

## **APPELLATE TRIBUNAL**

### **REPORT TO PRIMATE**

#### **REFERENCE ON THE LEGALITY OF THE ADMINISTRATION OF HOLY COMMUNION BY DEACONS OR LAY PERSONS**

**To The Most Reverend Dr Phillip Aspinall, Primate of the Anglican Church of Australia**

#### **Greeting**

**On behalf of the Appellate Tribunal I have the honour to make the following report as to the Reference on the legality of the administration of Holy Communion by deacons or lay persons**

1. Over 25 Members of the General Synod asked the Primate in accordance with Section 63(1) of the Constitution of the Anglican Church of Australia to direct questions to the Tribunal. Those requests are set out in the letter of Dr Muriel Porter supported by 25 members of the General Synod (hereafter referred to as "The Applicants") a copy of which is set out in Schedule 1 hereto. Three other persons later joined in as applicants.
2. The questions posed for the Tribunal's consideration are as follows:-

#### **GIVEN THAT:**

- A. The opinion of the majority of the Appellate Tribunal, expressed in its opinion given on 24 December 1997, was that –
  - (1) It is consistent with the Constitution of the Anglican Church of Australia to permit or authorise, or otherwise make provision for-
    - (a) deacons to preside at, administer or celebrate the Holy Communion; or
    - (b) lay persons to preside at, administer or celebrate the Holy Communion; and
  - (2) It is not consistent with the Constitution of the Anglican Church of Australia for a diocesan synod, otherwise than under and in accordance with a Canon of General Synod, to permit, authorise or make provision as mentioned in paragraph (1);
- B. The Synod of the Diocese of Sydney in 2008 by resolution No 27.08 passed on 20 October 2008 -
  - (a) accepted the report concerning legal barriers to lay and diaconal

administration of the Lord's Supper which was submitted to the 3rd session of the 47th Synod; and

- (b) affirmed again its conviction that lay and diaconal administration of the Lord's Supper is consistent with the teaching of Scripture; and
- (c) affirmed that the Lord's Supper in this diocese may be administered by persons other than presbyters and requested the Diocesan Secretary to send a copy of The Lord's Supper in Human Hands to all bishops who attended the GAFCON;

C. The *Lay Assistants at Holy Communion Canon 1973* of General Synod provides in section 1 that "Lay persons being communicants may be authorised by the bishop to assist the priest in the ministering and distribution of the Holy Communion";

D. By the *General Synod - Lay Assistants at Holy Communion Canon 1973 Adopting Ordinance 1973*, the Synod of the Diocese of Sydney adopted the *Lay Assistants at Holy Communion Canon 1973* of General Synod;

E. The *Authorized Lay Ministry Canon 1992* of General Synod provides-  
(a) in section 3(1)(c) that a lay person who is a communicant member of this Church maybe authorised by the bishop of a diocese to exercise within and for this Church in that diocese one or more of the following ministries:

- ...
- (c) assistance to the priest in the ministraton and distribution of the Holy Communion;" and
- (b) in section 6 that "The *Lay Assistants at Holy Communion Canon 1973* ceases to have effect in a diocese that adopts this canon by ordinance of the synod of the diocese.";

F. The Synod of the Diocese of Sydney has not adopted the *Authorized Lay Ministry Canon 1992* of General Synod; other dioceses have done so;

G. The *Canon Concerning Services 1992* of General Synod provides in s5-(1')The minister may make and use variations which are not of substantial importance in any form of service authorised by section 4 according to particular circumstances.

(2) Subject to any regulation made from time to time by the Synod of a diocese, a minister of that diocese may on occasions for which no provision is made use forms of service considered suitable by the minister for those occasions.

(3) All variations in forms of service and all forms of services used must be reverent and edifying and must not be contrary to or a departure from the doctrine of this Church.

(4) A question concerning the observance of the provisions of sub-section 5(3) may be determined by the bishop of the diocese.

H. By the *General Synod - Canon Concerning Services 1992 Adopting Ordinance 1998*, the Synod of the Diocese of Sydney adopted the *Canon Concerning*

**THE FOLLOWING QUESTIONS** arise under the Constitution of the Anglican Church of Australia:

1. Does the *Lay Assistants at Holy Communion Canon* 1973 of General Synod constitute an alteration in the ritual or ceremonial of this Church for the purposes of s71 (1) of the Constitution of the Anglican Church of Australia in conformity with which a synod of a diocese may make an alteration in the ritual or ceremonial of the Church so as to permit, authorise or make provision for a lay person to preside at, administer or celebrate the Holy Communion?
2. Does the *Authorized Lay Ministry Canon* 1992 of General Synod constitute an alteration in the ritual or ceremonial of this Church for the purposes of s71(1) of the Constitution of the Anglican Church of Australia in conformity with which a synod of a diocese may make an alteration in the ritual or ceremonial of the Church so as to permit, authorise or make provision for a lay person to preside at, administer or celebrate the Holy Communion?
3. Does the *Ordination Service for Deacons Canon* 1985 of General Synod constitute an alteration in the ritual or ceremonial of this Church for the purposes of s71 (1) of the Constitution of the Anglican Church of Australia in conformity with which a synod of a diocese may make an alteration in the ritual or ceremonial of the Church so as to permit, authorise or make provision for a deacon to preside at, administer or celebrate the Holy Communion?
4. Does the *Canon Concerning Services* 1992 of General Synod constitute an alteration in the ritual or ceremonial of this Church for the purposes of s71 (1) of the Constitution of the Anglican Church of Australia in conformity with which a synod of a diocese may make an alteration in the ritual or ceremonial of the Church so as to permit, authorise or make provision for a deacon or lay person to preside at, administer or celebrate the Holy Communion?
5. Does any other canon of General Synod constitute an alteration in the ritual or ceremonial of this Church for the purposes of s71 (1) of the Constitution of the Anglican Church of Australia in conformity with which a synod of a diocese may make an alteration in the ritual or ceremonial of the Church so as to permit, authorise or make provision for a deacon or a lay person to preside at, administer or celebrate the Holy Communion?
6. Is resolution No 27.08 of 2008 of the synod of the Diocese of Sydney in affirming that the Lord's Supper in the diocese may be administered by persons other than presbyters consistent and in accordance with the Constitution of the Anglican Church of Australia and the canons made thereunder?

3. As can be seen, the focus of the questions is on Resolution 27.08 passed by the Synod of the Diocese of Sydney which, so far as is relevant, is in the following terms:-

“Synod---(a) accepts the report concerning legal barriers to lay and diaconal administration of the Lord’s Supper which was submitted to the 3<sup>rd</sup> session of the 47<sup>th</sup> Synod, and (b) affirms again its conviction that lay and diaconal administration of the Lord’s Supper is consistent with the teaching of Scripture and (c) affirms that the Lord’s Supper in this diocese may be administered by persons other than presbyters...”

4. All members of the Tribunal considered the Reference. For purposes of record, the members are The Hon Mr Justice Peter W Young, AO, President, Mr Max Horton OAM, Deputy President, The Hon Justice David J Bleby, The Hon Keith Mason AC QC, The Most Rev Phillip Aspinall, Archbishop of Brisbane, The Most Rev Roger Herft Archbishop of Perth and The Rt Rev Peter Brain, Bishop of Armidale.
5. The reference was considered after a directions hearing and written submissions from interested parties, namely the persons making the request, Rt Rev Glenn Davies, the Diocese of Newcastle and three Sydney rectors and a lay person who is a member of the senior bar (this group is referred to as “the Supporting Parties”). Although communication was made with the Diocese of Sydney, it did not appear nor make submissions.
6. The directions hearing took place before the President and Bishop Brain in Sydney on 20 August 2009. Mr M Hines, Barrister appeared for The Applicants, Bishop Glenn Davies appeared on his own behalf, Mr R Wright SC appeared for the Supporting Parties.
7. At the directions hearing it was agreed and determined that no oral hearing was necessary and that the questions did not raise any question of doctrine or other matter making it necessary or expedient to seek the opinion of the

House of Bishops or the Board of Assessors. A timetable for submissions was set.

8. A problem arose because the only person willing to advocate an affirmative answer to any of the questions was Bishop Davies and he limited himself to argue for the validity of diaconal presidency only. There was thus no contradictor with respect to lay presidency.
9. In such circumstances, the Tribunal often considers that it is in the best interests of the Church for it to exercise its discretion not to answer a question where all the relevant issues have not been debated before it. However, the Applicants put on evidentiary material to show that there appeared to be persons in public ministry in this Church who were acting on or purporting to authorise others to act upon the assumption that Resolution 27.08 allowed not only deacons but also lay persons to celebrate the Holy Communion in certain circumstances.
10. The Tribunal considered that, in the light of this evidence, it would better serve the Church by answering the questions with respect to both deacons and lay persons.
11. After considering the submissions, the Tribunal was the opinion that each of the questions should be answered, "No", except Question 5, the answer to which is, "No suggestion that there is any other relevant canon of the General Synod was made to the Tribunal."
12. As to Questions 3 & 6, all members of the Tribunal other than the Bishop of Armidale answer the question, "No". The Bishop of Armidale answers the question, "Yes".
13. Thus, the statutory majority report that all questions other than Question 5 must be answered "No" and that the answer to Question 5 is as appears in paragraph 11 above.

14. The Tribunal's reasons are set out in Schedule 2.

Peter Young  
President Appellate Tribunal  
10 August, 2010

### **SCHEDULE 1**

17 June 2009

The Primate Anglican Church of Australia  
Level 9 51 Druiitt Street Sydney NSW 2000

Dear Archbishop

In accordance with Section 63 (1) of the Constitution of the Anglican Church of Australia, 25 members of General Synod hereby direct the following questions to the Appellate Tribunal:

[The letter set out the questions detailed above and continued]

A minimum of 25 signatories is required under the terms of Section 63 (1); a total of 25 have joined this action.

They are: The Revd John Baldock (Melbourne); Sally Burt (Melbourne); Helen Carrig (Adelaide); Canon Dr Ray Cleary (Melbourne); The Revd Sue Crothers- Robertson (Brisbane); Alan Dann (Brisbane); Phillip Davies (Canberra & Goulburn); Bishop Godfrey Fryar (Rockhampton); Canon Theresa Harvey (Perth); The Revd Geoffrey Hoyte (Brisbane); Bishop Richard Hurford (Bathurst); Archdeacon Dr Sarah Macneil (Canberra & Goulburn); Bishop David McCall (Bunbury); Bishop John Parkes (Wangaratta); Dr Muriel Porter (Melbourne); The Revd Canon Dr Colleen O'Reilly (Melbourne); Bishop William Ray (North Queensland); The Revd Graham Reynolds (Melbourne); Dean John Shepherd (Perth); Bishop Keith Slater (Grafton); The Revd Gary Smith (Brisbane); Bishop Douglas Stevens (Riverina); Archdeacon David Thornton-Wakeford (Adelaide); Ian Walker (Brisbane); Bishop Garry Weatherill (Willochra).

I attach the original letters of 24 of the signatories. Bishop John Parkes' letter will be sent directly to General Synod Office (it was).

Yours sincerely

(Sgd) Muriel Porter

## **SCHEDULE 2**

### **REASONS OF THE TRIBUNAL**

#### **A. REASONS OF THE PRESIDENT (THE HON MR JUSTICE PETER W YOUNG AO), THE DEPUTY PRESIDENT (MR MAX HORTON OAM), THE HON JUSTICE DAVID J BLEBY, THE HON KEITH MASON AC QC, THE ARCHBISHOP OF PERTH (THE MOST REVEREND ROGER HERFT)**

1. This reference concerns the ability of deacons and lay persons to celebrate the Holy Communion, or as it is often called the Lord's Supper or the Eucharist. We will use those terms interchangeably. We use the term 'celebrate' in a broad sense, but to cover at least the roles of presiding at a service or consecrating the elements.
2. The reference comes before the Tribunal as a result of over 25 members of the General Synod (referred to in these reasons as "the Applicants") requesting the Primate to refer the six questions which are listed below to the Tribunal pursuant to the provisions of section 63 of the Constitution of this Church and the Primate meeting that request.
3. The reference (which will be set out in the First Schedule of our Report to the Primate) first sets out a preamble headed by the words "GIVEN THAT". The Tribunal has previously noted that it is often inadvisable to use this form of question. This is for two principal reasons, (a) The "givens" may limit the proper scope of the enquiry and (b) the parties may be tempted to assume the truth of the matters so stated whereas those matters may be wrong in law or may have to be established by proper evidence unless properly conceded.

4. However, in the instant case, the 'givens' purely relate to the public documents of the Church and set the background so that the objections referred to above do not apply.
5. The background to the reference is that on 20 October, 2008, the synod of the Diocese of Sydney passed the following resolution being No 27.08 (the "Sydney Resolution"),

"Synod---(a) accepts the report concerning legal barriers to lay and diaconal administration of the Lord's Supper which was submitted to the 3<sup>rd</sup> session of the 47<sup>th</sup> Synod, and (b) affirms again its conviction that lay and diaconal administration of the Lord's Supper is consistent with the teaching of Scripture and (c) affirms that the Lord's Supper in this diocese may be administered by persons other than presbyters..."

6. Whilst no-one submitted to the Tribunal that the Sydney Resolution had any legal effect whatsoever, as will subsequently appear, the Applicants say that in practical terms, various persons including senior clergy have fixed upon the fact of passing of the resolution as a justification for illegal practices or the endorsement or authorisation of illegal practices in respect of the Holy Communion in the diocese of Sydney.
7. The report referred to in the Sydney Resolution will be discussed later in these reasons
8. The six questions proposed to be answered are stated as follows:-

**GIVEN THAT:**

- A. The opinion of the majority of the Appellate Tribunal, expressed in its opinion given on 24 December 1997, was that –
  - (1) It is consistent with the Constitution of the Anglican Church of Australia to permit or authorise, or otherwise make provision for-
    - (a) deacons to preside at, administer or celebrate the Holy Communion; or
    - (b) lay persons to preside at, administer or celebrate the Holy Communion; and
  - (2) It is not consistent with the Constitution of the Anglican Church of Australia for a diocesan synod, otherwise than under and in accordance

with a Canon of General Synod, to permit, authorise or make provision as mentioned in paragraph (1);

B. The Synod of the Diocese of Sydney in 2008 by resolution No 27.08 passed on 20 October 2008 -

- (a) accepted the report concerning legal barriers to lay and diaconal administration of the Lord's Supper which was submitted to the 3rd session of the 47th Synod; and
- (b) affirmed again its conviction that lay and diaconal administration of the Lord's Supper is consistent with the teaching of Scripture; and
- (c) affirmed that the Lord's Supper in this diocese may be administered by persons other than presbyters and requested the Diocesan Secretary to send a copy of The Lord's Supper in Human Hands to all bishops who attended the GAFCON;

C. The *Lay Assistants at Holy Communion Canon 1973* of General Synod provides in section 1 that "Lay persons being communicants may be authorised by the bishop to assist the priest in the ministering and distribution of the Holy Communion";

D. By the *General Synod - Lay Assistants at Holy Communion Canon 1973 Adopting Ordinance 1973*, the Synod of the Diocese of Sydney adopted the *Lay Assistants at Holy Communion Canon 1973* of General Synod;

E. The *Authorized Lay Ministry Canon 1992* of General Synod provides-

- (a) in section 3(1)(c) that a lay person who is a communicant member of this Church maybe authorised by the bishop of a diocese to exercise within and for this Church in that diocese one or more of the following ministries:

...

- (c) assistance to the priest in the ministrations and distribution of the Holy Communion;" and

- (b) in section 6 that "The Lay Assistants at Holy Communion Canon 1973 ceases to have effect in a diocese that adopts this canon by ordinance of the synod of the diocese.";

F. The Synod of the Diocese of Sydney has not adopted the *Authorized Lay Ministry Canon 1992* of General Synod; other dioceses have done so;

G. The *Canon Concerning Services 1992* of General Synod provides in s5-

(1) The minister may make and use variations which are not of substantial importance in any form of service authorised by section 4 according to particular circumstances.

(2) Subject to any regulation made from time to time by the Synod of a diocese, a minister of that diocese may on occasions for which no provision is made use forms of service considered suitable by the minister for those occasions.

(3) All variations in forms of service and all forms of services used must be reverent and edifying and must not be contrary to or a departure from the

doctrine of this Church.

(4) A question concerning the observance of the provisions of sub-section 5(3) may be determined by the bishop of the diocese.

H. By the *General Synod - Canon Concerning Services 1992 Adopting Ordinance 1998*, the Synod of the Diocese of Sydney adopted the *Canon Concerning Services 1992*

**THE FOLLOWING QUESTIONS** arise under the Constitution of the Anglican Church of Australia:

1. Does the *Lay Assistants at Holy Communion Canon 1973* of General Synod constitute an alteration in the ritual or ceremonial of this Church for the purposes of s71 (1) of the Constitution of the Anglican Church of Australia in conformity with which a synod of a diocese may make an alteration in the ritual or ceremonial of the Church so as to permit, authorise or make provision for a lay person to preside at, administer or celebrate the Holy Communion?
2. Does the *Authorized Lay Ministry Canon 1992* of General Synod constitute an alteration in the ritual or ceremonial of this Church for the purposes of s71(1) of the Constitution of the Anglican Church of Australia in conformity with which a synod of a diocese may make an alteration in the ritual or ceremonial of the Church so as to permit, authorise or make provision for a lay person to preside at, administer or celebrate the Holy Communion?
3. Does the *Ordination Service for Deacons Canon 1985* of General Synod constitute an alteration in the ritual or ceremonial of this Church for the purposes of s71 (1) of the Constitution of the Anglican Church of Australia in conformity with which a synod of a diocese may make an alteration in the ritual or ceremonial of the Church so as to permit, authorise or make provision for a deacon to preside at, administer or celebrate the Holy Communion?
4. Does the *Canon Concerning Services 1992* of General Synod constitute an alteration in the ritual or ceremonial of this Church for the purposes of s71 (1) of the Constitution of the Anglican Church of Australia in conformity with which a synod of a diocese may make an alteration in the ritual or ceremonial of the Church so as to permit, authorise or make provision for a deacon or lay person to preside at, administer or celebrate the Holy Communion?
5. Does any other canon of General Synod constitute an alteration in the ritual or ceremonial of this Church for the purposes of s71 (1) of the Constitution of the Anglican Church of Australia in conformity with which a synod of a diocese may make an alteration in the ritual or ceremonial of the Church so as to permit, authorise or make provision for a deacon or a lay person to preside at, administer or celebrate the Holy Communion?
6. Is resolution No 27.08 of 2008 of the synod of the Diocese of Sydney in affirming that the Lord's Supper in the diocese may be administered by persons other than presbyters consistent and in accordance with the Constitution of the Anglican Church

of Australia and the canons made thereunder?

9. The proceedings on the reference were unorthodox. A directions hearing was conducted by the President and Bishop Brain on 20 August 2009. At that hearing it became plain that the diocese of Sydney did not wish to participate in the reference. Despite this, the Tribunal directed the Registrar to advise that diocese that it would still be willing to receive submissions from that diocese. Sydney was served with all materials. The Registrar's invitation was not taken up.
10. The only person who wished to present submissions in favour of an affirmative answer to any of the questions was the Right Reverend Dr Glenn Davies, Bishop of North Sydney, an Assistant Bishop in the Diocese of Sydney. It appeared that Dr Davies was speaking for himself alone and not as a representative of the Diocese of Sydney. In the circumstances, the Tribunal gave Dr Davies leave to appear and make submissions.
11. Apart from the Applicants and Dr Davies, the only other persons seeking to make submissions were (1) a group of Sydney rectors (on their own behalf) together with a lay person who is a member of the senior bar and (2) the Diocese of Newcastle. The former group, to whom we will refer as the "Supporting Parties" made submissions which favoured the Applicants' position.
12. The Diocese of Newcastle made written submissions again supporting the Applicants' position. However, the chancellor of that diocese in his written submissions went beyond the reference and submitted, though without reasons, that that diocese disagreed with the Tribunal's decision of 1997 that it was possible for deacons to be authorised to celebrate the communion. We do not intend to deal with that submission which raises issues not before us on this reference.

13. Dr Davies stated that he did not wish to advance any argument in support of lay persons administering the Lord's Supper. Indeed, in his written submissions, the only question for which he advocated an affirmative answer was Question 3.
14. Further, no argument was placed before the Tribunal by Dr Davies seeking to challenge any part of the Tribunal's 1997 decision to the effect that only the General Synod could enlarge the class of persons who could celebrate the Holy Communion. Indeed, the basis of Dr Davies' submissions was that the General Synod had indeed done so.
15. No theological argument was presented by Dr Davies.
16. The lack of argument from anyone who wished to support the Sydney Resolution with respect to lay persons placed the Tribunal in an unenviable position. The Applicants and their supporters perceived that the Sydney Resolution was being used as justification for illegal practices. They perceived that people were seeking to justify those practices by reference to it yet no-one was prepared to speak up and support it except insofar as Dr Davies' submissions extended.
17. Normally, the Tribunal declines to answer questions which are posed for its decision where there is no proper argument presented or where there is no proper contradictor. The reason for this is that it is no service to the Church for the Tribunal to make a binding ruling where it has only been presented with inadequate material.
18. However, the normal practice must bend to the needs of the Church in any particular situation. The Applicants have presented material that, if accepted, indicates that as a consequence of the Sydney Resolution some senior clergy in Sydney Diocese have said or done things which might encourage the belief amongst both clergy and laity that persons other than priests could celebrate the Holy Communion on church trust property. Other material presented indicated that at least one deacon in that Diocese had formed the view, at

least partly based on what appeared to be an official publication of the diocese, that he could now celebrate the Eucharist. The Appendix gives details of this material.

19. It occurred to some members of the Tribunal that there might be a need to test these assertions. However, no-one denied their existence and no-one appeared ready to cross-examine the evidence supporting them.

20. Accordingly the Tribunal considers that, whilst it stops short of making a finding that any of these allegations have been proved, there is sufficient material to suggest that despite the lack of full argument and a proper contradictor, the Tribunal would best fulfil its role by addressing each of the questions.

21. It must always be borne in mind that the members of this church are entitled to worship God in this church according to the rules of this church in respect of many of which the clergy at their ordination swore before God to uphold. This point has been made by the highest secular judicial authority in both Australia and England, (see eg Sheppard v Bennett (1871) LR 4 PC 371, 493, Wylde v AG (The Red Book Case) (1948) 78 CLR 224, 253-4). The Anglican Church is so structured that despite wide ranging views on a number of matters, all its members should be able to worship together in accordance with the rules of the church.

22. Legally, many of those rules can be enforced under the law of trusts. However, few church members have the wherewithal to take expensive court proceedings. Further there is Scriptural authority for the view that proceedings of such nature before a secular court are wrong for believers.

23. It is thus up to the bishops and this Tribunal to see that the rules of the church are upheld. This is not just a matter of legalism, but a matter of fairness and protection of the ordinary members of the church. The determination of this Reference and the publication of these Reasons will make it difficult for any

member of the Church who acts contrary to them, or authorises others to act contrary to them, to argue that such conduct is inadvertent.

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24. It is convenient to consider Dr Davies' submissions and then move to the matters relevant to this reference which he did not cover.
25. As the Applicants point out in their submission, each of questions asks with respect to a particular canon of the General Synod whether it constitutes "an alteration in the ritual or ceremonial of this Church for the purposes of s71(1) of the Constitution of the Anglican Church of Australia in conformity with which a synod of a diocese may make an alteration in the ritual or ceremonial of the Church so as to permit, authorise or make provision for "a lay person and/or deacon" as the case may be "to preside at, administer or celebrate the Holy Communion?"
26. The canons involved in this reference are, in chronological order, the *Lay Assistants at Holy Communion Canon 1973*, the *Ordination of Deacons Canon 1985*, the *Authorized Lay Ministry Canon 1992* and the *Canon Concerning Services 1992*.
27. The primary focus of Dr Davies' submissions was on Question 3 and the *Ordination of Deacons Canon 1985*. Dr Davies states that that canon has been adopted by all Australian dioceses. No-one has said anything to the contrary and we proceed on the assumption that the statement is correct.
28. The submission is that it is legal for deacons to administer the Holy Communion within the Anglican Church of Australia where they have been made deacon under the 1985 Canon which authorises deacons to assist the priest in administering both sacraments.
29. Dr Davies fleshes out that submission by saying:-
  - (1) This Tribunal has ruled that diaconal administration of the Holy Communion is consistent with the Constitution;

(2) This Tribunal has ruled that a General Synod Canon authorising such practice would be required before any diocese could make provision for diaconal administration of Holy Communion;

(3) The 1985 Canon contained a new service for the Ordination of Deacons, which was a radical revision of the Ordinal of the *Book of Common Prayer (BCP)*, alternative to the conservative revision that was published in *An Australian Prayer Book (AAPB)* in 1978.

(4) The 1985 service departed from the text of both *AAPB* and *BCP* with expanded functions for the deacon, notably with respect to preaching and the administration of baptism and Holy Communion.

(5) Unlike the Ordinal of *BCP*, the deacon's responsibilities were not delineated separately with respect to each sacrament (baptise infants in the absence of the priest; help the priest in the distribution of the Holy Communion), but were coupled together in the expression "to assist in the administration of his holy sacraments", without any further qualification concerning the presence or absence of the priest.

(6) The function of the deacon was thereby expanded to allow the deacon to baptise not only infants, but candidates of any age (regardless of the absence of the priest), although such baptisms would only be conducted under the aegis of the priest, whom the deacon was to assist.

(7) The function of the deacon was also expanded to allow the deacon to administer Holy Communion with the same authority the deacon had to administer baptism, likewise in an assisting capacity under delegation from the priest.

(8) There are occasions when canons have valid legal effects which are not recognised until some time later, as was the case with the change in definition of canonical fitness for bishops in the Constitution. The fact that

the 1985 Canon was not previously recognised as authorising deacons to assist the priest in administering Holy Communion does not override the plain reading of the text of the service, in accordance with the principles of statutory interpretation.

(9) The 1985 Canon satisfies the conditions of the Appellate Tribunal to permit diaconal administration in any diocese which ordains deacons in accordance with the service in the 1985 Canon.

(10) Therefore the *Ordination Service for Deacons Canon 1985* of General Synod constitutes an alteration in the ritual or ceremonial of this Church for the purposes of s71(1) of the Constitution of the Anglican Church of Australia in conformity with which a synod of a diocese may make an alteration in the ritual or ceremonial of the Church so as to permit, authorise or make provision for a deacon to preside at, administer or celebrate the Holy Communion.

30. Dr Davies submits that in 1985, the new Ordination Service for deacons became an authorised liturgy in all dioceses, including Sydney. He submits that the service made at least two significant changes, (a) a deacon may now baptize a candidate of any age even in the presence of a priest and (b) the deacon is authorised to preach.

31. Dr Davies seems to say that the change in the service changed the function of deacons generally. If he means to say that, we would respectfully disagree. The most that the change in the service could effect would be with respect to those made deacon by a bishop using the new form of service.

32. Further, as the Supporting Parties point out, the 1985 service is said to authorise an *additional* form of service for the ordination of deacons. Thus it is contemplated that deacons may be ordained under the new form of service or the older forms. There is no express indication that the function of the deacon is altered or that there will be two classes of deacons, one ordained under the 1985 form with extra powers and functions and the other under the

traditional form without those powers and functions. This is an unlikely intention of the General Synod.

33. The Supporting Parties put that ever since the Council of Nicea in 325, the official line taken by the church is that deacons cannot celebrate the Holy Communion and it would be strange if the General Synod changed this inferentially.
34. We would add to these propositions that the rubrics in the Book of Common Prayer Service plainly indicate priestly presidency of the Eucharist. The "Curate" in the rubrics refers to the priest in charge of a parish, but even more explicitly, the rubrics consistently refer to the priest.
35. Thus the fourth rubric at the commencement of the Order for the Administration of the Lord's Supper concludes, "And the Priest standing at the north side of the Table shall say the Lord's Prayer, with the Collect following, the people kneeling." Before the comfortable words, before the confession and before the consecration of the elements, the rubrics consistently refer to "the Priest".
36. Again the Supporting Parties put that, not only are there no words in the new service expressly authorising a deacon to preside at the Eucharist, what there is suggests that the new deacon is to take his or her place in the service of Holy Communion. The Supporting Parties suggest that that means the traditional place of the deacon. We agree.
37. The Applicants also do not agree that the 1985 Canon should be construed as expanding the liturgical function of deacons in a radical way as contended by Dr Davies.
38. It is sometimes assumed that there is a nexus between preaching the Word and administering the Sacraments. Such an assumption requires testing. It would seem that this was not always so in the history of Anglicanism. It would appear that from 1549 until the accession of the Stuart kings, preaching (other

than reciting the prescribed homilies) was not part of church services unless the minister was specially licensed to preach. The supposition that there is necessary implication that a person who is authorised to preach must be authorised to celebrate the Eucharist thus needs examination.

39. Dr Davies then focuses on the Holy Communion. He puts in paragraphs 12-13 of his submissions that what is novel about the wording of the 1985 service is the explicit inclusion of assisting in the administration of Holy Communion in the deacon's responsibilities. He points out that on three occasions the service makes reference to the responsibilities of the deacon with respect to the administration of the Lord's Supper.
40. First, there is the bishop's instruction: "You are to be faithful in prayer, and take your place with the bishop, priest and people in public worship and at the administration of the sacraments". Then, in the bishop's questions: "Will you take your part in reading the holy scriptures in the church, in teaching the doctrine of Christ, and in administering the sacraments?", and then in the bishop's authorisation: "Receive this sign of your authority to proclaim God's word and to assist in the administration of his holy sacraments".
41. Dr Davies submitted that the service refers to the administering/administration of the sacraments, whereas the individual names of each sacrament, namely "Baptism" and "Holy Communion", do not occur at all. The text of the service does not differentiate between the sacraments: therefore, he submitted what applies to one sacrament applies to the other.
42. The Supporting Parties say that one cannot equate what a deacon can do in baptism and what he or she can do in the sacrament of the Eucharist. The vital difference is that the latter involves the consecration of the elements. [The Supporting Parties make a more detailed submission on this matter involving some matters which would not be held by all Anglicans which, being peripheral to what we need to decide, we merely note and pass on.]

43. Dr Davies says that purposive construction of statutes and measures resembling statutes is the method favoured by high judicial authority.
44. That means that one must look to the purpose of the 1985 Canon. Dr Davies puts that the purpose was a radical revision of the 17<sup>th</sup> Century Ordinal. The measure was not merely an attempt to restate the provisions of the traditional Anglican Ordinal in modern English: the AAPB had already done this. It was written to address a changing diaconal ministry with changing functions, in particular an expansion of the role of the deacon in the administration of baptism.
45. Assuming for the moment that this is so, one would then have to see to what extent the General Synod Canon extended the role of the deacon in the provision of the Lord's Supper.
46. Apart from general references to the deacon's role in the sacraments generally, as pointed out in [40] above, at the making of a deacon, the bishop enquires and receives assurances that, among other things, the deacon will be faithful at the *administration* of the Lord's Supper, to take his or her part in administering the sacraments and he or she is authorised to *assist* in the administration of the holy sacraments.
47. The key words are "administration" and "assist", though one must also examine what is the part of the deacon in administration of the sacraments.
48. Dr Davies submits that "administer" means more than "distribute".
49. Dr Davies says that the use of the term "administration" has had a particular reference in the history of Anglicanism to the conduct of the service of the Lord's Supper since the Prayer Book of 1549 whose actual title was "The Booke of Common Prayer and Administracion of the Sacraments".
50. Dr Davies points out that the Canons of 1604 also use the word "administration" with reference to the whole ceremony of the sacrament.

Thus Canon 56 commands all those clergy possessed of a Benefice that has a cure of souls at least twice a year to “administer the sacraments of Baptism...and the Lord’s Supper”. Likewise Canon 71 prohibits Ministers from preaching or administering the Lord’s Supper in private houses.

51. Dr Davies reads from Hooker’s Ecclesiastical Polity Book V (1597), section xlvii [4],

“[The Apostles] being the first to receive from him, the first which were warranted by his promise that not only unto them at the present time but to whomsoever they and their successors after them did duly administer the same....”

He concludes that “administer” is being used by Dr Hooker as including consecrating the elements at the Lord’s Supper.

52. Dr Davies says that the word “administration” is used in the current version of the Canons adopted by the Church of England in England in the same way.

53. The Applicants’ submissions do not challenge this learning except perhaps to say that it is more helpful to see how the word “administration” is used in more contemporary Anglican formularies especially in Australia.

54. There is no need to delve into the details of this submission. The principal riposte made by the Applicants is that in the 1985 Canon and the service for making deacons contained in it, the deacon’s role is clearly to take his or her place in the administration and to assist the priest in the administration.

55. Dr Davies says the word “assist” does not necessarily mean that the assistant is performing in the presence of the person he or she is assisting or indeed necessarily that he or she is in a subordinate role and cites the decision of the South Australian Supreme Court in *Reg v Johnson (No 2)* [2004] SASC 11; 143 A Crim R 395.

56. However, Dr Davies acknowledges that this is not necessarily the principal meaning of the word.
57. The Supporting Parties say that it is significant that the words used are “assist *in*”. Whilst it may be that one can assist X by doing Y when X is not present, this cannot be the case where what is required is that Z assist X *in* what X is doing. This submission is logically correct.
58. In their reply, the Supporting Parties make the further valid point that there is a real difference between “assist by” and “assist in”. They note that a child may assist his or her father in washing the car, but it is a different matter to say the child assisted by washing the car. In the present context the deacon is to assist in the administration.
59. The Applicants say that one sees the proper sense of the word when one compares the wording of the service for making deacons with the wording of the service for ordaining priests. They say that the clear distinction is made between the priest who is to administer the sacrament in the sense of presiding, consecrating and celebrating and the deacon who is to play a subsidiary role.
60. We cannot see any answer to this submission.
61. We do not consider that the role of the deacon in the service of Holy Communion has undergone any serious or relevant change by the 1985 Canon.
62. We would only add that the submission of the Diocese of Newcastle sought to challenge a previous ruling of the Tribunal that is to the effect that a change in the functions of Bishop, Priest or Deacon as befits their service in the Church from age to age does not offend against section 3 of the Constitution. That matter is not up for review in the present reference under the guidelines for conduct of the reference laid down at the directions hearing and followed by the principal parties.

63. Question 3 must thus be answered “No”.

64. As Questions 1 and 2 deal solely with the position of the laity, it is convenient next to address Question 4 which concerns both deacons and laity. Question 4 relates to the *Canon Concerning Services* 1992.

65. Dr Davies did not present any separate argument on this canon.

66. The Report to the Sydney Synod referred to in the Sydney Resolution merely says (paras 65-66) that as the Canon does not restrict the involvement of deacons and laity in any service for which no provision is otherwise made to use a form that is reverent and edifying of his or her own devising.

67. What seems to be being said is that a diocese or an individual minister could choose not to use an authorised service of Holy Communion and devise a service where a deacon or lay person could preside.

68. This interpretation would not in our view constitute an ‘occasion for which no provision has been made’.

69. There does not appear to be any other way in which this canon could operate to give an affirmative answer to Question 4 and none was submitted.

70. Question 4 must thus be answered, “No.”

71. We now turn to Question 1 which asks concerning the *Lay Assistants at Holy Communion Canon* 1973.

72. Again, Dr Davies makes no submissions and one had to look to the Sydney Report to see the possible basis for an affirmative answer.

73. That basis appears to be (para 68) that the lay person may “assist” the priest in the Holy Communion and as “assist” is not defined, that assistance can be by administering any part of the Lord’s Supper.

74. It is to be noted that the report suggests that the lay person cannot perform the whole administration but only “any part” of it.

75. However, the word “assist” must be read in its context and that context as demonstrated by our discussion of Question 3 means to take a part in the service subsidiary to the priest and not involving the act of consecration.

76. Thus Question 1 must be answered, “No.”

77. Question 2 concerns the *Authorised Lay Ministry Canon 1992*.

78. No submissions were presented with respect to this canon. In view of the wording of sections 2 and especially 3(1)(c), any argument could not get higher than those made in respect of the other canons.

79. Furthermore as this canon has never been adopted by the diocese of Sydney, it could not be a source of power for its Resolution.

80. Question 2 must thus also be answered, “No.”

81. Question 5 asks whether any other canon of the General Synod supports the Sydney Resolution. No party has suggested that there is any such canon and none appears to be referred to in the Sydney synod reports. It is tempting to answer this question, “No”. However, the Tribunal should not be asked to search for possibilities and then consider them one by one nor to give a definite answer where no submissions are made. The question should thus be answered, “No suggestion that there is any other relevant canon of the General Synod was made to the Tribunal.”

82. Question 6 is directed to the Sydney Resolution. It must follow from what we have already said that this question must be answered, “No.”
83. It remains just to comment upon a point that arose incidentally in some of the submissions to which we have not already adverted.
84. There was some reference to the English *Act of Uniformity of 1662* which made it clear that in England (and Berwick on Tweed) only bishops and priests could celebrate the Eucharist.
85. Two points should be made about this statute. First, it was not the origin of the rule that only bishops and priests could celebrate the Holy Communion. Such seems to have been the rule since at least 325AD though clearly there were times when the rule was not strictly applied.
86. Secondly, it is acknowledged by the secular courts (see eg *The Red Book Case* at p 303) and by most church lawyers that this statute does not apply in Australia as such, but that some of its principles are part of the consensual compact that bound this Church as part of the Church of England.
87. This being so, as the submission of the Diocese of Newcastle points out, in the light of s 71 of the Constitution even an ordinance of a diocesan synod attempting to ‘repeal’ the Act of Uniformity for its diocese could not affect the continued application of the rule restricting the celebration of the Holy Communion to duly ordained bishops and priests. A Diocesan Synod does not have the power to alter the consensual compact.

## **B THE REASONS OF THE ARCHBISHOP OF BRISBANE (THE MOST REVEREND PHILLIP ASPINALL)**

88. I agree with the Reasons of the majority of the members of the Tribunal set out above. What follows expands on paragraphs 32, 33, 34, 37, 44 and 61 of those Reasons.

89. Dr Davies proposes an argument that the Ordination Service for Deacons Canon 1985 (the 1985 service) changes the responsibilities and authority of deacons ordained in accordance with that service from what they had previously been, especially in comparison with the responsibilities and authority of deacons ordained in accordance with the Ordinal of the 1662 Book of Common Prayer. In particular, and among other alleged changes, Dr Davies argues that under the 1985 service deacons are authorised to conduct the service of Holy Communion, in its entirety.
90. Dr Davies does not prefer the terms preside or president in relation to a deacon ministering Holy Communion in its entirety. In his view, the deacon always acts to assist a priest or bishop and acts under the authority of such a priest or bishop, who remains the president of the fellowship. According to this view the terms president and preside properly apply to such a priest or bishop, rather than to the deacon, even though the presiding priest or bishop may not actually be present at a particular service of Holy Communion which the deacon conducts in its entirety. Acknowledging Dr Davies' linguistic preference the terms 'minister', 'admininister', 'celebrate' and 'preside' at or over a service of Holy Communion are used here interchangeably.
91. The central question under consideration is whether a deacon is authorised by the 1985 service, in contrast to the BCP ordinal, to conduct in entirety services of Holy Communion.
92. Dr Davies makes much of the phrase 'radical revision' in proposing his argument. He notes that this phrase was used by Bishop John Grindrod in the preface to An Australian Prayer Book, 1978 (AAPB). Dr Davies (para 9) asserts 'that the 1985 Ordination for Deacons Service was self-consciously a "radical revision" of the Ordinal of the BCP'. The fact that it was a 'radical revision', Dr Davies argues, reflects a deliberate intention to change the responsibilities and authority of a deacon ordained using this service. That is, the argument runs, this 'radical revision' of the ordination service results in radically revised responsibilities and authority of a deacon. Specifically Dr Davies argues that

the responsibilities and authority of the deacon were changed with respect to baptism, preaching and the Holy Communion.

93. In relation to baptism, Dr Davies (para 10) asserts that whereas under the BCP ordinal deacons could only baptise infants in the absence of the priest, under the 1985 service deacons could 'now baptise a candidate of any age and may do so, if appropriate, in the presence of the priest'.
94. In relation to preaching, Dr Davies (para 10) asserts that whereas under BCP ordinal the deacon's authority to preach 'was dependent upon the bishop's explicit licence', under 1985 this 'is replaced by the bishop's instruction: "to preach the word of God in the place to which you are licensed"' so that 'the authority to preach, which was not inherent in a deacon's functions in the BCP service, is now by definition one of the functions of a deacon'.
95. In relation to the Holy Communion, Dr Davies (para 11) asserts that 'what is novel about the wording of the 1985 service is the explicit inclusion of assisting in the administration of Holy Communion in the deacon's responsibilities'.
- 96 Dr Davies (para 28) summarises his position thus:  
While the symbol of authority was the same as that in the BCP Ordinal [the bishop handing a copy of the New Testament to the newly ordained deacon]. under the 1985 Canon the New Testament now symbolises a new authority: an authority to proclaim God's word and an authority to assist in the administration of both sacraments.
- 97 . Dr Davies also looks beyond the differences in wording between the 1662 Ordinal and the 1985 service for evidence to support his overall contention that the responsibilities and authority of a deacon have been deliberately altered. He canvasses (para 19) the views of Mr Gerald Christmas, in a Report of the Lay Reader's Commission to 1985 General Synod, supporting diaconal celebration of the Holy Communion. Dr Davies acknowledges that 'it is doubtful that all members of the Liturgical Commission' supported this view. Nevertheless 'they were aware of the debates surrounding the expansion of the role of deacon and

their carefully crafted service sought a “radical revision” of the BCP service, which would meet the needs of a changing diaconate’.

98. Dr Davies (para 23) repeats similar language asserting that ‘the purpose of the 1985 Canon was a radical revision of the BCP Ordinal’ and finds ‘The reality is that the 1985 Canon did not transfer without amendment all the functions of the deacon from 1662.’ Dr Davies (para 25) again asserts that ‘The 1985 Canon ... was written to address a changing diaconal ministry with changing functions, in particular an expansion of the role of the deacon in the administration of baptism...’
- 99 Overall Dr Davies (para 18) endeavours to establish that there was ‘a process of diaconal reform of which the 1985 Canon was a part’. He repeatedly uses the language of (radical) ‘revision’ and ‘reform’ to construe a case that the 1985 service deliberately and radically revised the provisions of BCP with respect to the responsibilities and authority of a deacon, that those responsibilities and authority were thereby been fundamentally altered and now include, among other new elements, celebrating or administering the Holy Communion in its entirety.
100. These various assertions which constitute Dr Davies’ argument do not withstand closer scrutiny.
101. With respect to baptism, Dr Davies (para 11) asserts that ‘These changes [in the 1985 service] seem to have been widely recognised as an authorisation of the deacon to ... administer baptism to candidates of any age, whether or not the priest is present’. He offers no evidence or reasons to establish this assertion. Nor does he attempt to establish his further assertions that ‘This represented a liturgical catch-up as many deacons had been baptising candidates other than infants, and the general recognition that there are occasions when it is appropriate for a deacon to baptise, notwithstanding the presence of the priest’ (para 11).
102. First it should be noted that there is no explicit provision in the 1985 service authorising a deacon to baptise a candidate of any age nor any authorisation for a deacon to baptise in the presence of the priest.

103. Secondly, it should be acknowledged that there is a change in language between the BCP ordinal and the 1985 service. The BCP ordinal provided that 'It pertaineth to the office of a deacon ... in the absence of the Priest to baptize infants'. The 1985 service requires the deacon to 'take your place with bishop, priest and people in public worship and at the administration of the sacraments', 'to take your part ... in administering the sacraments' and 'to assist in the administration of the sacraments.' The question is what is the significance of this change of language.
104. Dr Davies (para 14) cites as a principle of statutory interpretation that 'general words are to be given their plain and ordinary meaning unless their context necessarily implies some limitation'. The importance of context in statutory interpretation is underlined in the Diocese of Newcastle's submission setting out the view of the Chief Justice of New South Wales: 'Whatever words are used it is always to be remembered that a statute has a context, it has a background and it reflects assumptions as to the circumstances in which it will operate.' Dr Davies (para 18) also makes reference to this principle.
105. Surrounding the question before us there is a context that impacts upon the meaning of the words in the 1985 service, namely the BCP ordinal and the longstanding norms and practices governing the manner in which a deacon assists the priest in ministering the sacraments. That context impliedly limits the meaning of the words in the 1985 service and does not permit them to be construed in the manner submitted by Dr Davies.
106. Acknowledging the altered language between the 1662 ordinal and the 1985 service, there is no necessary implication that the substance of the deacon's responsibilities or authority has been altered in any way. Arguably, the 1985 language assumes that 'your place' and 'your part' in reference to the deacon are well established and known and that further specification of that 'place' and 'part' is absent from the service precisely because it is not needed. That specification is provided by the well understood context: the customary practice and rules established in the 1662 ordinal, and continued in AAPB in 1978,

continue in operation. In the absence of any explicit evidence that the responsibilities or authority of a deacon have been 'radically revised' it should not be assumed that they have been.

107. With respect to preaching, the BCP Ordinal authorised a deacon 'to preach ... if thou be thereto licensed by the Bishop himself'. In other words, ordination conveyed the authority to preach provided that in addition the deacon held the bishop's licence to do so. In the 1985 service the deacon is instructed 'to preach the word of God in the place to which you are licensed.' The same two elements are present: ordination and the bishop's licence. It was not the case in the BCP ordinal, nor is it in the 1985 service, that ordination alone, in and of itself, and apart from a bishop's licence, authorises a deacon (or a priest for that matter) to function/minister in a diocese including to preach. Ordination, in and of itself, means only that a deacon (or priest) may be so licensed. Ordination alone, apart from a bishop's licence, does not convey authority to minister in a diocese without the permission/authority/licence of the bishop of that diocese. In this respect there is no difference in substance between the position of the BCP ordinal and the 1985 service. Both services require both ordination and the bishop's licence for a deacon to preach.

108. In relation to the Holy Communion, the BCP Ordinal charged the deacon 'to assist the Priest in Divine Service, and specially when he ministereth the holy Communion, and to help him in the distribution thereof'. It has been noted above that the 1985 service requires the deacon to 'take your place with bishop, priest and people in public worship and at the administration of the sacraments', 'to take your part ... in administering the sacraments' and 'to assist in the administration of the sacraments.' To repeat, acknowledging that the language has changed somewhat, there is no necessary implication that the substance of the deacon's responsibilities and authorities has been altered in any way.

109. A comparison of the BCP Ordinal and the 1985 service, notwithstanding some changes in language, does not reveal substantial, or indeed any, changes to the responsibilities or authority of the deacon.

110. As the Applicants submit (para 52) in passing the 1985 Canon the General Synod was not directly conferring a new authority (to preside at the Holy Communion) on deacons subsequently ordained using that service. Rather the General Synod was authorising a new ordination service to ordain deacons to do what they had always done.
111. This should be in no way surprising. After all, the same preface to AAPB in which Bishop Grindrod (p.12) used the term 'radical ... revisions', much exercised by Dr Davies, spells out what is meant by that term. Bishop Grindrod explained that "Radical" revision became for the Commission a real searching for the roots of worship in The Book of Common Prayer' (AAPB, p.10).
- 112 The 1985 Liturgical Commission's own explanation of the term 'radical ... revisions' does not, in fact, lend itself to the use Dr Davies makes of it. By its own explicit statement, far from radically changing the provisions of the 1662 BCP, the Commission intended rather to find and express the roots of BCP.
113. Overall, Dr Davies would have us understand there was a trajectory of reform and revision in the life of the church addressing the fundamental responsibilities and authority of deacons. Certainly the 1985 Liturgical Commission Report to General Synod did refer to a 'desire to have a form of service for ordination which reflects a more contemporary attitude to ministry' because 'The Liturgical Commission is well aware that the diaconate is under careful consideration and that it is possible that women will be ordained to it and that some men or women may remain in the permanent diaconate'. Here, however, what Dr Davies (Para 18) calls the 'process of diaconal reform' consists of two elements: first whether women may be admitted as deacons and secondly whether some deacons may be permanent deacons and not proceed to the priesthood. Neither of these 'reforms', if that be an appropriate term in relation to the office itself, envisages any alteration to the responsibilities or authority of deacons, such as that for which Dr Davies argues.

114. In short, Dr Davies presents no evidence of a trajectory of reform of the sort that would sustain the practice of diaconal celebration of the Holy Communion for which he contends.

### **C THE REASONS OF THE BISHOP OF ARMIDALE (THE RIGHT REVEREND PETER BRAIN)**

115. My position is that, although I have the reservations expressed in the following paragraphs, I can answer “No” to Questions 1,2,4 and agree with the answer to Question 5.

116. I particularly endorse the final sentence of [22]. Those words send a signal that could keep us from both legalism (which rarely enhances fellowship) and unseemly litigation.

117. Whilst agreeing to the last sentence of [32] the intention of General Synod can only be determined by the actual words used.

118. The argument of [33] viz. Nicea 325AD is a narrow view of ‘the Church’. There are branches of the Church that allow authorised diaconal and lay administration.

119. I would not wish the statement in [34] to be taken as contradicting the rulings of the Tribunal 1(a) and I(b) of 24 December 1997.

120. I am concerned that [38] is special pleading since our own Article 19 and Priesting ordinal makes this connection between preaching and administration of the Holy communion perfectly clear.

121. [85] contains the nub of my problem, viz.:

- (a) it may have been decreed in 325AD that only priests and bishops could celebrate HC but the New Testament contains no such direction.

(b) the fact that the rule was not always strictly applied should alert us to the danger of a legislative solution to what is surely an issue on which legalism can hardly promote fellowship across the Anglican Church of Australia.

122. So far as Question 3 is concerned my answer is a qualified 'Yes' on the basis:

- (i) though I don't think this was the intention of 1985 Canon
- (ii) yet on the basis of the previous Tribunal reasons concerning consecration of women, to be consistent an unintended intention need not overrule a possible reading of the Canon

123. As to Question 6 my answer is "Yes" for the following reasons.

124. (i) In our Constitution the Diocese is considered the central unit of our church and therefore after careful theological consideration and Synodical approval and with the concurrence of the Bishop it should be able to order their life.

(ii) Reason (i) above should be consistent with the primary source of authority in the Anglican Church of Australia, viz. Scripture. Since the New Testament provides no direction for the administration of the Lord's Supper our church would be unwise to do so save the direction that the person celebrating should be (a) a Christian (b) well regarded (c) accepted as a congregational leader (d) involved in the teaching and pastoral ministry of the church.

(iii) The New Testament knows of no ministry in the church of 'priests' (save that of all the Christians, usually called the priesthood of the believers following 1 Peter 2).

The terms bishop, elder and pastor appear to be interchangeable in significant NT passages eg Acts 20:17-31; Titus 1: 5-9; 1 Peter 5:1-2.

What is emphasised is the character, the teaching ability and adherence to apostolic doctrine of the person.

Since presiding at the Lord's Supper is not the subject of any NT Scripture we can safely assume that the above characteristics and commitment to Christ and His people are suitable requirements for those who might preside at HC.

(iv) this is entirely consistent with Tribunal previous ruling 24/12/1997 1(a) and (b) and in my opinion renders the need for a Canon of General Synod unnecessary.

(v) There are practices across the Anglican Church of Australia to do with the Lord's Supper that if not commonplace, have become accepted practice, with Episcopal consent, but without General Synod approval, that would render a 'No' answer out of step with prevailing practice.

These include

- (a) the reservation of the sacrament (not just for extended communion in nursing homes) for use in parishes without priests (against the Article)
- (b) the practice of giving newly ordained priests a chalice as well as a Bible at ordination (against the rubric)
- (c) the praying of certain words prior to consecration that would imply an offering by the priest of bread and wine as works of our own hands to God (against the order of our services).

This latter practice, (c), is so serious that it turns the service of Holy Communion on its head from a sacrament of God's grace to one of our own works.

125. I raise these issues to ask the question: do we want the Anglican Church of Australia to be a Church that operates as a fellowship-grace model or one that functions on a litigious antagonistic model?

126 We do have already across the Anglican Church of Australia two classes of priests brought about essentially to solve the problem of Eucharistic ministry for small communities (or communities that cannot afford a priest or in places where no priests are available). Lay people who have not been fully trained (certainly not in the traditional sense) are ordained for the purpose of presiding at Communion. A 'No' answer to this question, though technically correct, would have the effect of

- (a) devaluing the training of Deacons in Sydney Diocese and
- (b) giving a value to the priest's role in Holy Communion that is warranted neither by our Articles nor Scripture.

127. This is not to devalue the Godliness, commitment, character or ministry of either lay people in general or those who have been ordained as local priests but to imply that there is another way of solving the problem, viz. diaconal or lay presidency properly ordered (which is in line with the Tribunal ruling 24/12/1997 and consistent with our fundamental authority - Scripture.)

128. In summary, my affirmative answer to Question 6 amounts to

- an affirmation that according to our Constitution, Scripture is our primary and binding authority
- an unwillingness to endorse the maintenance of fellowship in the Anglican Church of Australia on the basis of legal appeal in matters that do not infringe any Scriptural teaching
- an appeal to Article XXXIV (34) which sets the authority of Scripture above tradition of the church by endorsing a variety of practices in ACA so long as they are not against or repugnant to God's Word.

## APPENDIX

- A. Letter from the Bishop of South Sydney 21 October 2008 to the clergy of the South Sydney Region
- B. Weekly Bulletin of the Parish of St Thomas North Sydney 26 October 2008
- C. Weekly Bulletin of St Thomas North Sydney indicating that Rector and Parish Council had agreed that clergy who were deacons and who were approved by the Rector would be permitted to celebrate Holy Communion in the Parish
- D. Statutory Declaration of the Rev John Bunyan as to a public declaration made by the then Rector of St Peter Campbelltown (Sydney) in church that lay and diaconal communion was now approved. Further that subsequently, a layman described as an “Honorary Assistant Minister” celebrated Holy Communion in that church in the presence of Rev Mr Bunyan (a priest in good standing) and, when Rev Mr Bunyan queried the matter with the Assistant Curate of the Parish, he was informed that the then Rector had authorised the celebration.
- E. Brochure, “Full-time Paid Ministry in the Diocese of Sydney published by the Anglican Church Diocese of Sydney Department of Ministry Training and Development, 2<sup>nd</sup> edition January 2009, The Applicants submit that this official document, apparently issued under the imprimatur of the Archbishop of Sydney, endorses the Sydney Resolution as authorising both deacons and laity administering the Holy Communion.
- F. Sydney website story of 19 November 2008 publicising the ordination of 16 deacons and quoting one of them as saying, “I’m really grateful for the Synod vote last year made it possible for deacons to [preside at] communion, as that was probably the only thing I would not be able to do...”

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