Anglican Church of Australia

Appellate Tribunal

APPELLATE TRIBUNAL OF THE ANGLICAN CHURCH OF AUSTRALIA

Primate's References re Wangaratta Blessing Service

Date: 11 November 2020

Tribunal Members: The Hon Keith Mason AC QC, President

The Hon Richard Refshauge, Deputy President

The Most Rev'd Dr Phillip Aspinall

Ms Gillian Davidson

Professor the Hon Clyde Croft AM SC

The Rt Rev'd Garry Weatherill

Determination and Opinion (summary): Wangaratta Diocese's proposed service for the blessing of persons married in accordance with the *Marriage Act* does not entail the solemnisation of marriage; is authorised by the *Canon Concerning Services 1992*; and is not inconsistent with the Fundamental Declarations and Ruling Principles of the *Constitution* of the Church.

The formal answers to the questions referred by the Primate are set out in the attached joint reasons of the majority of the Tribunal at paras 284-285. The dissenting reasons of Ms Davidson are also attached at page 68.

REASONS OF THE PRESIDENT, DEPUTY PRESIDENT, ARCHBISHOP ASPINALL, PROFESSOR CROFT AND BISHOP WEATHERILL: OPINION OF THE TRIBUNAL

1. This Reference is about a marriage blessing service intended for use in the Diocese of Wangaratta. The service is not confined to the blessing of same-sex marriages but that aspect has attracted widespread attention and is deeply concerning to many. The legal issues presented to this Tribunal concern the location of authority within the Church to initiate this liturgy. Does it reside within the Diocese or only with the General Synod? Or is it beyond the constitutional competence of the Church as a whole?

2. Actually there are two References proceeding concurrently. One was initiated by the Primate (the Most Revd Dr Philip Freier) on his own motion, the other at the request of 41 members of the General Synod. Details of the Questions and processes are provided in Section (I) below. In response to a general invitation from the Tribunal, over forty groups, synods and individuals elected to participate, 34 of which have filed written submissions and, in reply, some have responded to the submissions of others. The Tribunal is grateful for this assistance. The submissions reveal a wide span of viewpoints, even from those generally supporting or opposing the Wangaratta measure. Abbreviated citations of particular submissions refer to the paginated submissions posted online by the Registrar.

3. The Tribunal was also aided by the spectrum of theological and legal viewpoints published recently by the Doctrine Commission, *Marriage, Same-Sex Marriage and the Anglican Church of Australia.* Likewise, the submissions from the House of Bishops and the Board of Assessors in response to the request for their opinions from the Tribunal pursuant to s 58 of the *Constitution* (see further para 279 below). When citing these opinions we refer to them as "the Bishops' Response" and "the Assessors' Response". They have also been posted online by the Registrar.

(A) The (limited) role of law in Church and State : drawing lines

4. Toleration by the State for religious diversity ebbs and flows, as does the readiness of Churches to use civil law to promote their agendas. Toleration for diversity within the Church is also variable.

5. Law is but one aspect of civil society, but law may set boundaries and impose sanctions when they are crossed. Its role is seldom to enforce uniformity except in a totalitarian state. On the contrary, law respects liberty and diversity of belief and conduct except where this is clearly constrained by law itself. One aspect of liberty as it pertains to the Anglican Church of Australia ("ACA") is recognised in Article XXXIV of the *Thirty-Nine Articles,* namely the authority of "every particular or national Church [to] ordain, change

and abolish, ceremonies or rites of the Church ordained only by man's authority, so that all things be done to edifying". The Bishop-in-Council of the Diocese of Rockhampton has drawn attention to the opening words in the preface to the *Book of Common Prayer* of the Episcopal Church of the United States of America:

"It is a most invaluable part of that blessed 'liberty wherewith Christ has made us free', that in his worship different forms and usages may without offense be allowed, provided the substance of the Faith be kept entire; and that, in every Church, what cannot be clearly determined to belong to Doctrine must be referred to Discipline."

6. There was a long struggle to find common ground in the years when the *Constitution* was being created. In consequence, and subject to the Fundamental Declarations and Ruling Principles, the ACA is a much more devolved federation than its secular counterpart in this country. The *Constitution* respects diocesan autonomy in many ways.

7. It is not the Appellate Tribunal's role to attempt the often impossible task of settling doctrinal let alone factional disputes within the ACA. It "only decides theological issues for the purpose of or in the course of determining legal questions arising under the Constitution. It is not, and cannot as constituted, be a 'final' court of appeal for the Australian Church on theological issues" (per Handley J in the 1991 *Opinion on eleven questions appertaining to the ordination of a woman to the order of priests or the consecration of a woman to the order of bishops* ("the 1991 Opinion"). The Tribunal's function is to "find an answer to the question we are asked – not to some other question – and find it within the four corners of our own Constitution after duly considering what it permits equally with what it requires and prohibits" (per Tadgell J in the 1987 *Opinion re Ordination of Women to the Office of Deacon Canon 1985* ("the 1987 Opinion")).

8. Law is primarily concerned with conduct as distinct from attitudes. Motives for actions and contested perceptions as to messages conveyed by actions seldom offer useful guidance for the resolution of constitutional disputes. Lines have to be drawn with clarity so as to demarcate the authority of synods and bishops, and to offer sound bases for disciplinary action taken against clergy who cross them. Paras 47, 66, 82, 83 and 103 of the recent *Affiliated Churches Ordinance Opinion* illustrate these propositions.

9. The Tribunal's jurisdiction to answer the questions referred depends upon them arising "under" the *Constitution* which came into effect on 1 January 1962. That instrument incorporates aspects of earlier authoritative points of reference, notably Holy Scriptures, the *Thirty-Nine Articles of Religion* that were agreed upon by Convocations of clergy in London in 1562, and the *Book of Common Prayer* of 1662 ("BCP"). But the *Constitution* also instructs the ACA and its tribunals as to the particular purposes for which they may access those older texts when considering the *validity* of canons and ordinances or charges of clergy misconduct.

10. The reference to the *Book of Common Prayer* requires a slight qualification. Section 74 (2) of the *Constitution* defines the term to mean the Book as received by the Church of England in the dioceses of Australia and Tasmania before and in 1955. That this document differs in details from the 1662 version is shown by the prayers for the welfare of Queen Elizabeth II. The Table of Kindred and Affinity at the back is that adopted by the Church of England in England in 1949 reflecting statutory changes in England (and also Australia) removing the preclusion of a man marrying his deceased wife's sister and of a woman marrying her deceased husband's brother that was the law in 1662 (see further below). We are not aware of any other material changes to the original version of 1662.

11. Bishop Stead has observed that "We are more tied to the 1662 *Book of Common Prayer* and 39 Articles than the Church of England" (*Doctrine Commission Essays,* p 32). At least two things follow that are relevant to this Reference. Firstly, caution is needed with arguments based upon declarations or actions adopted by Churches or entities that are not subject to the same constitutional framework as the ACA and which may therefore have greater or lesser freedom both in law and belief system than the ACA.

12. Secondly, as every theologian, lawyer, historian and literary critic knows, those who are tasked to understand documents written hundreds of years ago cannot ignore the context in which they were created or the impact of intervening time and events upon the hermeneutical task of giving faithful yet relevant application to the meaning of the original text. An additional complexity in the present situation comes from the need to understand and, if necessary, disentangle aspects of English canon law that were part of the Church Establishment in England not all of which pertain to the Australian Church.

(B) The Jurisdiction to entertain this Reference

13. Some submissions have challenged the jurisdiction of the Tribunal to entertain this Reference or at least some of the Questions asked (see Wangaratta (8), Newcastle (215), Perth (237-8), Anstey (217)). In our view, these submissions are sufficiently answered by GAFCON (174), Conway (269) and Sydney (280-4). As we demonstrate below, the Wangaratta measure rests itself upon the authority of a 1992 General Synod Canon. Serious questions have been raised about the consistency of the Wangaratta measure with that Canon (cf *Constitution,* s 70) and with the *Constitution* itself. Many of those issues concern the term "doctrine" which appears in the Fundamental Declarations, the Ruling Principles and the Canon.

14. We may well agree with the Revd Conway's remark that the "Appellate Tribunal is certainly not the ideal forum in which this debate be had" (272). This consideration has guided us to seek the narrowest of paths for addressing the issues in the Reference. But equally true, many of them are "significant constitutional issues...not merely matters of theological contention for which the Tribunal is acting as a sounding board" (Sydney (282)).

(C) Marriage in Church, State and Society

15. Holy matrimony is "an honourable estate, instituted of God in the time of man's innocence, signifying unto us the mystical union that is betwixt Christ and his Church" (BCP, *The Form of Solemnization of Matrimony*). As argued by Bishop Stead in the *Doctrine Commission Essays,* this is a teaching that marriage was "instituted of God" between Adam and Eve in the Garden of Eden, "from the beginning", rather than commencing with the Mosaic Law. Bishop Stead also submits that this "signals that marriage is God's pattern for all humanity and not just for his covenant people" (Bishop Stead, *op cit,* p 41).

16. Under God's providence, the popularity and utility of the institution has seen it spread in various forms (including polygamy) across the ages and across the nations. In recent times, same-sex attracted people have claimed it as well, under the banner of "marriage equality". Given the many consequences flowing from marriage or its absence, Church, State and private conscience have (within limits) constantly shaped and altered the parameters of the institution.

17. The Christian Church in England witnessed many changes over the centuries. Marriage did not always require the participation of a priest for its canonical validity. The Reformation saw the Church of England reject the idea that marriage and other commonly called Sacraments were "to be counted for Sacraments of the Gospel" (*Article* XXV). Many significant changes between 1662 and 1962 and between 1962 and the present day are discussed in Section E below. Almost invariably, the Church's laws, rules and teachings have proceeded from an understanding of Holy Scripture. But, consistently with Article XIX, some of them have been amended or even reversed.

18. Despite the variations in the law and practice of marriage over time and place, there must be core elements of the institution. These appear to *include* human actors of the age of sexual maturity; intention as to permanency; and (a basic level of) mutual consent. In the setting of the Australian Constitution, the High Court of Australia suggested that the juridical concept of "marriage" refers to:
"a consensual union formed between natural persons in accordance with legally prescribed requirements which is not only a union the law recognises as intended to endure and be terminable only in accordance with law but also a union to which the law accords a status affecting and defining mutual rights and obligations."

19. This passage in *Commonwealth v Australian Capital Territory* [2013] HCA 55, 250 CLR 441 at [23] is part of the reasoning that led the High Court to conclude that the federal Parliament had power to legislate for the formation and recognition of same-sex marriages. The judgment contains useful statements about the scope of the matters that can be affected by marriage status, the mutability of that status and its incidents, and

the necessity of referring to external laws to some degree in relation to the recognition of marriages formed elsewhere (see esp at [16]-[19], [23]).

20. This decision throws no direct light upon the canon law issues in the present Reference. But it was the trigger for the changes to the *Marriage Act* that has challenged the ACA to consider its own responses to an evolving social and legal environment within the Australian society where the Church exercises its mission. Significant numbers of people are directly and indirectly affected. The recently published work of Stuart Piggin and Robert D Linder, *Attending to the National Soul: Evangelical Christians in Australian History 1914-2014* records that (p 477):
    "*Sydney has one of the largest gay and lesbian communities in the English-speaking world. Their number* exceed[ed] *that of church-going Anglicans in Sydney in the mid-1990s....*"

    No one suggests that LGBTIQA+ people cannot be members of the ACA. Conflicting submissions have been received as to their current numbers (see Equal Voices (188) and Mrs McLean (R43)).

21. It is clear that *some* aspects of BCP's rite of *Solemnization of Holy Matrimony* no longer represent the law or practice of the Church in Australia, if they ever did. The challenge for this Tribunal is to discern the legal principles that give continuing force to the remainder insofar as those "standards" are invoked to direct the outcome of this Reference.

22. In Australia, the *Marriage Act 1961* saw the Commonwealth Parliament enter a field that was formerly occupied in differing respects by the changing common law, State enactments, and such of the statutory law of England as was suitable to Australian conditions at the appropriate cut off points. The *Marriage Act* since its inception has authorised marriages to be "solemnized" by a "minister of religion" in any recognised denomination, a registered civil celebrant, chaplains and others. It also recognises as valid, marriages effected overseas in a wide variety of circumstances (see Part V). For local marriages there are core requisites such as those relating to age (or age plus official consent) (ss 10-21), prohibited degrees of consanguinity and affinity (ss 22-24); and proscription of bigamy (s 94). Marriages solemnized in this country also have basic requirements as to notice, declarations and witnesses. A minimal form of ceremony is prescribed for weddings by authorised celebrants (s 45 (2)). Those who are ministers of religion may solemnise according to any form and ceremony recognised as sufficient for the purpose by the religious body or organisation of which he or she is a minister (s 45 (1)).

(D) Same-sex relationships and same-sex marriages

23. Until very recently, it would have been unthinkable for two persons of the same sex to attempt to marry other than perhaps by exchange of vows in private. Had they ventured

to do so, the common law and the law of the Church would have withheld the status of marriage. Nor would either partner have been shielded from the harsh laws punishing any extra-marital sexual activity, especially between persons of the same sex.

24. A rapid (though by no means total) shift of societal attitudes in Western countries over the past generation has seen same-sex marriage becoming lawful in many countries. According to Wikipedia, Denmark in 1989 was the first country to recognise a legal relationship for same-sex couples, The Netherlands in 2001 was the first to establish same-sex marriage by law, and 28 countries have now followed The Netherlands' lead.

25. Many people who campaigned for a "No" vote in the 2017 plebiscite expressed the view that they had no objection to the State using the label of "civil union" as the juridical concept for giving same-sex couples all or most of the protections and obligations accorded to the status of marriage. But they objected to what they saw as the misappropriation or even perversion of the word "marriage".

26. Similar attitudes have been expressed in some of the submissions in this Reference. For example, Sydney (276 ff) has strongly argued that heterosexual marriage is "'God's ordinance' for all humanity, as the pattern of relationship established by God from the beginning, and normative for all human 'coupling' relationships that are valid in his sight". See also EFAC WA (130). Unless we have misunderstood it, "coupling" is here defined as any close and permanent relationship intended to be lifelong, quite apart from whatever sexual intimacy might be involved (see esp Sydney 278 where the offending portions of the Wangaratta liturgy are detailed, focussing upon the blessing of the "companionship" and "friendship" of the "couple").

27. Sydney certainly pays attention to the actual or assumed sexual conduct of the same-sex married couple and its consistency with Biblical teachings, but that is presented as a separate problem. Other submissions concentrate solely upon this second aspect, sometimes at the expense of overlooking the very real possibility that some marriages will not involve sexual intimacy that infringes the Biblical proscription(s) relied upon. It is not always helpful to be unduly coy when legal lines have to be drawn, not that all submissions suffer from this difficulty.

28. The submissions reveal deep anguish and strong conviction on both "sides". All have urged their respective positions on Biblical as well as more directly canonical considerations. These factors reinforce the duty of the Tribunal to confine itself to constitutional issues.

29. The previous Section adverted to the varieties of marriage over time and place. There are also varieties of enduring same-sex relationships. In every age, pairs of related and unrelated adults of the same sex have chosen to live together in mutual support for possibly their joint lives. Many families and most congregations have encountered and

nurtured them. Some are members of the clergy. These couples are very much in the minority and doubtless feel so in church groups largely populated by heterosexual married couples and their children, as well as widows and widowers from “traditional” marriages. However, the rawness of the current debate has moved away from a former era’s “Don’t ask, don’t tell, don’t judge” culture to one where many want to see positive signs of *human* blessing/encouraging or of cursing/discouraging. Naturally, “[t]his Tribunal cannot be the judge of any individual’s conscience. Its responsibility is to interpret the law to the best of its ability” (1991 Opinion per Archbishop Rayner at p 8, Cox J agreeing).

30. For some same-sex couples, their intimacy is entirely a-sexual, perhaps becoming more so as they age. For others, the degree of physical intimacy would raise not the slightest eyebrow save from a suspicious mind. For others, there will be varieties of sexual relations not unlike those which may be practised privately by heterosexual adult couples, subject to the limits of the criminal law.

31. Consenting homosexual acts in private between adult men (and sometimes between women) were severely punishable by law until a generation ago. By contrast, sexual abuse by husbands received minimal attention from Church or State until recently. Indeed, as with slavery, the restriction of the franchise by reference to gender or race, the prohibition of usury, capital and corporal punishment, reform of now widely-condemned practices of the past was impeded by confidently expressed Biblical arguments supporting conduct that is now almost universally condemned.

32. Unmarried heterosexual couples began in Australia to seek legal protection upon the breakdown of their relationship in the 1970s. First, contractual and equitable principles were invoked, and then statutes were created to regulate disputes over property, maintenance, succession and the custody of children. Around the turn of the century roughly speaking, these laws were extended to same-sex couples. Pension, welfare and succession rights were also extended to such couples. “Bastard” and “Ex-nuptial” children have also ceased to be discriminated against in law.

33. Legal attitudes about the meaning of “family” were changing as well. For example, the House of Lords decided in 1999 that a man who had lived in a stable and permanent homosexual relationship was a member of his deceased partner’s “family” for the purposes of rent protection (see *Fitzpatrick v Sterling Housing Association Ltd* [2001] 1 AC 27).

34. The moving force in these developments was often a call for non-discrimination as between married and unmarried couples and later as between heterosexual and same-sex couples. But there were other drivers, including the perceived need to provide better for the welfare of children that were becoming members of these families usually in consequence of access gained to medical assistance previously confined to married,

heterosexual couples. The emotional, physical and spiritual needs of these children cannot be ignored whatever action is taken to deter the conduct of their begetters.

35. The Supreme Court of New South Wales has recognised the eligibility of a same-sex couple to adopt two infant children and ruled that it was in the best interests of those children that an adoption order be made (see *Re William and Jane* [2010] NSWSC 1435, 44 Fam L R 292). In some instances, Anglican adoption agencies have placed severely disabled children with same-sex couples when unable to find suitable carers from "traditional" couples.

36. Between 2004 and 2017 the *Marriage Act* of the Commonwealth contained a clear statement precluding the formation or recognition of marriages other than between a man and a woman. Following a national plebiscite, this preclusion was repealed effective from 9 December 2017 (see *Marriage Amendment (Definition and Religious Freedoms) Act 2017*). Section 2A was placed into the *Marriage Act,* declaring that its purpose is to create a legal framework:
"(a) to allow civil celebrants to solemnise marriage, understood as the union of 2 people to the exclusion of all others, voluntarily entered into for life;

(b) to allow ministers of religion to solemnise marriage, respecting the doctrines, tenets and beliefs of their religion, the views of their religious community or their own religious belief; and

(c) to allow equal access to marriage while protecting religious freedom in relation to marriage."

37. As its title indicates, the Blessing of Persons Married According to the Marriage Act 1961 Regulations 2019 of the Diocese of Wangaratta does not involve the solemnisation of marriage. It deals with the blessing of persons who are already married "according to the Marriage Act 1961". The liturgy prescribed is set out in the Appendix to this opinion. It blesses the couple in particular terms, in an explicitly Christian setting, and offers prayers for their welfare.

38. As long as constitutional boundaries are respected and existing laws obeyed, it will be up to the clergy and laity of the ACA to determine the Church's interaction with same-sex attracted people and their families. From Old Testament times, marriages have often confronted families with challenges as to how to relate with "outsiders". Some same-sex couples have brought their children to ACA clergy for baptism, receiving a mixture of responses, it is understood.

(E) The Canon Concerning Services 1992 and the Wangaratta Blessing Service

39. For reasons explained below, it may be taken that the canon law of the ACA presently restricts solemnisation of matrimony to the wedding of one man and one woman.

40. The central question in this Reference is whether a service for the Wangaratta Diocese that provides a specific liturgy of blessing for already married persons is unauthorised in whole or part for contravention of the *Constitution* or a Canon of General Synod.

41. Wangaratta invokes the *Canon Concerning Services 1992* (hereafter "the 1992 Canon") as the authority for permitting and regulating this discretional liturgy. The Canon has been adopted by ordinance of the Synod of the Diocese, as it has in several dioceses.

42. The Canon was amended in 2017 by the addition of s 4 (1) (c) (set out in para 50 below). In that extended form it has been adopted in several dioceses (not yet in Wangaratta).

43. Section 71 (1) of the *Constitution* provides in part that:
"Nothing in this Constitution shall authorise the synod of a diocese to make any alteration in the ritual or ceremonial of this Church except in conformity with an alteration made by General Synod."

44. Statements in this Tribunal in its 1991 Opinion by Cox J and Archbishop Rayner about the scope of this provision would have been in the contemplation of General Synod when the 1992 Canon was debated. In the 1991 Opinion, Cox J pointed out (at pp 31-32 of his reasons) that "ritual" is defined in s 74 to include "rites according to the use of this Church" and that General Synod has power under ss 4 and 71 (1) to alter the BCP (including the Ordinal). Archbishop Rayner (at p 2 of his reasons) observed with reference to s 71 (1)'s requirement of "conformity with an alteration made by General Synod" that the principle of a change in a rite might be accepted by General Synod in one canon such that it might authorise diocesan action in conformity with the principle in a parallel case.

45. Section 4 of the *Constitution* (in the Ruling Principles) confers and qualifies authority in the Church to deal with matters of faith, ritual, ceremonial and discipline. As regards ritual and ceremony, the section first declares that the ACA "retains and approves the doctrine and principles of the Church of England embodied in" the BCP, the Ordinal and the *Thirty-Nine Articles.* Then it declares that the ACA "has plenary authority at its own discretion to make statements as to ritual and to order its forms of worship and to alter or revise such statements and forms provided that all such statements, forms or alteration or revision thereof are consistent with the Fundamental Declarations and made as prescribed by the *Constitution*." It will be demonstrated below that this plenary authority (exercised by the General Synod in 1992) is the source of the authority to conduct the Wangaratta blessing service given that we discern no inconsistency with the Fundamental Declarations and that Wangaratta is proposing to act in accordance with the mandate of the 1992 Canon.

46. Section 4 of the *Constitution* also declares that alterations in or variations from the services contained in the BCP, which is to be regarded as the "authorised standard of

worship and doctrine" in the ACA, must not "contravene any principle of doctrine or worship laid down in such standard". (Section 74 (3) offers a definition that throws some light upon this last-mentioned stipulation.) Some liturgical reforms will embody alterations or variations from BCP services, others will not. To the extent that there is such an "alteration or permitted variation", any principle of doctrine or worship laid down in the authorised standard must be conformed to, as well as the Fundamental Declarations and any other (procedural) prescription of the *Constitution.* As we demonstrate below, "doctrine" in the phrase "principle of doctrine" (in s 4) is a term defined by s 74 (1) of the *Constitution.* However, the Wangaratta blessing service is not an alteration in or variation from any BCP service, as we also explain below.

47. Section 4 also permits certain "deviations" from existing orders of service to be authorised by the bishop of the diocese on various conditions. This Reference is not concerned with this power.

48. The *Australian Prayer Book Canon 1977* and the *Prayer Book for Australia Canon 1995* were significant milestones whereby the General Synod authorised new rites for the Church. The second of those measures stipulates that it does not come into force in a diocese unless adopted by ordinance of the diocese. Each measure authorises the synod of a diocese to "regulate" by ordinance the use of the relevant Prayer Book at services held in the diocese. Each measure additionally permits the bishop of a diocese to authorise deviations from the respective Prayer Books, adopting the procedures set out in the second and third provisos to s 4 of the *Constitution.* And each measure stipulates that nothing permits "a deviation contravening a principle of doctrine or worship referred to in section 4 of the Constitution" (AAPB Canon, s 5 (3); APBA Canon, s 6 (3)).

49. The 1992 Canon proceeded as a special bill in accordance with s 28 of the *Constitution* as it then stood. It passed provisionally in 1992. There were various assents, dissents and reports by the dioceses. In 1998 these were considered by the General Synod and the measure passed unanimously in each House.

50. The 1992 Canon (as amended in 2017 by the addition of s 4 (1) (c)) reflects the conceptual structure of the APBA and AAPB measures. Its ss 4 and 5 provide:

"4. (1) The following forms of service are authorised:

(a) the forms of service contained in the Book of Common Prayer;

(b) such forms as may have been authorised, as regards a parish, pursuant to the Constitution of a canon of the General Synod in force in the diocese of which that parish is part;

(c) for use within a diocese, any other form that has been –

(i) approved for use, on the recommendation of the Liturgy Commission with the concurrence of the Doctrine

Commission, by a decision of at least two-thirds of the diocesan bishops including all of the Metropolitans; and

(ii) approved for use within the diocese by the diocesan council of that diocese.

(2) Every minister must use only the authorised forms of service, except so far as the minister may exercise the discretion allowed by section 5.

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

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

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

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

51. The 1992 Canon authorises various forms of service as well as conferring upon ministers the discretion referred to in s 4 (2) as allowed by s 5. It covers a wide field both in the liturgies that it permits and those that it forbids or permits subject to close conditions. Its validity is not in issue.

52. The 1992 Canon authorises ministers to use but only to use the authorised forms of service as defined in s 4 (1) with the exception that "the minister may exercise the discretion allowed by section 5". (This authority is, of course, dependant upon his or her diocese having adopted the Canon: see s 11.) Variations to the services authorised by the 1992 Canon that are not of substantial importance are permitted by s 5 (1), subject to the limits set in s 5 (3).

53. "On occasions for which no provision is made", the minister may use [any] forms of service considered suitable by the minister for the occasions, subject to:
    (a) any regulation made from time to time by the Synod of the diocese (s 5 (2))
    (b) compliance with s 5 (3) (reverent, edifying and not contrary to or a departure from "the doctrine of this Church")
    (c) compliance with s 6 of the Canon (said or sung distinctly, reverently and in an audible voice in English or another language intelligible to the congregation)
    (d) compliance with ss 7 of the Canon (sermon conditions) and 8 (music conditions).

54. The Wangaratta Regulations and the blessing service stipulated in them do not involve the solemnisation of matrimony nor does the service in terms or effect purport to alter or vary any authorised rite in the BCP. Accordingly, if the service is authorised by and consistent with the 1992 Canon, it rests upon the authority of the Canon which in turn represents an example of the Church ordering its forms of service pursuant to the plenary authority confirmed in the early part of s 4 of the *Constitution,* that authority being subject only to consistency with the Fundamental Declarations and the measure being made as prescribed by the *Constitution.*

55. The synodical authority to regulate and the minister's obligation to comply with the regulation are conditions of the discretion conferred by the 1992 Canon on the minister. These integral aspects of the scheme of the Canon are the manner by which the General Synod has exercised its authority to make canons in respect of ritual, ceremonial and discipline, as declared in s 26 of the *Constitution.* That authority is expressly subject to the terms of the Constitution.

56. Most of the submissions accepted this framework of analysis of the 1992 Canon and have concentrated their fire upon establishing or rebutting the proposition that the Wangaratta service is contrary to God's word (eg RAFT Anglican Church (43)), contrary to or a departure from "the doctrine of this Church" (in breach of s 5 (3)), or otherwise contrary to the Fundamental Declarations.

57. Some submissions have also proceeded on the basis that the blessing service and/or the Regulations must also conform to that part of s 4 of the *Constitution* which speaks of non-contravention of "any principle of doctrine or worship laid down in" BCP. We do not consider that this part of s 4 is engaged given that the General Synod was not altering or varying any BCP service so far as it gave presently relevant authority by s 5 (2) of the 1992 Canon. This said, nothing would appear to turn upon this, so long as the correct meaning of the word "doctrine" in that part of s 4 of the *Constitution* is kept in mind.

58. None of the submissions voice any difficulty with the idea of blessing "civil marriages" so long as they are not between persons of the same sex. See also *Doctrine Commission Essays,* p 42 (Bishop Stead). The Liturgy Commission has published a rite for *The Blessing of a Civil Marriage.* None of the submissions appear to contend that the Wangaratta service is irreverent or unedifying save insofar as it entails the blessing of same-sex marriages and therefore, it is contended, being in breach of the law of the ACA.

59. Tasmania has submitted that s 5 (2) of the 1992 Canon provides a power to proscribe or condition the exercise of the minister's discretion but only if the Wangaratta Synod has independent power to legislate on spiritual matters. This, in turn was linked to submissions from Tasmania (207-212), Sydney (275) and Ridley College (39) to the effect that dioceses that are subject to the *Church Constitution Act 1854 (Vic)* have no relevant

authority to deal with exclusively spiritual matters. (The debatable assumption appears to be that liturgies are exclusively of the latter nature even if they are contemplated for use on church trust property.) Those parties cite some remarks in this Tribunal's 1989 *Opinion concerning the validity of the Ordination of Women to the Office of Priest Act 1988 of the Synod of the Diocese of Melbourne.* In our opinion, those remarks must be read in their context, rejecting an attempt to establish that the Diocese of Melbourne had a stand-alone legislative power in the matter of female ordination that was not constrained by the opening words of s 51 of the *Constitution* ("Subject to this Constitution"). Here, by contrast, the 1992 Canon itself conferred on the diocesan synod conditional authority to "regulate" a sphere of liturgical activity. This authority is not framed by reference to the particular legislative competence of the diocesan synod. We consider the arguments to be flawed because they fail to recognise the valid function of the "regulation" provisions in the 1992 Canon and also the Canons relating to *APBA* and *AAPB.* The *Constitution of the Province of Victoria* operates subject to the *Constitution* of the ACA (see *Province of Victoria Constitution Act 1980 (Vic),* s 19).

60. The Synod of the Diocese of Wangaratta made the *Blessing of Persons Married According to the Marriage Act Regulations 2019,* reliant upon s 5 (2) of the 1992 Canon. The Regulations came into operation on 1 September 2019 but the service has not yet been used pending the outcome of this Reference.

61. The central provision is reg 4 which provides:
    Where a minister is asked to and agrees to conduct a Service of Blessing for persons married according to the Marriage Act *1961 the minister will use the form of service at Appendix A to these Regulations and no other form of service.*

62. "Minister" has the same meaning as in APBA (reg 4). There are provisions for conscientious objection (regs 5 and 6) and reporting to the Bishop (reg 7). The form of service is appended to this Opinion.

63. As indicated, the Wangaratta Regulations extend to the blessing of a wide class of marriages identified with no more precision than marriages "according to the *Marriage Act 1961".* This definition would appear to include marriages previously solemnised according to the rites of Christian and non-Christian churches, civil celebrant marriages, and overseas marriages whose validity is recognised in Australia through the scheme of the *Marriage Act 1961.* The definition would also include same-sex marriages.

64. Wangaratta has submitted that the service is confined for use where the persons involved are not already married in a Christian service. This appears to be based upon a reference to "a civil marriage" in one of the questions addressed to the couple in the liturgy itself. It is unnecessary for the Tribunal to determine whether the Regulations are necessarily confined in this way.

65. Three submissions (Killow (133), New Cranmer Society (149-150) and McLean (70)) contend that Wangaratta has not established the absence of "provision made" in the presently authorised services so as to trigger the discretion conferred by s 5 (2) of the 1992 Canon. Some of these submissions also allege species of bad faith on Wangaratta's part, allegations that we would reject. The blessing service does not fall within the forms of service mentioned in s 4 (1) (a) and (b). Section 4 (1) (c) is not in force in the Diocese of Wangaratta. But, even if it were, the fact that the Liturgy Commission's *Blessing of a Civil Marriage* is deliberately framed so as to be confined to the blessing of marriages between a man and a woman would have left open the choice of a blessing liturgy that is not thus confined. This, of course, subject to Wangaratta showing compliance with the mandate of s 5 (3) of the 1992 Canon and overcoming the other legal obstacles raised in this Reference. The Wangaratta liturgy does not involve the solemnisation of marriage.

66. Some submissions challenge the Wangaratta blessing service on the basis that it is "unsuitable" and therefore outside the scope of s 5 (2). It should, however, be noted that the language of the subsection speaks of services **"considered** suitable**"** by the minister. Cf *Wilkie v Commonwealth* (2017) 263 CLR 487 [2017] HCA 40 at [98], [109]. By contrast, Equal Voices submits that the service offers "an affirmation of the love between two people and recognises the presence of God's grace" (196).

67. Others contend that the service is not "reverent and edifying" within s 5 (3). But on closer analysis, most of the submissions really loop back to the contentions that the Wangaratta blessing service offends the "doctrinal" limitation in that subsection, the Fundamental Declarations or the Ruling Principles. Mr Delaney submits that the service is not "edifying" because it is causing grief in the Church (44). We consider ourselves not to be in a position to weigh and assess such a subjective proposition with the data before us, especially if "edification" is to be determined in the context where the service takes place. We note, too, that the Canon speaks of the particular "form" of the service being "edifying". We would also observe that none of the submissions have cavilled at any aspect of the particular liturgy, as set out in the Appendix to this Opinion.

68. There has also been some debate as to whether s 5(4) of the 1992 Canon gives the diocesan Bishop the final say as to doctrinal conformity and therefore affects the Tribunal's jurisdiction to entertain this Reference (see Anstey (215, 217-8), Perth (239, 240), Wangaratta Reply Submissions). The opposite position is put by Dr Phillips (110) and Rockhampton (357) with the latter submitting that a Bishop who gave an egregiously false ruling would break his or her ordination oath. We reserve our position about the scope of s 5 (4) in para 281.

69. The submissions mainly divide as to whether the Regulations contravene s 5 (3)'s requirement that the form of the service "must not be contrary to or a departure from the doctrine of this Church". This matter will be addressed in Section F below.

(E) THE LAW AND DOCTRINE OF MARRIAGE IN THE CHURCH OF ENGLAND 1662-1962

70. No one argues in this Reference that it is presently lawful for a same-sex marriage to be solemnised in the ACA. This is common ground (see, eg Wangaratta (15), Perth (236)) although some submissions offer theological arguments for change (Anstey (223-233), Equal Voices (197-8)). It is also common ground that the Wangaratta service does not solemnise marriage. Indeed, several submissions embrace this proposition, arguing that it shows why there can therefore be no doctrinal inconsistency (eg Anstey (219)).

71. The juridical basis for the agreed status quo needs to be outlined because it bears upon the existence or location of authority to authorise or regulate the blessing of civil marriages.

72. It will assist by first stating in reverse chronological order the conclusions in this Section before turning to the supporting reasoning. On 1 January 1962 when the *Constitution* came into force, it was the canon law of the Church (now called the ACA) that Holy Matrimony could only be solemnised in the Church as between one man and one woman and that law has not yet been altered. It was the law because, as at 1962, it was the law of the Church of England in England and that law was in force throughout Australia (*Constitution,* s 71 (2)).

73. BCP's *Form of Solemnization of Holy Matrimony* provided only for the wedding of a couple consisting of a man and a woman. It taught that this was in accordance with God's Word and that Holy Matrimony had various additional Biblical incidents including preclusion of prohibited degrees of affinity and consanguinity, the total indissolubility of the married status during the joint lives of the couple, and that it was the woman's duty to "obey" her husband. These teachings were all "laid down" in the BCP liturgy and reinforced by the Scriptural injunctions upon which they were confidently believed to rest. None of them could be regarded as mere "practices" (cf Sydney (317)). Collectively, they may for present purposes be described loosely as the Church of England's law and doctrine of marriage in 1662. "Loosely", because the question whether they are "doctrine" in a presently relevant constitutional sense remains a key issue yet to be addressed.

74. Many of the Biblically-justified incidents of what was sometimes called "Christian marriage" have since 1662 been varied by the Church of England and/or by the ACA and/or by the State with the acquiescence of those Churches. This pattern makes it well nigh impossible for those contending that the Church's complete "doctrine of marriage" as at 1662 was part of the "Faith" as professed by the Church of Christ from primitive times (cf *Constitution,* s 1) or that the full BCP teaching entailed matters necessary for salvation. And it presents the question of identifying why the teaching about a monogamous heterosexual union is in a different *legal* category.

75. The BCP service also has stipulations about banns of marriage and the involvement of a priest. These too have had legal effect for much of the period since 1662, but they were not sourced in Holy Scripture. Their present relevance is in showing that the BCP rite was very much focussed upon the solemnisation of marriages in England in the Church of England.

76. BCP's "doctrine of marriage" was also the law of the land, recognised and enforced by the ecclesiastical courts, the common law courts and the Court of Chancery in England. As regards the requirement of a monogamous heterosexual union, any non-compliant "marriage" was regarded as null and void. The heterosexual mandate was seldom brought to the test but there was and is a scholarly consensus that this was the legal position (see Jackson, *The Formation and Annulment of Marriage,* 2nd ed, 1969, p131. Sydney also cites (324) an instance of what turned out to be a same-sex marriage purportedly solemnised in the Church of England being declared void.).

77. In using the word "doctrine of marriage" in relation to the teaching of the BCP or of the Church of England prior to 1962, we are obviously not using the definition of "doctrine" chosen in the *Constitution* for the Church of England in Australia (now the ACA) that came into operation three hundred years after BCP was issued in its original form. It will be seen that the elision of the expressions "doctrine of marriage" and "the doctrine (of the ACA)" (as defined in s 74 (1) of the *Constitution*) has been productive of much confusion in the actions and debates leading up to and continued in this Reference.

78. We shall proceed to develop these propositions concerning the Church of England's doctrine of marriage, proceeding forwards in roughly chronological order.

(i) *Thirty-Nine Articles (1562)*

79. Article XXV states that Matrimony is "not to be counted for Sacraments of the Gospel" although it is one of the "states of life allowed in the Scriptures...[but lacking] any visible sign or ceremony ordained of God".

80. Article XXXII affirms that it is lawful for bishops, priests and deacons "as for all other Christian men, to marry at their own discretion, as they shall judge the same to serve better to godliness". "Men" should be read here as including women although the idea of female clergy would have been almost unthinkable in the Church of England in 1562.

81. Article XXXV cites the Homily *Of the State of Matrimony* as containing "a godly and wholesome Doctrine". That Homily expounds the threefold function of matrimony. It also counsels husbands not to beat their wives, reminding them that women are "the more prone to all weake affections and dispositions of mind, more than men bee" (sic).

82. The absence of any other reference to marriage in the Articles is seen as significant in some of the submissions. The argument is that if BCP had purported to teach or advocate the parameters of marriage for all humankind and on the basis that submission to those parameters was necessary for salvation, one might have expected such doctrine to have been declared in the *Thirty-Nine Articles* and not just to those who come to the Church of England seeking to be married. There is considerable force in this proposition, but it must not be overlooked that liturgies may also teach and obey "doctrine" or "principles of doctrine" even in the constitutional sense. Some of the doctrinal truths both expounded and demonstrated in the liturgies of Baptism and the Holy Communion are of this nature.

83. Before leaving the *Thirty-Nine Articles*, it may be observed that some of the more extreme claims about people who engage in homosexual sexual activity not entering the Kingdom of Heaven that are reflected in some of the submissions are, to say the least, hard to understand in light of clearly doctrinal teachings in the Articles about grace and salvation (see further para 198 below).

(ii) *Catechism (1662)*

84. The *Catechism* states that there are only two sacraments that Christ has ordained in his Church "as generally necessary to salvation" (marriage not being one of them).

85. The *Catechism* also sets out, together with the Creeds, the Lord's Prayer, and the Ten Commandments, the matters about which a child being brought to confirmation should be instructed. Wangaratta submits that it "reflects the matters in the Fundamental Declarations. It says nothing of marriage." (14). It is also silent about any particular sins said to be relevant to this Reference.

(iii) *Marriage service in the Book of Common Prayer (1662)*

86. BCP's *Form of Solemnization of Matrimony* sets forth the bulk of the teachings and rules of the (Established) Church of England about marriage as at 1662, several of them expressly sourced to Scripture. These include that:
    - Banns "must be published" (opening rubric)
    - Marriage is between one man and one woman
    - The couple seeking to be married should come into the body of the church (third rubric)
    - An episcopally-ordained priest is to officiate
    - Marriage is a life-long union that no one can put asunder
    - Preclusion of prohibited degrees of affinity or consanguinity
    - The wife's duties include obedience.

87. Several of these teachings were reinforced by the statute law and the rulings of common law and ecclesiastical courts in England over the years. This is because “until [1857] ...it was true to say that the English law of marriage was the canon law of marriage as received in England” (Sir John Baker, *An Introduction to English Legal History,* 5th ed, 2019, p 517). (1857 was the year when the statute law of England allowed judges to dissolve marriages on particular grounds.)

88. Whilst marriage may be, in Bishop Stead’s words, “God’s pattern for all humanity”, it is impossible (for the reasons that follow) to read all of BCP’s solemnisation teachings as directed to all humanity, even in their original 1662 context. The law and practice of the Church of England over the centuries, the common law and statute law of England and of Australia, and the law and practice of the Church of England in Australia before and after the creation of the ACA all confirm that BCP’s marriage teachings were primarily addressed to those participating in the Anglican liturgy (including of course their witnesses), expounding the Church’s rules and teachings about what marriages it would solemnise and how this would be done.

89. BCP’s Preface describes “the particular Forms of Divine worship, and the Rites and Ceremonies appointed to be used therein [as] being things in their own nature indifferent, and alterable”. And its statement *Of Ceremonies* declares that “in these our doings we condemn no other Nations, nor prescribe any thing but to our own people only”. See also Article XXXIV.

90. None of this is to deny that several of the BCP teachings were and are rooted in an understanding of Holy Scripture or to imply that they were unwholesome for any hearer of them. But several of them were departed from or qualified over the years by the Church in light of revised understanding of the scriptural message. And even if, contrary to our view, one of the matters at issue involved the “principles of doctrine...laid down in” the formularies, this at least requires attention to the context and focus of the BCP teachings as a step to understanding their “true scope and purpose”. See *Stevens v Perrett* (1935) 53 CLR 449 at 462.

(iv) *Banns of marriage*

91. Canons 62-63 of 1603 recorded the English canon law about banns of marriage as it stood in 1662. Lord Hardwicke's *Clandestine Marriages Act* of 1753 (26 Geo II c 33) would later give statutory force in England to those rules and the essentiality of parental consent for under-age marriages. Where the latter Act operated, it rendered "voidable" non-compliant marriages, leading to decrees of nullity that affected innocent parties and their offspring. The harshness of this statute was wound back by Parliaments in England and New South Wales in the early nineteenth century.

92. The 1753 Act expressly exempted Jews and Quakers, members of the royal family, and those acting with the licence of the Archbishop of Canterbury. But it did not extend to Scotland "or to marriages solemnized beyond the seas" (s 18). This Act was therefore not an aspect of English law that arrived in New South Wales and Van Diemen's Land with British settlement given the absence of any parish system in the colonies. One collateral consequence was that Roman Catholic and Presbyterian marriages solemnised in the colonies without banns were valid, so long as there had been a solemn exchange of vows. Men who challenged convictions for bigamy on the basis that one of their marriages in the colony was void for non-compliance with Lord Hardwicke's Act would learn this to their discomfort (see *R v Maloney* (1836) 1 Legge 74, [1836] NSWSupC 24; *R v Roberts* (1850) 1 Legge 544).

(v) *Episcopally-ordained priest*

93. This requirement was a very important element of the Church of England's doctrine of marriage as recognised and expounded in BCP. It was underwritten by a provision in the *Act of Uniformity* effectively expelling and precluding from the Church of England priests who were not episcopally-ordained or who declined to attend to this. Many clergy chose to leave the Church rather than "conform" over this.

94. Both of the marriage services in *AAPB* and one of the two marriage services in *APBA* contain rubrics requiring the involvement of a priest. However, *APBA's* Second Order and both forms approved in the Diocese of Sydney permit a "minister" to officiate. To our knowledge, the validity of these departures has not been challenged on the basis of non-conformity with the Fundamental Declarations or Ruling Principles.

(vi) <u>*Despite the Church of England's doctrine of marriage as laid down in BCP, many non-conforming marriages were recognised as valid even by ecclesiastical courts*</u>

95. Because BCP is directly recognised as an "authorised standard of worship and doctrine" in s 4 of the *Constitution* it is not strictly necessary to explore the details of its statutory backing in England in 1662. But since that Act only required uniformity of worship in England, Wales and the Town of Berwick upon Tweed, the Church of England and its courts from the outset were confronted with what may be called recognition issues touching marriages solemnised elsewhere. How would the Church approach a wide span of ecclesiastical law issues that turned upon the status of marriages solemnised in Presbyterian Scotland, or in Catholic France, or in "heathen" countries as the British Empire spread?

96. In Old Testament times, Israelites married outside "the faith" and outsiders (like Ruth) married into the faith. Each activity disobeyed the injunction of *Deuteronomy* 7: 3-4. See also 2 *Corinthians* 6: 14. But all such marriages appear to have been recognised as valid in Biblical times, with many consequences.

97. Some scholars have even viewed *Genesis* 2:24 as focussing on this ethnicity issue rather than the sexual differentiation of the couple who have left father and mother to bond in marriage. According to Dr Megan Warner the verse may be a response to the pressing social issue of intermarriage and "an acknowledgement of the powerful attraction that causes human beings to seek relationship in opposition to the wishes of their parents, society or religion" (Megan Warner, "'Therefore a Man Leaves his Father and His Mother and Clings to His Wife: Marriage and Intermarriage in Genesis 2:24" *JBL* 136 (2017) 269-288. See also her contribution to the *Doctrine Commission Essays* esp at pp 100-103). It will be for others in the current theological debates to follow or contest this radical thought about one of the Bible texts used in the ongoing debates. But the very idea that disapproved marriages may still deserve to be recognised because of what would happen to children and others if they are not, underpins this aspect of English canon law that forms a part of any rational "doctrine of marriage".

98. Sydney (306) accepts that a polygamous marriage is still a marriage in the Bible, albeit one that is not part of the "normative pattern" as demonstrated in the unfolding of the Old Testament.

99. The status of marriage (or its absence) used to have extremely significant impacts upon property and regal succession, rights to custody, duties to maintain wives and children, the legitimacy of children, the accessibility of relief under matrimonial causes jurisdiction, social security etc. Nevertheless, the ecclesiastical courts of the Church of England and the royal courts in that country always accepted as valid a range of marriages that did not conform to all the rules and teachings of BCP's service. This was

able to be done because, in truth, those rules and teachings never addressed the status of marriages formed under other rites or in other places. And, over the years after 1662, the marriage law of England and later its colonies (including the law as to recognition of overseas marriages) was frequently adjusted by parliaments with those adjustments being accepted by the Church. By the early nineteenth century the law in England and the Australian colonies permitted and recognised registry weddings.

100. Needless to say many of such marriages ignored BCP's teachings and rubrics about the divine origin of the institution, the presence of an episcopally-ordained priest, marriage taking place in an Anglican church building, publication of banns etc. The validity of these marriages was nevertheless recognised. The highest courts of the Church of England ruled that marriages effected in England or abroad between Jews and between Quakers according to their own customs and rites were valid, as were marriages abroad according to Roman Catholic rites even when they were prohibited in England (see *Andreas v Andreas* (1737) 1 Hagg Con App 9, 161 ER 637; *Scrimshire v Scrimshire* (1752) 2 Hagg Con 395, 161 ER 782; *Lindo v Belisaro* (1796) 1 Hagg Con 216, 1 Hagg Con App 7 (Court of the Arches), 161 ER 530, 636; *Ruding v Smith* (1821) 2 Hagg Con 371 at 385, 391, 161 ER 774 at 781, 779; Sir John Baker, *An Introduction to English Legal History* 5th ed p 517). In *Scrimshire* at 417, 790, Sir Edward Simpson wrote:
"All nations allow marriage contracts; they are 'juris gentium', and the subjects of all nations are equally concerned in them; and from the infinite mischief and confusion that must necessarily arise to the subjects of all nations, with respect to legitimacy, successions, and other rights if the respective laws of different countries were only to be observed, as to marriages contracted by subjects of those countries abroad, all nations have consented, or must be presumed to consent, for the common benefit and advantage, that such marriages shall be good or not, according to the laws of the country where they are made."

101. So called "common law marriages" formed by no more than the exchange of vows privately ("in the sight of God") between a man and a woman without the participation of an episcopally-ordained priest were also recognised in some circumstances by ecclesiastical courts in England until the nineteenth century (see *R v Millis* (1844) 10 Cl & Fin 534, 8 ER 844). Their validity outside England was affirmed by Dr Lushington in *Catterall v Catterall* (1847) 1 Rob Ecc 580, 163 ER 1142. Some Australian cases have suggested that an episcopally-ordained priest was essential (see Dickey, *Family Law,* 5th ed, pp 140-3) unless local conditions meant that none such was reasonably available. The Family Court of Western Australia has declared that there was no such obligation if both parties were non-Christian (see *Hooshmand* [2000] FLC 93-044 at p 87,684). All of this case law is now to be read subject to the *Marriage Act 1961* which validates a huge range of marriages formed otherwise than according to Anglican (let alone BCP) rites.

102. The details do not really matter. But what does matter is that much of English canon and common law as stated in BCP's doctrine of marriage was never regarded as applicable

other than as prescribing the criteria for a valid solemnisation of marriage for those wanting or compelled to use the Church of England for that purpose. And compliance with those criteria was never treated as a matter of faith even though Biblical support was invariably invoked to bolster the rules even as they changed. In the chapter about marriage in Phillimore, *The Ecclesiastical Law of the Church of England,* 2nd ed, vol 2, p 551, the learned author quotes Lord Stowell's description of canon law as "a system which, in spite of its absurd pretensions to a higher origin, is in many of its provisions deeply enough founded in the wisdom of man" (*Dalrymple v Dalrymple* (1811) 2 Hagg 54 at 64, 161 ER 665 at 669).

103. Recognition issues of a legal nature touching same-sex marriages cannot be ignored by the ACA whether or not it ever changes its position on the solemnisation of such marriages and whatever position(s) it adopts about blessings. Just as the law of bigamy and divorce must now adjust to the presence of valid same-sex marriages, is it not unthinkable that an Anglican minister officiating at a marriage service would ignore a claim of impediment where one of the persons seeking to be joined in marriage is already married (albeit to a same-sex partner)? And would the statutory parentage of such a person be denied if he or she brought a child for baptism? And would a minister cavil at the prayer for the parents of the baptised child which is an integral part of the ACA's modern liturgies for infant baptism? (Apparently some would do so, in light of the Board of Assessors' opinion that "by the very act of standing up in front of the church to make [baptismal] promises as a same-sex couple, the couple are publicly declaring themselves to be unrepentant".) Our rhetorical questions should not be read as importing a legal ruling by the Tribunal. Nor do they lead directly to the constitutional validity of the blessing of civil marriages. But they are offered to suggest the spread of issues (legal and missional) now confronting the ACA and deserving of serious attention by General Synod regardless of the immediate outcome of this Reference.

(vii) *Prohibited degrees of consanguinity and affinity*

104. In the Form of Solemnization of Marriage there is a rubric that recognises that statutory changes relating to "impediments" might occur. It states that:
"if any man do allege and declare ***any impediment****, why they may not be coupled together in Matrimony, by God's law,* ***or the laws of this Realm****; and will be bound, and sufficient sureties with him* [etc] *then the solemnization must be deferred, until such time as the truth be tried."* (emphases added)

105. If, as Sydney suggests (320), the identical sexual identity of the spouses is itself an impediment (technically, we would add, a diriment impediment) rendering a marriage void and of no effect, then it might become necessary to explore the impact of the rubric's reference to "the laws of this Realm" upon some of the basic issues arising in the Reference. We imply no position on the matter. This line of argument has not been

taken up by anyone in the Reference and in the upshot it is not necessary to explore it in order to answer the Questions referred. See Jackson, op cit, p 20. But cf at p 131.

106. The rubric about impediments certainly recognised that the marriage of persons within the prohibited degrees was unlawful in both church and state. Canon 99 of the Canons of 1603 (*None to marry within the degrees prohibited*) stated that no person shall marry within the degrees "prohibited by the laws of God" and expressed Archbishop Parker's Table published in 1563 based on the 1536 statute discussed below. The 1603 Canon further declared that "all marriages so made and contracted shall be adjudged incestuous and unlawful, and consequently shall be dissolved as void from the beginning, and the parties so married shall by course of law be separated". (This Table differed from the one found at the back of the copies of BCP in general circulation in Australia in the later twentieth century because of the developments noted below.)

107. Until the twentieth century the Church of England's prohibited degrees of affinity and consanguinity (as set out in the said Table cited in Canon 99) were those declared by Henry VIII's *Second Succession Act* of 1536 (28 Hen VIII c 7). (See also (1540) 32 Hen VIII c 38. This and the Act of 1536 are reproduced in *The Complete Statutes of England Classified and Annotated,* vol 9, pp 316-8.) The 1536 Act's Table of prohibited degrees had varied the one in the first *Succession Act* of 1533 (25 Hen VIII c 22) in order to thread a careful path arriving at an unquestionable position relating to the validity of the king's marriage to Jane Seymour. The 1536 Act "cleverly rework[ed] the prohibited degrees so that Henry's marriages to Anne and Catherine were void but his marriage to Jane is valid. In doing so, the Act clarified the prohibited degrees of relationship in much the same terms as the [First Succession Act] but reintroduced the doctrine of affinity by sexual relations." (Maebh Harding, "The curious incident of the Marriage Act (no 2) 1537 and the Irish statute book" (2012) 32 *Legal Studies* 78 at p 82). The 1536 Act would become part of the law of marriage that arrived with British settlement in Australia (see *Miller v Major* (1906) 4 CLR 219).

108. A marriage in breach of these rules was declared by 28 Hen VIII c7, s 9 and by Canon 99 of 1603 to be" prohibited by the laws of God". It was voidable in the ecclesiastical courts whose decrees of nullity were also recognised in the royal courts. Marriage between persons of prohibited degrees could have the harshest of consequences. For example, a man who (having had sexual relations with his wife during her lifetime) had married his deceased wife's sister could at any time during his own lifetime choose to obtain a decree of nullity thereby throwing off all obligations for the maintenance of his "wife" and bastardising the children of the union with severe economic and social consequences (see, for example, *Wade v Baker* (1876) 5 WW&a'B (IE&M) 63). This, despite such marriages being common when women died in childbirth leaving their widower to bring up large families. See also *Obst v Obst* [1912] St R Qd 157 which involved a woman marrying her deceased husband's brother.

109. The preclusion upon marrying a deceased wife's sister is not explicitly supported by Scripture (*Leviticus* 18: 18 speaks only of having sexual relations with a wife's sister while the wife is living). But the Church persuaded itself that it was "contrary to the laws of God" stemming from the principle that husband and wife were "one flesh" (*Gen* 2: 24) and a corollary of the principle that he or she who was related to one by consanguinity was related to the other by affinity in the same degree.

110. The law as to prohibited degrees would be changed from time to time, both in England and in the Australian colonies. It eventually became permissible for a man to marry his deceased wife's sister; and belatedly for a woman to marry her deceased husband's brother. No doubt the Church's concurrence with these statutory changes only occurred after arriving at a deeper understanding about the Biblical principles upon which these aspects of the 1662 BCP doctrine of marriage were so confidently based. No one appears to have contended that compliance with these rules was necessary for salvation. As the colonies/States legislated piecemeal to adjust the prohibited degrees the Church of England in Australia kept pace. Once the rules changed in the relevant jurisdiction, men were permitted to marry their deceased wife's sister according to Anglican rites.

111. It is difficult to comprehend that s 4 of the *Constitution* would have had the effect of entrenching the 1662 or even 1962 positions on consanguinity and affinity even as "Level 2 doctrine" (cf Sydney (295-6, citing Bishop Stead in the *Doctrine Commission Essays* at pp 33-34). The *Matrimony (Prohibited Relationships) Canon 1981* now prohibits ministers from solemnizing matrimony between persons who are within a prohibited relationship as extensively re-defined in that Canon.

(viii) *"One flesh" and the wife's duty of "obedience"*

112. The "one flesh" metaphor taken from Genesis 2: 24 was repeated by our Lord himself when expounding his teaching as to the indissolubility of marriage and by the author of the Epistle to the Ephesians. Its impact upon impediments to lawful marriage has already been noted. English law, inherited in the Australian colonies, would build further upon the metaphor with its own doctrines of coverture and of the inability of a wife to testify against her husband or to sue her husband in tort for assault or false imprisonment (see *Sir Thomas Seymore's Case* (1613) Godbolt 215, 78 ER 131; *Phillips v Barnett* (1876) 1 QBD 436; *Tinkley v Tinkley* (1909) 25 TLR 264). These rules would be modified, then discarded, by common law and statutory developments in the nineteenth and twentieth centuries.

113. A wife's duty to "obey" her husband is repeatedly proclaimed in the BCP liturgy and its associated readings and in Homily 18. It was understood in 1662 as including her irrevocable consent to sexual intercourse, to physical discipline, and even involuntary confinement. In 1736 Sir Matthew Hale wrote that "the husband cannot be guilty of

rape committed by himself upon his lawful wife, for by her matrimonial consent and contract the wife hath given herself up in this kind unto her husband which she cannot retract" (*Pleas of the Crown* 1971 ed, p 629). Rulings of church and royal courts would enforce these principles but again first modify then reverse them.

114. It is unclear whether a husband's immunity from the law of rape had ceased to operate by 1962. Cf *R v McMinn* [1982] VR 5. Only in 2012 would the High Court rule that (in 1963 at least) a husband could be guilty of raping his wife (*PGA v The Queen* (2012) 245 CLR 355 (Heydon and Bell JJ dissenting)). Rape in marriage would be outlawed by the apex courts in England and Australia in the 1990s albeit with then clear indications as having ceased to be lawful well before the 1960s (see *R v L* (1991) 174 CLR 379, *R v R* [1992] AC 599).

115. In very recent times, the ACA itself has recognised this canonical and legal volte-face with public apologies about past failings to protect against the sexual abuse of wives by clergy and others. No one suggests today that adherence to this aspect of the Church's "doctrine of marriage" in 1662 or 1962 was a "doctrinal" matter in the sense of a teaching on a question of faith or something going to salvation.

116. Most if not all dioceses now offer couples seeking to be married in Church the option of a liturgy that omits any reference to the wife's duty of obedience or to spousal submission other than mutual submission. The General Synod approved such liturgies in AAPB and APBA without any suggestion of constitutional impediment stemming from the Fundamental Declarations or Ruling Principles. See also the Diocese of Sydney, *Common Prayer: Resources for gospel-shaped gatherings* (2012), A Service for Marriage Form 1.

(ix) <u>*Permitting divorced persons to remarry in Church*</u>

117. As English canon and secular law stood in 1662, neither party to a valid marriage could remarry during the lifetime of the other. Under Canon 107 of 1603, remarriage after divorce was precluded while a former spouse remained alive. "Divorce" in this context meant divorce *a mensa et thoro,* the limited form of relief that English ecclesiastical courts could provide in the era when BCP was promulgated.

118. BCP's *Form of Solemnization of Matrimony* also proclaimed the Church's clear doctrine about the indissolubility of holy matrimony (see references to "as long as ye both shall live", "till death us do part" and "let no man put asunder"). (We respectfully but firmly disagree with what Bishop Stead says to the contrary in the *Doctrine Commission Essays* p 45. Contrast Sydney (302).)

119. In 1670, starting with a statute permitting John Manners, Lord Roos to remarry in order to beget a legitimate heir, private Acts of Parliament began to be enacted so as to

permit remarriage during the lifetime of a spouse after divorce *a mensa et thoro* (which did not dissolve the marriage) had been pronounced by an ecclesiastical court on the grounds of the other spouse's adultery. Later Acts began to dissolve particular marriages. There was one such statute in New South Wales in 1853.

120. Following the lead of the English *Matrimonial Causes Act 1857,* colonial parliaments in Australia legislated to permit Supreme Courts to "dissolve" marriages. The grounds of matrimonial fault included desertion and cruelty as well as other grounds that did not align exactly with the understanding of many churchmen about Christ's restricted endorsement of divorce and remarriage. This vexed question led to lengthy debates within the Church of England and the Church in Australia. Some senior clergy fought tooth and nail against the legislation (see Henry Finlay, *To Have but Not to Hold: A history of attitudes to marriage and divorce in Australia 1858-1975*). In the upshot, colonial, state and federal parliaments legislated to allow divorce (and therefore re-marriage) on a variety of grounds wider than those addressed in Holy Scripture. The shift to "no-fault" divorce in Australia in 1975 added further canonical complications.

121. The Church was not, of course, obliged to countenance the second marriage of divorced persons. But, following vigorous debate, the outcome was the *Marriage of Divorced Persons Canon 1981* associated with the repeal of the relevant 1603 Canons that were in force in some but not all dioceses. In the previous year, 1980, the consistency of such a Canon with both the Fundamental Declarations and the Ruling Principles was put to this Tribunal for its Opinion and the Tribunal (Cox J dissenting) held that there was no inconsistency. The Tribunal was however unanimous that the Primate's Reference raised "no matter involving doctrine within the meaning of section 58 (1) of the Constitution which required the Tribunal to obtain the opinions of the House of Bishops and of the Board of Assessors". In short, the General Synod came to its own mind on the vexed exegetical and hermeneutical issues arising from quite explicit teachings of our Lord that went to the heart of an important aspect of the Church's teaching on marriage. This exercise was not seen to raise any of the constitutional impediments ventilated in the present Reference.

122. Consistent with the focus of the liturgical developments touching the Church's teaching on marriage over the centuries, the 1981 Canon stipulates that "the marriage of a divorced person shall not be solemnized according to the rites and ceremonies of this Church" etc "unless" fairly open-ended stipulations are met. Those stipulations devolve authority to the diocesan Bishops of the ACA to consent to the solemnisation if the bishop and the proposed celebrant are "satisfied that the marriage of the divorced person would not contravene the teachings of Holy Scripture or the doctrines and principles of this Church". With respect to those who see it otherwise (see Bishop Stead in *Doctrine Commission Essays* pp 45-46), this pragmatic outcome where the controversy was addressed in an ultimately disciplinary framework did not demonstrate that the BCP teachings on marriage and/or divorce were "doctrine" in the s 74 (1) sense.

(x) *<u>The continuing preclusion of solemnising same-sex marriages: Constitution, s 71 (2)</u>*

123. None of these developments touched that aspect of the law of marriage that precluded the solemnisation of a same-sex marriage in an Anglican church and that deemed it null and void under both canon law and the general law. This aspect of the law of the Church of England carried across into the Australian Church via s 71 (2) of the *Constitution* just like the preclusion upon the ordination of women. The preclusion certainly operated at least at the category of ritual. Being such, "nothing **in the *Constitution*** [authorised] the synod of a diocese or of a province to make any **alteration** in the ritual or ceremonial of this Church except in conformity with an alteration made by General Synod" (see s 71 (1), final paragraph, emphases added).

124. Whatever may be said about the Wangaratta Regulations, they do not involve the solemnisation of matrimony. Nor do they in their terms or effect involve the Synod of the diocese purporting to alter any authorised rite in the BCP. Nor did the diocesan Synod invoke the *Constitution* as the authority for making the Regulations. As indicated above, the General Synod conferred a liturgical discretion upon ministers in the diocese available so long as exercised in conformity with the 1992 Canon and any diocesan regulation made in accordance with that Canon. So long as it legislates upon the subject of ritual and ceremonial in conformity with a canon of General Synod (and Parts 1 and 2 of the *Constitution*), a diocesan synod may legislate upon the subjects of ritual and ceremonial (see 1991 Opinion per Cox J at 17, 30; per Archbishop Rayner at 1-2; per Tadgell J at 4-7). That flows from the plenitude of the legislative authority of General Synod in that area as confirmed by ss 4, 5, 26 and 71. Section E above demonstrates why the conduct of the Wangaratta diocese conforms generally to the 1992 Canon. We shall later address the more particular issues of conformity with s 5 (3) of that Canon and with the Fundamental Declarations.

(xi) *<u>Some conclusions from the foregoing and addressing the contrary arguments in the submissions</u>*

125. Depending on context, "marriage" may mean the ceremony or the institution (or both). Understanding the focus of BCP's teaching on marriage (what lawyers call its field of operation) is an essential step in determining what (if any) positive or negative teachings it propounds and what (if any) bearing it has upon a service that does not solemnise marriage.

126. The untidy history of the Church's grappling with the messages of Holy Scripture as regards liturgies and laws relating to marriage should caution against declaring that any aspect of "the doctrine of marriage" is clear beyond argument, eternally rooted in Scripture, and beyond reformation by the Church in light of deeper understanding of the

teachings of Jesus Christ and of Holy Scripture. Indeed, the presence of two sets of marriage liturgies in the ACA with very different teachings about "submission" by wives should caution against assuming that the ACA's "doctrine of marriage" speaks with a single voice.

127. As indicated, many of the BCP teachings were revisited or departed from, even for those married in England in the (Established) Church of England after 1662. Parts of BCP's "doctrine of marriage" underwent considerable reformulation and some would be changed entirely long before the creation of the Anglican Church of Australia in 1962. Other parts changed afterwards without claims to be doctrinal, however defined.

128. These developments also confirm, perhaps less clearly, that the Established Church of England and the Anglican Church in Australia before and after 1962 were generally content to leave the complex parameters of a marriage law that had to function across the nation and across the world to the law of the State. Cf 1987 Opinion per Tadgell J at 89-90 (BCP is to be interpreted in its historical context with the possibility that the canonical ineligibility of women for ordination stemmed from the common law). The Church could usually rely upon its political clout to get its way.

129. Of course, logic does not demand that the BCP teachings about the union of one man and one woman must be treated in a similar conceptual framework. But this cannot be done by simplistic assertions about the inalterability of the BCP "doctrine of marriage" or an insistence upon acceptance of the totality of the scriptural teachings about marriage that were endorsed and enforced in 1662 or even 1962. The matters considered in this Section raise additional difficulties that will have to be confronted when the language and jurisprudence of the Fundamental Declarations and the Ruling Principles are addressed, especially in light of the *Constitution's* definition of "doctrine".

130. One thing that is clear is that it is dangerous and unhelpful to elide "the Church's doctrine of marriage" with the *Constitution's* term "doctrine" (defined as meaning "the teaching of **this Church** on any **question of faith**" (emphases added)).

131. The task remains of deciding whether the presently critical aspect of the Church's "doctrine of marriage" is doctrinal in the constitutional sense; and **also** what (if any) bearing this has on the constitutional validity of a service of blessing that extends to the civil marriage of a same-sex couple.

132. Sydney submits that the BCP teaching about "one man" and "one woman" which remains an aspect of the ACA canon law of solemnisation of marriage is a teaching proclaimed to the whole world about the Church's attitude on a fundamental matter. As this was expressed by Bishop Stead in the *Doctrine Commission Essays* (p 43): "BCP views marriage as 'God's ordinance' for all humanity, as the pattern of relationship established by God from the beginning, and normative for all human 'coupling' relationships that are

valid in his sight." This proposition was put in contention in some of the other submissions; and the precise field occupied by the prohibition upon "coupling" remains somewhat elusive. But, subject to the Fundamental Declarations that deal otherwise than with "doctrine", this Tribunal only needs to address it if the posited BCP view is a matter of "doctrine" in the strict constitutional sense of being a teaching of the ACA "on a question of faith". For the reasons outlined in the next Section we do not consider that it is.

133. A few of the submissions did recognise the importance of showing that the Wangaratta blessing service contravened or departed from "doctrine" in the constitutional sense. And others effectively addressed the criteria of the constitutional definition in the course of urging that their understanding of the Biblical teachings entailed matters going to salvation. These will now be addressed.

(F) The Wangaratta Blessing Service is not "contrary to or a departure from the doctrine of this Church"

134. Part 1 of the *Constitution* consists of Chapter 1 – Fundamental Declarations (ss 1-3) and Chapter II – Ruling Principles (ss 4-6). These provisions point to several authoritative sources from which the Tribunals and synods of the ACA ascertain the doctrine (including "any principle of doctrine" (see s 4)) of the Church that may inform and control their various jurisdictions.

135. Those sources do not include bodies outside the ACA whether or not they are the Church of England, the Lambeth Conference, or Anglican Churches or bodies which may or may not be in communion with the Church of England or participants at the Lambeth Conference. This does not preclude consulting such "external" sources for their informative or persuasive effect, so long as care is taken (in this Tribunal) to avoid the distorting effect of the different constitutional or institutional settings from which statements or declarations by such entities proceed.

136. Resolutions of the General Synod or of diocesan synods are similarly only of persuasive force in this constitutional setting. *A fortiori*, because few canons of General Synod have automatic force throughout the Church (see *Constitution,* s 30).

137. It is unnecessary to consider the operation of General Synod "statements as to the faith ritual ceremony or discipline of this Church" as contemplated by ss 4 and 26 of the *Constitution* because none have been invoked in this matter. Rule V (Green Book p 439) shows the distinction between statements and resolutions.

138. The meaning of the expression "the doctrine of this Church" in s 5 (3) of the 1992 Canon is also revealed by the General Synod's *Rule XIX, Re Interpretation* (Green Book p 458).

That Rule declared that s 74 of the *Constitution* “shall apply to the canons ...of Synod unless the context or subject matter thereof indicates the contrary”. The Rule was repealed by the *Interpretation Canon 1995,* but the repeal did not affect its application to canons made before 1 January 1996 (see *Interpretation Canon 1995,* s 12).

139. Nothing in the context or subject matter of the 1992 Canon indicates that “doctrine” in s 5 (3) of the 1992 Canon has a meaning other than as stated in s 74 (1) of the *Constitution.* Indeed, the corresponding provisions in the two Canons authorising APBA and AAPB appear to show a general pattern for canons relating to liturgy. The *Australian Prayer Book Canon 1977* (s 5 (3)) and the *Prayer Book for Australia Canon 1995* (s 6 (3)) authorise deviations so long as they do not contravene “a principle of doctrine or worship referred to in section 4 of the Constitution”.

140. As indicated, many submissions in this Reference advanced positions about the ACA’s inherited “doctrine of marriage” as expounded in BCP and the inconsistency of the Wangaratta Regulations with it. But Section (E) above demonstrated that at many points in time between 1662 and the present day, that doctrine was changed in response to different understandings of Scripture, changing perceptions about the respective roles of men and women, and the need to accommodate the law of the land as well as the laws of other lands where couples marry abroad. These changes never signalled that the Church of England’s teachings expounded during the solemnisation rite were being proclaimed as matters going to salvation or part of the “faith” of the Church.

141. This pattern of change continued after the commencement of the *Constitution* in 1962 with its preclusion of departure from the Fundamental Declarations and its limited entrenchment of BCP “principle(s) of doctrine or worship” in the Ruling Principles. The General Synod has passed three canons relating to holy matrimony (*Solemnization of Matrimony Canon 1981, Marriage of Divorced Persons Canon 1981, Matrimony (Prohibited Relationships) Canon 1981*). As far as is known, no one raised constitutional impediments to these Bills proceeding according to the requisite processes, including the special bill process required for liturgical changes. This Tribunal in its Opinion of 1980 about the proposed *Marriage of Divorced Persons Canon* endorsed this position both in its Opinion and in its ruling that s 58 of the *Constitution* was not engaged.

142. “Doctrine” is a constitutional concept which (where it applies) has a quite different meaning to the non-constitutional concept of this Church’s (or the Church of England’s) “doctrine of marriage”. On closer analysis, the latter are a changing body of rules and teachings (often but perhaps not necessarily) about the marriages that may be solemnised in the Church. Not every aspect of liturgy conveys “doctrine” in any sense of that word and certainly not in the sense attributed in s 74 of the *Constitution*.

143. The meaning of “doctrine” in the *Constitution* is closely defined in s 74 (1). Unless the context or subject matter otherwise dictates, it means “the teaching of this Church on

any question of faith". "Faith" is there defined to include the obligation to hold the faith, but this adds nothing useful in the present context. References to faith "extend to doctrine" unless the context or subject matter otherwise indicates (s 74 (4)).

144. Invocation of "the Church's doctrine of marriage" does not provide a legal touchstone for understanding why a marriage in a Presbyterian Church or a registry must be recognised and may be blessed in an Anglican context, whereas a same-sex marriage may not.

145. The Tribunal's understanding of "doctrine" in the constitutional context has already been mentioned with reference to its 1980 Opinion. Other determinations discussed below have also explained why and how the restricted constitutional definition applies in relation to the operative scope of ss 3, 4 and 58 of the *Constitution*. We have already explained why this also applies to s 5 (3) of the 1992 Canon.

146. In its 1987 *Report Re the Ordination of Women to the Office of Deacon Canon 1985,* the Tribunal (Archbishop Robinson dissenting) held that the said 1985 Canon was not inconsistent with the Fundamental Declarations or the Ruling Principles in the *Constitution*. This conclusion repeated Opinions of the Tribunal given in 1980, 1981 and 1985. However, in 1987 the Tribunal had been presented with fresh arguments that included sharply competing submissions by the parties to the reference. There was also a spread of "opinions" obtained by the Tribunal pursuant to s 58 of the *Constitution* from the House of Bishops and a board of assessors. These were about whether there were "commands of Christ" or at least a scriptural doctrine that prohibited the ordination of women to the priesthood.

147. Six members of the Tribunal ruled in 1987 that s 3 of the *Constitution* was not contradicted (see per Mr Justice Cox, President at p 14, Archbishop Rayner at pp 42-48, Bishop Holland at pp 73-77, Mr Justice Tadgell at pp 79-82, Mr Justice Young at pp 98-100, Mr K R Handley QC at pp 113-116). Some of those reasons addressed and rejected the scriptural arguments in their terms. But of particular interest in the present context were the following remarks showing why the Fundamental Declarations and Ruling Principles were not even engaged in the controversy.

148. In the 1987 opinion, after referring to the definition of "doctrine" in s 74 (1), Archbishop Rayner (whose reasons concerning Chapter 1 of the *Constitution* were generally adopted by Cox J: see p 14) said (at p 49):
"The meaning of faith must therefore be taken from s.1 of the Fundamental Declarations as being 'the Christian Faith as professed by the Church of Christ from primitive times and in particular as set forth in the creeds known as the Nicene Creed and the Apostles' Creed'. With this must be taken the s.2 description of the canonical scriptures as 'the ultimate rule and standard of faith'. Account must also be taken of the statement in Article 6 of the Thirty-Nine Articles that 'Holy Scripture containeth all things necessary to salvation: so that whatsoever is not read therein, nor may be proved thereby, is not to be

required of any man, that it should be believed as an article of the Faith, or be thought requisite or necessary to salvation'.

'Doctrine' must therefore be understood in the Constitution as the Church's teaching on the faith which is necessary to salvation. That faith is grounded in scripture and set forth in the creeds; and the Church's doctrine or teaching on that faith may be explicated and developed, provided it is always subject to the test of scripture."

149. Young J said (at pp 108-9):
"[It] is necessary to...consider the definition of 'doctrine' in s. 74 (1) of the Constitution. The word is defined as meaning 'The teaching of this Church on any question of faith'. 'Faith' is then defined as including 'the obligation to hold the faith'. The word is used in contradistinction to 'discipline' which is said to include 'the rules of this Church and the rules of good conduct'. [This referred to s 76 (2) in its then form. See now s 72 (9). This change has no present bearing.] *The definitions are not completely in point because 'This Church' means 'The autocephalous Anglican Church of Australia' whereas in s.4, the doctrine of the Church is the doctrine of the Church of England as at 1955. Nonetheless, s.74 seems to me to make a very definite distinction between the rules of order and conduct on the one hand, and the teaching of the Church in matters of faith on the other.*

Reverting to the question of 'principle of doctrine or principle of worship' [in s 4]...*it connotes 'A fundamental truth or proposition on which many others depend...."*

[1955 was the year when the text of the *Constitution* was approved by the General Synod. Young J went on to quote with approval the following remarks of the majority (15 to 5) of the House of Bishops which had reported to the Appellate Tribunal their opinion that the 1985 Canon was not inconsistent with the Ruling Principles:]

A principle of doctrine or worship is a fundamental axiom of faith (expressed propositionally or doxologically) which may form the basis of a deductive argument whereby further doctrinal or doxological statements may be articulated. It is precisely such basic principles of doctrine or worship which govern the revision or alteration of forms of worship or behavioural rules of discipline. A 'principle of doctrine or worship' is not itself a rule of discipline but a controlling factor in the alteration or revision of rules of discipline, i.e., a ruling principle.'"

150. Mr Handley QC (as he then was and now is again) said (at pp 115-6, emphasis in original):
"While questions of doctrine, in the ordinary sense of the word, were central to the issues debated before us, doctrine is defined in Section 74 (1) of the Constitution as meaning the teaching of this Church on any question of faith. The definition of faith in Section 74 (1) is not at all helpful but the sense in which the word is used in the Constitution appears from Section 1. This refers to the Christian faith as professed by the Church of Christ from primitive times and in particular as set forth in the creeds.

Notwithstanding the importance of the issues before us, the strongly held views on all sides, and the fundamental nature of the theological and biblical arguments which have been raised, in my opinion the questions involved are not part of the Christian faith professed by *the Church, they are not dealt with in the Creeds, and do not directly involve matters necessary for salvation. This question before us therefore does not involve any principle of 'doctrine' as that expression is used in the Constitution."*

151. Tadgell J suggested (at pp 84-85) that the constitutional definition of "doctrine" is displaced in the phrase at the opening of s 4 about the Church retaining and approving "the doctrine and principles of the Church of England embodied in the Book of Common Prayer". But Tadgell J agreed with the other members of the Tribunal in holding that General Synod is armed by ss 4, 5 and 26 with authority to legislate upon matters of doctrine, worship, faith, ritual, ceremonial and discipline consistently with the Fundamental Declarations and (where applicable) the duty imposed by the concluding words of s 4 not to contravene "any principle of doctrine or worship laid down in" the formularies (see at p 87). In these conclusions we understand him to be referring, like the others in the majority, to "doctrine" in the narrow constitutional sense. As indicated, he agreed with the others in the majority in ruling that there was no inconsistency with the Fundamental Declarations or the Ruling Principles.

152. In 1991, the issue of female ordination was re-agitated in the Tribunal (see *Report and Opinion on the eleven questions appertaining to the ordination of a woman to the order of priests or the consecration of a woman to the order of bishops* (hereafter "the 1991 Opinion")). The members adhered to their respective positions on Scripture and again concluded (Archbishop Robinson dissenting) that there was no inconsistency with the Fundamental Declarations or Ruling Principles.

153. On this occasion the Tribunal had sought and obtained what turned out to be a divergent range of "opinions" from the House of Bishops and a board of assessors. In doing so, the Tribunal initially had relied upon s 58 (1) of the *Constitution* which states:
"Before determining any appeal or giving an opinion on any reference the Appellate Tribunal shall in any matter involving doctrine upon which the members are not unanimous upon the point of doctrine and may, if it thinks fit, in any other matter, obtain the opinion of the House of Bishops and a board of assessors consisting of priests appointed by or under canon of General Synod."

154. Portions of the opinions obtained by the Tribunal were quoted and discussed in the reasons of some of the members. But in the compendious Opinion of the Tribunal there is the following statement:
"The Tribunal obtained, under s. 58 of the Constitution, the opinions of the House of Bishops and the Board of Assessors on certain issues that were raised by the questions. In the opinion of the majority of the Tribunal the referred questions, independently of those issues, do not involve any points of doctrine upon which the Tribunal was obliged to obtain opinions under s. 58 before giving its opinion on the questions."

155. The eleven questions referred in 1991 included one (Question 8) that raised issues about the preclusive effect of ss 1, 2, 3, 4 and 71 of the *Constitution.* This confirms in our mind that the majority accepted that the confined and compendious definition of "doctrine" in s 74 (1) governed the meaning of the word when appearing in ss 3 and 4 and 58 of the *Constitution,* as stated in the above-quoted reasons of four of its members in 1987.

156. The 1987 and 1991 References related to what was ultimately characterised by the majority of the Tribunal as a question of "discipline". But it was necessary for the Tribunal to navigate the Fundamental Declarations and the Ruling Principles before reaffirming that the General Synod had legislative authority to alter the law inherited from the Church of England which precluded female ordination.

157. Following this Reference, the Canon which became the *Law of the Church of England Clarification Canon 1992* was able to proceed without any perceived need to amend s 4 of the *Constitution.*

158. The Tribunal will not lightly depart from its earlier decisions on matters of constitutional import: see 1991 Opinion per Cox J at pp 2, 11; per Handley J at p 4; per Young J at p 34.

159. Wangaratta has submitted (11-13) that the Tribunal should adhere to this restricted meaning of "doctrine" in the phrase "principles of doctrine" in s 4 and in the interpretation of s 5 (3) of the 1992 Canon. It contends that there is no reason why a "principle of doctrine" thus defined may not have been laid down in the *Thirty-Nine Articles* or the authorised standards of worship. So there is work to be done even if the Tribunal rejected the opposing suggestion that the whole doctrine of marriage laid down in BCP (minus what are described as "practices") is to be protected as what Bishop Stead labels "Level 2 doctrine" (Sydney (294)).

160. Wangaratta also submits (11-12) that the framers of the *Constitution* made a conscious decision to avoid the risk of repeating the court battles in England over liturgy in the nineteenth century and those here that became known as the *Red Book Case* in the twentieth. Knowing that there were long-held and continuing divergences of view, the framers cannot have intended to arm the holders of one position with the means of laying charges against those of an opposite persuasion. Accordingly, so the submission proceeds, "doctrine" was defined narrowly:
"*to matters contained in the Fundamental Declarations from which no departure or divergence was permitted. For instance, belief in the Holy Trinity, the continued administration of the sacraments, the maintenance of the three orders of ministry and the Old and New Testaments containing all things necessary for salvation."*

161. Wangaratta submits that the teaching of the Church on any topic will only be "doctrine" for the purposes of the 1992 Canon if it is a teaching about the faith of the Church "as contained in" sections 1, 2 and 3 of the Constitution (14). We accept the general thrust

of this submission although each of the sections needs to be construed according to its terms. As Sydney points out (295), the examples offered by Wangaratta cannot be regarded as definitive. Sections 2 and 3, properly construed, operate as Fundamental Declarations whether or not they (entirely) state "doctrine" in the constitutional sense of a teaching on a question of the "faith" of the Church.

162. Sydney, on the other hand, argues for what we see as an unduly broad meaning of doctrine in this constitutional context. For reasons already explained, it is not enough to point to anything "sourced in" the Ruling Principles (292) or established by the formularies (296). Even for Holy Scriptures, as distinct from the authorised formularies, the mere provenance of a teaching in the canonical scriptures is not sufficient, because Scripture is the "**ultimate rule and standard** of **faith**...**containing** all things necessary for salvation (Fundamental Declarations s 2, emphasis added). "Containing" and "comprising" are different concepts, the former carrying the meaning of holding something inside, the latter carrying the meaning of forming an exhaustive list.

163. Obviously, "this Church" (the ACA) holds many doctrines inherited from earlier times. And the first of the Fundamental Declarations makes it clear that the ACA is not the only repository of the "Christian Faith as professed by the Church of Christ from primitive times". The Nicene and Apostles' Creeds are "particular" professions of that Faith.

164. The *Constitution* implies that "faith", "ritual", "ceremonial" and "discipline" are separate categories, although not necessarily hermetically sealed ones.

165. Sydney's submission that "there is no power in the Constitution to make canons in respect of the faith of the Church" (293, citing Bishop Stead, *loc cit,* p 33) is also unhelpfully broad. There is a vast jurisprudence on the broad scope of the words "in respect of". While synods may be precluded from detracting from or departing from so much of "faith" and "doctrine" as may be protected by ss 1-4, one would think that disciplinary measures could be enacted to hinder such departures or detracting by clergy.

166. We are not disposed to depart from the settled meaning of "doctrine" in the *Constitution.* Nothing has been put to us to justify such a step. The additional remarks in the following paragraphs add further explanation for the conclusion to which this Section of the Opinion proceeds.

167. The centrality of the Nicene Creed and the Apostles' Creed as professions of "the Christian Faith as professed" is expressly affirmed by s 1 of the *Constitution.*

168. These documents did not spring up overnight. In the early days after Pentecost there was no single Church. The apostolic leaders debated the application of the teachings found in the books later called the Old Testament in light of the teachings of our Lord when he

was on earth. As the years passed, these debates extended to the formulation of the "canon" of the New Testament. Connected to these debates but conceptually separate from them were attempts to formulate, extrapolate and define fundamental propositions upon which there was consensus. These would serve to inform both insiders and outsiders what was professed by that which was evolving into an entity (ie the "One Holy Catholic and Apostolic Church of Christ", to use the words in the *Constitution*).

169. These developments are traced by F F Bruce in *The Spreading Flame.* Part 1: The Dawn of Christianity tells the story in apostolic times. There were several small "churches" with different locations and foci (Jews and Gentiles), looking to different leaders, disagreeing about some things (eg the Council of Jerusalem) but relating to each other and generally supporting each other. Part II: The Growing Day tells about the progress of Christianity from the fall of Jerusalem to the accession of Constantine (AD 70-313). Its chapters include "The Fiery Trial", "Christian Life and Worship", "Church Government", "Relations Between Churches", "The New Testament Writings", "The Earliest Christian Creed" and "Early Christian Heresies".

170. Dr Bruce's Chapter XXVI ("Defining the Faith") discusses what became known as the Apostles' Creed. Its final paragraph states:
"The third century, however saw no finality in the debate on the doctrine of God: a full and detailed statement which would conserve all the values of the Biblical revelation of the Son's relation to the Father was not attained until the great Christological controversy of the early fourth century made a settlement imperative."

171. Part III of *The Spreading Storm* ("Light in the West") has early chapters on Constantine and Christianity, the Council of Nicea and "From Nicea to Chalcedon". The so-called Nicene Creed was sanctioned at the Council of Chalcedon (the fourth general council) in 451. Dr Bruce discusses various heresies relating to the person of Christ and His relationship to the Father including Arianism, Apollinarianism and Nestorianism. "From Nicea onwards, it was mainly by way of reaction to heresy that the Catholic Church went on to formulate her belief more and more explicitly." (p 311)

172. The *Service of Prayer Praise and Thanksgiving* in *A Prayer Book for Australia* includes the *Apostles' Creed or a shorter modern Affirmation of Faith.* Then follows immediately the response:
"*This is our faith, the faith of the Church:*

We believe in one God, Father, Son and Holy Spirit. Amen."

173. Associated with these developments culminating in the two great Creeds were the discussions leading to the broad consensus about the canon of the Christian Bible. The second of the Fundamental Declarations in the *Constitution* describes the scriptures as "given by inspiration of God and containing all things necessary for salvation" and states

that they are "the ultimate rule and standard of faith". This provision is discussed further below (para 194 ff). The point presently made is that the *Constitution* distinguishes between the scriptures and the Faith, confirming that not every proposition sought to be drawn from them is itself the Faith. This distinction was obvious in the history and formulation of the Creeds and it would be explicitly maintained in the careful formulation of Article VI of the *Thirty-Nine Articles.*

174. The words "in particular as set forth in the creeds" in s 1 of the *Constitution* remind that those Creeds are not the only source of information about the Christian Faith. The definition of "Doctrine" in s 74 (1) refers to the teaching of **this Church** (ie the ACA) on any question of faith. Much of the *Thirty-Nine Articles* addresses fundamental issues relating to the reformed faith of the Anglican Church and those matters of relevance to this Reference are discussed below (see para 198). The teachings on the faith embodied in the *Articles* were in turn reflected in the BCP, albeit that BCP's focus was and remains (relative uniformity in) patterns of worship. As developed elsewhere in this Opinion, the BCP never presented itself as a timeless or universal proclamation of doctrine (in its non-constitutional sense).

175. There are, however, BCP teachings about **salvific** grace in the Baptism and Holy Communion sacraments. See also the Catechism, which says nothing about marriage except for the statement about it **not** being one of the sacraments ordained "as generally necessary for salvation".

176. Article VI was a key aspect of the Reformation settlement. So far as relevant, it declares that:
Holy Scripture containeth all things necessary to salvation: so that whatsoever is not read therein, nor may be proved thereby, is not to be required of any man, that it should be believed as an article of the Faith, or be thought requisite or necessary to salvation.

The impact of this Article upon the interpretation of s 2 of the *Constitution* and the issues in this Reference are discussed further below (paras 194ff). Article VI states that nothing can be required to be believed as an article of faith or thought necessary to salvation if it cannot be read in or proved in Holy Scripture. This affirms the centrality of the Scriptures while serving as a further pointer to the distinction between propositions that can or may be demonstrated by Holy Scripture and "the Faith" itself. Or, as expressed in the Bishops' Response with particular reference to Article XX, "while not everything that is in Holy Scripture is necessary for salvation, the various parts of Scripture should not be posed against one another or be made to contradict one another."

177. The concluding phrases of Article VI speak separately of "an article of the Faith" and a thing "requisite or necessary to salvation". But this does not suggest that, even in the context of Article VI, the two concepts are wholly independent. Rather, an emphatic overlap is confirmed by the preamble to the Article ("Holy Scripture containeth all things necessary to salvation"), words which are picked up in the second of the Fundamental

Declarations in the *Constitution*. In our opinion, these textual pointers to the scope of the words "Christian Faith" and "faith" support the elision in Archbishop Rayner's and Justice Cox's reference to "Doctrine" being understood in the *Constitution* as "the Church's teaching on the faith which is necessary to salvation" (1987 Opinion, as set out in para 148 above).

178. In his reasons in the 1987 Reference about the ordination of women (para 150 above), Mr Handley QC declared that the theological issues raised in 1987 did not involve "doctrine" because they were "not part of the Christian <u>faith professed</u> by the Church, they are not dealt with in the Creeds, and do not directly involve matters necessary for salvation" (emphasis in original). This may or may not have adopted the elision in the conclusory formulation by Archbishop Rayner and Justice Cox. But, however interpreted, Mr Handley's approach lends no support to any argument that would leap from any statement in BCP to a profession of the "Christian Faith...by the Church". Nor (for reasons offered elsewhere herein) to an argument that the matters presently in issue involve a matter of faith in the relevant sense, let alone "directly involve matters necessary for salvation", to use Mr Handley's words.

179. The plain words of the constitutional definition, the pattern of action taken over the centuries in relation to the 1662 "doctrine of marriage", and the earlier rulings and actions of this Tribunal show that it is impossible to take the teachings in the BCP solemnisation liturgy and require that they be regarded as themselves "doctrine", as the Doctrine Commission appears to have done (see Sydney (300)). That would not only ignore the prescriptive definitional language of s 74 but it would effectively prevent the ACA from discerning new insights from the Holy Scriptures and the (better parts of) the history of the Christian Church. The General Synod may decide to make no more changes to the 1662 "doctrine of marriage" but we have not discerned a constitutional barrier against this. If there were one, it might affect a lot more than the presently topical same-sex marriage issue.

180. In our view, the matters in the present reference do not involve issues of faith or doctrine properly so called any more than the dispute over female ordination. The contending views about "**blessing**" same-sex marriages are strongly held. But, with respect to some of the recent rhetoric, and the actions taken abroad by some bishops of this Church, the blessing of same-sex marriages does not [necessarily] involve denial of God or repudiation of the Creeds or rejection of the **authority** of Holy Scripture or apostasy on the part of bishops or synods prepared to support such measures. The history of the Church's approach to many of the teachings about marriage in BCP confirms that none of the BCP teachings about marriage are "teaching(s) on the faith which is necessary to salvation", to use the formulation of Archbishop Rayner and Justice Cox. Nor do they engage matters dealt with in the Creeds or directly involve matters necessary for salvation, to use Mr Handley's words (assuming for the sake of argument any conceptually different approach on his part). Further explanation why the Biblically-

contentious issues do not involve aspects of "doctrine" or "faith" in the constitutional sense is set out in the reasons about specific Fundamental Declarations to which we now turn.

181. Accordingly, based upon the *Constitution's* meaning of "doctrine", we would conclude that there is no inconsistency with the "doctrine" components of the Fundamental Declarations. And, for the reasons given in Section (C) above, there was no contravention of s 5 (3) of the 1992 Canon either.

(G) The Wangaratta Regulations and their authorised Blessing Service are not otherwise inconsistent with the Fundamental Declarations

182. Each Reference raises the issue of compliance with the Fundamental Declarations in Part 1 Chapter 1 of the *Constitution*, albeit in terms of asking whether the Regulation/service is "consistent with" the Fundamental Declarations. Previous references have more aptly framed similar questions in terms of "inconsistency" and this better aligns with the general principles discussed in Section (A) above.

183. The Fundamental Declarations that have been invoked are that the ACA "holds the Christian Faith as professed by the Church of Christ from primitive times" (s 1); receives the canonical scriptures "as being the ultimate rule and standard of faith given by inspiration of God and containing all things necessary for salvation" (s 2); and that it "will ever obey the commands of Christ [and] teach His doctrine" (s 3).

184. In the present context it is important to note that a contestable and contested **corollary** of a "command" or of a "doctrine" of Christ could not be the basis for this Tribunal purporting to intervene to settle some debate by an appeal to the Fundamental Declarations. Indeed, the problems are compounded in this specific matter since there is a need to explore the linkage between the posited teaching/doctrine about the solemnization of marriage and any teaching/doctrine about blessing in a constitutional context. At one stage in its submissions, Sydney referred to "doctrine **sourced from** the Fundamental Declarations" (294, emphasis added). This paraphrase impermissibly widens the scope of constitutional disputation and effectively thrusts this Tribunal into roles outside its function and competence. The submission also risks eliding duties that should probably be addressed separately in the context of s 3 ("obey the commands of Christ", "teach His doctrine", "administer His sacraments of Holy Baptism and Holy Communion" and "uphold His discipline").

185. In our opinion, there is no such constitutional inconsistency for the reasons that follow.

(i) **The Christian Faith as professed from primitive times**

186. Section 1 of the Constitution declares that:
"The Anglican Church of Australia, being part of the One Holy Catholic and Apostolic Church of Christ, holds the Christian Faith as professed by the Church of Christ from primitive times and in particular as set forth in the creeds known as the Nicene Creed and the Apostles' Creed."

187. Sydney has presented a very useful "Short History of Christian Marriage" by the Rev Dr Mark Earngey, Head of Church History, Moore Theological College (332-341). Dr Earngey's stated purpose is to demonstrate "that while aspects of Christian marriage have changed throughout history, the substance of the doctrine of marriage as a union between one man and one woman does not change."

188. Among other things, the paper shows that early Christian converts who were married were not required to remarry, but were recognised by the Church in "primitive times" as married members in Christ who committed themselves to the particular teaching of Scripture concerning Christian marriage. After Augustine of Hippo, leaders of the Church introduced ecclesiastical marriage and during the Middle Ages the Roman Catholic Church took over matrimonial cases. There have been different teachings about the sacramental nature of marriage and what this exactly meant. The early Christian Church opposed homosexual practices as unnatural.

189. Some leading European Protestants implemented a marriage law in which their teaching on marriage filtered down into the civil courts in the northern Germanic and Scandinavian regions. "In their implementation of marriage law, virtually none of these civil courts adopted a Scripture only approach, but rather held to the supremacy of Scripture while implementing Scripturally compatible aspects of marriage and divorce law from the received body of civil and canon law." In contrast, Reformation England continued to regulate marriage law within the framework of the ecclesiastical rather than civil courts. The 1604 canons set forth parameters for marriage and divorce "more restrictive than the pre-reformation situation: impediments were small in number, separation was permitted, but divorce itself was not." Despite the many changes, what Dr Earngey describes as "the core doctrine of marriage" – between one man and one woman – has remained remarkably and entirely consistent throughout the last two millennia.

190. Sydney adopts Dr Earngey's historical review as "an overview of the doctrine of marriage that has been professed by the Church of Christ from primitive times" (301). The implication is that the Wangaratta Regulations and what they contemplate therefore offend the first of the Fundamental Declarations (301-2).

191. The very long tradition of exclusively heterosexual marriage is significant, not that Sydney or anyone else is asserting that tradition can trump an informed understanding of Scripture. It is therefore only a partial answer to the thrust of Dr Earngey's thesis to

point to the terms of Article XX and to place into the balance some of what are now seen to be the errors in the "doctrine of marriage" proclaimed and enforced by the Church in the past three centuries. As Dr Claire Smith points out in the *Doctrine Commission Essays* (p 167), the Church of England claimed to be *ecclesia reformata, semper reformanda secundum verbi Dei.* All parties in this Reference are seeking to hold a line or chart a new course that they perceive to be according to the word of God. Where they disagree so strongly is about whether there is any room for further enlightenment or reformation in relation to same-sex marriage or "coupling".

192. To show that the Church's teaching/doctrine about heterosexual, monogamous marriage has been ancient and durable certainly assists aspects of the case advanced by Wangaratta's opponents. But it does not turn the selected aspect of the doctrine of marriage into "the Christian Faith as professed ...and in particular as set forth in" the Creeds. There is and always has been a distinction between the teaching and practice of the Christian (or Anglican) Church about marriage and its "profession" of the "Faith" particularly as set forth in the Creeds. See generally, Section E.

(ii) **Holy Scriptures**

193. The Report of the Doctrine Commission and the submissions in the present reference show that Anglicans of good faith hold sharply diverging attitudes on the teaching (if any) of Holy Scripture about same-sex marriage in its modern context, about the function of Church blessings generally, and (to the limited extent that this has been addressed at all in the submissions) the propriety of the particular liturgy approved in the Diocese of Wangaratta.

194. Section 2 of the *Constitution* affirms that the Church receives all the canonical scriptures of the Old and New Testaments "as being the ultimate rule and standard of faith given by inspiration of God and containing all things necessary for salvation".

195. The references to "faith" and "things necessary for salvation" focus attention on what is and what (by implication) is not declared to be "fundamental" as to the authority of the Holy Scriptures **so far as concerns the *Constitution*.** This aligns with the principle of doctrine enunciated in Article VI of the *Thirty-Nine Articles* which (at the expense of repetition) declares that:
Holy Scripture containeth all things necessary to salvation: so that whatsoever is not read therein, nor may be proved thereby, is not to be required of any man, that it should be believed as an article of the Faith, or be thought requisite or necessary to salvation.

196. The question forming a prelude to one of the oaths and declarations required of a priest at ordination (AAPB) is:
Are you convinced that the holy scriptures contain all doctrine required of necessity for eternal salvation through faith in Jesus Christ.? And will you instruct the people

committed to your care from the scriptures, and teach nothing (as required of necessity to eternal salvation) except what you are convinced may be proved by the scriptures?

197. It is, in our opinion, quite fallacious to read this statement and the thrust of these questions as if they declared that whatever is read within the Holy Scriptures is a thing necessary for salvation. The history of the Christian Church is littered with schisms stemming from insistence upon compliance with contested interpretations of particular Biblical verses on the basis that they entailed "gospel issues".

198. Those seeking to advance (their perception of) teachings about homosexuality and to have them treated as a constitutional barrier to any form of blessing need also to navigate teachings binding the ACA that are definitely "doctrinal", especially the Church's doctrine of salvation. The teaching of the Articles on the doctrine of salvation is summarised in David Broughton Knox, *Thirty-Nine Articles: The Historic Basis of Anglican Faith,* 1967, pp 26-29. Article XVIII declares that "holy Scripture doth set out unto us only the Name of Jesus Christ, whereby men must be saved." Article XI teaches the Reformation doctrine that "we are accounted righteous before God, only for the merit of our Lord and Saviour Jesus Christ by Faith, and not for our own works or deservings". This is not to deny the scriptural teachings about repentance or the importance of faith being consistent with good works. But in this constitutional setting it is legitimate for the Tribunal to place the onus of persuasion upon those who contend that "gospel issues" are truly at stake not just in maintaining the current position about the solemnisation of marriage but in prohibiting root and branch a church blessing of couples who are married in the eye of the law and who invoke the form of blessing set out in the service set out in the Appendix. There are many blessings offered in Anglican churches for "all sorts and conditions of men".

199. In the 1987 Opinion (p 42) the Archbishop of Adelaide quoted the Tribunal's 1985 reasons in response to submissions relying on certain scriptural passages said to inhibit women deacons:
"We note, however, that the passages in question are subject to widely different interpretation by biblical scholars of comparable reputation and competence."

Having observed (p 43) that the Tribunal had in 1985:

"also recognised that there was considerable difference of interpretation on the significance of the teachings of these passages when seen in the context of the New Testament as a whole";

the Archbishop went on to say:

"It is not the role of the Tribunal to judge on technical matters of biblical scholarship. Differences of interpretation sometimes result from differences in detailed exegesis, sometimes from application of differing hermeneutical principles...[W]hile the Constitution binds this Church to holy scripture as 'the ultimate rule and standard of faith'

and while the Thirty-Nine Articles make important statements about the place of holy scripture in the Church, this Church has not bound itself to one particular set of principles in the interpretation of scripture."

Cox J generally adopted Archbishop Rayner's reasons concerning Chapter 1 of the Constitution. See also the 1987 Opinion at p 113 per Mr Handley QC.

200. Given that it is, we understand, common ground that persons with same-sex attraction may be Christians; that some same-sex marriages will be celibate; and that Jesus Christ died for the whole world it also rests upon those opposed to the particular blessing service to demonstrate why and where it crosses a constitutional line. Otherwise, it is a matter for the General Synod to address, unless of course no branch of the ACA has authority in this matter which is one of the possible outcomes of this Reference.

201. According to the *Doctrine Commission Essays* (see p 6) and most but not all of the submissions in this Reference, it is accepted in the ACA in 2019 that homosexual attraction is not sinful nor invariably a life-style choice. From this now (almost) common ground, those opposed to allowing or blessing same-sex marriage rely upon passages in the Old and New Testaments condemning fornication, adultery and types of same-sex activity. The particular types of same-sex activity that are proscribed in the writings of the Old Testament and the letters of St Paul are contested by some essayists and submissions. For example, EFAC refers to "anal intercourse between men", albeit not exclusively (128). Other submissions debate the meaning of the unique Greek words found in 1 *Corinthians* 6, words which appear to be translated differently in different English versions of the Bible.

202. Holy Scriptures contain doctrines and a whole lot more. Their messages about marriage and homosexuality are contested but they cannot be ignored on that account. But the Appellate Tribunal is not the place to make definitive rulings on such matters unless essential to do so in the exercise of its constitutional functions. The *Doctrine Commission Essays* and the corpus of submissions in this Reference reveal a spread of exegetical and hermeneutical positions.

203. For those who submit that the vice of the Wangaratta Regulations lies in the absence of making the blessing conditional upon the public withdrawal from a state of sin we think that it is incumbent in a constitutional setting for the Tribunal to seek a clear statement as to what (if any) changes consistent with "the doctrine of the Church" would align with the principles being advanced by the objectors. Is it the abandonment of the marriage itself or an indication of intention to refrain from particular and if so which conduct? Or does the vice lie in the mere liturgical acknowledgment of the very existence and every class of this civil marriage? Is it the mere "coupling" in the relationship/companionship sense expounded in several of the submissions? Why are other liturgical blessings of persons not made expressly conditional upon them reforming their lives? Why does the

ACA solemnise the marriage of heterosexual couples without requiring confession of past or continuing sins?

204. To put the matter another way, what is the particular scriptural injunction that is breached (in a matter relevant to the faith of the Church or going to salvation, where they are the constitutional criteria that must be satisfied)? In light of the principles referred to in Section 1 of these reasons, it is essential for this Tribunal to insist on such clarity and such level of persuasive proof before a liturgy that does not contravene the specific command of an operative canon, adopted in good faith by a diocesan synod and the Bishop of a diocese, is effectively declared null and void by this Tribunal.

205. A handful of the submissions in this Reference invoked 1 *Corinthians* 6: 9-10, not just to reinforce arguments that certain types of homosexual acts are contrary to the teachings of Scripture, but as a step towards the conclusion that the Wangaratta blessing service contravenes Holy Scripture in a matter of faith (see Dr Phillips (90) (avoiding the things mentioned in 1 *Corinthians* 6: 9-10 "is necessary for salvation"), Mrs Phillips (116) (1 Corinthians 6: 9-10 make theft, greed, drunkenness, slander, adultery and homosexual offences "bars to salvation"); EFAC (WA) (128) ("a gospel matter...'required for salvation'") See also Seccombe (74), New Cranmer Society (153), Malalina (184)).

206. The true import of this passage has received much attention in church and state over recent times because an Instagram posting of a paraphrase triggered the dismissal of a famous footballer by Rugby Australia. Israel Folau's post warned that "hell awaits" "drunks, homosexuals, adulterers, liars, fornicators, thieves, atheists, idolators".

207. The Apostle Paul's letter to the Corinthians reads:
"Do you not know that wrongdoers will not inherit the kingdom of God? Do not be deceived! Fornicators, idolators, adulterers, male prostitutes, sodomites, thieves, the greedy, drunkards, revilers, robbers – none of these will inherit the kingdom of God." (1 *Corinthians* 6: 9-10, NRSV)

208. It should be acknowledged that the *Doctrine Commission Essays* reveal little consensus as to the translation of the notoriously difficult Greek words *malakoi* and *arsenokoites.* Some commentators confine the terms to species of abusive male homosexual conduct whereas others use even more general words than those in the above translation. There is also theological dispute as to whether the teaching about "not inheriting" the kingdom of God is the same as "hell awaits". "Atheists" are not mentioned in the *Corinthians* passage despite the passage appearing to have been the main source of Mr Folau's post.

209. But there are much broader problems with reading the passage out of context or focussing on the "homosexual" sins, whatever they are, as if they were in a special class of heinousness. The problems are compounded when it is sought to derive a relevant "doctrine of the ACA" that impacts upon the **constitutional** validity of a blessing service

that no one has cared to examine in its detailed terms or suggest to be flawed except when use to bless the marriage of two persons of the same sex.

210. St Paul immediately follows the passage quoted with:
"And this is what some of you used to be. But you were washed, you were sanctified, you were justified in the name of the Lord Jesus Christ and in the Spirit of our God." (v 11)

The opening words, as well as the context of the entire passage (following a diatribe against believers taking fellow believers to the civil courts), shows that St Paul is addressing the backsliding of those who have already committed themselves to Christ. (Not all of those who seek the solemnisation of matrimony or the blessing of their marriage will be professed Christians.) The whole passage also shows that the Apostle is focussing on what may be called the doctrines of salvation and of sanctification.

211. The list of sinful conduct catalogued by St Paul went vastly beyond whatever homosexual acts the Apostle had in contemplation. Indeed, the spread of the sins (greed, drunkenness, reviling etc) shows that his rhetoric was pointing to the universality of the very serious unredeemed condition of all men and women, as well as their total dependence upon God's grace through the work of Jesus and the working of the Holy Spirit. In short, the passage is one of many underpinning the theology of sin, salvation and sanctification as expounded in Articles IX, XI, XII, XV, XVI and XVIII. St Paul's second letter to the church in Corinth spells much of this out in 2 *Corinthians* 5: 17-19. The Bishops' response confirms that sexual immorality is as liable to the judgment of God as other sins (*James* 2: 10); that all sin requires repentance and forgiveness, with a view to following a life of obedience; and that the promise of forgiveness is made on the understanding that it is to all of those "who turn to him in faith".

212. A handful of the submissions grappled with the passage in 1 *Corinthians* in the context of the whole New Testament teachings about salvation and sanctification. They pointed to the need for linkage between actions and faith (cf *Matthew* 7:21 and *James* 2: 18-19). Others acknowledged that a call for repentance was implicit in St Paul's condemnation of the wide spread of practices proscribed in 1 *Corinthians* 6 (see Brain (28-38), Ridley (39-40), EFAC (WA) (128)). The difficulty remains for this Tribunal to perceive with necessary clarity how the Church's doctrines of salvation and sanctification establish the constitutional invalidity of the Wangaratta blessing service. Acknowledgement of past sins and undertakings as to the future are not required of heterosexual couples who are joined in Holy Matrimony or whose "civil" marriages are blessed under liturgies (including the Wangaratta blessing service in its general application) that are not called into question.

213. Confession of sin and absolution are not aspects of the law or practice of the ACA with regard to marriage. The rubric at the very end of BCP's *Solemnization of Matrimony* states that:

It is convenient that the new-married persons should receive holy Communion at the time of their Marriage, or at the first opportunity after their Marriage.

By contrast, the Prayer Book of 1549, like that from which it had been derived, stated that receiving Holy Communion was compulsory. "This was altered in 1661, in compliance with the objection of the Presbyterians, or more probably from a conviction that many persons would be married according to the rites of the Church, who were far from being in communion with it." (Francis Procter, *A History of the Book of Common Prayer,* 15th ed, 1880, p 414). *APBA* and *AAPB* indicate that the celebration of the Holy Communion is an option at the solemnisation of matrimony.

214. The blanket opposition to the Wangaratta service seems, to us, to turn on its head the real "doctrines" explicit in the whole of the Pauline passage, read in context. We are unable to construe the passage in *Corinthians* as casting special **constitutional** light on the matter at hand. In saying this, we are not expressing any opinion as to whether marriage between persons of the same sex is consistent with or contrary to the Scriptures; or whether various assumed types of sexual activity between such persons (male and female) is, notwithstanding their marriage according to law, consistent with or contrary to the Scriptures. But we are saying that the *Corinthians* passage, in our opinion, does not advance the case for establishing a scriptural teaching in the nature of a "doctrine" in the constitutional sense. There is in *Corinthians* a "teaching on the faith which is necessary to salvation". But it is the teaching about the necessity for Christ's saving grace. The application of that teaching on salvation to the matter at hand is a task for the discernment of the General Synod, diocesan synods and Bishops. The call for this Tribunal to discover in the Scriptures and to apply a direct constitutional preclusion must be declined, consistently with the past jurisprudence of this Tribunal.

215. At this point we address some of the themes developed in the Assessors' Response. The Assessors emphasise that the Creeds were framed with particular controversies in mind and that their meaning calls to be discerned in light of the contexts in which they were settled. They are not a complete statement of the "Christian Faith as professed by the church of Christ from primitive times". This is implicit in the wording of section 1 of the *Constitution.* The Assessors, like the Bishops, also point to certain (but not all) of the Thirty-Nine Articles as teachings relating to the Faith of the Church or approving documents that "contain" or expound aspects of doctrine. We have already indicated our agreement with these basic propositions.

216. The Apostles' and the Nicene Creeds affirm belief in the/one "holy Catholic Church". The Assessors advise that the epithet "holy" refers to the Church's union with Christ, therefore requiring the holiness of its members (Assessors' Response para 1 (f)). This implication – for it is more than a corollary – may be accepted and may be treated as one of the doctrines taught by the Christian Church from primitive times and a continuing "doctrine" of the ACA.

217. But what it means in practice will depend on the context of time and place. And whatever processes are adopted to encourage and enforce the Faith lie in the conceptually separate realms of discipline and liturgy.

218. The Assessors also draw attention to what may be accepted as the doctrinal teachings of the Church through the ages about belief (or faith in that sense) having to be genuine and to be reflected in obedient behaviour (*James* 2: 14-26, Articles VII, XII). "The Prayer Book... teaches that persistence in sin may preclude a person from salvation in Christ Jesus. Nevertheless, it repeatedly affirms that grace and mercy are extended towards those who repent and entrust themselves to the Saviour." (Assessors' Response para 3 (e)).

219. The Assessors' Response contains statements about the scope of the sin of fornication and other sexual sins on the assumption that they necessarily bear upon the mutual conduct of a same-sex couple who are married; and conclusions about what is implicit in "the very act of standing up in church to make promises as a same-sex couple". Our views on the "doctrinal" nature of such of these issues as require to be addressed in this matter are set out elsewhere in these reasons.

220. We are not being critical of the Assessors for choosing to record their views on these topics in response to four particularly framed questions (set out in para 279 below). Indeed, we have been assisted by aspects of their reasoning. A "holy" Church all of whose members fall short of God's standards, some spectacularly so, needs mechanisms and teachings for confronting the failings of clergy and laity alike, including sexual failings which may present additional threats. Closely defining boundaries, refining disciplinary mechanisms (for clergy) and "professional standards" and other risk-avoidance mechanisms (for clergy and laity) need constant attention as revealed by the institutional failings revealed by the Royal Commission and the activities of synods throughout the ACA in recent years.

221. The Assessors point out (Assessors' Response, para 1 (g)) that one early Church controversy regarding holiness concerned the committing of particularly serious sins (sometimes called "mortal sins" or "crimes") after baptism. Three sins were universally deemed by the early church to be so grave that those who committed them were to be publicly excommunicated from the church: idolatry, murder and sexual immorality. In the early church the "crime" of sexual immorality encompassed any sexual activity outside of heterosexual marriage, which included homosexual activity. We comment that history shows that enforcement was not uniform, but agree with the Assessors as to the theory and general practice. There was also debate in the early Church over how a person could re-enter the Church after committing such sins.

222. The Assessors advise that, in these earlier times, public repentance as distinct from second baptism was required of notorious sinners after their public excommunication;

and that this practice was reflected in the Nicene Creed's affirmation of **one** baptism for the forgiveness of sins. The Assessors state that this affirmation "concerned church discipline and not how one became a Christian" (para 1 (h), citing David F Wright, "The Meaning and Reference of 'One Baptism for the Remission of Sins' in the Niceno-Constantinopolitan Creed" in *Infant Baptism in Historical Perspective: Collected Studies* (Milton Keynes: Paternoster, 2007), 55-60).

223. We draw particular attention to the reference to "church discipline" in this statement by the Assessors. As demonstrated elsewhere, it is fallacious to treat every disciplinary or liturgical activity of the Church as part of the Faith of the Church as distinct from responses to it (and other aspects of human life). The universality and variableness of sin means that the disciplinary response of church and state is always contextual and itself constantly adapting. Pastoral considerations must also be weighed by a Church modelling itself upon the work and teachings of Jesus Christ.

224. The Assessors cite Article XXXIII (*Of Excommunicate Persons how they are to be avoided*) and the BCP service of *A Commination, or Denouncing of God's Anger and Judgements against Sinners* as pointers to the seriousness of unrepentant sinfulness. The latter includes a cursing of "fornicators, and adulterers, covetous persons, idolaters, slanderers, drunkards, and extortioners". We do not understand the Assessors to be asserting that these are statements of doctrine, however defined. But the examples illustrate the limits of that concept and how human faith-based responses must not be confused with the Faith itself.

225. We would be very surprised if public excommunication of lay persons has ever been taught or practised by the ACA. It relates to a Christendom long past. The service of Commination is no longer practised as far as we know. Nor are particular classes of sinners "cursed" by the Church or in its approved liturgies.

226. General Synod is the place to draw disciplinary or liturgical lines if it is the will of the Church to have uniformity in this particular matter or in the matter of what may or may not be blessed in worship. Blessings of things (including what occurs in the sacraments, the blessing of flags, ships and troops) and of "all sorts and conditions of" persons is commonplace. Obviously, there are limits, not that they could easily be defined in advance either positively or negatively. The Tribunal is not aware of any church blessings outside the one in question here where their consistency with Holy Scripture has been questioned on account of the sexuality of the person(s) blessed or the absence of an explicit foreswearing of particular conduct. The several blessings conferred in the solemnisation of Holy Matrimony are not conditioned in any such way.

227. It is only because "necessity for salvation" has been raised in this handful of submissions that the Tribunal has deemed it necessary to state its view as to the more probable import of the New Testament passages invoked.

228. As happened in the disputes over slavery and female ordination, there is controversy within the Church over the exegesis of particular passages of scripture when placed alongside the whole of Scripture, especially the teachings out of the mouth and actions of our Lord. There is also the hermeneutical issue of carrying these teachings into a modern context where the criminal law has changed and where the very mantle of marriage has been placed upon same-sex couples who seek it. And, as in the contexts of slavery and female ordination, scholars, bishops, clergy and lay persons of good will have come to completely opposing positions. The *Doctrine Commission Essays* show that there is no consensus about the particular types of homosexual conduct that were the focus of the apostle's attention. When it comes to female same-sex "couplings", the meaning and application of the Scriptural message is dimmer still.

229. BCP's three purposes of marriage declared in the *Form of Solemnization* as expressed in modern language in *AAPB's* First Form of its *Service of Marriage* are:

    1. for the procreation of children and that they might be brought up in the nurture and instruction of the Lord, to the praise of his holy name;
    2. so that those to whom God has granted the gift of marriage might live a chaste and holy life, as befits members of Christ's body; and
    3. for the mutual companionship, help and comfort, that one ought to have of the other, both in prosperity and adversity.

230. The *APBA Service for Marriage* has a rubric stating (p 559) that where the couple are unable to have children, the prayer for the blessing of children is omitted.

231. While some readers will be offended by this, same-sex marriages that are recognised and protected under Australian law are arguably capable of meeting the three BCP desiderata and the scriptural teachings on which they are based. Opponents of same-sex marriages who rely upon scriptural grounds as creating an eternal preclusion of same-sex marriage and/or of certain intimacy of a sexual kind see this as a circular and fallacious argument that defies the letter and spirit of the Scriptural text. Those who contend that same-sex marriages (or some of them) are consonant with Scripture disagree. Aspects of this particular debate may be found in the *Doctrine Commission Essays* at p 157ff (Porter) and 176ff (Smith). For reasons set out in the *Newcastle Discipline Reference Opinion,* the Tribunal must not be taken to be here ruling on these specific issues.

232. It is obvious that many people inside the Church on all sides of this current debate feel very strongly about the issue. Some of the submissions show that this has projected into the way that the stakes have been raised in the current Reference. For example, Rockhampton has characterised the Wangaratta Regulation as "a significant and critical shift from...the authority of Scripture and if allowed or endorsed by the Appellate Tribunal will risk the Anglican Church of Australia departing from our biblical foundation"

(354). GAFCON Australia has urged the Tribunal to "uphold the authority and relevance of the canonical Scriptures" (178). See also McLean (R 34-6).

233. Several countering submissions have denied that the Wangaratta action contravenes in any way the teaching of the whole of Scripture as it applies in the present context. Indeed, as occurred in the disputes over female ordination, a third scriptural position has been advanced in this Tribunal. There is a submission by the Revd Associate Professor Anstey in favour of a *tertium quid,* namely that a true reading of Scripture *supports* the Church changing its present stance (223ff and the *Doctrine Commission Essays*). While this Tribunal is only concerned with the law of the present (and of the past so far as it casts useful light), the Tribunal understands Professor Anstey also to be advancing the case for reappraisal based on a holistic understanding of Scripture itself, hence the reference to it in this context. This approach is strongly rebutted by Mr Phillips in his submissions in Reply.

234. Equal Voices contends that "to suggest that [the married relationship of same-sex people] contravenes the Fundamental Declarations and Ruling Principles is to suggest that such people are unable to be members of the ACA" (194). Archbishops Davies' widely reported call in late 2019 for "people [who] wish to change the doctrine of our Church" to "start a new church or join a church more aligned to their views....Please leave us" illustrates the point as well as the depths of anguished feelings that have entered this debate on both sides. Hopefully, this Tribunal's Opinion will clarify so much of the debate as turns upon assertions about the present "doctrine" of the ACA.

235. Fortunately, the Tribunal does not in this Reference have to arrive at or announce its view as to the meaning or impact of scriptural injunctions relied upon, except so far as it is necessary to determine the cogency of the claims that there is a "command of Christ" directly relevant to the blessing issue or that issues of salvation are at stake, such as to form "doctrinal" issues within the *Constitution's* definition.

236. Many submissions have urged the Tribunal to issue a ruling on this matter of Scripture. They do so in the expectation that a constitutional majority of the Tribunal will see the message of Scripture in the way that they see it. But history has shown time and again that resort to law is rarely the effective or even the scriptural way to resolve "doctrinal" disagreements between believers. And experience teaches that those who remain unconvinced in a matter of importance to them will not respect the legal rulings anyway. The framers of the *Constitution* were not so naive as to think they were creating a system whereby four lay persons and three bishops elected by the General Synod would put such issues to rest.

237. Any legal argument framed as "If you do not accept my interpretation of Scripture/ the Constitution/ a leading case you must necessarily be rejecting the authority of the posited source" must, of course, be rejected. It is inherently illogical. Truth-seeking is not

assisted by it. And such rhetoric is foreign to legitimate constitutional jurisprudence. This Tribunal will not be driven to "endorsing" any particular scriptural position on the matter of (blessing) same-sex marriage unless clearly persuaded that this is essential to meet its constitutional duty under the Reference.

238. If, consistently with the constitutional position as declared by this Tribunal, the General Synod wishes to change the present law relating to the solemnisation of matrimony in the ACA or the liturgy of blessings, that will be for it to decide under the guidance of the Holy Spirit, following the constitutional pathways. The concluding part of the extract from the Preface to the ECUSA *Book of Common Prayer* cited by Rockhampton (para 5 above) should be the more appropriate focus of legislative attention.

239. As indicated, the Appellate Tribunal is not constituted to be a final court of appeal for the Church on contested theological issues (1987 Opinion at pp 80-81 per Tadgell J, 1991 Opinion per Mr Handley QC at pp 3-4).

(iii) **Obeying Christ's commands and teaching His doctrine (s 3)**

240. In the 1991 Opinion, two of the Bishops on the Tribunal drew opposite conclusions about the canonical lawfulness of female ordination, each invoking Scripture generally and Christ's commands in particular. Bishop Holland reasoned from Jesus being fully God and fully human to infer that the redemptive and salvific character of his work related to the whole of humanity. The corollary was that equal opportunities of function and service were given to all – male and female – by virtue of their baptism within the Body of Christ. *Galatians* 3: 27-28 was the key and hierarchic text. The Pauline injunctions relating to women were really contextual "damage control". Was it therefore "not tenable that [Jesus] would demand the right and indeed moral obligation of women to minister alongside men as priests in His church?" Bishop Holland was disappointed that none of the submissions referred specifically to the teachings of Jesus and his attitudes towards women because, for him, the ordination of women was a theological issue not a legal one.

241. By contrast, Archbishop Robinson emphasised that "in identifying 'the commands of Christ...his doctrine...and...his discipline' we are bound to look not only to the Gospels, but to what was transmitted by the apostles to their churches as recorded in the Epistles". Apostolic teachings were often what the Lord had commanded. What St Paul delivered to all his churches as "the traditions" which he himself received "was so delivered as, in varying aspects, the commands, the teaching, the sacraments, and the discipline of Christ". Paul said he was writing one passage as "a command of the Lord" (1 Cor 14: 37f). Archbishop Robinson therefore stated the matter to be governed by the Fundamental Declarations and he also stood by his minority position on inconsistency with the Ruling Principles.

242. The other members of the Tribunal all rejected the claims of inconsistency with the Fundamental Declarations. Two of them explained why the commands of Christ did not lead to a finding of inconsistency. Archbishop Rayner (with whom Cox J agreed at p 32) expounded the matter at length at pp 5-9:

"[The] *apparent simplicity* [of the statement that 'This Church will ever obey the commands of Christ] *is deceptive. It implies that there are certain clearly identifiable commands of Christ, presumably to be found in holy scripture, which this Church and its members are bound to obey. That the simplicity is deceptive is indicated by* [the arguments before the Tribunal in that matter which drew different responses from the other bishops]....[Despite *Matthew* 5: 18-19 ("not an iota, not a dot , will pass from the law until all is accomplished")] *the Church has never taken the view that it is bound by every detail of Old Testament law. The whole tenor of our Lord's teaching was that the Old Testament law was to be understood not as requiring obedience to the letter of the law but to the fullness of its spirit. Again, there are instances where Christ utters commands which are apparently to be understood as hyperbole (e.g. Mark 9: 43-47). Any who have attempted to take these particular commands literally have generally been recognised as mentally unbalanced. Again, there is the commandment to the rich ruler, 'Sell all that you have and distribute it to the poor' (Luke 18:22). This might on the face of it be taken as a universal command, particularly because of its association with the general principle which follows: 'For it is easier for a camel to go through the eye of a needle than for a rich man to enter the kingdom of heaven' (Luke 18:25). Yet the Church has never felt itself or its members to be universally bound by this command.*

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

This is why the Church has sometimes understood the commands of Christ to lead to different specific consequences at different times. In a situation where money was lent to enable a person to survive, for example, the exaction of interest might be seen as contrary to the command of Christ; where it was lent to enable a person to start a profitable business, Christ's command might have quite different application. This is why Christian ethicists recognise that Christian duty cannot be expressed simply in terms of obeying a clearly defined set of commands.

In my 1987 Reasons (pp. 46-46) I discussed the way in which the 'command of the Lord' of 1 Corinthians 14:37 relating to the silence of women in the congregation (and hence to the possibility of the ordination of women) should be understood. None of the arguments put to us have caused me to resile from the opinion which I then expressed that this was

to be understood as an application by St Paul of broad commands of Christ to a particularly disorderly situation and not as a command universally binding on the Church.

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

This may well be true. There is no need for me to express a final opinion on that. But whether true or not, I do not accept that s.3 justifies a bishop claiming the authority of the Constitution to take action which would be prohibited by other parts of the Constitution. This would open the way to any person or group of persons claiming the authority of the Constitution to undertake action which in private or group conscience they believed to be right. If the conscientious convictions of a bishop, or indeed any other member of the Church, lead that person to conclude that action is needed which is not permitted by the present law of the Church, the right approach is to seek to change the law by constitutional means. For a bishop to act otherwise would be to violate his responsibility of allegiance to the Constitution.

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

This Tribunal cannot be the judge of any individual's conscience. Its responsibility is to interpret the law to the best of its ability. It might, however, appropriately point to the consequences of taking unlawful action in following the dictates of conscience. Such consequences might well include the shattering of the constitutional framework which was devised painfully (albeit imperfectly) over many decades to preserve the unity and foster the common mission of this Church. There is clearly divided opinion in the Church on how the commands of Christ are to be understood with respect to the ordination of women to the priesthood. There can be little doubt, however, of Christ's call for the unity of his disciples. That unity is preserved by agreement to work within the Constitution. Under the Constitution there are procedures by which the present law of the Church respecting the ordination of women may be maintained and there are procedures by which it may be altered. Whichever path is trodden, some will be uneasy: but agreement

to work within the framework of the Constitution is the only way by which the unity of this church can be preserved."

243. We agree with and adopt this reasoning. It is clearly relevant to the task confronting the Tribunal and the Church in the matter at hand. We would add to the final paragraph of the passage quoted the observation that another painful consequence of defiance of the law of the Church is exposure to charges in the Special Tribunal of a breach of discipline or an offence contrary to section 2 of the *Offences Canon.* Diocesan disciplinary ordinances may also be engaged in relation to clergy, including retired diocesan bishops resident or licensed within the diocese.

244. Section 3 of the *Constitution* requires the Church ever to obey Christ's commands and teach His doctrine. Textually, a command is something concrete and specific for the hearer to do or refrain from doing, albeit it may be general such as the command to love one another. In ordinary parlance, a doctrine is a more general teaching as in the Beatitudes, but in the constitutional setting it also carries the meaning defined in s 74 (discussed above) unless it is displaced by context or subject matter.

245. Nearly all of the submissions in this Reference proceed mainly from Christ's teaching about divorce, inferring or discerning a "doctrine" of marriage said to be directly stemming from a "command" of Christ to the effect that no marriage should be solemnised or recognised that is not between a man and a woman. Some, but not all, of these submissions also grapple with the need to discern a command relevant to a blessing generally, if not in the form proposed for Wangaratta. See RAFT Anglican Church (139), McLean (162), GAFCON (177), DNWA (267), Ridley (40), EFAC (68). Insofar as these invoke the "Christ's doctrine" rather than the "Christ's command" arm of s 3 of the *Constitution*, all of these submissions proceed as if the constitutional definition of "doctrine" has no role to play. It is not open to the Tribunal to approach the constitutional issue in this manner.

246. Sydney (302 ff) and others have focussed upon *Matthew* 19: 3-8 and *Mark* 10: 2-12 where Jesus teaches about divorce and the scope of *Deuteronomy* 24: 1. That teaching is that the dissolution of marriage can only rightly be understood in light of God's foundational purpose for marriage. This, with respect, is an uncontroversial exegesis. The scriptural debate then divides as to the doctrine/command (if any) about the male/female component. Those contending for a "doctrine" or "command" from our Lord point to the "man" and "woman" references in *Deuteronomy* and Jesus' teaching based on it as indicating a "creational logic to the nature of marriage" in which the Creator "created mankind as sexually differentiated beings, male and female" (Sydney (302)). "Only a male and a female can fulfil the mandate of *Genesis* 1: 28 to 'be fruitful and multiply and fill the earth.'" (303). These propositions become the trigger for the "coupling" prohibition that informs a major arm of the case advanced against Wangaratta with perhaps inadequate attention to what distinguishes the proscribed

"coupling" of two persons of the same-sex who are married from lifelong pairings of two adults that are entirely companionate.

247. Those urging the opposite position contest the inference about the essentiality of the sexual differentiation. As lawyers would put it, *expressio unius non est exclusio alterius.* To them, the purpose and emphasis are upon the "cleaving" or bond that is not to be put asunder even if it contradicts the wishes of the parents or the Deuteronomic teaching against marrying a non-Israelite. These parties argue that the sexualities of the couple were not the focus of the teaching any more than the likening of the Church as Christ's bride. Some who hold to this understanding of Scripture also rely upon modern understandings about sexual orientation. And, in light of access to artificial conception (which is generally supported by Anglicans at least for married couples of different sexes), the Old Testament concerns about propagation are said to be met, at least in part. Needless to say, the introduction of these last two considerations is like a red rag to a bull for many of those pressing to advance what they claim to be the literal inference of the teaching that our Lord adopted.

248. In our opinion, treating the divorce teaching as addressing the heterosexuality of the married partners, and as entailing a command by Christ neither to join in any way two persons of the same sex or to bless their relationship in any circumstances or on any terms, must be seen as inferences, not as commands. That the inferences are contested by some is revealed in the *Doctrine Commission Essays* (see pp 49-51, 87-103, 198-200). To the extent that the textually- and contextually- based inferences are reasonably contestable, as we believe they are, our remarks about the limited role of the Appellate Tribunal as the arbiter of scriptural and hermeneutical disputes apply. More directly, so too does the reasoning of Archbishop Rayner that we have adopted. Even were the matter confined to the solemnisation of marriage (which it is not) the Church is engaged in a Scripturally-focussed moral debate that is not made any easier by differing approaches to Scriptural interpretation and contested debate about both the relevance of "lived experience" and the message that it conveys (compare the arguments of the Revd Associate Professor Anstey (216ff and *Doctrine Commission Essays*) and the Revd Dr David Seccombe (R3ff)). To contemplate that the Church might eventually arrive at one, or possibly more (adiaphora), final position(s) in this painful debate does not open the door for this Tribunal to short-circuit the matter by invoking obedience to the commands of Christ or the teaching of his doctrine.

249. A second strand of the "command/doctrine" of Christ argument focused upon *Matthew* 19: 11-12 (Sydney (303-4)). It is contended that Jesus' reference to "eunuchs" is to be read as a universal injunction of sexual abstinence outside marriage which contains "doctrinal" consequences for the debate about blessing same-sex marriages notwithstanding that some of them will be chaste and all of them are "marriages" now protected by the civil law.

250. This strand has the same difficulties as the first, as regards engaging the intervention of this Tribunal. In addition, the inferences sought to be drawn and applied in the context of the Wangaratta blessing service strike us, with the greatest of respect, as special pleading. The context was a teaching about divorce. Jesus reminded his hearers that Moses allowed divorce because of the hard-heartedness of men. The disciples suggest that perhaps then it would be better not to marry at all (v 10). Jesus affirms marriage but in doing so affirms that some exceptional people ("those to whom it is given") will remain unmarried to give themselves to a special calling. Cf the lives of John the Baptist, Paul and Jesus himself. The rhetoric about eunuchs affirms that there is a place for voluntary celibacy in the service of God's kingdom (cf 1 *Corinthians* 7: 8-9).

251. Mrs Phillips joins Sydney (305) in seeking to rebut the claim that Jesus never said anything about homosexuality by pointing to the references to *porneiai* in *Matthew* 15: 19 and *Mark* 7: 21 (119). Once again, the "doctrinal" or other constitutional link between this and the withholding of blessing of a same-sex marriage is yet to be demonstrated to our satisfaction in light of the principles discussed.

252. So there remains a difficulty for a constitutional tribunal to proceed directly from these teachings of Jesus to any conclusion about the inconsistency of the Wangaratta Regulations with the Fundamental Declarations even if the particular activity condemned by our Lord were not also in dispute.

253. We are not persuaded that there is any "command of Christ" directly referable to the issues of the Wangaratta blessing service or what it purports or seeks to do. We agree, in principle, with Sydney's submission that "the doctrine of Christ must be constituted by the words of Christ's teaching, and cannot be established from silence" (304). And we reiterate our observation that contravention of a command of Christ is not, in the constitutional context, the same as departure from a (contestable) corollary of such a command. The link between Jesus' teaching about the indissolubility of marriage between a man and a woman and the contested corollaries concerning same-sex marriages and blessings of the same are not of such a nature or clarity that it would lead this Tribunal to rule that the Wangaratta measure offends the Fundamental Declarations.

(H) Why the Tribunal does not have to address the detailed arguments about the consistency of the Blessing service with contested propositions about the "doctrine of blessing"

254. The matter presently at issue accepts that neither BCP nor the law of the Church of England in 1662 or 1962 contemplated the solemnisation of same-sex marriages or offered any validity to them. That law was silent on the question of blessing same-sex

marriages, if only because such marriages only became a part of the legal landscape later, in 2017 for Australia.

255. The Tribunal has addressed the issues raised under the Fundamental Declarations. But one must not lose sight of the fact that Wangaratta has taken action which we have determined to be not inconsistent with the 1992 Canon. Within the four corners of that Canon the General Synod has conferred a liturgical discretion that is available according to its terms, most importantly so long as the service is not inconsistent with or a departure from the doctrine of the ACA as we have explained that term. Those discretions are not for this Tribunal to second guess any more than they are for persons outside the Diocese of Wangaratta to challenge in this place except on demonstrably constitutional grounds.

256. Some will see an element of circularity in this reasoning. But the law is used to recognising and upholding discretionary judgments so long as they are made consistently with any empowering statute, are made for proper purposes, and are not tainted with egregious error. There are many formulae and explanations in the cases, including *Minister for Aboriginal Affairs v Peko Wallsend Ltd* (1986) 162 CLR 24.

257. For the benefit of others, we record that there is fascinating debate about the theology of blessing especially as advanced by Reverend Canon Lee (359-362), Archbishop Goldsworthy (250-255), Bishop Brain (33-38) and the Revd Dr David Hohne (345-351). Dr Hohne (345-9) expounds the theology of blessing in a mainly Old Testament context. Bishop Brain (28-38) essays a more directly-focussed survey concentrating on the New Testament. He argues that it must be contingent upon confession of relevant sin and that the blessing of a same-sex marriage can never involve this. On the opposite side, Canon Lee reminds us that in the Sermon on the Mount, Jesus says that the God's rain and sun fall on the righteous and unrighteous alike. "Jesus' disciples are called to love all, even their enemies....Our blessing, like God's, is to flow to all people and, indeed, to all living creatures."

258. The Tribunal does not have to take a position on this theological debate. It should be left for General Synod if it wishes to amend the 1992 Canon or take other action. But we have not been persuaded that the particular Wangaratta blessing service contravenes any commands of Christ, doctrines in the canonical scriptures or even doctrines recognised in the formularies of the Church in such a way as to reveal inconsistency with the Fundamental Declarations.

259. Everyone is focussing attention on the specific issue of blessing same-sex marriages, appropriately so. But any constitutional principle brought into play has to be capable of clear enunciation. And it has to offer guidance about dealing with parallel disputes in other contexts. The interests of the Church would not be served if the processes of this Tribunal were invoked every time there was a dispute as to the consistency with

Scripture of any novel liturgy that satisfied the broad parameters of the 1992 Canon. The appointed role of the diocesan bishop under s 5 (4) (briefly referred to in para 281 below) is a deliberately significant one.

(I) Matters formal, procedural and dispositive

(i) Recusal

260. For obvious reasons, Bishop John Parkes of Wangaratta (now retired) has taken no part in this Reference.

261. Early in the Reference, the Registrar informed the 41 parties that various members of the Tribunal have friends and relatives who identify as LGBTI some of whom are or may be contemplating marriage with a person of the same sex. As far as is known none intend to seek a church blessing. The notice stated that the members did not see that these facts as stated would trigger a duty to recuse. Any party that wished to submit to the contrary was naturally welcome to do so. (In light of one of the responses discussed below, it should be pointed out that notification did not say that the relatives were "close", not that this is a definable or critical term.) In response, there were four calls for recusal, one as part of the submissions filed by a party, three by emails to the Registrar.

262. Helen and Brian Gitsham submitted that it was important that "the integrity of the Tribunal is maintained" and that this required the recusal of Clyde Croft, then a Justice of the Supreme Court of Victoria, now a retired judge (45-6). Professor Croft has been the Chancellor of the Diocese of Wangaratta for several years. Mr and Mrs Gitsham referred to the following extract from the Presidential Address of Bishop Parkes to the Wangaratta Synod on 30 August 2019:
"The observant among you will have noticed that the Chancellor is not at my side, for the first time in 11 Synods. I have deliberately not consulted the Chancellor in any matter relating to the Service of Blessing for those married according to the Marriage Act 1961 which will come to the Synod in due course....Justice Croft is a member of the Appellate Tribunal and it was clear to him and to me that this matter could come to the Tribunal....Nevertheless so that the judge can not only be but can be seen to be at arm's length from these matters and therefore able to sit in determination on any question which arises, we resolved that he should not receive any Synod papers and not attend this session of Synod. It causes me and my Chancellor great sorrow that this has to be the case. Justice Croft has served me and the Diocese with great skill and devotion."

263. While apparently accepting the truth of these statements, Mr and Mrs Gitsham expressed their concurrence with Rev David Ould who published an on line article stating that Justice Croft must recuse so that the Tribunal can be seen to be utterly without fear or favour. Dr David Phillips has adopted a similar position in his submissions in reply.

264. The legal principles involving the judicial duty to recuse on account of actual or ostensible bias are discussed and applied in many decisions of the High Court of Australia and other appellate courts. All of them proceed from the assumption that judges have an invariable duty to sit "without fear or favour" even or especially in highly controversial matters. Recusal otherwise than on a proper basis is not a soft option to avoid this. But if a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial mind to the resolution of the question that the judge is required to decide then the judge must recuse (*Ebner v The Official Trustee in Bankruptcy* (2000) 205 CLR 337). (There are exceptions relating to consent and "necessity" which are not presently engaged.)

265. Unlike the current situation, most ostensible bias cases arise out of the conduct of a judge revealed during a hearing when particular things have been said or done that may engender a perception of bias or pre-judgment.

266. But a financial stake in litigation or the close association of a judge with a party or a cause involved in the proceedings may also trigger a duty to recuse. The ground of disqualification remains that of "a reasonable apprehension that the judicial officer will not decide the case impartially or without prejudice, rather than that he will decide the case adversely to one party" *Re JRL; Ex parte CJL* (1986) 161 CLR 248 at [5] per Sir Anthony Mason. A reasonable apprehension is more than a suspicion, otherwise one suspicious litigant might effectively get the court of his or her own choosing to the unfair detriment of other interested parties.

267. Bias by reason of prejudgment must be "firmly established" (*R v Commonwealth Conciliation and Arbitration Commission: Ex parte Angliss Group* (1969) 122 CLR 546 at 553-4). In *Minister of Immigration and Multicultural Affairs v Jin Legeng* (2001) 205 CLR 507 at [72], Gleeson CJ and Gummow J said that:
"The state of mind described as bias in the form of prejudgment is one so committed to a conclusion already formed as to be incapable of alteration, whatever evidence or arguments may be presented. Natural justice does not require the absence of any predisposition or inclination for or against an argument or conclusion."

268. Judges are naturally entitled to have opinions and general relationships without them becoming disqualifying, "an open mind but not an empty head" in the words of Edward Tufte. In truth, every judge will bring to bear his or her lifetime experiences, including training as to the exclusion of irrelevant information. But no judicial officer is immune from human failings including the capacity to be blind to what others may see or "reasonably perceive".

269. Very few matters that have come before the Appellate Tribunal over the years have been uncontroversial. Fewer still will have not touched the members of the Tribunal in some

way in other aspects of their lives in the Church. There have been instances of Bishops in the Tribunal ruling on legal issues upon which they have already ruled as president of their diocesan synod. Three of the Members of the Appellate Tribunal are required to be diocesan Bishops. The four lay members are or have been diocesan chancellors in most instances. All are elected by constituencies in the General Synod from a small pool of men and women with close associations with the Church, usually in one or two particular dioceses. The members serve on the Tribunal in a voluntary capacity as often as they are required to participate. Membership of the Tribunal is (hopefully) a small part of their continuing lives in the Church and beyond.

270. No one has suggested actual bias on the part of any Tribunal member.

271. The objection to Professor Croft participating in this Reference should be firmly rebuffed, especially since the objectors and Mr Ould appear to accept the truth of Bishop Parkes' statement to his Synod. Nothing has been advanced to suggest anything that might support a claim of prejudgment in any sense, let alone its legal sense. There is the further difficulty that the objectors appear to presume that a legal adviser, like a chancellor, necessarily shares the opinions of his or her client in any particular matter (whether that "client" is seen as the Bishop or even as the Diocese). We also venture to suggest that no diocese has a synod which is of a common mind on the issues directly or indirectly involved in the Reference. Majorities in Synods may have been able to pass ordinances and/or take or fund other action supporting or opposing the cause of same-sex marriage or the blessing of same-sex marriages or a particular position in this Reference. But several of the submissions in this Reference have been at pains to invoke constitutional protection on the very basis of the interests of "minorities" in particular dioceses. As indicated, the submissions supporting a particular outcome in this Reference have taken a vast variety of legal and theological positions.

272. The (former) Bishop of Rockhampton responded to the Registrar's letter in general terms, reminding the Tribunal of the very controversial nature of the questions referred and of the duty to avoid actual or perceived impression of improper influence. He can be assured that the Tribunal is very conscious of these matters. In response to his question about guidelines to provide those participating in the hearing "with assurance as to potential conflicts", we can only say that it is not so much a question of "guidelines" being provided by the Tribunal as the Tribunal's acknowledgement of the legal duties of its members who are striving in good faith to act fairly and justly. The principles are discussed in many authoritative cases, not that this makes their application much the easier. Beyond this, it is not the Tribunal's role to take "efforts to ensure a balanced panel" as the Bishop intimates, whatever this might mean in theory or practice.

273. Mr Perrie also pursued the matter of balance, but in somewhat more specific terms. He submitted that any tribunal member who has "relatives or family members" in the LGBTI "community" should recuse themselves. The argument proceeded on both a particular

and a statistical level. "The known presence of family members will give the impression, rightly or wrongly, of any finding that may be determined in the future, that the tribunal has been biased and cause a degree of resentment." And since "the percentage of LGBTI persons within our community is probably about 3%...the tribunal should reflect that percentage in its makeup".

274. Mr Killow also requested that any member with a "close" family member identifying as LGBTI and contemplating marriage with a person of the same sex should be obliged to recuse him or herself.

275. We do not know the factual basis for Mr Perrie's "3%" statement but we certainly reject the notion that the Tribunal members should be tailoring their own numbers as he implies. On such logic, is there a duty to take steps to ensure that a sufficient number of Tribunal members with *assumed* relational or institutional biases in the opposite direction should be taken?

276. As to the application for the recusal of any member of the Tribunal with a family member who identifies as LGBTI and who is contemplating marriage to a person of the same sex we would respond as follows. We do not think that the hypothetical "fair-minded" lay person would see things the way that this minority of the 41 parties in this Reference have done. Regardless of definition, many families are large and they can be expected to contain persons with a spread of attitudes on all things. Without descending into a war of statistics we believe that significant numbers of people have some family member or friend who identifies as LGBTI some of whom are contemplating same-sex marriage. Some, not all, of the hypothetical class of fair-minded observers would be offended if this alone were a criterion of **dis**qualification. As indicated in the Registrar's notification, none of the persons adverted to are intending to seek a church blessing for their intended union.

277. The issue of approving the solemnisation of a same-sex marriage is not before the Tribunal. And, as will be apparent from our reasons, the Tribunal has not had to address the "merits" of blessing services or even the theology of blessing same-sex "coupling" beyond the inquiry as to whether it entails a relevant teaching on a question of faith. All we have done is to declare that the Synod of the Diocese of Wangaratta has not acted contrary to the *Constitution* nor contrary to the scope of authority given by the General Synod in 1992. All of the issues in this Reference are of a legal nature. No questions of fact or credibility are involved. Indeed, the reasons published above show that the matter has turned upon constitutional principles already decided by the Tribunal in the past.

(ii) Action taken pursuant to s 58 of the Constitution

278. It is for the Tribunal to interpret the *Constitution.* The meaning of the significant word "doctrine" has been stated, applying the earlier decisions of this Tribunal.

279. Section 58 of the *Constitution* requires the Appellate Tribunal in one situation, and permits it otherwise if it thinks fit, to obtain the opinion of the House of Bishops and the Board of Assessors. In this context, the Tribunal determined that it would be assisted if the Bishops and Assessors were invited to express their opinions on the following particular questions:

1. *One of the many issues in the Reference is the meaning and scope of the words "the Christian Faith as professed by the Church of Christ from primitive times and in particular set forth in the creeds known as the Nicene Creed and the Apostles' Creed". Which of the Thirty-Nine Articles and which (if any) part of any other document (including Holy Scripture) contains statements relevant to the Wangaratta references about the* ***faith*** *of the Anglican Church of Australia and what are they?*
2. *Can you please refer the Tribunal to two or three respected, published, available works or articles discussing the history and scope of Article VI? In that Article, what is meant by the words "containeth all things necessary to salvation"?*
3. *Does the Anglican Church of Australia have a teaching on whether persistence in sexual immorality precludes a person from salvation in Christ Jesus? Where is this teaching set out? In this context, is sexual immorality different from other forms of sinfulness?*
4. *Do you see any doctrinal impediment or difficulty with the baptism of a child of a same sex married couple according to one of the Anglican Church of Australia's authorised rites, including the use of the prayer for the child's parents?*

280. As indicated, the responses from the Bishops and the Assessors will be available online with the other submissions in this Reference. The Tribunal is grateful for this and all other assistance, including from the Registrar and her staff.

(iii) Two caveats

281. A question concerning the observance of the injunctions in s 5 (3) of the 1992 Canon may be determined by the bishop of the diocese (s 5 (4)). The Bishop of Wangaratta obviously signalled his general assent to the form of service that is annexed to the Regulation under challenge. While this has not provided a jurisdictional impediment to this

Reference, we should leave open the issue of the scope of this subsection. It may arise more squarely in a further reference or in some disciplinary proceedings.

282. Presumably circumstances may arise independently of the same-sex issue where it is inappropriate to use a blessing service and/or where the Bishop directed a minister in a diocese not to use it. For example, the policies and practices attending the remarriage of divorced persons that operate subject to the *Marriage of Divorced Persons Canon 1981* (if in force in the diocese) may call to be respected in letter and spirit.

(iv) <u>The Questions referred and the Opinion of the Tribunal on them</u>

283. The Primate made two References relating to the Wangaratta blessing service. The first was on 5 September 2019, upon the Primate's own motion, as permitted by s 63 of the *Constitution.* The second was on 21 October 2019, at the request of 25 members of the General Synod, as required by the same provision. There is significant overlap.

284. The Questions referred by the Primate (omitting the preambles), and our answers to them, are:

1. Q: Whether the regulation ***Blessing of Persons Married According to the Marriage Act 1961 Regulations 2019*** made by the Synod of the diocese of Wangaratta is consistent with the Fundamental Declarations and Ruling Principles in the Constitution of the Anglican Church of Australia?

A: The regulation is not inconsistent with the Fundamental Declarations or the Ruling Principles.

2. Q: Whether the regulation is validly made pursuant to the *Canon Concerning Services 1992?*

A: No ground of invalidity has been established.

285. The Questions that were referred at the request of the 41 members of General Synod (omitting the preambles), and our answers to them, are:

1. Q: Whether the use of the form of service at Appendix A to the ***Blessing of Persons Married According to the Marriage Act 1961 Regulations 2019*** made by the Synod of the Diocese of Wangaratta to bless a civil marriage which involved a union other than between one man and one woman, is consistent with the doctrine of this Church and consistent with the Fundamental Declarations and Ruling Principles in the Constitution of the Anglican Church of Australia?

A: Use of the service would not be inconsistent with the Fundamental Declarations or the Ruling Principles, provided that use is in a diocese in which the ***Canon Concerning Services*** is in force and the service is not contrary to any regulation of the Synod of that diocese.

2. Q: Whether the use of any other form of service, purportedly made in accordance with section 5 of the ***Canon Concerning Services 1992,*** to bless a civil marriage which involved a union other than between one man and one woman, is consistent with the doctrine of this Church and consistent with the Fundamental Declarations and Ruling Principles in the Constitution of the Anglican Church of Australia?

A: There is insufficient practical utility to justify answering this general and hypothetical question.

3. Q: Whether, in light of the determinations to be made in Questions 1 & 2, the Regulations are validly made pursuant to the ***Canon Concerning Services 1992***?

A: No ground of invalidity has been established.

286. These are the reasons of the President (the Hon Keith Mason AC QC), the Deputy President (the Hon Richard Refshauge), the Most Revd Phillip Aspinall, the Right Revd Garry Weatherill and Professor the Hon Clyde Croft AM SC. They therefore constitute the Opinion of the Tribunal, in accordance with s 59 (1) of the *Constitution*.

(v) <u>Our colleague's dissent</u>

287. In this matter and the associated Newcastle Reference, Ms Davidson has written separately and in painful dissent. We too have found this whole exercise particularly taxing for a number of reasons. It may be hoped that those who are unhappy with the Opinion and/or the reasons of the majority or the minority will accept that each member of the Tribunal has done his or her best according to his or her informed conscience. The Tribunal has been confronted with deciding on behalf of a divided Church strictly legal matters that will affect authoritatively the future choices for prayerful further action by synods, bishops, clergy and lay people. The Opinions in each Reference will also provide a limited basal framework that will hopefully assist in the exercise of any disciplinary jurisdiction in the years ahead.

288. Those who are party to these joint reasons have revisited all of the matters raised in the dissent before adhering to the position outlined in these reasons. It will be apparent to the careful reader that we differ from our respected colleague at several points of legal principle including the present non-application of s 4 of the *Constitution*, the meaning and application of Article VI, the relevance of the *Church of England Act* 1854 (Vic) and the status and exegesis of earlier Opinions of this Tribunal. Nothing would be gained in prolonging the process with any further rejoinder or rebuttal.

289. The one exception to the above relates to the suggestion by Ms Davidson in her two dissents to the effect that this Tribunal might judge the *legality* of synodical legislation by reference to the publication called *The Principles of Canon Law common to the churches*

of the Anglican communion. It was further suggested that the Wangaratta regulation might be rejected on the basis of the Tribunal forming the view that it does not further the good order of the Church. In para 59 of her reasons in the Newcastle matter, Ms Davidson cites Street CJ in the 1986 *Builders Labourers' Federation Case*. Street CJ was there in dissent on the particular proposition and there is a long stream of High Court authority to the effect that the phrase "peace, order and good government" confers no limit on legislative authority (apart from a territorial one) that might open its exercise up to second-guessing by the courts. In *Union Steamship Company of Australia Pty Limited v The Queen* (1988) 166 CLR 1 at 10 Mason CJ, Wilson, Brennan, Deane, Dawson, Toohey and Gaudron JJ stated that the words "did not confer on the courts of a colony, just as they do not confer on the courts of a State, jurisdiction to strike down legislation on the ground that, in the opinion of a court, the legislation does not promote or secure the peace, order and good government of the colony". *Union Steamship* has been more recently applied in other cases including *Durham Holdings Pty Limited v NSW* (2001) 205 CLR 399.

290. We do not with respect accept that Ms Davidson has accurately stated the views that she attributes to us in para 32 of her Newcastle reasons. We respectfully disagree with her exegesis of the statement of Archbishop Rayner which we have adopted. Nor do we accept her suggestion that we have rejected the unanimous opinions of the House of Bishops and the Board of Assessors and endorsed the formal blessing of homosexual sexual *practice* which is contrary to the teaching of the Church.

APPENDIX: THE SERVICE OF BLESSING APPENDED TO THE WANGARATTA REGULATION

INTRODUCTION

The Priest addresses the couple and congregation

The Lord be with you

And also with you

We have come together to ask God's blessing on ***N*** and ***N*** as they continue their married life together.

Hear what the Epistle of St John says: "Beloved, let us love one another, because love is from God; everyone who loves is born of God and knows God", and, "No one has ever seen God; if we love one another, God lives in us, and his love is perfected in us." - 1 John 4.7 & 12.

For the love that we receive and give let us thank God, saying together

Almighty God, source of all being, we thank you for your love, which creates and sustains us. We thank you for the physical and emotional expression of that love; and for the blessings of companionship and friendship. We pray that we may use your gifts so that we can ever grow into a deeper understanding of love and of your purpose for us, through Jesus Christ, our Lord. Amen.

Let us pray.

Loving and gracious God, who made us in your image and sent your son Jesus Christ to welcome us home; protect us in love and empower us for service. Through the power of the Holy Spirit may ***N*** and ***N*** become living signs of God's love and may we uphold them in the promises that each affirms this day, through Jesus Christ our Lord. Amen.

Ministry of the Word

One or more readings from the Scriptures, appropriate to the occasion, shall then be read.

A homily or address may follow the readings.

THE PROMISES

As you have entered into a civil marriage and now seek God's blessing on your ongoing life together, I ask you:

Will you be to each other a companion in joy and a comfort in times of trouble, and will you provide for each other the opportunity for love to deepen?

Couple: **We will, with God's help.**

(to each partner in turn): Will you, **N**, continue to give yourself to **N,** sharing your love and your life, your wholeness and your brokenness, your failure and your success?

Partner: **I will.**

PRAYERS

These might include the following or something similar.

Loving God, whose son Jesus Christ welcomed strangers and called them his friends, grant to ***N*** and ***N*** such gifts of grace that they may be bearers of your friendship and their home a place of welcome for all. **Amen**

Jesus, our brother, inspire **N** and **N** in their lives together, that they may come to live for one another and serve each other in true humility and kindness. Through their lives may they welcome each other in times of need and in their hearts may they celebrate together in their times of joy, for your name's sake. **Amen.**

Holy Spirit of God, guard and defend ***N*** and ***N*** in their life together, protect them from evil, strengthen them in adversity until you bring them to the joy of your heavenly kingdom, through Jesus Christ our Lord. **Amen.**

The Lord's Prayer

As our Saviour Christ has taught us to pray:

[Set out]

The Blessing

Let us now pray that ***N*** and ***N*** may be sustained by God's love.

Spirit of God, you teach us through the example of Jesus that love is the fulfilment of the Law, help ***N*** and ***N*** to persevere in love, to grow in mutual understanding, and to deepen their trust in each other; that in wisdom, patience and courage, their life together may be a source of grace to all with whom they share it; and that the blessing of God Almighty, Father, Son and Holy Spirit be upon you to guide and protect you and all those you love, today and always. **Amen.**

This Service of Blessing is best placed in the context of liturgical worship.

This Service may be followed by the celebration of Holy Communion, APBA second order, with adaptations permissible according to the Rubrics.

Music may be interposed as the occasion demands.

Opinion of Ms Gillian Davidson

Part 1 – Background

Questions before the Tribunal

1. The current matter arises due to two separate referrals under section 63(1) of the Constitution of the Anglican Church of Australia (**Constitution**) made on 5 September and 21 October 2019 (**Referrals**). The questions relate to the *Blessing of Persons Married According to the Marriage Act 1961 Regulations 2019* (Wangaratta) (**Regulations**), which purport to be made under the *Canon Concerning Services 1992*, in the form adopted in the Diocese of Wangaratta (**Wangaratta**).

2. The 5 September 2019 referral provides as follows:

> ***Blessing of Persons Married According to the Marriage Act 1961 Regulations 2019 (Wangaratta)***
>
> *On 5 September 2019 the Primate referred to the Appellate Tribunal the following questions:*
>
> - *At a session in August 2019 the Synod of the Diocese of Wangaratta purportedly made the Blessing of Persons Married According to the marriage Act 1961 Regulations 2019 pursuant to Section 5 (2) of the Canon Concerning Services*
> - *Section 5 (3) of the Canon Concerning Services 1992 provides that all forms of service used pursuant to Section 5 (2) "must be reverent and edifying and must not be contrary to or a departure from the doctrine of the Church."*
>
> *The following questions arising under the Constitution are referred to the Appellate Tribunal:*
>
> - *Whether the Blessing of Persons Married According to the Marriage Act 1961 Regulations 2019 made by the Synod of the Diocese of Wangaratta is consistent with the Fundamental Declarations and Ruling Principles in the Constitution of the Anglican Church of Australia.*
> - *Whether the regulation is validly made pursuant to the Canon Concerning Services 1992.*

3. The 21 October 2019 referral provides as follows:

> ***Referral to the Appellate Tribunal at the request of the 25 Members of General Synod***
>
> ***Blessing of persons married according to the Marriage Act 1961 Regulations 2019 (Diocese of Wangaratta)***
>
> *On 14 October 2019 the Primate received a request from 25 members of General Synod that he refer questions to the Appellate Tribunal in relation to the Blessing of Persons Married According to the Marriage Act 1961 Regulations 2019 (Diocese of Wangaratta)*
>
> *On 21 October 2019 the Primate referred to the Appellate Tribunal the following questions:*
>
> - *Whether the use of the form of service at Appendix A to the Blessing of Persons Married According to the Marriage Act 1961 Regulations 2019 made by the Synod of the Diocese of Wangaratta to bless a civil marriage which involved a union other than between one man and one woman, is consistent with the doctrine of this Church and consistent with the Fundamental Declarations and Ruling Principles in the Constitution of the Anglican Church of Australia.*
>
> - *Whether the use of any other form of service, purportedly made in accordance with section 5 of the Canon Concerning Services 1992, to bless a civil marriage which involved a union other than between one man and one woman is consistent with the doctrine of this Church and consistent with the Fundamental Declarations and Ruling Principles in the Constitution of the Anglican Church of Australia.*
>
> - *Whether, in light of the determinations to be made in Questions 1 & 2, the Regulations are validly made pursuant to the Canon Concerning Services 1992.*

4. The Tribunal determined to consider both referrals concurrently.

Jurisdiction of the Tribunal

5. The jurisdiction of the Tribunal under section 63(1) of the Constitution extends to any question which is properly referred to the Tribunal and which "arises under this Constitution".

6. I note that the submissions made by the Wangaratta and the Archbishop of Perth contended that the current Referrals were not matters arising under the Constitution. I find this position difficult to accept given that the Regulations purport to be made under, and to draw legislative authority from, a Canon of General Synod; namely, the *Canon Concerning Services 1992*.

7. Accordingly, I agree that the questions referred on 5 September and 21 October 2019 have been properly made and comprise questions which arise under the Constitution.

What material can the Tribunal consider?

8. The Regulations purport to be made under the *Canon Concerning Services 1992*. That Canon is to be interpreted in accordance with Rule XIX as follows:

   XIX. RULE RE INTERPRETATION 1

   Section 74 of the Constitution shall apply to the canons the rules and Standing Orders of Synod unless the context or subject matter thereof indicates the contrary.

9. Section 74(7) of the Constitution provides that:

   (7) This Constitution shall, unless the context or subject matter otherwise indicate, be construed as if the Acts Interpretation Act 1901-1948 of the Parliament of the Commonwealth of Australia applied to this Constitution.

10. The Appellate Tribunal in its 2 November 1989 Report[1] agreed with the proposition that the *Acts Interpretation Act 1901-1948* (Cth) (**1948 Act**) applied in the form it existed in 1948, but that that Act did not limit the materials available to the Tribunal in forming its opinions:

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

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

    In questions as to the proper interpretation of the Constitution the Tribunal considers that it is appropriate to act upon the history of the Church, and within limits, the earlier drafts of the Constitution to assist it in construing the Constitution.[2]

11. Accordingly, I have adopted the approach of examining both the text of the Regulations, the *Canon Concerning Services 1992* and the Constitution in their own right and also in the historical context in which were enacted.

12. In addition, I have reviewed a wide variety of materials. These materials have included the large number of submissions made to this Tribunal and the unanimous opinions of the House of Bishops and of the Board of Assessors. I have also been assisted by "*The*

[1] Report and Opinion of Tribunal on the "Ordination of Women to the Office of Priest Act 1988" of the Synod or the Diocese of Melbourne, dated 2 November 1989, pages 6-7 (the **1989 Report**).
[2] 1989 Report, ibid pages 6-7.

Principles of Canon Law common to the churches of the Anglican communion"[3] (**Principles**) which is the product of the work of the Anglican Communion Legal Advisers Network convened in 2002 following the meeting of the Primates of the Communion in 2001 and published by the Anglican Communion Office in 2008. While the Convenor of the network in the Preface stated that the aim of *Principles* is to "inform, not to oblige". I have found it persuasive that the *Principles* emerged from the work of 30 lawyers from 17 provinces of the churches of the Communion who worked off a body of 50 or so principles developed by Norman Doe, author of "*Canon Law in the Anglican Communion"*.[4]

13. Principles 1-3 of *Principles* contain statements that are highly relevant to the Referred Questions. Set out below are those statements in Principles 1-3 which are most pertinent:

Principle 1: Law in ecclesial society

1. *Law exists to assist a church in its mission and witness to Jesus Christ.*
2. *A church needs within its laws to order, and so facilitate, its public life and to regulate its own affairs for the common good.*
3. *Law is not an end in itself.*

Principle 2: Law as servant

1. *Law is the servant of the church.*
2. *Law should reflect the revealed will of God.*
3. *Law has a historical basis and a theological foundation, rationale and end.*
4. *Law is intended to express publicly the theological self-understanding and practical policies of a church.*
5. *Law in a church exists to uphold the integrity of the faith, sacraments and mission, to provide good order, to support communion amongst the faithful, to put into action Christian values, and to prevent and resolve conflict.*

Principle 3: The limits of law

1. *Laws should reflect but cannot change Christian truths. …*

6. *Some laws articulate immutable truths and values."*[5]

14. With the above interpretative framework, I now turn to examine the content of the Regulations.

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[3] Anglican Communion Legal Advisers' Network, "*The Principles of Canon Law common to the churches of the Anglican communion",* Published by The Anglican Communion Office, London, UK (2008).

[4] Norman Doe "Canon Law in the Anglican Communion: A Worldwide Perspective", Oxford University Press, Oxford, United Kingdom (1998).

[5] See above Footnote 3, page 19.

What do the Regulations authorise?

15. The Regulations attempt to mandate a form of service where a minister is asked to and agrees to conduct what is called a 'Service of Blessing' for persons who have already been married in accordance with the *Marriage Act 1961* (Cth):

> ***Form of Service***
>
> *4. Where a minister is asked to and agrees to conduct a Service of Blessing for persons married according to the Marriage Act 1961 the minister will use the form of service at Appendix A to these Regulations and no other form of service.*[6]

16. The Regulations do not limit the use of the service to heterosexual civil marriage. The Regulations expressly contemplate that the service may be used in circumstances which give rise to questions of conscience:

> ***Conscientious Objection***
>
> *5. No minister will be compelled to assent to conducting such a service if to do so would offend their conscience.*
>
> *6. Where a minister has a conscientious objection to conducting such a service, that minister may refer the couple seeking such a blessing to a minister who is willing and able to conduct the service.*[7]

17. Accordingly, the drafters of the Regulations expected that the use of the service could be contentious and may give rise to conscientious objections.

18. The Tribunal accepts that it is currently unlawful for same sex unions to be solemnised. The current state of the law is consistent with the current doctrine of the Church that marriage is only permitted between one woman and one man

19. Further, the Bishops Agreement of March 2018 acknowledged:

> *"If we as a Church are to change this doctrine to permit same-sex marriage, the appropriate mechanism is through the framework of the Constitution and Canons of the Anglican Church of Australia. … The bishops commit to working together to manifest and maintain unity, as we together discern the truth." (paragraph 1 of the Bishops Agreement)*[8]

and

> *"The bishops commit to act within the framework of the Constitution and Canons of this Church, and to encourage those under their episcopal oversight to do so." (paragraph 2).*[9]

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[6] Regulations, Section 4.
[7] Regulations, Section 5 and 6.
[8] As reported by The Melbourne Anglican, "Bishops' pledge on SSM rite" on 5 May 2018, pages 1 -2.
[9] The Melbourne Anglican, Ibid.

20. Wangaratta's submission also acknowledges that the Church's teaching is that marriage is expressly confined to marriage between a man and a woman:

> ***The Church's teaching on marriage***
>
> *53. The Church's teaching on marriage is to be found in its forms of service for marriage, most particularly in the BCP, and in the three Canons of General Synod dealing with the question of matrimony. It can also be found in codes of conduct such as Faithfulness in Service which contain advice or directives about sex and intimacy within marriage. None of the 39 Articles deal expressly with marriage.*
>
> *54. The BCP marriage service is expressly confined to marriage between a man and a woman. There is no authorised Anglican rite for any form of Christian marriage other than a marriage between a man and a woman. The General Synod, in exercising its powers under section 26 of the Constitution, has expressed the view that marriage is between a man and a woman.*[10]

21. Wangaratta additionally submits that the 'Service of Blessing' authorised under the Regulations:

> *10.1. is not a marriage service;*
>
> *10.2. is confined for use where the persons involved are not already married in a Christian service;*
>
> *10.3. does not purport to give the civil marriage that has previously occurred the status of Christian marriage;*
>
> *10.4. is a service blessing the persons in the civil marriage; and*
>
> *10.5. does not specify the sex of the persons who have been married.*[11]

22. On this last point, Wangaratta acknowledges that the 'Service of Blessing' is intended for use in the blessing of same-sex civil unions:

> *59. Whether dealing (as this reference does not) with a form of service purporting to solemnise a marriage according to Christian rites, or whether (as here) with a form of blessing only, the Tribunal can adopt this reasoning with respect to the blessing of civil marriages, including same sex marriages: to the extent that the BCP marriage rite provides for only marriages between men and women, that can be seen as reflecting the reality of the common law position and attitudes extending well beyond the Church rather than being derived from any doctrine. At the time the BCP was prepared, there was no possibility of same sex marriages, and no "civil marriage" in the sense of ceremonies conducted other than by priests.*[12]

[10] Primary submission by the Synod of the Diocese of Wangaratta dated 8 November 2019, paragraphs 53-54.
[11] Synod of the Diocese of Wangaratta, ibid, paragraph 10.
[12] Synod of the Diocese of Wangaratta, ibid, paragraph 59.

23. This position is consistent with that outlined by The Revd Canon Professor Dorothy Lee in her address to the Synod of Wangaratta, who made clear that the intent of the Regulations is to provide a service of blessing for both heterosexual and same sex civil unions:

> *What of gay and lesbian couples? Currently, they cannot marry in our church. The Bishops have confirmed that current church teaching says that marriage can only be between male-female couples…. Since Australia legislated for full marriage equality in 2017, the avenue of blessing same-sex unions needs to be seriously considered.*[13]

24. For these reasons, I have proceeded on the basis that the Regulations are intended to be used with respect to same-sex civil unions.

Separate Opinion

25. I have had the advantage of carefully considering the significant draft majority opinion that has been prepared, reviewed and discussed by the members of the Appellate Tribunal. In addition, I have been assisted by the responses from the House of Bishops and the Board of Assessors. I have determined that my best response to the opinion of the majority are the reasons contained in this separate opinion.

26. I know that this separate opinion will cause unease and pain to some, particularly to those who have felt saddened, denied or malnourished by their experience of the church. I lament any pain in the same way I lament having to break the news of a hard or difficult truth to someone I love. And yet I do so trusting that the word of God is for our good, and mindful that God is a merciful God who delights to bless his people graciously and faithfully and the opinions of this Tribunal will not alter that fact.

Executive Summary

27. I have concluded that the Regulations are invalid for the following reasons:

    a. The Regulations are inconsistent with the Fundamental Declarations as:[14]

        i. The doctrine of the Church is that marriage is only permitted between one woman and one man;

        ii. Scripture teaches that same sex practice is not permitted; and

        iii. The witness of the Church Universal is opposed to same sex practice;

    b. The Regulations are inconsistent with the Ruling Principles as:[15]

        i. The Regulations are contrary to the Fundamental Declarations and therefore also the Ruling Principles (Article XX);

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[13] The Blessing of Civil Unions Address to the Synod of Wangaratta, 31 August 2019; a copy of which was submitted by the Synod of the Diocese of Wangaratta as an attachment to its primary submission of 8 November 2019.

[14] See Part 2 of this Opinion.

[15] See Part 3 of this Opinion.

ii. The Regulations seek to bless same-sex civil unions which would not qualify for Christian marriage, as such civil unions are contrary to the church's teaching on marriage;

iii. The Regulations seek to bless sinful practice, contrary to the Church's teaching that persistence in sexual immorality endangers salvation; and

iv. The Regulations contravene the principle that our practice and worship should be consistent in furtherance of the good order of the Church;

c. The Regulations are not validly made under the *Canon Concerning Services 1992* as:[16]

i. The Regulations are contrary to the doctrine of the Church; and

ii. The Canon does not empower a Synod to make Regulations and the Synod of Wangaratta does not otherwise have power to make regulations with respect to non-temporal matters by virtue of the *Church of England Act 1854* (Vic).

Approach to previous opinions of the Tribunal

28. The current Referrals have required an examination of earlier Tribunal reports regarding the meaning of the word 'doctrine' under our Constitution, most notably the 1985[17] and 1987 Reports.[18] I have examined those reports in detail and applied the majority opinions of each report on that question.

29. For the 1985 Report, that majority comprises the joint opinion of Archbishop Rayner, Bishop Holland, and Justices Young and Tadgell who found that a principle of doctrine means:

a fundamental truth or proposition on which many others depend.[19]

30. For the 1987 Report, that majority comprises the opinion of Bishop Holland, Justices Young and Tadgell (who each affirmed their opinion stated in 1985), and either:

a. Justice Cox, who favoured a broader test of 'principle' as being:

A general law or rule adopted or professed as a guide to action; a settled ground or basis of conduct or practice; a fundamental reason of action, esp. one consciously recognized and followed. (Often partly coinciding with sense 5 - viz. Fundamental truth or proposition, on which many others depend ...);[20] or

b. Archbishop Robinson, for whom the Ruling Principles did not allow any departure:

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[16] See Parts 4 and 5 of this Opinion.

[17] Opinion of the Appellate Tribunal, Ordination of Women, dated 14 August 1985 (the **1985 Report**).

[18] Report of the Appellate Tribunal re Ordination of Women to the Office of Deacons Canon 1985 (the **1987 Report**).

[19] 1985 Report, see above footnote 17, page 4.

[20] 1987 Report, see above footnote 18, page 27.

even in a limited way, from the doctrine and principles of the Church of England retained and approved by this Church[21]

31. The majority opinion in the current matter has sought to apply the minority[22] opinions of Archbishop Rayner[23] and Justice Handley in the 1987 Report on the question of the meaning of 'doctrine' under the Constitution. I have adopted a different interpretation of, in particular, the Statement of Archbishop Rayner that:

> *"Doctrine" must therefore be understood in the Constitution as the Church's teaching on the faith which is necessary to salvation.*[24]

32. The majority applies the phrase 'which is necessary to salvation' as qualifying the word 'teaching' and therefore constraining its meaning.

33. I consider that this is a misunderstanding of what Article VI of the 39 Articles of Religion (**39 Articles**)[25] (upon which Archbishop Rayner is relying) means by the phrase that "Holy Scripture containeth all things necessary to salvation".

34. Read in context, I consider that the phrase 'which is necessary to salvation' must qualify the word 'faith' rather than the word 'teaching'. Archbishop Rayner immediately goes on to state:

> *That faith is grounded in scripture and set out in the creeds; and the Church's doctrine or teaching on that faith may be explicated and developed, provided it is always subject to the test of scripture. For reasons already advanced, I do not see the limitation of ordination to males as required by scripture, nor is it referred to in the creeds. (emphasis added)*[26]

35. So, for Archbishop Rayner, doctrine is that which is taught by the Church about the faith which is not inconsistent with Scripture or the creeds; within that, some doctrine may be further explicated or developed provided that it is not inconsistent with Scripture. That it is possible for doctrine – in Archbishop Rayner's view – to develop does not mean it is not 'doctrine' within the meaning of the Constitution.

36. Viewed in context, the interpretation placed by the majority on Archbishop Rayner's statement is one with which I cannot agree. If doctrine is only that teaching which is necessary for salvation, and if, as Article VI requires, Scripture contains everything necessary for salvation, then why would Archbishop Rayner state that "doctrine or

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[21] 1987 Report, ibid, page 63.

[22] Whilst the opinions of Archbishop Rayner and Justice Handley formed part of the majority on the questions before the Tribunal in the 1987 Report, their respective views on the meaning of 'doctrine' in the Constitution were minority views.

[23] Justice Cox stated that he was in 'general agreement with the additional reasons, with respect to Chapter I, that have been prepared by the Archbishop of Adelaide for the purpose of the present reference' (1987 Report, ibid page 14); however, the Ruling Principles are contained in Chapter II, so Justice Cox did not support Archbishop Rayner's position on the Ruling Principles as is evident an examination of his opinions (see discussion in paragraphs 128-138 below). Justice Cox expressly dissented from the majority opinion in the 1985 Report on the application of the Section 4 of the Constitution (see above footnote 17, page 4). See generally the discussion of Justice Cox's position in paragraphs 128 - 138 below.

[24] 1987 Report, see above footnote 18, page 49.

[25] References to the '**39 Articles of Religion**', the '**39 Articles**' or '**Article**' in this Opinion refer to "The Thirty Nine Articles of Religion, Agreed upon by the Archbishops, Bishops, and the whole clergy of the Provinces of Canterbury and York, London, 1562", referred to as the 'articles of religion' in Section 74(3) of the Constitution.

[26] See above footnote 24.

teaching on that faith may be explicated and developed, provided it is always subject to the test of scripture"?

37. By contrast, I have found that Archbishop Rayner is distinguishing between doctrine which is an expression of Scripture and the creeds (and hence eternal) and other doctrine which may develop in a manner not inconsistent with Scripture. I have understood Archbishop Rayner to be outlining a position which envisages that a definition of doctrine can extend beyond Scripture and could be based on reason, tradition or experience, as long as that extended definition is not inconsistent with Scripture.

What is the place of the Constitution?

38. The Constitution is a significant achievement in the life of the Church in Australia. It defines both the basis for our unity and the limits to which we may diverge on matters of controversy, including making divergent pastoral allowances for local circumstances where appropriate. As such it is both a symbol of our unity and coherence as a body of believers and also a means by which we continue in communion despite our different views or circumstances.

39. In this way the Constitution reflects the Apostle Paul's understanding of the Church, where our unity is first of all founded and derived in the Lord Jesus Christ:

> *The Son is the image of the invisible God, the firstborn over all creation. For in him all things were created: things in heaven and on earth, visible and invisible, whether thrones or powers or rulers or authorities; all things have been created through him and for him. He is before all things, and in him all things hold together. And he is the head of the body, the church; he is the beginning and the firstborn from among the dead, so that in everything he might have the supremacy. (Colossians 1:15-18)*

40. This unity is a work of God the Father achieved through Christ's death on the cross:

> *For God was pleased to have all his fullness dwell in him, and through him to reconcile to himself all things, whether things on earth or things in heaven, by making peace through his blood, shed on the cross. (Colossians 1:19-20)*

41. For Paul, this knowledge that "in Christ all the fullness of the Deity lives in bodily form, and in Christ you have been brought to fullness" and that "He is the head over every power and authority" (Colossians 2:9-10) guards the Church against being taken "captive through hollow and deceptive philosophy, which depends on human tradition and the elemental spiritual forces of this world rather than on Christ" or being deceived "by fine-sounding arguments." (Colossians 2:4; 2:8)

42. The Apostle appreciated that our unity as Christians could not be taken for granted and required believers to actively pursue that unity in good works, forgiveness and forbearance:

> *Therefore, as God's chosen people, holy and dearly loved, clothe yourselves with compassion, kindness, humility, gentleness and patience. Bear with each*

other and forgive one another if any of you has a grievance against someone. Forgive as the Lord forgave you. And over all these virtues put on love, which binds them all together in perfect unity. (Colossians 3:12-14)

43. Thus, despite the fact that the adoption of our Constitution followed decades of labour, disagreement, distrust, dispute, and that it required an intervention by the Archbishop of Canterbury before eventually being accepted by the whole Church, it flowed from a determination to express and enjoy unity.

44. Matters prominently under dispute in the evolution of the Constitution concerned the respective authority of the individual dioceses and the General Synod, the flexibility of the Constitution to allow variations especially in worship, the powers and membership of the Appellate Tribunal, the ongoing connection with the courts and canons of the Church of England ('the nexus'), the autonomy of the Church and its ability to speak with its own voice and even the capacity to unite with other churches.[27] There was fear on the one hand that the will of the majority would be forced on the minority, and that the Church would change its position and hence its identity on matters of strong theological and liturgical moment. On the other hand, there was an equal fear that the autonomy of the church would be always compromised and that the views of the minority would prevent the advent of necessary change.

45. At every point of this process, there was one chief issue, namely the statement of the fundamental authority which would determine the identity of the Church. What was that authority? Where could it be found? How was it to be interpreted? How was it to be safeguarded?

46. This was the issue which drove many of the discussions and provoked the difficulties on which attempts to create the Constitution foundered. To use one practical example, there were those who, to the very end, wanted the 39 Articles and the Book of Common Prayer (**BCP**)[28] to be included in the Fundamental Declarations. Others, fearful that this would inhibit all change, preferred them to appear amongst what became known as the Ruling Principles. It took a concession by some to allow for this and a concession by others which allowed the Articles and the BCP to be described as inhibiting any change inconsistent with their principles of doctrine and worship, for the Constitution to be agreed to.

47. To use two key illustrations about how the nature of the Constitution was formed by these considerations, we may refer to the Diocese of Adelaide and the Diocese of Sydney as two of the significant dioceses which had major difficulties with the Constitution, but ultimately acquiesced and accepted.

48. In the case of the Diocese of Adelaide, the problems revolved around the autonomy of the National Church. The Constitution was excessively rigid theologically, while being too devolved ecclesiologically. The sovereignty of the individual dioceses would hinder

[27] John Davis, *Australian Anglicans and their Constitution,* Acorn Press, Canberra (1993), see generally and, in particular, chapters 2 and 7.

[28] References to the **Book of Common Prayer** or the **BCP** in this Opinion have the same meaning as in Section 74(2) which provides that:
In this Constitution "the Book of Common Prayer" means the Book of Common Prayer as received by the Church of England in the dioceses of Australia and Tasmania before and in the year of our Lord one thousand nine hundred and fifty-five, that is to say, the book entitled "The Book of Common Prayer and Administration of the Sacraments and other rites and ceremonies of the Church according to the use of the Church of England together with the Psalter or Psalms of David pointed as they are to be sung or said in churches and the form or manner of making ordaining and consecrating of bishops, priests and deacons," and generally known as the Book of Common Prayer 1662.

the development of the unity of the Church nationally. Adelaide was the last Diocese to approve the Constitution and it ensured that when it was brought into law by the State Government, there was inserted a provision by which Adelaide could withdraw unilaterally. The unity of the national church was put first, but with a proviso.

49. The arguments in Sydney more clearly revolved around the question of the power of the Fundamental Declarations and the Ruling Principles to recognise and safeguard what Archbishop Mowll referred to as 'the Protestant and Reformed character of the Church of England'. To the very end, including during the process of submitting the Constitution to the NSW Legislature, there were those who felt that the Constitution was not sufficient to ensure that identity for the Church. But the key factor in the acceptance of the Constitution by the Diocese of Sydney was reassurances of Archbishop Mowll:

> *I would be failing in my responsibility as the Diocesan if I did not take every precaution necessary to safeguard the tradition of the Diocese…. We must, therefore, approach this matter, having in mind the welfare of the wider Church in Australia, of which we are the mother Diocese, and at the same time, with the determination that the point of view this Diocese represents should be both recognised and safeguarded,*[29]

and, even more significantly that of the senior theologian of the Diocese, Archdeacon T.C Hammond.

50. Hammond had expressed his support for the Constitution after achieving certain changes as a member of the Constitutional Committee. It was as a result of his conversations with the members of the committee from different parts of the Church, that he became convinced that the Constitution safeguarded the Protestant and Reformed nature of the Church. It is true that the Articles and BCP were not in the Fundamental Declarations, but he was persuaded that both the wording and the mechanism of the Constitution (eg the Appellate Tribunal and the need for special majorities of the General Synod to bring about all change) were more than sufficient to guard what Mowll called the Protestant and Reformed (the words are not synonymous) character of the Church.[30]

51. It was the voice of Hammond more than any other feature which secured the passage of the Constitution through Sydney and hence the acceptance of the Constitution by the Church as a whole Church. He did so by carefully and deliberately expounding the Constitution to reassure those whom he called 'Earnest Churchmen', who are, 'particularly anxious to know if the fundamental principles of the Church of England are maintained'. As he says, 'If the doctrine and principles of the Church are imperilled in any way all other provisions can well be regarded as inadequate to secure for the Church her time honoured position as a guardian of the truths of God. Does the Draft Constitution safeguard this position?' After considerable attention both to the wording of the Constitution and to the methods laid down in the Constitution to allow for changes while safeguarding the doctrine of the church (including 'the ordinary principles of interpretation employed in courts of justice'), he declares that the

[29] Archbishop Mowll's Address to a special session of the Sydney Synod, as reported in the Diocese of Sydney Year Book 1958, at page 202.
[30] Ibid.

Constitution 'protects the essential elements of the Catholic faith' and, 'retains her time-honoured standards of doctrine and worship as the norm of all further proceedings'.[31]

52. Thus, by nature the Constitution embodies compromise and did not satisfy everybody. Some have concluded therefore, perhaps with good reason, that there were (and are) two churches within the Church, each endeavouring to be assured of achieving and safeguarding their purposes. In this view, the union is fragile and depends among other things, on the assurances of Mowll and Hammond to that group (not merely in one Diocese) who, while accepting the possibility of change, as in the new Australian Prayer Books, will always need to be persuaded by 'the ordinary principles of interpretation', both in law and theology, that the Catholic, Protestant and Reformed faith exemplified in the Scriptures as interpreted through the tradition of Creeds and Articles and Prayer Book, are not compromised.

53. However, the "two churches within the Church" is not a view supported by the proper construction of the Constitution. In the same way that St Paul would not have countenanced the concept of two separate churches of Christ in Colossae, neither does the Constitution. The key mechanism by which the Constitution maintains unity and coherence are the Fundamental Declarations (Chapter I) and the Ruling Principles (Chapter II).

54. In my opinion, a construction of the Constitution which results in one unified, coherent, body of believers, based on solid Apostolic foundations, must be preferred to a view which would allow different constituent parts of the Church to teach diametrically opposite positions on matters of salvation. To put it simply, it is incoherent for one Diocese to bless behaviours which the rest of the Church would condemn as risking salvation.

55. Those who point to previous decisions of the Appellate Tribunal on the much debated and considered issue of the ordination of women, whether to the Diaconate, the Priesthood or the Episcopacy, or Lay Administration of the Lord's Supper, as evidence that Church is not so fragile that it cannot embrace serious difference, would also be aware that the decisions have led to thirty years of deeply impaired communion in the Church. The recognition of Orders is one of the key unifying factors in any ecclesiastical fellowship. For the Orders of some not to be recognised in principle by others, with the practical consequences that follow, has created a strain that only good will has been able to tolerate. The present matter is, however, more significant and for that reason the Tribunal needs to be all the more careful to recognise the history and significance of the Constitution as it seeks to interpret its meaning. For what is at stake is whether, under our Constitution, one Diocese may unilaterally proceed to celebrate and formally bless sexual practice which is contrary to the teaching of the Church:

> *Accordingly, the Anglican Church teaches that persistent, unrepentant sin precludes a person from God's kingdom. This is reflected in Article XVI and expressed in the way that confession and the assurance of forgiveness is enacted in the authorised prayer books. In the opening sentences before the general confession in BCP include Psalm 143:2. "Enter not into judgment with thy servant,*

[31] T C Hammond, 'Arguments in favour of the Draft Constitution', ms. held in the Moore College Library (undated).

O Lord; for in thy sight no man living be justified." The reality of God's judgment upon the unrepentant is clearly manifest, as a reminder to the congregation of the need to confess their sins.[32]

56. In my opinion the Regulations are inconsistent with both the Fundamental Declarations and the Ruling Principles. It inconceivable that any of the framers of the Constitution would have imagined that it would have allowed for such significant divergence from the teaching of Scripture as understood for nearly two thousand years. Such a change is highly contentious and divisive. It undermines our Constitution and threatens the unity of the Church.

Part 2 – Fundamental Declarations

57. The Fundamental Declarations are set out in Chapter 1 of the Constitution as follows:

CHAPTER I. - FUNDAMENTAL DECLARATIONS

1. The Anglican Church of Australia, being a part of the One Holy Catholic and Apostolic Church of Christ, holds the Christian Faith as professed by the Church of Christ from primitive times and in particular as set forth in the creeds known as the Nicene Creed and the Apostles' Creed.

2. This Church receives all the canonical scriptures of the Old and New Testaments as being the ultimate rule and standard of faith given by inspiration of God and containing all things necessary for salvation.

3. This Church will ever obey the commands of Christ, teach His doctrine, administer His sacraments of Holy Baptism and Holy Communion, follow and uphold His discipline and preserve the three orders of bishops, priests and deacons in the sacred ministry.

58. It has been claimed that the Fundamental Declarations "represents the fundamental truths of the Apostolic faith" in contrast to the Ruling Principles which, it is said, "represents the particular Anglican development of those truths."[33]

59. However, this view is too narrow as the Fundamental Declarations themselves contain a thoroughly Anglican understanding of the place of the Church and the ultimate authority of Scripture.

<u>The Christian Faith</u>

60. The Fundamental Declarations begin by placing the Church of England in Australia within 'the one Holy Catholic and Apostolic Church of Christ'. This bold claim must not be ignored.

61. This Church is located as an element of the one true Church of Jesus Christ, Holy in that it belongs to him and seeks to do his will, Catholic in that embraces people from every quarter and is genuine, and Apostolic in the sense that it is based on the teaching of

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[32] House of Bishops Question 3, point 4.

[33] Appellate Tribunal Opinion: Reference as to Deacons and Lay Persons Celebrating the Holy Communion, 24 December 1997, page 32 (Justice Bleby) (the **1997 Report**).

the Apostles and is thus in succession to those Apostles. It is a claim to identity, authenticity and to relationship: 'He can no longer have God for a Father, who has not the Church for a mother' (Cyprian). If the Church of England in Australia were not part of the one, Holy, Catholic and Apostolic church, it would not be Christian church.

62. Such an assertion of identity, authenticity and relationships entails obligations. In particular, the obligation to hold the Christian Faith. By the word 'Faith' here, is meant the teaching or doctrine which is the substance of the Faith 'once and for all delivered to the saints' (Jude 3).

63. 'The Faith' is a broad term which includes the whole counsel of God, both Law and Gospel as it has been revealed to us. But it is not the Faith simply as we may choose to conceive it: it is the Faith as professed by the Church of Christ from primitive times, and in particular as set forth in the Nicene and Apostles' Creed. That is to say, the teaching of the Church is rooted in history and the historic witness of those from the generation of the Apostles and the generations since.

64. The Creeds summarise and exemplify but do not exhaust the teaching of the Faith nor, as the Board of Assessors observe, do they "contain an entire summary of Christian belief in the early Church."[34] They do not say anything about the Holy Communion, for example. It is no accident that the 16th Century Reformers took great pains to show that what they were saying conformed not only with Scripture or the creeds as such, but also with the understanding of the Faith in the Patristic era. It is not the claim of the Church that she reads the Scriptures alone as if for the first time, but rather that she reads them within the tradition of many witnesses down through the ages.

65. Furthermore, in speaking of the Church as being part of the one, Holy Catholic and Apostolic Church, the Constitution is placing the Australian Anglican Church within that group of Churches which self-consciously trace their origins back to Apostolic times and see that the Faith has been truly declared in the two creeds. It is that Church which, according to section 7 of the Constitution has a historic custom of having as the see of a bishop, a diocese. Whatever the significant differences between these churches, they confess the one Triune Creator and Redeemer and the full deity and manhood of Christ, for example. Where differences occur, some of them being highly significant, the cause is in a different reading of the apostolic tradition as found in Scripture, for even the creeds themselves are subservient to this supreme authority.

66. Therefore, the Constitution insists simultaneously that 'Doctrine means that the teaching of this Church on any question of faith' and that 'Faith includes the obligation to hold the faith'. It is not open to a Church which wishes to remain one, Holy, Catholic and Apostolic Church, to lay aside elements of the Faith which forms part of the teaching of the Church, insofar as it has been based on Scripture, which is described in the next clause as 'the ultimate rule and standard of faith'. This is described as an obligation.

67. This point is developed further by the Board of Assessors who conclude that:

> *In summary, when speaking of the Faith of the Anglican Church, we insist that this includes matters of obedience as well as doctrine. This has been*

[34] Board of Assessors, Question 1, paragraph 1(f).

demonstrated in writings of the patristic era, debates in the Reformation era expressed through the Articles, the Book of Common Prayer, and the Homilies, twentieth century usages, all of which build on the Scriptural texts cited above.[35]

68. S.Donald Fortson III and Rollin G. Grams have recently published a lengthy and detailed study, *Unchanging Witness: The Consistent Christian Teaching on Homosexuality in Scripture and Tradition*.[36] This contains the result of their careful study of Christian teaching from the beginning, and through the periods of the Fathers, the Medieval Church and the Reformation. They summarise their conclusions in these words:

> *Both the teaching of the Bible and the teaching of the Christian tradition have uniformly taught the same thing: homosexual practice is sinful.*[37]

69. Wolfhart Pannenberg, one of most distinguished theologians of modern times, summarises the issue before us:

> *Here lies the boundary of a Christian Church that knows itself to be bound by the authority of Scripture. Those who urge the church to change the norm of its teaching on this matter must know that they are promoting schism. If a church were to let itself be pushed to the point where it ceased to treat homosexual behaviour as a departure from the biblical norm and recognised homosexual unions as a personal partnership of love equivalent to marriage, such a church would stand no longer on biblical ground but against the unequivocal witness of Scripture. A church that took this step would cease to be the one Holy, Catholic and Apostolic church.*[38]

The Holy Scriptures

70. Section 2 of the Constitution is fundamental even to the Fundamental Declarations, for it gives supreme authority to the canonical Holy Scriptures, describing them, both Old and New Testament, as 'the ultimate rule and standard of faith, given by inspiration of God and containing all things necessary for salvation'. The canonical books are defined in Article VI of the 39 Articles and thereby differ from those accepted by the Roman Catholic Church. This section depends on the Article for its definition and Article 6 for its wording, thus showing the interconnectedness of the Fundamental Declarations and the Ruling Principles.

71. In both cases, the words 'given by inspiration of God and containing all things necessary for salvation' are drawn from 2 Timothy 3:14-17:

> *But as for you, continue in what you have learned and have become convinced of, because you know those from whom you learned it, and how from infancy you have known the Holy Scriptures, which are able to make you wise for salvation through faith in Christ Jesus. All Scripture is God-breathed and is useful for*

[35] Board of Assessors, Question 1, paragraph 1(m).
[36] S.Donald Fortson III and Rollin G. Grams, *Unchanging Witness: The Consistent Christian Teaching on Homosexuality in Scripture and Tradition,* (B&H Academic, Nashville, 2016).
[37] S.Donald Fortson III and Rollin G. Grams, ibid page 3.
[38] Christianity Today, November 11th 1996,p.37.

teaching, rebuking, correcting and training in righteousness, so that the servant of God may be thoroughly equipped for every good work.

72. The inspiration of Holy Scripture finds expression in the phrase of Article XX, 'God's word written'.

73. The phrase 'contains all things' should not be construed as though the Scriptures also contain other things which are not necessary for salvation. The Scriptures are an integrated whole as a consequence of being 'God's word written'. Just as in the underlying scriptural text, the 'able to instruct you for salvation through faith in Christ Jesus' is not limited to the saving work of Christ on the cross and our acceptance of that by faith, but includes 'reproof, correction, instruction unto righteousness' so too in the Fundamental Declaration and the Article which it is quoting.

74. We can see exactly this usage in the contemporaneous Homily on Scripture, which says:

> *We may learn in these books to know God's will and pleasure, as much as, for this present time, it is convenient for us to know… As the great clerk and godly preacher, St John Chrysostom saith, whatsoever is required to salvation of man, is fully contained in the scripture of God… if it shall be required to teach any truth, or reprove false doctrine, to rebuke any vice, to commend any virtue, to give good counsel, to comfort or to exhort, or to do any other thing, requisite for our salvation, all these things, saith St Chrysostom, we may learn plentifully of scripture.*[39] *(emphasis added)*

75. Similarly, 'salvation' as used in Section 2 of the Constitution, should not be conflated with 'justification by grace through faith' so as to exclude the whole teaching of the Bible on human behaviour. On the contrary, as the Homily on Salvation makes clear:

> *For how can a man have this true faith, this sure trust and confidence in God, that by the merits of Christ his sins will be forgiven, and he reconciled to the favour of God, and to be a partaker of the kingdom of heaven by Christ, when he liveth ungodly, and denieth Christ by his deeds? Surely no such ungodly man can have this faith and trust in God. For as they know Christ to be the only Saviour of the world; so also they know that wicked men shall not inherit the kingdom of God.*[40]

76. This position is stated clearly in James 2:14-19:

> *What good is it, my brothers and sisters, if someone claims to have faith but has no deeds? Can such faith save them? Suppose a brother or a sister is without clothes and daily food. If one of you says to them, "Go in peace; keep warm and well fed," but does nothing about their physical needs, what good is it? 17 In the same way, faith by itself, if it is not accompanied by action, is dead.*
>
> *But someone will say, "You have faith; I have deeds."*

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[39] Book of Homilies, Book 1, Part 1, "A fruitful exhortation to the reading and knowledge of holy Scripture'.

[40] Book of Homilies, Book 1, Part 3, 'A Sermon of the Salvation of Mankind by only Christ our Saviour from sin and death everlasting'.

Show me your faith without deeds, and I will show you my faith by my deeds. You believe that there is one God. Good! Even the demons believe that—and shudder.

77. In this way, the phrase 'containing all things necessary for salvation' cannot properly be construed as stating that only some of the Scripture has the authority of 'the ultimate rule and standard of faith'. Notably, Section 2 of the Constitution uses the word 'all', as it states that it receives all the canonical Scriptures for the rule and standard of (the) faith. Accordingly, the Biblical witness on matters of, in this case, sexual ethics cannot be diminished or narrowed.

78. The reach of the authority of Scripture is made even clearer in section 3, where the Headship of Christ over his Church is the focus. The solemn commitment of the Church to obey his commands (not merely trust his saving power), teach His doctrine, administer His sacraments of the Baptism and the Lord's Supper, uphold his discipline and preserve the three orders of ministry reveals that the Church is not free to break loose from the authority of Christ, including the obligation to maintain his discipline in the Church. Such discipline is integral to the liturgy and becomes an obligation of both priests and bishops in the ordinal to exercise, in accordance with the commands of Christ.

79. This obligation finds special expression in the administration of the Holy Communion, in which the Priest is to call any who is a 'notorious and evil livers' to repentance, and to be prepared to exclude them from the Holy Table, provided that he reports such an event to the Ordinary, so that further steps may be taken. In the BCP, the exhortation during the Holy Communion, in the course of which the Priest is to warn that 'if any of you be a blasphemer of God, an hinderer or slanderer of his Word, an adulterer, or be in malice or envy, or in any other grievous crime, repent you of your sins, or else come not to that holy Table'. Thus, it is clear that the discipline of the Church as expressed in the BCP would not be to bless a same-sex union, but rather to call for repentance.

80. Rightly, over the last decades there has been considerable effort made to see whether the biblical witness overall can be read in any other way than as opposed to same-sex unions. The conventional understanding of Scripture on any such subject needs to be thoroughly tested to ensure that it has been rightly understood down through the years. It has been generally accepted that the witness of the Church has been consistently opposed to same sex relations. But is this actually Scriptural?

81. Two significant voices are those of pre-eminent Church Historian Professor Diarmaid MacCulloch, Professor of the History of the Church at Oxford, and, as well, a renowned expert on the sexual attitudes in the ancient world, Professor William Loader, Emeritus Professor of New Testament at Murdoch university. It is significant and persuasive that their personal views differ from the academic or theological conclusions they have reached on the biblical imperative in relation to sexual practice.

82. Professor MacCulloch writes:

Protestantism is faced with an equally monstrous challenge to its assumption of authority: the increasing acceptance in western societies of homosexual practice and identity as one valid and unremarkable choice among the many open to human beings. This is the issue of biblical authority. Despite much well-

intentioned fancy foot-work to the contrary, it is difficult to see the Bible as expressing anything else but disapproval of homosexual activity, let alone having any conception of homosexual identity. The only alternatives are to try to cleave to patterns of life and assumptions set out in the Bible, or to say that in this, as in much else, the Bible is simply wrong.[41]

83. At the end of his survey of New Testament evidence, Professor Loader concludes:

> *In this light it is not surprising that, as most conclude, Paul employs same-sex relations as a proof of human sinfulness and assumes people would then share the presuppositions which led him to that conclusion, however we might assess them today.*[42]

84. Of course there remain those whose use of Scripture is different. Professor Loader, for one believes that while exegesis leads inevitably to the conclusion given above, hermeneutics leads us in a different direction. He quotes those who point out that the Scriptures also contain the love command, and that in the light of modern understanding of sexuality it may well be the loving thing to do to allow or even encourage long term-committed, exclusive relationships between people of the same sex. The consideration of such a significant argument requires an examination of the Ruling Principles (see paragraph 112 below).

85. On the other hand, it is very difficult to maintain that the Bible and the commands of Christ or the witness of the Church Universal is anything else but opposed to same sex practice.

<u>Are the Regulations inconsistent with the Fundamental Declarations?</u>

86. The Appellate Tribunal itself is subject to the Fundamental Declarations and must apply Scripture as the 'ultimate rule and standard of faith'. It is not open for the Tribunal to conclude that because different parts of the church may express different views regarding Scripture or doctrine, the Tribunal can elect either to not form a view as to the teaching of Scripture and doctrine or to not apply it. The Constitution provides a process under section 58 for the Tribunal to obtain the assistance of the House of Bishops and the Board of Assessors in circumstances where the Tribunal may lack unanimity on a question of doctrine.

87. The unanimous views of both the House of Bishops and Board of Assessors is that Scripture teaches that homosexual practice is sinful, that persistent, unrepentant, sin threatens salvation and that such behaviour should not be blessed by the Church.

88. In response to the question "Question 4: Do you see any doctrinal impediment or difficulty with the baptism of a child of a same sex married couple according to one of the Anglican Church of Australia's authorised rites, including the use of the prayer for the child's parents?" the House of Bishops stated:

> *Given the promises and commitments required of parents of children to be baptised, there is certainly a difficulty, if not an impediment, when the <u>parents</u>*

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[41] Professor Diarmaid MacCulloch, 'Reformation', Allen Lane, London (2003), page 705.
[42] Professor William Loader, 'Sexuality in the New Testament: Understanding the Key Texts', Westminster, John Knox Press (2010), page 34.

are living, without repentance, in a manner which is contrary to the faith and practice of the Church. (emphasis added)[43]

89. In response to the same question, the Board of Assessors stated:

> *a. In treating pastoral encounters such as this, we begin by recognising that Scripture does not condemn homosexual temptation. Temptation is not a sin; Jesus himself was tempted. So a particular person's experience of ongoing same-sex attraction and temptation is not the issue at hand. Rather, Scripture condemns homosexual activity and the belief that it is morally permissible for any Christian. (emphasis added)*[44]

90. The House of Bishops affirmed that persistent, unrepentant, sin threatens a person's salvation:

> *2. Section 74(1) of the Constitution defines "doctrine" to mean "the teaching of this Church on any question of faith." The relationship between teaching and doctrine is best explained by the reference in the Fundamental Declarations, that the ACA "will ever obey the commands of Christ and teach His doctrine". Thus, the subject matter of the teaching of the Church is directly related to its doctrine. In other words, the doctrine of the ACA is its teaching, because the ACA must teach its doctrine, as it must teach Christ's doctrine.*
>
> *3. The corpus of teaching about sin, confession and persistence in sin is found primarily in Scripture, as understood within the framework of the Thirty-nine Articles and as expressed through its authorised liturgies.*
>
> *4. Accordingly, the Anglican Church teaches that persistent, unrepentant sin precludes a person from God's kingdom. This is reflected in Article XVI and expressed in the way that confession and the assurance of forgiveness is enacted in the authorised prayer books. In the opening sentences before the general confession in BCP include Psalm 143:2. "Enter not into judgment with thy servant, O Lord; for in thy sight no man living be justified." The reality of God's judgment upon the unrepentant is clearly manifest, as a reminder to the congregation of the need to confess their sins. (emphasis added)* [45]

91. The Board of Assessors confirmed that while the Church could offer private prayer to a same sex couple, focussing on common grace gifts such as peace, health, honesty, or generosity, it could not provide a blessing of the civil union:

> *God pours out the rain on the just and the unjust, so any private prayer for same-sex married parents would focus on common grace gifts like peace, health, honesty, or generosity, but would not assume a blessing on their married state, for God cannot bless that which is named as sin.*[46]

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[43] House of Bishops, Question 4, paragraph 4.
[44] Board of Assessors, Question 4, paragraph 4(a).
[45] House of Bishops, Question 3, paragraphs 2-4.
[46] Board of Assessors, Question 4, paragraph 4(k).

92. The Regulations do not reflect Christian truth as understood by 'the One Holy Catholic and Apostolic Church of Christ' or as taught by Scripture.

93. I conclude, based on the reasons outlined above, that the Regulations are inconsistent with the Fundamental Declarations.

Part 3 – Ruling Principles

94. Section 4 of the Constitution provides, relevantly, as follows:

> *"4. This Church, being derived from the Church of England, retains and approves the doctrine and principles of the Church of England embodied in the Book of Common Prayer together with the Form and Manner of Making Ordaining and Consecrating of Bishops, Priests and Deacons and in the Articles of Religion sometimes called the Thirty-nine Articles but has plenary authority at its own discretion to make statements as to the faith ritual ceremonial or discipline of this Church and to order its forms of worship and rules of discipline and to alter or revise such statements, forms and rules, provided that all such statements, forms, rules or alteration or revision thereof are consistent with the Fundamental Declarations contained herein and are made as prescribed by this Constitution. Provided, and it is hereby further declared, that the above-named Book of Common Prayer, together with the Thirtynine Articles, be regarded as the authorised standard of worship and doctrine in this Church, and no alteration in or permitted variations from the services or Articles therein contained shall contravene any principle of doctrine or worship laid down in such standard."*

95. General Synod and Diocesan Synods have no authority or power to make canons, ordinances and rules which are inconsistent with the Fundamental Declarations and the Ruling Principles (Section 5 of the Constitution).

96. As can be seen from the discussion in part 2 above, the Fundamental Declarations rely closely upon an Anglican understanding of the place and authority of Scripture (in particular Article VI of the 39 Articles). In this way, the Fundamental Declarations set out an Anglican understanding of the Apostolic faith and how the Anglican Church fits within that faith; the Ruling Principles describe the Anglican expression of that Apostolic faith.

97. The House of Bishops in their reply summarised this position :

> *7. With regard to the central issue, this shows that while there is a distinction between the Christian Faith (professed by the Church Catholic) and the doctrine of the Anglican Church of Australia (which is particular to our Church), assent to both are required of bishops and to be accepted by communicant members. The witness of the creeds as an essential part of the Christian Faith is supported by their placement in section 1 of the Constitution, with its allusion to Article VIII. Likewise, the ACA "receives all the canonical scriptures of the Old and New Testaments as being the ultimate rule and standard of faith" in section 2, with its allusion to Article VI. Clearly, the Apostles' and Nicene Creeds do not exhaust the content of the faith of the Anglican Church of Australia. Other aspects of its faith*

are found in the canonical scriptures, the Thirty-nine Articles, and form part of the liturgical practice of our Church in the Ordinal and the BCP, and reflected in as well as other authorised liturgies or practices. Nonetheless, it should be noted that "the faith of this Church" (to use the language of section 26) includes the principles of doctrine and worship laid down in the "Book of Common Prayer, together with the Thirty-nine Articles, be regarded as the authorised standard of worship and in this Church". Hence "no alteration in or permitted variations from the services or Articles therein contained shall contravene any principle of doctrine or worship laid down in such standard" (section 4).[47]

98. The Constitution binds the church to both an Anglican understanding of the Apostolic faith and the guiding or ruling principles which direct the Anglican expression of that Apostolic faith.

The Ruling Principles as the Interpretative Tradition of the Anglican Church of Australia

99. The Anglican Church of Australia professes itself to be 'a part of the one Holy Catholic and Apostolic Church of Christ' and to hold 'the Christian Faith as professed by the Church of Christ from primitive times' particularly, but not exclusively, in the Creeds. I say not exclusively because it is clear from sections 2 and 3 that there are elements of the Faith not contained in the Creeds.

100. Accordingly, to assist us in understanding and applying Scripture, we can examine how Scripture has been understood from primitive times and set forth by the acknowledged Teachers, Liturgies, Legislation, Confessions and Councils of the Church. None of these is infallible; even venerable readings may be wrong. But nor can they be put aside lightly (cf Article XXXIV).

101. For the Church of England, and therefore for the Anglican Church of Australia, this means that special attention is to be paid to:

> *'the doctrine and principles of the Church of England embodied in the Book of Common Prayer together with the Form and Manner of Making Ordaining and Consecrating of Bishops, Priests and Deacons and in the Articles of Religion sometimes called the Thirty-nine Articles'.* [48]

102. This is where the testimony of the tradition as understood by Anglicans is especially found. However, these documents are referred to in the Ruling Principles rather than the Fundamental Declarations precisely because, like all tradition, they are dependent for their veracity on the Scriptures.

103. Although, during the debates leading up to the adoption of the Constitution, there were those who wished to place them in the Fundamental Declarations, it was agreed that it was desirable that the way be open for change and that the autonomy of the Anglican Church of Australia be asserted. Hence the words, 'but has plenary authority at its own discretion to make statements as to the faith ritual ceremonial or discipline of this Church and to order its forms of worship and rules of discipline and to alter and revise such statements, forms and rules' is immediately subject to the proviso that any

[47] House of Bishops, Question 1, paragraph 7.
[48] Constitution, Section 4.

such changes must not 'contravene any principle of doctrine or worship laid down in such standard'.[49]

104. It may be worth noting that T C Hammond supported this Constitution precisely on the grounds that the 39 Articles which gave expression to what Archbishop Mowll called the Protestant and Reformed faith, were given an unchanging place of interpretative power. Here was the interpretative tradition of reading the scriptural text to which the Church of England and so the Anglican Church of Australia was committed. In this way, the Constitution allowed for 'deviations in form but not in substance' (13). [50]

105. Section 74(3) of the Constitution defines the phrase 'the doctrine and principles of the Church of England embodied in the Prayer Book and Articles' to mean 'the body of such doctrine and principles'. For T C Hammond this phrase:

> *must be understood not merely the verbal expression at a certain point but the general contextual trend of the Church's formularies. A verbal change may not alter the body of a doctrine. For example, we could say "Precede us O Lord" instead of "prevent us O Lord" and retain the body of doctrine expressed in the Prayer Book. It would be very different if we substituted "May the Lord and His Blessed Mother precede or prevent us"'. He goes on, 'In order to determine points of this nature the ordinary principles of interpretation employed in courts of justice must be put into operation.*[51]

106. The Ruling Principles set before us an interpretative tradition which the Constitution claims is faithful to the one Holy Catholic and Apostolic Church and which delivers a settled account of the Faith of the Church. To set it aside, is to disregard the very principles at work in the creation of the Constitution and the understanding of all the dynamics, negotiations, reasoning and ultimate agreement on the final form of the Constitution.

The Ruling Principles on the Nature and Interpretation of Scripture

107. The Prayer Book uses Scripture as the word of God written in all its services, giving it a pre-eminent place, in canticles, in the shaping of prayers, in the whole nature of the approach to God. The original lectionary directed the use of almost all of the scriptures in daily reading, not suggesting that the Mosaic Law, for example, no longer needed to be read in Christian churches. There is no suggestion whatsoever that the Scriptures 'contain' the word of God in the sense that they contain other things as well.

108. Rather, the whole of Scripture ministers to the salvation of the readers:

> *For the Scripture of God is the heavenly meat of our souls; the hearing and keeping of it maketh us blessed, sanctifieth us, and maketh us holy; it turneth our souls, it is a lantern to our feet; it is a sure, steadfast and everlasting instrument*

[49] T C Hammond, 'Arguments in favour of the Draft Constitution', ms. held in the Moore College Library (undated).
[50] Ibid, p.13
[51] Refer above footnote 31, page 18.

of salvation; …the words of Holy Scripture be called the words of everlasting life: for they be ordained for that same purpose.[52]

109. The use of the Scriptures in the BCP relies upon another principle, namely the clarity of Scripture. The Bible is read aloud to the people so that even the illiterate may benefit from its teachings. In most services no sermon is called for and there is no authoritative interpretation issued. But undergirding this is the key interpretative principle presented by the Articles and practised by the Prayer Book, namely the unity of Scripture, based on its inspiration by God. Thus Article VII, *Of the Old Testament,* affirms that the Bible is one, in that in both testaments 'everlasting life is offered to Mankind by Christ'. And yet, at the same time, it is asserted that the Law of Moses is not binding on men or nations in its ceremonial and civil aspects, although, 'no Christian man whatsoever is free from the obedience of the Commandments called Moral'.

110. The key to this judgment is found in Article XX:

> *The Church hath power to decree Rites and Ceremonies, and authority in Controversies of Faith: and yet it is not lawful for the Church to ordain any thing which is contrary to God's word written neither may it so expound one place of Scripture that it be repugnant to another. Wherefore, although the Church be a witness and a keeper of holy Writ, yet, as it ought not to decree anything against the same, so besides the same ought it not enforce any thing to be believed for necessity of salvation.*

111. That is, the common inspiration of Scripture by God himself means that Scripture must interpret Scripture, and the judgement that the civil and ceremonial laws are no longer to be exercised (though they are to be read for profit in that they point to Christ) is the application of the revelation contained in the New Testament to the details of the Old. The old sacrificial and food laws, for example, find their place as a testimony to the gospel, rather than a prescription for behaviour. But the moral law still stands.

112. The law of love is central to the biblical revelation of the will of God. It must give the moral law its heart. But it does not repeal the moral law. It helps us to see how it is to be administered and what it is aiming at. Thus the law against adultery is not softened or repealed by the law of love. Rather, it teaches us that adhering to the law against adultery for the right reasons is the law of love, it is the best way in which love is expressed. Similarly, the biblical injunctions against lying or greed are for our good. Thus when Jesus said to the woman caught in adultery, 'Neither do I condemn you', he added, 'go, and from now on sin no more' (John 9:11).

113. The mere fact that there is contemporary difference of opinion about the meaning of the Bible does not relieve us of the responsibility as a Tribunal to examine the Scriptures, using the presuppositions and interpretative principles of the BCP and 39 Articles, to see what they are saying about the subject under discussion. In order to assist this work, the Tribunal is bound to listen carefully to the whole tradition of the Church from Primitive times and especially the statement of that tradition in the Reformation documents which our Constitution sees as being foundational. In this, the

[52] Book of Homilies, see above footnote 39.

Tribunal has been assisted by the House of Bishops and the Board of Assessors, whose views on the these issues have been unanimous.

<u>Application of the Ruling Principles by the Appellate Tribunal</u>

114. The Tribunal has previously considered the meaning and application of the Ruling Principles, principally in its 1985[53] and 1987 Reports[54] in relation to the ordination of women to the office of deacon. In those reports, the Tribunal wrestled with the meaning of 'faith', 'doctrine', and 'principle of doctrine' as used in the Constitution.

115. Section 74(1) of the Constitution provides the following definitions which are to apply "unless the context or subject matter otherwise indicates":

> *"Doctrine" means the teaching of this church on any question of faith.*
>
> *"Faith" includes the obligation to hold the faith.*

116. Section 74(3) provides that:

> *In this Constitution "the doctrine and principles of the Church of England embodied in the Book of Common Prayer" and the "Articles of Religion" sometimes called the "**Thirty-Nine Articles**" means the body of such doctrine and principles.*

117. Section 74(4) provides that:

> *In this Constitution, unless the context or subject matter otherwise indicates, any reference to faith shall extend to doctrine.*

118. In my view, the best analysis by the Tribunal on the meaning the terms "doctrine" and "principle of doctrine" in Section 4 of the Constitution is the opinion of Justice Young in the 1987 Report:

> *Before tackling this question, it is necessary to digress and consider the definition of "doctrine" in s.74(1) of the Constitution. The word is defined as meaning "The teaching of this Church on any question of faith". "Faith" is then defined as including "the obligation to hold the faith". The word is used in contradistinction to the word "discipline" which is said to include "the rules of this Church and the rules of good conduct". The definitions are not completely in point because "This Church" means "The autocephalous Anglican Church of Australia" whereas in s.4, the doctrine of the Church is the doctrine of the Church of England in England as at 1955. Nonetheless, s.74 seems to me to make a very definite division between the rules of order and conduct on the one hand, and the teaching of the Church on matters of faith on the other.*
>
> *Reverting to the question of "principle of doctrine or principle of worship", I adhere to what the majority said about the meaning of the word "principle" in 1985, viz that it connotes "A fundamental truth or proposition on which many*

[53] 1985 Report, see above footnote 17.
[54] 1987 Report, see above footnote 18.

others depend" (see the Oxford English Dictionary), and whilst there may be little doubt that the compilers of the Prayer Book assumed that only men would be ordained, and this assumption is reflected in the use of the masculine pronoun, this does not represent a considered and definitive judgment of principle.[55]

119. Justice Tadgell in the 1987 Report followed the majority opinion (of which he formed part) in the 1985 Report as follows:

> *The "doctrine… of the Church of England embodied…" referred to in the second and third lines of section 4 cannot in my opinion be the doctrine as defined in section 74(1) - viz. "the teaching of this Church on any question of faith" - or at least cannot be confined to it. The definition must yield (as the opening words of section 74(1) contemplate it may) to the inconsistent context of section 4, which indicates that the "doctrine" there referred to is that embodied in the specified formularies, described together as "the authorised standard of worship and doctrine in this Church". That such doctrine is taken to consist of or include some "principles" is apparent from the expression "any principle of doctrine" contained in the concluding phrase of the first paragraph of section 4. "Principles" where first occurring in the section presumably does not include principles of doctrine (although it is difficult to be sure) and is no doubt calculated to include principles of worship, but I should doubt that it is necessarily confined to them. For the purpose of giving its opinion in 1985 it was essential for the Tribunal to fix upon a meaning of "principles" where first occurring in section 4, and opinion was divided. I have been unpersuaded by argument on the present reference that the majority view taken in 1985 (to which I was a party) was wrong but in any event I believe it is unnecessary here to pursue the matter.*[56]

120. The majority in the 1985 Report, comprising Rayner, Holland, Young and Tadgell, stated that:

> *For this reason we take as our standard the primary definition of "principle" in the Oxford English Dictionary, namely "a fundamental truth or proposition on which many others depend".* [57]

121. Bishop Holland's approach in the 1987 Report is that Section 4 of the Constitution should be given its ordinary and natural meaning:

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

[55] 1987 Report, see above footnote 18, page 108.
[56] 1987 Report, ibid, pages 84-85.
[57] 1985 Report, see above footnote 17, page 4.

I have dealt already with bishop, priest, and deacon, and I am unwilling to depart from the definition of principle outlined in the 1985 Tribunal majority decision.[58]

122. This view may be contrasted with the opinion of Archbishop Rayner set out as follows:

In 1980 and 1985 the Tribunal expressed the opinion that the question of the ordination of women did not involve any doctrine embodied in the Prayer Book, Ordinal and Articles nor any principle of doctrine laid down in these formularies. That opinion may need explanation, particularly as in common usage the word doctrine may simply mean "that which is taught on any subject" (Shorter Oxford Dictionary). On such a general definition matters of doctrine might be held to be involved. Doctrine is however defined for the purposes of the Constitution in s.74 as "the teaching of this Church on any question of faith". "Faith" is not defined in s.74 except by the statement (which is not helpful for our purpose) that it "includes the obligation to hold the faith". The meaning of faith must therefore be taken from s.1 of the Fundamental Declarations as being "the Christian Faith as professed by the Church of Christ from primitive times and in particular as set forth in the creeds known as the Nicene Creed and the Apostles' Creed".

With this must be taken the s.2 description of the canonical scriptures as "the ultimate rule and standard of faith". Account must also be taken of the statement of Article 6 of the Thirty-nine Articles that "Holy Scripture containeth all things necessary to salvation: so that whatsoever is not read therein, nor may be proved thereby, is not to be required of any man, that it should be believed as an article of the Faith, or be thought requisite or necessary to salvation".

"Doctrine" must therefore be understood in the Constitution as the Church's teaching on the faith which is necessary to salvation. [59]

123. At issue is whether the phrase 'which is necessary to salvation' qualifies the word 'teaching' or the word 'faith'. In my view, it must be the latter as Rayner immediately goes on to state:

That <u>faith</u> is grounded in scripture and set out in the creeds; and the Church's doctrine or teaching on that faith may be explicated and developed, provided it is always subject to the test of scripture. For reasons already advanced, I do not see the limitation of ordination to males as required by scripture, nor is it referred to in the creeds. (<u>emphasis added</u>)[60]

124. I refer to my discussion above in paragraphs 28 - 37 and reiterate that in my view for Archbishop Rayner, doctrine is that which is taught by the Church about the faith which is not inconsistent with Scripture or the creeds; within that, some doctrine may be further explicated or developed provided that it is not inconsistent with Scripture. That it is possible for doctrine – in Rayner's view – to develop does not mean it is not 'doctrine' within the meaning of the Constitution.

[58] 1987 Report, see above footnote 18, page 76.
[59] 1987 Report, ibid pages 48-49.
[60] 1987 Report, ibid page 49.

125. In summary, in my view Archbishop Rayner is distinguishing between doctrine which is an expression of Scripture and the creeds (and hence eternal) and other doctrine which may develop in a manner not inconsistent with the Scripture.

126. Justice Handley in the 1987 Report stated that:

> *The matter raised before us does not involve any question of "worship". While questions of doctrine, in the ordinary sense of that word, were central to the issues debated before us, doctrine is defined in Section 74(1) of the Constitution as meaning the teaching of this Church on any question of faith. The definition of faith in Section 74(1) is not at all helpful but the sense in which the word is used in the Constitution appears from Section 1. This refers to the Christian faith as professed by the Church of Christ from primitive times and in particular as set forth in the creeds.*
>
> *Notwithstanding the importance of the issues before us, the strongly held views on all sides, and the fundamental nature of the theological and biblical arguments which have been raised, in my opinion the questions involved are not part of the Christian faith professed by the Church, they are not dealt with in the Creeds, and do not directly involve matters necessary for salvation. This question before us therefore does not involve any principle of "doctrine" as that expression is used in the Constitution.*[61]

127. For Handley, the critical issue is whether the relevant questions are part of the Christian faith professed by the Church and are dealt with in the Creeds or directly involve matters necessary for salvation. In the 1987 Report, his view was that the ordination of women to the office of deacon was not such an issue.

128. Justice Cox in the 1987 Report stated that he was:

> *in general agreement with the additional reasons, with respect to Chapter I, that have been prepared by the Archbishop of Adelaide for the purpose of the present reference (emphasis added).*[62]

129. Chapter 1 contains the Fundamental Declarations; whereas the Ruling Principles are contained in Chapter II. Therefore Justice Cox's comment quoted above cannot be used to support the claim that he agreed with Archbishop Rayner's position on the Ruling Principles. Further analysis of his opinion demonstrates that he held a different view.

130. In this regard, it is important to remember that Justice Cox specifically dissented from the majority opinion in the 1985 Report on its application of Section 4 of Chapter II:

> *We agree with the majority in holding that there is nothing in Sections 1, 2 and 3 of the Constitution of the Anglican Church of Australia - the Fundamental Declarations - that would prevent the ordination of a woman as a Deacon or*

[61] 1987 Report, ibid pages 115-116.
[62] 1987 Report, ibid page 14.

Priest in the sacred ministry of the Church, or the consecration of a woman as a Bishop. Our difficulty is with Section 4. (emphasis added)[63]

131. In the 1985 Report, Justice Cox issued a joint opinion with Justice Handley which stated as follows:

> *The "principles" referred to in Section 4 must be principles of the Church, which relate to the Church, yet fall short of being matter of faith and doctrine. One of the many Oxford English Dictionary meanings for "principle" is*
>
> - *5. fundamental truth or proposition, on which many other depend*
>
> *This meaning would appear to be excluded in the context of Section 4 because the fundamental truths and laws of the Church of England are those referred to in Sections 1, 2 and 3 which comprise the Fundamental Declarations of Chapter 1. That is the place for principles of the first rank, as it were - identifiable as such because they are, so far as the Constitution is concerned utterly unalterable. (See Section 66.) The principles of the Church of England referred to in Section 4, whether doctrinal or otherwise, are not unalterable - they may be changed by canon or, if need be, by amending Section 4 itself - and must therefore be taken to be principles of a different, lesser kind, not fundamental in the same sense as the principles contained in Chapter I. In our view the OED meaning of "principle" which is appropriate in the context of Section 4 is -*
>
> - *A general law or rule adopted or professed as a guide to action; a settled ground or basis of conduct or practice; a fundamental… reason of action, esp. one consciously recognized and followed. (Often partly coinciding with sense 5)*[64]

132. The joint opinion applied this analysis and concluded that:

> *In our opinion, therefore, the Ordinal does embody a principle of the Church of England within the meaning of Section 4 that men only are qualified for ordination.*
>
> *Substantially the same reasoning applies, because of its language and provenance, and with the same conclusions, to the Ordinal that is contained in An Australian Prayer Book.*
>
> *Our conclusion that the Ordinal goes further than Scripture in confining ordination to men is not inconsistent with the majority view of the Tribunal that the ordination of women is not contrary to Sections 1, 2 and 3 of our Constitution. As we have attempted to show, the questions under Section 4 are directed to a different issue and to the Ordinal rather than to the scriptures. This very distinction was recognized by this Tribunal in its 1980 decision when it decided*

[63] 1985 Report, see above footnote 17, page 6.
[64] 1985 Report, see above footnote 17, page 12.

that the ordination of women was not inconsistent with Sections 1, 2 and 3 but might be inconsistent with Section 4.

It is for these reasons that we dissented from the Tribunal's answers to Questions 1 and 6.[65]

133. Whilst determining that a principle that ordination was restricted to men only was embodied in the Ordinal, Justices Cox and Handley held that this was a principle of discipline and not a principle of doctrine or worship:

We concurred in the answer to Question 3, however, because the principle that we consider to be embodied in the Ordinal is not, in our opinion, a "principle of doctrine or worship" within the meaning of Section 4.[66]

134. In the 1987 Report, Justice Cox re-affirmed his position set out in the 1985 Report:

Mr. Handley Q.C. and I published joint reasons for our dissenting opinion. In summary, we held that the context indicates that the principles referred to in s.4 must be principles of the Church which fall short of being matters of faith and doctrine and which are principles of a different, lesser kind than the unalterable principles set forth in Chapter I as Fundamental Declarations; that the OED meaning of "principle" appropriate to s.4 is "A general law or rule adopted or professed as a guide to action; a settled ground or basis of conduct or practice; a fundamental reason of action, esp. one consciously recognized and followed. (Often partly coinciding with sense 5 - viz. Fundamental truth or proposition, on which many others depend ...)"…. However, we also held that this principle was not a principle of doctrine or worship.

I see no reason to change the views expressed by Mr. Handley and me in 1985. In my opinion, the principle in question is a principle of discipline only.[67]

135. He continued that a principle does not necessarily imply that the principle must be deliberately stated (in resolution of controversy); a principle might also be self-evident (so as to be beyond controversy):

At any rate, the notion that the word "principle" necessarily implies a deal of deliberation, what the 1985 majority called "a considered and definitive judgement of principle", has its difficulties. If an important theological or ecclesiastical statement is made in one of the specified texts for the obvious purpose of declaring a doctrine or settling a controversy - as in the Catechism, for instance, and some of the BCP rubrics - it may not be difficult to identify the statement as a principle. It is paradoxical, however, and in my view wrong, to deny the same character to a statement of like importance simply because it was regarded by everyone at the time as so self-evident as to be beyond the reach of controversy, so that there was no controversy and therefore no occasion for expressing the statement in an elaborate or obviously deliberate manner, that is,

[65] 1985 Report, ibid, page 13.
[66] 1985 Report, ibid.
[67] 1987 Report, see above footnote 18, page 27.

what a critical reader 300 years later might think bears the hallmarks of a "considered and definitive judgement." A universally accepted rule may express a principle, in the s.4 sense, even though it does so by implication.[68]

136. He continued:

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

Counsel for the Standing Committee submitted that the word "principle' in s.4 refers "not to the conduct or rule of conduct itself but its source, whether described as a fundamental truth or a general law or a rule on which the rule of conduct is based." I agree with that proposition, in so far as it contrasts principle with conduct, but I am not so sure about the contrast with a rule of conduct. I think one may often correctly describe a rule of conduct as a principle. However, the conduct itself is rather in the area of practice, what one might think of as principles in action, and it may be that this is what the Bishops of Willochra and Armidale had in mind when in their written advice they contrasted the doctrine of the Church of England with the principles of the Church of England and described the principles as "those ways of doing things which were included in the Book of Common Prayer and the Thirty-Nine Articles but do not have the status of absolute doctrine. The principles reflect the way doctrine has been applied to the life of the Church." Of course, the distinction between principle and practice will often not be of any moment, so far as s.4 is concerned, because the practice will be evidence of the principle that inspired it.[69]

137. Justice Cox's position allows for a wider understanding of the term 'principle' which includes a universally accepted rule which is evidenced by practice, regardless of whether the rule is stated in a deliberate manner (so as to end controversary) or treated as self-evident (beyond controversy).

138. In the 1991 Report, Justice Cox confirmed that he had not changed his mind on his position set out in the 1985 and 1987 Reports, although he considered himself bound by the majority views on the specific questions the subject of those Reports:

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

[68] 1987 Report, ibid, page 30.
[69] 1987 Report, ibid pages 30-31.

Tribunal as a whole as correct, and thus the starting point for any further discussion, regardless of the contrary view hitherto taken by the minority of which I was one.[70]

139. Archbishop Robinson, no doubt mindful of the debates leading up to the adoption of the Constitution (which he personally witnessed and participated in), held a very high view of the importance of the doctrine and principles of BCP, from which he saw no power to depart. In the 1987 Report, he stated:

3. RULING PRINCIPLES

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

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

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

In my judgement, such a view misunderstands both the purpose of Section 4 and the extent of the power conferred on the Church under it. The suggestion that Section 4 gives to the Church power to depart, even in a limited way, from the doctrine and principles of the Church of England retained and approved by this Church is, with due respect to those who have advanced it, preposterous, and I do not believe a single diocese would have voted to adopt the Constitution had it been thought at the time that Section 4 conveyed such a power. In fact all parties were united in desiring the retention and approval of the doctrine and principles of the Church of England, embodied in the Prayer Book and Articles, as a ruling principle of the Church under a new constitution.

The "but" in Section 4 was not a modification of that position. It was "but" in the sense of "however". It merely indicated that the retention and approval of the doctrine and principles did not preclude the possibility of revising the Prayer Book or other statements of faith, or making rules of discipline. There was always a desire that this Church should "accept responsibility for the interpretation of the

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[70] Appellate Tribunal 1991: Report and Opinion of the Tribunal on the eleven questions appertaining to the ordination of a woman to the order of priests or the consecration of a woman to the order of bishops, dated 1991, page 2.

Faith and the conduct of our worship" (see Preface to the 1946 draft Constitution) and this was not thought incompatible with the declaration that "This Church doth retain and approve the doctrine and principles of the Church of England embodied in the Book of Common Prayer and the Articles of Religion" originally in Chapter 1 of the draft constitution without any qualification whatever. It does not now seem reasonable that a provision for ordering forms of worship, making statements or rules of discipline, should be used as a way of departing from a principle of the Church of England embodied in the Prayer Book or Articles. How could the Church depart from a principle, under Section 4, which in that very section it not only retains but approves? Certainly, the retention and approval of the doctrine and principles of the Church of England could be affected by an amendment of Section 4 itself, by the duly provided method. But I reject the view that Section 4 itself should be invoked to provide a way of escape from a principle acknowledged to be embodied in the Prayer Book and Articles.[71]

140. For Robinson, the critical question is whether the issues involved a departure "even in a limited way" from the doctrine and principles of the Church of England retained and approved by this Church, as embodied in the Prayer Book and Articles.

What is the doctrine of the church regarding marriage?

141. From the opening chapter of the Bible, marriage is viewed as between a man and a woman, and it is to be honoured and safeguarded (Heb 13:4). In the prototypical story of the joining of Adam and Eve, the Bible declares that they become one flesh, and then teaches that the sexual act unites us deeply with the other person, hence the importance of not engaging in prostitution (1 Cor 6:13-20), when we already belong to Christ. At the deepest level, therefore, is the teaching that the joining of Adam and Eve is intended to foreshadow the union of Christ and his people, his Bride (Ephesians 5:31-32).

142. The Scriptures, viewed as sufficient and inspired, have always been understood as clear: the word of God only endorses sexual relations between a man and a woman who are married to each other. Other relations, such as adultery, incest, bestiality, or homosexuality are condemned under the Moral Law of the Old Testament and the condemnation is reiterated in the New Testament. Jesus himself passes judgement on such behaviours, using the general term *porneia* (Mark 7:21-23) and so, too, do the Apostles, either generally or specifically (Acts 15:20, Rom 1:24-27, 1 Cor 6:9-20, 1 Tim 1:10). The emphasis has fallen on the practise of sex between people not married, although it was well understood in the days of Jesus that there were those who were naturally drawn to members of the same sex.

Is this a principle of doctrine contained in the BCP or the 39 Articles?

143. The submissions by Sydney contain a helpful summary:

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[71] 1987 Report, see above footnote 18, ibid pages 63-64.

The doctrine that marriage is between a man and a women is 'a principle of doctrine' that arises from the Form of Solemnisation of Marriage in the BCP, as determined by the Doctrine Commission in the letter quoted above.[72]

144. The submission then explains the contents of the BCP teaching under six headings. Firstly, marriage is a union between a man and a woman:

> *The BCP wedding service unites one man and one woman in marriage. The service 'join[s] together this Man and this Woman in holy Matrimony'. The consents and vows have a gendered reciprocity ('N wilt thou have this [woman/man] to thy wedded [wife/husband]'; 'I N. take thee N. to my [wedded wife/wedded husband]'). After the exchange of vows, the minister declares 'I pronounce that they be Man and Wife together', and later prays 'Send thy blessing upon these thy servants, this man and this woman'.*
>
> *The man/woman principle is scripturally and theologically grounded in the liturgy. The BCP wedding service interprets Genesis 1-2 as making the relationship between Adam and Eve normative for the institution of marriage:*
>
> *(a) The priest declares that marriage 'joins together this Man and this Woman in holy Matrimony; which is an honourable estate, instituted of God in the time of man's innocency'. The reference to 'innocency' is a reference to Adam and Eve's pre-fall condition.*
>
> *(b) The priest declares that God 'at the beginning did create our first parents, Adam and Eve, and did sanctify and join them together in marriage', and prays that God would similarly bless the couple being joined in marriage.*
>
> *(c) The prayer for God's 'blessing [on] these two persons, that they may both be fruitful in procreation of children' echoes Gen 1:28 ('And God blessed them, and God said unto them, be fruitful, and multiply').*
>
> *Furthermore, the BCP wedding service also applies Genesis 1-2 in light of Jesus' words in Matthew 19, seen in the priest's declaration that God 'didst appoint, that out of man (created after thine own image and similitude) woman should take her beginning; and, knitting them together, didst teach that it should never be lawful to put asunder those whom thou by Matrimony hadst made one.' This statement reflects Jesus' interpretation of Genesis 1-2 as recorded in Matt 19:4-6.*
>
> *Because BCP grounds the man/woman nature of marriage in theology and scripture, this is a principle-and not merely a practice-of The Form of Solemnization of Matrimony. All jurisdictions which have changed their doctrine of marriage to allow same-sex partners have had to pass a Canon to do so, recognising that this was a departure from the man/woman principle embedded in the BCP wedding service.*[73]

[72] Primary submissions of the Synod of the Diocese of Sydney, dated 16 December 2019, page 44.
[73] Synod of the Diocese of Sydney, ibid pages 45-46.

145. Secondly, the purpose of marriage expressly contemplates the possibility of procreation:

BCP identifies a threefold purpose for marriage-'for the procreation of children', 'as a remedy against sin and to avoid fornication' and for 'mutual society, help, and comfort'.

This is further explained in Homily 18, 'Of the State of Matrimony', which states that '[Marriage] is instituted of God, to the intent that man and woman should live lawfully in a perpetual friendly fellowship, to bring forth fruit, and to avoid fornication'.

This threefold purpose of marriage is also scripturally and theologically grounded

(a) Marriage for the purpose of procreation derives, as already noted, from Gen 1:28 ('And God blessed them, and God said unto them, be fruitful, and multiply').

(b) Marriage for the purpose of 'a remedy against sin, and to avoid fornication; that such persons as have not the gift of continency might marry, and keep themselves undefiled members of Christ's body' derives from 1 Cor 7, especially 7:2 ('to avoid fornication'), 7:5-7 ('the gift of continency') and-implicitly-7:9 ('keep themselves undefiled').

(c) Marriage for the purpose of 'mutual society, help, and comfort' derives from Gen 2:18 ('It is not good that the man should be alone; I will make him an help meet for him [KJV].')

The procreative purpose of marriage does not mean that a marriage is only valid if it is procreative. Rather, according to the BCP wedding service, the only valid context for the procreation of children is the context of a marriage between a man and woman. There are many examples in the Scriptures of couples unable to produce offspring, and there is no suggestion that their marriages were not valid. Nonetheless, the various annulling impediments related to impotence and non-consummation necessarily imply that marriage requires one man and one woman. To posit that the principles of the BCP permit same-sex matrimony makes an absurdity of the rubric which states: "... if any man do allege and declare any impediment, why they may not be coupled together in Matrimony, by God's law, or the laws of this Realm ... then the solemnization must be deferred, until such time as the truth be tried." Marriage is the God-instituted form of relationship which is directed towards the threefold purpose of marriage, even if all three aspects are not able to be manifest in every marriage.[74]

146. Thirdly, the marriage covenant is described as a voluntary, lifelong and exclusive union:

The BCP wedding service describes marriage as a 'vow and covenant betwixt them made'. In this covenant, husband and wife each commit to love each other

[74] Synod of the Diocese of Sydney, ibid pages 46-47.

in a lifelong and exclusive union-'forsaking all other, keep thee only unto [her/him], so long as ye both shall live'. The lifelong nature of this promise is also highlighted in the vows, which are 'until death do us part'. The voluntary nature of these consents and vows is underscored in the marriage declaration- 'Forasmuch as N. and N. have consented together in holy wedlock...'

The exclusive monogamous nature of the marriage union reflects Jesus' teaching about adultery in Matthew 19. The lifelong nature of marriage reflects Paul's teaching in 1 Cor 7:39. Therefore, mutual promises of lifelong faithfulness are a principle of BCP with respect to marriage.[75]

147. Fourthly, marriage is theologically grounded in Creation, and a sign of the union between Christ and the Church:

> *As noted above, the BCP service describes 'holy Matrimony' as being 'instituted of God' between Adam and Eve in the Garden of Eden. That is, the BCP wedding service understands marriage to be not merely a human or social institution, but a pattern of human relationships that was and is 'God's ordinance'. Moreover, the fact that marriage is said to be 'from the beginning', rather than commencing with the Mosaic Law, signals that marriage is God's pattern for all humanity and not merely for his covenant people.*
>
> *Human marriage is also symbolic of the relationship between Christ and the Church.*
>
> > *holy Matrimony ... is an honourable estate, instituted of God in the time of man's innocency, signifying unto us the mystical union that is betwixt Christ and his Church.*[76]

148. Fifthly, in the BCP marriage is the only relationship in which couples are 'joined together by God’:

> *The BCP marriage service explicitly rejects the validity of other forms of 'coupling':*
>
> > *so many as are coupled together otherwise than God's Word doth allow are not joined together by God; neither is their Matrimony lawful*
>
> *It is important to note that BCP rejects the validity of those 'coupled together' contrary to God's word not contrary to Anglican forms. It is not making the claim that only Anglican marriages are valid. Any marriage which conforms to the principles outlined above-a voluntary, lifelong and exclusive union between a man and a woman reflecting God's purposes of marriage - is a marriage which is 'joined together by God'. This will include (for example) Jewish, Muslim and Buddhist weddings, and will also include civil marriages. This is the rationale for the liturgy for blessing a civil marriage, which has been released by the Liturgical*

[75] Synod of the Diocese of Sydney, ibid pages 47-48.
[76] Synod of the Diocese of Sydney, ibid page 48.

Commission for trial use, as authorised locally by a Diocesan Bishop under s.4 of the Constitution.[77]

149. Finally, in the BCP marriage, the particular role of the minister is to pronounce God's blessing:

> *The particular role of the minister in a BCP marriage (beyond that of officiant and witness) is to pronounce and bless in God's name. After the exchange of vows, the minister declares:*
>
> > *I pronounce that they be man and wife together, in the Name of the Father, and of the Son, and of the Holy Ghost.*
>
> *This is followed by the following prayer:*
>
> > *Send thy blessing upon these thy servants, this man and this woman, whom we bless in thy Name'*
>
> *The pronouncement is a declaration that this couple has been validly joined together by God, and the blessing declares that this relationship is one which God blesses.*[78]

150. That marriage in the BCP is only between a man and a woman is applied in a multitude of ways, has been professed by the Church since primitive times, and has been clearly taught by Scripture. The Regulations are inconsistent with this.

151. It is a 'principle of doctrine' being:

a. a fundamental truth or proposition on which many others depend (Young, Tadgell, Rayner and Holland, 1985 Report; Young, Tadgell, Holland, 1987 Report);[79]

b. taught by the Church about the faith, which is not inconsistent with Scripture or the creeds (Rayner, 1987 Report);[80]

c. part of the Christian faith professed by the Church (Handley, 1987 Report);[81]

d. part of the doctrine and principles of the Church of England retained and approved by this Church, as embodied in the Prayer Book and Articles (Robinson, 1987 Report);[82] and

e. a general law or rule adopted or professed as a guide to action; a settled ground or basis of conduct or practice; a fundamental reason of action, esp. one consciously recognized and followed (often partly coinciding with sense (a) - viz. fundamental truth or proposition, on which many others depend), whether

[77] Synod of the Diocese of Sydney, ibid page 49.
[78] Synod of the Diocese of Sydney, ibid pages 49-50.
[79] 1985 Report, see above footnote 17, page 4; 1987 Report, see above footnote 18, pages 76 (Holland), 84-85 (Tadgell) and 108 (Young).
[80] 1987 Report, see above footnote 18, pages 48-49 (Rayner).
[81] 1987 Report, ibid, pages 115-116 (Handley).
[82] 1987 Report, ibid, pages 63-64 (Robinson).

stated in a deliberate manner (so as to end controversary) or treated as self-evident (Cox, 1985 and 1987 Reports).[83]

152. That the marriage service may have changed in parts, either before or after adoption of the Constitution in 1962, does not affect the conclusion that the Church's doctrine of marriage is a principle of doctrine contained in the BCP.

153. Put simply, the Anglican Church of Australia adopted the doctrine and principles of the Church of England which were in effect in 1962; any prior changes are caught up in this adoption. Any changes occurring after 1962 could only validly occur if such changes were not inconsistent with a principle of doctrine or worship contained in the BCP. In any case, the changes to allow the remarriage of divorced persons do not in any way contemplate the blessing of same sex civil unions. I conclude that the Regulations are inconsistent with a principle of doctrine contained in the BCP and are therefore invalid.

<u>What is the doctrine of the church regarding persistence in sexual immorality?</u>

154. As stated by the House of Bishops:

> *4. Accordingly, the Anglican Church teaches that persistent, unrepentant sin precludes a person from God's kingdom. This is reflected in Article XVI and expressed in the way that confession and the assurance of forgiveness is enacted in the authorised prayer books. In the opening sentences before the general confession in BCP include Psalm 143:2. "Enter not into judgment with thy servant, O Lord; for in thy sight no man living be justified." The reality of God's judgment upon the unrepentant is clearly manifest, as a reminder to the congregation of the need to confess their sins.* [84]

155. And as stated the Board of Assessors:

> *a. The Apostle Paul asserts that persistence in sexual immorality precludes salvation in Christ: "Do you not know that the unrighteous will not inherit the Kingdom of God? Do not be deceived: neither the sexually immoral, nor idolaters, nor adulterers, nor men who practise homosexuality … will inherit the kingdom of God. And such were some of you. But you were washed, you were sanctified, you were justified in the name of the Lord Jesus Christ and by the Spirit of our God" (1 Cor 6:9-11). In the very next paragraph, Paul goes on to state that sexual sin is of a different type from other sins: "The body is not meant for sexual immorality, but for the Lord, and the Lord for the body … Flee from sexual immorality. Every other sin a person commits is outside the body, but the sexually immoral person sins against his own body … So glorify God in your body" (1 Cor 6:13-19). This is consistent with the Old Testament law in which different types of transgression provoke different consequences and punishments. The teachings of the church, in many documents or formularies, explicitly follow Holy Scripture on this point.*
>
> *b. In our services of public worship, we include times of confession and absolution not as something to be done in a perfunctory way (since "God pardons all who*

[83] 1985 Report, see above footnote 17, page 12; 1987 Report, see above footnote 18, pages 30-31 (Cox).
[84] House of Bishops, Question 3, paragraph 4.

truly repent"), but rather in recognition that unless we continually turn to God and seek his forgiveness we may preclude ourselves from salvation in Christ. The absolution declares that God our Father "has no pleasure in the death of sinners but would rather they should turn from their wickedness and live." Assurance of forgiveness is offered to those who "truly repent and believe his holy Gospel." There is an implied recognition here that those who do not repent and believe but rather persist in sin are in danger of coming under God's judgement. As Anglicans, we acknowledge the concept lex orandi, lex credendi (the rule of prayer [is] the rule of faith), which means that our faith and our practice are bound together. We affirm in absolution, an act of repentance and assurance in authorised forms of worship, the teaching of the church concerning the link between sexual immorality and salvation….

q. In summary, the Anglican Church of Australia does teach (a) that persistence in sexual immorality precludes a person from salvation in Christ Jesus, (b) that such an ethical expectation is found in its prayer books, articles of religion, books of homilies, and preeminently in Scripture, and (c) that while sexual immorality is listed alongside other sins yet by its public nature affords disgrace to the church in ways that other sins may not.[85]

Is this a principle of doctrine contained in the BCP or the 39 Articles?

156. That persistence in sexual immorality endangers salvation has been applied in many ways, has been professed by the Church since primitive times, and has been clearly taught by Scripture.

157. Therefore, it is a 'principle of doctrine' being:

    a. a fundamental truth or proposition on which many others depend (Young, Tadgell, Rayner and Holland, 1985 Report; Young, Tadgell, Holland, 1987 Report);[86]

    b. taught by the Church about the faith which is necessary for salvation (Rayner, 1987 Report);[87]

    c. part of the Christian faith professed by the Church and directly involves matters necessary for salvation (Handley, 1987 Report);[88]

    d. part of the doctrine and principles of the Church of England retained and approved by this Church, as embodied in the Prayer Book and Articles (Robinson, 1987 Report);[89] and

    e. a general law or rule adopted or professed as a guide to action; a settled ground or basis of conduct or practice; a fundamental reason of action, esp. one consciously recognized and followed (often partly coinciding with sense (a) - viz.

[85] Board of Assessors, Question 3, paragraphs (a), (b) and (q).
[86] 1985 Report, see above footnote 17, page 4; 1987 Report, see above footnote 18, pages 76 (Holland), 84-85 (Tadgell) and 108 (Young).
[87] 1987 Report, see above footnote 18, pages 48-49 (Rayner).
[88] 1987 Report, ibid, pages 115-116 (Handley).
[89] 1987 Report, ibid, pages 63-64 (Robinson).

fundamental truth or proposition, on which many others depend), whether stated in a deliberate manner (so as to end controversary) or treated as self-evident (Cox, 1985 and 1987 Reports).[90]

158. The Church cannot bless behaviour which is sinful or sexually immoral; in particular, it cannot bless or encourage behaviour, which, if persisted with, endangers salvation.[91]

159. The Regulations seek to create a service of blessing for a same sex civil union which involves sexual practice outside of that which is taught or contemplated by Scripture and the doctrine of this church and which is intended for life:

We have come together to ask God's blessing on N and N as they continue their married life together….

THE PROMISES

As you have entered into a civil marriage and now seek God's blessing on your ongoing life together, I ask you: Will you be to each other a companion in joy and a comfort in times of trouble, and will you provide for each other the opportunity for love to deepen?

Couple: We will, with God's help.

(to each partner in turn): Will you, N, continue to give yourself to N, sharing your love and your life, your wholeness and your brokenness, your failure and your success?

Partner: I will. ….

Let us now pray that N and N may be sustained by God's love.[92]

160. Accordingly, it must be found that the Regulations are inconsistent with a principle of doctrine contained in the BCP which would therefore make them invalid.

May the Church authorise anything contrary to Scripture?

161. The answer to this question is "no" by virtue of the Fundamental Declarations. It is also contrary to the 39 Articles, namely:

Article XX: Of the Authority of the Church

The Church hath power to decree Rites or Ceremonies, and authority in Controversies of Faith: And yet it is not lawful for the Church to ordain anything contrary to God's Word written, neither may it so expound one place of Scripture, that it be repugnant to another. Wherefore, although the Church be a witness and a keeper of holy Writ, yet, as it ought not to decree anything against the

[90] 1985 Report, see above footnote 17, page 12; 1987 Report, see above footnote 18, pages 30-31 (Cox).
[91] Board of Assessors, Question 4, paragraph 4(k).
[92] Regulations, Appendix A.

same, so besides the same ought it not to enforce any thing to be believed for necessity of Salvation. (<u>emphasis added</u>)

162. The 39 Articles contains and principle of doctrine which the Regulations contravene.

<u>To what extent is diversity of practice permitted?</u>

163. Whilst the Articles contemplate some diversity of practice, such variations must not be contrary to Scripture:

> ***Article XXXIV: Of the Traditions of the Church***
>
> *It is not necessary that Traditions and Ceremonies be in all places one, and utterly like; for at all times they have been divers, and may be changed according to the diversities of countries, times, and men's manners, so that nothing be ordained against God's Word.*

164. Consistency and good order within the Church are a product of reliance upon Scripture which:

> *containeth all things necessary to salvation: so that whatsoever is not read therein, nor may be proved thereby, is not to be required of any man, that it should be believed as an article of the Faith, or be thought requisite or necessary to salvation. (**Article VI: Of the Sufficiency of the holy Scriptures for salvation)***

165. However, Article 34 goes further and requires uniformity in "the traditions and ceremonies of the Church", provided they are not inconsistent with Scripture, even in matters of conscience ('private judgement'):

> *Whosoever through his private judgement, willingly and purposely, doth openly break the traditions and ceremonies of the Church, which be not repugnant to the Word of God, and be ordained and approved by common authority, ought to be rebuked openly, (that others may fear to do the like,) as he that offendeth against the common order of the Church, and hurteth the authority of the Magistrate, and woundeth the consciences of the weak brethren.*

166. Likewise the purpose of BCP is to provide for consistency of Common Prayer, of Prayers in the Church, and of Administration of the Sacraments, throughout the Church:

> *Now in regard that nothing conduceth more to the setling of the Peace of this Nation (which is desired of all good men) nor to the honour of our Religion and the propagation thereof then an universall agreement in the Publique Worshipp of Almighty God and to the intent that every person within this Realme may certainely knowe the rule to which he is to conforme in Publique Worship and Administration of Sacraments and other Rites and Ceremonies of the Church of*

England and the manner how and by whom Bishops Preists and Deacons are and ought to be made ordained and consecrated [93]

167. As Justice Tadgell stated in the 1997 Report, the question as to the ongoing application of the *Act of Uniformity 1662* is uncertain:

> *The Tribunal was urged in the submission made on behalf of the Dioceses of Ballarat, Newcastle, Riverina, The Murray and Wangaratta to conclude that section 10 of the Act of Uniformity 1662 was in force in England when the Constitution took effect on 1st January 1962 and that, by virtue of section 71(2) of the Constitution, section 10 provides a ready answer to questions l(a) and l(b) that are now before us. The question whether section 10 of the 1662 Act was applicable to and in force in the several dioceses in this country in 1962 is moot.*[94]

168. However, as Justice Bleby stated in the 1997 Report, whilst the *Act of Uniformity 1662* is not part of the civil law, the principle of uniformity of worship is part of the consensual compact of the Australian Church:

> *It appears reasonably clear that the Act of Uniformity was never part of the civil law applicable to the Australian colonies on their formation. One of the main purposes of the Act of Uniformity was to ensure uniformity of worship by requiring adherence to the BCP. That principle is reflected in s4 of our national Constitution. Section 10 of the Act of Uniformity had not been repealed by the British Parliament as at 1 January 1962. It appears that the principle of uniformity of worship which was enacted and the contents of s10 were undoubtedly part of the consensual compact of the dioceses of the Australian Church prior to 1962.*[95]

169. Citing the High Court case of *Wylde v Attorney - General* (the 'Red Book case'), Justice Bleby continued:

> *In Wylde v Attorney - General (NSW) (1948) 78 CLR 224 at 262 Latham CJ said:*
>
> > *"The Act of Uniformity is not in force as a statute in New South Wales, but it is a statute which prescribes both the doctrine and ritual of the Church of England in England, and therefore equally determines the doctrine and ritual of the Church of England as it exists in New South Wales."*
>
> *Rich J, at p276, also said that the Act of Uniformity did not apply in New South Wales, but he considered that the obligations under the Act in England were personal obligations on clergymen, and that those obligations could not be transmuted into obligations on the part of trustees of church trust property. Dixon J said (at p296):*
>
> > *"[W]hile it is conceded that the Acts of Uniformity are not laws applicable to Australia so as to be in operation here in pursuance of 9 Geo. IV. c.83, yet an*

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[93] *Act of Uniformity 1662* (14 Car 2 c 4), Recital.
[94] 1997 Report, see above footnote 33, page 7.
[95] 1997 Report, ibid pages 38.

obligation of obedience to the actual provisions of the Act of 1662 is conceived as both an implied term of the consensual compact and as a necessary part of the full effectuation of the trusts."

Williams J said (at p303):

"The Act of Uniformity of 1662 is not in force in New South Wales but this is, I think, immaterial for I agree with [Roper CJ in Eq.] that the liturgy prescribed by the Act is made by the Act a fundamental law of the Church of England and that it follows necessarily that this liturgy is a fundamental rule of the voluntary association in New South Wales. Otherwise I fail to see how the Church of England in New South Wales can be an integral part of the Church of England."

There is no reason to believe that the position was any different in any of the other States. Section 10 was thus a law of the Church of England relating to faith ritual ceremonial or discipline, and was applicable to and in force in the several dioceses of the Australian Church as at 1 January 1962. It remains in force by virtue of s71(2) of the Constitution unless and until it is varied or dealt with in accordance with the Constitution. No such alteration has been made.[96]

170. It follows that consistency of practice and worship, in furtherance of the good order of the Church, is a principle of doctrine and worship contained in the 39 Articles and the BCP; indeed, I consider that it is the very purpose of the BCP. Consistency does not require rote conformity; but it does require a sufficient level of coherence that our practice and worship can function as part of a single unified whole. As stated above in paragraph 53 above, a proper construction of the Constitution does not support a "two churches within the Church" view, any more than St Paul would have countenanced the concept of two separate churches of Christ in Colossae.

171. By contrast, the Regulations expressly contemplate that a minister may refuse to use the service based upon conscientious objection.[97] The Regulations will allow one parish to conduct the service and another to refuse to do so, on the grounds of conscience. In one parish, a same sex civil union will be celebrated and 'blessed' and yet in another parish, such a service may be lawfully refused as contrary to the teaching of the Church and contrary to Scripture. The Regulations allow for this even within the Diocese of Wangaratta.

172. Viewed nationally, the inconsistencies in practice on a fundamental point of whether the Church may bless a same sex civil union are divisive. The Regulations do not further the good order, consistency of practice and worship within the Diocese or the National Church; rather, the Regulations endanger our unity as a Church.

173. Principle 1 of the "*The Principles of Canon Law common to the churches of the Anglican communion"*[98] provides that the purpose of Church law is "to assist a church in its mission and witness to Jesus Christ" and "to order, and so facilitate, its public life and

[96] 1997 Report, ibid pages 38-39.
[97] Regulations, Sections 5 and 6.
[98] Principles, see above footnote 3, page 19.

to regulate its own affairs for the common good." The Regulations contravene this Principle (and indeed, contravene Principles 2 and 3 as well).

174. Therefore the Regulations are inconsistent with a principle of doctrine and worship contained in the 39 Articles and the BCP.

<u>To what extent may the doctrine of the church regarding the blessing of same-sex civil unions be changed?</u>

175. The Ruling Principles of the Constitution allow variety of practice in a way that the Fundamental Declarations do not. But such variances must still derive from lawful authority and to be consistent with, and not contravene, the principles of doctrine and worship contained in the BCP and the 39 Articles.

176. For that reason, there have been multiple variations allowed in the use of the Prayer Book (including matters such as the banns of marriage, and the need for a priest to officiate), and even the introduction of whole new Prayer Books including new services. But in every case, the General Synod has been assured that the changes made have not contravened a principle of doctrine or worship. Thus, for example, although there would be those in the Church who pray for the dead and would wish to have such prayers in the Liturgy, no such prayers have been introduced. Likewise, although the reservation of the sacrament is practised by some, especially when it comes to caring for the sick, this has not become part of the Liturgy of the Church.

177. On this basis, the General Synod has itself been quite clear that same-sex civil unions, although legally permissible in Australia, cannot be endorsed by the Church. I am bound by that position in determining an answer to these referrals. It therefore follows that for the doctrine of the church to change on this matter there would need to be changes or amendments to the Constitution. I, however, must consider the answers based on the current form of the Constitution.

<u>Are the Regulations inconsistent with the Ruling Principles?</u>

178. The answer to this question is clearly 'yes', for the following reasons:

a. The Regulations are contrary to the Fundamental Declarations and therefore also the Ruling Principles (Article XX);

b. The Regulations seek to bless same-sex civil unions which would not qualify for Christian marriage, as such civil unions are contrary to the church's teaching on marriage;

c. The Regulations seek to bless sinful practice, contrary to the Church's teaching that persistence in sexual immorality endangers salvation; and

d. The Regulations contravene the principle that our practice and worship should be consistent and in furtherance of the good order of the Church.

Part 4 – Canon Concerning Services 1992

179. The Wangaratta Regulations purport to be made pursuant to Sub-section 5(2) of the *Canon Concerning Services 1992*, which provides as follows:

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

180. I agree with the submission of the Diocese of Tasmania that

> *The phrase "Subject to any regulation made from time to time by the Synod of a diocese" does not empower any diocese to pass regulations. Instead, the phrase is a restriction on the power granted to a minister of a diocese: that is, the minister may use a form of service except to the extent prevented from doing so by Diocesan regulation to the contrary.*
>
> *The Canon does not elsewhere grant any diocese the power to enact regulations.*
>
> *It follows necessarily that the Wangaratta Regulations are not validly made under any purported power to make regulations under the Canon. Hence, the Wangaratta Regulations are invalid.*[99]

181. Sub-sections 5(3) and 5(4) of the *Canon Concerning Services 1992* provide as follows:

> *(3) All variations in forms of service and all forms of service used must be reverent and edifying and must not be contrary to or a departure from the doctrine of this Church.*
>
> *(4) A question concerning the observance of the provisions of sub-section 5(3) may be determined by the bishop of the diocese.*

182. The word 'doctrine' in sub-section 5(3) has the same meaning as in the Constitution. Accordingly, as I have already determined that the regulations contravene the Fundamental Declarations and the Ruling Principles, it follows that the 'Service of Blessing' does not comply with this subsection.

183. Finally, I am of the view that sub-section 5(4) does not grant a diocesan bishop exclusive power to determine a question concerning the observance of the provisions of Sub-section s5(3) as the *Canon Concerning Services 1992* must be construed in a manner consistent with the Fundamental Declarations and the Ruling Principles.

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[99] Primary submission of the Diocesan Council of the Diocese of Tasmania, dated 13 December 2019, paragraphs 30-32.

Part 5 – Regulations are invalid

184. For the reasons outlined above in Parts 2, 3 and 4, my view is that a service of blessing for a same-sex civil union is contrary to our Constitution.

Acts Interpretation Act 1901-1948 (Cth)

185. This raises the question as to whether the Regulations may be read down in such a way as to exclude the possibility of the use of the 'Service of Blessing' with respect to a same-sex civil union. In this way, the Regulations would be valid, but only to the extent that they were only used with respect to a heterosexual civil union.

186. There is some legislative support for this approach, namely Section 46 of the 1948 Act, which provides that:

> *46. Where an Act confers upon any authority power to make, grant or issue any instrument (including rules, regulations or by-laws), then- …*
>
> *(b) any instrument so made, granted or issued shall be read and construed subject to the Act under which it was made, and so as not to exceed the power of that authority, to the intent that where any such instrument would, but for this section, have been construed as being in excess of the power conferred upon that authority, it shall nevertheless be a valid instrument to the extent to which it is not in excess of that power.*

187. However, reading the Regulations down in this manner would be at odds with the express intent of the Synod of Wangaratta.

188. For these reasons, I cannot construe the Regulations in this manner to make them valid.

189. The 1948 Act does raise additional concerns regarding the method the Regulations have been created and whether they may be subsequently disallowed by General Synod.

190. Section 48 provides as follows:

> *48.(1) Where an Act confers power to make regulations, then, unless the contrary intention appears, all regulations made accordingly-*
>
> *(a) shall be notified in the Gazette;*
>
> *(b) shall, subject to this section, take effect from the date of notification, or, where another date is specified in the regulations, from the date specified; and*
>
> *(c) shall be laid before each House of the Parliament within fifteen sitting days of that House after the making of the regulations.*

191. Where this process is not followed the regulations "shall be void and of no effect".[100] Section 48 then provides for a process for Parliament to disallow the Regulations.

192. As set out above in Part 4, the *Canon Concerning Services 1992* does not contain a regulating making power. Even if one was inferred, there is nothing in the *Canon Concerning Services 1992* evidencing any intention that regulations would not remain subject to scrutiny and disallowance by General Synod.

193. Given that the Regulations purport to be made under a Canon of General Synod, exercising General Synod's legislative power, arguably General Synod may resolve to disallow the Regulations.

Church of England Act 1854 (Vic)

194. If the Regulations cannot be validly made under the *Canon Concerning Services 1992*, that raises the question as to whether the Synod of Wangaratta may enact them under its own legislative powers.

195. As the Diocese of Tasmania points out in its submission, the Diocese of Wangaratta is subject to the *Church of England Act 1854* (Vic) (**1854 Act**).[101] That Act limits the powers of the Synod of Wangaratta (and all Victorian Synods) to 'temporal matters' only.

196. The Tribunal considered the application of the 1854 Act to the powers of Victorian Synods in its 1989 Report and confirmed that "the powers conferred are not plenary in the sense that they entitle synods to legislate with respect to all affairs of the Church". It stated further that:

> *The fact that the 1854 Act was facilitating and not mandatory as to the convening of synods is inconsistent with an intention or expectation that any exercise of the legislative powers which the Act conferred could produce any lack of uniformity with the wider Church upon essential matters of faith, doctrine and discipline….*
>
> *Secondly, the whole history of the 1850's shows that, both in Victoria and in England, there was a positive intention not to depart from the "firm and unalterable attachment to the Doctrine, discipline and government of the United Church of England and Ireland"; and an equal desire to see those characteristics "maintained in the colony in all their integrity": Report of the Conference held in Melbourne on 24th June 1852; Border, op cit., 201.*[102]

197. The Tribunal confirmed that the purpose of the 1854 Act was limited to temporal matters and did not extend to dealing with matters of faith or doctrine:

> *There was a plainly expressed desire, as appears from contemporary evidence, to maintain both the stability of the Church within Victoria and its integrity and communion with the Church abroad, in England and elsewhere. Consistently with*

[100] 1948 Act, Section 48(3).
[101] Diocesan Council of the Diocese of Tasmania, see above footnote 99, pages 3 & 7.
[102] 1989 Report, see above footnote 1, pages 11-12.

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

It is sufficient to say that in our opinion the Act is not directed towards conferring powers to legislate upon spiritual matters. In particular, we do not consider that section V is concerned to authorise legislation dealing with faith and doctrine.[103]

198. The references to 'faith' and 'doctrine' derive from the 1854 Act and are not constrained by the definitions in the Constitution. It follows that these terms should be given their ordinary meaning.

199. The Regulations provide for a spiritual blessing and, as such, extend to spiritual matters. The Synod of Wangaratta does not have power to legislate with respect to such matters.

Part 6 – Other matters

Section 58 process – when does it apply?

200. Section 58 of the Constitution provides as follows:

"58. (1) Before determining any appeal or giving an opinion on any reference the Appellate Tribunal shall in any matter involving doctrine upon which the members are not unanimous upon the point of doctrine and may, if it thinks fit, in any other matter, obtain the opinion of the House of Bishops, and a board of assessors consisting of priests appointed by or under canon of General Synod."

201. The historical background to this provision is illustrative of the framers' intent. As John Davis identifies in *Australian Anglicans and their Constitution*, the composition of the Appellate Tribunal was one of a number of sticking points preventing the adoption of a Constitution. Some interests wanted to restrict membership to bishops, others wanted the addition of lawyers.[104]

202. Eventually, the Constitution provided that where there was not unanimity on a point of doctrine, the counsel of the House of Bishops and a Board of Assessors be requested. In essence, this provision allows for the theological contribution of the bishop members of the tribunal to be augmented and fortified by considered reflections both from the diocesan bishops and the assessors. Once Section 58 come into play, the opinions of the House of Bishops and the Board of Assessors from part of the constitutional framework in the provision of an opinion answering questions posed in a reference.

[103] 1989 Report, ibid pages 12-13.
[104] John Davis, see above footnote 27, pages 67, 172-5, 184.

203. Whilst the Tribunal is not bound to follow the opinions of the House of Bishops and a Board of Assessors, it would be a rare and unusual position to do so. As stated by Justice Bleby:

> *<u>Role and Function of the House of Bishops and Board of Assessors</u>*
>
> *Section 58(1) of the Constitution requires that before giving an opinion on any reference the Appellate Tribunal must, in any matter involving doctrine--' upon which the members are not unanimous, and may, if it thinks fit, in any other matter obtain the opinion of the House of Bishops and the Board of Assessors constituted under the Constitution. Section 58(2) provides: ….*
>
> *Subject to the qualification referred to in s58(2), the House of Bishops comprises all the diocesan bishops of the Australian Church, and the Board of Assessors comprises seven priests elected by General Synod voting as a whole. It usually comprises theologians of undoubted standing in the Church.*
>
> *Before expressing any views on the question, the Tribunal in this case sought and obtained the opinion of the House of Bishops and of the Board of Assessors. The Tribunal, in its advisory jurisdiction under s63 of the Constitution, is not obliged to call for submissions or to conduct a hearing. It may do so (s63(2)), and as a matter of practice in recent references has done so. However, the Constitution affords a special place and standing to the opinion of the House of Bishops and of the Board of Assessors which is not afforded to other representations. In effect those bodies have a constitutional standing as advisers to the Appellate Tribunal. This is not surprising, particularly in relation to matters of doctrine, where a majority of the Tribunal comprises legally qualified lay persons and therefore persons not necessarily qualified in such matters. It is also not surprising that the Constitution should ensure that substantial weight is given to the advice of diocesan bishops as the pre-eminent guardians of the doctrine of the Church. There may even be an implication from s58(1) (although we have heard no argument on the matter) that any lack of unanimity in matters of doctrine among members of the Appellate Tribunal should be resolved by reference to the opinion of the House of Bishops and the Board of Assessors.*
>
> *It follows that in my opinion the Tribunal should be very slow to depart from the advice it receives from the House of Bishops and Board of Assessors, particularly when that advice is unanimous or substantially so. It should only depart from that advice if it is plainly wrong or contains an obviously flawed process of reasoning. Of course, if the House of Bishops and the Board of Assessors is more or less equally divided on the issue, then the Tribunal will have to form its own view on the matters.*[105]

204. Justice Young distinguished the opinions of the House of Bishops and a Board of Assessors where they strayed into providing opinions on legal questions:

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[105] 1997 Report, see above footnote 33, pages 36-37.

Again, the Tribunal usually has to deal with mixed questions of law and theology. When the bishops or the assessors include in their opinions, as they are entitled to do, their opinions on questions of law or statutory construction, the lawyer members of the Tribunal in particular, will usually not feel constrained to abide by the opinion.[106]

205. In the present Referrals, both the House of Bishops and a Board of Assessors have provided unanimous opinions on doctrinal matters. Those opinions are thoughtful, well-reasoned and directly applicable to the matters in issue. The opinions reflect the views of many different Dioceses and strands of 'churchmanship', yet, through those differences both committees have provided the Tribunal with significant theological statements which are unanimous.

206. It is my opinion that the Tribunal is bound to follow, reflect and or adopt such opinions.

Are Appellate Tribunal opinions binding?

207. There are many aspects to this question which each need to be addressed in turn.

208. Firstly, the Appellate Tribunal is not bound to follow its previous opinions:

73. (1) In determining any question as to the faith ritual ceremonial or discipline of this Church any tribunal may take into consideration but shall not be bound to follow its previous decisions on any such questions or any decision of any judicial authority in England on any questions of the faith ritual ceremonial or discipline of the Church of England in England.[107]

209. Justice Cox stated in the 1987 Report that:

The Appellate Tribunal is at the head of the judicial structure created or recognized by Chapter IX of the Constitution and there is every good reason, quite apart from s.73, for the Tribunal not regarding itself as being bound by its previous decisions. That does not mean that it will ignore such decisions, or overturn them lightly, but it must retain the freedom in a proper case to re-examine a question and, if need be, to depart from a previous ruling. That was the stand that the Tribunal took in 1980 with respect to the remarriage of a divorced person whose former spouse was still alive, and it is the stand which, in my opinion, the Tribunal should maintain.[108]

210. President Mason stated in the 2007 Report:

66. In this as in all matters the Tribunal should strive to maintain consistency. The Tribunal is not bound to follow its previous decisions (Constitution, s73(1)), but it should be slow to depart from them (see generally the Opinion of the President,

[106] 1997 Report, ibid page 29.
[107] Constitution, Section 73(1).
[108] 1987 Report, see above footnote 18, page 12.

Cox J in relation to the 1986 Reference in the matter of the Ordination of Women to the Office of Deacon Canon 1985).[109]

211. Justice Young stated in the 8 September 2010 Report:

> *15. The Tribunal is not bound to follow its previous decisions. However, it should only depart from them in clear cases and with great caution. Decisions will have been made and actions taken at many levels throughout the Church in reliance on the Tribunal's determinations. There are therefore good policy and practical reasons why its previous decisions should be followed. In this regard the Tribunal respectfully adopts the reasons of Cox J expressed in the Reference concerned in the Ordination of Women to the Office of Deacon Canon 1985 and of Mason P expressed in the Reference concerning Women Bishops.*[110]

212. Secondly, decisions of the Appellate Tribunal have limited legal effect. The decisions are not binding upon secular courts:

> *Whilst the opinions published by the Anglican Appellate Tribunal are not binding upon this court, nonetheless the court should acknowledge in particular the undoubted eminence of the legally qualified members of the Tribunal, and the views of relevance expressed therein should not be disregarded. I would not hesitate to ignore such decisions if I thought they were wrong in law but that is not the case here. They are in my mind highly persuasive in a number of areas. Most importantly there appears to be a settled view about the basic legal character of the "federal scheme" embodied in the National Constitution, (see the 1989 Melbourne Opinion and the 1991 Women Priests Opinion).*[111]

213. The Appellate Tribunal, as a body formed and governed by the Constitution, is also similarly constrained. It follows that its decisions have limited ability to bind the Church – limited to purposes connected with or in any way relating to the property of the Church – as the majority in *Scandrett v Dowling* made clear:

> *The first is that because the Constitution is a Schedule to an Act of the New South Wales Parliament, Act 16 of 1961, it had legally binding effect on all members of the Church in New South Wales not only in regard to Church property, but also in regard to the organization of the Church. Therefore the obligations and duties it creates are enforceable in the same way as those created by any statute.*
>
> *I do not agree with this. Section 2 of Act 16 of 1961 in my opinion makes it as clear as words can make it that the binding **legal** effect of the Constitution is limited to purposes connected with or in any way relating to the property of the Church. Matters of faith and organization not connected or related to Church property are not made any more binding at law than they were before the Act was passed.*

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[109] Appellate Tribunal Report to Primate: Reference on Women Bishops, 28 September 2007, page 22.

[110] Determination of the Appellate Tribunal, dated 8 September 2010, page 6; see also Justice Young's similar comments in the 8 March 2010 Report, paragraph 32.

[111] *Sturt and Anor v the Right Reverend Dr Brian Farran Bishop of Newcastle and Ors* [2012] NSWSC 400 (27 April 2012), paragraph 209.

Secondly, it was said that all members of the Church in New South Wales were parties to a consensual compact embodied in the Constitution and that this compact had contractually binding effect on every member.

I do not agree with this either. In my opinion the parties to the consensual compact upon which the plaintiffs rely are bound to it by their shared faith, not the availability of the secular sanctions of the judgments, orders and decrees of State courts of law. The belief of Church members is that they are all one in Christ Jesus; an acceptable way of describing the Church, as I understand it, is that it is constituted by this unity.

*The consensual compact is thus based on religious, spiritual and mystical ideas, not on common law contract. It has the same **effect** as a common law contract when matters of church property become involved with the other matters dealt with by the consensual compact.* [112]

214. Thirdly, 'opinions' issued under s63 of the Constitution cannot be final or authoritative, especially in matters of faith or doctrine; as stated by Justice Bleby such opinions are advisory only:

In its answer to some questions referred to it in 1976 concerning the proposed canon for "An Australian Prayer Book" the Appellate Tribunal expressed the view that "the Act of Uniformity does not now apply to this Church". That was in a somewhat different context, and it is not entirely clear whether the answer was directed to the Act as part of the civil law of the various States of Australia or in some other capacity, whether the Tribunal then had its attention directed to s71(2) of the Constitution or whether the observations in Wylde v Attorney-General (supra) were considered. The answer was given at a time when the Tribunal gave no reasons. In that rather unsatisfactory state of affairs, I do not consider that the Tribunal presently constituted is necessarily bound by that answer (see also s73(1) of the Constitution) and particularly as both then and now the Tribunal was and is exercising its advisory jurisdiction. (emphasis added)[113]

What is really at stake?

215. It would be remiss of me to ignore where the theological question raised by the current referrals sits in the wider context of the life of the Anglican Communion.

216. A central petition in the prayer recorded in John 17 is that the people committed by God into the hands of Jesus (John 17:6): 'may be one' (John 17: 20). The unity prayed for is of the highest order as our Lord compares it to the unity in the Godhead. A manifestation of that unity is when believers gather around the Lord's Table. A more substantive and grounded example is unity in doctrine and practice within the Church.

217. I understand that the concept of 'full communion' means, at least, that a person ordained in diocese A, is recognised as properly ordained by the bishop of diocese B.

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[112] *Scandrett v Dowling* (1992) 27 NSWLR 483, paragraphs 512-513.
[113] 1997 Report, see above footnote 33, page 39 .

The advent of women priests and bishops in some Australian dioceses has led to a situation of 'impaired communion'. That is, there is no longer universal mutual recognition of orders. If approval is given to the blessing of same sex civil unions, the present state of impaired communion will be significantly exacerbated as may be shown by reference to recent history.

218. What has been labelled the issue of 'human sexuality' was the subject of the well referenced resolution 1.10 of the 1998 Lambeth Conference.[114] The core part of that resolution stated that the teaching of Scripture:

> *upholds faithfulness in marriage between a man and a woman in lifelong union, and believes that abstinence is right for those who are not called to marriage.*[115]

219. Despite the vast majority of bishops supporting the resolution (562/70 with 45 abstentions), the Canadian diocese of New Westminster in 2002 countenanced the blessing of same sex unions. A year later the American diocese of New Hampshire elected as their bishop a 'divorced man openly acknowledged to be living in a sexually active and committed same sex relationship'.[116]. The Primates Meeting described the forth coming consecration as one which might 'tear the fabric of our Communion at its deepest level'.[117]

220. At the request of the Primates, the Archbishop of Canterbury commissioned the Windsor Report 'on the legal and theological implications flowing from the decisions of the Episcopal Church (USA) to appoint a priest in a committed same sex relationship as one of its bishops, and of the Diocese of New Westminster to authorise services for use in connection with sae sex unions, and specifically on the canonical understandings of communion, impaired and broken communion, and the way in which provinces of the Anglican Communion may relate to one another in situations where the ecclesiastical authorities of one province feel unable to maintain the fullness of communion with another part of the Anglican Communion.'[118]

221. The Windsor Report records that the overwhelming response from other Christians both inside and outside the Anglican family has been to regard these developments as departures from genuine, apostolic Christian faith. 'Condemnation has come from the Russian Orthodox and Oriental Orthodox churches, as well as a statement from the Roman Catholic church that such moves create "new and serious difficulties" to ecumenical relationships.'[119]

222. In the Anglican Communion, Windsor states that 'some eighteen of the thirty-eight provinces of the Anglican Communion, or their primates on their behalf, have issued statements which indicate, in a variety of ways, their basic belief that the developments in North America are "contrary to biblical teaching" and as such unacceptable.'[120]

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[114] Lambeth Conference 1998: Resolution 1.10 Human Sexuality, a copy of which is available in Appendix 3/6 of The Windsor Report (see below footnote 116).
[115] Lambeth Conference 1998: Resolution 1.10, ibid.
[116] The Lambeth Commission on Communion: The Windsor Report 2004, Anglican Communion Office, London UK (2004), paragraph 27.
[117] Windsor Report, ibid.
[118] Windsor Report, ibid, paragraph 13.
[119] Windsor Report, ibid, paragraph 27.
[120] Windsor Report, ibid, paragraph 28.

223. A further example of impaired communion was the absence of seven Primates from the Holy Communion service at the February 2007 Primates meeting. They issued a statement which said in part: We are unable to come to the Holy Table with the Presiding Bishop of The Episcopal Church because to do so would be a violation of Scriptural teaching and the traditional Anglican understanding:

> *"Ye that do truly and earnestly repent you of your sins, and are in love and charity with your neighbours, and intend to lead a new life, following the commandments of God, and walking from henceforth in his holy ways; Draw near with faith"*[121]

Part 7 – Answers to the Questions in the current Referrals

224. For the reasons outlined above, I answer the questions in the referral of 5 September 2019 as follows:

> *Whether the Blessing of Persons Married According to the Marriage Act 1961 Regulations 2019 made by the Synod of the Diocese of Wangaratta is consistent with the Fundamental Declarations and Ruling Principles in the Constitution of the Anglican Church of Australia.*
>
> ANSWER: No, the Regulations are not consistent with the Fundamental Declarations and Ruling Principles.
>
> *Whether the regulation is validly made pursuant to the Canon Concerning Services 1992.*
>
> ANSWER: No, the Regulations are not validly made.

225. For the reasons outlined above, I answer the questions in the referral of 21 October 2019 as follows:

> *Whether the use of the form of service at Appendix A to the Blessing of Persons Married According to the Marriage Act 1961 Regulations 2019 made by the Synod of the Diocese of Wangaratta to bless a civil marriage which involved a union other than between one man and one woman, is consistent with the doctrine of this Church and consistent with the Fundamental Declarations and Ruling Principles in the Constitution of the Anglican Church of Australia.*
>
> ANSWER: No, the Regulations are not consistent with the Fundamental Declarations and Ruling Principles.
>
> *Whether the use of any other form of service, purportedly made in accordance with section 5 of the Canon Concerning Services 1992, to bless a civil marriage which involved a union other than between one man and one woman is consistent with the doctrine of this Church and consistent with the Fundamental*

[121] BCP, 'Invitation to Confession'.

Declarations and Ruling Principles in the Constitution of the Anglican Church of Australia.

ANSWER: No, such a form of service would not be consistent with the Fundamental Declarations and Ruling Principles.

Whether, in light of the determinations to be made in Questions 1 & 2, the Regulations are validly made pursuant to the Canon Concerning Services 1992.

ANSWER: No, the Regulations are not validly made.