearly so demonstrable. For example, Christ said of the law of the Old Testament:

> "not an iota, not a dot, will pass from the law until all is accomplished. Whoever then relaxes one of the least of these commandments and teaches men so, shall be called least in the kingdom of heaven" (Matthew 5:18-19).

Yet the Church has never taken the view that it is bound by every detail of Old Testament law. The whole tenor of our Lord's teaching was that the Old Testament law was to be understood not as requiring obedience to the letter of the law but to the fulness of its spirit. Again, there are instances where Christ utters commands which are apparently to be understood as hyperbole (e.g. Mark 9:43-47). Any who have attempted to take these particular commands literally have generally been recognised as mentally unbalanced. Again, there is the commandment to the rich ruler, "Sell all that you have and distribute to the poor" (Luke 18:22). This might on the face of it be taken as a universal command, particularly because of its association with the general principle which follows: "For it is easier for a camel to go through the eye of a needle than for a rich man to enter the kingdom of heaven" (Luke 18:25). Yet the Church has never felt itself or its members to be universally bound by this command.

In fact, what have been taken in the New Testament itself and in the subsequent history of the Church to be commands of Christ have frequently represented the application of Christ's broad commands to particular people and particular situations. The command to the rich ruler to sell all he had is to be understood as a particular application (in this case by Christ himself) of the broader commands to love God and not to love money. These general commands had special application to a person who Jesus recognised loved and trusted in his possessions. The same broad commands would not necessarily have the same application to other people in other circumstances.

This is why the Church has sometimes understood the commands of Christ to lead to different specific consequences at different times. In a situation where money was lent to enable a person to survive, for example, the exaction of

interest might be seen as contrary to the command of Christ; where it was lent to enable a person to start a profitable business, Christ's command might have quite different application. This is why Christian ethicists recognise that Christian duty cannot be expressed simply in terms of literally obeying a clearly defined set of commands.

In my 1987 Reasons (pp. 46-47) I discussed the way in which "the command of the Lord" of 1 Corinthians 14:37 relating to the silence of women in the congregation (and hence to the possibility of the ordination of women) should be understood. None of the arguments put to us have caused me to resile from the opinion which I then expressed that this was to be understood as an application by St Paul of broad commands of Christ to a particular disorderly situation and not as a command universally binding on the Church.

Now the argument has been put to the Tribunal from the other side that it might be contrary to the command of Christ for a bishop to refuse to ordain a canonically fit deacon to the priesthood solely on the ground that the deacon is a woman. It is not argued that there is a specific command of Christ recorded in scripture or elsewhere to this effect, but that such a command represents a proper and compelling application of the principles expressed by Christ in the gospels.

This may well be true. There is no need for me to express a final opinion on that. But whether true or not, I do not accept that s.3 justifies a bishop claiming the authority of the Constitution to take action which would be prohibited by other parts of the Constitution. This would open the way to any person or group of persons claiming the authority of the Constitution to undertake any action which in private or group conscience they believed to be right.

If the conscientious convictions of a bishop, or indeed of any member of the Church, lead that person to conclude that action is needed which is not permitted by the present law of the Church, the right approach is to seek to change the law by constitutional means. For a bishop to act otherwise would be to violate his reponsibility of allegiance to the Constitution.

The argument that a bishop has authority to ordain a woman to the priesthood on the ground of his conscientious conviction that it would be contrary to the command of Christ to refuse to do so raises issues which go beyond the Tribunal's task of interpreting the Constitution. It implies that such action would be a prophetic one, and that prophetic action cannot be contained within the shackles of a constitution. The prophet - indeed any Christian - must ultimately act according to conscience, provided that conscience is well formed. Once convinced that the ordination of women to the priesthood is an implicit requirement of following Christ's commands, the prophetic bishop (it is argued) must follow conscience by ordaining suitably qualified women, even if such ordination is constitutionally irregular. It is further argued by some that the case is stronger if the bishop is supported in his conviction by a large group of his fellow bishops.

This Tribunal cannot be the judge of any individual's conscience. Its responsibility is to interpret the law to the best of its ability. It might, however, appropriately point to the consequences of taking unlawful action in following the dictates of conscience. Such consequences might well include the shattering of the constitutional framework which was devised painfully (albeit imperfectly) over many decades to preserve the unity and foster the common mission of this Church. There is clearly divided opinion in the Church on how the commands of Christ are to be understood with respect to the ordination of women to the priesthood. There can be little doubt, however, of

Christ's call for the unity of his disciples. That unity is best preserved by agreement to work within the Constitution. Under the Constitution there are procedures by which the present law of the Church respecting the ordination of women may be maintained and there are procedures by which it may be altered. Whichever path is trodden, some will be uneasy; but agreement to work within the framework of the Constitution is the only way by which the unity of this Church can be preserved.

I am of the opinion that a diocesan bishop does not have authority to ordain a canonically fit woman deacon to the priesthood solely on the ground that he believes that it is contrary to the command of Christ to refuse to do so.

IN THE MATTER of Two References to the Appellate Tribunal in 1990 relating to the Ordination of Women

REASONS OF THE DEPUTY PRESIDENT

In my opinion the Constitution of the Anglican Church of Australia precludes the ordination of a woman as a priest in the sacred ministry referred to in s.3 unless a canon of General Synod has been enacted to permit it. So much follows, I consider, in particular from the provisions of s.5, s.26, s.51 and s.71(2) of the Constitution. All the questions that have been put to the Tribunal upon these two references should be answered accordingly, and as questions arising under the Constitution.

I adhere to the view, expressed in my reasons published in March 1987 upon the 1986 reference to the Tribunal, that, at least until the Sex Disqualification (Removal) Act 1919, it was part of the constitutional law of the Church of England that a woman could not enter Holy Orders. I am satisfied also that that law was not abrogated before the Constitution of the Australian Church took effect on 1st January, 1962. The law to that effect was and is a precept, principle or rule of discipline and as such it was part of the "law of the Church of England ... relating to ... discipline" in terms of s.71(2) of the Constitution. The word "discipline" as variously used in the Constitution is one of considerable width, as the inclusive definition in s.74(1) shows. There is no reason to suppose that, having regard to the definition, it does not include in s.71(2) the precept, principle or rule to which I have referred.

History indicates that all Australian dioceses generally accepted up to 1st January 1962 that it was "an essential part of their Constitution that they are subject to the same laws as are binding on [the Church of England] in England, save in matters which, owing to difference of political circumstances, must ex neccesitate be subject to different conditions from those which exist in England". That is a quotation from paragraph 10 of the English Nexus Opinion of 1911, which greatly influenced the formulation of the national Constitution over the succeeding 50 years, including, as I would take it, the terms of s.71(2). A host of circumstances no doubt dictated the inappropriateness in individual Australian dioceses of parts of the law of the Church of England and those parts were sometimes by implication (and sometimes expressly) abrogated here before 1962. Nothing to which we have been referred or which I have discovered indicates to me that the rule that women might not be ordained was in that category. I therefore conclude that the rule was applicable and in force here on 1st January 1962. The rule has of course now been expressly abrogated in some dioceses to the extent that women may be ordained as deacons, but not otherwise.

The present autonomy of the Australian Church derives essentially from Chapter II of the Constitution, of which s.5 is for present purposes of prime significance. Section 5, however, does not by its terms distribute the powers which it recognises and confers. Being part of the Ruling Principles of the Church, it asserts for the Church "plenary authority and power to make canons, ordinances and

rules for the order and good government of the Church and to administer the affairs thereof". It goes on to say that "[S]uch authority and power" is exercisable by the synods and tribunals in accordance with the provisions of the Constitution. In order to identify the particular repositories of the undistributed powers to which s.5 refers one must turn to Part II. No powers of the kind contemplated by s.5 that are at present relevant appear to be dealt with until one reaches Chapter V, which defines and describes the legislative and other powers of General Synod.

Section 26 is the pivot of Chapter V. It is to be noted that among the several powers which s.26 confers is a power to make canons "relating to the order and good government of this Church ...". This is evidently a wider and less specific power than the power referred to in s.5 to make canons "for the order and good government of the Church"; and to the extent that it is wider it presumably derives its extra width from the words "and to administer the affairs thereof" in s.5. The legislative power conferred on General Synod by s.26 to "make canons ... relating to the order and good government of this Church" must on any view be regarded as one of great amplitude and it is, I think, the widest of any of the legislative powers conferred or recognised by the Constitution. It is difficult to see that the power is enlarged by the succeeding words "including canons in respect of ritual, ceremonial and discipline". It is tempting when interpreting these words, especially because they are found in a constitutional document, to give effect to the drafting precept which requires that no unnecessary

words should be used in expressing the intention of the draftsman. According to the precept, every word should have its due weight. Nevertheless, I think these words are probably intended to indicate, out of an abundance of caution, that matters in respect of ritual, ceremonial and discipline are comprehended within the expression "order and good government of this Church". One would have thought that this was in any event made plain by s.4. However that is, I have found it quite impossible, as no doubt others have before me, to give the Constitution a construction that will satisfy all the requirements of logic and legal principle.

Section 26 is to be compared and contrasted with s.51, which recognises the legislative (but not other) power exercisable by diocesan synods. As the Tribunal unanimously held in its 1989 opinion, s.51 refers to no head of legislative power of a diocesan synod (otherwise than of an incidental kind) that it does not enjoy under its individual diocesan constitution. Nor, in my opinion, does s.71 confer, either expressly or by implication, any power upon a diocesan synod that it does not have under its own constitution. Certainly, s.71(1) preserves for a diocese and its synod such legislative and other power (not being inconsistent with the national Constitution) as it had before the national Constitution took effect; and it secures to a diocesan synod such legislative and other power as it may derive from any lawful amendment to its diocesan constitution; but a power of a diocesan synod to legislate is not <u>conferred</u> by s.71. It has been suggested that s.71(2) of the Constitution, when considered together with the last sentence of s. 71(1),

recognises by implication that a diocese may make laws with respect to ritual, ceremonial and discipline. I agree that this is so. There can be no doubt that a diocesan synod has plenary power to make legislation with respect to matters of discipline so far as its constitution allows, but so much follows from s.51, the diocesan constitution being continued by force of s.47, subject to the national Constitution, until duly altered.

The Tribunal's 1989 opinion was concerned to consider whether s.51 provides a source of diocesan legislative power. It was either not necessary, or the Tribunal did not take the opportunity, to consider whether, and if so to what extent, s.51 constitutes a limitation upon diocesan legislative power. That question now squarely presents itself.

It follows from s.47, s.51 and s.71 that the individual constitutions of the dioceses were necessarily different after 1st January 1962 from what they were before that date: each then became subject to the national Constitution. Moreover, all diocesan constitutions remain subject to the national Constitution, whatever alterations may be made to them. No ordinance enacted by a diocese after 1st January 1962 can be made otherwise than "subject to" the national Constitution: s.51. Section 51 recognizes the power of a diocesan synod to make a law in accordance with its own constitution but limits the power so that its exercise is subject to the Constitution of which s.51 is part. The power of a diocesan synod recognized by s.51 is confined to one to make ordinances for the order and good

government of the Anglican Church of Australia within that diocese. Section 51 to that extent operates always as a limitation upon diocesan legislative power. This is a feature of the national Constitution of transcending importance which is to be borne steadily in mind.

It is argued that s.26 does not expressly confer an exclusive law-making power on General Synod. This is clearly so in the sense that a diocesan synod may legislate upon the same general subject matter as that upon which General Synod may legislate - for example, discipline. Moreover, a diocese may avoid the incidence of many a canon of General Synod: s.30. Nevertheless General Synod has legislative power by virtue of s.26 to make legislation which no diocesan synod could make, even upon a subject matter that may be common to both legislatures. General Synod may make legislation "relating to the order and good government of this Church including canons in respect of ... discipline ...". No diocesan synod may do that. Again, s.30(a) contemplates that a canon of General Synod may be deemed to "affect" the order and good government of the Church within a diocese that adopts it. No diocese can legislate so that the order and good government of the Church within any other diocese is affected. It follows that, while the legislative power of General Synod is not exclusive in terms of subject matter, it is (generally speaking) exclusive in terms of ambit. Correspondingly, in my opinion, the Constitution recognises that diocesan legislation has a limited ambit, even when a diocese may legislate upon the same subject matter as that upon which General Synod may legislate. Even the last sentence of s.71(1) does not, I think, deprive a

diocesan synod of power to legislate upon the subjects of ritual and ceremonial except in conformity with a canon of General Synod: it is only a power to make any alteration to ritual or ceremonial that is limited.

A diocesan ordinance that purports to alter the law within the diocese with respect to the class of persons who may be ordained priest does, in my opinion, amount to a law relating to the order and good government of the Church. That is something that can be done only by General Synod. The ambit of such a law is not one that is confined as a law for the order and good government of the Church within the diocese but is one "relating to" the order and good government of the Church.

The expression in s.51 "for the order and good government of the Church within the diocese" is a composite one. The validity of an exercise of the legislative power to which it refers is not tested by asking whether a law is one (a) for the order and good government of the Church and (b) taking effect within the diocese. The power recognized by s.51 is plainly very different from, and more limited than, the new grant of power conferred by s.26 (in association with s.5) to make legislation "relating to the order and good government of this Church". The limitation on the diocesan power is to be spelled out of sections 26 and 51 taken together. The words "Subject to this Constitution" in s.51 were said in the Tribunal's 1989 opinion (at pp.25-6) to "include not only the General Synod in appropriate cases first passing any authorising canon but also the limitation in the final paragraph of s.71(1) forbidding diocesan synods

to alter ritual or ceremonial ... Sydney ... puts that 'Subject to the [sic] Constitution' includes ss.1, 2, 3 and 66. Again, this must be so although there is no call in these reasons to take the submissions on this matter any further". It is appropriate to take the matter further now. In my opinion the words "Subject to this Constitution" in s.51 also include a reference to s.26 and produce the result, for example, that when legislating upon matters of discipline a diocese can not validly legislate for matters that are reserved for legislation of General Synod.

The restriction upon diocesan synods is not merely a matter of the geographical extent of a diocesan law. As the Tribunal indicated in its November 1989 opinion (at p.26) a diocese can legislate with effect outside diocesan boundaries. The Tribunal said: "For instance, if there is an ordinance providing for the election of a diocesan bishop the person so elected will be recognised as the bishop throughout Australia". But mere extra-territorial recognition is not to the present point. An ordinance for the election of a diocesan bishop could not, so far as I can see, be one for the order and good government of the Church otherwise than within the diocese. Nor is the restriction confined to the matter of nexus between the subject matter of the diocesan law and the diocese itself to support the law as a law for the order and good government of the Church within the diocese. I must expressly reject the view that the words "within the diocese" in s.51 are directed simply to requiring such a nexus. They do have that limiting effect but, more importantly, they limit the content of the diocesan

legislative power so that it does not encroach on that of General Synod by way of authorizing legislation relating to the order and good government of the Church as a whole.

The present point is that a diocesan law providing for the ordination of a female deacon as a priest within the diocese would be one relating to the order and good government of the Church. It would be so because it would purport of itself alone to authorize the ordination of a priest of the Church. If it purported to authorize an ordination of the female deacon as anything less it would be a nonsense. A person is not ordained as a priest within a diocese, but is ordained for the office and work of a priest in the Church of God, as the Ordinal lays down. That principle I take to be axiomatic while the Ordinal remains as it is. A person is a priest of the Church or not. A diocesan ordinance purporting to permit a person to be ordained as a priest, but anything less than a priest of the Church, cannot achieve anything by way of permitting an ordination of a kind known to the Church. It follows, in my opinion, that a law permitting a bishop to ordain as a priest of the Church a person not otherwise eligible cannot be anything else than one that relates to the order and good government of the Church as a whole. I conceive that such a law, being a matter of common concern to every diocese, is not within the competence of a diocesan synod.

The conclusion I have expressed gives appropriate operation to s.7 of the Constitution, which preserves the diocese as the unit of <u>organization</u> of the Church. Subject to the national Constitution, each diocese continues as it

was by virtue of s.43 until altered in accordance with the national Constitution; and the constitution of the diocese continues, subject to the national Constitution, as it was by virtue of s.47 until duly altered. In each case the subjection to the national Constitution, with all that that entails, was voluntarily undertaken, and with the safeguards to the diocese afforded by the provisos (a) to (d) to s.30. No law relating to the order and good government of the Church, including one in respect of the ritual, ceremonial or discipline of the Church, can affect a diocese unless and until it chooses; and the corollary is that no law relating to the order and good government of the Church can be made by a diocese. This is not to say that a law for the order and good government of the Church within a diocese with respect to (for example) discipline may not be made by a diocese: it may be made, but necessarily it cannot be one which affects the order and good government of the Church within any other diocese.

These reasons deal essentially with all the questions submitted upon the present references and I do not find it necessary to distend them unduly with obiter dicta. I would nevertheless add that question 5, which appears to ask whether a diocesan bishop has authority according to his subjective belief, strikes me as singularly startling. If a bishop's refusal to ordain <u>were</u> contrary to the command of Christ he would no doubt find it necessary to revise his point of view. To suggest, however, that the bishop's own belief is the determinant of his authority is, to my mind,

entirely contrary to the Constitution by which he and every other bishop is bound.

The foregoing reasons lead to the following answers to the eleven questions submitted -

1.	No.
2.	Yes, section 71(2)
3.	Yes.
4.	No
5.	No
6.	No
7.	No
8(1)	Yes
(2)	Yes
9(a) & (b)	No
10.	No
11.	No

R.C. TADGELL

IN THE APPELLATE TRIBUNAL

REASONS FOR JUDGMENT OF MR JUSTICE YOUNG

I have found it useful to find the answers to the questions put to the Tribunal by the Acting Primate, by examining a series of points which have arisen during consideration of these questions. I will thus approach the questions under the following headings:-

1. PRELIMINARY.

2. THE QUESTIONS.

3. DEFINITION OF TERMS.

4. WAS THERE ANY RULE IN ENGLAND AS AT 31/12/1961 WHICH EXCLUDED WOMEN FROM BEING INCLUDED AMONGST THE ORDER OF PRIESTS?

5. WHAT OPERATION DOES CLAUSE 71(2) OF THE 1961 CONSTITUTION HAVE ON ANY SUCH RULE?

6. IF THERE IS SUCH A RULE, IS IT COMPETENT FOR A DIOCESE TO ALTER SUCH A RULE?

7. IF THERE IS SUCH A RULE, AND IT IS COMPETENT FOR A DIOCESAN SYNOD TO ABROGATE IT, HAS THAT RULE BEEN ABROGATED IN -

   (a) THE DIOCESE OF CANBERRA/GOULBURN;

   (b) THE DIOCESE OF NORTH QUEENSLAND; or

   (c) THE DIOCESE OF ADELAIDE?

8. WHAT WAS THE EFFECT, IF ANY, ON THE ABOVE POINTS OF THE PASSING BY THE GENERAL SYNOD OF THE

ORDINATION OF WOMEN TO THE OFFICE OF DEACON CANON 1985 OR THE ADOPTION OF THAT CANON BY THE DIOCESES REFERRED TO IN POINT 7?

9. WHAT IS THE SIGNIFICANCE OF ORDAINING A PERSON TO THE OFFICE OF PRIEST?

10. WHAT IS THE POWER VESTED IN THE BISHOPS OF THE SEVERAL DIOCESES NAMED IN POINT 7 IN AND ABOUT THE ORDINATION OF PRIESTS?

11. CAN THE POWER IN POINT 10 BE MODIFIED, DIMINISHED OR AUGMENTED BY -

(a) THE GENERAL SYNOD;

(b) AS FAR AS THE BISHOP OF CANBERRA/GOULBURN IS CONCERNED BY THE SYNOD OF THE DIOCESE OF CANBERRA/GOULBURN;

(c) AS FAR AS THE BISHOP OF NORTH QUEENSLAND IS CONCERNED BY THE SYNOD OF THE DIOCESE OF NORTH QUEENSLAND; AND

(d) AS FAR AS THE DIOCESE OF ADELAIDE IS CONCERNED BY THE SYNOD OF THE DIOCESE OF ADELAIDE?

12. DOES THE DEFINITION OF "CANONICAL FITNESS" IN S 74(1) OF THE 1961 CONSTITUTION AFFECT THE TRIBUNAL'S REASONING WITH RESPECT TO WOMEN JOINING THE ORDER OF BISHOPS?

13. THE PROBLEM OF THE PRONOUNS.

14. INCONSISTENCY PROBLEM.

15. CAN A BISHOP ACT ALONE?

16. WHAT ARE THE ANSWERS TO THE QUESTIONS?

17. GENERAL COMMENTS.

1. PRELIMINARY.

By references made 31 August and 21 September 1990, the Acting Primate referred to the Tribunal questions 1 to 11 which are set out in point 2 of these Reasons.

These Reasons are rather lengthy and approach the questions posed in what non-lawyers might think is an overly legalistic fashion. I know there is a school of thought which holds that all matters of this nature should be able to be solved by consensus without the intervention of lawyers. Unfortunately, this side of heaven we do not live in such an ideal world. In his swearing in as Chief Justice of the High Court of Australia on 21 April 1952, Sir Owen Dixon said of the High Court, "It may be that the Court is thought to be excessively legalistic. I should be sorry to think that it is anything else. There is no other safe guide to judicial decisions in great conflicts than a strict and complete legalism." (These words are reported in (1985) 85 CLR xi, xiv and also in "Jesting Pilot" 245, 247).

2. THE QUESTIONS.

Question 1

In the absence of any canon of General Synod authorising the ordination of a woman to the office of priest or the consecration of a woman to the office of bishop, is the Bishop of the Diocese of North Queensland empowered to ordain a

woman to the office of priest or consecrate a woman to the office of bishop?

Question 2

In the absence of any canon of General Synod authorising the ordination of a woman to the office of priest or the consecration of a woman to the office of bishop, is the Bishop of the Diocese of North Queensland prevented by any provision or provisions of the Constitution from so ordaining or consecrating a woman, and if so by which provision or provisions?

Question 3

Does s 71(2) or any other provision or provisions of the Constitution prevent the Bishop of the Diocese of North Queensland from so ordaining or consecrating a woman?

Question 4

Does s 51 of the Constitution enable the Synod of the Diocese of North Queensland to make an ordinance empowering the bishop of the diocese so to ordain or consecrate a woman?

Question 5

Does a diocesan bishop have authority to ordain a canonically fit deacon who is a woman to the priesthood if he believes that it is contrary to the command of Christ to refuse to ordain a canonically fit deacon to the priesthood solely on the ground that the deacon is a woman?

Question 6

Does the diocesan bishop of a diocese that has adopted the Ordination of Women to the Office of Deacon Canon 1985 have authority to ordain to the priesthood a woman who was ordained

deacon after the adoption of that Canon by his diocese?

Question 7

Does any provision of the Constitution of the Anglican Church of Australian (the "Constitution") confer power on the synod of a diocese to:

(1) enact an ordinance (or equivalent measure) containing the provisions of the Ordination of Women to the office of Priest Ordinance 1989 made or purporting to have been made by the synod of the Diocese of Canberra-Goulburn;

(2) enact an ordinance (or like measure) with substantially equivalent provisions to those in that ordinance; or

(3) otherwise authorise the bishop of the diocese to ordain a woman to the order of priests or to consecrate a woman to the order of bishops in that church?

Question 8

Does any provision in:

(a) sections 1, 2 or 3 of the Constitution,

(b) section 4 of the Constitution, or

(c) section 71(2) of the Constitution and any law referred to in section 71(2) of the Constitution, or

(d) any other section of the Constitution (and if so, which section):

do either of the following:

(1) Make it unlawful for a bishop of a diocese of the Anglican Church of Australia to ordain a woman to the order of priests or to consecrate a woman to the order of bishops in that church?

(2) Preclude the synod of a diocese from:

(a) validly enacting an ordinance (or equivalent measure) containing the provisions of the Ordination of Women to the Office of Priest Ordinance 1989 made or purporting to have been made by the synod of the diocese of Canberra-Goulburn;

(b) validly enacting an ordinance (or like measure) with substantially equivalent provisions to those in that ordinance; or

(c) otherwise purporting to authorise the bishop of such a diocese to ordain a woman to the order of priests or to consecrate a woman to the order of bishops in that church?

Question 9

Does the unqualified adoption by ordinance of the synod of a diocese of the Ordination of Women to the Office of Deacon Canon 1985 of the General Synod -

(a) authorise the Synod of that diocese to:

(1) enact an ordinance (or eqivalent measure) containing the provisions

of the Ordination of Women to the Office of Priest Ordinance 1989 made or purporting to have been made by the synod of the Diocese of Canberra-Goulburn;

(2) enact an ordinance (or like measure) with substantially equivalent provisions to those in that ordinance; or

(3) otherwise authorise the bishop of the diocese to ordain a woman to the order of priests or to consecrate a woman to the order of bishops in that diocese?

(b) authorise the bishop of that diocese to ordain a woman to the order of priests or to consecrate a woman to the order of bishops in that diocese?

Question 10

Is the Ordination of Women to the Office of Priest Ordinance 1989 of the Diocese of Canberra and Goulburn an ordinance duly made for the order and good government of the church within the Diocese of Canberra and Goulburn in accordance with the powers conferred upon it by the Constitution of the said diocese?

Question 11

Is the Ordination of Women to the Office of Priest Ordinance 1990 of the Diocese of Adelaide an ordinance duly made for the order and good government of the church within the Diocese of Adelaide in accordance with the powers conferred upon it by the Constitution of the said diocese?

3. DEFINITION OF TERMS.

It became clear during the written and oral submissions, that some of the problems facing parties who presented submissions to the Tribunal lie in the area of definition of terms. It is necessary to focus on what ordination to the priesthood really means. I endeavour to deal with this briefly in 9. It is also necessary to focus on what is meant by "the inherent powers of a bishop". I have taken this latter term to mean the powers that a bishop has by virtue of his office as a bishop, not being powers which are conferred on him (a) by any of the Constitutions of the Australian Church or any of its dioceses, (b) any of the canons of General Synod, or (c) any of the ordinances or acts of the various synods.

4. WAS THERE ANY RULE IN ENGLAND AS AT 31/12/1961 WHICH EXCLUDED WOMEN FROM BEING INCLUDED AMONGST THE ORDER OF PRIESTS?

In the Tribunal's decision on the Deacons' Canon, 1985, Handley, JA said, "The settled law of the Church of England at the date of the Constitution on eligibility for ordination was as stated in Phillimore "The Ecclesiastical Law of the Church of England" pp 114-5: 'There are only two classes of person absolutely incapable of ordination; namely unbaptised persons and women. Ordination of such persons is wholly inoperative. The former because baptism is a condition of belonging to the Church at all. The latter because by nature, Holy Scripture and catholic usage they are disqualified."

Mr Keith Mason, QC, in his able submissions for the Diocese of Canberra/Goulburn, made two essential submissions about the statement in Phillimore, viz:-

(i) Whilst it may have been true when it was made (1873), it was no longer true as at 31 December 1961; and

(ii) In any event, it was incorrect.

Phillimore's book was, as is acknowledged in the preface, an expansion and updating of Burns' Ecclesiastical Law. It is significant that the passage quoted above does not appear in the 8th Edition of Burns under "Ordination", but it is repeated by Phillimore in his 2nd and latest edition of 1895 at p 93. The only authorities given by Phillimore for his sentence that nature, Holy Scripture and catholic usage disqualify women from ordination are 1 Corinthians 14: 34 and 1 Timothy II: 12-14. As Mr Mason, QC pointed out, the Tribunal has held that these passages do not disqualify women from ordination, and, despite the fact that the arguments based on scripture were represented to the Tribunal by the submissions of the Diocese of Sydney, the Tribunal can see no reason to change the view that it has previously held on this matter.

Furthermore, research by the Tribunal and counsel assisting it over the last eight years on these issues has, as Mr Mason, QC submits, shown that it is not completely true to say that there have been no women ordained in any part of the Catholic Church. Indeed, Mr Mason, QC is largely correct, when he submits that Phillimore's statement is to a great degree based on the cultural prejudices of the late 19th century in England.

However, just because some of the reasons advanced for a proposition by a writer may be suspect does not necessarily mean that one must disregard the learned writer's conclusions. Phillimore was a great canon lawyer of the 19th century, and his opinions are entitled to great respect by this Tribunal.

Returning to the first attack by Mr Mason that Phillimore may have been right in 1873 or 1895 but his view did not represent the law as at 1961 in England, Mr Mason points to the developments in English law during the 20th century including the Sex Disqualification (Removal) Act, 1919 (Imp).

That Act provided, so far as is relevant, "A person shall not be disqualified by sex or marriage from the exercise of any public function, or from being appointed to or holding any civil or judicial office or post, or from entering or assuming or carrying on any civil professional vocation ... ". The argument is that because the office of priest is an office of an established church it was a public office within the meaning of this Act.

Despite there being a superficial attractiveness to this argument, it would seem that the great majority of lawyers in England took the view that the English 1919 Act had nothing to say at all about officers in the church even though those officers might be officers in a State established church; see the article by McLean "Women Priests The Legal Background" in 5 Ecclesiastical Law Journal, pp 24 and following.

One must also consider the English Sex Discrimination Act, 1975 where s 19(1) clearly preserves any existing disqualification of persons of a particular sex to hold any

particular religious office. Indeed, although there are voices amongst English canon lawyers to the contrary, the prevailing view has been in England that the rule appearing in Phillimore was a rule of the Church of England in England until altered by the appropriate bodies.

There have never been any women priests in the Church of England in England as far as I can ascertain. The great majority of the authorities believe that no such ordination was possible. Accordingly, I am of the view that there was a rule of the Church of England in England as at 31 December 1961 against ordination of women to the priesthood.

5. WHAT OPERATION DOES CLAUSE 71(2) OF THE 1961 CONSTITUTION HAVE ON ANY SUCH RULE?

Clause 71(2) of the 1961 Constitution is as follows:-

> "The law of the Church of England including the law relating to faith ritual ceremonial or discipline applicable to and in force in the several dioceses of the Church of England in Australia and Tasmania at the date upon which this Constitution takes effect shall apply to and be in force in such dioceses of this Church unless and until the same be varied or dealt with in accordance with this Constitution."

I have just indicated why I take the view that there was such a law or rule of the Church of England in England as at midnight on 31 December 1961, immediately before the Constitution took effect. Mr Mason, QC, submits that if there

was such a rule it was not -

(a) applicable to; nor

(b) in force in

the Diocese of Canberra/Goulburn, North Queensland or Adelaide as at that date.

Mr Mason submitted that s 71(2) clearly implies that the rule in question entered into the Australian Church prior to 1962 otherwise than by force of the Constitution. This mode of entry could not have been because the Australian Church was an established church because of the Colenso cases. Therefore, the mode of entry must have been via the consensual compacts entered into by members of the Church in the mid-19th century as evidenced by the declarations made at that time by both the bishops and the synods.

It should be said that whilst this submission may, broadly speaking, be correct, it is not to be overlooked that in Bishop of Natal v Gladstone (1866) LR 3 Eq 1, 36, it was held that if one finds in a self-governing colony or dominion, a group of people who call themselves "Church of England" one presumes that they have agreed to bind themselves to the rules of the Church of England in England, at least unless those rules are clearly inapplicable to their situation, or they have validly made other provision.

I cannot see any reason why the English rule was not either applicable to or in force in each of the several Australian dioceses last century. There seems, with respect, little purpose to work out how the rule entered the English or the Australian Church. It was a rule of the English Church and

there is nothing that I can see which would show why it was not applicable to or in force in any of the Australian dioceses. Nor is there any act of the Australian dioceses (subject to those examined later in these Reasons) which would affect it.

6. IF THERE IS SUCH A RULE, IS IT COMPETENT FOR A DIOCESE TO ALTER SUCH A RULE?

I have read in draft the reasons of Tadgell, J. His Honour has expressed the reasons for the conclusion that a matter so intimately concerning the Church as a whole as opposed to a church within a diocese must be a matter for the General Synod. I myself could not have put the matter as felicitously as his Honour has put it.

7. IF THERE IS SUCH A RULE AND IT IS COMPETENT FOR A DIOCESAN SYNOD TO ABROGATE IT, HAS THAT RULE BEEN ABROGATED IN -

(a) THE DIOCESE OF CANBERRA/GOULBURN;

(b) THE DIOCESE OF NORTH QUEENSLAND; or

(c) THE DIOCESE OF ADELAIDE?

In view of my answer to point 6, this question does not arise. Were it to arise, the 3rd of the Constitutions of 1902 (NSW) for the Diocese of Canberra/Goulburn, clauses 11(a) to (n) in the North Queensland Constitution of 1883 and clauses 3, 7 and 9 of the Adelaide Constitution of 1979 would have to be analysed to see whether the proposed ordinance in the case of North Queensland or the actual ordinance in the case of the other dioceses, was within power.

Whilst accepting the submission of Mr Mason QC that the relevant provisions in NSW, Adelaide and North Queensland are wider than the corresponding provision in Victoria dealt with in the Women Deacons' case, I do not consider that any of these sets of provisions is sufficiently wide to enable any of these dioceses to pass an ordinance on the subject of the order of priesthood being conferred on a woman. As I have said, the question does not arise because of my answer on point 6. However, even if the reasoning of Tadgell, J, as adopted by Handley, JA and myself, were incorrect, my view would be that the dioceses named do not presently have the power to pass the subject legislation. Of course, if the only barrier was the local constitutions this matter may well be able to be remedied by internal action.

8. WHAT WAS THE EFFECT, IF ANY, ON THE ABOVE POINTS OF THE PASSING BY THE GENERAL SYNOD OF THE ORDINATION OF WOMEN TO THE OFFICE OF DEACON CANON 1985 OR THE ADOPTION OF THAT CANON BY THE DIOCESES REFERRED TO IN POINT 7?

It must be noted that the Phillimore rule applies equally to priests and deacons. Ordination to any of the three Holy Orders was denied to women.

The Phillimore rule, so far as deacons are concerned, has clearly been abrogated by the passing and adoption of the General Synod Canon.

Mr Ellicott, QC, at p 3 of his further submissions said, "Phillimore does not suggest that the rule was simply

dependent upon existing legislation in force in the Church. He states the rule as being fundamental, semper et ubique. A rule in those terms would be incapable of alteration. If it was ever in force in the diocese as a law of the Church of England it could not have been in force there in any immutable sense. ... It necessarily follows that the validity of the Women as Deacons Canon (as held by the Tribunal), must mean not only that the rule stated by Phillimore was abrogated, but that it never existed in the terms stated by him. There can be no room for an argument that the rule was only abrogated as to ordination of women to the office of deacon. The passing and adoption of the Canon is so fundamentally inconsistent with the supposed rule that they must each be seen as a rejection of it as being part of the continuing law either of the Church or the Diocese."

The contrary submissions are as well expressed as anywhere in the further submissions of the Dioceses of Ballarat and The Murray. These submissions put that there is a real distinction between each of the three sacred orders of ministry.

I do not accept that a modification of the Phillimore Rule to permit the ordination of women as deacons necessarily abrogated the whole rule. Nor do I accept that the actual rule was semper et ubique, even though Phillimore expresses it in such a way.

The history of the sacred orders shows that from time to time their content has altered, and that in some ancient times sub-deacons etc were within the orders. Again orders of

widows and deaconesses have waxed and waned and waxed again. The functions too of the orders have undergone changes. Indeed it can be argued that at least at some times and places women were within the diaconate though somehow deprived of liturgical functions.

It thus seems to me that it is quite competent for General Synod to vary the Phillimore Rule with respect to the diaconate, but leave it intact for the Order of Bishops and the Order of Priests.

Accordingly the passing and/or adoption of the "Ordination of Women to the Office of Deacon Canon, 1985" and its adoption by the dioceses did not operate to abrogate the Phillimore Rule as to priests or bishops. it enabled women to become deacons but did not lift the barrier which has been in place since ancient times preventing their entering a higher Order of the sacred ministry.

9. WHAT IS THE SIGNIFICANCE OF ORDAINING A PERSON TO THE OFFICE OF PRIEST?

In 1989, the Canadian equivalent of this Tribunal, known as the Supreme Court of Appeal for the Anglican Church of Canada, had to consider whether a Bishop consecrated according to the Canadian Prayer Book was validly consecrated. In the course of that Court's reasoning, the following passage as to the nature of ordination appeared (p 8):-

> "The Anglican Church of Canada is not a unique body but a part of the Catholic Church, and is an inheritor of the history and tradition of that one Church. Bishops were consecrated and

priests and deacons ordained long before the Anglican Church of Canada became self-governing.

...

The inward grace of the gift of the Spirit for ministry is received from God. The risen Lord promised that the Church would always have the spiritual gifts necessary to proclaim the gospel and to build up the body. It is God's action which makes any ordination valid; the Church trusts that God will hear its prayer to fulfil the divine promise.

The Church afffirms its belief in the divine promise by its response. The following factors constitute that response: a competent minister to perform the rite, an expressed intention, the laying on of hands with prayer, and a qualified recipient as subject. ...

The intention of ordination, that which gives the rite its character, has always been to ask God to fulfil the divine promise to bestow the inward gift of the Spirit for the ministry of bishop, priest or deacon."

At the oral hearing, Dr John Woodhouse of the Diocese of Sydney, one of the 25 members of General Synod who as a group were represented before the Tribunal (popularly referred

to as the "Ballantine-Jones Group"), submitted that ordination was man's act, not God's. The tenor of his oral submissions was that by ordination man sets apart a person for the role of head over a congregation. He further submitted that there was a universal principle of creation that a person who assumed the head of a congregation or a family must be male. Similar thoughts are evident in the written submissions of the Diocese of Sydney and of the Ballantine-Jones Group.

I thought it very significant that Dr Woodhouse was unable to give any satisfactory answer to the question from the Tribunal "If headship is such a universal principle of creation, why is its operation only confined to heading a congregation or a family?"

Indeed, the whole "headship" argument appears to me to be completely misplaced. It assumes that the sole role of a priest is to preside over a congregation. Indeed, a report prepared by a committee of the Sydney Diocesan Synod which was submitted to the Tribunal contained this paragraph:-

> "As a provisional definition we may say that ordination, in our formularies, means appointment or admission to ministry in a congregation, and to associated pastoral responsibilities, in accordance with a manner which includes examination as to call and fitness, laying on of hands with prayer, and a statement of authorisation for ministry."

With great respect, that statement is not in

accordance with the law of the Church.

In Attorney General v Wyeliffe (1748) 27 ER 904, Lord Hardwicke, LC, had to consider whether a person was qualified to be a master of a school. The wardens of the school were empowered to nominate a person in Priest's Orders to that office. They nominated Mr Romney who was not then in Priest's Orders. This the Bishop declined to accept and nominated a Mr Craddock who afterwards resigned. The wardens then renominated Mr Romney who at that stage was in Priest's Orders. The Lord Chancellor said, "The only objection to his first nomination, the not being in Priest's Orders, though but a slight objection at this time, yet on the construction of the statutes cannot be dispensed with by the court. I should doubt indeed, whether to be in Priest's Orders should be strictly taken according to canon law, or agreeable to common parlance; if it turned on that alone: but the subsequent statutes shew, that such orders were meant, as capacitated the person to celebrate mass; which is a decisive construction on the words of the former statute and binds me down; for since the Reformation a charitble foundation for saying mass, or for praying for the souls, etc, is adjudged to be performed by saying the service according to the liturgy."

Although the functions of a person exercising the office of a priest have changed from time to time, the central purpose of the appointment always appears to have been to have a person who could preside at the liturgy of the Eucharist. It is quite clear that preaching is not necessarily a function of the priest. For instance, especially immediately after the

English Reformation, there were many priests who did not have a licence to preach, but had to read from one of the books of Homilies instead. Furthermore, by merely looking at the lists of priests in the Year Book of the Diocese of Sydney for 1991, one can see that a large proportion of the persons listed as being in Priest's Orders in the clergy lists of the more populous dioceses do not have the charge of a congregation. The percentage would be much less if one looked at those who had never had charge of a congregation and the figure is also less in the rural dioceses.

It is quite clear from the canons that a priest must be ordained to a title. See Canon 33 of 1604. However, the title to which a person might be ordained might merely be that of vicar choral of a cathedral or to a fellow of a university college or of a chaplain to some college; see Phillimore, 2nd Ed pp 97-98.

Phillimore also says in the 2nd Ed at p 88 that, "The rite through which the Bishop as a successor of the apostles transmits to his clerical assistants a portion of his authority is ordination. Through ordination, as by a solemn consecration, the ordained person receives the privileges and powers necessary for the execution of the sacerdotal functions in the Church." Whilst some may consider that some of Phillimore's words were culturally conditioned, the importance is the emphasis on the sacerdotal functions.

It is difficult to see how in law one can equate a priest with a rector or incumbent or clergyman in charge of a parish or congregation. Whilst it may be (on the other hand it

may be not) that arguments based on some principle of male headship can be addressed to a situation of a person presiding over a congregation, it is hard to see how those arguments can be related to "mere" ordination to the priesthood. Indeed, there are even some difficulties about saying that any clergyman is ever heading a congregation in any absolute sense. In one sense all ordained people, like many other people in the community, are ordained to be leaders. In another sense, the word "minister" means "he or she who serves". Putting these aphorisims aside, it must be clear that legally there is considerable limitations on the headship of a member of clergy in a parish.

Not every Anglican will agree with each one of the following list, but sufficient Anglicans would agree with the majority of them (though not necessarily all the same items). First, the rector is not in sole charge of a parish. He is given a charge by the Bishop in most dioceses and it is made clear that the charge is "both mine and thine". Secondly, the property of the parish is not vested in the rector as may be the case in England, but rather the property is vested in the Diocesan Church Property Trust or the equivalent in consensual compact dioceses and the property which the member of clergy uses is only able to be used in accordance with the trusts on which it is held; see AG v Wylde (1948) 78 CLR 224 (the Red Book case). Thirdly, rights of members of a parish are set out in the various Constitutions of the dioceses and ordinances made thereunder. These rights are often very real rights which cut across absolute control by parish clergy. In addition to

these rights, members of the parish have rights under the compact such as the right to present for baptism, the right to insist that the daily offices be said (at least weekly), etc. Moreover, the persons who are to preach or officiate in a parish must not only have the permission of the rector but also of the Bishop.

It is, of course, true that on institution into a parish the people are told that the rector is "set over you in the Lord" and the rector is given the cure of souls, at least sharing that cure with the Bishop. However, it is difficult to see how headship enters into either of these roles. A person becomes a father in God to a parish and to the people because of the caring and loving relationship that person develops with them. The position of "father" in the Church sense does not depend on a person having headship in the sense of being a paterfamilias. Accordingly, even if one does equate ordination to the priesthood with taking upon one the cure of souls in a parish, we can see no room for the invocation of any principle of headship whether as a universal principle of creation or otherwise.

10. WHAT IS THE POWER VESTED IN THE BISHOPS OF THE SEVERAL DIOCESES NAMED IN POINT 7 IN AND ABOUT THE ORDINATION OF PRIESTS?

As the Canadian Tribunal put it, in the passage quoted above, "Bishops were consecrated ... long before the Anglican Church of Canada became self-governing". Bishops were consecrated and carried out the duties of their office in the

Church of God long before any of what are now the dioceses of the Anglican Church in Australia came into operation. It is quite wrong to say that bishops must look for their powers within the four walls of the Constitutions and the canons and ordinances passed thereunder. Indeed, to a certain extent, in some provinces, particularly Victoria, the ethos of the Constitution is that the bishop is being merely assisted in temporal matters by the laity and synod. It is also true that most bishops take an oath or make a declaration that they will submit to the Constitutions of the Church and ordinances of the synod, but beyond this there is a range of jurisdiction, authority and power which may not be found within any of the constitutional documents.

There is a great deal of difficulty in ascertaining just what this power is. This difficulty is not assisted by the fact that in the Church of England in England for many centuries, both before the Reformation but to a greater extent after it, the powers of the monarch as supreme governor has overridden the power that a bishop might otherwise have had in the primitive church. Even in the Roman Church, the growth of the power of centralism and of the Pope and College of Cardinals has affected the authority of a bishop as it seems to have existed in the primitive church. Indeed, even to speak of the primitive church is to give a misleading impression because in some parts of it the person called "bishop" would be equated to the office of parish priest as at the present day, and indeed, in some areas, country bishoprics lost their status and were absorbed.

What is then the inherent power of a bishop that each bishop has by virtue of his office? Even when one has been lucky enough to find some answer to that question, one must then consider how far that power has been modified by the Australian Constitutions.

It is fashionable to commence with a dictum of St Cyprian in his "On the Unity of the Catholic Church" viz "Episcopatus unus est cuius a singulis in solidum pars tenetur". Although various translations were put to us the one which appeals most is "The episcopate is one, each bishop having a share in what all bishops hold jointly". However, the translation does not give sufficient weight to the fact that "a singulis" and "in solidum" were technical terms in Roman Law having to do with joint obligations. They are used by Justinian in his Institutes III.xvi. We enter into what the Roman lawyers call "obligations which are solidary, each promisor being liable in full on a single promise", see eg Glanville Williams on Joint Obligations p 33. Zimmermann on Obligations, when dealing with solidarity in modern Roman Law systems, says at p 128 that simple solidarity is where each of the several debtors is liable for the whole (in solidum); hence the term "solidarity".

The way in which this maxim operates is that within his diocese each bishop possesses the whole authority of the episcopate, yet that authority is one which is held by the whole College of Bishops jointly.

There is no doubt that one of the matters committed to the episcopacy is the ordination of priests. There has been

some discussion in various books as to whether "the people" have the role of nominating candidates and the bishop the limited role of actually laying on hands, but for present purposes there is no practical value in discussing these matters. It is abundantly clear that the bishop has at least the right of veto by virtue of his office as bishop or, putting it another way, so long as some members of the Church are willing to present a candidate to the bishop he is empowered to accept or reject that candidate.

Dr Allen Brent urged us to reject the notion that each individual diocese was virtually a church and each bishop the personification of that church. Whilst I am sure there are some persons in the Anglican Church of Australia who sincerely hold this view, it is difficult to marry it with the whole thrust of the 1961 Constitution which is based on the premise that there is one national Church, the Anglican Church of Australia, often referred to in the Constitution as "this Church", rather than 24 individual churches loosely linked in some sort of federation.

Dr Brent says that the principle "The Church is in the Bishop and the Bishop in the Church", is only valid insofar as that bishop is enjoying "mutual union" with the remaining bishops of the Catholic world. This proposition, in my view, just cannot be correct. This can be seen from the fact that Roman Catholic bishops do not even recognize the Orders of Anglican bishops let alone that they are members of the one episcopate. True it is that if a bishop were to go out on a limb by himself or with perhaps one or two colleagues, he could

be regarded as outside the actions of the corporate episcopate. That is not the case we are dealing with here. Each of the bishops who seeks to ordain women appears to have the support of at least the majority of the 24 diocesan bishops in this Church.

Dr Brent says, at p 12 of his submissions, "The claim that there is an inherent right to ordain I take to mean that the right claimed inheres in the office itself and is not therefore derived from any other person or body save God alone. Thus presumably it is claimed that being a bishop in the apostolic succession means that one has the right to ordain whoever one judges to be fit. The apostolic succession, producing episcopal consecration, conveys that right, ipso facto, with the conveyance of the office itself." Dr Brent then goes on to produce arguments which show that the doctrine of apostolic succession is difficult to maintain on either historical or logical grounds.

In my view there is no need for the Tribunal to look at the doctrine of apostolic succession at all. I would not define "inherent right" in the same narrow way as Dr Brent does. On the definition I have taken, the term "inherent right" would also include what Dr Brent at p 19 refers to as a "derived right". It does not seem to me it matters from whence the right came. It is sufficient that under the consensual compact, upon the inception of the Australian dioceses, a person who was a bishop had the right either to choose or to veto, it matters not which, candidates for ordination to the priesthood and he gained that right not through anything in the

constitutional documents of the Church, but just because he was a bishop.

11. CAN THE POWER IN POINT 10 BE MODIFIED, DIMINISHED OR AUGMENTED BY -

(a) THE GENERAL SYNOD;

(b) AS FAR AS THE BISHOP OF CANBERRA/GOULBURN IS CONCERNED BY THE SYNOD OF THE DIOCESE OF CANBERRA/GOULBURN;

(c) AS FAR AS THE BISHOP OF NORTH QUEENSLAND IS CONCERNED BY THE SYNOD OF THE DIOCESE OF NORTH QUEENSLAND; AND

(d) AS FAR AS THE DIOCESE OF ADELAIDE IS CONCERNED BY THE SYNOD OF THE DIOCESE OF ADELAIDE?

It is not really necessary to give a full answer to this question. It is obvious that, as in clause 5 of the national constitution, this Church takes plenary power, one or other of the organs of the Church may alter anything by the prescribed processes (anything that is other than clauses 1 to 3 of that Constitution and certain matters dealt with in clause 4). There may be some part of a bishop's inherent power which is so connected with the office of a bishop that it is unable to be altered because of clause 3, but I do not consider that we are within that area in this present Reference. I should consider first the question of diminution of a bishop's power. The power of some of the diocesan synods to affect the inherent power of the bishop is questionable, especially in the Province

of Victoria. In Adelaide, it would seem that the authority to govern the Church is committed jointly to the Bishop and the synod.

It would thus seem probable that a bishop and synod might agree that for the future a bishop might relinquish a power. Other dioceses may have constitutions which may produce other answers. Of course, I am here considering the non-temporal powers of a bishop, though in practice it may be difficult to draw the line. For instance, the power to issue faculties may be part of the inherent dispensing power, though in practice lay officials often administer the system.

As to augmentation of powers, it is very difficult to see how a diocesan synod can act to augment the inherent non-temporal power of a bishop. It cannot unless there is operative legislation from the Parliament, authorize the bishop to affect the way in which Anglican worship is carried on in Church Trustee Property. A diocesan synod cannot, for the reasons given by Tadgell, J, augment its Bishop's powers to act as a figure of the National Church. I presently cannot think of any area where the synod could augment its Bishop's non-temporal powers.

Indeed it seems to me that the real and valuable role of the diocesan synods in the present debate is to enable a bishop to discover the mood of his diocese so as to satisfy himself that he is moving in a direction in which his diocesan family wishes to go.

12. DOES THE DEFINITION OF "CANONICAL FITNESS" IN

S 74(1) OF THE 1961 CONSTITUTION AFFECT THE TRIBUNAL'S REASONING WITH RESPECT TO WOMEN JOINING THE ORDER OF BISHOPS?

Section 74(1) of the national Constitution defines "canonical fitness" as "the qualifications required in the Church of England in England to the office of a bishop" as at 1 January 1962. It is put that this requirement includes the requirement to be male. As to this, it is quite clear that only male persons were in fact made bishops in England up to 1 January 1962. However, it could be argued that "canonical fitness" meant what was to be looked at by those who had to certify canonical fitness. It may be that, merely because no priest whom those persons were considering was ever other than a male, the matter did not enter into their consideration at all.

However, on the assumption that maleness was within the definition of "canonical fitness", Mr Mason, QC, points out that the only time the definition is taken up in the Constitution is clause 8 which deals with who may be elected as a bishop of a diocese. Mr Mason puts that there is a very real difference between electing a person as a diocesan bishop and consecrating a person so that that person joins the Order of Bishops. Semantically this must be so, though it is most odd that one could under the Constitution get a situation where only some of the bishops were eligible for appointment as diocesan bishops. Indeed, the point would not arise in New South Wales because the Provincial Synod has passed an ordinance adopted by each of the diocesan synods that where a

person already is a bishop of this Church, confirmation of that person's election to a diocesan position is not required.

I agree with the submissions of Mr Mason, QC, in this regard, and, accordingly, s 74(1) does not, in the ultimate, affect the position at all.

13. THE PROBLEM OF THE PRONOUNS

One matter on which I should express some thoughts is whether a diocesan synod may authorize an adaptation of the Ordinal to alter pronouns so as to refer, if necessary, to a candidate as "her". Section 3 of the Adelaide Ordinance under review purports to do this.

Some of the High Court Justices in the Red Book case considered that it was not competent for the celebrant of a liturgy to make any substantial alteration at all to the services of the Church. Section 4 of the National Constitution has left this rule in place, but allowed escape routes.

The use of the male pronoun "him" for instance in section 3 of the office for Ordering of Priests on p 608 of AAPB does not seem to me to cause any problems. A pronoun merely stands for a noun and in the relevant context means "any of the candidates". Before the English language suffered from the confusion caused by new fangled so-called "non-sexist" distortions, the word "him" in this context would grammatically have meant "any of the candidates". The mere matter that in the factual matrix there may never have been a female candidate when AAPB was composed would not alter my view.

14. INCONSISTENCY PROBLEM.

It occurred to the members of the Tribunal during debate after the oral argument, that it may be that there was some significance in the closing words of the main part of clause 30 of the national Constitution. These words provide that where a General Synod canon has been adopted, any diocesan ordinance inconsistent with the canon, shall, to the extent of the inconsistency, have no effect. It would seem that these words not only affect diocesan legislation in force at the date of the adoption of the General Synod canon, but also operate to nullify any future diocesan legislation passed after such adoption.

The inconsistency problem is, of course, a familiar one; the most well known area of its operation is s 109 of the Australian Constitution. However, cases under that section have indicated that what must be shown in order to nullify laws because of inconsistency, is that the Commonwealth legislature intended to cover the field; see eg Victoria v Australian Building Construction Employees & Builders' Labourers Federation (1982) 152 CLR 25, McWaters v Day (1989) 168 CLR 289, 295-6 and R v Stevens - NSW Court of Criminal Appeal - 15 May 1991.

It can hardly be argued in the instant case that the General Synod had any intention at all of dealing with any matter other than ordination to the deaconate. Accordingly, I cannot see how there can be any inconsistency with the Deacons Canon and the diocesan legislation in question in the instant case.

15. CAN A BISHOP ACT ALONE?

It is significant that it is nowhere suggested in the arguments that a bishop may or should act on his own feelings without the consent of "the Church". The real debate has been either whether the bishop has power at all, a matter which I have already considered, or whether the consent of "the Church" means the General Synod, the Diocesan Synod, the Diocesan Council or some other group.

It seems to me that, ordinarily, the appropriate body is the Diocesan Council. However this question does not arise on the present Reference in view of my answer to point 6 .

However it is necessary to say so far as Question 5 in the Reference is concerned that an individual bishop's conscientious belief in what are his powers or what are the commands of Christ in the matter are legally irrelevant.

The "commands of Christ" referred to in clause 3 of the National Constitution must, if there is any dispute about them in any particular case, be resolved objectively, possibly by this Tribunal. If an individual bishop takes a view contrary to the Church's objective view of the matter, then he must wrestle with his conscience as to what he will do. However, the answer cannot be that an individual bishop can let his conscience affect the office he has to exercise as a fiduciary for the Church as a whole.

16. WHAT ARE THE ANSWERS TO THE QUESTIONS?

The first group of questions deal with the Diocese of

North Queensland. Until the "Phillimore rule" is abrogated, there is a prohibition on the bishop exercising his powers to ordain. Accordingly, the first group of questions should be answered as follows:-

(1) No.

(2) Yes - s 71(2).

(3) Yes.

(4) No.

(5) No.

Question 6 raises the doctrine of progression. The members of the Tribunal have already made various statements about this doctrine. It does not seem to the Tribunal that it is necessary to go over the matter again, because until the Phillimore rule is abrogated with respect of priests, the answer to quesion 6 must be "No".

Questions 7 to 10 relate to the Diocese of Canberra/Goulburn. For reasons already given, question 7 must be answered "No". Question 8(1) must be answered "Yes" and 8(2) answered by saying that clause 47 of the national Constitution and the lack of power of the Diocesan Synod leads to an affirmative answer to this question. Question 9 must be answered "No". Question 10 must be answered "No".

Question 11 refers to the Diocese of Adelaide. For the reasons which we have already given, it must be answered "No".

17. GENERAL COMMENTS

Perhaps I might be permitted to make comments on five

matters which are of some concern to me.

(1) Regurgitation. Very weighty arguments were presented, particularly by the Dioceses of Sydney and Wangaratta on scripture, on the traditions of the Church, and on whether women were capable of holding any sacred office. These were weighty submissions, but they repeated exactly what had been said to us over the last eight years in various References, and were matters where this Tribunal had already reached a firm conclusion after considerable thought. I realize that a lot of the opinions which were expressed in those submissions are very sincerely held and the holders of them sometimes cannot imagine how any sensible being could hold opposing views. Arguments, however, are not improved by repetition, nor do we consider ourselves likely to be swayed by continued repetition of views which have already been thoroughly considered. I have not seen anything in the material on these matters which would cause us to change our views. I repeat that prima facie the Tribunal will take the view that its previous decision is correct and will not reconsider it unless there are serious grounds for thinking that something vital may have been overlooked. Accordingly, the fact that we do not refer to the scriptural and other arguments is not to be taken that we think them of no moment, rather than that the point has already been decided.

(2) Jurisdiction. The major part of these Reasons deal with diocesan constitutions and the powers of diocesan synods. Notwithstanding this, I believe that for the reasons which the Tribunal gave in the Women Deacons' decision, there is jurisdiction in the Tribunal to give its advisory opinion on

these matters.

(3) Expense of Oral Hearings. As indicated in the final directions hearing, the procedures of the Tribunal have been evolving as we have conducted our first oral hearings over the last three years. Members of the Tribunal are conscious of the great expense that must be caused to the parties in having oral hearings, especially when many have to travel to the place selected for the hearing from interstate. It should by now be quite apparent that the main thrust of the submission stage of the hearing will be in writing and that the oral hearing is available so that the Tribunal can ask questions. Accordingly, set speeches at an oral hearing are really no more than an expensive public relations exercise for the party. The Tribunal would never be put out if a person making detailed written submissions elected not to be present at the oral hearing.

(4) Evidence. The Tribunal may, of course, inform itself of material by whatever means it thinks appropriate. The Tribunal is not limited to the material noted in the submissions of persons given leave to appear. The Tribunal has, however, been scrupulously careful whenever any major matter of concern occurs to communicate that material to the parties so that they can make comment on it. I think it may be assumed that this will continue to be the policy.

(5) Non-Anglican Involvement. I feel there is still a problem in the area of giving leave to appear at oral hearings. Basically, only Anglicans should appear before the Tribunal as only they are bound by the Church's rulings.

However, diocesan organizations often are corporations and there seems no reason at all why this accident of form should prevent a body comprised wholly or almost wholly of Anglicans to be heard before the Tribunal. To my mind, there is a completely different situation where a corporation not distinctly Anglican seeks to make its views known on an issue which the Tribunal is deciding for the Anglican Church.

I should hasten to add that I would not envisage any restriction at all on the denominational preference of any barrister or solicitor who was chosen to present a case on behalf of a party.

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