

## **Royal Commission into Institutional Responses to Child Sexual Abuse**

### **Catholic Church Final Hearing: Submission in response to Issues Paper 11**

#### **Qualifications**

Though I am not Catholic, I teach Australian Constitutional Law, Law and Religion and Civil Procedure as an Associate Professor at The University of Notre Dame Australia's Sydney School of Law. I am also the Associate Dean of the School of Law, Sydney and supervise all post-graduate legal research at that school of law and am one of the Convenors of the SEIROS study into the economic impact of religion on Australian society.

I wrote a PhD thesis at Sydney and Murdoch Universities on the subject of Religious Confession Privilege in Australia and enlarged upon that thesis in an international text on the subject published by Brill in 2011.<sup>1</sup> I also worked as International Legal Counsel for the LDS Church for 20 years advising upon child abuse related matters through the Pacific (including Australia) and across the African continent.

My legal work in the third world and my legal research have taught me that religious liberty, tolerance and respect are the core principles which enable peace in any society. In that context, I am concerned that the Commission has taken an unnecessarily negative approach towards the Catholic Church. The Commission could have chosen a stance and demeanour that followed the example of Nelson Mandela's Truth and Reconciliation Commission in South Africa. That Commission provided leadership and wise guidance on how to heal our society.

#### **Child protection legislation pioneered by Queensland in 1998 has largely cured the problem**

A Mandela-style "Truth and Reconciliation Commission" approach was appropriate since the child protection measures pioneered by

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<sup>1</sup> *Religious Confession Privilege at Common Law*, Brill, Leiden, 2011.

the State of Queensland beginning in 1998<sup>2</sup> have largely resolved the “institutional problem”. That is, Queensland’s requirement of sexual probity checks into the character of every person intending to work with children on an employed or voluntary basis, has weeded out the abusers. Most states have recognized the Queensland wisdom, though NSW dragged its heels with a declaration system for volunteers for some years.<sup>3</sup> While I do not have the Commission’s analytical tools and database at my disposal to demonstrate my belief, I have only heard of one report of child abuse within an institution which adopted the Queensland reforms since those reforms were adopted. That was the Shannon Grant McCoolle case with Families South Australia between January 28, 2011 and June 11, 2014. To my knowledge, McCoolle had no connection with the Catholic Church.

The long title of South Africa’s *Promotion of National Unity and Reconciliation Act 1995* explains its purpose:

To provide for the investigation and the establishment of as complete a picture as possible of the nature, causes and extent of gross violations of human rights committed during the period from 1 March 1960 to the cut-off date contemplated in the Constitution, within or outside the Republic, emanating from the conflicts of the past, and the fate or whereabouts of the victims of such violations; the granting of amnesty to persons who make full disclosure of all the relevant facts relating to acts associated with a political objective committed in the course of the conflicts of the past during the said period; affording victims an opportunity to relate the violations they suffered; the taking of measures aimed at the granting of reparation to, and the rehabilitation and the restoration of the human and civil dignity of, victims of violations of human rights; reporting to the Nation about such violations and victims; the making of recommendations aimed at the prevention of the commission of gross violations of human rights; and for the said purposes to provide for the establishment of a Truth and Reconciliation Commission, comprising a Committee on Human Rights Violations, a Committee on Amnesty and a Committee on Reparation and Rehabilitation; and to confer certain powers on, assign certain functions to and impose certain duties upon that Commission and those Committees; and to provide for matters

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<sup>2</sup> *Child Protection Act 1999 (Qld)* and *Working with Children (Risk Management and Screening) Act 2000 (Qld)*.

<sup>3</sup> For example, *Child Protection (Working with Children) Act 2012 (NSW)*; *Care and Protection of Children Act 2007 (NT)*; *Child Protection Act 1999 (Qld)* and *Working with Children (Risk Management and Screening) Act 2000 (Qld)*; *Children’s Protection Act 1993 (SA)*; *Working with Children Act 2005 (Vic)*; and *Working with Children (Criminal Record Checking) Act 2004 (WA)*.

connected therewith.

While South Africa's Commission only granted amnesty to those whose acts of violence were politically motivated, Nelson Mandela emphasized that its mandate was "to deal with a past that contained gross violations of human rights...which threatens to live with us like a festering sore"; to recommend steps that might be taken "to ensure that such violations never take place again" but using amnesty as a wise tool that can "heal the wounds of the past by also addressing the plight of the victims".<sup>4</sup> Mandela's wisdom responded to Winston Churchill's concern after World War II that the allies not repeat the imposition of reparations which were part of the Versailles treaty. Churchill as historian thus wrote - of resolution in war, of defiance in defeat, but of magnanimity in victory and of good will in peace.

I do not think it wise to continue to denigrate the Catholic Church. While the Commission has its terms of reference, the Commissioners can learn from the wisdom of Churchill and Mandela and seed a future that learns from and repairs the past without its vengeance. There is no need to invite interference with the right of Catholic liberty of conscience which is enshrined in international human rights instruments and which ought to be a part of Australian domestic law. To recommend otherwise would be to proscribe Catholicism as the English and the Americans did for 250 years after the Gunpowder plot. Be it also remembered that the Gunpowder plot was itself a zealous reaction to the proscription of Catholic conscience during the reigns of Henry VIII and Elizabeth I. The Commission does not need to make recommendations which may have similar consequences.

### **What could be done differently?**

I have opined above that Queensland's world leading child protection legislation has largely cured the problem of institutional child abuse in Australia. The requirement that the history of all persons who work with children be thoroughly police checked before they work with children either in employer or voluntary roles, has put an end to future pedophilic offending in institutions.

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<sup>4</sup> <<http://www.africa.upenn.edu/Govern Political/Mandel 100.html>>.

What remained to be done was to work out how the victims of historic child abuse might be healed; whether they should be compensated for the damage they have suffered, and if so how they should be compensated since all Australia's states and territories had passed amendments to their statutes of limitation in the early 1990s which foreclosed traditional tort avenues to compensation.<sup>5</sup>

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<sup>5</sup> Because of public interest surrounding the work of the Royal Commission, the Victorian Parliament passed the *Limitation of Actions Amendment (Child Abuse) Act 2015* to retrospectively abolish these limitations and enable survivors of child physical or sexual abuse to bring civil action within 3 years of their discovery of a connection between the injuries they had suffered and the historic abuse. Following the lead of the Victorian legislature in 2015, the *Limitation Amendment (Child Abuse) Bill 2016* was passed by the NSW Legislative Council on 9 March 2016. It removed the limitation imposed in NSW by amendments to the limitations legislation during the 1990s. Before these amendments, s 50C (1)(b) of the *NSW Limitation Act 1969* provided a "12 year long-stop limitation period", though that period could be extended by a Court exercising its discretion under Division 4 of Part 3. Section 27E of the *Victorian Limitation of Actions Act 1958* had similarly provided that a person under a disability could bring an action before the earliest to occur of six years after the disability ends or twelve years from when the action accrued. Section 27L was similar to Division 4 of Part 3 of the New South Wales legislation and set out the basis upon which Courts may further extend these limitation periods. Section 11 of the *Queensland Limitation of Actions Act 1974* still provides a three year limitation period in respect of personal injuries. Section 29 provides that period is extended by six years from the date when a disability ceases. Section 36 of the *South Australian Limitation of Actions Act 1936* provides a three year limitation period for personal injury claims, or three years after the claimant becomes aware of the relevant injury. Section 14 of the *West Australian Limitation Act 2005* provides a three year sunset on personal injury actions. Part 3 of the same act makes various provisions for extension depending on the nature of the disability (different minority ages and mental disability). In Tasmania, sections 5 and 5A of the *Limitation Act 1974* make a distinction between causes of action accrued before and after the date of the commencement of the act, with extensions possible under Part III for similar reasons that apply in NSW and Victoria. In the ACT, section 11 of the *Limitation Act 1985* provides a six year limitation on all causes of action, but section 35 grants the court discretion to enlarge that time after reviewing specified criteria. Section 12 of the *Limitation Act 2008* in the Northern Territory prescribes a three year limitation period on actions in tort. But section 36 provides for an extension of three years after the disability ends. It is also arguable that greater detail in the legislation where disability is concerned in fact enables disabled plaintiffs to more easily make their cases since the legislatures clearly contemplated that they might not be competent to bring cases within normal limitation periods and therefore actively gave courts discretion to extend time when necessary.

What is remarkable about the Commission's treatment of institutional responses to child abuse, is the omission of any consideration of how those states and territories have responded. Perhaps the Commission considered itself unable to investigate state and territory responses to child abuse because the Commission was a federal body and states are politically autonomous political entities beyond the Commission's terms of reference. If that is so, it would have been a simple matter to recommend to the Federal Government that state cooperation and referral of power be sought to cure the lacuna. In the writer's view, the Commission's failure to seek that cooperation and referral of power is a defect in the Commission's focus, process and practice. Also in the writer's view, the reason the states and territories legislatively foreclosed historic child abuse litigation in the early 1990s was likely because the states and territories did not wish to be joined as parties in such tort litigation. In many cases they could have been joined because they were referring institutions.

### **Religious Liberty concerns**

I surmised above that one of the reasons why the Commission may not have investigated state and territory responses to child abuse was because the states and territories are autonomous political entities and may be seen as beyond the Commission's terms of reference. If that is correct, then some of the questions now asked about the Catholic Church in Issues Paper 11 are ironic. For while the Commission's terms of reference do not foreclose the investigation of churches, to the extent that churches are also autonomous entities, nothing that the Commission may say about internal church governance is likely to have practical utility. Certainly findings and recommendations that criticize churches may influence public opinion, but it is submitted that such criticism is unconstructive. I submit that what is needed are practical solutions with the potential to heal the outfalls of crimes and torts committed in the past.

Though Australia has not 'brought home' the religious liberty and autonomy that it has ratified in the *International Covenant on Civil and Political Rights*, that instrument confirms that the Catholic Church has institutional religious liberty and autonomy in international law and it is unlikely that submissions to the Commission in relation to the doctrines and religious practices of any

church could lead to enforceable change under s 116 of the Constitution.

I wrote above that I believe that religious liberty, tolerance and respect are the core principles that enable peace in any society. Religious liberty is also the essential foundation of liberty in any society. That is because freedom of thought, conscience and religion (freedom of conscience) is necessarily antecedent to freedom of speech and association. One cannot speak freely, nor is there any meaningful freedom of association (where we speak to one another) unless there is first freedom of conscience. Freedom of conscience, speech and association however do not exist independently. They are compounds and cognates of one another. Thus we cannot interfere with freedom of conscience without damaging freedom of speech and freedom of association.

During the period before the American Republic was formed, many faith groups fled to that land in search of the freedom to worship according to the dictates of their own consciences. Roger Williams ironically had to flee from the Puritans in Massachusetts who considered he was unsettling their City on a Hill religious experiment. He then wrote *The Bloody Tenent of Persecution* which demonstrated the danger to freedom of conscience which arises when uniformity of conscience is enforced by the civil state. "Sooner or later" he wrote, "enforced uniformity is the greatest occasion of civil war". The most famous expression of Williams' idea may have been US Supreme Court Justice Robert Jackson's memorable statement in *West Virginia State Board of Education v Barnette* 319 US 624 (1943) before he prosecuted at Nuremburg. He wrote:

If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us.

In his *Statute for Religious Freedom* in Virginia in 1777, Jefferson "outlawed any government compulsion to support religious worship or teaching and barred any civil penalties for individuals' religious opinions or belief."<sup>6</sup>

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<sup>6</sup> W. Cole Durham Jr., and Elizabeth A. Sewell, Virginia Founders and Birth of Religious Freedom, in *Lectures on Religion and the Founding of the American*

These insights bookend the US First Amendment which prohibits the state establishment of religion and the proscription of freedom of conscience. The US First Amendment was copied almost word for word in s 116 of the Australian Constitution. Though the High Court of Australia has interpreted our words differently, there is still acceptance that Church and State should be separate in Australia. No one church institution should dictate Australia's political agenda, and the Commonwealth should not interfere in church governance.

I hope that the Commission's invitation of submissions that comment on Catholic theology, doctrine and practice, is not a prelude to Commission recommendations that the Commonwealth government could not implement without breaching the prohibitions which are entrenched in s 116. I recommend that the Commission confine itself to practical recommendations which respond to where Australia is now in the wake of the Queensland reforms discussed above.

Subject to those general observations about the wisdom of making recommendations that cannot be implemented, it does seem appropriate that I make some general comments about religious confession since I have written a text on that subject.

### **Religious Confession Privilege**

Jeremy Bentham, the famous legal philosopher and positivist of the early nineteenth century was a famous critic of all privilege. But he made one exception. In his *Rationale of Judicial Evidence* he wrote about the suggestion that priests should be compelled to disclose the contents of religious confessions:

[The] coercion [of disclosure of religious confessions]...is altogether inconsistent and incompatible [with any idea of toleration]....The advantage gained by the coercion – gained in the shape of assistance to justice – would be casual, and even rare; the mischief produced by it, constant and extensive...this institution is an essential feature of the catholic religion, and...the catholic religion is not to be suppressed by force...Repentance, and consequent abstinence from future misdeeds...are the well-known consequences of the institution.<sup>7</sup>

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*Republic*, 72 (John W. Welch and Stephen J. Fleming, eds., Brigham Young University Press, 2003)

<sup>7</sup> Bentham, J, *Rationale of Judicial Evidence*, New York and London, Garland Publishing, Inc, 1978 (Reprint of the 1827 ed published by Hunt and Clarke, London), Vol. IV, pp 589-590.

Bentham's insight - that the advantage gained by the coercion of confessional disclosure would be casual and rare - has been supplemented by other scholars. McNicol has said that Catholic priests "would never betray the confidentiality of the confessional in any way or for any reason....even if this meant penal sanctions".<sup>8</sup> Burger CJ from the US Supreme Court, Cooke J (later Lord Cooke of Thorndon in the English House of Lords) from the NZ Court of Appeal and L'Heureux-Dubé J of the Supreme Court of Canada, have all opined that no one should suffer temporal prejudice because of what is uttered under the dictates or influence of spiritual belief.<sup>9</sup> Wright and Graham have agreed that interference with religious confession privilege would be futile, but they have added their concern that it would also bring the government legislating such change into disrepute.<sup>10</sup> In Australia, there is the further concern that any Commonwealth legislation that interfered with religious confession privilege, even in child abuse cases, might offend the constitutional prohibition on Commonwealth legislation that interferes with free exercise of religion.

But there are three practical reasons against interference with religious confession privilege that render these legal arguments unnecessary. First, pedophiles do not confess, even to priests.<sup>11</sup> They lie about their involvement with children and the only reason they disclose anything is because they have been found out in some degree and are seeking to create a pretense of good faith.<sup>12</sup> Second, anything that a pedophile confesses to a priest is hearsay and inherently unreliable even if, in the absence of statutory privileges from admission, it is technically admissible as a confession against interest. And thirdly, ministers of religion receiving confessions do not leave such sin untreated. Repentance, which is the doctrine which motivates confession in Christianity (the only faith that practices formal confession), requires reform including submission to criminal laws in the case of sins which are also crimes.

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<sup>8</sup> Nichols, S, *Law of Privilege*, Butterworths, Australia, 1992, 330 citing a press release by Father Brian Lucas quoted in *Parliamentary Debates* (N.S.W.), Legislative Council, 21 November 1989, 12,807.

<sup>9</sup> *Trammel v United States* 445 U.S. 40 (1980), 51 (Burger CJ); *R v Howse* [1983] NZLR 246, 251 (Cooke J) and *R v Gruenke* [1991] 3 SCR 263, 296-297 (L'Heureux-Dubé J).

<sup>10</sup> Wright, CA, and Graham, KW, *Federal Practice and Procedure: Evidence*, 3<sup>rd</sup> ed, St Paul Minnesota, West Publishing Co, 1992, 84, 86.

<sup>11</sup> Legally privileged anonymous case studies known to the author.

<sup>12</sup> *Ibid.*

Associate Professor A. Keith Thompson  
Associate Dean, the School of Law  
The University of Notre Dame Australia, Sydney  
Level 1, 29-35 Shepherd Street,  
Chippendale, NSW, 2008

31 May 2016