

**SHOULD RELIGIOUS CONFESSION PRIVILEGE BE
ABOLISHED IN CHILD ABUSE CASES?
DO CHILD ABUSERS CONFESS THEIR SINS?**

KEITH THOMPSON*

ABSTRACT:

*This article interrogates the suggestion that abolishing the seal of confession will protect children from abuse. It deconstructs the evidence John Cornwell used in *The Dark Box* to assert that Catholic priests do in fact confess child abuse in the face of contrary Irish research, and compares the current idea that child sex abusers cannot be rehabilitated against modern scientific evidence. But the heart of the article is a survey of the legal and practical reasons why it is correct to say that abolishing confession privilege would not help child abuse victims. In doing so, it considers the application of evidence law to this issue, as well as the tension between the right to religious freedom established by the International Covenant on Civil and Political Rights and the needs of victims.*

I INTRODUCTION

Several of the contributors to a recent Oxford University Press book entitled *Wrongful Allegations of Sexual and Child Abuse*¹ suggest that changes in our criminal evidence laws have

*Associate Professor of Law; The University of Notre Dame University Australia (Sydney campus).

led to an increasing number of unjust allegations...through the court...and...in the conviction of innocent defendants of crimes they did not commit.²

In part they trace these changes to a culture that demands that “those who make allegations of child abuse” should be presumed to be telling the truth.

One of the criminal evidence laws that some child protection advocates suggest needs to be changed to ensure that a higher percentage of alleged child abusers are convicted of crime,³ is the law that privileges members of the clergy from the need to disclose religious confessions.

In this article I will review the utility of the suggestion that religious confession privilege laws should be abolished from several perspectives, but with particular discussion of child sexual abuse by Catholic priests. In Part I, I begin by defining the terms that are used in this space. Members of the public generally recognize that there is a difference between child abuse and child sexual abuse, but most think the terms child sexual abuser and paedophile are synonyms. They are not, and the difference is important since not all paedophiles sexually abuse children. I therefore explain the difference as well as what the less familiar term hebephile means. I then review Gerald Risdale’s confession of his child sex abuse to the Australian Royal Commission into institutional responses to child sex abuse (the Royal Commission) and those of Michael Joseph McArdle

¹ Ros Burnett (ed), *Wrongful Allegations of Sexual and Child Abuse* (Oxford University Press, 2016).

² Sir Henry Brooke, ‘Wrongful Allegations of Sexual and Child Abuse’, book review < <https://sirhenrybrooke.me/2016/11/21/wrongful-allegations-of-sexual-and-child-abuse/>>.

³ Ibid.

referred to in John Cornwell's book, *The Dark Box*.⁴ In Part II, I will reconsider Jeremy Bentham's historical argument, despite his opposition to privilege in general, that the abolition of religious confession privilege will not result in additional convictions of crime but will rather remove an institution that serves society's greater interest in the rehabilitation of offenders. Though Bentham took for granted that criminal offenders can be rehabilitated, I will survey the current literature to determine whether such rehabilitation is possible since significant elements in contemporary society do not accept Bentham's assumption where child sex abusers are concerned.

In Part III, I will consider legal objections to the abolition of religious confession privilege to test whether it creates the risk of unsafe convictions to which Ros Burnett's contributors have referred, and I will also discuss the practicality of abolishing religious confession privilege since the Australia state legislatures are not bound by s 116 of the *Australian Constitution* where the free exercise of religion is concerned.

I will conclude on balance that while the abolition of religious confession privilege by states in Australia may be a theoretical possibility, it would achieve no long term practical good and would further offend Australia's international human rights commitments.

PART I – DO CHILD SEX ABUSERS CONFESS THEIR ABUSE?

In this part I discuss the abuse perpetrated by two of the most notorious child sex abusers in recent Australian history – George Risdale and

⁴ John Cornwell, *The Dark Box: A Secret History of Confession* (Basic Books, New York, 2014).

Michael Joseph McArdle. One of the reasons they are notorious is because both were Catholic priests and compounded their crimes by their utter disregard of the sacred trusts that were reposed in them as priests.⁵ But I will not discuss their abuse in a prurient way. Rather, I will review the contrasting things they said about their use of Catholic religious confession and I will compare their comments with what other researchers have said to assist understanding whether this Catholic sacrament facilitated or encouraged their abuse, or whether it is irrelevant. John Cornwell has suggested that Catholic religious confession encouraged McArdle's abuse, but Risdale said he never once confessed to his child abuse crimes. While Risdale's candour would not surprise Marie Keenan, eight out of nine of her informants said that while they did use the confessional to ease their consciences, they did not provide enough detail to identify their criminality.⁶ Because Keenan suggests that such confessions do not qualify for absolution in Catholic theology, I set out that theology.

⁵ Michael Coren says that child abuse within the Catholic Church was never any worse than in other Christian churches, faith communities, swimming clubs and even UN peacekeepers. But he suggests the venom reserved for the churches and the Catholic Church in particular is a consequence of perceived hypocrisy since "the Church speaks with a moral authority not claimed by a sports club" (Michael Coren, *Why Catholics are Right*, Toronto: McClelland and Stewart, 2011) 12, 23 and 24). Graham Glancy and Michael Saini also say that while "[p]erpetrators of child sexual abuse...can be found among the clergy of various denominations and in various countries", the Catholic Church is singled out for the criticism because of its "perceived secrecies and inner workings" and because "the media has cast [it] as being unable or unwilling to deal with clergy abuse within the Church". These authors also note that "men who work...[in] close contact with children such as Boy Scout leaders, sports coaches and teachers have the same proportion of sexual perpetrators as the clergy" (Graham Glancy and Michael Saini, 'Sexual Abuse by Clergy' in Fabian M. Saleh, Albert J. Gruzinskas Jr., John M Bradford and Daniel J. Brodsky (eds.), *Sex Offenders, Identification, Risk Assessment, Treatment, and Legal Issues* (Oxford University Press, 2009), 324 and 326).

⁶ Marie Keenan, *Child Sexual Abuse and the Catholic Church: Gender, Power and Organizational Culture* (Oxford University Press, 2012).

But before I begin, a short word about my use of the phrase ‘child abusers’ rather than paedophiles. I have chosen ‘child abusers’ because paedophiles is technically incorrect. While paedophile is the name given to adult human males and females who are sexually attracted to children, not all persons so attracted act on their attractions, just as not all homosexual or heterosexual human adults acts on their attractions in either a violent or non-violent way. Hebephiles are adult human male and females who are sexually attracted to pubescent or early adolescent youths, but again not all hebephiles act upon their attractions. Hence I have preferred the term ‘child abuser’ because it identifies criminal conduct rather than sexual orientation as the evil which contemporary law is passed to stigmatize and punish.⁷

In his testimony before the the Royal Commission on May 27, 2015, George Risdale infamously

said he never told anyone about his sexual abuse of boys, even during confession, because the ‘overriding fear would have been losing the priesthood’.⁸

But in his book, *The Dark Box*, John Cornwell referred to the 1,500 confessions of child sexual abuse that defrocked priest Michael Joseph McArdle swore that he made to a variety of confessors when he was seeking mitigation of his sentence at the Brisbane District Court on 8th

⁷ Marie Keenan notes a number of psychiatric classifications for child sexual offenders including regressed offenders, fixated offenders, paraphilia including pedophilia, ephebophilia and hebephilia. She also says that “not all child molesters are pedophiles, and not all pedophiles are child molesters” (ibid, 90-93 (93)).

⁸ < <http://www.news.com.au/national/courts-law/vile-paedophile-gerald-risdale-will-give-evidence-at-royal-commission-today/news-story/63054c92d762e9c3d53629b8da59ccab>>.

October 2003.⁹ John Cornwell explained McArdle's confessions in this way:

A priest in Queensland, Australia, went to confession some 1500 times to admit sexually abusing boys. In a 2003 affidavit, the then sixty-eight year old Michael Joseph McArdle, who was jailed for six years beginning in October of that year, claimed to have made confession about his paedophile activities to about thirty different priests over a twenty-five year period. He noted: 'As the children would leave after each respective assault, I would feel an overwhelming sense of sadness for them and remorse, so much so that so it would be almost physical. I was devastated after the assaults, every one of them. So distressed would I become that I would attend confessionals weekly and on other occasions fortnightly and would confess that I had been sexually assaulting young boys.' He said the only assistance or advice he was given was to undertake penance in the form of prayer. He claimed that after each confession 'it was like a magic wand had been waved over me'. McArdle's affidavit would appear to contradict a widespread view in Ireland that child sexual abusers are unlikely to admit their abuse to a priest in the confessional.¹⁰

Cornwell's reference to Irish opinion was to Marie Keenan's book, *Child Sexual Abuse and the Catholic Church: Gender, Power and Organizational Culture*, Oxford University Press, 2012.¹¹ However, Cornwell's suggestion of inconsistency between McArdle's self-serving affidavit and Keenan's evidence in nine more detailed post conviction case interviews is not convincing.

McArdle's affidavit was part of an extended plea in mitigation by his lawyer when seeking a lighter sentence after a delayed confession to the

⁹ *R v McArdle* [2004] QCA 7.

¹⁰ John Cornwell, above n4, 189.

¹¹ Marie Keenan, above n6, 163.

Police. In the Court of Appeal four months later, McMurdo P recounted the detail of that plea:

The applicant pleaded guilty on the 8th of October 2003 to 62 counts of indecent dealing. He was sentenced to an effective term of imprisonment of six years with a recommendation for eligibility for post-prison community based release after two years, a penalty imposed only on the most serious of the offences. He contends that the sentence was manifestly excessive...

He has not offended for 17 years and, as his lawyer points out, but for his less serious offending against one female complainant he would not have offended for 25 years. The defence contends this demonstrates self-rehabilitation. The applicant resigned from active ministry in the church in 1988 and general faculties were withdrawn by the Bishop in September 1999 prior to the applicant's resignation from the priesthood in October 2000.

The applicant contends that the sentence was manifestly excessive in that the learned primary Judge failed to give proper weight to the circumstances surrounding the offending conduct, the timely plea and cooperation with the administration of justice, the applicant's remorse, age, poor health, the delay in prosecution, the maximum penalty, the applicant's efforts at rehabilitation and the absence of any prospect of re-offending and relevant comparable cases.¹²

Her Honour then opined that the McArdle's submission did not adequately acknowledge the severity of the offending or how the evidence came to light. While McArdle had said the reason he did not tell the Police about his offending earlier was because he did not wish to further abuse the victims who might not want to "go through the pain of making a public complaint",¹³ the only reason his offending had come to light at all was because of *Courier-Mail* reporting. Her Honour then summarized the affidavit sworn by McArdle and upon which Cornwell

¹² *R v McArdle* [2004] QCA 7 (2-4).

¹³ *Ibid* 5.

relied for his statement that ‘McArdle’s affidavit...appear[ed] to contradict [Keenan’s view] in Ireland that child sexual abusers are unlikely to admit their abuse to a priest in the confessional.’¹⁴ Her Honour’s summary of McArdle’s affidavit is as follows:

Defence counsel tendered at sentence an affidavit from the applicant in which he referred to his hope that in speaking to the media his publicised acceptance of wrong doing would assist the healing process for the complainants. He emphasised that he had been shamed and vilified by his exposure and virtually became a prisoner in his own home, which he had been afraid to leave. Completely unfairly, his family, especially his brother, was forced to share this vilification. He said he first suffered a heart attack in 1981 and a second heart attack in August 2003 which necessitated his more recent surgery. He said that on three occasions during his ministry with the church he was summonsed to meetings with the Bishop to discuss his offending and was candid in disclosing what he did. After the first two occasions he was moved to another provincial centre. After the third occasion in early 1990, having already ceased active ministry in the church, he attended counselling in New South Wales, which he found helpful in giving him insight into the effect of his conduct on the children. This encouraged him to refrain from any future contact with children. In the early 1990s he was approached by one complainant, openly discussed what had occurred and sought the complainant's forgiveness. Since he left the ministry in 1988 he said he has ceased all contact with children and has concentrated on personal devotion and prayer.¹⁵

Her Honour then compared McArdle’s sentence with others and refused the application for leave to appeal against sentence. She explained:

After balancing the very serious aspects of the applicant's lengthy and multiple offending with the numerous mitigating features, I am satisfied that the

¹⁴ Above n10 and supporting text.

¹⁵ *R v McArdle* [2004] QCA 7 (6-7).

sentence imposed here, which I emphasise includes the early recommendation for parole after two years, adequately reflects the mitigating circumstances, and is within the proper range.¹⁶

Justice McMurdo and her two colleagues on the Queensland Court of Appeal upheld McArdle's sentence because of the gravity of his offence and did not need to consider his effort to pass the blame on to the Church in his affidavit. But it does not require great perception to question McArdle's assertion that he had told thirty priests that he had sexually assaulted children and only ever been told 'to undertake penance in the form of prayer.'¹⁷ That one priest in a church that insists of frank disclosure of sin and restitution before absolution would condone such grievous offending is possible though unlikely, but thirty?

Rather than accept McArdle's testimony at face value as rebutting Keenan's careful research,¹⁸ Cornwell, ought to have considered what she actually discovered more closely.

Though Keenan rails against Catholic Church infrastructure as part of the reason why so much child abuse has been perpetrated within its walls,¹⁹ she recognizes that labeling,²⁰ blaming²¹ and feminist critical studies²²

¹⁶ Ibid 11-12.

¹⁷ Cornwell, above n4, 189.

¹⁸ Marie Keenan, above, n 6. Keenan is an experienced systemic family therapist and reports she sought "to understand and analyze child sexual abuse by Catholic clergy in its individual and systemic dimensions" (ibid ix).

¹⁹ Ibid xxv, xxx, 23-25, 42-43, 46-47, 51-53, 172-174.

²⁰ Ibid 96-97, 104-105.

²¹ Ibid 12-14, 16, 59, 63-64 where she says that neither pedophilia nor homosexuality are the cause of sexual abuse by Catholic clergy and thus that these labels do not assist analysis. At 15 she observes that "[i]n some cases the pattern of abuse was opportunistic in nature; in others it was more planned and occurred on a number of occasions." At 22, she observes that "it is humanly attractive to have someone to blame" there are no "neat linguistic solutions...to significantly complex problems".

²² Ibid 115-118.

have not provided solutions. Child abuse cannot be explained with templates. Each abuse and each abuser is unique. She studied nine separate child abusers who cooperated while they were in prison.²³ She sought to understand how those lonely repressed, but privileged²⁴ men gave themselves permission to engage in this behaviour. She reports that none of them ever grew up emotionally.²⁵ While the confessional was a place of support,²⁶ each man chose the priests to whom he confessed carefully and not one of them ever disclosed the whole story in those confessions.²⁷ ‘Confessions’ were minimalistic and only ever reached the penance level.²⁸ There was never enough disclosure to invite guidance, counsel or reproof.²⁹ Though one of her subjects said he never disclosed anything at all, those who ‘confessed’ knew that genuine repentance could never be reconciled with repetitive behaviour,³⁰ and only one of her subjects acknowledged the criminal nature of what he had done.³¹

Keenan’s analysis suggests that like her subjects, McArdle never told his confessors what he had done though he may have convinced himself that he did. The irony is that like the priests who received ‘confessions’ from Keenan’s subjects, Cornwell, and perhaps even the Queensland Court of Appeal did not ask additional questions either. In that context, it is difficult to criticize the priests who received confessions from Keenan’s subjects. For even though further questions might have exposed the offending and led to counsel or other action that could have protected

²³ Ibid ix.

²⁴ Ibid xxi, 94, 158-162.

²⁵ Ibid 55-57, 64, 67, 75-76

²⁶ Ibid 61, 163-164.

²⁷ Ibid 162-163.

²⁸ Ibid 164.

²⁹ Ibid.

³⁰ Ibid 164-165.

³¹ Ibid 166.

future victims, that depends on whether there was enough information in what was confessed to reasonably lead to further questions. Nor does Keenan opine as to why priests, authors and even judges do not naturally ask those follow-on questions which look so easy with the benefit of hindsight.

Despite Cornwell's suggestion that some child abusers do frankly and fully confess their abuse, simple reflection informed by Keenan's analysis, says that Cornwell's conclusion is unreliable. But what if Cornwell was right? What if better-trained clergy were able to elicit detailed confessions from child abusers? Would society benefit from compelling them to report those disclosures to the police or other civilian authorities?

PART II – WOULD SOCIETY BENEFIT FROM THE ABOLITION OF RELIGIOUS CONFESSION PRIVILEGE?

Despite his general aversion to all forms of privilege,³² social engineer and legal reformer Jeremy Bentham answered this question with an unequivocal 'no' early in the early nineteenth century. He reasoned that religious confession privilege was justified by the need for freedom of conscience and belief.³³ He explained:

[A] coercion...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

³² J.H. Wigmore, *Evidence in Trials at Common Law*, Revised by John T McNaughton, Boston, Little Brown, 1961, Vol. 8., 877.

³³ Jeremy Bentham, *Rationale of Judicial Evidence* (New York and London: Garland Publishing, Inc, 1978) (Reprint of the 1827 edition published by Hunt and Clarke, London), Vol. IV, 586-592.

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.³⁴

Bentham went on to suggest that the secrets harvested by forcing the clergy to disclose confessions would be short-lived since people would cease confessing their sins the moment the confidentiality of their confessions was compromised.³⁵

The Supreme Court of Canada more recently considered whether there should be a religious confession privilege or even a more far reaching religious communications privilege in *R v Gruenke* in 1991.³⁶ Even though all nine judges found that no religious confession or communications privilege applied in that case since the admissions made to pastors of an evangelical Christian fellowship had not been made for purposes of spiritual absolution or with an expectation of confidentiality, seven of the nine judges nonetheless found that an ecumenical religious communications privilege should be recognized on a case-by-case basis in accordance with John Henry Wigmore's 1904 canons.³⁷ Wigmore had said that confidential communications should not be disclosed if:

- confidentiality was essential to maintenance of the relationship between the parties
- the relationship was one which the community wanted to support, and

³⁴ Ibid 589-590.

³⁵ Father Frank Brennan made similar observations in his article entitled 'Breaking the seal of the confessional a red herring that will not save one child' in *The Weekend Australian*, December 3-4, 2016.

³⁶ *R v Gruenke* (1991) 3 SCR 263.

³⁷ Ibid 286-290 referring to J.H. Wigmore, *Evidence in Trials at Common Law*, (Revised by John T McNaughton, Boston/MA: Little Brown, 1961) Vol. 8, 527.

- the injury to that relationship would outweigh the advantage that might be gained by allowing the relevant evidence into court.³⁸

In her concurring minority judgment, L'Heureux-Dubé J went further. She recommended that religious communications privilege should be recognized in Canada on the same basis as legal professional privilege. She was concerned that the majority's case-by-case analysis ruling would leave penitents up in the air and chill religious freedom generally in Canada.³⁹ She also identified other reasons why confidential religious communications should not be adduced as evidence in court proceedings. Those reasons included Sir Robin Cooke's idea that no "person should suffer temporal prejudice because of what is uttered under the dictates or influence of spiritual belief";⁴⁰ Chief Justice Warren Burger's recognition of

the human need to disclose to a spiritual counselor, in total and absolute confidence, what are believed to be flawed acts or thoughts and to receive priestly consolation and guidance in return";⁴¹

as well as

(a) society's interest in religious communications; (b) freedom of religion; and (c) privacy interests.⁴²

She also wrote of "practical considerations" that recommended a religious communications privilege. Trying to compel priests to disclose confidential religious communications in breach of sacred vows would bring the justice system into disrepute.⁴³ Admitting confessions made to

³⁸ Wigmore, *ibid.*

³⁹ *R v Gruenke* [1991] 3 SCR 263, 311-312.

⁴⁰ *R v Howse* [1983] NZLR 246, 251.

⁴¹ *Trammel v United States* 445 U.S. 40 (1980), 51.

⁴² *R v Gruenke* [1991] 3 SCR 263, 297.

⁴³ *Ibid* 303-304 citing Professor Seward Reese for his observation that the clergy would still refuse to testify even if the courts tried to compel them (Seward Reese, 'Confidential Communications to the Clergy' (1963) 24 *Ohio State Law*

priests was so like ‘admitting confessions made under duress to police that the idea should be expressly condemned by the common law’.⁴⁴

Professor Suzanne McNicol has made similar arguments including her idea that recognizing in law the particular determination of Catholic priests not to disclose confessional confidences would ‘reduce...unnecessary friction between church and state’.⁴⁵ She has also argued that

the arguments against the creation of a priest-penitent privilege are few and...far from compelling. First, there is the general argument...[that] the withholding of relevant evidence from a judicial tribunal...would be an impediment to the search for the truth and the administration of justice....Secondly,...the creation of a priest-penitent privilege would discriminate against other confidential relationships, such as doctors and patients, accountants and clients, journalists and their sources, anthropologists and their subjects etc., where one of the parties to the relationship is also under an ethical, professional or moral obligation not to disclose confidences. Thirdly,...the creation of such a privilege would involve serious definitional problems, leading to the discrimination in favour of some religions over

Journal 55, 81); Best CJ in *Broad v Pitt* (1828) 3 Car. & P. 518, 519; 172 E.R. 528, 529 for his unwillingness to ever compel an unwilling clergyman to give evidence from confidential communications; and Professor Lyon for the idea that the admission of confessional evidence is so similar to the admission of confessions made to the Police under duress as to merit express common law condemnation (J.N. Lyon, ‘Privileged Communications – Penitent and Priest’ (1964-1965) 7 *Criminal Law Quarterly* 327).

⁴⁴ *R v Gruenke* [1991] 3 SCR 263, 304 citing Professor Lyon (above n 43). This idea also has antecedents in the historical origins of the privilege against self-incrimination. For example, Henry E. Smith has stated that the privilege against self-incrimination “had its effective origins in a mid-nineteenth-century analogy between one rule, the witness privilege, and another, the confession rule.” The confession rule at that time held that “[s]tatements made [on oath before a magistrate at pretrial] under the hope of favor or fear of consequences were inadmissible at trial” (‘The Modern Privilege: Its Nineteenth-Century Origins’, in R.H. Helmholz, C.M. Gray, J.H. Langbein, E. Moglen, H.E. Smith, and A.W. Alschuler (eds.), *The Privilege Against Self-Incrimination, Its Origins and Development* (Chicago and London: The University of Chicago Press, 1997), 145-146.

⁴⁵ S. Nichols, *Law of Privilege* (Butterworths, 1992) 337.

others....Finally, there is...[no] need for the law to intervene...to bring the law into line with practice.⁴⁶

Others who have considered the matter objectively in recent times have all come to the same conclusion as Bentham early in the nineteenth century.⁴⁷ Though clergy other than Catholic priests might occasionally disclose confessional communications if the privilege was abrogated, that already happens in jurisdictions where the privilege is recognised.⁴⁸ As in Bentham's time, abrogating statutory privileges for confidential religious communications presents as an institutional effort to discriminate against Catholic religious practice with no golden pot of evidence at the end of rainbow.⁴⁹

Bentham however, assumed that sinners including sinners who were also criminals, could be rehabilitated by the pastoral work of clergy. But twenty-first century Australian penal practice appears to assume that sex offenders including child sex abusers are irredeemable and should never

⁴⁶ Ibid 331.

⁴⁷ See for example, W.H. Tiemann, and J.C. Bush, *The Right to Silence - Privileged Clergy Communication and the Law* (2nd ed, Nashville: Abingdon Press, 1983), 23; M.H. Mitchell, 'Must Clergy Tell? Child Abuse Reporting Requirements Versus the Clergy Privilege and Free Exercise of Religion' (1987) 71 *Minnesota Law Review* 723; W.A. Cole, 'Religious Confidentiality and the Reporting of Child Abuse: A Statutory and Constitutional Analysis' (1988) 21 *Columbia Journal of Law and Social Problems* 1; C.A. Wright and K.W. Graham, *Federal Practice and Procedure: Evidence* (3rd ed, St Paul/MN: West Publishing Co, 1992), § 5612; G.J. Zubacz, *The Seal of Confession and Canadian Law* (Montreal: Wilson & Lafleur, 2009), 212-217.

⁴⁸ See for example, *R v Howse* [1983] NZLR 246 and *R v Gruenke* [1991] 3 SCR 263.

⁴⁹ Note that although Australia has not yet honoured its 1980 promise to implement the *International Covenant on Civil and Political Rights* (arguably including the protection of religious confession) in domestic law, s 116 of the Commonwealth Constitution likely forbids federal legislation that abrogated religious confession privilege. While the states are not prohibited from such action by the Commonwealth Constitution, such state action would still breach the promise to implement the *ICCPR* throughout the country.

be released back into society.⁵⁰ Is that assumption correct? What does contemporary research say about the prospects of rehabilitating child sex abusers?

A Can Child Sex Abusers Be Rehabilitated?

In this section, I do not address the question whether indefinite sentencing offends the independent judicial process required under Chapter III of the Australian Constitution. Nor do I address the moral question of whether detaining anyone after they have completed a properly adjudicated criminal sentence morally offends the prohibition of cruel and unusual punishment recognized in the Bill of Rights in England since 1689 and adopted in the US Bill of Rights a century later. Those questions are beyond the scope of this article. All I will do here is survey contemporary literature about the prospects of child sex offender rehabilitation.

In their article in Beech, Craig and Browne's 2009 text – *Assessment and Treatment of Sex Offender: A Handbook*⁵¹ - Ward, Collie and Bourke assert 'that it is possible to reduce reoffending rates by treating or rehabilitating sex offenders as opposed to simply incarcerating them'⁵² though they acknowledge 'some dissenting views'. Though 'western

⁵⁰ Though Patrick Keyzer and Bernadette McSherry do not directly address the question of whether child sex offenders can be rehabilitated in their Latrobe University Research paper about the practice and constitutionality of indefinite detention of sex offenders, they document indefinite detention laws in Queensland and South Australia as well as post-sentence preventive detention and supervision schemes "in four Australian states and in the Northern Territory" (Patrick Keyzer and Bernadette McSherry, 'The Preventive Detention of Sex Offenders: Law and Practice' (2015) 38(2) *University of New South Wales Law Journal* 792).

⁵¹ A.R. Beech, L.A. Craig, Keving D. Browne, *Assessment and Treatment of Sex Offenders: A Handbook* (West Sussex/UK: Wiley-Blackwell, 2009).

⁵² Tony Ward, Rachael M. Collie and Patrice Bourke, 'Models of Offender Rehabilitation: The Good Lives Model and The Risk-Need-Responsivity Model', *Ibid.*, Chapter 16, 293.

societies are becoming risk averse' and are 'imposing severe sentencing regimes'⁵³ to protect the community,⁵⁴ 'sophisticated and powerful interventions'⁵⁵ that are tailored to individual offenders, can enable them to live "offence-free"⁵⁶ lives in the community. But these researchers are emphatic:

Deterrence-based approaches and diversion do not appear to provide any kind of significant treatment effect. The evidence suggests that deterrent type approaches which include intensive supervision programming, boot camps, scared straight, drug testing, electronic monitoring and increased prison sentences are ineffective in reducing recidivism.⁵⁷

What does work is identifying offenders learning styles and motivations,⁵⁸ teaching them "how they [can] live better lives" and identifying for them, "the positive rewards" they will enjoy as they "desist...from crime".⁵⁹ But this instruction requires intensive engagement with a therapist,⁶⁰ and developing a relationship of trust⁶¹ so that the offender learns to see him/herself as a different person. "Focusing *only* on the reduction of risk factors"⁶² does not work. Offenders need to identify "the kind of person they wish to be"⁶³ and then they must be assisted to "live more fulfilling lives".⁶⁴

⁵³ Ibid 308.

⁵⁴ Ibid 300.

⁵⁵ Ibid 308.

⁵⁶ Ibid 303.

⁵⁷ Ibid 294.

⁵⁸ Ibid 302.

⁵⁹ Ibid.

⁶⁰ Ibid 301. "[H]igh-risk sex offenders should receive the most treatment, typically at least 200 hours of cognitive behavioural interventions"

⁶¹ Ibid 303.

⁶² Ibid 305.

⁶³ Ibid.

⁶⁴ Ibid 306.

Professor Karen Terry from the John Jay College of Criminal Justice in New York, does not directly address the question of whether child sexual abusers can be rehabilitated, but she agrees with Ward, Collie and Bourke's conclusion that every sexual offender is unique and that 'there is no single typology that can account for all offenders.'⁶⁵ While 'child sexual abusers are more likely to specialize than rapists, and incarcerated child sexual abusers are two times more likely to have another conviction of child molestation than other offenders',⁶⁶ most child sexual offenders were not violent, were 'usually seek[ing] a mutually comforting relationship with a child', and chose children who were "easy to manipulate" because the abusers were "socially inept in adult relations".⁶⁷

Intrafamilial abusers were a little different. Once the abuse was identified, they were less likely to reoffend. In Terry's view, extrafamilial offenders and "are...more receptive to treatment than other offenders".⁶⁸ However nearly all child abusers had been sexually victimized themselves as children, experienced depression and many abused alcohol.⁶⁹ Intrafamilial offenders were more likely to have grown up

feeling distant from their parents,...experienced unstable childhoods...and did not have sexual relations with their partners as often as they wanted and had become dissatisfied with the relationship.⁷⁰

Despite her view that all sex offenders need to be treated individually, Terry does distinguish between fixated and regressed offenders.⁷¹ Fixated offenders 'exhibit persistent, continual, and compulsive attraction to

⁶⁵ Karen J. Terry, *Sexual Offenses and Offenders, Theory, Practice and Policy*, 2nd edition, Wadsworth Cengage Learning, 2013, 93.

⁶⁶ Ibid 94-95.

⁶⁷ Ibid 101-102.

⁶⁸ Ibid 102.

⁶⁹ Ibid 103-104.

⁷⁰ Ibid 102-103.

⁷¹ Ibid 105-108.

children’⁷² whereas regressed offenders ‘have a primary attraction to agetates’ and regress to victimize available adolescents and children ‘when they are having negative thoughts and feelings...commonly...at times of unrest with marital relations’.⁷³

But ‘not all child sexual abusers are motivated by sexual needs to commit their offenses.’⁷⁴ Intrafamilial offenders look for additional relationships when their primary relationship is not going so well, whereas extrafamilial offenders ‘show a strong level of attraction to...erotic material involving children.’⁷⁵

Female child sexual abusers are different again. They ‘usually have young victims’ and their offending can ‘often [be] linked to abusive backgrounds and/or psychological disorders’.⁷⁶ Many have “male co-offenders” and female victims, and they ‘are more likely than their male counterparts to use alcohol and illegal drugs’ which Terry says makes them similar to regressed male offenders in that they are ‘seeking a loving relationship’.⁷⁷ But they are also more likely than males ‘to be rearrested for a sexual offense.’⁷⁸ Terry’s considered summary is thus that:

Reducing recidivism of sexual offenders is best accomplished by understanding and identifying the characteristics of offenders and the situations in which they offend...Understanding the interpersonal and

⁷² Ibid 105.

⁷³ Ibid 106

⁷⁴ Ibid 107.

⁷⁵ Ibid.

⁷⁶ Ibid 112

⁷⁷ Ibid 112-113.

⁷⁸ Ibid 113.

situational characteristics that are the basis of offending behavior will lead to a greater likelihood of controlling such behavior in the future.⁷⁹

Like Ward, Collie and Bourke above, Terry does not accept the premise underlying the Australian legislation identified by Keyzer and McSherry in their paper about post-sentence preventive detention and supervision schemes, which is that such offenders cannot be rehabilitated.⁸⁰

In their article entitled ‘Sexual Abuse by Clergy’,⁸¹ Graham Clancy and Michael Saini observe many of the same correlations that the researchers above have drawn together. Despite greater media coverage, Catholic clergy are no more likely to sexually abuse children than others “serving children, in...schools, nursery schools, sports...voluntary organizations” and other churches.⁸² ‘[G]eneral framework[s] for sex offenders oversimplif[y] the complexity’ of identifying and treating sexual abuse, and many existing studies of clerical sexual abuse ‘suffer from methodological flaws, including small sample sizes, lack of comparison groups, and the employment of study designs that lack scientific rigor.’⁸³

The research literature none-the-less reveals that

sexual deviance...the presence of a sexual disorder...accompanied by ...substance abuse, antisocial personality disorders, psychotic mental illness, criminality, neuropsychological impairment and endocrine disorders predispose individuals to sexually offend.⁸⁴

⁷⁹ Ibid 93.

⁸⁰ Above n 50.

⁸¹ Graham Clancy and Michael Saini, ‘Sexual Abuse by Clergy’ in Fabian M. Saleh, Albert J. Grudzinskas Jr., John M. Bradford and Daniel J. Brodsky (eds), *Sex Offenders, Identification, Risk Assessment, Treatment and Legal Issues* (Oxford University Press, 2009), Chapter 23.

⁸² Ibid 324-326.

⁸³ Ibid 325. They are specific that “[n]o single factor alone can determine the likelihood of clergy committing a sexual offence against a child” (ibid 331).

⁸⁴ Ibid 327.

The clergy are no different, though they are ‘statistically older, more educated, and predominantly single as compared to other’ sex offenders. They are just as likely as all other sexual offenders to be alcohol abusers.⁸⁵ Clancy and Saini report conflicting evidence as to whether child sexual abusers including clergy ‘were predominantly pedophile[s]’.⁸⁶ Clerical sexual offenders were more likely than others to be hebephilic and ‘to have been sexually abused in childhood.’⁸⁷ While some researchers had suggested that celibacy should be investigated as a possible cause of sexual abuse by clergy, there was no convincing evidence of such correlation or that allowing them to marry would reduce child sexual offending by clergy.⁸⁸ They summarized research suggesting that child sexual abuse in the Catholic Church could be reduced by making church processes more transparent. The Canon Code against child sexual abuse should also be translated into clear ethical rules about interaction with youth and children, and those clear ethical rules needed to be systematically taught in seminaries.⁸⁹ Gonsiorek had suggested that ethical training around “boundary crossings” particularly needed to identify when priests should reduce their level of pastoral care even when young parishioners sought them out. ‘Boundary crossings [needed] to become boundary violations’ in seminary teaching.⁹⁰

After reviewing a variety of treatment programs for clergy who sexually abuse children, Glancy and Saini also affirm ‘that restoration is possible.’⁹¹ Bryant’s *Victim Sensitive Offender Therapy* impressed them

⁸⁵ Ibid.

⁸⁶ Ibid.

⁸⁷ Ibid.

⁸⁸ Ibid 328-331.

⁸⁹ Ibid 329-330.

⁹⁰ Ibid 331-332.

⁹¹ Ibid 335 citing Irons and Lassers’ large clinical study in 1994.

because it caused ‘the perpetrator [to] accept...responsibility for his actions and the harm that it caused to his victims.’⁹² Other practitioners had also reported significant redemptive success from a variety of programs tailored to sexually addicted clients. While

further empirical studies are needed...researchers need to be aware of the political, religious and social implications of their work and should guard against these forces to ensure that future work remains uncontaminated.⁹³

Subliminal anxiety about the political contamination of empirical research can be discerned in much of the recent research. Though expert scientific researchers are sure that child sexual abusers can be reformed with tailored therapy, they are anxious that their work is being counteracted by societal obsession with total security. Hence offenders remain locked up forever in accord with inhumane post-sentence detention laws. While ‘mental health professionals should become more involved with the prevention, screening and treatment of clergy who sexually abuse’,⁹⁴ such intervention is ironic if the offenders are never to be given “tickets of leave” or are branded by inhumane legislators who have forgotten our seventeenth century resolutions against cruel and unusual punishment.⁹⁵

⁹² Ibid 335.

⁹³ Ibid 336.

⁹⁴ Ibid. In their 2013 article detailing offender rehabilitation programmes in prison and community settings in Australasia, Andrew Day and Rachael M. Collie note successes with the *Risk-Needs-Responsivity* therapy model which dominates officially approved program design in Australia and New Zealand, but would like to see more resources allocated to test the *Good Lives Model* and other programmes more closely matched to offender needs and character (Andrew Day and Rachael M. Collie, ‘An Australasian Approach to Offender Rehabilitation’ in Leam A. Craig, Louise Dixon and Theresa A. Gannon (eds.), *What Works in Offender Rehabilitation* (West Sussex/UK: Wiley-Blackwell, 2013), Chapter 22.

⁹⁵ The ‘cruel and unusual punishment’ phrase most famous from the American Bill of Rights that forms part of the US Constitution, was originally drafted by the English Parliament as part of the English *Bill of Rights Act* in 1688 and was supposed to end arbitrary and capricious punishment.

The conclusion of the lawyers and philosophers who have carefully considered the utility of abolishing the confidentiality of all religious communications in the face of any judicial search for evidence of crime has been not only that it is futile as regards Catholic priests, but also that it is neither worth the effort or the aggravation that it would cause. Though Australia may not be as committed to protecting religious freedom as it has asserted it is to the UN,⁹⁶ it is not so uncommitted as to abolish this bulwark of religious practice for purely symbolic purposes. Similarly, the researchers who have scientifically addressed the question of whether child sexual abusers can be redeemed, are unanimous in answering “yes”.

In the final part of this article, I will nonetheless discuss the “what if” question. “What if” Australian legislators decided to abolish evidential privilege for confidential religious communications despite the evidence I have cited which suggests it would be futile? Does it matter that such abolition might interfere with the religious liberty promised to Australians under the federal Constitution and under various United Nations human rights instruments?

PART III - LEGAL OBJECTIONS TO THE ABOLITION OF RELIGIOUS CONFESSION PRIVILEGE

⁹⁶ For example, by being a Charter member of the UN and a promoter of the *Universal Declaration of Human Rights 1948 (UDHR)*, by ratifying the *International Covenant on Civil and Political Rights 1966 (ICCPR)* and by declaring the *Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief 1981 (Religion Declaration)* to be “an international instrument relating to human rights and freedoms for the purposes of the *Human Rights and Equal Opportunity Commission Act 1986 (Cth)*” on February 8, 1993.

Since I have discussed the alleged futility of such laws in Part II, I will not dwell on philosophical objections to such abolition, but I will consider two further quasi-philosophical objections, namely; the idea that admitting confidential religious communications breaches the hearsay and self-incrimination rules in the law of evidence, and that such evidence ought not be admitted as evidence since admitting it would be the same as admitting confessions made to police under duress. Admitting such evidence in court, or encouraging enforcement agencies to search for it, may also prejudice the long term interests of child abuse victims since it would reduce the availability of pastoral counseling to persons trying to identify wise ways to assist them.

Since the question of whether religious confession privilege should be abolished arises because the Royal Commission is authorized to recommend legal changes that would achieve best practice in child abuse reporting, I will also review the Commission's terms of reference and discuss whether Commonwealth or state laws abolishing religious confession privilege would offend the Australian Constitution's prohibition of Commonwealth laws that prohibit the free exercise of religion. Since it is elementary that s 116 of the Constitution does not bind the states which can theoretically pass such laws though they are forbidden to the Commonwealth,⁹⁷ I will also consider whether such abolition would offend international law and Australia's commitments under international human rights instruments.

⁹⁷ Tasmania is an exception since it does protect "[f]reedom of conscience and free profession and practice of religion...subject to public order and morality" under s 46 of the *Constitution Act 1934* (Tas). However, since this legislation is not entrenched in any way, it can be repealed by simple majority processes in the Parliament without any special procedure.

I conclude this part by again suggesting that legislation to abolish religious confession privilege would be futile.

I then conclude that on practical balance, that there are many reasons why we should leave religious confession privilege alone. Not least among those reasons is that child sexual abusers, whether priests or not, do not confess information to clergy that would be useful in a court of law. First, that is because to the extent that they do confess, child abusers do not provide information that would enable their conviction or the protection of child sexual abuse victims. Secondly, abrogating religious confession privilege would breach Australia's obligations under international law and would offend the federal Constitution to the extent that such legislation engaged Commonwealth legislative power. And thirdly, it would be futile. The reasons why any such laws would be futile include that Catholic priests would disobey such law; because the legislation of such law would dry up any information about child abuse that confessor clergy do hear and which they already use to protect children;⁹⁸ and also because such disclosure would prejudice the long term interests of the victims supposed to benefit by any amendment to religious confession privilege law.

A *The Hearsay and Self-Incrimination Rules*

In simple terms, the hearsay rule holds that evidence which cannot be cross-examined in a court, should not be admitted as evidence in that court. The underlying idea is that evidence must be tested by cross-examination to determine its reliability and its probative value. If a

⁹⁸ In the Louisiana Court of Appeal's October 2016 decision in *Mayeux v Charlet et ors* (2016-CA-1463), that Court observed that Catholic priests are at liberty to and do act to protect abused children when relevant information comes to them as "non-privileged communication... outside the confessional" (ibid 4).

witness relates a conversation had with someone else, and that third party is not available for cross-examination, the witness' account of what the third party said may not be tested for credibility and so should not be admitted as evidence in court.

When an accused person wishes to admit her own religious confession in court by waiving religious confession privilege, those admissions against interest are an exception to the self-incrimination rather than the hearsay rule because the accused can be cross-examined about such statements. But if the prosecution wishes to adduce confessional evidence from the member of the clergy who heard the confession, the admission of such evidence would breach the hearsay rule. The hearsay rule would be breached in such a case because the member of the clergy could not be cross-examined about the details of the admission because those details were beyond personal knowledge. The admission of such evidence would also arguably pre-empt the accused's self-incrimination privilege. If an accused person proposed that some aspect of her evidence should be admitted as evidence, she would also be able to assess whether she should waive her self-incrimination privilege for herself.

Some may interpret the hearsay and self-incrimination rules of traditional common law jurisprudence as the prudish reservations of a less efficient age. In such context, these rules present as a minor barrier with no enduring social utility. I highlight their philosophical history so that dispassionate observers can understand that these rules were developed during a harsh period in English criminal law history when judges were concerned about capital punishment in an era of unsafe convictions. Such historical concern about unsafe convictions and harsh punishment may well be irrelevant in an age when convicted felons are not executed but

incarcerated by the state for a maximum of the rest of their natural lives. In such an era it may be appropriate that the long-term security concerns of those who are never charged with crime should outweigh the liberty interests of those who suffer in consequence of an unsafe conviction.

B *Confessions Obtained Under Duress*

The concern expressed by Baron Alderson in 1853 and Professor J. Noel Lyon in 1964⁹⁹ may doubtless be similarly dismissed. Baron Alderson was considering admissions made by a woman to a workhouse chaplain in a child abuse case. The workhouse chaplain “was called to prove certain conversations he had had with [the prisoner] with reference to [the alleged injuries she had inflicted upon her infant child].”¹⁰⁰ Even though that chaplain was not bound by the vows which seal the mouth of a Catholic priest, Baron Alderson said

I think these conversations ought not to be given in evidence. The principle upon which an attorney is prevented from divulging what passes with his client is because without an unfettered means of communication the client would not have proper legal assistance. The same principle applies to a person deprived of whose advice the prisoner would not have proper spiritual assistance. I do not lay this down as an absolute rule; but I think such evidence ought not to be given.¹⁰¹

⁹⁹ J. Noel Lyon, ‘Privileged Communications – Priest and Penitent’ (1964-1965) 7 *Criminal Law Quarterly* 327.

¹⁰⁰ *R v Griffin* (1853) 6 Cox Cr Cas 219.

¹⁰¹ *Ibid.*

Professor Lyon said that the best reason for a religious confession privilege is to prevent police and prosecution using evidence extracted by any form of duress.¹⁰² This principle follows from the rule that

[a] confession of crime made to a person in authority will not be admitted in evidence unless it is shown to have been made voluntarily...Voluntary...means without fear of prejudice or hope of advantage exercised or held out by a person in authority. By this standard confessions to priests would never be voluntary since the very basis of the priest's authority is fear of purgatory and hope of redemption.¹⁰³

This logic did not prevent the admission of the evidence of Richard Gilham's repeated confession to the Gaoler, Mayor and Town Clerk in 1828 supposedly induced by the counsel of a chaplain.¹⁰⁴ But Lyon would have distinguished that case since the officials who received the confession had not extended inducements. In any event, Lyon points to two subsequent decisions in England where bancs of judges considering similar appellate questions, confirmed that simple encouragements by surgeons to tell the truth rendered the confessions to them that followed, inadmissible.¹⁰⁵ And indeed in *R v Kingston* decided just two years after *R v Gilham*, two of the same judges as were involved in the *Gilham* decision¹⁰⁶ found that the surgeon's admonition to "tell all you know"¹⁰⁷ since "you are here under suspicion of this" did constitute¹⁰⁸ "an inducement to confess untruly"¹⁰⁹ and the conviction was overturned.

¹⁰² Lyon, above n 99.

¹⁰³ Ibid 328.

¹⁰⁴ *R v Gilham* (1828) 1 Moody Cr Cas 186; 168 ER 1235.

¹⁰⁵ *R v Kingston* (1830) 4 Car & P 387; *R v Garner* (1848) 3 Cox C.C. 175.

¹⁰⁶ Parke and Littledale as noted by Patterson J in *R v Garner*.

¹⁰⁷ As quoted by Patterson J in *R v Garner*.

¹⁰⁸ Ibid.

¹⁰⁹ Ibid.

Henry E. Smith has followed Wigmore in stating that the idea that compulsion was unacceptable, evolved in response to the excesses of the prerogative courts of the Tudors and Stuarts including Star Chamber. By the late eighteenth century Courts had accepted that ‘a confession forced from the mind by the flattery of hope, or by the torture of fear, c[a]me...in so questionable a shape when it is to be considered as the evidence of guilt that no credit ought to be given to it’.¹¹⁰

Another antiquarian idea with a defensive spirit, which argues against the abolition of religious confidentiality, is the notion that the confidentiality of counseling relationships may encourage timid souls with information about crime but who were not involved in its commission, to protect victims by speaking with enforcement authorities. Such evidence avoids the duress, hearsay and self-incrimination protective evidentiary labels above, but may lie untapped without clerical encouragement. But this may also be a fanciful idea which is wisely discarded since criminal convictions are so much safer in the twenty-first century and because capital punishment has been outlawed.

C *Free Exercise of Religion Under the Australian Constitution*

Though the Commonwealth letters patent which established the Royal Commission in 2013 are said to have been supported by “all Australian

¹¹⁰ Henry E. Smith ‘The Modern Privilege: Its Nineteenth-Century Origins’, in Helmholz et al, above n 44, 154 citing *Warickshall’s Case* (1783) 1 *Leach* 263-264; 168 ER 234, 235. However note that Smith thinks that the decision of the court in *R v Gilham* (1828) 1 Moody Cr Cas 186; 168 ER 1235 is difficult to understand in the context of *Warickshall’s Case* since though the prisoner’s confessions in *Gilham* were not made to a member of the clergy, they were ‘compelled’ by religious influence and the court did not explicitly say that that the “cautions” given the prisoner outweighed that influence (ibid 155).

Governments”;¹¹¹ and though the Commission was, inter alia, directed to inquire into...

- a. what institutions and governments should do to better protect children against child sexual abuse and related matters in institutional contexts in the future;
- b. what institutions and governments should do to achieve best practice in encouraging the reporting of, and responding to reports or information about, allegations, incidents or risks of child sexual abuse and related matters in institutional contexts¹¹²

Even the *Royal Commissions Act 1902* (Cth) cannot empower the Commonwealth government to pass legislation which abrogates the confidentiality of religious communications if that confidentiality is protected by the Australian Constitution. And absent a successful referendum under s 128 changing the terms of s 116, it is doubtful that any referral of state power could overcome the prohibition in s 116 against ‘[t]he Commonwealth [making laws] ... prohibiting the free exercise of any religion’.

What law abrogating religious confession could the Commonwealth pass that could avoid challenge by a member of the clergy? Though there are churches where the confidentiality of religious communications is not protected by seal and ecclesiastical discipline, few would suggest the Roman Catholic Church had not followed such a practice since its relevant canons can be documented back to the Fourth Lateran Council in

¹¹¹ Terms of reference of the Royal Commission, <<http://www.childabuseroyalcommission.gov.au/about-us/terms-of-reference>>.

¹¹² Ibid.

1215 A.D. And what referral of state power could disenable the prohibition in s 116?

Certainly the states could pass laws abrogating religious confession privilege because s 116 does not bind them even though the prohibition appears in Chapter V of the Commonwealth Constitution which is headed “The States”. But Australia states proposing to pass such laws would need to avoid any suggestion that their legislation was part of a cooperative Commonwealth scheme to avoid the s 116 prohibition since the High Court has struck down schemes designed to end run the Constitution in the past¹¹³ and has intoned that it may do likewise in the future.¹¹⁴ The States may also be wary of passing such legislation since it is unlikely to convince Catholic priests and others to disclose confessions as discussed in Part II. However Australia’s moral obligations under international human rights instruments may give prudent state legislators pause before abolishing religious confession privilege,¹¹⁵ particularly since existing measures to protect children from child abuse in institutions appear to have been almost entirely effective since 1998.¹¹⁶

¹¹³ *PJ Magennis Pty Ltd v Commonwealth* (1949) 80 CLR 382

¹¹⁴ *ICM Agriculture Pty Ltd v Commonwealth* (2009) 240 CLR 140, 170 per French CJ, Gummow and Crennan JJ, where they said that ss 96 and 116 of the Constitution must be read together just as Gibbs CJ had said in *Attorney-General (Vic); Ex rel Black v Commonwealth (DOGS Case)* (1981) 146 CLR 559, 592.

¹¹⁵ Note that there are only three Australian states which have not passed religious confession privilege statutes. They are Queensland, South Australia and Western Australia. However, religious confession privilege may well exist at common law in these states for the reasons set out in A.K. Thompson, *Religious Confession Privilege at Common Law* (Leiden and Boston: Martinus Nihjoff, 2011), Chapter 7.

¹¹⁶ Though the Royal Commission into Institutional Responses to Child Sexual Abuse was commissioned by the Gillard government in 2013, to the date of this writing, the Royal Commission has only uncovered one case of child sexual abuse in an institution (a case in Families SA where a state government employee had abused a number of children between 2011 and 2014) since the Queensland Government passed its ‘child protection card’ laws in 1998 – laws which have proven so effective that they have been closely followed by all the other Australian states in subsequent years.

*D International Human Rights Instruments Which Morally Bind
Australia to Respect Religious Confession Privilege*

Though it is elementary that international human rights norms are not binding in Australia until they have been implemented by follow-on domestic legislation,¹¹⁷ Australia's ratification of the underlying instruments does invoke moral criticism within Australia and around the world when they are ignored. The international instruments relevant to the practice of religious confession include the *UDHR* itself, the *ICCPR*, and the *Religion Declaration*.

Since the relevant Article of the *UDHR* has been replicated in covenant form in the *ICCPR* considered below, I will not labour its message. It is however relevant to observe that Australia was one of the seven charter member countries which promoted freedom of religious practice around the world, and Herbert (Dr.) Vere Evatt a former Australian Leader of the Opposition and High Court Judge who became the President of the United Nations General Assembly, was prominent in that effort.

Australia ratified the provisions of the *ICCPR* which turned the declaratory pronouncements of the *UDHR* into binding covenantal commitments in 1980.¹¹⁸ Under Article 18, she promised

¹¹⁷ In *Chow Hung Ching v The King* (1948) 77 CLR 449, Dixon J said that the ratifying of a treaty only committed externally and had "no legal effect upon the rights and duties of the subjects of the Crown" (ibid 477-478). The High Court has followed this view in many subsequent cases including *Dietrich v The Queen* (1992) 177 CLR 292 (per Mason CJ and McHugh J) and *Kiao v West* (1985) 159 CLR 550 (per Gibbs CJ).

¹¹⁸ Australia agreed to be bound by the *ICCPR* on 13 August 1980 subject to reservations. She ratified the first Optional Protocol on 25 September 1991. This protocol means that the UN Human Rights Committee can hear complaints from

1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or adopt a religion or belief of his choice, and freedom either individually or in community with others and in public or private, to manifest his belief in worship, observance, practice and teaching.
2. No one shall be subject to coercion which would impair his freedom to have or adopt a religion or belief of his choice.
3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of others.
4. The States Parties to the present Covenant undertake to have respect to have respect for the liberty of parents, and where applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.

To suggest that this article does not protect religious confession privilege is to quibble. The international promise is to protect freedom of religious practice including religious confession unless it is necessary to limit that practice “to protect public safety, order, health or morals or the fundamental rights and freedoms of others.” Certainly arguments can be made that laws abrogating religious confession privilege may protect “public health or morals or the fundamental rights and freedoms of others”, but for the reasons I have already outlined, such laws are not objectively necessary as required in the *ICCPR*. Religious confession privilege does not harm the victims of child sexual abuse nor would its abolition protect them. And the evidence that the Royal Commission has

people who allege that Australia has violated their rights under the *ICCPR*, though the Human Rights Committee's findings are not binding or enforceable. The second Option Protocol, concerning the elimination of the death penalty, was ratified earlier on 2 October 1990 (<https://www.humanrights.gov.au/human-rights-explained-fact-sheet-5the-international-bill-rights>>).

adduced around Australia confirms that institutional child abuse all but ended with Queensland's innovative child protection card legal system in 1998. Certainly child abuse within families continues, but the evidence discussed in Parts I and II, suggests that even in family cases, child sexual abusers do not confess their crimes to clergy in any evidentially probative way.

The *Religion Declaration* goes further than the *ICCPR*. It is more explicit that the ratifying state will take active steps to implement the practical free exercise of religion in its domestic law. Articles 4 and 7 provide as follows:

Article 4

1. All States shall take effective measures to prevent and eliminate discrimination on the grounds of religion or belief in the recognition, exercise and enjoyment of human rights and fundamental freedoms in all fields of civil, economic, political, social and cultural life.
2. All States shall make all efforts to enact or rescind legislation where necessary to prohibit any such discrimination, and to take all appropriate measures to combat intolerance on the grounds of religion or other beliefs in this matter.

Article 7

The rights and freedoms set forth in the current Declaration shall be accorded in national legislation in such manner that everyone shall be able to avail himself of such rights and freedoms in practice.

Though these articles were proclaimed by the General Assembly of the United Nations on 25 November 1981 and Australia did not immediately ratify them, they were eventually ratified and then declared "an international instrument relating to human rights and freedoms for the purposes of the *Human Rights and Equal Opportunity Commission Act*

1986 (Cth) by Michael John Duffy as Commonwealth Attorney-General on February 8, 1993.

While Australia's commitment to the *ICCPR* norms was similarly late,¹¹⁹ she also made commitments there to implement practical free exercise of religion which includes laws that respect religious confession privilege. For example, in Article 2 she and the other state parties made the following promises:

1. Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.
2. Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant.
3. Each State Party to the present Covenant undertakes:
 - (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;
 - (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;
 - (c) To ensure that the competent authorities shall enforce such remedies

¹¹⁹ The *ICCPR* was opened for signature in 1966 and Australia agreed to be bound to it on 13 August 1980 < <https://www.humanrights.gov.au/human-rights-explained-fact-sheet-5the-international-bill-rights>>.

when granted.

Even though Australia's Article 2 promise to implement these domestic laws was made subject to her constitutional processes and the agreement of the Australian States and Territories since the Commonwealth government could not decide for them, the Commonwealth advised that it

been in consultation with the responsible State and Territory Ministers with the object of developing co-operative arrangements to co-ordinate and facilitate the implementation of the Covenant.¹²⁰

Sadly, such consultations as there were have produced very little state or territory legislation that protects religious liberty, and such legislation as there has been, does not respect the *ICCPR* requirement that only

¹²⁰ < <http://www.austlii.edu.au/au/other/dfat/treaties/1980/23.html>>. The full text of the reservation reads as follows:

Articles 2 and 50

Australia advises that, the people having united as one people in a Federal Commonwealth under the Crown, it has a federal constitutional system. It accepts that the provisions of the Covenant extend to all parts of Australia as a federal State without any limitations or exceptions. It enters a general reservation that Article 2, paragraphs 2 and 3 and Article 50 shall be given effect consistently with and subject to the provisions in Article 2, paragraph 2.

Under Article 2, paragraph 2, steps to adopt measures necessary to give effect to the rights recognised in the Covenant are to be taken in accordance with each State Party's Constitutional processes which, in the case of Australia, are the processes of a federation in which legislative, executive and judicial powers to give effect to the rights recognised in the Covenant are distributed among the federal (Commonwealth) authorities and the authorities of the constituent States.

In particular, in relation to the Australian States the implementation of those provisions of the Covenant over whose subject matter the federal authorities exercise legislative, executive and judicial jurisdiction will be a matter for those authorities; and the implementation of those provisions of the Covenant over whose subject matter the authorities of the constituent States exercise legislative, executive and judicial jurisdiction will be a matter for those authorities; and where a provision has both federal and State aspects, its implementation will accordingly be a matter for the respective constitutionally appropriate authorities (for the purpose of implementation, the Northern Territory will be regarded as a constituent State).

To this end, the Australian Government has been in consultation with the responsible State and Territory Ministers with the object of developing co-operative arrangements to co-ordinate and facilitate the implementation of the Covenant.

objectively necessary limitations on religious freedom be allowed.¹²¹

The Commonwealth's unwillingness to pass a domestic Religious Freedom Act can no longer be excused by its 1980 statement, when ratifying the *ICCPR*, that it did not have the constitutional power to enact religious freedom laws that would bind the whole country including state and territory legislatures. To the extent that Australia believed that even in 1980, subsequent jurisprudential development has confirmed beyond reasonable doubt that the Commonwealth government can pass legislation required to honour international treaty and other commitments despite state and territory resistance.¹²² There are now many examples of

¹²¹ In a report entitled *Article 18, Freedom of religion and belief*, in 1998, the Human Rights and Equal Opportunity Commission strongly advised the Commonwealth government that it needed to pass a Religious Freedom Act. No federal government has been prepared to act on that recommendation and the need for the recommended legislation is arguably greater now because anti-Muslim bigotry has escalated in the wake of the September 2001 terror attacks and the rise of Al Qaeda and ISIS. Tasmania has provided a general form of constitutional protection for religious freedom of citizens since 1934 (see above n 98). The Australia Capital Territory and the State of Victoria have respectively passed the *Human Rights Act 2004* and the *Charter of Human Rights and Responsibilities Act 2006*. Both provide protection for “[f]reedom of thought, conscience, religion and belief” in section 14, but that protection has been criticized because the “limitation provisions...bear little resemblance to *ICCPR* Article 18(3)” (see for example Patrick Parkinson, ‘Christian Concerns about an Australian Charter of Rights’ (2010) 15(2) *Australian Journal of Human Rights* 83, 98-101 (99), quoting a submission by the Presbyterian Church of Australia to the National Human Rights Consultation in 2010). The problem is that both Acts allow derogation from freedom of religion on grounds of subjective reasonableness rather than objective necessity as required in the *ICCPR* standard. Neither that Act nor Victoria's additional *Racial and Religious Vilification Act 2001* protected the religious expression of the Pastors who were subjected to extended tribunal and court proceedings in the *Catch the Fires Ministry* saga of cases (*Catch the First Ministry Inc v Islamic Council of Victoria Inc* [2006] VSCA 284). Arguably those cases would not have proceeded if the *ICCPR* objective standard had applied.

¹²² For example, litigation which tested the constitutional validity of the *Racial Discrimination Act 1975* (Cth), and the *Industrial Relations Act 1988* (Cth), has been decided in the Commonwealth's favour. In *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168, the Queensland government's unsuccessfully challenged the validity of the *Racial Discrimination Act 1975* (Cth) which had prevented their veto of a transfer of a lease of lands to the Wik aboriginal nation. And while some provisions in the *Industrial Relations Act 1988* (Cth) were beyond the scope of the international treaty they purported to implement, the legislation as a whole was valid since a law

the power of the Commonwealth legislature to create legislative codes which ‘cover the field’, but the best human rights examples in this religious freedom context must be the *Racial Discrimination Act 1975* (Cth), the *Sexual Discrimination Act 1984* (Cth), and the *Industrial Relations Act 1988* (Cth). The success of these codes have all been affirmed in subsequent High Court decisions.¹²³ The legislative power to protect religious freedom across the length and breadth of Australia thus exists, but her political leaders lack the courage to protect religious minorities for the same reasons as her framers resisted racial equality at federation and why Queensland continued to resist it through the *Koowarta*, *Mabo* and *Wik* period. While the Commonwealth government can find the money to educate Australia with extensive radio and television advertising when she wants to,¹²⁴ bi-partisan parliamentary leadership yields to political opportunism when entrenched bigotry and xenophobia identify opportunity for an electoral point of difference.

Though Australia has not kept her general commitment to protect free exercise of religion as she might have done, she still has more than a moral obligation to do so since these *UDHR*, *ICCPR* and *Religious Declaration* norms are widely recognized enough that they constitute

implementing an international treaty or recommendation only needed to “be reasonably capable of being considered appropriate and adapted to implementing the treaty” (*Victoria v Commonwealth (Industrial Relations Act Case)* 1996 187 CLR 416, 486).

¹²³ *Ibid.* Unlike the *Racial Discrimination Act 1975* (Cth) and the *Industrial Relations Act 1988* (Cth) (and its successor legislation, the *Workplace Relations Amendment (Work Choices) Act 2005* (Cth) and the *Fair Work Act 2009* (Cth)), the *Sexual Discrimination Act 1984* (Cth) has not been the subject of a significant validity challenge in litigation. However, it is fair to say that the Commonwealth’s power to pass legislation implementing international treaties under the external affairs power (*Australian Constitution*, s 51 (xxix)) is now well established.

¹²⁴ For example, the Commonwealth government successfully resisted litigation contesting its right to fund promotion of its *Work Choices* legislation in *Combet v Commonwealth* (2005) 224 CLR 494.

customary international law.¹²⁵ However that criticism cannot be fairly directed at her protection of religious confession privilege. While Queensland, South Australia and Western Australia have not passed legislation to prevent the adduction of religious confession as evidence in litigation, such legislation has been passed in all other Australian jurisdictions¹²⁶ to answer suggestions that religious confession privilege was not protected at common law.¹²⁷ That protection, coupled with Australia's accession to the Second Optional Protocol to the *ICCPR* means that if a member of the clergy practicing religious confession were sanctioned by an Australian law passed to interfere with or abrogate that practice, that member of the clergy could appeal to the United Nations Human Rights Committee (UNHRC) for redress when all domestic avenues for legal redress had been exhausted.

Thus while the Australian states and territories may not be prevented from passing laws abrogating religious confession privilege as the Commonwealth government arguably is under s 116 of the Constitution,

¹²⁵ In her text, *International Law: Contemporary Principles and Practice* (LexisNexis Butterworths, 2006), Gillian Triggs has written that "many of the provisions of the ICCPR" have achieved "customary law status" including the "rights of minorities to enjoy their own culture, profess their own religion [and] to use their own language" (ibid 14.5 and 14.8).

¹²⁶ Religious confession privileges were first passed in the following states on the dates indicated: Victoria (1890), Tasmania (1910), Northern Territory (1939), New South Wales (1989), Commonwealth (1995), Australian Capital Territory (1995), Norfolk Island (2004). The statutory provision which was adopted by the Commonwealth when it passed the Uniform Evidence Act in 1995, was originated in New South Wales by the *Evidence Amendment (Religious Confessions) Amendment Act 1989* which inserted section 10(6) into the then *Evidence Act 1898*. Section 127 of New South Wales, the Commonwealth and the ACT *Evidence Acts* have affirmed since 1995 that "[a] person who is or was a member of the clergy ... is entitled to refuse to divulge [even] that a religious confession was made, ... [and not just] the contents of a religious confession made". Tasmania adopted the same uniform Evidence legislation in 2001, Norfolk Island in 2004, Victoria in 2008, and the Northern Territory in 2012.

¹²⁷ For discussion of the protection of religious confession privilege at common law, see Thompson AK, above n115.

wise state solicitors general may counsel against the passage of anti-religious-confession privilege legislation at the state level rather than attract such criticism. While Australian popular opinion may currently be superficially set against ‘this privilege of Catholic priests’, it is doubtful that anti-religious rhetoric will yield legislation enabling the complete abrogation of such privilege and the penalizing of non-compliant clergy. While a specific law requiring Catholic priests to report confessions of child sexual abuse by pedophiles might avoid criticism by the UNHRC, for the reasons explained in Parts I and II, it is unlikely that such a case would ever be considered by the UNHRC. That is because in practice, child sexual abusers do not confess their crimes to clergy, and even if they did confess, their admissions would not be used in criminal litigation since the clergy would rarely disclose them. Self-serving disclosure of alleged religious confessions by child sex abusers when pleading guilty to crime and seeking mitigation of penalty as in the McArdle case discussed in Cornwell’s *Dark Box* book, are also unlikely to lead to the prosecution of priests who did not report because prosecuting authorities are unlikely to be impressed with the probative value of such allegations.

V CONCLUSION

In Part I of this article, I explained that despite the self-serving assertions of Michael Joseph McArdle when he was seeking to have his term of imprisonment reduced, that he confessed his child sexual abuse crimes to more than thirty priests over twenty-five years, the weight of research authority confirms that child sex abusers do not confess their crimes to the clergy. Australia’s most notorious child sex abuser gave evidence to the Royal Commission that he never did, and Marie Keenan’s

psychological research in Ireland confirms the fact.

In Part II, I reviewed legal and philosophical authority that suggested that legislation abrogating religious confession privilege is impractical for a number of reasons. In the early nineteenth century, Jeremy Bentham explained that unfettered religious confession privilege was essential to any conception of religious freedom worthy of the name, and he said that abrogating religious freedom would be a waste of time since it would not yield any useful evidence and would dry up religious confession in an instant. Bentham's philosophical arguments were confirmed by review of the jurisprudential foundations of the hearsay and self-incrimination rules in evidence law. Clerical confessional evidence has always been suspect as hearsay and also engages the public policy which is still set against forcing those accused of crime to incriminate themselves. I also noted academic opinion suggesting that attempts to force Catholic priests to disclose confessions would be futile given their commitment to their vows and would bring the justice system into disrepute.

In Part III, I explained that s 116 of the Australian Constitution likely prevents the passage of any federal law in Australia abrogating religious confession privilege and that the passage of such laws at a state level would also offend customary international law protecting freedom of religious practice.

My final conclusion is therefore that abrogating religious confession privilege would serve no good purpose, would harvest no probative evidence for any criminal trial and would breach Australia's commitments in constitutional and customary international law. Since the Royal Commission has only identified pre-1998 cases of child sexual

abuse within institutional contexts, Australian law reform focus would be more wisely focused on how we eliminate continuing child abuse within families and how we heal the psychological injuries of victims.