



Lessons for Church and State from the Pell Saga

**Thomas More Forum
Canberra**

25 June 2021

Fr Frank Brennan SJ AO

The presentation can be viewed at <https://www.youtube.com/watch?v=8fJXBuSerZs>

1. The Example of Thomas More

Mr Bill Mason, Father Emil Milat, ladies and gentlemen: thank you very much for the invitation to return and to address another Thomas More forum. I've entitled tonight's address *Lessons for Church and State from the Pell Saga*. First, the example of Thomas More. When Pope John Paul declared Thomas More a patron of statesmen and politicians he said:

'Whenever men or women heed the call of truth, their conscience then guides their actions reliably towards good. Precisely because of the witness which he bore, even at the price of his life, to the primacy of truth over power, Saint Thomas More is venerated as an imperishable example of moral integrity.' Thomas More *'distinguished himself by his constant fidelity to legitimate authority and institutions precisely in his intention to serve not power but the supreme ideal of justice.'* Thomas More *'placed his own public activity at the service of the person, especially if that person was weak or poor;[and] he dealt with social controversies with a superb sense of fairness'.*¹

Tonight I want to draw lessons from the Pell saga, heeding the call to truth, asserting the primacy of truth over power, working to enhance the place of legitimate authority and institutions which are to be administered not for the sake of power, but to seek the supreme ideal of justice, always having an eye for the one who is weak or poor, and attempting to deal with the most intense of social controversies with a sense of fairness.

2. The Example of Cardinal Marx and Pope Francis

Second, the example of Cardinal Marx and Pope Francis. As you know, we as a church have been confronting enormous things in relation to child sexual abuse in the church as an institution. Cardinal Marx wrote to Pope Francis on 21 May 2021:

'[It] is important to me to share the responsibility for the catastrophe of the sexual abuse by Church officials over the past decades. The investigations and reports of the last ten years have consistently shown that there have been many personal failures and administrative mistakes but also institutional or 'systemic' failure. The recent debates have shown that some members of the Church refuse to believe that there is a shared responsibility in this respect and that the Church as an institution is hence also to be blamed for what has happened and therefore disapprove of discussing reforms and renewal in the context of the sexual abuse crisis.

¹ Pope John Paul II, *Motu Proprio Proclaiming Saint Thomas More Patron of Statesmen and Politicians*, 31 October 2000, available at https://www.vatican.va/content/john-paul-ii/en/motu_proprio/documents/hf_jp-ii_motu-proprio_20001031_thomas-more.pdf

'I firmly have a different opinion. Both aspects have to be considered: mistakes for which you are personally responsible and the institutional failure which requires changes and a reform of the Church. A turning point out of this crisis is, in my opinion, only possible if we take a "synodal path", a path which actually enables a "discernment of spirits".'

Pope Francis responded on 10 June 2021:

'The whole Church is in crisis because of the abuse issue; Furthermore, the Church today cannot take a step forward without assuming this crisis. The ostrich policy does not lead to anything, and the crisis has to be assumed from our Easter faith. ... Assuming the crisis, personally and communally, is the only fruitful path because a crisis does not come out alone but in the community and we must also bear in mind that a crisis comes out better or worse, but never the same.'

3. The Pell Saga

So I come to consider the case of Cardinal George Pell. This case impacted most on two individuals - one who is simply known by the initial 'J', the complainant, and the other, George Pell. None of us knows the identity of the complainant in the Pell proceedings; nor should we. When the High Court acquitted Cardinal Pell of all charges, the complainant J issued a statement through his lawyer saying, 'My journey has been long, and I am relieved that it is over. I have my ups and downs. The darkness is never far away. Despite the stress of the legal process and public controversy I have tried hard to keep myself together. I am OK. I hope that everyone who has followed this case is OK.' Earlier, his lawyer Vivian Waller told the ABC journalist Louise Milligan that J has 'experienced depression, loneliness struggle with various issues over time' and that 'the criminal process has been quite stressful for him'.² Undoubtedly he has suffered additional trauma through the processes of the law, including the appeals all the way to the High Court. Much of it was avoidable. These processes have also re-traumatised many other people who have experienced institutional child sexual abuse and who have placed hope in our legal system. Their situation would have been assisted if the police in this case had undertaken competent policing.

Cardinal Pell walked free after 404 days in prison, most often in solitary confinement. When the High Court acquitted him of all charges, he said: 'I hold no ill will towards my accuser. I do not want my acquittal to add to the hurt and bitterness so many feel. There is certainly hurt and bitterness enough. The only basis for long term healing is truth; and the only basis for justice is truth because justice means truth for all.' So I think it behoves us to hold both J and Pell clearly in our sights tonight.

² ABC 4 Corners 'The Conviction of Cardinal Pell', 4 March 1989 available at <https://www.abc.net.au/4corners/guilty:-the-conviction-of-cardinal-pell/10869116>

So how did I become involved? Back in 2012 I was giving an address at Parliament House in Sydney. It was the annual *Law and Justice Oration*. I said clearly that the church itself cannot be left alone to get its house in order. I thought the Catholic Church needed the assistance of the state to deal with the issues of child sexual abuse and the failures that had followed institutionally. As all of you would know, Cardinal Pell and I had had our differences and that's to put it mildly. There had been a case running about the late Archbishop Wilson and I thought he was acting with poor advice. When it was clear that any proceedings against Pell were going to be run with suppression orders in place, I was very worried. I had grounds, as I will say later, to be very concerned about the approach of the Victoria Police towards the Catholic Church, but particularly towards George Pell. That being the case, I wrote to Cardinal Pell and I suggested that if he were to be facing trial under suppression orders where the public would not know day-to-day what was occurring, it was essential that there be someone who'd be in a position to inform the public, particularly Catholics of goodwill. Basically I didn't think it should be left just to the ABC and to a few other media outlets. I suggested that he commission the services of a retired County Court judge. In his inimitable style, he came back to me and said, 'I've spoken to my people, and we think it would be better to have you; you'll go over better with the *literati* and the *glitterati*'. So it was arranged that I would play a role, not at the request of Pell but at the request of the President and Vice President of the Australian Catholic Bishops Conference who formally approached the Jesuit Provincial asking for my services to be available to attend what I could of the trials. Pell was to give me access, as he did, to the transcripts.

So I had access to all transcripts except of course the transcript of the complainant giving his evidence. But you will appreciate that most, if not all, of the key evidence of the complainant was either put by the prosecution or the defence to other witnesses, or in their final addresses, or in the judgments of the appeal court judges. It was also decided that I would check in regularly with a very esteemed senior QC of the Melbourne Bar. Day to day as the trial progressed, I would check things out with that QC. I had good relationships with quite a number of professional journalists who were covering the proceedings, and was able to answer some of their queries about the strange nature of a solemn 11:00 AM mass. But I do have to say and disclose that I had nothing to do with the three major book writers simply because none of them ever approached me. In fact, you might be aware that one of them even wrote that I was in the courtroom when the verdict was delivered. I was 1000 kilometres away in Bathurst.

Having attended the proceedings, I think it would be good for everyone, including J and Pell and everyone else who's watched these proceedings, now to declare that truth is the only way to go. It's time to declare that Pell is innocent of the preposterous charges he faced in the County Court of Victoria, and to declare that a lot of grief for everyone including J could have been avoided if there had been competent policing and if there had been competent work by the DPP and if the Victorian Court of Appeal had given a judgment in line with the dissenting judgment of Mark Weinberg, the leading criminal appeal judge in the country or with all seven judges of the highest court in the land.

I published the book *Observations on the Pell Proceedings* so you can make your own assessment of the evidence. The book is dedicated to ‘those who seek truth, justice and healing and to those who have been denied them’. Having followed the Pell proceedings closely, I’m convinced that the case did nothing to help *bona fide* complainants; it did nothing to help victims and their supporters. I write in the introduction that ‘the failures of the Victorian police, prosecution authorities, and the two most senior Victorian judges in these proceedings did nothing to help the efforts being made to address the trauma of institutional child sexual abuse. As a society we need to do better and the legal system needs to play its part.’

So what was the background? Basically Victoria police charged Pell with 26 offences at the outset. Six of those charges were withdrawn before the committal proceedings. At the committal, the committing magistrate discharged Pell on a further 10 charges. She committed him on 10 remaining charges. Those 10 remaining charges included seven charges in what was alleged to have occurred in Saint Patrick’s cathedral and three charges of what was alleged to have occurred in the Ballarat pool. The first moment I smelled a real rat in these proceedings was with the DPP intending to proceed with the Ballarat pool case first when every prosecutorial principle pointed to dealing first with the St Patrick’s cathedral charges. They were the far more serious charges involving some very aged witnesses who with the elapsing of time might not have been available and that would have disadvantaged the defendant. It took the defence to put a formal submission that the DPP do its job and apply the honourable principles of prosecution and so then the cathedral case was heard first. Ultimately the Ballarat cases fell over completely because as the County Court judge ruled:

‘There is a limit to what the law allows. ... It is one thing to strengthen or reinforce individual complaints through the lens of the collective weight of the complaints, it is quite another to seek to cure fundamental defects and weaknesses or to change or obscure a complaint’s essential character. The tendency and coincidence applications seek to do the latter here. There is a limit to what can be saved.’³

So those charges fell over and Pell was never brought to trial on the swimming pool matters. On the Saint Patrick’s case, there were five remaining charges - four of which related to an event that was said to have occurred in the priests’ sacristy after solemn 11:00 AM mass, either on 15 December 1996 or 22 December 1996.

Now when we come to consider the truth of the innocence of George Pell, bear this in mind. He was interviewed in Rome on 19 October 2016. Let me quote to you what he said to the police. Now bear in mind, Mr Ashton, the Victorian police commissioner sent none other than his trusted deputy Shane Patton who is now the Commissioner of Police of Victoria. Ashton sent him to Rome to oversee the investigation, and in the record of interview in Rome, this is what Pell said:

³ *DPP v Pell (Evidential Ruling No 1)* [2019] VCC 149 para 153

‘The most rudimentary interview of staff and those who were choir boys at the cathedral in that year and later would confirm that the allegations are fundamentally improbable and most certainly false and I invite my interviewers to tell me who they’ve spoken to and I’m happy to provide them in due course the persons who can speak authoritatively about my functions, presence and conduct at the cathedral generally and more particularly at times when abuse is alleged to have occurred. I would earnestly hope that this is done before any decision is made whether to lay charges because immeasurable damage will be done to me and to the church by the mere laying of charges which on proper examination will later be found to be untrue. Thank you.’⁴

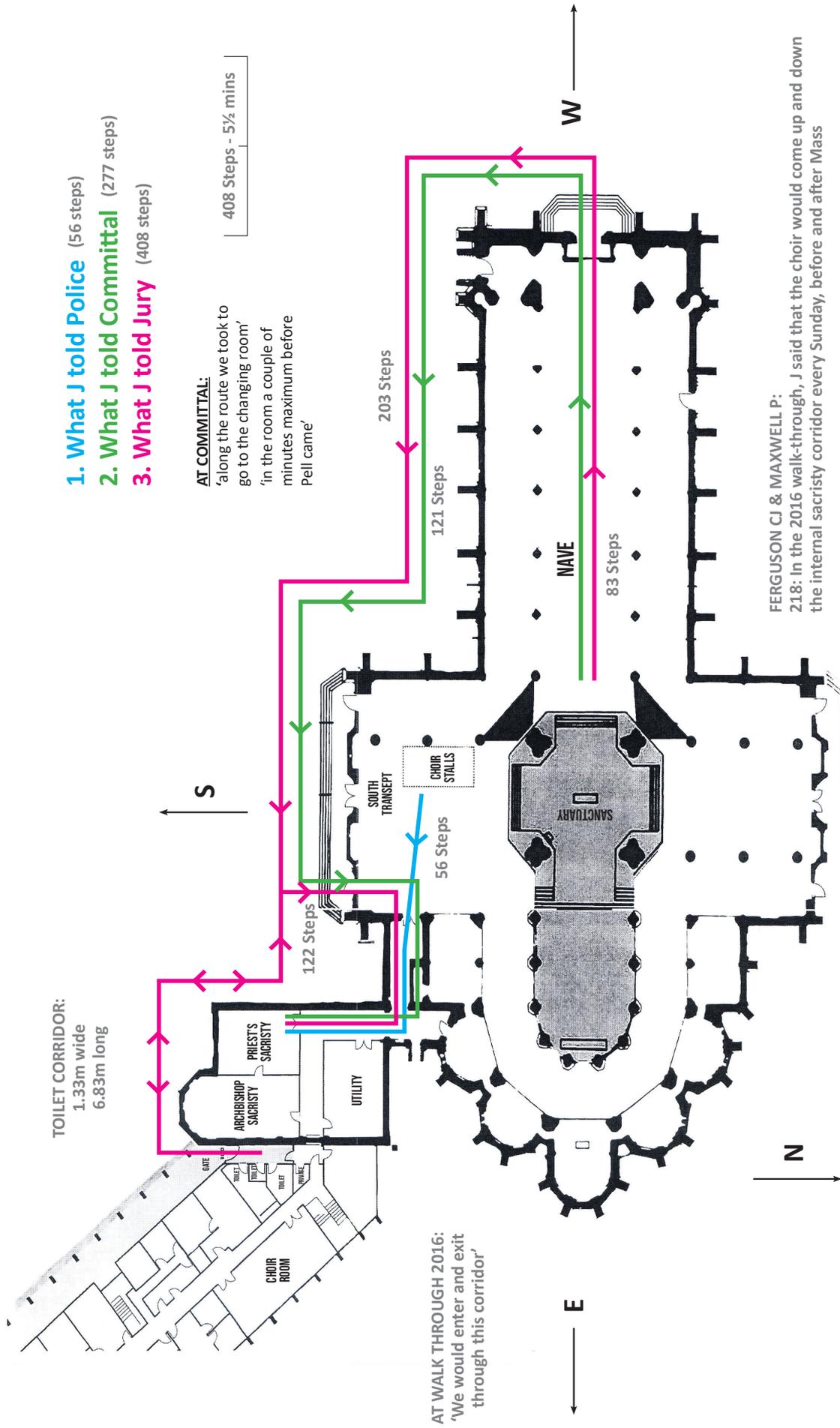
Let’s look at a number of vital pieces of evidence from the Pell record of interview. I’m going to focus tonight on the record of interview of Pell in October 2016 because basically it mirrors almost to a sentence the judgment of the seven judges of the High Court of Australia years later in April 2020.

On your tables, you have the list of the raffle prizes, this being a good Catholic event. On the other side of the raffle prizes, you will find a map. The map highlights why I think this case has always been very simple and quite preposterous. If you look at that map, it will make sense to those of you who are familiar with a solemn mass in a cathedral. I can assure you that many of the lawyers in the court were not familiar and I can assure you that many of the media were completely and utterly unfamiliar: ‘We don’t do Catholic stuff’. If they were having to cover a case which related to a military parade, they’d have learned the ropes saying, ‘We’ve got to get on top of this. This is a military parade.’ ‘But this is church stuff; now we don’t do church stuff.’

So what would happen usually after an 11 AM mass? At the end of mass, the archbishop would leave the sanctuary. There would be as a procession. At the head of the procession would be a number of altar servers, would there not? A cross bearer, 2 candle bearers and probably a couple of others; and then after them would come 50 to 60 choristers; and after them would come any concelebrating priests and the master of ceremonies; and ultimately after them would come the Archbishop with a mitre (the funny hat) and the crozier (a very sacred and very expensive piece of equipment which you just don’t leave lying around). He would be accompanied by two additional servers – the mitre bearer and the crozier bearer.

They would all process down the main aisle of the western nave to the steps. They’d make an external procession via the south side of the cathedral and come in what was called the toilet corridor. The concelebrants and servers would then walk through into the back of the cathedral and into the priests’ sacristy.

⁴ George Pell, Record of Interview, Rome, 19 October 2016, pp. 9-10



TOILET CORRIDOR:
 1.33m wide
 6.83m long

1. What J told Police (56 steps)
2. What J told Committal (277 steps)
3. What J told Jury (408 steps)

AT COMMITTAL:
 'along the route we took to go to the changing room'
 'in the room a couple of minutes maximum before Pell came'

408 Steps - 5½ mins

AT WALK THROUGH 2016:
 'We would enter and exit through this corridor'

FERGUSON CJ & MAXWELL P:
 218: In the 2016 walk-through, J said that the choir would come up and down the internal sacristy corridor every Sunday, before and after Mass

Unlike all of the investigative journalists, I've walked that route. It's 308 steps. Now I'm a bit tall. So it's probably a bit more than 308 steps. But I've walked it with the man who was at the time the MC at the cathedral when the trial was going on. It takes 4 ½ minutes to do that walk.

We come to Pell in the record of interview. The allegations are put to him. He says, 'Now, the sacristy after mass is generally a hive of activity because you've - , well have got the sacristan there and often you had an assistant sacristan. If there were concelebrants, they would divest. The servers would get out of their vestments. The collectors would bring in the collection. The sacristan and the assistants would be bringing the chalice and the vessels out from the altar. Now, I was always accompanied by my master of ceremonies after the mass, so he would come around with me and help me unrobe. It was just the protocol.'⁵

When J's version was put to him, Pell said, 'What a load of absolute and disgraceful rubbish. Completely false. Madness. All sorts of people used to come to the sacristy to speak to the priest. The sacristans were around, and altar servers were around. This is the sacristy at the cathedral after Sunday Mass?' Mr Reed, the chief police investigator replied, 'yes'. To which Pell responded, 'Well, need I say anymore. What a load of garbage and falsehood and deranged falsehood. My master of ceremonies will be able to say that he was always with me after the ceremonies until we went back to the car park or back to the presbytery. The sacristan was around. The altar servers were around. People were coming and going.'⁶

At the trial the Chief Police investigator Mr Chris Reed was asked questions in light of what had been alleged in the priests' sacristy. He clarified that they didn't interview anyone who was a concelebrant; they didn't interview any money counters. There was an altar server by the name of Connor who had a diary. He was anally retentive. He kept a record of every mass and every server, and then the lunches they'd go to at Jimmy Watson's, and the servers who attended the lunches etc. The police had this diary. They did not interview one single altar server. They interviewed lots of choristers, but not a single altar server. When asked why not, the police investigator said, well the complainant said there were none there.

Now this is basic policing. Let's take an example which has nothing to do with victims of abuse. Let's say you have someone who says: 'I've witnessed a bank robbery and I was in the bank and I'm a pedestrian and this is what happened.' And the police say, 'Well we'd better interview another 30 pedestrians.' 'Did you interview any bank tellers?' 'No, because the pedestrian said she didn't see any.' But wouldn't you at least interview the bank tellers to try and find out what actually goes on inside the bank at the time it's alleged that the robbery occurred? No altar servers were interviewed.

⁵ George Pell, Record of Interview, Rome, 19 October 2016, p. 171

⁶ George Pell, Record of Interview, Rome, 19 October 2016, p. 138

It got worse. The prosecutor Mark Gibson QC was a very honourable man and I think a good barrister. He before the jury said, ‘Well look, we’ve got to find the six minutes when there’s no one in the sacristy.’ So he said we need that six or seven minutes where there’s no one else in the sacristy. He said to the jury what happened was the seven altar servers (at the head of the procession) adjourned to ‘the utility room’ for seven minutes. He had to correct that. There was no evidence of that. So basically the prosecution case to the jury was that for that 7 minutes, the altar servers simply disappeared. They weren’t to be found anywhere. Now you who know how a solemn mass works, answer this: how would seven altar servers at that point, they come in, they bow to the crucifix, and then disappear for seven minutes? Where do they go? What do they do?⁷

The next issue that Pell highlighted was that it was an external procession. Now this is the complete giveaway of the case. Basic policing should have put an end to things at this stage. You see, in the early stages of investigation, the complainant told the police that he and his friend at the end of mass did what they always did: they made an internal procession from beside the sanctuary into the priests’ sacristy - a mere 56 steps. This route made it almost comprehensible that yes we were doing the usual 56 steps in the internal possession, and we started fossicking around, and we found a bottle of wine in the priests’ sacristy, and as the two appeal court judges in the Victorian Court of Appeal (Ferguson and Maxwell) said: ‘In the 2016 walk through’ which the complainant did being filmed, J ‘said that the choir would come up and down the internal sacristy corridor every Sunday, before and after mass.’⁸ So it was as simple as that. That’s what we always do; that’s what he remembered. Pell in the record of interview in 2016 says, ‘No that’s not what we do; this is a solemn mass in Saint Patrick’s Cathedral; we do an external procession’. And the senior investigator Sheridan bought in and says ‘Really?’. So Pell said, ‘Yes go back to Melbourne and check it out’.

So they come back to Melbourne, and sure enough the police satisfy themselves that it probably was an external procession. So the next time we hear from J is when he turns up at the committal proceedings and he says, yes actually it was an external procession. We came down here, up here, along here, and processing along this way but by the time we got to about the South transept here, I and my mate spontaneously decided to split off from the procession and we decided to come inside, and then if you like resume the old route of the internal possession. Now that was 277 steps. OK, by the time it got to trial and he was quizzed before the jury, there was a problem. If he’d peeled off near the South transept, you’ve got a choir of 50 persons. He and his mate were both altos, so they were at the front of the procession. There

⁷ By the time this aspect of the case got to the High Court, Ms K Judd, the DPP, took the extraordinary step of throwing her own prosecutor under the bus. MS JUDD: There was evidence that they left that room. There was evidence of McGlone that they went to what they called the “worker sacristy” to unrobe. That was a different sacristy. That was the workers’ room or the candle room. Let me take you to McGlone. BELL J: Is this going back to the position that the prosecution disavowed at trial? MS JUDD: He incorrectly disavowed that there was no evidence, he was very generous in that. BRET WALKER SC IN REPLY: ‘There was objection at trial on the basis of there being no evidentiary foundation for that argument and the Crown accepted the propriety of the objection and to the jury withdrew it. That is now, startlingly, to us, described as an incorrect disavowal by a very generous prosecutor of that theory. What we do not have, of course, is the second shoe dropping; so where is the evidence, the nonexistence of which, as understood by counsel on both sides at trial, led to the withdrawal by the prosecutor of such an argument and your Honours do not have it. In our submission, we should not have to deal with that kind of improvisation at this point. You will not find it in the exchange of written submissions, for example.’

⁸ Ferguson CJ and Maxwell P, *George Pell v The Queen* [2019] VSCA 186, #218

are 40 or 50 choristers behind him, including adults, some of whom were men whose own sons were in the choir. The question was: 'Well surely you'd be seen, and this is a breach of discipline? You there at the school on a scholarship. You wouldn't be doing this sort of thing.' So by the time it comes to trial and it goes before the jury, J says, 'Oh no, we didn't come off at the southern transept; we kept going all the way to the toilet corridor, and then spontaneously without speaking to each other, we turned around and we retraced our steps down here into the South transept and into the priests' sacristy.' That's 408 steps. Just bear in mind: it takes 5 ½ minutes. OK, that's all you need to remember at this stage.

Pell for his part says, 'Well actually I wouldn't be anywhere around there because I'd come out on to the steps (at the West Door) and I'd be greeting people on the steps.' The prosecution conceded that Pell ultimately set up a protocol that he would always be greeting people on the steps unless he had business to run off to. But the prosecution claimed that with these first two solemn masses of a new Archbishop in the cathedral, he wouldn't have stayed there very long. Now you've got to say it's a bit counterintuitive, isn't it? I mean, if you're one given to standing on the cathedral steps, you as the new Archbishop at your first two masses: chances are you'd spend more rather than less time meeting your new parishioners. Even if you tried to get away, if you've ever met any of those anxious parishioners who are very keen to meet the new priest or the new Bishop. You think: 'Hey, George back here! We want to meet you.'

Now if in any doubt about what Pell's approach to things was then when he had just become the Archbishop: the Melbourne *Age* did a two-page spread on him: *The gospel according to Pell* at that time and they described him attending a Chinese priest's funeral:

*'After the service they spill on to the concrete outside and the older Italians line up in front of Pell to pay their respects. They reach for his hand, then bend and kiss his knuckles or his ring in an ancient gesture of homage. Some wipe away tears. Pell is unsurprised and responds to each one with a few words or a blessing. Later, when he tries to pose for a photograph, he is surrounded by a flock of giggling nonnas half his size who want to get in the picture too. They are quite unembarrassed; he is their archbishop, the face of their church, and he belongs to them. This is Catholic faith in the old style, ritualised, tribalised and unquestioning.'*⁹

It's there on the cathedral steps: ritualized tribalized and unquestioning. And it takes time.

The next thing Pell says in his record of interview is: 'Look hang on, this is a very solemn event. I'm there with my MC Monsignor Portelli. He's always with me in this sort of thing. And so once again the prosecutor doing a painstaking job tries to get Portelli out of the picture. This was another one of those 'A-ha' moments for me as a lawyer attending the proceedings. As you know, there were two trials because in the first trial, the jury couldn't agree. Gibson had to separate Pell and Portelli with evidence which was in some way coherent. So he said, 'Well maybe there was some event on in the cathedral that afternoon which meant that Portelli had to go and fix up the books in the sanctuary so he would be away for a couple of minutes.'

⁹ Karen Kissane, 'The Gospel According to George', *The Age*, Saturday Extra, 30 November 1996

The only event that afternoon on either day was the evening 5.30 mass. Now a suggestion was put to the jury that maybe Pell stayed and did that mass. There was no evidence of that. Why is there no evidence of it? Because as all of you know, if the Archbishop does the solemn mass at 11:00 AM, he doesn't traipse back to do the low mass at 5:30 on a Sunday afternoon.

But the real giveaway was this. Gibson at both trials says to Portelli: 'You're a smoker, aren't you? So maybe while you were fully vested, you just whipped out the back and had a smoke, so you're away for six or seven minutes.' He put that to the jury at the first trial and had to retract it before the jury. He did it again at the second trial. Now this fellow is a QC and is a very honourable man. He's a good lawyer. How does he twice make that mistake? He is so desperate to find that six or seven minutes to separate Pell from Portelli, and he had to retract yet again.

We then come to the magical 6 minutes - 6 minutes when Pell and the two boys are said to be there in the sacristy. The sacristan was man by the name of Potter in his 80s and by the time of the second trial, he was starting to lose it. Anyone who attended both trials knows that the great weight which was put by the DPP in the High Court and by the two appeal judges in Victoria of the majority on the six minutes was preposterous. Why? Because in the first trial there was no mention of 6 minutes private prayer time by Potter. But he did mention it in the second trial. So let me give you exactly the question and answer that was put to him:

MR GIBSON: Mr Potter, can I ask this question. Once mass finishes and the procession commences down the nave towards the western door, once mass finishes and the procession commences how long is it before you first attend the sanctuary to start doing what you've just told us?

MR POTTER: Could be five minutes. I make sure that the procession's cleared from the cathedral first. That the whole procession's moved through. And people will be walking up to the sanctuary area kneeling, so we didn't disturb them for that five or six minutes, we gave them their private time and then we would move in after that.¹⁰

In the Court of Appeal, Justices Maxwell and Ferguson: their key paragraph was paragraph 300 of their judgement. Listen to it. It is absurd:

In our view, taking the evidence as a whole, it was open to the jury to find that the assaults took place in the 5-6 minutes of private prayer time and that this was before the 'hive of activity' described by the other witnesses began. The jury were not bound to have a reasonable doubt.¹¹

So the offending occurred in the five or six minutes after the first servers step down the nave. And we know it takes the first servers 4 ½ minutes to get to the priests' sacristy. So 4 ½ of

¹⁰ Transcript, *The Queen v Pell*, 19 November 2018, p. 473

¹¹ *George Pell v The Queen* [2019] VSCA 186, #300 [The Victorian Court of Appeal decision has not been reported in the authorised *Victorian Reports*].

your 6 minutes have gone before even the first server gets there. We know according to J's evidence that 5 ½ minutes elapse before he and his mate travel their elaborate route. So in those six minutes, not even J and his mate are in the room. Meanwhile Pell is at the back of the procession. Even if he stayed on the steps for only 10 seconds, he is still not going to be there within 6 minutes. It's absolutely impossible.

If you want to know how bad the criminal justice system of Victoria has become, just consider this exchange in the High Court of Australia where the DPP herself appeared before all seven judges of the highest court in the land. She comes to the six minutes. She says: 'Well, I am really going to go in hard on this and say that six minutes is just not something that you can be definite about because what they say is that the period – there is a period of a quiet interlude. Now, how long that is and when it starts is very much dependent upon how long it takes for the cathedral to be cleared.'¹²

She went on to suggest that if there's a big congregation, it takes a long time for the cathedral to clear. That's not what Potter said in evidence. Potter never spoke about the clearing of the whole congregation from the cathedral. He spoke only about the clearing of the procession. He said the procession started at the foot of the sanctuary and that the private prayer time ran from when the first servers set off. He waits for the procession to clear before he does anything.

Chief Justice Kiefel asked the DPP: 'Ms Judd, was it put to any witness that it could be more than five to six minutes?' Judd fudges it, I won't read you the answer. The Chief Justice tries again: 'The question is not a difficult one, Ms Judd. Was it put to any witness that it could be more than five to six minutes?' She fudges her answer again. A touch exasperated the Chief Justice says, 'I take it the answer to my question is no?' Judd fudges again. The Chief Justice answers her own questions: 'But in the passages you have just taken us to, the prosecutor adopts the evidence of five to six minutes and goes with it.'¹³

In the highest court of the land the most senior prosecutor of the state of Victoria invented a theory and then invented evidence. It's outrageous, and if in any doubt you can still watch the video of it on the High Court. Just observe the looks on the faces of the seven judges of the High Court of Australia wondering what in God's name is going on in Victoria!

Just to conclude. This was also against a background where Victoria police were up to no good and if you're in any doubt about that, just look at what happened at the time that there was the Victorian parliamentary inquiry. When Pell became the Archbishop in 1996, he negotiated a protocol with the Victoria police and the most senior Law Offices of Victoria. It remained in place from 1996 to 2011 – for 15 years. Then there was a Victorian parliamentary inquiry and the Victorian police fronted before that Victorian inquiry and said things which at the very least were not transparent. Let me simply quote what the Victorian inquiry said:

¹²*Pell v The Queen*, High Court Transcript, 12 March 2020, p. 52, available at <http://www.austlii.edu.au/au/other/HCATrans/2020/27.html>

¹³ *Ibid*, p. 55

'It is clear that Victoria Police paid inadequate attention to the fundamental problems of the Melbourne Response arrangements until relatively recently in April 2012 and that, when they did become the subject of public attention, Victoria Police representatives endeavoured quite unfairly to distance the organisation from them.'

The delightful centrepiece of Mr Ashton appearing before that parliamentary inquiry was his bombshell revelation about 43 suicides related to clergy sexual abuse. He told the inquiry:

Earlier this year we received a report from one of our detectives regarding work that was being pulled together on the issue of suicides as a result of clergy abuse. We have seen suicides as a result of clergy abuse. In relation to the material that was provided to us in a compiled format early this year, we met with the coroner and discussed the issues around those particular alleged suicides. I think there were 43 in number that were talked about at the broad level that needed to be looked at. The coroner asked us to do a review of those individual cases to determine whether she should reopen any of those matters. We have now concluded that research, and we will be in a position very shortly — maybe in the next week or two — to go back to see the coroner and give her the results of that work.¹⁴

That then became a big national story and it helped fuel the call for a royal Commission. Within less than two weeks on 1 November 2012, the police received an intelligence brief from its Sexual Crimes Squad. I won't read it all to you. There's no time. But it turned out that of the 43 cases, '1 case had childhood sexual assault by a member of the clergy identified as a contributing factor in the motivations of the person for their death by suicide. There is no new evidence of fact or circumstances that would suggest that it is appropriate to re-open any of the investigations into the death of the nominated persons.'

So there it was: one case! And we were not told that until 2015. Be in no doubt: Mr Ashton's police force had a job to do and it was to get Pell charged. The results were what Pell predicted.

So let me conclude by saying this: what we need for the good not just of people like Pell but also for the good of someone like J and for all *bona fide* complainants and victims and their supporters: we need good policing, good basic policing; we need honourable prosecution, and if in any doubt about our legal system, then in the end be grateful that we are part of a federation and we do have the High Court of Australia. I have my own criticisms to make of the High Court from time to time. I'm very critical of a judgment they gave on refugee issues this week where they split 4-3. But here 7-zip, where they said there's just nothing in this. So the big

¹⁴ Victorian Parliament, Family and Community Development Committee, Hansard, 19 October 2012, p. 8

lesson is: the media will continue with all sorts of intimation about Pell's guilt. There's no doubt that he's innocent. There's no doubt that he was made a scapegoat; and there is no doubt that the church does need the state to deal with these issues. But the state needs to act honourably, and state officials need to do their job. When they don't, everybody suffers huge and lasting trauma. Mr J was put through two years of additional trauma where the most basic of policing would have put him out of his angst about all that he was then put through. These are the lessons for church and state from the Pell Saga. Thank you.

Q&A

This is with regards to the questionable manner in which the investigation took off advertising for complainants. Do you believe a royal Commission into the affair should be called?

There won't be any royal Commission in Victoria on this. They've already had a royal Commission. You might remember the Lawyer X inquiry. It's been a bit of déjà vu for me because I was brought up in Queensland in the early 70s when Joh Bjelke Peterson was the premier. A lot of what I've seen in Victoria is just a replay of what I saw in Queensland in the early 70s. Queensland was right of centre; Victoria is left of centre. They've had a Royal Commission there into Lawyer X where the royal commissioner found there are up to 1000 or more criminal convictions which are now questionable because of the appalling behaviour of the Victoria police in what they did with Lawyer X. The High Court of Australia once again unanimously labelled this as completely 'reprehensible' to which commissioner Ashton speaking to his favourite radio personality said, 'Oh yeah, well they've got their view'.

The Royal Commission then said there was a need to appoint an investigator. When that happened with the Fitzgerald inquiry in Queensland, the investigator was appointed before Fitzgerald finished his work. In Victoria, it's now over six months since that Royal Commission reported and there has been no investigator appointed.¹⁵ Mind you, there are advertisements in the national newspapers to appoint a full time new judicial registrar of the Court of Appeal to deal just with the appeals of those who have been convicted with probably tainted evidence as a result of the activities of Victoria police and Lawyer X. So Victoria needs to implement its present Royal Commission. Getting to a Royal Commission on this one in addition to that, I think is all but inconceivable. Basically I think people have said, let the caravan move on. But I hope we would not see a repetition of that, and the way they advertised for people to come forward particularly on Christmas Eve in 2015. I thought was an absolute disgrace.

Was Mr. J coached by forces such as the police helping him to provide his evidence?

I don't know. I haven't seen the evidence Mr. J. I operate on the presumption that he was not, but I would have to say that I mean what you've seen there with the map where it changed from 56 steps to 277 steps to 408 steps. I mean clearly there was a lot going on. Let's just say that and I mean the absurdity of it was that J at least and the police having been convinced that it was an external procession. One problem was: how do we deal with an external procession and then still follow the path back for an internal procession from the southern transept to the priests' sacristy? But it created a whole new problem, namely that there just was not 6 minutes where Pell could be in the room and there wasn't six minutes when the two boys could be in the room, let alone 6 minutes when Pell and the two boys could be in the room alone together. It just can't be done, and if in any doubt, all I say to people nowadays is: let's forget about the

¹⁵ An investigator was finally appointed on 29 June 2021.

evidence; just give us a theory; just give us a theory – any theory! It needs 6 minutes for them to be alone in the sacristy immediately after mass. Give us a theory as to what happens with the altar servers. Give us the theory about all of this, and no one's come up with one.

Is the Pell travesty a one off, or should we interpret it as an anti-Catholic bias in the Victorian government against Catholic institutions?

I don't think it's likely that we'll have the same concatenation of circumstances ever again where you've got all the horror of a Royal Commission; you've got someone like Pell who had become a lightning rod conductor, and you've got a desire by the Victorian police force to get a scalp. Now it may be that in the future there's those sorts of risks, but that's why I keep emphasising that we've got to maintain faith, but that faith has to be deserved in our key institutions particularly policing, particularly prosecutions, and particularly appeal courts. The mystery for me has always been that Mark Weinberg undoubtedly was the leading criminal appeal judge in the country and he was called back from retirement to sit on this case by the Chief Justice who was known (and it's no criticism of her) but it's known that criminal law was not her field. Now as I say if it were a tax case and you're the new Chief Justice and you don't know much about tax and you've got the leading tax lawyer of the country sitting beside you, you'd think you'd start by presuming that I'll be pretty attentive to what this tax lawyer has to say.

So whether that sort of thing would be repeated again, I would hope that particularly given the way the High Court judgment deals with these things, I would think some lessons have been learned. Just to give you one example. There's a paragraph in the High Court judgment when the DPP in her desperation wanted to get the matter back to Victoria rather than having the High Court decide it there and then. She submitted to them that they didn't have all the evidence available to make a decision, so no, why not refer it back to the Victorian Court of Appeal or maybe bring it back here again the High Court of Australia? Unanimously all seven judges quoted the submission and they said there is only one word to describe this submission: 'specious'. Now I know enough about how the High Court of Australia works to know that draft judgment sat on seven desks and each of them looked and said, 'Oh, specious. It's not a word we usually use. It's pretty strong stuff.' And each of them said, 'Yes, specious!' Now hopefully we can avoid that sort of thing.

I want to repeat again as I said I think during the proceedings the prosecutor through the trial Gibson I think was very honourable and did a very workmanlike job. He just did his job. But by the time it got to the High Court, you have the DPP in this exchange with Justice Virginia Bell: 'Is this going back to the position that the prosecution disavowed at trial?' Judd replied: 'He incorrectly disavowed that there was no evidence, he was very generous in that.' Judd just threw Gibson under the bus. You don't do that sort of thing in the High Court of Australia.

I did not think Lindy Chamberlain could be found guilty because there was no body and no motive. In the Pell case my balance left me. It was only after the High Court appeal and the

publication of your book and the interview you gave that I could see rationality returning. Do you have any comment?

My only comment is this: what I've done in the book, it's just an accurate little book of reportage of every interview I gave and every article I wrote. They are there in chronological order. You might remember when I wrote that first article in *The Australian*, I copped quite a thrashing. I would still say going back and looking at that article today, I wouldn't change a word of it. In light of the High Court decision, I think a lot of people who were critical of me then might have cause to look again at what was being said. Now very deliberately, I decided that after the suppression order was lifted, I would write one and only one article and do three and only three interviews - two of the three were with the ABC: *7:30* and the *Drive* programme in Melbourne. I then made it clear I would not speak again until the legal processes had run their course. I thought it was not proper for someone like myself with a profile as I have to be buying into a public debate until everything had run its course in the courts.

When the High Court gave its decision, I then wrote three or four articles and I gave only one interview. I very deliberately did not give that interview to the ABC because I thought that the ABC by that time had not conducted itself in a dispassionate professional manner. I thought their calling me in at that stage as they wanted to would be simply the old game of restoring balance. Well I'm not in the game of hanging around just to restore balance when there's that sort of media reporting going on.

It's very necessary for us to be respectful of legal processes but then let's actually do the hard work of looking at the evidence and then identifying the problems that are there. I mean it is extraordinary in Australia at the moment: if it were a 4-3 or 5-2 decision of the High Court, you might say well maybe there's something in this. But that it's 7-2 and that it's written in the way that it is: it is very clear that the High Court was of the view that this was not a case which should have proceeded.

Cardinal Pell has received justice. Is it possible for J to receive justice?

The tragedy is we don't know what's happened to J. We do know this: there's no way that what he said occurred when and where he said - no way. It's just impossible. Given the changes of thinking that went on, there were obviously all sorts of mental processes at play. We do know from some of the records that he says that he suffered abuse when he was a young boy by someone who was childminding at his home. And he says he was abused by his parish priest when he was a young altar server. Now this is of course a whole other scenario. In terms of justice for J, what I've been arguing tonight is that justice for J would require us to ask what it means when the Prime Minister says in the apology, 'We believe you'. It means this: J, we respect you, and we will take on board absolutely everything you say, and we will do thoroughly professional police work and the prosecution will do thoroughly professional prosecution work determining whether your case should be pursued.

Now with quite a number of the Ballarat cases, that was done, and the cases were quite rightly thrown out. You might remember it was in the media at the time that there were allegations that Pell raped a child while watching a movie in the picture theatre. It was demonstrated that amongst other things the kid said he had a vivid memory of what movie was showing. The movie wasn't showing at that time, and the fellow who ran the movie theatre said that if this had been going on in his movie theatre, he would have known something about it. So justice for that person meant: 'Look, we don't know what happened in your life, but this is not a case to be prosecuted where there would be risks to everyone, yourself included.' I would say that justice for J would be with the sort of basic police work that should have been done after the record of interview of Pell, it should have been: 'This is not an appropriate case to go forward'.

The other thing to say is this: even the committing magistrate said, 'There was a preponderance of evidence that the archbishop spent time speaking with the congregants on the steps prior to returning to the sacristy. If a jury accepted the evidence of Monsignor Portelli and Mr Potter that the archbishop was never in the sacristy robed and alone, and that choirboys could never access the sacristy keys because they were always locked when unused, then a jury could not convict.' Now a lot of people don't appreciate this. The prosecution because they were calling 23 witnesses, 22 of whom would have been those who worked around the church or whatever, the prosecution was given permission in relation to a number of them including Portelli and Potter that they would be allowed to cross examine them, basically to question their honesty or credibility or recall, even though they were their own witnesses, the prosecution witnesses. So the prosecution went to the trouble of getting that permission and never exercised it. Now you're left with a case where the committing magistrate says, 'If a jury accepted the evidence of Monsignor Portelli and Mr Potter ... then a jury could not convict.' You've got permission to cross examine Portelli and Potter - to say: you know this is bunkum, and you don't take up the option.

That then leaves us and let's make no mistake for us as church and it's what I said in the 1st 7:30 interview the night after the lifting of the suppression order. The truly dreadful thing that we all have to accept as Catholics in contemporary Australia is that 12 presumably decent Aussies off the street sat through all this and said, 'We don't care. We're going to slot him.' I think you can see here tonight that on the available evidence, there's no way you could slot anyone on this unless there is a collective mindset that you know we want to slot this fellow for something, and we're slotting him for this.

What is the role of judges? On my understanding you get convicted in a criminal prosecution if it's proved beyond reasonable doubt. In a civil case, it's on the balance of probabilities. Does a judge have some duty to direct the jury? In a case like this you probably couldn't even satisfy the civil level that you know on the balance of probabilities does the judge have a role to play in saying this should not go ahead?

In some jurisdictions the judge does have a role but not in Victoria. In Victoria once the prosecution, and this is why the role of DPP is so important, once the prosecution is on foot,

the judge is basically powerless other than just to let the thing run its course. Now we'll never know what Justice Kidd, the trial judge, thought. I always thought that his final charge to the jury was a very light touch sort of charge, and I came away thinking that he probably thinks this isn't going to go anywhere in terms of conviction. But I may be quite wrong on that. For example, he managed to do his final charge without even mentioning a mitre or a crozier. Well if Pell turns up in the priests' sacristy without a mitre or a crozier, that's actually evidence that he must have been out there on the steps because it's only if he leaves the procession and stays on the steps for a considerable period of time that he will hand over the mitre and the crozier. And the mitre bearer and the crozier bearer will go ahead. But those things were left untouched in the final charge. I might just quote what he said about the different routes. This will give you an idea of how light his touch was on all that. I'm not being critical of him. I'm just saying that it was a light touch final charge. This is what the trial judge said to the jury:

'It does seem common ground, however, between the parties, that there are some differences in [J's] accounts... In relation to the first episode concerning the priests' sacristy, at the committal Mr J drew a diagram on the cathedral plan showing the way he left the procession and veered off at the south transept into the doors. ...[T]here is that line which shows veering off from the procession, not far from the south transept and into the south transept. At trial he said they went up to the toilet corridors near the iron gate and doubled back, so that is a difference. It seems common ground there is a difference there and both parties made arguments to you about what flows from that'.

I haven't even dealt tonight with the fifth charge which if you think these four charges were preposterous, the fifth charge was just interplanetary stuff. Pell was standing next to Father Brendan Egan who said the mass. At the end of the mass they're all in a corridor with probably 40 or 50 people there. Pell peels off, goes off in the midst of all these people, puts the kid against the wall, assaults him and then comes back and joins the procession. And guess what: the police to this day, to this day, have never spoken to Brendan Egan. Now he did leave the priesthood, but he's been working for a local council in Victoria readily contactable - and never spoken to by the police. And you put that charge against a citizen who happens to be George Pell – ridiculous!

There was a variety of opinions expressed in the politics and religion class of year 11 about Cardinal Pell's defence choice of lawyer, his refusing or choosing not to take the stand etc. What was your opinion?

I don't mind saying because it's not a claim made in hindsight, and to be fair and gracious Cardinal Pell acknowledges in his *Prison Journal* that after the first trial when he didn't give evidence I wrote to him telling him he must give evidence and I went to see him and I had a long talk with him and I fronted up for the second trial and I mean I wasn't part of Team Pell

or whatever so I was in the dark as much as anyone.¹⁶ It seemed to me that Richter was upping the ante a bit in the second trial and I thought that there was something going on here, but I thought that's OK because Pell's going to give evidence. This time, the first time my heart sank, was then at the end of the prosecution case, when it was announced that Pell was not giving evidence. There's a saying in the law, using an American term: we don't want Monday morning quarterbacks. After the game everyone's an expert and says what went wrong and that you should have done something different. I remain convinced, as I was between the first and second trial, that basically and I don't think the criminal lawyers had got this, I think they would in future. I mean criminal lawyers are very good at acting within the box but I think in this case it had reached the stage in the Australian public mind where I think ordinary decent jurors said we're sick to death of the Catholic Church spending big money to employ flash lawyers who cross examine the complainant for two days or whatever, and then this guy who's obviously very bright and all the rest of it doesn't even get in the box and eyeball us and tell us there's no way that could have happened.

Now I may well be wrong, but I think one of the lessons out of the Pell saga is that if there is a prominent church person in that sort of position in future then basically you've got to front the jurors; you've got to eyeball your fellow citizens, and you have to say, 'No, there is no way I could possibly have done what was alleged.'

The Pell case shows without a doubt that there is active discrimination in our institutions, namely police and judiciary, against Catholic clergy. Given this, what do you think would be the bare minimum that needs to be done with the federal Religious Discrimination Bill or otherwise to ensure there is true religious liberty and true non-discrimination against people of faith in Australia?[by a Member of the House of Representatives]

I'll be happy to come and see you in your office sometime and talk about these things. I've always had a rule. I chaired the inquiry for the Rudd government on national human rights. I was then on the committee Turnbull set up on religious freedom chaired by Ruddock. I've had a rule for myself that if you work on a committee like that, you do your report, you put it in, and you let it speak for itself. So that's been my approach.

One reason I've had that approach is that years ago there was a judge of whom I thought very highly, Justice Lockhart. Now I disagreed with him on things to do with stem cell research and he did a major inquiry on stem cell research. I think he died or was unwell so some of the public servants and others who have been involved in the inquiry evangelised very strongly for it, and I just didn't think that was right. I think it's very appropriate for any member of

¹⁶ In Volume one of his *Prison Journal*, Cardinal Pell writes at page 64: 'Frank Brennan was always keen for me to be in the box, especially after the hung jury decision. Eventually I decided I should give evidence, despite the entire legal team and my own advisers being opposed. Terry Tobin came around to my point of view. I only decided not to take the stand after the prosecutor had dealt with Charlie Portelli and especially Max Potter. I was so cross with the treatment they both received, I was frightened that my hostility might turn a majority for acquittal into a split decision. The basis of my reasoning was quite wrong.'

parliament to seek my views about these things, but I don't think it's appropriate for me to be evangelising that cause.

But I will say this. I became convinced in 2009 that Australia does need something like an overarching Human Rights Act. But that is not the will of our major political parties at this stage. The track we've gone down in Australia is with a whole bevy of discrimination laws: racial discrimination, age discrimination etc. Given that that's the track we've gone down, I think there is a *prime face* case for having a religious discrimination law providing that you shouldn't discriminate against people on the basis of religion. But where it becomes highly problematic is this: with a Religious Discrimination Act you would need far more exemptions than you would in other sorts of discrimination laws. Why? Because religious people want to be able to choose people of their own religion for particular functions for very understandable reasons.

The thing about religion is that if I'm a Christian, I actually believe that Jesus Christ is the saviour. I actually believe that Christianity is the best religion. If I'm a Muslim, I don't believe Christianity is the best religion. I believe Islam is the best religion. Now in that sort of situation, I think the work to be done by a discrimination law is very different from what it is in things like race discrimination and age discrimination. So there are many complexities in all of that. Having said that, I think what's essential is to ensure that within our public institutions that there is no discrimination including religious discrimination and it would be absolutely appalling if there were ongoing discrimination against Catholics by a particular state police force. I think it's no secret that I mean clearly there was an antipathy or a strong difference between George Pell as a leading Catholic and Graham Ashton as the Victorian police commissioner. But hopefully we can all move on from the sorts of abuse which occurred during the Pell proceedings.

I think the jury did want Pell to be responsible for child sex offences within the church. I agree that Pell in the criminal sense is not guilty but who in the church will take responsibility for the abhorrent treatment of children. Until responsibility is taken, the church has a problem with the public.

I readily concede that and that's why I started with the quotes from Cardinal Marx and from Pope Francis. In Pell's defence and in the church's defence, I would say this: I think the Royal Commission did a lot of good work but where I think the follow up on the Royal Commission has not been good is I think there was insufficient acknowledgment that the Catholic Church had done a lot of work since 1996 to get its house in order. There were still failures but there was a lot of work that was done in order to get that house in order. Part of the problem has been that where you have particularly some in the media saying that the Catholic Church is a complete cot case, while there are people in the church who have sweated long and hard between 1996 and 2021 - which is 25 years - who feel how can we ever get it right? Definitely some of those people would simply say: well the sooner the Catholic Church goes away, the better. As we know, the Catholic Church isn't going to go away. But what we do want to ensure is that we do have the appropriate accountabilities.

I've heard that there was a story very similar to the complainant's account in America 100 years ago.

I don't know anything about it so I'm not in a position to believe it or not believe it.

Could you comment on the allegations and suggestions about Vatican finances being used to get Pell in this case?

I think this has been one of the very unfortunate things. If there had been better policing, better prosecution, and better work by the Victorian Court of Appeal, we would all be spared these conspiracy theories about Vatican money and witness J. Who knows? I would still be very surprised and on all of these things I say: 'Let's wait and see the evidence'. And that's exactly what I tried to do during the course of the Pell trials. Let's see the evidence, and let's apply the appropriate standard of proof. Now for my money, anything else simply remains surmise or conspiracy theories.

I remember once, and I don't think he'd mind my saying this: Cardinal Pell spoke to me about some of the intrigues going on in the Vatican and I said to him, 'Look all these years I have taken no notice whatever of these intrigues in the Vatican. It would simply be a threat to my faith.' He said to me, 'Someone like yourself should be interested and should be involved.' But to this day, I find that I have more than enough things to interest me and more than enough things to do without trying to get on top of the intrigues of Vatican finances.

Joanne Gale's Vote of Thanks

It might bring me bad luck to quote a saint other than Thomas More at the Thomas More Forum but I'm going to do it anyway. In the words of Saint Ambrose, no duty is more urgent than returning thanks. And so it's my privilege to say a few words of thanks on behalf of the Thomas More Parish. My name is Joanne. I'm a member of the parish council and my legal expertise consists of watching British police dramas. I was pleasantly surprised that I could follow Fr Frank's presentation, and I suspect this is due to his talent for explaining complex processes and issues in such a way that even consumers of low brow television such as myself can understand. Father Frank's presence at the trials, his scrutiny of the court transcripts and evidence, and his presentations of his findings in the media, in his book, and here with us tonight give all of us an important opportunity to deepen our knowledge and understanding of this very complex chapter in the Australian Catholic Church, indeed in Australian history. He has thoughtfully and carefully presented his analysis always with empathy for the parties involved. From the start of this whole episode, he's being a consistent and constant voice asking for people to examine the facts: in the context, a very courageous stance. Father Frank's calls for truth, justice and healing echoed loud and clear.

My husband Ross and I live in a household with two boys under the age of four and therefore spend a shockingly disproportionate amount of time talking about superheroes. Superheroes are seekers of truth and justice, and above all they're compassionate and courageous. Now while Father Frank might not wear his undergarments on the outside of his clothing, he comes pretty close to a superhero classification in our household. Father Frank as a Catholic community gathered here this evening, we're all very grateful for your efforts to seek truth and justice for all involved, including the church. We thank you for writing the book so that we may learn from your insights and we thank you for your generosity in sharing your journey here with us tonight. We've got a small token for you on behalf of the parish.