

BOOK REVIEW

Observations on the Pell Proceedings

Author: Frank Brennan SJ

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Reviewed by Brian Skinner*

The author of *Observations on the Pell Proceedings* was requested by the Australian Catholic Bishops Conference and his Jesuit Provincial to offer commentary on the conduct of the Cardinal Pell court proceedings once suppression orders were lifted on 26 February 2019. Cardinal Pell had been convicted on 11 December 2018 for five offences after two trials in the County Court of Victoria.

His appeal to the Court of Appeal of Victoria was unsuccessful with one of the three judges dissenting. On 7 April 2020 the High Court of Australia unanimously, and in a single judgment of all of the court's seven justices, allowed his appeal and quashed each conviction. Verdicts of acquittal were entered in place of the convictions.

We should be grateful that Brennan elected to take up the challenge to provide valuable insight as both a priest and lawyer to a series of events now infamous in Australian legal history. Peter Craven in *Spectator Australia* quotes Brennan as having said in relation to the injustice rendered to Cardinal Pell, "Welcome to Salem," alluding to the terrible witchcraft trials in seventeenth century Massachusetts.¹

The apt description "witch hunt" was taken up and adopted by Keith Windschuttle in his detailed and much lengthier book, *The Persecution*



OBSERVATIONS ON
THE PELL PROCEEDINGS

Frank Brennan SJ



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1 Peter Craven, "Ulysses", *Spectator Australia* (15 May 2021), 41.

of *George Pell*.² In order to extract maximum benefit from Brennan's observations, I recommend first reading Windschuttle's detailed account of events from beginning to end. For example, the activism of the Royal Commission into Institutional Responses to Child Sexual Abuse³ is thoroughly examined by Windschuttle whereas the inept role of the Commission is considered by Brennan only by reference to redacted parts of the report.

Brennan's book is 157 pages in length. The content is pithy and forceful. It is a valuable accompaniment to Windschuttle's work in that it provides a splendid collection of interviews, Facebook posts, and articles written for newspapers and respected journals and transcripts of interviews. The book even includes a homily. The content of the *Observations* is usefully divided into three parts: After the Jury Conviction, After the High Court Acquittal and After the Release of the Unredacted Royal Commission Case Studies. In all, there are fourteen chapters.

Brennan concentrates on the history following the laying by the Victorian Police in June 2017 of five charges of sexual assault. Again, the lead-up to the decision was the culmination of many elements considered by Windschuttle and which were outside the scope of Brennan's work. Ultimately Cardinal Pell spent 404 days in prison for offences which he did not commit. Whilst there are aspects of the saga which will never be resolved, a reader of *Observations on the Pell Proceedings* is left in no doubt as to the existence of a biased mindset and a determination to pursue a criminal prosecution bereft of evidence.

Each of the five offences involving sexual assault was alleged to have occurred within the confines of St Patrick's Cathedral, namely the sacristy and in a corridor. The assaults were variously alleged to have occurred immediately following a solemn High Mass celebrated by Pell and in a procession following a Solemn High Mass at which Pell had presided. The determination of the date of the Mass at which Pell presided was even the subject of a working back exercise. The ultimate hurdle facing the prosecution was that in very simple terms there was no opportunity for Cardinal Pell to have committed the offences whilst alone and unaccompanied by his Master of Ceremonies and other assistants involved in the liturgy.

² Keith Windschuttle, *The Persecution of George Pell* (Sydney: Quadrant Books, 2020); reviewed in *Journal of the Australian Catholic Historical Society* 41 (2020).

³ Commonly referred to as the McClellan Royal Commission

The thrust of the collected writings and interviews is that there was simply no way the alleged offences could have been committed and that some decent investigative work on the part of the police could have avoided what became nothing less than a farce. Brennan states and restates that there was simply no evidence to support the complainant's account. Strictly speaking, there was some oral evidence, but it was weak and not compelling. The High Court found that the jury, acting rationally on the whole of the evidence, ought to have entertained a doubt as to the applicant's guilt with respect to each of the offences for which he was convicted.

One of the least satisfactory features of the proceedings was the outcome of a first trial which resulted in the jury failing to reach a unanimous verdict. At that trial the complainant had been permitted to give his evidence and to be cross-examined by video-link. Immediately following the discharge of the first jury, a second jury was empanelled, and a second trial conducted in which the complainant's evidence was given by the replay of the recording of his evidence and cross-examination in the first trial.

Any reaction by the Victorian legal system to the many criticisms raised by Brennan will be interesting to observe. Brennan's assessment that the Cardinal Pell prosecution revealed deep-seated problems in the Victorian criminal justice system is, after all, a well-founded conclusion.

Brennan elucidates significant shortcomings on the part of the Victorian Police Force (right up to the level of then Commissioner, Graham Ashton, and the then Deputy Commissioner, now Commissioner, Shane Patton), the Director of Public Prosecutions, Kerri Judd QC, the Chief Justice of the State of Victoria, Anne Ferguson, the President of the Court of Appeal, Chris Maxwell, counsel who appeared in the prosecution in the two trials and in the High Court, and the Royal Commission itself. None of the forgoing entities or individuals emerges unscathed.

It is important to record that Brennan left no stone unturned and was correct to identify, albeit in retrospect, errors on the part of Cardinal Pell and his legal team. Most significantly Cardinal Pell elected not to give sworn testimony in either trial. Defence lawyers have always erred on the side of electing not to expose their clients to the rigours of cross-examination. Times have moved on and due to press coverage and television, I agree with Brennan that the forensic election made by the legal team, was, in hindsight a mistake.

The author draws no final conclusion as to the party ultimately responsible for the travesty but observes that had the police responsible for the charges and investigation bothered to invest time and effort into interviewing relevant witnesses instead of trying to bolster a case that the complainant was alone in the sacristy of the Cathedral for five to six minutes during which time offences were alleged to have occurred, no prosecution would ever have taken place.

Brennan concludes that there is simply no excuse for the ineptitude of the investigating police. In all, they had twenty months in which to review the accuracy of what Cardinal Pell and his Master of Ceremonies, Monsignor Portelli had told them. They did nothing constructive. The account given by the complainant J was simply accepted. The use of orthodox methods of investigation would have put an end to the investigation. For example, the police never inspected the vestments used by Cardinal Pell.

The Director Public Prosecutions (“DPP”) failed in its duty to supervise the prosecution brief and in permitting the prosecution to go forward. Ms Judd QC entered the fray in the High Court and attempted to bolster the untenable version of complainant J. She succeeded in throwing her junior who had conducted the committal hearing and two earlier trials “under a bus”. The High Court let her off very lightly when she attempted to regurgitate an earlier discredited theory advanced and withdrawn at trial in an attempt to explain how Cardinal Pell could have been alone with the complainant J in order to commit the offences. Correctly, Brennan describes her performance as “appalling”.

The work of the majority of the Victorian Court of Appeal, Chief Justice Ferguson and the President of the Court of Appeal who dismissed an appeal to that Court was described kindly by Brennan as “below par”. Not only was the reasoning of the majority “poor” but the lengthy period of time taken to deliver judgment whilst Cardinal Pell remained behind bars was unconscionable. In short, serious errors were made and their judgment was “dreadful”.

The role of the Royal Commission announced in November 2012 is, in so far as it concerns the prosecution of Cardinal Pell, is of some complexity. Brennan identifies that at the outset the Commission clearly “needed a big scalp and Pell’s was the one they wanted”. Ultimately the Commission did not publish an unredacted version of the final report until 8 May 2020

following the High Court decision. An analysis of the Commission's report was undertaken by Brennan as part of a Background Paper for the Jesuits. Brennan concluded that the originally redacted portions contained flimsy conclusions and shoddy work on the part of the commissioners.

Perhaps the most egregious conduct of those associated with the prosecution was that of members of the media who appear to have no objectivity in providing "the fanfare which the police clearly wanted", as Brennan states "regardless of the incoherence of the evidence". No less than three authors and commentators, Louise Milligan, Melissa Davey and Lucie Morris-Marr are identified and criticised by Brennan.

Brennan also refers to the timing and content of an apology speech delivered by the Prime Minister on 22 October 2018 between the two trials. Brennan opined that the timing of the speech did not assist the Cardinal Pell cause. Leaving aside the issue of timing, the proposition of the Prime Minister that "I believe you; we believe you; your country believes you" is both unrealistic and reckless. Brennan is correct that statements of that kind tend to shift the reputational burden upon an accused person to prove innocence rather than the prosecution to prove guilt.

It is clear from the litany of errors demonstrated by Brennan that there is much needed law reform in order to tackle serious problems which emerged during the saga including the use of suppression orders and video evidence. The simple reason for the bias of many legal commentators and activists is their strident commitment to the so-called protection of "victims". The correct term is "complainant". They have lost touch completely with the presumption of innocence and the need for fair trials. The centrepiece of current attitudes is that there must be unreserved acceptance of any complaint of a sexual nature. The Premier of Victoria, Daniel Andrews, went so far as to declare that he still believed the complainant even after the High Court had quashed the convictions!

A glaring deficiency in the legal process was to deny the public the opportunity of considering the evidence of complainant J described by Brennan as the "perpetual non-disclosure of any of the complainant's evidence". How that situation could arise in circumstances where so much was made of the demeanour of complainant J is simply inexplicable and deplorable. As Brennan concludes, "all of us need to have a commitment to a robust legal system that does justice for all". Apparently not so in Victoria.

In an article published in *The Tablet* on 11 April 2020 Brennan called for serious legal reform. Such reform shall remain a pipedream until there is a return to more conventional and balanced administration of justice. That is to say, reduced use of suppression orders, the right of an accused person to confront his accuser other than by means of remote video link and the standing and being counted of complainants by naming. In short, there is a very real need for the unwinding of so-called reforms.

Brennan's expressed wish for fairer and less traumatic proceedings in the future will not come to pass until and unless the current climate of accepting complaints of sexual misconduct at face value abates and we no longer live, as the author says, "in a society where there can be such demonisation and scapegoating".

Brennan acknowledges that he is regarded as one who goes "over better with the literati and the glitterati" and is at pains to point out that he and Cardinal Pell do not see eye to eye on many things. In doing so he has done the Cardinal a service by enabling his *Observations* to be taken as an objective account of an enormous travesty of justice on all fronts.