ANGLICAN CHURCH OF AUSTRALIA

APPELLATE TRIBUNAL 1989

Report and Opinion of the Tribunal on Section 17(5) of the Constitution and Deacons and the Houses of General Synod

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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

Your Grace,

In the absence overseas of the President, I have the honour to report upon two questions set forth in Schedule B and Schedule C to the reference under your hand and seal dated 24th November 1988 requesting the opinion of the Appellate Tribunal on each of those questions, namely -

Question 1 -

> "Upon the alteration of section 17(5) of the Constitution by Canon No. 22 of 1985 and/or Bill No. 2 of 1985 (of which copies are annexed to this schedule) will the qualification of deacons to be members of General Synod extend to women deacons?"

Question 2 -

> "Does the Act of the Synod of the Diocese of Melbourne entitled 'Constitution Alteration (Deacons and the Houses of General Synod) Act 1987', of which a copy is annexed to this schedule, constitute an assent to the Bill No. 2 1985, being the Constitution Alteration (Deacons and Houses of Synod) Bill 1985?"

At a preliminary conference held at Melbourne on 4th February 1989 pursuant to Rule 8 of the Appellate Tribunal Rules 1988 the following were made parties to the reference: The Registrar of the Diocese of Melbourne, The Synod of the Diocese of Sydney and Deacons McGregor, Darling and Marten. The Tribunal sought and

obtained written submissions from those parties upon both questions. At the preliminary conference the following were invited to make written submissions and were advised that the Tribunal would decide upon a consideration of them whether their applications to become parties would be granted: The Movement for the Ordination of Women and the Reverend J.D. Potter. The former made no written submission and the latter made a submission upon question 1. In the event, the parties admitted at the preliminary conference were not increased.

THE OPINION OF THE TRIBUNAL IS AS FOLLOWS -

QUESTION 1:

The President, the Deputy President, the Archbishop of Adelaide, the Bishop of Newcastle and the Honourable Mr. Justice Young answer "Yes". The Archbishop of Sydney and Mr. K.R. Handley Q.C. answer "No".

QUESTION 2:

The President, the Deputy President, the Archbishop of Adelaide, the Archbishop of Sydney and the Bishop of Newcastle answer: "The Act referred to does not fail to assent to Bill No. 2 1985 because the second schedule to the Act incorrectly reproduces that Bill". The Honourable Mr. Justice Young and Mr. K.R. Handley Q.C. answer: "Yes".

COSTS

The Deputy President, the Archbishop of Adelaide, the Bishop of Newcastle and the Honourable Mr. Justice Young are of opinion that there should be no order for the costs of the reference and

the remaining members of the Tribunal have expressed no opinion on the matter.

The reasons of the members of the Tribunal accompany this report.

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

Dated this 6th day of June 1989.

R.C. TADGELL
Deputy President,
Appellate Tribunal

REASONS OF THE PRESIDENT

QUESTION 1

The Primate's reference asks, first, the following - question -

> Upon the alteration of s.17 (5) of the Constitution by Canon No. 22 of 1985 and/or Bill No. 2 of 1985, will the qualification of deacons to be members of General Synod extend to women deacons?

Section 17 of the Constitution deals with clerical and lay members of General Synod. Sub-section (5) prescribes the qualifications of bishops and priests as clerical representatives of a diocese. The purpose of the 1985 Canon and Bill is to extend the qualification for membership to deacons. (The full texts of the Canon and Bill are reproduced below in my reasons relating to Question 2.) The whole section, thus amended, would read -

> "(1) The house of clergy shall be composed of clerical representatives of each diocese.
>
> (2) The house of laity shall be composed of lay representatives of each diocese.
>
> (3) Clerical and lay representatives of a diocese shall be elected or appointed, and any vacancy in the place of a representative shall be filled at such time and in such a manner as may be prescribed by or under the constitution of the diocese.
>
> (4) The number of representatives shall be determined in accordance with the tabled annexed to this Constitution.
>
> (5) Every bishop, priest or deacon shall be qualified to be a clerical representative of a diocese if he is resident therein at the date of his appointment and holds a licence from the diocesan bishop, provided however that the qualification of residence in the diocese shall not be necessary in the case of a missionary diocese or a diocese having less than thirty-one clergymen resident and duly licensed to officiate therein.
>
> (6) Every layman who is not under the age of twenty-one years and is a communicant of this Church shall be qualified to be a lay representative of a diocese, whether he does or does not reside therein.

(7) The bishop of each diocese shall certify and transmit to the Primate a list of names and addresses of the clerical and lay representatives of the diocese.

In the event of any change in the representation of a diocese the bishop shall certify and transmit to the Primate a supplementary list showing the change.

Any list or supplementary list so certified shall be evidence that a representative therein named is entitled to be such representative unless a subsequent list shows that he has ceased to be a representative."

The question is whether "deacon" in sub-section (5), thus amended, would include a woman deacon.

The words "bishop", "priest", and "deacon" are not gender specific. See the Tribunal's 1987 Report to the Primate with respect to the Ordination of Women to the Office of Deacon Canon 1985. However, sub-s.(5) uses male personal pronouns only ("he" and "his"), and we have also been referred to s.74(6) as an aid to the interpretation of s.17. From this it is argued that only a male deacon would be qualified, under an amended sub-s.(5), to be a clerical representative of a diocese.

Sub-section (6) of s.74 reads -

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

In my 1987 reasons I said of this provision -

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

> "In 1985 the Tribunal found it unnecessary to express an opinion on the question whether s.74(6) has anything at all to say about the meaning of words of the Constitution that refer to clerical persons. In terms the sub-section is speaking only of lay persons. However, I think it probably carries an implication, at least when read in isolation, that, in the case of clerical persons, words in the Constitution importing the masculine shall not include the feminine. That may mean - there is no need to express a firm view about it - that the use of the personal pronouns "his" and "him" in the second paragraph of s.4 are to be interpreted strictly, so that the permission to which the section refers could not be granted, on any view of s.3, by a female bishop. See also s.17. It may also be possible to discern in s.74(6) an assumption on the draftsman's part about persons in holy orders. ..." (1987 Report, 24)

The words "bishop" and "priest" and (if the amendment is effective) "deacon" are not, in s.17, "words in this Constitution importing the masculine", any more than the words "bishops, priests and deacons" are in s.3. However, I remain of the opinion that sub-s.(6) is not merely making a statement about the construction of any specifically lay words in the Constitution. If that were all that the draftsman had in mind, he had no need to make any reference to clerical persons. Indeed he had no need to include the sub-section at all, for sub-s.(7) would have served his purpose adequately, the effect of that provision being to bring in s.23 of the Acts Interpretation Act 1901-1948 (C/w) which read -

> "In any Act, unless the contrary intention appears -
> (a) Words importing the masculine gender shall include females ...".

Clearly the draftsman of the Constitution had a reason for preferring the formula he used in s.74(6). There are two possibilities - that he simply thought it inappropriate, in the light of prevailing attitudes and practices, to imply, directly or indirectly, that there might be female clerical persons; or that he actually intended that words in the Constitution importing the masculine should not, in the case of clerical persons, include the feminine. As I said in 1987, the sub-section probably carried the latter implication, "<u>at least when read in isolation</u>." However, I

went on to conclude that the negative words of the sub-section were expressive, in their application to the Constitution generally, merely of an assumption on the part of the draftsman and did not indicate a positive intention to limit the application of common gender clerical words to males. If that is so in the case of the reference to bishops, priests and deacons in s.3, one would expect it to be so in the case of the same words when used in other sections of the Constitution, including s.17.

The above underlined qualification, then, is important. Nevertheless, I also expressed the view, in my 1987 reasons, that the use of the male pronouns in s.17(5) might mean that only male clerical persons were referred to in that sub-section. After further consideration I am of the opinion that the contrary interpretation is to be preferred.

The English language is deficient in singular, common gender pronouns. We can use "them" to denote both male and female, but there is no pronoun that comprehends both "him" and "her". It is not uncommon for a male pronoun to be used when either male or female is being referred to. One example that was suggested to us is, "He that is not with me is against me" (Luke 11:23,AV). No-one would argue that this refers only to men. Cf. Oxford English Dictionary sub nom. "he"- II, 4.

It is a matter, so far as sub-section (5) of s.17 is concerned, of discerning the intention of those responsible for its wording. If the clerical nouns in s.17 were gender specific - that is, if they were "words ... importing the masculine" - or if there were other evidence of an intention to confine their application to male persons, the use of the male pronouns would doubtless be seen as confirmatory of the restricted meaning. Thus, when considering in earlier references to this Tribunal whether there is a "principle" within the meaning of s.4 of the Constitution that deacons shall be male, I relied on the use of male personal pronouns in the Ordinal in support of my conclusion. However, in that case there were other, and substantial, indicators as well. Here there are only the pronouns. It seems to me that there

is no more reason in s.17 than in s.3 to infer an intention to restrict the meaning of the common gender nouns. The pronouns themselves may be explained by the literary convention to which I have referred. Had the draftsman intended to impose a sex qualification in s.17, the obvious way of doing it would have been by way of explicit statement, and not by way of mere pronominal allusion in a sub-section that is really concerned with the subsidiary topic of locality requirements. Given that deacons may be either men or women, no good reason appears for confining such clerical representation in General Synod to male deacons. It is possible that the use of the male pronouns in sub-section (5) is evidence of an assumption on the part of the draftsman but, as I have already held with respect to s.74(6), there is an important difference between an assumption and a positive intention. If the pronouns alone can create a restrictive meaning for s.17(5), presumably they may do the same for s.57(2) and s.60(3), and so support an argument that only male clergy are amenable to the disciplinary provisions of Chapter IX. That can hardly be right. For these reasons I do not, on mature consideration, favour the restrictive interpretation of s.17 to which I alluded in my 1987 reasons.

I would answer the question - Yes.

Before I leave this matter I should say something on a subject that has caused me some concern.

Paragraph 4.5 of the Responses submitted in relation to this question on behalf of the Synod of the Diocese of Sydney, dated 15 March 1989, criticizes what it calls "an insidious suggestion" in a section of the written submissions presented to the Tribunal by a number of Melbourne women deacons. The deacons' case in that respect merely adopted a familiar and unexceptionable line of legal reasoning in the area of statutory interpretation and I can see nothing insidious about it. The Sydney submission then goes on to refer to what it claims to be assertions made "outside the material submitted to the Tribunal" about the supposed churchmanship or theological or sociological disposition of most of the individual members of the Tribunal and the

bearing that might have, or be thought to have, on the Tribunal's decisions on the subject of the ordination of women. This was made the opportunity for what could only be interpreted as an exhortation to impartiality which the writer evidently thought the circumstances particularly required. The gratuitous introduction of such a topic into the submission, and in such terms, was unwarranted and ill-judged, and it should not have been made.

Recently, in another reference, it was submitted by an applicant that all of the members of the Tribunal should disqualify themselves from hearing the reference - the Bishops because they had voted in other places and spoken publicly on the subject of the reference, and the lawyers because they were members of diocesan synods that had made decisions about it. In view of the attitude disclosed on that occasion, reflected at least in part by paragraph 4.5 of the Sydney submission in the present reference, it would appear necessary to make some general observations about the constitution of the Appellate Tribunal.

The Tribunal, in accordance with s.57, comprises three diocesan Bishops and four laymen. The laymen are to be churchmen who are experienced lawyers. In the nature of things the matters that come before the Tribunal will include issues of great importance to the Church upon which many Anglicans will hold strong and divergent views. Often an issue will have been discussed extensively within the Church before it reaches the Tribunal. The ordination of women is a striking example of such a matter. It is almost inevitable that all diocesan Bishops and many interested lay members of the Church will already have considered such controversial subjects for themselves and formed at least a tentative view about them. In many instances the matters will have been debated in the diocesan synods where the episcopal members of the Tribunal could hardly avoid voting upon them - when the voting is by orders, for the Bishop to refrain from voting is usually in effect to veto the proposal - and it would also be unrealistic to expect them in all cases and on all occasions to refrain from public utterance on such matters. After all,

one of the chief functions of a Bishop is to advise and lead his people. It would be quite impracticable, as well as undesirable, to oblige the episcopal members of the Tribunal to avoid at all costs any expression of views on an important proposal simply because it might be thought to be a possible subject one day for reference to the Tribunal. Nor will it always be easy to predict when recourse to the Tribunal with respect to a particular topic will have ceased; witness the series of ordination references that have occupied the Tribunal on and off for some years. All of these difficulties must have been foreseen and accepted by those who devised or approved this constitutional procedure thirty years ago. The same general considerations apply, although obviously with a good deal less force, in the case of the Tribunal's lay members. It is to be expected that some, at least, of the lay members will be Chancellors of their respective dioceses and ex officio members of their diocesan synods, and I have no doubt that this has been so in fact since the Tribunal's inception. It is therefore inappropriate for anyone to object to a controversial question being decided by a Tribunal whose members - and especially the Bishops - have to varying degrees taken some prior, or even continuing, part in the controversy. Given the kind of Tribunal for which the Constitution provides, that is practically unavoidable. The rules about bias that apply to secular courts, particularly those relating to prior involvement, are thus not applicable, at least without substantial qualification, to this Tribunal. What the disputants before the Tribunal in any particular case, and the Church at large, are entitled to expect is that Tribunal members, notwithstanding any views they may have previously formed and declared about a question before the Tribunal, will nevertheless address themselves to it with open minds, ready to change their views, if need be, in the light of the evidence and arguments that are put to them. If the Church considers that to be an insufficient safeguard against conscious or unconscious bias by Tribunal members, its remedy is to find some other means by which the constitutional

validity of its synodical legislation may be determined. Meanwhile, as long as the present system prevails, it should not be too much to expect that the Tribunal will be spared any further protests, or veiled or unveiled expressions of apprehension or regret, about the real or supposed predilections and prejudices of its members, when they are based on no more than the considerations to which I have referred.

QUESTION 2

The other part of the Primate's reference relates to the Act of the Synod of the Diocese of Melbourne by which the Diocese assented, or purported to assent, to the General Synod legislation that made the amendment to sub-section (5) of s.17 of the Constitution that is the subject of Question 1. Because of a disagreement about the manner in which amendments to the Constitution should be made, whether by a canon under Chapter V of the Constitution or by a bill sui generis under Chapter XI, General Synod passed the amending legislation in duplex form, thus -

No. 22, 1985

A CANON TO ALTER THE CONSTITUTION IN RELATION TO DEACONS AND THE HOUSES OF SYNOD

The General Synod prescribes as follows:

1. The Constitution is altered to the extent provided in the Schedule to this Canon.

2. Section 30 is altered by the insertion after paragraph (d) of the following additional paragraph:

   (e) This section shall not apply and shall be deemed never to have applied to a canon to alter this Constitution.

3. The amendments to the Constitution made by this Canon shall come into force on a date to be appointed and declared by the Primate who shall follow, mutatis mutandis, the notification procedure prescribed by Rule XX.

4. This Canon may be cited as "Constitution Alteration (Deacons and the Houses of Synod) Canon 1985".

SCHEDULE

1. Section 17.(5) is altered by omitting "or priest" and substituting "priest or deacon".

Bill No. 2, 1985

A BILL TO ALTER THE CONSTITUTION IN RELATION TO DEACONS AND THE HOUSES OF SYNOD

The General Synod prescribes as follows:

1. The Constitution is altered to the extent provided in the Schedule to this bill.

2. This Bill may be cited as "Constitution Alteration (Deacons and the Houses of Synod) Bill 1985".

SCHEDULE

1. Section 17.(5) is altered by omitting "or priest" and substituting "priest or deacon".

The Melbourne Synod in October 1987, obviously with the intention of assenting to the legislation, enacted the following Constitution Alteration (Deacons and the Houses of General Synod) Act 1987 -

AN ACT

To assent to the Constitution Alteration (Deacons and the Houses of Synod) Canon 1985 and to the Constitution Alteration (Deacons and the Houses of Synod) Bill 1985 of the General Synod.

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

1. This Act may be cited as the Constitution Alteration (Deacons and the Houses of General Synod) Act 1987.

2. The Synod of the Diocese hereby assents to
   (1) The Constitution Alteration (Deacons and the Houses of Synod) Canon 1985, and
   (2) The Constitution Alteration (Deacons and the Houses of Synod) Bill 1985,
   both passed by General Synod, copies of which are contained in the Schedules hereto.

SCHEDULE
No. 22 1985

A CANON TO ALTER THE CONSTITUTION IN RELATION TO DEACONS AND THE HOUSES OF SYNOD

The General Synod prescribes as follows:

1. The Constitution is altered to the extent provided in the Schedule to this Canon.
2. Section 30 is altered by the insertion after paragraph (d) of the following additional paragraph:
   (e) This section shall not apply and shall be deemed never to have applied to a canon to alter this Constitution.
3. The amendments to the Constitution that are made by this Canon shall come into force on a date to be appointed and declared by the Primate who shall follow, mutatis mutandis, the notification procedure prescribed by Rule XX.
4. This Canon may be cited as "Constitution Alteration (Deacons and the Houses of Synod) Canon 1985".

SCHEDULE

1. Section 17(5) is altered by omitting "or priest" and substituting "priest or deacon".

SCHEDULE
BILL No. 2 1985

TO ALTER THE CONSTITUTION IN RELATION TO DEACONS AND THE HOUSES OF SYNOD

The General Synod prescribes as follows:

1. The Constitution is altered to the extent provided in the Schedule to this bill.
2. Section 30 is altered by the insertion after paragraph (d) of the following additional paragraph:
   (e) This section shall not apply and shall be deemed never to have applied to a bill to alter this Constitution.
3. The amendments to the Constitution that are made by this bill shall come into force on a date to be appointed and declared by the Primate who shall follow, mutatis mutandis,

the notification procedure prescribed by Rule XX.

4. This bill may be cited as "Constitution Alteration (Deacons and the Houses of Synod) Bill 1985".

SCHEDULE

1. Section 17(5) is altered by omitting "or priest" and substituting "priest or deacon".

There is no problem about the description of the General Synod Canon but the second Melbourne Schedule, which purports to reproduce the General Synod Bill, contains a number of errors. It omits the words "A Bill" in the heading, what are said to be sections 2 and 3 of the Bill were not part of the Bill as passed at all, and the section numbered "4" should have been numbered "2". A question thus arises as to the efficacy of the Melbourne Act. The Primate's question is as follows -

> Does the Act of the Synod of the Diocese of Melbourne entitled "Constitution Alteration (Deacons and the Houses of General Synod) Act 1987", of which a copy is annexed to this schedule, constitute an assent to the Bill No.2 1985, being the Constitution Alteration (Deacons and the Houses of Synod) Bill 1985?

There may be more than one ground upon which the efficacy of the Melbourne Act may be supported. The one that I favour regards the additional sections as mere surplusage.

Obviously the omission of the words "A Bill" in the recital of the Bill's long title is of no moment at all. If (as the Tribunal decided in 1981) the proper method of amending the Constitution is laid down exclusively in Chapter XI and has nothing to do with the rules relating to canons that are set out in Chapter V, it must follow that s.30 does not apply and has never applied to a bill to alter the Constitution. On this view of the matter - and obviously this was the hypothesis upon which the Bill was drafted and passed - the intrusive s.2 in the Melbourne legislation, even if taken at face value, is simply declaring what would be the case in any event. If, on the other hand, the Constitution

may only be amended by a canon that is passed in conformity with Chapter V, it follows that the whole bill procedure on this occasion was sterile unless, despite the measure being described as a "Bill", it really amounted to a canon within the meaning of Chapter V. In that case the purported addition to s.30 of the Constitution in the "Bill" section of the Melbourne Act - again, taking it at face value - could do no more than had already been done in the "Canon" section of the same Act. In short, on either view of the Constitution amendment controversy the false s.2 does not add, and on proper analysis could not be supposed to add, anything of substance to the assenting legislation. As for s.3, it purports merely to apply the notification procedure prescribed by Rule XX that would have applied to the Bill in any case by virtue of the Rule itself. The wrong numbering of s.2 of the General Synod Bill is insignificant.

For these reasons I am of the opinion that there is no disconformity in substance, though obviously there is in form, between the text of the Bill as passed by General Synod and the text of the Bill that is purportedly reproduced in the Schedule to the Melbourne Act. I have no doubt that substantial conformity is enough to support the Melbourne legislation in this respect. Whether some lesser test would suffice - whether, for instance, the assent in terms to the Canon and Bill that was made in s.2 of the Melbourne Act is all that matters, so that any misdescription of the Canon or Bill itself in the Schedules is necessarily beside the point - is a question that I do not need to decide.

While no-one has suggested that there is any other irregularity or informality relating to the Melbourne Act, either as to its contents or the manner of its enactment, the fact is that we have nothing before us about the Diocese of Melbourne's legislative procedures and I am content to concur in the Primate's second question being answered in the manner proposed by the Deputy President, namely -

> The Act referred to does not fail to assent to Bill No. 2 1985 because the Second Schedule to the Act incorrectly reproduces that Bill.

APPELLATE TRIBUNAL

IN THE MATTER OF A REFERENCE TO THE APPELLATE TRIBUNAL UNDER S.63 OF THE CONSTITUTION

REASONS OF THE DEPUTY-PRESIDENT

On 24th November 1988 the following questions raised by the Archbishop of Melbourne were referred by the Primate to the Appellate Tribunal pursuant to s.63 of the Constitution -

QUESTION 1 (annexed as schedule B to the reference) -

> "Upon the alteration of s.17(5) of the Constitution by Canon No. 22 of 1985 and/or Bill No. 2 of 1985 (of which copies are annexed to this schedule) will the qualification of deacons to be members of General Synod extend to women deacons?"

QUESTION 2 (annexed as schedule C to the reference) -

> "Does the Act of the Synod of the Diocese of Melbourne entitled 'Constitution Alteration (Deacons and the Houses of General Synod) Act 1987', of which a copy is annexed to this schedule, constitute an assent to the Bill No. 2 1985, being the Constitution Alteration (Deacons and the Houses of Synod) Bill 1985?

At a preliminary conference, held on 4th February 1989 pursuant to rule 8 of the Appellate Tribunal Rules, the Registrar of the Diocese of Melbourne, the Synod of the Diocese of Sydney and Deacons McGregor, Darling and Marten were made parties to the reference. These parties have made written submissions to the Tribunal. The Reverend J.D. Potter and the Movement for the Ordination of Women applied to become parties to the reference but their applications were not determined at the preliminary

conference. Instead, they were invited to make written submissions and were advised that the Tribunal would decide upon a consideration of the submissions whether or not their applications to become parties would be granted. In the event, Father Potter did tender a short submission upon question 1 but not upon question 2. The argument he raised is entirely covered by the full submission made on behalf of the Synod of the Diocese of Sydney. I think he has raised no point that would warrant his formal addition as an individual party to the reference. In the circumstances I believe that he should be content to have had his submission received and considered without his becoming a party. I take the Movement for the Ordination of Women, which made no written submission, not to have pursued its application. I accordingly consider that the parties admitted at the preliminary conference should not be increased.

QUESTION 1

The question is altogether one of interpretation of the Constitution. That is to say, it involves no matter of policy.

Section 17(5) provides that -

> "Every bishop or priest shall be qualified to be a clerical representative of a diocese if he is resident therein at the date of his appointment and holds a licence from the diocesan bishop, provided however that the qualification of residence in the diocese shall not be necessary in the case of a missionary diocese or a diocese having less than thirty-one clergymen resident and duly licensed to officiate therein."

As amended, the sub-section will contain the words "bishop, priest or deacon" instead of the words "bishop or priest".

It is necessary, as was stressed in the various submissions we received, to interpret s.17(5) of the Constitution in the context not only of s.17 but of the Constitution as a whole. So much is obvious enough, but it is as well to state emphatically that the necessity must be borne steadily in mind if the proper scope of s.17(5) is to be discerned.

Section 17 is found in Chapter IV of the Constitution - headed "Of General Synod" - which contains sections 15 to 25. Section 15 identifies the three houses of bishops, clergy and laity of which General Synod consists. The composition of the house of bishops is prescribed by s.16 and that of the other two houses by s.17. Sub-section (1) of s.17 declares that the house of clergy is composed of clerical representatives of each diocese; sub-s.(3) prescribes how they shall be nominated and sub-s.(5) prescribes their qualifications. One submission we received contends that all s.17(5) does, in its unamended form, is to prescribe a "residential" requirement for those clergy who happen to be bishops or priests; and that the amendment will extend this to deacons. I consider this to be too narrow a view. Reading sub-s.(5), as unamended, as a part of the whole of s.17, I take it to describe those who are qualified to be "clerical representatives" of a diocese. These are bishops (other than diocesan bishops, who are already members of general synod by virtue of s.16) and priests who are resident in the diocese in question and licensed by the relevant diocesan bishop. The proviso relating to clerical representatives of missionary and small dioceses is not

presently relevant. Sub-section (5) of s.17 therefore indicates that clerical representatives who comprise the house of clergy must be clergy (and not just representatives of clergy) and, moreover, clergy being bishops or priests resident in the diocese that they represent and licensed by the bishop of that diocese. The amendment extends the qualification to include deacons so resident and licensed. It is to be noted that the "representatives" referred to in s.17 are not representatives of clergy or of laity but representatives of a particular diocese who hold the prescribed qualifications.

All who are referred to in s.17(5), both now and as it will read when amended, are plainly "clerical persons" within the meaning of s.74(6), which provides that:-

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

That provision is relied on by those who contend that the pending amendment to s.17(5) will not serve to include female deacons. According to the argument the words "bishop, priest or deacon", as they will appear in s.17(5), import the masculine; and s.74(6) specifically excludes females because it means that, in the case of clerical persons, words in the Constitution importing the masculine do not include the feminine. An opposing view is that s.74(6) applies in the case of lay persons "but not clerical persons" and is therefore inapplicable to deal with a provision such as s.17(5), which is not concerned with lay persons. The proponents of this view would, if

necessary, rely also on s.23 of the Commonwealth Acts Interpretation Act which, by s.74(7) of the Constitution, is made applicable unless the context or subject matter otherwise indicate, and would, so far as it applies, require a reference to the masculine gender to include a reference to the feminine. The advocates of the first view argue that s.74(6) does provide a contrary indication because it designedly narrows the field that s.23 would otherwise cover.

The Tribunal has previously referred to s.74(6) but has not found it necessary to express any conclusion about its meaning. In the 1986 reference concerning the Ordination of Women to the Office of Deacon Canon 1985 those members of the Tribunal who considered the matter regarded s.74(6) as irrelevant to the interpretation of s.3 of the Constitution. My own view then expressed was that the reference in s.3 to "the three orders of bishops, priests and deacons" is a reference to the orders and not to the persons who constitute them. Section 17(5), on the other hand, in referring to "bishop or priest" (and, when amended, to "bishop, priest or deacon") plainly does refer to clerical persons. The question of the application of s.74(6) to the matter of the interpretation of s.17(5) is therefore directly raised.

Section 74(6) is part of a section which is evidently intended to provide definitions and other aids to the interpretation of the Constitution. Ironically, it presents appreciable difficulties of its own interpretation. One difficulty about s.74(6) is that it seeks in a sense to assimilate persons (who are necessarily

either of the male or female sex) and words, which may or may not import a gender. Certain words in the Constitution - those importing the masculine gender - are to be read to include the feminine gender "in the case of" lay but not clerical persons. Presumably this means at least that words importing the masculine gender, and describing or referring to lay persons but not clerical persons, are to include the feminine gender, and are therefore to be taken to describe or refer to persons of the female sex.

Another difficulty arises from the words "lay but not clerical persons" themselves. They might mean that the provision is concerned only with words importing the masculine gender that describe or refer to lay persons, and that the provision is not concerned with words that describe or refer to clerical persons. Another way of reading the words "lay but not clerical persons" is to say that words importing the masculine gender that describe or refer to lay persons include the feminine but those that describe or refer to clerical persons do not include the feminine. The former interpretation gives no real effect to the words "but not clerical": the sub-section might as well not contain them. For that reason I think that interpretation is not to be preferred. Moreover, I agree with the submission, in association with the second interpretation, that s.74(6) is inconsistent with the application of s.23 of the Commonwealth Acts Interpretation Act to import the feminine to words in the Constitution describing or referring to clerical persons.

I should accordingly be prepared to treat s.74(6) as meaning that, in the case of clerical persons, words in the Constitution importing the masculine do not include the feminine. I should be prepared further to conclude that, because of s.74(6), s.23 of the Commonwealth Acts Interpretation Act does not apply in the case of clerical persons to produce the result that a reference to the masculine gender includes a reference to the feminine gender. Given all that, I do not consider that s.74(6) produces the result that in s.17(5) the words "bishop or priest" (or, as amended, "bishop, priest or deacon") exclude females. I reach this conclusion because I do not regard these words in s.17(5) as "importing the masculine".

I maintain the view I expressed in the 1986 reference that a word imports the masculine if it carries with it, or brings in, the masculine gender. This it may do if it is directed as a matter of language to refer to, involve, signify, denote or imply a masculine noun. The only indication that the words in question, in themselves neutral as to gender, "import" the masculine is that the sub-section contains the pronouns "he" and "his" and, perhaps, the noun "clergymen".

Dealing first with the pronouns "he" and "his", it is axiomatic that they cannot be treated in isolation from the principals to which they refer, namely bishop, priest and deacon. The question, then, is whether the pronouns import the masculine into those principals.

It is perfectly true that "he" and "his" are both masculine pronouns but they do not on that account alone import the masculine to their principals. After all, it is

not ordinarily the function of a pronoun to denote the gender of its principal. The use of pronouns, as William Cobbett observed over 180 years ago, "is to prevent the repetition of nouns, and to make speaking and writing more rapid and less encumbered with words". Their use is essentially the same now as it was then. In an appropriate context a masculine pronoun will naturally be used in association with a principal of an obviously male gender - for example "boy". In such a case the principal will itself signify the masculine gender and the pronoun will not so much import the gender as conform naturally and conveniently with the principal exhibiting it. A masculine pronoun will by implication import the masculine gender to a principal noun that in the context needs a masculine gender imported to it. If the principal does not need it, the occasion will seldom arise to imply a gender from a pronoun. A masculine pronoun is not uncommonly used as a substitute word, or proxy, for an associated noun, or series of singular nouns, in order to avoid tedious or ungainly repetition: c.f. Automobile Fire and General Insurance Company of Australia Ltd. v. Davey (1936) 54 C.L.R. 534, at p.540, per Starke, J. In such a case the pronoun will not necessarily signify gender, or only one gender. It might or might not make an assumption about the gender of the principal, or even the sex of the person to whom the principal refers, but the context will dictate whether its use is designed to import the masculine gender or is merely conventional, convenient or adventitious.

The present task is to determine whether the draftsman of s.17(5) used the masculine pronouns as a means

of indicating that the related principals (not obviously words of the masculine gender) should be interpreted as only masculine. I consider that no such indication is to be discerned.

An indication of the sense of the use by the draftsman of pronouns in s.17(5) is revealed by a consideration of their deployment in other parts of s.17 and in s.18. Section 17(7) reads:-

> "The bishop of each diocese shall certify and transmit to the Primate a list of names and addresses of the clerical and lay representatives of the diocese.
>
> In the event of any change in the representation of a diocese the bishop shall certify and transmit to the Primate a supplementary list showing the change.
>
> Any list or supplementary list so certified shall be evidence that a representative therein named is entitled to be such representative unless a subsequent list shows that he has ceased to be a representative."

The "representatives" referred to in sub-s.(7) are clerical and lay. Lay representatives may be male or female, as appears from sub-s.(6), which provides:-

> "Every layman who is not under the age of twenty-one years and is a communicant of this Church shall be qualified to be a lay representative of a diocese, whether he does or does not reside therein."

I should doubt that "layman", as used in sub-s.(6), imports the masculine any more than the words "chairman", as used in s.22, or "churchman" do so; or any more than the word "draftsman" does so in the sense in which I have used it in the last two paragraphs. Even if, however, one were disposed to interpret "layman" as meaning a lay member of the church who is male, s.74(6) would negate the interpretation. It cannot sensibly be said that "he" in

sub-s.(7) imports the masculine to the noun "representative" to which it refers merely because, grammatically, it is a male pronoun. "Representative" is not only prima facie a word unconfined to a single gender but is, in the context, a word that extends to both males and females. Section 74(6) has nothing to do with it. Much the same reasoning applies to s.18, which provides that:-

> "General synod in such manner as it may deem proper may determine whether any person who claims to be a member of the synod or of any house is entitled to be a member thereof and whether he has been duly and lawfully elected appointed or summoned to the synod."

The "person" to which "he" refers might be clerical or lay, and therefore male or female.

It might be argued against the view I have expressed that, with the aid of s.74(6), a sensible interpretation of s.17(6) and s.18 could be made by reading "he" to refer to females, as well as males, in the case of lay persons but reading it as confined to males in the case of clerical persons. Such an argument would in my view be wrong because it would use s.74(6) for a purpose for which it is not intended. It would have the tail wag the dog. Section 74(6) does not say that, wherever you find a word in the Constitution capable of describing or referring to a clerical person, it is confined to males; and equally the provision does not say that a word capable of describing or referring to a lay person extends to females as well as males. The provision applies only to the interpretation of words that do actually import only the masculine gender. Where a word (such as "representative" in s.17(7) and "person" in s.18) by reason of its form or context already

imports masculine and feminine it is both unnecessary and impermissible to resort to s.74(6).

My conclusion is that all the pronominal words in s.17(5), (6), (7) and s.18 are used in the same way - simply in place of the principals to which they refer. That is to say, in s.17(5) (as unamended) "he" means "that bishop or priest"; and "his" means "that bishop's or priest's"; and in s.17(6) "he" means "that layman"; and in s.17(7) "he" means "that representative"; and in s.18 "he" means "that person". No designation of gender is intended, and s.74(6) does not operate to create a designation of gender.

The word "clergymen" in s.17(5) presents no difficulty. I would take it to have the same meaning (but plural) as the word "clergyman" in the table referred to in s.17(4). It is defined in the table without reference to gender. In any event the words "bishop, priest or deacon" in s.17(5) can gain no colour by way of gender from the word "clergymen" in that sub-section, even if the last is interpreted as importing the masculine. The clergymen referred to are relevant only to the calculation of the number of clerical representatives of a diocese and not to the qualification of those clergy who may represent it.

For the reasons expressed I am of opinion that the word "deacon" to be inserted into s.17(5) will have no limitation of gender. It follows that the question should be answered "yes".

I have had the benefit of reading in draft the President's response to the animadversions that have been

made upon this Tribunal's impartiality. I associate myself with his remarks.

QUESTION 2

This question arises because the Melbourne Diocesan Synod in the Act referred to made an error. It is a plain and obvious error that in my opinion had no effect on the operation of the Act.

The long title of the Act is "An Act to assent to the Constitution Alteration (Deacons and the Houses of Synod) Canon 1985 and to the Constitution Alteration (Deacons and the Houses of Synod) Bill 1985 of the General Synod". The body of the Act consists of two sections only. The first designates the short title of the Act and the second is this:-

> "2. The Synod of the Diocese hereby assents to
>
> (1) The Constitution Alteration (Deacons and the Houses of Synod) Canon 1985, and
>
> (2) The Constitution Alteration (Deacons and the Houses of Synod) Bill 1985,
>
> both passed by General Synod, copies of which are contained in the Schedules hereto."

The schedules to the Act are two in number. The first purports to state the canon referred to in sub-s.(1) of s.2 of the Act and accurately does so. The second schedule purports to state the Bill referred to in sub-s.(2) of s.2 of the Act but does not accurately do so. The inaccuracy consists in the omission of parts of the Bill and in the inadvertent incorporation of matter which was not part of the Bill but was part of the canon. It is easy enough to see how the slip occurred but unprofitable to consider why it was not noticed before the Act was passed.

It is equally unprofitable to dwell on the exposition of a legal principle or Latin maxim which might justify a disregard of the slip. No more than the application of common sense is required to discern that the intention of the Act is that which is evident from its long title and that its effect is as stated in s.2. The schedules add nothing to the effect of the Act, whether they accurately or inaccurately copy out the legislation of General Synod to which the Diocesan Synod intended to assent. In future, consideration might well be given to the omission of superfluous schedules of this kind. If the rest of the Act is right such schedules are unnecessary: if the rest is wrong they are unlikely to be useful.

I would answer question 2 as follows:-

The Act referred to does not fail to assent to Bill No. 2 1985 because the second schedule to the Act incorrectly reproduces that Bill.

I should say, in case it is thought relevant, that I am ex officio a member of the Synod of the Diocese of Melbourne but I played no part in any capacity in the passing of the Act.

COSTS

None of the parties to this reference has sought an order that any party pay the costs of any other party. The Synod of the Diocese of Sydney, however, has submitted that the Registrar of the Diocese of Melbourne should pay the whole or part of the costs of the Tribunal and its Registrar of the reference.

Both questions were referred by the Primate. The first question is one that fairly clearly concerns the

whole Church in Australia. In the circumstances I consider it not inappropriate that the costs of the Tribunal and its Registrar referable to that question should be borne by the Church as a whole. The second question also concerns the whole Church in Australia, although perhaps less obviously than the first. In any event the costs of the Tribunal and its Registrar already occasioned by the first question were not significantly increased by the addition of the second. I would accordingly propose that no order for costs of the reference be made.

R.C. TADGELL

KLJ:SC

REASONS OF THE ARCHBISHOP OF ADELAIDE

QUESTION 1

Upon the alteration of s.17(5) of the Constitution by Canon No. 22 of 1985 and/or Bill No. 2 of 1985, will the qualification of deacons to be members of General Synod extend to women deacons ?

In general I concur with the reasons of the President and the Deputy President.

This is essentially a question of linguistic construction, not of theological judgment. The task of answering it is rendered more difficult because the Constitution is a document which in some measure lacks internal consistency, and because questions being asked of it were not always in the minds of those who drafted it.

Clearly the interpretation of s.74(6) is critical. It states: "In the case of lay but not clerical persons words in this Constitution importing the masculine shall include the feminine". I consider that this sub-section is best interpreted as carrying the implication that in the case of clerical persons words in the Constitution importing the masculine shall not include the feminine.

The question then is whether there are words in s.17(5) referring to clerical persons which import the masculine. It is argued that the nouns "bishop", "priest" and "deacon" in s.17(5) refer to clerical persons and import the masculine. They undoubtedly refer to clerical persons, but I do not consider that in themselves they are words importing the masculine. I concur with the argument of the President in this respect. It is true that when the Constitution was drafted all bishops, priests and deacons were male. There was also a time when all judges and prime ministers were male, but that does not imply that those words in themselves imported the masculine. The nouns "bishop", "priest" and "deacon" are not in themselves gender specific. They refer to any person who, in accordance with the Constitution, is lawfully ordained to those orders in this Church.

There are, however, other words in s.17(5) which refer to clerical persons and which taken by themselves undoubtedly import the masculine, namely the pronouns "he" and "his". The relevant part reads:

> Every bishop, priest or deacon shall be qualified to be a clerical representative of a diocese if he is resident therein at the date of his appointment and holds a licence from the diocesan bishop....

Like Mr. Justice Young, I initially inclined to the view that though the nouns "bishop", "priest" and "deacon" did not import the masculine, the pronouns "he" and "his" did and so by implication imported the masculine into the nouns with which they were associated.

Upon further reflection, two considerations led me to the conclusion that this was not the correct understanding. The first was the argument so clearly expounded in the reasons of the Deputy President respecting the relationship of pronouns to their associated nouns, namely that the noun and not its dependent pronoun must be the determinant of gender. The second consideration was to ask what would be the effect on the interpretation of other parts of the Constitution if the masculine pronoun were to be allowed to determine the gender of nouns which were otherwise not gender specific. It would lead to the critical anomaly in s.57(2) and s.60(3) of ordained women not being subject to the same disciplinary provisions as ordained men. Such an interpretation would be intolerable in its consequences. For these reasons I was persuaded that the pronouns must be subordinate to their associated nouns and should not be given the weight of importing the masculine into the nouns. Accordingly a deacon, whether male or female, who otherwise fulfils the requirements of s.17(5) is eligible to be a clerical representative of a diocese in the General Synod.

It follows that my answer to the question is Yes.

QUESTION 2

Does the Act of the Synod of the Diocese of Melbourne entitled 'Constitution Alteration (Deacons and the Houses of General Synod) Act 1987', of which a copy is annexed to this schedule, constitute an assent to the Bill No. 2 1985, being the Constitution Alteration (Deacons and the Houses of Synod) Bill 1985 ?

I concur with the answers and the reasons given by the President and the Deputy President.

COSTS

I concur with the answer of the Deputy President.

+ Keith Rayner
Archbishop of Adelaide

10 May, 1989

OPINION OF THE ARCHBISHOP OF SYDNEY IN RESPONSE TO QUESTIONS 1 AND 2 OF THE PRIMATE'S SECOND REFERENCE DATED 24 NOVEMBER, 1988.

QUESTION 1

The Primate's reference asks the following question:

> Upon the alteration of s.17(5) of the Constitution by Canon No 22 of 1985 and/or Bill No 2 of 1985, will the qualification of deacons to be members of General Synod extend to women deacons?

In my opinion the answer is No, for the reason that s.74(6) has the effect of excluding deacons who are women from being qualified to be clerical representatives in the house of clergy of the General Synod.

s.74(6) reads as follows:

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

In the English language, a number of words "import the masculine" which in certain contexts are understood to "include the feminine". The words "man" and "men" are themselves prime examples of this usage, as in the verse "Except a man be born again, he cannot see the kingdom of God" (John 3:3), or as when we say in the Nicene Creed (following the same usage in the Greek) "who for us men and for our salvation came down from heaven". The pronoun "he" is similarly a word importing the masculine which is taken to include the feminine in certain contexts. as in John 6:35, "He that cometh to me shall never hunger". This inclusive usage is a linguistic characteristic of both the languages (Hebrew and Greek) in which the scriptures were originally written, and is a linguistic characteristic of the English Bible and of the Book of Common Prayer, and of the English language generally. The fact that there has been a reaction in recent years against this inclusive character of English, and an attempt to change the usage in certain respects, should not be allowed to obscure the character of the English language as it has been for many centuries, and as it is used in the Constitution itself.

In the light of this usage of words importing the masculine to include the feminine, the purpose of s.74(6) is clear enough. The inclusive use of certain masculine terms is to apply throughout the Constitution in the

case of lay persons, but is not to apply in the case of clerical persons. In the former case, the words involved seem to be mainly 'layman', 'laymen' and the attendant 'he' and 'his'. In the case of clerical persons the words involved are 'clergyman', 'clergymen', 'bishop(s)', priest(s)', 'deacon(s)' and the attendant 'he' and 'his'. All these words in themselves import the masculine. In some cases, at least, they may, either by usage or context, include the feminine.

It has been argued that 'bishop', 'priest', and 'deacon' do not import the masculine. I do not accept this as applying to the interpretation of the Constitution. It may indeed be the case that at the present time, as a result of a movement which has gathered momentum in the past decade, we are witnessing a linguistic change in the way the words 'bishop', 'priest' and 'deacon' are used, but I do not think it can be doubted that, in ecclesiastical usage up to and including the time the Constitution was adopted, all three words were regarded as words importing the masculine. The recent Macquarie Dictionary defines both 'bishop' and 'priest' in ecclesiastical usage as 'a clergyman...', a term which certainly imports the masculine, and the spokesman for the Church of England who in 1986 in the House of Commons proposed the Act to enable the ordination of women as deacons stated that, up to that time, a deacon "must by definition be a man". It would be indeed strange, if not absurd, if the Constitution had intended to impose the restriction of interpretation on a clerical person when referred to as a 'clergyman', but not when referred to as a 'bishop', 'priest' or 'deacon'.

As to the change that is now occurring in usage in some quarters (though, as I say, it does not affect the interpretation of the Constitution), it may be the case that the words 'bishop', 'priest' and 'deacon' are coming to be used in an inclusive way rather than that they are ceasing to be words importing the masculine. Even 'deacon' still imports the masculine as a norm when it is necessary to say 'woman deacon' to secure clarity, as in the question addressed to the Tribunal by the Primate. One does not need to speak of a 'man deacon'. But there was no ambiguity at all when the Constitution was framed.

Although I consider that s.74(6) must be taken to exclude the application of s.17(5) to women deacons, it is recognized that an anomalous situation exists by reason of this interpretation of the Constitution. Women may be ordained as deacons, but may not, as deacons, represent their diocese in the house of clergy. The remedy lies in amending s.74(6) to bring it into line with the admission of women to the diaconate. There was a proposal before the General Synod in 1985 to do just this. The proposal was not opposed, but it fell victim to the unusual circumstances which arose in the course of that Synod. Even so, its having been introduced in a bill is a witness to the belief of those who at that time desired to amend the Constitution to enable the ordination of women to the diaconate, that an amendment of s.74(6) was also necessary to enable women to be on a par with men in the matter of being representatives in the house of clergy as deacons.

The circumstances, in brief, were these:

Due notice was given of a bill for a canon, and also a bill, to alter the Constitution with two objects:

(a) to provide for the ordination of women to the office of deacon, and

(b) to amend s.74(6) to secure equality of eligibility to be representatives in the house of clergy. When the General Synod was persuaded to provide for the ordination of women as deacons by a canon alone, without altering the Constitution, the bill for a canon, and the bill, to alter the Constitution were dropped, and as a consequence the proposed amendment of s.74(6) was not considered. But some such procedure as was there proposed seems to be necessary if the present anomaly is to be overcome.

QUESTION 2

Does the Act of the Synod of the Diocese of Melbourne entitled 'Constitution Alteration (Deacons and the Houses of General Synod) Act 1987', of which a copy is annexed to this schedule, constitute an assent to the Bill No 2 1985, being the Constitution Alteration (Deacons and the Houses of Synod) Bill 1985?

I concur with the answers given by the President and Deputy President.

19 April 1989.

ADDENDUM TO THE OPINION OF THE ARCHBISHOP OF SYDNEY IN RESPONSE TO QUESTIONS 1 AND 2 OF THE PRIMATE'S SECOND REFERENCE OF 24TH NOVEMBER, 1988.

Having read the opinions and reasons of some of my colleagues of the Tribunal, I am constrained to add a further comment on the point whether or not the words bishop, priest and deacon are words importing the masculine.

With respect, it is not appropriate to argue from the supposed analogy of words like poet, judge, juror, author, painter, lawyer etc. The meaning and import of bishop, priest and deacon are determined for us by the meaning and import of certain words in the New Testament and early Christian writers. Our English words are a translation of these (originally Greek) words. As used in our formularies and documents such as the Constitution they are intended to represent the meaning and import of the original words. They are in fact linguistically derived from those words: bishop from episkopos, priest from presbuteros, deacon from diakonos. There is no parallel in words like poet, judge, etc. We are dealing with words which have virtually no reference outside specialised Christian vocabulary which consciously depends on the biblical origins.

Our correct course is to look to the import of episkopos, presbuteros and diakonos as used in the Greek New Testament and ecclesiastical writers.

All three Greek words are masculine in form, a linguistic feature we do not have in English, and which therefore does not appear in the English equivalent of these words. Episkopos and presbuteros must be said to be words which import the masculine. They can be used only of male persons and in fact always have the masculine definite article. Presbuteros is, in form, the comparative of the adjective presbus which means old, hence 'older' or 'elder'. If a female 'older' person is to be designated, there is a feminine form of the word which in fact occurs in the new Testament at 1 Tim.5.2. But our priest is derived from the technical sense of presbuteros, which without ambiguity imports the masculine, with or without the definite article.

If we were to look at all to the Greek hiereus (sacrificing priest) as having influenced our English use of priest, again we would find a word which imports the masculine; there is a cognate femine form, hiereia, which is used for priestess. Historically this described an officiant in non-Jewish or non-Christian religions, and has always been rendered priestess in English.

Diakonos is different from episkopos and presbuteros. Although masculine in form, it belongs to a class of words which can be used of a feminine person when qualified by the feminine definite article or when the context so indicates. It is so used in Romans 16.2 (where diakonos may or may not indicate an office in the church). For other instances see New Documents Illustrating Early Christianity (Macquarie University) Vol 2 Sect 109, Vol 4 Sect 122. But Greek is always specific as to whether men or women are referred to, and there is no evidence that the plural diakonoi could be used inclusively of men and women together. So, while the word diakonos by itself cannot be said to import the masculine as unambiguously as episkopos or presbuteros, it is as importing the masculine (i.e. as indicating a member of the order of male deacons) that diakonos has come to be represented by deacon in our Ordinal and related documents including the Constitution. From this it can be argued that the word deacon, as used in the Constitution, imports the masculine.

Since, therefore, the words bishop, priest and deacon in our usage mean or import nothing other than what their equivalents in the original language and context mean and import, it must be asserted that all three words import the masculine, except that deacon, though importing the masculine by itself, is capable of a feminine qualification so long as either the context or article is specific; whereas 'woman priest', if purporting to represent presbuteros, would be a contradiction in terms.

Usage may indeed modify this linguistic situation if the admission of women to holy orders is generally accepted, but this consideration is irrelevant to the question of the import of words as used in the Constitution. It is quite unjustified to interpret the words bishop, priest and deacon in our formularies as if they had a meaning or import other than that which is given to them by those biblical and ecclesiastical terms which they translate and represent.

OPINION OF THE BISHOP OF NEWCASTLE IN RESPONSE TO QUESTIONS 1 AND 2 OF THE PRIMATE'S SECOND REFERENCE, DATED 24 NOVEMBER, 1988 TO THE APPELLATE TRIBUNAL UNDER SECTION 63 OF THE CONSTITUTION

QUESTION 1

Upon the alteration of s.17 (5) of the Constitution by Canon No. 22 of 1985 and/or Bill No. 2 of 1985, will the qualification of deacons to be members of General Synod extend to women deacons?

This opinion attempts to adhere to the following ground rules.

(a) Any interpretation of the Constitution should attempt to relate to the intentions and motives in the minds of the framers of the Constitution, however difficult or speculative that might be.

(b) In any interpretation of the Constitution the attempt should be made to read and understand such Constitution as a whole. Individual sections should not be so interpreted as to be inconsistent with the interpretation of other sections containing identical or similar wording and intent.

(c) In any interpretation of the Constitution an attempt should be made to understand the literal, straightforward and commonsense meaning of the words.

In the application of these ground rules there may be occasions when there is a crossing over into one another's territory and perhaps some contradiction. Any interpretation of the Constitution then will require a subjective choice which is seen as the most likely meaning.

The Question requires a consideration of s.3, s.17 (5) and s.74 (6)

S.3

I have already argued in the 1987 Opinion that the words *'preserving the three orders of bishops, priests and deacons in the sacred ministry'* in s.3 refer specifically to the preservation of those orders and not to the make-up or qualifications of the persons who are called to exercise those orders. Such make-up might include male/female, black/white, learned in Latin/Japanese, or other qualifications which may have applied, or will apply, from time to time.

The words *bishops, priests and deacons* are inclusive words and can be interpreted as having application to both male and female. In English usage, words like *jurors, vagrants, authors, painters, musicians, sculptors, economists, lawyers and pilots* have generally speaking applied to males, but it is quite clear that the words have the potential to include the female: and indeed are used commonly to mean both male and female, or either male or female.

This interpretation of s.3 is important for the interpretation of the whole Constitution. Clearly, when the framers of the Constitution did their work it was unlikely that they considered the possibility of female bishops, priests and deacons, but the potential was always there. But if on the other hand the framers of the Constitution were aware of that possibility and opposed it, then it is surprising that they did not positively indicate the prescription of the orders to males only.

S.17 (5)

The words *bishop* or *priest*, and if the amendment is effective *deacon*, are words to be interpreted in the same manner as that in s.3. However, there are the pronouns *he* and *his* in the sub-section which might narrow the interpretation to male persons only. The biblical texts frequently use the pronouns *he* and *his* when in context they are to be interpreted as including the feminine. The examples of this are legion. This literary characteristic is part of English usage, and the pronouns *he* and *his* do not necessarily and categorically determine the noun they qualify as male only. In addition I think it unlikely that the original framers of the Constitution were making a specific statement about male gender in this

sub-section. Clearly the emphasis in the sub-section concerns the nature of the clerical representation of a diocese.

S.74 (6)

It has already been noted that this Section is obscure and awkwardly drafted. It is clearly making a statement that 'lay words' in the Constitution which import the masculine shall include the feminine. However, in that substantive statement the framer or framers include the phrase *'but not clerical persons'*. What was in his, her or their mind? Was he making a further substantive statement that words referring to clerical persons in the Constitution were to be interpreted only in a masculine way; or was he merely describing or stating the situation in his day and time when there was no consideration of female clerical persons?

If the above reasoning on s.3 and s.17 (5) is accepted, and the Constitution is to be seen as a whole, and the sections not to be seen to be isolated in meaning, then the interpretation is that the framer is making an assumption about the situation in his time, and not making a substantive statement that clerical words in the Constitution were limited in their application to males only.

I am therefore persuaded that the answer to the question is yes.

QUESTION 2

> Does the act of the Synod of the Diocese of Melbourne entitled 'Consitution Alteration (Deacons and the Houses of General Synod) Act 1987', of which a copy is annexed to this Schedule, constitute an assent to the Bill No. 2 1985, being the Constitution Alteration (Deacons and the Houses of Synod) Bill 1985?

I have considered the Reasons given by the President and Deputy President and concur with their answers.

COSTS

In the matter of costs I concur with the Reasons of the Deputy President.

†Arthur Holland

The Rt.Reverend A.C. Holland

2 May 1989

RESPONSE TO THE ADDENDUM TO THE OPINION OF THE ARCHBISHOP OF SYDNEY CONCERNING QUESTIONS 1 AND 2 OF THE PRIMATE'S SECOND REFERENCE OF 24 NOVEMBER 1988 FROM THE BISHOP OF NEWCASTLE

This response may not arrive within the time limits to allow it to be included with the completed Opinions of the members of the Appellate Tribunal concerned with the reference. If this is so, then it might be seen as a contribution to the ongoing debate.

While recognising the force of the Archbishop of Sydney's opinion that we must look to the Greek New Testament and ecclesiastical writers to discover the import of *episkopos*, *presbuteros* and *diakonos*, I believe with respect that this argument has only restricted application in our attempt to interpret the three words **bishop, priest** and **deacon** as they appear in our Constitution.

The languages of Greek and Latin are languages, like some others, which denote nouns in a masculine, feminine or neuter gender. In English translation the masculine and feminine genders are generally maintained when speaking of the names of men and women, although when this is not clear the context, or the addition of other words, can determine the substance of masculinity or femininity. However, in English there are nouns used to denote persons of either sex, such as parent, sovereign, which are said to be of Common gender.

There are some interesting examples of translations from Greek to English which cross from the masculine and feminine genders to Common gender categories. The Greek *gamos* is masculine and is translated **a marriage.** The English translation cannot bear either an exclusive masculine or feminine meaning but in suitable context imports both. It is therefore an English Common noun. The Greek *goneis* is masculine plural and is translated **parents.** It can only be Common in English. The Greek *hagioi* (singular *hagios*) is masculine and translated in English as **saints.** I am aware that a feminine definite article and an appropriate change in the case ending can refer to females in the Greek, but case endings in English have all but disappeared and **saints** in English can only have a Common application to both males and females. The Greek *hupokritēs* is masculine and translated **hypocrite** in English, when that word is

found in the New Testament texts there may be an assumption that it applies to males only, but there can be no certainty about that. **Hypocrites** used then as now can only be understood as being generally inclusive of both male and female.

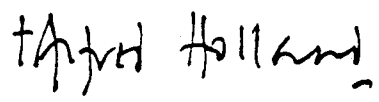
There is an additional fascinating argument, not quite to the point, but having a general bearing on the crossing of gender lines in translation. Some of the great biblical words in the New Testament are feminine nouns in the Greek. For example, *agapē* (love), *hamartia* **(sin)**, *basileia* **(kingdom)**, *dikaiosunē* **(righteousness)**, *eirenē* **(peace)**, *ekklēsia* **(church)**, *sophia* **(wisdom)**. None of these words in translation can continue in the feminine gender exclusively . They may be English Neuter, although if Neuter means names of qualities or things without life, they can scarcely be judged in that category. They may of course become masculine or feminine gender if attached to a masculine or feminine noun in the genitive case.

While I do not deny that *episkopos*, *presbuteros* and *diakonos* as used in the Greek New Testament and ecclesiastical writers have been translated and generally understood as having reference to males, there can be no absolute, categorical and binding interpretation that they are always to be so exclusively understood. There exists a potential to include the feminine as English Common gender nouns have demonstrated. Indeed, Romans 16:1 is to the point.

I am reminded of one of the sayings of Pope John XXIII, "It is not that the Gospel has changed; it is that we have begun to understand it better".

The force of that quotation as applied to this argument is that whereas once we would have believed that certain words had an exclusive masculine interpretation, it can now be seen that from the beginning they had the potential to be interpreted to include the feminine also.

While not wanting to suggest a definitive case has been made in all respects, I am persuaded that there is enough evidence to believe that the words **bishop, priest** and **deacon** as they appear in our Constitution cannot be prescribed as having application to males only.



ALFRED HOLLAND

30 May 1989

IN THE APPELLATE TRIBUNAL

REASONS OF HON MR JUSTICE YOUNG

These Reasons deal with the two questions raised by the Archbishop of Melbourne referred to this Tribunal by the Primate pursuant to s 63 of the Constitution, viz

1. Upon the alteration of s 17(5) of the Constitution by Canon No 22 of 1985 and/or Bill No 2 of 1985 ... will the qualification of deacons to be members of General Synod extend to women deacons?

2. Does the Act of the Synod of the Diocese of Melbourne entitled "Constitution Alteration (Deacons and the Houses of General Synod) Act 1987" ... constitute an assent to the Bill No 2 1985 being the Constitution Alteration (Deacons and the Houses of Synod) Bill 1985?

Section 17 of the Constitution in its unamended form dealt with the composition of the House of Clergy in General Synod. Prior to its amendment subsection 5 read as follows:-

> "Every bishop or priest shall be qualified to be a clerical representative of a diocese if he is resident therein at the date of his appointment and holds a licence from the diocesan bishop, provided however that the qualification of residence in the diocese shall not be necessary in the case of a missionary diocese or a diocese having less than ~~30~~ 31 clergymen resident and duly licensed

to officiate therein."

The alteration made in 1985 was to omit the words "or priest" and substitute therefor the words "priest or deacon".

At the date when the Constitution came into force and at all material times prior to about 1986, every bishop or priest who might be qualified to sit in General Synod was a male. That statement can no longer be made in respect of every bishop, priest or deacon in the Australian Church.

The problem is one of statutory construction. There is a definition section in the Constitution, s 74, which normally one would hope could be of assistance in resolving such questions. However, s 74(6) is itself obscure. It provides as follows:-

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

It is really this subsection rather than s 17(5) itself which must be the first subject of analysis.

Two things in particular should be noted about s 74(6). The first is that in contradistinction with the opening words of s 74(1) and the opening words of s 74(4), s 74(6) is not preceded by the words "unless the context or subject matter otherwise indicates". The second thing to note is the peculiar expression "but not clerical".

Provisions in the style of s 74(6) have been common in interpretation statutes ever since Lord Brougham's Act of 1850. A similar provision has been adopted throughout the

United States, see Crawford on Statutory Construction p 755. In that work the learned author said, "The purpose of this section was to avoid the use of such expressions as 'such person or persons', 'he she or they', 'himself or themselves', found in some poorly drawn statutes: Von Glahn v Harris 73 NC 323. This statute should be applied only in order to carry out the legislative intent."

Perhaps the most thorough analysis of this provision is given in the article by Marguerite E Ritchie QC entitled "Alice through the Statutes" in (1975) 25 Magill Law Journal 685. She makes a fairly convincing case for saying that in every definitive authority including the well known decision of Chorton v Lings (1868) LR 4 CP 374, the Judges have always said that whenever they did not consider that a right should extend to women the contrary intention plainly appeared that the Interpretation Act provision should not apply. Because s 74(6) is not expressed to apply only where the contrary intention does not apply it would seem to me to be a provision that applies whenever one finds a word importing the masculine in the Constitution.

The next matter is what is a word "importing the masculine"? As far as I can see there has never been a case in Australia, New Zealand, America or Canada which really answers this question. The word "importing" here must mean "conveying the meaning of" see the third definition of "import" in the Macquarie Dictionary. Thus either the words "bishop priest or deacon" convey the meaning of masculinity or they do not. If

they do, then one must apply s 74(6), if they do not, then the subsection is quite irrelevant.

The words "bishop priest or deacon" may refer to an office or they may refer to the holder of an office. This tribunal has said, with respect to s 3 of the Constitution, that the words there refer to an office and accordingly do not involve gender.

To avoid making a decision merely on personal prejudice, I think it is necessary to look at some of the instances in which courts have held that words import the masculine and when they do not. There are not very many of these examples and they are not easily found.

In Re v Cyr reported at first instance in [1917] 2 WWR 1185 and on appeal (1917) 38 DLR 601, the Criminal Code of Alberta s 238(a) defined a vagrant as one who is wandering abroad or lodging in a barn "and not giving a good account of himself, or who, not having any visible means of maintaining himself, lives without employment." The defendant Lizzie Cyr was a prostitute and was charged under the section before a woman magistrate. It was held that a woman could be validly convicted under that section. The court also held that a woman could be a police magistrate.

In People v Barltz (1920) 180 NW 423, Barltz had been convicted by a jury consisting of 11 men and Miss C. Gitzen. The Constitution of Michigan guaranteed him the right to "a trial by a jury of 12 men good and true". The Constitution also provided that the legislature might "authorise a trial by

a jury of a less number than 12 men." The Full Court of the Supreme Court of Michigan held that probably "man" in the Constitution meant "a human being" but even if it did not, then the word "men" in the Constitution should be read as "jurors".

In Re Woodling [1984] 1 WLR 348, the House of Lords had to consider s 35 of the English Social Security Act 1975 which provided, so far as is relevant, as follows:-

> "A person shall be entitled to an attendance allowance if he satisfies prescribed conditions as to residence ... and either (a) he is so severely disabled physically or mentally that by day he requires from another person ... frequent attention in connection with his bodily functions ... or continual supervision ... in order to avoid substantial danger to himself or others."

The House of Lords considered that "bodily functions" meant matters connected with a "high degree of physical intimacy between the person giving and the person receiving the attention" and it is quite clear from their judgments and from the judgments of the Court of Appeal in the earlier case of R v National Insurance Commissioner [1981] 1 WLR 1017, that the section equally applied to a woman who had problems with bodily functions as it did to men.

There are many cases where words which are seemingly neutral have been restricted to males, see eg R v Harrald (1872) LR 7 QB 361, Chorlton v Lings (1868) LR 4 CP 374 and

Beresford-Hope v Sandhurst (1889) 23 QBD 79. Some of these cases were decided on specific statutory provisions, others may have been decided because the Judges who were involved in the decision thought that contrary indications otherwise appeared in the legislation they were considering. One should also include in this list Peters v Cowie (1877) 2 QBD 131, a case on the Vagrancy Act which apparently reached the opposite result to R v Cyr and held that the words "every person running away and leaving his wife or his or her child ... shall be deemed a rogue and a vagabond" did not include a woman running away from her children. That decision is probably one founded in mercy rather than in good law.

Other parts of the statute may indicate that a word which is apparently neutral is to be restricted. Thus, s 4 of the English Vagrancy Act, 1824, provides -

> "Every person wilfully ... exposing his person ... with intent to insult any female ...".

Although the word "person" appears to be neutral, the use of the word "female" gives some indication that it may be limited to males and the fact that the word "person" where secondly appearing means "penis" (Evans v Ewels [1972] 1 WLR 671) means that even a naked woman posing lewdly to offend other females could not come within the section.

After this long digression I must come back to the question "Do the words bishop priest or deacon" in the notionally amended s 17(5) import the masculine?

It is noteworthy that none of the English cases which

hold that women are not persons for the purpose of holding an office or electing others to that office proceeded on the ground that the word "person" did or did not import the masculine. All apparently were decided because of some "escape route" that the Judges were able to find, eg in Nairn v University of St Andrews [1909] AC 147, the words "or persons ... not subject to any legal incapacity."

Although "the law shall be considered as always speaking, and whenever a matter or thing is expressed in the present tense, it shall be applied to the circumstances as they arise" (s 10 of the Canadian Interpretation Act, 1967), however when one is looking at the construction of an Act of Parliament one looks at it as at the date at which it was passed. Thus in R v Harrald (1872) LR 7 QB 361, 363, one ignored the fact that the Married Womens Property Act had been passed between the date of the Act dealing with voting at a municipal election and the date on which the Court decided the dispute. See also Chorlton v Lings at p 384.

As at the date when s 17 of the Constitution was originally enacted, the only persons who had been bishops or priests for the previous 400 years in the Church of England had been persons who were male. I do not really think that this assists the problem. One has got to look to see whether the words themselves are words which import masculinity. From the cases which I have reviewed, courts have not been over anxious to import into a particular word masculinity. The reason for this is obvious. THe Interpretation Act is there to solve

problems not to make them. One just does not need the interpretation provision at all unless one first comes to the view that there is a provision which prima facie would debar persons of the other genders. Accordingly in my view the words "bishop priest or deacon" do not import masculinity.

The next question is whether the pronouns "he" and "his" are words which import masculinity.

In Sutherland on Statutory Construction 4th Ed Vol 2A, p 244, the following appears:-

> "it is not uncommon usage, in statutes for masculine pronouns to be used generically to refer to both sexes. General interpretation statutes commonly provide for such usage. In recognition of the common practice, courts have, even in the absence of statutory directive, interpreted masculine pronouns to make statutes applicable to both sexes where that result is reasonable."

Woodlings case (supra) is a good illustration of this particular principle. Indeed it is always difficult to construe a section in a particular way based on the apparent gender of a pronoun where the nouns in the sentence are gender neutral because the better way of construing an enactment where a pronoun is used is to read it substituting the actual noun for the pronoun. If one goes through this exercise with s 17(5) one ends up with gender neutral words.

Accordingly, it does not seem to me that this is a

case where s 74(6) applies because there are no words importing the masculine.

I have spent so much time on this particular question because I must confess before I looked at the authorities and before I read in draft the judgment of the learned Deputy President, I had reached the tentative view the other way. One of the main reasons why I had reached that tentative position was that if s 74(6) does not apply to s 17, there is nothing else in the Constitution to which it could apply except the table annexed to the Constitution. However, it seems to me that in view of what I have said above and in view of the admitted fact that s 74(6) is in any event obscure, this consideration does not outweigh the other matters to which I have already adverted.

If one approaches s 17 apart from s 74(6), the first submission of the Synod of the Diocese of Sydney is clearly correct. One reads the Constitution as one enactment and in particular reads s 17 as a whole. Subsection 1 says that there is to be a House of Clergy composed in a particular way, subsection 3 deals with the way in which elections shall take place as does subsection 7 and subsection 5 deals with the qualification of those who can be members of the House of Clergy. Subsection 5 when read with subsection 1 makes it clear that the clerical representatives in General Synod are -

(a) only to be persons who are in Orders; and

(b) with an exception which is presently irrelevant, persons in Orders physically

resident in the Diocese which they represent.

One then has to ask whether, on the natural reading of subsection 5 untrammelled by any artificial rules of construction such as appear in s 74, the section only applies to male bishops priests or deacons. In my view, subsection 5 should be read as if it said that the qualifications for being elected to the House of Clergy involve -

(a) the person being a bishop priest or deacon;

(b) that that person is resident in the Diocese for which that person is appointed;

(c) that person holds a licence from the diocesan bishop.

I do not consider that the presence of the pronoun "he" does the work which the Diocese of Sydney have submitted it does in para 4.2(c) of its submission. Reading the section in this way it seems to me that the literal meaning is not to exclude anybody who is a bishop, a priest or a deacon if that person fulfils the other qualifications in the paragraph.

The only other possible indication in subsection 5 is the use of the word "clergymen" in the proviso. On this point it seems to me that the word "clergymen" must have the same meaning as it has in the table annexed to the Constitution and in para 3 of that table, the definition is such as to include no reference to gender.

Accordingly, in my view the question should be answered "Yes".

Question 2. All the submissions received by the Tribunal have presented cogent arguments why this question should be answered "yes". I think this relieves me from dealing with this question in the same detail with which I dealt with the former question.

I will make the assumption for this case, without making any finding which may be an estoppel in the Reference on the Act of the Synod of the Diocese of Melbourne re Women Priests that the Act assenting to the Canon and Bill was an Act of a properly constituted and conducted meeting of the Melbourne Synod. I will also assume, again without deciding, that the proper method of amending the Constitution under s 67(d) is by Bill. On these assumptions the question then becomes whether it is necessary for the ordinance of a diocesan synod adopting a constitutional amendment to do anything more than clearly identifying the Bill to which it is giving assent. To my mind it is not necessary to do anything more. Thus if a Bill is set out in a schedule to a diocesan ordinance which contains errors, that is a mere irregularity in the information provided to members of the diocesan synod and does not affect the validity of the assent.

Accordingly I would answer the second question "Yes'.

So fas as costs are concerned, having noted what was put by the Diocese of Sydney it does not seem to me that this is a case where the expenses of the Reference should be borne otherwise than by the Church as a whole.

17 April, 1989.

ADDENDUM TO THE REASONS OF YOUNG, J.

I have, since preparing the above, read in draft the addendum of the Most Reverend the Archbishop of Sydney.

I would first disavow any learning of biblical Greek and would never hold myself out as having the scholarship in this area that the Archbishop has, but notwithstanding I would venture to suggest that his addendum does not assist the present problem.

First, the question before the Tribunal is to determine whether the English words used in the Statute are words importing the masculine. Although, if one is reading an international treaty which is also a schedule to an Australian Statute, one reads the words in their international sense, I do not think that this principle goes so far as to justify reading "Bishop priest or deacon" as if they were "episkopos, presbuteros and diakonos".

Secondly, even if one could make the substitution noted above, I do not really think that because an office is described with a masculine word that there is thus a prohibition on a female executing the office. As far as I am aware, there is no female form of episkopos and as far as I know there were no women who ever occupied that office so that the word is hard to test. However, if I can take a more homely example, the Latin word "agricola" which was a masculine noun meaning a farmer could, as I understand it, comprehend a farmer who was in fact female. I see no reason why one could not have

the analogous situation with an episkopos. This point indeed is illustrated by the Archbishop's discussion of the word "diakonos".

It does not seem to me that the material as to priests and priestesses in the Greek is sufficiently strong to make me alter the view that I have already taken.

PETER YOUNG.

30 May, 1989.

APPELLATE TRIBUNAL

IN THE MATTER of a reference to the Appellate Tribunal under Section 63 of the Constitution (24/11/88)

REASONS OF K.R. HANDLEY Q.C.

APPELLATE TRIBUNAL

IN THE MATTER of a reference to the Appellate Tribunal under Section 63 of the Constitution (24/11/88)

REASONS OF K.R. HANDLEY Q.C.

The Primate as referred the following question to the Tribunal:-

> "Upon the alteration of Section 17(5) of the Constitution by Canon No. 22 of 1985 and/or Bill No. 2 of 1985 .. will the qualification of Deacons to be members of General Synod extend to Women Deacons?"

Section 17 of the Constitution governs the composition of General Synod. Section 17(5) in its present form provides:-

> "Every Bishop or Priest shall be qualified to be a clerical representative of the diocese if he is resident therein at the date of his appointment and holds a licence from the diocesan Bishop, provided however that the qualification of residence in the diocese shall not be necessary in the case of a missionary diocese or a diocese having less than 31 clergymen resident and duly licensed to officiate therein."

As amended the sub-section will contain the words "Bishop, Priest or Deacon" instead of the words "Bishop or Priest".

The question calls for a determination of the relationship between Section 17(5) and Section 74(6). The latter provision reads:-

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

The language of Section 74(6) is compressed and therefore somewhat cryptic. However the words "but not clerical persons" should be given some meaning and some effective operation. This is not difficult because Section 74(7) incorporates the Commonwealth Acts Interpretation Act 1901 - 1948 "unless the context or subject matter otherwise indicate". Section 23(a) of that Act provided that unless the contrary intention appeared words importing the masculine gender shall include the feminine.

In the absence of Section 74(6) therefore all words in the Constitution importing the masculine would have included the feminine. Hence reference to lay or clerical persons which imported the masculine would have included women.

It is obvious that Section 74(6) was intended to displace the operation of Section 23(a) of the Acts Interpretation Act.

It is equally clear that Section 74(6) was not intended to produce a different result in the case of lay persons.

The words in Section 74(6) intended to produce a different result were "but not clerical persons".

In my opinion therefore the inclusion of those words in Section 74(6) mean and can only mean that in the case of clerical persons words importing the masculine shall not include the feminine.

Any other interpretation would deprive the words in question of any legal effect. Such an interpretation is not ordinarily to be adopted. In Beckwith v. The Queen (1976) 135 C.L.R. 569 at 574 Gibbs J. (as he then was) said:-

> "As a general rule a Court will adopt that construction of a statute which will give some effect to all of the words which it contains."

This principle is of long standing. In The Commonwealth v. Baume (1905) 2 C.L.R. 405 at 414 Griffith C.J. said:-

> "In The King v. Berchet a case decided in 1688 it was said to be a known rule in the interpretation of Statutes that such a sense is to be made upon the whole as that no clause, sentence or word shall prove superfluous, void or insignificant, if by any other construction they may all be made useful and pertinent."

Other members of the Tribunal consider that there are no words in Section 17 in the Constitution referring to clerical persons which "import" the masculine.

If this is correct there will also be no words anywhere in the Constitution referring to clerical persons which "import" the masculine.

It would also follow that there will be no words in the Constitution referring to lay persons which "import" the masculine. Such a construction deprives both the lay and the clerical limbs of Section 74(6) of any operation at all.

In these circumstances the Tribunal is compelled to seek an interpretation of Section 74(6) which gives the provision some effective operation. This is not difficult. The framers of the Constitution evidently considered that the Constitution contained words referring to lay persons which imported the masculine. The ordinary reader of Section 17(6) of the Constitution which contains the words "layman" and the pronoun "he" might well think that those words were promising candidates for the operation of the lay person limb of Section 74(6).

I have searched the Constitution to find other words referring to lay persons which arguably import the masculine. I can find no better candidates than those found in Section 17(6). Either the word "layman" in Section 17(6) and its accompanying pronoun "he" are words which import the masculine, or the Constitution is completely devoid of such words.

The identification of words which import the masculine is not governed by scientific rules which automatically ensure a single correct answer. One is necessarily searching for the intention of the framers of the Constitution at the time it was enacted in so far as that intention is reflected in the words of the Constitution. Thus in Shore v. Wilson [1842] 8 E.R. 450 at 433 Tindal C.J. spoke of

> "The true interpretation .. of every instrument being manifestly that which will make the instrument speak the intention of the party at the time it was made .. "

Similarly in Ore Concentration Co. v. Sulphide Corporation Limited (1914) 31 R.P.C. 206 at 224 Lord Parmoor delivering the judgment of the Privy Council said:-

> "It is a general canon of construction, applicable to all documents, that the document should be construed as if the Court had to construe it at the date of publication, to the exclusion of information subsequently discovered."

If the framers of the Constitution at the time it was enacted thought that particular words imported the masculine, and for that reason included Section 74(6) in the Constitution then that intention, evident on the face of the Constitution as a whole, should govern the interpretation of Section 17(5) and Section 74(6). Once such an intention is to be found the Tribunal is bound to give effect to it and to construe words such as "layman" as importing the masculine in this Constitution even

though those words when used in some other document would not or may not be understood as importing the masculine.

Reading the Constitution as a whole I am driven to the conclusion that Section 74(6) was enacted for a purpose and the only purpose could have been to give an extended meaning to words such as "layman" where it appears in provisions such as Section 17(5). It follows that in the 1961 Constitution "layman" is a word which imports the masculine.

A similar process of reasoning must also determine the application of the clerical limb of Section 74(6). Unless "clergymen" in Section 17(5) is a word importing the masculine this part of the sub-section will have no effective operation. There can be no better candidate in the Constitution for a word referring to clerical persons which imports the masculine. If "clergymen" is not such a word there are no others to be found in the Constitution.

It follows that the "clergymen" and "clergyman" referred to in the Table annexed to the Constitution will also be words which import the masculine. Section 17(4) refers to this table, and both provisions are concerned with the composition of General Synod.

I can see no escape from the conclusion that if "clergyman", and its plural are words which import the masculine then the words Bishops and Priests which refer to the persons who comprised the class of clergymen in the original Section 17(5) must also be words which import the masculine.

This conclusion is not inconsistent with the Tribunal's earlier decisions on the meaning of Section 3 of the Constitution which entrenches "the three orders of Bishops Priests and Deacons." The orders as such are impersonal and without gender.

The same ultimate conclusion can be reached by another, but similar route. The intention of the framers of the Constitution expressed in the language of Section 74(6) is clear. Words in the Constitution which refer to clerical persons are not be given an extended meaning which would include females.

Perhaps on the ordinary and natural meaning or the literal meaning of the expression "words importing the masculine" there are no such words in the Constitution. On another view there are such words. Given the intention evident in the language of the clerical limb of Section 74(6) the Tribunal should adopt that meaning of the relevant provisions, including Section 17(5), which gives effect to the intention evident in Section 74(6). Clear authority for such an approach is to be found in Cooper Brookes (Wollongong) Pty. Limited v. F.C.T. (1981) 147 C.L.R. 297 where at 311 Stephen J. (as he then was) referred with approval to a case where the English Court of Appeal refused to adopt a literal interpretation which would have led to the result "that the plain intention of the legislation has entirely failed by reason of a slight inexactitude in the language of the section."

In the same case Mason J. (as he then was) and Wilson J. in their joint judgment at page 321 said:-

> ".. the propriety of departing from the literal interpretation .. extends to any situation in which for good reason the operation of the statute on a literal reading does not conform to the legislative intent as ascertained from the provisions of the statute .."."

In my opinion therefore the Tribunal should hold that the words Bishop and Priest in Section 17(5) as originally enacted, are words which import the masculine. Since this results from Section 74(6) it follows that the amendment to Section 17(5) to add "Deacons" will not produce a different result in the case of Deacons. Section 74(6) will still control. In my opinion therefore women Deacons will not be qualified for membership of General Synod whilst Section 74(6) remains in its present form.

Such a result is only to be expected. The ordination of women was not a live issue in the Church at the time the Constitution came into force. This is recognised in the reasons both of the Archbishop of Sydney and of the Bishop of Newcastle in this case. It is therefore not surprising that the Constitution of our Church will require amendment before women Deacons are eligible to sit in General Synod. It is equally clear that the Table to the Constitution will also require amendment if women Deacons are to be included among diocesan clergy for the purposes of determining the number of clerical and lay representatives which any given diocese will be entitled to send to General Synod. The Archbishop of Adelaide has also drawn attention in his reasons to the provisions of Section 57(2) and 60(3) where anomalies have

arisen as a result of the ordination of women to the diaconate. All these anomalies call for amendments to the Constitution. They do not justify a strained interpretation of Section 74(6).

In my opinion therefore question 1 should be answered "no".

Question 2

I agree with all the other members of the Tribunal and with the reasons they have expressed for reaching the conclusion that the Act of the Synod of the Diocese of Melbourne referred to in the Primate's reference validly assented to Bill No. 2 of 1985 of the General Synod.

K.R. HANDLEY Q.C.

CHAMBERS
1 June 1989