

Australian child sex abuse inquiry is no fishing expedition

Public scrutiny of Church files will make the world safer for children

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Kieran Tapsell addressing "The role of Church law in the child abuse issue: help or hindrance" conference in Melbourne, Australia, in October. Photo [Catholics For Renewal](#) (reprinted on [catholica.com.au](#))

Jesuit Fr. Frank Brennan has [criticized the U.N. Committee against Torture](#) for making some gratuitous comments about Australia's response under the convention, and about the Holy See's response to the request for the production of documents from the Australian Royal Commission into Institutional Responses into Child Sexual Abuse.

Some of the committee's comments were gratuitous: its members initially did not seem to understand that the Australian government has no power to tell a royal commission what to do; nor did they seem to understand that the royal commission only makes recommendations, and does not prosecute anyone.

However, the assertion by Fr. Brennan that the royal commission's request for the production of documents involved a "fishing expedition" is, with respect, equally gratuitous. This is a term used in civil litigation where one party, in seeking discovery of documents, hopes that they will reveal relevant evidence to support its case without any ground for believing that such evidence exists. If that kind of restriction were placed on royal commissions, their powers to investigate would be significantly shackled.

Even assuming that the civil litigation discovery rules apply to royal commissions (and they don't), if fish are reasonably suspected of being in the pond, the discovery exercise is not a "fishing expedition." The "fish" in this case are relevant documents in the possession of the Holy See that were not retained in Australia. There is hard evidence, publicly available, of the Holy See's practice of requiring local copies of documents to be destroyed, and of bishops being advised to send "sensitive" documents to the papal nuncio who could then claim diplomatic immunity over them.

In his book published this year, [*Benedict and Me, and the Cardinals Three*](#), retired Bishop William Morris of Toowoomba, Australia, describes how in 2007 he made inquiries to U.S. Archbishop Charles J. Chaput about his report to the Holy See concerning Morris's alleged failings in his diocese: "The next communication I received was in the early part of May informing both the chancellor and myself that he had sent an electronic copy as well as a hard copy to the dicastery for bishops. He then destroyed his electronic and hard copy as ordered by Rome." The Murphy Commission in Ireland found that Bishop John Magee, the former private secretary to three popes, had two files about allegations of sexual abuse against a priest, one for police in answer to a subpoena or search warrant, and one for the eyes of the Vatican. On the Vatican file there was an admission by Fr. Caden of sexual abuse of children, and on the police file it was missing. It seems Bishop Magee forgot to destroy his Vatican file, and it came into the hands of the Murphy Commission.

In 1990, U.S. Bishop James Quinn of Cleveland, who also was a civil lawyer, advised bishops in a speech to ship all their documentation they considered "dangerous" to the papal nuncio who could then claim diplomatic immunity against their production. In 2006, Rick Romley, the district attorney from Phoenix, Ariz., said that this was the kind of obstruction he experienced when investigating child sexual abuse in the Church.

In 1994, a former bishop of Parramatta, Australia, had his presbytery searched under a warrant when it was alleged that he had refused to hand over to police documents and reports of a canonical inquiry into sexual abuse by priests in his diocese. The [pontifical secret](#) imposed by Pope Paul VI in his 1974 Instruction, [*Secreta Continere*](#), applied to these documents, and there were no exceptions for handing them over to the police. The canon lawyer who conducted the inquiry on behalf of the bishop told the Cunneen Special Commission in 2013 that if a civil court required the disclosure of material revealed to a Church tribunal, the appropriate response would be to seek a dispensation to reveal it. Such a dispensation under canon law would have to come from the Holy See.

Two years after the issue of the search warrant against the bishop of Parramatta, Fr. Brian Lucas, the current general secretary of the Australian Catholic Bishops' Conference, wrote a paper for the Canon Law Society of Australia and New Zealand, titled, [*Are Our Archives Safe: An Ecclesial View of Search Warrants*](#). Fr. Lucas correctly advised that no privilege under Australian civil law applied to the Church's internal investigations, and any such documents would have to be produced on subpoena or search warrant. He then wrote: "There may be cases that appear to be so sensitive that it is in the best interests of the parties, or one of them, and of the Church, that the documents not be created in the first place." He kept no notes of his interviews with some 35 priests accused of child sexual abuse. The Cunneen Special Commission found: "The purpose of this practice was to avoid the creation of documentary records, and a consequence of it was that documents that could later reveal to church outsiders (including the police or complainants in civil litigation) matters that might bring scandal on the Church — including admissions of child sexual abuse by a priest — did not come into existence." Another way of achieving the same end was to do what Archbishop Chaput said he was ordered to do by the Holy See, and destroy the documents, or follow the practice of keeping all copies of sensitive documents in the offices of the papal nuncio. Faced with this evidence even in civil litigation, a court would be unlikely to find that a request for documents relevant to disciplinary proceedings against Australian priests for child sexual abuse was a "fishing expedition."

Fr. Brennan's accusation of a "fishing expedition" by the royal commission also is gratuitous because it implies that it has no evidence of other examples in Australia of this practice being adopted in specific cases it is investigating. There may well be Australian bishops who, like Bishop Magee and unlike Archbishop Chaput, were somewhat slack in destroying their documents.

The royal commission has no power to force the Holy See to produce its documents. The claim by the Holy See that because it has the status of a sovereign country under international law, it is entitled to keep details of its "judicial and administrative proceedings" confidential, smacks of casuistry. That objection would be justified if the commission were seeking access to the papers relating to the trial of the pope's butler for breaching the laws of the Vatican City-State, but documents in relation to disciplinary proceedings under canon law have nothing to do with the Holy See's status as a sovereign state or any crime committed within the Vatican City. These priests were not abusing the children of the Swiss Guards but children in Australia. The Holy See is showing more inclination to cooperate with the Australian royal commission than it did with the Murphy Commission, but the objection to production, based on national sovereignty, does it little credit.

The royal commission's terms of reference require it to concentrate on "systemic issues" and one such systemic issue is how Catholic priests are disciplined under canon law for the sexual abuse of children. Australian society has as much right to know about this as it has the right to know about disciplinary proceedings against doctors for drug dealing, lawyers for stealing clients' money and teachers and psychologists for sexual abuse. Such proceedings are open to public scrutiny but the Church's disciplinary proceedings are not, and are still covered by the pontifical

secret. As the commission's investigation of the Nestor case in Wollongong revealed, a priest can be acquitted of a crime under the civil law, but there may still be an issue of what is called in other professions, “professional misconduct” that might justify his dismissal. Information on how canon law deals with this is critical to “making the world safer for children,” and has nothing to do with “fishing expeditions” in civil litigation.

Kieran Tapsell is the author of [Potiphar's Wife: The Vatican Secret and Child Sexual Abuse](#) (ATF Press 2014)