

2024 ANNUAL PLUNKETT LECTURE
**UNHERALDED NATION-BUILDER: ANOTHER DIMENSION OF JOHN
HUBERT PLUNKETT**

The Hon Andrew Bell*
Chief Justice of New South Wales
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Banco Court, Supreme Court of New South Wales



*The Hon John Hubert Plunkett, photo, Mitchell Library, State Library of NSW,
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* The Chief Justice acknowledges the significant assistance of his Researcher, Mr Jacob Lerner, in the preparation of this lecture.

- 1 I begin today by acknowledging that we meet on land for which the Gadigal people have cared and been custodians for thousands of years, and I extend my respects to all Aboriginal and Torres Strait Islander people, including any present here today.

- 2 John Hubert Plunkett would, I think, have been very comfortable with these words, and the sentiment and spirit in which they are offered. Although not the focus of my address this evening, Plunkett's role as the courageous and principled Crown Prosecutor (a dimension of his position as Attorney General) in the Myall Creek massacre trials in and of itself marks him out as one of the greatest barristers New South Wales has known. Mark Tedeschi's book on the subject, and Plunkett's role in it, deserves particular commendation.¹

- 3 As many here will know, that case involved the slaughter, in cold blood, of at least 28 unarmed indigenous Australians. Against public opinion at the time, he fearlessly prosecuted eleven of the perpetrators.² A not guilty verdict followed initially after the jury had deliberated for "about a quarter of an hour".³ Undeterred, Plunkett requested that the perpetrators be held in custody pending a second trial.⁴ He re-prosecuted seven of the perpetrators in front of a jury who were subject to intimidation: only 28 of the 48 people called for

¹ Mark Tedeschi, *Murder at Myall Creek: A Trial That Defined a Nation* (2017, Simon & Schuster).

² *R v Kilmeister (No 1)* [1838] NSW SupC 105.

³ *Ibid.*

⁴ Lyndall Ryan, "'a very bad business': Henry Dangar and the Myall Creek Massacre 1838" at 14, https://www.newcastle.edu.au/_data/assets/pdf_file/0015/31056/Henry-Dangar-and-the-Myall-Creekmassacre.pdf.

jury service showed up. Guilty verdicts followed; the seven men were hanged.⁵

- 4 This was one of the very few times that those who committed atrocities in the early days of settlement in Australia were brought to justice. It demanded courage, conviction and a deep sense of justice, qualities which coalesced in Plunkett. William Hobbs, the equally courageous station manager who reported the massacre to the Governor and was a witness in the trials certainly thought so: he named his son “John Hubert Plunkett Hobbs”.⁶
- 5 Many law students (and millions of others) are familiar with the great character of fiction, Atticus Finch, for his courageous advocacy in Harper Lee’s *To Kill a Mockingbird*.⁷ Here in New South Wales, in the middle of the 19th century, we did not need to resort to fiction to find such a paragon.
- 6 Three years prior to the Myall Creek massacre and trials, Plunkett had authored *The Australian Magistrate*,⁸ a work of great practical use, published at a time when much of the summary criminal justice in this colony was dispensed by Justices of the Peace who lacked legal qualifications or experience. Magistrates had onerous duties

⁵ *R v Kilmeister (No 2)* [1838] NSWSupC 110.

⁶ Lyndall Ryan, ““a very bad business”: Henry Dangar and the Myall Creek Massacre 1838” at 16-17, https://www.newcastle.edu.au/_data/assets/pdf_file/0015/31056/Henry-Dangar-and-the-Myall-Creekmassacre.pdf; “John Hobbs”, *Discover Shellharbour*, <https://discover.shellharbour.nsw.gov.au/nodes/view/762>.

⁷ (1960, J. B. Lippincott & Co.).

⁸ (Anne Howe, 1835). There is some debate as to whether it was the first legal textbook published in the colony, as to which see John Kennedy McLaughlin, ‘John Hubert Plunkett: An Irish Lawyer in Australia’ (2021) 50 *Australian Bar Review* 1, 1-2 (*McLaughlin Article*). Professor Molony, in John N Molony, *An Architect of Freedom* (Australian National University Press, Canberra, 1973) (*Molony*) at 165-166, noted that the text “helped bring a much needed degree of uniformity into the inferior courts, and that in its essence it was so long in use, indicated that [Plunkett’s] attention to his office, perhaps beyond the call of duty, was of great benefit to the young colony.”

to discharge without support,⁹ and Plunkett's work was born of a concern that this might lead to breaches of people's rights. The book runs to some 527 pages, and was published in 1835.¹⁰ Plunkett was then 33 years old and in his third year as Solicitor General of the colony. It is available on-line in the Australian Colonial Law Monograph Series on Austlii.¹¹ I draw attention to a particular passage in the context of his prosecution of the perpetrators of the Myall Creek massacre, remembering that this was penned three years prior to the trials. Speaking of the expression "King's Peace" in the definition of murder, Plunkett wrote:

"As to the words "the King's peace," in the definition of murder, they mean merely that it is not murder to kill an alien enemy in time of war. The Aboriginal Natives of the Colony are within "the King's peace," and the unlawful killing of them is as much murder, as the killing of any other of the King's subjects."¹²

7 In 1839, the year following the Myall Creek massacre and trials, Plunkett proposed a bill to allow indigenous Australians to give evidence in Court on oath.¹³ At the time, indigenous Australians were regarded as not competent to do so due to a lack of belief in the God to whom the oath was to be sworn. The bill did not succeed. While it passed the Legislative Council, it was never presented to the Queen as required.¹⁴ Many further attempts were made over the years that followed to make this change, and Plunkett was

⁹ See, e.g. *An Australian Magistrate*, preface.

¹⁰ Plunkett published three other legal texts, too: *Brief Summary of the Law of Landlord and Tenant*, apparently published in around 1845, *The Magistrate's Pocket Book* in 1859 (J Moore), and *On the Evidence of Accomplices* in 1863 (JJ Moore).

¹¹ John Hubert Plunkett, 'The Australian Magistrate' [1835] AUCoLLawMon 1, <https://classic.austlii.edu.au/au/journals/AUCoLLawMon/1835/1.html>.

¹² Ibid at 234. *An Australian Magistrate* was repeatedly republished, although not by Plunkett. A second edition was published in 1840 by a Mr Michael Murphy, a Police Magistrate in New Zealand, under the name *Plunkett's Australian Magistrate*. Further editions were published in 1847 and 1860, at which time the preface noted that Plunkett had been consulted about the work: William H Wilkinson, *Plunkett's Australian Magistrate* at v.

¹³ "Legislative Council", Sydney Herald (Sydney), 23 September 1839 at Supplement p 1, <https://trove.nla.gov.au/newspaper/page/1525857>.

¹⁴ *Molony* at 151.

involved with nearly all of them. In a speech in the Legislative Council ten years later, having recounted numerous injustices faced by indigenous Australians – murder, poisoning, and shooting – Plunkett said:

“[I] might enumerate many other instances of a similar kind, and for all this there was no remedy but that of admitting the testimony of aboriginal witnesses.”¹⁵

8 Plunkett had a great commitment to equality and non-discriminatory treatment of human beings, be they indigenous, Roman Catholic, Jewish or members of some other minority group. That fierce commitment to equality and non-discrimination, tolerance and liberalism, was undoubtedly born of his Irish upbringing with all that that entailed.¹⁶ For example, it was only in 1792, ten years before Plunkett’s birth, that Catholics were permitted to practice law in Ireland (and medicine)¹⁷ – and it was not until 1829 that Catholics could join the Inner Bar.¹⁸ The qualities of non-discrimination, tolerance and liberalism, and a deep sense of social justice, informed much of Plunkett’s other work as a legislator and public servant. This will be the focus of this address which it is my great pleasure to deliver as the twelfth Plunkett Lecture. My title is “Unheralded nation-builder: another dimension of John Hubert Plunkett”.

¹⁵ “Legislative Council”, Sydney Morning Herald (Sydney), 29 June 1849 at 2, <https://trove.nla.gov.au/newspaper/page/1512903>.

¹⁶ Plunkett had grown up in an Ireland riven by sectarianism. Indeed, although by 1793 Catholics were permitted to attend Trinity College Dublin (from which nearly all Irish lawyers had graduated) (see *Roman Catholic Relief Act 1793* (Ireland); 33 Geo III c. 21 (Ireland) (9 April 1793) s 13), the Catholic Church had threatened excommunication for anyone who attended Trinity without permission from his Bishop, as a means of deterrence from attending Trinity that persisted until 1970. There is no record of Plunkett – who remained a devout Catholic – ever having sought such permission: see *McLaughlin Article* at 1-2.

¹⁷ Due to 32 Geo III c. 21 (Ir) (18 April 1792), entitled *An Act to remove certain restraints and disabilities therein mentioned, to which His Majesty’s subjects professing the Popish religion are now subject*.

¹⁸ See *Roman Catholic Relief Act 1829* (Ireland); 10 Geo IV c. 7 (13 April 1829) s 10.

- 9 Before turning more fully to that other dimension, the dimension of Plunkett's life and work which will be most familiar to this audience (apart from his role in the Myall Creek massacre trials) revolved around Plunkett's service as Solicitor General and subsequently as Attorney General, an office in which he served for more than 20 years, both prior to and after representative government.¹⁹
- 10 Francis Forbes had been Chief Justice for six years by the time Plunkett, then 30, arrived in Sydney in 1832 to take up the position of Solicitor General. He would appear regularly before Forbes until the latter's retirement in 1837 by which time Plunkett had been formally appointed Attorney General, although he continued also to discharge the work he had performed as the second law officer.
- 11 He would continue as Attorney General during the seven year tenure of Sir James Dowling as the State's second Chief Justice until Dowling's death in 1844. It was Dowling who presided over the first Myall Creek trial.
- 12 Upon Dowling's death, Plunkett was in competition with Sir Alfred Stephen, the senior puisne judge, to be the colony's third Chief Justice.²⁰ Twenty five years later, at the time of Plunkett's death,

¹⁹ Having arrived in NSW as the Solicitor-General, Plunkett promptly set to work as Solicitor-General on a salary of £800 per annum. His superior, the Attorney-General, John Kinchela, was deaf, meaning that most of the Attorney's work fell to him. This was especially so for Court work, at a time when the Attorney personally appeared in most serious criminal matters, which largely prevented Plunkett exercising his right to private practice. It should be remembered at this time the Colony of NSW extended to Port Phillip in the South and Moreton Bay and beyond to the north, meaning Plunkett was responsible for a geographically disparate jurisdiction. By February 1836, Plunkett was formally appointed as Attorney-General, with a salary of £1200, and the office of Solicitor-General was temporarily abolished. Plunkett was left to do both jobs.

²⁰ In 1844, James Dowling died in office as Chief Justice. Much positioning then ensued; Plunkett and then serving Justice Alfred Stephen angling for Chief Justice, a variety of others angling for vacancies that might arise through their promotions. Plunkett had by then been Attorney-General for some eight

aged 69, Stephen was still in office and would remain so for almost another five years.

- 13 To complete the contextual picture, late in life, between 1863 and 1865, Plunkett again held office, this time in the ministry of Sir James Martin, who would become our fourth Chief Justice, and, famously, a three-time Premier.
- 14 As with Sir James Martin, interest in whose life has been revived by the annual Sir James Martin lecture under the auspices of the Lysicrates Foundation, so too this lecture series has contributed significantly to the knowledge of the life and work of John Hubert Plunkett, and the Francis Forbes Society deserves special commendation for its support and sponsorship.
- 15 The relative paucity of Plunkett scholarship is something of an enigma given that, in the words of Sir Alfred Stephen at the time of Plunkett's appointment as the colony's first Queen's Counsel in 1856:²¹

years, and felt he had the better claim to be appointed Chief Justice, especially having served for longer in colonial New South Wales.

As history demonstrates, not everyone saw it that way. Plunkett and Stephen's claims both rested on their long service to the Colony. In Stephen's case, he plausibly claimed that he "looked forward to judicial advancement": *Molony* at 62. Plunkett drew on the custom in England and Ireland by which an Attorney-General had a right to a vacancy on the bench, whether as a puisne Judge or Chief Justice.

Governor Gipps called the Executive Council together to appoint an Acting Chief Justice in light of the manoeuvring. He favoured Plunkett for the position of Acting Chief Justice due to his long service, but he was outvoted: *Molony* at 64. The Herald thought it was beyond argument that Justice Stephen was the deserving candidate: "The Late John Hubert Plunkett", *Sydney Morning Herald* (Sydney), 19 May 1869 at 6, <https://trove.nla.gov.au/newspaper/page/1461756>. Dr John Bennett, in his biography of Stephen, disagreed, describing his conduct as "decidedly hostile and duplicitous": John Bennett, *Sir Alfred Stephen* (Federation Press, 2009) at 130.

²¹ "Bar History", *NSW Bar Association*, <https://nswbar.asn.au/the-bar-association/bar-history>.

“there will be no name recorded by the pen of history, in Australian annals, with juster or more enduring praise than that which belongs to Mr Attorney-General Plunkett.”²²

and, shortly, after Plunkett’s election to the first Legislative Assembly in 1856, the *Sydney Morning Herald* would editorialise that “no name would shine brighter than Plunkett’s in the pages of Australian history.”²³

16 Those predictions did not eventuate. There is no statue of him although there is a street name, associated appropriately, as will appear, with the Plunkett Street School. There is also a building named after him at St John’s College at Sydney University and there is the Plunkett Centre for Ethics attached to the Australian Catholic University, but that would seem to be the extent of it.

17 Why this should be is intriguing. Plunkett left very few personal papers.²⁴ He had no children to sustain his legacy. His independence and strong commitment to anti-sectarianism had engendered hostility from powerful political figures including Henry Parkes and also Charles Cowper, later the Premier but also known as “the Member for the Church of England”.²⁵ He also had an admirable modesty which Dr JM Bennett surmised cost him dearly

²² “Supreme Court – Monday. First Day of Term”, *Sydney Morning Herald* (Sydney), 24 June 1856 at 4, <https://trove.nla.gov.au/newspaper/article/28640421/3859546>. The full quote is as follows:

“Throughout the long period to which we have adverted, the duties of Advocate for the Crown, and of Public Prosecutor - exercising also the functions of a Grand Jury - have been discharged by you with singular moderation, ability, and firmness; with zeal tempered by discretion, with humanity, never relaxing into sympathy for crime, with an integrity which may defy the breath of slander, and an impartiality on which suspicion has never rested. When the contests of party shall have passed away, and the voice of friendship and of calumny have been alike silenced by death, and the grave has closed over the generations which now know us, there will be no name recorded by the pen of history, in Australian annals, with juster or more enduring praise than that which belongs to Mr Attorney-General Plunkett.”

²³ “Friday, March 14, 1856”, *Sydney Morning Herald* (Sydney), 14 March 1856 at 4, <https://trove.nla.gov.au/newspaper/page/1499427>.

²⁴ *Molony* at xii.

²⁵ John M Ward, “Cowper, Sir Charles (1807-1875)”, *Australian Dictionary of Biography*, <https://adb.anu.edu.au/biography/cowper-sir-charles-3275>.

in the manoeuvring for the Chief Justiceship following Dowling's death (although his Catholicism and strong anti-sectarianism, then already well known in the colony - as shall also be seen - had not assisted his candidature).

- 18 Parenthetically I note that the published scholarship relating to Plunkett has very recently been augmented by the posthumous publication by Federation Press, in the last few days, of the late former Associate Justice Dr JK McLaughlin's marvellous work entitled "The immigration of Irish lawyers to Australia in the 19th century".²⁶
- 19 Plunkett's life in New South Wales spanned almost 40 years, and straddled three political systems: first, that established by the Third Charter of Justice and the creation, in 1824, of the Legislative Council; second, that implemented by the *Constitution Act* of 1842 which brought a limited form of representation; and third, representative democracy after the passage of the 1855 *Constitution Act*. Plunkett held office under each governmental structure, initially as a member of the Executive Council, as a member of the Legislative Council, as a member of the Legislative Assembly and then returning to the Legislative Council as its President.
- 20 His nearly 40 years in New South Wales was punctuated by only one return trip to the United Kingdom in 1841-1842 but even then, he worked for the interests of the colony. While the *New South*

²⁶ Dr John Kennedy McLaughlin AM, *The Immigration of Irish Lawyers to Australia in the 19th Century: Causes and Consequences* (2024, Federation Press) ('*McLaughlin Book*').

Wales Constitution Act 1842 (UK)²⁷ was being drafted by the Colonial Office, Plunkett as it happened was on leave but was called on to assist. The *New South Wales Constitution Act 1842* (UK) provided for a partially representative government: a Legislative Council of 36 members, two-thirds elected by the (limited) franchise of the colony with the remaining being appointed by the Crown, of whom no more than six were to be officials.²⁸ It was a very important “pivot point”²⁹ on the journey to a more representative democracy.

- 21 Much of that Act’s drafting can likely be attributed to Plunkett. As Lord Stanley, then the Secretary of State for War and the Colonies (and later thrice Prime Minister of the United Kingdom), wrote to Governor Gipps when he transmitted the new Constitution:

“I have also gladly availed myself of the presence in this country [the UK] of the Attorney-General of New South Wales, to obtain the benefit of his local knowledge and experience in the arrangement of many points of detail. Under these circumstances, the Bill has passed without a dissentient voice through both Houses of Parliament.”³⁰

- 22 The happy accident of Plunkett’s presence in the United Kingdom at such a vital time for the new Colony, and the importance of his influence, should not be underestimated. At the time, it certainly wasn’t. The *Australasian Chronicle*, for instance, said the following after Plunkett arrived back in Sydney:

“The Colonists have had already a long and satisfactory trial of the integrity and impartiality of this Chief Officer of Justice as the administration of the very arduous and not unfrequently unpopular duties devolving on the Attorney

²⁷ See generally Professor Emerita Anne Twomey, ‘The Constitution Act of 1842 and the Struggle for Responsible Government’ (Speech, The Spark: The Act that Brought Parliament and the Supreme Court to NSW, 14 November 2023), <https://www.parliament.nsw.gov.au/about/Documents/Bicentenary/spark-conference-2023-hansard.pdf> at 72-79 (‘Twomey’).

²⁸ *Molony* at 41.

²⁹ *Twomey* at 73.

³⁰ As cited in *Molony* at 42.

General of the Crown – and we believe there is hardly a second opinion in Australia regarding the good and sound qualities both of head and heart possessed by John Hubert Plunkett.

During Mr Plunkett's absence in England we have reason to think that he has done the Colony some important services. For a good deal of the sound and liberal features embodied in the present [*Constitution Act*], we are in a considerable degree indebted to the honest and enlightened views of Mr Plunkett ... May he long live to enjoy the high and confidential situation he now fills and to assist in carrying out to their full extent the blessings of free Institutions so recently conceded to the people of New South Wales."³¹

- 23 The 1842 Constitution may be thought to exemplify what Dr McLaughlin in his recently published work records as Plunkett's motto – "Festina Lente" – hasten slowly.³² The Constitution was a very significant step on the way to representative democracy, which would be secured some 13 years later (albeit with limitations as to the franchise with which we are well familiar).
- 24 When we think of government in the 21st century, core areas of legislative and executive responsibility include education and health as well as social security. Modern governments, at both state and federal level, also continue to be involved in issues of religious freedom and, as I continually emphasise, the rule of law underpins all of this. These were also the pre-occupations of colonial government in the 19th century, during Plunkett's almost 40 years of public service.
- 25 As I shall seek to illustrate, Plunkett had an unmistakeable hand in all of these areas, in part no doubt because, as Attorney General, he would have had a significant role in the drafting of much colonial legislation. But it was surely more than that. We see in much of the

³¹ "Arrival of the Attorney-General", *Australasian Chronicle* (Sydney), 9 August 1843 at 2, <https://trove.nla.gov.au/newspaper/page/4232670>.

³² *McLaughlin Book* at 99, fn 112.

legislation I shall address an abiding commitment to social justice and what we would think of as a distinctly modern liberal flair (although perhaps we should think again in relation to modernity's claim to such a value).

Education

- 26 Let me begin with education.
- 27 In 1825, the Sydney Public Free Grammar School had been established in the colony under the headmastership of one Laurence Hynes Halloran, described by the Australian Dictionary of Biography as a “bogus clergyman, schoolmaster and journalist”. It was a private institution and had failed by October 1826.
- 28 In 1830, Sydney College was founded with Francis Forbes as its President. It would move to the site of what is now Sydney Grammar School in College Street in 1835. The King's School at Parramatta had been established in 1831 by Bishop Broughton under the Royal patronage of King William IV. It took its first three students in the same year as Plunkett's arrival in the colony.
- 29 Plunkett favoured the so-called “Irish National System”, which combined secular, state-run education with some general religious instruction and a day per week of denominational instruction, with students splitting along denominational lines.
- 30 Plunkett expressed views that the State ought to take a role in education as early as 1833.³³ It was vigorously opposed by the

³³ See *Molony* at 233.

Anglican Church, which was implacably opposed to the State taking any role in education other than funding Church schools, and viewed it as an unwarranted secularisation which risked removing the youth of the Colony from the Church. There was more than an undertone of anti-Catholicism, too.³⁴

- 31 Plunkett was undeterred. In his view, the new system was needed for two reasons. First, and most obviously, there was a pressing need to ensure all in the Colony could be educated:

“The stream of knowledge should flow for all and for ever, and there in no part of the earth more in need of their fertilizing influence than New South Wales ... If the youth of this Colony are left to be educated according to the voluntary inclinations of their parents, there will be no education at all, for it is well known that the greater number of the people sent to this Colony can neither read nor write, and if so, it is not the grown man who commits the crime that is to blame, but the blame is with the Government that allows him to grow up in ignorance...”³⁵

- 32 Second, in his view it was entirely wrong to use religion to frustrate education, particularly as, in Plunkett’s words, the experience of non-denominational education “subdues hostility and softens asperities”.³⁶ He went on:

“...It is lamentable that religion should be the stalking horse for the stoppage of education at every step... The springs of knowledge ought never to be closed against any party on account of their creed.”³⁷

- 33 Here, he spoke from experience. Not only did he reference his own time at Trinity College, Dublin, a Protestant institution, but he was also the only Catholic in the Legislative Council at the time. It is, of course, worth noting that the (Anglican) Bishop of Sydney sat in the

³⁴ *Molony* at 203.

³⁵ “Legislative Council”, *Sydney Herald* (Sydney), 2 September 1839 at Supplement p 2, <https://trove.nla.gov.au/newspaper/article/12860702/1525816>.

³⁶ *Ibid.*

³⁷ *Ibid.*

Legislative Council at this time.³⁸ As to the persistence of sectarianism in the colony and as will be seen in the forthcoming history of the Supreme Court, there would be a hiatus of approximately 80 years between Roger Therry's appointment to the Court and that of another Roman Catholic.

34 Plunkett convinced many, but it was not enough to overcome predominantly Anglican opposition, and the issue was left to languish, and a denominational education system plodded along, with over half of the children in the Colony receiving no education at all.³⁹

35 A compromise was finally reached by 1848, when two boards were set up: the National Education Board, operating what we would now call state schools, and a "Denominational Schools Board" to oversee the denominational system, which the government would finance but not operate.⁴⁰ Plunkett, although not convinced that two systems were beneficial, became the first Chairman of the National Education Board, and within three years had set up 35 schools, with a further seven handed over to the newfound Colony of Victoria.⁴¹

36 Opposition remained to the State's intervention in schooling, however, and many clergy refused to go into the "national schools" to deliver religious instruction. Charles Cowper, later the Premier but as noted above then known as "the Member for the Church of England" for his vigorous advocacy for Church Schools as

³⁸ Ibid at Supplement p 1, <https://trove.nla.gov.au/newspaper/article/12860702/1525815>.

³⁹ *Molony* at 205.

⁴⁰ Ibid at 206.

⁴¹ Ibid.

Chairman of the Denominational Schools Board,⁴² attacked it in 1851 as an 'infidel system',⁴³ which earned a lengthy and characteristically rousing rebuke from Plunkett, which swung James Martin, another future Premier, in favour of the system.⁴⁴

37 It should be noted that the regulations of the National Education Board banned the use of school houses for political meetings or public worship.⁴⁵ It is very likely that Plunkett was an author of these regulations, and he certainly administered them.

38 The battle between Cowper and Plunkett continued when Cowper became Premier, Cowper being described as the "most pertinacious enemy" of the National Schools.⁴⁶ In 1858, an exchange occurred between Plunkett and Cowper in which Plunkett effectively repudiated cabinet responsibility, and Plunkett was sacked, following the parliamentary elections then in progress, after an Executive Council Meeting.⁴⁷ Plunkett immediately resigned all his public offices, including the Presidency of the Legislative Council, accusing the government of commencing a "reign of terror".⁴⁸

39 However, the press was firmly on Plunkett's side. The Herald said that Cowper "deserves the reprobation of the colony – as deceitful

⁴² John M Ward, "Cowper, Sir Charles (1807-1875)", *Australian Dictionary of Biography*, <https://adb.anu.edu.au/biography/cowper-sir-charles-3275>.

⁴³ "Legislative Council", *Sydney Morning Herald* (Sydney), 29 November 1851 at 2, <https://trove.nla.gov.au/newspaper/page/1509493>.

⁴⁴ *Ibid* at 2-3.

⁴⁵ *Regulations and Directions to be attended to in Making Application to the Commissioners of National Education for Aid Towards the Building of School Houses or for the Support of Schools* (Sydney, 1849) V, 3 at 12, <https://fromthepage.com/statelibrarynsw/macarthur-papers-1789-1936/volume-86-macarthur-family-papers-relating-to-national-schools-camden-and-district-1849-1871/quest/32871836>.

⁴⁶ "Wednesday, February 10, 1858", *Sydney Morning Herald* (Sydney), 10 February 1858 at 4, <https://trove.nla.gov.au/newspaper/article/28634240>.

⁴⁷ *Molony* at 256-257.

⁴⁸ *Ibid*.

and un-English” and accused him of political cowardice.⁴⁹ It lauded Plunkett’s public service, pointing out his tolerance of all men. Three days later, the Herald printed the laudatory remarks concerning Plunkett that had been published in the Illawarra Mercury, the Maitland Mercury and the Goulburn Chronicle.⁵⁰ The Maitland Mercury opined:

“Whichever party may ultimately prove to have been in the wrong, it must be a matter of great regret to all who can appreciate the services of Mr. Plunkett to this country for so many years, and his high unblemished character, at their true worth that anything should have occurred between him and the Government to cause his dismissal from a post of honour, and to lead in turn to his resigning every office he held connected with the Government, or the public service of the country. The quarrel is treated by Mr. Plunkett evidently as a personal one between himself and Mr. Cowper, and in this spirit the Herald has commented on the transaction, in an article in its Monday’s issue. We will wait to hear both sides, before deciding in this summary way, that Mr. Cowper has committed an act of tyranny, from personal or sectarian motives.

...

If the facts are exactly as put by the Herald, Mr. Cowper has signally proved his incapacity to distinguish between his sectarian leanings and his duty as Premier of the country; and has thus demonstrated his unfitness for the latter office.”⁵¹

40 Of particular note was that the Herald later pointed out specifically that:

“He has consecrated his time, his money, his official and private influence to bring within reach *of all sects and classes* that teaching which he believes will tend to their well-being.”⁵²

41 Unsurprisingly, at this time there were all manner of protests and rallies calling for Plunkett’s reinstatement. One rally featured “about

⁴⁹ “Wednesday, February 10, 1858”, Sydney Morning Herald (Sydney), 10 February 1858 at 4, <https://trove.nla.gov.au/newspaper/article/28634240>.

⁵⁰ “Mr Plunkett and Mr Cowper”, Sydney Morning Herald (Sydney), 13 February 1858 at 5, <https://trove.nla.gov.au/newspaper/page/1493999>.

⁵¹ “Mr Plunkett and The Government”, Maitland Mercury (Maitland), 11 February 1858 at 2, <https://trove.nla.gov.au/newspaper/page/130908>.

⁵² “Tuesday, February 16, 1858”, Sydney Morning Herald (Sydney), 16 February 1858 at 4, <https://trove.nla.gov.au/newspaper/article/13006315/1494014>.

a thousand persons” in a “popular meeting *sui generis*” who wanted “deliberate action” in Plunkett’s favour.⁵³ There was a partial censure of the government in the Legislative Assembly, after fierce debate.⁵⁴ Plunkett took some time before returning to public life that September. In 1859 he helped defeat a proposal from Cowper to make the Education Boards less independent of Parliament.⁵⁵ That ultimately precipitated the downfall of Cowper’s government. Plunkett got the last laugh – and he was ultimately asked to chair the National Education Board again, although he declined.⁵⁶

- 42 Plunkett’s hand and values can I suspect also be detected in the *Sydney Grammar School Act 1854* (NSW), the preamble to which was in the following terms:

“WHEREAS it is deemed expedient for the better advancement of religion and morality and the promotion of useful knowledge to establish in Sydney a public school for conferring on all classes and denominations of Her Majesty’s subjects resident in the Colony of New South Wales without any distinction whatsoever the advantages of a regular and liberal course of education.”

- 43 Almost identical language appeared in the preamble to the *University of Sydney Act 1850* (NSW)⁵⁷ and we know that Plunkett took a vital interest in its establishment, being on the Select Committee, seconding the Bill in the Legislative Council⁵⁸ and becoming an inaugural senator. Even in this, he fought for equality.

⁵³ Ibid at 5, <https://trove.nla.gov.au/newspaper/page/1494015>.

⁵⁴ “Legislative Assembly”, *Sydney Morning Herald* (Sydney), 29 April 1858 at 2-5, <https://trove.nla.gov.au/newspaper/page/1494550>.

⁵⁵ *Molony* at 266.

⁵⁶ Ibid at 267.

⁵⁷ See the recital to that Act.

⁵⁸ *Molony* at 71-72.

He vigorously defended the right of William Bland, as an ex-convict, to be a Fellow of the Senate, a proposal which was later defeated.⁵⁹

- 44 The non-discriminatory and pointedly anti-sectarian words in both the *University of Sydney Act* and the *Sydney Grammar School Act* are worth special emphasis, as at that point in time in the United Kingdom, Roman Catholics were still not permitted to attend Oxford or Cambridge. That was modified slightly for Oxford in 1854⁶⁰ and for Cambridge in 1856⁶¹; Oxford then allowed Roman Catholics to undertake Bachelor's degrees, and Cambridge allowed any level of degree, but only in Arts, Law, Music or Medicine. Even then, at both institutions, Catholics were precluded from becoming a member of the Senate or holding an office in the University.⁶²
- 45 Indeed, it was not until the *Universities Tests Act 1871* (UK) that religious tests were abolished that Roman Catholics, non-conformists and non-Christians could take up professorships, fellowships, studentships and other lay offices at Oxford and Cambridge.⁶³ So, the explicit anti-sectarian and non-discriminatory language in Sydney University's foundation statute, almost certainly the language of John Plunkett, was quite remarkable for its time.
- 46 Plunkett went on to serve as Vice-Chancellor of the University between 1865 to 1867, an appointment with which he was "delighted".⁶⁴

⁵⁹ *Ibid* at 74.

⁶⁰ See *Oxford University Act 1854* (UK) ss 43-44.

⁶¹ See *Cambridge University Act 1856* (UK) s 45.

⁶² See *Oxford University Act 1854* (UK) ss 44 and *Cambridge University Act 1856* (UK) s 45.

⁶³ See *Universities Tests Act 1871* (UK) s 3.

⁶⁴ *Molony* at 279.

47 In a speech delivered last year, I also highlighted Plunkett’s critical role in the establishment of St John’s College at the University of Sydney.⁶⁵ He spoke at a fundraiser for the College at St Mary’s Cathedral on 4 August 1857, in an address that was substantially printed in the *Sydney Morning Herald*. The strong sectarianism which still existed in the United Kingdom at that time featured prominently in his speech. The contrast between the “old country” and the fledging New South Wales democracy was extraordinary. The laws still on the statute books in the United Kingdom, Plunkett said that night, “set class against class, and religion against religion”.⁶⁶ He contrasted the position in New South Wales – “here”, he said proudly “instead of having any hostility against each other, we all run in the same race, and wish success one to another.”⁶⁷ The *Sydney Morning Herald* recorded that there were “cheers” at this point. Plunkett rose to a crescendo (albeit not a conclusion, for it was a very long speech) saying:

“We all have the same object in view – the general elevation of the country, and to prove to the world that the best way to make all classes satisfied is to have laws based on civil and religious liberty.”⁶⁸

The *Herald* recorded “loud applause” at these lofty and progressive sentiments.

48 The *St John’s College Act 1857* (NSW) was passed later that year. He served the College for many years as a fellow of the College

⁶⁵ ‘St John’s College Faculty of Law Dinner Address’ (Speech, St John’s College, 22 March 2023), https://supremecourt.nsw.gov.au/documents/Publications/Speeches/2023-Speeches/Chief-Justice/Bell_20230322.pdf.

⁶⁶ “St. John’s College”, *Sydney Morning Herald* (Sydney), 4 August 1857 at 5, <https://trove.nla.gov.au/newspaper/article/12998866/1496578>.

⁶⁷ *Ibid.*

⁶⁸ *Ibid.*

Council, sitting through some 144 meetings on top of his myriad other commitments.⁶⁹

49 Although the *St John's College Act* was clearly directed to the education of Roman Catholics, land had been set aside at Sydney University for other religions including the Anglicans and the Wesleyans.

50 It could fairly be said that Plunkett is the father of *state* and *secular* education in New South Wales and therefore Australia. A more valuable instance of state-building would be difficult to identify.

Hospitals

51 Plunkett also played a major role in founding St Vincent's Hospital. Plunkett had always been associated with the Sisters of Charity, and in 1856 was the initiator of a scheme to start a hospital in Sydney under their care.⁷⁰ The hospital, as we have come to expect from Plunkett, was open to Catholics and Protestants, and one of its principal surgeons was a Protestant.⁷¹

52 Plunkett's involvement does not appear to have continued for very long, due to a slightly arcane but seemingly very fractious dispute about the removal of Protestant bibles from the Hospital by a chaplain.⁷² Although this led to a rift between Plunkett and the Church, then led in Sydney by Archbishop Polding, Plunkett was apparently met with encomium, with the Herald giving him a lengthy

⁶⁹ R.A. Daly, *One Hundred Years on Grose's Farm* (1977) at 612.

⁷⁰ *Molony* at 262.

⁷¹ *Ibid* at 263.

⁷² *Ibid* at 264.

endorsement in his campaign for the seat of West Sydney shortly thereafter:

“Mr Plunkett is a man whom we shall ever mention with admiration and gratitude. Twenty-seven years ago, this day, he landed on these shores. He found thousands of his fellow-beings in bondage – down-trodden, tortured, debased! – he found them in the moral degradation which is the result of slavery as well as of crime. ... From that moment his voice was on the side of the oppressed; he protested against tyranny; he mitigated the severity of the convict system; and, at a time of great crisis, he stood up alone – and spoke and voted for the abolition of transportation.

Mr Plunkett was then, as now, the hearty honest friend of religious liberty. To him the ages of religious strife had taught only a lesson of charity and tolerance.
...

Mr Plunkett was Attorney-General for twenty years. What was the verdict of the colony when he laid down his office? Never was public justice brought under momentary suspicion by him. Mistakes, we suppose, were made, but never was he even suspected of deliberate wrong.... Mr Plunkett never feared the face of man, but defended the right cause.

His services to popular education are associated with the National system...tens of thousands who are now up grown, have obtained their education in those schools. Has any one ever complained of interference with his faith, of insult or partiality?

.... No man among us is more worthy of their admiration.”⁷³

53 That leads me naturally enough to a sphere of activity of which Plunkett was evidently most proud, namely his commitment to freedom of religion.

Freedom of Religion and the Church Building Act

54 By 1836 and after only four years in the colony, Plunkett had established himself as the primary advisor to Governor Bourke, interestingly a fellow Irishman and life long Whig.⁷⁴ It was in this context that the two combined to make good what Plunkett later

⁷³ “Tuesday, June 14, 1859”, Sydney Morning Herald (Sydney), 14 June 1859 at 4, <https://trove.nla.gov.au/newspaper/page/1491269>.

⁷⁴ See Hazel King, “Sir Richard Bourke (1777-1855)”, *Australian Dictionary of Biography*, <https://adb.anu.edu.au/biography/bourke-sir-richard-1806>.

regarded as his most important contribution to New South Wales:⁷⁵ the *Church Building Act 1836* (NSW). The Act had the ostensible purpose of providing aid to build and maintain churches throughout the colony in order to aid its development, a noble goal. But in so doing, Plunkett, the Act's draftsman,⁷⁶ achieved a more far-reaching goal, which was to clarify the State's position as to the Church of England.

- 55 That is, the *Church Building Act* provided state aid to churches of *any* Christian denomination, not merely to the Church of England.⁷⁷ The import of this cannot be overstated. At the time of its passage, the *Roman Catholic Relief Act 1829* (Ireland), widely regarded as the principal legislation underpinning the Catholic Emancipation, still provided for the extensive suppression of Jesuits, providing for the “banish[ment]” of any immigrant Jesuit and significant fines for any local Jesuits.⁷⁸ But, in what might be regarded as the first example in New South Wales of Plunkett's anti-sectarianism, the *Church Building Act* simply provided for aid to “the Christian religion” generally.
- 56 One historian has described The *Church Building Act* as the Act “by which religious equality was firmly and permanently established in this colony.”⁷⁹ Plunkett himself regarded it as his *magnum opus*. The

⁷⁵ See “City of Sydney Election”, Sydney Morning Herald (Sydney), 21 March 1856 at 5, <https://trove.nla.gov.au/newspaper/page/1499476>.

⁷⁶ *Ibid.*

⁷⁷ See *Church Building Act 1836* (NSW) preamble.

⁷⁸ *Roman Catholic Relief Act 1829* (Ireland) ss 28-30.

⁷⁹ Roderick Flanagan, *The History of New South Wales* (2011, Cambridge University Press) at 512-513.

Sydney Morning Herald reported that Plunkett had spoken on this in the Legislative Council in 1852:

“There was no action of his life that he could look back upon with so much pride and satisfaction...It broke that spirit of church ascendancy in this colony which had ever led to the bitterest animosities in other communities. It put an end to the jealousies, heart burnings and resentments which will always prevail where any man’s faith is proscribed, or in any way placed under ban. It promoted the spread of religion, for it encouraged every man to worship God according to his own conscience, and while he did this, the public good, the public morality, the public character, was served.”⁸⁰

- 57 That shows Plunkett in two lights – a characteristic concern for the morality and civility of his adopted homeland, and a fierce protector of equality.
- 58 It is appropriate to note that Plunkett’s religious egalitarianism extended to Jews; he was no mere Catholic crusader. He voted against a motion later to support churches on a per capita basis on the grounds that “Christian” was used in the motion, thereby excluding Jews.⁸¹ He fought for aid to be extended to the Jewish community to pay for costs outlaid in building a synagogue.⁸²
- 59 The proposed payment of money for the synagogue – which was to include a payment for a Rabbi’s house and stipend – has an interesting history. In building the York St Synagogue, a predecessor to the Great Synagogue now on Elizabeth St, the Jewish community had incurred significant debts.⁸³ A government

⁸⁰ “Legislative Council”, *Sydney Morning Herald* (Sydney), 30 September 1852 at Supplement p 1, <https://trove.nla.gov.au/newspaper/page/1508620>.

⁸¹ *Molony* at 245.

⁸² “Legislative Council”, *Sydney Morning Herald* (Sydney), 25 October 1845 at 2, <https://trove.nla.gov.au/newspaper/article/12883063/1517242>.

⁸³ This probably assisted in making the building a “very pleasing structure of the Egyptian order”, although the *Herald* placed the resultant debt at around £1500: “Opening of the Jews’ Synagogue”, *Sydney Morning Herald* (Sydney), 3 April 1844 at 2, <https://trove.nla.gov.au/newspaper/article/28651368/1521442>.

payment to defray the cost – as was available to Christian communities – was first discussed in 1845 and the payment was approved by the Legislative Council but in a form deliberately designed to be *ultra vires* from the fund out of which it was to be paid, which Plunkett rightly fought against.⁸⁴ He lost, and the Jewish community therefore initially received nothing. In 1846, the matter came up again, while Plunkett was away prosecuting in Berrima, and it was approved in a form that was actually payable (and it was paid!) although the proposed stipend for a Rabbinic salary was rejected by then-Governor, FitzRoy.⁸⁵

60 Around this time, one newspaper publisher said that he hoped the Jewish community might realise that Plunkett was their real ally.⁸⁶ He was, as a result, given strong support from the Jewish community throughout his political career.⁸⁷

61 Indeed, at a public meeting of 80 or 90 Jewish men to acknowledge the election of Baron Rothschild to a seat in the English Parliament, Saul Samuel, the first Jewish Magistrate, is recorded as having said:

“... there were, as he had said, some friends of civil and religious liberty in the colony who were before the prejudices of those who had kept them back from their rights so long. For himself he could say that for many years back he had been appointed and recognised as a magistrate, and in common with many

⁸⁴ “Legislative Council”, Sydney Morning Herald (Sydney), 25 October 1845 at 2, <https://trove.nla.gov.au/newspaper/article/12883063/1517242>. Interestingly, Charles Cowper, who had demonstrated his prejudice against Catholics openly to Plunkett, showed his true colours when he moved to ensure the Jewish community received no support, saying that “it was the duty of the Government to support the truth and the truth only”.

⁸⁵ *Molony* at 210; “Legislative Council”, Sydney Morning Herald (Sydney), 16 September 1846 at 3, <https://trove.nla.gov.au/newspaper/article/12895069/1516036>; “Legislative Council”, Sydney Morning Herald (Sydney), 26 September 1846 at 2, <https://trove.nla.gov.au/newspaper/article/12898394/1516079>. It is not clear that the proposed Rabbi’s house was ever actually built.

⁸⁶ “The Hebrew Petition”, *Weekly Register* (Sydney), 25 October 1845 at 195, <https://trove.nla.gov.au/newspaper/page/22337314>.

⁸⁷ See, e.g., Sydney Morning Herald (Sydney), 7 January 1856 at 8, <https://trove.nla.gov.au/newspaper/page/1501072>.

other distinguished men in the colony, they were indebted for the manly, independent parts in the assertion of the civil and religious rights which had always been taken by Mr. Plunkett.”⁸⁸

62 This was followed by Samuel Cohen, soon to become a member of the Legislative Assembly, saying:

“In this country, the greatest tolerance was extended to all, and he heartily concurred in the sentiment expressed by Mr Samuel that the Jews of New South Wales owed a debt of gratitude to Mr Plunkett, for the liberal views he had ever entertained towards them as a body. He looked upon Mr Plunkett as one of the most liberal and most tolerant of men, and the most faithful and sincere friend of civil and religious liberty in the colony.”⁸⁹

Commerce

63 Mention should also be made of Plunkett’s role in the establishment of the AMP Society. In 1850, as a Vice-Patron of the fledgling AMP Society, Plunkett had supported what the AMP’s historian Geoffrey Blainey described as a revolutionary Act, referring to the *Provident Societies Act 1850* (NSW). Blainey wrote that this was:

“a cause of the new optimism in the board room. ... Thomas Holt had first proposed it in 1848; the board had drawn up a succession of rough drafts and early in 1850 the Attorney-General, John Hubert Plunkett, a vice-patron of the Society, agreed that the bill had merit. In effect it protected people who took out a deferred annuity in the belief that if they reached old age they would receive a regular pension. Under the Society’s proposal such people might fall heavily into debt – they might even go insolvent – but the sum of £52 a year could not be touched by the courts or by those to whom money was owed.

A deputation of directors appears to have waited on Plunkett to state their case. He was persuaded, he drew up a Deferred Annuities Bill, and on 26 June 1850 he introduced to the legislative council his bill ‘for the encouragement of persons desirous of providing for their support in old age’. ... Persons who were facing debt or insolvency now held – in an annuity or deferred annuity policy – a financial lifebuoy.

Plunkett hoped that the act would ‘promote the growth of economical and careful habits among the labouring classes.’⁹⁰

⁸⁸ “Hebrew Public Meeting”, Sydney Morning Herald (Sydney), 9 November 1858 at 4, <https://trove.nla.gov.au/newspaper/page/1491807>.

⁸⁹ Ibid at 5, <https://trove.nla.gov.au/newspaper/page/1491808>.

⁹⁰ Geoffrey Blainey, *A History of the AMP* (1999, Allen & Unwin) at 16-17.

64 This was a private, far-sighted form of social security. Plunkett also moved the Bill to incorporate the AMP in 1856.⁹¹ By the time the Bill had gone through Select Committee, Plunkett had been elevated to the Presidency of the Legislative Council.⁹²

Drawing conclusions

65 Many although by no means all of the State-building initiatives with which John Plunkett was involved post-dated the appointment of Sir Alfred Stephen as Chief Justice in 1844. Perhaps it was as well that Plunkett missed that appointment! The colony would have been poorer without his many contributions to its civic infrastructure and, I dare say, our modern State would have been too for the building blocks of our society can be traced back to Plunkett's time. His constant and powerful liberalism, and his hostility to inequality and discrimination, is a salutary reminder of what a just society should look like.

66 All of Plunkett's achievements of which I have spoken – in the fields of education (both school and higher education), the provision of health care, the commitment to freedom of religion, his pervasive anti-sectarianism, and his contribution to an incipient system of social security through his support for the AMP - were enormously important, and that was on top of and as an added dimension to his work as an advocate and first law officer.

⁹¹ "Parliament of New South Wales", Sydney Morning Herald (Sydney), 26 November 1856 at 5, <https://trove.nla.gov.au/newspaper/page/1499020>.

⁹² "Parliament of New South Wales", Sydney Morning Herald (Sydney), 17 March 1857 at 2, <https://trove.nla.gov.au/newspaper/page/1497646>.

67 As I have sought to show, his career and life's work was informed by a deep commitment to social justice and liberalism, in the finest sense of that word. His 40 years of public service bear some similarity to the work and career of Sir Robert Garran at a federal level: two highly able lawyers whose public service and contribution to their communities was as lengthy as it was profound.

68 John Hubert Plunkett's life is one that should continue to be explored and celebrated.
