

“PUNISH OUR TRESPASSES!” AN EXAMINATION OF PRIVATE TRIBUNAL LAW AS APPLIED IN THE ANGLICAN CHURCH’S TRIAL OF BISHOP DONALD SHEARMAN

HOWARD MUNRO *

I INTRODUCTION

In June 2004, the Anglican Diocese of Brisbane convened a hearing before its Diocesan Tribunal to determine the guilt or innocence of Bishop Donald Shearman (aged 78) who was charged with having “committed disgraceful conduct which is/ would be productive of evil report”.¹ The conduct in question referred to events alleged to have occurred in a church-run hostel in Forbes, NSW, during 1954-56. Having found Bishop Shearman guilty of such misconduct, the Tribunal recommended that he be deposed from holy orders.

In response to the Tribunal’s findings, the Archbishop of Brisbane, the Most Rev Dr Phillip Aspinall, who had the power under the *Tribunal Canon 2003* (the church’s disciplinary legislation) to accept, suspend or mitigate the decision recommended by the Tribunal in the exercise of his ‘prerogative of mercy’,² took the view that no mitigation of sentence was warranted. Dr Aspinall, declared (without giving reasons) that:

The positive ministry that Mr Shearman was able to exercise, as a result of his misconduct against the complainant not generally being known for so many years, is not a reason to mitigate what I accept is the appropriate response to the offence.³

* Howard Munro BA (Hons)/LL.B (UQ), BTh (BCT), PhD (Griffith) is Dean of St John’s College, The University of Queensland.

¹ *Decision of the Diocesan Tribunal* at [1]. (The Decision of the Diocesan Tribunal in the case of *Robert Cunningham v Donald Shearman* (Diocesan Tribunal of Brisbane, Australia, July 2004) - referred to in this paper as the *Decision of the Diocesan Tribunal* - was published by way of an e-mail attachment to all Brisbane clergy on 26 August, 2004. A statement by the Archbishop explaining his decision was published in the September 2004 edition of the Diocesan newspaper *Focus*).

² *Tribunal Canon 2003* s 36(1) (Anglican Diocese of Brisbane). The *Tribunal Canon 2003* is published as part of folio titled *The Constitution and Canons of the Diocese of Brisbane 2003* by the Corporation of the Synod of the Diocese of Brisbane, 2004.

³ This opinion is contained in *Archbishop’s Sentence – DN Shearman* at [11], which accompanied the e-mail attachment containing the *Decision of the Diocesan Tribunal*.

Prior to the instigation of the Tribunal hearing, the events complained of had come to the attention of the church and had been handled at various levels. These prior efforts to resolve the issue were examined at length in the *Board of Inquiry into the Past Handling of Complaints of Sexual Abuse in the Anglican Diocese of Brisbane 2003* chaired by Mr Peter O’Callaghan QC and assisted by Professor Freda Briggs.⁴ After reviewing all the evidence available to it, the Board concluded that the Diocese had not adequately dealt with the complaints. The Board stated that:

The subject complaint was not handled fairly, reasonably and appropriately, in that there was and remains a failure on the part of the Respondent [Bishop Shearman] to make a full and unconditional apology for his conduct towards the Complainant.⁵

Hence, the Tribunal hearing was instigated by the Archbishop of Brisbane and Bishop Shearman was officially censured and punished, with the result that he is now no longer in holy orders so far as the church is concerned, as of 25 August 2004.

II ISSUES

Whilst the case against Bishop Shearman is now closed from the church’s point of view, I nevertheless wish to argue that Bishop Shearman’s trial by the Tribunal in the Anglican Diocese of Brisbane reveals the legal vulnerability of unrepresented accused persons before ecclesiastical courts.

It would appear from the recorded judgment of the Tribunal that the accused bishop could not afford legal representation. The Tribunal, in the early stages of its judgement, notes a letter from Bishop Shearman’s solicitors to the Tribunal as saying:

Another relevant matter, again as earlier advised, the cost of legal representation before the Tribunal is beyond Mr Shearman. Mr Shearman was a priest for all of his working life and is retired at an elderly age on a modest and limited pension\stipend.⁶

Bishop Shearman therefore, facing a Tribunal that had the ultimate sanction of deposing him from holy orders – a matter Archbishop Aspinall described as “the most serious step the church can take in relation to an ordained person”⁷ – had no legal representation and was not even self-represented; and even if he were, he would have had to be advised as to the conduct of his case by the President (or Deputy President) of the Tribunal, which would have been a situation that was far from ideal.

The final outcome for the unrepresented accused Bishop is that he bears the odium of being found guilty of an ecclesiastical offence, the consequence of which is to suffer the ultimate penalty of being publicly deposed from holy orders. As a result of being deposed, Bishop Shearman also loses any chance of casual employment as a minister of the church, which, were it not for the fact that the Bishop is retired, would indicate that

⁴ P O’Callaghan and F Briggs, *Report of the Board of Inquiry into Past Handling of Complaints of Sexual Abuse in the Anglican Church Diocese of Brisbane* (Queensland State Parliamentary Papers, 2003).

⁵ Ibid 337-338 [20.1].

⁶ *Decision of the Diocesan Tribunal* at [18].

⁷ Jeff Waters, *Anglican Bishop defrocked over sexual abuse allegations* (2004) ABC Online <<http://www.abc.net.au/am/content/2004/s1185518.htm>> at 4 April 2005.

there are very few procedural safeguards protecting clergy from deprivation of their economic livelihood.

The fact that the Tribunal tolerated this situation exposed Bishop Shearman to the potential hazards that confront all legally unrepresented accused persons when they are summoned before courts and other tribunals. Bishop Shearman would, in the ordinary course of events, have been well served by having counsel representing him in order to make submissions on his behalf in determining issues (to be considered below) such as (i) the jurisdictional claims of the Tribunal; (ii) the procedural rights of the accused; (iii) whether the Tribunal ought to have afforded the accused the protections of criminal (or quasi-criminal) jurisdiction compared to the lesser standards of ‘disciplinary’ proceedings; (iv) whether the facts as alleged had been proved; and (v) the recommendation on the penalty to be imposed.

The trial of Bishop Shearman under the *Tribunal Canon* was in many respects a test case in ecclesiastical law in the Anglican Diocese of Brisbane. As such it could well have been deserving of legally aided (privately sourced from church funds) or at least *pro bono* support to the accused Bishop to ensure that a number of potentially legally complex issues were fully canvassed from both a prosecution and defence perspective.⁸

III THE TRIAL

The Anglican Diocese of Brisbane *Tribunal Canon* provides for a trial to be presided over either by the Archbishop as its President, or else by the Deputy President. As laid down by the *Tribunal Canon*:

The Archbishop may appoint as Deputy President only the Chancellor or the Deputy Chancellor or some other barrister or solicitor of the Supreme Court of Queensland who is a communicant Member of the Church.⁹

Pursuant to the *Tribunal Canon*, the Archbishop appointed the Hon. Justice Debra Mullins of the Supreme Court of Queensland as Deputy President of the Tribunal to preside over the Tribunal in his place. The Tribunal was comprised of two clergy and three lay persons, in addition to Justice Debra Mullins.¹⁰ The Archbishop also appointed a person to act as an ‘Accuser’ against Bishop Shearman. The person so appointed was Mr Robert Cunningham, a solicitor of the firm Flower & Hart Lawyers.¹¹ In addition to the Accuser, the Archbishop appointed an ‘Advocate’, Mr Peter John Dunning, (barrister-at-law) to prosecute the charge.¹² Hence the case against Bishop Shearman

⁸ See J Western, T Makkai and K Natalier, ‘Professions and the Public Good’ in C Arup and K Lester (eds), *For the Public Good: Pro Bono and the Legal Profession in Australia* (Federation Press, 2001) 33 (viz. “some practitioners consider working at reduced fees to be part of pro bono work, others include only free services in their definition, still others account for work that is in fact in the broader public interest, for example, in the form of test cases”).

⁹ *Tribunal Canon 2003* (Anglican Diocese of Brisbane) s 20 (3). The present Chancellor of the Diocese of Brisbane is the Chief Justice of the Supreme Court of Queensland, the Hon Mr Justice Paul de Jersey. The Chancellor of a diocese is the principal confidential adviser to the bishop of the diocese in legal and related matters. See General Synod *Chancellors Canon 2001* s 2 (1).

¹⁰ The Tribunal’s Deputy President, Justice Debra Mullins, in addition to being a Supreme Court Judge, was also recently appointed as the Diocesan Deputy-Chancellor.

¹¹ *Decision of the Diocesan Tribunal* [2].

¹² *Decision of the Diocesan Tribunal* [12].

was brought not by a ‘complainant’, but was brought by the Diocese itself at the instigation of the Accuser, hence the case being *Robert Cunningham v Donald Shearman*. The Tribunal’s task was to establish whether the ‘Articles of Accusation’ were proved and, if so, to recommend a ‘sentence’ on the wrongdoer.¹³

At the commencement of its judgement the Tribunal noted, in the course of reciting the pre-trial formalities such as the proper serving of the Articles of Accusation upon Bishop Shearman, that Bishop Shearman could not afford legal counsel. However, nowhere in the judgment is the question raised as to the possibility that since Bishop Shearman was unable to afford legal counsel this could pose a problem so far as natural justice is concerned.

However, the Tribunal did give attention to possible impediments to the Tribunal having any jurisdiction to put Bishop Shearman on trial. The first of these was an attempt by Bishop Shearman in 2003 to resign his holy orders by presenting a deed relinquishing his holy orders to the Primate of the Anglican Church, the Most Rev. Dr Peter Carnley. Dr Carnley apparently rejected the legal efficacy of the deed.¹⁴ Bishop Shearman subsequently attempted to resign his membership of the church by writing a letter to this effect to Archbishop Phillip Aspinall. However, the Tribunal ruled that based on Canon 76 of 1603 and a case determined by the Arches Court of Canterbury in 1845, *Barnes v Shore*,¹⁵ Bishop Shearman’s efforts to relinquish both his holy orders as well as his membership of the church did not deprive the Tribunal of jurisdiction to hear the case against him and to recommend a sentence.

Having asserted its jurisdiction, the question of whether it is satisfactory to proceed with a case where a person is legally unrepresented was apparently not addressed by the Tribunal. To compound matters, Bishop Shearman himself did not appear before the Tribunal and so the trial proceeded in his absence. The only legal concession made by the Tribunal to Bishop Shearman in the absence of himself or a legal representative was to enter a plea of ‘not guilty’ on his behalf, in accordance with s 21(6) of the *Tribunal Canon*.¹⁶

The charge put to the Tribunal was that Bishop Shearman committed ‘disgraceful conduct which is/ would be productive of evil report’. The essence of the charge against Bishop Shearman was that:

During the years 1954 to 1956 at St John’s hostel at Forbes, New South Wales, the accused maintained a sexual relationship with [the complainant]. At all relevant times, the accused was the warden of the hostel and assistant priest in the parish of Forbes and was married. During the relevant times [the complainant] was aged 15 years to 17 years.¹⁷

The Tribunal’s summary of the evidence suggests that the Complainant and Bishop Shearman had later sexual relations and intermittent contact with each other at various

¹³ *Tribunal Canon 2003* (Anglican Diocese of Brisbane) s 29.

¹⁴ *Decision of the Diocesan Tribunal* [25].

¹⁵ *Barnes v Shore* (1845) 8 QB 640; 163 ER 1074 cited in *Decision of the Diocesan Tribunal* [27].

¹⁶ *Decision of the Diocesan Tribunal* [36].

¹⁷ *Decision of the Diocesan Tribunal* [7]. The Tribunal chose not to reveal the name of the Complainant.

times in the period from the mid-1970s until the mid-1990s.¹⁸ However, the actual events at issue would appear to be narrowly focused on the period of 1954-56.

The Tribunal reached its verdict based on evidence that consisted of an affidavit, as well as oral evidence heard *in camera*, without any legal representation or cross-examination on behalf of the accused. In spite of the fact that there was no counsel representing the accused, the Tribunal expressed “no hesitation”¹⁹ in accepting the truth of the Complainant’s account of the events that were the subject of the charge. The Tribunal found, therefore, that Bishop Shearman committed “gross impropriety when he commenced kissing the complainant”²⁰ sometime in 1954. Thereafter, according to the Tribunal, the “sexual misconduct towards the complainant progressively escalated”.²¹

The Tribunal, having separated out the period 1954-56 from subsequent periods in the relationship between the Complainant and Bishop Shearman, and having declared its ‘guilty’ verdict, turned its attention to the question of sentencing. Under the *Tribunal Canon*, the Tribunal has the power to recommend a range of penalties including monition, suspension, expulsion from office, deprivation of rights and emoluments, and finally, deposition from holy orders,²² all of which are varying degrees of penalty of increasing gravity.

The Tribunal chose to invoke the ultimate penalty of deposition, citing the Anglican Diocese of Sydney case of *Gerber v Ellmore* (involving the deposition from holy orders of Robert Ellmore in 2001) as a precedent.²³

Under the *Tribunal Canon*, the Archbishop has the discretion to exercise a ‘prerogative of mercy’ by either mitigating or suspending, or mitigating *and* suspending, the sentence recommended by the Tribunal.²⁴ The Archbishop chose instead to accept the Tribunal’s recommendation and declared that there was no reason to mitigate the sentence. Bishop Shearman was therefore deposed and the Archbishop expressed his hope that this would bring closure and “healing for all who have been hurt”.²⁵

IV THE JURISDICTION OF THE TRIBUNAL

One issue that had to be determined at the outset of the hearing was whether the Tribunal had jurisdiction to hear the case, given that Bishop Shearman had voluntarily attempted to relinquish his holy orders and then sought to resign his membership of the church. The Tribunal asserted that it retained disciplinary jurisdiction over Bishop Shearman. The Tribunal declared that Canon 76 of 1603 remains in operation in the Diocese and cited the case of *Barnes v Shore* to illustrate its operation. Canon 76 of 1603, which forbids clergy to relinquish their holy orders, forms part of a series of

¹⁸ *Decision of the Diocesan Tribunal* [42]-[48].

¹⁹ *Decision of the Diocesan Tribunal* [50].

²⁰ *Decision of the Diocesan Tribunal* [60].

²¹ *Decision of the Diocesan Tribunal* [60].

²² *Tribunal Canon 2003* (Anglican Diocese of Brisbane) s 29.

²³ A case note for *Gerber v Ellmore* (Diocese Tribunal of the Diocese of Sydney, October 2001) appears on the web site for the Ecclesiastical Law Society, <www.ecclawsoc.org.uk/case_ger.html>.

²⁴ *Tribunal Canon 2003* (Anglican Diocese of Brisbane) s 36 (1).

²⁵ *Archbishop’s Sentence – DN Shearman* [13].

Canons passed by the Convocation of Canterbury in 1603.²⁶ These Canons have generally been held to be binding on all the clergy (as distinct from laity) of the Church of England under English ecclesiastical law until and unless they are amended or repealed. *Barnes v Shore* is a case which invoked Canon 76 in order to foil an attempt by a Church of England clergyman, the Rev. Jas. Shore, to relinquish his holy orders so as to enable him to officiate in a dissenting chapel, contrary to his bishop’s instructions.

Barnes v Shore illustrates the application of Canon 76 if it has force.²⁷ As far as the application of any or all of the Canons of 1603 to any given diocese in the Anglican Church of Australia there is some doubt. Apart from the fact that some of the Canons (there are one hundred and forty-one in all) are outmoded or have relevance only to English conditions, the question has occasionally been raised as to how the Canons came to be part of ecclesiastical law in Australia. Reference may be made to a Conference of Australian Bishops in 1850 which declared that the bishops were of the opinion that the Canons of 1603 “form part of the established Constitution of our Church, and are generally binding upon ourselves, and the clergy in our respective Dioceses”.²⁸ However, the legislative competence of this Bishop’s Conference in 1850 is open to question.

However, in order to remove any legal doubt, the law-making bodies of the Anglican Church of Australia, (ie its General Synod and the various diocesan synods) have, over the past decade or so, sought to amend or repeal various of the Canons of 1603 so as to make them comply with Australian conditions. However, the Appendix to *The Constitution and Canons of the Diocese of Brisbane 2003* (Table 2) indicates that various Canons, including Canon 76, which up until the date of publication had not received legislative clarification or amendment, “should not be taken [by their inclusion in Table 2] to imply that they have any force or effect in the Diocese of Brisbane”.²⁹

The Tribunal ruled, however, that Canon 76 of 1603 did remain in operation in the Diocese. This question was resolved without hearing any submissions from counsel for Bishop Shearman. The General Synod of the Anglican Church of Australia has seen fit to pass (since the Shearman case was decided) the *Holy Orders, Relinquishment and Deposition Canon 2004* which states in s 13 that:

The Canon numbered 76 of the Canons of 1603, insofar as it may have any force, shall have no operation or effect in a diocese of this Church which adopts this canon.³⁰

The effect of the new Canon is to replace Canon 76 so as to allow clergy to relinquish their orders, but only if “the bishop is satisfied that the person is not currently the subject of any information, complaint or charge in any diocese concerning his or her conduct or fitness to hold any office”.³¹ Given the adoption of the new Canon, there

²⁶ For the original Latin text plus translation and commentary see J V Bullard, *Constitutions and Canons Ecclesiastical 1604 Latin and English* (The Faith Press, 1934).

²⁷ Canon 76 was superseded in England by the *Clerical Disabilities Act 1870 (UK)*. See Bullard, above n 26, 200. See also *Halsbury’s Laws of England* (4th ed) Vol. 14 [686].

²⁸ *Canon Law in Australia: A Summary of Church Legislation and its Sources* (Canon Law Commission of the Church of England in Australia, Anglican Church of Australia, 1978) [2202].

²⁹ *The Constitution and Canons of the Diocese of Brisbane 2003* (Corporation of the Synod of the Diocese of Brisbane, 2004) Appendix 2 “Constitution and Canons Ecclesiastical 1603”.

³⁰ <<http://www.anglican.org.au/docs/GS04Canon10-HO%20Relinquishment.pdf>> at 4 April 2005.

³¹ *Holy Orders, Relinquishment and Deposition Canon 2004* s 4(d).

will no longer be any doubt about any future Tribunal's jurisdiction to proceed against a member of the clergy who has attempted voluntarily to relinquish their holy orders.

Whilst it is doubtful that Bishop Shearman could have succeeded in arguing that the Tribunal lacked jurisdiction (had he wished to pursue this line of argument), nevertheless, without counsel acting for him in order to make submissions to the Tribunal, he certainly had no chance of mounting a challenge to its jurisdiction.

V THE RIGHTS OF THE ACCUSED

The *Tribunal Canon* provides that:

The rules of evidence prevailing and in force in the Supreme Court of Queensland, including provisions relating to judicial notice proof and admissibility contained in State or Federal Acts of Parliament shall so far as is practicable apply in a trial and for the purposes of the application of those rules and provisions a Tribunal and a trial shall be taken to be respectively a court and a legal proceeding.³²

The *Tribunal Canon* also provides that:

The Accused may appear in person or by counsel or solicitor or (if charged with breach of Faith Ritual or Ceremonial) by a person in holy orders.³³

The *Tribunal Canon* also allows the right of appeal to the national church's Appellate Tribunal, which is established at the national level and constituted by a Canon of General Synod. The Brisbane Diocese's *Tribunal Canon* therefore *prima facie* goes a long way towards enshrining the principles of natural justice.³⁴ It has the guidance of Supreme Court rules of evidence, the right to counsel and a right of appeal.³⁵

³² *Tribunal Canon 2003* s 23(2) (Anglican Diocese of Brisbane).

³³ *Tribunal Canon 2003* s 21(2) (Anglican Diocese of Brisbane).

³⁴ For a comprehensive treatment of the relationship between natural justice and the status of private disciplinary tribunals see J R S Forbes, *Justice in Tribunals* (Federation Press, 2002). In particular, in Chapter 11 the right to counsel is discussed - "Does Natural Justice Imply a Right to Counsel?", 134-146. Forbes is mainly concerned with judicial rulings on the question of whether there can be an *implied* right to counsel where no such right is expressly provided for in the rules establishing a disciplinary tribunal. The *Tribunal Canon* of the Diocese of Brisbane, however, expressly provides such a right.

³⁵ This compares favourably to a recently passed Canon in the Brisbane Diocese establishing a 'Professional Standards Board' which effectively replaces - without actually repealing - the *Tribunal Canon* as the primary vehicle for the discipline of clergy and other church workers. Not only does the newly established Board have no right of appeal from its decisions, it also dilutes the principles of natural justice by enacting the provision that:

The Board must act with fairness and according to equity, good conscience and the substantial merits of the case without regards to technicalities or legal forms and is not bound by the rules of evidence but may inform itself on any matter in such manner as it thinks fit.

See *Professional Standards Canon 2004* s 49(3) in "Synod 2004 Business Papers" Anglican Diocese of Brisbane. This provision echoes a current tendency even concerning the discipline of lawyers, as manifested in a recommendation of the NSW Law Reform Commission in 1993 that, in respect to the then proposed 'Legal Profession Disciplinary Tribunal':

Having regard to the 'protective' nature of the Tribunal's jurisdiction, the Tribunal should be flexible in its procedures, the rules of evidence do not apply, and it may adopt an inquisitorial style.

See 'Scrutiny of the Legal Profession' (NSW Law Reform Commission, 1993) Report No 70, 173. In a follow up report, 'Complaints Against Lawyers' (NSW Law Reform Commission, 2001) Report No 99, 145 the Commission notes that the rules of evidence do not apply to various NSW

However, as valuable as these safeguards are to an accused person coming before the Tribunal, especially the right to counsel, the *Tribunal Canon* is silent on what happens in the event that an accused person is unable to afford legal counsel. There is no hint of any possible provision of legal aid or *pro bono* support to ensure that accused persons are properly represented before the Tribunal.

This is in marked contrast to the equivalent legislation governing misconduct hearings in the Church of England where, both in the former *Ecclesiastical Jurisdiction Measure 1963* and the recently passed *Clergy Discipline Measure 2003* there is provision for legal aid being made available to clergy facing disciplinary proceedings, to be paid out of a Legal Aid Fund provided by the church itself.³⁶ In addition, the *Clergy Discipline Measure 2003* (Comments and Explanations) states that:

Clergy will be encouraged at all stages of the procedure to take advice and to attend interviews with a companion, be it a friend, a union official, or a lawyer.³⁷

In England there is a dedicated ‘clergy section’ of the MSF (Manufacturing Science Finance) Union (a union representing a wide range of workers in the services and not-for-profit sectors). In Australia there is no equivalent facility, as clergy in this country have not sought to unionise.

Of course, since in the present instance the *Tribunal Canon* merely provides a ‘right to counsel’ but with no reference to legal aid (or even encouragement of the *pro bono* services of a suitably qualified legal practitioner or canon lawyer, a *McKenzie* friend³⁸ or a union official), the Tribunal was acting within its canonical powers by ignoring the question of Bishop Shearman’s inability to afford legal representation. Hence, so far as the position under the *Tribunal Canon* is concerned, it could be argued that there is no more than a mere ‘right to counsel’ and beyond this there is no legal or moral obligation on the part of the Tribunal to provide legal assistance to those accused before it of misconduct, nor to stay proceedings until such assistance might be arranged, either by way of privately funded legal aid, *pro bono* assistance or any other means.³⁹

The plight of unrepresented persons in the secular courts is somewhat different given the safety net of publicly funded legal aid. The publicly funded legal aid system in Australia began with the high ideal, expressed in 1973 by then Senator Lionel Murphy, that:

boards and tribunals including those governing chiropractors, dental technicians, dentists, medical practitioners, nurses, pharmacists, podiatrists, psychologists and police.

³⁶ The *Ecclesiastical Jurisdiction Measure 1963* (UK) s 59. See Butterworths, Halsbury’s Statutes of England (3rd ed) vol 10 (at 1 February 1969) Ecclesiastical Law ‘Ecclesiastical Jurisdiction Measure’ 282. The *Clergy Discipline Measure 2003* is found at <www.publications.parliament.uk/pa/jt200203/jtselect/jtecc/87/87i01.htm>. The *Church of England (Legal Aid) Measure 1994* is referred to in the *Clergy Discipline Measure 2003* (Comments and Explanations) [41] see <www.publications.parliament.uk/pa/jt200203/jtselect/jtecc/87/8705.htm>.

³⁷ Clergy Discipline Measure 2003 (Comments and Explanations) [22].

³⁸ *McKenzie v McKenzie* [1971] P 33.

³⁹ By contrast, D Robertson, ‘Pro Bono as a Professional Legacy’ in C Arup and K Luster (eds), above n 8, 97-127, argues that during the middle ages “the Christian church added to political theory the motivation of charity and became an important provider of legal assistance to the poor” (at 97). Robertson cites Saint Augustine’s *City of God* Book 9 Chapter 5 for a classic Christian statement on the virtue of Christian compassion.

The ultimate object of the Government is that legal aid be readily and equally available to citizens everywhere in Australia and that aid be extended for advice and assistance of litigation as well as for litigation in all legal categories and in all courts.⁴⁰

Naturally, the then Attorney General would have had in mind only criminal and civil jurisdictions within the ordinary court system and not private tribunals such as ecclesiastical courts in the Anglican Church of Australia. (Needless to say, the implementation of such high ideals for legal aid as expressed by then Senator Murphy have over time been subjected to ever more stringent matter, merit and means tests due to increasing demands being made on the available funds).⁴¹

Speaking generally concerning the proper administration of justice within the State of Queensland, the Chief Justice of the Supreme Court of Queensland, the Hon Paul de Jersey AC has commented on the basic requirements of justice in a number of his extra-judicial speeches and addresses, in particular upon the celebration of the 25th Anniversary of the establishment of the Caxton Legal Centre.⁴²

In the course of this address, Justice de Jersey expressed the view that “the concept of a court system unavailable, for reason of expense, to many of the taxpayers who fund its operation, is anathema”.⁴³ He then addressed three broad notions: the accessibility of legal services, equality of treatment before the law, and the accessibility of the justice system. The Chief Justice said that “as to the first notion, access to legal services, one of the clearest examples of a basic requirement is that of legal representation”.⁴⁴

After an examination of the pronouncements of the High Court in *Dietrich v the Queen*,⁴⁵ the Chief Justice stated that:

The basic requirement regarding access to a legal representative is, accordingly, that an unrepresented person charged with the commission of a serious offence would ordinarily be entitled to have his or her trial delayed until legal representation may be secured.

⁴⁰ Commonwealth, *Parliamentary Debates*, Senate 13 December 1973, 2800 quoted in Law Council of Australia, *Legal Aid Funding in the 1990s* (Law Council, 1994), [2.14].

⁴¹ See the Law Council of Australia report generally, *ibid*, as well as Criminal Justice Commission, *Funding Justice: Legal Aid and Public Prosecutions in Queensland* (Queensland Criminal Justice Commission, 2001).

⁴² The Caxton Legal Centre is a well known community non-profit legal centre in Brisbane, funded by various Government and Law Society grants, in order to provide free legal assistance to people who cannot afford a solicitor.

⁴³ P De Jersey, ‘Access to Justice: What are the basic requirements and do we achieve them in Australia?’ *Address given to the 25th Anniversary Access to Justice Conference*, 11 October 2001, and published on the Chief Justice’s “Articles and Speeches by the Hon Paul de Jersey AC” web site at <www.courts.qld.gov.au/publications/articles/articlesscj.htm>.

⁴⁴ *Ibid* 3.

⁴⁵ *Dietrich v the Queen* (1992) 177 CLR 292. The ‘*Dietrich* principle’ – ie “in the absence of exceptional circumstances, a judge faced with an application for an adjournment or a stay by an indigent accused charged with a serious offence who, through no fault is unable to obtain legal representation, should adjourn, postpone or stay the trial until legal representation is available” (see Headnote) – has been the subject of considerable subsequent analysis concerning the limits to the principle. (See *New South Wales v Canellis* (1994) 181 CLR 309, 330 (Mason CJ, Dawson, Toohey and McHugh JJ): “There is no authority for the proposition that the rules of procedural fairness extend to a requirement that legal representation be provided to a party at a trial, let alone a witness at an inquiry” etc. See also A Dickey, ‘*Dietrich* and Contempt Proceedings Under The Family Law Act’ (2000) 74 *Australian Law Journal* 500; Hon Justice R Nicholson, ‘Australian Experience with Self-Represented Litigants’ (2003) 77 *Australian Law Journal* 820).

Ritualistic invocation of the presumption of innocence is mere incantation if those, entitled to its protection but unable to afford representation, are denied that representation.⁴⁶

Hence:

Access to representation in a broader range of criminal and civil matters, and during some serious pre-court procedures, while not a guaranteed right, is nonetheless a basic requirement of access to justice.⁴⁷

With regard to the second notion - equality of treatment before the law – the Chief Justice suggests that a self-represented litigant can pose a particular challenge for a court:

To an extent, the Judge must actively assist the self-represented litigant to ensure he or she understands the procedure and has a reasonable opportunity to present a case. Where the other party is represented, that party may, in such a case, perceive that differential treatment is being accorded. Judges are conscious of the need to be careful about this.⁴⁸

Finally, in regards to access to the legal justice system, the Chief Justice noted that:

There is throughout the legal community, a willingness to provide pro bono services. The Court of Appeal pro bono scheme is a recent entrant to the field. The Caxton Legal Centre is a long-standing, much respected contributor.⁴⁹

In the much publicised case of *R v Hanson; R v Ettridge* de Jersey CJ also remarked that the wrongful conviction and subsequent jailing of Mrs Pauline Hanson (who was represented in her original criminal trial by a solicitor) and Mr David Ettridge (who represented himself) could have been avoided by their being represented by “experienced trial counsel”.⁵⁰ Whereas the element of experienced defence counsel was lacking in the original trial, Mrs Hanson and Mr Ettridge were each represented by senior and junior counsel at the appeal stage, which no doubt made no small contribution to the success of their appeal.

VI THE TRIBUNAL AND DISCIPLINARY PROCEEDINGS

One could of course argue that the established safeguards of justice apply only to the criminal justice system (where deprivation of liberty and fines may be imposed by the state) and perhaps, in ideal circumstances, to civil litigation as well. A distinction might therefore be made between the standards of justice required in the administration of justice in the secular realm compared to requirements of justice in the ecclesiastical justice system.

⁴⁶ De Jersey, above n 43, 4.

⁴⁷ Ibid, 5.

⁴⁸ Ibid, 9.

⁴⁹ Ibid, 14.

⁵⁰ *R v Hanson; R v Ettridge* [2003] QCA 488, [40], and the Chief Justice called for a more “highly resourced, top level team of prosecutors within, or available to the Office of the Director of Public Prosecutions” in order to avoid the difficulties which led to the wrongful convictions.

It could be argued, furthermore, that the ecclesiastical justice system is analogous to the disciplinary system that applies, for example, to lawyers and medical practitioners, and to many other professions as well. This is precisely the approach taken by the Tribunal in the Shearman case, which stated that “the hearing of this charge is analogous to a disciplinary proceeding”.⁵¹

The Tribunal therefore adopted the civil standard of proof as defined by the High Court in *Briginshaw v Briginshaw*⁵², and chose to follow the precedent set in *Basser v Medical Board of Victoria*⁵³, where O’Byrne J declared that he was satisfied that the civil standard of proof applied to “infamous conduct” cases before the Medical Board of Victoria.

By describing itself as being analogous to a ‘disciplinary tribunal’ one may reasonably infer that the Tribunal saw itself as being there to defend the public interest. Hence, in regard to the discipline of lawyers, for example, it is said that:

Disciplinary proceedings are considered to be protective of the public and the image of the profession and not punitive in nature. As a result, the procedures are different from the normal adversary trial and have an inquisitorial aspect. This does not mean that they are not adversarial. They are *sui generis* because they combine the adversarial with an inquiry rather than a hearing based on information. Similar to the admission cases there is an obligation for candour and cooperation that is foreign to the adversary system in relation to the disciplinary authorities investigating and adjudicating a case.⁵⁴

Likewise, in regards to disciplinary proceedings relating to the medical profession:

Strictly speaking, disciplinary proceedings are not really a patient complaint procedure. This is because ...the purpose of the proceedings are different. They are not instituted to punish an offending health care practitioner (unlike criminal proceedings), nor to recompense the patient who has suffered harm (unlike a tortious action). Rather, their purpose is the maintenance of standards within the relevant profession.⁵⁵

In the case of *Rajagoplan v Medical Board of South Australia*⁵⁶ before the Full Court of South Australia, Mullighan J stated that:

It is well established that the purpose of proceedings of this nature is not punitive but to protect the public, even though in the course of imposing discipline, some sanction in the nature of punishment may be ordered, such as a fine or suspension. This disciplinary power is protective. The true position is appropriately expressed by Kirby P and O’Keefe AJA in *Richter v Walton* (unreported, SC of NSW, Court of Appeal, 15th July 1993).

The purpose of an order under s 32R of the Act is to protect the public, not to punish the practitioner. The disciplinary power is, as the High Court said in *New South Wales Bar*

⁵¹ *Decision of the Diocesan Tribunal*, [39].

⁵² *Briginshaw v Briginshaw* (1938) 60 CLR 336.

⁵³ *Basser v Medical Board of Victoria* [1981] VR 953, 969.

⁵⁴ Y Ross, *Ethics in Law* (Butterworths, 2001) [7.81]. The case of *Clyne v New South Wales Bar Association* (1960) 104 CLR 186 is central to this discussion of legal disciplinary tribunals.

⁵⁵ J Devereux, *Australian Medical Law* (Cavendish, 2002) 474.

⁵⁶ *Rajagoplan v Medical Board of South Australia* No SCGRG-96-22318 Judgment No S6667 [1998] SASC 6667 (5 May 1998).

Association v Evatt ((1968) 117 CLR 177 at 183), ‘entirely protective’. In no sense is the order to be regarded as punitive or imposed to conform to notions of due punishment for the conduct which is found. Removing the name of a medical practitioner from the Medical Register is the ultimate professional sanction, in the same way as is the disbarring of a barrister. Again as the High Court has said ‘when such an order is made, it is made, from the public point of view, for the protection of those who require protection, and from the professional point of view, in order that abuse of privilege may not lead to loss of privilege’ (*Clyne v New South Wales Bar Association* (1960) 104 CLR 186 at 201-202).

Necessarily, the exercise of a disciplinary power in respect of a professional person may have a consequence that seems punitive and that has results for the person that are burdensome and hard. But that is not their purpose in the eye of the law. In a case such as the present, punishment can be left to the application (if any) of the criminal law, to the consequences for the practitioner’s practice, to any civil action that may be taken and to the shame of the publicity that has attended these proceedings. Punishment is not the purpose of the proceedings. That purpose remains, from first to last ... the protection of the public who deal with medical practitioners upon the assumption of their integrity and ethical behaviour, including those who deal with this practitioner.

However, the disciplinary system under which clergy were previously to be tried for misconduct in the Church of England under the *Ecclesiastical Jurisdiction Measure 1963*, (the Consistory – i.e. Bishop’s Court of a diocese) is defined as operating according to the criminal standard of justice, where in s 28(a) it states:

The procedure at the trial shall, so far as circumstances admit, and subject to any rules which may be prescribed, be the same as at the trial of a person by a court of assize exercising criminal jurisdiction.⁵⁷

Summarising the position *Halsbury’s Laws of England* (Halsbury) states:

The expression, “criminal suit” is used in the *Ecclesiastical Jurisdiction Measure 1963* (see e.g. s. 69) with reference to proceedings in which a person is charged with an ecclesiastical offence, and the trial procedure is assimilated to that of temporal courts exercising criminal jurisdiction: cf. ss. 3, 28(a), 36(b), 45(1)(a).⁵⁸

Halsbury also indicates that the power to sentence ecclesiastical wrongdoers is not so much to do with protecting the public, but to be an instruction to the soul of those who have offended. Hence:

Traditionally, the exercise of coercive jurisdiction by spiritual authority has been justified on the ground that it is for the good of the soul (see Phillimore, *Ecclesiastical Law* (2nd Ed) 837, 838), and it is in keeping with this principle that a bishop or archbishop is empowered to decide (after a private interview) that no further step be taken in the matter of an appropriate complaint which has been duly laid and verified: see the *Ecclesiastical Jurisdiction Measure 1963*, ss. 23(1)(a), 39(1)(a), 40.⁵⁹

⁵⁷ The *Ecclesiastical Jurisdiction Measure 1963* s 28. See Butterworths, *Halsbury’s Statutes of England* (3rd ed) vol 10 (at 1 February 1969) *Ecclesiastical Law ‘Ecclesiastical Jurisdiction Measure’* 264.

⁵⁸ *Halsbury’s Laws of England* [Butterworths, *Halsbury’s Statutes of England* (4th ed) vol 14 (at 1 May 1975) *Ecclesiastical Law ‘Ecclesiastical Jurisdiction Measure’* [1350] note 1.

⁵⁹ *Ibid.*

Moreover, “the functions of the assessors, who must be unanimous, are the same as those of a jury in the Crown Court”.⁶⁰ In the case of *Bland v Archdeacon of Cheltenham* the argument that the assessors in a consistory court were not a common jury “but were a select panel of experienced and intelligent persons” was rejected as being “untenable, as the assessors are bound to accept the directions of the chancellor on the law and are not entitled to form their own opinions about it”.⁶¹

It should be noted that the adoption of the model of criminal jurisdiction contained in the *Ecclesiastical Jurisdiction Measure 1963* does not depend upon the fact that the Church of England, as distinct from the Anglican Church in Australia, has ‘established church’ status. What it does indicate is that the *Ecclesiastical Jurisdiction Measure 1963* adopted the criminal standard as the appropriate standard for ecclesiastical justice whereas in the successor legislation, the *Clergy Discipline Measure 2003*, the thinking has changed. It is now asserted that current ‘best practice’ is to be found in the less stringent procedures of disciplinary tribunals of other professions. Hence:

The newly proposed disciplinary tribunal has been crafted from best practice in the secular and professional worlds. It differs markedly, as do employment tribunals, from the Crown Court (on which the existing disciplinary court of the Church (the Consistory Court) is based).⁶²

By seeking to replicate current ‘best practice’, the *Clergy Discipline Measure 2003* (Comments and Explanations) states that under the new *Measure*:

To uphold a complaint, the tribunal must be satisfied that the misconduct has taken place. In line with employment tribunals and nearly every professional body (including the police) the standard of proof will be the civil standard, (ie on the balance of probability).⁶³

The Tribunal in the Shearman case followed precedents drawn from current Australian law relating to the disciplinary procedures of medical boards, rather than the practice of the Church of England’s *Ecclesiastical Jurisdiction Measure 1963*. The Tribunal’s approach might well have been in accordance with what may be regarded as ‘best practice’ both in Australian medical (and other professions) disciplinary law as well as with more recent developments within the ecclesiastical law of the Church of England.

However, the fact that the *Tribunal Canon’s* procedures were interpreted as being analogous to a disciplinary proceeding deprived Bishop Shearman of the additional safeguards of a criminal (or quasi-criminal) trial. The standard of proof was lowered and the risk posed to the perceived fairness of the trial by the non-provision of legal counsel to assist the accused Bishop in his defence was also lowered. The *raison d’etre* would be that this served the public interest and that the lesser standards of procedural justice are justified on the basis of maintaining public confidence in the clerical profession.

⁶⁰ Ibid [1367].

⁶¹ *Bland v Archdeacon of Cheltenham* [1972] Fam 157, 163. See also Butterworths, Halsbury’s Laws of England (4th ed) vol 14 (at 1 May 1975) Ecclesiastical Law ‘Ecclesiastical Jurisdiction’ [1367] note 6. The *Tribunal Canon 2003* (Anglican Diocese of Brisbane) s 26 also declares that “The Deputy President shall determine all questions arising during the trial which are questions of law or questions of the admissibility of evidence”.

⁶² *Clergy Discipline Measure 2003* (Comments and Explanations) [25].

⁶³ Ibid [26].

Had Bishop Shearman been charged under the recently passed *Professional Standards Canon 2004*⁶⁴ – which was enacted some time after the Articles of Accusation were issued under the *Tribunal Canon* – then the trial would have been quite clearly a disciplinary proceeding and the Board hearing the charge could have “inform[ed] itself on any matter in such manner as it thinks fit”.⁶⁵ Even if the Tribunal was correct in ruling that the *Tribunal Canon* ought to proceed along the lines that it did, it simply reveals that the accused Bishop had even less chance of mounting a successful defence against the charges without legal aid, *pro bono* support, a *McKenzie* friend or union official at his side than he would have had otherwise. This seems to indicate a worrying trend in the ecclesiastical justice system.

VII THE QUESTION OF PROOF

The procedural rules adopted had potential implications for the way the evidence presented to the hearing was to be evaluated. Given that the Tribunal chose to adopt the *Briginshaw* test rather than some other standard of proof,⁶⁶ we have only the Tribunal’s assurance of its unhesitating conviction in the truth of the matters complained of⁶⁷ to compensate for the lack of any experienced legal counsel representing the accused to critically examine the evidence. The Tribunal may well have come to a correct decision on the facts of the case, but (as per Kaminski L J in *McKenzie v McKenzie*⁶⁸), one cannot be certain that the Tribunal would have reached the same conclusion had counsel been present to assist the accused in their defence.

VIII THE SENTENCE

As previously mentioned, the Tribunal chose to apply the ultimate penalty of deposition, citing the case of *Gerber v Ellmore* as a precedent. The conflation of the Ellmore case with the Shearman case by the Tribunal reinforces the impression that Bishop Shearman was ill served by the lack of legal counsel both during the hearing of the facts and at the stage when submissions on penalty were being heard.

The Public Defenders Office of NSW records that Robert Ellmore has been sentenced to 10 years jail on multiple child sex offences relating to children aged 12 years, 10 years and 8 years old. Ellmore is described by the Office as having “a substantial record for similar offences – breached parole...[and is a] long term paedophile”.⁶⁹ It is difficult to imagine what justified the Tribunal’s decision to recommend the maximum penalty to Bishop Shearman, as applied in the *Ellmore* case, without first considering one of the lesser penalties such as monition or suspension as being more appropriate.

⁶⁴ Above n 35.

⁶⁵ *Professional Standards Canon 2004* s 49 (3).

⁶⁶ It is noted in G E Dal Pont, *Lawyers’ Professional Responsibility* (Law Book Co, 2001) 580 that under the Bar Association of Queensland *Articles of Association*, art 78, “the disciplinary procedures for Queensland barristers are a notable exception ... in that the Committee of the Bar Association must find a charge proven *beyond reasonable doubt* before taking disciplinary action”.

⁶⁷ *Decision of the Diocesan Tribunal* [50].

⁶⁸ *McKenzie v McKenzie* [1971] P 33, 42.

⁶⁹ See <www.lawlink.nsw.gov.au/lawlink/pdo/ll_pdo.nsf/pages/PDO_sexoffencesindecent61m>.

The Tribunal also asserted that “the passage of time does not alter the nature of the offending conduct”.⁷⁰ In the Shearman case as reported by the Tribunal, the Complainant and the Bishop had a number of different periods in their lives when they had sexual relations with each other. In addition to the evidential material presented in the record of the Tribunal’s decision, there is information available on the public record contained in the O’Callaghan and Briggs Report, that may (or may not) have been relevant to the Tribunal’s deliberations.⁷¹

As part of its extensive examination of the church’s handling of complaints by the Complainant against Bishop Shearman, the O’Callaghan and Briggs Report cites a letter that the Complainant wished Bishop Shearman to sign as part of a mediation process. The letter was drafted by the Complainant as if addressed by Bishop Shearman to the Complainant’s deceased parents as a kind of confession on the part of Bishop Shearman to her deceased parents. The letter states in part:

It was in August in the church at Manuka and before God that I [Bishop Shearman] pledged myself to the Complainant, afterwards celebrating the day picnicking under a flowering wattle on Red Hill and now... it is eleven years (1984) since I found the honesty to resign the Bishopric of Grafton so that finally the Complainant and I could be together.

I had twelve wonderful God-filled days with the Complainant and Paul before taking the first opportunity and the easy way out to betray them again and creep back to Grafton....⁷²

Based on this account, there are two seemingly irreconcilable propositions on the record of two separate inquiries into the matter:

1. The Tribunal’s claim that Bishop Shearman’s conduct in 1954-56 was at “the extreme end of offences against morality by a person in holy orders”;⁷³ and
2. The Complainant’s written evidence before the O’Callaghan and Briggs Inquiry that their relationship in 1984 included ‘twelve wonderful *God filled* days’ together.

The Tribunal makes no effort to resolve this paradox. In contrast to the verdict of the Tribunal and the sentencing of Bishop Shearman to deposition from holy orders, Mr O’Callaghan allowed greater scope for Bishop Shearman’s continuation in the ministry (even though he was not satisfied with Bishop Shearman’s failure to apologise unconditionally to the Complainant), whereas the Tribunal was obviously more in tune with the more severe judgement arrived at by Professor Briggs.

The O’Callaghan and Briggs report describes at some length the attitude taken by the previous Archbishop, Dr Peter Hollingworth, in regards to the question of Bishop Shearman’s fitness to continue in the ministry and the reasons for it:

Dr Hollingworth did give consideration to the question of whether or not Mr Shearman should be allowed to continue in his ministry. While the Complainant argued that his

⁷⁰ *Decision of the Diocesan Tribunal* [66].

⁷¹ O’Callaghan and Briggs, *Inquiry into the Past Handling of Complaints*, 292-339 [2003] See n 4 above.

⁷² *Ibid* 305, [6.2].

⁷³ *Decision of the Diocesan Tribunal* [67].

permission to officiate should be revoked, Dr Hollingworth considered the following factors to be relevant:

- *The early date at which the events of the Complainant’s complaints occurred;*
- *Mr Shearman’s expression of remorse and his endeavours to conciliation with the Complainant;*
- *The absence of complaints by others in relation to Mr Shearman’s conduct generally or, in particular, in relation to his conduct of his relationship with those for whom he had a pastoral responsibility;*
- *The fact that Mr Shearman was, by the time of Dr Hollingworth’s involvement, formally retired from active full ministry in the Church;*
- *The fact that Mr Shearman’s limited permission to officiate was exercised by him in locum tenor that were apparently highly valued by those familiar with his work; and*
- *The potential pastoral and financial consequences for Mr Shearman and his wife if that permission were revoked.*

Dr Hollingworth’s view was that, on balance, and without in any way condoning Mr Shearman’s past conduct of his relationship with the Complainant, it was neither necessary nor appropriate to withdraw Mr Shearman’s permission to officiate.⁷⁴

On a split decision the Board held (O’Callaghan and Briggs reaching different conclusions) that Dr Peter Hollingworth had acted fairly, reasonably and in good faith by not withdrawing Bishop Shearman’s permission to officiate. Hence:

The Chairman whilst recognising the force of the arguments to the contrary considers that in the circumstances Dr Hollingworth in exercising his discretion not to withdraw the Permission [to officiate] was acting fairly, reasonably and appropriately. The Chairman considers that on balance the stated reasons for the decision (see para. 17.1) justified it. Put another way, the Chairman considers that this was a case in which it was open to a bishop acting reasonably to decline to withdraw the Permission.

Professor Briggs considers that once Dr Hollingworth, in his capacity as Archbishop, was apprised of the serious misconduct of the Respondent should, in order to demonstrate proper moral leadership, have withdrawn the permission. His failure to do so was in the circumstances inappropriate.⁷⁵

The O’Callaghan and Briggs Report considered the case against Bishop Shearman in terms of whether it was appropriate for the previous Archbishop not to withdraw Bishop Shearman’s ‘permission to officiate’. The Tribunal took matters further by declaring that the very basis upon which a ‘permission to officiate’ might be issued (ie that the person in question be an ordained minister of the church) be revoked in the case of Bishop Shearman.

There are, however, good reasons why the deposition of ‘unworthy ministers’ should only be undertaken rarely. The origin of the power to depose unworthy ministers can be

⁷⁴ O’Callaghan and Briggs, above n 71, 330, [17.1]. Italics are in the original.

⁷⁵ Ibid 332-333, [17.6] and [17.7]. However, I have argued elsewhere that the O’Callaghan and Briggs Report never fully articulates reasons for its decisions. See H Munro, ‘The Brisbane Diocesan “Board of Inquiry”: Neither Fish nor Fowl?’ *St Mark’s Review* 2003 (3), 13-20.

found in the Anglican Church's early doctrinal formulae, the "Thirty-Nine Articles" of 1571.⁷⁶ Article 26 states:

Nevertheless, it appertaineth to the discipline of the Church that enquiry be made of evil ministers, and that they be accused by those that have knowledge of their offences; and finally being found guilty, by just judgement be deposed.⁷⁷

This power to depose evil ministers is to be read in conjunction with the preceding paragraph of Article 26 which, in short, affirms that "the unworthiness of ministers *hinders not* the effect of the sacraments"⁷⁸ [italics added]. Hence:

Although in the visible Church the evil be ever mingled with the good, and sometimes the evil have chief authority in the ministration of the Word and Sacraments: yet forasmuch as they do not the same in their own name, but in Christ's, and do minister by his commission and authority, we may use their ministry, both in hearing the Word of God, and in the receiving of the Sacraments. Neither is the effect of Christ ordinance taken away by their wickedness, nor the grace of God's gifts diminished from such, as by faith, and rightly, do receive the sacraments ministered unto them; which are effectual, because of Christ's institution and promise, although they be administered by evil men.⁷⁹

A balance must therefore be struck between maintaining good order and discipline in the church and avoiding the theological error associated with the ancient Donatist heresy which asserts that:

The sacraments are holy when administered by holy men, but not else: also the Apostolics, or Henricians, who had a fancy that he was no bishop which was a wicked man.⁸⁰

The first limb of Article 26 picks up the early church's rejection of Donatism whilst the second limb provides that where evil ministers offend and, according to Thomas Rogers' exposition, "*if admonitions will not serve*"⁸¹ [italics added], then they may be deposed. Rogers quotes from a commentary on Psalm 122 by 'R.H.' (attributed to a 'Robert Harrison') in 1583 the following:

By vertue of which libertie and authoritie, the church of God have to trie and examine the giftes and conversation of those who would leade them, and finding them meet, to chuse them, and percieving them afterwarde to fall to anie evill heresie in doctrine, or to looseness of life, and will not be reclaymed by dewe admonition, to depose them. Also...the church of God have to use their dewe admonitions, and rebukings of

⁷⁶ *The Book of Common Prayer* (1662) any edition. The Thirty-nine Articles may also be found in *An Australian Prayer Book* (1977) and *A Prayer Book for Australia* (1995).

⁷⁷ For the purposes of this discussion I refer to an exposition of the Thirty-Nine Articles by Thomas Rogers, Chaplain to Archbishop Bancroft, Bishop of London, originally published in 1586 but republished by Cambridge University Press in 1854. See T Rodgers, *The Catholic Doctrine of the Church of England: An Exposition of the Thirty-Nine Articles* (Cambridge University Press, 1854) 269.

⁷⁸ Rodgers, above n 77, 268.

⁷⁹ Ibid 268.

⁸⁰ Ibid 270. The 'Henricians', who derive their name from Henry of Lusanne (died circa 1145), claimed that the efficacy of the sacraments depended on the worthy character of the priest. See F L Cross (ed), *Oxford Dictionary of the Christian Church* (Oxford University Press, 1984) 636.

⁸¹ Rodgers, above n 77, 272.

offendours...And such offendours as will not hear the church and bee reformed, must feele the sworde of excommunication by the woorde of God to bee cutte of, &c.⁸²

The power to depose evil ministers, based on Rogers’ interpretation, must only be used in the event that the offending minister cannot be ‘reclaimed by due admonition’. The condemnation of unworthy ministers – even their excommunication (let alone their deposition) – must only be invoked once admonition and repentance have been attempted and failed.⁸³

On the basis of this reasoning by persuasive authorities from the past, it therefore remains uncertain why the Tribunal, in the Shearman case, did not recommend the Bishop be admonished and only then, if he remained unrepentant, should the final penalty of deposition be imposed. The crucial issue therefore is whether the Tribunal had exhausted its options for penalties in the Shearman case, or whether it had even properly explored them in the first place.

IX CONCLUSION

Under ecclesiastical law in the Church of England there is the possibility of “the Royal Prerogative of Pardon to be exercised for any archbishop, bishop priest or deacon who is prohibited from exercising functions or is removed from office”.⁸⁴ This prerogative forms part of the ‘dispensing’ power that resides both in the Parliament and in the Crown to alleviate hardship and injustice that may result from a rigid approach to law enforcement:

The failure of the law to meet exceptional cases has, in the case of temporal law, been met in a variety of ways, the most obvious of which has been the exercise of some dispensing power...The royal prerogative survived the fall of James II, and like an Act of Indemnity, the effect is to relieve a person from the consequences of his unlawful acts.⁸⁵

The ability to pardon people for their offences also upholds a fundamental principle of Christian theology (ie the forgiveness of sins).

The provision for a Royal Pardon is echoed in the *Tribunal Canon* by the provision for the exercise of the Archbishop’s ‘prerogative of mercy’.⁸⁶ However, the impression conveyed by the ecclesiastical justice system in the Shearman case is that whilst the

⁸² Rodgers, above n 77, 273. The initials ‘R.H.’ are attributed to ‘Robert Harrison’ in the catalogue of the British Library.

⁸³ In the recent controversy concerning the treatment of priests in the Catholic church who commit sexual offences, Cardinal Avery Dulles S.J. says that:

Involuntary loss of the clerical state can be imposed by a judicial sentence or by a special act of the Pope (Canon 290). But such removal from the clerical state should be exceedingly rare, since it obfuscates the very meaning of ordination, which confers an indelible consecration. It reinforces the false impression that priesthood is a job dependent on contract rather than a sacrament conferred by Christ.

See A S J Dulles, ‘Rights of Accused Priests: Toward a Revision of the Dallas Charter and the ‘Essential Norms’ *America: The National Catholic Weekly* June 21-28, 2004, <www.americamagazine.org/articles/Dulles-priests-rights.cfm>.

⁸⁴ *Clergy Discipline Measure 2003* (Comments and Explanations) [83]. See also *Ecclesiastical Jurisdiction Measure 1963* s 53 (UK).

⁸⁵ G Moore, *English Canon Law* (Clarendon Press, 1967), 150, 151.

⁸⁶ *Tribunal Canon* s 36(1) 2003 (Anglican Diocese of Brisbane).

system itself is theoretically committed to the principle of administering ‘justice with mercy’, the likelihood of mercy ever being shown will be exceedingly rare.

After the deposition from holy orders was pronounced, the deposed Bishop’s wife wrote a public letter expressing the view that Bishop Shearman and herself had been abandoned by the Diocesan leaders and that “after a lifetime of service to Our Lord and His church, we no longer want to remain members of the Anglican Church of Australia”.⁸⁷

This unhappy circumstance may – although it is by no means certain – have been avoided if the Tribunal had been assisted by experienced legal counsel representing Bishop Shearman’s interests during the examination of procedural issues, the hearing of the facts and the decision as to the penalty. Unfortunately the church failed to provide any semblance of legal aid or *pro bono* legal support to the accused Bishop, which leaves a question mark hanging over the case as to whether justice has been done.

⁸⁷ F Shearman, ‘When Love Triumphs over Adversity’ *Focus* (Diocesan Newspaper, September 2004) 13.