

APPELLATE TRIBUNAL OF THE ANGLICAN CHURCH OF AUSTRALIA

Matter:	Appeal of the Reverend Gail Orchard
Hearing Date(s):	Matter dealt with on the papers
Decision Date:	2 September 2025
Tribunal Members:	The Hon Justice Debra Mullins AO, President The Hon Richard Refshauge AM SC, Deputy President The Hon Justice Clyde Croft AM The Rt Rev'd Garry Weatherill The Most Rev'd Kanishka Raffel The Rt Rev'd Dr Richard Treloar The Hon Justice Michael Meek
Decision:	The email of 4 October 2022 from the Bishop of Newcastle to the Rev'd Gail Orchard was not an admonition. Accordingly, the findings and recommendations of the Diocesan Tribunal of the Diocese of Newcastle of 14 February 2025 on the first charge must be set aside and, in lieu, the charge be dismissed.
Catchwords:	Admonition – meaning of – in the context in the nature of a censure – must be clear that it is part of the disciplinary proceedings – need for reform Ministerial duty – no relevantly identified ministerial duty
Legislation Cited:	<i>Anglican Church of Australia Constitutions Act 1902</i> (NSW, ACT) <i>Child Services Act 1965</i> (Qld) <i>Child Welfare Act 1939</i> (NSW) <i>Child Welfare Act 1965</i> (Qld) <i>Child Welfare Ordinance 1957</i> (ACT) <i>Clergy Discipline Ordinance 2019</i> of the Diocese of Newcastle <i>Constitution of the Anglican Church of Australia</i> <i>Interpretation Act 1987</i> (NSW) <i>Legal Practitioners Act 1978</i> (NT) <i>National Register Canon 2007</i> (ACA) <i>Offences Canon 1962</i> (ACA) <i>Penalties and Sentences Act 1991</i> (Qld) <i>Small Business Fair Dismissal Code 2019</i> (Cth)
Cases Cited:	<i>Amalgamated Society of Engineers v Adelaide Steamship Company Limited</i> (1920) 28 CLR 129 <i>Boensch v Pascoe</i> [2016] NSWCA 191; 311 FLR 101 <i>CIC Insurance Ltd v Bankstown Football Club</i> (1997) 187 CLR 386 <i>Eberstaller v Poulos</i> [2014] NSWCA 211; 87 NSWLR 394 <i>ENT19 v Minister for Home Affairs</i> (2023) 278 CLR 75

Hazeldell Limited v The Commonwealth (1924) 34 CLR 442

Kalbasi v Western Australia (2018) 264 CLR 62

Long v The Bishop of Cape Town (1863) 1 Moo NS 411; 15 ER 756

Momcilovac v The Queen (2011) 245 CLR 1

Primates Reference Re Newcastle Discipline Ordinance Appellate Tribunal 11 November 2019

R v A2 (2019) 269 CLR 507

R v Merrilees [2013] ACTSC 81

R v Peters (1886) 16 QBD 636

SZAL v Minister for Immigration and Border Protection (2017) 262 CLR 362

Wass v Director of Public Prosecutions (NSW) [2023] NSWCA 7

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Texts:

Rupert Bursell, *Liturgy, Order and the Law* (Oxford, UK; 1996)

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Macquarie Dictionary (Sydney, Australia) and online

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Oxford English Dictionary (Oxford, UK)

Sir Walter George Frank Phillimore, *The Ecclesiastical Law of the Church of England*, 2nd ed (London, UK; 1895)

Category:

Appeal Decision

Parties:

The Reverend Gail Orchard (Appellant)
The Diocese of Newcastle (Respondent)

Representation:

Appellant: The Reverend Chris Bedding, Faith Workers Alliance
Respondent: Jason Hale, Diocesan Advocate

REASONS OF THE PRESIDENT, THE DEPUTY PRESIDENT, THE HONOURABLE JUSTICE CLYDE CROFT, THE RIGHT REVEREND GARRY WEATHERILL, THE MOST REVEREND KANISKA RAFFEL AND THE RIGHT REVEREND DR RICHARD TRELOAR: OPINION OF THE TRIBUNAL

INTRODUCTION

1. The Reverend Gail Orchard is a Deacon in the Diocese of Newcastle. Until recently, she was licensed to officiate in that Diocese.
2. Ms Orchard resides in her own home and has a long-time friend and his family living with her there. The Bishop of Newcastle believed that her friend had been convicted of some domestic violence offences. After advice from the Diocese Professional Standards Committee, he considered that this was undesirable. The Bishop met with Ms Orchard on 4 October 2022 and advised her, inter alia, to arrange for her friend and his family to leave the home.
3. The Bishop confirmed the discussion in an email sent the same day. It was titled “Your Ordination” and apparently confirmed the earlier discussion. It also, rather indirectly, indicated that she should arrange for her friend to leave her home. A copy of the email, appropriately redacted, is in the Schedule to these reasons.
4. Ms Orchard did not do so, permitting her friend to remain residing there and, under the Diocese’s Clergy Discipline Ordinance 2019 (the Ordinance), she was charged with two offences arising out of the situation.
5. After a hearing, the Diocesan Tribunal dismissed the second charge but found that Ms Orchard was guilty of the first charge, namely:

Conduct contrary to clause 1 (3) of the *Offences Canon 1962* for the Diocese of Newcastle (as amended) being conduct that is a habitual and wilful neglect of ministerial duty after written admonition in respect thereof by the bishop of the diocese.

6. As is very appropriate, the charge followed closely the terms of section 1 (3) of the Offences Canon 1962 (**the Canon**) of the Anglican Church of Australia (**the National Church**) and which had been adopted by the Diocese under section 2 of the Ordinance.

7. The Tribunal recommended that she be rebuked and admonished if the family friend is still living with her at that time and that the Bishop consider requiring her to undertake specified sustained professional guidance.
8. Ms Orchard has now appealed to this Tribunal under sections 54 (4) and 57 (2) of the Constitution of the National Church as is permitted under section 49 of the Ordinance.

PRELIMINARY POINT

9. A preliminary point has arisen as to whether the email sent to Ms Orchard on 4 October 2022 was a written admonition as required to be provided to Ms Orchard before the charged offence can be committed.
10. Ms Orchard submitted that it was not an admonition; the Diocese of Newcastle submits to the contrary.
11. The Tribunal has decided to address this issue as a preliminary point. If the point is decided in favour of Ms Orchard, the appeal will have to be upheld and the findings of the Diocesan Tribunal and its recommendations set aside.

ADMONITION

12. In order to determine whether the email was an admonition, it is necessary to understand the meaning of that term.
13. The term is used in the Canon. As noted above, the Canon has been adopted in the Diocese by section 2 of the Ordinance, which was made under section 4 of the *Anglican Church of Australia Constitutions Act 1902* (NSW) and binds each member of the Church. It is not a “public statute or regulation” (*Baker v Gough* (1963) 80 WN (NSW) 1263 at 1275-6), but does provide enforceable rights and is, thus, a private statute. It is, therefore, appropriate to interpret it as a statute would be interpreted.
14. There is no definition in the Canon or the Ordinance of the word “admonition”. “Admonish”, the verb form of the word, especially in the phrase “admonish and discharge”, has appeared reasonably frequently in temporal legislation. For example, it appears in s 126 (2) (a) of the *Penalties and Sentences Act 1991* (Qld) and appeared in older, often now repealed, legislation relating to children and child welfare and lawyers. For example, see s 82 of the

Child Welfare Act 1939 (NSW) (now repealed), s 62 (1) (k) of the *Child Services Act 1965* (Qld) (now repealed), the *Child Welfare Act 1960* (Tas) (now repealed), the Child Welfare Ordinance 1957 (ACT) (now repealed) and s 47 (1) (c) of the *Legal Practitioners Act 1978* (NT) (now repealed).

15. Despite this, there is no formal legal definition, in any of that legislation, or otherwise, of the terms “admonish” or admonition”. It does not appear in the standard Australian legal dictionaries, nor in the respected David Hay (ed) *Words and Phrases Legally Defined* 4th ed (London, UK; 2007).
16. The High Court has not defined the term, but has used it. For example, in *Webb v Hay* (1994) 181 CLR 41, per Brennan J at [5], a warning to jurors was described as an admonition. In *Kalbasi v Western Australia* (2018) 264 CLR 62 at [65], the statement “[n]o single universally applicable description of what constitutes ‘no substantial miscarriage of justice’” declared in *Weiss v The Queen* (2005) 224 CLR 300 at 317; [44] was described as an admonition. The Court in *Waterford v The Commonwealth* (1987) 163 CLR 54 at [5], referred to “the admonition to employees to be careful to resist pressure from the employer”. It is, thus, used in a variety of meanings.
17. Words of general use appearing in statutes should be “prima facie given their ‘natural and ordinary meaning’”: *Amalgamated Society of Engineers v Adelaide Steamship Co Limited* (1920) 28 CLR 129 at 148-9. In ascertaining this meaning, it is permissible to have regard to the definitions given in well-known and authoritative dictionaries: *R v Peters* (1886) 16 QBD 636 at 641. Thus, as the submissions on behalf of the Diocese did, it is appropriate to have regard to the definition given in the *Macquarie Dictionary*.
18. The definition there given is “the act of admonishing, counsel or advice; gentle reproof; caution” and “admonish” is defined as “1. to counsel against something; caution or advise. 2, to notify of or reprove for a fault, esp. mildly...3. To recall or incite to duty, remind”. This is similar to the definition given in the submissions on behalf of the Diocese from the *Macquarie Dictionary* (online, 20025), which referred to “[t]he definition of admonish includes to provide counsel or advice, a gentle reproof (rebuke, to censure); caution”. Clearly, it has a range of meanings, some of wide import.
19. In order to be able to identify the relevant meaning used in a particular statute, however, regard is required to be had to the context or the mischief intended to be addressed: *CIC Insurance Limited v Bankstown Football Club* (1997) 187 CLR 384 at 408. In this case, that is important. The term is used in the context of church law and for the purpose of discipline. Thus, the term is defined in Daniel Greenberg (ed) *Jowett’s Dictionary of English Law* 3rd ed (London, UK; 2010) as follows:

“The first and lightest form of an ecclesiastical censure, it is in the nature of a warning to abstain in the future from the act or conduct censured. Disobedience to an admonition assumes the grave character of contempt or contumacy and is visited by a grave punishment, e.g. suspension”.

20. Authority for this definition is given to the venerable and authoritative Sir Walter George Frank Phillimore, *The Ecclesiastical Law of the Church of England* 2nd ed (London, UK; 1895) at 1065, where the first part of the first sentence of that definition appears. The rest of the definition comes from the later discussion in that authority.
21. While the submissions on behalf of Ms Orchard submit that the admonition is a warning, perhaps something of this definition, that is inadequate. It is a censure, though there is an element of warning in the definition above for disobedience will have consequences.
22. Reference is then made in those submissions to guidance given in the Small Business Fair Dismissal Code 2019 (Cth). That Code, a creation of the Australian Government, may have some useful information, but is hardly appropriate for this very different circumstance, for at least two reasons. It is, firstly, specifically limited for use in relation to enterprises with 15 or fewer employees; the Diocese of Newcastle has over 200 clergy within over 50 Parishes, quite apart from any lay employees or volunteers who may be caught by the legislation. Secondly, it is for use in relation to employees in a business; the clergy are generally not regarded as employees and are not engaged in a business.
23. Two elements come from the narrowing of the meaning of “admonition” to fit the context of the use of the word in the Canon: it is a censure in itself and it is the basis for further penal action.
24. This requires, firstly, the admonition to have the effect of a censure. That is, “harsh criticism, expression of disapproval” (*Oxford English Dictionary*) or “an expression of disapproval, adverse or hostile criticism; blaming” (*Macquarie Dictionary*).
25. Secondly, as the basis for further penal action, it must be clear that it is part of the discipline process and thus to provide procedural fairness to the recipient, knowing what an appropriate response must be and the consequences of non-compliance.

26. Nevertheless, here the email fails really on both counts. The concerns mentioned are merely with the impression that the living arrangements, namely that Ms Orchard has her friend and his family living with her, give “the impression ... [of] a pro perpetrator [sic] position”. This is hardly sufficient for “adverse criticism” or “blaming”. It is hardly a disciplinary matter, rather a relationship that gives rise to a wrong and undesirable perception.
27. As to the other matter, the context is far from suggesting clearly, with the clarity that natural justice would require, that this is a disciplinary matter with penal consequences, including the censure as a disciplinary response, and the possibility of further action for non-compliance.
28. Rather, the context is that Ms Orchard is due for ordination to the priesthood and that this matter would prevent that from proceeding. This is a matter of fitness for proceeding to ordination rather than disciplinary action. Many prospective clergy do not proceed to ordination for reasons quite unrelated to any matter of discipline.
29. Thus, the email of 4 October 2022 cannot be the written admonition which is a required to be proved as a precondition for finding the charge made out. Given the uncertainty that has surrounded the term "admonition" as shown in these proceedings, it would be appropriate for consideration to be given to amending the Canon to provide a definition of that term.

A FURTHER PROBLEM

30. There is, however, a further difficulty in finding that the email is an admonition. Under the Ordinance, the admonition must relate to a neglect of ministerial duty. Unfortunately, the material before the Diocesan Tribunal failed to identify clearly what the ministerial duty was. Neither of the submissions for the parties addressed this important issue.
31. There was, however, some suggestion during the hearing of the Diocesan Tribunal that the duty was the requirement to comply with a lawful direction given by the Bishop, that is to say a breach of the duty of canonical obedience. See *Long v Bishop of Cape Town* (1863) 1 Moo NS 411; 15 ER 756. This is the duty of clergy to comply with the promise made at their ordination (whether to the order of deacons or of priests) to obey lawful orders or directions given by their Diocesan Bishop.

32. The difficulty with this suggestion is that any order or direction of this kind was, the evidence shows, given at the face-to-face meeting earlier on the day on which the email was sent. It cannot reasonably be said that there has been disobedience of that order or direction some few hours since the order or direction was given in these circumstances. Indeed, the email, in the sentence “I indicated to you at some point in the future, when there are different arrangements in place for [the friend and his family], that we could explore the journey towards your priestly ordination...”, makes it expressly clear that immediate compliance, by evicting Ms Orchard’s friend and family or otherwise separately housing them, is not necessarily expected.

33. Secondly, the only other ministerial duty could be a requirement not to behave in such a way as to constitute a breach of section 1(5) of the Canon. That section provides:

5. Conduct, whenever occurring,

- a) which would be disgraceful if committed by a member of the clergy, and
- b) which at the time the charge is preferred is productive, or if known publicly would be productive, of scandal or evil report.

34. There is some possible basis for this in the reference in the email to “matters being raised from within the parish” which led the Professional Standards Committee to express “its serious concerns about the suitability of you continuing to house [Ms Orchard’s friend]”. That is hardly a matter that could be described as “disgraceful conduct” or having caused “scandal or evil report”. There was no evidence to the contrary. At best it is indiscreet and a matter of concern about a perception.

35. There is, however, a further point about this. If Ms Orchard having her friend and his family living with her is a breach of her ministerial duty, the offence as described in the Canon is at least ambiguous. Thus, it is not completely clear whether the breach “in respect thereof”, which must be the subject of the admonition, is simply a “neglect of ministerial duty” or a “habitual and wilful neglect of ministerial duty”.

36. Given that it is unlikely that any possible neglect of ministerial duty (such as something like failure to attend a meeting of Parish Council because of forgetfulness) would likely be intended to be the subject of a charge as an offence, the wider definition would bring a risk to clergy to be exposed to actions too widely. In such a situation, this is quite significant, and it is appropriate that, unless the interpretation is clear or mandated by rules of interpretation,

the interpretation which protects the rights of the accused be preferred: *Momcilovic v The Queen* (2011) 245 CLR 1 at 46; *R v Merrilees* [2013] ACTSC 81 at [4].

37. Under that interpretation, the charge cannot be made out. In the first place, while Ms Orchard has had her friend and his family living with her for some time, her doing so has not been “wilful” as she believed, and on reasonable grounds, that she was acting in accordance with her Christian principles in giving hospitality to a friend who needed it. The *Macquarie Dictionary* defines “wilful” relevantly as “willed, voluntary or intentional”. Any breach was not wilful, for that would require her to have intentionally breached her duty.
38. Secondly, while Ms Orchard’s friend and his family had been staying at her house for some time, that, by itself, did not make it habitual. “Habitual” is helpfully defined in the *Merriam-Webster Dictionary* as “regularly or repeatedly doing or practicing something or acting in some manner”. Similarly, the *Oxford English Dictionary* defines the word as meaning “done constantly or as a habit”. While the period of residence was extended, there was no question of repetition of or regularity in any act of neglect that would be required to make out the charge, merely a continuation of the consequence of the initial act.
39. Accordingly, there is no basis made out for the charge on the material before the Diocesan Tribunal.

CONCLUSION

40. The preliminary point must be found in favour of Ms Orchard and the appeal upheld. Accordingly, the findings and recommendations of the Diocesan Tribunal of the Diocese of Newcastle of 14 February 2025 must be set aside and, in lieu, the charge be dismissed.

SCHEDULE

From: Bishop Peter
Sent: Tuesday, 4 October 2022 12:21 PM
To: Gail Orchard
Cc: [REDACTED]
Subject: Your ordination

Dear Gail,

Thank you for meeting with me earlier today. I recognise that what I shared with you brought disappointment.

As I advised, following matters being raised from within the parish, the Professional Standards Committee has raised with me its serious concerns about the suitability of you continuing to house [REDACTED] given his convictions. The PSC sees the living arrangements as unsuitable due to the impression it gives to survivors or victims of any type of abuse. This is heightened recently considering Gail Orchard's recent Ordination into Ministry in the local area of Beresfield. This living arrangement also appears to align Gail Orchard and therefore also the church with a pro perpetrator position.

I indicated to you at some point in the future, when there are different arrangements in place for [REDACTED], that we could explore the journey towards your priestly ordination. It will be your responsibility to let me know, in writing, what arrangements have been made and when they will take effect.

It is a responsibility for all in ordained ministry to ensure the protection of people who participate in parish activities. It is a matter of public record that [REDACTED] has admitted and been convicted of serious domestic and personal violence offences resulting in him being under a Community Corrections Order, which is still current. He has not shown any desire to cooperate with the Director of Professional Standards or the Chair of the PSC.

Ordination has placed you much more in the public eye. The fact is that the ambiguity of [REDACTED] living arrangement and perceived support of his position, as opposed to supporting the position of the Director of Professional Standards, has resulted in expressions of concern.

Before proceeding further, it is important that you address this area of concern.

I look forward to hearing from you. I have indicated that you can also feel free to contact Cathy Rose, the Director of Professional Standards.

Yours sincerely in Christ,

+Peter

Dr Peter Stuart
 Bishop of Newcastle

REASONS OF THE HONOURABLE JUSTICE MEEK

1. I agree with the conclusion that the preliminary point must be found in favour of Ms Orchard and the appeal upheld. The consequence is as stated in the Reasons of the Majority, that the findings and recommendations of the Diocesan Tribunal of the Diocese of Newcastle of 14 February 2025 must be set aside and, in lieu, the charge be dismissed.

2. I further generally agree with the reasons of the Majority. However, I prefer to address in slightly fuller terms a few matters, namely: context in construing legislation; the concept of admonition; and the importance of ensuring that ecclesiastical offences and defences to them are clearly defined.

3. Briefly, I note:
 - a. context in construing provisions of the Canons is to be considered in the first instance, not merely at some later stage when ambiguity might be thought to arise;
 - b. there is a paucity of contextual material which explains important elements of the charge in question;
 - c. historically in the realm of ecclesiastical law, an 'admonition' is a type of censure *after* a trial, rather than an element of a charge preliminary to a trial or hearing;
 - d. currently, the notion of a 'written admonition' as an element of the cl 1.3 *Offences Canon* 1962 (**Offences Canon**) offence, is a step which precedes an alleged 'habitual and wilful neglect of ministerial duty';
 - e. ideally any written admonition in respect of 'ministerial duty' should identify the claimed duty, include the reason for admonition, the necessary action that is required in response and the consequences for failure to respond appropriately; and
 - f. this case highlights some lack of clarity in terms of ecclesiastical offences and defences to them which I consider may well benefit from Synodical reform.

Preliminary point

4. The Appellate Tribunal is granted jurisdiction to hear this matter by ss 54(4) and 57(2) of the Constitution of the Anglican Church of Australia as permitted by cl 49 of the *Clergy Discipline Ordinance 2019* of the Anglican Diocese of Newcastle.

5. The Notice of Appeal specifies the grounds of appeal was as follows:

The short grounds for the Appeal are that:

- (a) The Diocesan Tribunal have (sic) misapprehended the terms 'ministerial duty' and 'neglect';
- (b) While the Diocesan Bishop provided a written admonition, it was not an admonition in respect of 'habitual and wilful neglect of ministerial duty'. Accordingly, the Diocesan Tribunal did not have jurisdiction to hear the charge;
- (c) Even if the Diocesan Tribunal had jurisdiction to hear the charge, the Accused was not guilty of 'habitual and wilful neglect' of ministerial duty. On the contrary, the Accused at all times gave careful attention to and sought to fulfil her ministerial duty;
- (d) Even if the Accused was guilty of 'habitual and wilful neglect of ministerial duty', the recommended sentence is excessive.

6. Pursuant to directions made by the President on 16 May 2025, ground (b) was identified as a 'jurisdictional issue' and one to be dealt with as a preliminary matter by the Appellate Tribunal, on the papers, following receipt of submissions.
7. The jurisdictional issue was not raised as such before the Diocesan Tribunal.
8. Nonetheless, the first duty of a court or tribunal is to determine whether or not it has jurisdiction to deal with the application before it.¹
9. The *Offences Canon* relevantly provides:

1. A diocesan tribunal ... in its original jurisdiction in addition to their respective powers under section 54(2) and section 55(3) of the Constitution may hear and determine charges made in respect of the following offences alleged to have been committed by a person who, at the time the charge is preferred, is authorised to function by the bishop of the diocese or is in holy orders resident in the diocese:

..

3. Habitual and wilful neglect of ministerial duty after written admonition in respect thereof by the bishop of the diocese.

¹ *Hazeldell Ltd v Commonwealth* (1924) 34 CLR 442 at 446; [1924] HCA 36 (Isaacs ACJ); *Eberstaller v Poulos* (2014) 87 NSWLR 394; [2014] NSWCA 211 at [1]; *Boensch v Pascoe* [2016] NSWCA 191; (2016) 311 FLR 101 at [10].

10. The charge which is the subject of the appeal was laid against the appellant (Ms Orchard) under cl 1.3 of the *Offences Canon*.

Construction principles

11. Canons are a form of delegated legislation.
12. Statutory construction involves the Court looking at text, context and purpose.²
13. The process of construction requires that ‘context’ be considered in the first instance, not merely at some later stage when ambiguity might be thought to arise. ‘Context’ is used in its widest sense to include such things as the existing state of the law and the mischief which, by legitimate means including by reference to legislative history and extrinsic material, one may discern the legislation was intended to cure.³
14. This approach to construction is unsurprising as, generally, all words may have different shades of meaning in different contexts.
15. Specifically, this approach recognises that, understood in its statutory, historical or other context, some meaning of a word other than its ordinary meaning may be suggested, and if its ordinary meaning is not consistent with the statutory purpose, that meaning must be rejected.⁴
16. The Act which empowers and sustains the making of delegated legislation also provides the context for that legislation.⁵

² See e.g. s 33 of the *Interpretation Act 1987* (NSW); *Wass v Director of Public Prosecution (NSW)*; *Wass v Constable Wilcock* [2023] NSWCA 71 at [3], [25] per Leeming JA, (Bell CJ at [1] and Kirk JA at [64] agreeing).

³ *ENT19 v Minister for Home Affairs* (2023) 278 CLR 75; [2023] HCA 18 (**ENT19**) per Gordon, Edelman, Steward and Gleeson JJ at [86]; *CIC Insurance Ltd v Bankstown Football Club Ltd* [1997] HCA 2; (1997) 187 CLR 384 at 408 per Brennan CJ, Dawson, Toohey and Gummow JJ.

⁴ *SZTAL v Minister for Immigration and Border Protection* (2017) 262 CLR 362; [2017] HCA 34 per Kiefel CJ, Nettle and Gordon JJ at [14].

⁵ *ENT19* at [86].

17. Historically, offence provisions were strictly construed. The modern approach is that they are to be construed by reference to the ordinary rules of construction. Judges of the High Court have observed that the prior historical approach (of strict construction) has lost much of its importance. Nevertheless, as offence provisions may have serious consequences, there is need for caution in accepting any 'loose' construction of an offence provision. Its language should not be unduly stretched or extended. As is evident from the reasons of the Majority, any persisting ambiguity after application of the ordinary rules of construction is to be resolved in favour of the person the subject of the charge.⁶ On the other hand, a broader interpretation of an offence provision might be appropriate where the purpose of an offence provision is protective.⁷

Context regarding ecclesiastical offences

18. The regime for the dealing with ecclesiastical offences within the Anglican Church of Australia is gleaned from the Appellate Tribunal's decision in the *Primates References Re Newcastle Discipline Ordinance* delivered on 11 November 2020.
19. In the joint reasons of the majority (the President, Deputy President, Archbishop Aspinall, Professor Croft and Bishop Weatherill) it was noted that:
- The *Constitution* entrenches a regime for dealing with ecclesiastical offences by clergy. Authority is devolved to the diocesan synods, diocesan tribunals and diocesan Bishops, but this is subject to the *Constitution* and to any canon of General Synod operating in the diocese. Subject to this framework, diocesan synods may create additional offences. Appeals lie to this Tribunal. The system is supplemented by the authority of the Bishops to license and de-license clergy and by the interlocking professional standards regime.⁸
20. Relevantly, and more specifically, the majority made observations regarding the nature of clergy offences within the Australian Church as follows:

Some of the broad categories of clergy offences are very ancient. Jurisdiction to try them is now sourced to the *Constitution*; the *Offences Canon 1962*; and diocesan ordinances made by the synods according to their respective constitutional competencies, which vary from State to State, but always subject to the requirements of the *Constitution* (see s 51).⁹

⁶ *R v A2* (2019) 269 CLR 507; [2019] HCA 35 per Kiefel CJ and Keane J at [52].

⁷ *Ibid* at [55].

⁸ At [5].

⁹ At [6].

21. Significantly, as noted by the Majority, the concepts of 'ministerial duty' and 'admonition' are not defined (nor indeed is the phrase or terminology 'habitual and wilful neglect').
22. There is a paucity of material giving insight into the historical background and context for the inclusion of an offence of "*habitual and wilful neglect of ministerial duty...*" within the *Offences Canon*.
23. Davis in *Australian Anglicans and their Constitution*,¹⁰ a study of and commentary on the lead up to and the making of the Constitution over the period 1910 to 1962, does not address the issue of offences, as distinct from comment on the Tribunals.¹¹
24. For the period from the inception of the Australian Church up to 1930, Giles¹² recorded some brief comment regarding ecclesiastical discipline. Giles notes that the letters patent issued in 1936 made reference to the power of the Bishop to exercise jurisdiction over all clergy in his diocese and that the Bishop was authorised and empowered to "punish and correct the aforesaid Chaplains, Ministers, Priests and Deacons... according to the Ecclesiastical Laws of England". However, the Bishop was nevertheless subject in his decisions to the right of appeal to the Archbishop of Canterbury".¹³
25. The above suggests the possibility that some insight as to the genesis of the framing and content of the offences in the *Offences Canon* is or might be gleaned from English texts dealing with the ecclesiastical law of the Church of England.
26. However, the main pre-1900 texts dealing with ecclesiastical law in the Church of England are similarly barren in terms of insight into any offence of neglect of ministerial duty (let alone habitual and wilful neglect).

¹⁰ John Davis, *Australian Anglicans and their Constitution* (1993, Acorn Press).

¹¹ Ibid at pages 172-177.

¹² R.A. Giles, *The Constitutional History of the Australian Church* (1929, Skeffington & Son Ltd).

¹³ Ibid at 63-65, especially at 65.

27. Cripps in *A Practical Treatise on the law relating to the Church and Clergy*¹⁴ reveals no such offence in those terms. Phillimore's *The Ecclesiastical Law of the Church of England*¹⁵ has relatively extensive sections dealing with discipline over the clergy,¹⁶ offences of the clergy¹⁷ and the *Clergy Discipline Act 1892* (UK).¹⁸ Yet those sections do not readily reveal offences in respect of neglect of ministerial duty. However, Phillimore does deal, albeit briefly, with admonition, which I will shortly address.
28. The *Clergy Discipline Act 1892* (UK) likewise does not contain offences or provisions dealing expressly with neglect of ministerial duty.
29. More modern English texts dealing with the Church of England such as Bursell's *Liturgy, Order and the Law*¹⁹ are similarly unfruitful.
30. For the Church in Australia, the above points highlight the practical need for the Church to diligently record context for the passing of Canons.
31. In recent times, that is not problematic. That is because the path for legislative reforms in the Anglican Church, at least for the last few decades, has invariably included reports to the General Synod Standing Committee, recommendations, and drafting of legislation by the Church Law Commission, lawyers or others within the church.
32. Thus, for Canons that are promoted to the General Synod, particularly in recent years, there is usually clear contextual material addressing issues which have given rise to the need for legislation and the purposes intended to be achieved by legislation.

¹⁴ Henry William Cripps, *A Practical Treatise on the law relating to the Church and Clergy* (5th ed, 1869).

¹⁵ Sir Walter George Frank Phillimore, *The Ecclesiastical Law of the Church of England* (2nd ed, 1895, Sweet and Maxwell Limited, Stevens and Sons Limited).

¹⁶ *Ibid* pages 836-839.

¹⁷ *Ibid* pages 840-911.

¹⁸ *Ibid* pages 1037-1044.

¹⁹ Rupert D. H. Bursell, *Liturgy, Order and the Law* (1996, Clarendon Press, Oxford).

33. However, the *Offences Canon* is one of the earliest Canons passed by the General Synod. For it, and those of its ilk, the contemporaneous recording of context preserved through archival material or other general records of the Synod Office, to the extent it exists, is an important resource for those such as tribunals tasked with construing historical provisions. Sometimes, long-standing Synod members are able to assist in providing recollections of context that are not otherwise recorded.
34. In light of the impoverished historical context for the cl 1.3 offence, one is left with text and purpose in understanding the elements of the offence and in particular what is meant by the concept of 'admonition'.
35. In a general sense, the purposes of offence provisions are relatively clear. However, within churches generally and the Anglican Church in particular, the framing of such provisions, especially in more recent times, has a very clear protective purpose. That is evident from the amendments to the *Offences Canon* to address the subject matter of child abuse.

Admonition

36. Further to earlier comments regarding construction of statutory provisions such as Canons, there is importance in reading the provisions as a whole even if the only contested area of enquiry is a particular clause within the Canon.
37. The *Offences Canon* is described as "A Canon to specify offences under sections 54, 55 and 56 of the Constitution". Clause 1 makes provision for a diocesan tribunal and a provincial tribunal to hear and determine charges made in respect of specified offences. Clauses 2 and 2A make like provisions in respect of the Special Tribunal. Clause 2B contains certain definitional provisions. Clause 3 provides for citation of the Canon and clauses 4 and 5 clarify the timing of conduct to which offences are applicable. The overall structure of the *Offences Canon* reveals a broad range of specification of offences, in some instances nominated by single words (e.g. unchastity, drunkenness)²⁰ and other offences that are far more detailed in their description (e.g. cl 2.11).²¹ It is not obvious that the overall structure of the *Offences Canon* nor the description and nature of other

²⁰ Clauses 1.1 and 1.2.

²¹ "Ordaining or authorising to function a member of the clergy or permitting to function a church worker contrary to, or in the absence of, a recommendation of a screening authority, or with actual knowledge or reasonable grounds for suspecting that the screening authority may not have properly discharged its statutory functions in making its relevant recommendation".

offences gives any particular insight as to the meaning of the elements of the cl 1.3 offence.

38. The Majority has surveyed and referenced a number of statutory provisions regarding the word 'admonition'. Dictionary definitions and some insight from ecclesiastical texts shed a degree of light on the likely meaning of 'admonition'.

39. The Macquarie Dictionary, both hard print and the online edition, undoubtably provides indication as to the more recent attribution of meaning to the word 'admonition'.

40. The Oxford Dictionary online edition reveals a degree of the historical use of the word. The second listed meaning of "admonition"²² is to the following effect:

An act of admonishing; an instruction, exhortation, or warning; a rebuke, a reprimand; *spec.* an ecclesiastical censure given prior to excommunication.

41. There is an example of historical usage under that definition as follows:

Admonition is the lowest of Ecclesiastical censures.

T. Fuller, *Church-history of Britain* ix. 102 (1655)

42. That definition is consistent with the definition referenced by the Majority in citing *Jowett's Dictionary of English Law* (3rd ed, 2010, London, UK) as follows:

The first and lightest form of an ecclesiastical censure, it is in the nature of a warning to abstain in the future from the act or conduct censured. Disobedience to an admonition assumes the grave character of contempt or contumacy and is visited by a grave punishment, e.g. suspension.

43. The Majority made reference to Phillimore as I have above.

44. Phillimore deals with admonition under the Chapter heading of 'Ecclesiastical Censures'. Relevantly, it is stated:

There are some censures applicable to the whole church, clergy and laity; others applicable only to one of those classes.

The censures to which both clergy and laity are subject may, for the purposes of this work, be considered as follows:

1. Admonition, or monition.

²² Oxford Dictionary Online.

2. Penance.
3. Suspension *ab ingress ecclesiae*.
4. Excommunication, with the spiritual and temporal consequences incident to it.

45. Specifically, in relation to admonition, the passage in Phillimore cited by the Majority is as follows (omitting footnotes):²³

Admonition, or monition, is the first and lightest form of ecclesiastical censure, whether to clergyman or laymen. It is to be observed, that when an admonition has been duly served, after a trial, upon the admonished person, disobedience to it entails the penalties incident to a contempt of the order of a lawful court.

In the ordination services the clerk solemnly binds himself to reverently obey “his ordinary, and to follow with a glad mind and will their godly admonitions,” – an obligation binding, no doubt, *in foro conscientiae*, but distinct from the legal admonition to be enforced *in foro externo*.

46. Two points may be noted.

47. First, at least in the ecclesiastical law of the Church of England historically, admonition in the above sense is described as a type of censure *after* a trial. It is not an element of a charge preliminary to a trial.

48. Secondly, Phillimore’s commentary highlights the difference between ecclesiastical admonition and legal admonition. There is a difference between matters of conscience and matters of law.

49. Despite the paucity of contextual material, I infer that it is likely the concept of ‘admonition’ in cl 1.3 of the *Offences Canon* has been drawn from the notion of censure within ecclesiastical law of the Church of England. However, the use of that concept as an element of a charge as distinct from at a later point of time regarding an ecclesiastical censure is a little perplexing. Specifically, it seems to me that mixing the concept of censure, or what otherwise might be described as a form of punishment, into the definition of a charge which might lead to a trial and then to punishment, is not ideal. That thought leads to my final observation regarding reform.

²³ Phillimore at page 1065.

Reform

50. The notion of a 'written admonition' as an element of the cl 1.3 *Offences Canon* offence, is a step which *precedes* a 'habitual and wilful neglect of ministerial duty'.
51. The dealing with the preliminary point by means of submissions and "on the papers" has meant that there has not been a fuller debate regarding the concept of an 'admonition' and importantly the nature and extent of what is a 'ministerial duty' and what constitutes 'habitual and wilful neglect' of a 'ministerial duty' after a 'written admonition'.
52. Ideally any written admonition in respect of 'ministerial duty' should identify the claimed duty, include the reason for admonition, the necessary action that is required in response and the consequences for failure to respond appropriately.
53. Significantly, Doe has made the observation that Anglicanism is notable for the lack of juridical precision in the definitional elements of its ecclesiastical offences.²⁴ Perhaps with muted irony, he makes the observation that "The Principles of Canon Law Common to the Churches of the Anglican Communion" provide that "in disciplinary cases ecclesiastical offences and defences to them are to be clearly defined and set out in writing".²⁵
54. For my part, I consider it less than ideal that the offence that is the subject of this appeal, is framed in terms which lack clear definition as to their nature and extent. I suspect that the lack of clarity has underpinned some of the evident difficulty of the Bishop, Ms Orchard, the Diocesan Tribunal and to some extent this Tribunal has had in construing and applying the provisions of cl 1.3 of the *Offences Canon*. Further, it has been stymied to some degree by the lack of context for construing the important elements of the offence.

²⁴ Norman Doe, *Christian Law Contemporary Principles* (2013, Cambridge University Press) at page 180.

²⁵ *Ibid*, citing Principle 24.9.

55. The fact that offence provisions may (and often do) have serious consequences and the fact that, at least in a church context, the provisions also have at least in part a protective purpose, reinforce the sensibility of having definitional clarity (in the Canon or elsewhere) regarding the elements of the offence. The importance of definitional clarity appears to have been recognised by the General Synod in 2022, when the addition of child abuse offences within the *Offences Canon* was being considered. Definitional provisions addressing important aspects of those offences were part of the proposed amendments and in fact included within the *Offences Canon* (to the extent that they were not otherwise defined within the *National Register Canon 2007*).²⁶
56. In due course, the General Synod Standing Committee and the General Synod may wish to address the issue of providing greater clarity by way of definition to the various elements of the offence in cl 1.3 of the *Offences Canon*.

²⁶ See cl 2B.