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Australian Government Royal Commission delivered its final 17-volume report and 189 recommendations following a wide-ranging investigation on Dec. 15, 2017. (Jeremy Piper/Australian Government Royal Commission)

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The Australian Royal Commission into Institutional Responses to Child Sexual Abuse spent five years interviewing over 8,000 survivors, their abusers and personnel from institutions that had covered up the abuse. The Commission found that 61.8 percent of all survivors within religious institutions had been under the care of the Catholic Church.

The Commission's 17 volume Final Report, released on Dec. 15, 2017, made hundreds of recommendations for change in structures, practices and internal laws of institutions. Many of the recommendations addressed to the church involved changes to canon law.

Two of these recommendations received massive media attention: that celibacy no longer be obligatory and that civil reporting laws should not provide an exemption in the case of confession. There has been some pushback against these recommendations because they involve overturning long traditions in the church.

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But many other recommendations had more to do with church law and practice, and could be more easily implemented, if church leadership is willing to take up this challenge.

Recommendation 16.10: Abolish the pontifical secret

One important recommendation challenges the church to return to its long tradition from the 4th to the 19th century of requiring clergy child sexual abusers to be handed over to the civil authorities for punishment. The decrees of four church councils and three popes to this effect were abrogated by the 1917 *Code of Canon Law*, and in 1922, and thereafter canon law imposed the strictest secrecy over such matters.

One of the most significant recommendations is that the pontifical secret should not apply "to any aspect of allegations or canonical disciplinary processes relating to child sexual abuse" (Rec. 16.10). The secret of the Holy Office was imposed in 1922 by Pope Pius XI on all information about the sexual abuse of minors, and that was extended in 1974 by Pope Paul VI's *Secreta Continere* under which the pontifical secret covered even the allegation. It provided no exceptions for reporting to the police, and told the bishops that there was no room for the exercise of conscience in

the matter. The Commission found that "the Holy See considered that bishops were not free to report allegations of child sexual abuse by clergy to civil authorities before and during the 1990s and early 2000s."

The pontifical secret is still imposed by Art. 30 of *Sacramentorum Sanctitatis Tutela* of Pope John Paul II, as revised by Pope Benedict XVI in 2010. In 2002, the Holy See granted a dispensation to the United States to allow reporting where the civil law required it, and that dispensation was extended to the rest of the world in 2010. The Commission found that the pontifical secret still applies where there are no applicable civil reporting laws. The Italian and Polish Catholic Bishops conferences seem to agree, because they announced in 2014 and 2015 that their bishops would not be reporting these crimes to the police because their countries' laws did not require it.

The recommendation to abolish the pontifical secret over child sexual abuse is in line with similar requests in 2014 by the United Nations' human rights committees on the rights of the child and against torture. Pope Francis in his formal response of Sept. 24, 2014, rejected the request.

Recommendation 16.55 – A more balanced standard of proof

An equally important factor in the church's failure to protect children is the dysfunctional nature of its disciplinary system. The Commission found that it is slow, "cumbersome, complex and confusing," and that "the Vatican's approach to child sexual abuse by clergy was protective of the offender." The Australian Church authorities were reluctant to use it for these reasons. The result was that more children were abused than would otherwise have been had the abusers been quickly weeded out.

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Civil law prosecutions of abusive priests may fail because the criminal standard in Anglo/American law is proof beyond reasonable doubt. The church disciplinary system may have to deal with an acquitted priest who could still be a danger to children, but the standard of proof required for dismissal is "moral certainty," the equivalent of proof beyond reasonable doubt. A practical illustration of the problem is the case of a Sydney priest who was acquitted of a criminal offence of sexual

assault, and was then unsurprisingly acquitted by a canonical court over the same facts. The Commission found it was inappropriate to have such a high standard of proof for disciplinary matters, and recommended that canon law be changed to allow a test based on the balance of probabilities.

Recommendations 16.11 and 16.56 – Real zero tolerance

The Commission criticized the "pastoral approach" embodied in *Crimen Sollicitationis* and *Canon 1341* (for clerics) and *Canon 697* (for religious brothers and sisters) of the *1983 Code* which required superiors to rebuke, warn or try to cure those against whom allegations are made before subjecting them to a canonical trial.

The Commission said that the "pastoral approach" had a negative effect in two ways on the church's response: It encouraged the belief that child sexual abuse was a moral failure "rather than a crime that should be reported to the police"; and it inhibited canonical action for dismissal because the pastoral approach was a precondition to instituting it. The Commission found that the "pastoral approach" had led to "catastrophic institutional failure" in dealing with child sexual abuse and recommended abolition of the precondition.

> The figures that Francis presented to the United Nations in 2014 demonstrated that only one quarter of all priests found to have sexually abused children had been dismissed. That's 75 percent tolerance, not zero.

Another example of the "pastoral approach" can be found in the practice of the Congregation for the Doctrine of the Faith to allow priests who admitted abusing children to "live a life of prayer and penance" rather than being dismissed. Pope Francis has claimed that he and Benedict XVI practiced "zero tolerance" for child sexual abuse. Zero tolerance in a professional context invariably means dismissal. The figures that Francis presented to the United Nations in 2014 demonstrated that only one quarter of all priests found to have sexually abused children had been dismissed. That's 75 percent tolerance, not zero. The Commission has recommended real zero tolerance, the dismissal in all cases of child sexual abuse.

Recommendation 16.12 – No statute of limitations

Prior to the *1983 Code*, there was no limitation period for canonical trials for child sexual abuse. Pope John Paul II in 1983 introduced a year-year limitation period, which meant that if a 10-year-old child was abused, and did not complain by the age of 15, the canonical crime simply disappeared, and no action for dismissal could be taken. A study in 2000 by the Australian Catholic Bishops Conference of 402 cases of sexual abuse of minors indicated that the limitation period had expired in 96.77 percent of them. The Holy See extended the period in 2001 to 10 years from the age of minority of the victim and in 2010 to 20 years, plus a power to extend it beyond that. The Commission found that the average time in which the survivors told anyone of the abuse was 33 years. It recommended that the church return to its pre-1983 policy of no limitation period, and that such a change should operate retrospectively.

Recommendation 16.13 – Amend the 'imputability' test

Another discouragement for bishops wishing to dismiss a priest was the "imputability" defence in *Canon 1321*. Imputability means that the accused was responsible for his actions. Under the *1917 Code*, imputability was assumed unless it was disproved by "moral certainty." Pope John Paul II watered this down in his *1983 Code*, whereby imputability was assumed "unless it is otherwise apparent," thus creating a Catch-22 defence for abusers: a cleric cannot be dismissed for pedophilia because he is a pedophile. Two serial Irish pedophiles had their dismissals by Dublin canonical courts overturned by Rome because they had been diagnosed as pedophiles. The Commission recommended that the 'imputability' test in canon law be amended "so that a diagnosis of pedophilia is not relevant to the prosecution of or penalty for a canonical offence relating to child sexual abuse."

Recommendations 16.15 and 16.16 – Keep tribunals local and transparent

The Commission recommended the setting up of an Australian canonical tribunal to hear complaints against clergy, with Rome being involved only as an appellate court (Rec. 16.15). It also recommended that Vatican congregations and courts publish reasons for their disciplinary decisions (Rec. 16.16).

Recommendations 7.8, 7.10 and 33 – Mandatory reporting laws

On the civil law front, the Commission recommended that state supervisory bodies be set up to deal with "reportable conduct" which would then allow that body to supervise any disciplinary proceedings instigated against the accused. It also

recommended that all Australian states and territories have comprehensive mandatory reporting laws for child abuse in institutions.

The Royal Commission found that the church was seriously out of step with community standards in dealing with child sexual abuse, and that it suffered a "catastrophic failure of leadership." If Pope Francis does not accept these recommendations, the reaction may very well be the same as that of the Irish Prime Minister, Enda Kenny, in a speech to Parliament in 2011 after the publication of the Cloyne Report, an Irish government report on clerical sex abuse:

> Cardinal Josef Ratzinger said: 'Standards of conduct appropriate to civil society or the workings of a democracy cannot be purely and simply applied to the Church.' As the Holy See prepares its considered response to the Cloyne Report, as Taoiseach, I am making it absolutely clear, that when it comes to the protection of the children of this State, the standards of conduct which the Church deems appropriate to itself, cannot and will not, be applied to the workings of democracy and civil society in this republic. Not purely, or simply or otherwise. Children… first.

[Kieran Tapsell is a retired civil lawyer and the author of Potiphar's Wife: The Vatican's Secret and Child Sexual Abuse and of a submission to the Royal Commission into Institutional Responses to Child Sexual Abuse: Canon Law, A Systemic Factor in Child Sexual Abuse in the Catholic Church. He was also a member of the canon law panel before the Australian Royal Commission Feb. 9, 2017.]

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