

**IN THE PROFESSIONAL STANDARDS
BOARD OF THE ANGLICAN DIOCESE
OF NEWCASTLE.**

CASE NO. 04 OF 2018.

IN THE MATTER OF:

The Professional Standards Committee

Applicant.

by Mr. Hale

and

Assistant Bishop Appleby

Respondent.

by Mr. Skinner, Inst. by M. Panagoda

DETERMINATION.

Preamble:

This application by way of referral dated 25 July, 2018, has been brought by the PSC pursuant to the Professional Standards Ordinance 2012 (as amended) (herein “the Ordinance”) of this Diocese.

Paragraph 2 of the Referral by the PSC is in these terms:

“2. The Applicant relies on Part 3.8 of the findings of the Royal Commission into Institutional Responses to Child Sexual Abuse into the Anglican Diocese of Newcastle (Case Study 42)”

Part 3.8 of the said findings, includes:

“We are also satisfied that Assistant Bishop Appleby took no steps in relation to Father Parker after being advised in 1984 of the allegations he had sexually abused a child many years earlier. After this time, Father Parker remained licensed as a priest in the Diocese until February 1996.”

The “Position Statement” of the Ordinance asserts: *“the diocese will be open and accountable. In dealing with these matters it will act with integrity and transparency”*.

In Part 2, Section 5 of the Ordinance provides:

“The overriding purpose of this Ordinance and any protocol made under this Ordinance in their application to any information received under this Ordinance is to facilitate the just, quick and inexpensive resolution of the real issues in the information.”

The question to be determined is:

- A. *“Whether temporarily or permanently, the Respondent is fit to hold a particular, or any office, licence or position of responsibility in the Anglican Church, or to be or remain in Holy Orders or in the employment of a Church body; or, alternatively,*
- B. *Whether in the exercise of the Respondent’s ministry or employment or in the performance of any function, the Respondent should be subject to certain conditions.”*

Jurisdiction:

The Respondent, through his solicitor, consented to the jurisdiction and does not deny he was at all relevant times a “Church worker” within the meaning of the Ordinance.

Purpose of Proceedings:

The purpose of these proceedings is to determine the conduct of the Respondent on the evidence presented, including his oral evidence given to this Board, the evidence presented to the Royal Commission, as well as its findings, and make recommendations about the fitness or otherwise of the Respondent to be a “Church worker”.

The question to be asked then is, is the Respondent fit to hold a particular, or any office, licence or position of responsibility in the Anglican Church, or, alternatively, whether in the exercise of the Respondent’s performance of any function in the Church, he should be subject to certain conditions or restrictions.

I emphasize these proceedings are not criminal proceedings which must be proven beyond a reasonable doubt as to justify imposing some form of punishment, nor civil proceedings as to justify the provision of compensation for injury or loss, but simply, whether or not in the circumstances as found, the Respondent is fit for office or should be subject to conditions or restrictions.

The Respondent:

The Respondent is now 78 years of age. He first became involved in the Church when he was a child. In his early twenties, he felt he had a vocation to the priesthood and completed his education and entered Holy Orders in early 1967. He performed priestly and chaplaincy duties for the Church in Perth, W.A., until about 1980 when he was appointed Dean of Bathurst Cathedral. In 1983, he was appointed Ancillary Bishop in this Diocese, and it was during the time of this appointment that incidents occurred about which the Royal Commission heard evidence and came to conclusions about, and which also gave rise to these proceedings.

He has been a practicing Christian all of his life and, it seems, that apart from the findings of the Royal Commission, he is a person of good character. He relies upon his good character, about which he is supported by Rt. Rev. E.D. Cameron, who has known the Respondent since 1965. Rt. Rev. E.D. Cameron attests:

“I am entirely convinced that Bishop Appleby is incapable of telling and maintaining an untruth”, and goes on to say “(this is) an unqualified statement in no way influenced by personal friendship.”¹

He is further supported by Mr.M.F.Horton, OAM LLB who is well acquainted with him and says, amongst other things:

“I count Bishop Appleby to be of exemplary character: a person of rectitude, trustworthy reliable, meticulous, forthright and professional”.²

The Issues:

1. To what extent can this Board inform itself from the record of the Royal Commission and adopt as its own the findings of that Commission?
2. On what basis could this Board, on the evidence before it, come to a conclusion different to that of the Royal Commission?
3. Was the Royal Commission in error in reaching the conclusion it did, especially having regard to the application of principle in *Briginshaw .v. Briginshaw* (1938) 60 CLR 336?

¹ Letter from Rt Rev E.D. Cameron to the Professional Standards Board, undated.

² Letter from Mr MF Horton OAM LLB to the Professional Standards Board, dated 4 October 2018.

4. On what the Board has seen and read, can it be satisfied to the Briginshaw standard, that the Applicant has proven unfitness of the Respondent, the extent of such unfitness, and, if so, what limitations on his church work should be recommended to the Church Authority?

Reasoning:

As to issue 1:

To what extent can this Board inform itself from the record of the Royal Commission and adopt as its own the findings of that Commission?

Section 59(4) of the Ordinance provides:

“The Board may inform itself from the record of any court or tribunal and may adopt any findings, and accept as its own, the record of any court or tribunal”.

On the face of it, such provision makes no limitations on the Board, but I acknowledge that the degree to which this Board may so inform itself, adopt any findings, and accept as its own the record of any court or tribunal, is discretionary. It is not trite to say that each case depends upon its own merits.

I am of the view that I must take into account the standing of that “court or tribunal” in the hierarchy of jurisdictions. The higher that standing, the higher the regard I should have for its findings. It is analogous to the manner in which lower Courts are bound by, for example, a Supreme Court. There are issues of public policy involved.

I should also take into account, in this case, that the Royal Commission is inquisitorial in nature, i.e. witnesses can be compelled to give evidence under pain of penalty. Further, the Royal Commission is not bound by the rules of evidence that normally apply for the protection of suspects and otherwise to ensure procedural fairness.

This Board is also not bound by the rules of evidence and is inquisitorial in nature but has no power of subpoena or compulsion to attend.

Section 60(3) of the Ordinance provides:

“The Board must act with fairness and according to equity and good conscience and the substantial merits of the case without regard 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 things fit.”

As I have said in other cases, to ignore the rules of evidence altogether can be fraught - especially when procedural unfairness may be implied.

In this case, the Respondent has given evidence, and also relies upon the evidence he gave to the Royal Commission and submissions made by Counsel both at the hearings and in writing to this Board.

At the hearings before the Royal Commission and before this Board, the Respondent was represented by Mr. Skinner.

I can perceive nothing about the manner in which the Royal Commission proceeded that might give rise for concern.

As to issue 2:

On what basis could this Board on the evidence before it, come to a conclusion different to that of the Royal Commission?

Essentially, the Respondent seeks to persuade this Board that the Royal Commission was in error in that:

- (a) When determining this Respondent’s knowledge of the criminal charges against Rev. Gray, it ought not have conflated the Respondent’s evidence with that of Bishop Holland, as that “is just not fair”.
- (b) On a proper application of the principle in *Briginshaw .v. Briginshaw*³, this Board should come to a different conclusion and, if not able to resolve the issues in dispute, then the Board should extend the benefit of fairness and justice to the Respondent and make no finding against him.

³ (1938) 60 CLR 336

For this Board to come to a different conclusion to the Royal Commission would require either:

- (i) Compelling evidence that was not available to the Royal Commission, or
- (ii) Compelling argument that the Royal Commission misapplied *Briginshaw v. Briginshaw*⁴.

As to (i):

The Respondent gave evidence about his work on behalf of the Church and of his character, he produced character references in his support, although neither of them refer to the findings made by the Royal Commission.

In the Respondent's evidence before me, this hypothetical was posed:

"Q. ...just say Mr. Smith did mention something to you in 1984and you missed it and as a consequence, didn't do anything. Is that something that you consider is a possibility?"

The Respondent's answer:

"A. I don't consider it a possibility for the reasons that I have given to the Royal Commission. The first one was for a matter as serious as that, even after all these years it is not something I would forget. That is something I would remember. Secondly and I think more importantly given my role as auxiliary Bishop I am conscious that I was answerable to Bishop Holland, I would have reported any such matter to Bishop Holland under the normal process in those years what we would record in those years as a memoir. These days we call it a file note I think, and I would have given that to him and spoken to him. The fact there is no evidence of any such shape, memoir or file note, supports the view that I take – on, I wouldn't have forgotten it; two I would have reported it to Bishop Holland. It was my responsibility and I knew my place. I did what was required of me. And the third matter was, given the fact that I had had a long track record of being decisive in dealing with issues, it is not something I would have dilly-dally-ed about. Had it been reported to me I would have acted on it."

⁴ (1938) 60 CLR 336

His evidence of his character, supported by those referees I have referred to, is not much different to the evidence that was before the Royal Commission. In any event, it does not reach that quality of compelling evidence this Board says is required to assist the Respondent to overcome the finding of the Royal Commission as to enable a different conclusion to be reached by this Board.

As to (ii):

Briginshaw.v. Briginshaw⁵ was decided by the High Court in 1938. I have refreshed my memory by re-reading it. There is no magic in it, for it is basically the application of commonsense principle. The decision distinguishes “proof beyond reasonable doubt” – as required in Criminal proceedings - and proof to the “reasonable satisfaction” of the tribunal as in civil proceedings.

Part of the decision of Dixon, J (as he was then) is in these terms:

“...reasonable satisfaction is not a state of mind that is attained or established independently of the nature and consequence of the fact or facts to be proved. The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal. In such matters “reasonable satisfaction” should not be produced by inexact proofs, indefinite testimony or indirect inferences. Everyone must feel that, when, for instance, the issue is on which of two dates an admitted occurrence took place a satisfactory conclusion may be reached on materials of a kind that would not satisfy and sound and prudent judgment if the question was whether some act had been done involving grave moral delinquency.”⁶

⁵ (1938) 60 CLR 336

⁶ Briginshaw.v. Briginshaw (1938) 60 CLR 336

He went on to say:

*“It means that the nature of the issue necessarily affects the process by which reasonable satisfaction is attained. When, in a civil proceeding, a question arises whether a crime has been committed, the standard of persuasion is, according to the better opinion, the same as upon other civil issues. But consistently with this opinion, weight is given to the presumption of innocence and exactness of proof is expected.”*⁷

To suggest - as is the import of the submission - that the Royal Commission misled itself or that it misapplied principles or did not understand the evidence of the Respondent, required a close examination of the evidence before it and of its determinations.

At page 5 of its report there is this:

*“In reaching findings, the Royal Commission will apply the civil standard of proof which requires its ‘reasonable satisfaction’ as to the particular fact in question in accordance with the principles discussed by Dixon J in Briginshaw .v. Briginshaw (1938) 60 CLR 336.”*⁸

The Royal Commission then quotes verbatim the words of Dixon J⁹. Then, using its own summation of that principle, says:

*“In other words, the more serious the allegation, the higher the degree of probability that is required before the Royal Commission can be reasonably satisfied as to the truth of that allegation.”*¹⁰

That principle is so well known, so accepted by Courts and Tribunals (including this Board) it is folly to suggest that it was not paramount in the considerations of the Royal Commission when weighing up **ALL** the evidence it had.

I acknowledge that an adverse finding against the Respondent would likely give rise to serious consequences, so the necessary weight must be given to the exactness of the evidence given.

⁷ Briginshaw.v. Briginshaw (1938) 60 CLR 336

⁸ Royal Commission Report of Case Study No. 42 @P.5

⁹ Ibid.

¹⁰ Ibid.

I emphasize that the Royal Commission had before it the assertions of the Respondent that because:

- (i) he had no memory of the conversation in which CKA says he told the Respondent that CKA had been sexually abused by a priest in the Diocese of which the Respondent was then Auxiliary (or Assistant) Bishop;
- (ii) there was no "file note" made by him;
- (iii) there was no mention in the Respondent's diary at the time of such a specific conversation having occurred (although it was conceded he did have a conversation with CKA.);

then therefore the conversation stated by CKA had not occurred.

The acceptance of CKA's evidence by the Royal Commission that such a conversation did occur, and that years later when CKA telephoned the Diocese's hot line for sexual abuse the responder made a note that corroborated the assertions of CKA that he had in fact told the Respondent of the sexual abuse inflicted upon him, clearly puts in issue the weighing exercise that the Royal Commission had to engage in.

The Royal Commission also had a very good opportunity to observe the conduct and responses of the Respondent during cross-examination, and was able to form an opinion as to his credibility. It must have had regard to the prevarications of the Respondent. I have certainly done so.

At Page 16556 of his evidence before the Royal Commission on 5 August, 2016 @ 13, the Respondent was asked:

"Q. Did you check your diaries for around about that time, 6 June, the middle of 1984?"

A. I indicated in my evidence yesterday that I checked with great care my appointments diaries for not only 1984 but I also looked at the whole of 1983, the whole of 1984 and the whole of 1985 and there is no single entry for CKA having made a time to come and see me."¹¹

¹¹ Transcript of Royal Commission into Institutional Responses to Child Sexual Abuse, Day C157, P. 16556 @13.

And, later, at P. 16559 @12 et seq, there is this:

“Q....I suggest to you that the reason you’re so scant in your knowledge and your preparedness to accept that you met with CKA about Arthur Bridge is because in the same conversation you had spoken with him about Arthur Bridge, he talked to you about the abuse that happened under the hand of CKC didn’t he?”

A. As I indicated yesterday that had that been revealed to me it is not something I would have forgotten in that it is abhorrent behaviour and I would have acted upon it. The fact that I did not act and that I have no recollection whatsoever would suggest to me very clearly that that matter was not raised with me.”¹²

That answer caused The Chairman to interrupt and ask:

“Q. Bishop there is a conflict here, you understand, in the evidence that we will have to resolve. If we came to the view that such a discussion did happen, that would mean that you’re not telling the truth. Do you understand?”

A. Yes. I assure you, your Honour, that I tell the truth.

Q. Do you understand that that’s the consequence?”

A. Indeed.

Q. Your denial in those terms has that consequence?”

A. Yes.”¹³

Later when the diaries were produced and examined by the Royal Commission, there was such an entry relating to a meeting about Arthur Bridge.

I accept that he later apologized for having made a mistake and explained that he did not “proof read” his diaries before giving that evidence. But his evidence was on oath and had those diaries not been called for and examined by the Royal Commission, his evidence may well have stood as a lie and no one would have been the wiser.

It is not surprising that the Royal Commission indicated it had to treat the Respondent’s evidence with caution. Especially as he continued to assert that he had not been told by CKA of the sexual abuse.

¹² Transcript of Royal Commission into Institutional Responses to Child Sexual Abuse, Day C157, P. 16559 @12.

¹³ Transcript of Royal Commission into Institutional Responses to Child Sexual Abuse, Day C157, P. 16559 @25.

It was submitted before this Board that “*an obvious explanation for Bp Appleby’s lack of recollection of that disclosure is that it was never made A person cannot remember something that never happened.*”¹⁴ However, I am satisfied that the Royal Commission weighed that possibility and rejected it as a reasonable alternative and logical explanation, having regard for all of the evidence before it.

In relation to the resignation of Mr. Gray, the Respondent denied any knowledge of Mr. Gray’s sexual assault upon a child, even though he attended the scene of the crime (apparently in the early hours of the morning) as instructed by Bishop Holland to get Mr Gray’s resignation, without any query as to the cause beyond knowing it was a “*serious disturbance*”. This is hardly the stuff of someone who describes himself as having “*a long track record of being decisive in dealing with issues.*”¹⁵ Given his then classification as Assistant Bishop, one might have expected that he would have been even slightly inquisitive as to the nature of the so-called “*serious disturbance*”.

To attend upon a priest in the early hours of the morning (or at any time for that matter) and demand a resignation, is serious business. The obligation of an Assistant Bishop, “*decisive in dealing with issues*”, required him to have knowledge of facts to enable him to be decisive. He says he didn’t have knowledge of the child sexual abuse, so I find he was hardly “decisive”.

A reasonable and objective bystander, aware of the evidence given to the Royal Commission, would be entitled to conclude that the Respondent was, at best, willfully blind to the reasons why that resignation was sought by Bishop Holland in those circumstances, or, at worst, untruthful. Either way, he ought to have been inquisitive enough to find out the real reasons before he acted as he did.

This is the type of conduct that did nothing to prevent the cover-up culture that, sadly, prevailed in this Diocese at that time.

¹⁴ Submissions for the Respondent dated 30 November 2018, P10, paragraph 59.

¹⁵ Transcription from Directions Hearing of 10 December 2018, P16.

There was also the evidence of Mr. Allen (discredited as he might be) which was closely examined by the Royal Commission. I reference this exchange at P. 16746 @ 22 et seq:

“Q. Are you suggesting that you didn’t convey to Mr. Cleary that Bishop Appleby was aware of the problems in relation to Reverend Gray As well?”

A. Bishop Appleby must have been aware when he obviously had been to the particular parish.

Q. But let’s get clear on what it is that you are suggesting he was aware of. The reference to “the problems” is a reference to Reverend Gray’s misconduct with a child; correct?

A. Yes, the subject of the criminal charge.

Q. You would reject, I gather, any suggestion that Bishop Appleby’s knowledge was limited to a few holes in the wall apparently occurring during a moment of some excitement or hostility?

A. I never knew of holes in the wall until many months later and I had understood that – I hold the view that Bishop Appleby knew of the principal offence.”¹⁶

I accept that the weight that may be attributed to a discredited witness is not much, but in all of the circumstances, I am of the view that the Royal Commission was entitled to group the evidence of Bishop Holland with that of the Respondent.

Even if I accepted that the Royal Commission wrongly conflated the evidence of the Respondent with that of Bishop Holland’s, the Respondent’s evidence in my view is so unreliable that the Royal Commission was justified in coming to the conclusions about him that it did.

Further, at 3.7 of the Royal Commissions Report, at p.157 (dealing with different facts and circumstances) the finding is that:

“We are not able to find to the Briginshaw standard that Assistant Bishop Appleby knew that the young man had made an allegation of sexual assault against Brown based only on the other man at the meeting stating to the youth worker that he knew what the young man had told her.”¹⁷

¹⁶ Transcript of Royal Commission into Institutional Responses to Child Sexual Abuse, Day C157, P. 16746 @22.

¹⁷ Royal Commission Report of Case Study No. 42 @P.157

This is a further indication of the Royal Commission's respect for the Briginshaw standard and its proper application – this time in favour of the Respondent. The Royal Commission was applying the appropriate test.

These are not criminal proceedings requiring proof beyond reasonable doubt as in a criminal trial.

As to issue 3:

Was the Royal Commission in error in reaching the conclusion it did, especially having regard to the application of principle in Briginshaw .v. Briginshaw¹⁸?

I have not been persuaded either by argument or the additional evidence of character that the Royal Commission was in error.

The fact is the Royal Commission, an august body charged with a specific responsibility to investigate Institutional Responses to Child Sexual Abuse, found after examining the Respondent for at least two days and after considering all the other evidence it had gleaned over a period of about three weeks (as well as many other documents and statements) said:

“We are also satisfied that Assistant Bishop Appleby took no steps in relation to Father Parker after being advised in 1984 of the allegations he had sexually abused a child many years earlier. After this time, Father Parker remained licensed as a priest in the Diocese until February 1996.”¹⁹

I emphasize that during the hearings before the Royal Commission the Respondent was represented by Counsel.

So far as I am aware, there has been no suggestion that the Royal Commission's findings of fact have been challenged or overturned in any jurisdiction. They stand until that happens.

¹⁸ (1938) 60 CLR 336

¹⁹ Royal Commission Report of Case Study No. 42 @P.159

I acknowledge that accepting the findings of the Royal Commission is discretionary, but I am satisfied it was entitled to come to the conclusions that it did and there has been no sufficiently compelling evidence or persuasive argument to justify this Board coming to a different conclusion.

Determination:

So, this Board concludes, just as the Royal Commission did, that this Respondent took no steps in relation to Father Parker after being advised in 1984 of the allegations he had sexually abused a child many years earlier. After this time, Father Parker remained licensed as a priest in the Diocese until February, 1996.

As to Issue 4:

On what the Board has seen and read, can it be satisfied to the Briginshaw standard, that the Applicant has proven unfitness of the Respondent, the extent of such unfitness, and, if so, what limitations on his church work should be recommended to the Church Authority?

I am satisfied to the Briginshaw standard that the Respondent is not fit for office.

Recommendation:

Reasoning:

When Bishop Herft gave evidence to the Royal Commission, he acknowledged:

“the Diocese had ‘failed miserably’ in its response to CKA by not providing pastoral care and by allowing key persons in the Diocese to act on Father Parker’s behalf. He acknowledged that CKA’s existing anguish would have been exacerbated by the fact that people with significant responsibility in the Diocese acted on Father Parker’s behalf”.²⁰

This was part of the systemic failure of the Diocese at that time. The position that the Respondent occupied (as Assistant Bishop to Bishop Holland) was one of trust requiring a strong moral compass, one who might be inquisitive about conduct brought to his notice so that he could deal with it appropriately. He should have had a greater understanding of the impact such criminality can have on victims of child sexual abuse.

²⁰ Royal Commission Report of Case Study No. 42 @P.224

Counsel for the PSC is seeking an order that the Respondent cease to hold any office and be prohibited from holding any office, licence or position of responsibility in the Church in the future.

As indicated earlier, these proceedings are not about imposing penalties for behaviour that should not have occurred. The purpose is to determine whether the Respondent's conduct in these circumstances renders him unfit, temporarily or permanently, to hold a particular office; or whether he should be subject to conditions or restrictions in the performance of any particular office.²¹

I am satisfied that because of the conduct found, the Respondent is unfit permanently to hold any office.

I recommend therefore, that he be deposed from Holy Orders and that, other than as a parishioner, he have no office or licence as a Church worker.

A copy of this determination and recommendation has been forwarded to the Bishop and to the Solicitors acting for the parties.

In accordance with the Ordinance, the Respondent has 28 days within which to apply for a review of these decisions. Information about that can be obtained in the Diocesan Registry or from my Secretary.

Dated: 15 February, 2019.

Delivered: 19 February, 2019.

By the Board,

C.A. Elliott.
President.

²¹ Sec. 82 (a) and (b)