APPELLATE TRIBUNAL OF THE ANGLICAN CHURCH OF AUSTRALIA

Matter:	Appeal of Keith Francis Slater
Hearing Date(s):	20th November 2016
Decision Date:	19 January 2017
Tribunal Members:	The Hon Keith Mason AC QC, President The Hon Justice Richard Refshauge Mrs Gillian Davidson The Rt Rev'd John Parkes AM The Hon Justice Clyde Croft The Rt Rev'd Garry Weatherill
Decision:	The Appellate Tribunal lacks appellate jurisdiction in the matter. In setting out its reasons, the Appellate Tribunal has also concluded that the deposition of Bishop Slater from Holy Orders was null and void on various grounds.
Catchwords:	Bishop - limited authority of diocesan bishop to depose another bishop from Holy Orders Professional standards regime - validity - concerned with "fitness" as distinct from "discipline" - appeal and review mechanisms Episcopal standards regime - scope - powers of Episcopal Standards Commission - impact on powers of resignation of diocesan bishop - inconsistent diocesan action The Professional Standards Ordinance 2004 (Diocese of Grafton) - scope - application to former diocesan bishop - extra-diocesan application - "Church worker" - "process failure" - exclusive role of Professional Standards Committee Appellate Tribunal - appellate jurisdiction - professional standards matters Jurisdiction - excess of jurisdiction - constructive failure to exercise jurisdiction - nullity Diocesan ordinances - inconsistency with Canons of General Synod

Legislation Cited:	*Anglican Church of Australia Constitution Act 1902 (NSW)* *Clergy Discipline Ordinance 1966, Diocese of Grafton* *Constitution of the Anglican Church of Australia* *Constitution Alteration (Chapter IX) Canon 2004* *Holy Orders, Relinquishment and Deposition Canon 2004* *Offences Canon 1962* *Special Tribunal Canon 2007* *The Professional Standards Ordinance 2004*
Cases Cited:	*Ex parte Tighe (1858) 2 Legge 1100* *Finance Facilities Pty Ltd v Federal Commissioner of Taxation (1971) 127 CLR 106* *Harrington v Coote (2013) 119 SASR 152; [2013] SASCFC 154* *Harrington v Coote (No 2) [2014] SASCFC 39* *In re Lord Bishop of Natal (1864) 3 Moo PC NS 115* *Kirk v Industrial Court of NSW(2010) 239 CLR 531* *Minister for Immigration and Multicultural Affairs v Bhardwaj (2002) 209 CLR* *Opinion on the Ordination of Women to the Office of Priest Act of the Synod of the Diocese of Melbourne* *Port Macdonnell Professional Fisherman's Association Inc v South Australia (1989) 168 CLR 340* *Ridley v Whipp (1916) 22 CLR 381 at 386* *Sturt v The Right Rev Dr Brian Farran Bishop of Newcastle [2012] NSWSC 400* *Thomson Australia Holdings Pty Ltd v Trade Practices Commission (1981) 148 CLR 150 at 163* *Victoria v Commonwealth (1937) 58 CLR 618* *Wentworth v New South Wales Bar Association (1992) 176 CLR 239*
Category:	Appeal Decision
Parties:	Keith Francis Slater The Diocese of Grafton (see para 36)
Representation:	Keith Slater (Appellant) represented by Carol Webster SC and Mandy Tibbey of Counsel instructed by Stephen Remington of Harris & Company The Diocese of Grafton (Respondent) represented by Chris Erskine SC of Counsel, instructed by Stephen Campbell of Fishburn, Watson & O'Brein

These Reasons are arranged in the following Sections:

DECISION OF THE TRIBUNAL

1 Introduction

1. Keith Francis Slater was ordained as deacon, then priest, in 1975 by the Rt Rev'd John Grindrod; and consecrated as bishop by the Most Rev'd Dr Peter Jensen on 14 November 2003. He was the Bishop of Grafton from then until 17 May 2013 when he resigned from that diocesan office. In September 2013 he moved from Grafton to Tambourine Mountain, Queensland, in the Diocese of Brisbane.

2. Bishop Slater remained a bishop in Holy Orders because his status as a bishop was distinct from any particular office that he held. A diocesan bishop may resign from that office in retirement, or as a step towards assuming office as diocesan bishop elsewhere, or as a step towards taking up an alternative licensed clergy position in his or her original diocese or in another diocese or overseas. There are other possibilities. The Ordinal in the Book of Common Prayer, whose embodied doctrines and principles are retained and approved by s 4 of the *Constitution* of the Anglican Church of Australia (the Church) *,* speaks of entry into the "office and work of a Bishop in the Church of God" at the point of laying on of hands.

3. The *Holy Orders, Relinquishment and Deposition Canon 2004* provides for the voluntary relinquishment of Holy Orders by any person in Holy Orders, including a bishop (s 3). It also permits the bishop of a diocese to depose such a person from Holy Orders where that person consents (s 4). Thirdly, it contemplates a bishop deposing from Holy Orders another bishop "following the sentence of a duly constituted tribunal" (see s 6 and Schedule 4 when read with the definition of "person in Holy Orders" in s 2). "Tribunal" is defined to mean "a tribunal established in accordance with the provisions of Chapter IX of the *Constitution* and includes a body established by canon or by an ordinance of a diocese". None of these events occurred with respect to Bishop Slater because, as will appear, the outcome of the process taken against him did not have his consent and was not a "sentence" in the constitutional sense.

4. On 14 October 2015, Bishop Slater's successor as Bishop of Grafton (the Rt Rev'd Dr Sarah Macneil) by Instrument deposed Bishop Slater "from Holy Orders in the Anglican Church of Australia…in accordance with the recommendation of" the Professional Standards Board of the Diocese of Grafton. The Board and the Bishop each relied upon Grafton's *Professional Standards Ordinance 2004* (the "*2004 Ordinance"*). It may be inferred that Bishop Macneil relied upon and adopted the Report and recommendation of the Board. In this Tribunal, Keith Slater challenges the validity of that deposition. Alternatively, he seeks the imposition of a less punitive sanction that would permit him to remain a priest of the Church.

2 The Professional Standards Ordinance 2004

5. The *2004 Ordinance* was Grafton's counterpart of an interlocking set of ordinances that have been passed in varying forms by many of the Australian dioceses as one means of addressing fitness issues relating to sexual abuse by clergy and laity. The ordinances had been recommended by resolution of the General Synod (Resolution 54/04).

6. It will be necessary later in these reasons to give detailed consideration to the purpose and scope of the *2004 Ordinance*, but (speaking generally) it provides for:
    - approval by Synod or Bishop-in-Council of a Code of Conduct for observance by "Church workers" in the diocese
    - approval by Synod or Bishop-in-Council of a Protocol for implementation in relation to "information"

- appointment by Bishop-in-Council of a Professional Standards Committee ("PSC") armed with investigative and other functions, including sole authority formally to initiate an inquiry into the fitness of a "Church worker" by a Professional Standards Board ("PSB")
- appointment by Bishop-in-Council of a panel from which a Professional Standards Board can be constituted to which questions of the fitness of a "respondent" may be referred by the Professional Standards Committee for investigation, determination and recommendation as to outcome
- empowering a "relevant Church authority" (the diocesan Bishop in most cases) to give effect to the recommendation, including by deposition from Holy Orders.

7. The *2004 Ordinance* came into effect on 27 June 2004. Unlike the ordinances of some other dioceses, no mechanism for review was enacted beyond what may be implicit in the fact that the "relevant Church authority" (the Bishop of the Diocese) was "empowered" (as distinct from "required") to give effect to any recommendation by the Professional Standards Board or its equivalent in another diocese (see s 71).

8. Putting aside for the moment all questions about the reach of the *2004 Ordinance* over bishops, the Synod of the Diocese of Grafton had undoubted power to enact that ordinance. It was a law for the "order and good government of" the Church within the diocese (see *Anglican Church of Australia Constitution Act 1902 (NSW),* s 2; *Constitution,* s 51). Challenges to the validity of roughly counterpart ordinances passed respectively by the Synods of the Dioceses of Newcastle and of The Murray were rejected by the Supreme Court of New South Wales in *Sturt v The Right Rev Dr Brian Farran Bishop of Newcastle* [2012] NSWSC 400 (Sackar J) ("**Sturt**") and by the Supreme Court of South Australia in *Harrington v Coote* (2013) 119 SASR 152; [2013] SASCFC 154 (Kourakis CJ, Gray J and Peek J) ("**Harrington**").

9. *Sturt* related to the deposition from Holy Orders of two priests licensed and resident in the Newcastle diocese and *Harrington* related to the suspension from duties and office of a priest licensed and resident in The Murray diocese. Whether, as to scope or validity, the situation differs as regards a diocesan Bishop deposing from Holy Orders another bishop who may be residing in another diocese, perhaps even serving as its diocesan bishop or exercising clerical ministry with the licence of its diocesan bishop, will be considered later.

10. The reasoning in *Harrington* is critical to a proper understanding of the function of the *2004 Ordinance* and (as will later appear) bears upon the competing arguments both about the proper exercise of jurisdiction by the Grafton authorities and the jurisdiction of this Tribunal to entertain this appeal.

11. One key submission on behalf of the Rev'd Coote in *Harrington* was that the jurisdiction of The Murray's Professional Standards Board involved "disciplinary" proceedings, with the consequence that the diocesan Synod lacked power to enact the *Professional Standards Ordinance* because of an asserted incompatibility with the disciplinary regime involving priests that is recognised by and entrenched in the *Constitution.* The submission based itself, in part, on the fact that the questions of unfitness raised in 2007 against Mr Coote stemmed from sexual misconduct that had allegedly occurred between 1995 and 1998 and (subject to a complex limitation argument) could therefore have been made the subject of charges brought under The Murray's *Ecclesiastical Offences Ordinance*.

12. The three judges constituting the Full Court of the Supreme Court of South Australia rejected this submission. Kourakis CJ (with whom Peek J agreed) recognised that the subject matter of the inquiry authorised by the *Professional Standards Ordinance* was wide enough to include conduct which might have been the subject matter of a disciplinary charge against a priest over which diocesan tribunals are given jurisdiction by the *Constitution* (at [43]). But it did not follow, he held, that the *Constitution* impliedly precluded the diocesan Synod from conferring the very different type of jurisdiction that it did under The Murray's *Professional Standards Ordinance* (see [44]-[50]). That ordinance was relevantly concerned with supervising the **fitness** of clergy to continue to exercise their offices ([50]-[53]). Detailed reasons for this disciplinary/fitness distinction are given at [54] ff of the Chief Justice's reasons. In particular, at [67] he adopted paras [148]-[154] of the reasons of, Gray J, the third member of the Court (see below), as demonstrating that "*there is a clear difference in purpose between 'disciplinary' and 'fitness' proceedings".*

13. Gray J dealt with this topic at much greater length (see [144]-[174]). It is unnecessary to set out the entire passage. But it includes the following paragraphs which the other two judges had expressly adopted:

"*148. The Professional Standards Ordinance 2007 addresses,* inter alia, *the fitness of a member of the clergy to remain in office and whether conditions or restrictions should be imposed on that member. The Ordinance does not provide for the hearing of charges of offences. The Ordinance is not concerned with punishment. The conduct of an inquiry or investigation by the Professional Standards Board does not involve the determination of a charge. The board is not concerned to determine whether any particular offence occurred. The nature of the Board's investigation is into fitness to hold office. These considerations distinguish the Professional Standards Ordinance 2007 from the Ecclesiastical Offences Ordinance* [of The Murray] *that addresses disciplinary matters….*

150. Mr Coote contended that the Professional Standards Ordinance 2007 purported to authorise inquiries into and making of findings concerning breaches of discipline. In my view, this submission should be rejected. The Board's obligation is to consider fitness to hold office having regard to all relevant facts and circumstances. These may include the past conduct of a priest if relevant to fitness to hold office."

14. Helpfully, Kourakis CJ described the purpose of the Ordinance as being "to protect the standing of the Church and the welfare of parishioners by ensuring that all church workers are fit for the office they hold" (at [67]). Gray J said that the processes identified in the Ordinance were "directed to the ensuring of pastoral protection for current and future members of the Church from sexual harassment, exploitation, inappropriate gratification and related harms" (at [171]).

15. These conclusions by the Court appear to be entirely congruent with the submissions advanced on behalf of the then Primate, The Most Revd. Dr Phillip Aspinall, who had been granted leave to intervene in the *Harrington* proceedings.

16. In *Sturt*, Sackar J had also rejected a submission that those portions of the Diocese of Newcastle's Professional Standards Ordinance that armed its Professional Standards Board with jurisdiction to recommend various actions against a member of the clergy were inconsistent with the Constitution for seeking impermissibly to usurp the "disciplinary functions of the constitutionally recognised tribunals in Chapter IX of the Constitution" (at [166]).

17. At one point in his Honour's reasons he described the Board's role as that of "exercise[ing] an evaluative discretionary power in the protection of the public to determine **present unfitness**" (at [328], emphasis added). The Newcastle Board was found to have acted within its jurisdiction (see at [348]). This notwithstanding, there are statements in Sackar J's reasoning in *Sturt* that use the term "disciplinary" with reference to the role of Newcastle's Professional Standards Board (see at [3], [131], [191], [192], [195], [341]). In our respectful opinion, these passages need to be viewed with caution, especially since the later Full Court decision in *Harrington* must be regarded as more authoritative in law.

18. There is also risk of confusion unless it is clearly recognised that, while processes concerned with fitness to practice in professions such as medicine and law are often called "disciplinary" (eg *Wentworth v New South Wales Bar Association* (1992) 176 CLR 239 at 250-1) their function is essentially protective and not punitive. The approach in such cases may be analogous to professional standards matters in the Church although the Church's different constitutional framework and the specific definitions of "discipline" in s 74 (9) of the Constitution need to be kept in focus. It will always be safer to pay particular attention to the language of the professional standards ordinances and canons, viewed through the prism of *Harrington.*

19. As to the purpose of the professional standards regime, neither *Sturt* nor *Harrington* appears to have been cited in the Grafton PSC submissions concerning Bishop Slater, or in the Grafton PSB's reasons. (*Sturt* was, however, cited by the Chair of the Grafton PSB on a different procedural matter in a ruling on evidence dated 2 March 2015.) Before this Tribunal, the appellant has submitted that the Board's reasons indicate that it misconstrued its own jurisdiction because it considered itself to be exercising a "disciplinary" as distinct from a "fitness-assessing" role. We shall return to this issue in Part 6 of these reasons.

20. It will be seen that the correct characterisation of the jurisdiction created by the professional standards regime impacts on the issues debated before this Tribunal at several points, including issues touching the very existence of appellate jurisdiction in the present matter.

3 The proceedings in Grafton leading to Bishop Slater's deposition from Holy Orders

21. As indicated, Bishop Slater resigned as Bishop of Grafton on 17 May 2013 and he moved into retirement in the Diocese of Brisbane in September of that year.

22. He gave evidence before the Royal Commission into Institutional Responses to Child Sexual Abuse on 18 November 2013.

23. On 12 December 2013, the Grafton PSC referred to the Grafton PSB the following questions:

> *Whether temporarily or permanently, Bishop Keith Slater (the Respondent) is fit to hold a particular or any office, licence or position of responsibility in the Anglican Church or to be or remain in Holy Orders or in the employment of a Church Body; or in the alternative*
>
> *Whether in the exercise of Bishop Slater's ministry or employment or in the performance of any function, Bishop Slater should be subject to certain conditions or restrictions.*

The letter indicated that the Grafton PSC had relied upon s 54 of the *2004 Ordinance.*

24. Nine allegations said to justify answering either question in the affirmative were set out. Their terms are significant to the jurisdictional issues considered below both as regards the framing of the alleged failings by Bishop Slater and their dates:

> *1. In 2006, having received twenty historical complaints of child sexual abuse related to the North Coast Children's Home, failed to cause those complaints to be dealt with in accordance with the Anglican Diocese of Grafton Professional Standards Ordinance 2004 and the Professional Standards Sexual Abuse Protocol.*
>
> *2. Between 31st December 2005 and 1st January 2013, as the organisational head of the Anglican Diocese of Grafton, and having approved financial settlement of thirty-nine claims relative to abuse at the North Coast Children's Home and having received a further five claims of the same or similar nature, did refuse to cause those claims to be treated in the same or a similar manner.*

3. Between 31st December 2005 and 1st January 2013, as the organisational head of the Anglican Diocese of Grafton, failed to discharge a moral obligation to offer reasonable pastoral support and/or counselling to alleged victims of historical physical and psychological abuse at the North Coast Children's Home.

4. In 2011, having directly received written complaints by [X] and [Y] *alleging historical sexual abuse failed to cause those complaints to be dealt with in accordance with the Anglican Diocese of Grafton Professional Standards Ordinance 2004, and failed to inform New South Wales Police.*

5. Between 31st December 2005 and 1st January 2013 failed to keep confidential files relating to sexual abuse allegations in accordance with confidentiality and privacy requirements.

6. On 14th August, 2007, wrote a letter to Richard 'Tommy' Campion, an alleged victim of sexual, physical and psychological abuse at the North Coast Children's Home, which letter was wholly inappropriate and was capable of being regarded by a reasonable person as offensive.

7. Between 31st December 2005 and 1st January 2013, failed to ensure observance of the Sydney Pastoral Care and Assistance Scheme.

8. Between 31st December 2005 and 10th May, 2013, by omission, failed to honour a moral obligation to accurately report to inquiry by the Primate of the Anglican Church of Australia as to details of the conduct of the Grafton Diocese in respect to allegations of sexual, physical and psychological abuse at the North Coast Children's Home.

9. Between 1st January 2003 and 18th May 2013, being aware that Reverend Allan Kitchingman had been convicted of sexual offences against a child, and having authority to discipline Reverend Kitchingman, did not commence disciplinary action against him.

25. Bishop Slater sent a lengthy response to the Rev'd Canon Hanger, the Chair of the Grafton PSC. This was later placed before the Grafton PSB.

26. Bishop Slater informed the Diocesan Registrar by letter dated 5 January 2015 that he did not intend to appear at the hearing for reasons primarily related to his health, although he was

happy to respond in writing to any questions that the Board wished to direct to him. On some later occasions he was represented by a solicitor. He provided a lengthy written submission to the Grafton PSB on 21 July 2015.

27. The Grafton PSC was represented by Mr Elliott its Director, and by counsel. Its submission at the end of the proceedings before the Grafton PSB was that deposition from Holy Orders was the appropriate response.

28. The questions were considered and determined by a Professional Standards Board constituted by the Hon Moreton Rolfe QC, the Ven Archdeacon Sally Miller and Mr Phillip Bonser.

29. In about September 2015 the Grafton PSB issued its Report recommending to Bishop Macneil that Bishop Slater be deposed from Holy Orders. The qualified concessions, explanations and character references that had been offered on behalf of Bishop Slater were analysed. There were findings that various "failings" had occurred in the manner that Bishop Slater had (while he was the Bishop of Grafton) managed or responded to complaints of sexual, physical or psychological abuse said to have taken place at the North Coast Children's Home in about 1975. The Report tracked the nine allegations set out above, concluding that each of them had been established, admitted or conceded. Unmoved by Bishop Slater's apologies and his submissions that he had acted on legal advice, with the concurrence of his Bishop - in – Council, and with regard to a financial crisis facing the Grafton Diocese, the Grafton PSB characterised Bishop Slater's neglect in the strongest of terms (see eg *Report*, para 51).

30. Because the issues presently under consideration are all of a jurisdictional nature, it will be unnecessary and inappropriate for the Appellate Tribunal to consider whether the Grafton PSB's determination and recommendation were appropriate or not; nor whether a lesser response than deposition from Holy Orders was called for in all the circumstances. These reasons must not be read as taking a position either way on these questions.

31. Since, however, the following matters bear on the jurisdictional issues that this Tribunal needs to consider, it should be recorded that:

a. all of the findings made against Bishop Slater involved conduct occurring during his term as Bishop of Grafton;

b. none of the allegations involved any sexual misconduct on his part; and

c. with the arguable minor exception considered below at paras 83-94, all of the allegations involved acts or omissions post-dating the commencement of the *2004 Ordinance.*

It will be seen that, in combination, these circumstances created fundamental jurisdictional problems for the Grafton authorities when the actions taken against the former diocesan Bishop come to be analysed by reference to the key definitions in the *2004 Ordinance.* This will be explained in Section 5 of these reasons.

32. A separate matter of a jurisdictional nature that has been raised by the appellant is whether the Grafton PSB approached its task with the proper recognition of the essentially protective and non-disciplinary nature of the proceedings contemplated by the *2004 Ordinance* when viewed in the light of *Harrington*. This will be addressed in Section 6.

33. On 14 October 2015 Bishop Macneil deposed Bishop Slater "from Holy Orders in the Anglican Church of Australia…in accordance with the recommendation of" the Board. The Instrument of Deposition sets out details of Bishop Slater's respective ordinations and consecration. Copy of the Instrument was delivered to the Primate and relevant details were entered into the National Register. The action was announced throughout the Church in Grafton by a Pastoral Letter and a Media Statement. Bishop Slater's "defrocking" received considerable attention in the media.

34. According to s 72 of the *2004 Ordinance*, the effect of deposition from Holy Orders rendered Keith Slater incapable of officiating or acting in any manner as a bishop, priest or deacon of the Church; terminated any right, privilege or advantage attached to those respective offices; deprived Keith Slater from holding himself out to be a member of the Clergy; and rendered him incapable of holding an office in the Church which may be held by a lay person without the prior consent of "the Bishop". (It is unclear whether this last provision means the Bishop of whatever diocese he resides in or the Bishop of Grafton, but nothing turns on this.)

4 The appeal to the Appellate Tribunal

35. On 23 November 2015 Keith Slater's lawyers filed a Notice of Appeal in the Appellate Tribunal. It purported to invoke s 54 (4) of the *Constitution* and challenged the Grafton PSB's recommendation; Bishop Macneil's consequential decision to depose from Holy Orders; and all ancillary determinations made by or on behalf of the Diocese of Grafton leading to the deposition. The appellant contends that he is entitled to appeal to the Appellate Tribunal by way of a hearing de novo. He seeks orders that include the setting aside of the recommendation of the Grafton PSB and the Instrument of Deposition; as well as a declaration that he is entitled to remain in Holy Orders as a bishop of the Church. Alternatively, he seeks an order that he be entitled to remain in Holy Orders as a priest of the Church, and other orders. (The original Notice of Appeal was later supplemented as to its grounds of appeal.)

36. At a directions hearing before the President on 25 February 2016 the legal representatives from Grafton indicated that if Bishop Macneil was to be a party to the appeal she would prefer to be, in effect, a nominal party in the sense that she would not be personally taking an active role in the proceedings and she would abide the outcome. This proposal was predicated upon there being a body such as the "Diocese of Grafton" or its Professional Standards Committee that would conduct the appeal through lawyers. The appellant's lawyers accepted this approach. Accordingly, these reasons refer compendiously to "Grafton" as the respondent to this appeal.

37. Without suggesting that any disciplinary charge could or should have been brought against Bishop Slater in the Special Tribunal under the *Offences Canon 1962* or any other Canon of General Synod, Grafton correctly points out that this appeal is not brought against any determination of the Special Tribunal.

38. Neither does Grafton suggest that any charge relating to an ecclesiastical offence could or should have been laid against Bishop Slater in Grafton's "diocesan tribunal" constituted under its *Clergy Discipline Ordinance 1966*.

39. The *2004 Ordinance* does not in terms confer any right of appeal to this Tribunal. Nor does it offer any express mechanism for review (in contrast to the corresponding ordinance of some dioceses). The appellant nevertheless contends that an appeal lies, in effect by way of implication stemming from either (a) the interaction between the *2004 Ordinance* and Grafton's *Clergy Discipline Ordinance 1966* as amended; or (b) the interaction between the *2004 Ordinance* and s 54 (4) of the *Constitution*. Some of the appellant's contentions involve the proposition that the Grafton PSB was a "diocesan tribunal" and that its recommendation was a "sentence" for the purposes of the *Constitution*.

40. Grafton has submitted that no appeal lies to this Tribunal.

41. In the circumstances, this Tribunal must satisfy itself that it has appellate jurisdiction before it could embark upon any hearing as to the merits, or any independent consideration as to whether deposition from Holy Orders was an appropriate response to the matters proved. It does not follow that this Tribunal can or should close its eyes to matters going to the legal efficacy of the action taken by Grafton against its former Bishop if that is pertinent to understanding exactly what has happened and considering whether this Tribunal has appellate jurisdiction to affirm, correct or vary it.

5 Did the 2004 Ordinance by its own terms confer jurisdiction on Bishop Macneil to depose Bishop Slater from Holy Orders?

(a) *Importance of this question*

42. It is necessary to understand what, in jurisdictional terms, happened in the proceedings against Bishop Slater in Grafton. If those proceedings produced a legal nullity, because jurisdictional deficits rendered null and void the outcome of the processes actually taken against Bishop Slater, then (whatever additional remedies may be available to Bishop Slater) there would be nothing in law for him to appeal against in this Tribunal. If this Tribunal arrived at such a conclusion as to the legal issues in the course of considering its own jurisdiction, then it may be expected that expressing and explaining it would be welcomed and accepted in view of the justice of the situation, the costs already invested in the proceedings here and below, the impact of the action already taken with regard to the National Register, the desirability of avoiding further litigation in the secular courts, and the

theological principles discussed by St Paul in 1 *Corinthians* 6. See also *Sturt* at [209], *Harrington* at [85].

43. Lack of jurisdiction on the part of the Grafton authorities that proceeded against him is only one of the questions that the appellant wishes to agitate in this Tribunal. But it is logically prior to all other issues, and may well go to the jurisdiction of this Tribunal. As Kourakis CJ observed in *Harrington* at [80], "a decision [of a Church tribunal relating to the office of a licensed priest in the Church] which departs from the law, as ultimately determined by a court, can have no legally binding effect". There may be no power and no point in this Tribunal embarking on the hearing of the factual and discretionary issues foreshadowed in the Notice of Appeal, or even contemplating affirming or varying the Grafton PSB's determination and recommendation or Bishop Macneil's Instrument of Deposition, if the whole proceedings promoted against Bishop Slater were themselves misconceived in law or miscarried on a jurisdictional basis.

44. Were he to challenge what was done to him in the Supreme Court of New South Wales, Keith Slater would have undoubted standing to do so, at the very least on jurisdictional grounds (see *Sturt* at [142], [146]; *Harrington* at [19]-[25]).

45. Jurisdictional error may occur when a body or tribunal embarks upon a proceeding or imposes a particular remedy or sanction without authority to do so. But it may also be demonstrated by showing that the body or tribunal has misconceived the nature of the function it was established to perform: *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531 at 573-4. The legal consequence of such error is that the decision of the body or tribunal is a nullity, an event with no legal consequences.

46. This does not mean that the actors need to await some order from a Court or Tribunal so declaring. According to Gaudron and Gummow JJ (McHugh J agreeing) in *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597 at 614-5 (footnote omitted):

> *"There is…no reason in principle why the general law should treat administrative decisions involving jurisdictional error as binding or having legal effect unless and until set aside. A decision that involves jurisdictional error is a decision that lacks legal*

foundation and is properly regarded, in law, as no decision at all. Further, there is a certain illogicality in the notion that, although a decision involves jurisdictional error, the law requires that, until the decision is set aside, the rights of the individual to whom the decision relates are or, perhaps, are deemed to be other than as recognised by the law that will be applied if and when the decision is challenged."

47. When Bishop Macneil deposed Bishop Slater, she purported to invoke the *2004 Ordinance*. No one has suggested that her status as a diocesan bishop carried any inherent power to depose another bishop (*a fortiori* one then residing outside her diocese). See also *In re Lord Bishop of Natal* (1864) 3 Moo PC NS 115; 16 ER 43. Nor did the Grafton PSB or Bishop Macneil invoke any jurisdiction derived from a Canon of General Synod.

48. On the other hand, the absence of inherent episcopal authority or the presence of an inconsistent provision of the *Constitution* or of an operative Canon could conceivably impact upon the validity of the *2004 Ordinance* if, on its true construction, it purported to authorise the deposition from Holy Orders of another bishop. Alternatively, such matters may offer a principled basis for reading down the *2004 Ordinance* were the Tribunal to be faced with some ambiguity as to its meaning and scope. These matters will be addressed in Section 7.

49. Regrettably, neither the Report of the Grafton PSB nor Bishop Macneil's Instrument of Deposition indicate why jurisdiction to proceed against Bishop Slater on the basis of the nine allegations set out above was asserted, beyond invoking the *2004 Ordinance*. On the face of the record, no submissions on this topic were provided to the Grafton PSB from either the Grafton PSC or counsel briefed on its behalf.

50. This is not to imply that a body's failure to spell out (correct) jurisdictional bases for action is fatal, provided that they can be demonstrated when questioned. Nevertheless, a provisional concern that there may be significant jurisdictional gaps in the present matter led the President to invite Grafton's lawyers to file and serve a document addressing these matters for the assistance of the Appellate Tribunal. A document was provided and supplemented at the hearing that took place on 20 November 2016.

51. The fulsome, though qualified, concessions as to the facts on Bishop Slater's behalf before the Grafton PSB do not enable Grafton to avoid the need to address jurisdictional issues. Bishop Slater conceded most of the facts in the nine allegations "as historical events" and "within their historical context". He offered extensive apologies and made reference to his medical condition. His letter of 21 July 2015 may have recognised that deposition from Holy Orders was an available outcome although he disputes this interpretation in his submissions. He certainly urged the Board to deal less harshly with him than recommending deposition. But the critical point is that jurisdiction cannot be conferred by oversight or consent (*Ex parte Tighe* (1858) 2 Legge 1100; *Ridley v Whipp* (1916) 22 CLR 381 at 386; *Thomson Australia Holdings Pty Ltd v Trade Practices Commission* (1981) 148 CLR 150 at 163; *R v Halmi* (2005) 62 NSWLR 263 at 273, 275).

52. There is one rider to the statement that the Grafton PSB appears not to have addressed the topic of its own jurisdiction over Bishop Slater. The Board had been informed that, shortly before the end of Bishop Slater's diocesan episcopacy, he and the then Registrar of the Diocese, Mrs Hywood, sent a letter to the Episcopal Standards Commission detailing adverse information about Bishop Slater's handling of various legal claims relating to sexual abuse at the North Coast Children's Home. In Section 7 (b) of these reasons, we shall examine whether this letter engaged the jurisdiction of the Episcopal Standards Commission under the *Episcopal Standards Canon 2007*; and whether in some way this impacted upon whatever jurisdiction over Bishop Slater the Grafton PSB might otherwise have possessed at the time it embarked on its endeavours.

53. It would appear that the Chair of the Grafton PSB pondered the same question privately at some stage. A document in the file of papers provided to this Tribunal by Grafton is called *DRAFT CONSIDERATION OF JURISDICTION: 1 APRIL 2015*. It states:

> *" STRICTLY PRIVATE AND CONFIDENTIAL*
>
> *The PSC of the Diocese has referred certain questions relating to Bishop Keith Slater's conduct, whilst he was the Bishop of the Anglican Diocese of Grafton, for consideration by the Diocesan PSB, pursuant to the Diocesan Professional Standards Ordinance 2004.*
>
> *The Ordinance defines 'Church Authority' as 'the Bishop or a person or body having administrative authority of or in a Church body to license, appoint, authorize, dismiss or*

suspend a Church worker'. A 'Church worker' is defined in a number of ways, but, relevantly for present purposes as 'a member of the clergy', which is defined as 'a person in Holy Orders'.

The definition of 'Church worker' concludes: 'but excludes a bishop subject to the jurisdiction of the Special Tribunal of the Church'.

Bishop Slater resigned as the Bishop of Grafton on 17 May 2013, although it appears that he did not seek to renounce or resign his bishop's orders. The question raised is whether he remains within the exclusion in the Ordinance definition, such that the matter cannot be dealt with by the provisions of the Ordinance, but should be considered by the Special Tribunal of the Church.

Section 53 of the Constitution…provides for the Special Tribunal. Section 56 sets out the requirements for it, sub-section (6) stating:

'The Special Tribunal shall have jurisdiction to hear and determine charges against any member of the House of Bishops….' Certain others are mentioned, but they are not presently relevant.

Section 16 provides that the House of Bishops shall be [etc]*.Thus while Bishop Slater held the position of the Bishop of Grafton he was a member of the House of Bishops subject to the Episcopal Standards Canon 2007 and the Episcopal Standards Commission (ESC) appointed under the Special Tribunal Canon 2007.*

Apparently, the Acting Registrar of the Diocese, Ms Hywood, and Bishop Slater wrote to the ESC on 15 May 2013 enclosing a copy of Ms Hywood's complaints about the Bishop. It seems extraordinary that Bishop Slater should have signed that letter. The ESC responded on 16 May 2013 acknowledging receipt of the letter of 15 May 2013. The Director of the ESC is making copies of both letters available to me.

On 17 May 2013, Bishop Slater resigned and, therefore, ceased to be a member of the House of Bishops.

On 17 June 2013, the director of the ESC wrote to the Administrator of the Diocese advising that the ESC met on 15 June 2013, noted that Bishop Slater had resigned on 17 May 2013 and that the resignation meant that 'has deprived the ESC of its jurisdiction.' The letter concluded that the ESC 'regrets that it cannot take any action in regard to Ms Hywood's report for lack of jurisdiction.' I have spoken to the Director. She has advised me that the ESC did not at that meeting, which was first held after the exchange of

correspondence on 15 and 16 May 2013, consider the complaint other than to determine that as Bishop Slater had resigned as diocesan bishop and so the ESC had no jurisdiction to consider it. Nor did it subsequently re-visit the matter. In these circumstances clause 16 (d) of the Episcopal Standards Canon does not apply.

The matter was then taken up by the Diocese, although there was some delay as a consequence of the hearing of matters affecting the Grafton Diocese and Bishop Slater by the Royal Commission. However, that does not in my view alter the fact that the ESC had no jurisdiction over Bishop Slater."

54. According to the Index provided by Grafton (the authorship being undisclosed):

"This paper was prepared by the Professional Standards Board in anticipation of a question regarding jurisdiction. No question regarding jurisdiction was raised and this document was not finalised or tabled."

55. It will be necessary, later in these reasons (Section 7 (b)), to consider whether the ESC was in fact correct in perceiving itself to have had no power to take any action with respect to Bishop Slater after he resigned as Bishop of Grafton. Also, whether (in effect) the learned author of the *DRAFT CONSIDERATION*, was correct in his provisional analysis of the non-application of s 16 (d) of the *Episcopal Standards Canon*.

56. What is important to note at this stage is that it could not be suggested, and was not suggested in the DRAFT CONSIDERATION or before us, that any absence of jurisdiction under the *Episcopal Standards Canon 2007* could boost the jurisdiction of the Grafton PSB with respect to Bishop Slater and the nine allegations levelled against him by the Grafton PSC. If the author of the statement in the Index is suggesting that the failure on all sides to raise or debate the question of jurisdiction meant that it could be passed over, then, with respect, he or she is mistaken in point of principle and authority. It was the primary duty of the Grafton authorities contemplating deposition from Holy Orders to satisfy themselves as to their authority to exercise what the Privy Council described as "coercive legal jurisdiction" in *In re Lord Bishop of Natal* (1864) 3 Moo PC NS 115 at 155; 16 ER 43 at 58.

57. It should also be noted that the author of the *DRAFT CONSIDERATION* adverted to the possible impact of the concluding words of the definition of "Church worker" in the *2004 Ordinance* as raising the additional question whether, after his resignation as Bishop of Grafton, Bishop Slater "remain[ed] within the exclusion in the Ordinance definition, such

that the matter cannot be dealt with by the provisions of the [2004] Ordinance". As will appear in Section 5 (b) below, we consider that the final words of the definition of "Church worker" had critical impact on the jurisdiction of the Grafton PSB, not that they are the only source of a jurisdictional deficit touching Bishop Slater's deposition in reliance on the *2004 Ordinance*. It is, to say the least, unfortunate that the matter was not further addressed in 2015 before Bishop Slater's deposition from Holy Orders was recommended, determined and announced. It is important for a body such as the PSB which has powers to make recommendations of significant consequence to satisfy itself that it has jurisdiction and, if there is any doubt, to require those appearing before it to address the issue. But there is nothing in the Record to suggest that the matter was taken any further than the private, tentative note in the *DRAFT CONSIDERATION* quoted above.

(b) *Key provisions of the 2004 Ordinance*

58. Section 20 (1) of the *2004 Ordinance* states that the powers and duties of the Grafton PSC include the power to receive "information" and "to act on information in accordance with the provisions of this Ordinance…." Subsection (2) defines the scope of the powers and duties expansively, but always by reference to a "Church worker".

59. Section 25 states that:

> *"Subject to this Ordinance, where the PSC considers that the subject matter of information constitutes examinable conduct it shall investigate the information."*

60. Section 37 relevantly states that "*subject to the provisions of this Ordinance the function of the Board is to inquire into and determine a question or questions referred to it pursuant to section 54".*

61. Section 54 relevantly states that *"after investigation in accordance with section 25 … the PSC … may refer to the Board"* [questions as to] *the fitness of a Church worker … to hold a particular or any office … in the Church or to be or remain in Holy Orders…."*

62. Section 38 of the *2004 Ordinanc*e states that:

> *"The Board has jurisdiction to exercise its functions in respect of a Church worker:*
>
> *(a) resident or licensed in the diocese, or engaged by a Church authority; and*
>
> *(b) not resident or licensed in the diocese nor engaged by a Church authority but whose conduct giving rise to the reference is alleged to have occurred in the diocese or whose omission giving rise to the reference is alleged to have occurred when the Church worker was resident or licensed in the diocese or was engaged by a Church authority."*

63. Five key definitions in section 2 (1) of the *2004 Ordinance* explicate and limit the respective functions of the PSC in investigating (see s 25) and the PSB in exercising its functions on a reference (see s 54). So far as relevant they state:

> *" '**Church authority'** means the Bishop…"*
>
> " '***Church worker'*** *means a person who is or who at any relevant time was:*
>
> (a) *a member of the clergy; or*
>
> (b) *a person employed by a Church body; or*
>
> (c) *a person holding a position or performing a function with the actual or apparent authority of a Church authority or Church body*
>
> *but excludes a bishop subject to the jurisdiction of the Special Tribunal of the Church."*
>
> *"'**examinable conduct'** means conduct wherever or whenever occurring the subject of information which, if established, might call into question:*
>
> *(a) the fitness of a Church worker … to hold a particular or any church office … in the Church or to be or remain in Holy Orders ….*
>
> *(b) whether, in the exercise of a Church worker's ministry or employment, or in the performance of any function, the Church worker should be subject to certain conditions or restrictions."*
>
> *" '**information'** means information of whatever nature or from whatever source relating to:*
>
> *(a) alleged conduct of a Church worker wherever or whenever occurring involving sexual harassment or assault, or sexually inappropriate behaviour;*

(b) alleged inappropriate or unreasonable conduct or omission of a Church worker who had knowledge of conduct of another Church worker involving sexual harassment or assault, or sexually inappropriate behaviour; or

(c) an alleged process failure."

*" '**process failure'** means the failure of a Church body or Church authority prior to this Ordinance coming into effect to deal appropriately with or to investigate matters referred to in paragraphs (a) or (b) of the definition of information."*

64. In his Notice of Appeal and written submissions, the appellant squarely raised the point that Bishop Macneil lacked power to depose him from Holy Orders unless with his consent or pursuant to a sentence by a tribunal duly constituted under the Constitution, ie on the basis of a finding that he was guilty of an ecclesiastical offence. One variant of this contention is the submission that, since the Grafton PSB and Bishop Macneil have purported (albeit mistakenly) to exercise "disciplinary" jurisdiction over the appellant, the appellant has a right to appeal to this Tribunal in a matter of "discipline" (cf *Constitution*, s 54 (4)) because, in effect, a "sentence" of deposition was pronounced by a "diocesan tribunal" (cf *Constitution*, s 57 (2), fifth paragraph).

65. The appellant has also raised a (narrow) jurisdictional complaint in that some of the claims relating to the North Coast Children's Home went beyond claims of **sexual** abuse by a Church worker. In all the circumstances, it will be unnecessary to consider this particular matter.

(c) Analysis of the jurisdictional issues arising under the terms of the 2004 Ordinance

66. In considering the jurisdictional issues confronting both the Grafton authorities and this Tribunal it is important to remember that the entire focus of the Grafton proceedings was upon the conduct of Keith Slater while he was Bishop of Grafton and that there was never any suggestion of sexual misconduct on his part.

67. At the risk of oversimplification, the potential gaps in jurisdiction affecting the entirety of the proceedings that took place in Grafton turn on at least two main problems:

- it was relevantly necessary to show that Bishop Slater was a "Church worker" as defined, but he was not;

- to engage the definition of "process failure" on Bishop Slater's part it was necessary to establish some failure on his part that occurred **prior to** the *2004 Ordinance* coming into effect, but that was neither attempted nor established.

68. *Keith Slater was not a Church worker at the relevant time both having regard to the terms of the nine allegations of unfitness and generally:* Most of the nine allegations were framed without identifying any actor other than Bishop Slater. Senior counsel for Grafton has nevertheless invited this Tribunal to read them as if they also contained implicit references to three unnamed yet identifiable former Church workers (one of them being the Rev'd Allan Kitchingman) whose alleged or proven sexual offences against children at the North Coast Children's Home in the 1970s should have been more vigorously addressed by Bishop Slater when he was the Bishop of Grafton. For present purposes, we are prepared to read the allegations this way, although we would encourage those involved with administration of the professional standards regime to more clearly identify (in the light of the definitions discussed below) the jurisdictional bases upon which fitness questions are referred to a professional standards board.

69. What is, however, critical is that the concluding words of the definition of "Church worker" operated to exclude Bishop Slater from the relevant jurisdiction of the Grafton PSB. He was not a "Church worker" at the "relevant time", namely the period when he was the Bishop of Grafton because this was the period in which the alleged conduct, omission or failure occurred and during this period he was undoubtedly subject to the jurisdiction of the Special Tribunal (see *Constitution,* s 56(6) and the *Offences Canon 1962*).

70. In a written submission provided to this Tribunal on 18 November 2016 Grafton sought to meet this point in two overlapping ways.

71. First, as will be discussed in Section 7 (b), and as noted by the Chair of the Grafton PSB in the *DRAFT CONSIDERATION* set out above, the Episcopal Standards Commission formed the view that Bishop Slater's resignation had deprived it of jurisdiction to consider the information about his conduct while Bishop of Grafton. According to Grafton, this meant that the appellant was not subject to the jurisdiction of the Special Tribunal. Second, the Special Tribunal had no jurisdiction over the appellant once he had resigned because its jurisdiction to hear and determine charges under s 56 (6) of the *Constitution* and s 2 of the

Offences Canon 1962 is confined to any member of the House of Bishops and any bishop assistant to the Primate in his capacity as Primate.

72. The two submissions really merge into one. Although the appellant contends otherwise in one variant of his submissions, let it be accepted that, after he resigned his see, the appellant ceased to be a Bishop who could be charged before the Special Tribunal. But the jurisdictional problem for Grafton lies in the language chosen in the *2004 Ordinance* to define the powers and duties of its PSC and PSB with respect to the "information" capable of being "examinable conduct". As indicated, s 25 confines the PSC to the investigation of information constituting examinable conduct. And "examinable conduct" speaks of conduct which, if established, might call into question "the fitness of a Church worker" to do various things.

73. As is plain from its opening words, s 38 of the *2004 Ordinance* gave the Grafton PSB jurisdiction "in respect of a Church worker" and none other. Whether, in the context of the present form of the 2004 Ordinance, Bishop Slater was a Church Worker or not after his retirement was irrelevant to the subject conduct in which he is alleged to have engaged while he was the Bishop of Grafton.

74. In addition, neither sub-section (a) or (b) of section 38 were satisfied when the Grafton PSC referred the questions to the Grafton PSB and the Grafton PSB embarked upon its inquiry. Section 38 (a) did not apply because Bishop Slater was not then resident or licensed in the Grafton Diocese or engaged by a Church authority of the Diocese. Section 38 (b) did not apply because the conduct giving rise to the reference did not occur "when the Church worker was resident or licensed in the diocese or was engaged by a Church authority", once again because Bishop Slater, the respondent, was not a "Church worker" when he resided in Grafton as its Bishop.

75. Section 38 (a) and (b) of the *2004 Ordinance* when read together require (a) to be read in the present, ie as requiring the relevant Church worker to be resident or licensed in the diocese, or engaged by a (diocesan) Church authority when (and arguably so long as) the Grafton PSB asserted jurisdiction over the respondent. It is (b) that provides limited retrospective and extra-territorial extension to the "jurisdiction" of the Board, but it remains tied to the definition of "Church worker". Under each limb there is a diocesan nexus thereby satisfying

the *Constitution's* requirement that a diocesan synod legislate in respect of matters that are "for the order and good government of [the] Church within the diocese". As Gray J states in *Harrington* (at [156]):

> *"A diocese cannot legislate upon matters relating to the order and good government of the Anglican Church as a whole, or the order and good government of the Anglican Church within another diocese."*

76. But whatever its territorial or temporal application, s 38 and the other provisions quoted above (with the exception of the definition of "process failure") require in terms that the whole focus is upon the conduct of a "Church worker". This brings matters back to the concluding words of the definition of that expression, which operate to exclude the conduct of the diocesan bishop given that he was subject to the jurisdiction of the Special Tribunal while he occupied that office.

77. *The conduct alleged and established against Bishop Slater did not relate to "an alleged process failure"*: Part (c) of the definition of "information" was not engaged because all of the alleged failings occurred **after** the *2004 Ordinance* came into effect. With the partial exception of the Kitchingman allegation (discussed below), the dates assigned for the alleged failings were all from 2006 onwards.

78. *The Kitchingman findings addressed in the ninth allegation:* The Grafton PSB concluded that Bishop Slater's failings with regard to Mr Kitchingman were alone sufficient to merit deposition from Holy Orders. We read this as focussing entirely on the ninth allegation. It would appear that this conclusion was affected by jurisdictional error additional to the matters already identified.

79. The ninth allegation averred:

> *Between 1st January 2003 and 18th May 2013, being aware that Reverend Allan Kitchingman had been convicted of sexual offences against a child, and having authority to discipline Reverend Kitchingman, did not commence disciplinary action against him.*

80. The former date seems to have been chosen because Mr Kitchingman was convicted on a plea of guilty and sentenced in late 2002. His sexual abuse offence occurred in about 1975 at the North Coast Children's Home. After serving an 18 month non-parole period of imprisonment he returned to live within the Diocese of Newcastle where he had previously resided for some years. 18 May 2013 was the date when he was deposed from Holy Orders by Bishop Macneil.

81. As with the other eight allegations, the form of the Kitchingman allegation did not attempt to engage with the jurisdictional criteria of the *2004 Ordinance*. An identified jurisdictional basis for action has therefore to be constructed *ex post*. Here the critical definitions with respect to Bishop Slater were "Church worker", "information" and "process failure".

82. Nothing more need be said on the topic of Bishop Slater not being a Church worker. But this alone meant that the Kitchingman allegations did not engage paras (a) or (b) of the definition of "information".

83. As regards para (c), the definition of "process failure" was not engaged either, given that Grafton authorities relied exclusively on conduct that Bishop Slater should have taken against Mr Kitchingman under the *2004 Ordinance* whereas the definition of "process failure" confines itself to failures prior to that ordinance coming into effect. The only case that was run and purportedly established against Bishop Slater before the Grafton PSB related to action that in some unclearly defined way Bishop Slater might have initiated against Mr Kitchingman, invoking the professional standards regime. Nothing has been raised to suggest that action against Mr Kitchingman under Grafton's *Clergy Discipline Ordinance 1966* was open to Bishop Slater at any time during his diocesan episcopacy, possibly because (among other reasons) Mr Kitchingman was not licensed or resident in Grafton during that period: see the definition of "member of the clergy to whom this Ordinance applies" in s 3 of the *Clergy Discipline Ordinance*.

84. There would appear to be additional jurisdictional difficulties with regard to the Kitchingman "information" said to have been the basis of "examinable conduct". The relevant facts appear to be the following:

- The Grafton PSC told the Grafton PSB that Mr Kitchingman had been within the "disciplinary" jurisdiction of both the Diocese of Grafton and the Diocese of Newcastle.

- The Grafton PSC invited the Grafton PSB to adopt the following finding of the Royal Commission with regard to Mr Kitchingman:
    - *"From 2003 to 2013, Bishop Keith Slater was aware that Reverend Allan Kitchingman had been convicted of sexual offences against a child, and had authority to discipline him. Bishop Slater did not start disciplinary proceedings against the reverend."*
- The Grafton PSB accepted this when it included Bishop Slater's "failure to take disciplinary action" against Mr Kitchingman as sufficient in itself as a ground for recommending Bishop Slater's deposition from Holy Orders (*Report*, paras 56, 58 and 96). This, despite apparent acceptance that Bishop Slater was uncertain about the correct diocese (Grafton or Newcastle) having "disciplinary" jurisdiction at whatever was the relevant time (*Report*, para 118).
- The Grafton PSB cited "the finding of the Royal Commission that the Respondent was aware from 2003 to 2013 that Mr Kitchingman had been convicted of sexual offences against a child" (*Report*, para 56).
- The Grafton PSB ruled in effect that the relevant "disciplinary action" that ought to have been taken **by Bishop Slater** was the initiation of action under the *2004 Ordinance* presumably by notifying a member of the Grafton PSC of his (Bishop Slater's) knowledge that Mr Kitchingman had been convicted.

85. As indicated, the nature of Bishop Slater's failing as alleged precludes any reliance upon it constituting a "process failure" because that term is defined to mean a failure occurring prior to the 2004 Ordinance coming into effect. No one could have initiated any action against Mr Kitchingman under the *2004 Ordinance* until it came into force.

86. But returning to para (b) of the definition of "information" and assuming, contrary to the above, that Bishop Slater was himself a "Church worker", the way in which the Grafton PSC and PSB addressed the Kitchingman matter suggests a further actual or at least constructive failure of jurisdiction, perhaps triggered by the blanket adoption of Royal Commission findings that had skirted over the necessary detail. The sole authority to refer the issue of Mr Kitchingman's fitness to the Grafton PSB under the *2004 Ordinance* lay with the Grafton PSC (see s 54). Bishop Slater was not a member of the PSC.

87. Reading the Grafton PSB Report, one infers that Bishop Slater's putative obligation under s 24 (1) of the *2004 Ordinance* was to have notified a member of the Grafton PSC "as soon as possible" after relevant "information" about Mr Kitchingman came to his "possession or knowledge…unless there are reasonable grounds to believe that the information is already known to the PSC".

88. In para 58 of its Report, the Grafton PSB adverted to s 24 of the *2004 Ordinance*, holding that:

> "the Respondent was obliged 'as soon as possible' to refer that information to a member of the PSC unless there were reasonable grounds to believe that it already knew about it. There is no evidence to support that fact. The 'information', clearly within the definition, was such that should have been referred. No reason was advanced for not doing so and the effect of the whole situation was that the Respondent was allowing a person with a criminal record for sexual abuse of children to continue in Holy Orders without any attempt to take disciplinary action against him, which action, when eventually brought, led to Mr Kitchingman's being deposed."

89. This is not the occasion to consider whether these conclusions were factually correct or harsh. Only matters suggestive of some jurisdictional miscarriage can be considered at this stage.

90. Regrettably, neither the PSC Reference nor the PSB Report descend to any detail as to what knowledge about the Kitchingman conviction was possessed or known by whom and when (beyond the above finding that Bishop Slater was aware of the conviction "from 2003" onwards). There is merely the elliptical statement that "there is no evidence to support that fact", ie reasonable grounds for Bishop Slater to believe that no PSC member already knew about the fact of Kitchingman's conviction whenever it was that Bishop Slater himself failed to act "as soon as possible".

91. This suggests that the Grafton PSB may have seen Bishop Slater as carrying the evidentiary burden of disproving the implied ignorance of the Grafton PSC, a view which we are inclined to doubt. But, more importantly, one struggles to perceive the evidentiary basis for the critical, though unexpressed, finding on the part of either the Royal Commission or the Grafton PSB. The Royal Commission does not appear to have concerned itself with any

precise basis for holding Bishop Slater at fault, let alone fault under the *2004 Ordinance*, beyond describing his inaction as a failure to "start disciplinary proceedings" against Mr Kitchingman during the period chosen by the Royal Commission, namely from "2003 to 2013".

92. In 2015 the members of the Grafton PSC were the Rev Canon David Hanger (chair), Mr Michael Elliott (director, since 2009), Ms Aniko Cripps-Clark (a solicitor) and the Rev'd Lenore Moules (a hospital chaplain). But the critical point of time for the Grafton PSB establishing Bishop Slater's putative failure to "start disciplinary proceedings" against Mr Kitchingman under the *2004 Ordinance* was much earlier, namely shortly **after** the *2004 Ordinance* came into effect. The members of the Grafton PSC at that time were The Very Rev'd Dr Peter Catt, Ms Aniko Cripps-Clark, Mr Phillip Gerber (Director-Professional Standards, Sydney), Mr Col Pritchard and Mrs Ann Skamp. The state of their individual or collective knowledge about the facts of Mr Kitchingman's conviction and sentence was simply unexplored.

93. One infers that the Grafton PSB intended to find Bishop Slater at fault precisely and only because he had breached s 24 (1) of the *2004 Ordinance* and thereby acted improperly or unreasonably within the terms of para (b) of the definition of "information". It is implicit in the finding in para 58 of the Report set out above that Mr Kitchingman's 2002 conviction and sentencing were events not generally known within the Diocese of Grafton at the time when the *2004 Ordinance* came into operation. One must also infer that, when in 2015 the Grafton PSC (one of whose number had been a member from the outset) included this "failing" on Bishop Slater's part to make notification as soon as possible in its Referral, it was impliedly representing to the Grafton PSB that none of the original Grafton PSC members knew about the conviction until well after 27 June 2004. The unlikelihood of these being the true facts reinforces our perception that (having omitted to make any findings about the state of knowledge of the Grafton PSC) the Grafton PSB misunderstood the true legal basis of Bishop Slater's own putative failings under the *2004 Ordinance*.

94. It seems entirely improbable that Mr Kitchingman's 5 August 2002 conviction and sentence would not have been notorious within the Grafton Diocese by the commencement of the *2004 Ordinance* given that:

- Mr Kitchingman's sentencing attracted media attention (Brief of Evidence, Tab 58 p2)

- The key Royal Commission finding that Bishop Slater "was aware" of Mr Kitchingman's conviction from 2003 onwards suggests that this awareness came from learning about it shortly after it occurred
- It was put to both Mr Gerber and Archbishop Aspinall in the Royal Commission that the conviction was a matter of public notoriety (Brief of Evidence, Tab 36, pp 1961, 2035; Tab 40 p2451)
- There is evidence that the Chair of the Grafton PSC knew about it in November 2005 (Brief of Evidence, Tab 48 p17).

95. In the Amended Notice of Appeal the appellant contends that there were both legal and practical limitations on the powers, authority and responsibility of the Bishop of Grafton to take "disciplinary" action against Mr Kitchingman who was neither resident in or licensed by the Diocese of Grafton. And in his affidavit, he says (in para 15) that it was 2006 that he initiated some enquiries about Mr Kitchingman, offering a reason for his inaction in the matter. The exploration of these matters by this Tribunal would require us to have appellate jurisdiction in the matter and for that jurisdiction to allow the adducing of additional evidence. But it does not follow that the Grafton PSB (and Bishop Macneil who adopted its reasoning and recommendation) did not themselves, for the reasons indicated, commit one or more jurisdictional errors when addressing the ninth allegation.

96. There may be another issue of a legal nature involved in the Kitchingman allegation and the need to relate it to the language of para (b) of the definition of "information". We mention it solely to flag something that may repay the attention of those with the responsibility of enforcing professional standards or keeping the professional standards regime under review. Para (b) speaks of inappropriate or unreasonable conduct or omission "of a Church worker who had knowledge of conduct of another Church worker involving sexual…assault". What level of "knowledge" is contemplated or required? Is knowledge derived only from learning something through a media report sufficient? We are not implying the correct answer, merely raising the questions.

6 Was there a constructive failure to exercise jurisdiction on the part of the Grafton PSB having regard to the essentially non-disciplinary nature of proceedings under the 2004 Ordinance?

97. In Section 2 of these reasons, we demonstrated how the decision of the Full Supreme Court of South Australia in *Harrington* has clarified understanding as to the proper nature of proceedings brought under ordinances such as the *2004 Ordinance* which lack some of the procedural and appellate safeguards of the regime under the Constitution dealing with ecclesiastical offences.

98. At least in the case of a convicted sexual offender like Mr Kitchingman, there may exist an option to proceed down either the "disciplinary" or the "fitness" paths, so long as the separate procedural, jurisdictional and appellate boundaries are respected. See *Sturt* at [207].

99. Those choosing the procedurally simpler path of the professional standards regime must follow the correct signposts on pain of committing a jurisdictional error. And importantly, for present purposes, they must keep the issue of **present** fitness clearly in focus. This is illustrated by the reasoning in *Harrington* itself where the Court closely examined what it labelled the "unfortunate" language used by the Professional Standards Board of The Murray Diocese before concluding that "in context, and viewing the reasons as a whole" the Board had correctly addressed fitness for office as distinct from embarking upon disciplinary proceedings (see at [92]).

100. As regards a member of the clergy who is amenable to being charged with an ecclesiastical offence, there may be a constitutional underpinning for this distinction; and one that reinforces the importance of maintaining it. This appears more clearly in the reasoning in *Harrington* given what we have respectfully noted as a degree of ambiguity by Sackar J in *Sturt* as to the concept of "disciplinary" in contra-distinction to "fitness" inquiries. Constitutional lines cannot usually be crossed by resort to matters of form. If, therefore, a canon or diocesan ordinance purported as a matter of substance to allow a "charge" to be brought in a tribunal constituted with the characteristics contemplated by s 54 (1) of the Constitution, then it would be at least arguable that the constitutional limitations, protections and appeal rights would apply, regardless of the label given to that tribunal. This

problem has not happened with regard to the *2004 Ordinance*, as we have endeavoured to explain. But it will be necessary to return to this point when we come to address the argument in favour of an implied constitutional right of appeal that has been advanced on behalf of the appellant.

101. The appellant contends in his Notice of Appeal and his written submissions that the Grafton PSB went beyond the "fitness" jurisdictional line mandated in the 2004 Ordinance itself, when construed in light of *Harrington*.

102. There is considerable material suggestive that this is what occurred, although one feels sympathy for the Grafton PSB given that its attention was not apparently drawn to *Harrington*'s *Case*.

103. At one point late in the proceedings before the Grafton PSB, the Director of Professional Standards informed the Board that the proceeding "deriv[ed] jurisdiction through a Canon". He cited the *Holy Orders, Relinquishment and Deposition Canon 2004*.

104. In its *Report*, the Grafton PSB (like the Royal Commission) frequently used the expression "disciplinary action" to describe the task before itself (see *Report*, paras 12, 87) as well as the action that Bishop Slater failed to take or initiate under the *2004 Ordinance* against Mr Kitchingman (see *Report*, paras 53, 56, 58, 96).

105. Immediately after the heading "***The Issues***", the nine allegations were described as "fundamental". Throughout the Report, there was very little overt consideration of the question of Bishop Slater's present fitness. Primary attention was directed at what were labelled "the failings" occurring when he had been Bishop of Grafton. Concern was expressed that Bishop Slater had not offered satisfactory explanation for "the conceded breaches".

106. Nowhere was there any express advertence to what the past showed as to present or future unfitness, especially fitness to serve in all of the non-episcopal offices and callings that would become barred to Bishop Slater if deposed from Holy Orders according to s 72 of the *2004 Ordinance*. The character references tendered on Bishop Slater's behalf were analysed critically, and dismissed primarily on the basis that the referees were not shown to have

been fully aware of the nature and extent of those past failings. On the same basis, Bishop Slater's invocation of personal health issues, financial concerns for the Diocese and reliance upon the counsel of Bishop - in - Council and external legal opinion were afforded minimal weight by the Board. Bishop Slater's apologies and remorse were accepted as genuine (*Report*, para 87), but the recommendation for deposition followed nevertheless.

107. The reasoning disclosed in paras 87-88 of the Report is important because it declares that "there is no suggestion that **disciplinary** action should not be imposed on the Respondent" (emphasis added) and because the Board considered that "mitigation" of such action was not appropriate. This language sounds more like a sentencing exercise following conviction for an offence, although it must be observed that the Board immediately added that "mitigation" "would mean that the Board would be exercising a far more restrictive function than that imposed upon it by the Ordinance".

108. Paras 91 to 96 of the *Report* ("***Conclusions***") are replete with reference to the areas where Bishop Slater had "failed" in circumstances where his proffered "excuses" could not "be accepted as mitigating from [his] derelictions of duty" (*Report*, para 93). Nowhere in this key part of the *Report* is there any express advertence to the character and fitness of the man as he presented himself in 2015. And there is no explanation why his shortcomings as Bishop of Grafton served to render him unfit for **any** clerical office in the Church, or **any** lay one either, absent the prior consent of "the Bishop" (s 72(d)). Indeed, nowhere is there any discussion of this last mentioned topic. Nor was the possibility of imposing conditions upon the future exercise of any ministry or employment given any consideration in the Board's reasoning.

109. All in all, we have concluded that the Report discloses jurisdictional error on this ground as well. We emphasise that this conclusion follows from the failure of the Report to demonstrate that the Board's attention was always focussed on the issue of present unfitness. And we repeat that confusion, if not error, would certainly have been avoided had the Grafton PSB's attention been drawn to *Harrington*.

7 If the 2004 Ordinance had in terms purported to authorise the deposition of Bishop Slater would it have been valid?

110. What follows is strictly unnecessary in that we have already expressed the clear view that the *2004 Ordinance* did not, in its terms or operation, authorise the action that was taken against Bishop Slater by Bishop Macneil.

111. Since, however, the *Professional Standards Ordinances* of other dioceses may not be enacted in the same terms as the *2004 Ordinance* we venture some additional remarks hopefully for the benefit of those reviewing the professional standards scheme in its diocesan context, or contemplating reliance upon diocesan legislative authority as the basis for initiating proceedings against a bishop.

112. As indicated, the decisions of the Supreme Court of New South Wales and the Full Supreme Court of South Australia confirm that the scheme of diocesan legislation represented by the several *Professional Standards Ordinances* is generally within the legislative power of the various diocesan synods.

113. Neither *Sturt* nor *Harrington* considered issues touching upon the deposition of one bishop by another in reliance upon a diocesan ordinance as distinct from a canon of General Synod operative in the diocese. Nor were those cases concerned with the possibility of inconsistency with a canon of General Synod such as the *Episcopal Standards Canon 2007*. The decision in *Harrington* must be read as rejecting the particular grounds of invalidity that were raised, no more: see *Harrington v Coote (No 2)*[2014] SASCFC 39.

114. In this Section, we consider (in the specific context of the Diocese of Grafton) whether there were additional validity hurdles by reason of principles derived from the Constitution or the operation of inconsistent Canons of General Synod. Two possible lines of enquiry are considered on the assumption (contrary to the above) that the *2004 Ordinance* purported to authorise the deposition of Bishop Slater by Bishop Macneil.

(a)Possible limitations on diocesan legislative authority derived from the Constitution and the roles assigned to bishops under the Constitution and Anglican Church polity

115. As indicated in the Introduction to these reasons, a diocesan bishop may resign his or her see with a view to taking up an episcopal or other office elsewhere in the Church or even overseas. This means that more than one diocese may have a direct concern with issues of the status or fitness of a former diocesan bishop. These matters at least suggest the appropriateness of a common approach to the issue through a canon of General Synod as distinct from separate diocesan responses, not that they necessarily preclude diocesan action. What follows is therefore a tentative identification of some constitutional issues that may bear on the validity of a diocesan ordinance unsupported by a canon of General Synod that purported to arm a diocesan body with authority to depose a bishop from Holy Orders.

116. The *Constitution* contains a *Fundamental Declaration* that the Church will ever preserve the three orders of bishops, priests and deacons in the sacred ministry. Part II, dealing with the government of the Church states, in s 7:

> *"A diocese shall in accordance with the historic custom of the One Holy Catholic and Apostolic Church continue to be the unit of organisation of this Church and shall be the see of a bishop."*

117. Section 71 (2) of the *Constitution* declares that *"[t]he law of the Church of England including the law relating to …discipline applicable to and in force in the several dioceses…at the date upon which this Constitution takes effect shall apply to and be in force in such diocese of this Church unless and until the same be varied or dealt with in accordance with this Constitution*". For the purpose of this provision, "discipline" is defined in s 74 (9) to mean *"the obligation to adhere to, to observe and to carry out (as appropriate)…the…rules of this Church which impose on the members of the clergy obligations regarding the religious and moral life of this Church…."* By this means, limitations upon the inherent power of one bishop to depose another from Holy Orders, including those discussed in *In re Lord Bishop of Natal* and *Phillimore's Ecclesiastical Law of the Church of England*, 2nd ed, 1895, vol 1, p 66 would have been carried across into the Church.

118. Consistently with the Fundamental Declarations in Chapter I of the Constitution and the Ruling Principles in Chapter II, the "Church" has "plenary authority" to legislate for the order and good government of the Church (s 5). The powers of General Synod are extensive although many canons will not come into effect solely because they are made by General Synod.

119. Diocesan legislative power is also broad but not without its limits. One limit is that the power to make diocesan ordinances is subject to the *Constitution* (see s 51). Earlier Opinions and rulings of this Tribunal indicate that there are certain topics which for one reason or another are reserved for the attention of General Synod. There are also limitations of a territorial nature. In *Harrington*, Gray J stated (at [156] that:

> *"A diocese cannot legislate upon matters relating to the order and good government of the Anglican Church as a whole, or the order and good government of the Anglican Church within another diocese."*

120. Nevertheless, as this Tribunal observed in its *Opinion on the Ordination of Women to the Office of Priest Act of the Synod of the Diocese of Melbourne* (p 22): "If there is an ordinance which provides for the election of a diocesan bishop the person so elected will be recognised as the bishop throughout Australia.".

121. There will always be dangers in drawing close analogies between the Australian Constitution and the *Constitution* of the Church. But one may conceive that some constitutional principle comes into play if competing but otherwise valid laws of two dioceses purported to apply to the one situation: cf *Port Macdonnell Professional Fishermen's Association Inc v South Australia* (1989) 168 CLR 340 at 374.

122. All of these matters reinforce the need for caution when addressing the validity of a diocesan ordinance divorced from a canon of General Synod as regards the deposition from Holy Orders of a bishop. The situation may **possibly** differ as regards a diocesan ordinance that extends to the fitness of a bishop serving otherwise than as a diocesan within the diocese.

123. Diocesan ordinances have no effect to the extent of inconsistency with a canon duly passed by General Synod that is in force in the diocese (*Constitution*, s 30). In the next Sub-Section

of these reasons we consider a particular intersection between a Canon of General Synod and the *2004 Ordinance*.

(b) Possible limitations derived from inconsistency with the Episcopal Standards Canon 2007

124. Because of s 30 of the *Constitution* it becomes necessary to consider whether the scheme established by canons of General Synod that deal with both disciplinary and fitness issues involving bishops in the Church might also have operated in some way to preclude the action taken by Bishop Macneil under the *2004 Ordinance*.

125. The *Special Tribunal Canon 2007* established an Episcopal Standards Commission ("ESC"), with a Director. It may receive and investigate complaints and promote charges against a Bishop before the Special Tribunal (s 12 and Part 6), unless the bishop concerned has relinquished or has been deposed from Holy Orders in accordance with the *Holy Orders, Relinquishment and Deposition Canon 2004* (see s 23(3)). Section 17 enables any person to make a complaint against a "Bishop" (defined to include a diocesan bishop). Section 18 provides that, subject to the Canon, when the ESC receives a complaint it shall investigate the allegations contained in it. Section 22 (c) stipulates that the ESC may, at any time after the commencement of an investigation into a complaint against a Bishop, in the event that the bishop whose conduct is under investigation ceases to be a Bishop, refer the matter, together with such information as it shall have received, to the bishop of the diocese in which the former Bishop then resides. Cf also s 16 (d) of *the Episcopal Standards Canon 2007* discussed below.

126. The *Episcopal Standards Canon 2007* (which addresses fitness issues) arms the ESC with powers and duties to investigate "information" (defined in s 2 as "information of whatever nature and from whatever source relating to the alleged misconduct or omission of a Bishop wherever or whenever occurring").

127. Part 5 of the Canon deals with "examinable conduct", a term defined in s 2 to mean "any conduct or omission wherever or whenever occurring the subject of information which, if established, might call into question the fitness of a Bishop to hold office or to be or remain in Holy Orders but exclude[ing] any breach of faith, ritual or ceremonial". Section 9 provides that, subject to the Canon, where the ESC considers that the subject matter of information constitutes examinable conduct it **shall** investigate the information (emphasis added). It may

refrain or cease from doing so on limited grounds one of them being that "the subject matter **is** under investigation by some other **competent** person or body or is the subject of legal proceedings" (s 10 (b), emphases added). "Competent" in this context means "having jurisdiction".

128. Section 16 (d) of the *Episcopal Standards Canon 2007* provides that at any time after the commencement of an investigation under Part 5 the ESC may (emphasis added):

> *"in the event that the bishop whose conduct is under investigation ceases to be a Bishop [ie, relevantly, a diocesan bishop], refer the matter, together with such information as it shall have received, to the bishop of the diocese in which the former Bishop then resides."*

129. Steps were actually initiated by the Grafton authorities shortly before Bishop Slater resigned his diocesan office and this action was known to the Grafton PSC and drawn to the attention of the Grafton PSB. A letter dated 15 May 2013 had been written to the ESC by Mrs Hywood and Bishop Slater, apparently at the request of the Primate, Archbishop Aspinall . The Grafton PSB described it as disclosing the extent of "breaches" in the Diocese (*Report*, para 28). This action was not a "complaint" within the *Special Tribunal Canon* but it did provide "information" to the ESC that triggered an investigative duty on the part of the ESC under s 9 of the *Episcopal Standards Canon*.

130. Under the *Episcopal Standards Canon 2007*, the ESC was also empowered to refer to the Episcopal Standards Board constituted under Part 6 of the Canon, "the fitness of the Bishop, whether temporarily or permanently, to hold office or to remain in Holy Orders" (s 16(b)). However, this power would appear to have been available only so long as Keith Slater remained a "Bishop", ie the Bishop of Grafton. Some confirmation of this may be gleaned from s 19(2) which relevantly provides that the Board "may make a determination and recommendation… notwithstanding that the bishop whose conduct is the subject of the reference has ceased, **after the reference**, to be a [diocesan] Bishop" (emphasis added).

131. Since Bishop Slater ceased to hold the office of a "Bishop" within days of the information being formally brought to the attention of the ESC, it follows that (on the current wording of the Canon) the ESC then ceased to have power to refer fitness questions to the Episcopal Standards Board had it been minded to do so. The Administrator of the Diocese was informed of the ESC's decision about its own lack of jurisdiction in this regard. And, as

indicated, this became known to the Chair of the Grafton PSB who pondered its impact upon his continuing role.

132. What appears to have been overlooked by the ESC, but not by the Chair of the Grafton PSB (see para 53 above), was that the ESC had an additional power, under s 16 (d) of the *Episcopal Standards Canon 2007* (set out above). Despite the word "may", it is even possible that there was a duty (see *Finance Facilities Pty Ltd v Federal Commissioner of Taxation* (1971) 127 CLR 106). Whether a mere power or a duty, it was to refer the matter, together with such information as the ESC had received, to the Bishop of the diocese in which the Bishop Slater then resided (Brisbane). As with s 22 (c) of the *Special Tribunal Canon 2007*, this power was obviously designed to enable the diocesan bishop to take account of the forwarded information when deciding whether or not to issue a licence or to exercise whatever disciplinary or protective options were available in the circumstances.

133. Given our other conclusions about the absence of jurisdiction on the part of the Grafton authorities to have deposed Bishop Slater from Holy Orders, it is unnecessary to take this matter much further in these reasons. However, there would appear to be a respectable argument that (in addition to the limitations in the *2004 Ordinance*) deposition from Holy Orders by Bishop Macneil (or hypothetically and conversely, the imposition of a much lighter "response") would have involved action that was inconsistent with the situation provided for and contemplated under s 16 (d) of the *Episcopal Standards Canon 2007*. This, because it arguably cut across the powers and discretions of the Archbishop of Brisbane to do what he thought fit in accordance with his inherent rights and obligations as a diocesan, under the canons of General Synod and under the ordinances of the Diocese of Brisbane. Cf V*ictoria v Commonwealth* (1937) 58 CLR 618 at 630 per Dixon J ("When a State law, if valid, would alter, impair or detract from the operation of a law of the Commonwealth Parliament, then to that extent it is invalid."). Senior counsel for Grafton submitted to the contrary, contending in effect that (assuming that Bishop Macneil had authority under the 2004 Ordinance) whichever diocesan bishop chose to act was authorised to take whatever action is appropriate. This alternative possibility is noted. Cf *Victoria v Commonwealth* (1937) 58 CLR 618. At the very least, the issue calls out for consideration by General Synod, especially in light of the apparent view of the Royal Commission that responsibility to initiate what it terms "disciplinary" power is widely dispersed with the consequence that every person with

possible authority to transmit information or initiate action on information about sexual abuse by another may omit to do so at his or her peril.

134. If, and we repeat if, this analysis reveals gaps in relation to the legislated reach of the "disciplinary" and "fitness" arms of the ESC's oversight over "Bishops" and "bishops" this is a matter for General Synod.

8. The appellate jurisdiction of this Tribunal

135. Having identified and, in part opined upon, what occurred in Grafton with respect to Bishop Slater, we come to consider whether it is open or necessary for the Appellate Tribunal to embark upon the review of the factual and discretionary analysis or the conclusions reached by the Grafton PSB and adopted by Bishop Macneil. In doing so, we shall hopefully demonstrate why much if not all of the constitutional and legal matters already addressed bear upon the arguments advanced for and against this Tribunal having appellate jurisdiction in the matter.

136. Appellate jurisdiction needs to be conferred expressly or by necessary implication.

137. Section 57 (2) of the *Constitution* provides (in its second paragraph) that the Appellate Tribunal shall have jurisdiction to hear and determine appeals from "any determination of any diocesan tribunal in any case in which an appeal lies there from to the Appellate Tribunal". Assuming for the moment that the recommendation of the Grafton PSB satisfied both arms of being the "determination of a diocesan tribunal' in the constitutional sense, the concluding words of the sub-section require identification elsewhere of some basis for a right of appeal to the Appellate Tribunal. No such right is conferred in terms either by an ordinance of the Synod of the Diocese of Grafton or by a provision of the *Constitution* addressing professional standards boards in terms. Cf the *Constitution Alteration (Chapter IX) Canon 2004* which, if and when it came into effect, would confer a right of appeal to the "Review Tribunal" in some instances.

138. The appellant invokes s 54 (4) of the *Constitution* which provides:

> *"In matters involving any questions of faith ritual ceremonial or discipline an appeal shall lie from the determination of a diocesan tribunal to the Appellate Tribunal,*

provided that in any province in which there is a provincial tribunal and an appeal thereto is permitted by ordinance of the diocesan synod, an appeal may lie in the first instance to the provincial tribunal, and provided that in any such case an appeal shall lie from the determination of the provincial tribunal to the Appellate Tribunal.

In other matters an appeal shall lie in such cases as may be permitted by ordinance of the diocesan synod from a determination of the diocesan tribunal to the provincial tribunal, if any, or to the Appellate Tribunal, and from a determination of the provincial tribunal to the Appellate Tribunal."

139. No question of faith, ritual or ceremonial is involved in the present matter. What of "discipline"? "Discipline" is defined in s 74 (9) of the *Constitution*. For the purpose of Chapter IX (ie ss 53-63) it means:

"…as regards a person in Holy Orders licensed by the bishop of a diocese or resident in a diocese both:

(i) the obligations in the ordinal undertaken by that person; and

(ii) the ordinances in force in that diocese."

140. When construed with the whole of subsection (9), it would appear that the elliptically expressed (ii) should be construed as if it read "the obligations derived from the ordinances in force in that diocese in which the person in Holy Orders is licensed or resident".

141. Bishop Slater would not have been a person in Holy Orders "licensed by the bishop" of his own diocese. But he would have been resident in the Diocese of Grafton, at the time of his alleged "failings", if not at the time when the inquiry as to his fitness commenced before the Grafton PSB. Construing sub-para (ii) of the definition of "discipline" as indicated, one would need to identify some "obligation" under a diocesan ordinance for which he was being held accountable. Despite having omitted to identify the provisions of the 2004 Ordinance breached by Bishop Slater, the Grafton PSB effectively found that he had breached that ordinance, the clearest finding being that Bishop Slater had failed to refer information about Mr Kitchingman in his possession or knowledge to the Grafton PSC under s 24 (1) of the *2004 Ordinance*. According to Mr Erskine SC's submissions at the hearing before us, the Report should also be read as including several additional findings that Bishop Slater had been

involved in “inappropriate or unreasonable conduct or omission” [as a Church worker] within para (b) of the definition of “information” in the *2004 Ordinance*.

142. Even if the Grafton PSB may have erred in assuming jurisdiction over Bishop Slater or in its factual analysis, this may not preclude “questions of discipline” arising sufficient to satisfy so much of s 54(4) as refers to “questions of discipline”. But the real problem for the appellant lies in the need to point to a constitutional conferral of a relevant right of appeal to the Appellate Tribunal.

143. The critical issue then emerges. Was the process under the *2004 Ordinance* that had been purportedly engaged a “matter” in the sense contemplated by s 54 (5)? The appellant submits that the answer is “Yes”, because that sub-section is effectively free-standing; and because the fifth paragraph of s 57 (2) of the *Constitutio*n is similarly engaged. Grafton submits “No”, because the sub-sections must be read as referring to matters otherwise falling within s 54, namely those matters before a “diocesan tribunal” falling within subsections (2) and (2A), ie truly disciplinary matters resulting from a “charge”. In our opinion, Grafton is correct, for the following reasons.

144. In the *Constitution*, CHAPTER IX – THE TRIBUNALS performs several functions.

145. Section 53 mandates the existence of “a diocesan tribunal of each diocese, the Special Tribunal and the Appellate Tribunal” and permits the creation of a provincial tribunal of any province.

146. The remaining sections in Chapter IX explain how the various tribunals are constituted, define their respective jurisdictions and powers, and provide for appellate mechanisms and (in the case of the Appellate Tribunal only) jurisdiction to give an opinion as to questions arising under the *Constitution* that are referred to it under s 63.

147. Sub-sections (2) and (2A) of s 54 confer and confirm (constitutional) jurisdiction on diocesan tribunals to hear and determine charges of breaches of faith ritual ceremonial or discipline as well as charges of various offences. Sub-section (6) of s 56 confers (constitutional) jurisdiction on the Special Tribunal to hear and determine charges against certain bishops of breaches of faith, ritual, ceremonial and discipline as well as charges of offences specified by

canon. On the face of it, these are the only types of non-appellate jurisdiction conferred (using the language of jurisdiction) under the *Constitution*.

148. The appellant effectively invites this Tribunal to read s 54 (4) as a free-standing provision both in the sense of conferring a direct appeal to the Appellate Tribunal and regardless of the nature of the proceedings, so long as a question of faith, ritual, ceremonial or discipline is involved in the matter.

149. We are unaware of any discussion of this point in the jurisprudence of the Appellate Tribunal.

150. For its purposes, the *Holy Orders, Relinquishment and Deposition Canon 2004* defines "tribunal" to mean "a tribunal established in accordance with the provisions of Chapter IX of the Constitution and includes a body established by canon or by an ordinance of a diocese". Citing this provision, Sackar J in *Sturt* (at [203]) observed that the Professional Standards Board established by the *Professional Standards Ordinance* of the Diocese of Newcastle was clearly a "tribunal" for the purposes of the last mentioned Canon. But this was in the context of **rejecting** the argument that the professional standards regime was in some way antithetical to the scheme of tribunals already recognised under the Constitution and any canon of General Synod.

151. As indicated, s 53 of the *Constitution* provides that "there shall be a diocesan tribunal of each diocese". Section 54 makes it plain that the expression "diocesan tribunal" at least includes a tribunal with the characteristics spelt out in that section. These are that the tribunal "shall be the court of the bishop"; that it shall consist of members as defined in subsection (1) (the bishop, or a deputy appointed by the bishop; not less than two other members as may be prescribed by diocesan ordinance and elected etc as similarly prescribed). It is conceivable that the Grafton PSB has all of these characteristics and the Tribunal heard submissions for and against that proposition. But that does not necessarily make it a "diocesan tribunal" for the purposes of the *Constitution*.

152. Subsections (2) and (2A) of section 54 state what at least may be taken as the constitutional jurisdiction of the "diocesan tribunal" established as required by s 54. Subsection (2) says that "in respect of a person licensed by the bishop of the diocese, or any other person in

holy orders resident in the dioceses" the diocesan tribunal shall have jurisdiction to hear and determine "**charges of breaches** of faith ritual ceremonial or discipline and of such **offences** as may be specified by any canon ordinance or rule" (emphases added). Subsection (2A) confirms that a diocesan tribunal shall also have and be deemed to have had jurisdiction to hear "**a charge relating to an offence of unchastity, an offence involving sexual misconduct or an offence relating to a conviction for a criminal offence**" (emphases added).

153. None of these provisions were engaged in the present matter because Bishop Slater was not "charged" with any "offence" of any nature. Nor did the Grafton PSB "determine" any charge of this nature.

154. The critical question that we must now address is whether what we have described as the "constitutional" jurisdiction of the "diocesan tribunal" represents the only head of jurisdiction that the *Constitution* contemplates may be conferred on the diocesan tribunal, at least as regards constitutionally-mandated procedures and appeal rights. A related but separate question is whether the *Constitution* permits more than one diocesan tribunal to be created within a single diocese. If the answer is yes, then in light of the outcome of both *Sturt* and *Harrington* there would appear to be no impediment to a diocesan synod constituting its Professional Standards Board as a "diocesan tribunal" with whatever consequences flow from this under the *Constitution* or a canon of General Synod.

155. The expression "any diocesan tribunal" in s 57 (2) (already quoted) casts little light on the question because it has work to do given that every diocese is required to have its diocesan tribunal.

156. Apart from s 54 (4) (arguably) and leaving aside the provisions conferring appellate and opinion on a reference jurisdiction on this Appellate Tribunal, every provision in Chapter IX conferring original jurisdiction or powers ancillary thereto speaks and speaks only of jurisdiction with respect to charges and offences and sentences: see ss 54 (2), (2A), (3), 55 (3), 56 (6), 57 (2) (fifth paragraph), 59 (4), 60, 61, 61A.

157. Section 62 confers evidentiary and procedural powers on the various tribunals. Because it is capable of performing useful work with regard to the "constitutional jurisdiction" already

identified, this provision does not assist the appellant. It casts no useful light on the question at issue.

158. We have concluded that the same must be said for s 54 (4) which makes perfect sense if confined to "matters involving questions of faith ritual ceremonial or discipline" that arise in the course of proceedings with which s 54 is otherwise concerned, ie proceedings on a charge falling within sub-sections (2) and (2A). There is no basis for an implication supporting a free-standing right of appeal from the determination of a "diocesan tribunal" that has been vested with non-disciplinary, non-charge-related jurisdiction. The location of subsection (4) within s 54 corroborates this.

159. Accordingly, there is no need to consider whether the provisions for constituting a Professional Standards Board constituted under the *2004 Ordinance* happen to satisfy the criteria for "the court of the bishop" laid down in s 54 (1) of the *Constitution*.

160. It is now appropriate to address the appellant's submissions in support of the argument that the *Constitution* should be construed as if, in the circumstances, it conferred a right of appeal from the Grafton proceedings involving the Grafton PSB and the action of Bishop Macneil, in order to maintain the appellant's "constitutional" rights to an appeal against what in effect is a sentence [of deposition] in consequence of a disciplinary process. One variant of that argument contends that, unless a right of appeal to this Tribunal is available, then the *2004 Ordinance* is invalid.

161. Not overlooking the appellant's argument to the contrary, we are of the view that this submission is precluded by the essential reasoning in both *Sturt* and *Harrington*. In each of those cases, the argument that the diocesan *Professional Standards Ordinance* was invalid because it cut across or negated rights arising under Chapter IX of the *Constitution* was rejected. It is true that the unsuccessful argument was, in effect, that the "delinquent" clergymen in *Sturt* and *Harrington* had the right to be charged with an ecclesiastical offence under the diocesan equivalent of Grafton's *Clergy Discipline Ordinance 1966* before a "diocesan tribunal" in the constitutional sense, and that the proceedings before the respective Professional Standards Boards did not have similar safeguards and were not of that nature. It seems to us that adding the complaint that appellate rights otherwise available under the *Constitution* are also lacking adds nothing to the submission. There is no

basis for distinguishing *Sturt* or *Harrington* in the present context. Nor for avoiding the conclusion that there is no constitutional basis for the appellant having some implied right of appeal to the Appellate Tribunal either.

162. The further suggestion that some appeal right could be teased out of reading together Grafton's *Clergy Discipline Ordinance 1966* and the *2004 Ordinance* is one that we barely understand but do not accept.

163. At this point, however, we come back to what we have written at paras 10 to 18 above about the importance of construing and applying the professional standards legislation of the Church in the non-"disciplinary", fitness-focussed manner indicated in *Harrington.* And we repeat our remarks in para 100 above to the effect that holding this line of distinction may be part and parcel of the basis for rejecting the sort of arguments advanced unsuccessfully in *Sturt*, *Harrington* and now (as regards some implied appellate jurisdiction) this matter.

164. Given what we discern to have been the clear intent of the framers of the professional standards regime (evidenced in part by the submissions of the then Primate as intervener in *Harrington*), the way in which to hold the appropriate line is also the way alluded to in *Harrington* at [92]. A professional standards recommendation and outcome that is seen as disciplinary in the punitive sense will entail a jurisdictional misunderstanding of the professional standards regime and be, on that account, null and void. (This is not to say that the professional standards regime may not be resorted to as an alternative to a charge before a diocesan tribunal or, in the case of a Bishop, the Special Tribunal, if the choice is open on the facts. But it is to say that those who resort to the professional standards regime must respect its limits and jurisdictional requirements.)

165. It follows that the Appellate Tribunal could not entertain an appeal in this matter.

9. Concluding remarks

166. But as it turns out, the exercise of appellate jurisdiction is neither appropriate nor called for: In short, because there is no "determination" to correct. We repeat what is written in para 46 above about the consequences in law of the errors of jurisdiction on the part of the Grafton authorities that we have identified. And we reiterate that we have not considered

the merits of the matters addressed by the Grafton authorities and challenged by the appellant.

167. Hopefully we have demonstrated why addressing the jurisdictional issues affecting the Grafton authorities was part and parcel of addressing the legal issues connected with our own jurisdictional questions. We have not ignored Grafton's appeal that we exercise "restraint" before moving into territory on which we are unable to exercise appellate or dispositive jurisdiction. But, since we have considered it necessary to go by the longer route to answer the more proximate issue of our own jurisdiction, we have chosen to do so. We are also conscious of the need for some guidance to be offered about the application of *Harrington* and the other matters addressed in Parts 5, 6 and 7 of these reasons (not only for the Church, but possibly for the assistance of secular courts and institutions).

168. For the reasons in Section 5, we are of the opinion that the Grafton authorities had no jurisdiction over Bishop Slater under the *2004 Ordinance*. Furthermore, such jurisdiction as they purported to exercise was legally flawed for the reasons in Section 6 above and possibly also for the reason in Section 7 (b).

169. It follows that the recommendation of the Grafton PSB and the Instrument of Deposition issued in consequence by Bishop Macneil were and are null and void in our opinion. It will be a matter for Bishop Macneil whether she respects this view and whether, in addition, she formally revokes that Instrument or takes any other action to remedy the injustice unintentionally inflicted upon Bishop Slater by the steps taken and announced against him in 2015.

170. The General Secretary or other appropriate authority should rectify the National Register by removing any reference to Bishop Slater's deposition from Holy Orders, perhaps in conjunction with any steps taken by Bishop Macneil, but not necessarily so. This may require certain notifications to be given.

171. The Episcopal Standards Commission may consider whether taking any action consistent with these reasons is appropriate at this point of time, and (if it is) which diocesan bishop should be contacted.

172. Lacking appellate jurisdiction, this Appellate Tribunal cannot preclude the parties from re-litigating the jurisdictional issues in a civil court (at risk as to costs), but we respectfully venture to repeat the remarks in para 42.

January 2017