ECCLESIASTICAL TRIBUNALS — THE ANGLICAN CONTEXT

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In order to understand the nature and operation of Tribunals in the Anglican Church of Australia, it is necessary to have some understanding of the background and history of that church, and of the nature of its government. What I am about to say is a very much potted and pressure cooked version of that history and government.

Origins of the Anglican Church of Australia

I am not here concerned with the scriptural origins of the church, based on the commands of Christ and the empowerment of the original eleven Apostles by the Holy Spirit. Nor do I want to become involved in the debate about the great schism between east and west nor, especially in present company, the nature and effect of the English reformation, save to note that, by that process, the English church became, by law of the United Kingdom, established as a national church.

That meant that the law of the church was inextricably bound up with the civil law, much of which was administered by the ecclesiastical courts, e.g. marriage and probate, along with the traditional common law.

The 17th and 18th centuries saw enormous colonial expansion throughout the world by Britain. The immigrating settlors took the law with them as their "birthright" [1]. "Better an Englishman go where he will", said Richard West in his advice to the Board of Trade and Plantations in 1720, "he carries as much of the law and liberty with him as the nature of things will allow". [2] In 1808 Lord Ellenborough CJ remarked that the ecclesiastical and civil law of England "was recognised by subjects of England in a place occupied by the King's troops, who would impliedly carry that law with them".[3]

That was all very well with direct colonial rule from London. But self government created a real dilemma for the church. The various acts of self government did not establish the church in the colonies. Bishops had previously been appointed by letters patent from the Crown. Clergy were subject to the jurisdiction of English

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ecclesiastical courts. Suddenly there was a legal vacuum in these and many other matters which had to be filled. The Crown prerogative to create new courts was limited to courts of common law and not to courts of equity, admiralty or ecclesiastical law.[4] With representative government the powers of the Crown to make laws in the exercise of the prerogative came to an end.[5] That outcome was confirmed by Privy Council in *Long v Bishop of Capetown.*[6] In that case it was held that in the Colony of South Africa a Bishop had no coercive powers of discipline. Thus, representative government left the Church of England and English canon law with no more force or authority in the colony than the rules of any other church or voluntary association.

However, the church had inherited a whole system of law and practice to which no legal effect could now be given. The Church of England in the colonies had to reinvent its forms of government and church discipline - with not a little encouragement from W E Gladstone in the 1840's and 1850's.[7] But what they reinvented reflected very much the legal structures and, to a certain extent, the legalism to which they were accustomed.

What emerged was the notion of a voluntary consensual compact and the use of the law of trusts for the holding of church trust property and for the enforcement of discipline and the canon law generally.

Nevertheless, it was not long before problems emerged. In *Long v Bishop of Capetown*[8] the Privy Council held that a sentence of suspension and deprivation pronounced by Bishop Gray of Capetown against the Reverend Mr Long as incumbent of a parish in the diocese was ineffective to remove him from his living. The Privy Council decided that any authority of the Bishop to displace Mr Long derived solely from his voluntary submission to the authority of the Bishop by taking the oath of canonical obedience, by accepting from him a licence to officiate and to have the cure of souls in the parish concerned, and by accepting appointment to the living of the parish under a deed providing for his removal, but only "for lawful cause". Lawful cause was such as would authorise the deprivation of a clergyman by his bishop in England.

Long's case revealed the difficulties in engrafting the consensual compact onto an already existing colonial church organization where clergy declined to accede to the new regime.

Church government and diocesan tribunals in Australia

Nevertheless, the notion of consensual compact has survived, in some States with statutory backing, and in others without. That has given rise to modern forms of synodical government, with the assimilation of certain aspects of English canon law into that compact, and with the various dioceses and synods acting as church "parliaments" by enacting canons of their own. Thus there evolved in each diocese of the Anglican Church in Australia, legislation on a variety of topics, including disciplinary tribunals in respect of clergy misbehaviour. These differed quite substantially in their form and method of operation, but they were essentially the court of the bishop in which charges could be brought of ecclesiastical offences against members of clergy. Sometimes the Bishop himself presided or he appointed

a deputy. The tribunal would find a charge "proved" or not, as the case may be, and if proved, would recommend a "sentence" to the Bishop, which he then had the power to implement, suspend or remit.

These tribunals, in theory, had two areas of jurisdiction. They could hear charges against priests or deacons for alleged heresy or breaches of faith, ritual or ceremonial. They could also hear charges for alleged breaches of moral conduct or discipline. The sentences that could be imposed generally included monition, suspension from office, expulsion from office, deprivation of rights and emoluments pertaining to office, perhaps a monetary fine, or deposition from holy orders. The emphasis always has been that on proof of some named offence, a sentence might be imposed by way of retribution. Little attention was given to a person's fitness to hold office other than by the seriousness of the offence with which he might be charged, reflected in the penalty imposed.

So those diocesan tribunals continued until 1962. There was no equivalent tribunal that could deal with similar charges against a Bishop. That may explain such cases as *Wylde v Attorney-General for New South Wales*[9] where proceedings were brought against the Bishop of Bathurst for alleged doctrinal offences in alleged breach of the charitable trust upon which the relevant church property was held.

The formation of a National Church

In 1962, the enactment of almost identical legislation in each of the States and Territories, saw the creation of the Church of England in Australia. By those Acts a new Constitution came into being. Among other things, it provided not only for the continuation of the diocesan tribunals of the types which I have described, but for the creation of a Special Tribunal for the trial of bishops, and a single national Appellate Tribunal which was to act as a final tribunal of appeal from diocesan tribunals, provincial tribunals where they existed, and the Special Tribunal.

Nature and purpose of the existing tribunal

Diocesan tribunals have continued in form and jurisdiction much as they have for the past 150 years or more. Under the Constitution they remain the court of the bishop, and have jurisdiction to hear and determine "charges of breaches of faith ritual ceremonial or discipline and of such offences as may be specified by any canon (of General Synod) Ordinance (of a diocese) or rule (in effect, a resolution of the General Synod)".[10] There are 23 dioceses, each with their own tribunal.

The special tribunal has power to hear charges against a member of the House of Bishops (ie Diocesan Bishops) of breaches of faith, ritual ceremonial or discipline and such offences as may be specified by canon (of General Synod).[11] That tribunal presently comprises the Primate, as president, and two other diocesan bishops. That, in itself produces problems. There is no lawyer involved, and each member will know well any colleague who is charged before them.

The sort of offences prescribed are unchastity, drunkenness, wilful failure to pay just debts, conduct disgraceful in a clergyman and productive or likely to be productive of scandal or evil report and wilful violation of the Constitution, canons or diocesan

ordinances. The sentences that may be prescribed are similar to those I have previously mentioned.

The Appellate Tribunal comprises four lawyers, who have always been Supreme Court Judges or senior barristers, and three diocesan bishops. One of the lawyers presides. It has a threefold function. It sits as an appellate tribunal from a diocesan or the Special Tribunal. As far as I am aware it has never exercised any such function. Secondly, it has a power to declare invalid a canon or a bill for a canon of the General Synod as being inconsistent with the fundamental declarations or ruling principles contained in the Constitution. It has exercised that power once.

Thirdly, it has an advisory jurisdiction, which has occupied most of its time. Its opinions in the exercise of this jurisdiction are not binding, but they have, in the past, carried substantial weight. It has, with the aid of a panel of theological assessors, answered various questions brought before it involving such diverse matters as questions relating to the remarriage of divorced persons, the ordination of women as deacons and priests and lay presidency at the eucharist.

Recent experience

The present role and function of these various tribunals within the church is now being questioned and is the subject of quite serious review. The advisory opinions of the Appellate Tribunal have been criticised as having no proper standing at all. Ultimately, the issues which have engaged that jurisdiction of the Appellate Tribunal have been resolved through the process of the General Synod and its interaction with diocesan synods. The Special Tribunal and the diocesan tribunals are still seen as tribunals where trials take place for offences against church law, resulting, if found proved, in some form of penalty against the bishop or priest concerned. Fortunately, the engagement of diocesan tribunals has been relatively rare, but where they have been engaged, they have been cumbersome and extraordinarily expensive, and ultimately of little benefit to the mission of the church. They are run on adversarial lines as expensive forensic contests, more often than not creating greater divisions than they were intended to solve.

The Special Tribunal was required to convene for the first time within the last two years. That concerned an alleged offence of moral turpitude, not a doctrinal offence. It revealed many problems. There was no lawyer on the tribunal. There was a confusion of roles between the bishop nominated to prosecute the charges and the original complainant or victim of the alleged offences. There was even a confusion as to what the role and purpose of the tribunal was. The president of the Tribunal, being the Primate of the Anglican Church, was unable to provide or to direct any pastoral care to the diocesan bishop concerned. On what was a complaint of sexual misconduct, the Constitution required that the matter be referred to a board of assessors comprising theologians whose principal function is to give advice on theological questions. Such a reference was quite inappropriate to the case in questions.

Similar problems have been encountered in some diocesan tribunals. They were set up and their role was defined principally to deal with heresy or doctrinal offences. They had various items of misconduct added to their jurisdiction, but always on the

implied assumption that a priest or deacon who was charged and who was guilty of immoral conduct would confess his misdeeds, resign his position and go quietly, causing less than a ripple. If that led to his secular employment, he was seldom seen again. However, sometimes he would turn up in another diocese with a less than complete reference from his previous bishop from whom no inquiry would be made and be licensed by another bishop who had no knowledge of his past.

Bishops became fearful of a black list because of the possibility of defamation actions. In some cases, those fears might be well founded if the sources of information which caused the resignation were doubtful. In others, they would most likely be protected by qualified privilege. The fear of defamation itself was sufficient to prevent full communication within the church.

As I said, most of these tribunals were designed principally to deal with doctrinal offences. With the growing community awareness of the great personal devastation that can be caused by child molestation and other sexual offences particularly, the emphasis on the role of tribunals now has changed substantially, and has caused the church to engage in a substantial reassessment of their nature and function.

A New Direction

At risk again of compression of what is a subject of vast complexity, and emphasising the fact that the inquiry and assessment is still continuing, what seems likely to emerge is a very different sort of tribunal with different functions and purposes. As I see it, this is likely to be the position:

1. The notion of ecclesiastical offences will disappear except, perhaps, in the very rare cases of alleged breaches of faith, ritual and ceremonial, or doctrinal offences.

2. The sole criterion governing whether a tribunal should make any recommendation for action will be the fitness of the bishop, priest or deacon to hold office. It is that inquiry with which the tribunals will be primarily concerned.

3. There must, of necessity, be a trigger or an allegation of some conduct which calls into question the fitness to hold office. In order to take some of the sting out of the notion of blame and punishment, such conduct might be included in a definition of “examinable conduct”.

4. Complaints will usually be initiated by another member of the church, although in the case of an allegedly false accusation, a member of the clergy may wish to initiate an inquiry in order to clear his or her name.

5. Unlike the present method of conducting proceedings at the instance of nominated persons or a certain number of members of the church who obviously feel aggrieved by the conduct, there will need to be an “independent” prosecutor. By independent I mean an independent canonical authority not including the alleged victim or persons immediately affected by the conduct. That authority would be required to investigate allegations, to decide whether proceedings in

the tribunal should be initiated and to place evidence before the tribunal in much the same way as counsel assisting a Royal Commission.

6. The procedures of the tribunal would need to have a greater inquisitorial emphasis rather than adversarial, while still protecting the rights of clergy to challenge disputed facts. In fact it might not even be called a tribunal.

7. Bishops would be banned from any participation in the proceedings of a tribunal or of an investigating/prosecution body. They would obviously need to be kept informed, however, of developments at every stage. This would enable proper pastoral and counselling support for the priest or deacon who is the subject of an inquiry. They would still need to implement any ultimate recommendation of the tribunal.

8. Associated with some rather radically different procedures in tribunals would be canonical legislation enabling a member of clergy to surrender the exercise of orders or to consent to an order for deposition from holy orders such that, for all purposes connected with church government and the person's role in that church, he or she would be treated as a lay person only.

These features are of by no means cast in tablets of stone. They will require considerably more working out. But they are necessary for a new era where we are seeing a great upsurge in complaints of and acknowledgement of past sexual misconduct. The church can no longer sweep these matters under the carpet and hope they will disappear. They have to be faced, and the community and church membership is entitled to transparency of action and process. The churches will have to be much more careful about who they engage in ministry, and must devise adequate processes to ensure that those at risk, particularly of sexual offending, are no longer able to hold themselves out as ministers of the church. The difficulty in all this is to devise a process which is not an absolute drain on the resources of the church, which produces a clear and transparent result, but which at the same time ensures the appropriate degree of natural justice to the person whose livelihood and reputation may be at stake.

Endnotes

1 *Anonymous* (1722) 2 P Wms 75; 24 ER 646.
2 G Chalmers, *Opinions of Eminent Lawyers* at 194 – 195 (Burlington 1858); W Forsyth, *Cases and Opinions on Constitutional Law*, London 1869, at 1.
3 *R v Inhabitants of Brampton* (1808) 10 East 282 at 288; 103 ER 782 at 784. See also *Beard v Baulkham Hills Shire Council* (1986) 7 NSWLR 273 at 277.
4 *Re Colenso, Bishop of Natal* (1865) 3 Moo PC (NS) 114 at 148; 16 ER 43 at 56.
5 *Campbell v Hall* (1774) 1 Cowp 204; 98 ER 1045
6 (1862) 1 Moo PC (NS) 411; 15 ER 756
7 A useful historical summary of developments in the Australian Anglican Church at this time is to be found in the judgment of Priestly JA in *Scandrett v Dowling* (1992) 27 NSWLR 483 at 522-546
8 (1863) 1 Moo PC (NS) 411; 15 ER 756
9 (1948) 78 CLR 224
10 Constitution s 54(2)
11 Constitution s 56(2)