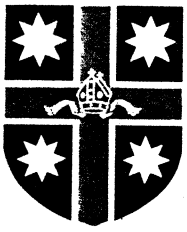

The General Synod
ANGLICAN CHURCH OF AUSTRALIA
ST ANDREW'S HOUSE SYDNEY SQUARE NEW SOUTH WALES

REPORT OF THE APPELLATE TRIBUNAL

RE ORDINATION OF WOMEN TO THE OFFICE OF DEACON CANON 1985

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4 MARCH, 1987

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The General Synod
ANGLICAN CHURCH OF AUSTRALIA
ST ANDREW'S HOUSE SYDNEY SQUARE NEW SOUTH WALES

REPORT OF THE APPELLATE TRIBUNAL RE ORDINATION OF WOMEN TO THE OFFICE OF DEACON CANON 1985

In August 1985 the General Synod of the Anglican Church of Australia made a canon which authorised the bishop of a diocese to ordain a woman to the Office of Deacon. The canon has no force of itself but is operative in a diocese of the Anglican Church of Australia if the Synod of the diocese adopts the canon. The canon has been adopted by 11 dioceses, declined in 4, and the 9 remaining dioceses have yet to consider it.

In February 1986 a number of members of the General Synod called upon the Primate to refer the validity of the canon to the Appellate Tribunal of the Anglican Church of Australia. They argued that the canon was contrary to a number of provisions of the Constitution and hence was of no effect. The Tribunal received the written submissions and heard argument on the validity of the canon in December last year.

The Tribunal (Archbishop D.W.B. Robinson dissenting) has held the canon to be valid. The other members of the Tribunal are Mr. Justice Cox (President), Mr. K.R. Handley, Q.C., Bishop A.C. Holland, Archbishop K. Rayner, Mr. Justice Tadgell and Mr. Justice Young.

This decision of the Appellate Tribunal upholds the validity of the ordination of those women who have been made deacons under the provisions of the canon. However their ordination is not recognised in those dioceses of the Church which have declined to adopt the canon.

A Special Session of the General Synod of the Anglican Church of Australia is proposed to be convened for August this year to consider the ordination of women to the priesthood and the episcopate.

John G. Denton
GENERAL SECRETARY

4 MARCH, 1987

BOX Q190 QUEEN VICTORIA BUILDINGS POST OFFICE SYDNEY NSW AUSTRALIA 2000 TEL (02) 265 1525 TELEX COFE 24183

APPELLATE TRIBUNAL OF THE ANGLICAN CHURCH OF AUSTRALIA

To the Most Reverend J.B.R. Grindrod, K.B.E., Primate of the Anglican Church of Australia.

OPINION OF THE APPELLATE TRIBUNAL

1. The Appellate Tribunal received your Reference of the 24th day of February 1986, made pursuant to s.31 of the Constitution of the Anglican Church of Australia, with respect to the Ordination of Women to the Office of Deacon Canon 1985 of the General Synod. The question asked in the reference is:

> "Is the Ordination of Women to the Office of Deacon Canon 1985, being Canon No. 18 of 1985 made by the General Synod of the Anglican Church of Australia, inconsistent with the Fundamental Declarations or the Ruling Principles of the Constitution of the said Church?"

The Tribunal obtained, under s.58 of the Constitution, the opinions of the House of Bishops and the Board of Assessors with respect to the question. It also received written submissions from the signatories to the s.31 request and from the Standing Committee of General Synod. On the 6th day of December 1985 the Tribunal met at Sydney to hear the matter. All members of the Tribunal attended that meeting, namely -

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

The Tribunal heard oral submissions from counsel representing two groups of signatories, the Standing Committee, and a number of women deacons and ordinands who had been given leave to intervene. The Tribunal then adjourned to consider its decision.

In the opinion of the Tribunal (the Archbishop of Sydney dissenting) the question asked in the Reference should be answered - No.

The Tribunal's reasons accompany this report.

2. The Tribunal decided in the circumstances of this case not to make an order as to the costs of the proceedings.

However, the Tribunal would not wish that to be taken as an indication of the attitude that it would usually expect to take on the matter of costs. The general practice with civil litigation is that the unsuccessful party pays the other side's costs, and that should normally be the guiding principle where a question is referred to the Tribunal under the Constitution. Indeed, the power to award costs under s.14 of the Tribunals Procedure Canon 1962 ("the costs occasioned by the determination of the reference or question") may empower the Tribunal to order the payment of expenses as well as legal costs - for example, the expenses involved in obtaining the opinions of the Bishops and the Assessors and the expenses of the Tribunal itself. However, that interpretation of s.14 is not free of doubt, and we recommend that General Synod consider amending s.14 in order to make its intention clear.

3. I enclose a copy of a statement about procedure that was made on the Tribunal's behalf when the hearing began. The lack of any standing rules of procedure applying to a reference of this kind was the cause of much inconvenience and delay. The Tribunal proposes in the near future to exercise its powers under s.11 of the Tribunals Procedure Canon by making appropriate rules of procedure that will govern future references.

Pursuant to the provisions of Rule XVIII made under s.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.

Date this 27th day of February 1987.

President,
Appellate Tribunal.

In the Matter of the Ordination of Women to the Office of Deacon Canon 1985

And in the Matter of a Reference to the Appellate Tribunal under Section 31 of the Constitution

STATEMENT BY THE TRIBUNAL

This meeting of the Appellate Tribunal of the Anglican Church of Australia has been called to hear a matter referred to it under s.31 of the Constitution.

On 7 February 1986 certain members of the General Synod, being not fewer than 25 in number, made a written request to his Grace the Primate that he refer to the Tribunal for determination by it the question whether the Ordination of Women to the Office of Deacon Canon 1985 of the General Synod is inconsistent with the Fundamental Declarations and Ruling Principles of the Constitution.

On 24 February 1986 the Primate, acting pursuant to s.31, referred to the Tribunal the following question:

> "Is the Ordination of Women to the Office of Deacon Canon 1985, being Canon No. 18 of 1985 made by the General Synod of the Anglican Church of Australia, inconsistent with the Fundamental Declarations or the Ruling Principles of the Constitution of the said Church?"

I table the Primate's reference to the Tribunal.

Before the matter proceeds it is desirable that I say something on the Tribunal's behalf about the nature of this reference and the procedural steps that have so far been taken.

Written submissions

So far as we are aware, this is the first reference that has been made under s.31 since the Constitution came into force. The Tribunal has power under s.59(3) of the Constitution to regulate its procedure with respect to a hearing such as this, but there are in fact no standing rules of procedure on the subject and it was therefore necessary to give directions in this matter as occasion required.

The signatories, in their request to Primate, referred to "new material" that they wished to place before the Tribunal. They also asked that they be permitted to be heard in argument and to be represented by counsel. The Tribunal resolved that the signatories should lodge with the Tribunal their full submission in writing with respect to the validity of the Canon. It is unnecessary to detail the consequences of that direction. It is enough to say that it proved impossible to secure compliance with the timetable that the Tribunal laid down.

A considerable complication arose when, at the time the Tribunal received a submission that declared itself to be the submission of all of the signatories, certain of the signatories notified the Tribunal that they wished to be separately represented and to lodge their own submission. The general rule in the civil courts is that persons who join in a claim must be jointly represented by solicitor and counsel, throughout the proceedings and at any hearing. The Tribunal felt obliged, in the circumstances of this matter, to allow the signatories' case

to be split in that way, but it resulted in a great deal of inconvenience and delay. It will be realized that there is no reason why those members of General Synod who make common cause under s.31 should not include in their case alternative, even contradictory, arguments as long as they all point to the desired conclusion. If it is proper for the joint signatories under a s.31 request to divide into two groups, it must be proper for them to divide into 22, with each group lodging its own written submission and claiming the right to be heard separately at the hearing. What happened in this case should not be regarded as an acceptable precedent for any future matter of this kind.

Eventually the Tribunal received written submissions, from each of the two groups of signatories, dealing with the issues raised by the s.31 request. The Tribunal has also received a written submission from counsel instructed by the Standing Committee of General Synod.

Section 58(1) of the Constitution provides as follows -

> "Before determining any appeal or giving an opinion on any reference the appellate tribunal shall in any matter involving doctrine upon which the members are not unanimous upon the point of doctrine and may, if it thinks fit, in any other matter, obtain the opinion of the house of bishops, and a board of assessors consisting of priests appointed by or under canon of general synod."

The Tribunal decided to seek the assistance of the Bishops and Assessors under that section, and it has received their opinions. The signatories and counsel for Standing Committee have been supplied with copies of them. The Tribunal is grateful to the House of Bishops and the Board of Assessors for their assistance.

The signatories were given leave to file written replies to any opposing material in the other documents to which I have referred.

Other interested persons

A point arose as to whether interested Anglicans, other than the signatories, should be permitted to put their views before the Tribunal, in writing or orally, either by way of an intervention of the kind envisaged by s.63(2) of the Constitution or in some other manner. The question of the validity of the 1985 Canon is obviously of great importance to the Church and, as is common knowledge, the subject of the ordination of women has been, and continues to be, vigorously debated throughout the country. It was to be expected that there would be many Anglicans who might wish to put their views on the subject to the Tribunal. The Tribunal saw difficulties in acceding to all such requests, or in discriminating between one such applicant and another. However, it was obliged to deal with any actual application on its merits. In fact, it has so far received only two applications of this kind. The first was from the Movement for the Ordination of Women (National) Incorporated, seeking permission to file a written submission, and possibly to make oral submissions as well. The Tribunal considered the application and ruled against it. It recognized that MOW has been prominent in the debate on the ordination of women, but it would have been difficult to prefer MOW over any other interested group or persons, on one side or the other, who might make

similar applications, and the Tribunal had to reckon with the possible practical consequences of a large number of such requests. The Tribunal also took into account that it had sought the assistance of the Bishops and Assessors and of the Standing Committee. It invited MOW to confer with counsel representing the Standing Committee. The second application, from a number of women deacons and ordinands, will be dealt with this morning.

The intervention of the Standing Committee was made at the request of the Tribunal itself. It was obviously desirable that the Tribunal have the benefit of a full argument on the propositions put forward by the signatories. It also appeared to the Tribunal that General Synod, acting through its Standing Committee, would wish to defend the constitutional validity of any legislation passed by the General Synod. The Tribunal therefore informed the Standing Committee that it would regard it as appropriate for the Standing Committee to present a submission in answer to the submissions filed on behalf of the signatories. It could have taken the alternative course of requesting the Standing Committee to brief counsel to assist the Tribunal, or of asking for counsel who would act rather like an amicus curiae in the courts, but it considered that the first course was preferable. It was necessary to ensure, from the Tribunal's point of view, that counsel so assigned should present the case for the validity of the canon. It will be appreciated, of course, that the Tribunal is not concerned with the merits of the canon, but only with the matter of legislative power.

As I have already indicated, the Tribunal subsequently received a written submission prepared by counsel briefed by the Standing Committee.

Oral submissions

The signatories have pressed strongly from the outset for the right to make oral submissions to the Tribunal. The Tribunal has given careful consideration to that request but has felt unable to accede to it without some qualification. We are not a full time court in permanent session. The members of the Tribunal have other duties and live in different parts of Australia, and arranging meeting times is not easy. It is simply not practicable for a body of this kind to allow unrestricted oral debate. Nor, in the Tribunal's view, is that necessary, having in mind especially the nature of the issues in this matter. It is not as though the Tribunal is required to judge the credit of witnesses appearing before it, or to make some kind of discretionary judgement. As I have explained, the signatories and Standing Committee have had the opportunity to submit their complete arguments in writing, together with any supporting documents. However, the Tribunal has notified the two groups of signatories and the Standing Committee that each will be permitted one hour at today's hearing in which to make an oral submission, which must be confined to an exposition of the written case or the answering of an opposing written case or opinion. The lawyers representing the signatories will also be allowed 15 minutes each by way of reply to counsel for the Standing Committee.

I have already referred to the absence of any standing rules of procedure to govern a reference under s.31. The proceedings so far have been attended by much inconvenience and delay. The Tribunal proposes to publish next year rules of

procedure that should ensure a more orderly and speedier hearing of any reference made to it under s.31 or s.29 of the Constitution. It follows that members of General Synod who join in making a request or petition to the Primate in the future should acquaint themselves at the outset with any such standing rules.

Documents

I table the three written submissions of the two groups of signatories and of the Standing Committee respectively, with the reply of one of those groups, and also the opinions of the House of Bishops and the Board of Assessors. The latter documents include the reasons accompanying the statements of opinion.

President.

6 December 1986

In the Matter of the Ordination of Women to the Office of Deacon Canon 1985, and
In the Matter of a Reference to the Appellate Tribunal under s.31 of the Constitution

REASONS OF THE PRESIDENT

On 30 August 1985 the General Synod of the Anglican Church of Australia passed, or purported to pass, a Canon in the following terms -

"No. 18, 1985

A Canon to provide for the Ordination of Women to the Office of Deacon and for other purposes

The General Synod prescribes as follows:

1. The bishop of a diocese may ordain a woman to the office of deacon.
2. The bishop of a diocese may grant to any woman who has been ordained in Australia or elsewhere to the office of deacon a licence to perform the duties of a deacon in that diocese.
3. Notwithstanding any other law of the Church a woman may be admitted to the office of deacon in this Church in accordance with the form appropriate to that office set out in the Ordinal included in the Book of Common Prayer or in the Ordinal included in The Australian Prayer Book [sic] or in accordance with any other form appropriate to that office and approved for use in this Church, 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. Nothing in section 1 or section 2 or section 3 shall limit any power or authority possessed by the bishop of a diocese prior to the making of this canon.
5. The provisions of this cannon affect the order and good government of the Church within a diocese and shall not come into force in a diocese unless and until the diocese by ordinance adopts it.
6. This canon may be cited as 'Ordination of Women to the Office of Deacon Canon 1985'".

On 24 February 1986 the Primate, following a written request made to him under s.31 of the Constitution of the Church, referred to the Appellate Tribunal the following question-

"Is the Ordination of Women to the Office of Deacon Canon 1985, being Canon No. 18 of 1985 made by the General Synod of the Anglican Church of Australia, inconsistent with the Fundamental Declarations or the Ruling Principles of the Constitution of the said Church?"

The Tribunal received a written submission on the matter, from each of two groups of signatories (the Adelaide signatories and the Sydney signatories, as they were called), contending that the General Synod lacked power to pass the Ordination of Women to the Office of Deacon Canon 1985. It also received a written submission, from counsel instructed by the Standing Committee of General Synod, which argued for the validity of the Canon. The Tribunal obtained, under s.58 of the Constitution, the opinions of the House of Bishops and the Board of Assessors on the question referred to it, together with the joint or individual reasons of the members of those two bodies. These and other interlocutory proceedings are more fully described in a statement that was made on behalf of the Tribunal at the hearing of the matter in Sydney on 6 December 1986. At that hearing the Tribunal heard oral submissions from counsel representing the two groups of signatories and the Standing Committee respectively, and also from counsel who was given leave to represent certain women deacons and ordinands. The Tribunal then adjourned to enable it to prepare its answer to the question that the Primate had referred to it.

The 1980, 1981 and 1985 Opinions

The Tribunal heard argument about the status and authority of opinions that it gave in 1980, 1981 and 1985 with respect to the ordination of women.

In an opinion dated 8 February 1980 the Tribunal advised the Primate that, subject only to the possibility that there was a principle of the Church of England referred to in s.4 of the Constitution with which the ordination of women to Holy Orders might be inconsistent, the admission of women to Holy Orders was consistent with the Constitution and, in particular, that s.3 of the Constitution did not preclude the ordaining of women into the sacred ministry as bishops, priests or deacons. The Tribunal further expressed the view that there was no doctrine of the Church embodied in the Book of Common Prayer together with the Ordinal and the Thirty-nine Articles with which the ordination of women would be inconsistent. The decision of the Tribunal on these points was unanimous. In accordance with its practice at that time, the Tribunal did not give reasons for its answers to the Primate's questions.

The 1981 opinion was, so far as this subject was concerned, a brief supplement to the opinion given the previous year. It repeated a part of the earlier advice with a minor variation.

On 16 May 1985 the Primate referred certain questions to the Tribunal for

its opinion. Several of them related to a draft canon in the following form -

"1. The bishop of a diocese may ordain a woman to the office of deacon.

2. The bishop of a diocese may grant to any woman who has been ordained in Australia or elsewhere to the office of deacon a licence to perform the duties of a deacon in that diocese.

3. Nothing in s.1 or s.2 shall limit any power or authority possess by the bishop of a diocese prior to the making of this canon."

In an opinion dated 14 August 1985 the Tribunal advised the Primate that the draft canon would not be inconsistent with s.1, 2, 3 or 4 of the Constitution and would not authorize or involve an alteration in or variation from any service or Article in contravention of any principle of doctrine or worship laid down in the Book of Common Prayer together with the Thirty-nine Articles. That decision was by a majority of six members to one. The same majority held that there was no provision of s.1, 2 or 3 of the Constitution or any principle of doctrine or worship referred to in s.4 which would prevent the bishop of a diocese from ordaining a woman to the office of deacon, and by a majority of four members to three the Tribunal held that there was no principle of the Church of England referred to in s.4 which would prevent such ordination. Before arriving at its decision on the 1985 reference the Tribunal, acting under s.58 of the Constitution, obtained the opinions of the House of Bishops and Board of Assessors. The members of the Tribunal gave extended majority and minority reasons for their answers to the Primate's questions.

The relevance of the 1980, 1981 and 1985 opinions to the present matter is obvious. However, those references were not made under s.29 or s.31 of the Constitution, following a petition or request from members of General Synod, but were made by the Primate acting in each case of his own motion and in apparent reliance upon the provisions of s.63 of the Constitution. It was put to us that s.63 does not authorize the reference to the Tribunal of a question concerning a draft canon. Indeed, it has been suggested that s.63 confers no authority on the Primate to refer any question to the Tribunal independently of s.29 or s.31.

Section 63(1) reads -

"Wherever a question arises under this Constitution and in the manner provided and subject to the conditions imposed by this Constitution the question is referred for determination or for an opinion to the appellate tribunal the tribunal shall have jurisdiction to hear and determine the same or to give its opinion as the case may require provided that if provision is not

> otherwise made under this Constitution for the reference of such question to the Tribunal the Primate may and shall at the request of General Synod by resolution or at the written request of the twenty five members thereof or at the request by resolution of the provincial or diocesan synod affected refer the question to the Tribunal which shall have jurisdiction as aforesaid."

It is necessary to construe that sub-section in the light of the other provisions of the Constitution.

Sections 29, 30 and 31 prescribe different methods whereby an issue of constitutional invalidity with respect to (inter alia) a canon or proposed canon may be referred to the Appellate Tribunal for its opinion. Under s.29 it is done by petition of members of General Synod to "the President", and the implication is that this procedure will be used, or at least in the typical case used, when General Synod is in session. The section provides that the President "shall" refer the question to the Appellate Tribunal. He is given no discretion in the matter.

Section 30 also casts a duty on the President in specified circumstances, and again the imperative "shall" is used.

Section 31, under which the present reference was made, reads as follows -

> "If any question shall be raised as to the inconsistency of any canon rule resolution or statement of general synod with the Fundamental Declarations or the Ruling Principles the Primate may and at the written request of twenty-five members of general synod shall refer the question to the appellate tribunal hereinafter constituted whose opinion thereon shall be final."

This time the duty is cast on the Primate, not the President, and if there is a written request the duty is imperative. It will be noted, however, that the section implies that an inconsistency question may be raised independently of a written request and in such a case the Primate "may" refer the question to the Appellate Tribunal. He has a discretion, then, as to whether he will make a reference in the event of a question merely being "raised", but if he does refer the question the Appellate Tribunal's opinion will, again, be final.

I return to s.63. The argument is that the purpose of sub-s.(1) is simply to complete the grant of jurisdiction that is implied in other provisions of the Constitution, most obviously in ss.29, 30 and 31. I do not think that the opening words, "Wherever a question arises under this Constitution," or the sub-section as a whole, can be limited in this way. That opening clause was perhaps inspired by the familiar words of s.76 of the Commonwealth Constitution ("In any matter .... arising under this Constitution, or ... arising under any

laws made by the Parliament"), but the two contexts are so different that any attempt to construe s.63 by reference to the received interpretation of s.76 of the Commonwealth Constitution immediately runs into difficulties. I do not think it is necessary to look beyond s.63 itself.

Had the draftsman of s.63 stopped at the words "the case may require", there would be something to be said for giving the section a limited jurisdictional scope. The proviso, however, is inconsistent with such an interpretation. It assumes that a question may arise under the Constitution and there be no provision made, independently of s.63, for the reference of the question to the Tribunal. However, ss.29, 30 and 31 each contain their own provision for the reference of a question to the Tribunal, and our attention was not drawn to any other section of the Constitution which answers the descriptive words of the proviso of s.63. The concluding words of the proviso cannot be harmonized with the members or bodies, with their stipulated numbers, referred to in ss.29, 30 and 31. They also contain a discretionary "may" which appears to give the Primate authority to refer a question arising under the Constitution to the Tribunal, in certain circumstances, of his own motion. Again, that cannot be merely a reflection of the discretion referred to in s.31 because the s.63 power is only exercisable "if provision is not otherwise made under this Constitution for the reference of such question to the Tribunal". The words, "If any question shall be raised as to the inconsistency of any canon" etc. in s.31 simply require, in my opinion, that someone should perceive a serious inconsistency point with respect to the canon, and if it is the Primate who perceives it he may in his discretion refer the matter to the Tribunal. The opening words of s.63, "Wherever a question arises under this Constitution," should be interpreted in the same way. Perhaps the words are not well chosen, but the sense is, in my opinion, tolerably clear. So far as the Primate is concerned, it will be enough if he sees that there is a question, actual or hypothetical, that arises "under the Constitution". I do not think that this last phrase is to be interpreted pedantically or narrowly. The purpose of s.63 is to enable the Primate, or in certain circumstances other bodies or persons, to require the Appellate Tribunal to give an advisory opinion with respect to a possible constitutional issue - a question arising "under this Constitution" either in the narrow sense of a question arising pursuant to the Constitution (for example, in virtue of some right granted by the Constitution) or in the broader sense of a question arising with respect to the Constitution or its interpretation. That is the way, as I understand it, that s.63 has always been interpreted by the Tribunal. All but one of the references to the Tribunal that have been made since the Constitution came into force in 1962 - and there have been several of them - have been s.63 references of this kind, and they have all been concerned with the interpretation of the Constitution. In short, s.63

gives the Primate - and, at the possible risk of an adverse costs order, certain synodsmen - the power to obtain an advisory opinion on a constitutional question. In my opinion, the Tribunal had jurisdiction to give its 1980 and 1981 opinions to the Primate with respect to the ordination of women.

I would say the same about the opinion given in 1985, which was related in part to a hypothetical (or actual) draft canon. The argument of the Adelaide signatories that s.29 "provides a comprehensive procedure for obtaining an advisory opinion about proposed legislation before it comes into force", and that this in some way denies the authority of the 1985 opinion, is untenable. Section 29 applies in the case of a canon which is "duly made" but which has not yet come into force. The subject matter of s.29 does not carry into s.63 an implication that excludes from the reach of the latter section a question addressed to the Tribunal with respect to a hypothetical canon, not "duly made", of the kind referred to in the 1985 reference. Given the power to seek advisory opinions, it would be manifestly illogical and inconvenient to have it restricted in this way. In so far as the postulated exclusion is one merely of form, it would be easily avoided. In my opinion, the Primate had power under s.63 to make the 1985 reference and the Tribunal had jurisdiction to give its opinion with respect to it.

There is also a question as to the authority of those opinions. Section 73(1) of the Constitution reads as follows -

> "In determining any question as to the faith ritual ceremony or discipline of this Church any tribunal may take into consideration but shall not be bound to follow its previous decisions on any such question ...."

There can be no doubt, I think, that the Tribunal is now being required to determine a question as to the faith, ritual, ceremonial or discipline of the Church. Cf. s.31. The reference to "previous decisions on any such question" is not in terms restricted to the sort of final determination for which ss.29, 30 and 31 provide, and I am inclined to think that it should not be so restricted. However, it does not matter. The Appellate Tribunal is at the head of the judicial structure created or recognized by Chapter IX of the Constitution and there is every good reason, quite apart from s.73, for the Tribunal not regarding itself as being bound by its previous decisions. That does not mean that it will ignore such decisions, or overturn them lightly, but it must retain the freedom in a proper case to re-examine a question and, if need be, to depart from a previous ruling. That was the stand that the Tribunal took in 1980 with respect to the remarriage of a divorced person whose former spouse was still alive, and it is the stand which, in my opinion, the Tribunal should maintain.

There is a question whether the Tribunal should, while retaining the power to overrule previous decisions, do so only with great caution and in clear cases. There is much to be said for such a rule of practice, on both policy and practical grounds. Inevitably some questions brought to the Tribunal will be finely balanced and the Tribunal's decisions may not command universal acceptance. Nevertheless, it is not desirable that important constitutional questions remain in a state of permanent uncertainty. Decisions will often have to be made throughout the Church in reliance upon the opinion of the tribunal which the Church has established for the resolution of constitutional disputes. The present proceedings have been protracted and must have occasioned considerable expense. In 1985 the Tribunal obtained the opinions of the House of Bishops and the Board of Assessors on the matters referred to it, and this time it thought it desirable - prudently, as it turns out - to seek once more opinions under s.58 that necessarily cover largely the same ground again. There is also the not unimportant, if obvious, consideration that the purpose of the 1985 reference was doubtless to settle the question of legislative competence with respect (inter alia) to women deacons in advance, and to make any challenge under s.29 or s.31 unnecessary. It would be unseemly, as well as conducive to uncertainty, if interested persons could seek to provoke a revision of an earlier decision of the Tribunal merely because they found it unacceptable or, say, because of a change in the membership of the Tribunal. For all these reasons, there are good grounds for the adoption by the Tribunal of a rule of practice that it will not lightly re-open a question that it has previously decided.

However, I think it would be wrong to take too rigid a view about this. It should depend on the circumstances of the particular case. The relevant factors will include the importance of the question in issue and the extent to which it was tested in argument on the previous occasion and possibly, in some cases, the extent to which the Church has acted upon the earlier decision. While the obtaining of the s.58 opinions in 1985 is a ground for discouraging a reconsideration a year later of substantially the same questions, I do not think in all the circumstances that the Tribunal should decline to reconsider the 1985 decision. It is necessary to understand, however, that these questions of interpretation, important though they are, cannot be regarded as being in a constant state of flux, and it is not difficult to conceive of circumstances in which the Tribunal would very properly decline to re-examine an earlier considered decision.

For the signatories to succeed in their argument it is necessary for them to undermine the majority opinions given in 1985. It would be a reasonable and convenient procedure for the Tribunal to require the signatories to show why the 1985 answer should, in effect, be changed. However, the procedural formula is

not of great moment in this case. We have been asked whether the Ordination of Women as Deacons Canon 1985 is inconsistent with the Constitution, and unless we are persuaded that it is we must answer the question in the negative.

Fundamental Declarations

The first question is whether the Canon is inconsistent with the Fundamental Declarations laid down in Chapter I. I was one of the majority in 1985 who considered that the draft bill, if enacted, would not contravene Chapter I. As to that I agreed with the joint reasons of the Archbishop of Adelaide, the Bishop of Newcastle, Mr. Justice Tadgell and Mr. Justice Young. The present reference raises substantially the same question. I have considered the matter afresh in the light of the additional material that is now before us. I remain of the same opinion and for the same reasons. I am also in general agreement with the additional reasons, with respect to Chapter I, that have been prepared by the Archbishop of Adelaide for the purpose of the present reference.

I shall discuss later the question of a principle of progression, with its possible effect upon s.3 of the Constitution. At this stage I wish to deal with the application of English ecclesiastical law to the Constitution, and also to say something about sub-s.(6) of s.74.

The Relevance of English Law

One group of signatories relies in its written submissions specifically upon sub-s.(2) of s.71 of the Constitution which 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."

The submission is that the law of the Church of England, applicable under this provision, has at all relevant times prohibited the ordination of women to the diaconate. However, Mr. Lindsay, who appeared for the Sydney signatories at the hearing, presented an interesting argument, about the application of English ecclesiastical law to this Constitution generally, which was independent of s.71 and appeared to go far beyond it.

The argument, in essence, is as follows. There is much English authority (it is said) for the proposition that women may not be admitted to Holy Orders in the Church of England. See Grendon v. Bishop of Lincoln (1577) 2 Plowden 493; 75 ER 734, Colt Glover v. The Bishop of Coventry and Litchfield (1617) Hobart 148; 80 ER 290 and Olive v. Ingram (1739) 7 Mod. 263; 87 ER 1230 and 2 Strange 1114; 93 ER 1067. See also Chorlton v. Lings (1868) LR 4 CP 374.

Authoritative text books on English ecclesiastical law have always stated the qualifications for ordination in terms of males only. The disqualification of women, by Judges and text writers alike, is based upon Holy Scripture and catholic usage. The practice of the Church of England has conformed consistently with that understanding of the law. This Tribunal is bound to interpret the Constitution in conformity with the law and practice of the Church of England. That means that it is bound, in law, to apply the Scriptures and to view the formularies of the Church as judicially interpreted; alternatively, the English authorities provide strong historical evidence of the Anglican position from which the Tribunal should not depart. Reliance in that last respect is based upon the High Court's decision in Wylde v. Attorney- General for New South Wales (1948) 78 CLR 224. From this it is submitted that the Tribunal is bound to hold that the ordination of women to the diaconate in this country would be inconsistent with both Chapter I and Chapter II of the Constitution.

Mr. Lindsay's written and oral submissions on this subject were carefully prepared and elaborated, with much citation of authority, and what I have said may not do complete justice to his argument. However, I do not want to attempt here an exhaustive discussion of the influence of English law upon the Anglican Church of Australia. I can state my position, so far as the present case is concerned, fairly shortly.

I begin with some comments on two of the cases upon which Mr. Lindsay relied.

In Merriman v. Williams (1882) 7 App.Cas. 484, the Judicial Committee of the Privy Council had to consider the legal position of the Church of the Province of South Africa and its relation to the Church of England in England. The Church of the Province had its own separate Constitution. It included a section dealing in orthodox terms with standards of faith and doctrine, and the reception of the Book of Common Prayer, but it also made provision for possible local alterations which, while by no means unrestricted, could result in a departure from the doctrine and use of the Church of England. The Constitution also provided that the Church of the Province was not, in its interpretation of its standards and formularies, bound as to questions of faith and doctrine and discipline by the decisions of any tribunals other than its own. The Privy Council held that the Church of the Province, so constituted, had lost the identity in standards of faith and doctrine which, in the view of their Lordships, was necessary to give the Church of the Province any right to the benefit of trust property in South Africa that had been dedicated to "ecclesiastical purposes in connection with the Church of England." In the result the Bishop of Graham's Town found himself excluded from what everyone had previously considered to be his Cathedral. Critical to the decision that the

legal nexus with the Church of England had been broken was the right given by the local Constitution to depart from English ecclesiastical case law. The Church of England was an established Church and the judge-made law relating to it, which by 1882 was very substantial, was part of the law of England. It was therefore not enough for the Church of the Province to declare its adherence to certain fundamental doctrines and at the same time to claim for itself the right to alter its standards. More than that was needed to create or maintain a nexus with the Church of England by reference to which the Cathedral and other trust property were held. The Privy Council said -

> "The trusts of the property in dispute are declared by the Ordinance of 1839, and the grant of June, 1849, in favour of persons belonging to the United Church of England and Ireland as by law established. But the standards of faith and doctrine adopted by that Church are not to be found only in the texts. They are to be found also in the interpretation which those texts have from time to time received at the hands of the tribunals by law appointed to declare and administer the law of the Church."
> (7 App.Cas. at p.509)

The advice referred by way of illustration to certain important Privy Council decisions about the doctrine and practices of the Church of England, and continued -

> "The decisions referred to form part of the constitution of the Church of England as by law established, and the Church and the tribunals which administer its laws are bound by them. That is not the case as regards the Church of South Africa. The decisions are no part of the constitution of that Church, but are expressly excluded from it. There is not the identity in standards of faith and doctrine which appears to their Lordships necessary to establish the connection required by the trusts on which the Church of St. George is settled. There are different standards on important points. In England the standard is the formularies of the Church as judicially interpreted. In South Africa it is the formularies as they may be construed without the interpretation.
>
> .....
>
> Of course it was perfectly competent to the Church of South Africa to take up its own independent position with reference to the decisions of the tribunals of the Church of England. But, having chosen that independence, they cannot also claim as of right the benefit of endowments settled to uses in connection with the Church of England as by law established."
> (at pp.510-1)

It is unnecessary to consider whether a court today would decide a question of this sort by reference to such exclusively legal and formal considerations.

Wylde v. Attorney-General for New South Wales (the Red Book case) was a suit brought in New South Wales to enforce religious trusts which, by virtue of their terms, tied the liturgy and formularies used in connection with the trust property (Bathurst Cathedral and several parish churches in the diocese of Bathurst) to the liturgy and formularies of the Church of England. The trusts were created by certain trust deeds and by legislation of the Parliament of New South Wales. As a result the Act of Uniformity and all the other relevant English statute and case law operated (in the opinion of Latham C.J. and Williams J.; Rich and Dixon JJ. dissenting) to prevent the use on the trust property of a service book that could not lawfully have been used in England. In considering the English decisions about impermissible rites and ceremonies, Latham C.J. referred with approval to the statement in Merriman v. Williams that the standard of faith and doctrine in the Church of England is "the formularies of the Church as judicially interpreted" (78 C.L.R. at p.264).

Merriman v. Williams and Wylde v. Attorney-General for New South Wales were cases in which, because of the way the relevant documents were worded, the courts were obliged to consider the content and status of English ecclesiastical law, and that necessarily included the definition and exposition and application of that law by the English courts. I suppose it would be possible for an Australian court or tribunal to hold that a particular English case on a point of ecclesiastical law had been wrongly decided, but the general statement in Merriman v. Williams about the authority of judicial interpretation is no doubt correct. Its relevance to the issue before this Tribunal is another matter. Generally speaking, we are not directly concerned in this case with the law in England. The reasoning in Wylde's Case turned largely upon the legal situation that "the Church of England in New South Wales is not a separate and autonomous association but an integral part of the Church of England" (78 CLR, at p.298 per Williams J.). That was in 1948. The legal position now is fundamentally different. On 1 January 1962 the Constitution of the Anglican Church of Australia (as it is now called) came into force. It is supported by Acts of Parliament of the Commonwealth and the several States. The Acts are not identical and it is conceivable that the old legal nexus with England survives in some places for some purposes. I do not know. No argument was addressed to us about that. I have no doubt, however, that the proper starting point in the present case is our own Constitution. That is the legal charter, as it were, of the Australian branch of the Anglican Communion - an association which (to adapt the language of Williams J.) is now separate and autonomous, no longer an integral part of the Church of England. That does not mean that all of the

pre-1962 law is to be disregarded. Section 71(2), to which I shall turn in a moment, makes that plain. Furthermore, any constitution, and especially one that creates a kind of federation of long-established bodies, will be interpreted in the light of the historical conditions which brought it into being. Expressions used in the Constitution, particularly those of a technical kind, may be found to have a meaning that corresponds with the meaning which has been given to them in English ecclesiastical law. There may be other ways as well in which the influence of English law and English practice will continue. However, the Constitution is an Australian document, to be interpreted as such, and there is no way in which English law and practice can apply by direct force to the Constitution except in so far as the Constitution, as in s.71(2), gives it an application. That is clear from Merriman v. Williams itself. Certainly this Tribunal will consider carefully the views of English Judges about the legal position in England where that is relevant to the position in Australia. However, when it comes to the interpretation of, say, the Fundamental Declarations, it is in my view incorrect simply to say (as Mr. Lindsay submitted) that "the Tribunal is bound, in law, to apply the Scriptures as judicially interpreted" and "to view the formularies as judicially interpreted". No doubt if there evolves an Australian case law with respect to this Constitution, the latter statement may acquire some validity, but the submission was made to us with respect for the most part to English decisions. For the reasons that I have given, English judicial views about general doctrinal or disciplinary matters or the like can be of no more than pursuasive authority. Cf. s.73(1). If the other proposition, that "the Tribunal is bound in law to apply the Scriptures as judicially interpreted", means that, wherever a question arises under the Constitution as to the meaning or significance of a passage of Scripture or a passage in a Service Book, we are obliged to adopt the exposition of an English Court or Judge, it is clearly untenable. Our responsibility is to make up our own minds about such matters. If, on the other hand, that submission relates merely to English statements of the law, on matters of doctrine and so on, that were supported in their reasoning by a scriptural exegesis, it would not appear to add anything to the submission about judicially interpreted formularies.

For these reasons I reject the submission that, if a woman cannot be ordained to the diaconate under the law of England, that virtually forecloses the debate in this country. I can also say, in a few words, that I do not consider that the expression, "the three orders of bishops, priests and deacons", in s.3 should, having regard simply to the cases and the ecclesiastical law text books to which Mr. Lindsay referred, be interpreted as applying to male persons only. What have to be analysed in s.3 are ordinary words appearing in an Australian text. One must bear in mind their

ecclesiastical import, of course, and their history, including their Anglican history. However, if the word "deacon", for example, is otherwise apt in the context of s.3 to include a woman, there could be no justification, in my view, for giving the word a restricted meaning for no other reason than that there was in England, in 1962, a legal disqualification of women from Holy Orders. That disqualification resulted, it appears, from a combination of factors - the text of the Ordinal, the Act of Uniformity, the Canons of 1603, the influence perhaps of custom and the old common law disabilities, and conceivably though improbably a few scattered judicial dicta about the interpretation of Scripture. As far as that last factor is concerned - the "Scriptures as judicially interpreted" - I think it very unlikely that any modern English court or tribunal, faced with the problem and also with the fruits of modern Biblical scholarship and hermeneutics, would put the disqualification on such a controversial and insecure basis. At any rate, as a ground for departing from the ordinary denotation of "deacon" in a non-English document, the legal material relied upon by the signatories is simply inadequate.

Section 71(2)

That brings me to the narrower question of the meaning and application of s.71(2). Strictly speaking, the validity of the Canon of 1985 in the light of this sub-section is not before us. We are asked (following the language of s.31) only about inconsistency with the Fundamental Declarations and Ruling Principles. However, we heard submissions on the subject and I think it desirable that I express my opinion about it.

The Tribunal's answer to Question 3 in its 1985 Opinion included the following paragraph -

> "There is a question whether those of the Canons of 1603 that relate to Ministers - their Ordination, Function and Charge, particularly Canons 33 to 36, constitute laws of the Church of England, applicable in some or all of the Australian dioceses by virtue of s.71(2) of the Constitution, with respect to the qualifications of ordinands including a requirement that only men may be ordained to the sacred ministry. This matter has not been referred to us and we are not in a position to express a firm view about it. However, in the opinion of the Tribunal, if by virtue of s.71(2) there is such a requirement it is one that may be abrogated by an appropriate canon of General Synod."

The Sydney signatories take up this line of reasoning but expand it to include aspects of English ecclesiastical law that lie outside the Canons of 1603. The submission cites English legal opinions that rely upon the Revised Canons Ecclesiastical, but they are irrelevant to our purpose, as those Canons came into force in 1964 and s.71(2) cannot have the effect of applying any English law that was made after the date upon which the Constitution took effect,

namely, the first day of January 1962. However, this does not invalidate the general argument. In 1962 the Canons of 1603 were still in force in England, and in our 1985 joint reasons Mr. Handley and I referred to a number of those Canons, especially Canons 33 to 36, which made it plain, in our opinion, that only men could be ordained. We drew the conclusion that, by virtue of those Canons, and quite independently of the Ordinal, there was an effective legal barrier to the ordination of women in the Church of England. That this was still the position in 1962 is confirmed by the reasoning used in the recent English legal opinions relied upon by the signatories. (See The Ordination of Women to the Priesthood - A consultative document presented by the Advisory Council for the Church's Ministry, GS104, dated 28 April 1976; The Ordination of Women: A Supplement to the Consultative Document GS104, GSMisc.88, par.335; and The Ordination of Women to the Priesthood: Further Report, GSMisc198, pars. 271-275 (Howard).)

It is one thing to identify the relevant ecclesiastical law of England in 1962. It is another and quite difficult thing to determine how much of that law was "applicable to and in force in the several dioceses of the Church of England in Australia and Tasmania" at that time. I have already mentioned the various considerations that contributed to the legal disqualification of women from the office of deacon in England and which required the General Synod in that country to proceed in this area by way of a Measure in the English Parliament - the Deacons (Ordination of Women) Measure 1986. The Act of Uniformity 1662 gave the Book of Common Prayer, including the Ordinal with its male personal pronouns, the force of a statute in England, but that Act is not a part of the law of the Australian States. As for the Canons of 1603, they were binding on the clergy in England in ecclesiastical matters, but they never did of their own force bind the laity. See the discussion in Chapter 11 of the Canon Law Commission's report to the 1981 General Synod - Canon Law in Australia. Many of the Canons of 1603 were in their nature inapplicable to Australian conditions and doubtless many of them had already been abrogated in some or all dioceses prior to 1962. Some, indeed, may have been abrogated since 1962 by diocesan synods acting consistently with the Constitution. It may be, however, that the prohibition of the ordination of women under English ecclesiastical law was, for one reason or another, part of the law applicable to and in force in all Australian dioceses in 1962 and that nothing has since been done in any diocese by way of abrogation or purported abrogation of that law. Taking the view that I have of s.4 of the Constitution, I do not think it matters. Section 4 is not made subject to such of the law of the Church of England as was received under sub-s.(2) of s.71. Nor is s.5 or s.26. The concluding words of the sub-section make that plain. If there is a law of the Church of England on the subject applicable to and in force in the Australian dioceses by virtue of s.71(2) - that is, independently

of s.4 -, it is a law relating to discipline which can be varied or repealed in the same way as a principle of discipline embodied in the Ordinal. I shall consider later how that can be done. I do not think that the signatories' case is advanced in any practical way by s.71(2).

Section 74(6)

Submissions were made as to the proper construction and application of sub-s.(6) of s.74 of the Constitution. The sub-section reads as follows -

"In the case of lay but not clerical persons words in this Constitution importing the masculine shall include the feminine."

The argument is that this provision makes it plain that the clerical persons referred to in s.3 - the bishops, priests and deacons - must be male persons only.

The Tribunal was asked for its opinion about s.74(6) in the references of 1980 and 1985, and also in a separate reference in 1981 that, in this respect, duplicated the 1980 reference. I set out the Tribunal's 1985 opinion on the matter -

"QUESTION 2 Does s.74(6) of the Constitution limit -

a. the order of deacons referred to in s.3, or

b. admission thereto to male persons?

If not, why not?

If so, why so?

ANSWER As to a : No.

As to b : No.

Reasons:

(i) In the opinion of the Tribunal s.74(6) of the Constitution is concerned with the interpretation of the Constitution itself, not with the interpretation of the Book of Common Prayer or the Ordinal or the Thirty-nine Articles or any other document.

(ii) The Tribunal (the Archbishop of Sydney dissenting) is of the opinion that the words in s.3 of the Constitution that refer to the orders of ministry are not 'words ... importing the masculine.'

(iii) There is also a question, which it is not necessary for the Tribunal to decide, whether s.74(6) has anything at all to say about the interpretation of words in the Constitution that refer to clerical persons."

I see no reason to resile from that answer but it is desirable to say more on

the subject.

It was put to us by Mr. Merralls Q.C., for the Adelaide signatories, that the words used in s.3 are exclusively male gender words as a matter of ordinary English usage. In my opinion, they are not. I say that for two reasons.

First, while it is true that "deaconess" and "priestess" are English words, it by no means follows that "deacon" and "priest" are confined to male persons. We often use this sort of word to apply to both sexes, and only use the unequivocally female word when we want to make a sex distinction. Take the word "Jewess." If in a population study it is recorded simply that there are 500 Jews resident in a particular town, one would not think of asking, "And how many Jewesses?" on the ground that, as there is a word "Jewess", the writer must have been referring only to males. Again, there is an English word "poetess", but no-one would pick up a book entitled "Australia's Poets" supposing that it could not appropriately include a poem by a woman. That does not mean that the words "Jews" and "poets" are being used in those examples loosely or colloquially. Rather it is because, unless the context or the writer's purpose requires a sex differentiation, the word "Jew" will generally refer merely to one of the Hebrew or Jewish people. In the same way the word "poet" will refer to any person who writes poetry, and it will only take on the narrower meaning of "male poet," in contrast with "poetess", when the writer wants to differentiate between the sexes. In short, the fact that the language knows the words "Jewess" and "poetess" carries no implication that "Jew" and "poet" in any particular instance signify male persons. On the contrary they would usually, unless the context otherwise required, signify a person who may be either male or female. Of course, not all English words that have a female form are used in the same way, in this respect, as "Jew" and "poetess," although a great many of them are. I am of the opinion, however, that the latter class includes, in such a context as s.3, the words "bishop", "priest" and "deacon." It could be said that the argument in favour of that view is certainly not weakened by the reference in s.3 being to the three <u>orders</u> of bishops, priests and deacons. The emphasis is upon the degree and relationship rather than upon the individuals who comprise the orders. But I do not rest my conclusion upon that.

Secondly, while it is true that "deaconess" and "priestess" are English words, it is significant that they are not the words that are commonly used, except perhaps in a facetious or disparaging way, in the area under discussion. The word "deaconess" is generally used to describe a woman minister, called a deaconess, whose status (if not function) is held by many to be different in a fundamental respect from that of a deacon in the traditional three-fold ministry. The word "priestess" is used in a number of contexts, but as far as I am aware they do not include, at least in serious discussion, a woman ordained to the priesthood as we know it. It is question- begging, and in this respect

irrelevant, to say that the authentic priesthood cannot include such a person. It is simply a matter of how those who contemplate such a possibility, favourably or unfavourably, would be likely to describe an ordained woman; indeed, how we already describe such persons in those branches of the Anglican Communion where women are ordained now. No-one has suggested that the use of the term "woman priest", rather than "priestess", in the ordination debate in this country is eccentric, much less that it is tendentious, designed to undermine a linguistic argument otherwise available under s.3. So far as I am aware, the term "woman priest" is used universally. It is so used, not because the word "priest" is male, but because "priest", standing alone, is common to both sexes. On those occasions where a gender differentiation is being made, the contrasting expressions are usually, not "priest" and "woman priest", but "male priest" - that seems to be the idiom, rather than "man priest" - and "woman priest", occasionally "female priest". Of course, until recently there was no need to say "male priest" because the Anglican Communion knew no other kind of priest. But that is not the position now. So also with deacons, as members of an order within the threefold ministry.

For these reasons I do not think that English usage assists the signatories' case.

I should say a word about the reach of an interpretation provision, such as s.74(6), in a constitution that has certain of its sections entrenched. It was put to us in the written submission of the Standing Committee that

> "it is highly doubtful whether any part of s.74 can operate on Chapter I. That chapter is unalterable by Acts of the various State Parliaments. Section 74 is alterable in accordance with the provisions of s.67(d) of the Constitution. It could not have been intended that the words in Chapter I could be affected by definitions which themselves could be altered to give a totally different meaning to the words in Chapter I."

I do not draw the conclusion stated in the first sentence from the immutability of Chapter I. There is no reason why, on general principles of construction, the s.74 definitions and statements should not apply to Chapter I as well as to the other parts of the Constitution. The purpose of a definition section in a document such as this is to save the draftsman explaining in full, every time he uses a particular expression, precisely what it means. It is reasonable to understand s.74 to be providing this service for Chapter I. See, for example, the definition of "canonical scriptures". However, by virtue of s.65 the Church has no power (with one immaterial exception) to alter Chapter I. The reconciliation that I would make between s.65 and s.74 is that s.74, including sub-s.(6), may be amended in the manner provided by the Constitution, but that any such amendment could not affect the interpretation of Chapter I. It would

not matter whether an amendment to s.74 did or did not expressly state that the alteration it was making to a word that happens to appear in Chapter I would not apply to that chapter, because by virtue of s.65 the amendment would have to be interpreted as having no such application. The original wording of s.74 would thus continue to govern the interpretation of Chapter I, even though in form the section had been amended or even repealed.

In my opinion, as I have already indicated, the words "bishops, priests and deacons" in s.3 are common gender words. I say this having in mind both the ordinary meaning of the words and also the context in which they appear in the Constitution. Section 74(6) deals with the interpretation of "words in this Constitution importing the masculine". That must be a reference to words importing the masculine distinctively. As the words in s.3 are not words of that description, it would appear that s.74(6) can be of no assistance in their interpretation. It was submitted, however, that such a reading of s.74(6) renders the sub-section largely nugatory. It was also put to us - correctly - that the Constitution must be read as a whole, which means that s.3 must be interpreted in the light of all of the other provisions including sub-s.(6) of s.74. From this it was argued that, whatever the position might have been independently of s.74(6), that sub-section indicates an understanding on the part of those who established the Constitution that the orders of ministry referred to in s.3 are exclusively male, and an intention that they should so remain in the future.

In 1985 the Tribunal found it unnecessary to express an opinion on the question whether s.74(6) has anything at all to say about the meaning of words of the Constitution that refer to clerical persons. In terms the sub-section is speaking only of lay persons. However, I think it probably carries an implication, at least when read in isolation, that, in the case of clerical persons, words in the Constitution importing the masculine shall not include the feminine. That may mean - there is no need to express a firm view about it - that the use of the personal pronouns "his" and "him" in the second paragraph of s.4 are to be interpreted strictly, so that the permission to which the section refers could not be granted, on any view of s.3, by a female bishop. See also s.17. It may also be possible to discern in s.74(6) an assumption on the draftsman's part about persons in holy orders. It is well established that, at the time the English service books were compiled, everyone took it for granted that only men would be ordained. It is common knowledge, I think, that any popular and widespread movement for the ordination of women in the Anglican Church in this country (as distinct, perhaps, from some fairly select academic discussion) is of quite recent origin. When the Constitution was adopted, 25 or 30 years ago, few people would have considered the ordination of women in this Church to be a serious possibility. It is not surprising, in those

circumstances, that a general statement in a document of this sort about words importing the masculine, apparently applying to both lay and clerical persons, should have been thought inappropriate. (Indeed, s.74(6) simply repeats, without significant change, the words of s.65(3) of the amended draft Constitution of 1926. See Giles, The Constitutional History of the Australian Church (1929), 295.) However, I have already indicated my view that the three orders that are preserved in s.3 are not, in their ordinary signification, exclusively male orders, and I do not consider that the exceptive words in s.74(6) show an intention that s.3 should be given a restricted interpretation in this respect. Certainly the Constitution must be read as a whole, but it is also important that more weight should not be placed on the exceptive words than they may reasonably bear. I think this is a situation in which the distinction between an intention and an assumption, fine though it may be, is important. It is quite possible that the draftsman of the Constitution assumed, like most people, that there would only be male bishops, priests and deacons in this Church. It is also conceivable that he did not stop to consider all of the implications of the general words he used in s.3. Perhaps his state of mind in this respect is reflected in the words he used in s.74(6). However, it requires more than a possible assumption or want of foresight to create the positive intention that must be found in sub-s.(6) of s.74 if it is to override the natural meaning of s.3 when read independently of it. The language of the sub-section is, in my view, quite inadequate for that purpose. There might be some sort of foothold for the signatories' argument if there were any ambiguity or uncertainty about what is meant essentially by "the three orders of bishops, priests and deacons in the sacred ministry" but, in my view, there is not. For those reasons, I am of the opinion that the signatories get no help, so far as the Fundamental Declarations are concerned, from s.74(6).

Perhaps I should add, in the light of a submission made by one group of signatories, that this opinion is completely consistent with the answer that the Tribunal gave to the 1981 reference. The relevant passage is as follows -

"QUESTION 1

Legislation has been proposed for amendment of the Constitution of the Church of England in Australia by

1. (i) adding to Section 4 a sub-section in the form

'(2) Nothing in this section prevents this Church from authorising by Canon the ordaining of women into the three orders of bishops, priests and deacons in the sacred ministry.'

and

2. (ii) adding to Section 74 a sub-section in the form

'(6A) Notwithstanding anything in sub-section (6), in

> Chapters II to XII both inclusive and in the Table annexed to this Constitution words importing the masculine shall include the feminine.'
>
> Would such amendment of the Constitution enable the making of a Canon to authorise the ordaining of women?
>
> ANSWER
>
> Yes, but two members of the Tribunal would prefer, as a matter of drafting, the form of amendment to Section 74 that was suggested by the Tribunal in the answer that it gave to a similar question in its report to you of the 8th day of February 1980 - namely, that Section 74 of the Constitution be amended simply by deleting from sub-section (6) the words 'in the case of lay but not clerical persons.' The other three members of the Tribunal consider the proposed sub-section (6A) to be preferable."

That answer has to be read with the Tribunal's 1980 opinion that ss.1, 2 and 3 of the Constitution do not create any impediment to the ordination of women but that s.4 may. The Tribunal said that, assuming that to be the case, the proposed amendments to s.4 and s.74 would remove the problem. The first amendment would have modified any principle embodied in the Ordinal (not being a principle of doctrine or worship) and the second would have removed the possible difficulty with respect to bishops caused by the use of the male personal pronouns in s.4. (I was one of those who preferred merely to delete from s.74 the words 'in the case of lay but not clerical persons' on the ground that such amendment, despite its apparent generality, could not have any application to Chapter I - a view that I have attempted to explain in these reasons.) The 1981 opinion was thus in accord with the majority opinion of 1985 and the opinion of the present majority.

Ruling Principles

The Primate's question asks, secondly, whether the Ordination of Women to the Office of Deacon Canon 1985 is inconsistent with the Ruling Principles of the Constitution.

The Ruling Principles are contained in, or identified by, Chapter II of the Constitution, consisting of ss.4, 5 and 6. It is convenient to consider first whether the ordination of women to the diaconate would, at least in the absence of some sort of legislation, conflict with any such Ruling Principle, and then, if it would, to consider whether the Canon of 1985 has removed the impediment.

The subject of Chapter II and the ordination of women to the diaconate was considered by the Tribunal in its 1985 opinion. I was one who dissented from the answer to Question I which saw nothing in s.4 of the Constitution that, directly or indirectly, prevented the bishop of a diocese from ordaining a woman

to the office of deacon using a relevant form contained in the Book of Common Prayer or An Australian Prayer Book. Mr. Handley Q.C. and I published joint reasons for our dissenting opinion. In summary, we held that the context indicates that the principles referred to in s.4 must be principles of the Church which fall short of being matters of faith and doctrine and which are principles of a different, lesser kind than the unalterable principles set forth in Chapter I as Fundamental Declarations; that the OED meaning of "principle" appropriate to s.4 is *"A general law or rule adopted or professed as a guide to action; a settled ground or basis of conduct or practice; a fundamental .... reason of action, esp. one consciously recognized and followed. (Often partly coinciding with sense 5 - viz. Fundamental truth or proposition, on which many others depend ...)"* ; that the Ordinal and the Thirty-nine Articles state plainly that only a man can be made a deacon; that the competence of women to minister in the Church was the subject of serious debate in the century preceding the publication of the Book of Common Prayer in 1662 and that their disqualification from ordination in the eyes of the Church was consistent with their disqualification at common law from public office and found expression in the Canons of 1603 and in the Ordinal itself; and that the restriction of the diaconate to men, in the Ordinal and the Thirty-nine Articles, is to be characterized as one of the "principles of the Church of England" referred to in s.4. However, we also held that this principle was not a principle of doctrine or worship.

I see no reason to change the views expressed by Mr. Handley and me in 1985. In my opinion, the principle in question is a principle of discipline only.

Section 4 is a difficult section. Its first long paragraph reads as follows -

> "This Church, being derived from the Church of England, retains and approves the doctrine and principles of the Church of England embodied in the Book of Common Prayer together with the Form and Manner of Making Ordaining and Consecrating of Bishops, Priests and Deacons and in the Articles of Religion sometimes called the Thirty-nine Articles but has plenary authority at its own discretion to make statements as to the faith ritual ceremonial or discipline of this Church and to order its forms of worship and rules of discipline and to alter or revise such statements, forms and rules, provided that all such statements, forms, rules or alteration or revision thereof are consistent with the Fundamental Declarations contained herein and are made as prescribed by this Constitution. Provided, and it is hereby further declared, that the above-named Book of Common Prayer, together with the

Thirty-nine Articles, be regarded as the authorised standard of worship and doctrine in this Church, and no alteration in or permitted variations from the Services or Articles therein contained shall contravene any principle of doctrine or worship laid down in such standard."

It is not practicable to deal with every argument that has been addressed to us about the Ruling Principles, including the construction of s.4, by the signatories and the Standing Committee and the Bishops and the clerical Assessors. However, I wish to say something about a number of those arguments.

First, a small point about the text of the Thirty-nine Articles. The Article to which Mr. Handley and I referred was Article 23 which deals with Ministering in the Congregation and refers to "any man" and "by men". It thus uses male gender language that is consistent with the language of the Ordinal and its Preface. Mr. Mason Q.C., for the interveners, in arguing that such words are used in the Articles in a non-exclusive sense, stated that "in the definitive Latin version none of the Articles relied upon by the petitioners used masculine forms in the relevant portion." It may be that the Latin text of Article 23 is not gender specific, but the English text is, and it does not appear to be correct to claim any primacy for the Latin form of the Articles. The Articles were originally drafted and passed and revised in Latin, but the same Convocation of 1571 that revised them also made the English translation, and the Articles were published in both languages, by royal authority, the same year. The Act 13 Eliz.ch.2, passed the previous year, had required the clergy to subscribe to, and also to read to their congregations, the English text of the Thirty-eight Articles of 1562. It is the English text of the Thirty-nine Articles, of course, that has customarily been printed with the Prayer Book. The better view seems to be that both texts of the Articles are equally authoritative, one often throwing light on the other. Neither is "definitive". See Blunt, The Reformation of the Church of England 1547-1562 (1882), 383; Griffith Thomas, Principles of Theology (1951), xlviii; S.C. Carpenter, The Church in England 597-1688 (1954), 310. It seems reasonable in the circumstances to conclude that the English text, with its male gender terms, accurately expressed the intention of those who were responsible for the adoption and promulgation of both texts.

There is a reference at the beginning of s.4 to "the doctrine and principles of the Church of England embodied in the Book of Common Prayer together with the Form and Manner of Making Ordaining and Consecrating of Bishops, Priests and Deacons and in the Articles of Religion sometimes called the Thirty-nine Articles", and later in the same section, in the first proviso, it is declared that "the above-named Book of Common Prayer, together with the Thirty-nine Articles, be regarded as the authorised standard of worship and

doctrine in this Church." Counsel for the Standing Committee, in their carefully reasoned written submission, argued that the omission of a reference to the Ordinal in the latter instance was deliberate so that the Ordinal is not to be regarded as a part of the authorized standard. It was claimed that the definition of "the Book of Common Prayer" in s.74 could not be used to bring in the Ordinal, for the purpose of s.4, because the second reference in s.4 is not to "the Book of Common Prayer" but to "the above-named Book of Common Prayer." From this the conclusion was drawn that there can be no inconsistency with the first proviso to s.4 if the ordination of women to the diaconate contravenes a principle, even a principle of doctrine or worship, that is laid down merely in the Ordinal. I do not think that can be right. There is more than one instance in the Constitution of a single idea being expressed differently in different places, not always in a harmonious or completely consistent manner. (The way in which the subject-matter of a "statement" is expressed in ss.4 and 26 is possibly an example of this.) This is not altogether surprising, having regard to the way the Constitution evolved. As the 1985 majority reasons observe, the Ordinal is invariably printed with the Book of Common Prayer - the customary long title to the Book of Common Prayer, ending with the words, "and the form and manner of making, ordaining and consecrating of bishops, priests and deacons", is taken from the Act of Uniformity itself - and the content and general structure of s.4 strongly suggest that the draftsman intended that there should be no contravention of any principle of doctrine or worship laid down in the texts mentioned at the beginning of the section in which are embodied the doctrine and principles which the Anglican Church in Australia generally retains and approves. The problem only arises because the draftsman, in sub-s.(2) of s.74, unwisely included the definite article in the expression "the Book of Common Prayer". In sub-s.(1) he followed the usual style and omitted the article with each of the words he defined. I think the article which crept into sub-s.(2) should be disregarded. (It is ironical that no question would have arisen had the draftsman not used, quite unnecessarily as it seems to me, the expression "above-named" in s.4. There is no other Book of Common Prayer that the section could possibly have been referring to.) In my opinion, the Ordinal is a part of the Church's authorized standard of worship and doctrine.

Mr. Handley and I annexed to our 1985 reasons an Appendix consisting of a list of documents which show that the right of women to speak in the congregation or to minister in other ways was the subject of discussion among certain reformers in the sixteenth century. The researches of the signatories and others, for the purposes of this hearing, have added further references of a like kind. See also the old authorities cited by Mr. Lindsay with respect to the disqualification of women under English law. All of that material indicates, I think, that the restriction of ordination in the Church of England

to men, as evidenced by the terms of the Ordinal and the Articles of Religion, was deliberate. It was not a mere assumption that the compilers incorporated into those texts in a quite uncritical fashion. At any rate, the notion that the word "principle" necessarily implies a deal of deliberation, what the 1985 majority called "a considered and definitive judgement of principle", has its difficulties. If an important theological or ecclesiastical statement is made in one of the specified texts for the obvious purpose of declaring a doctrine or settling a controversy - as in the Catechism, for instance, and some of the BCP rubrics -, it may not be difficult to identify the statement as a principle. It is paradoxical, however, and in my view wrong, to deny the same character to a statement of like importance simply because it was regarded by everyone at the time as so self-evident as to be beyond the reach of controversy, so that there was no controversy and therefore no occasion for expressing the statement in an elaborate or obviously deliberate manner, that is, what a critical reader 300 years later might think bears the hallmarks of a "considered and definitive judgement." A universally accepted rule may express a principle, in the s.4 sense, even though it does so by implication. If (as the 1985 majority considered) there is a principle of advancement embodied in one of the closing Collects and the concluding rubric of the service for the Making of Deacons, it is probably there by implication. The text certainly assumes that such advancement may occur, indeed that it probably will occur, but I have difficulty in discerning in the Collect and rubric - the latter with its discretionary "may be admitted" - a "considered and definitive judgement" that advancement in the relevant sense is of the essence of Holy Orders. Be that as it may, the question is whether this poses the correct test. In my opinion, it does not. To see the use of the male pronoun in the Ordinal and the Articles as "reflecting customary practice rather than determined principle" is, I think, against the contemporary evidence, but in any event I do not consider that the statement quoted makes a legitimate antithesis for the purpose of identifying a principle under s.4 of the Constitution.

I am also of the opinion, for much the same reasons, that it is possible to read too much into the use of the word "embodied" in s.4. A doctrinal principle is embodied in the texts mentioned in s.4 if it finds its expression in those texts. I am uneasy about the notion of any great deliberation, even directness, being implied by the use of the word "embodied". However, if I am wrong about that it makes no difference for, in my view, the restriction of ordination to men was made in the Ordinal and in the Articles of Religion with all due deliberation.

Counsel for the Standing Committee submitted that the word "principle" in s.4 refers "not to the conduct or rule of conduct itself but its source, whether described as a fundamental truth or a general law or a rule on which the rule of

conduct is based." I agree with that proposition, in so far as it contrasts principle with conduct, but I am not so sure about the contrast with a rule of conduct. I think one may often correctly describe a rule of conduct as a principle. However, the conduct itself is rather in the area of practice, what one might think of as principles in action, and it may be that this is what the Bishops of Willochra and Armidale had in mind when in their written advice they contrasted the doctrine of the Church of England with the principles of the Church of England and described the principles as "those ways of doing things which were included in the Book of Common Prayer and the Thirty-Nine Articles but do not have the status of absolute doctrine. The principles reflect the way doctrine has been applied to the life of the Church." Of course, the distinction between principle and practice will often not be of any moment, so far as s.4 is concerned, because the practice will be evidence of the principle that inspired it.

Finally, there is the circumstance that s.4 itself authorizes the revision of certain principles of the Church of England embodied in the specified texts. This is not surprising. Article 34 acknowledges that "it is not necessary that Traditions and Ceremonies be in all places one, or utterly like", and states that "every particular or national church hath authority to ordain, change, and abolish ceremonies or rites of the Church ordained only by man's authority, so that all things be done to edifying". The Article is usually interpreted as the recognition of a local authority in matters of discipline. The Bishop of Canberra and Goulburn has gone further and argued that for the Anglican Church in Australia to take order over such a matter as the ordination of women to the diaconate is merely to follow the "ruling principle" embodied in Article 20 ("The Church hath power to decree Rites or Ceremonies, and authority in Controversies of Faith"), provided that what is done is not contrary to Scripture and does not contravene another Ruling Principle. Not everyone would interpret the expression "the Church" in Article 20 as referable merely to one part of the Church. (See, for example, pars. 3 ff. of the opinion of the Venerable S.M. Smith.) There is no need to pursue that question because it is plain, in my view, from the terms of s.4 itself, that a departure from the principles of the Church of England embodied in the specified texts may be acceptable provided that it does not involve the contravention of any principle of doctrine or worship laid down in those texts. See below. I have already expressed the opinion that no principle of doctrine or worship is involved in making a woman a deacon, but only a principle of discipline.

The Alteration of a Principle under Section 4

That brings me to the way in which a principle of discipline may lawfully be altered or repealed by the General Synod.

When it is found that a proposed action in the Church, such as the

ordination of women to the diaconate, is "against the Constitution", the extent (if any) to which the General Synod may do anything about it will depend on the precise nature of the constitutional impediment. If the proposal is inconsistent with the Fundamental Declarations, it will not be able to do anything at all. While the Constitution does not appear to say so expressly, it is implicit in a number of its provisions that a canon that is inconsistent with the Fundamental Declarations will be invalid. The problem cannot be cured by General Synod amending the Fundamental Declarations themselves because the Constitution generally forbids such an amendment. See ss.65 and 66. The only way in which the Fundamental Declarations may be amended is by, or under the authority of, an Act of Parliament. If, on the other hand, the proposal is consistent with the Fundamental Declarations but inconsistent with the Ruling Principles, the General Synod is not powerless to act. What it may do in any given case will depend upon the kind of principle involved. If it is a principle of doctrine or worship the General Synod may not abrogate it merely by passing a canon on the subject, for any such canon will be invalid for inconsistency with Chapter II. See ss.4, 5 and 26. The only course open in such a case is to amend the Constitution - say, by modifying directly the terms of s.4, or by writing into the Constitution an express power to do the proposed act which will achieve the same modification in an indirect way. Any such constitutional amendment would have to conform with the requirements of s.67. If, however, the proposal is inconsistent, not with a principle of doctrine or worrship, but only with some other kind of principle - for instance, a principle of discipline - the General Synod may legislate effectively on the subject by canon.

It is desirable to explain that last statement more fully. Section 5 states -

> "Subject to the Fundamental Declarations and the provisions of this Chapter this Church has 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. Such authority and power may be exercised by the several synods and tribunals in accordance with the provisions of this Constitution."

Section 26 provides that, subject to the terms of the Constitution, the General Synod may make canons for the purposes referred to in s.5 including canons in respect of ritual, ceremonial and discipline. Any such canons must be consistent with s.4. It is s.4 that entrenches the principles of doctrine and worship embodied in the specified texts. Nevertheless, it is clear, to my mind, as I have already indicated, that s.4 itself envisages legislation, and perhaps mere statements, that may override principles other than principles of doctrine or worship. For convenience I set out again the opening words of the section -

"This Church, being derived from the Church of England, retains and approves the doctrines and principles of the Church of England embodied in the Book of Common Prayer .... but has plenary authority" etc.

We heard much debate about the word "but" in that passage. In my opinion, "but" is used here exceptively, not merely by way of explanation or addition. The words that follow the conjunction qualify, or limit, the general statement that precedes it. It really creates the first of the section's numerous provisos. It does so by carving out of what is retained and approved a grant to the Church of "plenary authority at its own discretion to make statements as to the faith ritual ceremonial or discipline of this Church and to order its forms of worship and rules of discipline and to alter or revise such statements, forms and rules, provided that all such statements, forms, rules or alteration or revision thereof are consistent with the Fundamental Declarations contained herein and are made as prescribed by the Constitution." There is also the clear implication, in the concluding words of the first paragraph of s.4 ("and no alterations in or permitted variations from the Services or Articles therein contained shall contravene any principle of doctrine or worship laid down in such standard"), that there may be certain alterations in or variations from the Services and Articles referred to in s.4. The words "any principle of doctrine or worship" must be words of limitation, otherwise the draftsman would have said simply "any principle." One kind of principle which is thus excluded from the retained principles is a principle of discipline only. I think this helps to clarify some of the language used in the earlier part of the section. The expression "rules of discipline", however, is not entirely clear. Perhaps they are rules of a subordinate kind. Perhaps it is a comprehensive term that includes principles as well. Certainly there is no reason for inferring from the use of the expression "rules of discipline" a denial of power to deal with anything fit to be called a principle of discipline. The broad distinction between doctrine and discipline is a familiar one in Anglican teaching. That there are in fact principles of discipline cannot be doubted. One might suppose that the Church would want to change them from time to time. If principles of discipline were to be unchangeable, it would have been easy to say so. It will be seen that, as with ordering the Church's forms of worship, the plenary authority to make statements as to discipline and to alter rules of discipline - and that must in this context include abolishing a particular rule - is conditional only upon what is done being consistent with the Fundamental Declarations. As I have already noted, the Services and Articles may be altered, provided that the variations do not contravene any principle of doctrine or worship. (I take the word "Services" to refer to the services in the Book of

Common Prayer, with the Ordinal, and to include the rubrics and possibly also the prefaces.) All of these considerations lead me to the conclusion that a principle of discipline, including the expression of the principle in a Service, may be abrogated or altered in the manner prescribed by the Constitution, namely, by a canon made pursuant to s.26, provided that it is not also something enshrined in the Fundamental Declarations or a principle of doctrine or worship laid down in the authorized standard. Such a canon will not offend s.5, which makes any canon subject to s.4, because s.4 itself, correctly understood, permits the alteration or abrogation of a mere principle of discipline by canon.

Statements

I have referred in passing to the "statements" that the Constitution authorizes with respect to certain subjects. There was some discussion of the matter in the oral submissions. I have quoted the words of s.4 that give authority to the Church "at its own discretion to make statements as to the faith ritual ceremonial or discipline of this Church ... provided that all such statements ... are consistent with the Fundamental Declarations contained herein and are made as prescribed by this Constitution." Section 26, which confers general legislative power, says that the General Synod may (inter alia) "make statements as to the faith of this Church and declare its view on any matter affecting this Church of affecting spiritual, moral or social welfare, and may take such steps as may be necessary or expedient in furtherance of union with other Christian Communions". In 1962 the General Synod passed a procedural rule on the subject, pursuant to s.33: see Rule V, 16 May 1962. The Rule begins -

> "A statement of the Church as to faith ritual ceremonial or discipline shall be made only after it has been considered by Synod and is passed as a resolution or is contained in a Canon of such Synod."

and goes on to lay down certain procedural steps to be taken with respect to a proposed resolution. Presumably a statement will be made when the General Synod simply wants to express its mind on a particular question, perhaps to settle a controversy or to indicate a new area of Church activity, and there is no need to legislate on the subject. However, as Rule V contemplates, there may be occasions for giving a statement legislative force, or providing by way of legislation for matters ancillary to the policy declared in the statement, and it will then be appropriate to embody the statement in a canon. There is no good reason for regarding canons and statements and declarations under s.26 as mutually exclusive procedures. Indeed, it may be expected that a canon dealing with the faith or ritual or discipline of the Church will often contain a statement or declaration on the subject. I have already referred to the difference between the subjects of s.4 ("statements as to the faith ritual ceremonial or discipline of this Chuch") and s.26 ("statements as to the faith

of this Church") as an instance of a difference that was possibly not intended. The power in s.4 is given to "this Church", while the power in s.26 is confined to the General Synod, but I cannot think of any reason why it should have been thought appropriate to give other Church bodies, such as diocesan synods, a wider statement-making power than the General Synod. At any rate, the difference in the grants would appear to have little, if any, practical effect. I do not think that we should take a narrow view of the form that a statement contained in a canon may properly take. A typical statement would be the sort of declaration that sometimes is contained in an Act of Parliament to resolve an uncertainty about the law, but a statement need not be confined to that form or purpose. (Of course, a statement could not be used to resolve an uncertainty about the meaning of the Constitution itself.) Certainly a declaration of General Synod's mind on an authorized topic will be a "statement" within the meaning of the Constitution.

The Canon of 1985

I set out the text of the Canon of 1985 at the beginning of these reasons. Sections 1 and 2 are taken without significant alteration from the draft canon that was a subject of the 1985 opinion. Although I considered that s.4 of the Constitution prevented the bishop of a diocese from ordaining a woman to the office of deacon without the authority of General Synod legislation, I was of the opinion that the principle in question was simply a principle of discipline which could be modified or repealed by a canon of General Synod, and that the draft canon would be effective for that purpose. There would be no inconsistency with the Fundamental Declarations or with any principle of doctrine or worship laid down in the authorized standard created by s.4 of the Constitution. I take the same view of ss.1 and 2 of the Canon that was actually made in 1985.

Section 4 of the Canon is a saving provision. (It was also in the draft canon.) Those who hold that the Constitution permits the ordination of women as deacons irrespective of legislation will no doubt regard ss.1 and 2 as unnecessary, though possibly expedient. Section 4, I conceive, is designed on that understanding to avoid any limitation upon the bishop's power arising by implication. It probably has nothing to say to the matter if the view that I have taken is correct.

Section 3 provides for the adaptation of the male personal pronouns in the Ordinal to the case of a woman being admitted to the office of deacon. If I am right in my characterization of the other sections of the Canon, with respect to Chapters I and II of the Constitution, the variation from the Ordinal that s.3 authorizes is plainly within the first Proviso to s.4 of the Constitution.

Section 5 makes a declaration for the purpose of Proviso (b) of s.30. It does not touch the question of validity.

It does not matter whether some parts of the Canon are "statements" for the purpose of s.4 of the Constitution. The Canon obviously has legislative force as well. The extent to which one or more of its sections are mere statements or declarations, within the meaning of s.26, depends in large part upon the perceived necessity for any General Synod legislation at all. If (contrary to my opinion) the Canon gives the Bishops no more authority than they already had, it is easy to see the Canon, with the possible exception of s.3, as little more than a series of s.26 declarations. The matter appears to be of no practical moment.

A Principle of Advancement?

At this point it is necessary to consider a constitutional problem that may result from the apparently limited scope of the Canon, namely, its restriction to the diaconate. The Canon says nothing expressly about the ordination of women as priests or bishops.

One principle that the 1985 majority did find in the Ordinal was what some have called a principle of advancement, or progression -

> "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 require 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."

I have already referred to that view in my discussion of the nature of a ruling principle for the purpose of s.4 of the Constitution. If there is a principle of advancement, the question arises whether the Canon of 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. 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. We must therefore contemplate the possibility (at least on one view of the Canon's construction) of a de facto permanent diaconate for women in this country. Hence the problem. However, not everyone agrees that there is a principle of advancement.

There is no doubt that the Collect and rubric at the end of the service

for the Making of Deacons reflect what has long been a normal and expected progression in the Anglican Church from deacon to priest. I have touched on this already. It is to be observed that the rubric says of the new deacon that "if he be found faithful and diligent, he may be admitted by his Diocesan to the Order of Priesthood." The word "may" is usually permissive or discretionary, rather than mandatory, but doubtless a discretion in the bishop is not the same as a want of capacity or inherent disqualification. Nevertheless, I do not think it obvious, as a mere matter of construction, that the two passages in the Ordinal establish a principle of advancement which is of the essence of ordination to the diaconate. Whether they embody a principle that is established elsewhere is not clear. I note that the statement submitted to us on behalf of the majority of the House of Bishops upholds the principle; indeed, it says that "to introduce a fourth Order of deacons who in principle could not be advanced to the priesthood .. would thus be inconsistent with Section 3 of the Fundamental Declarations." The Reverend Dr. J.R. Gaden does not appear to share that view, and others are non-committal about it. Recent moves in England are interesting in this respect. The Deacons (Ordination of Women) Measure 1986 was passed by the General Synod of the Church of England in July 1985. It was unanimously supported by the Bishops and it had the support of the great majority of the rest of the General Synod. It was approved by all but one of the English diocesan synods. In November 1986 the Measure was passed by both Houses of Parliament. The Measure gives power to the General Synod to make provision by canon for the ordination of women as deacons and for the gradual disappearance of the lay order of deaconesses. It is clear that what the General Synod in England contemplates is the admission of women to the first of the three traditional orders of ministry. However, the Measure does not enable the General Synod to authorize the ordination of women as priests. Indeed, s.1(4) expressly states -

> "Nothing in this Measure shall make it lawful for a woman to be ordained to the office of priest."

If there is a principle of advancement embodied in the Ordinal, or inherent in the three-fold ministry itself, then the question must arise, in England no less than in Australia, whether it has been infringed by a law that was passed with such weighty episcopal and other support. Indeed it is a more obvious problem in England, because it seems to be generally accepted, and on strong legal grounds, that it will not be possible to ordain women to the priesthood in England unless a Measure is passed to that effect. See the English opinions cited earlier in these reasons and also the Report by the Ecclesiastical Committee of Parliament upon the Deacons (Ordination of Women) Measure, 10 June 1986, with the Comments of the Legislative Committee of General Synod - all referred to in the supplementary written submission of the Sydney signatories.

Canon 32 of the Canons of 1603 speaks of the office of deacon as "a step or degree to the ministry, according to the judgment of the ancient fathers, and the practice of the primitive Church." Let it be supposed that this and other such statements are evidence of a principle of advancement that is embodied in the Ordinal and that should be characterized as being a principle of discipline for the purpose of s.4 of the Constitution. That would not matter. The critical question is whether there is a principle of advancement that also amounts to a principle of doctrine, within the meaning of s.4, or that is a feature inherent in the threefold ministry preserved by s.3. On the evidence put before us, I am not satisfied that there is.

The 1985 majority did not find it necessary to categorize the principle of advancement. (It is not mentioned at all in any of the minority reasons.) The statement in which most of the House of Bishops joined last year possibly implies that it is a principle of doctrine - that depends on the meaning it gives to that last word. It certainly holds that it is something entrenched by s.3. Obviously the position taken in that statement must be given great weight. Unfortunately for present purposes, the Archbishop of Perth, who drafted the statement, did not develop the point. On the view that he and most of the House of Bishops took, there is perhaps no reason why he should have done so. The Bishop of Canberra and Goulburn referred to the question for another purpose, but his allusion to "the so-called 'principle of progression'" would seem to indicate some reservation on the subject. The Bishops of The Murray, Wangaratta and Ballarat were of the opinion that the Canon of 1985 is inconsistent with the Fundamental Declarations as well as the Ruling Principles, but the paper that they have provided for our assistance does not refer to any principle of advancement. Indeed, it states that "Two of our number are of the opinion that the theological problems about women's ordination to the diaconate are not especially prohibiting", although it goes on to say that "if women are admitted as deacons under our present constitution, then there would be no legal or constitutional reason for their being inhibited from being ordained priests and bishops." I am not sure what the Bishops mean by that last statement. Perhaps it is no more than a recognition of the implication that is possibly contained in the view taken by the majority of the Bishops, namely, that enabling legislation is unnecessary. It is not obvious that the minority Bishops are saying anything about a principle of advancement.

The Majority View of the Board of Assessors refers to the position taken by the majority of this Tribunal in the 1985 opinion, "without opining whether the principle thus asserted is in fact a principle," and chiefly in order to make a comparison with a principle of maleness which the Tribunal rejected. It is fair to say, I think, that the paper in which those four Assessors joined shows no enthusiasm for any principle of advancement. However, one of them was

Archdeacon Smith and in a separate opinion he notes, as one of the interrelationships within the three traditional orders, "the eligibility of a person who is a member of one order to become a member of another." It is not explained whether this feature is of doctrinal or merely disciplinary significance, but I presume the former. The proposition is not developed or supported by citation of authority. Its consequences, with respect to the 1985 Canon, are not spelled out. I refer below to the supplementary submission of the Reverend Canon A.A. Langdon. Another of the majority Assessors, the Reverend Canon D.B. Knox, also provided a supplementary submission. It does not, on my reading of it, support a principle of advancement. Nor do the opinions of any of the three minority Assessors. Dr. Gaden, indeed, and probably also the Reverend Canon K.S. Chittleborough, would appear to deny it, at least so far as s.3 or any principle of doctrine under s.4 is concerned.

Finally on this point there are the submissions of the signatories and the Standing Committee. The two original submissions of the signatories said little about a principle of advancement. The Adelaide signatories did not refer to it beyond saying,

> "Preservation of the three orders connotes the retention of each of them in their historical form and relationship. It is not satisfied merely by the retention of their names or duties. Admission to the diaconate was traditionally the first stage to admission to the priesthood."

They did not mention the principle in their reply. The other Sydney signatories noted the view of the 1985 majority and said,

> "If this concept of progression is a 'principle' of the Church of England it cannot be put into effect in Australia because there is no legislative authority for such ordination or consecration."

Their supplementary submission refers to the comments of the Ecclesiastical Committee of the English Parliament that considered the Deacons (Ordination of Women) Measure last year. Its treatment of the subject stops short of submitting that there is in fact a principle of advancement. Except for noting the tradition of progress, it does not deal with the topic at all with respect to s.3 of the Constitution. So far as the Ruling Principles are concerned, it does not say whether the principle is to be regarded as a principle of doctrine or a principle of discipline. It cites the opinion of the 1985 majority, and makes a brief allusion to Anglican practice (not doctrine) since the Reformation. In short, there is no attempt by either group of signatories to develop, rather than simply assert, a case for a principle of advancement that would invalidate the 1985 canon under either s.3 of the Constitution or s.4. It is understandable, I suppose, that the main submission lodged on behalf of the Standing Committee does not, so far as I can see, deal with the subject at all.

The Standing Committee's reply does. It denies the principle's existence and criticizes the lack of evidence brought forward by the signatories in support of it.

I am not a theologian or a New Testament scholar or a Church historian. I can only form an opinion on a disputed question by having regard to the material that is placed before us. There are the Collect and rubric to support a principle or practice of some kind, and Canon 32 of the Canons of 1603, but I should not be prepared to find on that evidence alone that the Ordinal embodies a principle of doctrine, much less that a permanent and distinctive diaconate which did not necessarily qualify the deacon for advancement to the priesthood would contravene s.3 of the Constitution. Indeed, one could observe, having in mind Dr. Gaden's paper, that all the evidence before the Tribunal points the other way. I do not maintain that there is no such doctrinal principle. What I say is that it is for those who seek to rely upon it in these proceedings to make out their case, and they have failed to do so.

It may be that there is a shorter route to the same conclusion. Mr. Mason Q.C. submitted that there would be nothing to stop a woman deacon, ordained in Australia, from going to New Zealand, say, to be priested. I have some doubt about that as a solution to the problem of principle, however effective it might possibly be in practice. What if the candidate had to travel to the other side of the globe? What if all the Australian bishops, including the candidate's Diocesan, disapproved of that course, regarding it as a subversion of the General Synod's intention? However, there are other possible answers. It must be assumed that the General Synod intended, by its Canon of 1985, to authorize the admission of women into the existing diaconate, that is, into the historic ministry of the Church. Perhaps, even if there is a doctrinal principle of advancement, a legal disability from proceeding further which is merely the concurrent effect of a principle of discipline embodied in the Ordinal does not compromise the nature of the ordination itself. The impediment remains, as it were, coincidental and unessential. Or perhaps, whatever the General Synod may have supposed in that respect, the effect of admitting women to the diaconate is necessarily, by virtue of this inherent and inseparable feature of advancement, to qualify them for admission to the higher orders, so that any further legislation enabling women to be ordained as priests or bishops is, even on my view of the maleness principle, unnecessary. Compare the second passage from the three minority Bishops that I quoted earlier. Compare also the following section from the supplementary submission of Canon Langdon -

> "As at present determined the Anglican Diaconate of the Prayer Book Ordinal is at one with the other two Orders of Priests and Bishops and no changes in the Ordinal were introduced by the Canon, as passed, to remove the possibility of such a progression.

> Therefore, the current issue of whether women should be made deacons is really equivalent to whether women should be made priests and bishops.
>
> The issue of the maleness of the diaconate is vital in this instance because it is equivalent to the maleness of the priesthood and the episcopate."

Perhaps this is another way of saying that, given this unity of orders, express constitutional authority for ordination beyond the diaconate would be superfluous. These aspects of the matter were not debated before us and I am not in a position to express any opinion about them. It is worth noting, however, that all of the English Bishops supported a Measure that is in this respect practically the same as the 1985 Canon. It is hardly conceivable that the vote would have been unanimous if the Measure was authorizing a departure from sound catholic doctrine.

For these reasons I am not willing to hold that the Canon, by virtue of any principle of advancement, contravenes s.3 or s.4 of the Constitution.

Conclusion

These reasons are already long. To attempt to deal with every argument and proposition that is contained in the written and oral submissions and opinions that have been put before us would require a judgement of quite inordinate length. If I have not mentioned a particular argument that is opposed to the views that I have expressed in these reasons, it is because I have felt unable to accept it.

In my opinion, the Ordination of Women to the Office of Deacon Canon 1985 was within the legislative power of the General Synod. The Primate's question should be answered - No.

IN THE MATTER OF THE ORDINATION OF WOMEN TO THE OFFICE OF DEACON CANON 1985, AND
IN THE MATTER OF A REFERENCE TO THE APPELLATE TRIBUNAL UNDER SECTION 31 OF THE CONSTITUTION

Reasons of the Archbishop of Adelaide

In many aspects of the judgment I am in general agreement with the reasons given by the lay members of the Tribunal who are learned in the law. I confine my comments to certain matters arising from the Fundamental Declarations and the Ruling Principles of the Constitution.

CHAPTER I : FUNDAMENTAL DECLARATIONS

On three occasions (1980, 1981 and 1985) the Tribunal has already given its opinion that the ordination of women would not be inconsistent with the Fundamental Declarations. Two major lines of argument were submitted on the present occasion, namely that the ordination of women would be contrary to holy scripture and that it would be inconsistent with the requirement to preserve the three orders of bishops, priests and deacons.

Holy Scripture

In the Reasons accompanying the 1985 Opinion, account was taken of the precise passages -- I Corinthians 11: 2-16, I Corinthians 14: 33-36 and I Timothy 2: 11-15 -- on which the Sydney signatories rely. The majority of the Tribunal said of these passages:-

> "We note, however, that the passages in question are subject to widely different interpretation by biblical scholars of comparable reputation and competence. If these passages are to be interpreted literally and as having universal application, women would not only be precluded from ordination but from exercising other functions in the Church (as lay preachers or even askers of questions) which have been generally accepted as consistent with the teaching of scripture. We are of the opinion that the weight of contemporary biblical scholarship emphasises that these passages must be interpreted in the context of the teaching of the New Testament as a whole, and that when seen in this light they are not to be taken as prohibiting the ordination of women".

Having examined the further arguments submitted I see no reason to depart from this opinion.

The Sydney signatories submitted that there is clear consensus among New Testament scholars that the relevant texts speak of a subordination of women

to men that was to apply to the Church, and that this subordination was understood to be based on fundamental principles of creation, not only on cultural grounds. Numerous extracts from reputable biblical commentaries were cited to support this case. It was argued that if the Tribunal had had this evidence before it, it would have been unlikely to have come to the view that it did in 1985.

The Tribunal was in fact well aware in 1985 of the kind of evidence submitted in detail by the Sydney signatories in 1986. While the Tribunal recognised that the three passages referred to contained certain teaching on the subordination of women, it also recognised that there was considerable difference of interpretation on the significance of the teaching of these passages when seen in the context of the New Testament as a whole.

The case of the Sydney signatories may be conveniently summarised as follows:-

1. Women are enjoined to silence in the congregation (I Cor. 14:34 and I Tim. 2:11). Such silence is incompatible with the exercise of a ministry involving preaching and teaching.

2. The injunction to silence is a particular expression of a basic theological principle of subordination of women to men, which principle is rooted in the order of creation and even in the nature of the Holy Trinity.

3. As preaching and teaching are integral to all three orders of ministry as received in this Church, the ordination of women to any of these orders is contrary to God's will.

It is not the role of the Tribunal to judge on technical matters of biblical scholarship. Differences of interpretation sometimes result from differences in detailed exegesis, sometimes from the application of differing hermeneutical principles. I note that some of the Assessors are critical of certain hermeneutical principles implicit in the Sydney signatories' case. This criticism at least draws attention to the fact that while the Constitution binds this Church to holy scripture as "the ultimate rule and standard of faith" and while the Thirty Nine Articles make important statements about the place of holy scripture in the Church, this Church has not bound itself to one particular set of principles in the interpretation of scripture.

This does not matter, however, because even on the principles of biblical interpretation implicit in the Sydney submission, I find no reason to depart from the 1985 Opinion. The three passages on which the case rests are quite brief in relation to the New Testament as a whole. One of the passages, I Cor. 11: 2-16, is obscure in many details and has given scholars considerable

difficulty of interpretation. In the case of the other two passages, I Cor. 14: 33-36 and I Tim. 2: 11-15, we lack precise information as to the circumstances in which St. Paul was led to enjoin silence upon women.

The submission draws attention to the principle of Article 20 that the Church may not "so expound one place of Scripture that it be repugnant to another". The implication is that we cannot ignore the injunction to silence, even though it occurs only in two places. This principle is, however, a doubled-edged sword. Other New Testament references clearly imply occasions when women speak with authority in the exercise of ministry, as in prophecy (Acts 21:9, I Cor. 11:5), authoritative teaching (Acts 18:26) and presumably in the ministry of a deacon (Rom. 16:1). This suggests that the injunction to silence was not of universal application and may have resulted from particular instances of women behaving in a disorderly fashion. There can be no certainty about the precise backgrounds of St. Paul's injunctions, but the evidence is too flimsy to establish a case against ordination based on a supposed universal injunction to silence.

The argument based on a subordination of women rooted in the order of creation is more fundamental to the case. Nevertheless on examination it raises a number of problems. It is not clear precisely what is implied by subordination. Is it that women in general are subordinate to men in general, so that every woman is subordinate to every man ? Or is it that a wife is subordinate to her own husband only ? Is it a subordination in certain aspects only or in every respect ? What is the precise relation of the particular subjection of wives to husbands to the mutual subjection, referred to in Ephesians 5:21, of Christians to one another ? These are not merely rhetorical questions, because the way in which subordination is understood markedly affects the relationship of any alleged principle of subordination to the question of the ordination of women.

The submission appears to assume that the particular references to subordination in the passages in question imply a subordination of women to men in general such as would inhibit the exercise of any authority by any women over any men. The problem is that if there is such an essential and universal subordination of women to men rooted in the God-given order of creation, this principle must have ramifications far wider than in respect of ordination. It means that any position of authority of women over men in the Church is forbidden, for example as theological teachers, churchwardens, members of parish councils or Synods or indeed any body that makes authoritative decisions in the Church. More than this, it might imply the obligation of Christians to oppose, so far as possible, the appointment of women to any positions in the community at large in which they might exercise authority

over men. It is interesting that John Knox, the 16th Century controversialist who was one of the authorities cited by the Sydney signatories, recognised precisely this point. He argued that forbidding women to speak in the congregation was the least part of what followed from the principle of subordination: "But greater is it to reigne above realmes and nations, to publish and to make lawes, and to commande men of all estates, and finallie, to appoint judges and ministers, then to speake in the Congregation". (Knox, The First Blast against the Regiment of Women, as cited, p.380).

Whatever is the precise teaching of these New Testament passages on the subordination of women, it has never been taken in the Church of England to mean that essential and universal subordination of women to men which leads inexorably to the consequences outlined by John Knox. These passages must be weighed against other passages in scripture which by implication allow to women the exercise of authority while maintaining, within the general principle of the mutual submission of Christians to one another, a certain kind of subordination within marriage.

Let us assume that the signatories are right that certain passages of scripture teach some kind of subordination. Is ordination automatically excluded from a person in a subordinate position ? In various passages of scripture a certain subordination is enjoined upon various groups of people. All Christians, for example, are bidden to be subject to the emperor and governors (I Peter 2: 13-14), but this has never inhibited the ordination of men to minister to those to whom, in certain respects, they are to be subordinate. Likewise younger men are enjoined to be subject to their elders (I Peter 5:5 and Ephesians 6:1), yet this has never prevented the ordination of young men, even though their ministry might be among their elders, perhaps including their parents. In the armed forces, a chaplain ministers to those to whom he is subordinate in other respects. Indeed, a priest may minister to a bishop to whom he owes canonical obedience.

The Canon relates only to the ordination of women as deacons. It is doubtful, in fact, whether preaching and teaching are integral to the ministry of a deacon. The Anglican ordinal portrays the deacon as an assistant minister who may preach "if he is licensed to do so by the bishop". It would be in accordance with the discipline of this Church to ordain deacons without giving them a licence to preach. In any case, however, I do not see that the ministry of teaching and preaching the Word of God with authority is excluded from women. Surely the authority lies in the Word preached, not in the preacher. Is the truth and authority of the Word of God rendered void because of the person who proclaims it ? Is the same Word different in its effect when

preached by a woman rather than a man ?

It has been submitted that the argument from scripture is strengthened by St. Paul's comment in I Corinthians 14:37: "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". This is interpreted to mean that the injunction to silence and submission on the part of women which immediately precedes this verse is to be understood as a specific command of Christ which is binding upon the Church in all circumstances. As s.3 of the Constitution requires this Church to obey the commands of Christ the implication is obvious.

The requirement of obedience to the commands of Christ is not, however, as straightforward as might initially appear. Where Christ's commands are of universal application, such as the command to his disciples to love one another, they are clearly binding upon all. Other commands, however, must be understood as instructions to particular people in particular circumstances, and these have never been understood by the Church as universally applicable. Such is the command to the rich young man to sell everything and give to the poor (Mark 10:21); or the command not to swear an oath (Matthew 5:34), which is specifically stated in the 39 Articles not to be binding upon a Christian in a court of law; or the commands of Matthew 5:29 and 30 to cut off the right eye or the right hand in certain circumstances. Commands like these are clearly not to be taken as generally binding on the Church.

Does I Corinthians 14:37 mean that St. Paul attributes to the Lord a specific command, universally binding to the Church, that women are to be silent in the congregation ? I do not think this is the right way to understand this verse. No evidence was submitted to us from the Gospels that Christ spoke during his earthly ministry about the place of women in the congregation, or indeed about the other matters of speaking in tongues and prophecy to which St. Paul refers in this chapter. As Christ's ministry was not exercised in the context of Christian congregations at worship, it would have been surprising if he had issued a command in these terms. Rather St. Paul appears to have been drawing particular applications from the principle -- which accorded with the general tenor of Christ's teaching -- that "all things should be done decently and in order" (I Corinthians 14:40). This is the conclusion to which the whole chapter is leading. Applying this general principle to the circumstances of the rather disorderly church at Corinth, St. Paul in effect says that the particular teaching which he gives on tongues, prophecy and women has the force of a command for Christ <u>for that situation</u>. This is why he calls on those who see themselves as prophets, or spiritual, to <u>acknowledge</u> this teaching as a command of Christ. It is not

that he is pointing to a specific command of the Lord which is universally binding, but that he is delineating an application of the principle of good order in the Church for this situation. It is Christ's command in those circumstances. In a different cultural climate, the particular application of orderliness which was binding for the Corinthian Church might not be appropriate. For this reason I do not understand the "command of the Lord" referred to in I Corinthians 14: 33-36 as meaning a universally binding "command of Christ" referred to in s.3 of the Constitution.

In summary, while the passages cited by the signatories pose certain questions in relation to the ordination of women, I do not find their case convincing, even on the principles of biblical interpretation on which it is based. The case relies upon certain assumptions which are not demonstrated to be true, namely that the passages cited contain the whole teaching of the New Testament on the subject, that references to subordination imply an essential and universal subordination of women to men, that persons who are subordinate to others in certain respects are thereby rendered ineligible for authoritative ministry, and that the "command of the Lord" referred to in Corinthians 14:37 is a command of Christ universally applicable to the place of women in the Church.

Having examined the further arguments submitted I see no reason to depart from the opinion that the ordination of women would not be inconsistent with holy scripture.

Preservation of the three orders of bishops, priests and deacons

Section 3 requires this Church "to preserve the three orders of bishops, priests and deacons in the sacred ministry". It has been put to us that these are essentially male orders and that the admission of women to any of them would be contrary to this requirement. I agree with the reasons given by the President and other members of the Tribunal for rejecting any argument based on linguistic considerations and on the effect of s.74 (6). I now refer to the argument based on catholic tradition.

The present Canon deals only with the ordination of women as deacons. I shall refer to the question of progression later. It has been put to us that the orders received by the Church of England from the universal Church were entirely male, and it is not disputed that at the time of the Reformation and for some centuries preceding it this was so. Nor is it disputed that in New Testament times and in early church history there were women who were described as deacons. What is argued is that these women were not deacons in the sense understood by the Anglican Ordinal. Thus a group of the Assessors who argue against the validity of the Canon, say:

> "There is no bar to a woman being a deacon (i.e. 'deaconess') in the New Testament sense of the word. A problem arises however when the New Testament and the Anglican formularies are compared, as the meaning of the word 'deacon' in the Anglican sense has been extended beyond the New Testament usage".

This last comment refers to the conditional licence to deacons to preach. In my comments on holy scripture I have already given reasons why I do not hold the authority for women to preach to be inconsistent with the teaching of scripture as a whole. It is widely agreed that the three orders of ministry, while rooted in the ministries named in the New Testament, did not settle into fixed forms until later. Nevertheless the Ordinal clearly understands the three orders as directly continuous with the ministries of the New Testament. For this reason the existence of women deacons in the New Testament makes it impossible to exclude women as a matter of principle from the Order of Deacons which s.3 requires the Church to preserve.

The position might be different if, in Ecumenical Councils which are recognised as authoritative by the Church of England, the Catholic Church had definitively rejected the possibility of the ordination of women on scriptural or theological grounds. Evidence was submitted to us of sporadic negative references to the ordination of women by particular Church Fathers and in the disciplinary canons of certain councils. No convincing evidence was submitted, however, of any definitive theological pronouncement against the ordination of women by an Ecumenical Council of the Church. In the absence of such pronouncement it cannot be argued that the removal of a gender qualification for membership in an order of ministry is inconsistent with preserving that order of ministry. In this respect too I see no reason to depart from earlier finding of the Tribunal that the ordination of women as deacons is not inconsistent with the Fundamental Declarations.

CHAPTER II : RULING PRINCIPLES

The variety of interpretations of s.4 submitted to the Tribunal is testimony of the complexity of this section, both in respect of the definition of particular terms and of overall construction. I now consider the meaning of three words -- "doctrine", "principle" and "statement" -- used in s.4 and the construction of the section as a whole.

In 1980 and 1985 the Tribunal expressed the opinion that the question of the ordination of women did not involve any doctrine embodied in the Prayer Book, Ordinal and Articles nor any principle of doctrine laid down in these formularies. That opinion may need explanation, particularly as in

common usage the word doctrine may simply mean "that which is taught on any subject" (Shorter Oxford Dictionary). On such a general definition matters of doctrine might be held to be involved. Doctrine is however defined for the purposes of the Constitution in s.74 as "the teaching of this Church on any question of faith". "Faith" is not defined in s.74 except by the statement (which is not helpful for our purpose) that it "includes the obligation to hold the faith". The meaning of faith must therefore be taken from s.1 of the Fundamental Declarations as being "the Christian Faith as professed by the Church of Christ from primitive times and in particular as set forth in the creeds known as the Nicene Creed and the Apostles' Creed". With this must be taken the s.2 description of the canonical scriptures as "the ultimate rule and standard of faith". Account must also be taken of the statement of Article 6 of the Thirty-nine Articles that "Holy Scripture containeth all things necessary to salvation: so that whatsoever is not read therein, nor may be proved thereby, is not to be required of any man, that it should be believed as an article of the Faith, or be thought requisite or necessary to salvation".

"Doctrine" must therefore be understood in the Constitution as the Church's teaching on the faith which is necessary to salvation. That faith is grounded in scripture and set out in the creeds; and the Church's doctrine or teaching on that faith may be explicated and developed, provided it is always subject to the test of scripture. For reasons already advanced, I do not see the limitation of ordination to males as required by scripture, nor is it referred to in the creeds. It has certainly been the usage of the Church in the centuries preceding and following the Reformation, but that usage has not been the subject of any authoritative definition of doctrine by the Church. Our attention was drawn to Phillimore's explanation that women are disqualified from ordination "by nature, Holy Scripture and catholic usage". The statement that women are disqualified by nature appears to reflect certain culturally conditioned assumptions about the defectiveness of female nature, which assumptions themselves influenced the interpretation of scripture and helped shape catholic usage. In view of the clear position of this Church on the primacy of scripture in matters of faith, usage based on such assumptions cannot be considered matters of doctrine. For this reason I stand by the view that the ordination of women does not involve any doctrine embodied in the formularies nor any principle of doctrine laid down in them.

In 1985 different definitions of the word "principle" were favoured by the Majority and the Minority of the Tribunal. The Majority, of which I was one, favoured the more stringent definition, viz. "a fundamental truth or proposition on which many others depend". The Minority favoured a broader definition, viz. "a general law or rule adopted or professed as a guide to

action; a settled ground or basis of conduct or practice; a fundamental ... reason of action, esp. one consciously recognized and followed".

"Principle" is a slippery word, as evidenced by the variety of meanings given to it in the submissions received. Indeed I do not think that it can be taken as certain that it has the same nuance of meaning in the phrase "doctrine and principles of the Church of England" as it has in the phrase later occurring, "any principle of doctrine and worship". It seems to me that "a principle of" something implies a more stringent definition of "principle" than is required by a more general phrase such as "the doctrine and principles of....". It is not however necessary to express a final view on that question.

That there are such difficulties in interpreting s.4 indicates that the drafters were not very successful in expressing their intentions. Nevertheless we have clues to assist us in understanding those intentions. Clearly it was intended that this Church should continue to be essentially the same Church as it had been while still part of the Church of England. For this reason the doctrine and principles of the Church of England were retained. Nevertheless it was recognised that changing circumstances would mean that a tight and literal binding to the formularies would be undesirable if not impossible. When the Constitution was drafted there were already clear instances of the problem that would be created by over-rigid adherence to every detail of the historic formularies. For example, the Prayer Book, Ordinal and Articles embodied in various ways the principle of a special relationship between the Crown and the Church which had long ceased to be applicable to Australia when the Constitution was drafted.

Recognising this problem, the drafters attempted to meet it in several ways. In contrast to earlier drafts of the Constitution they removed what is now the opening statement of s.4 from the unalterable provisions of the Consitution where it had appeared, for example, in the 1926 draft (R.A. Giles, The Constitutional History of the Australian Church, p.208). They also specified in s.74 (3) that the doctrine and principles of the Church of England which were retained and approved meant "the body of such doctrine and principles". I agree with the remarks of Mr. Justice Young in his Reasons as to the significance of this definition in not binding this Church to every detail but to the main part and essentials of the doctrine and principles embodied in the formularies. This was a safeguard against binding the Church to a host of principles (which if a broad definition of "principle" were accepted would include some quite minor matters) which might simply reflect the circumstances and assumptions of past ages. The drafters also provided in the Constitution that this Church would have "plenary authority" -- a phrase with far-reaching implications --

to make statements as to the faith, ritual, ceremonial or discipline of this Church subject to certain important provisos. It seems clear that the Constitution was designed to allow sufficient flexibility to this Church, while preserving it as in all essentials the same Church as it had been before.

In 1985 I favoured the more stringent definition of "principle" because it seemed to me that it best accorded with this intention of allowing reasonable flexibility in relation to the formularies. This is particularly true in relation to the proviso that alterations to the formularies should not contravene any principle of doctrine or worship laid down in them. I see no reason to alter this view. In particular I do not think that the use of the male personal pronoun in the Ordinal is sufficient to constitute a principle of the Church of England, and I agree in general with the reasons given in Mr. Justice Young's judgment in respect of this question.

While I still favour the more stringent definition of "principle", certain of the submissions made to us as to the construction of s.4, together with the analysis of that construction given in the judgments of the President and the Deputy President, enable me to see that in any case it makes no difference to the answer to be given as to the consistency of this Canon with the Constitution. I agree with the conclusion of the President that even if there were a principle of the Church of England embodied in the formularies, not being a principle of doctrine, such principle would be capable of variation under the terms of s.4. The present Canon would, consistently with the Constitution, be sufficient to effect the variation of principle required.

I am indebted to the President for his analysis of the significance of "statements as to the faith ritual ceremonial or discipline of this Church", and I agree with what he has said on this. The purpose of such statements is not spelt out in the Constitution, but a primary purpose would appear to be an interpretive one. As early as 1921 a report to General Synod on the basis of a Church Constitution for Australia listed reasons why autonomy was desirable and said inter alia: "It is felt that the Church should accept its proper responsibility of interpreting the formularies it has adopted" (Quoted in R.A. Giles, op.cit., p.302). I think the significance of statements authorised by s.4 is to be understood against this background. They may interpret the application of the doctrine and principles of the Church embodied in the formularies in respect of particular questions that might arise in the areas of faith, ritual, ceremonial or discipline, provided that no inconsistency with the Constitution is involved.

Canon 18 of 1985 purports to authorise the ordination of women as deacons. In so doing it implicitly embodies an interpretive statement as allowed for in s.4. That statement is in my judgment consistent with the Fundamental Declarations and is made in the way prescribed by the Constitution. It does not breach any principle of doctrine or worship laid down in the formularies. It is therefore consistent with the Ruling Principles of the Constitution.

One other matter raised in the 1985 Reasons of the Majority requires further comment. Reference was there made to what some submissions have variously called "a principle of advancement" or "a principle of progression" from one order to ministry to another. These terms were not used by the Majority, and it would be more accurate to speak of "a principle of no inherent disqualification". The Majority were at pains to emphasise that no principle of the Church of England required every deacon to be ordained priest any more than every priest to be consecrated a bishop. We were aware that throughout the history of the Church of England as in other parts of the Catholic Church men had been made deacons without any intention of proceeding to the priesthood. We were also aware of evidence that in the primitive Church the orders were not necessarily regarded as "inferior" or "higher" but different, and that even those who became bishops did not in every case progress through the steps of deacon and priest.

The principle that we discerned in the Collect and rubric at the end of the service for the ordination for a deacon was that there should be no inherent disqualification from proceeding to other orders of ministry. In categorising this as a principle of the Church of England embodied in the Ordinal, we were not comparing its significance with that of other principles of the Church of England but were alluding to the fact that it is more clearly "embodied" in the Ordinal than some other principles (which may in themselves be more significant). The Majority did not categorise it as a principle of doctrine, or as one incapable of variation under the terms of s.4. Indeed, it cannot be understood as a matter of doctrine as defined in the Constitution for reasons set out earlier in my Opinion.

I agree with the other members of the Tribunal who see no case for invalidity in the present Canon on the ground that it makes no specific provision for advancement of women deacons to other orders of ministry.

COSTS:

I agree with those members of the Tribunal who consider it would be inappropriate to make an order for costs in this case.

CONCLUSION

For reasons I have given, the answer to the Primate's question should be: No.

THE APPELLATE TRIBUNAL

RE ORDINATION OF WOMEN TO THE OFFICE OF DEACON CANON 1985

OPINION OF THE ARCHBISHOP OF SYDNEY.

1. PRELIMINARY REMARKS

In addressing myself to the questions submitted to the Appellate Tribunal by the Primate in accordance with Section 31 of the Constitution, I wish to make three preliminary comments about my approach.

First, the composition of the Tribunal - three diocesan bishops and four communicant lay members of the Church (who must also be experienced lawyers) - points to the fact that its members are expected to produce among themselves not merely expertise in legal interpretation, but a wider Christian background. Of course their task is to ascertain the meaning of the Constitution, for this will determine whether the Canon is valid or not. Moreover the Constitution is a legal document, a schedule to an Act of Parliament. Nevertheless it is clearly not expected that all the members should approach the question in exactly the same way. In references involving any question of faith ritual ceremonial or discipline, the concurrence of two bishops and two laymen is necessary for the giving of an opinion. This distinction between the bishops and the laymen suggests that the two groups may well have a different approach to a matter, though it should be assumed that these would be complementary rather than contradictory. Inevitably, my own background and experience is that of a bishop rather than that of a lawyer.

Secondly, a referral made to the Tribunal under Section 31 does not require any "plaintiff" in the ordinary sense. It is sufficient that a question has been raised as to the consistency of any canon with the Fundamental Declarations or the Ruling Principles of the Constitution. How the question may have been raised is not stated. The Primate may refer the question to the Tribunal on his own initiative. At the written request of twenty-five members of General Synod - who may act severally or together, and who may have a variety of reasons for wishing to see the question resolved - the Primate is bound to refer the question to the Tribunal. While the Tribunal, acting under the power conferred on it under Section 59(3),

decided to hear both written and oral evidence submitted by various parties, there was no compulsion on it to do so, and it would have been required to consider the question even if no evidence had been offered or admitted. I conclude that the Tribunal's consideration of the questions now before it is not limited to evidence submitted by one or other of the parties. I take it that this point is made in Legal Submissions of the Requesting Members (Sydney) p.5.

Thirdly, it is my view that these questions should be heard without regard for any previous opinions expressed by the Tribunal. This is the first time a referral has been made under Section 31, and the first time the validity of this Canon (or any other canon) has been tested after being passed. It is not at all clear to me that the referral of certain hypothetical questions to the Tribunal in 1985 under Section 63 was properly made. Section 63 comes at the end of Chapter IX which deals with the Tribunals and their powers, and the main thrust of the Section is to confer the appropriate jurisdiction on the Tribunal to hear and determine matters which have arisen under this Constitution and referred to the Tribunal "in the manner provided and subject to the conditions imposed by this Constitution". This must include matters which have arisen under Sections 29 to 31. It is true that the subsequent proviso of Section 63 can hardly refer to Sections 29 to 31. But the explanation may be that the drafting is defective rather than that the proviso was intended to allow, at this tail-end of Chapter IX and in a mere proviso, a new unspecified power (of doubtful effectiveness) for the Tribunal to give discretionary opinions on hypothetical matters. All in all, and especially since in any case the Tribunal only "may" take into consideration its previous decisions (Section 73(1)), it is my view that in the present referral the Tribunal should not be influenced by former opinions.

2. THE FUNDAMENTAL DECLARATIONS

The first question referred by the Primate concerns the inconsistency of the Ordination of Women to the Office of Deacon Canon 1985 with the Fundamental Declarations of the Constitution.

The purpose of Chapter I of the Constitution, entitled Fundamental Declarations, is broadly to tie the Anglican Church of Australia to those

features of the one holy catholic and apostolic church of Christ which are considered by the Constitution to be essential to that una sancta. Adherence to these features by the Anglican Church of Australia secures its integrity and identity as part of the una sancta. Adherence to these features by the Church of England and by churches in communion with the Church of England is a condition of the communion of the Anglican Church of Australia with those churches (Section 6).

Section 3 declares, inter alia, that "this Church will ever...preserve the three orders of bishops, priests and deacons in the sacred ministry". The use of the definite article indicates that both "the sacred ministry" and "the three orders" in that ministry are well-known and require no further definition within this Chapter. It is not enough to recognise merely some form of ministry, or to preserve the names of three orders, or three orders of anyone's devising. "The three orders of bishops, priests and deacons in the sacred ministry" can only be the ministry and orders referred to in the 39 Articles (see for example articles 19,23,26,32 and 36) and in the Book of Common Prayer especially the Ordinal. Just as "the canonical scriptures" in Section 2 of the Fundamental Declarations depend on the 39 Articles for their correct definition (see Section 74), so "the three orders.....in the sacred ministry" depend on the Articles and Prayer Book for their correct definition. This definition claims catholic and apostolic, not merely Anglican, status for the three orders. The orders are in fact common to the Anglican, Roman and Orthodox communions. "The sacred ministry" itself is declared in the Ordinal to have been "appointed for the salvation of mankind", and the orders in that ministry are said to have been in Christ's Church "from the Apostles' time" and to have been appointed by God's "divine providence".

There can be no doubt that what Section 3 commits this Church to preserve are these orders in this sacred ministry. The question is whether admission of women to the order of deacons would be inconsistent with this commitment.

I believe the answer to that question must be Yes. The traditional view in both Eastern and Western christendom is "that only a baptized and confirmed male person can be validly ordained", i.e. admitted to one of the three orders of bishop priest or deacon (Oxford Dictionary of the Christian Church, ed F.L. Cross, sub voc. 'Orders and Ordination'). This is not a matter of law but of doctrine.

This qualification for valid ordination is quite different from a variety of qualifications considered necessary from time to time and in different places for regularity of ordination, such as age, celibacy, being learned in the Latin tongue, subscription to oaths and declarations, interstices, availability of title, etc. This catholic tradition regarding conditions for valid ordination has been reinforced by ecclesiastical law. So far as I am aware, there is no doubt as to the law of the Church of England which our own Constitution adopted for our own Church at 1 January 1962. This law was, and always had been, that a woman could not be admitted to holy orders. Such ordination would be not merely irregular or unlawful, but invalid. Legal evidence submitted to the Tribunal included this statement as to the law of the Church of England found in Phillimore's Ecclesiastical Law (2nd ed. p.93): "There are only two classes of persons absolutely incapable of ordination: namely unbaptized 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".

With regard to the distinction between validity and regularity made above, I cite in support the description given by R.C. Mortimer, former Bishop of Exeter and sometime lecturer in early Canon Law at Oxford. He draws attention to "the distinction between the variable and the immutable parts of the canon law". This distinction is "based on laws which are held to be of divine origin and those which are of purely ecclesiastical origin". He writes:

> "Apart from fundamental moral principles, the most important part of the immutable canon law concerns the validity of the sacraments. The sacraments are nothing if they are not of divine origin; the conditions which are clearly laid down by God concerning their administration the church cannot alter. The only room for change here lies in the church's judicial power to determine what those conditions are...These determinations form no part of the church's legislative function. They are judgements of fact, of what God has ordained..."

The greater part of the canon law, says Mortimer, is mutable, and canons are only immutable "when and in so far as they contain or express some precept of the divine or natural law.

> Thus the canon will lay down the minimum age at which a man may be ordained to the priesthood, and the moral, physical and

> intellectual qualifications he must have. But any of this may be altered from time to time or even to meet particular cases. That the candidate for ordination must be a man and not a woman, however, admits of no alteration or exception because it is part of the determination by the church of what is divinely required for the validity of the Sacrament of Orders".

(Western Canon Law, Oxford 1953, pp 74-77).

It will be noted that Mortimer is speaking specifically of ordination to the priesthood (admission to which he regards as a sacrament) and I suppose it is arguable that it lies within the judicial power of the church to determine that masculinity is not, by divine ordinance, required for ordination to the diaconate even though it be so required for the priesthood. However, at the time our Constitution was adopted no such determination had been made by the church in England (if indeed a national church could act on its own in such a matter) and the presumption of masculinity for deacons as for priests was clearly written into the law and order of the church. Accordingly, this position, explicitly endorsed by the law of the Church of England, was what formed part of our own law, and since it related to what was meant by "the three orders of bishops priests and deacons in the sacred ministry", it formed that part of our law which could not be altered under the Constitution. Where the scriptures have been judicially interpreted in relation to a matter involved in the Fundamental Declarations, our Church cannot alter it under this Constitution.

If the invalidity of women's ordination were merely a doctrine or principle of the Church of England to which our Church was committed solely by Section 4 of the Constitution, the only question before the Tribunal would be whether that doctrine or principle could be altered in terms of Section 4. If however the present law of our Church accurately reflects the definition of the orders in the sacred ministry as essentially and exclusively male, altering that law now cannot change the meaning and interpretation of Section 3 of the Fundamental Declarations. Indeed the law cannot be changed at all if the change is inconsistent with the Fundamental Declarations. It appears to me that by definition the orders of ministry in Section 3 are essentially and exclusively male. Thus deliberately to ordain women to an order, or to pass a canon to permit this, would be inconsistent with the commitment of the Church to preserve the orders in the sacred

ministry. In my view, the wording of Section 74(6) - "In the case of lay but not clerical persons words in this Constitution importing the masculine shall include the feminine" (my emphasis) does not reflect a holding operation in view of uncertainty about the debate on women's ordination, as has been suggested, but rather reflects the awareness of those who framed and adopted the Constitution that clerical persons could not be women under this Constitution.

In my discussion so far, orders have been treated collectively. Is it possible that a different result would be yielded if the diaconate were treated on its own? Despite the fact that there have been deacons who have never proceeded to the priesthood, it does not seem possible to isolate the diaconate from the priesthood in considering the question now before us. Certainly, the priesthood is the centre and heart of what is meant by "the sacred ministry". So much is clear from the Ordinal itself. The deacon is to assist the priest in divine service and in pastoral visitation. The expectation, indeed the prayer, at his ordination is that he will in due time proceed to the priesthood, so long as he "well behaves himself" in the office of deacon. Canon 32 of 1603 describes the diaconate as "a step or degree to the Ministry". More significant, the deacon at his ordination is asked not merely whether he feels inwardly moved by the Holy Spirit to take upon himself the office and ministry of a deacon, but, as a subsequent question, whether he thinks he is truly called according to the will of our Lord Jesus Christ and the order of this church to "the ministry of the Church". This must refer to the ministry in larger terms than merely the diaconate.

It has been necessary to look at the formularies and the law of the Church of England and of our own Anglican Church of Australia to determine what is meant in Section 3 by "the three orders of bishops, priests and deacons in the sacred ministry". It would perhaps have been more appropriate had the intention to preserve the ministry in this way been expressed among the Ruling Principles rather than among the Fundamental Declarations. There was considerable argument to this effect in the debates which led up to the adoption of the Constitution. But, since the sacred ministry and its orders were of wider usage and not distinctively Anglican, the reference to them remained among the Fundamentals. I consider it proper and correct, however, to discover what is meant and implied by "the three orders in the sacred ministry" by reference to Anglican law and formularies. It is true that the latter are not irreformable under the Constitution. But even if they were reformed, this would not alter the meaning (derived from the law and formularies at the time of the adoption of the Constitution) to be given to Section 3. That meaning includes the fact that the three orders are

essentially and exclusively male in character. The Church could not, having committed itself to preserve those three orders in the sacred ministry, deliberately ordain persons lacking fundamental qualifications for such orders. To do so would, in my judgement, be inconsistent with the Fundamental Declarations.

In view of the fact that Holy Scripture is cited in ecclesiastical law as one of the grounds for holding that only males may be admitted to the ordained ministry of the Church, it must be asked whether the Canon under consideration may be inconsistent with other parts of the Fundamental Declarations in addition to that clause which relates explicitly to the preservation of the three orders.

It is difficult here to distinguish one order from another if all are seen as comprising together "the sacred ministry". In claiming that "the office of Deacon (is) a step or degree to the Ministry, according to the judgement of the ancient Fathers and the practice of the Primitive Church", Canon 32 of 1603 is evidence for the view that the integration of the orders is more than a particular principle of the Church of England, and that this integration is involved in what the Fundamental Declarations claim as requiring to be "ever...preserved". To some extent, therefore, whatever Holy Scripture may authenticate about the higher orders will inevitably affect an order which is a step or degree to them. On this view, a scriptural sanction regarding the priesthood will also be a sanction regarding the diaconate. But there is a more particular consideration insofar as the ordination of a deacon includes authority to preach "in the Church where he shall be appointed to serve". It is not taken for granted that a deacon will preach. He will require the licence of the bishop himself to do so. But given that licence, authority to preach is conferred by ordination to the diaconate. In recent years the increase of lay participation in liturgical services has led to considerable confusion as to the significance of preaching. For many years the regulations concerning the ministry of deaconesses in some parts of the Church were careful to avoid any expression which would imply that deaconesses shared in the "pulpit" or "preaching" ministry of the Church, even though they might "address the congregation" in certain circumstances. Likewise Readers, in the Diocese of Sydney for example, were for many decades carefully restricted as to their speaking in church, being permitted to "preach" only from a text provided by the bishop or a manuscript approved by him. The now widespread assumption that laymen are entitled and qualified to "preach" in church has clouded the issue before us. This practice may be a breach of the principles of the church and of the constitution, but that question is not before us. At the least it is necessary for us to discover what is the significance of "preaching" in connection with "the sacred ministry", and whether there is anything in Holy Scripture which would restrict preaching in church to duly authorized men.

Preaching the pure word of God is, according to Article 19, the primary note or criterion of the visible Church of Christ. Obedience to that Word is the duty of every hearer in Church. Even the ordaining bishop joins with the ordaining priests and all others present at the ordination of priests in prayer that "we may always have grace so to hear and receive their proclamation of your holy word that in all our words and deeds we may seek your glory". Preaching is the sceptre of Christ within the Church. Only those lawfully called and sent may exercise the office of public preaching in Church (Article 23), and neither the Ordinal nor any other part of the Prayer Book knows any but ordained ministers in this category. It is here that the apostolic prohibition of women teaching and having authority over men in church has effect. If that prohibition remains valid, women may not exercise in church that preaching and teaching of the word of God with authority which St. Paul refers to in his epistles and which our Anglican formularies designate as a mark or note of the visible Church of Christ. Insofar as the deacon shares in that ministry, any restriction applying to the priesthood also applies to the diaconate.

While it is clear from the writing of English church leaders of the 16th and 17th centuries(such as Richard Hooker) and from expositions of English church law cited in evidence before the Tribunal that the prohibition of scripture was considered applicable to the question whether women could be admitted to holy orders, I should like to state a little more exactly how I believe this application should be viewed and justified. Texts of scripture are certainly not to be applied indiscriminatelyto situations far removed from their original context. But the prohibition in question belongs to a body of instruction comprising certain specific matters of doctrine and practice which has been identified as the apostolic paradosis or "tradition" delivered to the churches of St. Paul's foundation to be "received" by them for the governing of their faith and order. The character and content of this paradosis has been the subject of study by a number of New Testament scholars. I mention C.H. Dodd ("The 'Primitive Catechesis' and the Sayings of Jesus" in More New Testament Studies, Manchester 1968, and The Gospel and the Law of Christ, Longmans 1947), Oscar Cullman ("The Tradition" in The Early Church, SCM 1956), W.D. Davies ("Paul and Tradition"

being pp.341-366 in The Setting of the Sermon on the Mount, Cambridge 1966), and Donovan F. Mitchell ("Women and the Ministry" in Reformed Theological Review, Melbourne Feb. 1951, and "The New Approach to 'Paradosis' " in RTR June 1953). This "tradition" is the very foundation of what we may call the "constitution" of the first Christian churches. Its content is not simply coextensive with all the material to be found in the New Testament. It is to be distinguished, on the one hand, from incidental matters, or matters of opinion and advice, and, on the other hand, from later "traditions" which various churches developed in the course of their lives, such as are mentioned in Article 34. While it may not be possible to determine with certainty the exact limits of the original apostolic "tradition", its importance and authority can hardly be over-estimated. It included the content of the gospel itself (1 Cor.15.1ff. "I delivered unto you what I also received...."), a pattern of ethical conduct (1 Thess. 4.1-8, "You know what instructions we gave you through the Lord Jesus..."). information concerning the Lord's Supper (1 Cor.11.23-26, "For I received from the Lord what I also delivered to you..."), and certain principles of church order (1 Tim 2,3, "that you may know how one ought to behave in the household of God...", 1 Cor.14.33-40, "he should acknowledge that what I am writing to you is a command of the Lord".). This tradition was the rule of all the churches, Jewish as well as Gentile; it was in accordance with the Old Testament (or "the law"); it was in accordance with "nature"; and, most important, it did not originate with Paul but was from the Lord himself.

I do not think there can be much doubt that what St. Paul says about women not exercising the authoritative teaching role in the congregation belongs to this apostolic, or rather dominical, tradition. Paul's words in 1 Cor.14.37, "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", may have a fairly extensive reference to instruction in the previous chapters, but must at least include the immediately preceding verses 33 to 36 where the subordinate, "silent" role of women in church is enjoined. It should be observed that not all of Paul's instructions are in the same category of dominical authority. His instructions about women's head-covering in 1 Cor.11, for example, apparently does not belong to the dominical "tradition", even though Paul urges it on the ground of propriety and church custom. It is a useful example of the distinction between a basic principle (in this case set out in verse 3) and a practical application which may be desirable at the time but not permanent.

The argument from holy scripture, therefore, is actually in the case before us an argument from the apostolic or dominical "tradition" attested by the New Testament, and faithfully observed by the church as belonging to its charter of faith and order. The Fundamental Declarations of our Constitution contain a deliberate affirmation of our Church's adherence to it, especially in Section 3 which refers to the doctrine, commands, sacraments and discipline of Christ. If the position of women in church is part of this "tradition", as the New Testament indicates and as the Church has always believed, then there is no power to change it under this Constitution, and any canon which purports to do so is invalid.

Before leaving the Fundamental Declarations I should indicate my assent to the submission of Mr. Lindsay that the Tribunal is bound to apply the scriptures as judicially interpreted. I do not take this to mean that whevever a question arises under the Constitution as to the meaning or significance of any passage of scripture we are obliged to adopt the declared view of an English court or judge. Section 73(1) relieves us of this responsibility. But in determining what is meant by the scriptures in relation to the three orders of Section 3 of the Fundamental Declarations, it seems to me that we cannot get around the existing judicial interpretation. Not a lot of scripture has been the subject of judicial interpretation. But it so happens that the verses of scripture which refer to women in the congregation have been interpreted by the English church so as to bar women from admission to holy orders. This interpretation is part of the law we have adopted in this Church and is part of what is meant by the scriptures as our ultimate rule and standard of faith. In asking now whether the scriptures impose any bar to the canon of 1985, we are asking whether the scriptures as judicially interpreted before 1962 in relation to the ordination of women to holy orders impose any such bar. The answer to that is certainly Yes. It is the interpretation of the scriptures in the Fundamental Declarations which is at issue. The Appellate Tribunal is not bound to follow the decisions of other ecclesiastical courts, but it cannot alter the meaning of the Fundamental Declarations or the interpretation they had in English law at the time we adopted the Constitution. On this view the canon of 1985 must be invalid, and only a new Constitution by Act of Parliament could relieve the situation.

3. RULING PRINCIPLES

The second question concerns the inconsistency of the canon with the Ruling Principles of the Constitution.

If, as already concluded, the canon is inconsistent with the Fundamental Declarations, it follows a fortiori that it is inconsistent with the Ruling Principles. The doctrine and principles of the Church of England embodied in the Book of Common Prayer and the 39 Articles - which this Church retains and approves under Section 4 - clearly embrace everything in the Fundamental Declarations, and further, no action taken under Section 4 is permitted to be inconsistent with the Fundamental Declarations.

The view has been advanced,however, that the admission of women to the diaconate is not inconsistent with the Fundamental Declarations, nor with the doctrine of the Church of England, but is inconsistent with a principle of the Church of England embodied in the Prayer Book and Articles; but that Section 4 itself gives power to the Church to depart from the principle involved, since it is not a principle of doctrine or worship laid down in the Prayer Book or Articles and therefore need not be retained.

In my judgement, such a view misunderstands both the purpose of Section 4 and the extent of the power conferred on the Church under it. The suggestion that Section 4 gives to the Church power to depart, even in a limited way, from the doctrine and principles of the Church of England retained and approved by this Church is, with due respect to those who have advanced it, preposterous, and I do not believe a single diocese would have voted to adopt the Constitution had it been thought at the time that Section 4 conveyed such a power. In fact all parties were united in desiring the retention and approval of the doctrine and principles of the Church of England, embodied in the Prayer Book and Articles, as a ruling principle of the Church under a new constitution. The "but" in Section 4 was not a modification of that position. It was "but" in the sense of "however". It merely indicated that the retention and approval of the doctrine and principles did not preclude the possibility of revising the Prayer Book or other statements of faith, or making rules of discipline. There was always a desire that this Church should "accept responsibility for the interpretation of the Faith and the conduct of our worship" (see Preface to the 1946 draft Constitution)

and this was not thought incompatible with the declaration that "This Church doth retain and approve the doctrine and principles of the Church of England embodied in the Book of Common Prayer and the Articles of Religion" originally in Chapter 1 of the draft constitution without any qualification whatever. It does not now seem reasonable that a provision for ordering forms of worship, making statements or rules of discipline, should be used as a way of departing from a principle of the Church of England embodied in the Prayer Book or Articles. How could the Church depart from a principle, under Section 4, which in that very section it not only retains but approves? Certainly, the retention and approval of the doctrine and principles of the Church of England could be affected by an amendment of Section 4 itself, by the duly provided method. But I reject the view that Section 4 itself should be invoked to provide a way of escape from a principle acknowledged to be embodied in the Prayer Book and Articles.

I see no reason to doubt that the doctrine and principles of the Church of England retained and approved by this Church in January 1962 included the article that holy orders in the sacred ministry are essentially and exclusively male. In view of the origin of this article in the doctrine and commands of Christ I do not consider that it can be regarded as among the principles of the Church as distinct from its doctrine. In any case I do not see how an amendment to forms of worship, or a statement of faith, or a rule of discipline, could change an invalid ordination into a valid one. More important, the doctrine or principle itself must remain inviolate under Section 4 unless the section itself were to be amended in accord with the provisions of the Constitution, and this could only be done if it were possible to do so without contravention of the Fundamental Declarations.

Much of my reasoning for the view that the 1985 canon is inconsistent with the Constitution rests on the premise that on 1st January, 1962 we inherited, by our own decision, certain law of the Church of England, and that insofar as this law of the Church of England determined the interpretation of the Fundamental Declarations we cannot change it under this Consitution. It is therefore instructive (and, I believe, generally supportive of my view) to observe the way in which the Church of England has, in recent months, gone about exactly the same quest as our General Synod attempted in

1985, namely to admit women to the order of deacons. If, as I have argued, the masculinity of persons to be admitted to holy orders has hitherto been seen as a fundamental matter, how has the Church of England been able to proceed?

Two features of the English process should be noted. First, the ordination of women to the diaconate could not be secured by a simple canon of the General Synod, or indeed by any synodical procedure alone. It was necessary to secure parliamentary and royal assent to a General Synod measure before a canon could be passed by the General Synod. That was the equivalent of a change in the Constitution of the Church. Because of the existing fundamental obstacles to the ordination of women, a canon of General Synod was insufficient to achieve it.

Secondly, steps were taken to break the traditional nexus between the diaconate and the priesthood so far as women deacons were concerned. The promoter of the measure in the House of Commons on behalf of the General Synod recognised, in his speech, that up to that time a deacon "must by definition be a man" (my emphasis).[1] In other words, the Church was aware that it was seeking a fundamental change in its Constitution. At the same time, it took the step of explicitly breaking the nexus which hitherto was recognised to exist between the diaconate and priesthood as far as women deacons were concerned, for the Measure contained the categorical statement that "nothing in this measure shall make it lawful for a woman to be ordained to the office of priest". It is a matter of record that many supported this Measure, both in the Church and in the Parliament, who were opposed to the ordination of women to the priesthood, and these were generally agreed that the Measure was adequate to effect the distinction desired. Steps were also taken to alter the rubrics of the Prayer Book "to ensure" (in the words of the Bishop of Rochester in promoting the Measure in the House of Lords) "that when a woman deacon is ordained the congregation will not be invited to pray that she may go on to the higher ministries of the Church."[2]

The law of this Church is, we believe, the same as the law of the Church of England in respect to holy orders. However, what the Church of England can do through Parliament and a subsequent General Synod canon to alter this law (at least in regard to the diaconate), we could only achieve by a change in the Fundamental Declarations.

1. Sir William Van Straubenzee, Parliamentary Record, 28/10/1986. p.198.
2. Parliamentary Record, 4/11/1986. p.1048.

This latter cannot be achieved by a canon of our General Synod, but only by Acts of Parliament to allow a new Constitution different from the present Constitution to the extent necessary to break the nexus between (women) deacons and the priesthood and to permit women to be ordained as deacons.

The English experience suggests that the question is not whether women may be deacons absolutely, but whether they can be admitted to the present order of deacons under our present Constitution.

My conclusion is that the Ordination of Women to the Office of Deacon Canon 1985 is inconsistent both with the Fundamental Declarations and also with the Ruling Principles of the Constitution.

REASONS OF THE BISHOP OF NEWCASTLE IN THE MATTER OF THE ORDINATION OF WOMEN TO THE OFFICE OF DEACON CANON 1985 AND OF A REFERENCE TO THE APPELLATE TRIBUNAL UNDER s.31 OF THE CONSTITUTION.

1. The text of Canon 18 1985:
the reference of 24 February 1986 to the Primate under s.31 to the Appellate Tribunal,
and the developments since, and up to, and including the sitting of the Appellate Tribunal on December 6, 1986, are all set out by the President in the opening statement of his Reasons.

2. I had made the decision personally to make a complete reassessment of the matter; and I have done this. However, this decision did not involve in any way an acceptance of the submission from the two groups of signatories suggesting that the previous Tribunal Opinions of 1980, 1981 and 1985, "should not be treated as 'decisions' meriting the status 'precedent'.... The subject matter should be considered de novo", as if there were a clear legal responsibility to do so. I accept in a general manner the Reasons given by the lay members of the Tribunal concerning this matter, and reiterate my own personal desire to ensure a thorough reexamination of the whole issue.

3 Anglicanism, says Bishop Richard Holloway, is a "cool" medium for religion, and not one greatly given to excitability or over-emphasis. When the s.31 reference was made with the exciting possibility of new evidence one wondered if the calm stability of Anglicanism would be disturbed, and the General Synod voting majorities about the Canon be made to think again. I could find little that was new in the submissions, although I acknowledge a strengthening, by detailed biblical and theological references, of arguments used in previous debate.

4. The reference of the whole debate to the Church is primarily concerned with doctrinal-theological and scriptural-exegetical issues, although I am fully aware that the Tribunal is faced with a clear legal question as to whether the Canon is inconsistent with the Fundamental Declarations and/or the Ruling Principles of the Constitution. Nevertheless if first the theology and biblical texts can be rightly determined then the legal question is easier of resolution. I was therefore grateful for the

submission from the Sydney signatories concerning the evidence from St. Paul, and the accompanying appendices. But can a clear unequivocal teaching be found in the biblical texts which deny the possibility of women serving as deacons? I shall return to this point later.

5. The formation of the Fundamental Declarations suggests to me that the framers may have had in mind the Chicago Quadrilateral (1886) which eventually became the Lambeth Quadrilateral of 1888 and which was reaffirmed at succeeding Lambeth Conferences.

It reads:-

> *(1) The Holy Scriptures of the Old and New Testaments as 'containing all things necessary to salvation' and as being the rule and ultimate standard of faith.*
>
> *(2) The Apostles' Creed as the Baptismal Symbol; and the Nicene Creed as the sufficient statement of the Christian Faith.*
>
> *(3) The two Sacraments ordained by Christ Himself - Baptism and the Supper of the Lord - administered with unfailing use of Christ's words of institution and of elements ordained by Him.*
>
> *(4) The Historic Episcopate, locally adapted in the methods of its administration to the varying needs of the nations and peoples called of God into the Unity of his Church.*

The unchanging character of this statement needs no further comment.

6. The interesting point is that no such unchanging character was afforded to the Book of Common Prayer either by the Lambeth bishops or by the Ruling Principles of the Constitution, provided that in the latter, the doctrine and principles embodied in the Book of Common Prayer are retained and approved, and that it be regarded as the authorised standard of worship and doctrine; and that no alteration shall contravene any principle of doctrine or worship.

Unfortunately, only the words doctrine and faith are defined by the Constitution. We are left to our own resources (including the 1662 Preface, Concerning the Service of the Church, and Concerning Ceremonies) to define

"statements as to the faith"
"(statements as to) ritual"
"(statements as to) ceremonial"
"(statements as to the) discipline of this Church"
"forms of worship"
"rules of discipline"

and particularly what constitutes "principles" and "any principle of ....worship" .

7. The submissions from the House of Bishops and the Assessors were comprehensive, but the clear fact emerging from their work is that eminent biblical scholars line up on either side of the argument when debating the exegesis of individual passages. Nor is it good enough to talk of "literal" and "original" meanings because literal and original merely beg further obvious questions. For example a straightforward interpretation of Galatians 3:28 would suggest a freedom and equality for every individual person with respect to status and function within the person of Christ: and this would accord with Professor F.F. Bruce's interpretative principle, "whatever in Paul's teaching promotes true freedom is of universal and permanent validity; whatever seems to impose restrictions on true freedom has regard to local and temporary conditions". On the other hand, what does "true freedom" involve, and how is Article 20 related to expounding Scripture in such a way that one passage is not repugnant to another? Is the Galatians reference taken by itself a clearly stated doctrinal principle of Scripture which would make it impossible to discriminate against women serving as deacons?

8. Another example is to ask what we can find of the three-fold Holy Order in the New Testament. The answer is that the evidence, while being there, is patchy. There is reference to bishops, presbyters, and deacons. Common sense suggests that there could well have been a great diversity in leadership roles and functions as the apostolic church increased and grew in numbers. Any number of ad hoc decisions about church leadership in local situations could well have been the case. The New Testament evidence suggests that women were not excluded

from this pattern. Women are mentioned as Paul's co-workers: Prisca, Apphia, Phoebe, (a diakonos), and Junia (apostle) as well as men, Erastus, Mark, Timothy, Titus, and Tychicus. Paul usually equates co-worker (synergos) and those who "work and labour" and Mary, Tryphaena, Tryphosa, and Persis, are all commended in Romans 16:6 and 12 for having "laboured hard" in the Lord.

This is not presented as conclusive argument but to suggest that one cannot rule out the possibility of women taking church leadership in the New Testament age and therefore no clear evidence to debar them from being deacons today.

However, the three-fold order emerged as we know it today over several centuries and was the result of the church reflecting on the experience of its life as controlled and directed by the Holy Spirit. This development of practice starting from the biblical texts and relating to the life of the Church within given social and cultural contexts is the continuing experience of Christian men and women.

9. The reference to headship and subordination put forward by the Sydney signatories claims a scriptural teaching of St. Paul stemming from the natural order of creation - God: Christ: Man: Woman - and which is a true teaching applicable in every age and culture. They further claim that "biblical scholars of comparable reputation and competence agree on the meaning of the texts. Scholars disagree on whether the agreed meaning should be discarded by the Church." Quite so: scholars may not be the ones authorised to make that decision. But this Church, through its 1977 General Synod Resolutions 23 and 27: its acceptance of its Doctrine Commission recommendations, and a Canon passed with requisite majorities, together with its Appellate Tribunal findings, is the body equipped to do so.

However, this Church listens to its scholars; and concerning biblical exegesis asks them a number of questions. What is the original context and meaning of this teaching? How is it to be understood and acted upon in contemporary social and cultural conditions? Paul himself faced similar questions and his writings show his adaptation of teaching to the needs of his sometimes unruly congregations. This two-fold questioning is part of the Church's continuing development

guided (as promised by Jesus) by the Spirit. For example, an almost clear cut case for pacifism can be made out from scriptural evidence, and in the early centuries before Constantine the church adopted such a stance. Today, it would be true to say that fighting in a just war is compatible with some other principles of scripture adapted to a certain political and social condition. It may be, that given the horror of nuclear war, the church could once again return and hold fast to a pacifist stance.

A further example is the church's acceptance of the concept of slavery for many centuries, and its eventual abolition.

This is not to say that one changes with every whim and wind, but one cannot ignore 150 years of biblical critical scholarship and its results; nor 300 years of scientific investigation and discovery, nor again the developing relationships between men and women in terms of status and function.

The House of Bishops of the Church of England state in the pamphlet "The Nature of Christian Belief" -

9. *An integral part of loyalty to the inheritance is commitment to mission, to the task of 'proclaiming the faith afresh'. Many Christians carry out this task in the most effective of all ways by corporate and individual lives of self-giving love for God and neighbour in prayer and service. But the faith which is the context and inspiration of such lives also has to be communicated, if others are to be touched by God, and if the Church is to grow in understanding and discipleship. This task of helping the world to know and understand the faith is a never-ending process. Where venerable words are still the best, yet they need to be explained in new ways to the children of new cultures. Where they are failing to communicate, new words have to be found to convey the original vision. Where new knowledge opens up a larger and deeper conception of God, it has to be shown how the inheritance of faith is enriched and developed by this without losing its essential character. If this 'proclaiming afresh' is an exciting vocation, it is also an exacting one. At various periods it can be both painful and precarious.*

10. *It is, for example, always painful for believers when the society of which they are a part comes to think and speak in a way which offers no natural home for Christian concepts and images. The pain springs partly from the pressure on the believer's own faith, but even more hurtful are the barriers set up against the effective communication of the Gospel. In such a situation, familiar enough in our society today, there is need for a spirit of discernment. Christians have to learn to distinguish between what is authentic new knowledge, calling for new expression to match the enlargement of our insight into God and the things of God, and what is simply the current fashion, which it is for the Gospel to test and, if necessary, challenge.*

11. *Christians also have the creative task of developing words and thoughts accessible to the contemporary world, within which the being and work of God, though always infinite and inexpressible can yet be glimpsed as both compatible with the universe as we understand it, and also probable, illuminating and fulfilling to the human mind and heart. Care, however, is needed not to introduce fatal distortions of the Gospel, nor to resort to words and images which merely reduce revelation to the narrow limits of unredeemed human vision. Because God is what he is, the truth about him, however sympathetic to the reason of creatures made in his image, is bound also to carry its logic beyond that reason's grasp.*

12. *The questioning and creative process is a necessary part of Christian discipleship. Provided that it is positive, and undertaken out of concern for truth, with faith in the God who has brought us thus far, and with prayerful dependence on his Spirit, it will never be hurtful. In the past, crucial insights have been won by those who had the courage to question in faith. The Church of England is committed to this process with openness and integrity, and with a confidence, born of experience, that, however exacting it may be, essential truths of the Gospel will emerge from it more clearly understood, and better able to bring help and illumination to a world caught in the confusion of ever more rapid change.*

Yet the question could still be addressed that headship/subordination was a prime and unchangeable principle. Assessor Chittleborough quotes Professor John Macquarie reporting to the Lambeth Conference 1978 on the subject of the ordination of women as follows:

> *"First of all, I think we have to get the problem into perspective. Most theologians would agree that in Christianity there is what has come to be called a hierarchy of truths, that is to say, there are some central doctrines which comprise the very heart of the Christian faith, there are others which may be less central but are nevertheless moderately important and well attested, while there are others still which are more peripheral and about which there is some question as to whether or not they are implicates of the central truth. It seems quite clear that the question of whether women can be priests belongs to this outer grey peripheral area. It is certainly not I would say a question by which Christian faith stands or falls."*

I accept that "hierarchy of truths" principle, believing that the headship/subordination teaching is in the "peripheral area". Both the Genesis narratives and the Corinthian and other Pauline references are capable of other interpretation than the one given by the Sydney signatories, and is part of that teaching that the Church does in every age of "proclaiming the faith afresh".

10. The question of legal precedent raised by the Sydney signatories that "subject to the Constitution, the standard of faith and doctrine in the Anglican Church is the "formularies of the Church as judicially interpreted....": and their counsel's comment that the interpretation of Scripture is judicially interpreted, was for me a view quite contrary to the essence and spirit of both Scripture and tradition. Nevertheless while being personally aggrieved by such a view I recognise a legal response is required and I concur with that stated by the lay members of the Tribunal.

11. Section 3 of the Constitution requires that "the three orders of bishops, priests and deacons in the sacred ministry" be preserved. The signatories view that preservation as confined to male Orders.

It is the "orders" which are to be preserved and not the qualifications of the persons who are called. Male/female, married/single, black/white, learned in Latin or Japanese, are qualifications which may vary and have varied from time to time. The Canon in no way offends this preservation of the order of Deacons, and I am willing to reaffirm support for the 1985 majority Tribunal opinion.

I am interested in the President's response to Mr. Merralls' submission that the words in Section 3 are exclusively male gender words in English usage. In further support, could it be held that when we use the noun "Australian" we almost automatically think of maleness: yet there is no doubt it is inclusive. Such usage is and has been socially and culturally conditioned over centuries, and includes words like author, painter, musician, sculptor, economist. We know it is possible that they may be women but our mind-bent is first to visualise them as males: yet they are normally inclusive words; and bishops, priests and deacons can be similarly used.

12. Does s.74 (6) confine the "bishops, priests and deacons" in Section 3 to male persons only? A similar response as outlined in Section 11 above applies. Section 3 is referring to "orders" not persons. I am further willing to concur with the general reasoning given by the lay members of the Tribunal.

13. With respect to the principle of progression or advancement I still hold with the majority 1985 finding, namely:-

> 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 require 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."

However, it has been questioned whether the Canon can be consistent with this progression or advancement principle when the possibility of women deacons becoming priests and bishops is not possible in Australia.

This Church can authorise legislation for the ordination of women as priests and bishops if it so determines: that is an option that is always possible, and because of that maintains the integrity of the advancement principle.

Secondly, as Mr. Mason QC suggested, there are many Provinces in the Anglican Communion where it would be possible for a woman deacon to proceed to priesthood. This is not a practice which personally I find appealing and would not generally condone. Nevertheless, it is an option which is always possible and maintains the principle of progression or advancement.

Thirdly, the 1985 Tribunal majority answer to Question 6 of the reference:-

> "With what principle (if any) of the Church of England embodied in the Book of Common Prayer together with the Ordinal and the Thirty-nine Articles would -
>
> (a) the ordaining of a woman to the office of
>
> (1) deacon, or
>
> (2) priest
>
> or
>
> (b) the consecrating of a woman as bishop be inconsistent?
>
> ANSWER (The President, the Archbishop of Sydney, and Mr. Handley QC dissenting):
>
> As to (a) (1) None
>
> (2) None
>
> (b) None"

suggests that it could be possible for a woman deacon to be ordained priest or bishop without further enabling legislation in General Synod.

I would not want to make further comment now on this matter, but clearly it would support the progression or advancement principle.

14. Section 4 of the Constitution is not only difficult of interpretation for laymen but appears to baffle and bewilder the lawyers too. This is not intended in totally uncomplimentary terms, but to pick up some words from the Sydney signatories, "unless terms, i.e. words, are terms of art with legal connotations or have been given judicial consideration then they should be given their ordinary and natural meaning. This, we submit, should determine the meaning of bishop, priest, deacon and principles".

I have dealt already with bishop, priest, and deacon, and I am unwilling to depart from the definition of principle outlined in the 1985 Tribunal majority decision.

The word "principles" in line 2 of Section 4 seems to me to refer to "principles of worship" given the context of the paragraph. Thus "the doctrine and principles (of worship) of the Church of England embodied in the Book of Common Prayer together with the Form and Manner of Making, Ordaining, and Consecrating of Bishops, Priests, and Deacons and in the Articles of Religion sometimes called the Thirty-nine Articles," are to be retained and approved.

The use of "but" suggests that what follows i.e. "statements" as to faith, ritual, ceremonial or discipline of this church, and "forms of worship" and "rules of discipline" are secondary (and perhaps tertiary) elements which are dependent elements flowing from primary principles.

Is the "maleness" of Holy Order then an un alterable doctrine and principle which must be retained and approved? Clearly it is assumed in the Ordinal and Article 23 that only men would be ordained, and masculine pronouns in the Ordinal support this assumption. In addition the Timothy reference supports this, but assumes further that the deacon will be married. I cannot accept this evidence as establishing a definite doctrine and principle. I can perhaps see it as a "rule of discipline" capable of being "ordered" by this Church with its "plenary authority". Even if maleness of order could be defined as a doctrine and principle, on my own prior reasoning, it would be contrary to

Scripture and therefore Section 3 of the Constitution, and thus would be invalid.

15. With respect to an historical perspective of the matter I found much help from a document received on behalf of the Standing Committee of General Synod. From the bottom of page 2 onwards I find myself in substantial agreement with the writer.

16. I find myself wanting to reimburse the General Synod and so asking the signatories to pay certain costs. This would include fares of all members attending the House of Bishops meeting, the Assessors, the Tribunal sitting, and expenses involved in the use of St. Andrew's House for the day of the sitting.

It would be impossible to quantify the countless hours of work by all involved, and more especially members of the Tribunal. I am not suggesting that Tribunal work should be reimbursed, merely that the Church as represented by General Synod should not be out of pocket over this matter.

I am aware that the signatories claimed no knowledge of the 1962 Canon No. 6, but find it naive in the extreme that their legal representatives had no knowledge and had not drawn the question of costs to their attention.

17. My conclusion, based on the reasons given above, is that the question in the Reference, "Is the Ordination of Women to the Office of Deacon Canon 1985 made by the General Synod of the Anglican Church of Australia inconsistent with the Fundamental Declarations or the Ruling Principles of the Constitution of the said Church" be answered in the negative.

IN THE MATTER OF THE ORDINATION OF WOMEN TO THE OFFICE OF DEACON CANON 1985

- and -

IN THE MATTER OF A REFERENCE TO THE APPELLATE TRIBUNAL UNDER SECTION 31 OF THE CONSTITUTION

REASONS OF THE VICE-PRESIDENT, THE HONOURABLE MR. JUSTICE TADGELL

The question for our decision is whether Canon 18 of 1985, which provides for the ordination of women as deacons, is inconsistent with the Constitution of the Anglican Church of Australia. As such it is purely a question of ecclestiastical law concerning the ambit of synodical legislative power to authorize, not to require, the ordination of females as deacons. I take time to point the obvious because some of the submissions we received were disposed to wander from the central and crucial issue and to address other questions, for example whether the ordination of women as priests or their consecration as bishops is desirable or convenient or possible. These are questions with which we have no present direct concern. Moreover, a consideration of the ecclesiastical law affecting the Anglican Church of Australia before the commencement of the Constitution in 1962, while valuable and necessary, cannot be decisive; and the Constitution of the Church of England can throw only oblique light on the subject of our enquiry. We must find an answer to the question we are asked - not to some other question - and find it within the four corners of our own Constitution after duly considering what it permits equally with what it requires and prohibits.

So considered, I regard the question to be a much narrower one than it was apparently perceived to be by the authors of some of the wide-ranging submissions we received. I propose to confine my reasons for my answer to it accordingly and to state them as shortly as may be.

I am prepared to approach the task afresh, as I believe all members of the Tribunal are, and to assume that no decision hitherto made in this country binds us upon the answer to the question outside the words of the Constitution itself.

Chapter I of the Constitution - The Fundamental Declarations

The Constitution adopts as a foundation the divine authority of the canonical scriptures and treats them, by section 2, as being the ultimate rule and standard of faith. By section 3 the Church is perpetually committed to obey the commands of Christ, teach His doctrines, administer His sacraments, follow and uphold His discipline and preserve the three orders of bishops, priests and deacons. These precepts, described in Chapter I of the Constitution as fundamental declarations, are as such immutable. It was submitted to us that Canon 18 of 1985 conflicts with one or more of them in various ways and is accordingly invalid. Essentially the arguments came down to two points. First it was said that there is to be found in the scriptural texts what amounts to a divine command forbidding the grant to a woman of equal authority to do as a servant of God within the Christian Church what a man can do in that capacity. Doctrines of male headship and of female subordination were said to be discernible from passages chiefly in the Pauline

correspondence to which, and to commentaries on which, we were extensively referred.

Having studied the texts and commentaries and the submissions upon them pro and con to the best of my ability as a lawyer, I am left with the following clear impressions. First, that the ancient texts to which resort is had are far from unambiguous. Some, indeed, are on any view no less than obscure. Secondly, and unsurprisingly, their interpretation and explanation by professed exponents of the arts of hermeneutics and scriptural exegisis are not only bereft of unanimity, but are widely divergent. I adopt and apply the simple but penetrating statement by Krister Stendahl that -

> " ... any judgment about how to apply an ancient text to a contemporary situation presupposes much more than academic competence in languages and in the history and thought of the early church": The Bible and the Role of Women: a Case Study in Hermeneutics, Facet Books (Philadelphia, Fortress Press, 1966) page 9.

Plainly enough, as the Rev. Dr. Richard McKinney submitted to us in his capacity of a member of the Board of Assessors, the issues raised by the scriptural texts raise in their own turn difficult and complex questions of theological method. It is really extraordinarily difficult, if not impossible, to separate out the several different results of textual investigations and explorations from the several theological approaches taken to them. Accordingly, the prospect of any substantial unanimity in the future is as remote as it has been in the past. The quotation back and forth of scriptural texts is therefore calculated to be relatively profitless in the exercise which confronts this Tribunal. Moreover, the countless learned expositors and commentators, well qualified as they are

to express their individual persuasive views, have no authority to provide a decision which will have constitutional force in the Anglican Church of Australia. We have that authority, and upon this reference we are committed to exercise it. It is our obligation to do so even in the knowledge that many will legitimately and fervently dissent from our judgment.

I have had the advantage of reading in draft the reasons for the opinions of the Archbishop of Adelaide and the Bishop of Newcastle that the ordination of women is not inconsistent with Holy Scripture on the first of the alleged bases to which I have referred - that relying in substance on headship and subordination. I respectfully agree with them and adopt their reasons. Save for the foregoing I would not presume to add to what they have said. I am, however, further encouraged to accept their view by the general concurrence in it by our own General Synod and by the fact that the Church of England in England has already indicated by its Synod in 1978 that it sees no "fundamental objection" to the admission of women to Holy Orders. The approach to the ordination of women as deacons in England has been made, as the Archbishop of Sydney points out in his reasons, otherwise than by the enactment of a simple synodical canon. I do not understand, however, that this approach was taken with a view to overcoming any equivalent in the constitution of the Church of England of our own fundamental declarations. Indeed, it could not be so, for I have no doubt that what we call our fundamental declarations in Chapter I of our Constitution have equally fundamental and unalterable counterparts in the less compact constitution of the Church of England.

The second essential argument addressed to us upon Chapter I concerned that part of section 3 which requires the three orders of bishops, priests and deacons to be preserved. It was submitted that members of the these orders by definition are and have always been male and that to admit females to any of them would infringe the injunction to preserve because it would involve an alteration to what exists, or perhaps the creation of an additional order. This in my opinion misapprehends the requirement of section 3. The orders are to be preserved in their essence, individually and inter se, not in their composition. Given that nothing else contained in the fundamental declarations requires that those in Holy Orders be males, I do not understand why a continuance of the traditional male composition of the orders should be a prerequisite to their preservation. The argument appears to me to employ its own bootstraps for support and in my view it must accordingly fail.

Associated with this argument was a separate one based on section 74(6) of the Constitution, which provides that -

> "In the case of lay but not clerical persons words in this Constitution importing the masculine shall include the feminine".

It was said that this carries the conclusion that section 3 of the Constitution cannot tolerate female bishops, priests and deacons. The answer to the submission is, in my opinion, that the words "of bishops, priests and deacons" in section 3 are used descriptively by way of identification not of clerical persons but of orders of ministry. That they are merely descriptive of "orders", and do not import masculine persons, can be seen from the fact that section 3 would make just as much

sense if the words "of bishops, priests and deacons" were omitted. They do not import - scil. carry with them or bring in - the masculine gender because they are not directed as a matter of language to refer to, involve, signify, denote or imply a masculine noun.

There was one submission that went so far as to say that the order of deacons referred to in section 3 cannot include females so long as section 74(6) remains unaltered. This, if I may say so, appears also to be self-defeating. Before section 74(6) could provide any necessary assistance in the interpretation of section 3 one would have to conclude not only that the words "of bishops, priests and deacons" refer to clerical persons and not to clerical orders, but also that those words import only the masculine. Yet, if section 3 inferentially referred only to males there would be no need to rely on section 74(6) for any such conclusion, because the Constitution would already have decreed by one of its fundamental and immutable provisions that members of its sacred ministry must be males. Accordingly, I regard section 74(6) as irrelevant to the task in hand.

Chapter II of the Constitution - The Ruling Principles

Chapter II enumerates in sections 4, 5 and 6 a series of what the heading to the chapter describes as "Ruling Principles" referable, among other things, to the conduct and regulation of the Church. The scheme is to identify or designate for the Church's purposes some matters of doctrine and other principles, including principles of worship, faith, ritual, ceremonial and discipline. Specifically, part of section 4 identifies (or

provides a formula designed to enable the identification of) certain of the doctrine and principles of the Church of England; and the remainder of section 4 and section 5, and to a degree also section 6, recognize and confer the Church's authority to order its own affairs, subject to conditions.

The composition of section 4, especially of its first paragraph, leads to some tantalising difficulties of construction. For ease of reference it is convenient to set out the terms of that first paragraph. It reads thus -

> "This Church, being derived from the Church of England, retains and approves the doctrine and principles of the Church of England embodied in the Book of Common Prayer together with the Form and Manner of Making Ordaining and Consecrating of Bishops, Priests and Deacons and in the Articles of Religion sometimes called the Thirty-nine Articles but has plenary authority at its own discretion to make statements as to the faith ritual ceremonial or discipline of this Church and to order its forms of worship and rules of discipline and to alter or revise such statements, forms and rules, provided that all such statements, forms, rules or alteration or revision thereof are consistent with the Fundamental Declarations contained herein and are made as prescribed by this Constitution. Provided, and it is hereby further declared, that the above-named Book of Common Prayer, together with the Thirty-nine Articles be regarded as the authorised standard of worship and doctrine in this Church, and no alteration in or permitted variations from the Services or Articles therein contained shall contravene any principle of doctrine or worship laid down in such standard."

Notably, there is an undefined and confusing use of the words "doctrine" and "principle(s)", an ambiguous use of the word "but" and an unhappy and not always consistent use of the word "provided".

The "doctrine ... of the Church of England embodied ..." referred to in the second and third lines of section 4 cannot in my opinion be the doctrine as defined in section 74(1) - viz. "the teaching of this Church on any question of faith" - or at least

cannot be confined to it. The definition must yield (as the opening words of section 74(1) contemplate it may) to the inconsistent context of section 4, which indicates that the "doctrine" there referred to is that embodied in the specified formularies, described together as "the authorised standard of worship and doctrine in this Church". That such doctrine is taken to consist of or include some "principles" is apparent from the expression "any principle of doctrine" contained in the concluding phrase of the first paragraph of section 4. "Principles" where first occurring in the section presumably does not include principles of doctrine (although it is difficult to be sure) and is no doubt calculated to include principles of worship, but I should doubt that it is necessarily confined to them. For the purpose of giving its opinion in 1985 it was essential for the Tribunal to fix upon a meaning of "principles" where first occurring in section 4, and opinion was divided. I have been unpersuaded by argument on the present reference that the majority view taken in 1985 (to which I was a party) was wrong but in any event I believe it is unnecessary here to pursue the matter. Still less is it necessary now to investigate the question whether the expression "Ruling Principles" in the heading to Chapter II involves yet another use of the word "principles" in opposition to principles of doctrine, principles of worship and whatever other meaning the word has where first used in section 4. It is sufficient - and, as I think, permissible - to assume in favour of those who discern embodied in the formularies constituting the authorized standard of worship and doctrine a principle which confines ordination to men. In my opinion it is not an entrenched

principle and can be abrogated pursuant to the Constitution by appropriate synodical legislation.

The retention of the "doctrine and principles of the Church of England embodied" etc. that is achieved by virtue of the opening lines of section 4 does not, I consider, necessarily involve a retention of matters of faith, ritual, ceremonial and discipline that are so embodied. The succeeding lines of section 4 assume as much, and recognize and confer on the Church a plenary authority to take its own stance with respect to such matters, including legislating for them with a view to their modification, abolition or replacement.

The scope of the plenary authority that section 4 recognizes and confers was necessarily the subject of sustained debate before the Tribunal, particularly in the light of the troublesome word "but" which follows the initial declaration of retention and approval of the doctrines and principles embodied in the formularies. The question is whether "but" connotes "subject to the foregoing" or "notwithstanding the foregoing". In my opinion it has the latter connotation. That is to say, it is adversative in sense to what precedes it and not complementary or explanatory. If there is one thing that the singular drafting mode of section 4 does it is to force the reader to read and construe the section, and indeed the chapter, as a whole. The opening lines of the section preceding "but" are apparently designed to import into the Constitution by reference, as it were, identifiable doctrine and principles. The bulk of the remainder of the section, and section 5, are evidently designed to deal with a different matter, namely to recognize and confer plenary authority in

relation to matters which might otherwise fall within the terms of the opening declaration, and to do so subject to certain conditions. The whole of Chapter II consists, as I see it, of ruling principles; and to give the first six or seven lines of section 4 a primacy attributable only or largely to the word "but" would be to distort the whole chapter. We are, after all, interpreting a national Church's Constitution - an instrument of government. The ascription of a narrow or niggardly operation to its provisions that are calculated to recognize and confer a plenary power would be opposed to the obvious intent of the instrument.

I take section 4, then, to authorize the Church to legislate upon matters of its doctrine, worship, faith, ritual, ceremonial and discipline, and section 5 to empower it to legislate for its order and good government and to administer its own affairs, subject only to the conditions specified. These are that such legislation and administration are to be consistent with the fundamental declarations, that no principle of doctrine or worship laid down in the authorized standard (which in my view includes by implication the Ordinal) should be contravened, and that the legislation is made and the administration of the Church's affairs is conducted otherwise in accordance with the Constitution.

I have already indicated my view that Canon 18 of 1985 is consistent with the fundamental declarations. In addition I adhere to the view I expressed in 1985, as one of the majority of the Tribunal, that the ordination of a woman to the office of deacon does not contravene any principle of doctrine or worship laid down in the authorized standard. Any principle against the

ordination of women that may be thought to be laid down in the authorized standard is not in my opinion properly categorized as a principle of doctrine or worship. We were pressed with a contrary view that placed particular reliance upon what was said to be a principle of the Church of England "enshrined in the Ordinal and its Preface which holds our orders of bishops, priests and deacons to be male and in continuity with the deliberately male orders existing in the Church of previous times". I gathered this at least implicitly to submit that the principle was one of doctrine or worship. There were other submissions to like effect. The submission noted that, at the time of their composition, the preface to and the service prescribed by the Ordinal envisaged that Anglican orders would be male; the masculine gender was used throughout and the scriptural readings from Acts and I Timothy, chosen for their diaconal dimension, refer to men. The submission conceded that the matter of "maleness or femaleness" was not addressed explicitly as was, say, the length of service of a deacon; but it was said to have been strongly implied throughout. All or most of the facts upon which this submission was based are incontrovertible but the central issue is whether whatever principle may be discerned in the Ordinal is constituted by those facts a principle of doctrine or a principle of worship.

In order to discover the doctrine of a church or its principles of worship one must surely look at the formularies by which it regulates its worship, for doctrine and worship are closely linked. Doctrine determines liturgy and a study of liturgy can reveal doctrine. Plainly, however, one would be wrong to classify as principles of doctrine or worship all that the formularies contain. In considering the authority of the Book of

Common Prayer as a classifier and exemplar of such principles it is instructive to bear in mind the remarks of the Rev.E. Garth Moore, Chancellor of the Dioceses of Durham, Southwark and Gloucester, in his An Introduction to English Canon Law (O.U.P., 1967.) At page 7 he observed that -

> "The Book of Common Prayer is, of course, the work of churchmen, and of churchmen who were conscious of the delicacy of their task in giving expression to the teaching of a Church at once Catholic and Reformed. The language which they employed had, as far as possible, to satisfy many conflicting factions so as to embrace within one fold as many Englishmen as possible without sacrificing truth, for the Church claimed to be at once both the Church of the English and a part of the Catholic Church of Christ".

Concerning the interpretation of the Book of Common Prayer he said, at page 54 -

> " ... it must be remembered that, although it has statutory authority, it is not itself an Act of Parliament and should not be construed as such. Its rubrics, though binding, are clerical directives, written in the seventeenth century by clerics for the guidance largely of clerics, and unless they are interpreted as such, and in the context of the seventeenth century, they will not make sense. They must be interpreted with the elasticity which directives usually require."

The learned Chancellor's decision in Bishopwearmouth (Rector and Churchwardens) v. Adey [1958] 3 All E.R. 441, 444 is authority to the same effect.

The social and constitutional millieu in which the Book of Common Prayer was produced required that its compilers proceed upon the footing that women were ineligible for ordination. No-one doubts that they were ineligible both by the common law and by the canon law, for by neither the common law from its commencement nor the Constitution of England was a woman entitled to exercise any public function: Beresford-Hope

v. Lady Sandhurst (1889) 23 Q.B.D. 79, 95, per Lord Esher, M.R. What Lord Haldane in Viscountess Rhondda's Claim [1922] 2 A.C. 339, 387 called "the general disability which the law regarded as attaching to the exercise by women of public functions" cannot be supposed to have depended upon the canon law or any religious doctrine or other religious principle, for it extended much beyond the Church in its application. Inasmuch as the common law exclusion of women overlapped the religious exclusion, I should be unwilling to ascribe to any position with respect to women adopted (or "enshrined" or "embodied" or "laid down") by the Ordinal the character of a principle of doctrine or worship unless there were other evidence to justify its being treated as such. Of that I have found none. I must certainly accept the view 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. This, however, does not constitute what may or may not be found in the Ordinal as a principle of doctrine or worship, and I see no other reason for so treating it. Any such precept is in my view no more than a principle or rule of discipline; and I would not distinguish for this purpose a precept, principle or rule.

It was contended on behalf of some of the opponents of Canon 18 of 1985 that the interpretation of section 4 of the Constitution to which I would give effect is offensive to section 71 and therefore impermissible. Section 71 imports, or might import, certain pre-existing elements of canon law derived otherwise than from the formularies referred to in section 4. In particular, it might render applicable at the present day certain precepts contained in the Canons Ecclesiastical of 1603

(or 1604), the Homilies and the judgments of English courts; and in them might be found statements of principle supporting the opponents' submission with respect to the Church's attitude towards a prospect of female clergy.

It is again sufficient for my purposes to say that, if any such principle is imported into the fabric of our present Australian canon law from a source outside the authorized standard described in section 4, it is susceptible of alteration. Much of what I have said about the Ordinal's supposed attitude to women is applicable to a comparable attitude of the Church of England that might be derived from sources outside the Ordinal. I would add only a word or two about the Canons of 1603 (or 1604) out of deference to the submission that some remarks about them expressed by the Tribunal in 1985, and especially those of the minority, give force to the opposition to Canon 18 of 1985.

The Canons Ecclesiastical, although they (or many of them) may be admitted prima facie to constitute part of the canonical code now extant in Australia, must be interpreted nowadays with appropriate commonsense - and some even taken with a grain of salt. This is not modern trendiness. Bishop Hensley Henson wrote forty and more years ago -

> "Let any candid and loyal clergyman be at the pains of reading through the Canons of 1604 (which form the bulk of our canonical code) and let him consider how he could reasonably and usefully make them his rule of action. He will certainly rise from his study with a feeling of dismay, so remote are they from the circumstances of his life, so harsh their tone, so frankly impracticable are many of their practical requirements."

The sensible view would appear to be that the Canons were (again in the words of Chancellor Moore) a "hotch-potch of the matters, big and small, which at the beginning of the

seventeenth century it was thought desirable to produce or reproduce for the clergy in some sort of legislative form". Today they need to be interpreted as such, for it is not surprising that "what was designed very largely with an eye to the needs of the seventeenth century should, by the twentieth century, appear in places a little threadbare and ill-fitting": Moore, op. cit., 7.

I would reject the view that the Canons Ecclesiastical seek to lay down any principle of the maleness of clergy. One may accept that the Latin text (which alone has formal authority: 14 Halsbury's Laws of England, 4th ed., 308, note 1) used male pronouns designedly and not accidentally. The use of the male gender in the Latin and (whether necessary or not) in the contemporaneous English translation was perfectly natural and unremarkable in those canons dealing with the clergy for, in 1603, as in 1865 when the canons were revised, no-one could have contemplated any but male clergy. To suppose, however, that the male pronouns were used in the Latin original or in the translation pointedly, with a view to indicating that females were debarred, strikes me as fanciful. For one thing there was no need to state such a principle because the common law of England forbade the appointment of female clergy. For another, if the Canons had intended to declare, as a matter "it was thought desirable to produce or reproduce for the clergy in some sort of legislative form", that males alone could be priests and that females could not, it is to my mind practically inconceivable that it would not have been done expressly rather than by a backhand implication.

The opponents of Canon 18 of 1985 also sought comfort from the statement of the Tribunal in 1985 to the effect that it is a principle of the Church of England that a deacon be entitled to progress or advance to the office of priest, and from priest to bishop. It was argued that the canon infringes that principle because it does not in terms recognize and apply it. Assuming some such principle, I do not regard the present reference as requiring us to decide whether it is a principle of doctrine which may not be abrogated or whether it is simply a principle of discipline. I take that view because, in my opinion, Canon 18 of 1985 does not infringe any such principle, however it is to be characterized. The canon does not of itself inhibit the operation of the principle. If the time should come when it is desired that a female deacon should progress to the priesthood there would be nothing in the canon to preclude it. If further legislation should be required in order to provide for such progression, then that can be enacted if there be power to enact it; and if there be no power to enact it - as to which I express no present view - that would prove no more than that (for reasons which would presumably affect the appointment of female priests and do not affect the appointment of female deacons) a woman cannot be ordained priest. It would not demonstrate that the present canon was invalid on the ground that it did not provide for the ordination of female priests or because it was in conflict with a principle of progression.

In any event the argument in reliance on the so-called principle appears to involve an unacceptable circularity: in order to apply it in the case of the clerical

progress of women one needs to assume that there are or will be women deacons competent to progress; and this itself is to assume the validity of Canon 18. In truth, I think any reference to the principle produces at best a neutral result for the opponents of Canon 18. At worst for them, it might even tend to support the canon.

As I predicted at the outset of these reasons, they have not pretended to deal with all the arguments that were presented. Having, however, considered and I hope understood them all, I am of opinion that the question addressed to the Tribunal should be answered: No.

Costs

One is naturally tempted to consider making an order for costs, if only to provide some reimbursement to the Church for the not inconsiderable out-of-pocket expenses it has incurred in connection with this reference which, if my opinion is correct, should provide a confirmation of the validity of the canon the Church has made. Nevertheless, I think there are difficulties about making such an order. In the first place there is a question of power. Section 14 of Canon 6 of 1962 is, so far as I know, the only direct source of possible power; but it is not clear that it justifies an enforceable order for costs against individuals, as opposed to a diocese or a member or members of general synod as such. Again, the nature of the costs to which section 14 refers is not clear; and it is uncertain to my mind whether power to order payment of out-of-pocket expenses (rather than legal costs as such) is comprehended.

Even assuming an appropriate power, I would be hesitant to exercise it on this occasion. The reference, although arduous on all sides and no doubt expensive in terms of time, effort and money, seems to me to have involved in many respects a not unhealthy exercise for the Church. The subject of the reference is and will remain of critical importance in the Church's life. With that in mind I think it is likely to prove to be refreshing, and therefore beneficial for many years ahead, to have had the matter thoroughly scrutinized with the assistance of the useful analytical arguments that have been addressed to the Tribunal. These considerations, together with the fact that this is the first occasion upon which the Tribunal has entertained a reference under section 31 of the Constitution, indicate to my mind that the appropriate course is to allow costs to lie where they fall and make no order for them. Nothing I say is intended to suggest that, in an appropriate future case, the Tribunal should not make such order for costs as it considers fit, for this reference can create no precedent in relation to orders for costs in proceedings before the Tribunal.

R.C. TADGELL

February, 1987.

IN THE APPELLATE TRIBUNAL

RE THE ORDINATION OF WOMEN TO THE OFFICE OF DEACON CANON 1985

OPINION OF THE HONOURABLE MR. JUSTICE YOUNG

The text of the Canon which is under attack and the circumstances of the challenge are outlined in the judgment of the learned President and I do not need to repeat them.

At first I thought that there was need for me to write but a very short statement adopting with slight variation what the majority said about this matter when it was last before the Tribunal, but on further consideration, mainly in an endeavour to minimise speakers in General Synod saying that the Tribunal has overlooked important matters, I have decided to reveal my reasoning process in far greater detail than is perhaps necessary.

I have, for the purpose of the present hearing, considered the issues raised from scratch, accordingly there is no need for me to spend time as to whether the advisory opinion given on this matter is or should be the starting point of consideration of the present Reference. I should say, however, that in my view, there is not the slightest validity in the submission that it is beyond the power of the Primate to put a question to the Tribunal under s.63 of the Constitution which involves consideration of a draft Canon. It may be that the Tribunal might in its discretion decline to give an advisory opinion by analogy to the way in which a civil court only gives a declaratory decree if it thinks it should do so. There is, however, no question as to the power of the Primate to refer such a matter or for the Tribunal to give a ruling thereon if it is considered proper to do so.

The matters for decision in this Reference fall into the following categories:-

1. PRELIMINARY MATTERS
2. SCRIPTURE
3. LEGAL PRECEDENT
4. HISTORY
5. THE PROPER CONSTRUCTION OF S.3 OF THE CONSTITUTION
6. THE PROPER CONSTRUCTION OF S.4 OF THE CONSTITUTION
7. MISCELLANEOUS MINOR MATTERS
8. COSTS
9. CONCLUSION

I will deal with these matters in turn.

1. PRELIMINARY MATTERS

The Tribunal has endeavoured to make its decision on the widest range of material possible. Each of the parties, and I use that word in a loose sense, has made detailed submissions and has annexed primary and secondary source material to those submissions. In addition, the House of Bishops has considered the matters arising and has given the Tribunal its reasoned views thereon, and the Board of Assessors has done likewise. In the case of the Assessors, detailed reasons for each assessor's opinion was furnished to the Tribunal. Furthermore, the members of the Tribunal have made themselves acquainted with the relevant historical material and the writings of contemporary authors on the problem. It is, of course, quite clear that this Tribunal may inform itself of matters by whatever means it is convenient to do so. As Dixon, J. said in Australian Workers Union v. Bowen (No. 2) (1948) 77 C.L.R. 601, 628, "It is a tribunal that has no rules of evidence and can inform itself in any way it chooses. Members may act upon their own knowledge and upon hearsay if they are satisfied of the truth of what they so learn...". Of course, this must be read subject to the obligation of the Tribunal to inform those arguing the case of the impressions gained so that there is an opportunity to disabuse the members of the Tribunal of any arguably false view: Keller v. Drainage Tribunal [1980] V.R. 449, 456.

Contrary to expectations, with a couple of exceptions, no really new material was produced to the Tribunal that was not considered by it on the last occasion. This is not to say that in many cases, further authority was provided for viewpoints which had already been considered. Again it was surprising that little material was presented on the history of deaconesses and women workers in the Australian Church. I myself referred to this matter during argument. The way in which the ministry of women has been dealt with in the Diocese of Gippsland since Bishop Cranswick's time is surely a relevant matter to be considered, see particularly Bishop Cranswick's article "Ministries of the Church" reprinted in the Papers from the Australian Church Congress 1925,pp.190 and following. This is because what has happened in Gippsland and in other places in Australia would appear to make one pause before fully accepting the "It has always been so" type statements in the case of both the Sydney and Adelaide signatories. Indeed, the document put to the Tribunal by the counsel for Standing Committee of General Synod again makes me very cautious about accepting many of the statements purportedly made on an historical basis by the signatories. Some of these matters are minimized, however, when one distinguishes between the historical position of the Anglican Church as it existed after 1549 on the one hand with the Catholic Church in the west generally. To illustrate this, it may truthfully be said that at all times since 1549, ordination as a deacon was usually the first step to ordination to the priesthood, though there may have been an exception in the case of university lecturers who needed to be in Orders to secure their position. However, the statement is not true if taken of the Catholic Church in western christendom because for a significant period in the history of the Church, one could

be a deacon and then an archdeacon from which one could be promoted to bishop without first obtaining ordination to the priesthood. I merely mention these matters here. I will deal with the problem in greater depth in section 4 of these Reasons.

2. SCRIPTURE

The professed cornerstone of the case for the Sydney signatories was their interpretation of Holy Scripture. I read what was said on this part of the case with particular care, and indeed, the whole of the case on Scripture was put in writing: there was very little said in oral addresses about this aspect of the case at all. I also read many of the Biblical commentaries referred to, and perhaps a layman may be permitted the comment that on the main passages required to be studied in the instant case, reading the commentaries merely gave one the idea that there are as many different views on parts of Scripture as there are views about the meaning of s.92 of the Australian Constitution!

It was put that Holy Scripture clearly points to a subordination of women to men that was to apply in the Church, which subordination was based on fundamental principles of creation.

I was much assisted in this part of the case by the Rev. Dr. Richard McKinney's paper dealing with Biblical Authority furnished to us in his role as a member of the Board of Assessors. [Indeed I hope that this and the other learned papers furnished by the Bishops and the Assessors are not lost to posterity but are published in some enduring form]. After full consideration I am still of the view that the majority was correct when we said in August, 1985,

> "The passages in question are subject to widely different interpretation by Biblical scholars of comparable reputation and competence. If these passages are to be interpreted literally and as having universal application, women would not only be precluded from ordination, but from exercising other functions in the Church (as lay preachers or even as askers of questions) which have been generally accepted as consistent with the teaching of Scripture.
>
> We are of the opinion that the weight of contemporary Biblical scholarship emphasizes that these passages must be interpreted in the context of the teaching of the New Testament as a whole, and that when seen in this light, they are not to be taken as prohibiting the ordination of women".

I have read the draft reasons of the Archbishop of Adelaide and respectfully agree that even if one accepts the

interpretation of Scripture put by the Sydney signatories, one does not get to the result that a woman cannot be made a deacon unless some unwarranted assumptions are made.

A refinement of this argument is that whilst Scripture does not prohibit a woman from teaching Sunday School, teaching in a theological college, teaching in the mission field or even addressing a congreation, even though in each case the hearers include men, Scripture does prohibit a woman from preaching the word of God in a church as an authoritative minister of the Word. I myself can see no justification in Scripture for that view, nor does it appear to be a view that is held by at least 15 of the 20 bishops who gave a report to the Tribunal, nor does it seem to be in accordance with what happens in churches throughout the world every day of the year.

This is not to say that there is not reflected in Scripture that the Jews in Christ's time had the conception that an ordained Rabbi alone had authority to proclaim God's decisions and inferior teachers could only appeal to a chain of tradition. [See e.g. Wm Lane's Commentary on Mark 1:22 which could possibly be paraphrased "Jesus taught with Rabbinic authority and not like those who were unordained").

It may also be true that this conception was taken up by the very early church, because it would appear that prior to 350 the role of preaching was the special liturgy of the bishop alone. Even the bishop's throne was the teaching chair from which he preached and taught the authoritative doctrine of the Church [see e.g. Dom Gregory Dix,"The Shape of the Liturgy", 2nd Ed pp.31-2]. Such preaching was a far different and more solemn affair than informal teaching and evangelization outside the liturgy.

However, with the expansion of numbers, this special liturgical function of the bishop was shared first with the priests and later with any whom the bishop thought fit to licence whether priest, deacon or lay person. [Of course, lay person is used here in the original sense of a person who has, by baptism, been admitted into membership of the visible Church].

I have carefully read the draft reasons of the Most Reverend Archbishop of Sydney. It may be that the wording of my previous paragraphs is influenced by the modern assumption in the Church that lay persons are able to preach if duly licensed. I have endeavoured as much as I can to dispel such influence. Having done this I still am in the position that I agree with the wisdom of the Most Reverend Archbishop of Adelaide where he says in his draft reasons that the Church's view is that "the authority lies in the Word preached, not in the preacher".

The reality is that the Church from age to age has made adjustments in some of the functions of the ordained and the laity and within the orders themselves. See e.g. Moore's Introduction to English Canon Law, 2nd Ed. pp.121-2 and the learned paper of Assessor Dr. John Gaden furnished to us on this Reference. I do not consider that the law of the Church, even as at 1 January,

1962 was that the ordained ministry alone could "preach" [i.e. give a congregation definitive teaching as opposed to an address].

Accordingly, it seems to me that there is no reason to depart from the view of the 1977 General Synod, the view of this Tribunal in 1980 and 1985 and the view of the Bishops that the admission of women to any of the three Holy Orders would not be contrary to the teaching of Scripture.

3. LEGAL PRECEDENT

A keystone of the case for the Sydney signatories was that "Subject to the Constitution, the standard of faith and doctrine in the Anglican Church is the 'formularies of the Church as judicially interpreted': Wylde v. Attorney-General for N.S.W. (1948) 78 C.L.R. 224 at 264. Decisions of the Courts form part of the Constitution of the Church of England as by law established, and the Church and the Tribunals which administer its laws are bound by them: Merriman v. Williams (1882) 7 App. Cas. 484 at 510-11." Reference is also made to ss. 71(2), 72 and 73 of the Church Constitution.

This submission was made first to remind the Tribunal that it must apply the law and not make up its own rules and do what it personally thought would be best for the Church. In one sense it is a shame that such a submission should have been voiced because there has never at any stage in its history, been any attempt by the Tribunal to do other than to apply the law of the Church and to hold the scales evenly between the contesting parties. General Synod has already indicated the will of the Australian Church so far as it is competent to do so, and Diocesan Synods by adopting or not adopting the Canon, will again express the will of the Church for their respective dioceses. The function of this Tribunal which its members have firmly in mind, is purely the legal question as to whether the Canon is constitutional or not.

The other purpose of the submission is to indicate that Scripture must be interpreted not as the Holy Spirit speaks to the Church of 1986, but rather as it was held to mean by judicial tribunals in England from 1617 onwards. The submission in this form cannot be right. However, insofar as the decided cases indicate that the Church is bound to the laws as interpreted by Tribunals in England, intellectual assent must be given to counsel's submission, but it must be realized that the important words are "subject to the Constitution". The cases relied on were decided at a time before the Anglican Church became autocephalous. Since 1 January, 1962, the Constitution has especially provided for (a) the status of English decisions on Church law; and (b) the power of the organs of the Church to make alterations. Although s.71(2) applies the law in force

in the several dioceses as at 1 January, 1962, the Church also reserves to herself the power to alter that law (subject, of course, to ss. 1-4 of the Constitution), and further s.73 determines that this Tribunal is not bound to follow any previous decisions on a question of ritual ceremonial or discipline made by any judicial authority in England. Indeed, the mere presence of s.73 makes it clear that this Church is free from English judicial interpretation of its formularies. Merriman v. Williams supra at 510-1.

Nonetheless, I have read with care the main decisions relied on by counsel for the Sydney signatories which include Grendon v. Bishop of Lincoln (1577) 75 E.R. 734; Colt v. The Bishop of Coventry (1617) 80 E.R. 290; Olive v. Ingram (1739) 87 E.R. 1230 and Chorlton v. Lings (1868) L.R. 4 C.P. 374. The antiquity of the early cases cited make it very difficult to work out exactly what was decided, and indeed, the most interesting portions are in the argument of counsel. The other authorities are merely evidence that in accordance with the spirit of the times, Judges who then decided them were of the view that women couldn't conceivably be people for the purpose of holding public office.

Our attention was particularly drawn to the passage in Phillimore's Ecclesiastical Law (2nd Ed. p.93), "There are only two classes of persons absolutely incapable of ordination; namely, unbaptized 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". The passages cited for this last observation include passages that we have already examined when considering our view under section 2. Phillimore, doubtless, expressed the law as it was on 1 January, 1962. However, subject to ss. 1-4 of the Constitution, this Church may alter it, and the question before the Tribunal is not what the law was before the Canon, or what the law might have been in Australia on 1 January, 1985, but rather is, whether the Canon under consideration was validly passed by General Synod.

The Archbishop of Sydney in his draft, relied on a passage from Bp. Mortimer's Western Canon Law, pp.76-7, to support the view that the maleness of orders was unalterable. The passage taken from a discussion as to which parts of canon law were changeable and which parts immutable reads, "That the candidate for ordination must be a man and not a woman, however, admits of no alteration or exception, because that is part of the determination by the Church of what is divinely required for the validity of the Sacrament of Orders". Apart from the unease I have that the writer is sliding into the Roman view of Sacraments, this statement is historically inaccurate and should be given no weight as authority in the present debate. There is overwhelming evidence for the existence of women deacons in the early church. Even if it was accurate, it must be read for the Anglican Church of Australia subject to the provisions of the Constitution.

Accordingly, in my view, there is no legal precedent determinative of the question before the Tribunal on this Reference.

4. HISTORY

Some of the historical problems have already been considered in my preliminary remarks, but it is necessary to go into fuller detail.

In my view, many of the statements made in the submission of the Adelaide signatories go further than the historical evidence warrants. At the end of paragraph 6 of the submissions in reply it is said, "The early Church admitted only men as bishops, priests and deacons and gave distinct functions to women". I am not at all sure that this is so. Certainly women deacons do appear to have existed in the western Church up until the 6th century. It may well be true that a woman deacon did not exercise liturgical functions, but I wonder whether this is really material when one is considering the office of the deacon. In the eastern Church, women deacons existed up until the 11th century, and there probably the rise of monasticism was the reason for their disappearance. Further, in the very early Church, a person who had been tortured or imprisoned, yet had maintained their confession of the faith, appears to have been considered by those acts alone to have been ordained, so that laying on of hands was not required. There has been no research into the question as to whether this applied to both men and women or whether the persons concerned ever exercised liturgical functions. These matters and the considerations in Assessor Gaden's paper referred to above, reinforces my view that the historical propositions of the signatories often contain overstatements and that great care must be exercised before basing any conclusions on them.

Recent history seems also to deny that there is any universal view that women are incapable of preaching. I have already referred to the practice in Gippsland. I believe that in some other dioceses an occasional woman has been ordained using the Order for Ordination of Deacons unaltered, though such woman may have in fact assumed the title of deaconess. Further, as pointed out by the submission for the intervenors, there are currently in the diocese of Sydney some 66 women who have authority to preach.

Although it is quite clear from history that it was not the norm for women to be involved in the formal ministry, the evidence goes far from establishing some exclusionary principle that at no stage in the history of the Church, has it been permitted for a woman either to be admitted to the office of deacon or to exercise the functions of the office of deacon.

5. THE PROPER CONSTRUCTION OF S.3 OF THE CONSTITUTION

Section 3 provides that "This Church will ever obey the commands of Christ, teach His doctrine, administer His sacraments

of Holy Baptism and Holy Communion, follow and uphold His discipline and preserve the three Orders of Bishops, Priests and Deacons in the sacred ministry". It is argued by the signatories that, "The three Orders of Bishops, Priests and Deacons in the sacred ministry" which this Church will ever preserve, are in essence male Orders and that these Orders would not be preserved if women were admitted to them.

I see no reason to depart from the view that was formed in 1985 by the majority which I repeat:-

> "The critical question is whether the three Orders are inherently male or whether they are Orders which happened to be, but were not necessarily, composed of male members. For the Orders to be preserved, it is necessary to preserve more than their names. Their essential functions and their relationships with one another also need to be preserved. There is no suggestion that the admission of women to Holy Orders implies a change in the functions and relationships to one another of these Orders. What would change would be one of the qualifications for membership; but qualification for membership in these Orders have varied from time to time without changing the Orders themselves. It was once required that candidates for ordination be learned in the Latin tongue, as the Preface to the Ordinal testifies. More importantly, it was once the law that illegitimate men were debarred from Holy Orders. These qualifications for admission to Holy Orders have altered, but the Orders themselves have been preserved. We believe that this would be true of the admission of women, and having reached the conclusion that such admission would not be contrary to Scripture we are of the opinion that the preservation of these Orders would not be negated by the admission of women to them".

An argument was put to the Tribunal based on s.74(6) of the Constitution, viz that "In the case of lay but not clerical persons words in this Constitution importing the masculine shall include the feminine". To my mind, this sub-section has nothing to do with s. 3 because the section is speaking of "Orders", not of persons.

6. THE PROPER CONSTRUCTION OF S.4 OF THE CONSTITUTION

There is no need to set out the full text of this very long section as it has already been set out in other judgments. The essential part is, however, "This Church, being derived from the Church of England, retains and approves the doctrine and principles of the Church of England embodied in the Book of

Common Prayer... and no alteration in or permitted variations from the Services or Articles therein contained shall contravene any principles of doctrine or worship laid down in such standard".

Although one may not be able to look to earlier drafts of the Constitution as such, the 1926 version was in fact enacted by the Parliament of Tasmania as Act 18 George V No. 29 (1927). The present section does not appear in that Act, though s.6 of the Schedule to that version of the Constitution indicated that the Church "doth retain and approve the book of common prayer and the doctrine and principles contained therein" and would not change the character of the Church by Prayer Book alteration. This indicates a starting point of Prayer Book principles only governing the life of the Australian Church in matters of worship.

I would have thought that there is a lot to be said for the fact that the words "The doctrine and principles of the Church of England embodied in the Book of Common Prayer" derive from the central paragraph of the Preface to the Canadian revision of the Prayer Book in 1918. As was said by Dyson Hague in his "Through the Prayer Book", a book which was in wide circulation in Australia from 1932, "The central paragraph is the most important, for it declares that our Church in Canada in its revision has clearly forbidden any change in text or rubric which would involve or imply a change of doctrine or principle of the Church of England as set forth in the Book of Common Prayer". [This wording does not appear in the Preface to the 1959 Canadian book].

The meaning of the words "The doctrine and principles" are defined in s.74(3) as "The body of such doctrine and principles". At first glance, this gives no assistance at all as the word "body" is very much a non legal term in this sense. Here again is a problem in interpreting this Constitution which is a pot pourri of ideas from lawyers and non lawyers. The word "body" was defined by the U.S. Court of Customs and Patent Appeals following the Webster Encyclopaedia Dictionary of the English Language (1963) in Walberg v Probst (1973) 474 F (2d) 683,687, as "The main central or principal part of any thing as distinguished from subordinate parts, such as the extremities, branches, wings etc." A meaning given in the Macquarie Dictionary is "The central structure of a building", "The major portion of an army, population etc. ... The Central part of a speech or document...". A definition in the Shorter Oxford Dictionary is "The main, central or principal part". The second Australian edition of Collins Dictionary defines "body" inter alia as "The largest or main part of anything".

It would seem to me that it is more likely than not that the word "body" is derived from the first paragraph of the Preface to the Prayer Book of 1662. Bishop Sanderson, in such Preface, says, "Accordingly we find, that in the reigns of several Princes of blessed memory since the Reformation, the Church upon just and weighty considerations her thereunto moving, hath yielded to make such alterations in some particulars, as in their respective times were thought convenient: yet so, as that the

main body and essentials of it (as well in the chiefest materials, as in the frame and order thereof) have still continued the same unto this day, and do yet stand firm and unshaken, notwithstanding all the vain attempts and impetuous assaults made against it, by such men as are given to change, and have always discovered a greater regard to their own private fancies and interests, than to that duty they owe to the public".

A question which arises with respect to s.4 is whether it contains an all pervading command to the Church to retain every matter of doctrine and every principle of the Church of England which is embodied in the Book of Common Prayer (including the Ordinal) and the 39 Articles, or whether it is restricted in some way.

My mind has fluctuated on the matter, but in the end it does not seem to matter to the determination of the question before the Tribunal. Whatever principles are retained and approved may be altered by this Church save and except there shall be no contravention of any principle of doctrine or principle of worship.

I am extremely indebted to counsel for the Standing Committee of General Synod for their structural analysis of s.4. This was as follows:-

> "1. The Church retains and approves the doctrine and principles of the Church of England embodied in the BCP, the Ordinal and the 39 Articles,
>
> BUT
>
> 2. the Church has plenary authority to make statements as to the faith, ritual, ceremonial or discipline of the Church,
>
> AND
>
> 3. The Church has plenary authority to order its forms of worship and rules of discipline
>
> AND
>
> 4. The Church has plenary authority to alter or revise the statements, forms and rules referred to in paragraphs 2 and 3 above.
>
> 5. The proviso to paragraphs 2,3 and 4 above is that all such statements, forms and rules etc. are consistent with the Fundamental Declarations and are made as prescribed by the Constitution.

6. The BCP and the 39 Articles are regarded as the authorised standard of worship and doctrine in the Church.

7. No alteration in or permitted variations from the services or articles contained therein shall contravene any principle of doctrine or worship laid down in the BCP or the 39 Articles."

Although there were some quibbles about this analysis, it was not seriously challenged.

The analysis again, to my mind, (unless there is some special significance in the word "but") throws up the plenary power of this Church to alter any of the principles and doctrine of the Church of England in England which were part of its heritage, provided that so far as principles of doctrine and principles of worship were concerned, the body of the Prayer Book (including Ordinal) and 39 Articles were not to be contravened.

As to the word "but", we were referred by senior counsel for the intervenors to part of the judgment of Latham,C.J. in Dey v. Victorian Railways Commissioners (1949) 78 C.L.R. 62, 80, where his Honour said, "'But' is adversative in sense; it is not complementary or explanatory. It introduces a reference to circumstances which limit or prevent the application of some prior proposition. An exegetical statement may properly be introduced by 'that is to say'. A proposition introduced by the word 'but' is intended to introduce a statement which modifies or qualifies the proposition to which it is attached by preventing that proposition from being understood or applied in what (apart from the adversative sentence) might have been regarded as its proper significance".

The Macquarie Dictionary's primary meaning of the word "but" is "on the contrary; yet" and "A mildly adversative addition with the force of however or though". The Australian Pocket Oxford Dictionary puts the sense "however" as colloquial Australian expecially used in N.S.W. and indicates the primary meaning is "except". The second Australian edition of Collins Dictionary puts the primary meaning as "contrary to expectation... in contrast; on the contrary: I like opera but my husband doesn't".

If a synonym was required for the word "but", it would seem to me that "yet" or "notwithstanding this statement" would come nearest to the proper sense. The Church retains the principles of the Church of England, yet notwithstanding it is autocephalous and has plenary authority.

The Sydney signatories say that to construe the word "but" in this way gives it too much work to do and that the true construction of s.4 is that the Church has plenary authority, so long as no alteration contravenes any doctrine or principle

embodied in the Book of Common Prayer. In other words the section should be read "Apart from the doctrine or principle embodied in the Book of Common Prayer" this Church has full authority to order itself. In view of the first two provisos to the section, it does not seem to me that it is proper to construe it in that way.

It was also put that "principles" when first occurring in s.4 had a wider meaning than "principles of doctrine or principles of worship". Assuming that this is correct, great care needs to be taken in defining what are the principles which are retained. The word "retain" has its own difficulties because it may be that things changed in England between 1955 at the time when the principles became fixed for the purpose of the 1961 Constitution and 1 January, 1962, when the Constitution came into operation (vide s.74(2) of the Constitution). However, putting that aside, it would seem abundantly clear that principles such as "The Church of England is an established Church" could not be a principle which was retained because it had not applied in Australia since at least 1860, see A-G v. Wylde (supra).

It is also imperative to be very precise when expressing the context of such principles. For instance, the Preface to the 1662 Prayer Book concerning the service of the Church makes it clear that the services are to be read and sung in Church in the English tongue. Although the Prefaces to the Prayer Book are more likely to contain principles than some other parts of the Book, the true principle is that the services are to be said in a tongue which is understood by the whole of the congregation, so that there is no principle which excludes services in Chinese to a wholly Chinese congregation or in some Aboriginal dialect. To glean such a narrow principle would be erroneous. This treatment of the matter fits in well with the word "body" in s.74(3) of the Constitution.

Furthermore, as counsel for the intervenors pointed out, it is wrong to assume that the doctrines and principles of the Church of England are necessarily self consistent. Indeed, this has been recognized in the Church of England in England by the doctrine of dispensations, whereby where there was an interface between two conflicting principles, the Archbishop of the Province, or sometimes the Bishop of the Diocese, could administer the principles so as to comply with the spirit of them in each particular case. Thus, if there was a principle that a person could not be made deacon and priest in the one day, there was also a principle that at least the Archbishop of Canterbury could dispense to avoid that requirement, and, as is shown in Chambers "Faculty Office Registers 1534-1549" (Oxford 1966), this power was not infrequently exercised. This consideration again makes it difficult to uphold the contentions of the signatories.

What principle of doctrine or principle of worship then is infringed by the ordination of a woman to the office of deacon?

Before tackling this question, it is necessary to digress and consider the definition of "doctrine" in s.74(1) of the Constitution. The word is defined as meaning "The teaching of this Church on any question of faith". "Faith" is then defined as including "the obligation to hold the faith". The word is used in contradistinction to the word "discipline" which is said to include "the rules of this Church and the rules of good conduct". The definitions are not completely in point because "This Church" means "The autocephalous Anglican Church of Australia" whereas in s.4, the doctrine of the Church is the doctrine of the Church of England in England as at 1955. Nonetheless, s.74 seems to me to make a very definite division between the rules of order and conduct on the one hand, and the teaching of the Church on matters of faith on the other.

Reverting to the question of "principle of doctrine or principle of worship", I adhere to what the majority said about the meaning of the word "principle" in 1985, viz that it connotes "A fundamental truth or proposition on which many others depend" (see the Oxford English Dictionary), and whilst there may be little doubt that the compilers of the Prayer Book assumed that only men would be ordained, and this assumption is reflected in the use of the masculine pronoun, this does not represent a considered and definitive judgment of principle.

Because of this position, it is not necessary to go the further step and consider whether, if there is a principle, it is a principle of doctrine or a principle of worship. However, out of respect to those who take a wider view of the meaning of "principle", I will spend a little time dealing with those questions.

First, it may be that the use of the masculine pronoun in the Ordinal does not, in any event, indicate support for the view that there was an assumption that men only would be ordained. The Preface to the Ordinal seems to indicate that only a man is to become ordained, yet the opening words are "It is evident unto all men diligently reading Holy Scripture" which one would think included women. Furthermore, the command of the Bishop to the people, "Brethren, if there be any of you who knoweth any impediment ... let him come forth in the name of God", would seem to be addressed as well to women as men. Be this as it may, it is probably historically correct to say that the compilers of the Prayer Book did not contemplate a woman being presented to the Bishop to be ordained deacon.

It is, I think, significant that in the 1985 opinion, the majority of the members of this Tribunal who took a wider meaning for the word "principle" did not consider that the principle involved was one of doctrine or worship. There was little put by the parties on this problem, and indeed, the Board of Assessors as a whole, do not seem to have addressed it, though Assessor Gaden considered that there was no principle of doctrine or worship involved in the present Canon. The House of Bishops, however, gave a clear ruling on the question, voting by 15 to 5 that the Canon was not inconsistent with the ruling principles of the Constitution.

The Bishop said:- "What is to be understood by the words 'principle of doctrine or worship' laid down in such standard?"

"The first thing to be said that a 'principle of doctrine or worship' is to be distinguished from a moral or behavioural principle or rule of conduct or discipline. A moral or behavioural principle or rule is a statement of universal hypothetical form such as: 'Whenever you are in a situation of kind X you should behave in way Y'. A principle of doctrine or worship is a fundamental axiom of faith (expressed propositionally or doxologically) which may form the basis of a deductive argument whereby further doctrinal or doxological statements may be articulated. It is precisely such basic principles of doctrine or worship which govern the revision or alteration of forms of worship or behavioural rules of discipline. A 'principle of doctrine or worship' is not itself a rule of discipline but a controlling factor in the alteration or revision of rules of discipline, i.e., a ruling principle."

Indeed, the Bishops in their conclusion said, "Not only is there no 'principle of doctrine or worship' laid down in BCP and Articles which may be said explicitly to exclude women from ordained ministry; if such a principle were laid down in BCP and Articles, it would be contrary to Scripture and reason and thus invalid".

Accordingly, in my view, there is no principle of doctrine or worship involved in the Canon, and it does not fall foul of s.4 of the Constitution.

7. MISCELLANEOUS MINOR MATTERS

I should mention some submissions which were made which do not call for decision, but which perhaps should be mentioned in case it be thought that they have not been considered.

First, that "Orders" in s.3 means Orders as they existed in the reformed Church of England of the 16th century. The submission then went on to define these Orders with reference to St. John Chrysostom on Priesthood. It seems to me that the word "preserve" when coupled with the opening words of s.3 "will ever" makes one search wider than merely looking at how Orders were understood in the 16th century. Historical research does indicate that for a very significant period in the Church's history, the functions of the persons who held the office of bishop, priest and deacon and their relationship one to another were not always the same. It would appear that for quite a period of time, the deacon was the bishop's assistant and an archdeacon could be the chief deacon without ever becoming a priest.

Indeed, in Canons made in London in 1126 only a deacon was eligible for collation to archdeacon. In 1840 the English Parliament changed the qualifications for archdeacon limiting

the appointment to those who had been in priests orders for six complete years. Despite this, the offices of bishop, priest and deacon have survived as such. The particular functions of each office and indeed what may properly be done by an ordinary member of the laos in one generation may only be done by a member of the laos who has been ordained as clergy in another generation. A prime illustration of this is the case of Cardinal Pole who was offered the Archbishopric of York while not even a deacon and accepted the Archbishopric of Canterbury before even being priested. See e.g. Moore's Introduction to English Canon Law, 2nd Ed. pp.123-4.

Thus it is of no relevance to my mind that (if it be the fact) women deacons in the early Church had no liturgical functions. As has been said earlier, there were women deacons in the very early Church, though the majority, if not all, appear to have had no liturgical functions. The command in s.3 is to forever preserve the three Orders and does not deal with the functions of the Orders.

This leads on to the progression arguments. It has been put that it is fundamental to the office of deacon that there be a capacity to become a priest. Whilst I stand by what was said last year that it is a principle of the Church that the three Orders stand together and that any person ordained deacon must be capable of proceeding to the higher Orders, it may be that this statement needs some fine tuning. The time to do that is if ever the General Synod passes a Canon authorising ordination to the priesthood of women or alternatively when the question is a live one. It may be too, that at the appropriate time it will be necessary to give deep consideration of the matters raised in Dr. Gaden's paper referred to earlier and that such may lead me to modify the views I presently hold on progression.

Finally, it was strongly pointed out in the submissions of the counsel for the Standing Committee that it ill-behoved the Sydney signatories to say that ordination of women to the deaconate was unscriptural when a report of the Diocese's own Doctrine Commission had found there was no objection to the ordination of women as deacons. Apart from its "political" value, this submission merely highlights the narrow way in which the Sydney signatories put their case. The principal objections of those signatories are (a) that the law of the Church prior to 1962 did not permit women to be ordained deacon; and (b) that if a function of a woman deacon is to preach, (then regardless of the fact that by ordination she does not obtain the right to preach as she needs the licence of her dioceasan), Scripture's view that a woman is forbidden to preach, forbids ordination. I have already dealt with these propositions earlier in these reasons.

8. COSTS

Canon 6 of 1962 by s.14 provides that this Tribunal may direct how the costs occasioned by the determination of the Reference should be provided. The section also makes it clear

that, in appropriate cases, the determination may direct a member or members of General Synod or a Diocese to pay the costs.

I would think that it would be abundantly clear that where the situation is that there has been a recent opinion of the Appellate Tribunal, and someone moves the Primate to put the matter back to the Appellate Tribunal on the basis that he or she has new and further material, and the result of the new Reference is the same as the earlier Reference, that ordinarily, the member or members who so move the Primate, should bear the whole of the costs of the proceedings. It is really unthinkable that the funds of the Church which have been given by parishioners for the spread of the Gospel should be expended in Reference after Reference on some dry principle of law.

There is only one thing that stops me from making an order for costs in the instant proceedings, and that is, that this is the first public hearing of the Appellate Tribunal on a Reference under s.31 of the Constitution, and that it would appear that through oversight, the petitioners were not warned of the existence of the 1962 Canon, nor apparently, were they aware of its existence. I think it would be too much of a hardship to make an order for costs against clergymen particularly who have little assets, and who, had they appreciated the risks they were taking in mounting this challenge, might have taken another course. Accordingly, with some reluctance, in the instant Reference I would be in favour of there being no order for costs.

Whilst on the question of costs, it may well be that it would be prudent for the Standing Committee to reconsider the terms of ss. 13 and 14 of the 1962 Ordinance in the light of the problems with finances that have arisen in the course of these proceedings.

9. CONCLUSION

The question in the Reference is, "Is the 'Ordination of Women to the Office of Deacon Canon, 1985', being Canon No. 18 of 1985 made by the General Synod of the Anglican Church of Australia, inconsistent with the fundamental declarations or the ruling principles of the Constitution of the said Church?"

For the reasons which I have given, this question should be answered "No".

19 February, 1987.

J.

OPINION OF K.R. HANDLEY Q.C.

At the outset I would like to state that the function of the Tribunal in this or any other case is to deterine legal issues which arise under the Constitution of the Anglican Church of Australia. The question in this case is whether the Ordination of Women to the office of Deacon Canon 1985 of General Synod is inconsistent with the Constitution. That is, and for us must be, essentially a legal question. Fortunately or unfortunately the question for us is not what the Constitution should have said, not what its framers would have said had they had this issue before them nor what they believed or assumed the Constitution would achieve.

The only question before us involves the meaning of the actual text of the Constitution, fairly interpreted, and the application of that text so interpreted to the language of the Canon.

This Tribunal exists to decide legal questions arising under our Constitution and to act as a final appellate tribunal in disciplinary cases. Its function is not to act as "a final Court of Appeal" to determine finely balanced theological questions.

Where a theological question has been authoritatively settled for us by the great Ecumenical Councils or the English Reformation, or where we consider that one of the opposing views is not fairly open on the text of scripture, the Creeds, or the Church's authorised standard, the question will be a legal one which we can and must decide. However one is entitled to think that legislation of General Synod will rarely, if ever, be invalidated on this ground.

Once it becomes clear that there are powerful and respectable arguments on both sides of a theological question, and that question has not been authoritatively settled for this Church, then in my opinion it is impossible for us to "finally" decide such questions. If both views are reasonably open the question ceases to be a legal one. The question is and remains a theological one to be decided elsewhere in the Church, by persons better equipped to do so than myself, and ultimately by our General Synod.

This Tribunal does not exist to correct highly debatable theological errors on the part of our Bishops, Assessors and General Synod.

I therefore turn to consider the legal questions raised by the case before us.

In the words of Sir Owen Dixon, a former Chief Justice of the High Court of Australia, on the occasion of his swearing in as Chief Justice in 1952:-

"There is no other safe guide to judicial decisions in great conflicts than a strict and complete legalism". (85 C.L.R. xiv)

The challenge to the legal validity of the Canon before us was based on alleged inconsistency with Sections 2, 3 and 4 of the Constitution.

I agree generally with the reasons of the President on the issues arising under Sections 2, 3 and 4 of the Constitution and with his conclusion that the Canon is not inconsistent with any of those sections.

In my opinion that part of Section 4 of the Constitution which provides that this Church "retains and approves" the doctrines and principles of the Church of England embodied in the Book of Common Prayer together with the form and Manner of Making Ordaining and Consecrating of Bishops, Priests and Deacons and in .. the Thirty Nine Articles" (the authorised standard) does not commit this Church to continue to retain all those principles unless and until Section 4 itself is amended by an alteration to the Constitution.

Ordinarily the opening words of Section 4 that this Church "retains and approves" such doctrine and principles would be read as "a standing provision constantly speaking in the present". (Commonwealth v. District Court (1954) 90 C.L.R. 14 at 21). This Church therefore would not merely have

retained and approved that doctrine and those principles in 1962 but would still do so today and continue to do so tomorrow unless and until Section 4 itself was amended.

Section 4 provides that the Church has plenary authority to make statements as to "the faith ritual ceremonial or discipline" of the Church. Reference is later twice made to "any principle of doctrine or worship".

The matter raised before us does not involve any question of "worship". While questions of doctrine, in the ordinary sense of that word, were central to the issues debated before us, doctrine is defined in Section 74(1) of the Constitution as meaning the teaching of this Church on any question of faith. The definition of faith in Section 74(1) is not at all helpful but the sense in which the word is used in the Constitution appears from Section 1. This refers to the Christian faith as professed by the Church of Christ from primitive times and in particular as set forth in the creeds.

Nothwithstanding the importance of the issues before us, the strongly held views on all sides, and the fundamental nature of the theological and biblical arguments which have been raised, in my opinion the questions involved are not part of the Christian <u>faith professed</u> by the Church, they are not

dealt with in the Creeds, and do not directly involve matters necessary for salvation. This question before us therefore does not involve any principle of "doctrine" as that expression is used in the Constitution.

I agree with other members of the Tribunal who have concluded that the law of the Church governing eligibility for and admission to Holy Orders forms part of the "discipline" of the Church.

Section 4 provides, so far as relevant for present purposes that "... this Church .. has plenary authority ... at its own discretion .. to order its .. rules of discipline and to alter or revise such .. rules". Section 5 contains a further grant of plenary authority and power to the Church to legislate for the order and good government of the Church. This power is subject to Chapters I and II of the Constitution and raises the same issues as the grant of plenary authority in Section 4.

The plenary authority of the Church to order, alter or revise its rules of discipline which is conferred by Section 4 is subject to two qualifications which are presently relevant. The first is that any such alteration or revision must be consistent with the Fundamental Declarations in Chapter I, and the second is that no alteration in the services in the Book of Common Prayer shall contravene "any

principle of doctrine or worship" laid down in the authorised standard. The form and Manner of Making Ordaining and Consecrating of Bishops, Priests and Deacons are services contained in the Book of Common Prayer and no alteration in those services may contravene any principle of doctrine or worship laid down in the authorised standard.

I have already held that the Canon does not deal with or affect matters of "worship", or of "doctrine" as that expression is defined and used in the Constitution.

Canons of General Synod dealing with the "discipline" of the Church, such as the Canon now in question must be consistent with the Fundamental Declarations of Chapter I. However Section 4 does not entrench <u>all</u> the "principles" of the Church of England embodied in the authorised standard. A construction of the section which had that result would fail to give proper effect to

(a) The grant of plenary authority to the Church to alter its rules of discipline.

(b) The requirement that such alterations must be consistent with the Fundamental Declarations of Chapter 1.

(c) The further qualification that no alteration shall contravene any principle of doctrine or worship laid down in the authorized standard.

The restrictions and qualifications on the plenary power of the Church referred to in (c) above would have been unneccesary if Section 4 had entrenched all the principles of the Church of England embodied in the authorized standard. The absence of any requirement that such alterations be consistent with all the principles embodied in the authorized standard, but need only be consistent with its principles of doctrine and worship demonstrates that the opening provisions of the section ("retains and approves") cannot have been intended to entrench the whole of such principles.

When Section 4 is read as a whole it is clear that while this Church did retain and approve all the principles of the Church of England embodied in the authorized standard at the time the Constitution came into force, this retention and approval was not necessarily to be permanent. Those principles were entrenched in so far as they reflected the Fundamental Declarations of Chapter I, or in so far as they were principles of doctrine or worship. Other principles, and in particular the principles of discipline, were only retained and approved until the Church "otherwise provided". The Church has now done so in the Canon under challenge. In my opinion the Canon is not inconsistent with Section 4 of the Constitution.

It is now necessary to consider the challenge based on that part of Section 3 which provides that:

> *"This Church will ever ... preserve the three orders of bishops, priests and deacons in the sacred ministry."*

This has to be considered in the light of Section 74(6) which provides that

> *"In the case of lay but not clerical persons words in this Constitution importing the masculine shall include the feminine."*

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" pages 114-115:-

> *"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".*

There can be no doubt that in 1962, statements such as "the Bishop said", "the priest conducted the service", "here comes the priest" all implied that a male person was involved.

I have considered and reconsidered the question of the true legal meaning of Section 3 of our Constitution. In the 1981 and 1985 decisions in which I participated I followed the 1980 decision of this Tribunal from loyalty, and not from conviction. On this occasion like other members of the Tribunal I have felt entitled to re-examine the question afresh free from any constraints arising from the Tribunal's earlier opinions.

Having done so I have become satisfied that the language of Section 3 itself does not impose any legal or constitutional fetter on the powers of the Church to legislate for the ordination of women to the diaconate.

The settled law and practice of our Church at the date of the Constitution does not mean that the words bishop, priest and deacon in Section 3 by themselves import the masculine.

The general meaning of Section 3 would not have been altered if the section had simply required the Church to ever preserve "the three orders in the sacred ministry".

This section requires the preservation of the orders, and orders as such are neither masculine nor feminine.

This point may be illustrated by examples. A requirement that the services should preserve the three divisions of officers, non-commissioned officers and other ranks would have

been understood for generations as referring to officers, non-commissioned officers and other ranks who were exclusively male. Statements such as "here comes the officer" would likewise have been understood as referring to a male.

When the Services began to admit women, and women became officers etc in the Services, the ranks, and the three divisions did not change. They were preserved as ranks and divisions.

Today a statement "here comes an officer" in a context relevant to the Services is ambiguous. One cannot say from just those words whether the officer in question is a man or a woman.

The word officer in a Services context no longer necessarily imports the masculine. The word has not changed its meaning, but the surrounding circumstances have changed. Where once those circumstances limited the full scope of the natural meaning, they no longer do so.

In the same way statements such as "here comes the Anglican bishop etc", and "the Anglican priest delivered a good sermon" would have been understood for centuries as referring to a bishop etc who was male, and of Anglo-Saxon descent, and to a sermon delivered in English. Today the Bishop

is not necessarily Anglo Saxon, and the sermon is not necessarily in English. The words themselves have not altered in meaning, but the surrounding circumstances have changed and no longer restrict the full width of the natural meanings.

The language of Section 3 itself does not entrench the hitherto exclusively male character of the three orders. The framers of the Constitution may well have assumed that the membership of the orders would remain exclusively male, but this very assumption may well explain why they did not use the kind of language needed to entrench the exclusion of women.

The exclusion of women in the past flowed from circumstances other than the language of Section 3 itself. While these circumstances remained unchanged membership of the orders was limited to men. When those circumstances change membership may not be so limited.

In the same way in the past membership of the orders has been limited to persons learned in Latin, and membership of the higher orders has been limited to persons of a certain age, who had passed through the lower orders. A statement that X was a bishop once implied that the person was a male over 30, Anglo-Saxon, spoke English, was learned in Latin, and had previously been ordained deacon and priest.

Members of the Church who share the same view of the ordained ministry as the Adelaide and Sydney signatories believe that there is a fundamental difference between the requirement that men only be eligible for ordination, and the other requirements and qualifications referred to above. However the difference flows not from the language of Section 3 itself, but from their belief that the will of God as revealed in Holy Scripture, the practice of the "catholic" Church, or the role of the priest in the Sacrament of Holy Communion require that membership of the ordained ministry be limited to men, whereas no such fundamental support can be found for the other requirements and qualifications. If they are correct the limitation is to be derived from Holy Scripture etc, and not from the language of Section 3 itself.

In my opinion the legal challenge to the validity of the Canon based on Section 3 also fails.

No order for costs should be made against the Adelaide or Sydney signatories.

K.H. Handley