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Law of the State and Religious Institutions. Cause for concern or an opportunity for reform?

A review of the impact of Commonwealth and State laws and the common law on religious institutions

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Introduction

It is a privilege to present this lecture in the name of the late Robin Sharwood. I knew Robin well. I followed him as Chancellor of the Anglican diocese of Ballarat. I served with him for a number of years on the Provincial Legal Committee of Victoria. We met quarterly and engaged in lively conversation on all sorts of church legal issues. Robin would have enjoyed a lively discussion on this evening's topic.

Tonight, the focus is on how, in particular areas, the law of the State has impacted religious institutions, particularly the Anglican Church but other institutions as well. It is for me an appealing topic. It raises interesting questions how Church and State work together or don't, as the case may be.

Of course, the State has also taken on itself a regulatory role where it allocates public moneys to a religious institution for education, social welfare or aged care purposes. That is not my focus this evening.

In this address, when I speak of the law of the State, I mean any law of the Commonwealth of Australia or any State or Territory or indeed the common law as applied by Australian courts.

I confess however the topic has proved a challenge. Some many different areas for discussion are available. This speaks to the complexity of the current relationship between Church and State. Forgive me then if I am selective in what I discuss. I don't pretend to be comprehensive or exhaustive in my treatment of the topic.

I would like to identify some broad themes and some particular challenges that arise on the ground. Hence the title of the address – cause for concern or an opportunity for reform. Of course, the choice is not a binary one.

The Covid era has highlighted what might well have already been evident. With some notable exceptions, the states have exercised considerable power and authority in daily life, compared with the Commonwealth. We have seen this particularly with Covid legislation in response to the pandemic. They were exceptional times. During lockdowns, the states in effect closed down places of worship, along with a host of business activities. Victoria suffered extended lockdowns, as did New South Wales.

Church and State have had an uneasy relationship for thousands of years. At its worst, we have seen how, in 1170, followers of King Henry II murdered Archbishop Thomas Becket, in Canterbury Cathedral. They were in conflict over the rights and privileges of the Church. Other martyrs have followed down the course of history.

The Pharisees posed Jesus the question – is it permissible to pay taxes to Caesar or not? Jesus replied – *Render unto Caesar the things which are Caesar's and unto God the things that are God's.* (Matthew 22.21)

The answer, on one common reading, implies a separation –Caesar from God, of the Church from the State – two Kingdoms. It is however open to different interpretations.

That separation can also be found in our reference to the *secular* as distinct from the spiritual – the secular connotes the temporal, that which is of this world. The spiritual connotes all things of God.

The secular is not independent of the spiritual – they operate with interdependence in our society where our democracy has derived from Christian foundations.

One can challenge the other.

Tensions arise in the working through of State laws and the doctrines, rules and laws of religious institutions. State law can of course raise a moral dilemma for people of faith. An individual may in good conscience decide not to obey or to argue against a law and accept the consequences.

The laws requiring disclosure of child sexual abuse revealed under the seal of the confessional are a case in point. It has proved a vexed question for priests in the Roman Catholic Church, much less so in the Anglican Church. There is also the challenge presented by euthanasia laws introduced in some States.

A religious institution can set itself at odds with the State.

One calls to mind the Christadelphians and their conscientious objection to participating in the second world war.

The Church of England, the established Church, opposed the Falklands' War, much to Prime Minister Maggie Thatcher's dismay. In contrast, the Russian Orthodox Church has supported Russia's war in Ukraine. As you may have read, Archbishop Rowan Williams has been outspoken in condemning that support.

As we examine particular State laws, it appears to me that more commonly, it is not a question of the State vs the Church, the secular vs the spiritual such that one repudiates and disavows the other. The Church is in and of the community. We see the interconnectedness of the secular and the spiritual in the way State law interacts with religious activity, along with all other aspects of community life.

From a strict legal perspective, no institution is above the law of the State. The constituting legislation for the Anglican Church in each of the Australian States make this clear.[1] The same is true of other religious institutions.[2] An institution can by its internal rules regulate its affairs but cannot override the laws of the State.

Recent changes in State law have been significant and impactful. Most have not provoked the moral dilemma whether or not to obey. They do present a challenge how to respond.

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1 See for example the *Anglican Church of Australia Constitution Act 1960* (Vic), s 4.
> Any canon or rule made under or by virtue or in pursuance of the Constitution which contravenes any law or statute in force for the time being in the said State, shall to the extent of such contravention be incapable of having any force or effect.

See also the *Anglian Church of Australia Constitutions Act 1902* (NSW), s 6.

2 For example, the Code Book of the Presbyterian Church of Victoria (2019), para 5.1(a) relating to the General Assembly - *Its power is subject to: all relevant civil laws*…

It is timely to name some changes brought by State law and their impact on religious institutions. This can inform a discussion of future directions for those institutions in the years ahead.

The historical context

The history of Church State relations in Australia in the 19th and 20th centuries is relatively benign. Religious institutions conducted their ministry and social service, assisted where needed by the State. They left each other largely alone. They collaborated in education, health, aged care and welfare. It was a *live and let live* approach, as Archbishop Anthony Fisher recently described it.[3]

Beginning in the 19th century, many of the major religious denominations have received the support of the State, either by legislative enactment or grants of Crown land or both. Religious institutions made a huge contribution to the welfare of the community through the delivery of their services in schools, aged care, social services and hospitals. They continue to do so.

The Anglican Church

The Victorian Parliament enacted the *Church of England Act,* No 45 of 1854. This provided the legislative foundation for the convening of diocesan synods.

In 1871, the Victorian Parliament enacted the *Abolition of State Aid to Religion Act 1871* (Vic), that stopped further State aid to religion after 1875.

The Victorian Parliament later enacted the *Church of England Property Act 1884* (Vic), enabling the establishment by a synod of a trust corporation for their diocese.

In 1961, the Anglican Church of Australia was given formal recognition by the Victorian Parliament in the enactment of the *Anglican Church of Australia Act 1960* (Vic). Like legislation was passed by the Parliaments of the other States. In each enactment, the Church was subject to the laws of the State.

Other denominations

Both Victoria and New South Wales have given legislative assistance to the other major denominations, recognising the huge contribution they made in the area of social services, education, hospitals and aged care. It facilitated the more efficient management of property and provided for perpetual succession of trustees. I include in the paper details of various Victorian legislation ranging from 1890 to 2006.[4]

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3 Archbishop Anthony Fisher OP, Annual Warrane Lecture, Warrane College, University of New South Wales, 15 August 2018.

4 Examples are–

More recently established religious institutions, such as the large Pentecostal churches have not availed themselves of this approach, favouring a corporate structure.

Tax concessions to religious institutions

Both Federal and State Parliaments have long extended tax concessions to religious institutions. These derived from the long established common law classification of religious purposes as a class of charity. The concessions have extended to a range of taxes including income tax, fringe benefits tax, stamp duty[5], payroll tax and land tax. In Victoria, since November 2021, the land tax exemption is limited to land used *and occupied* for charitable purposes.[6]

Incorporation

The Commonwealth and the States have for many years now had legislation for the incorporation of companies and associations – the *Corporations Act 2001* (Cth) and Associations Incorporation legislation. A religious institution does not have to incorporate to conduct its activities. Indeed, some faith organisations have taken the view, supported by the common law,[7] that their unincorporated status offers the best prospect of practising their faith with *less* interference from the State. The major political parties have taken the same approach.

Some faith organisations have chosen to incorporate.

For example, in Melbourne, the Anglican Chinese Mission of the Epiphany Inc was incorporated in the 1990's. Some Jewish and Christian congregations have incorporated.

The Churches of Christ in Victoria and Tasmania Inc was incorporated in 2007. It serves as the umbrella body of the Churches of Christ in those states.

The incorporation of a religious entity obviously involves a submission to the regulatory regime of the relevant incorporation legislation. A member may have statutory rights to intervene in connection with the affairs of the entity. Members also will have rights in contract. It can also involve in some limited circumstances a transfer of trusts of property in

- 1890, the *Presbyterian Trusts Act 1890* (Vic) empowering the General Assembly to constitute of corporate body of trustees for that denomination.
- 1907, the *Roman Catholic Trusts Act 1907* (Vic) empowering the Council of the Diocese to establish a body corporate of trustees.
- 1930, *The Salvation Army (Victoria) Property Trust Act 1930* (Vic).
- 1941, *Churches of Christ Property Act 1941* (Vic) establishing its trust corporation and vesting a large list of church properties in the new corporation.
- 2006, the *Coptic Orthodox Church (Victoria) Property Trust Act 2006* (Vic).

5 New South Wales has a more limited stamp duty exemption on property transfers that does not apply to religious institutions pursuing religious purposes only. See *Duties Act 1997* (NSW) ss 275, 275A.

6 *Windfall Gains Tax and State Taxation and Other Acts Further Amendment Act 2021* (Vic), s 61(2) amending *Land Tax Act 2005* (Vic), s 74.

7 *Cameron v Hogan* (1934) 51 CLR 358, see also *Asmar v Albanese (No 4)* [2021] VSC 672.

favour of the incorporated entity.[8] There will also be statutory duties applicable to the members of the governing body of those incorporated entities.[9]

However the introduction of the scheme administered by the Australian Charities and Not-for-profits Commission has brought regulation by the State even to unincorporated charities. I will come back to this.

The triggers for greater intervention by the State

There have been some particular circumstances (or triggers) in recent times through which the State has been moved to intervene in the affairs of religious institutions, namely–

- The impact of the Royal Commission into Institutional Responses to Child Sexual Abuse (the **Royal Commission**) and ensuing legislation
- Common law developments
- The role of charity registration and taxation
- The impact of marriage equality and anti-discrimination legislation.

This not only serves an historical purpose of understanding what has happened – how we have got to where we are – but also it can give some valuable insights into what the future may hold.

I am putting the Covid legislation to one side as being exceptional.

The Royal Commission

On 12 November 2012, then Prime Minister Julia Gillard announced her decision to establish the Royal Commission. It was a joint Commonwealth / State commission. The Royal Commission operated from January 2013 to December 2017. On 15 December 2017, the Royal Commission delivered its final report covering 17 volumes and 409 recommendations.

These included a process by which both State and Territory governments and religious institutions could be accountable for the implementation of the recommendations that applied to them.[10]

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8 The applicable Associations Incorporation legislation has provisions that provide for the vesting in the incorporated entity of property held in trust or otherwise for the purposes of the unincorporated association. See for example *Associations Incorporation Reform Act 2012* (Vic), s 9; *Associations Incorporation Act 2009* (NSW), s 8(2), schedule 2, item

9 See the duties set out in Associations Incorporation legislation. The statutory directors' duties at s 181 of the *Corporations Act 2001* (Cth), are 'switched off' for entities registered under the *Australian Charities and Not-for-profits Commission Act 2012* (Cth) by reason of s 111L of the *Corporations Act 2001* (Cth). However, other 'duties' still apply where they are expressed as offences under the *Corporations Act 2001* (Cth), for example, s 184.

10 The Royal Commission recommended that, at a minimum, 11 institutions that were the subject of relevant Royal Commission hearings should provide 5 consecutive annual progress reports starting in 2018. The National Office for Child Safety worked with these institutions to facilitate their public reporting in 2018.

The Commonwealth

At the Commonwealth level, we now have a National Office for Child Safety. We have the National Principles for Child Safe Organisations, 10 principles, agreed to by the States and Territories and the Commonwealth – an overarching framework. We also have the National Redress Scheme.

The States and Territories

New legislation

For constitutional reasons, the detailed legislative response falls to the States and Territories. Each has moved at their own pace, informed by their historic approaches to child protection. This creates difficulties for religious institutions that operate nationally or in more than one State. They need to respond on a State or provincial basis because of this. What works in Queensland will not necessarily work in Western Australia. There is no consistency.

A lot has happened. There is new legislation applicable in different jurisdictions–

- creating new criminal offences of failing to protect a child and failing to report child abuse;[11]
- establishing a new cause of action of organisational liability for failure to take reasonable care to prevent abuse;[12]
- in NSW and Tasmania, extending vicarious liability of organisations to persons 'akin to employees' – clergy;[13]
- removing the statute of limitations for child abuse proceedings;
- allowing the Court to set aside previous settlements of claims of historic child abuse; and
- requiring an organisation to nominate a proper defendant to overcome the Ellis defence.[14]

Child Safety laws

Child safety laws represent a further layer of legislative intervention. Their purpose is laudable – to prevent or minimise the occurrence of child abuse. They enable regulation of

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In 2020, the National Office for Child Safety contacted 69 institutions encouraging them to submit a progress report. This included the 11 institutions that reported in 2018 and the additional 42 institutions that were contacted in 2019.Details of institution reports can be found here.

11 *Crimes Act 1900* (NSW), s 316A ('Concealing'), s 43B ('Failure to reduce or remove risk'); *Crimes Act 1958* (Vic), s 327 ('Failure to disclose'), s 49O ('Failure to… protect')

12 See for example the *Wrongs Act 1958* (Vic), s 91; *Civil Liability Act 2002* (NSW), s 6F; *Civil Liability Act 2003* (Qld), s 33D; *Civil Liability Act 1936* (SA) (when amended by the *Civil Liability (Institutional Child Abuse Liability) Amendment Act 2021* (SA), s 50E; *Civil Liability Act 2002* (Tas), s 49H.

13 See for example the *Civil Liability Act 2002* (NSW), ss 6G-6H and *Civil Liability Act 2002* (Tas), ss 49I-49J.

14 *Legal Identity of Defendants (Organisational Child Abuse) Act 2018* (Vic), s 8(2)*; Civil Liability Act 2002* (NSW), Part 1B Division 4*; Civil Liability Act 2003* (Qld), Chapter 1 Part 2A Divion 3.

religious institutions both at a systemic level and in individual matters. There are particular areas in Victoria I would like to touch on briefly –

- Child Safe Standards
- The Working with Children regime
- The Reportable Conduct Scheme

New South Wales has similar provisions.

Child Safe Standards

The adoption of consistent child safe standards was at the heart of the recommendations of the Royal Commission for institutions providing services to children, including religious institutions.[15]

Each jurisdiction has set standards in one manner or other. They are legislated in NSW and Victoria.[16] The onus is on the institution to implement the standards by putting in place the necessary systems, policies and procedures. There is no one way to meet the standards. It depends on the size and nature of the institution. They need to address the question – how in their institution do they meet the standards? They need to be proactive.

With a large denomination, there is much to be said for a centralised approach, for collaboration and working together on a State or even national basis.

If they don't comply, in Victoria, the Commission for Children & Young People (**CCYP**) can seek court orders for compliance and a pecuniary penalty.[17] In NSW, they can face publication of their non compliance with the standards.[18]

Working with children legislation

The Working with Children regime on one view represents the high water mark of State intervention. Victoria prohibits all clergy from engaging in ministry unless they have obtained a working with children card.[19] They are deemed to be engaging in child related work. New

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15 For religious institutions, *Royal Commission into Institutional Responses to Child Sexual Abuse* (Final Report, December 2017) Vol 16, recommendations 16.31 – 16.35

16 *Child Wellbeing and Safety Act 2005* (Vic) (‘***CWSA***’), Part 6; *Children's Guardian Act 2019* (NSW), Part 3A (‘***CGA***’).
In Victoria, Child Safe Standard 5 will require that – *Equity is upheld and diverse needs respected in policy and practice.* The CCYP states in its fact sheet that, in complying with Child Safe Standard 5, an organisation must, at a minimum, ensure:
5.1…
5.3 The organisation pays particular attention to the needs of children and young people with disability, children and young people from culturally and linguistically diverse backgrounds, those who are unable to live at home, and lesbian, gay, bisexual, transgender and intersex children and young people.

17 *CWSA* Part 6, ss 31, 33.

18 *CGA*, s 8E; the enforcement provisions set out in the *Children's Guardian Amendment (Child Safe Scheme) Act 2021* (NSW), ss 12 - 15 are yet to commence as at 5 May 2022.

19 The provisions are now in the *Worker Screening Act 2020* (Vic), s 121. The definition of ‘child related work’ is now in s 7(1). The prescribed penalty is level 7 imprisonment (2 years maximum) or a level 7 fine ($39,000) or both.

South Wales legislation has a similar deeming provision.[20] The penalty for contravention is a fine or imprisonment.

There is a corresponding prohibition on the religious institution engaging the person.

The working with children process in Victoria and other jurisdictions is not a fitness check. The person is screened for sexual, violent and drug offences[21] and relevant disciplinary regulatory findings made by the agencies listed under the Act.

Currently the findings of the Anglican Professional Standards Board or Review Board are not included in that list. CCYP does however refer those findings to the Department of Justice that administers the scheme. That can trigger a re-assessment of a WWC card already held.

Religious institutions must conduct their own fitness checks. The Child Safe Standards make this clear.[22] How should they go about that?

In the Anglican Church, the General Synod has prescribed standards of screening of Church workers (clergy and lay people).[23] It is left to individual dioceses how they implement them.

The dioceses of Melbourne and Bendigo have a comprehensive regime of clearances – for clergy, for lay people and for persons of concern.[24] It affords procedural fairness and a right of appeal; it is subject to a clearly prescribed process and is managed by the independent Kooyoora Ltd.[25]

This kind of model makes great sense. The Kooyoora type body can operate a central confidential repository of information about church workers; they can give independent safe ministry assessments. They can be a safe recipient of disclosures of sensitive information. I commend it to religious institutions. The Church authority still decides who to appoint.

People in Victoria and other states who practise as lawyers or as medical or allied health professionals are all subject to a state regime of registration that includes a fitness appraisal.[26]

I ask the question – in time, will clergy and other Church workers be made subject to a similar State regime? In my view, the more religious institutions can be proactive in this area, the more likely they will successfully resist moves for a state regime of registration. The precedent for State action is there – already the state determines the precondition for ministry or other child related work in a religious institution – the working with children check.

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20 *Child Protection (Working with Children) Act 2012* (NSW), s 6, *Child Protection (Working with Children) Regulation 2013* (NSW), r 13.

21 The list of offences is on the Victorian Working with Children website.

22 See for example, Child Safe Standard 6 of the New *Child Safe Standards* in Victoria commencing on 1 July 2022.

23 *Safe Ministry to Children Canon 2017*.

24 *Professional Standards Uniform Act 2016 – 2021* (Melb).

25 Similarly, an unsuccessful applicant for a working with children check may seek a review by the Victorian Civil and Administrative Tribunal: *Worker Screening Act*, Part 4.3.

26 *Legal Profession Uniform Law 2014* (Vic), s101; *Health Practitioner Regulation National Law (Victoria) Act 2009* (Vic); see the website of AHPRA.

Reportable Conduct scheme

Since September 2017, Victoria has had its Reportable Conduct scheme.[27] The CCYP has responsibility to administer, oversee and monitor the scheme.[28] New South Wales had earlier enacted its Reportable Conduct scheme which is administered by the Children's Guardian assisted by its Committee for Children & Young People.[29] The Australian Capital Territory has followed.

The schemes all have similar features – in essence, the head of entity must report certain allegations to the CCYP or Children's Guardian; they must investigate; they are supervised; they must make findings and decide on action to be taken and report back to the authority.

I will speak about Victoria.

It places a heavy obligation on the head of entity of the institution[30] to deal with reportable allegations[31] against its employees, office holders and volunteers. For the Anglican Diocese of Melbourne including all its parishes, that head is the Archbishop, for the Uniting Church in Victoria, it is the General Secretary (the Chief Executive Officer) and for the Presbyterian Church of Victoria, it is the Clerk of Assembly.

The head of entity has defined statutory duties that are triggered on becoming aware of the reportable allegation[32]–

- To notify CCYP of a reportable allegation – within 3 days from learning about it
- To report further on action taken within a further 30 days.[33]

They have to investigate or cause an investigation. They have to arrive at findings and decide on action to be taken, and report that to CCYP.[34]

How does the head of entity meet these responsibilities? How are they to become aware of reportable allegations?

Under the Reportable Conduct scheme, the head of entity must have certain systems in place[35]–

(a) a system for preventing the commission of reportable conduct by an employee of the entity within the course of the person's employment; and

Codes of conduct, guidelines for behaviour, supervision

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27 See *CWSA*, Part 5A; *Children Legislation Amendment (Reportable Conduct) Act 2017* (Vic).
28 *CWSA,* s 16D.
29 Now *CGA*; *Ombudsman Act 1989* (ACT).
30 *CWSA*, s 3(1), *CGA*, s 17.
31 *CWSA*, s 3(1).
32 *CGA*, s 18 - *Reportable allegation* means any information that leads a person to form a reasonable belief that an employee has committed—
(a) reportable conduct; or
(b) misconduct that may involve reportable conduct—
whether or not the conduct or misconduct is alleged to have occurred within the course of the person's employment..
33 *CWSA*, s 16M(1); *CGA*, ss 34(1), 36.
34 *CWSA*, s 16N; *CGA*, s 40 (*have regard to accepted community standards*).
35 *CWSA*, s 16K(1); *CGA*, ss 8D, 54.

(b) a system for enabling any person, including an employee of the entity, to notify the head of the entity of a reportable allegation of which the person becomes aware.

The New South Wales legislation mandates reporting by employees to the head of entity.[36]

The Anglican Church diocesan legislation has mandatory reporting.[37] Throughout Australia, it varies from diocese to diocese, sometimes applying only to clergy, sometimes to clergy and lay people. State mandatory reporting to police and other authorities also applies.

(c) a system for enabling any person, including an employee of the entity, to notify the Commission of a reportable allegation involving the head of the entity of which the person becomes aware;

Many Anglican dioceses have episcopal standards legislation that has a process for complaints against bishops.

(d) a system for investigating and responding to a reportable allegation against an employee of the entity.

This calls for clear and concise rules and procedures that both inform a complainant and respondent about the process and guide those managing or determining the allegation or complaint as to how to proceed. This is fundamental to an efficient and fair process. The Anglican Church does this with its professional standards ordinances.

The State legislation does not offer guidance as to the structure or form of those systems, although the Commission in its published literature offers some guidance. This is perhaps a weakness as any and all kinds of systems may be adopted by a large denomination.

The Anglican Archbishop of Melbourne, as head of entity, has appointed Kooyoora Ltd, and its Office of Professional Standards to act on his behalf in making notifications and otherwise acting to comply with the provisions of the scheme. As I have said, it also handles screening. This does not absolve the Archbishop of responsibility but it provides a sensible process on the ground to achieve compliance.

Kooyoora Ltd is a company limited by guarantee, with its own board of directors and operating independently. It was formed as a specialist entity, intended to develop expertise in complaint management and screening and serve institutions that sought its services.

Under these arrangements, there is one notifying body acting on behalf of the Archbishop and all the parishes of the diocese. The same body is the repository of all complaints and mandatory notifications and manages them.

The State can intervene in the process:

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36 *CGA*, s 27(2). More information.

37 The synod of the Anglican diocese of Melbourne has legislated mandatory reporting obligations on all Church workers: *Professional Standards Uniform Act Adoption Act 2016 – 2021* (Melb), s 17.

- The CCYP or Children's Guardian can take over an investigation.[38]
- They can oversee the investigation.[39]
- The head of entity or their delegate must not investigate if a police investigation is underway and the police have not consented to the Church's investigation proceeding.[40]
- A Church adjudicator such as the professional standards board can be constrained from proceeding with a hearing of a complaint if criminal charges against the respondent in respect of the matter have been laid or are likely. This is to avoid prejudicing that criminal process under the general law relating to procedural fairness.[41]

Impact of the Scheme

What then do we make of the reportable conduct scheme for its impact on religious and other institutions? Here are my own observations.

First, the hallmark of the scheme appears to be the CCYP, or in NSW, the Children's Guardian closely scrutinising the management and handling by the head of entity of every reportable allegation. As we have seen, the legislation requires the head of entity to have various systems in place but the focus of the scheme is on close supervision of the head of entity in their management of the allegation. This must inevitably place considerable strain on the CCYP in scrutinising the management of the reportable allegations that come to their attention.[42]

There appears much less emphasis or energy devoted to promoting the development of Kooyoora type independent bodies which, as expert complaint handlers, can manage the investigation of allegations and bring to bear a focus and expertise that is missing from many institutions involved in reportable allegations. There are other such bodies, apart from Kooyoora. The Catholic Church in Victoria has recently formed a company called Pathways Response Victoria to manage these matters on a province wide basis. Since 2017, the Seventh Day Adventist Church has had Adsafe Ltd, act as a professional standards body for all its Australian activities.

Absent adequate resourcing, the purpose of the scheme may in future be frustrated. I ask rhetorically – would not the better course be to empower and encourage institutions to engage properly skilled and independent complaint management bodies like Kooyoora Ltd to manage reportable conduct allegations. A scheme that puts the focus on State supervision and scrutiny may operate only to disempower institutions from themselves taking responsibility for the proper management of complaints and clearances.

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38 *CWSA*, s 16O; *CGA*, ss 46, 48.
39 *CWSA*, s 16N; *CGA*, s 43.
40 *CWSA*, s 16U; *CGA*, s 33.
41 *Lucciano v The Queen* [2021] VSCA 12; *Villan v State of Victoria* [2021] VSC 354.
42 The CCYP annual report for 2020 – 2021 reported 1,006 mandatory notifications for that year, and an aggregate total of 3,537 notifications since 2017.

Second, it is surprising how silent the legislation is about the need for an independent investigation. The legislation makes no attempt to ensure the independence of an investigation from the institution.[43] Indeed the head of entity can themselves investigate! This is a surprising shortcoming in the legislation when the experience of the Royal Commission so strongly highlighted the shortcomings of internal investigations by an institution. Perhaps, it was felt too much to require this of all organisations; perhaps the aspiration is that the shortcomings in investigation are compensated by the close supervision and scrutiny by the CCYP, including its right to take over the investigation. In the end, much will depend on the resources, both financial and experienced and skilled personnel, that present and future governments can direct to the CCYP.

Third, how does the scheme operate in conjunction with the internal complaint handling procedures of the religious institution? Should there be a dual process (CCYP and Church) or a single process? The former risks inconsistent outcomes. Bear in mind one of the stated fundamental principles of the Victorian scheme is that of procedural fairness – *employees who are the subject of reportable allegations are entitled to receive natural justice in investigations into their conduct.*[44] Some Anglican dioceses are revisiting their professional standards legislation in response to the Reportable Conduct Scheme.[45]

Immunity and Exchange of information

Fourth, whilst the State requires religious institutions to investigate reportable conduct and take appropriate action, the State's assistance to the institution in that regard is limited in some key areas–

(1) No protection in the form of immunity from suit is afforded to professional standards bodies conducting hearings. I put to one side insurance. Neither members of the board, nor legal representatives nor witnesses enjoy the same privileges and immunities as apply for example, to either the Supreme Court of a State or to a board or tribunal appointed by the Governor in Council.[46]

(2) A head of entity or their office of professional standards is not given authority to disclose material information to another head of entity or their office, for example, one diocese to another. This may hamper the ability of religious bodies to undertake thorough investigations.[47]

In 2018, the Victorian Parliament introduced a new statutory scheme for information sharing between recognised entities, with statutory protections for doing so.[48] NSW

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43 *CWSA,* s 16N.

44 *CWSA,* s 16B(1)(e); *CGA*, s 54 (*having regard to principles of procedural fairness).*

45 For example, the diocese of Sydney is considering at their upcoming synod in 2022: Review of Ministry Standards Ordinance - Report and Bills (sds.asn.au). See in particular the *Reportable Allegations and Convictions Ordinance 2022* .
The Diocese of Newcastle updated their professional standards ordinance to address the reportable conduct scheme: Professional-Standards-Ordinance-2012-24092020.pdf (newcastleanglican.org.au).

46 Compare *Children, Youth and Families Act 2005* (Vic), s 132A.

47 The Kooyoora office of professional standards is authorised by the Church legislation to disclose material to the professional standards body of another denomination*: Professional Standards Uniform Act 2016 – 2021* (Melb), s 177(3).

48 *CWSA*, Part 6A. See also the *Child Information Sharing Scheme, Ministerial Guidelines*, September 2018.

has a similar scheme.[49] The list of entities prescribed extends beyond Government regulators for example, to bodies funded by government to provide family violence services or services to victims of sexual assault. Currently, religious institutions and Kooyoora type bodies that manage complaints and screening have not been prescribed. They should be.

The Common Law

I turn to some developments in the common law.

A colleague reminded me the other day of some remarks of Lord Denning MR in a judgement of the Court of Appeal in England he delivered in 1963.[50] Many cases, he said, were referred to us but having looked at them we were able to stack most of them on one side in a pile marked "not to be looked at again." Now a number of us in the law have had that feeling from time to time (with great respect to our judicial colleagues) but that cannot be said of the cases I now mention to you! I do so briefly.

The first relates to the question whether clergy are employees. The second to whether a religious institution can be vicariously liable for the wrongful acts of their clergy.

The status of clergy

The question of the employment status of clergy has long been a vexed question. I will not recite here the long list of authorities. In February this year, the High Court delivered judgment in two cases that addressed the question of the distinction between employees and independent contractors at least where the parties have entered into an agreement.

They are–

> *Construction, Forestry, Maritime, Mining and Energy Union (CFMMEU) v Personnel Contracting Pty Ltd* [2022] HCA 1
>
> *ZG Operations Australia Pty Ltd v Jamsek* [2022] HCA 2

They represent a significant change to the law. The High Court was considering whether a person was an employee or an independent contractor.

In essence, the court ruled that, in deciding that question, you look at the rights and obligations of the parties under the contract they entered into. You do not embark on a wide-ranging review of the entire history of the parties' dealings. Now the preface for those dicta were where the parties entered into a written contract in which the parties comprehensively committed to the terms of their relationship.[51] However, even where the

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49 *Children and Young Persons (Care and Protection) Act 1998* (NSW), Chapter 16A.
50 *In Re King* [1963] 1 Ch 459 at p 483 (CA).
51 *Personnel Contracting*, at [59]

contract is not wholly in writing, it seems a Court should look only at legal rights and obligations for the purpose of conducting the necessary characterisation exercise.[52]

How is this relevant to a religious institution where, some will argue, there is no contract between clergy and institution? That contention is nowadays fraught with difficulty as the High Court in *Ermogenous*[53] ruled in the case of the Archbishop in that case. There is likely to be an agreement of one kind or other when the Bishop or other authority offers a minister a position and the latter accepts.[54] The distinction here is between employee and office holder.

The enquiry will now be confined to the rights and obligations arising out of the relationship – under the contract to the extent there is one and under binding Church law or rules to the extent they apply. That is unless claims on some different legal basis are brought that make subsequent conduct relevant.

The right under the contract or church law of the authority to exercise control is still a critical factor.[55]

What actually happens post appointment is not generally relevant.[56] How parties describe themselves is of limited importance.[57]

In practical terms, the party with the superior bargaining power (here the religious institution) can seek to ensure the relationship they want by fashioning the terms and conditions of the contract to that end.

For *independent contractor*, read *office holder* and the relevance to religious institutions becomes clear. They have greater opportunity now to shape the arrangements by which they appoint clergy by reference to a carefully drawn agreement to drive the conclusion that clergy are not employees.

The question of vicarious liability

The recent decision of Forest J in *DP (a pseudonym) v Bird*[58] is worth noting. The court there considered two fundamental and closely inter-related questions –

First, did the relationship between the Catholic priest in a parish and the Diocese or the bishop give rise to vicarious liability of the diocese for the conduct of the priest?
Second, if it did, is the Diocese or the bishop liable for the priest's unlawful conduct, it being accepted that the assaults were unlawful and far outside the priest's clerical role?

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52 *Personnel Contracting*, at [56], [61], *Jamsek* at [51].

53 *Ermogenous v Greek Orthodox Community of SA Inc.* (2002) 209 CLR 95 at 109 - 110; [2002] HCA 8.

54 In *Sturt & Anor v Rt. Reverend Dr. Brian Farran & Ors* [2012] NSWSC 400, Sackar J. said at 81, applying *Ermogenous*, that the mere fact that the plaintiffs were priests did not entitle the Church or the court to proceed upon a presumption that no contract of employment will exist.

55 *Personnel Contracting,* at [72], [73], [76]-[78], [195], [196].

56 *Personnel Contracting,* at [74].

57 *Personnel Contracting*, at [66]; see also [63]-[65], [79]).

58 *DP (a pseudonym) v Bird* [2021] VSC 850.

Vicarious liability would have arisen if the priest was an employee of the Diocese or the bishop. Could it arise otherwise? The court accepted for present purposes that the priest was not an employee.[59] But it held – vicarious liability still arose.[60]

Just as well for the plaintiff because the court held that the Diocese had not breached any duty of care it owed to the plaintiff.[61]

Forrest J referred to the statements of the High Court in Prince Alfred College[62] and stated –

> [178] [they] demonstrate, I suggest, that there is room for an Australian court to adopt a robust and contemporaneous approach to vicarious liability drawing "heavily on various factors identified in cases involving child sexual abuse" in overseas jurisdictions.**63** In such cases, courts will need to "make and develop the common law, as distinct from discovering and declaring it", which may involve making judgments about "[i]dentification, modification or even clarification of some general principle or test … in the context of, and by reference to, contestable and contested questions".**64**

And at [212 - 213] —

> To the contrary, and consistent with the authorities I have referred to, I consider that the appropriate determination of whether the Diocese may be vicariously liable for Coffey's assaults of DP requires the following — a holistic and broad inquiry into the circumstances surrounding: the relationship between the Diocese and Coffey; the role of both the parish priest (Father O'Dowd) and Coffey; Coffey's role within the Port Fairy Catholic community; and Coffey's relationship with DP and his family.
>
> Rather, as Prince Alfred College demonstrates, the inquiry ought to be directed to the totality of the relationship so as to enable a determination as to whether the Diocese should be held vicariously liable for Coffey's actions as an assistant parish priest.

We have seen then in matters of employment status, the High Court confines the enquiry to the rights and obligations of the parties under the relevant contract; in matters of vicarious liability, the Victorian Supreme Court is looking at the totality of the relationship, the very approach cautioned against in considering the legal status of a person as an employee. The case is headed for the High Court. The Catholic Church has sought leave to appeal the decision.

This is a significant decision. It extends the legal responsibility of religious institutions for the misconduct of their clergy for historical abuse claims. The institution that has vicarious liability can no longer dismiss the claim as being the sole responsibility of a rogue member of

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59 Ibid [211].
60 Ibid [210], [278].
61 Ibid [308].
62 Ibid [127], [131].
63 *Prince Alfred College* (2016) 258 CLR 134, [130].
64 Ibid [127].

the clergy. In New South Wales and Tasmania, Parliament has extended vicarious liability to persons akin to employees, with effect from 2018.[65]

Governance

The Royal Commission considered why some institutions failed to protect children.[66] It pointed amongst other things to the governance and internal structure of the institution. It recommended change in the area of transparency, accountability and effective governance.

In the last 10 years, the Commonwealth Parliament has been active in fostering better governance in registered charities. This was not a response to the Royal Commission but rather a move to foster confidence in charities.

Taxation and the Australian Charities and Not for Profits Commission Act 2011

The Commonwealth Parliament uses its taxation powers to bring religious institutions within the regulatory regime for charities imposed by the *Australian Charities and Not for Profits Commission Act 2012 (**the ACNC Act**)*.

A religious institution is not obliged to register with the Australian Charities and Not for Profit Commission (**the ACNC**) but if it wishes to avail itself of the tax exemptions available to charities, it must register and be endorsed by the Commissioner of Taxation as exempt from federal tax.[67]

Entities that are religious institutions are therefore typically registered with the ACNC, for example the entity may be a diocese, a Cathedral or a particular parish or congregation.[68]

What are the consequences of registration with the ACNC?

If a parish or congregation or diocese or other association is registered, it will fall into the category of a basic religious charity if broadly –

(a) it has not received government grants in excess of $100,000;
(b) it is not incorporated;[69] and
(c) it has not been identified as being involved in the abuse of a person, and has not joined the National Redress Scheme.

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65 See for example *Civil Liability Act 2002* (NSW), ss 6G-6H and *Civil Liability Act 2002* (Tas), ss 49I-49J.

66 *Royal Commission into Institutional Responses to Child Sexual Abuse* (Final Report, December 2017) Vol 1, p 20 (Preface and Executive Summary).

67 *Income Tax Assessment Act 1997* (Cth), ss 50.1, 50.5, 50.50, 50.52; *Fringe Benefits Tax Assessment Act 1986* (Cth), s 57.

68 In NSW, for example, the Anglican Church Property Trust of the Diocese is registered but not as a basic religious charity; St Andrew's Cathedral Sydney is registered as a basic religious charity.
In Victoria, both the Anglican Diocese of Melbourne and St Paul's Cathedral Melbourne are registered with the ACNC as charities. They are not basic religious charities. The Catholic Archdiocese of Melbourne is registered as a basic religious charity. So are the Catholic Dioceses of Ballarat and Sale.

69 See *ACNC Act*, s 205.35.

As a basic religious charity, it must lodge with the ACNC only a limited annual information statement, comply with the recordkeeping requirements[70] and the external conduct standards. Other registered charities are also required to –

- answer the financial questions in the Annual Information Statement;
- submit annual financial reports; or
- comply with the Governance Standards.[71]

The governance standards are rigorous.[72] They include –

> Standard 2 – adhere to the standard of accountability to its members and stakeholders;
>
> Standard 5 – take reasonable steps to ensure that the members of its governing body are subject to, and comply with, the duties prescribed by the ACNC Regulations – these are similar to the duties that directors owe to a company. Particularly relevant are–
>
> (f) to ensure that the registered entity's financial affairs are managed in a responsible manner;
>
> (g) not to allow the registered entity to operate while insolvent.
>
> Responsible persons have to be mindful of the financial affairs of the charity and how it is managed.
>
> Standard 6 – maintain and enhance public trust and confidence in the Australian not-for-profit sector. The charity must have taken reasonable steps to join the National Redress Scheme for Institutional Child Sexual Abuse (Redress Scheme) if it has been identified as being involved in the abuse of a person.[73]

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70 See *ACNC Act*, Division 55.

71 The *ACNC Act,* s 45.10(5) provides that the regulations prescribing governance standards must not require a registered entity to do, or not to do, a thing (including the things mentioned in subsection (2) if the registered entity is a basic religious charity.

72 The prescribed minimum governance standards prescribed by the Act and set out in the ACNC Regulations: s 25-5(3)(b) of the ACNC Act.

Governance Standard 1, comply with its purposes and its character as a not-for- profit entity and, by its website and otherwise, make public information about those purposes;

Governance Standard 2, adhere to the standard of accountability to its members and stakeholders;

Governance Standard 3, not engage in unlawful conduct;

Governance Standard 4, adhere to the standard of the suitability of its Chapter members ensuring that they are not disqualified from managing a corporation or from being a director; and

Governance Standard 5, take reasonable steps to ensure that the members of its governing body are subject to, and comply with, the duties prescribed by the ACNC Regulations

Governance Standard 6: Maintaining and enhancing public trust and confidence in the Australian not-for-profit sector.

73 Either–

1. in an application for redress under section 19 of the *National Redress Scheme for Institutional Child Sexual Abuse Act 2018* (Cth) (**Redress Act**) or
2. in response to a request for information from the National Redress Scheme Operator (Secretary of the Department of Social Services) under ss 24 or 25 of the Redress Act.

As an aside, it seems a missed opportunity that, given all that has been revealed in the Royal Commission, the prescribed governance standards make no mention of the observance by responsible persons of the child safe standards.[74]

The ACNC does not have the power to suspend or remove a member from the governing body of a basic religious charity (what the ACNC calls a 'Responsible Person'). Nor do they have that power in relation to any registered unincorporated charity where constitutional constraints apply.[75]

I would like to focus on governance standard 2– *adhere to the standard of accountability to its members and stakeholders.* Does a religious institution have members? In a broad, the answer must be yes. Without members, or adherents, they are nothing.

Being accountable means in practical terms[76]–

- Holding regularly meetings such as an annual general meeting or synod, with the opportunity for members to raise concerns and ask questions
- Providing information to members.

There is nothing exceptional about this.

Of course, none of the above applies to a basic religious charity – which, as the ACNC Regulations now stand, could be either your local parish or congregation or indeed a large diocese.

How does this standard affect the Anglican Church? None of this would present a problem for the Anglican Diocese of Melbourne or Sydney or any denomination holding regular synods or assemblies. Each year in Melbourne and Sydney, the Anglican Archbishop and his Council report to the Synod of the Diocese that comprises both licensed clergy and elected lay synod members.

Early Victorian history gives an example of how the State has helped shape the governance of the Church of England in Australia. The Victorian Parliament passed the *Church of England Act* in 1851 empowering the bishop of an Anglican diocese in Victoria to convene a synod and providing that the resolutions of that synod will to the extent there provided be binding on the members of the Church when the resolutions are passed by a majority of the house of clergy, a majority of the house of laity and have the assent of the bishop. It facilitated the introduction of synodical (and democratic) government in the Anglican Church in Victoria. As Robin Sharwood himself said in an address in 2004[77]–

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74 The *Royal Commission into Institutional Responses to Child Sexual Abuse* (Final Report, December 2017) Vol 6, p 296 ('making institutions child safe'): adverted to this issue. *Many institutions may benefit from aligning WHS and child safety requirements. Institutions should apply the governance model best suited to their structure and context to promote compliance with the Child Safe Standards.*

75 *See R v Federal Court of Australia; Ex parte WA National Football League* (1979) 143 CLR 190 (Adamson) per Mason J at 234;
United Firefighters Union of Australia v Country Fire Authority [2014] 218 FCR 210 at [24] – [40].

76 See the ACNC website, as at April 2022

77 *To Strive, To Seek, To Find, and not to Yield, The Making of the (Victoria) Church of England Act 1854* by Professor Robin Sharwood, AM, 24 November 2004.

> the changes begun or achieved in the polity of the Church of England by a handful of people in the middle of the Nineteenth Century were quite extraordinary, indeed revolutionary, and we live in their shadow to this very day.

He described the report in *The Argus* in 1856[78]—

> It is difficult to over-estimate the important of this measure, which has now become law. So far as regards the Church of England it is practically a revolution, for it entirely changes the form of Government which has hitherto prevailed in that church, and we may add that it is a revolution which has long been earnestly desired both by clergy and laity, not merely in the colonies, but in the parent country itself.

Now governance standard 2 would appear to present a particular challenge to the Catholic dioceses of Victoria if made applicable to them. The Catholic Archdiocese of Melbourne is registered as a basic religious charity. So are the dioceses of Sale and Ballarat. Melbourne's nominated responsible people, that is say, the putative governing body are named as the Archbishop, the Vicar General and the Executive Director. In some ways, this is surprising since the *Roman Catholic Trusts Act 1907* (Vic)[79] expressly recognises the role of their diocesan council in directing any management or dealing with Church trust property.

Neither the Catholic Archdiocese nor indeed, I understand, the country dioceses holds a periodic synod. I mean by that – a meeting of the members of the Church in the diocese, where the leadership of the diocese accounts to the membership and gives the membership an opportunity to raise concerns, as the standard contemplates. This is not for want of calls from members of the Church in some quarters for such a synod to be convened. The experience of the recent Plenary Council convened by the Australian Catholic Bishops' Conference only strengthened those calls.

The Bishops' Conference commissioned a distinguished working group that delivered a report called the *Light from the Southern Cross*[80] which relevantly recommended that, within 5 years following the closing session of the Plenary Council 2020-21, each diocese conduct a diocesan synod and every ten years thereafter. They also recommended particular law requiring each diocese have a diocesan pastoral council or close equivalent to be consulted on matters of importance in the diocese.[81]

But the three registered Catholic dioceses in Victoria are all basic religious charities and the current governance standards do not apply to them so long as they do not receive the prescribed government funding and they have joined the National Redress Scheme.

The legislation in its current form quarantines the basic religious charity from the regulation made by the governance standards. This has given rise to a substantial policy debate.

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78 *The Argus*, Wednesday 11 June 1856, page 82 of Robin Sharwood's paper.

79 *Roman Catholic Trusts Act 1907* (Vic) s 13.

80 *Promoting Co-Responsible Governance in the Catholic Church in Australia*, May 2020, para 6.11, recommendations 50, 56.

81 The formal response of the Australian Catholic Bishops' Conference stated. –
Agreed. So long as it is consistent with the decrees of the Fifth Plenary Council of Australia and any universal law, the recommendation that a diocesan synod be held within five years of the conclusion of the Plenary Council is endorsed, so that each local Church can determine for itself the appropriate means to apply the decisions of the Plenary Council in the local context.

There does seem a good case for arguing that adherence to the governance standards would help fulfill the objectives of the Royal Commission recommendations to prevent or reduce the incidence of child sexual abuse.

That if it is sound policy to rule ineligible for registration as a basic religious charity an institution that fails to join the National Redress Scheme and thereby give survivors the opportunity for justice under that scheme, is it not equally sound policy to make it a condition of eligibility for registration as a charity that a large religious institution (with or without a record of redress claims) should be subject to and meet the prescribed governance standards?[82]

This is not a novel suggestion. The Royal Commission itself said that the ACNC may wish to consider whether these exemptions from the governance standards should still apply to basic religious charities that engage with children and are subject to the child safe standards.[83]

The Second Assembly of the Plenary Council of the Catholic Church meets in July this year to consider proposals from small groups and individuals – they include a proposal for the holding of a regular diocesan synod and best practice governance.[84] Is this an instance where action by the religious institution itself can head off State intervention?

Marriage Equality and Proposed Discrimination Legislation

In December 2017, the Commonwealth Parliament amended the *Marriage Act 1961* (Cth) to permit same sex marriage.[85] An expressed object was to *allow equal access to marriage while protecting religious freedom in relation to marriage.*[86] It specifically reserved the right of a religious marriage celebrant to refuse to solemnise a marriage, if the celebrant's religious beliefs do not allow the celebrant to solemnise the marriage.[87]

The legislation heralded a profound change in Australian society and culture and has had a significant if indirect impact at least on the Anglican Church. Like a number of other denominations and faiths, the Anglican Church recognises marriage as the union of a man and a woman. The controversy over same sex marriage has triggered deep divisions within the Anglican Church, with seemingly irreconcilable differences that go to matters of faith. The recent General Synod only confirmed this. That is not a subject I explore tonight.

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82 The working group that prepared the *Light from the Southern Cross* report to the Australian Bishops Conference stated at 5.4.1–

> A gesture of commitment and good will to the Catholic and broader communities would be for all Basic Religious Charities to have regard to the ACNC governance standards and for the larger Basic Religious Charities to comply with the same reporting and governance standards as comparable charitable and civil entities to the extent circumstances permit.

83 The *Royal Commission into Institutional Responses to Child Sexual Abuse* (Final Report, December 2017) Vol 16, p 284..

84 Plenary Council, *First Assembly Proposals from Small Groups and Individual Members*, December 2021, p 82, proposals 67, 69.

85 *Marriage Amendment (Definition and Religious Freedoms) Act 2017* (Cth).

86 *Marriage Act 1961* (Cth) s 2A(c).

87 Ibid s 47A.

The Commonwealth legislation also heralded changes or proposed changes to discrimination legislation.

The final days of 2021 saw the introduction into the Victorian Parliament of the *Equal Opportunity (Religious Exceptions) Amendment Bill 2021*. The Bill was passed by Parliament and is now law.

The Federal Government introduced into the Federal Parliament the *Religious Discrimination Bill 2021* (Cth) (some 68 pages) which was intended to operate alongside the *Sex Discrimination Act 1984* (Cth). It was to give legal protection to people of faith in religious activities, employment and education. It was to allow people of faith to discriminate against others. In strengthening the protection for freedom of religion, it was criticised as weakening protections from discrimination available to others. It purported to override other discrimination laws, Federal and State.

As you know, this Bill was withdrawn and did not proceed. The recent Victorian Act however brings into sharp focus some of the issues that arise.

At the heart of the issues raised is the freedom to practise one's religion, a concept the High Court has described in these words –

> Freedom of religion, the paradigm freedom of conscience, is of the essence of a free society. The chief function in the law of a definition of religion is to mark out an area within which a person subject to the law is free to believe and to act in accordance with his belief without legal restraint. Such a definition affects the scope and operation of s. 116 of the Constitution and identifies the subject-matters which other laws are presumed not to intend to affect. Religion is thus a concept of fundamental importance to the law.[88]

It is then the marking out of the boundaries of that area of freedom of religion that presents the challenge in seeking to enact anti discrimination legislation. It must account for the right to freedom from discrimination. There are competing rights at play.

Equal Opportunity (Religious Exceptions) Amendment Bill 2021 (Vic)

First some background.

The Victorian Act, the *Equal Opportunity (Religious Exceptions) Amendment Bill 2021* made changes to the *Equal Opportunity Act 2010*. The 2010 Act, s 82(1) allowed a wide exemption to the ordination or appointment of priests and the like; training or education for those people and the selection and appointment of people to perform functions or participate in a religious observance. This has not changed.

Separately from those particular exemptions, the 2010 Act, s 82(2) also allowed religious bodies to discriminate against people based on that person's religious belief or activity, sex,

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88 *The Church of the New Faith v Commissioner of Pay-roll Tax (Vic)* (1983) 154 CLR 120 per Mason CJ and Brennan J at 130.

sexual orientation, lawful sexual activity, marital status, parental status or gender identity (personal characteristics) – a wide exemption.

They could only discriminate where the discrimination conformed with the doctrines, beliefs or principles of the religion or was reasonably necessary to avoid injury to the religious sensitivities of adherents of the religion. There was a similar exemption in s 83 for religious schools.

The amending Act limits the exemption further. It introduces new sections 82A and 83A and has the effect that the religious body or school can only discriminate against another person *in relation to their employment in a particular position* by the body if three elements are satisfied –

(a) conformity with the doctrines, beliefs or principles of the religious body's religion is an inherent requirement of the position; and

(b) the other person cannot meet that inherent requirement because of their religious belief or activity; and

(c) the discrimination is reasonable and proportionate in the circumstances.

This, the Government stated, was to ensure a fairer balance between the right to religious freedom and the right to be free from discrimination. The goal is laudable; the challenge is by suitable legislative language to achieve that outcome.

On the one hand, Parliament is saying certain discriminatory conduct in connection with employment against, for example, a person in a same sex marriage is unlawful (and contrary to community moral values); on the other hand, some religious institutions (or sections of them) say their religious faith cannot countenance employment of such a person.

Within the Anglican Church, there are different views – one senior diocesan bishop, holding a particular faith view, hails the recent Victorian legislation as best practice, urging its adoption; another bishop, with a different faith view, condemns the legislation as forcing them to violate their religious beliefs, as a significant Sate intervention, reinforcing the need for religious protections. The debates at General Synod exposed these different views.

Does legislation change community moral values or merely reflect them? The postal survey in 2017 returned a majority that reflected those changed values.

We now have community moral values given legal effect by Parliamentary enactment at odds with some contemporary religious values. This is a striking development. Does it in part reflect the disenchantment with religious institutions as a result of their response to child sexual abuse? Maybe. Maybe not.

There is then the practical legal question how the State framed exemption will operate. I don't purport here to provide answers but will make some observations.

First, how will the state court or tribunal construe the reference to the doctrines, beliefs or principles of the religious body's religion? How will it reach a view on those matters? The secular decision maker is being asked to rule on matters going to the core of the religious body.

The courts have taken different approaches to this question.

In the *Wesley Mission* case in 2010,[89] the New South Wales Court of Appeal considered the operation of the *Anti-Discrimination Act 1977* (NSW).[90] The court held that the Equal Opportunity Division of the Administrative Decisions Tribunal fell into error in searching for a definition of religion focusing on the lowest common denominator of Christianity rather than the doctrines followed by the Wesley Mission. The tribunal undertook a search for the meaning of doctrine by reference to dictionaries of various kinds, even the online Pocket Catholic Dictionary [44].

This is not intended to be disrespectful to the tribunal doing its best and employing the usual judicial techniques but rather to highlight the challenges secular tribunals face in addressing issues of faith and doctrine of religious bodies. Issues that in the past the courts have been reluctant or not obliged to address.[91] Put another way, the idea of a government or a court assessing when faith matters or doesn't matter in a religious institution or school has been described as a *significant incursion into church affairs by the state.*[92]

After being ordered by the Court of Appeal to reconsider the matter, the New South Wales Tribunal held that the relevant doctrine is that of the body in question (the Wesley Mission), not that of the denomination or faith group to which it belonged (the Uniting Church) and that doctrine is not just formal doctrinal pronouncements but also what is commonly taught or advocated.[93]

The Victorian Court of Appeal took a different approach in the *Christian Youth Camps* case[94]. President Maxwell in the Court of Appeal (Neave JA largely concurred with him) asked whether what the religious body did by way of discrimination (in that case, refusing an accommodation booking for gay people) was in any relevant sense controlled or dictated by 'the doctrines of the religion'; that any doctrine containing a prohibition on certain conduct would be expected to be reflected in the rules and procedures of the body down to the minutiae of booking information in that particular case; that conduct by a religious body said to 'conform with doctrine' in this sense would be expected to be a consistent feature of the body's activities. You can see how this analysis can narrow the scope of the exemption.

In that context, you can understand a religious institution wanting to be very clear as to its doctrines, beliefs or principles and to support their position with an evidentiary statement.

Second, a prerequisite of the exemption is that conformity with the doctrines, beliefs or principles of the religious body's religion is an inherent requirement of the position.

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89 *OV and OW v Members of the Board of the Wesley Mission Council* (2010) 79 NSWLR 606 at [44] (CA).

90 *Anti-Discrimination Act 1977* (NSW) s 56(e) exempts *any other act or practice of a body established to propagate religion that conforms to the doctrines of that religion or is necessary to avoid injury to the religious susceptibilities of the adherents of that religion.*

91 In *Wylde v Attorney-General (NSW)* (1948) 78 CLR 224 at 263-4 ('the Red Book Case'). Latham CJ (admittedly in a different context) observed that when a civil court is called upon to administer trusts for the purpose of maintaining and promoting religious worship it is not for the court to determine the soundness of any particular doctrine or the wisdom of a particular ritual:.

92 Jacinta Colllins, Catholic Education Commission quote in the Age *How in God's Name did we get there? Chip Le Grand,* 12 February 2022.

93 *OV & OW v Members of the Board of the Wesley Mission Council* [2010] NSWADT 293 at [32], [33].

94 *Christian Youth Camps Ltd v Cobaw Community Health Services Ltd* [2014] VSCA 75;2014) 50 VR 256 at [268], [290].

Presumably that calls for an objective assessment of the position. You could imagine a variety of positions – a cleaner, a careers adviser, a finance officer. There will be challenges in determining where to draw the line.

Third, the discrimination must be reasonable and proportionate in the circumstances. The notion of *reasonable limits* can be found in the Victorian *Charter of Human Rights and Responsibilities Act 2006*.[95] My point is that the decision maker, the court or tribunal is given little guidance and much leeway. There is considerable scope for judicial law making.

The Victorian amending legislation significantly narrows the scope of the exemption from what was available previously. Does this achieve the right balance? To my mind, it has an uncertain operation that rests in the hands of the court or tribunal. This for me is cause for concern.

Conclusion

One can see in the discussion this evening a strong inter connectedness between State law and the ministry and other activities of religious institutions. This is hardly surprising when the mission of many religious institutions is to be in the community engaging with people. Their ministry and other activities impact positively and constructively in the community.

In all the issues canvassed above, there must be real merit in greater mutual engagement, co-operation and collaboration as between the State and religious institutions. By that means, they may all have a better prospect of reconciling the conflicts in moral values that arise.

95 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 7(2) - A human right may be subject under law only to such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom, and taking into account…