APPELLATE TRIBUNAL

REPORT TO PRIMATE

REFERENCE ON WOMEN BISHOPS

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

Greeting

On behalf of the Appellate Tribunal I have the honour to make the following report as to the Reference on Women Bishops

1 A reference has been received from the Primate dated 22 April, 2005 in the following terms:-

"Given that:

1. the opinion of the majority of the Appellate Tribunal, expressed in its 1991 opinion, was that it was the constraint imposed by section 71(2) of the Constitution that then prevented the ordination of a woman as a priest or the consecration of as woman as a bishop in the Anglican Church of Australia;

2. in the case of the ordination of a woman as a priest, such constraint has been removed in a diocese which has adopted by ordinance the Law of the Church of England Clarification Canon 1992; and

3. the definition of "canonical fitness" as it relates to a person elected bishop contained in section 74(1) of the Constitution was amended to its present form with effect from 5 June 1995;

is there anything in the Constitution which would now prevent-

1. the consecration of a woman in priests' orders as a bishop in this church in a diocese which by ordinance has adopted the Law of the Church of England Clarification Canon 1992; or

2. the installation of a woman so consecrated as a bishop of such a diocese?"

A copy of the Reference is attached in Schedule 1 to this report.

2 All members of the Tribunal considered the Reference.

3 The reference was considered after a directions hearing, written submissions for interested parties and an oral hearing held in Sydney on 31 March, 2007.

4 At the oral hearing, Dr C E Croft SC and Mr R Hay appeared for the members of the General Synod who promoted the reference, Mr R Refshauge SC for the Synod of the Diocese of Canberra and Goulburn in support of the promoters' position and Mr GC Lindsay SC for the Standing Committee of the Synod of the Diocese of Sydney.

5 An objection to the Most Reverend Roger Herft was filed by the Standing Committee of the Diocese of Sydney.

6 In accordance with the usual policy of the Tribunal, Archbishop Herft alone decided on this objection.

7 After considering submissions by interested parties, Archbishop Herft announced at the oral hearing that he declined to recuse and that he would give his reasons in due course. Archbishop Herft's reasons on this matter appear as Schedule 2 to this report.

8. For ease of reference, copy of Canon 9 of 1989 which changed the definition of "canonical fitness" appears in Schedule 3.

9. It is also necessary to set out the legislation made at Provincial level as to confirmation of the election or appointment of bishops. In South Australia and in Western Australia this is dealt with in the Constitution of the Province. The relevant extracts are set out in Schedule 4. It is to be noted that the WA legislation only applies to the diocese of Perth.

10. The other Provinces have Provincial legislation dealing with confirmation of the election of bishops. Schedule 5 contains copies of the applicable legislation, as follows:-

A NSW

B Vic

C Q'ld

11. There was almost unanimity that the questions as posed do not embrace the full scope of the issue with which the church is concerned. The questions relate only to the Constitution. As the following sets of reasons disclose, the focus should also be on the legislation of the dioceses and the provinces. As to Assistant Bishops, particular note should be made of Justice Mason's observation in his paragraph 88, "It follows that women remain unqualified for confirmation or consecration as assistant bishops so long as the diocese concerned remains bound by the 1966 Canon in its present form."

12. The statutory majority of the Tribunal is of the view that the questions should be answered as follows:-

> **Question 1:** Is there anything in the **Constitution** which would now prevent the consecration of a woman in priests' orders as a bishop in this Church in a diocese which by ordinance has adopted the Law of the Church of England Clarification Canon 1992?
>
> **Answer**: As regards diocesan bishops: No, provided that the woman has been duly elected as the diocesan bishop and has had her election duly confirmed in accordance with the criteria for canonical fitness set out in s74(1) of the **Constitution**.
>
> As regards assistant bishops: As two bishops have not indicated agreement with the remaining members of the Tribunal, there is no statutory majority to support an answer to the question. The majority view is noted in paragraph 13 of this report.
>
> **Question 2**: Is there anything in the Constitution which would now prevent the installation of a woman so consecrated as a bishop of such a diocese?
>
> **Answer:** No, provided that the woman has been duly elected as the diocesan bishop and has had her election duly confirmed in accordance with the criteria for canonical fitness set out in s74(1) of the **Constitution**.

13. As to the answer to Question 1 with respect to Assistant Bishops, three lawyers and the Archbishop of Brisbane take the view that there is nothing in the **Constitution** itself that would preclude the consecration of a woman appointed in accordance with the law applicable in the diocese concerned. However, they are also of the view that such consecration could not take place in a diocese in which the **Assistant Bishops' Canon 1966** in its present form is in force so long as it remains in force in that diocese.

14. Set out hereunder are the opinions of the various members of the Tribunal commencing with the lawyers who formed the statutory majority, then the bishops of the same opinion followed by the minority judgments.

PETER W YOUNG
PRESIDENT
26 SEPTEMBER, 2007

Reasons of the Honourable Justice Keith Mason AC

The questions referred

1. Pursuant to s63 of the **Constitution** the Primate has referred the following questions to the Tribunal for opinion:

> *Given that:*
>
> *1. the opinion of the majority of the Appellate Tribunal, expressed in its 1991 opinion, was that it was the constraint imposed by section 71(2) of the Constitution that then prevented the ordination of a woman as a priest or the consecration of a woman as a bishop in the Anglican Church of Australia;*
>
> *2. in the case of the ordination of a woman as a priest, such constraint has been removed in a diocese which has adopted by ordinance the Law of the Church of England Clarification Canon 1992; and*

> *3. the definition of "canonical fitness" as it relates to a person elected bishop contained in section 74(1) of the Constitution was amended to its present form with effect from 5 June 1995;*
>
> *is there anything in the Constitution which would now prevent*
>
> *1. the consecration of a woman in priests' orders as a bishop in this Church in a diocese which by ordinance has adopted the Law of the Church of England Clarification Canon 1992; and*
>
> *2. the installation of a woman so consecrated as a bishop of such a diocese?*

2. Some dioceses have adopted the 1992 Canon referred to in question 1 and have proceeded to ordain women as priests. The first question asks whether there is any Constitutional impediment now preventing the consecration of a woman in priests' orders as a bishop in those dioceses. This question, unlike the second, is not confined to a diocesan bishop.

Diocesan and assistant bishops

3. Section 3 of the **Constitution** commits the Anglican Church of Australia to preserve the three orders of bishops, priests and deacons in the sacred ministry.

4. Various powers are conferred or recognised as inhering in (diocesan) bishops: including that they meet as members of the House of Bishops (ss15, 58) and otherwise to discharge functions under the Constitution (ss9-14); they exercise judicial and other roles with reference to diocesan tribunals (s54); they are eligible for appointment to the Appellate Tribunal and have nomination rights in that regard (s57); and they have powers to suspend persons licensed by them when a charge is pending against such persons before a tribunal (s61).

5. The **Constitution** provides in s8 that:

> *diocesan bishops shall be elected as may be prescribed by or under the constitution of the diocese provided that the election shall as to the canonical fitness of the person elected be subject to confirmation as prescribed by ordinance of the provincial*

> *synod, or if the diocese is not part of a province then as prescribed by canon of General Synod.*

6. This provision prescribes the manner of election of diocesan bishops. It also implies that any election requires confirmation as to the canonical fitness of the person elected and it confers powers to prescribe the confirmation process "as to the canonical fitness of the person elected".

7. Before 5 June 1995 (when Canon 9, 1989 and Bill 5, 1989 came into effect) "canonical fitness" in s8 of the **Constitution** was defined by s74(1) to mean:

> *… the qualifications required in the Church of England in England for the office of a bishop, at the date when this Constitution takes effect.*

8. After 5 June 1995 "canonical fitness" was defined in s74(1) of the **Constitution** to mean:

> *… as regards a person, that:*
>
> *(a) the person has attained at least 30 years of age;*
>
> *(b) the person has been baptised; and*
>
> *(c) the person is in priest's orders.*

9. As definitional clauses, these provisions operate merely as aids to the construction of the substantive enactment to which they refer, ie s8 of the **Constitution.** This principle of statutory interpretation is well established **(Gibb v Federal Commissioner of Taxation** (1966) 118 CLR 628 at 635, **Allianz Australia Insurance Ltd v GSF Australia Pty Ltd** (2005) 221 CLR 568 at 574[12]). Its application directs attention back to s8 and its function.

10. It should be observed that both the new and old definitions are statements as to what the defined term "means" (see also the defined terms of "Canonical Scriptures", "Church trust property" and "Diocesan bishop" in s74(1)). Such exclusive definitions are to be contrasted with terms defined by reference to what they "include" (eg "Alteration", "Australia", "Ceremonial" in s74(1)).

11. Most non-diocesan or assistant bishops are appointed under the **Assistant Bishops' Canon 1966**, s5 of which provides:

> *No priest appointed to the office of an assistant bishop in a diocese within a province shall be consecrated unless his appointment as to canonical fitness has been confirmed as prescribed by ordinance of the provincial synod or if there be no such ordinance or if the diocese be not within a province unless his appointment as to canonical fitness has been confirmed by the Primate and one or more metropolitans.*

12. Not all dioceses have adopted the **Assistant Bishops' Canon**. Unlike the **Constitution**, the **Assistant Bishops' Canon** contains no definition of "canonical fitness". When it was passed, the interpretative guide was General Synod Rule XIX (Rule re Interpretation) which provided:

> *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.*

13. The **Interpretation Canon 1995** does not apply to the **Assistant Bishops' Canon 1966** (see s3 of the **Interpretation Canon**).

14. This throws up an issue upon which the Tribunal has not received submissions. The question is whether the incorporation of s74 into the Canon via the Rule re Interpretation is to be construed with ambulatory effect. Does "canonical fitness" for the purpose of the 1966 Canon mean "canonical fitness" in accordance with the original constitutional definition? Or does the Canon pick up the changed definition after 1995?

15. The common law presumption is that, in the absence of an indication that a reference to another piece of legislation was to be ambulatory, the reference is taken to be to the legislation in the form it took at the date the referring legislation was made (Pearce & Geddes, **Statutory Interpretation in Australia** 6th ed, 2006, para [6.19]; **Commissioner for Government Transport v Deacon** (1957) 97 CLR 535 at 546). To rebut this presumption,

legislative drafters frequently used the formula of incorporating legislation "as amended" or "as in force from time to time". Interpretation Acts throughout Australia now contain a general provision stating that references to other legislation are to be read to include subsequent amendments of that legislation in the absence of a contrary intention (Pearce & Geddes, **loc cit**).

16. There is nothing in the **Assistant Bishops' Canon 1966** itself and no applicable Interpretation Rule or Canon that would displace the common law presumption of interpretation. It follows that, as regards bishops appointed under that Canon, the original definition of "canonical fitness" in the Constitution continues to apply in relation to confirmation as to canonical fitness. It follows that, in a diocese that has adopted that Canon, it would not be possible for a female to obtain confirmation of canonical fitness under that Canon so long as the adoption stands. And, by virtue of s5 of that Canon, this would preclude her consecration as a bishop in this Church. This situation could only be overcome by amendment of the Canon or (in a particular diocese) by exclusion of the Canon by ordinance of the diocesan Synod under s30(d) of the **Constitution**.

The appointment, election and confirmation of bishops in England as at 1 January 1962

17. The Constitution took effect on 1 January 1962. If one takes **Burn's Ecclesiastical Law** 8th ed, 1824 ("**Burn**"); **Phillimore's Ecclesiastical Law of the Church of England**, 2nd ed, 1895 ("**Phillimore**"); **Cripps on Church and Clergy** 8th ed, 1937 ("**Cripps**") and **Halsbury's Laws of England** 3rd ed, vol 13, ("Ecclesiastical Law"), 1955 ("**Halsbury**") as indicators of the English situation at that date, then the following emerges.

18. The combined effect of the **Appointment of Bishops Act 1533** (25 Hen 8 c 20) and the **Cathedrals Measure 1931 (UK)** meant that, for diocesan bishops in England, the right of appointment lay with the Crown. This principle predated the Reformation. The statutes provided in effect that the Crown's nominee was required to be formally "elected" by the Dean and Chapter of the relevant Cathedral, failing which the Crown could appoint by Letters Patent

(see esp **Halsbury** §157-159, **Cripps** pp74-5). The criminal law penalty for disobedience (praemunire, a serious offence punishable by loss of civil rights, property and imprisonment that was only abolished in this context in England by the **Criminal Law Act 1967**) and the Crown's default power to appoint by Letters Patent if election was not forthcoming meant that the "election" of the single Crown appointee was a mandated formality.

19. Suffragan (ie non-diocesan) bishops were subject to a different statutory regime, but one in which the Crown had a significant role (**Halsbury** §198).

20. After the election of a diocesan bishop was signified by the Crown to the Archbishop of the Province, steps were to be set in train to perform all the acts requisite for perfecting the Archbishop's confirmation of the election (**Halsbury** §161, **Cripps** p75). There were procedures for those opposed to the election that had taken place to state their objections and for the objections to be determined summarily by the Archbishop or his vicar-general (**ibid**). The grounds of objection derived from the canon law. They were uncertain, but very limited.

21. As regards deacons and priests, the bishop is said by **Cripps** (pp25-6) to be the *"sole and proper judge, unfettered in the exercise of his judgment by any particular tests which might formerly have been imposed"*. Some of the canons of 1603 were also relevant to qualifications to be admitted to those two orders, once again subject to the bishop having a broad area of personal judgment about whether the criteria were satisfied.

22. As to bishops, **Cripps** states (at p25) that:

> *The ordering of bishops is dealt with more particularly hereafter, remarking here that every bishop, prior to his ordination, is already an ecclesiastical person.*

Note that the status of being "an ecclesiastical person" is described as a precondition of ordination (ie consecration).

23. The "hereafter" mentioned in the sentence quoted is identified as a passage addressing the role of the Archbishop or his vicar-general in the ceremony of confirmation that took place between election and consecration. **Cripps** states (at p75) that:

> *It is now settled law that the ceremony of confirmation is in substance only a formal act, which the Archbishop is bound to perform, by himself or by his vicar-general, under penalty of praemunire. He has no jurisdiction to entertain objections to the confirmation founded on questions of doctrine, and a writ of mandamus will not lie to compel him to hear and determine such objections, nor apparently will a mandamus lie to compel him before proceeding to confirmation to inform his mind of the fitness of the bishop elect. The only possible points upon which objectors could be heard are the identity of the person, an informality in the election, and possibly the personal disqualifications imposed by the canon law, such as age. The Archbishop has power to regulate the procedure in connection with the making of objections.*

24. The authorities cited are **R v The Archbishop of Canterbury (Bishop Hampden's Case)** (1848) 11 QB 483, 116 ER 557 and **R v The Archbishop of Canterbury** [1902] 2 KB 503. Neither case involved what **Cripps** describes (p25) as "canonical impediments which formerly existed to the taking of orders, which were expressed with minute particularity". These were the "personal disqualifications imposed by the canon law" which **Cripps** could only state were "possibly" grounds of objection that could be raised by those opposed to the confirmation of a bishop's election.

25. Canon law, as the source of the principles of "canonical fitness" is founded upon Holy Scripture, Christian tradition, and various canons or rules made at different periods of the Christian Church's history, both in the east and west (**Halsbury** §§8-9).

26. Canonical fitness requirements in England appear to have included matters deriving from Scripture, the Book of Common Prayer (including the Ordinal) and Church (canon) law. Some matters, eg as to minimum age (which is referred to in the Ordinal), were well-established and easily determined. Others, eg as to moral fitness, were bound to be more contestable in their application. Others again, eg as to legitimacy of birth and absence of what

Phillimore (p93) termed "corporal infirmity which would … tend to repel and alienate the laity", were debatable both as to whether they were still canonical requirements in 1962 and as to whether they were met in a particular candidate.

27. According to **Halsbury** §163, objections to confirmation of the election of a bishop were allowed on only two points, namely, that the election had been defective in some matter of form, or that the person presented for confirmation was not the person on whom the choice of the Crown had fallen. In other words, the authors of **Halsbury** (who state the qualifications for appointment at §156, set out below) were of the view that **Cripps'** third category of "possible" objections (ie as to personal disqualifications imposed by the canon law) no longer existed as **legal** impediments to confirmation.

28. It does not matter who is correct about these issues in England, because the framers of s8 of the **Constitution** (and of the **Assistant Bishops' Canon 1966**) expressly contemplated that "canonical fitness" would be addressed in the process of confirmation which within a province was to take place after election or appointment of a bishop by whatever method was prescribed by ordinance of the provincial synod. This matter is further discussed below.

29. Reverting to the English position, I see no basis for doubting that if canon law in England imposed an impediment based on the gender of a bishop-elect this would have been (to use Cripps' term) a "personal disqualification imposed by the canon law" in this context. My reasons are set out below. Of course, the issue never arose before 1962 because the idea of consecrating a woman to be a bishop in the Church of England was not seriously considered by that Church before the late twentieth century. Needless to say, differing conclusions can and have been drawn from this fact of history.

30. Some insight into the scope and uncertainty as to the grounds of canonical (un)fitness as regards a bishop emerges from the English texts. This uncertainty explains why the open-ended definition in s74(1) of the Constitution came to be amended.

31. **Burn** states (at p194):

> *By the preface to the form and manner of making, ordaining, and consecrating of bishops, priests and deacons,* [ie the Ordinal] *every man which is to be ordained or consecrated bishop shall be full thirty years of age.*

A footnote states that the reason given by the canon law was that our Saviour was baptised and began to preach at this age.

32. **Phillimore** states that the Crown traditionally had the right of patronage over bishoprics, with the confirmation and consecration being in the power of the pope until the Reformation (pp33-4). All papal jurisdiction was taken away by 25 Hen 8 c20. Under that statute the Crown nominated the bishop, who was required to be elected by the dean and chapter, failing which the offenders incurred a praemunire. The procedure for opposition to confirmation is summarised (pp38-9). Then follows a detailed, inconclusive discussion of the divided decision in Dr Hampden's Case in 1848 (pp39-42) that obviously needs to be read in the light of the Court of Appeal decision in the ***Archbishop of Canterbury Case*** of 1902 (discussed below) that post-dated **Phillimore**.

33. **Phillimore** deals with the ordination of priests and deacons in a separate chapter from his discussion about bishops. It is here that he states the well-known propositions about the incapacity of unbaptized persons and women to be ordained. It is pertinent to set out the first two paragraphs of a lengthy passage (p93):

> *There are only two classes of persons absolutely incapable of ordination; namely, unbaptized persons and women. Ordination of such persons is wholly inoperative. The former, because baptism is the condition of belonging to the church at all. The latter, because by nature, Holy Scripture and catholic usage they are disqualified.*
>
> *Though an absolute incapacity be confined to these two classes, yet the canon law, having regard to the great importance of the subject, has been careful to prescribe the qualifications, and to set forth the disqualifications of candidates for holy orders. The law enjoins that the candidate be of sufficient age and learning,*

> *and of good reputation. That he be not afflicted by any corporal infirmity which would impede the exercise of his spiritual functions, and tend to repel and alienate the laity. That he be born in lawful wedlock. That he be not engaged in secular occupations inconsistent with devotion to the spiritual calling. Disqualifications of this kind constitute what, since the twelfth century, have been canonically termed irregularitates, and may upon sufficient grounds be removed by the dispensation of the bishop. There are irregularitates ex defectu and ex delicto*.

34. The context and language of this passage and of the two pages of text that follow show that the author was addressing ordination to the diaconate or priesthood. But, in so observing, I am not suggesting that the various personal disqualifications were inapplicable to the episcopate as a matter of canon law. The contrary is the case because (as **Cripps** noted) "every bishop prior to his ordination is already an ecclesiastical person" (see also **Phillimore** p22). I observe below that a gender restriction was an aspect of canonical fitness and that the majority of the Tribunal held in 1991 that the inherited canon law of the Australian dioceses as at 1962 included a prohibition upon a woman being consecrated.

35. The leading judgment in the **Archbishop of Canterbury Case** of 1902 was given by Lord Alverstone CJ. As indicated, the decision establishes that objections based upon unsoundness of doctrine were not open to be raised in opposition to confirmation.

36. There is one passage in the Chief Justice's reasons adverting to more particular instances of canonical unfitness. He said ([1902] 2 KB at 541):

> *We have nothing to do on this application with any question of refusal or unwillingness on the part of an archbishop executing his high office to confirm or consecrate; the archbishop would do so upon his own responsibility, and would incur the risk of praemunire contemplated by the statute. No question was, or could be, raised before us upon the argument of these rules as to the consequences of such refusal. I mention this because, both in the argument of Bishop Hampden's case and on the argument before us, what appear to me to be extravagant suggestions were made that the archbishop might be compelled to confirm as bishop a man who was not a priest in holy orders, a person under the age of thirty, a Jew or Turk, a pronounced infidel, or one having some other obvious disqualification, and*

> *there is a strong passage in the judgment of Coleridge J to the same effect.* [See 11 QB at 604, 116 ER at 601] *We are not dealing with any such case, and, in my opinion, these considerations do not assist us. We have only to read the history of the last 150 years, or of our own time, to know that the choice of persons to fill the high office of a bishop is a matter of most anxious consideration by the Crown, and that advice is given by those who are most competent to guide in the selection of fit persons.*

37. These remarks recognise the pre-existent canon law fitness requirements, without conceding either their relevance or irrelevance in point of English public law to the situation of a diocesan bishop appointed by the Crown in England after the Act of 1533.

38. Halsbury states the qualifications of a bishop in the following terms (§156):

> *No man can be a bishop unless he is fully thirty years of age, and duly appointed and consecrated according to the statutory rules. He must be a godly and well-learned man, and has to be vouched for as such by two bishops. He must be able to say that he is truly called to this ministration according to the will of our Lord Jesus Christ and the order of this realm; also that he is persuaded that the Holy Scriptures contain sufficiently all doctrine required of necessity for eternal salvation through faith in Jesus Christ, and that he is ready to drive away all erroneous and strange doctrine contrary to God's word.*

It can be seen that this statement includes matters drawn from the Ordinal, but not the full list of qualifications set out in 1 Timothy 3:2-3.

39. The older texts and the Ordinal itself refer to numerous personal qualities expected of a bishop, many of which are based on Scripture and the subject of interrogation during the consecration service. Ayliffe in his **Paregon Juris Canonici Anglicani** published in 1726 says:

> *A bishop according to St Paul's Direction (1 Tim ch 3 vv 2, 3 etc) ought to be vested with fourteen Conditions or Qualifications. For he ought to be blameless, that is to say, without any Crime or Blemish imputed to him, the Husband of one Wife, not given to Wine, a person of Prudence, Modesty, Hospitality and Charity; a Teacher of the People, no Striker or litigious Person; not given to filthy Lucre or Covetousness; a Man that governs his own House; no Novice, but a person well apparelled.*

> *For it is not the Name, but the Life of the Person that makes a Bishop. An election therefore to a Bishoprick, ought to be made of a Person that is fitly qualified for it, in respect of Knowledge, Age and Good Manners …. And the Council of Lateran ordains, because some Persons had been elected Bishops who were in no wise qualified in respect of Age, Knowledge, Morals and the like decreeing, That in all the Offices of the sacred Ministry, there should be three Things especially requisite and necessary, viz Maturity of Age, Gravity of Manners, and Knowledge of Letters.*

The appointment of bishops in the colonial Church

40. When Archdeacon Broughton was made Bishop of Australia in 1836, he was appointed by Letters Patent executed by William IV under the Great Seal. The Letters Patent purported to confer various powers of a coercive nature. According to Ross Border, **Church and State in Australia 1788-1872**, p85:

> *They treated the Episcopal appointment as if it were a government post: they purported to give the bishop "the right of resignation", and* mirabile dictu*, the Crown purported to hold "the power of revocation"*.

41. In the **Archbishop of Canterbury Case** in 1902 Lord Alverstone CJ had considered ([1902] 2 KB at 553) that:

> *It was absolutely essential to keep clearly in view the distinction between the state of things in the Church when bishops were really elected by some electoral body, and when the metropolitan had, as such, the responsibility of inquiring into and confirming the choice of the electors after that choice had been made. From the earliest days of the Church it has no doubt been recognised that a bishop should possess certain qualifications. They are to be found in many ancient ecclesiastical works, and were in great part based originally upon the Epistles of St Paul.*

Events in the 1860s had brought about the situation that, in the Australian colonies, there had to be a reversion to the "state of things" adverted to by Lord Alverstone, ie when bishops were elected.

42. As is well known, the Crown's power to confer coercive authority upon a colonial bishop by appointment by Letters Patent was exploded by a series of

judicial decisions in the 1860s (see **Ex parte The Rev George King** (1861) 2 Legge 1307; **Long v Bishop of Cape Town** (1863) 1 Moore NS 411, 15 ER 756; **Bishop of Natal v Gladstone** (1866) LR 3 Eq 1). Thereafter, the Crown stopped the practice altogether and branches of the Anglican Communion in the colonies set about establishing regimes for the election of bishops by or under the authority of local synods. As Clarke, **Constitutional Church Government in the Dominions Beyond the Seas and in other Parts of the Anglican Communion**, 1924 put it (at p12):

> *When Letters Patent … were declared in 1863 incapable of conferring jurisdiction in self-governing Colonies, the Church was sufficiently organised to adapt itself to the new conditions. Henceforth the Bishops were chosen by the several Synods under varying rules which continue to this day, but always under the authority of the Synod of the Diocese.*

The election and confirmation of diocesan bishops under the Constitution

43. The regime existing in the Australian dioceses in 1962 is recognised in s8 of the **Constitution** which, as indicated, provides for appointment of diocesan bishops by election as prescribed by or under the **Constitution** of the relevant diocese. This allows the several dioceses to decide (subject to the **Constitution**) upon the qualifications for their diocesan bishops and the processes for electing them.

44. However, s8 also recognises and addresses the post-election confirmation process referred to by Lord Alverstone and the other English authorities mentioned above. The section implies the continuing necessity for a confirmation process, while providing the means whereby that confirmation could be regulated as to "the" (ie all: see below) questions of "canonical fitness". This matter was to be capable of regulation by ordinance of the provincial synod in the case of a diocese in a province, and by canon of General Synod for other dioceses.

45. When the **Constitution** came into effect the various Provinces in the Australian Church had their own confirmation processes. Some were

prescribed by ordinance of Provincial Synod. Some such ordinances have been passed or amended since 1962. Issues may possibly arise as to the compatibility of these ordinances with the situation now prevailing under the **Constitution** and with the impact of the subsequent amendment of the definition in s74(1), but these have not been raised in the current Reference.

46. Section 8 is expressed so as to embrace diocesan legislation (as to election) and provincial or General Synod legislation (as to confirmation of election) of a diocesan bishop whether that legislation came into force before or after the date on which the **Constitution** took effect. But, as regards the election and confirmation of a diocesan bishop **after** the commencement of the **Constitution**, s8 (read with the definition of *"canonical fitness"* in s74(1)) limits the matters to which the confirmation process might be directed. With the original definition of "canonical fitness" those limits were defined by reference to the qualifications required in the Church of England for the office of a bishop, as at 1 January 1962. Qualifications that were not part of the English ecclesiastical law at that date were to be disregarded, but much scope for disputation remained. The amended definition that came into effect on 5 June 1995 swept away the uncertainties of the English position as at 1962 and replaced them with three (and only three) requirements to be addressed at the confirmation stage.

47. It remains possible for dioceses to determine, subject to the **Constitution**, their own procedures for election and criteria of suitability in prescribing the election process that, under s8, has to precede confirmation of the bishop-elect as to canonical fitness. But the criteria whereby the person or persons vested with authority to confirm the election could determine canonical fitness are limited to those falling within the constitutional definition.

48. Initially the framers of the **Constitution** chose not to spell out the requirements as to canonical fitness of a bishop otherwise than by the broad incorporation of received English canon law as at 1962 effected by the original definition of canonical fitness in s74(1). Nevertheless, the framers intended to deal with the issue comprehensively, even then. This follows from several considerations: (1) the use of the definite pronoun *"the"* before *"canonical*

fitness" in a sense that suggests all questions of canonical fitness; (2) the generality of the original definition of *"canonical fitness"* in s74(1) ("the qualifications required … for the office of a bishop); (3) the fact that canonical fitness was defined as to what it *"means"*; and (4) the broad scope of *"canonical fitness"* as at 1962 whereby it embraced a broad range of qualities and qualifications derived from the Ordinal and the canons of the Church and perhaps also directly from Scripture (what **Cripps** called the *"personal disqualifications imposed by the canon law"*: supra).

49. If male gender was a requirement of such fundamentality as to derive from Scripture (as many believed and still do) as well as from inherited canon law, then it is impossible to see why its absence would not have formed a (dis)qualification as matter of canonical fitness. Nor could one envisage a reason for thinking that it lay outside the scope of the original definition of *"canonical fitness"* in s74(1). In other words, if one assumes the correctness of the so-called **Phillimore** rule and its separate application to each of the three orders, the matter is squarely addressed within the framework of s8, at least at the confirmation phase. This was the view of Cox J in the 1991 Opinion (Reasons of the President, pp29-30). Archbishop Rayner agreed generally with Cox J. Archbishop Robinson also considered that *"under the present law of the Church canonical fitness includes the qualification of being male*….[Consecration of a woman to the order of bishops] *would apparently be excluded by the definition of canonical fitness in respect of a bishop given by s74(1) of the Constitution. The qualifications required in the Church of England for the office of a bishop at the date when the Constitution took effect certainly included being a man and not a woman"* (Opinion and Reasons of Archbishop Donald Robinson, pp5, 12).

The changed definition of canonical fitness as from 1995

50. The Canon and Bill explicitly altered the **Constitution** as regards canonical fitness: see their long and short titles and compare the terms of the old and new definitions. Like its predecessor, the current definition purports to be exclusive in its effect (*"Canonical fitness **means"*** etc). The language chosen is gender-neutral ("*as regards a person"*). It is used with reference to a

bishop-elect who will doubtless be in priest's orders. The terms "bishop" and "priest" in the **Constitution** do not convey any implicit gender tag (see below).

51. The earlier definition speaks of the *"qualifications"* required for the office of a bishop, whereas the later definition proceeds directly to define the term *"canonical fitness"*. In my view, each formulation is addressing the constitutional prerequisites to a canonically unchallengeable consecration, at least at the confirmation stage. The essential difference between the two definitions lies with the breadth and vagueness of the former definition and its capacity to generate disputation as to the validity of a candidate for consecration.

52. The "mischief" calling forth the 1989 amendment is apparent from the uncertainty and potential for embarrassment generated by some of the matters arguably embraced by the old definition of *"canonical fitness"* in s74(1). The deliberations of the Canon Law Commission that promoted the amendment show that the new definition was designed to remove the potential for embarrassment and disputation. Resort to such sources for this purpose is uncontroversial (see Pearce and Geddes, **op cit**, para [2.5]).

53. It may be accepted that reform or change (depending on one's point of view) of any inherited prohibition upon female bishops was not part of the mischief contemplated by the General Synod in what was in 1989 an uncontroversial measure. But it would be fallacious to proceed to the conclusion that the Canon and Bill had no impact upon the matter. For one thing, the mischief that was addressed was the lack of clarity in the inherited law of the Church of England as at 1962. For another, the impact of an enacted law depends upon what it states, fairly construed, not upon what may or may not have been in the minds of those voting in the legislative body.

54. A principled approach to the task of interpretation of legislative measures such as the Canon, the Bill and the amended Constitution requires their meaning to be based upon what they provide, fairly construed according to the principles of statutory interpretation.

55. When in 1989 the Canon Law Commission forwarded to General Synod its recommended amendment to the definition of "canonical fitness" in the **Constitution** (being the form ultimately adopted), the Commission said of the new definition:

> *This definition records the qualifications required by the Church of England in England in 1961. It is of relevance to Section 8. Whilst Section 8 is also in need of reform it seemed appropriate to defer consideration of this section until after the new definition has been adopted.*

(Submission by the Standing Committee of the Synod of the Diocese of Sydney para 27.)

56. It was obviously a requirement of English ecclesiastical law in 1962 that only priests were qualified for consecration as a bishop. The absence of controversy surrounding the form of the amended definition as regards the gender of a priest may possibly have been because par (c) of the new definition required being in priests orders as an aspect of canonical fitness. If, which I doubt, anyone at General Synod had turned their mind to it, he or she might possibly have reasoned that there would be no female bishops in the Church as long as there would be no female priests. This may have been seen to be a satisfactory method of *"holding the line".* These observations are necessarily speculative and do not inform the reasoning that follows.

57. "Canonical fitness" is defined in the **Constitution** by reference to what the term "means". And, when this conclusion is placed side by side with the application of the plain meaning principle of statutory interpretation, it could not be clearer that the new definition (like the old) is exhaustive. There are only three criteria to be addressed in the confirmation process. But, since it is only a definition, the central issue remains the operation of s8, albeit now in the context of the amended definition.

58. As indicated, s8 of the **Constitution** regulates the processes for election and confirmation of diocesan bishops after 1 January 1962, with the new definition of canonical fitness becoming operative from 5 June 1995. Since 1962 the

powers of the several synods must be exercised in accordance with the provisions of the **Constitution** (s5). These two observations may possibly impact upon the validity and/or interpretation of existing ordinances of diocesan and provincial synods that contain definitions of canonical fitness inconsistent with the current definition of canonical fitness in the **Constitution**.

Matters unhelpful

59. On occasions, both "sides" represented at the hearing of this Reference lapsed into unhelpful submissions that asserted what those who promoted or voted in favour of the Canon and Bill intended by their support for the measures. Thus, the Signatories argued that the Canon would not have passed the 1989 General Synod if there had been any suggestion that it either instituted or maintained a bar on women. Conversely, the Standing Committee of the Synod of the Diocese of Sydney argued that the Canon would never have come into effect because, had its effect been to remove an existing restriction concerning women bishops, it would never have been ratified by the Sydney Synod, (as it eventually was, despite rejection in 1990 when Archbishop Robinson withheld his assent to the adopting ordinance).

60. It is common ground that the measures excited no controversy in their adoption, but this entirely unexceptionable situation cannot be used to inform or control consideration of the meaning of the text, especially since each side would draw the opposite conclusion from the uneventful parturition of the Canon and Bill at General Synod 1989.

61. The primary source of the presumed "intention" of a legislative body is the language it uses. But to talk about a legislator's "will" is largely fictional. It is certainly incapable of proof by resort to such hypothetical arguments as have been conjured up here.

62. Passing reference was made in various submissions to the decision in **Pepper v Hart** [1993] AC 593, but that exceptional case involved the use of a statement made by the minister promoting legislation during a debate on the

Bill in Parliament as an aid to construction. No one here points to anything remotely close to that scenario.

63. To delve into the subjective thoughts of the unidentified individuals who voted for the measures at General Synod in 1989 is both impossible and irrelevant. Scalia J once observed that the Members of Congress *"need have nothing in mind in order for their votes to be both lawful and effective"* (***Pennsylvania v Union Gas Co*** 491 US 1, 56 (1989)). Lord Hobhouse wrote in ***Wilson v First County Trust Ltd*** (No 2) [2004] 1 AC 816 at 843[66] that it is *"a fundamental error of principle to confuse what a minister or a parliamentarian may have said (or said he intended) with the will and intention of Parliament itself*". In the present case, no one even points to things said during debate at General Synod.

64. Those who prepare or promote legislation (or any other formal instrument) have the opportunity to frame it in their own terms, but they have no additional control over its interpretation. After all, they are not the lawmakers.

65. The faintly pressed suggestions that the meaning of the **Constitution** can be derived from the failure in 2001 to pass a particular measure by way of "further clarification" concerning women bishops are quite untenable. The meaning of the **Constitution** does not depend on the voting patterns attending particular measures later introduced into General Synod. General Synod is of course free to address and, subject to the **Constitution**, regulate matters touching the episcopate, but this Reference is concerned with the meaning of the **Constitution** itself.

Authority in this Tribunal

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, Cox J in relation to the 1986 Reference in the matter of the Ordination of Women to the Office of Deacon Canon 1985).

67. No question of departure arises in this Reference.

68. This Tribunal has consistently held that the admission of women to Holy Orders would not be inconsistent with the teaching of the canonical scriptures, thereby contravening the Fundamental Declaration in s2 of the **Constitution**.

69. The Tribunal has also held that the words bishops, priests and deacons in s3 of the **Constitution** do not import the masculine gender so as to engage some implied prohibition deriving from s74(6) (see **Reports** of 1980 and 1981; **Opinion and Reasons relating to the Ordination of Women** (1985); **Report and Opinion of the Tribunal on eleven questions** (1991)).

70. Section 74(6) of the **Constitution** states:

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

This definitional provision is limited in its effect. First, it relates only to the **Constitution** and its interpretation. Secondly, it addresses only words *"importing the masculine"* and, as indicated, the words bishop, priest and deacon are not of this nature. Thirdly, s74(6) operates only in the case of lay persons: it does not, by implication, state anything about clerical persons referred to in the **Constitution**. There is ample work for the provision because there are several references in the **Constitution** to lay persons where words importing the masculine are used. These include the use of the words *"layman"* and *"he"* with reference to membership of the Appellate Tribunal (s57(1)); the use of the male pronoun in the definition of *"Member of this Church"* in s74(1); and the reference to *"the King's Majesty in Council"* in s74(5).

71. In 1985 the majority of the Tribunal also held that there was no principle of maleness embodied in the formularies that would offend s4 of the **Constitution** as regards any of the three Orders (see Reasons of the Archbishop of Adelaide, the Bishop of Newcastle, Mr Justice Tadgell and Mr Justice Young pp4-5). This conclusion was reiterated in 1991 by six of the seven members of the Tribunal in their reasons.

72. Section 71(2) of the **Constitution** stipulates that:

> *The law of the Church of England including the law relating to faith ritual ceremonial or discipline applicable to and in force in the several dioceses of the Church of England in Australia and Tasmania at the date upon which this Constitution takes effect shall apply to and be in force in such dioceses of this Church unless and until the same be varied or dealt with in accordance with this Constitution.*

73. In 1991 the Tribunal gave formal opinions on some but not all of the eleven questions referred to it. The answers to Questions 2 and 3 and the reasons of at least two bishops and two laymen that supported those answers concluded that s71(2) prevented the ordination or consecration of a woman by the Bishop of the Diocese of North Queensland. The reasons of the Tribunal make plain that the same situation applies throughout the dioceses of the Anglican Church of Australia, save that the Tribunal's inability to answer Questions 8 and 10 left unresolved the power of a diocesan bishop if additionally supported by diocesan ordinance. The last mentioned issue does not arise under the present Reference as it was argued before the Tribunal.

74. The Tribunal also held that *"the law of the Church of England"* as at 1 January 1962 prohibited women from ordination to the diaconate or the priesthood or consecration to the episcopate and that this rule of English ecclesiastical law was part of the inherited law of the several dioceses (see Reasons of the President, Cox J, pp12-16; the Deputy President, Tadgell J at pp1-2; Young J at pp8-13; Handley J at p7; Archbishop Rayner at p4; Archbishop Robinson at p7).

75. I draw attention to the language used to express of this decision, as relating to prohibition on **consecration**. As Young J points out, the making of a bishop involves a three or four step process, viz:

(a) the issue of a mandate for election (not always applicable);

(b) the election of a diocesan bishop or appointment of an assistant bishop;

(c) the confirmation of the election or appointment;

(d) the consecration.

76. Section 8 of the **Constitution** mandates steps (b) and (c) as regards a diocesan bishop. Step (d) (consecration) is also mandated by the Ruling Principle in s4 insofar as that Ruling Principle retains and approves the doctrine and principles of the Church of England embodied in the Ordinal.

77. In 1991 the Tribunal held that General Synod could abrogate the inherited law as to the gender of deacons, priests and bishops, relying on the mandate referred to in the concluding words of s71(2) and its general legislative powers. It further held that the **Ordination of Women to the Office of Deacons Canon 1985** had not affected the situation so far as women priests and women bishops were concerned (Cox J at p17). But, as indicated, the Tribunal was unable to form an opinion within s59 of the **Constitution** as to whether some or all diocesan synods had legislative power to override the inherited "Phillimore rule" in certain circumstances.

78. By parity of reasoning, the inherited law concerning the gender of a bishop was not directly amended by the **Law of the Church of England Clarification Canon 1992**. The mere passing of the **Law of the Church of England Clarification Canon 1992** and its adoption by a diocese provides no answer to the questions at issue in this Reference. This would be to revert to the now discredited "progression" thesis that was once floated as an argument against the wisdom or validity of measures authorising the ordination of women to the diaconate. It would also ignore the limited terms of the 1992 Canon. The only relevance of that Canon to the present issue is that it provides the means whereby a diocese that adopts it may incontrovertibly proceed to ordain women as priests or permit women ordained priest elsewhere to function as priests within the diocese, thereby presumably satisfying any diocesan qualification requirement as regards election or

appointment as a bishop and enabling those ordained to satisfy one of the requirements of canonical fitness.

79. Needless to say, no issue arose in the 1991 Opinion as regards s8 in its application to the later amended form of the definition of canonical fitness. Nevertheless, there are statements by four members of the Tribunal that strongly support to the view that the gender of a bishop-elect is a matter addressed in the context of s8 and the definition of canonical fitness from time to time.

80. The President, Cox J (with whom Archbishop Rayner generally agreed), said that the candidate's male sex was a "qualification" required in the Church of England in England in 1962, no less than his being in priest's orders and of the age of 30 years or more. He continued (pp29-30, emphasis added):

> *It follows that **while the definition remains** it will not be possible for a woman, otherwise qualified, to be elected as bishop of an Australian diocese. However, not all bishops are diocesan bishops. Some are, and are appointed at the outset to be, assistant bishops. Section 8 says nothing about a woman's qualifications to be consecrated as a bishop. Presumably this is another instance of the draftsmen of the Constitution assuming that all persons in orders would be men but not so providing as a general rule. Compare s74(6). **The sex qualification is created in this case through the implication of the definition of canonical fitness, by a side-wind as it were,** and I should not interpret this as indicating an intention by the framers of the Constitution that only men may be ordained. No-one, indeed, had suggested as much, in all the submissions the Tribunal received in this and related references, prior to the Tribunal itself raising the point with the parties after the public hearing in this matter.*

81. Young J thought that it could be argued that *"canonical fitness"* in s74(1) meant what was to be looked at by those who had to certify canonical fitness. *"It may be that, merely because no priest whom those persons were considering was ever other than a male, the matter did not enter into their consideration at all"* (p29). His Honour continued (pp29-30):

> *However, on the assumption that maleness was within the definition of "canonical fitness", Mr Mason QC, points out that the*

> *only time the definition is taken up in the Constitution is clause 8 which deals with who may be elected as a bishop of a diocese. Mr Mason puts that there is a very real difference between electing a person as a diocesan bishop and consecrating a person so that that person joins the Order of Bishops. Semantically this must be so, though it is most odd that one could under the Constitution get a situation where only some of the bishops were eligible for appointment as diocesan bishops. Indeed, the point would not arise in New South Wales because the Provincial Synod has passed an ordinance adopted by each of the diocesan synods that where a person already is a bishop of this Church, confirmation of that person's election to a diocesan position is not required.*
>
> *I agree with the submissions of Mr Mason QC, in this regard, and, accordingly, s74(1) does not, in the ultimate, affect the position at all.*

82. As indicated, Archbishop Robinson said in his Reasons (p12) that the qualifications required in the Church of England in England when the **Constitution** took effect certainly included being a man and not a woman (p12). He said that consecration of a woman to the order of bishops was apparently excluded by the definition of canonical fitness in respect of a bishop given by s74(1). He thought that there was no hint in s8 that the meaning of, or qualifications for, canonical fitness itself could be different in the two cases of diocesan bishop and assistant bishop. The Archbishop was, of course, addressing the definition of canonical fitness then in s74(1).

83. It is to be remembered that the alteration to the s74(1) definition in the **Constitution** was effected by a Canon and a Bill duly passed by General Synod subsequently assented to be ordinance of at least 75% of all diocesan synods including all metropolitan sees. If this has brought about the situation whereby there is no longer a gender-based disqualification of canonical unfitness for a bishop-elect, it has occurred through the participation of General Synod. The 1991 Opinion shows that this is constitutionally sufficient to overcome any inherited impediment traceable via s71(2).

84. Indeed, if s8 with the new definition has the effect of abrogating the Phillimore rule as regards diocesan bishops, then the situation is *a fortiori* because a specific, later-amended provision in the **Constitution** (s8 read with the new

definition) would necessarily overreach the generality of any incorporated *"law of the Church of England"*. Section 71(2) declares by its concluding words that such incorporated law may be *"varied or dealt with in accordance with this Constitution".*

The critical issue

85. With these preliminaries I come to the critical issue in the Reference.

86. No one has suggested that the correct answer to the questions referred is controlled by the assumptions of the framers as stated in the three "givens" stated by way of preamble. The givens merely set the scene.

87. I have already indicated why the plain meaning of the amended definition in s74(1), read in its context, is that those vested with the necessary power of confirmation as to canonical fitness of an elected diocesan bishop may only have regard to the three "qualifications" stated, namely attainment of at least 30 years of age, baptism and being in priest's orders. Other matters are irrelevant to the confirmation process regarding diocesan bishops.

88. As regards assistant bishops appointed under the **Assistant Bishops' Canon 1966**, the original definition of *"canonical fitness"* applies (see above). It follows that women remain unqualified for confirmation or consecration as assistant bishops so long as the diocese concerned remains bound by the 1966 Canon in its present form.

89. Given that, as the Tribunal held in 1991, the *"law of the Church of England"* inherited in 1962 via s71(2) included a ("Phillimore") prohibition on consecrating a woman as a bishop, what is the effect of redefining *"canonical fitness"* in s74(1) as from 1995 upon the situation concerning diocesan bishops? This, I perceive, is the critical issue.

90. I have already indicated that, subject to the **Constitution**, a diocese is free to prescribe its own procedures and criteria for electing a diocesan bishop. The

opening words of s8 of the **Constitution** speak in terms of broadest generality in this regard.

91. If a diocesan election ordinance expressly or impliedly incorporated a prohibition upon a woman being a candidate for election then this would block such a candidate at that stage. (No argument arises in this Reference as to whether such an express prohibition might contravene the "commands of Christ" as properly perceived: cf **Constitution**, s3 and see the reasons of Bishop Holland in the 1991 Opinion.)

92. But let the ultimate issue be tested by assuming that a diocesan election ordinance prescribed in terms that a woman was eligible for election or that the eligibility criteria for a candidate for election as the diocesan bishop were as in the current definition of *"canonical fitness"* in the **Constitution**. It will be apparent from my reasons that I can see no basis for such an ordinance to be invalid under the **Constitution**. Would the election of a woman in those circumstances be invalid for contravention of Phillimore's rule, with the consequence that it would not be open for the elected woman to be confirmed as canonically fit or to be consecrated?

93. In my opinion, the answer must be "no". *"canonical fitness"* is not prescribed in s8 as a condition of a valid election. On the contrary, it is a matter to be addressed by way of confirmation with regard to the particular candidate whose name emerges from the election process. Since 1995 there are three criteria to be applied with regard to confirmation and three only.

94. As this Tribunal expressed it in 1991, the Phillimore rule was a prohibition upon **consecration** under the law of the Church of England in 1962. That "rule" was always an aspect of the canon law in England, not part of the enacted public law whereby the Dean and chapter were bound to elect the Crown's nominee upon pain of criminal sanctions. As indicated in the historical material discussed above, the canonical qualifications of the elected candidate were, at most, matters addressed in the confirmation process, with the consecration according to the Ordinal operating as the ultimate longstop

whereby "the Church" might possibly decline to accept an unfit or unqualified candidate nominated by the Crown.

95. Under the situation prevailing before 1995, a diocese that elected a bishop who was not qualified according to the broad and uncertain criteria of fitness then applicable was at risk that the Metropolitan or other persons vested with authority in the Province to confirm as to canonical fitness might decline to do so. But I am unaware of any situation in the past whereby the validity of a diocesan election in Australia was subjected to challenge (within the Church or in a secular court) on the basis that the **election** was invalid because a canonically unfit person was elected.

96. This reflects the different function of the different stages in the process of placing a diocesan bishop into office. Given the broad yet debatable qualifications that were rendered aspects of canonical fitness under the **Constitution** between 1962 and 1995 it would have been an embarrassing and time-consuming exercise to have run the measuring stick of canonical fitness across each and every candidate for election at the stage of his nomination for election as a criterion of the validity of the election process itself. Would an undoubtedly canonically fit candidate have had a **legal** right to object to the inclusion in a ballot of the name of a candidate about whom there was some question of canonical fitness to be consecrated? Could an outvoted minority in diocesan synod have gone to this Tribunal or a secular court challenging the imminent or completed election of a candidate on the basis that he failed to meet all of Ayliffe's fourteen *"conditions or qualifications"* or all of the qualifications stated in **Halsbury** §156? It seems unthinkable that such embarrassing and unnecessary issues would call to be addressed by an electoral body such as a diocesan synod as a matter going to the validity of the election process itself. Would an election have been **invalid** because one of the candidates (not necessarily the successful one) was born outside lawful wedlock? How could such a question have been investigated and resolved within the process of an election synod?

97. Surely these and other matters of *"canonical fitness"* were intended to be addressed (if at all) when and if a single name emerged from the election

process and in the discrete, unheated and better informed (as to matters of ecclesiastical law) context of the confirmation process prescribed in the relevant Province. This accords with the process referred to in the passage from Lord Alverstone's 1902 judgment already quoted where he referred to the metropolitan having *"the responsibility of inquiring into and confirming the choice of the electors after that choice had been made".*

98. The absurd consequences of these possibilities show that it would be equally absurd to construe s8 as if it envisaged that the validity of **election** depended on the pre-1995 criteria of canonical (un)fitness. The opening words of s8 carry no such suggestion. On the contrary, they point to diocesan synods as being able to set their own criteria. Nor does the language of s8 allow that some pre-1995 qualifications/conditions might have been less significant than others. More to the point, there is no need for s8 to be read that way given that the framers of the **Constitution** chose the traditional process of confirmation as to canonical fitness of the single candidate elected for consecration as the stage at which (his) **legal** qualifications according to the needs of the Church as a whole were to be addressed. This was entirely consonant with the stages of the English process that were generally replicated in the Australian Church (subject to diocesan election substituting for Crown nomination).

99. This understanding of s8 is entirely consonant with the reasoning of those members of the Tribunal who adverted to s8 and the original definition of canonical fitness in 1991 (see above). It also fits completely with the Tribunal's ruling that the Phillimore rule operated as a prohibition on the **consecration** of a woman in light of the original definition in s74(1).

100. As regards bishops, the original definition in s74(1) overlapped s71(2)'s incorporation of the **Phillimore** rule as part of the law of the Church of England inherited by the Australian Church in 1962. The completeness of the overlap was emphasised by Archbishop Robinson in his reasons (par 49 above). In view of this, it is impossible to envisage why the framers of the **Constitution** would have intended to allow the definition of *"canonical fitness"* to be amended by constitutional processes (as happened) while intending that

a "qualification" incorporated indirectly through s71(2) would continue to operate with different effect.

Disposition

101. Recognising that the first question embraces both diocesan and assistant bishops whereas the second is confined to diocesan bishops, I propose that the questions be answered as follows:

> **Question 1:** Is there anything in the **Constitution** which would now prevent the consecration of a woman in priests' orders as a bishop in this Church in a diocese which by ordinance has adopted the Law of the Church of England Clarification Canon 1992?
>
> **Answer**: As regards diocesan bishops: No, provided that the woman has been duly elected as the diocesan bishop and has had her election duly confirmed in accordance with the criteria for canonical fitness set out in s74(1) of the **Constitution**.
>
> As regards assistant bishops: There is nothing in the **Constitution** itself that would preclude the consecration of a woman appointed in accordance with the law applicable in the diocese concerned. However, such consecration could not take place in a diocese in which the **Assistant Bishops' Canon 1966** is in force so long as it remains in force in that diocese in its present form.
>
> **Question 2**: Is there anything in the **Constitution** which would now prevent the installation of a woman so consecrated as a bishop of such a diocese?
>
> **Answer:** No, provided that the woman has been duly elected as the diocesan bishop and has had her election duly confirmed in accordance with the criteria for canonical fitness set out in s74(1) of the **Constitution**.

APPELLATE TRIBUNAL – WOMEN BISHOPS

REASONS OF THE HONOURABLE JUSTICE DAVID BLEBY

1 I agree with Justice Mason as to the answers to the question that he proposes. I agree with his reasons and with the answers that follow as a matter of statutory construction. I make some additional observations in response to those who find it difficult to accept that mere alteration to a definition in the Constitution, affecting a process which in the Church of England appears to have become a formality, could have significant effect on the Australian Church.

The Processes leading to consecration

2 The processes leading to consecration of a bishop in England after the reformation were based essentially on Act 25 Hen. VIII.c.20, passed in 1534. The effect of that Act was conveniently summarised by Lord Alverstone CJ in *The King v The Archbishop of Canterbury*:[1]

> Briefly summarised, that Act by s. 4 enables the King on every avoidance of an archbishopric or bishopric to grant to the dean and chapter a licence to proceed to the election of a person named in a letter missive sent by the King, and provides that the dean and chapter shall elect and choose the person so named. By s. 5 it provides that, if the dean and chapter elect and choose such person, then their election shall stand good and effectual to all intents; and further that the King may by letters patent under the Great Seal signify the election to the archbishop, and require and command him to confirm the election, and to invest and consecrate the person so elected. Sect. 4 contains a further provision that, if the dean and chapter defer or delay the election for more than twelve days, the King may, by letters patent, nominate and present to the said office such person as he thinks able and convenient. The 7th section provides that the failure of the dean and chapter to elect in accordance with the King's licence and letters missive, or the refusal of the archbishop to confirm, invest, and consecrate such person within twenty days after the King's letters patent have come to his hands, shall involve the one or the other in the dangers and penalties of the Statute of Praemunire.

3 Thus, there were four steps to be taken before a person could be consecrated as a bishop by the laying on of hands. The first was nomination or appointment by the Crown. It was assumed or expressly stated by the authorities to which Justice Mason has referred that the person so nominated would at least be a person in priest's orders and would meet any other personal criteria.

4 The second step was formal election of the person so nominated by the Dean and Chapter or, failing that, appointment of the person by Letters Patent.

5 The third step was confirmation of the election by the Archbishop of the province or his Vicar-General, about which I will say more below.

6 The fourth step was the solemn undertaking given by the candidate in the course of the consecration liturgy by the answers to the questions of the Archbishop set forth in the ordinal.

Confirmation

[1] [1902] 2 KB 503 at 540.

7 As can be seen from the authorities cited by Justice Mason, confirmation by the archbishop was a formal act, with the only possible grounds of objection apparently being the identity of the person or some informality in the election. While *Cripps on Church and Clergy*, 8th edition, 1937 at page 75 allows for the possibility of some personal disqualification to be raised at the confirmation stage, it is quite clear that the confirmation process would not allow for the hearing of objections based on the doctrine adhered to by the candidate. This much is clear from *The King v The Archbishop of Canterbury*.[2] In that case Lord Alverstone CJ made it clear that confirmation was little more than a formality. The Lord Chief Justice said:[3]

> There is in the statute no mention of any examination or inquiry by the archbishop, but he is directed to confirm the election within a period of twenty days; nor does the statute, on the face of it, in terms contemplate or directly or indirectly suggest that the archbishop can in any way question the fitness of the person nominated by the Crown, unless such power is involved in the use of the word "confirm".[4]

8 His Lordship summarised the principal argument for those seeking to object to the confirmation of the bishop concerned in that case as follows:

> To meet the plain objection which arises upon the words of the statute, it was urged that the words "confirm the said election" in s. 5, and "confirm" in s. 7, refer to a practice of confirmation alleged to be well known, which was said to have existed in normal circumstances in the Church of England at some period prior to the passing of the Act, a practice under which it was contended that there was a duty on the part of the archbishop before confirming any person, although such person had been named by the King and duly elected by the dean and chapter, **to inquire at the stage of confirmation as to his fitness, having regard to the qualifications of a bishop as laid down in the canons of the Church**; and that, as a consequence, persons who were of opinion that the person named was not fit to be a bishop would be entitled to appear before the archbishop and be heard.[5] [Emphasis added]

9 The Chief Justice's short answer to the submission was as follows:

> But, after the most careful consideration of the many matters, historical and legal, which have been brought before us, I am clearly of opinion that there is no evidence of the existence of any such established practice prior to the passing of the statute, and that the forms, which, as I have said, have been used without alteration from that time to the present, were not intended to refer to or to revive any practice of the kind. The uniform practice in usage since the year 1533 is practically conclusive against the contention that it is possible to construe the statute as referring to any such practice or right.[6]

His Lordship went onto explain why that was so.

10 In answer to a submission based on the long-standing practice of summoning opponents in accordance with the customary forms used the Lord Chief Justice said:

> It must be remembered that ever since the statute, although, in my opinion, the proceedings by way of confirmation are formal in the sense that no general opposition can be raised at that stage to the fitness of the person elected, they were still a proceedings of a solemn character, in which, after the original licence, return of the election, letters patent, and other necessary steps were formally proved, confirmation by the archbishop or his representative, the vicar-general,

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2 [1902] 2 KB 503.
3 Ibid at 540.
4 Ibid at 540.
5 Ibid at 542.
6 Ibid at 543.

> followed. It seems to me not unnatural that the desire to maintain the dignity and public character of the act of confirmation of the election should have led to the retention of the ancient practice of summoning opposers to appear if they thought fit.[7]

Furthermore, he observed:

> We have a complete register of the proceedings at the confirmation of Archbishop Parker in 1559, shortly after the date of the statute, and substantially the same forms have been continued to the present day, and they shew in the most convincing manner that although an ancient form of objection has been preserved it has never since the statute retained, if it ever possessed, any reality.[8]

11 In short, in the Lord Chief Justice's view, confirmation had become a mere formality and was certainly not an occasion to enquire into a person's fitness to be appointed, having regard to the qualifications laid down in the canon law.

The breaking of the colonial nexus

12 When the Crown ceased issuing Letters Patent for appointment of bishops in the colonies, following the series of judicial decisions in the 1860s,[9] the Australian dioceses and other colonial churches had to devise their own processes to replace the steps leading to consecration which had previously been availed of through the practice of the established Church of England.

13 The steps of nomination by the Crown and election by the Dean and Chapter were replaced by election, usually by synods and later, in some cases, by electoral colleges or councils, as prescribed by or under the constitutions of newly emerging diocesan synods. It was possible for diocesan ordinances to impose whatever personal qualifications on candidates they might choose. Some did.[10]

14 Traditions and well-tried processes within the Church, at least in the 19th century, were not easily changed or abandoned. There was still thought to be required a process of confirmation, even though it had become a formality in England. At the first General Synod of the Dioceses of Australia and Tasmania held in 1872, Determination I of 1872 was passed, being "Rules for the Confirmation and Consecration of Bishops and for the Election of Primates". The determination was "accepted" by most dioceses.[11] It provided for a process whereby, if a majority of the Bishops of the Province or, in the case of an extra-provincial diocese, the other bishops of the dioceses in Australia and Tasmania, were "satisfied with the fitness of the person so elected, or nominated, the election or nomination of such person shall be duly confirmed under the hand and seal of the Metropolitan or Primate".

15 At this point we find confirmation, at least in respect of the election of diocesan bishops in Australia and Tasmania, beginning to take on a new significance. It required satisfaction as to the "fitness" of the person elected or nominated. Where there were diocesan qualifications prescribed, "fitness" would include at least those qualifications. Whether it included others might be a matter of some debate. But unlike the position in England, where confirmation

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7 Ibid at 555-556.

8 Ibid at 562.

9 *Ex parte the Reverend George King* (1861) 2 Legge 1307; *Long v Bishop of Capetown* (1863) 1 Moore NS 411, 15 ER 756; *Bishop of Natal v Gladstone* (1866) LR 3 Eq 1.

10 For example, the Diocesan of Adelaide specified that a candidate for election had to be "in priest's orders and of the age of thirty years or … some Bishop eligible for the vacancy". See: Regulation 45 as at 11 May 1880; Clause 6, Canon III, 1926.

11 If it was not, it had no effect in the diocese.

was little more than a formality, confirmation in Australian dioceses did now include confirmation as to fitness. It was intended to be a meaningful process involving assessment against whatever qualifications were necessary for fitness.

16 No process of objection was prescribed, but those undertaking the confirmation process were obliged to make some assessment of the fitness of the candidate, at least against the required qualifications, whatever they were, for holding the office.

17 It is understandable that the colonial Church should have given a new emphasis to confirmation by way of significant departure from the practice in England. Centuries of tradition had required a process of confirmation. Appointment by the Crown provided some assurance that only a person duly qualified would be appointed. As Lord Alverstone CJ noted in the *Archbishop of Canterbury Case*, when responding to a suggestion that a formal process of confirmation would allow unqualified persons to be appointed:[12]

> We have only to read the history of the last 150 years, or of our own time, to know that the choice of persons to fill the high office of a bishop is a matter of most anxious consideration by the Crown, and that advice is given by those who are most competent to guide in the selection of fit persons.

18 With the election of a bishop by or in accordance with an ordinance of a diocesan synod, that degree of assurance of conformity with qualifications might be lost. Strengthening the confirmation process and giving meaning to it was a means of ensuring that if a synod did elect a person who was not duly qualified, the person would be unable to proceed to consecration, if a priest, or to installation, if already a bishop. It was not surprising that such a filter was then introduced at the confirmation stage by a collegial group of bishops of the Church to whom the required assessment could be entrusted. But in doing so, it gave a new emphasis and significance to the confirmation of an election.

19 There was one circumstance where confirmation was not necessary. That was where "any nomination [of a diocesan bishop] shall have been delegated by any Synod or Diocese, to any of the Archbishops or Bishops of the Church of England, and such delegation shall have been approved by the Bishops of the Province, or of Australia and Tasmania [in the case of an extra-provincial diocese] as the case may be".[13] That exception was presumably to avoid any appearance of calling in question the judgment of an Archbishop or Bishop of the Church of England as to fitness of a candidate.

20 The provision relating to confirmation remained in substantially the same terms following amendment of the Determination by Determination I of 19 October 1881 and in replacement Determinations made by Determination I of 1 October 1896, Determination II of 5 October 1905 and Determination V of 17 October 1910. However, the 1896 Determination also provided[14] that "if the election of a Bishop shall have neither been confirmed, nor formally refused confirmation", at the expiration of three months the President of the relevant Synod or other relevant person or persons mentioned was or were to be notified of the reason for the delay. While this might suggest a formality which could only be delayed but not denied, there is, nevertheless, specific recognition of the possibility that confirmation might be refused, and the strongest implication that consecration and installation could not proceed without it. This was entirely consistent with the new role of confirmation and with the necessary implication that, if refused, the process could go no further.

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12 *The King v The Archbishop of Canterbury* [1902] 2 KB 503 at 541.
13 Determination I, 1872, clause 2.
14 Determination I, 1896, clause 4.

21 The 1905 and 1910 Determinations were altered to provide that "if the election or nomination of a Bishop shall not have been confirmed" within the required time, the notification was to be given. However, that does not detract from the stated purpose and function of confirmation or from its significance.

22 While unfitness was not a barrier to a valid election, there would have been little point in a synod or other electoral body nominating a person who was known to be unfit if confirmation then had the role and purpose I have described.

23 When assistant or coadjutor bishops began to be appointed, it was necessary to provide for them also. General Synod, by Determination II of 6 October 1896, provided for diocesan synods to create the office. That Determination was also accepted by most dioceses. Among other things the Determination provided:

> 3. No such appointment shall be filled, nor any person consecrated to fill such appointment, without the same confirmation as is required in the case of a Diocesan Bishop.

The 1962 Constitution

24 So far as is relevant for present purposes, the 1962 Constitution did four things:

1. It provided in s 8 for the continued election of diocesan bishops "as may be prescribed by or under the constitution of the diocese".

2. It provided in the same section that the election shall, "as to the canonical fitness of the person elected" be subject to confirmation by one of the methods prescribed.

3. For that purpose, "canonical fitness" was defined in s 74(1) as meaning "the qualifications required in the Church of England in England for the office of a bishop" as at 1 January 1962.

4. Section 71(2) provided (and still does):

> The law of the Church of England including the law relating to faith ritual ceremonial or discipline applicable to and in force in the several dioceses of the Church of England in Australia and Tasmania at the date upon which this Constitution takes effect shall apply to and be in force in such dioceses of this Church unless and until the same be varied or dealt with in accordance with this Constitution.

25 Section 8, which by virtue of its inclusion in the Constitution, would now apply to every diocesan bishop, took confirmation one step forward by prescribing what was meant by fitness or, as it was now called, "canonical fitness". By virtue of its lack of certainty, it may not have been a particularly helpful definition, but it did not diminish the significance, in the Australian Church, of the process of confirmation. It was also evidence of a clear intention to prescribe, for diocesan bishops in the Australian Church, a constitutionally enshrined set of qualifications that a candidate would have to meet before proceeding to consecration or installation. Such qualifications were never enshrined in that manner for any other order of the sacred ministry.

26 Similar provisions were enacted in respect of the appointment of assistant bishops early in the life of the Church under the new Constitution. The Assistant Bishops Canon 1966 was passed at the second session of the General Synod under the new Constitution. Section 5 of that Canon provided (and still does):

> No priest appointed to the office of an assistant bishop in a diocese within a province shall be consecrated unless his appointment as to canonical fitness has been confirmed as prescribed by ordinance of the provincial synod or if there be no such ordinance or if the diocese be not within a province unless his appointment as to canonical fitness has been confirmed by the Primate and one or more metropolitans.

Of course, that Canon only has effect in a diocese which has adopted it.

27 Therefore, since 1962, the Anglican Church of Australia has required that confirmation of the election of all diocesan bishops and of most assistant bishops should involve a process of certification of "canonical fitness", as defined, as a prerequisite to consecration or installation. For diocesan bishops the significance of the confirmation process was enshrined, along with the specification of the qualifications necessary for that process, in the Constitution. Initially, the criteria were the qualifications required in the Church of England for the office of a bishop as at 1 January 1962, whatever those qualifications were. At the time, whatever those qualifications may have been, they included that the person be in priest's orders[15] and that he be male.[16] In other words, what has often been referred to as the Phillimore rule in respect of the ordination of priests and the consecration of bishops was enshrined in the Constitution in respect of bishops, whatever might become of it in respect of priests.

28 It is important to recognise that this was enshrined by a provision in the Constitution. There was also in place a prohibition against the ordination of a woman as a priest and the consecration of a woman as a bishop by the importation of the relevant law of the Church of England by s 71(2).[17] However, that prohibition was not a provision of the Constitution but of a law of the Church of England imported by s 71(2). That law could be changed by a Canon of General Synod or by a change in the Constitution itself. [18]

29 I accept that statutory definitions should not, by themselves, be construed as enacting substantive law[19]. The evil is in construing the definition without reference to the object and purpose of the Act in which it appears. That is not to say, however, that when read into the substantive enactment (section 8 of the Constitution) and construed with it, it does not indicate what the intention of the framers of the Constitution was in dealing with a problem that had been sought to be addressed in Determinations before 1962, and which was picked up in this manner in the 1962 Constitution. There is no doubt that section 8 is the operative provision. It has provided, by means of the definitions, all that is required to be confirmed in

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15 *Cripps on Church and Clergy*, 8th edition, 1937 at page 25; *Phillimore's Ecclesiastical Law of the Church of England*, 2nd edition, 1895 at page 22, citing *Hooker's Ecclesiastical Polity*, book vii.

16 Appellate Tribunal, 1991 Report and Opinion on the Eleven Questions Referred by the Primate on 31 August 1990.

17 So held by a majority of the Tribunal in the 1991 Opinion: Cox J, President, at pages 12-18, 33; Tadgell J at page 1; Handley JA at page 5; Young J at pages 11-12; Archbishop Rayner at page 4; Archbishop Robinson at page 5.

18 Previous references dealt with by the Appellate Tribunal had determined that there was no other provision of the Constitution which prevented such ordination or consecration; see Opinion of the Appellate Tribunal, August 1985 as to Eight Questions Referred by the Primate, Archbishop Rayner, Bishop Holland, Tadgell J and Young J; the President (Cox J) and Mr Handley QC dissenting as to s 4 of the Constitution; Archbishop Robinson dissenting as to ss 1, 2, 3, 4 and s 74(6) of the Constitution. That position was reaffirmed in the 1991 opinion by six members of the Tribunal: the President (Cox J) at pages 11 and 33, Tadgell J at page 1, Handley J at pages 4-5, Young J at page 34, Archbishop Rayner agreeing with the President, Bishop Holland holding that there was no inhibition in the Constitution at all at pages 19-21; Archbishop Robinson dissenting.

19 *Kelly v The Queen* (2004) 218 CLR 216 at 253, McHugh J (dissenting); *Allianz Australia Insurance Ltd v GSF Australia Ltd* (2005) Cth 568 at 574-5, McHugh J.

a situation where confirmation has assumed a much more significant role than it had in England when the Australian colonies began.

The 1989 Amendment

30 The other qualifications for the office of bishop in England as at 1 January 1962, apart from being in priest's orders and being male, may have been vague and uncertain. But for whatever reason, by the passing of Canon No.9 of 1989 and Bill No.5 of 1989,[20] which sought to amend the Constitution by substituting the present definition of canonical fitness, the General Synod was prescribing that, if the Constitution amendment took effect, the requirements for confirmation would no longer be the qualifications for episcopal office required in the Church of England. The only qualifications constituting canonical fitness or qualification for consecration or installation as a diocesan bishop would then be attainment of the age of 30 years, baptism and being in priest's orders. It was a deliberate process of simplifying and clarifying what had to be certified before admission to diocesan episcopal office. The new definition continued to be exhaustive.21 It was not clarifying what, in England, had become a largely ceremonial process. It was altering minimum qualifications for a process that, in this Church, had assumed some significance and meaning. In so doing, it abolished the Phillimore rule as a mandatory requirement in respect of diocesan bishops.

31 That is not to say that these became the only qualifications on consecration. It was and is always open to a diocesan synod to impose qualifications on the election. The person whose election is confirmed will still have to have undertaken the solemn vows contained in the Ordinal before being consecrated, and any further oath or undertaking required before installation. But the only considerations relevant at confirmation and, as a matter of practical reality, the only universally applicable conditions applicable to the election became those specified in the Constitution.

32 Having prescribed the original qualifications, by reference, in the Constitution, and having altered those qualifications by amendment to the Constitution, the Church was effectively overriding any law of the Church of England with respect to the qualification for the office of a diocesan bishop imported by s 8 and the definition in s 74(1) of the Constitution. As Justice Mason has pointed out, those members of the Tribunal in 1991 who directed their attention specifically to the consecration of women as bishops seem to have recognised the Phillimore rule as having effect by virtue of s 74(1) and, by implication, because a necessary qualification for consecration as a bishop was prior ordination as a (male) priest. If there was any suggestion of any operation of the rule with respect to bishops independently through s 71(2) of the Constitution, it must have ceased through the amendment to the Constitution, being a rule that was "varied or dealt with in accordance with (the) Constitution".[22]

33 At the time when the Constitution amendment was enacted in 1989, under conditions then prevailing, a woman in the Australian Church could not be consecrated as a bishop. She could not be a priest – one of the necessary qualifications under both versions of s 74(1). That may explain why the Canon and the Bill appear to have generated little debate at the time of their passage. Regardless of the provisions of section 8, as long as an essential practical qualification for election or appointment of a bishop was being a priest, and as long

[20] The dual process for amending the Constitution was in order to overcome some uncertainty at the time as to precisely how the Constitution should be amended, the process being settled by Canon No.1 of 1987 and Bill No.1 of 1987 which took effect on 1 July 1992.

[21] By providing that "canonical fitness" **means** ….

[22] Section 71(2), Constitution.

as priests in the Australian Church could only be male, bishops elected from within the Australian Church would therefore have to be male also.

34 However, before the amendment to the Constitution took effect on 5 June 1995, General Synod passed the Law of the Church of England Clarification Canon 1992 ("the Clarification Canon") which removed, in a diocese which adopted it, any barrier to the ordination of a woman as a priest. By that process the Church was saying, in a diocese which adopted the Canon, that a duly ordained female priest was just as much a priest as a male priest. But that Canon changed nothing in respect of the requirements of canonical fitness, and hence in respect of what might be described as the practical qualifications for election as a bishop. Section 8 of the Constitution with the old s 74(1) definition importing the Phillimore rule in respect of bishops was still in place. The Constitution amendments had not taken effect. For similar reasons to those expressed above, it is not surprising that the question of female bishops did not enter debate on the passage of the Clarification Canon. As long as s 8 and the definition of canonical fitness remained in their original form, a woman could not be consecrated or installed as a diocesan bishop in the Australian Church, neither could a female Bishop consecrated elsewhere have been installed. The Phillimore rule, as imported by s 8 would have prevented the confirmation and, therefore, in practical terms, the election of such a person.

35 The result can be seen from another perspective. Prior to the passing of the Clarification Canon, a woman could not be consecrated as a bishop in this Church. For a person ordained priest in this Church, the candidate for election could only be male. There could be no woman priests. If a woman, lawfully consecrated as a bishop in a church of the Anglican Communion other than the Church of England, were elected as the bishop of a diocese of this Church, whether before or after the Clarification Canon took effect in a diocese, her election as to canonical fitness could not have been confirmed. She would have been prevented from taking office by s 8 of the Constitution, but only by s 8. She would not have met the qualifications for holding office as a bishop in the Church of England. In other words, it was the Phillimore rule acting through s 8 and s 74(1) which would have prevented giving effect to her election. Once the amendment to s 74(1) took effect, the barrier was lifted. It also meant that at that time, subject to any restrictions in a diocesan ordinance, there was no barrier to a woman ordained priest in this Church being consecrated and installed as a diocesan bishop. She would qualify as being a duly ordained priest and could be certified to be canonically fit.

36 This conclusion is not to give effect to the now discounted notion of a principle of progression or advancement. As argued on previous occasions,23 the application of such a principle would require that woman, once ordained priest, should by that fact be eligible to be consecrated as a bishop. The conclusion I have reached does not rely on any such notion. Indeed, any such principle, if it exists, could not survive an express constitutional prohibition such as that contained in s 8 of the Constitution as affected by former provisions of s 74(1). The conclusion is merely a manifestation of what the former Archbishop of Adelaide described as a principle of no inherent disqualification.[24] The mere fact that a priest is a woman does not in itself disqualify her from becoming a bishop unless there is some other prohibition. That prohibition was the disqualification written into the Constitution by ss 8 and 74(1). As it is now removed, a female priest duly elected and over 30 years old is not disqualified from proceeding to consecration and installation as a diocesan bishop. The Clarification Canon did not change the law with respect to the consecration of women

[23] For example, see Report of the Appellate Tribunal concerning the Ordination of Women to the Office of Deacon Canon 1985 dated 4 March 1987.

[24] Ibid at page 52.

bishops. It merely enlarged the pool of persons in Australia eligible for election as a bishop and who could proceed to consecration if and when the 1989 amendment to the Constitution took effect and if they met the other criteria (baptism and age).

The effect of previous determinations

37 It is no answer to this conclusion to rely on principles of *stare decisis* and to argue that, merely because the majority of the Tribunal held in 1991 that the law of this Church prevented the consecration of a woman to the episcopate, to hold otherwise now would be to infringe that principle. Since the 1991 opinion, the relevant law has changed in significant respects. The most significant is the amendment, as from 5 June 1995 to the operation of s 8 of the Constitution. That was not and could not have been the subject of consideration in the 1991 opinions.

38 All that was necessary for the majority of the Tribunal to say in order to reach the conclusion it did in its 1991 Opinion was that the law of the Church of England as at 1 January 1962 prevented the consecration of a woman as a bishop. It did not have to consider the operation of that law in a diocese once the Phillimore rule with respect to confirmation of the election of diocesan bishops was set aside in this Church by the amendment of s 74(1) of the Constitution.

Assistant Bishops

39 Section 8 of the Constitution only applies to diocesan bishops. As Justice Mason has pointed out, the original definition of canonical fitness applies to assistant bishops appointed under the Assistant Bishops Canon 1966. A woman appointed in a diocese where that Canon has effect could not be certified canonically fit for that reason. The operation of the Phillimore rule, applying through the provisions of that Canon, has not been affected.

40 Although it is not a barrier contained in or imposed by the Constitution, I think the qualification with respect to assistant bishops suggested by Justice Mason is appropriate. Whether a similar barrier applies in a diocese which has not adopted the Assistant Bishops Canon would depend on the requirements, if any, for the certification as to canonical fitness in diocesan or provincial legislation.

41 Question 2, by the use of the word "of", seems to be limited to a diocesan bishop. Therefore, my answer to that question would not require the same qualification.

Effect of this determination

42 This reference does not raise a theological issue. That has already been determined in previous references concerning the ordination of women. Nor is this reference about whether it is desirable that women should be admitted to episcopal office in this Church. The reference raises a purely legal question involving the interpretation of the Constitution. It must be decided on the application of legal principles only, whatever views there may be about the desirability of women bishops with or without provision for alternative episcopal oversight.

43 I realise that this conclusion, if it prevails, will have significant consequences in the Australian Church if and when, assuming a valid election, a female priest or bishop who is otherwise canonically fit is elected or appointed to episcopal office in Australia. Much of the General Synod's time has been devoted to debating whether, if it occurred, it should only occur where there are in place provisions for proper episcopal oversight of those who are unable, in conscience, to accept the ministry of a female bishop, and if so, what should be the form of those provisions.

44 If a woman is consecrated or installed as a consequence of this determination, there will be no such provisions in place unless the diocese concerned makes such provision, whether of its own volition or in pursuance of a model protocol or some other provision adopted by General Synod. Experience has shown the difficulty in this area of trying to provide a one size fits all solution. The circumstances in which a female bishop may minister in this Church will vary greatly. Different solutions will need to be applied in different situations. Nevertheless, there will be genuine pain and concern in some quarters which will need to be addressed with sensitivity and understanding, and with mutual respect for those who hold opposing views.

Answers to the Questions

45 The formal answers to the questions should be:

Question 1

Is there anything in the Constitution which would now prevent the consecration of a woman in priests' orders as a bishop in this Church in a diocese which by ordinance has adopted the Law of the Church of England Clarification Canon 1992?

Answer

As regards diocesan bishops, No, provided that the woman has been duly elected as the diocesan bishop and has had her election duly confirmed in accordance with the criteria for canonical fitness set out in s 74(1) of the Constitution.

As regards assistant bishops, there is nothing in the Constitution itself that would preclude the consecration of a woman appointed in accordance with the law applicable in the diocese concerned. However, such consecration could not take place in a diocese in which the Assistant Bishops Canon 1966 in its present form is in force so long as it remains in force in that diocese.

Question 2

Is there anything in the Constitution which would now prevent the installation of a woman so consecrated as a bishop of such diocese?

Answer

No, provided that the woman has been duly elected as the diocesan bishop and has had her election duly confirmed in accordance with the criteria for canonical fitness set out in s 74(1) of the Constitution.

APPELLATE TRIBUNAL – REFERENCE RE WOMEN BISHOPS

REASONS OF THE MOST REV'D DR PHILLIP ASPINALL

1. A reference has been received from the Primate dated 22 April, 2005 in the following terms:-

> *"Given that:*
>
> 1. *the opinion of the majority of the Appellate Tribunal, expressed in its 1991 opinion, was that it was the constraint imposed by section 71(2) of the Constitution that then prevented the*

ordination of a woman as a priest or the consecration of as woman as a bishop in the Anglican Church of Australia;

2. *in the case of the ordination of a woman as a priest, such constraint has been removed in a diocese which has adopted by ordinance the Law of the Church of England Clarification Canon 1992; and*

3. *the definition of "canonical fitness" as it relates to a person elected bishop contained in section 74(1) of the Constitution was amended to its present form with effect from 5 June 1995;*

is there anything in the Constitution which would now prevent-

1. *the consecration of a woman in priests' orders as a bishop in this church in a diocese which by ordinance has adopted the Law of the Church of England Clarification Canon 1992; or*
2. *the installation of a woman so consecrated as a bishop of such a diocese?"*

2. I have carefully read the reasons in draft form of the President, Justice Mr Peter Young, the Deputy President, Mr Max Horton, Justices Keith Mason and David Bleby and the Rt Rev'd Peter Brain.

3. I generally agree with the reasons of Justices Mason and Bleby and I agree with their answers to the questions the subject of the reference.

4. Justice Mason's answers to the questions at par 101 must be read carefully in conjunction with his reasons particularly par 88, which deals with some, but not all, assistant bishops and the related pars 11-16. While the varied situations that pertain to the consecration and appointment of assistant bishops do not alter the answers to the technical questions, the material in these parts of His Honour's reasons reflects the qualified implications of the answers. As the President (par 54) rightly implies it is not the case 'that there is now carte blanche to install a woman as a bishop.'

5. Below I outline my reasons for reaching the same substantive conclusions as Justices Mason and Bleby and indicate what I understand to be the qualified implications of those answers.

6. The President (par 8) agrees with Justice Mason that the critical question concerns 'whether the change of definition of 'canonical fitness' had an effect on the so called Phillimore rule which prohibits the consecration of a woman as a bishop'.

7. In 1989 the General Synod passed the 'Constitution Alteration (Canonical Fitness) Canon (and Bill) 1989 which, having passed through the necessary processes in the dioceses, took effect from 5 June 1995. Since then s74(1), in so far as it is relevant, has read:

"Canonical fitness" means, as regards a person, that:
(a) the person has attained at least 30 years of age;
(b) the person has been baptized; and
(c) the person is in priests' orders.

8. Obviously, a woman in priests orders in a diocese which has adopted the 1992 Clarification Canon but who has not attained the age of 30 years could not satisfy the canonical fitness test on the first ground of age and so the admittedly unlikely election of such a person as a diocesan bishop pursuant to ss8 and 74(1) of the Constitution could not be confirmed. So clearly the answer to question 1 cannot be an unqualified 'No'.

9. Assuming that the age requirement is met, however, the central issue is whether s74(1), in defining 'Canonical fitness', **exhaustively** describes the requirements to be met in order for a person to be consecrated as a bishop, except for those matters examined in the Ordinal prior to consecration.

10. The definition of 'Canonical fitness' takes effect through s8 of the Constitution which provides that '…the election [of a diocesan bishop] shall as to canonical fitness of the person elected be subject to confirmation…' That is, s8 prescribes that confirmation of election is to be determined on the basis of 'canonical fitness' as that term is defined in the Constitution.

11. S8 concerns only diocesan bishops and does not touch on the situation of assistant bishops.

12. S74(1) provides that '"Canonical fitness" **means** …' In contrast to other definitions using the term '**includes'**, for example '"Ceremonial" includes …', '"Faith" includes …' and '"Incumbent" includes …', there seems to me no sufficient reason to conclude that the definition of 'canonical fitness', prescribing as it does what the term 'means' in contrast to what it 'includes', should be understood as non-exhaustive. I take it then that the definition is exhaustive.

13. The new definition of canonical fitness replaced in the Constitution the definition of 'Canonical fitness' inherited from the Church of England on 1st January 1962. Specifically, this change to the exhaustive definition of 'canonical fitness' removed the inherited English requirement that a candidate for consecration as a diocesan bishop be male.

14. A remaining question concerns whether there is a block to the consecration of a woman as bishop stemming from s71(2) concerning the law of the Church of England inherited in Australia at the time the Constitution came into effect on 1st January 1962. However, s71(2) concludes with the words 'unless and until the same be varied or dealt with in accordance with this Constitution.' The barrier to the consecration of a woman as a diocesan bishop has been 'varied or dealt with in accordance with this Constitution' through the 1989 Canon and Bill which came into effect in 1995. This alteration removed the inherited English requirement of maleness from the definition of 'canonical fitness' in s74(1) thereby effecting the operation of s8. The amendment to the Constitution overrides any relevant rule imported under s71(2).

15. I turn then to answer the questions the subject of this reference.

> *"Is there anything in the Constitution which would now prevent -*
>
> 1. *the consecration of a woman in priests' orders as a bishop in this church in a diocese which by ordinance has adopted the Law of the Church of England Clarification Canon 1992; or*
> 2. *the installation of a woman so consecrated as a bishop of such a diocese?"*

16. In respect of a woman in priests' orders in a diocese which has adopted the Clarification Canon but who has **not** attained 30 years of age, the answer to question 1 is 'Yes'. The canonical fitness test pursuant to ss8 and 74(1) of the Constitution would prevent the confirmation of election of such a person as a diocesan bishop. In such a situation question 2 is otiose.

17. Assuming the age requirement is satisfied, I conclude that there is nothing **in the Constitution** of The Anglican Church of Australia that precludes the consecration and installation of a woman as a diocesan bishop. The answer to question 1, as it relates to diocesan bishops, and to question 2, which relates only to diocesan bishops, is 'No.'

18. However, it needs to be recognised that the Constitution does not solely determine the matter. To determine whether such a consecration and installation are lawful other factors must also be considered. It remains the case that a diocese may preclude the consecration of a woman as a bishop of the diocese in two ways: by not having adopted the Law of the Church of England Clarification Canon 1992 permitting the ordination of a woman to the priesthood; or by some proscription in the Constitution or in an ordinance of the Diocese concerning the election of a woman as diocesan bishop which takes effect through s8 of the national Constitution. That is to say, it is possible that a diocesan constitution or ordinance may prohibit the election and installation of a woman as diocesan bishop even though the Constitution of the Anglican Church of Australia does not. Justice Mason identifies this at par 91.

19. Further considerations concern the election or appointment of an assistant bishop, however termed. In relation to assistant bishops appointed under The Assistant Bishops' Canon 1966, it seems that s5 of that Canon retains the meaning of 'canonical fitness' current at the time the Canon was made, that is the now repealed definition of 'canonical fitness', which includes the requirement for maleness. Justice Mason expresses this view (pars 11-16). This represents **a canonical barrier but not a Constitutional one**.

20. The situation is made more complex still because not all assistant bishops in this Church are appointed under The Assistant Bishops' Canon 1996. Whether or not there is a requirement for assistant bishops, appointed other than under the Assistant Bishops' Canon 1966, to be male would require further examination and may vary from diocese to diocese.

21. Of course any such prohibition, while preventing the consecration of a woman as a bishop, is not a **Constitutional** prohibition in terms of the national Constitution and in that sense does not technically affect the answer to the questions in the reference.

22. With these qualified implications clearly in view I agree with the answers of Justices Mason and Bleby to both questions:

Question 1

Is there anything in the Constitution which would now prevent the consecration of a woman in priests' orders as a bishop in this Church in a diocese which by ordinance has adopted the Law of the Church of England Clarification Canon 1992?

Answer

As regards diocesan bishops, No, provided that the woman has been duly elected as the diocesan bishop and has had her election duly confirmed in accordance with the criteria for canonical fitness set out in s 74(1) of the Constitution.

As regards assistant bishops, there is nothing in the Constitution itself that would preclude the consecration of a woman appointed in accordance with the law applicable in the diocese concerned. However, such consecration could not take place in a diocese in which the Assistant Bishops Canon 1966 in its present form is in force so long as it remains in force in that diocese.

Question 2

Is there anything in the Constitution which would now prevent the installation of a woman so consecrated as a bishop of such diocese?

Answer

No, provided that the woman has been duly elected as the diocesan bishop and has had her election duly confirmed in accordance with the criteria for canonical fitness set out in s 74(1) of the Constitution.

APPELLATE TRIBUNAL
REFERENCE RE WOMEN BISHOPS

REASONS OF THE MOST REVEREND ROGER HERFT, ARCHBISHOP OF PERTH

1 The Primate received a reference dated 22 April 2005 in the following terms:

"Given that:

1. the opinion of the majority of the Appellate Tribunal, expressed in its 1991 opinion, was that it was the constraint imposed by section 71(2) of the Constitution that then prevented the ordination of a woman as a priest or the consecration of a woman as a bishop in the Anglican Church of Australia;

2. in the case of the ordination of a woman as a priest, such constraint has been removed in a diocese which has adopted by ordinance the Law of the Church of England Clarification Canon 1992; and

3. the definition of "canonical fitness" as it relates to a person elected bishop contained in section 74(1) of the Constitution was amended to its present form with effect from 5 June 1995;

is there anything in the Constitution which would now prevent-

1. the consecration of a woman in priests' orders as a bishop in this church in a diocese which by ordinance has adopted the Law of the Church of England Clarification Canon 1992; or
2. the installation of a woman so consecrated as a bishop of such a diocese?"

2 With the other members of the Appellate Tribunal I was privileged to hear the matters referred to us argued strenuously yet courteously by Dr C E Croft SC, Mr R Hay representing those who promoted the reference, Mr R Refshauge SC for the Standing Committee of the Diocese of Canberra-Goulburn, and Mr G C Lindsay SC for the Standing Committee of the Diocese of Sydney.

3 The substantial and carefully prepared material provided by the various parties assisted me in bringing my mind to the varied and complex details in law that were being canvassed in respect of this reference.

4 It is evident that the reference, while it has theological and ecclesiastical implications for the Anglican Church of Australia, is a matter that is to be determined by the legal impact of the Constitution as it stands today and the specific amendment affected by the passing of Canon 9 of 1989 and Bill No 5 of 1989 read in conjunction with Section 8, Section 71(2) and the Law of the Church of England Clarification Canon 1992.

5 While recognising the focus on the law it would be remiss for one in Episcopal Orders elected to serve on the Appellate Tribunal to ignore the opportunity to reflect on the

primary proposition made by Phillimore which some contend has validity within the laws of the Anglican Church of Australia in determining who can be ordained. Justice Mason quotes the relevant segment as follows:

> **33 Phillimore** deals with the ordination of priests and deacons in a separate chapter from his discussion about bishops. It is here that he states the well-known propositions about the incapacity of unbaptized persons and women to be ordained. It is pertinent to set out the first two paragraphs of a lengthy passage (p93):
>
> *There are only two classes of persons absolutely incapable of ordination; namely, unbaptized persons and women. Ordination of such persons is wholly inoperative. The former, because baptism is the condition of belonging to the church at all. The latter, because by nature, Holy Scripture and catholic usage they are disqualified.*
>
> *Though an absolute incapacity be confined to these two classes, yet the canon law, having regard to the great importance of the subject, has been careful to prescribe the qualifications, and to set forth the disqualifications of candidates for holy orders. The law enjoins that the candidate be of sufficient age and learning, and of good reputation. That he be not afflicted by any corporal infirmity which would impede the exercise of his spiritual functions, and tend to repel and alienate the laity. That he be born in lawful wedlock. That he be not engaged in secular occupations inconsistent with devotion to the spiritual calling. Disqualifications of this kind constitute what, since the twelfth century, have been canonically termed* irregularitates*, and may upon sufficient grounds be removed by the dispensation of the bishop. There are* irregularitates ex defectu *and* ex delicto.

6 Baptism is absolute and non-negotiable as a pre-requisite for those called to Holy Orders. In respect of Phillimore's observation on women it could be argued that a particular understanding of Holy Scripture and Catholic usage bound by a particular world view that considered women as "inferior beings" influenced such opinions. To link women and unbaptised persons into a category that makes ordination "wholly inoperative" is to question the sacrament of Baptism and its effect on women *per se*. Professor Stephen Sykes clarifies the link between Baptism and Holy Orders in a helpful way.

> Being baptised involves participating in the Church's foundational metaphor, that is, of passing from death to life by being ritually identified with Christ in his death, so as to rise again with Christ into newness of life. Being baptised means to receive the gift of the life-giving Spirit and thus to participate in the death-conquering new life which is the gift of the risen Christ to his Church. To be a 'member' of Christ implies that one has passed from the domain of death into that of life and has become a living limb or organ of a new reality. Baptism therefore establishes the sense of each individual person as having an irreplaceable part in an active system of persons-in-relation. This is that new personal identity which transcends the old identifying marks of humanity. Is one male or female, Jew or Gentile, in slavery or free? No, one is a new person in Christ. Nothing more fundamental can be said about anyone's life than that it has been lived as part of Christ's body. It is for this reason that *episcope* in the Church must be understood first in relation to baptism.
>
> In order to understand the relationship of baptism to ordination it is essential to distinguish between identity and role. To be a 'member' of

Christ is a matter of identity; to be a priest is a matter of role. It is for this reason that according to the theological definition of laity, however it may have to be used conventionally in other contexts, no priest every ceases to be a lay person. No one ever gets 'beyond' baptism. The ordained do not become 'super-members' of Christ; on the contrary, as St Paul makes clear, in the body of Christ those parts which are commonly regarded as of least importance are given a special status.

The problem of how to conceive of ordination is, of course, an aspect of the doctrine of the Holy Spirit. Here the language of 'gift' needs to be deployed with discrimination, because human gifts (presents, money, attention) are all capable of being quantitatively increased. But the gift of the Spirit is not quantifiable. This gift is a divine self-giving without measure, pure superabundant grace; we note, in this context, the use of the analogy of excess which is designed to subvert our awareness of the human possibility of residual meanness of giving. But God deals with all his people with superfluous generosity. Thus the idea of an increase in the Holy Spirit is, so to speak, an optical illusion; it is not the case that to certain persons is given more Holy Spirit than to others: rather, that in the lives of some there ceases to be such resistance or obstacle to the effectiveness of the Holy Spirit. For such increase of grace all Christians have both the need and the right to make daily intercession.

What then is the significance of the prayer for the bestowal of the Holy Spirit on those set aside for ordination? Ordination is the recognition by an act of special solemnity that a new role is being undertaken by a particular person which has consequences for every member of the Church. Solemnity at this moment is justified as in the case of the ritual observance of marriage or of the approach of death. Ordination is a life-transforming event, the outcome of deliberate decision by both people and candidate, is carefully prepared for, and involves intimate contact with most holy things, the preaching of the word and celebration of the sacraments. It would be inconceivable that the prayers of the Church at this moment of personal choice should not be given solemn, ritual focus.

Secondly, prayer for the gift of the Holy Spirit is an oblique acknowledgement of the special danger attaching to this particular role in the Church. We are speaking not now of the danger of contact with the holy, but rather of the more mundane temptations of pride which the public character of the office entails. Precisely because *episcope* involves exposure to the possibility of abusing power, and thus to the risk of further obstacles to the realisation of the gift of the Spirit, it is wholly appropriate that the 'increase' of the gift of the Holy Spirit be sought at this moment.

Finally, inasmuch as a series of tasks are solemnly assigned to the officeholder, failure in which will have the most serious repercussions for the Church, the whole Church joins in common prayer to the Holy Spirit that what should be true of each baptised Christian will indeed be true of these baptised Christians, namely that they will truly be Christ to their neighbours. The service of ordination is a recognition of the public character of the life of the ordained in his assigned roles in liturgy and in preaching, undeniably a greater burden and responsibility, humanly speaking, than that of the non-ordained. In the prayer for the Holy Spirit there is an implicit recognition of the social anthropology of representation in religion, a phenomenon not peculiar to Christianity; nor none from whose potential, and difficulties, it is exempt.

> It is a corollary of the relation of *episcope* to the theology of baptism that the Christian is able to be thoroughly realistic about the continued influence of death in the lives of individual members of the Church and its institutional structures. The recovery in contemporary theology of the eschatology of the Church has enabled theologians of many denominations to recall ecclesiology from a triumphalism which seriously distorted the practice of *episcope*.
>
> Stephen Sykes *Unashamed Anglicanism*,
> Darton, Longman & Todd, London 1995 pp188-190

7 The determination in the Church of England that permitted the ordination of women in that country and the General Synod of the Anglican Church of Australia passing the Clarification Canon, in my opinion appears to have moved us legally past the Phillimore view on the "wholly inoperative" effect on women being ordained. Justice Bleby in sections 30, 31 and 32 of his reasons articulates this sequence with clarity.

8 If the definition of "canonical fitness" as applied to the Assistant Bishops Canon 1966 Section 5 is different from that found in the Constitution at Section 74, this would create a tautology if not in law then in the ontology inherent in the way in which the Holy Spirit grants grace to those who select/elect/confirm and those consecrated as Bishop through the laying on of hands and the granting of authority.

9 Could it be reasonably argued that inasmuch as the Clarification Canon moved past the Phillimore rule "on the wholly inoperative effect", and inasmuch as the "canonical fitness" requirements were altered by the coming into effect of Canon 9 1989 and Bill 5 1989 on 5 June1995, that in fact this should apply in the case of Assistant Bishops as well?

10 The question must arise as to the primary place of the Constitution when one seeks meaning for phrases and terms used within General Synod legislation. Surely, the term "canonical fitness" and its interpretation must be subject to the definition given to it in the Constitution.

11 Justice Mason and Justice Bleby in their reasons make reference to the Interpretation Canon 1995 not applying to the Assistant Bishops Canon of 1966. They point to section 3 of the Interpretation Canon (see section 13 and following of Justice Mason and section 39 and following of Justice Bleby).

12 If one accepts that Rule XIX guides the interpretation of Canons prior to 1 January 1996, then looking at Section 74 of the Constitution at least two possibilities emerge:

(a) A pre-5 June 1995 interpretation.
(b) A post-5 June 1995, but prior to 1 January 1996 interpretation.

Each of these interpretations, by the Rule, applies Section 74 as it then relevantly existed as far as the Assistant Bishops Canon 1966 is concerned. The question then becomes which of the two applies?

13 Presuming that Rule XIX has application to this issue and that a double definition of "canonical fitness" is to be avoided, it would seem to me preferable that the term "canonical fitness" where it applies in Canons prior to 1 January 1996 must have a constancy of meaning that is congruent with the current definition found in Section 74.

14 I have argued through the opinion of Stephen Sykes on baptism that to categorise women and the unbaptised, as the Phillimore rule does, as a group upon whom the sacrament is wholly "inoperative" is theologically unsustainable.

15 I would further reason that the scriptural, Christian and social world view in which the Phillimore rule came into existence is seriously questionable.

16 The view held in the Scriptures on women stems from an interesting translation of Genesis 1:18f where the concept of woman as helpmate appears.

17 In the Biblical Archaeological Review 1983 David Friedman of the University of California notes that the word 'Azare' which is translated 'helpmate' in the Genesis story is translated as power or strength on every other occasion it occurs in Scripture. Similarly, the word 'conedgo' in Genesis is translated as 'fit' (for Adam) whereas in most other places it is translated as 'equal'.

18 The New Revised Standard Version gets closer to the concept found in the narrative when it speaks of God making Adamah (meaning earth creature – non-gender specific) and 'a helper as partner'. This initial misreading of text lives with the 'Eves' of this world through time.

> In several stories and phrases in Scripture women are held up as enhancers of life. Yet in other passages women are given a subordinate role as the property of men. The Ten Commandments requires that you do not covet your neighbour's wife, or male or female slave or ox or donkey or anything that belongs to your neighbour (Ex 20:17). The early history of the faith of Israel saw eternity in the continuance of the male line – sons are a blessing from the Lord. Females seemed to have a hazy future!
>
> This worldview was linked to an understanding of the earth where the seed is active, the soil passive: the seed is full of vitality, the soil is inferior. Women are seen in this worldview as unclean property – vessels for the act of procreation (Lev 12:1-8 and Lev 15).
>
> The first century rabbis saw women as not worthy of receiving the Torah – they did not have the sense to understand it.
>
> The 'fathers' of western civilisation, Plato and Aristotle, placed women alongside children and animals – "women were created from wicked men – a woman is a wicked man from a past life who is punished for being irrational. Women are derived and therefore deficient. They have a natural essential inferiority". Aristotle placing the hierarchical pattern of society as God-given suggests that women's role in the scheme of things is to be a place where reproduction happens – a type of walking incubator.
>
> St Paul recognises that in Christ 'there is no male or female'. Baptism into the death and resurrection of Jesus brings a new creation – the grace of Calvary is equal and as abundant for women as for men. There is evidence that he shared leadership with women and they formed an essential part of his wider *episcope*.
>
> Several times Paul moves back into a view of women that is inconsistent with his 'justification by faith' truth.
>
> The Christian tradition has a fair representation of women being viewed negatively. Clement suggests that a beard is a sign of the Divine; Origen claims that the eyes of the creator see the masculine. God does not stoop to look at the feminine, Dionysius states that women are not pure and should not enter the sanctuary; Cyril of Alexandria concludes that women are slow in comprehension; Jerome pontificates that a woman is for birth and children – if she remains a virgin and serves Christ she ceases to be a

> woman and becomes a man! Tertullian describes woman as the devil's gateway; Ambrose agrees that women are inferior in all aspects and Augustine describes her as the great temptress of the flesh while Gregory the Great tells us that another name for weakness is woman. Her reason for existence is sex and motherhood. Aquinas informs us that women are occasional, incomplete and misbegotten males.
>
> John Dempsey in a descriptive mood writes about a woman being a sick she-ass, a hideous tapeworm, and the advance ghost of hell.
>
> The Reformation put the woman in the home as the one who creates Eden for the hard-working man caught up in the Industrial Revolution. She would find her life by being under the authority of her husband.
>
> In British Civil Law 'rule of thumb' meant the right of a man to beat a woman any number of times and at any place for the sake of Godly chastisement, provided that the instrument with which he beat her was never larger in diameter than his thumb.
>
> Roger Herft, *Women in the Episcopate,*
> Diocese of Newcastle Synod 2002

19 When the Phillimore rule is seen as representing a culture where the role of women is considered inferior and adjunct to men, then the logic of "wholly inoperative" sacraments makes some sense. The Holy Spirit has led the Church into a deeper truth inherent in the Scriptures that is at variance with the Phillimore rule. The office of the Episcopate is one and the same in respect of the Prayer Book, the Ordinal and Formularies be the person designated as Diocesan, Assistant or assigned another role.

20 The process by which a person is to be examined, selected and consecrated in Episcopal Orders has been at the heart of the discussions entered into by the members of the Tribunal. Justices Young and Mason helpfully outline the process and the variety of systems in place. Provinces and diocese in the Anglican Communion have a variety of methods adopted from a closed system of selection by the House of Bishops to a democratic election by a diocesan synod with confirmation by a Province or Metropolitan. The confirmation process is largely formal with the detailed scrutiny and expectations addressed in a different forum.

21 A brief overview of the historic pattern is a set of conditions or exhortations that are laid out as in Acts 1:21-26, in Timothy 3:1-13, I Peter 5:1-11. Similar exhortations are found in the early liturgical texts and find their place in the exhortations contained in the current Ordinals, the 1662 *Book of Common Prayer* and in both *An Australian Prayer Book* and *A Prayer Book for Australia*. These are far ranging and the questions cover the wide range of faith, doctrine and holiness of life issues that are required in Christian leadership.

22 During the early period the selection and confirmation was left to the Elders, Presbyters and Bishops. In the Middle Ages Metropolitans had some say over the choice of those in Episcopal Orders. In the Western Church this choice came under the sole jurisdiction of the Papacy.

23 Dr Rowan Strong (see *Anglicanism and the British Empire c1700-1850*) observes:

> It seems clear that the Royal Supremacy, which replaced that of the Papacy in the Church of England at the Reformation, meant that the monarch was effectively the legal and theological power in the selection of bishops. Obviously, in doing so, the monarch was influenced by a number of contemporary factors at any one time, and by various influential persons.

But it was the English monarch personally who effectively and de jure made the appointment of bishops, with deans and cathedral chapters entirely a formal rubber stamp to the monarch's nomination, which stipulated the candidate the canons were required to elect.

It does need to be understood that the Royal Supremacy was theologically regarded as the government of the Church of England by a baptised lay head, who was thought to be a quasi-sacerdotal personage by virtue of his/her coronation rite.

By the nineteenth century the Royal Supremacy had become effectively the nomination of the ministers of the crown (the Prime Minister domestically, and the Colonial Secretary for the colonies), though monarchs up to and including Victoria were consulted, and could still exercise a veto. However, it was not the case that the crown, or the Prime Minister, relied solely or mostly, on the advice of the Archbishop of Canterbury, nor were they required to do so. Palmerston, for example, took advice from the evangelical Earl of Shaftesbury far more than from the archbishop.

Bishops in the colonies were appointed by royal Letters Patent from 1787 (Nova Scotia). However, by this time there were other Anglican bishops in the newly independent United States of America, and in the Scottish Episcopal Church. Bishops in the Scottish Episcopal Church, by this period of the later eighteenth century, in a church which was politically and theologically Jacobite and not Hanoverian loyalist, were appointed by electoral synods of clergy [Rowan Strong, *Alexander Forbes of Brechin: The First Tractarian Bishop* (Oxford, Clarendon Press, 1995) 5-9].

Colonial bishops were for over seventy years, appointed by Letters Patent, which demonstrated the formal exercise of the Royal Supremacy in the colonial churches of the empire (though effectively the appointment of the Prime Minister). Letters Patent continued to be used to appoint colonial bishops until the 1860s, when it was legally ruled that this manifestation of the authority of the Crown had no application in self-governing British colonies. This was a consequence of a judgement of the Judicial Committee of the Privy Council in 1865 over the tussle between Bishop Colenso of Natal and his metropolitan, Bishop Gray of Cape Town. Bishop Tyrell of Newcastle's assessment to his diocesan synod in August 1865 was eventually determinative in understanding the legal ramifications of this case for the Australian church. Tyrell argued, firstly, on the basis of Blackstone's famous dictum that 'Colonists carry with them so much of the English law as is applicable to their own situation', that the ecclesiastical law of England was not part of the English law Australian colonists brought with them. Secondly, he asserted that Letters Patent could command the appointment of a bishop, but could not assign him to any colonial diocese. The Colenso judgement then opened the way for Diocesan Synods or delegates to elect and appoint bishops. [Ross Border, *Church and State in Australia 1788-1872: A constitutional study of the Church of England in Australia (*London, SPCK, 1962), 252-3.]

Dr Strong points out that movements for the freedom of the colonial Anglican Churches from the Royal Supremacy had begun before the 1865 Privy Council judgement on the Colenso case. These earlier assertions of colonial ecclesiastical independence from the royal supremacy were largely over the issue of the power of colonial bishops to call diocesan synods which could pass legal canons. So, in 1847, when Lord Grey, the Secretary of State for the Colonies, asserted the efficacy of the royal supremacy

> being exercised by the government (that is, by the ministers of the Crown whose advice the monarch was now constitutionally required to accept), Bishop Broughton of Australia was shocked. He was particularly perturbed that Grey dismissed the power and right of the Archbishop of Canterbury to be necessarily involved in the selection of colonial bishops by himself, as the responsible minister of the crown. This assertion of independence by colonial bishops, and the power of the royal supremacy manifested in Letters Patent as the basis of colonial episcopacy, became an increasingly contentious area of church and state relations between the Anglican metropole and the colonial peripheries of empire between 1840 and the 1860s. But it was not until 1873 that the Crown formally ceased to issue Letters Patent for the appointment of bishops in the colonies [Border, *Church and State*, 270].

24 Since diocesan synods were granted the legal right to elect persons to the Episcopate a variety of forms of selection and confirmation have been put in place with Diocese and Provinces in Australia.

25 Justice Mason in his observations in section 95 notes that "But I am unaware of any situation in the past whereby the validity of a diocesan election in Australia was subjected to challenge (within the Church or in a secular court) on the basis that the election was invalid because a canonically unfit person was elected."

26 There have been cases where the Bishops of a Province have not given their consent and at least one occasion in 1992 when the confirmation of election of the Bishop of Waikato in New Zealand as Bishop of Newcastle was held up by the Metropolitan in New South Wales who questioned the canonical fitness of the person elected on the basis that the person had ordained women into the Priesthood. The Registrar of the Diocese of Sydney advised that this fact did not constitute an impediment to confirmation. (Details obtained through the Administrator of the Diocese of Newcastle in 1992.) I must declare that the Bishop referred to in this instance was myself.

27 The term "canonical fitness" is therefore to be understood as the exclusive formal requirements for a person to be confirmed as a Bishop. The process of selection may, depending on the diocese, require further criteria. The confirmation and consecration are further dependent on the person elected or appointed responding to the Exhortation and Examination which includes a place for public acceptance: "If, however, any of you know an adequate reason why we should not proceed, come forward and make it known."

28 Further, the 'bishop elect' has the option during the whole process to withdraw.

29 None of these exhaustive processes of selection and examination find themselves explicitly referred to in the Constitution except by way of the Governing Principles concerning the place of the Prayer Book and the threefold ordering of Bishops, Priests and Deacons.

30 Justice Young notes in section 28 that the word 'qualification' is omitted in the 1995 change and observes that only three matters are left to be considered. He further recognises that the exhaustive matters of faith, doctrine, and holiness of life are addressed in a more public way in the liturgy of our Church. It is clear that the office of Bishop has particular significance within Anglican ecclesiology contained in the Book of Common Prayer, the Ordinal, in our formularies and in the Constitution of our Church. I therefore appreciate Mr Horton's reasons to seek a further clarification process, yet nevertheless I am unable to agree with his conclusions.

31 There is little doubt that the subject of women in the Episcopate has had wide debate within the Australian Church and that a further Clarification Canon has been sought through the General Synod. Protocols that respond to those who have principled objection have been canvassed in Australia and overseas. Substantial work covering the theological and pastoral concerns are available, eg Women in the Episcopate – Eames Commission Report; Consecrated Women, a report from Jonathan Baker, etc.

32 Justice Bleby's reasonings regarding these matters sufficiently places them in context:

> 45 This reference does not raise a theological issue. That has already been determined in previous references concerning the ordination of women. Nor is this reference about whether it is desirable that women should be admitted to episcopal office in this Church. The reference raises a purely legal question involving the interpretation of the Constitution. It must be decided on the application of legal principles only, whatever views there may be about the desirability of women bishops with or without provision for alternative episcopal oversight.
>
> 46 I realise that this conclusion, if it prevails, will have significant consequences in the Australian Church if and when, assuming a valid election, a female priest or bishop who is otherwise canonically fit is elected to episcopal office in Australia. Much of the General Synod's time has been devoted to debating whether, if it occurred, it should only occur where there are in place provisions for proper episcopal oversight of those who are unable, in conscience, to accept the ministry of a female bishop, and if so, what should be the form of those provisions.
>
> 47 If a woman is consecrated or installed as a consequence of this determination, there will be no such provisions in place unless the diocese concerned makes such provision, whether of its own volition or in pursuance of a model protocol or some other provision adopted by General Synod. Experience has shown the difficulty in this area of trying to provide a one size fits all solution. The circumstances in which a female bishop may minister in this Church will vary greatly. Different solutions will need to be applied in different situations. Nevertheless, there will be genuine pain and concern in some quarters which will need to be addressed with sensitivity and understanding, and with mutual respect for those who hold opposing views.

33 I find myself therefore generally agreeing with the reasons outlined by Justice Mason, Justice Bleby and Archbishop Aspinall.

34 I have already made comment and expressed my view on the issues surrounding the "canonical fitness" requirements in the Assistant Bishops Canon 1966, the Interpretation Canon 1995, Rule XIX and the Constitution. I note the matters raised by Justice Bleby and Justice Mason and the observations of Archbishop Aspinall that this to them represents a canonical barrier but not a constitutional one.

35 In respect of this reference my answers to the two questions are:

1 No, provided that the woman has been baptised, is a priest, is over 30 years, has been duly elected or appointed and has had her election or appointment duly confirmed.

2 No, provided that the woman has been duly elected as the diocesan bishop and has had her election duly confirmed in accordance with the criteria for "canonical fitness" set out in Section 74 (1) of the Constitution.

REASONS OF THE PRESIDENT, PETER W YOUNG, J AO

1. I have carefully read the draft of the reasons of Justice Mason. I agree with what His Honour has said in paragraphs 1-91, with only the rather trivial modification set out below. This includes my agreement with His Honour's statement of the critical question as to whether the change of the definition of 'canonical fitness' had an effect on the so called Phillimore rule which prohibits the consecration of a woman as a bishop.

2. The triviality is that in his paragraph 21, Justice Mason appears to suggest that a bishop has an untrammelled right to create priests and deacons. That right is a wide one, but, the bishop can only ordain if the candidates are presented to him on behalf of the church. In these days, this is usually done by an archdeacon. If all archdeacons in a diocese refuse to present a candidate (as has occurred) the bishop may be constrained not to ordain.

3. As Justice Mason has pointed out, there is no doubt at all that as at 1 January, 1962, there was a law of the Church that only males could be ordained into holy orders.

4. There is also no doubt that this Church has abrogated that rule for deacons and priests in dioceses where the General Synod mandate to do so has been activated.

5. The question before us involves whether the rule is a rule:-
   (a) To do with canonical fitness; and
   (b) Has been abrogated by the change of definition of canonical fitness.

6. Mr Refshauge submitted that the only barrier, apart from canonical fitness to a woman being consecrated a bishop was that, until the rule was abrogated for priests, a woman could not be a priest and so was ineligible to become a bishop. Mr Lindsay put that the rule was of greater force.

7. We have called the rule the "Phillimore Rule" as Chancellor Phillimore states it clearly in his seminal work on ecclesiastical law. However, it must be realised that Dr Phillimore was merely repeating an ancient rule. Phillimore's work largely follows Burn's Ecclesiastical Law of 1824, which, in turn relied to a great extent on the key works of the 18th Century by Ayliffe and by Gibson.

8. Indeed, the rule was not only a rule in England, but was recognised in Germany where *Ricter's Kirchenrecht , 6th ed* 1895, states it citing in support the well known texts in I Cor 14:34 & I Tim2:12-14 as the basis of the rule against women's ordination.

9. Unfortunately, I respectfully disagree with the reasoning adopted by His Honour in the final paragraphs of his opinion. However, whilst His Honour's proposed answer to the narrow question asked might be technically correct, I believe, for reasons I will give later, that to answer the question in that form may unwittingly mislead the church on wider questions.

10. S 71 (2) of the Constitution provides that:-

> "The law of the Church of England including the law relating to faith ritual ceremonial or discipline applicable to and in force in the several diocese of the Church of England in Australia and Tasmania at the date upon which this Constitution takes effect shall apply to and be in force in such dioceses of this Church unless and until the same be varied in accordance with this Constitution"

11. As His Honour notes in paragraph 9 of his reasons, the High Court has made it clear what is the function of a definition section. As McHugh J said in **Kelly v The Queen (2004) 218 CLR 216, 253** (a statement he repeated in **Allianz Australia Ltd v GSF Australia Pty Ltd (2005) 221 CLR 568,** 574:-

> The function of a definition section is not to enact substantive law. It is to provide aid in construing the statute.

12. Particularly when one takes into account the factual matrix referred to by His Honour in his paragraph 55 that the intent was that once the amendment to the definition took effect, attention would need to be paid to s 8 (an intention that was not to date carried out), I find it impossible to reason from possible absurdities or imputed intention of the framers of the Constitution that an alteration to the definition of canonical fitness has altered the substantial law, and has altered the fundamental rule continued in force by s 71(2).

13. The making of a bishop involves a three or four stage process, viz:-

(a) The issue of a mandate for election (not always applicable);
(b) The election of a diocesan bishop or appointment of an assistant bishop;
(c) The confirmation of the election or appointment;
(d) The consecration.

14. I agree that stages (a) and (b) are committed to the dioceses even to the extent of each diocese within its constitutional powers creating its own rules for eligibility. Stage (c) is usually governed in accordance with the Constitution or the

Assistant Bishops Canon by Ordinance of the Provincial Synod or its equivalent and stage (d) is governed by the ordinal or its successor.

15. Although there may have been the occasional exception, bishops in the Australian church up until 1 January, 1962 were chosen in accordance with diocesan legislation, confirmed in accordance with Determination II of 1905 or Provincial legislation made thereunder.

16. Justice Mason has traced the rules as to appointment of bishops since the time of Henry VIII. However, English political considerations have given a distorted view of the basic process.

17. The argument of the Attorney-General in **Bishop Hampden's case (R v Archbishop of Canterbury (1848) 11 QB 483; 116 ER 557)** gives a thorough sketch of the history of the appointment and confirmation of bishops in England up to 1848 (when the case was argued).

18. That argument, plus the arguments in **R v Archbishop of Canterbury [1902] 2 KB 503,** provide the following information:-

- Bishops can be put into four categories, viz Donative, appointed by the Crown, appointed under the usual English procedure and bishops in the colonies;
- In England, it was only between 1216 and 1316 that English bishops were freely elected, and then the person elected needed to be confirmed by the archbishop before he could be consecrated;
- In England, because the Crown virtually chooses the bishop, the process of confirmation is extremely curtailed.

19. One of the leading books on the Canon Law of the Church of England is John Ayliffe's, *Paregon Juris Canonici Anglicani* published in 1726. The work will be referred to hereafter as "Ayliffe".

20. Ayliffe at p 119 says,

> " A bishop according to St Paul's Direction (1 Tim ch 3 vv 2, 3 etc) ought to be vested with fourteen Conditions or Qualifications. For he ought to be blameless, that is to say, without any Crime or Blemish imputed to him, the Husband of one Wife, not

> given to Wine, a person of Prudence, Modesty, Hospitality and Charity; a Teacher of the People, no Striker or litigious Person; not given to filthy Lucre or Covetousness; a Man that governs his own House; no Novice, but a Person well apparelled."

21. Ayliffe continues

> "For it is not the Name, but the Life of the Person. That makes a Bishop. An election therefore to a Bishoprick, ought to be made of a Person that is fitly qualified for it, in respect of Knowledge, Age and Good Manners…. And the Council of Lateran ordains, because some Persons had been elected Bishops who were in no wise qualified in respect of Age, Knowledge, Morals, and the like, decreeing, That in all the Offices of the sacred Ministry, there should be three Things especially requisite and necessary, viz Maturity of Age, Gravity of Manners, and Knowledge of Letters.
>
> The reference is to the Fourth Lateran Council of 1215, ch X.1.6.7.

22. It would seem from *Lancelottus Institutiones Juris Canonici*, quoted by the Attorney-General in the **Hampden case,** that originally, a person who had objected to the qualifications or suitability of the person elected could reagitate that matter before the archbishop at the confirmation stage and indeed that is how the word "confirmation" came to be coined.

23. However, as time wore on, questions of the candidate's doctrine were excluded, possibly because the questions could not be properly formulated and dealt with in the strict time limits for confirmation.

24. The second edition of Grey's *System of English Ecclesiastical Law* (1732) extracted from Gibson's *Codex* deals with the manner of electing and consecrating bishops in Title V p30 et seq. However, apart from giving details of the then process of confirmation and stating that the conclusion of the hearing is that the election is confirmed, it adds nothing to the present debate.

25. Questions of morality, learning and even the political wisdom of the appointment do seem to have featured in confirmation in the Middle Ages.

26. The report of the Objection of Confirmation of bishop elect Thomas of Melsanby in *Wharton's Anglica Sacra* (London 1691) pp735-6 shows that in proceedings for the confirmation of the bishop elect to the See of Durham in the fifteenth century, confirmation was refused not only because the candidate as a monk in Scotland he had sworn allegiance to the King of Scotland, but also because he was not sufficiently literate. The text says "non cit sufficienter litteratus", which appears to mean 'not sufficiently well educated' rather than not sufficiently able to read and write.

27. Whatever else the original definition comprehended, it focussed on the qualifications for being a bishop. The vital question is whether the definition went to formal qualifications only or included personal qualifications as well.

28. The 1995 change omitted the word 'qualification', it did not address what qualifications were needed to be a bishop. It did, however, operate that, when applying the Provincial legislation governing the confirmation process, only three matters had to be considered.

29. The Provincial legislation dealing with confirmation of bishops is, for convenience, appended as Schedules 4 & 5 to my report to the Primate. It might be noted that not all legislation requires confirmation by the metropolitan.

30. It might also be noted here, as we were reminded during argument that the Canon Law Commission reported in its Report "Canon Law in Australia" para 30005, that the confirmation process in Australia has never been closely analysed. The Commission said,

> "The exact process of confirmation in Australia perhaps needs closer examination as one feels that last century it was considered that as in England there was a requirement for confirmation of Bishops, in some cases the institution should be taken over holus bolus to Australia without a real examination of the different circumstances that prevail."

31. This provides an additional reason why it is rather odd that alteration of a definition that only applies to a poorly understood process should be considered to work such a fundamental change to our church structure.

32. It would seem clear that the validity of an election cannot be dealt with in Australia in the confirmation process which must only consider canonical fitness as defined.

33. This then raises the question, is there some other process by which a person's progression from priest to bishop may be prevented?

34. It would seem strange if there was no process to challenge the election of a bishop for cause. It would seem that the structure of s 8 and the definition of canonical fitness means that this cannot take place during the confirmation process. However, diocesan ordinances may provide for a tribunal to decide such matters or refer these matters to the Metropolitan and there may be other avenues available for challenge.

35. The scenario of challenge by appropriate means is to my mind preferable to making the assumption that it is no longer possible to challenge an invalid election either on the

ground that a person is not qualified to be a bishop because of the personal and other qualities demanded of bishops since the 13th Century or that the election was invalid for procedural reasons.

36. In my view the mere alteration of a definition in the Constitution to apply to the confirmation process could not have such a far reaching effect.

37. Whilst, at present, it would appear that the question as to who is eligible to be a bishop of or in a diocese is a matter for diocesan legislation. Two riders must be added, viz

a. The ability to legislate in this area to alter existing rules may be circumscribed by the legislative power of the respective diocesan synods;
b. It may well be that the General Synod (even other than by constitutional amendment) can, by canon, prescribe minimum educational qualifications for bishops.

38. The change in the rules as to confirmation does not necessarily involve change in qualifications for election nor the rules applicable to consecration.

39. As to consecration of a bishop, the Ordinal provides that the chief consecrator, who, at least by custom is the Metropolitan, must examine the bishop elect as to whether he accepts Holy Scripture, whether he will teach that nothing is relevant to salvation that is not recorded therein and that he will live a sober and good life.

40. I cannot accept that none of these matters have ceased to have any relevance. They are given prominence in the service, which is, by Section 4, held up as a basic standard of our faith. It seems most odd that an alteration to a definition section should effect such a fundamental change.

41. Although it is unlikely to happen in practice, if a Metropolitan found that it had recently come to light that the bishop elect was a person properly described as an ‘evil liver’, it could not be the case that he was still bound to proceed with the consecration.

42. Whilst this example has no direct relevance to whether a Metropolitan could reject a person on the ground of gender, I do not wish to explore such a question until, if ever, it becomes relevant and, only then, after full argument. All I wish to do at this stage is to make the point that, even in the case of a person whose election has been confirmed, the Metropolitan still has some residual discretion as to whether the consecration should proceed.

43. Indeed it might be noted that, whilst in England, with an established church, a mandamus may go to compel a metropolitan to consecrate the Crown's appointee, there is no equivalent remedy available in Australia.

44. All this makes me take the view that the alteration of the definition of 'canonical fitness' for the purpose of what is to be considered in the confirmation process does not have the wider effect that Justice Mason considers it has.

45. It is clear that, before 1995, women could not be consecrated as bishops. The only amendment made in 1995 was to change a definition section in the constitution with respect to the confirmation process.

46. As can be seen in the reasoning of members of the tribunal, the confirmation process for the election of bishops has never been a clearly mapped out process, nor has it ever had a significance in the system of appointment of bishops that was higher than that of election or appointment on the one hand or consecration on the other.

47. With respect to Justice Mason, my view is that there is insufficient material from which one could conclude that at any time in its operation s 8 of the Constitution was a code as to who was eligible to be consecrated a bishop.

48. The amendment to the definition did not thus have the effect of making women eligible to be consecrated as bishops.

49. I have also had the privilege of reading Justice Bleby's opinion in draft. There is little point in me indicating where I respectfully would dissent with part of His Honour's reasoning as this should be apparent from my own reasons. However, there is one matter I should mention specifically.

50. Whilst I can see that an amendment to the Constitution that goes to substance may have the effect of displacing a rule inherited from England under s 71(2), I respectfully disagree with the view that an amendment to a definition can have that effect, or, assuming that it is theoretically possible for that to be so, that it is so in the present case.

51. Stripped of its decoration, the question posed is:-

Q. is there anything in the Constitution which would now prevent-

the consecration of a woman in priests' orders as a bishop in this church in a diocese which by ordinance has adopted the Law of the Church of England Clarification Canon 1992; or

the installation of a woman so consecrated as a bishop of such a diocese?"

52. The Constitution alone does not purport to address this matter. A person may only be consecrated a bishop or installed as a bishop if that person is duly elected or appointed in accordance with the law of the relevant diocese and the election and appointment is duly confirmed. Furthermore, the person need only be consecrated if the sponsors for consecration and the consecrating bishops are assured that the person is a fit person to be consecrated in accordance with the Ordinal.

53. In my view, with all respect, the answer to the question proposed by my brother judges is correct as far as it goes as an answer to the question posed, but is not a complete answer to the matter that concerns the church.

54. The answer I would propose is as follows:-

" The constitution itself is not the document to be considered when considering who is eligible to be consecrated or installed as a bishop. There is no doubt that, prior to 1995, women were not so eligible. Any constitutional amendment made taking effect in 1995 or subsequently, does not affect that statement."

55. I would add three additional comments. First I should note that, when the Diocese of Sydney assented to the constitutional amendment in 1995, it purported in a covering clause of the assenting ordinance to exclude the possibility that it would open up further avenues to women in ordained ministry. Whilst such a provision may have some operation within a diocese, once a diocese has assented to a constitutional amendment, its role in the constitutional process is complete and no such covering clause can affect the fact of assent.

56. Secondly, apart from the submissions of Equal but Different, there was no mention of Holy Scripture. This suggests that all parties recognised that the present matter is one of church order and legal interpretation.

57. Thirdly, whilst it is possible for some dioceses to alter their Provincial Legislation without General Synod approval, this is not necessarily a simple matter. Thus, in NSW, the legislation can be altered with the unanimous consent by ordinance of all seven dioceses. However, as the procedure for confirmation is enshrined in the case of Western Australia and

South Australia in the Provincial Constitution, any change will need General Synod approval under s 41 of the National Constitution.

ANGLICAN CHURCH OF AUSTRALIA
APPELLATE TRIBUNAL
REFERENCE RE WOMEN BISHOPS

DECISION OF DEPUTY PRESIDENT, MR M F HORTON OAM

1. I refer to a reference received from the Primate in the following terms, dated 22 April 2005.

> *"Given that:*
>
> 1. *the opinion of the majority of the Appellate Tribunal, expressed in its 1991 opinion, was that it was the constraint imposed by section 71(2) of the Constitution that then prevented the ordination of a woman as a priest or the consecration of as woman as a bishop in the Anglican Church of Australia;*
>
> 2. *in the case of the ordination of a woman as a priest, such constraint has been removed in a diocese which has adopted by ordinance the Law of the Church of England Clarification Canon 1992; and*
>
> 3. *the definition of "canonical fitness" as it relates to a person elected bishop contained in section 74(1) of the Constitution was amended to its present form with effect from 5 June 1995;*
>
> *is there anything in the Constitution which would now prevent-*
>
> 1. *the consecration of a woman in priests' orders as a bishop in this church in a diocese which by ordinance has adopted the Law of the Church of England Clarification Canon 1992; or*
>
> 2. *the installation of a woman so consecrated as a bishop of such a diocese?"*

2 The reference raises difficult issues of legal interpretation.

The signatories' case is that an interpretation of the Constitution of the Anglican Church of Australia at the strict end of the principles consequent upon *Pepper v Hart* [1993] AC 593 is appropriate, and that this discloses no bar to women becoming bishops in Australia. Such restriction as existed when previous pertinent Appellate Tribunal decisions were made has been negated as a consequence of the *Law of the Church of England Clarification Canon 1992* ("the 1992 canon") and the 1995 amendment of s74(1) of the Constitution. It is claimed that whether this was intended cannot properly be divined from extrinsic evidence, nor is it relevant. In essence, the only bar to a woman becoming a bishop was reduced to the precondition of being a priest: hence, once a woman could be ordained, a woman could be consecrated.

The case put on behalf of the Diocese of Sydney says that the Constitution dictates that there be further legislation to remove an historic preclusion on women becoming

bishops which still exists. Reliance is placed upon: (a) the inherent federal system involved; (b) s71(2) of the Constitution, given extant English ecclesiastical law (vide such sources as “catholic usage” and The Ordinal); (c) aspects of previous pertinent Appellate Tribunal decisions; (d) the lack of explicit revocation.

There is scope to argue persuasively for different outcomes: the correct conclusion does not, to my mind, stand out definitively.

3. I am indebted to the legal representatives of the parties to the reference for their professional input; also to my colleagues Justices Young, Mason and Bleby for their scholarly written assessments of issues, not least their learned exposition of relevant historical ecclesiastical law. I have also had the advantage of deliberations with fellow members of the Tribunal.

4. My comments on the issues are relatively brief, being made in the context of the detailed papers of Justices Young, Mason and Bleby. I trust this does not mask the great deal of time, attention and anxiousness entailed in my consideration of the reference.

5. I accept the review of the law in the first 91 paragraphs of Justice Mason's statement. His Honour’s reasoning to his conclusion I count compelling, but I am not persuaded to the degree of accepting his position. I accord the like respect to Justice Bleby's careful and informed input, but I am not able to adopt his interpretations and conclusions.

6. On balance, my studied assessment of the issues before the Tribunal leaves me with a view aligned to that stated by Justice Young. In particular, I am specifically of the same mind as him with regard to that put in his paragraphs 44 to 48. I am not convinced that the Tribunal’s majority answer “is correct as far as it goes as an answer to the question posed”, vide Justice Young's paragraph 53, also the second sentence of his paragraph 9 (noting what I see to be moot points as to what constitutes being “duly elected”). Otherwise, I adopt Justice Young's statement generally, except to the degree that my following comments indicate.

7. There are two fundamental prerequisite elements for a person to proceed to the consecration stage of becoming bishop in Australia: selection (election or appointment) and confirmation.

The election of a diocesan bishop is prescribed in s8 of the Constitution. It follows that there are three governing factors as to election: (i) diocesan legislation, (ii) as an overlay, the Constitution generally, a critical relevant specific of which is s71(2) and (iii) constitutionally defined canonical fitness (by implication, given the statutory confirmation requirement).

With respect to the selection element generally: (a) in 1962, there was a categorical and basic embargo on women; (b) the 1992 canon ostensibly endeavoured, quite specifically, not to alter the position, but in fact did so to the extent that ordained priest status ceased to constitute a barrier to women; (c) the amendment of s74(1) of the Constitution altered the above factor (iii).

The foregoing lines of thought lead to it being arguable that, for the election of a diocesan bishop, a bar to women remains to the extent arising through factors (i) and (ii), in particular per s71(2). Any change to the relevant affect of this section since 1962 would be by the 1992 canon, indirectly, and by the new s74(1) definition, specifically as to factor (iii). On the above reasoning as to governing factors, noting in particular the distinction between election and confirmation, the argument is that

these two legislative measures did not remove entirely the bar to a woman being elected a diocesan bishop.

The general proposition is that, in 1962, the primary constitutional bar to a woman being selected to be a bishop was as per s71(2) and s74(1); and that the bar was, historically, fundamental. After the 1995 change to the latter section, for diocesans, or other selected persons subject to confirmation based on s74(1), the bar was diminished, but it still remained per s71(2) in relation to the selection element. This argument has it that s71(2) entails a greater breadth as to fitness requirements for a bishop than the statutory definition of s74(1). It is noted as prospectively pertinent to this argument that the ecclesiastical law of the Church of England involves both written (statute, including Synod enactment) and unwritten (common) law. (*Halsbury's Laws of England* 4th Ed, Vol 14 ("Ecclesiastical Law") 1975 (but referring to a pre-1962 position) §303). There seems to be scope to question validly the extent to which the fundamental bar at common law has been neutralised by an enactment that changes a statutory definition which serves a specific constitutional purpose. At the least, this path seems to afford uncertainty on the point in contention.

The alternative proposition of the "no" answer to the reference, that any s71(2) bar did not apply after the 1995 change, has it that the change in the statutory canonical fitness definition resulted in the s8 election criteria becoming solely the requirements of that definition, which position seems open to question. This is the more so given Justice Cox's review, in his 1991 Appellate Tribunal decision, of the selection criteria as in 1962.

8. In weighing all of the input on the issues, I conclude that it cannot be said categorically that there is not a bar to women being consecrated bishops pursuant to the present laws of the Anglican Church of Australia. It seems to me arguable that the bar in this regard which applied in 1962 continues today, despite relevant legislative measures in 1992 and 1995. Prior to those measures, it seems clear that the bar applied to both the selection element and the confirmation element of the bishop creation process. At the present time, the bar does not apply to the confirmation element if the same is based on the s74(1) definition, but a difference of opinion exists as to whether it still applies to the selection element: both positive and negative cases on this point have merit. If the answer is not clear cut, which is my assessment, I count that to be a definitive deciding factor as to the reference answers.

A specific cause for lack of certainty is a possible statutory interpretation, in tune with the relevant legal situation, which finds the selection element to be a principal step in the process preceding consecration, and that element to be subject to the Constitution. This means that the fitness of a selected person for consecration includes firstly, as may be needed pursuant to s71(2) of the Constitution, and secondly, pursuant to such confirmation as may be prescribed. The confirmation element has historically been and, it seems possible to contend cogently, continues to be, secondary to the selection element; this contention also accords with the usual meaning of "confirmation". Such a perspective sees the change of the statutory definition of "canonical fitness" in the Constitution as diminishing the check template of any confirmation element that is pursuant to that definition, but not as leading to the check template for the selection element becoming identical.

The emphasis of this line of approach is upon interpreting the statutory definition to be for the purpose of the constitutional confirmation element only. This view has it that the selection element is a principal step in its own right, not a rehearsal for, or a second-guess of, the confirmation. This line of argument puts that, were the position otherwise, it would be at odds with the history of, and the interpretation of the contemporary development of, relevant laws.

9. In short, I find that there is scope to contend validly in relation to the Constitution that s71(2) was not diminished in its application to the selection element of the bishop creation process by the amendment of s74(1) further than was consequent upon the statutory canonical fitness definition being changed for the purposes of any required confirmation step based upon that definition: that is to say, not to the extent of changing the application of s71(2) to the selection element.

10. Thus, I am not convinced that the subject bar, which it is accepted on all sides applied to the selection element of the bishop consecration process as at the adoption of the Constitution, has since been cleared completely by the relevant legislative measures of 1992 and 1995. Given this lack of certainty, I consider that clarifying legislation is necessary.

11. Because I find that doubt exists on the point as to whether, pursuant to the Constitution, maleness is a prerequisite to becoming a bishop, I consider my answer to the first reference question, as it relates to that point, must be yes. This response renders the second reference question otiose.

Reasons of the Rt. Rev. Peter R. Brain in the matter before the Appellate Tribunal concerning the consecration of a woman in priest's orders as a Bishop and her consequent installation as a Bishop of a Diocese.

Having considered the arguments of those seeking a 'no' and a 'yes' answer to the questions put to the Appellate Tribunal by the former Primate viz:-
" is there anything in the constitution which would now prevent

1. the consecration of a woman in priests orders as a Bishop in this church in a Diocese which by ordinance has adopted the Law of the Church of England Clarification Canon 1992; or

2. the installation of a woman so consecrated as a Bishop of such a Diocese?"

and having considered the reasons and comments by fellow members of the Appellate Tribunal my considered answer in regard to both questions is 'yes.'

I have formed this opinion for the following reasons:

1. (a) That since section 74.1 is a part of the constitution it should be read in conjunction with the constitution as a whole.

(b) The requirements for Canonical fitness as outlined in 74.1 needs to be interpreted in the light of sections 1-3 of the Constitution.

(c) These sections (1-3) called the 'Fundamental Declarations" commit our church to "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."

(d) Since the Pastoral Epistles speak about the qualifications of fitness of those to be appointed Bishops we would expect that those requirements need to be taken into account when determining the meaning of Canonical Fitness in 74.1.

(e) Given that one of the requirements of these scriptures is the affirmation that a Bishop should be a male person then the requirement of Canonical Fitness in 74.1 should be understood in this light.

2. (a) Section 71.2 allows for variation in accord with the Constitution, in matters including faith, ritual, ceremonial or discipline.

(b) The preamble to Canon 18, 1992, parts a, b and c expressly recognized the need for unity in diversity and the differences of conviction about the ordination of women as priests within our church.

(c) Given this change of great magnitude, proposed in the questions before the Tribunal, I am of the view that such changes should be resolved as before by General Synod

.

SCHEDULE 1

PRIMATE OF AUSTRALIA

Ref. 4633.doc

22 April 2005

The Hon Justice Peter Young
Judges Chambers
Supreme Court of NSW
SYDNEY
DX 829 NSW

Dear Peter

I am writing to you in your capacity as President of the Appellate Tribunal. I have been asked to refer to the Appellate Tribunal the following:

"In accordance with Section 63(1) of the Constitution of the Anglican Church of Australia, 28 members of the General Synod hereby direct the following question to the Appellate Tribunal:

Given that:

1. the opinion of the majority of the Appellate Tribunal, expressed in its 1991 opinion, was, that it was the constraint imposed by section 71(2) of the Constitution that then prevented the ordination of a woman as a priest or the consecration of a woman as a bishop in the Anglican Church of Australia;
2. in the case of the ordination of a woman as a priest, such constraint has been removed in a diocese which has adopted by ordinance the Law of the Church of England Clarification Canon 1992; and
3. the definition of "canonical fitness" as it relates to a person elected bishop contained in section 74(1) of the Constitution was amended to its present form with effect from 5 June 1995;

is there anything in the Constitution which would now prevent -

1. the consecration of a women in priests' orders as a bishop in this church in a diocese which by ordinance has adopted the Law of the Church of England Clarification Canon 1992; or
   the installation of a woman so consecrated as a bishop of such a diocese?

The Most Revd Dr Peter Carnley AO GPO Box W2067, Perth, Western Australia 6846
Telephone: [+61] (08) 9325 7455 Facsimile: [+61] (08) 9325 6741 Email: abcsuite@perth.anglican.org

A minimum of 25 signatories is required under the terms of Section 63(1). A total of 28 have joined this action and I enclose the original letters from each of the signatories.

Accordingly, I write formally to refer this matter to the

Tribunal. With good wishes.

Yours sincerely

(sgd) PETER PERTH

SCHEDULE 2

IN THE APPELLATE TRIBUNAL

REFERENCE CONCERNING WOMEN BISHOPS

REASONS OF THE MOST REVEREND ROGER HERFT, ARCHBISHOP OF PERTH ON APPLICATION TO RECUSE

1. These reasons are in response to submissions made by the Standing Committee of the Diocese of Sydney dated 15 February 2007 and 8 March 2007, as well as the submissions made by each of Equal but Different (a group within the Diocese of Sydney), the Forward in Faith letter, the Signatories to the Reference and the Synod of the Diocese of Canberra and Goulburn both dated 1 March 2007.

2. The allegation of "actual bias" made by the Standing Committee of the Diocese of Sydney and by other groups within our Church is one that I find deeply distressing. I find the presumption made that various Boards, Commissions and Tribunals of our Church are to be measured by the expectation of a secular court is regrettable.

3. I have made myself aware of the legal principles relevant to my decision on this application. Having received appropriate legal counsel, I consider that the rule against bias does not apply in the circumstances of this particular Reference, and even if it does, the evidence relied upon would not warrant a finding of actual bias.

4. Accordingly I do not consider that the current complaint provides a legal obstacle to my participating in hearing the Reference.

5. One of the submissions made by the Standing Committee of the Diocese of Sydney is that I failed to comply with any of the principles agreed to in the Australian Anglican Bishops' Protocol dated 3 May 2000 entitled "Collegiality in the Episcopate" ("Protocol"). It should be remembered that the Protocol:

a. has no legal basis or effect, it is not enshrined in the Constitution of the Anglican Church of Australia nor the Canons of General Synod; and

b. is an "agreement in principle" between the bishops of the Australian Church and does not prevent any of those bishops from making any public statements;

c. is not a protocol that disallows difference of opinion to be canvassed.

6. It must be reiterated that the primary "actual bias" that holds members of our Church together are of a different order. They are described in the Fundamental Declarations of our Constitution:

> *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 scripture's 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.*

7. The expectations one has of judicial officers in the court system of our land must be different from those who sit on the councils of the Church. We claim a revelation of God in Christ that affects every aspect of our lives.

8. This revelation is not in propositions or legally codified documents but in the Word made flesh, Jesus the Christ, crucified and risen. It is this conviction and faith commitment that calls me into the Church and binds me to others in Christ.

9. It is because we are held in this different order that I sought forgiveness in respect of the opinion piece that had unintentionally caused offence. In prayerful conversation and communication with the Archbishop of Sydney I believed that this matter had been resolved. He was clear that our communion in Christ was intact. Several of the Bishops, leaders and members of the Diocese of Sydney who wrote to me received a full apology both in conversation and in writing. I am grateful for many who wrote accepting my genuine apology.

10. It may be construed that the charge of "actual bias" against a fellow Bishop is simply a legal matter. We are bound by a deeper reality which has ramifications in the Gospel of salvation which is primarily relational; "so we, who are many, are one body in Christ, and individually we are members one of another" (Romans 12:5). Since my arrival as Bishop of Newcastle in the Province of New South Wales in 1993 I sought to give this relationship my tangible support. Most of the leadership team in the Diocese of Sydney were invited on a regular basis to attend events in the Diocese of Newcastle including Synods, Clergy conferences, 150th Anniversary celebrations, retreats, etc. I enjoyed the highs and lows of life in the Province of New South Wales. For me, at a personal level, the invitation issued by the Diocese of Sydney to lead the Service of Consecration and Installation of Archbishop Jensen at St Andrew's Cathedral was a significant moment that expressed our common bonds in the Gospel at the highest level. If I was seen to be carrying the bias that I am being accused of the invitation is unlikely to have been extended and if such a bias existed I could not in good conscience have presided at such a holy event in the Diocese of Sydney. My recollection of the service is of a genuine feeling of goodwill and graciousness between the leadership of the Diocese of Sydney and myself. Subsequent feedback from this event underlined this good relationship. These experiences express the reality of the mutuality of goodwill exchanged between the Diocese of Sydney and myself which has been our life in Christ over many years.

11. A document that comes from the Standing Committee of the Diocese of Sydney I presume must have the approval of the Archbishop and this creates a spiritual dilemma for me. The acceptance of my apology, forgiveness and absolution was generously given by the Archbishop of Sydney on 1 November 2006. I believe the Archbishop to be a leader of the highest integrity and that this forgiveness was fulsome and genuine.

12. I am at a loss to know how the allegation of "actual bias" made against me subsequent to this act of repentance/forgiveness made by the Standing Committee of the Diocese of Sydney fits into the higher order to which we are called.

13. The Biblical injunction is clear:

'Whenever you stand praying, forgive, if you have anything against anyone; so that your Father in heaven may also forgive you your trespasses.' (Mark 11:25)

So my heavenly Father will also do to every one of you, if you do not forgive your brother or sister from your heart.' (Matthew 18:35)*

Be on your guard! If another disciple sins, you must rebuke the offender, and if there is repentance, you must forgive. (Luke 17:3)*

So now instead you should forgive and console him, so that he may not be overwhelmed by excessive sorrow. Anyone whom you forgive, I also forgive. What I have forgiven, if I have forgiven anything, has been for your sake in the presence of Christ. (2 Corinthians 2:7,10)

And be kind to one another, tender-hearted, forgiving one another, as God in Christ has forgiven you. (Ephesians 4:32)

Bear with one another and, if anyone has a complaint against another, forgive each other; just as the Lord has forgiven you, so you also must forgive. (Colossians 3:13)

14. Our primary fellowship in Christ is based upon the repentance/forgiveness reality that comes in and through the salvation wrought in Christ. "All this is from God, who reconciled us to himself through Christ, and has given us the ministry of reconciliation; that is, in Christ God was reconciling the world to himself, not counting their trespasses against them, and entrusting the message of reconciliation to us. So we are ambassadors for Christ, since God is making his appeal through us; we

entreat you on behalf of Christ, be reconciled to God. For our sake he made him to be sin who knew no sin, so that in him we might become the righteousness of God." (2 Corinthians 5:18-21)

15. The legal argument mounted against me of "actual bias" I believe has been adequately and fully met. Accordingly I should not and will not be disqualifying myself from participating in the hearing of this Reference.

16. The ramifications in the Gospel for such a charge is one that I am committed to work on and which I hope will find its "Peace" under the blood of the Cross.

17. While I have strong and differing opinions to many in our Church I am committed to the Fundamental Declarations of our faith in Christ and do not hold a bias actual or otherwise against any in our Church.

18. Blessings and Peace.

SCHEDULE 3

CANON NO. 9, 1989

A Canon
to alter the Constitution in relation to Canonical Fitness

The General Synod prescribes as follows

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

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

3. This Canon may be cited as "Constitution Alteration (Canonical Fitness) Canon 1989"

SCHEDULE
Section 74(1) is amended by the substitution of the following definition for the definition of "Canonical fitness"

"Canonical fitness" means, as regards a person, that;
(a) the person has attained at least 30 years of age;
(b) the person has been baptised; and
(c) the person is in priests' orders

SCHEDULE 4

The Provincial Constitution of South Australia No 3 of 1973 provides as follows in clause 23,

"23. The confirmation required by section 8 of the Constitution of the Church of England in Australia as to the canonical fitness of a person elected to be the bishop of a diocese shall be by all the other diocesan bishops for the time being of the province. The confirmation as to the canonical fitness of a person to be appointed an assistant bishop shall be by all the diocesan bishops for the time being of the Province."

The Provincial Constitution of Western Australia provides as follows in clause 24 (f)-(j)

"(f) When a person has been elected as Metropolitan the Administrator of the metropolitan Diocese shall transmit the name of such person together with a certificate of his election to the Senior Bishop for communication within seven days to the other diocesan bishops of the Province.

(g) The diocesan bishops or a majority of them shall within fifteen days satisfy themselves as to the canonical fitness of the person so elected.

(h) If the diocesan bishops or a majority of them shall be so satisfied the Senior Bishop shall within a further fourteen days submit the name of such person together with the certificate of his election to the Primate of the Church for confirmation as required.

(i) If the diocesan bishops or a majority shall not be so satisfied the Senior Bishop shall within the said fourteen days give notification accordingly to the said Administrator and the said election shall be null and void and proceedings shall be taken under this Constitution as if the vacancy in the See had occurred at the time of such notification.

(j) When an election has been confirmed as required the person so elected (subject to his consecration if necessary) shall be the metropolitan and Bishop of the metropolitan See and shall be entitled to exercise the functions of such Metropolitan as from the date of his enthronement in the Cathedral Church of the metropolitan See."

SCHEDULE 5

A. NSW Provincial Synod Ordinance, 1965

An Ordinance to provide for the confirmation as to Canonical fitness of persons elected to be Diocesan Bishops in the Province of New South Wales.

WHEREAS Section eight of the Constitution for the Church of England in Australia (hereinafter called the said Constitution) provides that the election of a bishop of a diocese shall as to the canonical fitness of the person elected be subject to confirmation as prescribed by ordinance of the Provincial Synod.

NOW this Synod of the Province of New South Wales (hereinafter called the Province) in pursuance of the powers in that behalf conferred upon it by the said Constitution and by the Constitutions for the Management and Good Government of the Church of England within the State of New South Wales 1902 (hereinafter called the Constitutions) ordains prescribes and rules as follows:

(1) When in any diocese of the said Province a person shall be elected to be the bishop of such diocese, the president of the Synod of such diocese, or if the See be vacant, the person appointed or entitled to exercise the powers of the bishop of such diocese under or pursuant to the 26th of the Constitutions shall forthwith transmit the name of such person together with a certificate of his election to the Metropolitan.

(2) On receiving any such certificate the Metropolitan shall forthwith communicate the election to the other diocesan bishops of the Province.

(3) If three or more diocesan bishops are satisfied as to the canonical fitness of the person so elected, the confirmation of the election of such person shall be duly certified under the hand and seal of the Metropolitan. Provided that the

election of a person who at the time of his election is already a Bishop of the Church of England in Australia shall not require to be confirmed.

(4) An election shall be deemed to have been communicated to any diocesan bishop if notice in writing thereof has been posted by prepaid registered mail addressed to him at his Registry either in addition to or in lieu of any other mode or manner of communicating the same to him, and any such bishop to whom any such election shall have been communicated shall inform the Metropolitan in writing whether or not he is satisfied as to such canonical fitness provided that if the Metropolitan shall not have received any such reply within thirty days of such communication the bishop concerned shall be deemed to be satisfied.

(5) For the purposes of this Ordinance "Metropolitan" and "Canonical Fitness" shall have the same meaning respectively as they have in Sec. 74 (1) of the said Constitution.

(6) This Ordinance may be cited as the *"Provincial Ordinance for the Confirmation of Bishops Elections (N.S.W.) 1965".*

B Victorian Legislation

Canonical Fitness of Bishops ordinance 1979

AN ORDINANCE OF PROVINCIAL SYNOD

CONCERNING THE CANONICAL FITNESS OF BISHOPS

Whereas Section 8 of the Constitution of the Church of England in Australia provides that there shall be a bishop of each diocese who shall be elected as may be prescribed by or under the Constitution of the diocese, provided that the election shall as to the canonical fitness of the person elected be subject to confirmation as prescribed by ordinance of the provincial synod, and

Whereas General Synod by The Assistant Bishops' Canon, 1966 has prescribed that no priest appointed to the office of an assistant bishop in a diocese within a province shall be consecrated unless his appointment as to canonical fitness has been confirmed as prescribed by ordinance of the provincial synod or otherwise as provided by that Canon.

The Provincial Synod of the Province of Victoria prescribes as follows:-

1. This ordinance may be cited as the "Canonical Fitness of Bishops Ordinance 1979"

2. When in any diocese other than the Metropolitical See a person shall have been elected as bishop or a person shall have been appointed to the office of assistant bishop the administrator or bishop of the diocese shall forthwith transmit the name of that person together with a certificate of his election or appointment to the Metropolitan of the province and when a person shall have been elected or nominated the first bishop of a newly-formed diocese or of a diocese about to be formed the person or persons who have nominated or elected him shall transmit a like certificate in like manner provided always that no certificate of election or appointment of any person to be bishop of a diocese other than a newly-formed diocese shall be submitted to the bishops of the province unless such a See shall have become vacant or shall have been declared vacant by the Metropolitan.

3. On receiving any such certificate the Metropolitan shall communicate the election or nomination to the other diocesan bishops of the Province and if the diocesan bishops, including the Metropolitan, who shall have a casting vote, or a majority of them, be satisfied as to the canonical fitness of the person so elected or nominated, the election or nomination of such person shall be duly confirmed under the hand and seal of the Metropolitan.

4. If the canonical fitness of the person elected or appointed shall not have been confirmed or denied at the expiration of three months from the receipt by the Metropolitan of the notice of such election or appointment the metropolitan shall notify to the Administrator of such diocese or in the case of a newly-formed diocese or of a diocese about to be formed the person or persons who made such election or nomination the reason for such delay.

5. If at the expiration of a further period of six weeks from the date of such notification or the expiration of six months from the date of the election or appointment of a person as aforesaid whichever first occurs his canonical fitness shall not have been confirmed it shall be deemed to have been denied.

C Queensland, The Confirmation of Bishops Canon, 1971-1982

A Canon for the Confirmation of Bishops Elected or Appointed within the Province of Queensland.

Be it declared and established by the Provincial Synod of the Province of Queensland as follows –

1. This Canon may be cited as "The Confirmation of Bishops Canon of 1971".

2. Where in any diocese within the Province of Queensland a person shall have been elected or appointed as a diocesan bishop or as an assistant bishop, the Administrator of such Diocese shall transmit the name of such person together with a certificate of his election or nomination to the Metropolitan.

And when a person shall have been elected or nominated the first bishop of a newly-formed diocese or of a diocese about to be formed, the person or persons who have elected or nominated him shall submit a like certificate in like manner.

3. On receiving any such certificate the Metropolitan shall communicate the election or nomination to the other diocesan bishops of the Province and if the diocesan bishops, including the Metropolitan, who shall have a casting vote, or a majority of them, be satisfied as to the canonical fitness of the person so elected or nominated, the election or nomination of such person shall be duly confirmed under the hand and seal of the Metropolitan.

4. If the election or nomination of a bishop shall not have been confirmed at the expiration of forty days from the receipt by the Metropolitan of the notice of such election or nomination then such election or nomination shall be deemed not to have been confirmed and the Metropolitan shall forthwith notify the Administrator of such diocese, or in the case of a newly-formed diocese or of a diocese about to be formed, the person or persons who made such election or nomination. Should such election or nomination be deemed not to have been confirmed, then the name of some other person may be transmitted in manner provided and pursuant to sections 2 and 3 hereof.

5. When a person nominated or elected as diocesan bishop or an assistant bishop of any diocese in the Province of Queensland is to be consecrated outside Australia, confirmation as to canonical fitness shall be made as provided in sections 2 and 3 hereof.

6. "Administrator" shall mean and include the person appointed by or under the constitution of the diocese to administer the affairs of the diocese during a vacancy in the see.

"Metropolitan" shall have the same meanings as it has in Section 23 of the constitution of the Province of Queensland. Provided however where the person whose election is sought to be confirmed is the Metropolitan or acting as the

Metropolitan, then, for the purpose of the operation of this canon, the next senior Bishop of the Province other than such person shall be deemed to be the Metropolitan.

"Primate" shall have the same meaning as it has in Section 74(1) of the constitution of the Church of England in Australia.

7. When a bishop of a diocese within the Province of Queensland intends to resign he shall notify such intention and the date on which it is to take effect in writing to the Metropolitan and the Administrator. On and after such date the see shall be deemed to be vacant.

PETER W YOUNG
PRESIDENT APPELLATE TRIBUNAL
26 SEPTEMBER, 2007

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