

A Higher Loyalty? A Case Study of Anti-Catholicism and Section 44 of the Australian Constitution

Dr Benjamin Wilkie*

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The immediate postwar period was a time of expansion for the Catholic Church in Australia. In the middle of the 1950s, 93 new Catholic churches, two new hospitals, four new orphanages, and nearly 40 boys' and girls' high schools had been built; Catholic primary school enrolments grew by over 30,000 pupils, and high school enrolments had grown by around 5000 students; 80 new priests were ordained, and 163 women became nuns in those years. A former Anglican Archbishop of Sydney, Sir Marcus Loane, described the 1950s as "a decade of spiritual renewal" for Catholics in Australia.

A renewed presence in Australian religious life, however, and high-profile interventions in contemporary issues, opened new entry points for sectarian polemic shaped by local affairs. Benjamin Edwards notes that interdenominational relations in the postwar decade were marked by Protestant co-operation and Catholic isolation. As Edwards has argued, nevertheless, although sectarian polemic in the 1950s "was sometimes triggered by contemporaneous local contingencies, it was framed within the traditional sectarian discursive context." That is to say, while the sectarianism of 1950s Australia was shaped by local and sometimes new concerns, polemic drew on old ideas and language.

One element of anti-Catholic discourse that was sustained and appropriated for Australia was the assertion, as Edwards describes it, "that Catholics cannot be loyal subjects of sovereign states because they owe a higher loyalty to the Pope, a foreign temporal power." Indeed, when British governance first came to Australia, it brought the old prejudices with it. Mere days after the First Fleet arrived in January 1788, on February 13, Arthur Phillip pledged allegiance to the King in the presence of the new colony's judge-advocate. After first announcing that "I do believe that there is not any Transubstantiation in the Sacrament of the Lord's Supper or in the Elements of Bread and Wine at or after the Consecration thereof by any Person whatsoever", Phillip "acknowledged and declared George III to be the only lawful and undoubted sovereign of this realm, and that he abjured allegiance to the descendants of the person who pretended to be the Prince of Wales during the reign of James II." Alas, Bonnie Prince

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Charlie – exiled leader of the Scottish Jacobite cause – would die in Rome on January 31, 1788.

The notion was, perhaps, most infamously articulated in the words of British Prime Minister William Gladstone in 1874, writing in response to Pope Pius IX's *Syllabus of Errors*: "No one can now become [Rome's] convert without removing his moral and mental freedom, and placing his civil loyalty and duty at the mercy of another." About 75 years later in Australia, this sentiment was raised again in a unique and high-profile manner with the suggestion that lay Catholics were, due to their faith, still beholden to a sovereign and foreign power and thus incapable of proper allegiance to Australia.

In August 1950, *The Argus* in Melbourne informed readers that a High Court judge had ruled on "the question of whether a Roman Catholic could be a member of Parliament." One Henry William Crittenden had run as an independent candidate for the electorate of Kingsford Smith in the 1949 Federal election. He was unsuccessful. Crittenden's successful opponent was Gordon Anderson, a railway worker and unionist who had served four terms as the Labor Mayor of the Waverley Municipal Council in the eastern suburbs of Sydney. *The Argus* announced that, some months later in January 1950, Crittenden had challenged Anderson's nomination and election. "He claims that the Commonwealth Constitution bars Anderson from being a member of the House of Representatives," it said. "Crittenden submits that the Roman Catholic Church is an integral part of a world-wide political regime headed by the Pope, as sovereign pontiff and ruler of a foreign power."

The grounds for Anderson's election to be made void, thought Crittenden, were laid down in Section 44 of the Australian Constitution: any person who "is under any acknowledgment of allegiance, obedience, or adherence to a foreign power, or is a subject or a citizen or entitled to the rights or privileges of a subject or a citizen of a foreign power . . . shall be incapable of being chosen or of sitting as a senator or a member of the House of Representatives." This article briefly examines the mid-twentieth century context and background of the case, details some of content of the accusation levelled at Anderson and, by extension, all Catholics in Australia, and outlines the eventual judgement that Catholics could, in fact, run for office in Australia. Although sectarianism in postwar Australia was muted in comparison to earlier decades, it was not entirely absent from public discourse.

The 1949 election campaign in the New South Wales electorate of Kingsford Smith had, by some accounts, presaged Crittenden's more formalised attacks on the rights of Catholics in Australia. When it reported on the petition in January 1950, *Truth*, a newspaper known for scandal and gossip, suggested that there had been a "flood of anti-Roman Catholic propagandist literature in the division during the campaign." It indicated that "Feelings of deep indignation had been aroused in the Roman Catholic community in Kingsford Smith, and the cause of certain Liberal candidates, who are Protestants and who are alleged to have been responsible for the propaganda, is believed to have suffered materially in consequence." Crittenden in particular had a track record for sectarian polemic.

Crittenden was described as "the moving spirit in a plan to form a new political party" in 1943, to go under the name of British-Australian Union, to combat the "blatantly anti-British Irish fifth of Australia . . . it was anti-trade unionists; anti-labor governments; anti-Communists, anti-party governments, and anti-religious denom-

inational schools.” Later, in 1947, he attempted to establish his own newspaper, which would be called the *Monitor*. It would “endeavour to preserve a high moral tone from the British-Australian viewpoint while ruthlessly challenging any and all attempts by minorities to further prejudice or destroy our British heritage of freedom and equal opportunity.”

His viewpoint would become more openly sectarian. Writing for the virulently anti-Catholic publication, *The Rock*, in May 1950, Crittenden levelled criticism at the popular Catholic apologist and writer, Leslie Rumble, exposing a swath of religious, ethnic, and class prejudices. He described Rumble’s title – doctor – as “unacceptable” because it “would prejudice the dignity of less pretentious witch-doctors of other more primitive branches of pagan theology.” Rumble was a convert to Catholicism from Anglicanism, and Crittenden said it was “difficult for me to accept that you were trained for the Anglican ministry in the English traditions of decency, as you still permit your readers to believe. It seems that St Ligouri’s [sic] villainous ‘Moral Theology’ is hardly the textbook for transforming congenitally handicapped Irish students into gentlemen.” Catholicism was a “perfectly balanced compound of polytheistic paganism and Machiavellian politics . . . the hybridised product of the union of early Christianity with still earlier paganisms”, he also wrote. Touching on the Gladstonian fears for civil allegiance, Crittenden said that Catholicism – a “foul racial-religious-political combination” – had “corrupted all our British institutions in Australia; poisoned our National soul; and, from its present domination, now threatens our entire future as a great State.” This was the sectarian background from which emerged the suggestion that Catholics could not, under Section 44 of the nation’s constitution, be eligible for public office in Australia.

In the petition presented to the courts, Crittenden alleged that “Gordon Anderson is not capable of being chosen or of sitting as a Member of the House of Representatives he being under acknowledgement of adherence, obedience and/or allegiance to a foreign power within the meaning of Section 44 of the Commonwealth Constitution.” Elaborating on the accusation, Crittenden said that Anderson “was, at the time of his nomination and election, a professed member of the Roman Catholic Church. As such he, as in the case of all members of that Church in all countries, is under ‘acknowledgement of Adherence, Obedience or Allegiance to a Foreign Power’ – the Papal State. He is therefore incapable of being chosen or of sitting as a Member of The House of Representatives.” Crittenden believed that his case was bolstered by the fact that “the sovereign status of the Vatican was restored through the signing of the Lateran Treaty of 1929 by Mussolini and Pope Pius XI.”

Sir Wilfred Fullagar was the High Court judge – sitting as a Court of Disputed Returns under the Commonwealth Electoral Act – who would hand down the final judgment on Crittenden’s petition. An erudite Melbourne lawyer with a staunchly Presbyterian outlook – and therefore, perhaps, having some understanding of religious minorities in a predominantly Anglican nation – Fullagar was described by his friend, the judge Sir Owen Dixon, as a man who “had combined, with a remarkable legal erudition, great resources of scholarship. His judgments commanded the admiration of lawyers, not only for their penetration, their soundness and their correctness, but for the exposition of legal principles in an almost unequalled English style.” He was appointed to the High Court of Australia on 8 February 1950, and the question of

Catholics and the Australian Constitution would be one of his early cases.

Fullagar clarified Crittenden's accusations. He wrote that "the petitioner made it quite clear to me that he did not allege that the respondent had entered into any individual or particular acknowledgement of adherence, obedience or allegiance to what he describes as the Papal State." Which is to say, Crittenden's argument was not that Anderson had specifically and explicitly, as an individual, sworn any allegiance to a foreign power. Instead, explained Justice Fullagar, Crittenden thought that "merely by virtue of being a professed member of the Roman Catholic Church, the respondent owes allegiance to a foreign power." Fullagar continues to summarise the full implications of the argument for the relationship between Catholics and the Australian state: "What [Crittenden] is saying is no more and no less than that every member of [the Catholic Church] is the subject of a foreign power and for that reason incapable of becoming or being a member of either House of the Parliament of the Commonwealth."

The petition was widely covered in Australia's major capital city and regional newspapers. The nation's Catholic press, especially, took an interest. Shortly after the petition was delivered in January, Adelaide's Catholic newspaper, the *Southern Cross*, editorialised on the matter: "There is a grave misconception here due to the fact that Mr. Crittenden fails to distinguish between temporal authority and spiritual authority – a mistake that could only be made in a very materialistic age. Is that a distinction Catholics make just to get out of a difficulty? Of course not."

The *Southern Cross* continued to explain: "Every Anglican in South Australia recognises [Thomas Playford, Premier of South Australia] as holding temporal and Bishop Robin spiritual authority over them. Every Australian Catholic hails the King as his temporal ruler, the Pope has his spiritual ruler. The Pope has temporal authority, too – but not over us. He has spiritual authority over all Catholics throughout the world; temporal authority only over the citizens of the Vatican State. The Australian Catholic, or any Catholic not a citizen of the Vatican State, owes no allegiance to the Pope as civil ruler. The fact that there is a Vatican State at all is non-essential and comparatively unimportant. It does not belong to the essence of the Papacy."

Fullagar's own judgment and opinion of Crittenden's argument was clear and unambiguous: "It is obvious, in my opinion, that no such major premiss [sic] can be supported." What Crittenden was attempting to argue, thought Fullagar, was rather transparent, and spoke to old bigotries. The judge contended that the sovereignty of the Vatican was irrelevant to the question. He said that "the root of the matter . . . lies in the fact that the petitioner really seeks to revive a point of view which was abandoned in England in 1829", referring legislative changes that allowed Catholics to sit and vote as a member of either house of parliament in the United Kingdom. Fullagar said that "our own Constitution was, of course, not enacted by men ignorant or unmindful of history" and noted that the Australian Constitution determines that "no religious test shall be required as qualification for any office or public trust under the Commonwealth . . . it is, in my opinion, sec. 116, and not sec. 44(i) of our Constitution which is relevant when the right of a member of any religious body to sit in Parliament is challenged on the ground of his religion."

Fullagar continues: "One may observe, as a matter of law, that every person born in Australia, into whatever religion he may be born and whatever religion he may embrace, is according to the law of this country (which is the only relevant law) a British

subject owing allegiance to His Majesty, and of that allegiance he cannot rid himself except in certain prescribed ways. One may observe, as a matter of fact, that many thousands of Catholics have fought in the armed forces of this country in recent wars.”

That Fullagar pointed towards Section 116 of the Australian Constitution in defence of the nation's Catholics was apt. Half a century earlier, in the lead up to the Federation of the Australian colonies in 1901, Catholics had been ambiguous about the project, not least because the rhetoric surrounding Federation was distinctly British and imperial. Although he was a supporter, when Patrick Francis Cardinal Moran was informed that only the Anglican Primate would be allowed to read prayers and give blessings at the inauguration ceremonies, he led the Church in Australia in a boycott of Federation celebrations. Very few Catholics had participated in the preceding federal conventions that would decide the shape of the new Commonwealth. Only three of fifty delegates at the first convention in 1897 were Catholic: Patrick McMahon Glynn, Richard O'Connor (described as “one lone Catholic in a sea of Protestants”), and Matthew Clarke. It was Glynn who, as one writer puts it, “is popularly remembered, if remembered at all, as the man who put God into the Australian Constitution.” With the support of Victorian Presbyterians, Glynn convinced the final convention in Melbourne to insert the phrase “humbly relying on the blessing of Almighty God” into the preamble of the Constitution. Most importantly for those Catholics who would later face questions about their faith and allegiance to a foreign power, Glynn had the convention insert Section 116 into the Australian Constitution: “the Commonwealth could not legislate to establish any religion, to impose any religious observance, to prohibit free exercise of any religion, or to impose any religious test for holding Commonwealth office.”

In the end, Crittenden's accusations were dismissed. In his judgment, Justice Fullagar determined that the arguments put forward were “quite untenable”, that they were not sufficient grounds for declaring the Anderson's election void, and that “the petition shows on its face that it has no prospect for success, and that it is vexation and oppressive in the relevant sense.” The proceedings were “for ever stayed.” So unimpressed was Fullagar that instead of ordering Crittenden to pay fixed costs as was often the case, he crossed out the relevant phrases in his judgment and thereby opened the applicant to whatever costs Anderson had incurred defending himself. The judgment was published in full on the front page of Sydney's Catholic Weekly newspaper, which proudly declared: “Catholic M. H. R. Wins Case: Religion No Bar To Election, Judge Declares”.

As the editors of the *Southern Cross* in Adelaide had predicted in February 1950 as news of Crittenden's petition first emerged: “No Australian Catholic is under any act of acknowledgement, allegiance, or obedience or adherence to the Vatican State, or is a subject or citizen entitled to the rights or privileges of a subject or citizen of the Vatican State.” As Fullagar had recognised, however, that point was irrelevant: the framers of the Australian Constitution had, fifty years earlier, defended believers against discrimination when it came to the question of public office. Gordon Anderson held the seat of Kingsford Smith until his eventual retirement in 1958.