CLERGY STATUS IN THE AGE OF THE ROYAL COMMISSION

The Hon Keith Mason, AC, QC

The first Sharwood Lecture in Church Law: March & April 2018

TRINITY COLLEGE
THE UNIVERSITY OF MELBOURNE

The author and acknowledgements

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Introduction

I am most privileged to deliver this lecture as a memorial to Robin Sharwood who made a profound contribution to ecclesiastical law in the Anglican Church of Australia. I never met him, but think of him whenever singing his approved variant of the national anthem at the opening of law term service in St James' Sydney.

Mainline Churches were not the only institutions to fail those they profess to serve in their responses to the scourge of child sexual abuse. But the extent of those failings as exposed by the *Royal Commission into Institutional Responses to Child Sexual Abuse* has been alarming and shameful. In this lecture I seek to locate the Commission's work in a longer sweep of Church-State relationships, focussing on issues relating to the status of clergy in canon and secular law.

When lawyers talk about status, they mean a bundle of special rights and duties that attach to a class of persons, following them as they move around and generally recognised by all. For some people, legal status holds a negative connotation, as with slaves or married women (in times past) or New Zealanders seeking election to the Australian Parliament (in time present). But usually status is seen in positive terms. Thus, solicitors, registered nurses and police officers enjoy a legally recognised status that confers special authority at the price of additional obligations.

Holy Orders entail much more than a status as that term would be used even by a lawyer or envious outsider. Ordinands respond to God's call. And they are ordained into the universal "Church of God" after formal assents, solemn oaths and reminders of stern Scriptural duties. The office into which they are admitted is much more than a job intended for life. But (*pace* some of my Sydney Anglican friends) it is not the only form of "Gospel ministry" and there is no principled reason why clergy should be treated with kid gloves by Church or State.

In this lecture, the focus will be upon the historical yet ever-changing distinctions between clergy and laity that are enmeshed into church governance and liturgy. I shall discuss accountability mechanisms whereby clergy status may be withdrawn or qualified in its operation. The Royal Commission has identified aspects of what it terms "clericalism" that have contributed to the child abuse problems it has exposed. It has also recommended some radical reforms.

No one (least of all a Christian) claims that sinfulness can be entirely addressed through rules of law. And no one (least of all a lawyer) claims that rules are always effective. The Royal Commission has revealed much more than defects in canon and civil law. It has also criticised ignorance about the harmful impact of sexual abuse and the recidivism of abusers, clergy bias towards their own, confusion between the roles of justice and forgiveness, and an obsession with secrecy that focussed on avoidance of scandal at the expense of accountability. Churches were also chided for their exclusion of women from leadership and of victims from disciplinary processes. Her Majesty's Judges, the high priests of the civil law, have also been guilty of all such failings.

Some general reflections on Church and State

The Royal Commission demonstrates the truth of the nineteenth of the *Thirty Nine Articles* which proclaims that the Churches of Jerusalem, Alexandria, Antioch and Rome have erred "not only in their living and manner of ceremonies, but also in matters of faith". As an Anglican legalist, let me point out that the drafters of that Article acknowledged no error in the Church of England itself. But 1562 was very early in the history of that Church as an *independent* national branch of Christendom. Not even the Roman Catholic Church claims perfection anymore.

The work of the Commission also reflects the prophet Ezekiel's teaching that the sacking of Jerusalem in 587 BC by King Nebuchadnezzar was a *divine* judgment for Israel's idolatry and disobedience.[1] Throughout history, God has frequently used outsiders to the faith in order to call his people to justice and reform.

Australian law confers several privileges upon religious institutions and personnel in the areas of marriage celebration, confessional secrecy, tax and rate exemptions, and qualifications to the application of anti-discrimination and charitable trust laws. At the same time, Churches have wide leeway in how they define and organise themselves. Our law is agnostic on matters of dogma unless their advancement is written into valid contractual and trust arrangements.[2]

However, Australian law can be discriminating as well. It curbs many practices that have claimed divine sanction, overseas or in the past. In the field of child protection alone, when it comes to withholding blood transfusions from minors, permitting underage sex or marriage, the genital mutilation of young girls, failure to immunise babies, and excessive physical chastisement of children, our secular law stamps its foot firmly down. Lines are drawn that are enforceable by the criminal law and/or the withholding of state benefits. Custody disputes over the religious upbringing, medical treatment or sterilisation of infants - even the withdrawal of life support - will be resolved on the basis of the best interests of the child perceived through secular eyes. In all these matters, appeals to the Bible or Koran or Aboriginal custom or secular tradition rightly fall on deaf ears once this democratic, post-Christian society has made up its mind on a specific topic.

Martyrdom remains for the recalcitrant who is prepared to take his or her medicine. And in this fortunate country, Churches and their members may campaign to maintain or change the law. Like commercial organisations, they can also spend corporate money if authorised to do so by internal rules. In weighing into political campaigns, they may anticipate harsh rebuttal in the courts of public opinion. But I for one need convincing that people of faith need greater *legal* protections. If the proclamation of counter-cultural messages attracts no more than shunning, abuse and calumny, they might remember the mixed responses to Christ's teachings when he walked this earth.

The recommendations of the Royal Commission that, if Churches are not prepared to continue reforming their canon law so as to provide proper protection from child abuse and vindication for victims, then the law of the State should intervene, should be viewed against these general observations.

Benefit of clergy ancient and modern: the significance of clergy status in canon and civil law

Both canon and secular law have recognised, regulated and qualified clergy status over the centuries – with the two systems of law intersecting in varieties of ways. The legal historian Maitland has observed that, in the recurring battle between the secular and the ecclesiastical, the border is under constant negotiation on particular issues.[3] "So ragged, so unscientific was the

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1 See *Ezekiel* chapters 9 and 11. See also *Jeremiah*.

2 Australian Constitution, s 116; *General Assembly of the Free Church of Scotland v Overtoun* [1904] AC 515; *The Church of the New Faith v Commissioner of Pay-Roll Tax* (Vic) (1983) 154 CLR 120; *In the matter of South Head & District Synagogue (Sydney) (Administrators appointed)* [2017] NSWSC 823 at [29].

3 Frederick William Maitland, "Canon Law in England (Continued)", (1896) *The English Historical Review* 641. The passages quoted are from p 645. See Bruce Kaye, *The Rise and Fall of the English Christendom* (Routledge, 2018), p 131.

frontier which at any given moment and in any given country divided the territory of secular from the territory of ecclesiastical law that the ground could be lost and won by insensible degrees." Maitland also wrote that "from the twelfth century onwards there has been a good deal of ecclesiastical law that has not been enforced."

These propositions were graphically illustrated by the issues contested in the recent campaign to change the law on same sex marriage which took place in a context where same sex couples are no longer exposed to state punishment or the withholding of state benefits. That debate also shows the importance we can place upon status with its overlay of symbolic and legal aspects.

"Benefit of clergy" is the name given to a legal immunity that originated from clerical status. It lasted for hundreds of years in the English common law during which time its scope and rationale changed out of all recognition. For Christian clergy, the concept may be traced back as far as the Emperor Constantine who, in about 312 AD, gave them the right to be tried in Church courts.[4] A version of the privilege was recognised by the early English kings, including the Normans. Clergy were tried for crimes in their bishop's court, according to the rules of canon law. Those rules allowed the cleric to swear an oath to his innocence and to bring oath-helpers to back him up. Even if guilt was admitted, since canon law forbade the shedding of blood, and penance was privileged over punishment, so-called "criminous clerks" tended to get off lightly compared to lay persons.

The quarrel between King Henry II and Archbishop Thomas Beckett that led to Beckett's murder in Canterbury Cathedral in 1170 was mainly about whether clergy charged with felony, including murder, theft or rape, could be tried in the royal courts. In 1164 Henry II had established a new system of royal courts. He decreed that if clergy were found guilty in the ecclesiastical court, they had to be degraded to lay status and returned for punishment to the secular court. With the Pope's backing, Beckett protested that "the clergy, by reason of their orders and distinctive office, have Christ alone as king...[U]nder the King of Heaven, they should be ruled by their own law".[5]

In response to Beckett's murder by the king's knights, Henry was excommunicated and an interdict placed over his kingdom by Pope Alexander. To lift those sanctions (which were then truly feared), Henry had to do public penance outside several cathedrals. He was also made to promise that the royal courts, with few exceptions (high treason being one of them), would give up **entirely** their jurisdiction over clergy charged with secular offences. It is estimated that about 5% of the population were priests or lesser clerics in those days.[6]

This created the need for courts of law to separate the clerical sheep from the lay goats. At the outset of this new system, judges accepted as clergy any man who was tonsured or wore ecclesiastical dress. But these sometimes counterfeited badges of clerical office came to be replaced by a literacy test, based on the largely true supposition that clergy were literate and laymen were not. By the fourteenth century clergy status would be determined only if and when the jury in the royal court brought in a verdict of guilty.

If there was any debate about clerical status, the accused man would be directed to read aloud a verse from Scripture chosen by the judge.[7] Benefit of clergy was thereby extended to **all** men

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4 Edward Gibbon, *Decline and Fall of the Roman Empire,* Vol 2 (New York: Everyman's Library 1993), p 335.

5 Kaye, *op cit*, p 121, quoting W L Warren, *Henry II,* 2000, p 485 ff.

6 Robert Bartlett, *England under the Norman and Angevin Kings*, 2000, p 377.

7 The White Australia Policy that sorted immigrants on racial grounds for many years used a not dissimilar device that could be manipulated in a more extreme fashion in that the Australian official could choose the language as well as the text.

who could demonstrate they were clerks by reading in this manner. Not quite as easy as it sounds, because in those days the Bible was in Latin. The good news was that, unless the judge took a particular fix against the accused, the same passage from the Psalms was always chosen. In modern translation, *Psalm* 51:1 reads:[8]

> "Have mercy on me, O God, according to your steadfast love; according to your abundant mercy blot out my transgressions."

This sentiment was obviously appropriate to the occasion. And because the ability to read the passage (or appear to do so) it enabled the convicted felon to escape the noose, that verse became known as the "neck verse".

This legal fiction underwent many transformations over the centuries, as its justification morphed from a true clergy benefit into a shield available to all deserving first offenders. In 1691, even women were admitted to plead benefit of clergy, although they would wait three centuries longer before accessing any other aspects of clergy status in the Church of England. Felons invoking the privilege who were not genuine clergy would be branded on the thumb to ensure that if they offended a second time, they could expect no further mercy this side of the grave. Commencing from the time of Henry VIII, various offences were made "unclergyable" by Parliament. And by the reign of Elizabeth I, claiming the privilege only downgraded the punishment from death to a term of imprisonment.

Benefit of clergy continued to evolve before it arrived with the First Fleet on the shores of New South Wales as part of an Englishman's "birthright" but it was formally repealed in New South Wales in 1828.

This excursus into benefit of clergy hopefully demonstrates how the legal and symbolic aspects of status can confer real benefits, how such matters change over time, and how a status can be abused. It also illustrates the State's interest in clergy status and its proper usage.

Benefits of clergy that are directly available under modern Australian law

One hears whispers about clergy avoiding speeding tickets, on an alternative fiction that deems them always to be rushing to a wedding or funeral. But only a handful of genuine clergy privileges are recognised today. In New South Wales (but not Victoria), clergy may claim exemption from jury service[9] and there is an offence of interfering with a member of the clergy when conducting divine service.[10]

In the context of the *Marriage Act* amendments relating to same sex marriage, Ministers of Religion have been permitted to decline to solemnise a marriage which conflicts with the "doctrines, tenets or beliefs" of their religion.[11] The Anglican Archbishop of Sydney has advised his clergy that this interaction of state and church law not only *permits* clergy to decline same-sex marriages, but *requires* them to do so.[12] This, on the basis that the *Marriage Act* requires Ministers of Religion to use a form of ceremony that is "recognised as sufficient for the purpose by the religious body of which he or she is a minister".[13] According to Archbishop Davies, since there is

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8 *New Revised Standard Version*. It was *Psalm* 50 in the Latin *Vulgate* which followed the ordering of the *Septuagint*.

9 *Jury Act 1977* (NSW), Schedule 2.

10 *Crimes Act 1900* (NSW), s 56.

11 *Marriage Act 1961* (Cth), s 47.

12 Letter to clergy 15 December 2017.

13 *Marriage Act 1961* (Cth), s 45 (1).

no authorised Anglican marriage service for same-sex couples, the purported marriage would be invalid by virtue of s 48 (1) of the Act. The offending minister would also face the secular sanction of deregistration as a marriage celebrant; and the canonical sanction of a charge of breach of faith, ritual or ceremonial. In summarising this *ad clerum* I imply neither endorsement nor dis-endorsement, for what I hope are obvious reasons. Suffice it to say that Archbishop Davies' announcement raises fascinating issues of clergy status in a current interaction of civil and canon law.

The primary area where clergy status is engaged directly with Australian law is the evidentiary privilege attaching to religious confessions. This was not part of the common law of England (after the Reformation). A version of the privilege was first enacted in Victoria in 1890. Nowadays, s 127 of the Commonwealth *Evidence Act 1995,* and the corresponding legislation of several states and territories (South Australia excluded), provides that a person who is or was a member of the clergy is entitled to refuse to divulge that a religious confession was made, or the contents of a religious confession made to the person when a member of the clergy. The only exception is where the communication involved in the religious confession itself was made for a criminal purpose. This is truly a privilege of clergy because it applies regardless of the wishes of the penitent.

The Royal Commission has recommended that clergy be no longer exempt from mandatory reporting to child protection authorities with respect to information disclosed in confession. If enacted, this change would intersect with some canonical rules about the inviolability of the confessional. The Commission has also proposed that the Australian Catholic Bishops Conference consult with the Holy See to "clarify" whether if a person confesses during the sacrament of reconciliation to perpetrating child sexual abuse, absolution can and should be withheld until they report themselves to civil authorities.[14] Whether Federal, State and Territory Parliaments will press the matter of confessional secrecy further and how the Churches will respond lies yet in the future.

Clergy status is thoroughly embedded in canon law and indirectly supported by the secular law's protection of Church trust property

Anglican Church Establishment came for a time to New South Wales, evidenced by the oath against transubstantiation taken by Governor Phillip on 13 February 1788 to the bemusement of assembled convicts and marines. But, to the extreme disappointment of Bishop Broughton, this would not endure. Courts here and in England denied the Crown any role in the appointment of colonial bishops[15] and Anglicans here found themselves stripped of the privileges and burdens of English Establishment.[16] Those who wished to hold co-religionists to Anglican formularies would have to use the mechanisms of voluntary association such as property law, constitutions and trusts. It would take a long time for Anglicans in Australia to accept these developments[17] and to recognise that all faith systems would be treated equally in the eyes of the law.

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14 Final Report, Recommendation 16.26. For the Anglican position, see the Canon Concerning Confessions (Revision) Canon 2017 and the Canon Concerning Confessions (Vulnerable Persons) Canon 2017 to the extent that they are adopted in the several dioceses.

15 See *Long v Bishop of Cape Town* (1863) 1 Moo NS 411, 15 ER 756; *Bishop of Natal v Gladstone* (1866) LR 3 Eq 1.

16 See *R v Hall (No 1)* [1829] NSWSupC 13; *Ex parte Rev George King* (1861) 2 Legge 1307; *Wylde v Attorney-General (NSW) (at the relation of Ashelford & Ors)* (1948) 78 CLR 224 ("the Red Book Case) at 285-6 (Dixon J).

17 See Keith Mason, "Believers in Court: Sydney Anglicans Going to Law," *The Cable Lecture* 2005.

Canon law allocates many roles exclusively to ordained persons. Despite Old and New Testament doctrines of the priesthood of all believers[18] nearly all Churches entrench clerical hierarchy and authority, in both governance and liturgy.

When, however, the Anglican bishops laid the roots of synodical government in the Australian colonies they recognised the inevitability of lay participation in church government. They also accepted their own inability to sanction lay misbehaviour otherwise than by persuasion or exclusion from worship or church office. As far back as 1699 the Chief Justice of the Court of King's Bench, Sir John Holt, had declared:[19]

> "The clergy are subject to a law different from that to which laymen are subject, for they are subject to obey the canons, for the convocation of the clergy may make laws to bind all the clerks, but not the lay people. And if the clergy do not conform themselves, it will be cause of deprivation."

Of course, many lay people care deeply about maintaining (sometimes finetuning) traditional doctrine, order and liturgy - especially if the rules they support keep other laity in their proper place or rogue clergy in check.[20] But membership of a denomination or parish is now entirely voluntary. And, since the Protestant Reformation and the invention of the motor car, the laity has many choices and considerable freedom of movement.

When turning to the formal structures of authority in the Anglican and Roman Catholic Churches in this country, distinctions between clergy and laity are embedded, with much formal power residing in the bishops. While the Vatican has simply declined to yield any governance authority to the laity, the Anglican Church has locked a vast array of episcopal power into its *Constitution*.

The outcome of Anglican disestablishment in Australia would be diocesan synods that elect bishops with a primary role of ensuring "quality control" as clergy ranks are replenished. Diocesan and national constitutions then share governance between laity and clergy, securing the role of each while reinforcing that of bishops in particular. The constitutions purport to bind all members but are only enforceable in the secular courts "for all purposes connected with or in any way relating to the property of the Church".[21]

Clericalism in the sense of a categorical distinction between clergy and laity is a fundamental aspect of the canon law of the Anglican Church of Australia. In the national *Constitution*, inalterable Fundamental Declarations bind the Church ever to "preserve the three orders of bishops, priests and deacons" and declare that it "retains and approves the doctrines and principles embodied in the Book of Common Prayer" including the Ordinal.[22]

Moving across to the working parts of the *Constitution*, the admittedly dispersed government of the Church is partially conferred on diocesan bishops according to historic catholic custom.[23]

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18 See eg *Exodus* 19: 4-6, *Luke* 22: 24-30, 1 *Peter* 2: 4-10.

19 *The Bishop of St David's v Lucy* (1699) 1 Ld Raym 447 at 449, 91 ER 1197 at 1199.

20 As witnessed by the role taken by lay people as well as clergy in cases such as *the Red Book Case* and *Scandrett v Dowling* (1992) 27 NSWLR 483 (challenging the ordination of women to the priesthood) ("S*candrett"*). Each of these cases were, however, primarily promoted by senior clergy in the Diocese of Sydney and, in *Scandrett,* funded substantially by money paid out of the Sydney Endowment of the See.

21 See (for New South Wales) the *Anglican Church of Australia Constitution Act* 1961 (NSW), s 2 and the earlier legislation underpinning the Church's State Constitution as discussed in the two cases mentioned in the preceding footnote. As to the scope of the words in quotations, see further below.

22 *Constitution*, ss 3,4.

23 *Constitution*, ss 7, 8.

Diocesan Bishops and Clergy sit as separate Houses of General Synod alongside the House of Laity, with separate voting rights when invoked. In the Appellate Tribunal, three of whose seven members are diocesan bishops, key decisions must also achieve the concurrence of at least two bishops and two lay members. The Special Tribunal appointed to hear disciplinary charges against diocesan bishops has three members, two of whom are clergy.[24]

All diocesan constitutions retain an effective episcopal veto[25] on legislation; and also voting by "houses" (clergy and laity) if called for. There are separate allocations for clergy and laity on diocesan councils. In some of the sanctioned liturgies, roles are set apart exclusively for those in priestly orders, [26] which is not the same as saying that these requirements are universally practised.

The Roman Catholic Church is democratic in that a conclave of cardinals elect the Pope. After that, the Pontiff holds all governance cards. The 1983 *Code of Canon Law* vests in him "supreme, full, immediate and universal ordinary power in the Church" (Canon 331). Canon 333 adds that "there is neither appeal nor recourse against a judgment or decree of the Roman Pontiff". The Pope can also declare, amend and dispense with any aspect of the canon law.[27] This authority vastly outstrips even the claims of the Stuart kings in the run-up to the Glorious Revolution. Catholic lay folk have been ceded few if any roles in governance, as distinct from administration. And lay celebration of the Mass does not occur apart from extreme situations in the mission field that are only whispered about.

The formalities of clergy status: Ordination, licensing and oaths of canonical obedience

Absent Church Establishment, the principal way in which Australian Churches are enabled to hold doctrinal and liturgical lines is through their several monopolies to ordain, commission and licence clergy, and to vest sufficient governmental authority in them to hold those lines. Such authority is underpinned by hierarchical control over property that is underwritten by civil law.

While ordination occurs in and through the Church, "it recognises the prior call and gift of God through the Holy Spirit".[28] The Church's responsibility is to discern, recognise and authorise the exercise of the relevant ministry (diaconal, priestly or episcopal). The calling or office is not just functional, because ordination (like baptism) confers the relevant status "in the Church of God".[29] (I shall pass over Roman Catholic non-recognition of Anglican orders.)

For Anglicans in this country, the criteria for ordination to the three orders and the formalities to be met are set out in the *Canon Concerning Holy Orders 2004* (and for Sydney Diocese the *Solemn*

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24 *Constitution*, s 56 (1).

25 Through the diocesan bishop effectively voting as a separate "house" as a necessary step to passing ordinances etc.

26 See Appellate Tribunal, Report on Reference concerning diaconal and lay presidency, 7 March 1996; Report on Reference concerning the administration of Holy Communion and the Lord's Supper by persons other than a Priest or Presbyter, 10 August 2010.

27 See Kieran Tapsell, *Potiphar's Wife. The Vatican's Secret and Child Sexual Abuse*, ATF Press Adelaide, 2014.

28 To quote from the recent report of the Doctrine Commission of the Anglican Church of Australia on *Deposition from Holy Orders,* citing the opening prayer in the *A Prayer Book for Australia* services for the ordination of deacons and priests.

29 See *Report on Reference concerning diaconal and lay presidency,* 7 March 1996 at p 27 per Young J ("it is impossible to define the orders of bishops, priests and deacons in terms of functions").

Promises Ordinance 2011). Ordinations and consecrations must be effected by bishops of the Church or of a Church in communion with it.[30]

Within Anglicanism, those of the more Catholic persuasion regard the celebration of Holy Communion as central to priesthood whereas the more Puritan wing emphasises teaching eldership. These positions about the functional essence of the office appear to have little in common. But each group maintains categorical justifications to withhold priestly ordination from **all women**, whatever type of ministry they wish to practise. As such, each group is affirming (for entirely different reasons) that priesthood as such is a status to be closely guarded and fought over. To this observer at least, in this continuing struggle little attention has been paid to Jesus' effective bypassing of the priests of his day or the model of pastoral servant-hood that he emphasised in his rebuke of the sons of Zebedee.[31]

Whatever its essence, clerical status confers liturgical and other authority that is widely respected, unduly so according to the Royal Commission. Subject to licensing, it also offers portability across dioceses, across the world, and across denominations.

One reads statements to the effect that Holy Orders are "indelible". The underlying theology is contested and clouded with ambiguity. Certainly there has been a long tradition emphasising the lifelong permanence of Orders. Thomas Aquinas spoke of the sacrament of ordination as making "an indelible mark" on the soul of the recipient and the Council of Trent in 1547 anathematised those who did not hold to this position.[32] For Catholics, even a laicised priest may give effective absolution to someone in danger of death. Eastern Orthodoxy regards the distinctive status resulting from ordination as lasting permanently, although this is not couched in the language of "indelibility". The Uniting Church and Presbyterian Churches also view the ordained state as lifelong unless removed by some formal processes.

Anglicans hold to a range of positions on the conceptual indelibility of orders and the consequential precise impact of deposition from Orders.[33] The Doctrine Commission has suggested that the language of recent Canons addressing "deposition from Holy Orders" may support this spectrum of opinion on the topic – an extreme example of studied ambiguity in the Anglican tradition. I would reserve my judgment on that issue. But what **is** clear is that clergy status endures at least until formal relinquishment or deposition.[34] This was why, as Chancellor of the Diocese of Armidale, I ruled (most reluctantly) that the solitary female priest ordained in the diocese's history, a woman who had not served in clerical ministry for many years, was unable to stand for election as a **lay** member of Diocesan Council in her extant clerical state.

Holy Orders in the Anglican Church may be relinquished voluntarily[35] although this mechanism cannot be used to escape disciplinary processes.[36] The Catholics call relinquishment voluntary

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30 *Canon Concerning Holy Orders 2004*, s 3. As to the seriousness of disregarding these rules of discipline, see *St Albans (Bishop) v Fillingham* [1906] P 163. See also *Holy Orders (Reception into Ministry) Canon* 2004.

31 See *Matthew* 20: 25-28, *Mark* 10: 42-45, *Luke* 22: 24-30.

32 Biblical sources that are invoked include *Psalm* 110:4 and *Hebrews* 5:5, 6.20, 7:17 and 7:21. 1983 *CIC,* Canon 1008 (amended in 2009) states, in part: " By divine institution, some of the Christian faithful are marked with an indelible character and constituted as sacred ministers by the sacrament of holy orders."

33 See Doctrine Commission, *op cit,* paras 7-9.

34 The *Holy Orders, Relinquishment and Deposition Canon 2004,* s 9 spells out the effect of relinquishment or deposition.

35 See *Holy Orders, Relinquishment and Deposition Canon 2004* for the current arrangements within the Anglican Church of Australia. See also *Holy Orders (Removal from Exercise of Ministry) Canon 2017,* which replaces it but needs to be adopted in the several dioceses.

36 See *Holy Orders, Relinquishment and Deposition Canon 2004*, ss 3 (b) (ii), 4 (d); *Holy Orders (Removal from Exercise of Ministry) Canon 2017*, s 3 (2).

laicisation but, for them, it is far from automatic. A petition to the Holy Father for dispensation from the clerical state, including the vow of celibacy, is necessary. There is no guarantee of success, let alone timely action. Many Catholic clergy have chosen not to bother, especially if intent on marrying.[37]

One aspect of the durability (to use a neutral term) of Holy Orders is that a man or woman who is consecrated a bishop or ordained priest or deacon in the Church of England (or the Diocese of Melbourne) retains that status when moving to Australia (or the Diocese of Sydney).[38] (Any licence that restricted a priest's ministry in the Diocese to that which may be performed by a deacon is not tantamount to a degradation or deposition, although its contravention may have disciplinary consequences.) A bishop or priest who goes into retirement retains his or her orders, regardless of the motivation for that retirement or any intention to continue serving in ministry. And, reliant on episcopal status in the Church of God, Australian Anglican bishops have more than once assisted overseas in the consecration of a bishop to serve in or establish a Church not in communion with Canterbury.[39]

I move now to the distinctions between clerical status and licensing in the Episcopal Churches.

The general principle is that the licence of the relevant diocesan bishop is a prerequisite to canonically lawful service in any particular place. Episcopal, priestly or diaconal status in the relevant Church is not sufficient.[40] For Roman Catholics, its discretionary removal by the bishop is called "withdrawal of faculties".[41] As the 1983 *Code of Canon Law* quaintly puts it,[42] "acephalous or 'wandering' clergy are in no way to be allowed".

I understand that these general rules have been traced back to Canon 16 of the Council of Nicea of 325 AD. Like much in canon law, there is much disputation about the scope of the original principle. And, like most principles, there have been exceptions in theory and practice. For a general discussion about the practicalities of church order in the Anglican tradition, I would commend the Revd Dr Bruce Kaye's very recent book *The Rise and Fall of English Christendom: Theocracy, Christology, Order and Power.*[43]

A licence or faculty will specify the extent of permission granted to participate in the life of the Church in the diocese.[44] It may be limited in place or time or, as with some faculties granted to Catholic priests, simply *usque revocetur* (until revoked). However framed, it is effectively revocable at the discretion of the bishop, usually on notice or for cause. The withholding, suspension, non-renewal or withdrawal of a licence has until quite recently been the preferred, less confrontational, and more private method of dealing with rogue clergy, including those accused or convicted of sexual abuse or other crimes.

The hierarchy's capacity to control entry onto church trust property gives teeth to these deprivations[45] which sidestep the formalities and evidentiary standards of the ecclesiastical

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37 See Christopher Geraghty, *Dancing with the Devil. A Journey from the Pulpit to the Bench*, Spectrum Publication Pty Ltd, 2012.

38 See Appellate Tribunal, Opinion on the Ordination of Women to the Office of Priest Act of the Synod of the Diocese of Melbourne, p 22; Appeal of Keith Francis Slater at [120].

39 No opinion is expressed as to whether the consecrating bishops' conduct breached church order in the place of consecration or the Church to which he or she is primarily attached.

40 See *Canon Concerning Holy Orders 2004*, s 14; *Scandrett* at 515.

41 See *DEF v Trappett* [2016] NSWSC 1698 at [110]-[113].

42 *1983 CIC,* Canon 265.

43 Routledge, 2018.

44 See generally *Gent v Robin* [1958] SASR 328 at 355-8.

45 See *Scandrett* at 522; *Sturt* at [96].

offences regime that I shall discuss later. I would be tempted to see this as illustrating the truth of Henry Maine's famous aphorism that "the movement of the progressive societies has hitherto been a movement from *Status to Contract*".[46] But a bishop's licence is not in itself a contract.[47] And the recent misuse of this technique has been justly criticised by the Royal Commission and others.[48] The withdrawal of faculties without more is now seen as an inadequate disciplinary response to clear wrongdoing.

The system of canon law operating in both the Catholic and Anglican Churches in Australia does not of itself constitute a contract. Nor is the relationship between priest and bishop contractual, absent an appointment framed so as to have that particular effect. Licensing to a particular position, such as a chaplaincy, does not establish a contract of employment or otherwise engage the wrongful dismissal jurisdiction of an industrial commission.[49]

In *Baker v Gough*[50] an injunction restrained the summary dismissal of the chaplain at The King's School, Parramatta because his right to a hearing was also grounded in a Sydney diocesan ordinance relating to the school.[51] I was going to describe this 1963 decision of Jacobs J as an old one before I recalled that Mr Baker was also my history teacher at King's. Being a day boy, I never heard him preach in Sunday chapel, but I have a vivid memory of some remarks about Marilyn Monroe "making sex decent" uttered at a school assembly on the day after she died. They may well have been the trigger for Archbishop Gough trying to remove him as chaplain. Bill Baker was fortunate that his brother in law was the redoubtable Edward St John QC who in turn engaged a rising junior, William Deane, who would later follow Jacobs J from the Supreme Court to the High Court before moving on to become Governor-General.

Anglican ordinations are invariably accompanied by oaths of canonical obedience[52] whereas, for Catholic clergy, that duty is simply imposed by the *Code of Canon Law*.[53] Serious disobedience is a disciplinary offence. For example, an Anglican Bishop in Australia who is guilty of "any conduct

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46 Sir Henry Sumner Maine, *Ancient Law,* Cheap (sic) edition, 1908, p 151 (emphasis in original).

47 See *DEF v Trappett* [2016] NSWSC 1698 at [108]-[119]. Contractual and other rights may, however, accompany a licence in some situations: see *President of the Methodist Church v Parfitt* [1984] 1 QB 368 at 377. In *Melbourne Anglican Trust Corporation v Greentree,* Supreme Court of Victoria No 4387 0f 1997 (BC9702239) Vincent J held that the right of the licensed vicar of a parish to be accommodated in the vicarage was contractual, but not proprietary. See *Harrington v Coote* (2013) 119 SASR 152, [2013] SASCFC 154 at [16]-[17]. See further, below, p 26.

48 See, eg Kieran Tapsell, *Potiphar's Wife.*

49 *Trustees of the Roman Catholic Church for the Archdiocese of Sydney v Ellis* (2007) 70 NSWLR 565, [2007] NSWCA 117 (hereafter *Ellis*); *The Revd Howard Knowles and the Anglican Property Trust, Diocese of Bathurst* (1999) 89 IR 47 (Wright J) (this case involved the non-renewal of a licence to serve as a prison chaplain); *E v English Province of Our Lady of Charity* [2011] EWHC 2871 (QB), [2012] 1 All ER 723 (Roman Catholic priest); *President of the Methodist Conference v Preston* [2013] UKSC 29, [2013] 2 AC 163; *DEF v Trappett* [2016] NSWSC 1698 at [109]; *Sturt* at [86]. Cf *Ermogenous v Greek Orthodox Community of South Australia Inc* (2002) 209 CLR 95 recognising that some matters relating to clergy are enforceable as contracts according to their intent. In New South Wales, at least, clergy are deemed by statute to be employees for worker's compensation purposes if their denomination requests the making of the requisite regulation: see *Workplace Injury Management and Workers Compensation Act* 1998 (NSW), Schedule 1, cl 17; Workers Compensation Regulation 2016, cl 65.

50 [1963] NSWR 1345. See *Sturt* at [124]-[125]. As to diocesan ordinances touching contractual and property rights being capable of generating rights enforceable in the courts, see also *Anglican Development Fund Diocese of Bathurst v Palmer* [2015] NSWSC 1856.

51 See the discussion of *Baker v Gough* in *In the matter of South Head & District Synagogue (Sydney) (Administrators appointed)* [2017] NSWSC 823 at [37]-[38] (Brereton J).

52 See eg *Oaths Affirmations Declarations and Assents Canon 1992* (which has been adopted in most dioceses); *Solemn Promises Ordinance 2011* (Diocese of Sydney).

53 See *1983 CIC,* Canon 273*; DEF v Trappett* [2016] NSWSC 1698 at [111].

involving wilful and habitual disregard of...consecration vows" (which may include one of canonical obedience to the metropolitan of the Province) will commit an offence under Anglican canon law.[54]

However, I am unaware of disobedience as such ever being successfully used as the basis of formal charges. When the disciplinary book is thrown at clergy, the focus is upon the substantive misconduct. Perhaps this is one lesson all Churches have taken away from the Reformation. But in this vein, let me share a story from *Scandrett v Dowling,* the unsuccessful attempt to obtain an injunction to stop Bishop Dowling ordaining as priests eleven female deacons that will be touched upon later in this lecture. The Metropolitan, Archbishop Donald Robinson, requested and later solemnly directed Bishop Dowling not to proceed with his stated intention to ordain if (as happened) the Appellate Tribunal did not determine that Dowling's status as a bishop, backed by diocesan ordinance encouraging the ordination, was sufficient to the task. Replying to Robinson, Dowling noted:[55]

> "It is an ironical position for us to be in. You from the reformed tradition, delivering me an episcopal injunction in the prelatical and catholic tradition, and me, from a more catholic background saying, as I do: 'Here I stand, I cannot do otherwise'."

Insofar as diocesan ordinances relate to clergy they may supplement the practical enjoyment of the status of priesthood, especially for incumbents of parishes. All dioceses stipulate basic conditions of what is, in effect, the tenured office of rector or vicar. These conditions extend to stipend and long service entitlements, minimum rectory standards, superannuation and the like.

For Catholics, the 1983 *Code of Canon Law* goes further in its financial underpinning of clerical status. Unless and until Roman Catholic priests are formally laicised in accordance with canon law, they continue to enjoy (in the words of Canon 281), the guarantee of "the remuneration that befits their condition, taking into account both the nature of their office and the conditions of time and place. It is to be such that it provides for the necessities of their life and for the just remuneration of those whose services they need. ..Suitable provision is likewise to be made for such social welfare as they may need in infirmity, sickness or old age."

Clergy status as perception: risks and dangers

While the word "laity" comes from the Greek *laos* ("people"), it is invariably used nowadays to indicate those not holding clerical office. An extreme version of the expected role of the laity is expounded in a 1906 encyclical letter of Pope Pius X when he declared:[56]

> "The Church is by its very nature an unequal society: it comprises two categories of person, the pastors and the flock. In the hierarchy alone reside the power and authority necessary to move and direct all the members of the society to its end. As for the many, they have no other right than to let themselves be guided and so follow their pastors in docility."

Catholic laity still has few rights in their Church. For Anglican lay folk, things are better, although synodical and parochial authority must be shared with clergy, as already demonstrated.

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54 See *Offences Canon 1962*, s 2.

55 See Keith Mason, "Believers in Court: Sydney Anglicans Going to Law," *The Cable Lecture* 2005, pp 24-5.

56 *Vehementer Nos,* 11 February 1906, *Acta Apostolica Sedis* (1906), quoted in Brian Lucas, Peter Slack, William d'Apice, *Church Administration Handbook,* St Pauls 2008, p 29. The authors describe this pre-Second Vatican Council dictum as "incongruous".

For all laity, their strongest **legal** position is the liberty to ignore monition and withdraw support in this age where excommunication is no longer viewed as a threat. Clergy no longer exercise directly compulsive powers over laity unless there are contracts of employment or access to church properties is withdrawn according to the law of real property. Of course, no one likes to be driven from a beloved Church or parish by the conduct of effectively tenured clergy, which partially explains why the laity is nowhere as docile as Pope Pius may have wished.

In its *Final Report,* the Royal Commission has identified many contributors to child endangerment. As to the **causes**, the Commission reported that, in several religious institutions, "the central factor, underpinning and linked to all other factors, was the status of people in religious ministry".[57] This is what the Commission labelled as clericalism and it will be seen that both legal and symbolic aspects of clergy status are involved. In the view of the Commission, the power exercised by people in religious ministry gave access to children and created opportunities for abuse. It also shielded perpetrators for a variety of cultural and institutional reasons.

As to the Anglican Church, the Commission reported that:[58]

> "Aspects of clericalism – that is, the theological belief that the clergy are different to the laity – may have contributed to the occurrence of sexual abuse in the Anglican Church and impeded appropriate responses to such abuse. A culture of clericalism may have discouraged survivors and others from reporting child sexual abuse, including to the police. Greater transparency and a more extensive role for women in both ordained ministry and lay leadership positions in the Anglican Church, among other measures, could address the negative impacts of this culture of clericalism."

By analogous reasoning, many Anglicans see variants of the "male headship" arguments invoked to exclude **all** women from **all** priestly offices as having contributed to the abuse of women. The matter has been partially addressed in recent statements of public contrition.

It is well known that the Royal Commission paid a lot of attention to the Catholic Church and what it described as "catastrophic failures of leadership of Catholic Church authorities over many decades, particularly before the 1990s."[59] There was a toxic interaction between certain doctrines, canonical rules and human failings in which misguided concern about "scandal" to the Church was privileged over the interests of vulnerable children. Again, I confine my attention to issues of clergy status. On the topic of "Clericalism", the Commission reported:[60]

> "Clericalism is at the centre of a tightly interconnected cluster of contributing factors. Clericalism is the idealisation of the priesthood, and by extension, the idealisation of the Catholic Church. Clericalism is linked to a sense of entitlement, superiority and exclusion, and abuse of power.

Clericalism nurtured ideas that the Catholic Church was autonomous and self-sufficient, and promoted the idea that child sexual abuse by clergy and religious was a matter to be dealt with internally and in secret.

The theological notion that the priest undergoes an 'ontological change' at ordination, so that he is different to ordinary human beings and permanently a priest, is a dangerous component of the

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57 *Final Report,* vol 16, p 28.
58 *Final Report,* vol 16, p 33.
59 *Final Report,* vol 16, p 36.
60 *Final Report,* vol 16, p 43.

culture of clericalism. The notion that the priest is a sacred person contributed to exaggerated levels of unregulated power and trust which perpetrators of child sexual abuse were able to exploit.

Clericalism caused some bishops and religious superiors to identify with perpetrators of child sexual abuse rather than victims and their families, and in some cases led to denial that clergy and religious were capable of child sexual abuse. It was the culture of clericalism that led bishops and other religious superiors to attempt to avoid public scandal to protect the reputation of the Catholic Church and the status of the priesthood.

We heard that the culture of clericalism continues in the Catholic Church and is on the rise in some seminaries in Australia and worldwide."

Personal experience of abuse by clergy and the extensive revelations of the Royal Commission have destroyed for many people (some clergy included) their trust in clergy; and, by transference, in their former Church; and by further transference, in God himself.[61] Where particular clergy have been disgraced and deposed, steps have even been taken to rewrite history by removing photos from what in other situations are **euphemistically** called "rogues' galleries".

But back to more obviously legal issues.

Justice as an attribute of God and recent calls for greater accountability of all church workers

Justice is an attribute of God. Its pursuit by both Church and State is not an optional extra. Most people perceive its centrality whatever their beliefs about God and divine retribution. The Bible teaches a lot about the accountability of leaders and priests.[62]

The Royal Commission has actually **practised** justice in its cathartic process of allowing so many victims to tell their stories, publicly and privately.

The neglected plight of victims and the need to offer effective redress for past wrongs has been a major focus of the Commission's work and it will continue to engage public attention in the years ahead. The wheels of the criminal law will grind their necessary part without recourse to the ancient privilege of clergy spoken about earlier. Unlike the canon law, the secular law knows no statute of limitations for serious crimes. There are also tortious duties sounding in damages that supplement criminal sanctions. We are also witnessing significant shifts in the understanding of recidivism, the intergenerational harm of sexual abuse and the capacity of children to give credible evidence.

The crunch point for monetary redress is the capacity of victims to have effective recourse against Church assets given the relative impecuniosity of most clergy. My Court's decision in *Ellis*[63] revealed a gap when we held in effect that "the Roman Catholic Church" did not have legal personality allowing it to be sued in these matters and that, if the "Ellis" point were taken by an insurer or bishop, recourse was not universally available against Church trust property vested in the statutory corporate trustee. Responding to the Royal Commission, the Victorian Government has recently introduced complex legislation to ensure that tort claims no longer risk

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61 See, eg "Faith no more: parishioners lose trust" *Sun-Herald* 11 February 2018.

62 See, eg, 1 *Samuel* 2: 35, *Ezekiel* 34: 7-10, *Micah* 3, *Malachi* 2: 1-9, *Acts* 5: 1-11, 1 *Corinthians* 5: 1-5.

63 *Trustees of the Roman Catholic Church for the Archdiocese of Sydney v Ellis* (2007) 70 NSWLR 565, [2007] NSWCA 117. Special leave to appeal was refused by the High Court on the basis of insufficient prospects of success: see [2007] HCATrans 697 (16 November 2007).

defeat due to the non-corporate status of Churches. This welcome reform will doubtless be replicated in other jurisdictions.

Note, however, that such legislation leaves with the courts the much harder task of determining when Churches will be held liable for abuse committed by clergy or other paid and unpaid church workers. In the 2001 case of *Lepore v New South Wales* I was joined by Davies AJA in a majority decision of the New South Wales Court of Appeal which held that what lawyers call a non-delegable duty of care enabled a child to sue the State of New South Wales alleging he had been sexually abused in the classroom of a state school by a teacher.[64] Heydon J A (as he then was) dissented and his conclusion to the contrary prevailed when the case went on appeal to the High Court. In that Court, only McHugh J in dissent supported the non-delegable duty concept of fairly strict liability.[65] The High Court adhered to this position in 2016.[66] However, for what it is worth, the Royal Commission prefers the outcome proposed by McHugh J, Davies AJA and myself; and it has recommended legislation creating a non-delegable duty of care as regards the sexual abuse of children in institutions.[67] This recommendation has been put into law in Victoria[68] but a private member's Bill to do so in New South Wales awaits debate.[69]

For the present, the traditional yet opaque principles of vicarious liability apply. Under them, all that can be confidently predicted is that licensed clergy status will not in itself lead to vicarious liability even for a post-*Ellis* Catholic or Anglican Church. According to *Prince Alfred College Inc v ADC,*[70] even for an employee, a plaintiff seeking to render an institution vicariously liable must establish particular features creating the "occasion" for criminal abuse – features such as trust, control and the ability to achieve intimacy with the victim.

The Royal Commission has also called upon the Churches to reform their own constitutions, dogmas, processes, codes of conduct, education curricula and child protection systems in the cause of minimising the risk of child abuse and maximising the accountability of recalcitrant clergy and other church workers. State intervention is invoked to back up the proposals should the churches drag their feet and much has begun to happen. As indicated, several of the suggested reforms touch matters of clergy status. Most notably, it has been suggested that celibacy become a voluntary, rather than compulsory, aspect of ordination to Catholic ministry.

One recurring scenario linked with the work of the Royal Commission has been the call by victims for disgraced clergy to suffer what the media still rejoices to call "defrocking", ie deposition from Orders. These cries for public vindication (heartily endorsed by the Royal Commission) are perfectly understandable. Note, however, that the objects of the loudest calls for "defrocking" are men already convicted and imprisoned for their crimes who are no longer licensed to officiate in liturgy. In some instances, as with certain now-retired bishops, their offending has been in failure to deal appropriately with the wrongdoing of others. I am in no way seeking to justify their conduct. It is nevertheless significant that **formal** degradation to the lay status is perceived even by Church outsiders as a necessary vindication for egregious

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64 See *Lepore v New South Wales* (2001) 52 NSWLR 420; [2001] NSWCA 112.

65 *New South Wales v Lepore* (2003) 212 CLR 511; [2003] HCA 4.

66 *Prince Alfred College Inc v ADC* (2016) 258 CLR 134; [2016] HCA 37.

67 See *Redress and Civil Litigation Report* (2015), pp 490-493 and Recommendations 89-93. This would encompass "any facilities or services operated or provided by religious organisations, including activities or services provided by religious leaders, officers or personnel of religious organisations but not including foster care or kinship care".

68 See *Wrongs Amendment (Organisational Child Abuse) Act* 2017 (Vic).

69 The Civil Liability Amendment (Institutional Child Abuse) Bill 2017l was introduced by Mr Paul Lynch on 23 November 2017.

70 *Prince Alfred College Inc v ADC* esp at [81].

wrongdoing. There is a clear perception of some ontological hierarchy as between the clergy and laity that needs to be corrected.

Canonical clergy discipline for ecclesiastical offences

A key aspect of any status is the entitlement to formal processes before it may be removed involuntarily. It has been observed that "[d]iscipline of the clergy is a subject of perennial interest...[and t]he subject has a long history."[71] Orders do not confer perfection or immunise from discipline, either in the sight of God or man. But over the years many barriers have shielded clergy from effective accountability.

Back in the heady days of clerical power after the murder of Archbishop Beckett, lay persons could not, as a general rule, initiate or even testify in disciplinary proceedings against clergy, ostensibly out of fear of vexatious accusations. All proceedings were in the court of the bishop (or Ordinary, as he was called in that context) and all decisions were in his hands, with ultimate appeal to Rome.[72] There were (and still are) extensive layers of secrecy (especially but not exclusively under Catholic canon law processes), in marked contrast to the civil law's core principle of open justice.[73]

Under canon law, clergy discipline involves what are called ecclesiastical offences and adverse outcomes are called "sentences" in the Anglican polity and "penal sanctions" in the Catholic polity. For Anglican clergy in Australia, the Church *Constitution* has modified the inheritance of English canon law by limiting "sentences" for such offences to deposition from orders, prohibition from functioning, removal from office and rebuke.

Involuntary deposition from Anglican Holy Orders for ecclesiastical offences is effected by a bishop but may only be imposed pursuant to the sentence of a church tribunal following trial in a tribunal identified in the *Constitution*.[74] The *Constitution* requires each diocese to have a tribunal with jurisdiction to hear charges against clergy. The bishop's so-called "prerogative of mercy" is however preserved, subject to a duty to consult with the tribunal.[75]

Ecclesiastical offences recognised under the Anglican Church *Constitution* include breaches of faith, ritual, ceremonial or discipline,[76] an offence of unchastity, an offence involving sexual misconduct or an offence relating to a conviction for a criminal offence punishable by imprisonment for twelve months or upwards.[77] The *Offences Canon 1962* adds drunkenness, habitual and wilful neglect of ministerial duty after written admonition in respect thereof by the bishop of the diocese and wilful failure to pay just debts. It also treats as an offence "conduct, whenever occurring, which would be disgraceful if committed by a member of the clergy, and

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71 R M Helmholz, "Discipline of the Clergy: Medieval and Modern" (2002) *Ecclesiastical Law Journal* at p 189.

72 Ibid.

73 As to the "open justice" principle in Australian common law, see, eg *John Fairfax Publications Pty Ltd v District Court (NSW)* (2004) 61 NSWLR 344 (Spigelman CJ). As to secrecy in Catholic canon law, see, eg Kieran Tapsell, *op cit.* Cf T S Eliot's observation that "The Church of England washes its dirty linen in public....In contrast to some other institutions both civil and ecclesiastical, the linen does get washed" (Essay, "Thoughts After Lambeth" 1930).

74 See *Holy Orders, Relinquishment and Deposition Canon 2004* for the current arrangements within the Anglican Church of Australia. It is currently in force in most dioceses but will be replaced by the *Holy Orders (Removal from Ministry) Canon 2017* when it comes into force in the dioceses.

75 *Constitution*, s 60 (2).

76 All four of these terms are defined, after a fashion, in s 74 of the *Constitution.*

77 *Constitution,* s 54 (2) and (2A). There must be a link between the member of clergy charged and the diocese: see s 54 (2A).

which at the time the charge is preferred is productive, or if known publicly would be productive, of scandal or evil report". In 2017 further offences of child abuse and failure without reasonable excuse to comply with laws requiring the reporting of child abuse to police or other authority were added. Canons of the General Synod and diocesan ordinances have created additional offences.

Clergy offences do not threaten liberty and may only indirectly threaten the wallet. Penal processes "are not victim-focussed and are mainly concerned with dealing with accused persons".[78] They are defined so as to address the past conduct of the accused cleric as distinct from its impact on victims or others. The authoritative *Phillimore* [79] states that "the object of all punishment [for ecclesiastical offences] inflicted by...the bishop or his court...is the promotion of the soul's health by the reformation of the life and moral conduct, or the irreligious and heretical opinion, of the guilty person". Since, however, such punishment may be life-long (as with deposition from orders) there is some conscious ambiguity here, just as there is with the multiple functions of sentencing in the secular criminal law and the striking off of doctors and lawyers.

Time and ignorance preclude a detailed discussion of the canonical offence system for Roman Catholic clergy. Even Catholic insiders have been frustrated by inconsistent messages received from the Vatican about penal norms and processes as the sexual abuse disaster has unfolded. Confusion has related to things such as the definitions of abuse capable of attracting disciplinary action, limitation provisions, and the exact agency in Rome to which requests for action by bishops is to be directed. There are complex appeal processes in which lay persons exercise no determinative roles, with an ultimate appeal to Rome and absolute dispositive authority residing in the Pope. Catholic clergy (including bishops) have nevertheless been laicised by the Pope on various grounds.[80]

For Catholic clerics, the 1983 *Code of Canon Law* contemplates the discretionary modification of penalties in a wide range of circumstances including where "the offender has repented and repaired the scandal, or if the offender has been or foreseeably will be sufficiently punished by the civil authority".[81] Dismissal from the clerical state (ie laicization) is a permanent measure whereby the cleric is from then on treated as a layman. It may be imposed as a penalty (*ad poenam*) or granted as a favour at the priest's own request. Laicization does not in itself remove the obligation of celibacy: only the Pope can grant that dispensation. Nor does it entirely remove the indelibility of orders, given that Catholic doctrine allows a laicised priest to give absolution to someone in danger of death.

Anglican bishops in Australia may also be charged with offences and deposed from orders through disciplinary processes.[82] Ecclesiastical offences for them include breaches of faith, ritual, ceremonial or discipline, unchastity, drunkenness, wilful failure to pay just debts, conduct that is disgraceful in the manner set out above, wilful violation of the constitution or applicable church

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78 Submission from the Truth, Justice and Healing Council, Royal Commission Issues Paper No 2, "Towards Healing", 30 September 2013, cited in *DEF v Trappett* [2015] NSWSC 1840 at [12].

79 Robert Phillimore, *The Ecclesiastical Law of the Church of England*, 1st ed, 1873, p 1087.

80 See generally Tapsell, *op cit.*

81 *1983 CIC,* Canons 1343-1345. The Royal Commission was highly critical of this "pastoral" attitude. See also Tapsell, *op cit.*

82 In 2004, a retired Anglican bishop (Donald Shearman) was deposed from Holy Orders for his misconduct in a sexual relationship that spanned many years which had commenced when the woman was fourteen. This occurred through the disciplinary processes applicable in the Diocese of Brisbane. In 2010 the Special Tribunal recommended prohibition from functioning in the office of a bishop and the removal from office for various contraventions of the *Offences Canon* by another diocesan Bishop (Ross Davies). The Primate pronounced the sentences recommended.

legislation, any conduct involving wilful and habitual disregard of consecration vows, child abuse, failure without reasonable excuse to comply with laws requiring the reporting of child abuse, and failure to comply with a direction of the Episcopal Standards Board.[83] To plug an obvious gap, the General Synod legislated in 2017 to allow most of these charges to be brought against **former** diocesan bishops in respect of their conduct when they held such office.[84]

There is a Special Tribunal with jurisdiction to handle charges against diocesan bishops.[85]

Appeals lie to the Appellate Tribunal against sentences imposed against clergy by diocesan tribunals or the Special Tribunal in matters involving any question of faith ritual ceremonial or discipline. The appeal is by way of re-hearing.[86] Either party to the disciplinary proceedings may appeal.[87] There are few leave filters and an ultimate right to petition the Metropolitan or Primate for leave to appeal exists where a person is aggrieved by any sentence recommended by a diocesan tribunal.

To the extent that is adopted in the several dioceses, the *Holy Orders (Removal from Ministry) Canon 2017* will allow for relinquishment of some, but not all orders, and (under the ecclesiastical offences regime) prohibition of exercise of some but not all orders.[88]

Church reluctance and Royal Commission criticisms about formal disciplinary processes

As indicated, for many years, Anglican and Catholic clergy who were accused, even convicted, of child abuse or other sexual wrongdoing have generally been dealt with **outside** these church disciplinary mechanisms. Some gaping holes in the offences regime played their part. These gaps include provisions requiring that charges could only be brought against a person with an active link to the relevant diocese at the time of or shortly before the charge is preferred;[89] absurdly short limitation periods (in the context of sexual offending);[90] and the way in which clergy offences were actually defined.

These shortfalls were magnified in the Roman Catholic Church for many reasons.[91] Catholic bishops and their advisers have also grappled with the perception that the Vatican has tended to resolve matters in favour of offending priests; and, in any event, took considerable time with the

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83 *Constitution,* s 56 (6); *Offences Canon 1962,* s 2 (as amended in 2017).

84 See *Offences Canon 1962* (as amended in 2017), s 2A.

85 *Constitution*, s 56; Special Tribunal Canon 2007.

86 See *Constitution,* s 57 (2). Other subsections and ss 58-59 prescribe detailed procedures etc. Deposition from Holy Orders through the professional standards regime does not generate a right of appeal to the Appellate Tribunal: see *Slater*.

87 See *Constitution,* s 59 (4).

88 See s 5 (1) (d). If a member of the clergy is to be prohibited permanently from all Orders by way of a sentence for an ecclesiastical offence, the correct mechanism is deposition (see note to s 5 (2) of the Canon).

89 See *Constitution,* s 54 (2), (2A) and the various diocesan "discipline" ordinances. But see now Sydney Diocese's *Diocesan Tribunal Ordinance 2017,* s 7.

90 See *Constitution,* s 54 (2A) (b) and the various diocesan discipline ordinances. The nature of sexual abuse of children is such that complaints often do not surface until many years after adulthood.

91 See Tapsell, *op cit,* Chapter 14. Recommendation 16.9 in the Royal Commission's *Final Report* included one for the requested amendment of the 1983 Code so as to create a new canon specifically relating to child abuse in which all delicts relating to child sexual abuse should be articulated as canonical crimes against the child, not as moral failings or as breaches to the 'special obligation' of clerics and religious to observe celibacy.

formal canonical disciplinary processes.[92] The exclusion of laity from determinative positions and the "hierarchical structure of the...Church [also] created a culture of deferential obedience in which poor responses to child sexual abuse went unchallenged", in the words of the Royal Commission.[93]

The written and unwritten rules for Anglican and Catholic ecclesiastical offences have been, until very recently, that penal processes were to be used only as a last resort.[94] The Royal Commission has reported that the Church authorities it examined did not engage with the canonical disciplinary processes. Instead:[95]

> "... bishops and religious superiors adopted a range of informal responses aimed at limiting the capacity of alleged perpetrators to engage in ministry or, at most, removing alleged perpetrators from particular dioceses or religious congregations."

Labelling these responses "inappropriate" and "ineffective", the Commission has demonstrated that some perpetrators continued to offend even after multiple responses following initial and successive allegations of child sexual abuse. This is not the occasion to rehearse the levels of culpability involved in these attitudes (hopefully past). We have all heard from the Royal Commission about some spectacular failures by bishops and headmasters and some terrible consequences that flowed. Sadly, inaction or worse often flowed from the misguided privileging of the reputation of the Church in general and clergy in particular over the interests of victims of abuse.[96]

There were undoubtedly dreadful, possibly criminal, failures by bishops and their advisers in the past. I would, however, record from personal experience as a Solicitor-General, that exercising the prosecutorial discretion is far from easy, even if you have legal training and experienced advisers. Victims of crime or abuse are not invariably good or willing witnesses. The delay and cost involved in a prolonged examination of contested accusations of very serious misconduct means that (for **some** suspects) negotiated retirement from ministry and withdrawal of faculties will be an appropriate canonical outcome. Such practices are not unknown in politics, law, commerce and other sectors. The unreformed canonical processes were, however, deeply flawed for the conflicting roles imposed upon bishops who were (and in some dioceses still are) expected to juggle the functions of licensor, confessor, public relations spokesperson, and the repository of the canonical prerogative of mercy.

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92 Royal Commission, *Final Report*, vol 16, pp 39-40, 44; Tapsell, *op cit,* p 43.

93 *Final Report*, vol 16, p 44. See also Tapsell, *op cit*, p 43.

94 As to Anglicans, see Royal Commission*, Final Report*, vol 16, Religious institutions, pp 30-32. For the Catholic position, see 1983 *CIC,* Canon 1341 ("The Ordinary is to start a judicial or an administrative procedure for the imposition or the declaration of penalties only when he perceives that neither by fraternal correction or reproof, nor by any methods of pastoral care, can the scandal be sufficiently repaired, justice restored and the offender reformed.") The Commission's criticism of this approach is set out at p 46 of its *Final Report*, vol 16.

95 *Final Report,* Volume 16, Religious Institutions, Book 1, p 37. This passage deals with the Catholic Church but there were similar criticisms of Anglican bishops.

96 See *Final Report*, vol 16, pp 34-49.

The quest for satisfactory alternative mechanisms for addressing clergy unfitness

In the early years of this century both the Anglican and Catholic Churches established alternative regimes for addressing the unfitness in clergy and other Church workers.[97] The schemes created mechanisms for investigating allegations and determining factual issues in a fair manner, usually with recourse to internal review. Lay men and women with particular skills were for the first time given formal roles in the investigatory, assessment and internal review stages of the determinations.

For Anglican clergy, deposition from Holy Orders is a possible outcome of this so-called "professional standards" scheme which originated with a 2004 resolution of the General Synod. It is enacted through canons of the General Synod for diocesan bishops and interlocking diocesan legislation for other clergy and church workers. A National Professional Standards Register, established under canon of General Synod,[98] records information about clergy and laity against whom notifiable complaints or charges have been made, or convictions or sentences recorded, in relation to sexual offending and abuse.

Much of the credit for this scheme goes to Garth Blake SC[99] and it is very appropriate that he has this year been made a Member of the General Division of the Order of Australia.

Unlike the system for determining charges for ecclesiastical offences mandated under the *Constitution*, the Anglican professional standards system focuses on the present and future fitness of church workers to continue service in the Church. This is not to say that past conduct or failures are irrelevant or that, where the church workers are clergy, past events (even ecclesiastical offences) may not trigger the option of proceeding down either path if it is available.[100] As indicated, the potential outcome of an adverse professional fitness process against a member of the Anglican clergy extends to his or her deposition from Holy Orders or the exercise of Holy Orders.

A roughly parallel scheme addressing the continuing fitness of Anglican diocesan bishops was introduced in 2007 and revamped in 2017.[101] It too sits alongside the ecclesiastical offences regime for diocesan bishops established by the *Constitution* (s 56) and the *Offences Canon 1962* (s 2). Examinable conduct is not confined to sexually-related failings. Once again, deposition from Holy Orders may be the outcome, although a 2017 Canon has clarified that the partial removal of orders is a particular option. In 2017 the scheme was also amended to ensure that retired diocesan bishops did not fall through the net where child protection is concerned.[102]

It goes far beyond the scope of this lecture to discuss the details of the professional standards regime. But let me make three short observations about the recent developments, relevant to the broader themes of this lecture.

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97 The Catholic scheme called *Towards Healing* is not confined to sexual abuse of children or to clergy failure to respond to such abuse by others.

98 *National Register Canon 2007*.

99 Garth Blake's article "Ministerial duty and professional discipline in the Anglican Church of Australia" in (2010) *Ecc L J* 53 has been a very informative resource in preparing this lecture.

100 See *Harrington* at [43], *Slater* at [12], [98].

101 See *Episcopal Standards Canon 2007* (discussed in *Slater* at [126]-[134]), *Episcopal Standards (Child Protection) Canon 2017*.

102 See *Episcopal Standards (Child Protection) Canon 2017*.

First, the "fitness for ministry" language of the various provisions as well as constitutional warnings from the Appellate Tribunal in the recent *Slater* appeal[103] mean that attention must continue to be focussed upon present fitness as distinct from purely historical delinquency - at least for clergy. Given, however, the need for appropriate denunciation in some instances,[104] the reformed **disciplinary** armoury will have to be dusted out from time to time – at least for clergy. In this regard, it is noteworthy that Sydney Diocese's *Ministry Standards Ordinance 2017* expressly contemplates the halting of fitness proceedings and initiation of disciplinary proceedings in certain cases.[105]

The Diocese of Armidale went one step further in 2017 when its Synod moved clergy across into an upgraded but solely disciplinary framework with its unique appellate and other protections. Lay church workers continue to be monitored under a revised professional standards ordinance.[106] Categorical differences between clergy and laity therefore remain alive and well in this diocese theologically committed to "lay presidency".

Secondly, it is (in my respectful opinion) highly commendable that Sydney Diocese's *Ministry Standards Ordinance 2017*[107] and the model *Professional Standards Uniform Act 2016* introduced for the Victorian Province effectively remove[108] the diocesan bishop's right to second-guess the recommendations of the Professional Standards Board or Professional Standards Review Board. The same has occurred as regards episcopal standards under a recent Canon of the General Synod.[109]

Thirdly, past lack of uniformity within the Anglican Church of Australia annoyed the Royal Commission. But this former State Solicitor-General endorses experimental diversity, observing that individual dioceses, like states in a federation, can serve as so-called "laboratories of democracy", in the famous words of Brandeis J.[110]

For Roman Catholic clergy in Australia below the rank of bishop, a not dissimilar "administrative" scheme has been in place for more than a decade.[111] It was promulgated by the Australian Catholic Bishops Conference as part of the protocols known as *Towards Healing*.[112] These arrangements define abuse as "sexual assault, sexual harassment or any other conduct of a sexual nature that is inconsistent with the integrity of the relationship between Church personnel and those who are in their pastoral care". It is thus not confined to the abuse of children. Unsurprisingly, there are some differences in scope, processes, and the labelling of key operatives as between the Catholic and Anglican schemes. Thus, when a Catholic cleric is accused and he denies the complaint, two independent assessors are appointed by the Director of Professional Standards. *Towards Healing* then specifies a range of outcomes relating to the victim[113] and the

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103 See *Slater* at [10]-[18], [160]-[164].

104 See *R v Dodd* (1991) A Crim R 349 for a comparable attitude to sentencing in the secular criminal law.

105 See *Ministry Standards Ordinance 2017* (Sydney), s 40.

106 See *Clergy Standards and Discipline Ordinance 2017* (Armidale) and *Professional Standards Ordinance 2017* (Armidale).

107 Section 80.

108 Section 119. The Act has not been adopted in all dioceses of the Province.

109 See *Episcopal Standards (Child Protection) Canon 2017*, s 50A.

110 Brandeis J in *New State Ice Co v Liebman* 285 US 262 (1932) (because each may engage in "novel social and economic experiments without risk to the rest of the country").

111 See generally *DEF v Trappett* [2016] NSWSC 1698 at [16] ff.

112 *Towards Healing, Principles and procedures in responding to complaints of abuse against personnel of the Catholic Church in Australia*, January 2016 (TH). A separate but largely similar scheme was adopted for the Archdiocese of Melbourne.

113 Clause 41.

accused cleric.[114] The cleric's future ministry may be limited or restricted, eg by precluding the ability to celebrate the Mass.

Towards Healing is not intended to operate as a "disciplinary" scheme,[115] and any decision of a bishop as to the cleric's future ministry, such as excommunication or withdrawal of faculties, is not to be inconsistent with canon law.[116] Dismissal from the clerical state is therefore not a direct option for bishops under *Towards Healing*.[117] But, as with Anglicans dealt with adversely under their professional fitness scheme, clergy on the receiving end of this process are likely to perceive any adverse outcome as disciplinary in effect.

For Anglican clergy who are deposed from Holy Orders pursuant to the professional fitness regime there is no avenue of appeal to the Appellate Tribunal or any other body.[118] A proposal to amend the *Constitution* to establish a National Review Tribunal got off to a speedy start in 2004 but still awaits the assent of the Dioceses of Melbourne and Sydney to progress into effect.[119] Most dioceses provide for review of professional standards outcomes on limited grounds by an independent legal expert. *Towards Healing* also offers avenues for internal review open to an accused cleric or church worker.[120]

The validity of each scheme has been challenged in the civil courts by clergy concerned that rights protective of their interests conferred under canon law are being sidestepped. In each instance, those challenges have failed – but for entirely different reasons, as I shall now demonstrate.

Unsuccessful challenges to the validity of the professional fitness regimes and the limits of recourse to civil law

For ease of reference I shall use the generic term "professional fitness" for both the Anglican and Catholic varieties of the modern schemes I have mentioned. What is crystal clear both as to the intent and operation of these administrative schemes is that they are **not** part of the much older regime for dealing with ecclesiastical offences by clergy, even offences involving sexual misconduct or clerical failure to deal appropriately with knowledge about the sexual misconduct of others. Nor are they subject to the limitations, appellate processes, inherent delays, obscurities and clergy-biases of the canonical disciplinary systems.

Challenges to the validity of the Anglican scheme have been rebuffed at least three times. The Supreme Court of New South Wales in *Sturt v The Right Rev Dr Brian Farran Bishop of Newcastle*,[121] the Full Court of the Supreme Court of South Australia in *Harrington v Coote*[122] and the Appellate

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114 Clause 42.

115 See *DEF v Trappett* [2016] NSWSC 1698 at [37]-[38].

116 *TH* 42.5.

117 *TH* 42.5.a (added in 2016) states: "While the Church Authority may discuss future options with the accused cleric or clerical religious who has admitted to or been found guilty of the sexual abuse of minors, the ultimate decision rests with the Congregation for Doctrine of the Faith. At all times the offending cleric or clerical religious may be offered the opportunity to petition the Holy Father for a dispensation from the clerical state."

118 See *Slater* at [136]-[165].

119 See *Constitution Alteration (Chapter IX) Canon* 2004.

120 *TH* 44.

121 [2012] NSWSC 400 (Sackar J). See esp at [166].

122 (2013) 119 SASR 152; [2013] SASCFC 154 (Kourakis CJ, Gray J and Peek J). See esp at [67], [159]-[161].

Tribunal in *The Appeal of Keith Francis Slater*[123] have all rejected arguments to the effect that the *Constitution's* scheme of "sentences" for ecclesiastical offences by clergy covered the field in some way. In so doing, however, it has been emphasised that proceedings against clergy under the professional fitness regime must focus upon present fitness as distinct from punitive "discipline", on peril of jurisdictional error.[124] Speaking of the Grafton *Professional Standards Ordinance,* the Appellate Tribunal offered this summary in *Slater*:[125]

"Those choosing the procedurally simpler path of the professional standards regime must follow the correct signposts on pain of committing a jurisdictional error. And ... they must keep the issue of **present** fitness clearly in focus."

As regards diocesan bishops, the Appellate Tribunal also expressed reservations about the validity of any **diocesan** fitness ordinance unsupported by Canon of General Synod especially so far as it might purport to authorise the deposition of a diocesan bishop, including a man or woman who once held such office but retained that status of bishop while serving in another office or in retirement.[126] General Synod addressed these concerns in 2017.

I understand that a group of Roman Catholic clergy has for some time been claiming the **right** to have accusations of abuse dealt with according to the processes stipulated in the Code of Canon Law and only by those canonical mechanisms.[127] Indeed, they argue that *Towards Healing* contravenes the 1983 *Code of Canon Law* in several respects.[128] Thus far, they have made no headway internally and an attempt to litigate this issue in the Supreme Court of New South Wales was rebuffed when the Court ruled that lacked jurisdiction in such a matter.

I am referring to the recent *DEF v Trappett* case.[129] In *DEF* (a pseudonym), the unsuccessful plaintiff was a Catholic priest who has been found by assessors appointed under the *Towards Healing* protocols to have sexually exploited an adult parishioner. DEF alleged a denial of procedural fairness, and he sought to agitate the invalidity argument as to the inconsistency between *Towards Healing* and the *Code of Canon Law (CIC)*

. Beech-Jones J ruled that the Supreme Court had no jurisdiction to investigate any of these claims. Defamation was not (and almost certainly could not have been) raised, that being the branch of the law concerned with reputation. Neither was any contractual right advanced.[130] In light of *CIC,* Canon 281 (already discussed), DEF was also unable to establish that he would suffer any loss of material benefits even were his archbishop to withdraw permanently his ministry faculties.[131] In any event, the Court applied a recent appellate decision which held that adverse affectation of reputation or livelihood is an insufficient basis to obtain judicial review of

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123 Decision of 19 January 2017 (The Hon Keith Mason AC QC, 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).

124 See *Harrington* at [67], [148]-[154]; *Slater* at [11]-[18], [163].

125 *Slater* at [99], emphasis in original.

126 See *Slater* at [110]-[134].

127 See, eg *DEF v Trappett* [2015] NSWSC 1840 at [26], [52].

128 It is understood that these include *TH* 38.10.2 which is said to contravene *CIC* in sidestepping the Episcopal duty to hold a preliminary inquiry; *TH* 40.9 which is said to impose a lower standard of proof than *CIC's* "moral certainty"; and *TH* 40.10 which is said to dictate to the bishop as to outcome, thereby displacing the discretionary power recognised in "the ordinary" by *CIC*.

129 *DEF v Trappett* [2016] NSWSC 1698. Leave to appeal was refused by the Court of Appeal mainly on the narrow ground that DEF's complaints of denial of procedural fairness were yet to be finally addressed through internal review mechanisms: see *DEF v Trappett* [2017] NSWCA 163.

130 As to the importance of this, see *Agricultural Societies Council of NSW v Christie* [2016] NSWCA 331.

131 It is understood that these faculties had been suspended at the stage of the litigation.

a private tribunal, at least in the absence of a contract, an effect on property rights or an unlawful restraint of trade.[132]

Earlier precedents that had set aside expulsions from unincorporated clubs for want of natural justice were distinguished because each member of such a club was party to a contract with all the others. Membership of the Catholic Church, even as a priest of that Church, does not entail any contractual relationship either with other Catholics or the bishop who had incardinated the priest in the first place.[133] DEF was not in a contract of employment nor did he invoke any rights stemming from statute.[134] And unlike the situation prevailing for Anglican clergy to which I am about to turn, there is no relevant statutory backing of any Catholic Church "constitution".[135]

Where do Anglican clergy stand if they were to challenge deposition from Orders in the Supreme Court?

DEF v Trappett may prove to be the last word for Catholic clergy disputing in the civil courts action taken against them under either canonical procedures or the *Towards Healing* protocols. For Anglican clergy, getting to the door of the court may prove easier, although much will turn upon the ingenuity of lawyers in steering paths through the judicial shoals. I content myself with three broad observations.

First, secular courts hate getting involved in religious disputes and judges will even quote Scripture in support of their reluctance.[136] In the notorious *Red Book Case,* the attempt to obtain injunctive relief to enforce liturgical rectitude on Church trust properties in the Anglican Diocese of Bathurst was partially successful. A two-all split in the High Court of Australia was resolved by Latham CJ and Williams J on the casting vote of Latham CJ who incidentally was a committed atheist and for some years the President of the Rationalist Society of Victoria. As lawyers say, the better view that is more likely to be followed were the matter to resurface today was expressed in the dissenting judgments of Rich and Dixon JJ.[137] To Rich J, the proceedings were about "abstract questions involving religious dogma":[138] His opening remarks set the tone:

> "The subject of this unhappy controversy is only fit for a domestic forum and not for a civil court. Unfortunately it is not an example of 'charity' in the New Testament sense or of the command to love one another. The dispute illustrates a saying of Dean Swift that 'we have just enough religion to make us hate, but not enough to make us love one another."

In these attitudes, judges wittingly or unwittingly reflect the teachings of the apostle Paul about the sinfulness of believers taking their disputes before heathen courts.[139] Teachings in the Jewish faith to similar effect about the unworthiness of religious disputes being taken to civil courts are also reflected in many cases where courts have declined to jurisdiction even to correct injustices of which they heartily disapprove.[140]

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132 *Agricultural Societies Council of NSW v Christie* [2016] NSWCA 331.

133 See also *Ellis.*

134 DEF at [127], [137]. Cf *Bathurst Anglican Development Fund Diocese of Bathurst v Palmer* [2015] NSWSC 1856.

135 See Ellis.

136 See also *Attorney-General (NSW) v Grant* (1976) 135 CLR 587 at 613 (Murphy J).

137 Because of the substantive two-all split, the decision has no binding precedential effect.

138 *Wylde v Attorney-General (NSW) (at the relation of Ashelford)* (1948) 78 CLR 224 at 282. See also *Ermogenous* at 119 [66] (Kirby J).

139 See 1 Corinthians 6: 1-7.

140 See, eg *Live Group Pty Ltd v Rabbi Ulman* [2017] NSWSC 1759.

Secondly, as indicated above, it is now crystal clear that some contractual or property or statutory right must be established before there can be judicial intervention in the affairs of a voluntary association such as a Church.[141] Mere damage to reputation or livelihood will not suffice.[142]

However, and consistent with these limits, **some** Anglican clergy have been able to challenge deposition from Orders, without the need to prove a specific contract such as a contract of employment.

In *Scandrett v Dowling* the New South Wales Court of Appeal ruled that it had no jurisdiction to stop the ordination of women **into** the priesthood. I should disclose that I appeared on the side of the angels in this my most stressful case at the Bar.[143] By adopting this label, I am not referring to the eleven deacons and Bishop who were my clients. Rather, to explain why the case turned out to be a providential lay down *misere*. Why? One of the majority judges in the Court of Appeal had the surname "Priestley" and the other "Hope".[144] These two judges ruled that the so-called "consensual compact" between adherents to the Anglican faith in Australia was **not** a common law contract. It relevantly operated only in the realms of canon law and conscience.[145] Since no property interest was asserted in *Scandrett* that was the end of the matter. My clients' priestly hopes were realised in the ensuing ordination.

So, on what basis have civil courts contemplated the judicial review of disciplinary or professional fitness decisions casting Anglican clergy **out of** ministry? The entire Court in *Scandrett* recognised that the limited statutory backing given to the national Anglican Constitution in the various States and Territories could have made a difference in a different case. The key section stipulates that the Constitution and all rules and canons made under it are "binding on the Bishops, clergy and laity being members of the Church in Australia" [but only] "for all purposes connected with or in any way relating to [Church trust[146] property]".[147] These latter words are not limited to questions of title over Church property or to the express trusts on which the property might be held.

The concept of a benefice is a badge of English Church Establishment that never reached Australian shores. However, a member of the clergy who is licensed in a diocese may enjoy rights conferred by contract or the ordinances of the relevant synod.[148] If these include the right to use church property such as a rectory, this will suffice to render a dispute about the validity of deprivation by a church tribunal or bishop justiciable, according to statements in *Scandrett*[149] and

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141 Proceedings for defamation or based upon a restraint of trade may be put aside in this context.

142 *Agricultural Societies Council of NSW v Christie* [2016] NSWCA 331.

143 My good friend Leslie Katz, later Katz J of the Federal Court, was my junior along with David Davies, now Davies J of the Supreme Court of New South Wales. A bystander came up to Leslie and asked him "Where are you involved in Sydney Anglican politics?" Leslie's reply was: "I am a card-carrying atheist but I help my friends when they are in trouble and Keith Mason is in a lot of trouble."

144 Priestley JA and Hope AJA.

145 See *Scandrett* at 563F ("in the ecclesiastical sphere"), at 554 ("*in foro conscientiae*").

146 These words are not in the particular section. But see *Scandrett* at 563.

147 Legislative backing for the national Constitution was provided separately in each State and Territory. See, eg s 2 of the *Anglican Church of Australia Constitution Act* 1961 (NSW). For its predecessor as regards the constitutional arrangements of the Church in New South Wales, see *Scandrett* at 562. See generally *Scandrett* at 512, 562-5 and *Harrington* at [16] for discussion as to the limiting yet extensive scope of the property reference.

148 See p 11 above.

149 At 522 per Priestley JA (Hope AJA concurring).

Harrington.[150] Such a dispute will "relate to" church trust property, whether or not the clergy licence is contractual.[151]

In the *Sturt* and *Harrington* cases involving Anglican clergy contesting their deprivation from orders under the professional fitness regime, Supreme Courts in New South Wales and South Australia have indicated that deposition from Holy Orders or the withdrawal of an episcopal licence to officiate at a particular place were sufficient to allow the terms of the relevant professional standards ordinances to be treated as contractual rights capable of civil law injunctive protection.[152] In those cases, however, no breach of contract was established and the professional fitness schemes were upheld.

If in a similar case judicial review were available, the grounds for intervention would be very limited. There is no right of appeal on the merits and internal review mechanisms need first to be exhausted. What is left, at most, would be challenges based on denial of procedural fairness or (possibly) jurisdictional error, which is not easy to prove.

My third and final observation is that this reasoning will not assist a priest holding no current licence which confers "property" benefits or a bishop in deep retirement wishing to complain in a civil court about the validity of action taken under either the disciplinary or professional fitness regimes. If, however, he or she could point to some **specific** right spelt out in an ordinance or canon that had been ignored, then notions drawn from Archbishop Davies' recent *ad clerum* about the *Marriage Act* and from *Baker v Gough,* the case about my old King's School chaplain, might be worth pursuing as a last resort. Sackar J alluded to a version of such an approach in *Sturt's Case.*[153]

Devotees of American football will know what I talking about when I liken such an argument to a "Hail Mary pass", the last-second fling of the ball in the direction of the goalpost, in the hope of something good coming of it. All lawyers have used this desperate stratagem on occasions. Perhaps not devout Roman Catholic canon lawyers.

But for me, time has definitely run out. Thank you to those who have commented on drafts of this lecture, especially Kevin Tang. And I thank the late Robin Sharwood and those administering the trusts of his will for this opportunity and honour.

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150 At [16] per Kourakis CJ (Peek J concurring). At [17], Kourakis CJ (Peek J concurring) also instanced the loss of emoluments attaching to a particular clerical office as relating to church property, having regard to the historical nature of clerical offices held in the Church of England and the Anglican Church of Australia. *Gent v Robin & the Synod of the Church of England, Adelaide Inc* [1958] SASR 328 at 330-331 was cited. I would respectfully question this, in light of the non-established nature of the Church in Australia and the reasoning in *Scandrett.* See also *Agricultural Societies Council of NSW v Christie* [2016] NSWCA 331 and *Live Group Pty Ltd v Rabbi Ulman* [2017] NSWSC 1759 (Sackar J) at [87] as to the insufficiency of either "reputation" or "livelihood", without more, as a basis of jurisdiction.

151 *Harrington* at [16].

152 See *Sturt* at [144]-[146]; *Harrington* at [119]-[120]. See also *DEF* at [174].

153 See *Sturt v Farran* [2012] NSWSC 400 at [142]-[143]. See also *In the matter of South Head & District Synagogue (Sydney) (Administrators appointed)*[2017] NSWSC 823 at [36]-[37].