ANGLICAN CHURCH OF AUSTRALIA

APPELLATE TRIBUNAL 1989

Report and Opinion of the Tribunal on the "Ordination of Women to the Office of Priest Act 1988" of the Synod of the Diocese of Melbourne

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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

The Appellate Tribunal received your reference of the 15th day of November 1988, made pursuant to s.63 of the Constitution of the Anglican Church of Australia, with respect to the Ordination of Women to the Office of Priest Act 1988 of the Synod of the Diocese of Melbourne. The question asked in the reference is:

> "Is the Ordination of Women to the Office of Priest Act 1988 an ordinance duly made for the order and good government of the Church within the Diocese of Melbourne in accordance with powers conferred upon it by the constitution of the Diocese?"

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. On the 26th day of August 1989 the Tribunal met at Sydney to hear the matter. All members of the Tribunal attended that meeting, namely -

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

At the conclusion of the hearing the Tribunal adjourned to consider its decision.

In the opinion of the Tribunal the question asked in the reference should be answered - No.

The Tribunal's reasons accompany this report.

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

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.

Dated this 2nd day of November 1989

President,
Appellate Tribunal.

IN THE APPELLATE TRIBUNAL

IN THE MATTER OF THE REFERENCE BY THE PRIMATE AS TO THE VALIDITY OF THE ORDINATION OF WOMEN TO THE OFFICE OF PRIESTS ACT 1988 OF THE DIOCESE OF MELBOURNE

THE TRIBUNAL: By reference under his seal made 15 November, 1988, the Primate referred a question to this Tribunal at the request of the Synod of the Diocese of Melbourne. The question essentially is whether the "Ordination of Women to the Office of Priest Act 1988" passed by the Synod of the Diocese of Melbourne on 8 October, 1988 is valid. A copy of the Act is attached as a Schedule to these Reasons.

The Tribunal, after due notice, held a preliminary hearing of interested parties in Melbourne on Saturday 4 February, 1989. Directions were there given as to the furnishing of written submissions and the following were or were made parties to the reference.

A. The Synod of the Diocese of Melbourne.

B. The Movement for the Ordination of Women.

C. The Synod of the Diocese of Wangaratta.

D. The Synod of the Diocese of Ballarat.

E. The Synod of the Diocese of Sydney.

F. The Reverend J. D. Potter.

After further consideration, the Tribunal also granted the requests of the following other persons to be made parties

to the reference.

G. The Reverend D. Van Dissel for himself and the Union of Anglican Catholic Priests SA Inc.

H. Mrs. Phyllis Boyd representing Women Against the Ordination of Women (Australia).

I. The Reverend J. P. Haldane-Stevenson.

J. The Reverend Andrew Gilbert.

K. Anglicans for Unity Peace and Concord subsequently renamed AAM Australia, sometimes called the Association for the Apostolic Ministry Australia.

L. Deacons Smith, Pinchbeck, Prowd, Marten and McGregor.

M. Mr. Albert B. Corkhill, and

N. Mrs. Virginia Hutchinson.

Most of the above submitted written submissions. In addition the Synods referred to above, the Movement for the Ordination of Women, Women Against the Ordination of Women, Mrs. Hutchinson and the Reverend J.D. Potter made oral submissions at a public hearing held in Sydney on Saturday 26 August, 1989. The Tribunal also obtained the advice of the House of Bishops and the advice of the 7 Assessors elected by the General Synod. The Tribunal is grateful for the assistance given by the parties and the Bishops and the Assessors.

The parties noted as A and B and L above supported the validity of the Melbourne Act and hence submitted that the

question before the Tribunal should be answered "Yes". All other parties took the contrary position and submitted that the question should be answered "No".

After due consideration, the Tribunal is of the opinion that the matter arising for determination in this reference is a matter of statutory construction and, except incidentally, the subject matter of the Melbourne Act, namely the possible ordination of women to the priesthood, is not a focus for consideration.

The Tribunal's reasoning upon which it has reached its determination may be conveniently summarised under the following headings:-

1. Matters of Jurisdiction.
2. Material which can be considered by the Tribunal when construing the Constitution and other relevant Acts of Parliament.
3. The extent of operation of the Act of the Victorian Parliament of 1854 conferring power on the Synod of the Diocese of Melbourne.
4. Whether s 51 of the Constitution is a grant of power to the Diocese of Melbourne.
5. Miscellaneous observations.
6. Costs.
7. Conclusion.

In the course of these Reasons, reference will be made to the submissions made by the parties. For convenience these will be referred to by the short name of the party and a number

or alternatively the word "submission" or "reply". Thus, "3 Melbourne" refers to the third set of written submissions furnished on behalf of the Synod of the Diocese of Melbourne. Many of the parties made reference to the Tribunal's Reasons which accompanied the opinion of the Tribunal re Ordination of Women to the Office of Deacon Canon 1985 handed down on 4 March, 1987. These Reasons will be referred to as the "Deacons Canon Reference" with page numbers as in the report issued by the Anglican Church of Australia Trust Corporation.

The Tribunal will refer to the Constitution which is a schedule to various Acts of Parliament such as Victorian Act No 6626 of 1960 simply as "the Constitution". A section in an Act such as 6626 will be referred to as "covering clause", the word "section" being used in this judgment as a reference to a clause of the schedule to those Acts. The Tribunal will refer to the Act of the Parliament of Victoria passed 30 November 1854 whose long title is "An Act to enable the bishops, clergy and laity of the United Church of England and Ireland in Victoria to provide for the regulation of the affairs of the said Church" as "the 1854 Act".

1. JURISDICTION.

The current reference was made under s 63(1) of the Constitution. That section empowers the Primate to refer matters "wherever a question arises under this Constitution". Some of the parties have argued that a question involving the validity of an Act of the Synod of the Diocese of Melbourne is

not a question arising under the Constitution.

In the Deacons Canon Reference at page 11, Cox, J said that the phrase "under the Constitution" was not 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." With that passage the whole Tribunal agrees.

In the instant case, Melbourne seeks to support its Act as an exercise of a power purportedly given to it by s 51 of the Constitution. Where an alleged source of the right relied on to support an ordinance or the source of a defence to invalidate an ordinance is a section of the Constitution it is clear that the matter arises under the Constitution, see e.g. Felton v Mulligan (1971) 124 CLR 367, 408. It is not possible to answer the question posed in the Primate's reference without interpreting s 51 and determining to what extent, if any, it authorized the Melbourne legislation.

The Tribunal is thus of the view that it has jurisdiction in this Reference. It is also of the view that in the circumstances of this Reference it has jurisdiction over the whole matter, including questions such as the proper scope of the 1854 Act which in themselves do not arise under the

Constitution. Such circumstances include the fact that Melbourne submitted that the "Constitution of such diocese" referred to in s 51 of the Constitution "comprises not only the Victorian Acts but the Constitution of the National Church".

2. WHAT MATERIAL CAN THE TRIBUNAL CONSIDER?

The Tribunal is not a court in the strict sense. It is set up by General Synod under the authority of various Acts of State and Territorial Legislatures. The Tribunal is both an expert Tribunal on ecclesiastical matters and a Tribunal in part composed of lawyers who would be expected to approach questions of construction of Statutes in a similar way to a court.

A significant matter in the instant reference is the reliance placed by some of the parties on the history of the Church and the production of various drafts of the Constitution between 1920 and 1960 for discussion at various Synods and Conventions of members of the Church. Had the Tribunal been a court sitting in New South Wales, Victoria or as a Federal Court, there would be no question that, pursuant to s 15AB of the Commonwealth Acts Interpretation Act or similar provisions of the Interpretation Acts of New South Wales or Victoria, in cases of ambiguity this material could be considered.

The Tribunal put to senior counsel for Melbourne that it was able to look at this material. Counsel submitted that s 74(7) of the Constitution prevented looking at the material opened up by s 15AB because the Constitution was to be interpreted by the Acts Interpretation Act as it existed in

1948 and at that stage there was no s 15AB or its equivalent. However, he did not demur from the proposition that the Tribunal could look at the history of the legislation though he submitted it would be extremely risky to do so.

In the Tribunal's view, it can, subject to the rules of natural justice, inform itself of all matters necessary for its determination in any way it seems fit. See Australian Workers' Union v Bowen (No 2) (1948) 77 CLR 601, 628.

In questions as to the proper interpretation of the Constitution the Tribunal considers that it is appropriate to act upon the history of the Church, and within limits, the earlier drafts of the Constitution to assist it in construing the Constitution. When the words "within limits" are used with respect to drafts, the Tribunal bears in mind that when construing deeds, normally drafts can only be looked at if the document being construed is ambiguous and one might be tempted to make an implication which the parties have shown they did not intend to apply because the words sought to be implied have been considered and struck out in an earlier draft, see Louis Dreyfus & Cie v Parnaso cia. Naviera SA [1959] 1 QB 498, 513. Perhaps the rule does not even extend this far, see e.g. City & Westminster Properties (1934) Ltd v Mudd [1959] Ch 129, 140-142 and see Halsbury's Laws of England 4th Ed Vol 12, pp 607-8 and 612-616. It should not be overlooked that drafts of the Australian Constitution are used by the Courts as an aid to interpretation, see eg Tasmania v Commonwealth (1904) 1 CLR 329 amd The Seaman's Union of Australia v Utah Development Co (1978) 144 CLR 120.

3. THE 1854 ACT.

There is no doubt at all that the 1854 Act is a most significant piece of legislation in the history of the Australian Church. As Archdeacon Border says at pp 208-9 of his "Church and State in Australia 1788-1872", "The passing of this Act was one of the great steps in the development of the Church of England in Australia and in all the colonies ... . The passing of the Victoria Church Act enabled the creation of legally independent dioceses in Australia and throughout the English-speaking world ... The Victoria Church Act achieved three things: first it determined the constitution of its own Assembly; secondly, it defined the extent of the jurisdiction of that Assembly; thirdly, it provided for the establishment of an ecclesiastical Province and the setting up of a Provincial Assembly ... ."

It is the ambit of the second of these achievements that the Tribunal must now consider. In order to do so, it is necessary to examine the first two sections of the Statute, which are as follows:-

> "I. It shall be lawful for any Bishop of the United Church of England and Ireland in Victoria to convene an Assembly of the licensed Clergy and the Laity of such Church in his diocese And the Bishop or in his absence a Commissary appointed in writing by him shall preside in such Assembly.
>
> II. Every regulation act and resolution

of such Assembly made by the Bishop and the Clergy and Laity thereat respecting the affairs of the said Church including all advowson and right of patronage shall be binding on every such Bishop and his successors and on the Clergy and Lay members of the said Church residing within the diocese for which such Assembly shall have been convened and on none other and on them only so far as such regulation act or resolution may concern the position rights duties and liabilities of any minister or member of the said United Church or any person in communion therewith in regard of his ministry membership or communion or may concern the advowson or right of patronage in or management of the property of the said Church Provided that no such regulation act or resolution shall be valid except it be made with the concurrence of a majority both of the Clergy and of the Laity the votes of the Clergy and those of the Laity being separately taken and except it receive the assent of the Bishop."

It is useful also to set out some other provisions of the Statute.

Section IV, the side note of which is "Powers of Assembly and Commission" made it clear it would not be lawful for the Assembly by any act to impose a penalty on a delinquent clergyman other than suspension or deprivation. Section V provided, inter alia, "No regulation act or resolution made or passed at any Assembly shall be valid which shall alter or be at variance with the authorised standards of faith and doctrine of the United Church of England and Ireland or shall alter the oaths declarations and subscriptions now by law or canon required to be taken made and subscribed by persons to be consecrated ordained instituted or licensed within the said Church." Section XIII provided it was lawful for the Assembly to make regulations acts or resolutions for altering the Constitution of the Assembly, for determining the mode and conditions under which rights of patronage might be exercised, for the licensing of clergy and for the calling of future assemblies. There is also power for the Privy Council to disallow any regulations or rules.

It is to be observed that there is no explicit grant of power given to the Assembly, or as we shall term it "diocesan synod", to make ordinances. This is remarkable, especially when one compares the 1854 Act with what Bishop Perry had taken as its model, Archbishop Sumner's failed Colonial Church Regulation Bill of 1853. Section I of that Bill was designed to empower the Synod to make "by a majority of voices of the said Clergy and Laity severally and respectively, with the assent, in the case of any Diocese, of the said Bishop, any such Regulations as circumstances shall in their

judgment render necessary for the management of the affairs of the said United Church within such Diocese. ..."

Plainly enough, however, the terms of the 1854 Act taken as a whole carry with them a series of subordinate legislative powers to pass regulations, Acts and resolutions respecting the regulation and management of the affairs of the Church within a diocese. Equally plainly, in our opinion, the powers conferred are not plenary in the sense that they entitle synods to legislate with respect to all affairs of the Church. We are obliged definitely to reject submissions to the contrary made on behalf of Melbourne and the Movement for the Ordination of Women.

The passing of the 1854 Act is described by Border (op. cit., 208) as "... one of the great steps in the development of the Church of England in Australia and in all the colonies". It became the model for all other church constitutions in Australia, whether they were founded on legislative enactment or consensual compact: ibid., 210 Yet evident limitations upon the legislative powers conferred by the Act can be seen at three levels. First, section I of the Act was designed to remove any bar to the holding of synods, constituted by Bishop, clergy and representative laity, such as was thought to be imposed by the statutes of Henry VIII and Elizabeth. It is notable, however, that section I made the holding of a synod merely lawful, not mandatory. This circumstance in itself tends to deny any contemplation of a right to legislate at large upon the affairs of the Church within Victoria. The fact that the 1854 Act was facilitating

and not mandatory as to the convening of synods is inconsistent with an intention or expectation that any exercise of the legislative powers which the Act conferred could produce any lack of uniformity with the wider Church upon essential matters of faith, doctrine and discipline.

Secondly, the whole history of the 1850's shows that, both in Victoria and in England, there was a positive intention not to depart from the "firm and unalterable attachment to the Doctrine, discipline and government of the United Church of England and Ireland"; and an equal desire to see those characteristics "maintained in the colony in all their integrity": Report of the Conference held in Melbourne on 24th June 1852; Border, op. cit., 201.

Thirdly, the protracted legislative history and terms of the 1854 Act show that the prime purpose of the measure was to allow voluntary regulation and management by diocesan synodical government of the ecclesiastical matters which might expediently be dealt with by that means. The essential objects were to confer self-government on the diocese and to bind the members of the Church in their capacities as such, and in particular the Bishop and his successors. The scope of the government that was contemplated was necessarily local, municipal and internal to the extent that the diocese chose to adopt the means that the Act allowed. There was a plainly expressed desire, as appears from contemporary evidence, to maintain both the stability of the Church within Victoria and its integrity and communion with the Church abroad, in England and elsewhere. Consistently with this approach the Bill for

the 1854 Act was promoted by Sir William Stawell in his private capacity, not as Attorney-General, not as a "religious" one, but as "merely a Bill to enable the Church to regulate its temporal affairs".

It would be a genuinely invidious task to attempt an exhaustive catalogue of the heads of legislative power that the 1854 Act conferred on diocesan synods. Fortunately, however, there is no present need to attempt that task. It is sufficient to say that in our opinion the Act is not directed towards conferring powers to legislate upon spiritual matters. In particular, we do not consider that section V is concerned to authorise legislation dealing with faith and doctrine. Contrary to some submissions we received we consider that section to limit legislation in those areas rather than by implication to authorise it so far as it does not alter or vary "authorised standards of faith and doctrine". This is not to say that there may not be some legislation legitimately enacted pursuant to the 1854 Act which does touch or stray into areas of faith and doctrine and also areas of Church discipline. The definition of these concepts is notoriously difficult and an attempt outside a specific context to characterise legislation by reference to them is not necessarily useful. Regulatory legislation in some limited areas of local or internal discipline, and with respect to disciplinary proceedings, is clearly authorised by the 1854 Act while other, wider-reaching, principles of discipline are excluded as primary subjects of synodical legislation.

Whether one classifies the matter of the ordination of

priests as falling within the area of faith or of doctrine or of discipline, or within more than one of them, we are of opinion that legislation upon that subject is not authorised by the 1854 Act. We have considered the argument advanced by Melbourne founded on Acts 6626 and 8984 whereby the Victorian Parliament effectively amended the 1854 Act so that "United Church of England and Ireland" is now to be read as "Anglican Church of Australia". The submission was that section V of the 1854 Act is accordingly to be treated as speaking today only of the authorised standards of faith and doctrine of the Anglican Church of Australia so far as it is in Victoria. Even if that were so it would not, in our view, enlarge the powers conferred by the 1854 Act to authorise the enactment of synod legislation upon the ordination of priests.

For the reasons expressed we are of the opinion that the 1854 Act cannot support the Act that is the subject of this reference.

4. S.51 OF THE CONSTITUTION

Section 5 of the Constitution provides that "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 7 provides that the Diocese shall continue to be the unit of organisation of this Church.

Chapter V of the Constitution deals with the powers of General Synod. Section 26 provides "Subject to the terms of this Constitution Synod may make canons rules and resolutions relating to the order and good government of this Church including canons in respect of ritual, ceremonial and discipline ...". Section 30 provides that when a canon duly passed by General Synod comes into force in a Diocese "any ordinance of any diocesan synod inconsistent with the canon shall to the extent of the inconsistency have no effect."

Chapter VII deals with the provinces and provincial synods and s 42 in that Chapter provides "A provincial synod ... shall have such powers for the order and good government of this Church within the province as may be prescribed by the Constitution of the province." Chapter VIII deals with the dioceses and diocesan synods. As this is the Chapter in which s 51 appears, it must be considered in some detail. Section 44 deals with the formation of new dioceses. A proposal to form a new diocese may be initiated in General Synod or by the dioceses concerned. Section 47 is as follows:-

> "The constitution of each Diocese of the Anglican Church of Australia shall subject to this Constitution continue as at the date on which this Constitution takes effect, until altered in accordance therewith."

Section 48 deals with the constitution of new dioceses. Section 49 deals with missionary dioceses or dioceses in which there are less than ten licensed priests and there is no diocesan synod. It gives power to the General Synod to appoint

a synod or diocesan council and makes provision for appointing a bishop. Section 50 provides for alteration of a constitution of a diocese in accordance with a canon of General Synod. Section 51 then reads as follows:-

> "Subject to this Constitution a diocesan synod may make ordinances for the order and good government of this Church within the diocese, in accordance with the powers in that behalf conferred upon it by the constitution of such diocese."

Senior counsel for Melbourne submits that s 51 viewed in the light of the other sections which have been referred to, amounts to a grant of power to the Synod of the Diocese of Melbourne. It is a grant of almost plenary power to the diocesan synod, the principal limitation being anything which by the Constitution is given to some other organ of the Church though it is recognised that there are also other limitations such as those contained in s 71. Indeed, s 71 is considered to reinforce these submissions because the final words of that section ("nothing in this Constitution shall authorise the synod of a diocese or of a province to make any alteration in the ritual or ceremonial of this Church except in conformity with an alteration made by General Synod") recognise that without this statement it might be considered that diocesan synods did have such a power.

Counsel also puts that it is clear from the Constitution itself that there are many matters in respect of which diocesan synods have power which they could not have

possessed before the enactment of the Constitution. There is power in s 17 concerning membership of the house of clergy and the house of laity in General Synod, there is power in s 28 to assent to a special bill for a canon, in s 30 to adopt a canon of General Synod, in s 32 to assent to an ordinance to pay costs of the national Church over and above that which is set out in the Constitution, in s 41 to consent to an alteration of a provincial constitution. Sections 54 to 61 confer additional powers with respect to the tribunals of the Church and s 67 confers power to assent to an alteration to the Constitution. Over and above all this are the provisions of Chapter VIII itself giving dioceses power with respect to creation of new dioceses. It is put that it is only by holding that s 51 is a conferral of power in lieu of any previous grant of power that one can be said to have a rational scheme in the Constitution to distribute the plenary power referred to in s 5 amongst the various regal organs of the Church. Were this not so, it is argued, one would have two discrete sources of power for the Diocese of Melbourne - (a) that conferred by the various sections of the Constitution noted above, and (b) all other matters. With respect to class (b), the powers would be limited by the provisions of the 1854 Act.

The various ways of interpreting s 51 may be summarized as follows:-

(a) That s 51 is merely declaratory;

(b) That s 51 is an additional source of power for those matters noted above;

(c) That s 51 limits the pre-existing powers of the

dioceses because of the coming into being of the national Church; or

(d) That s 51 plays the same role as s 107 of the Australian Constitution namely that it "saves the power" of diocesan synods so as to make it completely clear that despite the formation of the new Church, the Anglican Church of Australia, the powers which diocesan synods had as semi-autonomous regions of the Church of England continued mutatis mutandis as organs of the new Church.

The principal submissions for the view that s 51 does not confer power on diocesan synods (except perhaps additional powers to those which diocesan synods possessed before 1962) are advanced by Wangaratta and Sydney. The submissions from Ballarat appear to take the view that s 51 is a source of power but that on its proper construction the instant Act of the Synod of the Diocese of Melbourne does not come within the power granted by s 51.

Wangaratta and Sydney each rely on two main propositions (1) the close analogy between s 107 of the Australian Constitution and s 51 of the Constitution and (2) the history of the legislation.

As to the first matter, there is a distinction between the Australian Federation and the Anglican Church of Australia. At Federation the Australian States continued to exist as British colonies, see eg Southern Centre of Theosophy Inc v South Australia (1979) 145 CLR 246. However, the dioceses of the Church of England in Australia were not linked to the Church of England in the way colonies were linked to

Great Britain, and their metamorphosis into units of the Church of England in Australia (later renamed the Anglican Church of Australia) under the Constitution in 1962 confirms their complete structural independence of (though continuing communion with) the Church of England in England. It is conceded that there is similarity between s 47 of the Constitution and s 106 of the Australian Constitution. Sydney concedes that the similarity between s 51 of the Constitution and s 107 of the Australian Constitution is "less obvious" (1 Sydney 2.12); Melbourne (2 Melbourne 9.2) puts that there is no correspondence because of the difference between the national Church and the Australian Federation.

Another point that should be made in this connection is that if, as the Tribunal's view is, the powers granted to diocesan synods in the province of Victoria by the 1854 Act were limited, the only way in which the plenary grant of power in s 5 could be completely distributed would be to treat it as granting to diocesan synods greater powers than they had formerly. This could only be done if s 51 was taken to grant to diocesan synods some powers.

The legislative history tends to go the other way.

The genesis of the Constitution can be found in a resolution passed by the 1921 General Synod on the motion of Bishop Long, Bishop of Bathurst. The then Chancellor of Bathurst, Sir John Peden, drafted a completely new Constitution and this was put to a Constitutional Convention of the Church under the chairmanship of the Bishop of Bathurst in 1926. The draft was unanimously accepted and was adopted by all dioceses

except one. It was even enacted as a schedule to the Tasmanian Church of England Constitution Act 1927 (18 Geo V No 29). The Archbishop of Perth and the Bishop of Wangaratta (Bishop Hart) took charge of the project after Bishop Long died in 1930 and a further Constitutional Convention was held on 11 October, 1932. In preparation for this Convention, Bishop Hart composed a detailed advisory memorandum.

Another draft was adopted by the 1932 Convention and this was approved by 18 out of the then 25 dioceses. This was not considered sufficient and a new draft was completed in 1939, but this draft was approved by only 17 of the 25 dioceses.

After the War further work was done and a revised draft prepared in 1951. Consensus could still not be reached and the dioceses were urged by the Archbishop of Canterbury to endeavour to reach agreement. Indeed, the Archbishop is said to have made his own draft on board ship on his way home to England which became the basis of discussion for the draft of 1954.

In 1955 the final draft of the Constitution was adopted by the General Synod and this is the document which now is the Constitution, the dioceses eventually unanimously agreeing with it (though even then as appears from Hansard Debates in New South Wales some churchmen lobbied against its adoption).

The above summary is based principally on the material in the epilogue section at pp 278-9 of Archdeacon Border's work cited above.

The schedule to the 1927 Tasmanian Act sets out the 1926 version of the Constitution in the most accessible form. Section 7 of the 1926 draft was approximately equivalent to the present s 5 save that the 1926 draft expressly preserved unaffected by the Constitution the inherent powers of the episcopate and the inherent powers of priests or deacons conferred by their ordination. Specific powers were given to the General Synod by ss 20 and 21, ss 36, 40 and 44 were the approximate equivalents in the 1926 draft of what are now ss 43, 47 and 51. Section 44 of the 1926 draft is as follows:-

> "44(1) A diocesan synod may make ordinances for the order and good government of this Church within the diocese.
>
> This subsection shall not be deemed to be a direction or permission to prescribe by ordinance of a diocesan synod within the meaning of paragraph (e) of subsection 1 of section 20 of this Constitution, but otherwise nothing in this section shall limit any powers of a diocesan synod under this Constitution or under the Constitution of the diocese.
>
> (2) A diocesan synod may refer to the General Synod any matter affecting this Church, either for the purposes of section 20 or for the purposes of section 21 of this Constitution."

It would seem that in the draft of Sir John Peden it had been

suggested that the Constitution give certain specific powers to diocesan synods (vide s 62 of the Peden draft) and further that the Constitution should specifically prescribe the method by which diocesan synods were to be constituted and how they were to go about their business. It would seem that all this was rejected.

The 1932 Convention adopted the following s 51:-

"(1) A diocesan synod may make ordinances for the order and good government of this Church within the diocese.

(2) A diocesan synod may refer to the General Synod any matter affecting this Church either for the purposes of section 20 or for the purposes of section 21 of this Constitution."

Bishop Hart of Wangaratta in his memorandum for the continuing committee appointed after 1932 said this at page 7, "The Church of England in Australia has at present no power to alter its standards, or to revise the Prayer Book, except by adopting changes made in England. Nor can it, as a consequence, take any effective steps towards reunion with other Christians.

These powers the Constitution claims for us for the first time. The dioceses thus retain all the powers of self-government which they have had in the past. Section 52 explicitly affirms that this local liberty must not be interfered with against the will of a diocese. ... The preservation of diocesan autonomy is one of the principles of the Constitution. Our idea of the

Catholic Church is that it is not only self-governing as a whole, but that it is self-governing in every part. The Church in Australia intends to remain loyal to the Anglican communion and to catholicity, but in all its internal affairs it will legislate for itself. Within it, each province will direct the affairs internal to it, though so far provincial government remains undeveloped. Similarly every diocese will unite with others in matters of common concern, but in its purely internal affairs it will have full liberty."

The draft for the 1939 Convention was the same as that adopted in 1932 as was the revised draft of 1946. The 1951 draft simply provided in s 51 -

> "51. A diocesan synod may make ordinances for the order and good government of this Church within the diocese."

This simple statement was then altered in 1955 by adding two further matters, "Subject to this Constitution" at the beginning and "in accordance with the powers in that behalf conferred upon it by the Constitution of such diocese" at the end.

It can thus be seen that the Church, relatively early on in the drafting process rejected the idea that the Constitution should prescribe a uniform procedure and uniform powers for diocesan synods. It accepted the principle that within each diocese there was to be full liberty in purely internal affairs. The 1955 amendments cut down that liberty to avoid conflict with other constitutional powers and also added the final words to which the Tribunal will revert shortly.

This history makes us wonder deeply about the Melbourne submission that the Constitution operated to confer uniform powers on each diocesan synod.

Attention must next be turned to the words "In accordance with the powers in that behalf conferred upon it by the Constitution of such diocese".

Wangaratta (1 Wangaratta 7.3.11) says that these words "emphasise the continuing operation of existing diocesan constitutions as the source of power for diocesan synods." This is true in one sense in that State governments or consensual compacts granted a power to pass an ordinance which would be binding on members of the Church. It is not true, however, in the sense that the subject matter of such ordinances is completely restricted to the subject matter of what might have been passed by diocesan synods before 1962.

Melbourne (3 Melbourne 1.5.7) puts it that the language is that "of form and method".

It is difficult to see how the word "powers" in the last part of s 51 can be construed as if it were "procedures" and really it is necessary to take this step if the words are words of "form and method". On the other hand, if the word "powers" is read in its natural sense as "authorities", problems again occur because the authority of the diocesan synods to pass ordinances was limited. The existence of these problems points to the view that the whole argument has got on to the wrong track.

Melbourne also relies on the words of covering clause 2 to the Victorian Act No 6626 of 1960. This is as follows:-

"2. The provisions of this Act and of the Constitution and of any canon or rule made under the Constitution shall have full force and effect notwithstanding anything in the Church of England Act 1854 ... ".

This section is to be compared and contrasted with the corresponding provision of the New South Wales Act, covering clause 4 of which reads:-

"Any provision of the Church of England Constitutions Act 1902 which is inconsistent with the provisions of this Act and Constitution shall to the extent of such inconsistency be inoperative in the several dioceses of the Church of England within the said State."

It is difficult to see how covering clause 2 can affect the current question. It is to be noted that it only applies to canons or rules made under the Constitution and not to ordinances. The Constitution itself makes it quite clear that there is a vital distinction between a canon or rule of General Synod and an ordinance of a diocesan synod. See in particular s 70. Furthermore, in the definition section, s 74(1) whilst "ordinance" includes any legislative measure of a provincial or diocesan synod, there is no corresponding definition to make canon include an ordinance.

Then there is the phrase "Subject to this Constitution". This must include not only the General Synod in

appropriate cases first passing any authorising canon but also the limitation in the final paragraph of s 71(1) forbidding diocesan synods to alter ritual or ceremonial. 1 Sydney 3.3 puts that "Subject to the Constitution" includes ss 1, 2, 3 and 66. Again, this must be so though there is no call in these Reasons to take the submissions on this matter any further.

The next matter to consider is the words "within the diocese". Ballarat submits that these words mean that a diocesan synod does not have power to deal with other than local matters and that as a person is ordained priest in the Church of God and not just for a diocese the subject matter of the Melbourne Act does not come within the grant of power in s 51.

It is clear from the outset that the words "within the diocese" do not mean that no act of a diocesan synod can have any effect outside diocesan boundaries. For instance, if there is an ordinance providing for the election of a diocesan bishop the person so elected will be recognised as the bishop throughout Australia. Again if the diocesan synod by ordinance appoints a secretariat to handle its business affairs, that secretariat will be able to transact business outside the diocese: its authority will not stop at the diocesan boundary.

The State Constitutions of the various Australian States have similar limitations on law making power at least up to the Australia Act, see e.g. Lumb on the Constitutions of the Australian States 3rd Edition pp 81 and following. An illustration of the States' limited powers is given in Re Hancock (1962) 80 WN (NSW) 56, 57. Myers, J there held that a

Victorian Statute providing that a child would be legitimated if her parents later married and reregistered the child only operated so that the child would be considered legitimate within the State of Victoria. This result followed because one had to construe the Victorian Statute in the absence of any specific indication as applying only to the Territory of Victoria and if there had been any specific provision in the Act it would have been beyond the State's legislative competence. The decision has been criticised by textwriters, see e.g. Nygh on Conflict of Laws 4th Edition p 376 as one which misunderstood the reasoning of the decision upon which it was based.

It is interesting to observe that State laws provided for the celebration of marriages before the Commonwealth entered the field. It would be rather odd to think that the State law was only valid to create the status of marriage of persons who married in New South Wales within the State of New South Wales and immediately the persons moved into Victoria they were not regarded as married.

It is clear that State law can incorporate a corporation which can operate as such both within and outside the State.

Thus under secular law a State Parliament can, so long as there is sufficient nexus with the State, legislate for the status of a person which status will be recognised outside the State. The Ballarat submissions appear to accept this (1 Ballarat p 2), but say that because of the limitations of powers respecting doctrine faith discipline ritual or

ceremonial, a different result follows. Apart from matters of ceremonial or ritual which come within s 71(1) it is hard to see why this is so. The instant Act of the Synod of Melbourne provides for its Archbishop within the diocese to ordain a woman to the office of priest. That would appear to constitute a sufficient nexus for the Diocese of Melbourne no matter what test was used. The mere fact that the woman might also have status outside the Diocese of Melbourne does not on the analogy with cases decided under the State Constitutions appear to invalidate the law.

The Tribunal must also note the argument respecting the operation of s 71(2). This provides that the law of the Church of England as at 1962 is applicable in the diocese unless and until the same be varied or dealt with in accordance with this Constitution. This subsection, as 2 Sydney 8.2. recognises, provides no barrier at all if s 51 confers powers on diocesan synods, but otherwise constitutes a serious bar.

The Tribunal has reached the view that s 51 should not be interpreted as a general grant of legislative power to diocesan synods. The limiting words with which the section concludes argue against that construction. Section 51 simply spells out one of the implications in s 5 with respect to the distribution of powers within the Church under what might be called a "federal" scheme. It also makes it plain that diocesan legislation must conform with such overriding constraints as the Fundamental Declarations. The Tribunal can understand the view that s 51 provides the authority for a diocesan synod to legislate under s 30, say, or s 67 - that is,

to make the essential complementary diocesan legislative responses that the Constitution in certain respects requires; in other words, to do what is necessary to make the Constitution work, particularly with respect to the role of general synod. However the preferable view is that these incidental local legislative powers are necessarily implied already in those few constitutional provisions that require such an express diocesan response.

Accordingly there is no need to spell such a legislative grant out of s 51, and the embarrassment to the opposing interpretation that is provided by the final words of limitation in the section is thus avoided. At any rate, whatever the better view might be with respect to that relatively narrow question of essential complementary powers, s 51 is certainly not to be interpreted as a general authority for a diocesan synod to make ordinances for the order and good government of the Church within the diocese. The concluding words of the section are too strong for that. It follows that Melbourne can get no assistance in the present matter from s 51, and there is no relevant legislative grant in any other section of the Constitution.

Accordingly it follows that there is nothing in s 51 to empower the Synod of the Diocese of Melbourne to pass the subject Act.

5. MISCELLANEOUS OBSERVATIONS.

The Tribunal has taken the view that it is better for

the Church as a whole, in a matter in which the Tribunal has reached a unanimous view as to the answer to the questions posed, for the Tribunal to deliver one set of Reasons. However, some members of the Tribunal are concerned lest their failure to express their mind on certain matters might lead some to misread the position.

Some of the arguments before the Tribunal suggested that the Melbourne Act was unnecessary as in any event it was part of the inherent episcopal power for bishops to ordain. The Tribunal has not referred to these arguments because they are really irrelevant to the question before it. Nevertheless, it should be said that some members of the Tribunal are concerned that there may well be an argument that a bishop's power to ordain is not necessarily an unrestricted power to select the candidates for ordination and also that there may be another rule of discipline that might affect a Bishop's authority, namely a rule of discipline that only a man may be made priest.

Again some members of the Tribunal take the view that even if s 51 does operate to confer some general legislative powers, the better view of s 26 is that it would operate to deny a diocesan synod power to legislate with respect to the discipline of the Church as a whole.

Further, a note of caution should be sounded for any who might assume that Diocesan Constitutions in States other than Victoria, necessarily produce the same result.

The only other comment that the Tribunal considers it should make is with respect to the way in which some of the

submissions to it were expressed. The procedure which has now been adopted by the Tribunal is that submissions from parties must be in writing and must contain the whole of the argument. When time is granted to address the Tribunal it is not for the purpose of reading a prepared speech, but so that the Tribunal can understand fully the written submissions and can put to the party matters about the submissions that may be troubling one or more members. The Tribunal recognises that very deep felt views about the subject matter may tempt those putting forward submissions to put their views very strongly. However, there can be no justification at all for submissions cast in language as disrespectful as some which the Tribunal has had to read in the current reference. As this is the second time in which a remark of this nature has had to be made, it is clear that in future the Tribunal will have to adopt a policy that if submissions are handed to the Registrar which fall short of the acceptable standards, they will be returned for redrafting and unless redrafted to meet proper standards, will not be considered by the Tribunal.

Further, it should be stated that the Tribunal is not to be addressed as a jury. The Tribunal is unmoved by such rhetoric as used in the Ballarat submission that our flawed reasoning and fundamental grave errors must continually be refuted. The Tribunal is always ready to listen to fresh reasoned argument but merely to repeat what has been said so many times before and to reiterate a party's fundamental objection to a previous decision does not assist the Tribunal.

Serial No. 142

AN ACT

To provide for the ordination of women to the Office of Priest and for other purposes.

Be it enacted by the Archbishop, the Clergy and the Laity of the Anglican Church of Australia within the Diocese of Melbourne duly met in Synod according to law as follows:

1. This Act may be cited as the "Ordination of Women to the Office of Priest Act 1988".

2. This Act shall come into operation on a date to be determined by the Archbishop in Council being a date

   (a) subsequent to a determination by the Appellate Tribunal that this Act is an ordinance duly made for the order and good government of the Church within the Diocese of Melbourne in accordance with powers in that behalf conferred upon it by the constitution of the diocese, and

   (b) subsequent to the next meeting of general synod.

3. The Archbishop or with the mandate of the Archbishop an assistant bishop of the diocese may within the diocese of Melbourne ordain a woman to the office of priest.

4. A woman may be ordained in this diocese to the office of priest 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 An Australian Prayer Book or in accordance with any other form appropriate to that office and approved for use in this diocese.

5. Nothing in this Act shall limit any power or authority possessed by any bishop prior to the making of the Act.

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

(Passed 8th October 1988 -- Assented to 8th October 1988)

I certify that this is a true copy of the Act passed by Synod and assented to by the Archbishop on October 8, 1988

Registrar.

6. COSTS.

Sydney has submitted that Melbourne should pay the costs of this reference in any event. This submission a fortiori applies as the Tribunal has held that Melbourne fails in the case it has presented.

Clause 14 of Canon 6 of 1962 empowers the Tribunal to direct how the costs occasioned by the determination of the reference should be provided. However, the concluding words of that section appear to deal only with the costs and expenses incurred by the General Synod or the Appellate Tribunal itself which would otherwise fall under s 32(2)(d) of the Constitution.

The power to award costs should be employed to protect the national Church against unwarranted depletion of its resources. However, with the present reference a genuine question was raised for the first time which was of vital concern to the whole Church. The Tribunal considers that no order for costs should be made in this case.

7. CONCLUSION.

For the reasons that it has given the Tribunal is satisfied that the Synod of the Diocese of Melbourne had no constitutional power to pass the Ordination of Women to the Office of Priest Act 1988. The Primate's question must therefore be answered - No.

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