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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**

A response to the lecture of Michael Shand AM QC FCI Arb

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The Fifth Sharwood Lecture in Church Law: May 2022

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I acknowledge that I am speaking on the land of the Gadigal people of Eora nation and pay my respects to their elders past and present and to their emerging leaders. I pray, with you, for continuing justice and reconciliation between the First Nations indigenous people of Australia and all others who live here.

Thank you, Michael, for that wide-ranging excursus into the various ways in which state and Commonwealth statute law and the common law impact on religious institutions, especially Christian religious institutions. It is indeed an important topic at this time in Australia.

I would like to pick up Michael's statement that "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."

There is, and always has been, a compact between the community, the state and the churches, whether our church is an established church or not, in the constitutional sense. This compact or tacit agreement affects not only churches but each religious community. The relationship between church, state and society is also a dynamic and evolving one. We cannot rest on understandings that are passing and on the reputation built up in a past age.

This relationship is played out in legislation that is in force federally and in each state and territory of Australia. Politicians introduce bills that they believe their constituents wish to see implemented as law. We are part of the community, hopefully leaven in the lump!

In addition, at a level below legislation, the compact between churches, the state and the community has impacts in terms of in the regulatory arrangements made in many areas, including grants made to institutions caring for the aged, those with disabilities, schools and other church-related community organisations.

The extent to which there is a view by decisionmakers that churches are of benefit to society will have a significant influence on how tolerant or even supportive they are of the identity and work of the churches, including the Anglican Church of Australia in all its manifestations. Are we a blessing to our community?

Charities

A brief response as to charities: There can be a tension between the role of church-related advocacy on behalf of the poor and marginalised (e.g., through institutions such as Anglicare and the Brotherhood of St Laurence) and the support willingly provided by government and government agencies for church activities and agencies. We as church want to accept the financial assistance that government can provide, whether tax concessions, reduced costs in local parishes for removal of rubbish bins, charitable status or grants to schools. Most Christians would say, however, that this should not be at the price of losing our critical and prophetic edge. In the main, the agencies that represent the churches are careful about this. It is an issue not only domestically but in international aid agencies such as the Anglican Board of Mission (ABM) and the Christmas Bowl appeal of the NCCA.

In recent years, there has been a tendency in government to want to at least muffle, or even silence, the critical voices from churches and the not-for-profit sector generally where they are inconvenient. But it remains an integral part of the Gospel for us to speak for the voiceless.

Recently, thirty or so Australian Anglican bishops signed a letter addressed to the federal government, urging greater compassion to refugees in Afghanistan through increasing our intake of them. It was quite moving to see the actual signatures of our bishops on the letter that went to government from the recent meeting of the Australian Anglican bishops, prior to the General Synod meeting. Other Christian traditions also joined that advocacy. This is a tremendous example of church-based advocacy, speaking for the voiceless about injustice and encouraging government to remedy it. In the most recent edition of *Southern Cross*, the Sydney Diocesan magazine, Archbishop Kanishka Raffel acknowledged the additional 16,500 places for Afghan refugees that have been granted over four years. The article was headlined “Refugee advocacy bears fruit”. Such advocacy is a fine example of how our advocacy on behalf of the powerless is received in the community.

Recent issues in terms of discrimination law

Problems arise in the levels of comfort of church and community respectively where views within churches appear to contradict those of the majority of people in the community. We presently seem to have a gulf between some in our churches who would like a greater right, or even an untrammelled right, to discriminate against gay, lesbian and transgender people and many in the community who want gay, lesbian and transgender people to be treated with respect and not condemned for their sexual orientation and/or practice.

In terms of anti-discrimination law, in NSW we are governed by both state and Commonwealth legislation. The *Anti-Discrimination Act 1977* (NSW) states at s56 that:

Nothing in this Act affects-

- (a) The ordination or appointment of priests, ministers of religion or members of any religious order;
- (b) The training or education of persons seeking ordination or appointment as priests, ministers of religion or members of a religious order;
- (c) The appointment of any other person in any capacity by a body established to propagate religion; or
- (d) 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. “

At the Commonwealth level, there is also an exemption in s38 of the *Sex Discrimination Act 1984*, as follows:

Educational institutions established for religious purposes

- (1) Nothing in paragraph 14(1)(a) or (b) or 14(2)(c) renders it unlawful for a person to discriminate against another person on the ground of the other person's sex, sexual orientation, gender identity, marital or relationship status or pregnancy in connection with employment as a member of the staff of an educational institution that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed, if the first-mentioned person so discriminates in good faith in order to avoid injury to the religious susceptibilities of adherents of that religion or creed.
- (2) Nothing in paragraph 16(b) renders it unlawful for a person to discriminate against another person on the ground of the other person's sex, sexual orientation, gender identity, marital or relationship status or pregnancy in connection with a position as a contract worker that involves the doing of work in an educational institution that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed, if the first-mentioned person so discriminates in good faith in order to avoid injury to the religious susceptibilities of adherents of that religion or creed.
- (3) Nothing in section 21 renders it unlawful for a person to discriminate against another person on the ground of the other person's sexual orientation, gender identity, marital or relationship status or pregnancy in connection with the provision of education or training by an educational institution that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed, if the first-mentioned person so discriminates in good faith in order to avoid injury to the religious susceptibilities of adherents of that religion or creed.

In the last parliament, a number of Liberal Party members crossed the floor, seeking to repeal that provision. Some of them, such as Fiona Martin in my electorate of Reid, paid heavily for that by letterboxing against her by the Australian Christian Lobby, which put a flyer in my letterbox saying:

“In February, Fiona Martin voted to remove laws that protect the values of faith-based school. On 10 February Fiona Martin voted to repeal s38 of the *Sex Discrimination Act*. Section 38 enables faith-based schools to exist by hiring staff, teaching and operating in accordance with their faith. Does her attack on Christianity and other faiths accord with your values?”

Do we really want the right to treat others less favourably on the ground of who they love or their gender identity? I hope not. As Michael Kirby has pointed out, a person's sexual orientation is not necessarily something that is chosen, it may be simply there in their makeup. If we believe that we are all made in the image of God, who are we to reject others due to their sexual orientation or gender identity?

It seems to me that God is love and that our job, individually and corporately, is to love others as Jesus loves each human being, whether gay, lesbian, straight or transgender. There seems to be too great a component of judgement in the condemnatory pose of some Christians on this matter. As Pope Francis put it: who am I to judge?

But it goes further than that: if our churches are perceived as bastions of bigotry, then we can expect this to be reflected in much less assistance, tolerance, support and leeway to churches from government and the community in the future. What we say about generosity, support for and

recognition of the dignity of the marginalised (for example the poor, the aged or refugees) will be marred if we lack generosity, support and concern for the dignity of those who are marginalised in other ways (due to sexuality for example).

It is often Scripture that is cited in support of a condemnatory attitude towards gay, lesbian and transgender people and practices. We need to read our Scriptures carefully: why should we not feel compelled to obey the Leviticus prohibitions on eating shellfish, not feel compelled to follow Leviticus' prohibitions on eating 'cloven footed animals', pork and bacon, yet want to read literally and apply Old Testament condemnations of homosexuality? We need to read our Scriptures with a careful eye to what is time and culture-bound and what is an overarching principle that is at stake.

Lest we think this is a difference between the Old and New Testaments, even St Paul seemed to accept slavery, yet many Christians have been at the forefront of the anti-slavery movements over time, for example William Wilberforce and other Christians in the UK and also the Quakers and many other Christian traditions in the US. In our own times we see Justin Welby, Archbishop of Canterbury, Pope Francis and other Christian leaders uniting against various forms of modern slavery, to try to have anti-slavery legislation passed and action taken against slavery around the world.

Similarly, the epistles of St Paul refer to women wearing head coverings in church. Do we think that we need to observe that? No. Yet some want to insist on a few comments of St Paul on homosexuality as being for all time and contexts, rather than limited to the context of male temple prostitution in Paul's time.

We need to be discerning and understand where culture, rather than fundamentals of the faith have shaped attitudes that may not be Godly, loving or kind. The insight of Richard Hooker, that we need to examine and interrogate Scripture, tradition and to use our God-given reason to interpret what the Scriptures mean in our own times is as fresh and relevant today as when it was written.

If we choose interpretations of Scripture that are unnecessarily judgmental, excluding and condemnatory of others, that will have an impact on how our churches are seen in the community and by the legislators who are elected by the community, at all levels of government. Are we a blessing or a curse? As Michael has said, church and society are intertwined.

We live in community and the law of the land arises from community and its perceptions. If we want our advocacy on refugees from Afghanistan and for the poor and homeless to be taken seriously, we need to live out values of love, kindness, generosity, wisdom and so on in all we do. Against these there is no law. As the old chorus goes "You will know they are Christians by their love". Whatever we do for the least of these, we do for Christ. The transgender student in the classroom is as much a child of God as every other student and should be treated as such.

Do we really want or need the freedom to discriminate against gay, lesbian or transgender people in our schools, as students or teachers or school principals or to suggest in our teaching that they

are somehow lesser than others or more sinful than others? The protections we presently have in NSW in this area in terms of both state and federal law are, I would argue, adequate and even generous.

I suspect that if others in the community are struck by the increasingly strident demands of some Christians for preferential treatment in being able to discriminate against some on the basis of their sexual orientation, gender identity or marital or other relationship status, we will see the space shrink for Christians to have a voice that is respected and taken seriously in other areas of our national life.

It is good that our advocacy on behalf of the poor still receives prominent coverage in the press. Before the recent federal election, Anglican Australia's Executive Director Kasey Chambers was quoted on 28 April in the SMH on p18. Anglicare Australia had undertaken a study of a crisis in affordable rental accommodation: Anglicare's rental affordability snapshot of 46,000 available rental listings in one weekend in March showed that less than 1% of rentals were affordable for people on income support, while those on the minimum wage could afford just 2% of available rentals across the country.

Such advocacy for the poor makes one proud to be Anglican. It shows others that we care about those who are at the margins of our society.

Let us embrace everyone in the love of God, as demonstrated in the life of Jesus, who chose to eat with sinners, to relate with tax collectors, to drink water poured by a Samaritan woman, to heal a Syrophenician woman, to meet with lepers and those with "demons" perhaps the mentally ill. This is the Jesus who lifts up those of low degree, who brings good news to the poor, who sets the captives free. If we take seriously that mission, then we will be close to God's heart. We will meet with the favour of God and our community and may occasionally be ahead of the state.

Royal Commission

I agree with Michael that the Royal Commission into Institutional Responses to Child Sexual Abuse has had a profound impact on the Anglican Church of Australia and on probably most of the other churches (though there are some smaller churches that have not greatly reflected upon or changed their practices in New South Wales).

Perhaps the most immediate impact of the Royal Commission was to shock the populace at large with what had been happening within churches, which ought to be places of safety. Shining a light on the crimes against children and failures of churches and many, many other institutions to have proactive structures in place to deal with such crimes has led to a much greater distrust of Christian churches from which we are only slowly recovering.

In the end, it will be the slow, careful and painstaking changes that each diocese and each parish puts in place that will tell in the long run and demonstrate that we should be respected and taken seriously by the society at large. As Michael's lecture points out, we are taking those steps, in a

way that is co-operative with government and which builds confidence in the community. That is to be applauded.

The Working with Children Check that is required of clergy and other church workers in NSW has been well accepted. Most, if not all dioceses, also do psychological testing of candidates for ministry and have a discernment process that is rigorous. There is also now on-going annual professional standards training for at least clergy and hopefully more broadly.

I think only Melbourne Diocese has set up a separate company to deal with professional standards and there are pluses and minuses in doing that.

I am proud that, through the National Council of Churches, the experience of the Anglican Church as one of the larger churches is also being shared with other churches to strengthen our churches as safe places for all. Garth Blake AM and others have given generously of their time in working with other churches on these issues.

The Future – what can we contribute

Going forward, the Anglican Church of Australia has important opportunities for leadership in the interaction between church, state and the rest of the community in many areas. One that stands out is in relation to justice and reconciliation with the First Nations people of this land. Our church can continue to build on our history of standing with Aboriginal and Torres Strait Island peoples (some of whom are Anglicans and other Christians) in the days ahead. The government has signalled that it wants to move on the Uluru Statement from the Heart and to also tackle indigenous disadvantage in various areas.

Pioneer First Nations clergy have led the way: Rev Gloria Shipp has led the way in being Christ in juvenile justice centres in Dubbo, supported by the Anglican Board of Mission and Pastor Ray Minnecon an Aboriginal Anglican pastor in Glebe, Sydney has dedicated a lot of his time to supporting members of the stolen generations. They, and many others, are standing alongside those in need and in the midst of doubt and despair.

Let us listen to those First Nations leaders and be proud standard bearers of the light of Christ in walking with First Nations people into this new chapter of Australian history, with a new national parliament. We will be called upon to express views on a possible referendum on the Uluru Statement from the Heart and then any legislation that follows. This is an opportunity to stand for reconciliation with the indigenous people of the land.

As Micah 6:8 says: “He has told you, O mortal, what is good; and what does the Lord require of you but to do justice, to love kindness and to walk humbly with your God.”

Let us choose to live according to the light of Christ, being neighbour and friend to others, known for our love, shown to all people.

Christ is risen, he is risen indeed, Alleluia!