Catholic Theological College
University of Divinity

20 August 2014

Mr Sean Tynan
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Catholic Diocese of Maitland-Newcastle
PO Box 29
**CARRINGTON NSW 2294**

Dear Sean,

Thank you for your letter of 7 July 2014 seeking canonical advice for the members of an independent panel established by Bishop Wright to consider the ministry of Monsignor Allan Hart and Father William Burston. I apologise for the delay in the preparation of the report, due to the occurrence of unforeseen events outside my control. The documentation you sent me is certainly voluminous.

My mandate is to comment on whether the evidence you sent me may be proof of a failure on the part of either of these two priests to fulfil the canonical obligations of offices they held in the Diocese of Maitland-Newcastle. I have neither mandate nor competence to comment on any civil law (such as the obligation to report to the police) that they may have been alleged to have infringed; moreover, I have neither the mandate nor competence to evaluate the fairness of the criticism levelled against them by the Commissioner in the NSW Special Inquiry.

I note that judges and officers of ecclesiastical tribunals are forbidden by canon 1448 of the Code of Canon Law to exercise their offices in cases where there may be a personal interest by reason of consanguinity, affinity, guardianship or tutelage, or by reason of close acquaintanceship or marked hostility or possible financial profit or loss. While the independent panel is not an ecclesiastical tribunal, I state here that I have no personal interest in the task of this panel or in the two priests. I have had dealings with Monsignor Hart over the last decade in connection with matters of canon law in the diocese (principally with the statutes of the Maitland Clergy Central Fund). I believe I have met Father Burston once, but if I passed him in the street I doubt I would recognise him.

I shall now outline the canonical requirements of the various canonical offices exercised by Monsignor Hart and Father Burston.



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### 1.1 - The Office of Vicar General

The office of vicar general started to evolve by slow degrees in some places in the eleventh and twelfth centuries because of dissensions between bishops and the chief officers of their dioceses. These officers - archdeacons (in charge of temporal administration) and archpriests(in charge of the clergy) - had evolved during the first millennium and could act quite independently of their bishops. In contrast, bishops wanted persons who would be their vicars. Briefly, many bishops looked for an individual who would become his representative and in particular to represent him and act for him when he was absent from the diocese or ill. The Fourth Lateran Council (1215), the twelfth of the twenty-one ecumenical councils recognised by the Catholic Church, decreed that bishops were to appoint suitable priests to assist them in their episcopal duties.[1] The Council of Trent (1545-1563), the nineteenth of these councils, in the wake of the Reformation legislated much about Church governance, in particular about the office of the bishop. While it passed no legislation on the office of vicar general, it certainly curtailed the powers of archdeacons[2] which had the effect of permitting bishops to choose freely and appoint a vicar who would safeguard the bishop's authority and governance, rather than have to tolerate or be obstructed by an independent institute.

The first general codification of canon law (the 1917 Code of Canon Law) came into effect on 19 May 1918. It brought for the first time legislation for the entire Church concerning the office of vicar general, The legislation required the bishop of a diocese to constitute, **whenever the correct governance of the diocese required it**, a vicar general to help him by ordinary power throughout the diocese.[3] Therefore, a bishop was not absolutely obliged to appoint a vicar general, and the judgement of the need to appoint or not appoint a vicar general was left entirely with the bishop himself. That same Code stated that, while the vicar general, by virtue of his office, was competent to deal with both spiritual and temporal matters in the diocese that pertained to the bishop, he could not deal with **those matters which the bishop reserves to himself**;[4] moreover, he had to take care that his powers **not be used contrary to the mind and will of the bishop**.[5]

Since the establishment of the Catholic Church in Australia, there have been six councils of all the Australian bishops: in 1844, 1869, 1885, 1895, 1905 & 1937. At the first five of those councils, there was no legislation passed about the office of vicar general. This was in contrast to the situation in Ireland, from where the vast majority of Australia's bishops and priests had come. Legislation passed in Ireland in 1875 & 1900 recommended that a vicar general be appointed by a diocesan bishop to assist him in his concerns and worries, with the proviso that

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[1] Lateran IV, constitution 10, *De prædicatoribus instituendis*, 30 Nov. 1215.

[2] E.g., Trent, *sess. XXIV*, 11 Nov. 1563, *de ref.*, chs 3,12 & 20.

[3] Code of Canon Law [1917] (=CCL-1917), canon 366 §1.

[4] CCL-1917, canon 368 §1.

[5] CCL-1917, canon 369 §2.

the vicar general was not to be involved in matters the bishop reserved to himself.[6] In 1937, the legislation of the 1917 Code of Canon Law was simply restated for Australia in a slightly abbreviated form.[7]

Some bishops in Australia appointed vicars general; others did not. More often than not, the vicar general was a senior respected priest of the diocese, usually a parish priest in a town other than the cathedral city. It was expected that he was in charge during the absence from the diocese of the bishop. It could not be presumed that he was involved in the day to day administration of the diocese, or in frequent consultation with the bishop.

Leo Morris Clarke, Bishop of Maitland from 1976 until 1995, was previously a priest of the Archdiocese of Melbourne where he served as vicar general from 1965 until 1976 under three successive archbishops (Justin Simonds [1963-1967], James Knox [1967-1974] & Francis Little [1974-1996]). Each of those archbishops had several auxiliary bishops and lived in the archiepiscopal residence; while the vicar general lived at the cathedral presbytery. It was generally accepted that the vicar general dealt with routine matters of day-to-day administration, leaving the archbishop free to deal with the more serious and extraordinary matters of governance. It was well known and accepted that the vicar general was chosen, not because he was a close confidant of the archbishop, but because he was a competent and efficient executive officer of routine matters of administration. It was also presumed by the clergy that the priests who lived at the archiepiscopal residence (normally the archbishop's personal secretary and another priest) were the ones the archbishop would have consulted should he have sought confidential advice. This was the lived experience of Leo Clarke, and the model that he most likely would have had in mind when appointing a vicar general in the Diocese of Maitland.[8]

The Second Vatican Council (1962-1965), when dealing with bishops, mentioned in passing the office of vicar general. It said simply, *The most important office in the diocesan curia is that of vicar general*,[9] without specifying the nature of the office or its obligations. In 1983, the revised Code of Canon Law replaced the 1917 Code. The revised Code obliges each diocesan bishop to appoint a vicar general;[10] however, the provision that the vicar general may

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[6] *Acta et decreta Synodi plenariæ episcoporum Hiberniæ habitæ apud Maynutiam, an. MDCCCLXXV*, nos 174-176; *Acta et decreta Synodi plenariæ episcoporum Hiberniæ habitæ apud Maynutiam, an. MDCCCC*, nos 263-266.

[7] *Concilium plenarium IV Australiæ et Novæ Zelandiæ habitum apud Sydney a die 4ª ad diem 12ªm mensis septembris anno Domini 1937 præside excell.mo ac rev.mo domine Joanne Panico, archiepiscopo tit. Justinianen. delegato apostolico, a Sancta Sede recognitum* (=CP-1937), decrs 130-138.

[8] The present writer's assertions here are based on having worked in the same building and eaten with the then Monsignor Clarke practically daily from December 1974 until mid-1976.

[9] Vatican II, decree, *Christus Dominus*, 28 Oct. 1965, n. 27.

[10] Code of Canon Law [1983] (=CCL-1983), canon 475 §1.

not deal with **those matters which the bishop reserves to himself** was retained.[11] Moreover, his loyalty to the bishop is stated more forcefully, as **[he] is never to act against the will and mind of the diocesan bishop.**[12]

### 1.2 - The Office of Parochial Administrator

A parish is essentially a community of Catholics (can. 515 §1). It is not an agency of a diocese as are institutes such as the Catholic Schools Office, the Ecumenical & Interfaith Council, the Catholic Development Fund and the Diocesan Liturgical Council. It is a group of Catholics (normally territorially defined) where the reality of the Church can be found, just as it can be found in the diocese and in the Universal Church. Can. 515 §1 states that a parish is stably established within a particular church. This simply means that the parish must be seen as part of the broader ecclesiastical organisation, and not as an exempt or autonomous parish not aligned to a diocese, as happened historically in some places. It does not imply that a parish is a mere geographical division of a diocese. A parallel in our Australian civic society may illustrate this. The City of Newcastle is under the governance of the Mayor. Neither the Premier of New South Wales, nor the Prime Minister of Australia can intervene in the governance of the City of Newcastle or usurp the Mayor's legitimate office. The citizens of Newcastle belong to the three separate and different realities of Newcastle, New South Wales and Australia.

Can. 515 §1 states that the parish priest is the *proper pastor* of the parish. The term *proper pastor* refers to the proper power or jurisdiction exercised by the parish priest. Proper power or jurisdiction is non-vicarious power or jurisdiction, which is power or jurisdiction exercised in one's own name and not as the bishop's deputy or vicar. A parish priest is a pastor independent of the bishop and may even, as guardian of the rights of his parish, have to proceed ecclesiastically against the bishop. At the same time he is a pastor aligned with his diocesan bishop. In the canon, the expression *under the authority of the diocesan bishop* means that a parish priest, in the conduct of his pastoral functions, is to act as a pastor according to the diocesan bishop's mind and will for parish priests. However, the expression does not carry any connotations of retainer, employment or delegation. The parish priest is not an employee of his diocese or his bishop. Most priests are office holders most of their priestly lives, holding offices such as parish priest, assistant priest (curate), and chaplain.

The person with direct ecclesiastical governance over the parish is the parish priest. The bishop has power of governance over his diocese. However, parishes established within dioceses are governed by parish priests, not by the bishop. The bishop has only a supervisory role, with the right and/or obligation to intervene on occasion. Moreover, this intervention cannot be according to his whim, but only according to what canon law permits him or directs him to do.

The bishop's supervision or indirect governance is done by visitation (can. 396), and by ratification or otherwise of the parish priest's governance actions when required by canon law.

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[11] CCL-1983, canon 479 §2.

[12] CCL-1983, canon 480.

It has always been held that visitation has two purposes: namely, the bishop is informed about the state of the parish so that he can make appropriate decisions according to law; and the faithful are stimulated by his encouragement and exhortations. In summary, a bishop has no authority to govern a parish. However, he may and must intervene by way of supervision according to law.

Canon Law (both the present Code and previous legislation) has never provided that the bishop himself may be a parish priest. However, because of the difficulties in Ireland under the penal laws, the Holy See permitted bishops in Ireland to name themselves parish priest of two parishes within their diocese. These parishes were called mensal parishes.[13] This arrangement provided the bishop with accommodation and revenue; whereas in the normal European system properties (known as benefices) maintained the bishop. This Irish system was automatically followed by the first bishops in Australia, with the bishop normally appointing himself the parish priest of the cathedral parish and one other. In such parishes, after the bishop names himself as the parish priest, he usually commits the day-to-day running of the parish to an administrator. Canon law permits a custom to obtain the force of law;[14] and as the Holy See has never objected to the custom of mensal parishes existing in Australia, they now exist lawfully.

As I understand it, during the entire time that the cathedral of the diocese was at Maitland, the Parish of Maitland was a mensal parish. This meant that the Bishop of Maitland held an additional office, namely the office of Parish Priest of Maitland, and normally appointed a priest to be the parochial administrator when the bishop was exercising his episcopal functions and consequently unable to exercise properly all his parochial functions. In many dioceses, a cathedral administrator would be accorded an honorific title such as *dean* as some compensation for being deprived of the independence and household of a parish priest. I understand that often happened at Maitland. But, whatever of an honorific title, the cathedral administrator is canonically no different to any other parochial administrator.

A parochial administrator is a priest who takes the place of the parish priest, either when the parish is vacant, or when the parish priest is prevented from exercising his pastoral function in the parish (can. 539). The bishop is the appointer, and it is the bishop's responsibility to decide whether or not a parish needs an administrator. Once appointed, an administrator has the same duties and rights as the parish priest, except that he has no tenure of office (can. 540 §1). However, since his office is interim, he is not permitted to do or say anything which could prejudice the rights of the parish priest, harm the temporal goods of the parish, or disturb the people (can. 540 §2). He can properly be called a caretaker, and may not make innovations in the pastoral, liturgical or administrative aspects of the parish that are prejudicial to the rights of the parish priest. If, because of a special situation, the administrator were to be given special authority or a mandate to solve a particular problem, his authority is to be interpreted according to the written instructions and faculties given him by the bishop. Other than such a situation, he should not use his own initiative, but should act according to the mind and intentions of the

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[13] *Mensa* (Latin) is *table*. The term originated from the concept of a bishop being able to support his table with hospitality.

[14] CCL-1917, canons 25-30; CCL-1983, canons 23-28.

parish priest whom he is replacing. Canon law explicitly requires that the administrator is to render an account of his stewardship to the parish priest (can. 540 §3). Canon law does not prescribe a briefing of the administrator by the parish priest at the commencement of the administration.[15] However, it is generally held that the neglect by a parish priest to brief an administrator when he is able to do so, or a refusal or reticence by an administrator to be briefed adequately by the parish priest, is extremely imprudent.

### 1.3 - The Office of Dean (Vicar Forane)

The 1917 Code of Canon Law required the bishop to divide his diocese into regions called vicariates forane[16] which are clusters of parishes. In Anglophone countries, these vicariates have traditionally been known as *deaneries*. One of the parish priests in the deanery is appointed the dean. In 1844, the first council of Australian bishops directed that there be deaneries in which there be an annual spiritual retreat for the clergy and clergy conferences three times annually,[17] and the 1885 council, using the traditional description of the dean as *the eyes and ears of the bishop*, decreed his role of discreet vigilance and an obligation of an annual report to the bishop.[18] The 1917 Code of Canon Law and the 1937 Australian council ratified this legislation.[19]

The dean had no power of governance over the deanery and its clergy, but he was to be vigilant and notify the bishop of any irregularities. He was also to preside over meetings of the clergy of the deanery, and ensure that appropriate arrangements were in place in connection with the illness, death or funeral of a priest. It seems that in the Diocese of Maitland-Newcastle there is a meeting of deans. While this is nowhere legislated in canon law, and would not occur in most dioceses, it would appear to be an easy, sensible and effective means by which the bishop can receive the local information via the deans collectively, rather than individually, about conditions and situations.

The revised Code of Canon Law of 1983 has made deaneries optional now, as they were not perceived as useful or necessary everywhere. In addition to the traditional functions, the role of the dean now is to co-ordinate common pastoral action in the neighbouring parishes, give

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[15] This is because it would be impossible in situations such as an administrator being appointed to a vacant parish, or replacing a parish priest who is seriously ill, or imprisoned, or unexpectedly detained elsewhere.

[16] The term comes from the Latin *foras* (*outside*) as they were outside the cathedral city.

[17] *Acta et decreta Concilii primi provinciæ Australiensis a reverendissimo archiepiscopo Sydneiensi una cum præsulibus provinciæ suffraganeis, anno Domini MDCCCXLIV pontificatus Gregorii Papæ decimo quarto celebrati, a Sancta Sede approbata*, decrs V-VI.

[18] *Acta et decreta Concilii plenarii Australasiæ habiti apud Sydney A.D. 1885, a Sancta Sede recognita* (=CP-1885), decrs 26-28.

[19] CCL-1917, canons 217, 445-450; CP-1937, decrs167-177.

encouragement, and be consulted by the bishop when a parish priest is being appointed within his deanery.[20]

### 1.4 - The Office of Diocesan Consultor

For many centuries, bishops were obliged to consult the chapter of canons attached to the cathedral, and sometimes to obtain their consent, before certain major decisions were made in the diocese. By the late nineteenth century, many dioceses lacked chapters, either because they had not survived the Reformation in Europe or because they were dioceses in the New World. The Holy See recognised a need for a group to fulfill the legal functions that were fulfilled by the chapter of canons until such chapters, corporate bodies regulated by intricate and complicated canonical legislation, could be established. By legislation of the 1885 Council of Australian bishops, Australia was one of the first countries where diocesan consultors, with the approval of the Holy See, were established.[21] This legislation required the bishop to consult the diocesan consultors when convoking a diocesan synod and proposing legislation in it; when a parish was to be dismembered or given into the care of a religious institute; when property was being alienated or mortgaged; and when a new consultor was being chosen.

The 1917 Code of Canon Law mandated diocesan consultors for all dioceses in the world lacking a cathedral chapter. The 1937 Australian council conveniently summarised this legislation by restating the 1885 legislation requiring consultation from the diocesan consultors except that consent (rather than consultation) of the consultors was required in connection with alienation and mortgaging of ecclesiastical goods.[22]

The 1983 Code of Canon Law retained the diocesan consultors, although changing their name to the *college of consultors*, which emphasises its corporate nature. The college is to be no fewer than six and no more than twelve priests chosen by the bishop from the council of priests. Besides specific duties when the see is vacant, the college must be consulted by the bishop in connection with the appointment or removal of the diocesan finance officer, and before the bishop can place important acts of administration; and the bishop needs the consent of the college for acts of extraordinary administration and alienation of property beyond the amount specified by the conference of bishops.[23] The bishop - should he wish to do so - would also be free to seek advice from the college on any issues of importance. However, the college has no authority on its own initiative to make the bishop discuss or be advised on any matter. Moreover, the consultors may act only as a college, and not as individuals.

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[20] CCL-1983, canons 524, 553-555.

[21] CP-1885, decrs 29-34. (The first mandated diocesan consultors anywhere were in Scotland in 1884).

[22] CP-1937, decrs 147-148.

[23] CCL-1983, canons 502,

### 1.5 - The Council of Priests

The Second Vatican Council decreed that in each diocese a representative group of all the priests of the diocese should be established to assist the bishop in his pastoral governance.[24] In 1966, Pope Paul VI promulgated norms for the establishment of this new body, to be effective until the revised Code of Canon Law took effect.[25]

The 1983 Code of Canon Law regulates that at last half the priests of the council are to be freely elected by the priests themselves; its purpose is the pastoral welfare of the people; the bishop presides over it and determines the agenda; it is advisory to him; and he alone can make public any decisions made during its meetings. So that there is no tension or conflict with the college of consultors, the college is to be chosen by the bishop from the council membership. In some small dioceses where the council members number no more than twelve, the bishop merely declares that the council is identical with the consultors. As canon law is silent on this, there is nothing irregular about such an arrangement.[26]

## 2 - Some Observations on the Hearings

Without wishing to be or to appear critical of the hearings in any way, I formed the distinct impression that many questions were posed without accurate understanding of the functioning of the Catholic Church. The current governance structures of the Church are built on the current Catholic theology that Jesus Christ himself established three entities, namely the Church, the papacy and bishops. As a result of this theology, any other entities of governance in the Church merely assist, advise or enhance the monarchical governance of the pope[27] or the bishop.[28] The bishop in his diocese has the discretion to decide how much he will make use of the various institutes available to him, and whether or not he will delegate authority or use executive officers.

This position is not seen by most theologians as defined non-reformable doctrine, and in fact is quite different to how the Church functioned during the first millennium. While the position of the pope and the bishop were primary then, these offices were exercised in a more

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[24] Vatican II, decree, *Presbyterorum ordinis*, 7 Dec. 1965, n. 7.

[25] Paul VI, *motu proprio*, *Ecclesiæ Sanctæ*, 6 Aug. 1966, n. 1.15 (*Acta Apostolicæ Sedis*, 58[1966], pp. 766-767).

[26] CCL-1983, canons 495-502.

[27] Institutes such as the synod of bishops, the college of cardinals, the bureaucracy of the Roman curia, and papal legates.

[28] Institutes such as the diocesan synod, the diocesan curia, the vicar general, the episcopal vicar, the chancellor, the diocesan finance committee, the diocesan financial administrator, the council of priests, the diocesan consultors, and the diocesan pastoral council.

collegial or synodal fashion. Specifically, in the diocese much of the governance was in the collegial assembly of the bishop surrounded by all his priests; it contrast to the current mode of all authority being vested in the bishop alone, albeit after receiving advice from various bodies. No doubt the effects of schisms in the Church, specifically the Protestant Reformation in the sixteenth century, led to the Catholic Church fearing trends that could appear to be presbyterianism or congregationalism, and bolstering itself by highly centralised norms emphasising the monarchical governance of pope and bishop.

I was surprised to read that Ms Gerace asserted to the Commissioner on 24 September 2013 that Father Burston and Monsignor Hart sought to minimise their roles as vicars general, and that they were almost in effect administrative or perfunctory or limited to various different things; and that they were chosen for the office of vicar general because of their training and expertise.[29] It is a well-known fact that in most Australian dioceses the requirement that the vicar general have post-graduate qualification in theology or canon law or be at least well-versed in those discipliners is overlooked or ignored. In fact, Monsignor Hart has no post-graduate qualification, and Father Burston's post-graduate qualifications are in psychology, not canon law or theology. Bishops in Australia have developed a custom of appointing as vicar general a priest who is known for his sound doctrine, integrity, prudence and practical experience; and as long as someone in the diocese is qualified in canon law, this vicar general can obtain canonical advice when necessary from that canonist. As far as I can ascertain, during the period under consideration, there were two canonists in the Diocese of Maitland-Newcastle, namely Monsignor Paul Simms, now elderly and retired, with a doctorate in canon law, and Monsignor Philip Wilson, at present the Archbishop of Adelaide, with a licentiate in canon law. Consequently, Mr Gerace's assertion that the vicar general is chosen because of his competence and expertise must not to taken to imply that he has competence in canon law.

Conceding that Dr Rodger Austin was asked merely to provide a *concise* definition of some terms,[30] it is regrettable that the concise definitions made reference only in passing to the provision that the vicar general may not deal with those matters which the bishop reserves to himself,[31] and omitted to state that the vicar general's loyalty to the bishop is stated forcefully as he is never to act against the will and mind of the diocesan bishop, and that the bishop determines the agenda of matters discussed at the council of priests.[32]

I was also surprised that Father Burston appears to have been treated unsympathetically in connection with memory loss.[33]

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[29] *NSW Special Commission of Inquiry*, transcript, pp. 2521-2523.

[30] *Cunneen Report*, vol. 3, pp. 56-57.

[31] CCL-1983, canon 479 §2.

[32] CCL-1983, canon 500.

[33] At the risk of being criticised for injecting information into this report obtained from outside the documentation of this inquiry, I record the following. Within the last year, in

### 3 - Opinion about Failure to Fulfill Canonical Obligations

As I stated at the outset, my mandate is to comment on whether the evidence you sent me may be proof of a failure on the part of either of these two priests to fulfil the canonical obligations of offices they held in the Diocese of Maitland-Newcastle.

#### 3.1 - As regards Monsignor Hart

The documentation indicates clearly to me that Monsignor Hart exercised the office of vicar general in accord with what canon law required him to do. The then bishop (Leo Clarke) was secretive in his way of operation, and a very private person.. He opened his own mail; retained all confidential correspondence and documents in a personal briefcase; defined the office of vicar general as acting for the bishop when he is absent from the diocese, and acting according to the mind of the bishop; reserved all important and sensitive matters to himself; personally typed some of his correspondence; and gave the vicar general no access to the diocesan archives.. Despite canon law permitting the vicar general to exercise the bishop's executive power of governance, it appears that Bishop Clerks deliberately excluded Monsignor Hart from so acting, except when the bishop was absent from the diocese. Even though Monsignor Hart had been approached by AJ with the request that Monsignor Hart inform Bishop Clarke of sexual abuse of her by Denis McAlinden, Monsignor Hart promptly did exactly what he had been requested to do, namely notify the Bishop; the Bishop then passed the matter to a committee (including Father Brian Lucas); and Monsignor Hart was involved neither in that committee or any other addressing of AJ's complaint, as the Bishop effectively reserved it to himself.

In fact, it is clear that AJ approached Monsignor Hart not in his capacity as vicar general, but as administrator of the cathedral mensal parish, which office he exercised as well at that time, and which Bishop Clarke called his "pastoral role." . Although the Cunneen Report asserted in one place that Monsignor Hart was acting then as diocesan administrator[34] (the title used since 1983 for the office formerly known as the vicar capitular), it is clear that he was merely administrator of the mensal parish, of which the parish priest was Bishop Clarke himself; and that he was never at any time the diocesan administrator. There was no failure in his duty as administrator of the cathedral parish. In fact, canon law obliged him to avoid prejudicing the right of the parish priest of Maitland (Bishop Clarke) to administer his own parish, and obliged Monsignor Hart to give an account of his administration to the parish priest (Bishop Clarke).

As regards the office of vicar forane (dean) exercised by Monsignor Hart: it obliged him to bring to the attention of the bishop any negligence or irregularity he became aware of in his

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conversation with a retired Melbourne priest friend of mine, he spoke in general about his coping with the deaths and debilitation due to age of his seminary classmates. He described one classmate, "Bill Burston of Newcastle", by words to the effect of illness that has resulted in significant memory deterioration.

[34] *Cunneen Report*, vol. 2, p. 53, n. 12.149.

deanery; but it did empower him to govern the parishes, or to conduct investigative inquiries. At the meeting of the deans, he and the other deans would be bringing forth information about priests and parishes to enable to bishop to be better informed when appointing priests to the various parishes.

As regards the offices of member of the council of priests and member of the college of consultors, neither office gives the office holder the right or the obligation to give the bishop personal advice or counselling. Each body is convoked by the bishop, who presides over it and determines its agenda. He seeks the advice (and occasionally even the consent) that canon law requires of him before he can place certain juridical acts. Were the bishop to ask either body for advice about some important matter, each member should give his opinion freely in the meeting. But there is no debate, and then the bishop takes that advice, but makes his own decision. These bodies are a canonical device to try to ensure that bishops are fully informed before making decisions, and to try to prevent bishops from acting on whim. However, as noted at the start of section 2 of this report, the bishop's power of governance is monarchical.

Therefore in answer to this question:

> *Whether the conduct of Monsignor Allan Hart, as evidenced in the final report or relevant transcripts or exhibits presented by the NSW Special Commission of Inquiry, either in the period when Denis McAlinden was still alive (i.e. up to 30 November 2005), or whilst giving evidence to the Commission in 2013, may constitute a failure in fulfilling the canonical obligations of his offices in the Diocese of Maitland-Newcastle?*

I would answer

> *NO.*

that is, I cannot find evidence that Monsignor Hart failed to fulfill the canonical obligations of the offices he held. I am aware that the Commission formed its view that Monsignor Hart was an unsatisfactory and unimpressive witness and that his evidence was misleading.[35] Whatever role Monsignor Hart played with the complaint of AJ and the management of McAlinden, I do not see as a failure to fulfill the canonical obligations of one of the offices he held.

### 3.2 - As regards Father Burston

I note that Father Burston served as vicar general under Bishop Michael Malone; and never as vicar general under Bishop Leo Clarke. Bishop Malone clearly had a much different style governance to his predecessor. However, there is no evidence before me that Bishop Malone gave a job or role description of the office of vicar general to Father Burston. There was

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[35] *Cunneen Report*, vol. 2, pp. 234-235.

no "handover" from Monsignor Hart. Father Burston understood that he was "second in charge" but was unable to define what the office of vicar general required of him

As regards Father Burston's exercising the offices of vicar forane (dean), members of the college of consultors, and member of the council of priests, I would give exactly the same opinions as I gave about these three offices being exercised by Monsignor Hart. Briefly, these offices neither empower nor encourage the officeholders to counsel or advise the bishop at their own initiative.

Therefore in answer to this question:

> *Whether the conduct of Fr William Burston, as evidenced in the final report or relevant transcripts or exhibits presented by the NSW Special Commission of Inquiry, either in the period when Denis McAlinden was still alive (i.e. up to 30 November 2005), or whilst giving evidence to the Commission in 2013, may constitute a failure in fulfilling the canonical obligations of his offices in the Diocese of Maitland-Newcastle?*

I would answer

***NO.***

that is, I cannot find evidence that Father Burston failed to fulfill the canonical obligations of the offices he held. I am aware that the Commission formed its view that Father Burston was an unimpressive witness in certain respects, and that there was a reluctance on his part to consider fully questions put to him or to explore his memory.[36] I have neither competence nor mandate to explore the possibility of his resiling from questions or to judge the state of his memory.

With kind regards and best wishes,

Yours sinverely

(Very Reverend Professor) Ian B. Waters
**CANONICAL CONSULTANT**

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[36] *Cunneen Report*. Vol. 2, p. 235.