Royal Commission into Institutional Responses to Child Sexual Abuse
Submission of Professor Michael Quinlan in response to Issues Paper 11: Catholic Church Final Hearing

I refer to Issues Paper 11 (Issues Paper) and the Royal Commission’s invitation for submissions from interested individuals and others. I am the Dean of the School of Law, Sydney at The University of Notre Dame Australia. Prior to taking up the role of Dean in 2013, I worked at the commercial law firm Allens2 for over 23 years. I was a commercial litigation partner of that firm for more than 14 years. I was a long-time member of that firm’s Pro Bono Committee with my pro bono practice centred around refugee and migration appeals but it also involved assisting charities and other individuals in need. I am the Junior Vice President of the St Thomas More Society. I hold Bachelor of Laws, Bachelor of Arts and Master of Laws degrees from The University of New South Wales and a Master of Arts (Theological Studies) (with High Distinction) degree from The University of Notre Dame Australia.

I am a practicing Catholic. I have a deep interest in the relationship between law and morality and law and religion. My papers include “How the law in Australia is used and can be used to promote or to harm the Catholic faith”,2 “Religion, Law and Social Stability in Australia,”3 “Marriage, Multiculturalism and the Accommodation of Religious Difference in Australia,”4 “When the State requires doctors to act against their conscience: the religious implications of the referral and the direction obligations of health practitioners in Victoria and New South Wales”5 and “Give me liberty and give me death!” Euthanasia and capital punishment in Australia: consistency or contradiction?6

I am grateful to the Royal Commission for this opportunity to make this submission. The submission begins with a discussion on religious freedom and on the nature of Catholicism which are generally relevant to the Issues Paper. I note that the Issues Paper states that in making a submission, it is not necessary to address every issue outlined in the Issues Paper. Accordingly, this submission specifically addresses two issues raised by question 1 of the Issues Paper namely (using the terminology used in that paper):

1. To what extent have any of the following issues contributed to the occurrence of child sexual abuse in Catholic institutions:
   f. mandatory celibacy
   i. the operation of the sacrament of confession

The Issues Paper does not contain any explanation of the intended meaning of the terms which it uses or any indication of the particular “case studies, submissions, private session

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1 Previously known as Allen Allen & Hemsley and Allens Arthur Robinson
2 *Catholics and Law Congress*, Turin, Poland, November, 2013
3 22nd Annual International Law and Religion Symposium, Brigham Young University, Provo, Utah, USA, October 2015
5 Forthcoming *Brigham Young University Law Review*
6 Forthcoming *Solidarity*
or literature regarding child sexual abuse in Catholic institutions” which have caused it to ask the particular questions it has posed in the Issues Paper and nor does it contain any explanation of the terms used. This has made it difficult to respond to the Issues Paper. In this submission:
- the word “child” is used to refer to anyone under the age of 18;
- the term “celibacy” is used rather than “mandatory celibacy” because I consider it to be more accurate. I have assumed that the Issues Paper is referring to the vows of celibacy taken by Catholic priests, brothers and nuns; and
- I have assumed that by the phrase “the operation of the sacrament of confession” the Issues Paper intends to refer to the inviolable seal of confession.

It is important to begin this submission by expressing my personal sympathy and my prayers for all survivors of child sexual assault and for all who have suffered child sexual abuse. It is a hideous and terrible crime which our society needs to confront honestly and fairly.

1. Religious Freedom generally

The matters on which submissions are sought give some indication of the issues that the Royal Commission is considering and the areas where findings that might ultimately be reached by the Royal Commission in any final report. This suggests that the Commission is considering opining on such matters as: Catholic theology, the structure of the Catholic Church, the Canon Law of the Catholic Church, the celibacy requirements (presumably of Latin rite Catholic priests, brothers and nuns) and the seal of confession which forms part of one of the sacraments of the Catholic Church. Matters of this type are, of course, central to the operation of the Catholic Church and at the heart of the Catholic religious faith. The Royal Commission’s request for submissions on these topics and the prospect that it may recommend changes in such areas as these, present a challenge to the freedom of religion of the Catholic Church, its religious orders, organisations, works and followers. In the circumstances this submission begins with a consideration of religious freedom.

Australian Courts have made numerous statements recognising the importance of religious freedom. It has been described as “the paradigm freedom of conscience,”7 “the essence of a free society,”8 “a fundamental concern to the people of Australia,”9 “a fundamental freedom”10 and as “a fundamental right because our society tolerates pluralism and diversity and because of the value of religion to a person whose faith is a central tenet of their identity.”11 Australian Courts have recognised “the importance of the freedom of people to adhere to the religion of their choice and the beliefs of their choice and to manifest their religion or beliefs in worship, observance, practice and teaching.”12

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8 Church of the New Faith v Commissioner of Pay-Roll Tax (Vic) 154 CLR 120 [1982-1983] 150 per Murphy J
9 Canterbury Municipal Council v Moslem Association Ltd (1985) 1 NSWLR 525, 543
10 Aboriginal Legal Rights Movement Inc v State of South Australia and Iris Eliza Stevens (1995) 64 SASR 551, 552 and 555
11 Christian Youth Camps Ltd v Cobaw Community Health Services Limited [2014] VSCA 75 [560] per Redlich JA.
12 Evans v New South Wales 168 FCR 576 [2008], 580
The inclusion of a religious freedom provision in the Australian Constitution itself demonstrates that this freedom was considered one of particular moment in Australia at Federation. Whilst the Australian Constitution gives the Commonwealth powers in “what may be broadly described as public economic or financial subjects” and protects or confers very few rights on individuals, s116 contains a proscription on the Commonwealth establishing a State religion or imposing any religious test for the holding of any Commonwealth office. It also prevents the Commonwealth from prohibiting the free exercise of religion. Whilst there have only been a few cases which have considered this section’s freedom of religion has also been protected in specific legislation which protects religious freedom in designated areas. It as an important principle both in Australian and international law.

Australia is party to a number of international agreements which recognise the right to freedom of religion. For example, Article 18 of the 1948 Universal Declaration of Human Rights provides that:

> Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.

Article 18(1) of the International Covenant on Civil and Political Rights (ICCPR), which Australia has been a party to since 1980, provides that:

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14 Section 116 of the Australian Constitution provides that “The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth.”


16 For example, although voting is compulsory in Australia if an elector has a religious belief that it is his or her religious duty to abstain from voting this will constitute a reasonable excuse under s 245(14) of the Electoral Act and s 45(13A) of the Referendum Act see Australian Electoral Commission, Electoral Backgrounder: Compulsory voting [41] available at http://www.aec.gov.au/About_AEC/Publications/backgrounders/compulsory-voting.htm. Exemptions are provided to religious bodies from a range of discrimination provisions to enable them to operate schools and to comply with their own doctrines in managing their own operations (e.g. Sex Discrimination Act, 1984 (Cth) ss 5, 9A,14,21(3),23(3)(b),37(1)(a),37(1)(d),37(2) and 38, Age Discrimination Act 2004 (Cth) s35, the Anti-Discrimination Act, 1977 (NSW) ss 8, 38(2)(c), 45Z(2)(c), 49ZB(2)(c),49ZB8,49Y and 56(1) and the Equal Opportunity Act, 2010 (Vic) ss 83(1)-(2). For a summary of the exemptions from various discrimination provisions which are afforded to religious (and other) schools in Australia see Greg Walsh, Religious Schools And Discrimination Law (Central Press, 2015) 1-11. Members of the clergy of any church or religious denomination are also entitled to refuse to divulge that a religious confession was made, or the contents of a religious confession made them in NSW and Victoria (s127 Evidence Act 1995 (NSW) and s127 Evidence Act 2008 (Vic)) and see further discussion in 5 below.
Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to 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 religion or beliefs in worship, observance, practice and teaching.

The United Nations Human Rights Committee, established under Article 29 of the ICCPR, has recognised that:

The freedom to manifest religion or belief may be exercised “either individually or in community with others and in public or private”. The freedom to manifest religion or belief in worship, observance, practice and teaching encompasses a broad range of acts...  

Under Article 2 of the ICCPR, Australia undertook to respect and ensure that everyone within Australia and subject to Australian jurisdiction, recognises the rights in the ICCPR. Article 9 of the European Convention on Human Rights (ECHR), which recognises the right to freedom of thought, conscience and religion, is in substantially the same terms as Article 18(1) of the ICCPR.

Australia is a pluralist, multi-faith, multi-racial society. Whilst the religious landscape of Australia is a constantly evolving one, the Christian faith traditions continue to be dominant in Australia with Catholicism (with which more than a quarter of the population self-identify) being the largest single religious denomination in Australia. The European Court of Human Rights (ECHR) has observed that the maintenance of pluralism is dependent on maintaining freedom of religion. In Sindicatul “Pastorul Cel Bun” v Romania (2014) 58 EHRR 10 the Grand Chamber of the European Court of Human Rights stated that:

[136] The autonomous existence of religious communities is indispensable for pluralism in a democratic society and is an issue at the very heart of the protection which Article 9 affords. It directly concerns not only the organisation of these communities as such but also the effective enjoyment of the right to freedom of religion by all their active members. Were the organisational life of the community not protected by Article 9, all other aspects of the individual’s freedom of religion would become vulnerable [emphasis added]  

At least prior to Australia ratifying the ICCPR, there have been cases in Australia in which the Courts have not honoured this “autonomous existence of religious communities.” For example, in Wylde v Attorney-General for NSW (1948) 77 CLR 224, it was alleged that the

[19] A detailed examination of the influence of Christianity is well beyond the scope of this submission but a good survey can be found in Williams ibid 1-141. Between 2001 and 2011 the proportion of the Australian population identifying with a Christian faith tradition fell from 68% in 2001 to 61% in 2011 and this trend was also evident in the two most commonly reported denominations: Catholicism and Anglicanism. In 2001, 27% of the population reported an affiliation to Catholicism and this had fallen to 25% of the population in 2011: Australian Bureau of Statistics above n18.
[20] Case of Eweida And Ors v The United Kingdom ECHR 48428/10,59842/10, 51671/10 and 36516/10 15 January 2013 (Eweida) 30 [79]
Anglican Bishop of the Diocese and the Church of England Property trust for the Diocese of Bathurst had breached their trusts by conducting services other than in accordance with the order of the Sacrament of Holy Communion as set out in the Book of Common Prayer of 1662. It was argued that this was using the church other than for or for the use benefit or purposes of the Church of England in NSW. Latham CJ, quoted Lord Davey from the Free Church case in 1904 in the UK and confirmed what would later be called the “autonomous existence of religious communities” when he said:

I disclaim altogether any right to discuss the truth or reasonableness of any of the doctrines of this or any other religious association or to say whether any of them are or are not based on a just interpretation of the language of Scripture or whether the contradictions or antinomies between different statements of doctrine are or are not real of apparent only....The more humble but not useless function of the civil court is to determine whether the trusts imposed upon property by the founders of the trust are being duly observed.\(^2^2\)

Having endorsed that statement, he then found that in the absence of ecclesiastical courts in NSW he would need to determine the doctrinal questions which arose himself.\(^2^3\) With the majority he then dismissed the appeal by considering a mixed issue of trust and doctrine.\(^2^4\) Dixon J would have respected the independence of the Church of England and allowed the appeal on the ground that:

this decree goes beyond and outside the administration of the charitable trusts and undertakes the completely different function of determining questions of ritual and ecclesiastical practice, of correcting the bishop for a failure or supposed failure to observe the liturgy of the Church and of enforcing its observance in the future.\(^2^5\)

With respect to Chief Justice Latham, Justice Dixon’s approach was the correct approach and one that ought to be followed by this Commission and by Australian Courts. In other countries, including Germany, the right of religions to govern their internal affairs has been more fully respected. For example, the Federal Constitutional Court has held that:

what is meant by the Church’s own affairs is determined particularly by how the Church itself views its own affairs, although competence to take final decisions on the basis of the Basic Law is still reserved for the State Courts.\(^2^6\)

The nature of the right to freedom of religion in Australia, has recently been considered by Kenny, Greenwood and Logan JJ of the Federal Court of Australia in Illafl. This case concerned the rights of a church to determine the language to be used in its religious services. As the Court there noted:

The right to freedom of religion is a complex right regarding religious beliefs and practices of worship. In Metropolitan Church of Bessarabia v Moldova (2002) 35 EHRR 13 (Church of Bessarabia), the European Court of Human Rights described religious freedom in the following way (at [114] and [127]):

\(^{2^2}\) Wylde v Attorney-General for NSW (1948) 77 CLR 22423 [19]

\(^{2^3}\) Ibid [41]

\(^{2^4}\) Ibid [39] – he considered whether these infringements of the order of service prescribed in the Prayer Book of 1662 constitute breaches of trust or whether they are matters for internal regulation by local church authorities

\(^{2^5}\) Ibid [9]

\(^{2^6}\) Gerhard Robbers, State and Church in Germany, in State and Church in the European Union, (2nd ed., Gerhard Robbers ed., Nomos, 2005) 77, 79
[114] While religious freedom is primarily a matter of individual conscience, it also implies, inter alia, freedom to “manifest [one’s] religion” alone and in private or in community with others, in public and within the circle of those whose faith one shares. Bearing witness in words and deeds is bound up with the existence of religious convictions. That freedom entails, inter alia, freedom to hold or not to hold religious beliefs and to practise or not to practise a religion ... Article 9 lists a number of forms which manifestation of one’s religion or belief may take, namely worship, teaching, practice and observance. Nevertheless, Article 9 does not protect every act motivated or inspired by a religion or belief ...

[117] In principle the right to freedom of religion for the purposes of the Convention excludes assessment by the State of the legitimacy of religious beliefs or the ways in which those beliefs are expressed. [Citations omitted; emphasis added.]

The European Commission and the European Court of Human Rights have both recognised that the freedom of religion guaranteed by ECHR Article 9 is a right enjoyed both by individuals and by churches on their behalf. As the Court in Iliahi further noted:

the European Commission of Human Rights [has recognized] that the right to freedom of worship required protection of both the possibility to worship alone and in community with others: see, for example, X v United Kingdom (1982) 4 EHRR 126 at [5].

This is explained by the nature of a church. A church is, as the European Commission stated, in Prussner v Germany (1984) 8 EHRR 45 at 79 (Prussner), “an organised religious community based on identical or at least substantially similar views” and is “itself protected in its right to manifest its religion, to organise and carry out worship, teaching practice and observance, and it is free to enforce unanimity in these matters” (emphasis added). In Church of Bessarabia [118], the European Court expressly linked individual religious freedom to the protection of the autonomy of the collective church, stating that:

[118] Since religious communities traditionally exist in the form of organised structures, Article 9 must be interpreted in the light of Article 11 of the Convention, which safeguards associative life against unjustified State interference ... Indeed the autonomous existence of religious communities is indispensable for pluralism in a democratic society and is thus an issue at the very heart of the protection which Articles 9 affords ... [Citation omitted; emphasis added.]

The European Court of Human Rights has repeatedly affirmed this statement: see, for example, [78] below; see also J Rivers, “Religious Liberty as a Collective Right” (2001) 4 Law and Religion: Current Legal Issues 227.

Whilst the Articles of the ICCPR, the Universal Declaration of Human Rights and other potentially relevant international instruments have not been domesticated in Australia the principle of legality requires a Court seeking to infringe rights or overturn fundamental principles to do so with “irresistible clearness” whilst international law is not part of the

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27 Iliahi [74]
28 Ibid [76]
29 Ibid [75]
31 Potter v Minahan (1980) 7 CLR 277, 304 quoting from Sir Peter Benson Maxwell and J Anwyl Theobold, On The Interpretation Of Statutes (Sweet & Maxwell, 4th ed, 1905) 122
common law it can influence the common law. Where, for example, legislation is ambiguous Australian courts should favour a construction which is consistent with Australia’s obligations at international law. The internationally recognised right of churches to enjoy an autonomous existence is of considerable importance to the questions raised in the Issues Paper particularly in the context of a global church, like the Catholic Church. In the Catholic Church areas such as doctrine and Canon law are universal and outside the scope of a local or domestic part of the church to vary.

2. The nature of Catholicism: universal, comprehensive, interconnected and interrelated

The media and the Royal Commission have focussed the attention of Australian society on the terrible scar of child sexual abuse which occurred within a number of schools, parishes and orphanages and other institutions operated by religious orders of the Catholic Church, by the diocese of the Church and by others associated within the Church. These crimes cannot be ignored or glossed over and they should not be. One of the challenges for a Royal Commission, which has a very focussed attention on only those areas which are within its remit, is that it can be difficult to maintain a holistic picture of the particular group or organisation which is the subject of investigation at any point. Inevitably the Royal Commission also groups or categorises organisations or groups which share certain attributes, such as faith tradition or religious order or title, within which child sexual abuse occurred, together. For example, the Issues Paper is headed “Catholic Church Final Hearing” and indicates that “[t]he Royal Commission will hold a final hearing regarding the institutional response of the Catholic Church to child sexual abuse...” The Issues Paper then refers to “Catholic Church authorities” and to “Catholic institutions.”

As will be discussed below, because the Catholic Church has a huge number of followers, orders, programs, institutions and activities, when referring to “the Catholic Church”, to an “institutional response”, to “Catholic Church authorities” and to “Catholic institutions” it is important, at all times, to be clear about which authority or institution it is intended to be referred to. Because the Royal Commission has seen and heard from many victims and also from some perpetrators of the crime of child sexual abuse, the Commission may gain the impression that these terrible crimes were somehow the mission or the centre of the focus of the Church or of any order or institution within which child sexual abuse occurred. That impression would be false. Similarly the Commission may not gain the impression that

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32 Mabo v Qld (No 2) (1992) 175 CLR 1, per Brennan J; Chow Hung Ching v the King (1948) 77 CLR 449 per Dixon J citing Prof Brierley and Jago v Judges of the District Court of NSW (1988) 12 NSWLR 558

33 Minister for Immigration and Ethnic Affairs v Teoh (1995) 183 CLR 273

34 The universal operation of the Canon Law is important when considering, for example, if Canon Law ought require all bound by it to report any and all breaches of the criminal or civil law which they suspect may have occurred to the State authorities. There are many countries which punish same sex sexual activity and ten countries in which such activities are punishable by death: see Max Bearak and Darla Cameron, “Here are the 10 countries where homosexuality may be punished by death” Washington Post, June 16, 2016 accessible at https://www.washingtonpost.com/news/worldviews/wp/2016/06/13/here-are-the-10-countries-where-homosexuality-may-be-punished-by-death-2
Catholic theology and doctrine, canon law, clericalism, celibacy and the sacrament of confession form part of a cohesive, universal, comprehensive, interconnected and interrelated approach to life in which child sexual assault is clearly condemned and abhorrent. Again, that impression would be false.

2.1 A universal Church

As the name itself suggests, Catholicism is a global religion. According to the latest figures showing the position globally, at the end of 2014, there were then about 1.27 billion baptized Catholics globally (about 17.8 per cent of the total world population).\textsuperscript{35} These Catholics were served by 5,237 Catholic bishops, 415,792 diocesan priests and priests of particular religious orders and 44,566 permanent deacons.\textsuperscript{36} There were 116,939 seminarians studying for the priesthood at the end of 2014 around the world. In addition there were about 54,600 religious brothers and nearly 11,000 women in religious orders.\textsuperscript{37}

Whilst the Catholic Church is an international and universal church with Catholic theology and doctrine, canon law, a Church structure, celibacy requirements and the seal of confession, founded on scripture and Tradition, which apply to all Catholics throughout the world, fundamental to the operations of the Church are the principles of apostolic succession (which is theologically and doctrinally at the very centre of the Church) and subsidiarity. As St Peter was given the keys of the Church and was the rock upon which Christ built the Church and as the apostles were commissioned by Christ, the Pope (who is the successor of St Peter) and the bishops (who are the successors of the apostles) have a fundamental role in the Church. This fundamental core structure of the Church was ordained by Christ and is unchangeable. This may give the impression that the Vatican or the Pope control every aspect of the actions of each of the Bishops around the world, that the Bishops control every aspect of Catholic life within their diocese and that the governance of the Church ignores the principle of subsidiarity. This is far from the reality.

Patrick Parkinson has observed that:

[In the Catholic Church] [e]ach bishop is the prime authority in his diocese, subject to oversight from Rome.\textsuperscript{38}

Even this overstates the real authority of the Bishop in the Catholic world because this could give the impression that the Bishop of a diocese actively controls every “Catholic” activity that takes place within the parishes of his diocese let alone within the universities, schools, hospitals, aged care facilities, charitable activities, missions and other activities of the Church and let alone every religious order that might operate within his diocese. It may also


\textsuperscript{36} ibid

\textsuperscript{37} ibid

overstate the role of “Rome” in the day to day operations of a local Church. As Parkinson observes:

Each leader of a religious Order is responsible for his or her members subject to direction from the worldwide leadership of the Order, if there is one.\(^{39}\)

Parkinson is critical of the organisational structure of the Church and asserts that the Church has a “governance problem.”\(^{40}\) He describes the organisation of the Church as a “management structure”\(^{41}\) which “made sense in the middle ages, when the fastest mode of transport was a horse and authority even within countries was highly decentralised. All that has changed now.”\(^{42}\) He argues that the Church need to “modernise”\(^{43}\) and that “[t]he pathway to renewal may also lie in transferring much power and responsibility from the clergy and religious to the eminent Catholic lay people, both men and women, who have not only had great success in their careers but are people of the highest integrity and deepest faith.”\(^{44}\)

No sexual abuse of a child can be condoned or dismissed. It is a terrible and heinous crime. It is now clear that, during the mid-1960s to the 1980’s, child sexual abuse occurred within a number of Catholic parishes, religious orders and institutions associated with the Catholic Church and that the actions taken during that time did not stop that abuse from occurring. The proposition that a structure in which local authority of a diocese is given to a local bishop is an inappropriate structure which “made sense in the middle ages” ignores the Biblical origins of that structure, the principle of subsidiarity and the need for and the demand for local decision making to the greatest extent possible. This is by no means a “middle ages” concept as the recent decision of the British people to leave the European Union and the angst over forced amalgamation of local councils in New South Wales demonstrate. In the context of the Catholic Church, the authority structure is not an optional extra but an organisation ordained by Christ. As St Boniface observes:

When Christ instituted the Twelve, “he constituted [them] in the form of a college of permanent assembly, at the head of which he placed Peter, chosen from among them.” Just as “by the Lord’s institution, St Peter and the rest of the apostles constitute a single apostolic college, so in like fashion the Roman Pontiff, Peter’s successor, and the bishops, the successors of the apostles, are related with and united to one another.”\(^{45}\)

The apostolic succession and the role of the bishop is fundamental to the Catholic Church. The Church would cease to be “Catholic” if it ceased to be “apostolic” and this is not something that could be changed by the Australian Church or by the Church itself. The role of the bishop is not a role that could be transferred to eminent Catholic lay people. Even the most eminent of Catholic lay person, does not enjoy the apostolic succession of a bishop. The laity and the bishops — and the priest and deacons who assist the bishops — perform

\(^{39}\) Ibid 28
\(^{40}\) Ibid 28
\(^{41}\) Ibid 28
\(^{42}\) Ibid 28
\(^{43}\) Ibid 28
\(^{44}\) Ibid 28
\(^{45}\) The Catechism of the Catholic Church (CCC) [880] [references omitted]

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different roles in the Church. All of those roles are important but they are not the same and they are not interchangeable.

Given the international structure of the Catholic Church and its scriptural foundation, there may be little efficacy in the Royal Commission inquiring into and critiquing Catholic theology and doctrine, canon law, clericalism, the celibacy asked of Latin rite priests and religious orders and the seal of confession. Changes to these areas are outside the control of organisations and orders operating in Australia. As Catholic theology and doctrine, canon law, clericalism, celibacy requirements and the seal of confession are all deeply scriptural and with nearly two millennia of tradition, there will be areas in which the apostolic Church itself - not just the Catholic Church in Australia - has no ability to implement recommended change. As Laycock and Berg have observed:

[Comm]itted religious believers argue that some aspects of human identity are so fundamental that they should be left to each individual, free of all nonessential regulation, even when manifested in conduct. For religious believers, the conduct at issue is to live and act consistently with the demands of the Being that they believe made us all and holds the whole world together. 

No religious believer can change his understanding of divine command by any act of will...Religious beliefs can change over time...But these things do not change because government says they must, or because the individual decides they should ... [T]he religious believer cannot change God's mind.

Since religious belief is such an integral part of a person, a religious person can only flourish when they are freely able to worship and live their faith. These observations are equally applicable to the Catholic Church as a whole. Religious freedom manifested in Catholic theology and doctrine (including canon law, the role of the clergy and the seal of confession) has been fundamental to Catholics and through the broader activities of the Church, discussed further below, to Australia's wider society. Australia has benefitted greatly from the basic works of everyday charity that churches and believers carry out as a standard part of life.

2.2 Comprehensive, interconnected and interrelated

Catholicism is a comprehensive, interconnected and interrelated approach to the human being and to life. Any examination of the role Catholic theology and doctrine, canon law, clericalism, celibacy requirements and the seal of confession cannot consider these aspects of Church life or the behaviour of Catholics in isolation. Any consideration of the potential contribution of these aspects of Church life to the occurrence of child sexual abuse, which failed to consider these aspects of Church life holistically, would be deficient and inevitably inaccurate. Catholic theology and doctrine, canon law, clericalism, celibacy requirements and the seal of confession are all deeply interconnected and inseparable from the charitable activities of the Church and the approach that it takes to chastity for all Catholics.

46 CCC [971]—[933]
47 Douglas Laycock and Thomas Berg, Same-Sex Marriage and Religious Liberty 99 VIR. L.REV 1.[2013], 3
48 Ibid 4.
3. Celibacy

The requirement of celibacy of the Catholic priesthood has always been considered to be a matter of discipline rather than a dogmatic requirement of faith. As a result, it is, at least, theoretically possible that, at some time in the future, the Church may determine that it would be appropriate for this requirement to be varied or changed. The scriptures do disclose that St Peter was married before he became an apostle although once he became an apostle he embraced celibacy.⁴⁹ Although Church fathers such as Eusebius, Augustine, Tertullian, Origen, St Cyril of Jerusalem, St Epiphanius and St Jerome wrote in favour of a celibate priesthood, the requirement of priestly celibacy was not made standard in the Catholic Church until the Second Lateran Council in 1139.⁵⁰ Nevertheless, celibacy has been a longstanding and important tradition within the Catholic Church for centuries and there are strong arguments for its retention including that:

(i) it has been critical to the ability of the Church to perform its educative and charitable work;
(ii) it must be seen in a context in which all Catholics are called to a life of chastity and all unmarried Catholics are called to remain celibate;
(iii) there are deep scriptural and theological foundations for the celibacy of the Catholic priests and religious.
Each of these factors are considered below before the view that celibacy is causative of child sexual abuse is critiqued.

3.1 Celibacy, education and charity

The Church and its members are called on by Christ to educate⁵¹ and to care for others.⁵² These are obligations which the Church has only been able to fulfil due to the celibacy of its priests and religious. In Australia, the Catholic Church is and has always been the largest provider of welfare and social services, hospitals, schools, hospices, orphanages, aged care, indigenous ministries, disaster relief, overseas missions (and in more recent times) universities outside the Federal, State and Territory governments.⁵³

Absolutely fundamental to the ability of the Church to provide these services has been the willingness of single men and women to choose the celibate life of a priest, brother or nun. Without the financial costs involved in supporting families and without the many other demands which family life involves, these men and women were able to dedicate their lives to the service of others and to make immeasurable contributions to educating and caring for the physical and spiritual needs of Australians both Catholic and non-Catholic alike. As Coren has observed, in relation to the Catholic priesthood, but equivalent comments could be made in relation to those brothers and nuns who have and do devote themselves to Christian charity, education and the service of others:

⁴⁹ Michael Coren, Why Catholics Are Right (McClelland & Stewart, 2011) 37-38; Philip Jenkins, Pedophiles and Priests (Oxford University Press, 1996) 109
⁵⁰ Coren ibid 38
⁵¹ See e.g. Mark 16:15-16 and Matthew 28:19;
⁵² See e.g. Matthew 25:31-46 and Luke 16:19-31
⁵³ Michael Digges, “Don’t switch off from elections, because bigotry is alive and well” The Catholic Weekly, 19 June 2016, 8
Although married clergy can and do exist in the Church, there are several potential problems and even contradictions. Marriage is a sacrament and is held in extremely high regard but so is priesthood. A priest must be devoted to his parish and parishioners, and a husband must be devoted to his wife and children. As children and family figure so large — in importance as well as numbers within Catholicism, a man could well find himself raising several children with his wife while also being required to be constantly available to his flock. It is inevitable that one if not both areas of his life and the lives of those around him would suffer. This seems to be supported by the experience of Protestant ministers, even in some of the most faithful and serious denominations. Focus on the Family is one of the most influential evangelical organisations in the United States if not the world, and according to its research some of the most pressing concerns and problems for married clergy are issues concerning pornography, children and their sexual relationship with their spouse. Focus’ results showed that clergy frequently felt guilt about the lack of time they spend with their families, sometimes leading to depression and family conflict.\textsuperscript{54}

Celibacy enables a person to concentrate their efforts on the service of others and to do so without the costs and obligations of supporting a family. It is only in comparatively recent times that government has provided significant financial assistance to assist in the provision of many of the services provided by Church agencies. Historically, had those involved in these enterprises been paid and had families to care for, Catholic schools, hospitals, orphanages and so on would have simply been impossible to establish and operate.

The Catholic Archbishop of Sydney, Archbishop Anthony Fisher has observed that:

\begin{quote}

The [Catholic] Church in Australia now has over 10,000 hospital beds, 20,000 aged care places, 700,000 school desks, and assists countless people through parishes, CatholicCare and St Vincent de Paul. Five and a half million Catholics, in 1300 parishes and every walk of life, contribute in myriad ways to our nation. Democracies, economies and societies don’t just happen; they depend upon a complex of ideals, priorities and institutions and in this country these are largely a Judeo-Christian inheritance, however under-appreciated that often is.\textsuperscript{55}
\end{quote}

Michael Digges, the Business Manager of the Archdiocese of Sydney, has also recently noted that:

\begin{quote}

CatholicCare, the official welfare arm of the Catholic Church in the Archdiocese of Sydney, delivers more than 140 programs in areas of ageing, dementia and disability care; employment, education, training and support services; children, youth and family services.

Other services include family and relationship counselling; drug, alcohol and gambling support services; foster care and adoptions; services for at risk children and young people; mediation and counselling; support accommodation and respite services. These are inclusive of the whole community regardless of circumstances, ethnicity, religion, economic situation, age, gender or ability.\textsuperscript{56}
\end{quote}

The dimensions of Catholic welfare are vast, as they have been throughout most of Australia’s history and in the period that the Royal Commission is investigating. Whilst terrible crimes of child sexual assault were being committed, in some places and by a small number of perpetrators relative to the huge numbers involved in the provision of these services across the country, Australian society continued to benefit from the activities of

\textsuperscript{54} Michael Coren above n49, 41
\textsuperscript{55} Anthony Fisher, Catholic Archbishop of Sydney, Archbishop, homily delivered at his installation mass on Wednesday 12 November 2014 \url{http://www.xt3.com/library/view.php?id=17926}
\textsuperscript{56} Digges n53 above 8
those associated with the Catholic Church. These benefits include the tangibles such as those identified above, but also the life direction, meaning and longevity enjoyed by religious believers.\textsuperscript{57} As religious believers are also the most generous in contributing financially to charitable causes Australian society has also benefitted from the giving of Catholics.\textsuperscript{58} This is not for one moment to suggest somehow that any child sexual assault is acceptable or that some sort of utilitarian approach is appropriate. It is however to note that the mission and objective of the Church was never—and is not today—the infliction of the evil of child sexual assault. It is inconceivable that the works of the Church, its orders and its ordained and laity could be made today and historically could have been made but for the celibacy of its priests and religious.

3.2 The call of all Catholics to a life of chastity and the call of celibacy for those who are not married

Before specifically considering the role of celibacy in the Catholic priesthood and the Church’s religious orders, it is necessary to have an understanding of the proper place of sexual activity in Catholic teaching. This is because all Catholics—not just priests and religious—are called to a life of chastity.\textsuperscript{59}

In Catholicism, sexual activity is appropriate only between a husband and wife within the confines of a valid marriage, recognised as such by the Church.\textsuperscript{60} It may sound—and indeed it may be—deeply counter-cultural, but all Catholics—not just Catholic priests and religious—are called to live celibately unless they are living in a marital state. I understand that the call for unmarried persons to live celibately is shared by other Christian denominations.\textsuperscript{61}

The Issue Paper, refers to “mandatory celibacy.” Presumably by doing so, the Issues Paper intends to refer to the celibacy of Catholic priests and religious orders, but referring to this form of celibacy as “mandatory” is a misnomer. Individual Catholics may freely choose, after a period of discernment and study, to seek to enter the priesthood (if they are a single male) or one of the religious orders (if they are unmarried). It has been very clear,\textsuperscript{62} from at least the Second Lateran Council in 1139, that celibacy is a requirement of the Catholic priesthood. No man could enter the priesthood not knowing that celibacy went with that choice. It is also clear that no one can be forced to enter the priesthood. As the current Canon Law makes clear:

For a person to be ordained, he must enjoy the requisite freedom. It is absolutely wrong to compel anyone, in any way or for any reason whatsoever, to receive orders... \textsuperscript{63}

\textsuperscript{57}"Why church-goers live longer" New Zealand Herald, May 18, 2016 Accessible at \url{http://www.nzherald.co.nz/lifestyle/news/article.cfm?c_id=6&objectid=11640392}
\textsuperscript{58}John Micklethwait and Adrian Wooldridge in \textit{God is Back} (2009, Penguin) (228-230 and elsewhere)
\textsuperscript{59}CCC [2348]
\textsuperscript{60}CCC [2360]-[2363]
\textsuperscript{61}According to Roy Williams “[t]he Christian ideal is chastity outside marriage and monogamy within.” Williams above n18. Whilst he goes on to say that “It is certainly true that the former ideal – chastity outside marriage – is no longer aspired to, let alone practiced, by the vast majority of Australians” it remains the ideal for Christians such that single Catholics and Catholic clergy are not the only Australians living celibately.
\textsuperscript{62}with some very limited exceptions for married clergy from other Christian denominations who convert to Catholicism after they have are married in another Christian faith tradition
\textsuperscript{63}\textit{The Code of Canon Law}, 1983, [1026]

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In the circumstances, referring to “mandatory celibacy” is akin to referring to “mandatory fidelity” or “mandatory exclusivity” in the context of a Catholic marriage. To enter the priestly life, to enter a religious order or to marry involves a choice and part of that choice involves a different vocation and a different commitment to chastity. Importantly, as noted above, all Catholics - not just priests and religious - are called to a life of chastity. Chastity here refers to the integration of a person's body and spirit and self-control over one's passions. Offences against chastity include lust, masturbation, fornication, pornography, prostitution and rape. The manner in which a Catholic person lives chastely will depend upon whether they are single or married. As the Catechism explains:

“People should cultivate [chastity] in the way that is suited to their state of life. Some profess virginity or consecrated celibacy which enables them to give themselves to God alone with an undivided heart in a remarkable manner. Others live in the way prescribed for all by the moral law, whether they are married or single.” Married people are called to live conjugal chastity, others practice chastity in continence.

The longstanding tradition within Catholicism of a celibate priesthood, of celibate religious orders and of the celibacy of single men and women, like the Church’s teachings on fidelity within marriage, have a deep theological foundation. As noted above, the celibacy of the priesthood and religious orders has been elemental to the spread of Catholic education and charity in Australia. It would, however, be quite wrong to conceive of the Catholic approach in this regard to be driven by economics and financial concerns. There are very deep scriptural and theological foundations to the Catholic celebration of the single celibate life and of married life. These warrant consideration because they are the primary reason for the Church’s embrace of the celibate priesthood and religious. The theological grounding and the long tradition of the celibate priesthood (in particular) within Catholicism would present very serious challenges for many Catholics in the pews, in the community and in the clergy and religious orders, were the Catholic Church (and it would need to be the universal Church not the Australian Church working alone) to seriously entertain a revision of this long-standing tradition.

3.3 The scriptural and theological foundations for the celibacy of the Catholic priests and religious

According to Catholic theology, God has a Plan and he revealed his Plan in the scriptures and through his only Son. In Catholic theology, God’s Plan begins and ends with a wedding. It starts with the wedding of Adam and Eve, proceeds to the formation of Christ’s spouse the Church at his passion. It culminates in the Parousia or end of time. This is the wedding feast of Christ, the bridegroom and the Lamb with his people, the

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64 CCC [2337]-[2339], [2346].
65 CCC [2351]-[2355]
66 CCC [2349] (references removed)
67 CCC [101], [128]-[129].
70 CCC [766]
Church, at the conclusion of history. Of critical importance to gaining an understanding of the importance of celibacy for priests, religious orders and unmarried persons in the Catholic Church is the recognition that celibacy also forms part of God’s Plan. Celibacy is deeply rooted in the scriptures and in the Tradition. It is evident throughout the Bible (from Joshua, Jeremiah, Elijah and Elisah to Jesus, Mary and St Paul), to the call for celibacy of all the faithful prior to marriage and to celibacy as part of a number of Catholic religious vocations since the birth of the Church and still today and at the Parousia. The Book of Revelation describes a crowd of virgins in heaven as the “first fruits for God and for the lamb.”

Significantly, Jesus himself spoke about marriage and about celibacy. According to Matthew:

Some Pharisees approached [Jesus], and asked, “Is it against the law for a man to divorce his wife on any pretext whatever?” He answered, “Have you not read that the Creator from the beginning “made them male and female” and that he said: “This is why a man leaves his father and mother and becomes attached to his wife, and the two become one flesh?” They are no longer two, therefore, but one flesh. So then, what God has united, human beings must not divide.” They said to him, “Then why did Moses command that a writ of dismissal should be given in cases of divorce?” He said to them, “It was because you were so hardhearted, that Moses allowed you to divorce your wives, but it was not like this in the beginning.” “I say to you, whoever divorces his wife (unless the marriage is unlawful) and marries another commits adultery.”

Jesus did not impose impossible demands on people. His prohibition on divorce identified the reason that Moses had permitted divorce: “It was because you were so hardhearted.” According to Catholic theology by his death and resurrection, his institution of the sacraments (including importantly, Holy Orders, marriage and confession) and his Church, Jesus enables us to overcome that hardness of heart.

According to Catholic theology, Christ did something about our “hard-heartedness.” As Saint John Paul II has put it: Christ responded to the call of Psalm 51: “God, create a clean heart in me, put into me a new and constant spirit, do not banish me from your sight, do not deprive me of your holy spirit. Be my saviour again, renew my joy, keep my spirit steady and willing.” “[I]n Christ the mutual opposition between man and woman — which is the

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71 Rev 19:5-10; 21:2-3. The Parousia will be the completion of history when God will grant incorruptible life to our bodies by reuniting them with our souls (CCC [997]) and “God will be all in all.” (1 Corinthians 15:28 and see CCC [1001]). Unless otherwise noted, in the balance of this paper all quotations from Scripture are taken from The New Jerusalem Bible (NJB) except that “[the Lord]” has been substituted for the holy name of God.
72 Rev 14:4-5 which is referenced in Saint Pope John Paul II, Theology of the Body, above n68 74.5.
73 Matthew 19:1-12, Mark 10:1-12, also see Luke 16:18
74 Matthew 19:1-8
75 Matthew 19:9 (NAB).
76 Matthew 19:8 (NAB), “the hardness of your hearts” (NAB)
77 CCC [1131]
78 Saint Pope John Paul II, Theology of the Body, above n69 [86:8]
79 Psalm 51:8-10

According to the scriptures “in the beginning” God created man and woman and instituted marriage which from the beginning was intended by God, according to Genesis, to be between one man and one woman. Marriage enables spouses to live chastely, as a married couple. In other words, marriage enables a married couple to give each other spousal or conjugal love which is total, faithful, exclusive, honourable, meritorious and fecund. It enables them to give a full gift of self – body and spirit - to each other in sexual union.

Sexual activity which occurs outside a marriage between one man and one woman ignores this symbolic and nuptial nature of sex. It is contrary to the unity and dignity of the couple and to God’s Plan. Importantly, in the context of priestly and religious celibacy, St Paul also recognised that marriage was not for everyone. He described the Church as the body of Christ and said:

Now you together are Christ’s body; but each of you is a different part of it. God put all the separate parts into the body on purpose. If all the parts of the body were the same how could it be a body? St Paul never married and dedicated his life entirely to the service of God as a celibate single man. Whilst St Paul saw great benefit in that celibate life, St Paul recognised that celibacy was not the appropriate vocation for everyone. As he said:

This is a suggestion, not a rule: I should like everyone to be like me, but everyone has his own particular gifts from God, one with a gift for one thing and another with a gift for the opposite. Jesus also recognised that marriage is not everyone’s vocation. Christ recognised that we all have different talents, gifts and skills and that everyone has a vocation. He said that:

Some are incapable of marriage because they were born so; some, because they were made so by others some, because they have renounced marriage for the sake of the kingdom of heaven. Whoever can accept this ought to accept it. [emphasis added]

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85 1 Cor 12:27

86 1 Cor 12:18-19

87 1 Cor 7:6-7

88 In the parable of the talents a man who was going abroad gave each of his servants some money. The servants who used the money wisely were praised and rewarded but the man who buried his talent and did not use it was chastised: Matthew 25:14-30. As Christians then we are expected by Jesus to make full use of any gifts that he has given us so that his kingdom may grow on earth.

In this passage, Jesus confirmed that marriage was the proper vocation for some, that the vocation for some others would involve a single life of celibacy and renouncing “marriage for the sake of the kingdom of heaven” and that for other people marriage would never be appropriate either because they were born incapable of marriage, for some reason, or through things that have happened to them after they were born they have become incapable of marriage. So, in Catholic theology, for some people their vocation is to marry, for others it is to live a consecrated celibate religious life and others will never marry and are also be called to live a celibate life.

When a Catholic priest celebrates the sacrament of confession and when he celebrates mass and the other sacraments, he is acting in persona Christi or “in the person of Christ.” A priest’s celibacy is an important sign or symbol of the role that a priest plays. The fact that, like Christ, the priest is an unmarried and is a celibate man, is very important to many, like me, in the Church. There is a deep scriptural foundation to the celibacy of Catholic priests and religious which, in my opinion, present theological challenges – not just practical problems - to abandoning priestly celibacy Tradition also plays a significant role in the Catholic Church and the fact that the vast majority of saints who have been recognised as such by the Church have been celibates also weighs heavily in favour of the retention of the celibacy of Catholic priests and religious. For reasons including these many Catholics, myself included, would find it very difficult to accept a married man acting in the role of a priest.

4. Celibacy does not contribute to child sexual assault

As discussed above, celibacy has deep roots in scripture and in Tradition. It has been a major contributor to the ability of the Catholic Church to provide the many services that it provides to the community in Australia and around the world. Celibacy is not a cause of child sexual abuse as is evident from the following (each of which is considered below):
(i) the vast majority of child sexual abuse happens within the homes of families where the perpetrator has not made a vow of celibacy;
(ii) child sexual assault has been perpetrated in other Christian churches. other religious organisations and in many other organisations where the perpetrators have not made a vow of celibacy;
(iii) there were very substantial differences in the percentages of priests who engaged in child sexual assault who were diocesan (that is priests attached to a Catholic diocese) compared to religious (that is priests living in a religious communities) but all took the same vows of celibacy;
(iv) child sexual assault appears to have been historical but celibacy requirements have remained unchanged;
(v) celibacy is not a cause of the sexual assault by men of boys;
(vi) victims of child sexual assault who later enter the Catholic priesthood or become Catholic religious brothers are no more likely to commit child sexual assault than victims of child sexual assault who choose other vocations; and
(vii) the potential for clergy molesters to rationalise abusing boys as not offending the vow

See discussion in Saint Pope John Paul II Theology of the Body above n69 [82] [84]
As the Catechism puts it “[w]hen he celebrates the sacrament of Penance, the priest is fulfilling the ministry of the Good Shepherd” CCC [1465]
of celibacy is symptomatic of child abusers' self-rationalisation but not a basis for concluding that the vow of celibacy is causative of child sexual assault.

4.1 The vast majority of child sexual abuse happens within the homes of families

Within the general population somewhere between 15 and 60 per cent of the population are estimated to have suffered sexual assault as children. Goldman and Goldman in 1988 found that nearly 28 per cent of women reported sexual abuse before the age of 16. Russell estimated that nearly 40 per cent of girls had been the victims of sexual abuse before turning 18. Fleming's Australian study found that 20 per cent of women had been victims of child sexual assault. These studies suggest that somewhere between 20-40 per cent of girls are sexually abused before they turn 18. Boys are less likely to be abused than girls but it appears that around 9-16% of boys are sexually abused.

The Australian Institute of Criminology in January 2014 observed that:

> Precise estimates of the proportion of familial child sexual abuse perpetrated by a parent remain difficult to ascertain and are conservatively estimated at 15 percent of the general population (ABS 2005), with rates as high as 20 percent for female victims.

> Few parental child sex offenders are apprehended, charged and convicted for their offences (Cossins 2011). These factors contribute to the low number of parental sex offenders in custody.

A US study reported by Parkinson found that where relatives were responsible for sexually assaulting girls those responsible were uncles (25.8%), biological fathers (14.5%), brothers (14%), first cousins (14%), stepfathers (8%), grandfathers (4.3%), other male relatives (15%) and female relatives (4.3%). It appears that incest offenders on average abuse 1.7 (boys) and 1.8 (girls). Parkinson reports that Abel and his colleagues found that many men who abuse their own children also abuse other children – nearly 50% of men who abuse their own daughters abuse other girls and nearly 12% of men who abuse their own sons abuse other boys. As family structures are increasingly unstable, involving de facto and unmarried relationships and children living with numerous and changing adults adopting parental roles and coming in and out of children’s lives, the risks of child sexual assault increase.

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93 Patrick Parkinson, Child Sexual Abuse And The Churches, (Aquila, 2nd ed, 2003) 16 (Book)
94 Philip Jenkins, Pedophiles and Priests (Oxford University Press, 1996) 87
95 Parkinson Smith Lecture, above n38, 3
96 Ibid 18-19
98 Parkinson, Book, above n93,17
99 Parkinson, Book, above n93,34
100 Parkinson Book, above n93,37
101 Living with a male parent substitute has been found to be one of the best predictors of child neglect, abuse and filicide Reference re: Section 293 of the Criminal Code of Canada, (2011) BSCC 1588
Whilst Parkinson states that “[t]here is no reliable baseline data on levels of offending in the general population in Australia”\textsuperscript{102} and Marshall’s English study estimates that 1-2% of the male population might be convicted for sex offences (against minors and adults) over their lifetime\textsuperscript{103}, there is a huge discrepancy between the results of survey reports of the rates of child sexual assault (which as noted above suggest that somewhere between 20-40 per cent of girls and 9-16 per cent of boys are sexually abused before they turn 18), the numbers of allegations actually made and the numbers of convictions recorded.

Even allowing for the fact that some male child sexual offenders have a very large number of victims,\textsuperscript{104} it is evident that:

(i) the vast majority of child sexual assaults go unreported;
(ii) most perpetrators are never brought to justice;
(iii) the percentage of abuse in the general community is very significantly higher than the percentage of abuse perpetrated by Catholic clergy or members of Catholic religious orders;
(iv) most child sexual assaults are committed in circumstances, which fall outside the remit of this Royal Commission,\textsuperscript{105} where the offender and the victim have some familial relationship;
(v) the vast majority of child sex offences were not and are not committed by Catholic clergy or members of Catholic religious orders and by perpetrators who have not made a vow of celibacy; and therefore that
(vi) celibacy is causative of child sexual assault.

Whilst it is possible to alter the opportunity for celibate priests and religious to spend time alone with children, and so to reduce the potential for child sexual assault to occur, and this has been done in the Catholic Church in Australia,\textsuperscript{106} this would not be possible in a familial or marital situation. If the Australian Institute of Criminology’s conservative estimates of the percentages of parental child sexual abuse which occur within the general community are correct, terribly, horribly, they suggest that if the levels of child sexual abuse suffered within the general community were replicated within the families of Catholic clergy, the percentages of clerical child sexual abuse may, in fact, increase rather than decrease if married clergy were permitted in the Catholic Church.

4.2 Child sexual assault has been perpetrated in other organisations

As the Commission itself has been investigating, in relation to the Australian experience, perpetrators of child sexual assault operated within many organisations. Child sexual assault has been alleged or found to have occurred within many religious organisations (including the Episcopal, Methodist, Lutheran, Presbyterian, Baptist, Christian Brethren, Churches of Christ, Church of Jesus Christ of Latter-Day Saints, Oriental Orthodox, Jewish, Assemblies of God, Greek Orthodox, Uniting Church, Jehovah’s Witnesses and Watchtower Bible Tract

\textsuperscript{102} Parkinson Smith Lecture above n38, 5
\textsuperscript{103} Ibid
\textsuperscript{104} Ibid 34-35
\textsuperscript{105} The sexual abuse by Gerald Risdale, whilst he was a Catholic priest, of his nephew, is an exception
\textsuperscript{106} According to Stephen Smallbone around 70-80% of cases of child sexual abuse are in this category: ABC “Background Briefing” 11 August 2013 accessible at http://www.abc.net.au/australianational/programs/backgroundbriefing/2013-08-11/4870366#transcript. See also Philip Jenkins, above n94, 87
\textsuperscript{107} See 4.4 below
Society of Australia, in the Salvation Army (NSW and QLD), and Salvation Army (Eastern Territory), in Australian Christian Churches (a Pentecostal movement in Australia) and two affiliated churches in the Anglican Dioceses of Tasmania, Adelaide, Sydney and Brisbane). One United States’ survey reported in 1990 that 10 per cent of Protestant clergy were involved in some kind of sexual misconduct and “about two to three per cent” were paedophiles. According to the Christian Science Monitor in 2002:

[Despite headlines focusing on the priest pedophile problem in the Roman Catholic Church, most American churches being hit with child sexual abuse allegations are Protestant, and most of the alleged abusers are not clergy or staff, but church volunteers.]

Although some Greek Orthodox clergy may have taken a vow of celibacy, the perpetrators in these many other non-Catholic churches had not made a vow of celibacy.

As the Commission itself has also been investigating, child sexual abuse has been alleged or found in many organisations beyond the churches including the Boy Scouts of America, the Big Brother Organisation, the Young Men’s Christian Association (YMCA), athletic organisations, sporting clubs and institutions (including Swimming Australia Ltd), in child care centres, at the North Coast Children’s Home, in disability service providers, in private medical practices and public hospitals, in the Australian Defence Force (including at Army Apprentices Schools and in the Australian Air Force Cadets), in centres for the performing arts (including RG Dance Pty Ltd and the Australian Institute of Music), in the Church of England Boys’ Society, in public and private schools (including the Hutchins School, an independent school in Perth, Brisbane Grammar School and St Paul’s School in Queensland, at Geelong Grammar, at Knox Grammar School in Wahroonga, New South Wales and at Yeshivah Melbourne and Yeshiva Bondi), at institutions operated by The Salvation Army (Southern Territory), State run youth training and reception centres (including Turana Youth Training Centre, Winlaton Youth Training Centre and Baltara Reception Centre), at Bethcar Children’s Home, Brewarrina, New South Wales and at Retta Dixon Home, Darwin, at The Parramatta Girls’ Training School and The Institution for Girls in Hay. The perpetrators in these and other non-Catholic organisations had not made a vow of celibacy.

This evidence all militates against the view that celibacy is causative of child sexual abuse. Particularly, in an Australian context, these observations must confront the Royal Commission’s statistics which indicate that:

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109 Philip Jenkins above n83, 50

111 Mark Clayton, Christian Science Monitor, April 2002 quoted in Michael Coren above n42, 14

Where abuse occurred in a faith-based institution, survivors most commonly reported the institution was Catholic (68.1 per cent), then Anglican (12.3 per cent). Of all the institutions where abuse was reported to occur, including government and private Catholic institutions were still the most common (40.9 per cent). These percentages belie a very complex set of factors, other than celibacy, which may explain the apparent preponderance of “Catholic” abuse. These factors include the size and the nature of the Catholic involvement in welfare and the increased likelihood of allegations being made against Catholic clergy and religious perpetrators identified by Jenkins. Each of these warrants separate discussion:

4.2.1 The size and the nature of the Catholic involvement in welfare

The size of the Catholic commitment to welfare is discussed in 3.1 above. This commitment has included providing assistance to the most needy and the most vulnerable members of our society—the orphans, the homeless, the indigent and those from broken homes. It is terrible but true that children in these categories—“children who have been starved of affection” are most at risk of child sexual assault. It is also terrible but true that those who have a pre-disposition to child sexual assault are likely to be attracted to circumstances which present them with opportunities to groom their victims and assault them. As Parkinson has observed:

The tendency of men (and in a few cases women) to sexually abuse children crosses all sectors of the population and includes people with a great variety of beliefs—and no belief. It is not surprising then, that churches have a problem with child sexual abuse. It would be surprising if they did not. Churches are as vulnerable to the problem of sexual abuse as any other group in society. Indeed they may be even more vulnerable, because of the extent to which the church is involved in work with children and young people...The church is therefore a community which is likely to attract people with a strong sexual interest in children. In Australia at least, it is likely that churches are the largest organised providers of activities for children outside of school hours. The Catholic Church, in particular, has also been very involved in caring for children in institutional settings such as boarding schools and children’s homes.

In addition to parish ministries, the Catholic Church also ran schools and children’s homes in which priests and brothers worked, and this would have add significantly to the tally of sexual abuse incidents which might involve members of religious organisations. There is not the same tradition in Protestant denominations of clergy or other people called to religious vocations running schools and children’s homes. Such institutions tend to be run by lay people. For these reasons, Catholic priests and religious have a much greater opportunity for abuse than their counterparts in other denominations.

4.2.2 The increased likelihood of allegations being made against “Catholic” perpetrators

Jenkins argues that there is a greater likelihood of allegations of child sexual assault being made against Catholic clergy rather than that there is (or was) a greater proportion of child sexual assaults proportionately committed by Catholic clergy. He bases his argument on:
(i) the disproportionate size of the Catholic clergy;
(ii) the comparatively centralised hierarchy;

113 Royal Commission Interim Report June 2014 Appendix C, 290 and see Table 7
114 Jenkins above n94, 8-10
115 Parkinson, Book above n93, 66,
116 Parkinson, Smith Lecture, above n38, 4
117 Ibid 7
(iii) the solid bureaucratic tradition with diocese maintaining written records and responding to complaints;
(iv) the publicity surrounding abuse by Catholic clergy;
(v) that abuse by Catholic clergy is more likely to be reported by the media; and that
(vi) abuse by Catholic clergy or religious is more likely to be reported to the police and authorities than abuse in other churches and organisations.  

When the fact that child sexual abuse occurs in a very wide range of institutions in which vows of celibacy are not given, and are committed be perpetrators in the general population who make no vow of celibacy, the size and the nature of the Catholic involvement in education and welfare and the increased likelihood of allegations being made against Catholic perpetrators are taken into account, there is a sound basis for concluding that the vow of celibacy taken by Catholic priests and religious orders is not causative of child sexual assault.

4.3 There were very substantial differences in the percentages of diocesan and religious priests who committed child sexual assault

The John Jay College of Criminal Justice study of the nature and scope of sexual abuse of minors by Catholic priests and deacons in the United States in the period from 1950 to 2002 found a very significant difference between the percentages of allegations of this type made against diocesan and religious priests. They found that in the period of their survey, allegations were made against 4.3% of diocesan priests but only 2.5% of religious priests. A similar disparity was found by the Center for Applied Research in the Apostolate (CARA) for the period 1960-1996 CARA found allegations had been made against 5% of diocesan priests compared to 2.7% of religious priests in the same period.  

Diocesan and religious priests both make a vow of celibacy. If celibacy were causative of child sexual assault Catholic priests would be expected to offend at the same rate.

4.4 Child sexual assault appears to have been historical

According to the John Jay College of Criminal Justice study of the causes and context of sexual abuse of minors by Catholic priests in the United States in the period from 1950 to 2010:

The "crises" of sexual abuse of minors by Catholic priests is a historical problem. The count of incidents per year increased steadily from the mid-1960s through the late 1970s, then declined in the 1980s and continues to remain low. Initial estimation models that determined that this distribution of incidents was stable have been confirmed by the new reports of incidents made after 2002. The distribution of incidents reported since 2002 matches what was known by 2002 – the increase, peak and decline are found in the same proportions as those previously reported.

These comments might equally made in relation to the Australian experience. The Royal Commission has found that, "Abuse reported at private sessions reached a peak during the 1960s (see Table 4)." These figures are not limited to statistics of abuse by Catholic clergy but include abuse in any institution within the remit of the Royal Commission. Table 4 shows

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117 Jenkins above n94, 8-12
118 John Jay College of Criminal Justice Nature and Scope Study, 4
119 As reported in Nature and Scope Study, 4
120 Royal Commission into Institutional Responses to Child Sexual Assault, Interim Report, Volume 1, June 2014 (Interim Report), 287, Appendix C Table 4
that 61.6 per cent of those survivors, who gave evidence in private sessions, reported first abuse in the 1960-1989 period with 26.9 per cent reporting first abuse in the 1960’s, 22.4 per cent in the 1970’s and 12.3 per cent in the 1980’s. The percentages in the 1990’s (3.3 per cent) and since 2000 are much smaller. Assuming these statistics are similar, in relation to Catholic clergy, this supports the findings of the John Jay College, at least as to the preponderance of allegations between min-1960 to the 1980’s and to their subsequent decline.

The Royal Commission appears not to draw the conclusion from their statistics that is drawn by the John Jay College from the statistics which it considers: namely that the figures indicate that there was an actual, not just a reported, proliferation of child sexual abuse from the mid-1960’s to the end of the 1980’s from lower levels prior to that time and to low levels since. The Royal Commission opines that the peak shown in the 1960s in Table 4 “corresponds with the age of survivors and is not an indicator of current prevalence.”121 This statement is presumably made because survivors who attended the private sessions had on average taken more than 22.2 years to disclose.122 There appears to be an assumption that the time taken to report abuse demonstrated in these analysis in the past is continuing today and that abuse which occurred prior to the mid-1960s continued to go unreported.

Like the Royal Commission, the John Jay College identified the fact that there have historically been substantial delays in the reporting of child sexual assault with abuse by Catholic priests and brothers often reported decades after it had occurred.123 In fact, in their study of child sexual abuse, which occurred between 1950 and 2002, they found that:

Less than 13% of allegations were made in the year in which the abuse allegedly began and more than 25% of the allegations were made more than 30 years after the alleged abuse began.124

Historically reasons for the delay in reporting child sexual assault included:
(i) feelings of guilt or shame resulting from the abuse;125
(ii) fear of not being believed;126
(iii) had no one to disclose to;127
(iv) severity of the abuse;128
(v) older children were less likely to disclose as they were more aware of “the knowledge of social consequences”;129
(vi) fear of negative consequences and in particular fear for personal safety;130
(v) that the perpetrator was a relative or an acquaintance;131

In Australia, there are good reasons for concluding that, at least some of these factors would no longer operate to discourage proximate reporting of child sexual abuse by Catholic

121 Ibid
122 Royal Commission, Interim Report above n120, Appendix C Table 10
123 John Jay College of Criminal Justice Nature and Scope Study, 84-86
124 John Jay College of Criminal Justice Nature and Scope Study, 5
125 John Jay College of Criminal Justice Nature and Scope Study, 86 ; Royal Commission Interim Report above
n120, 296, Appendix C Table 11
126 Ibid, 296, Appendix C Table 11
127 Ibid 296, Appendix C Table 11
128 John Jay College of Criminal Justice Nature and Scope Study, 86
129 Ibid 86
130 Ibid 86
131 Ibid 85
clergy today and there has indeed been an actual decline in child sexual abuse by Catholic priests and religious. These include that:

(i) there has been a very substantial focus in all forms of media on criminal cases involving Catholic clergy and on the activities of this Royal Commission (which has itself provided an additional opportunity to victims to come forward). Increased media attention on child sexual assault within the Church increases the number of victims who come forward;\(^\text{132}\)

(ii) the opportunity for Catholic priests and brothers to develop the sorts of close relationships with children which were possible in the past has very substantially diminished if not disappeared in the Catholic Church in Australia today;

(iii) today, as result of media attention and this Royal Commission, Australian society is very much aware of the possibility of child sexual assault as is the Church. Social events, retreats, travelling and home visits in which priests or brothers spend unaccompanied time with minors, which were the sites of most historical abuse,\(^\text{133}\) no longer occur as they did in the past;

(iv) with the awareness in society of the possibility of child sexual assault, children and their parents are aware of the risk and victims of child sexual assault are much more likely to be believed and to be treated appropriately as victims of a most heinous crime;

(v) given community awareness of the potential for child sexual assault by the clergy and the fact that Australian children are aware of that potential, in a way unknown to them in the 1960s-1980s, the likelihood of historic stigma or guilt and shame associated with abuse by the clergy discouraging disclosure of such crimes is much diminished;

(vi) changes have been made in the laws to improve child protection;\(^\text{134}\)

(vii) Pope John Paul II’s statement to the American Cardinals on 23 April 2002 that “there is no place in the priesthood and religious life for those who would harm the young”\(^\text{135}\)

(viii) the adoption of the principles and standards for catholic clergy and religious in Australia contained in Integrity in Ministry in June 2004 which set out behavioural standards “[t]o safeguard integrity and to preserve clarity of sexual and professional boundaries”\(^\text{136}\) and provided guidance for dealing with complaints of misconduct;\(^\text{137}\)

(ix) the introduction of the Towards Healing protocol by the Catholic Bishops Conference and the leaders of religious orders in 2006 made it clear that the Church encouraged formal reporting of criminal misconduct to the police;\(^\text{138}\)

(ix) Pope Benedict XVI’s apology to the victims of child sexual assault in Australia on 19 July

\(^{132}\) Jenkins, above n94, 8-10


\(^{134}\) For example, Child Protection Act 1999 (Qld) and Working with Children (Risk Management and Screening) Act 2000 (Qld). Child Protection (Working with Children) Act 2012 (NSW); Care and Protection of Children Act 2007 (NT); Child Protection Act 1999 (Qld) and Working with Children (Risk Management and Screening) Act 2000 (Qld); Children’s Protection Act 1993 (SA); Working with Children Act 2005 (Vic); and Working with Children (Criminal Record Checking) Act 2004 (WA).


\(^{136}\) National Committee for Professional Standards, 2004, Integrity in Ministry. June 2004, 3-4, 9 [1.4]-[1.5],[3.5]

\(^{137}\) Ibid 19-20 [8.1]-[8.3]

2008\textsuperscript{139} and in Ireland;\textsuperscript{140} 
(x) the Congregation of the Faith’s Circular Letter which made clear the obligations of bishops to listen to victims and families of child sexual assault perpetrated by clerics, spoke of the need for bishops to be committed to the spiritual and psychological assistance of such victims and made clear the obligations of bishops to comply with civil law as well as canon law;\textsuperscript{141} 
(xi) most recently Pope Francis’s apostolic letter of 4 June 2016 making clear that bishops who had been negligent in dealing with cases of child sexual assault could be removed from office;\textsuperscript{142} 
(xii) as a result of these developments, if the Catholic priesthood or religious life was once considered a career of choice by men with a predilection for child sexual assault this is no longer the case; and 
(xiii) removal of the opportunity to sexually abuse a child removes or at least militates against the occurrence of offences driven by opportunity. As the John Jay College, Nature & Scope Study found: “[w]hatever the motivation of men to sexually abuse children, the abuse is much less likely to occur if there are fewer opportunities for the abuse to happen.” \textsuperscript{143} 
This supports the view of the John Jay College in relation to the US but applied by extension to Australia, that there has been a real decline in child sexual abuse in the Catholic Church rather than a reduction in reported offences committed after 1989.

Whilst very clearly recognising that historically reporting of abuse claims have been delayed, the John Jay College concluded that the scale of child sexual assault by clergy was an historical event concentrated in the mid-1960s to 1980s. Whilst the John Jay College found that most of the child sexual abuse reported in the United States had occurred between the mid-1960s and the 1980’s, they also recognised the fact that substantial time period elapsed between the time of abuse and the report of abuse with 83.8 per cent of survivors reported their abuse between 1990 and 2002.\textsuperscript{144} As they noted:

A substantial delay in the reporting of sexual abuse is common and many incidents of sexual abuse by priests were reported decades after the abuse occurred. Even though incidents of sexual abuse of minors by priests are still being reported, they continue to fit into the distribution of abuse incidents concentrated in the mid-1960s to mid-1980s.\textsuperscript{145}

\textsuperscript{139} Pope Benedict XVI, “Words of Pope Benedict XVI” St Mary’s Cathedral, Sydney, 19 July 2008 as quoted in Towards Healing, 2 ibid
\textsuperscript{140} Pope Benedict XVI, Pastoral Letter to the Catholics of Ireland (n6) accessible at http://w2.vatican.va/content/benedict-xvi/en/letters/2010/documents/hf_ben-xvi_let_20100319_church-ireland.html
\textsuperscript{142} Pope Francis, Apostolic Letter issued Motu Proprio “As A Loving Mother”(4 June, 2016) accessible at https://w2.vatican.va/content/francesco/en/motu_proprio/documents/papa-francesco-motu-proprio_20160604_como-una-madre-amorevole.html
\textsuperscript{143} John Jay College of Criminal Justice Nature and Scope Study, 68
\textsuperscript{144} John Jay College of Criminal Justice Nature and Scope Study 89-91 esp Table 5.2.1 and Table 5.2.2
As to why child sexual assault by clergy increased during the mid-1960s and 1970s, the John Jay College of Criminal Justice opined that:

The rise in abuse cases in the 1960s and 1970s was influenced by social factors in American society generally. The increase in abusive behavior is consistent with the rise in other types of "deviant" behaviors such as drug use and crime, as well as changes in social behavior such as an increase in premarital sexual behaviors and divorce. At the time of the peak and subsequent decline in sexual abuse incidents by Catholic priests, there was a substantial increase in knowledge and understanding in American society about victimization and the harm of child sexual abuse; changes were made in statutes related to rape and sexual abuse of children and in reporting requirements of child abuse and neglect; an understanding of the causes of sexual offending advanced and research related to the treatment of sexual abusers was expanded.\(^{146}\)

The College's findings that the rise in abuse cases in the 60's and 70's was independent of vows of celibacy is supported by their findings relating the time of abuse and the period of ordination. As they observe:

When priests who abused minors are grouped by the decade of their ordination to the priesthood, each group displays a distinct pattern of behavior. The social influences can be seen in the behavior of each ordination group, or "cohort." Men ordained in the 1930s, 1940s and 1950s did not generally abuse before the 1960s and 1970s. Men ordained in the 1960s and the early 1970s engaged in abusive behavior much more quickly after their entrance into ministry.\(^{147}\)

As there was no change in the nature of the celibacy vows of Catholic priests in the United States during the period of the study, John Jay College concluded that factors other than celibacy must be causative of child sexual abuse:

Features and characteristics of the Catholic Church such as an exclusively male priesthood and the commitment to celibate chastity, were invariant during the increase, peak, and decrease in abuse incidents, and are thus not causes of the [child sexual abuse] "crises" [of sexual abuse of minors by Catholic priests].\(^{148}\).

4.5 Celibacy is not a cause of the sexual assault by celibate men of boys

Studies in the United States and in Australia have shown that male victims accounted for 75-81 per cent of victims of child sexual assault in the Anglican and Catholic churches. This is relevant to this analysis here because, the celibacy of Catholic priests is often said not just to be causative of child sexual assault but also to result in the sexual abuse of boys. This evidence is explained by considering opportunity rather than celibacy as causative. As Parkinson has observed:

Lest it be thought that these patterns [of the victims of sexual assault by Catholic clergy perpetrators being predominantly male] are unique to the Catholic Church, we found a similar pattern in our Anglican Church study. Three-quarters of complainants who alleged sexual abuse were male. It may at first seem surprising that the gender of complainants in the Anglican Church study was so similar to the pattern of abuse found in the Roman Catholic Church. There are significant differences in the nature of clergy vocations (i.e. requirements of singleness or celibacy). There are also differences in patterns of ministry involving children. For example, in the Catholic tradition, priests may have opportunities to abuse children who act as servers, while servers are less common in the Anglican Church in Australia. The greater abuse of boys than girls in both the US Catholic church and the

\(^{146}\) Ibid 3

\(^{147}\) John Jay College of Criminal Justice, Causes and Context Study 3

\(^{148}\) Ibid
Anglican Church of Australia is likely to reflect the fact that priests, ministers and youth leaders have a much greater opportunity to abuse boys than girls given the patterns of their ministry.\textsuperscript{149}

4.6 Catholic priests and brothers who had been victims of child sexual assault are no more likely to commit child sexual assault than other victims of child sexual assault

Somewhere between 8 and 60 per cent of child sex offenders report having been the victims of sexual assault as children.\textsuperscript{150} There is a greater propensity for those who have themselves been victims of child sexual assault, to sexually abuse children themselves as adults.\textsuperscript{151} Haywood, Krawitz, Wasyliw, Goldberg and Cavanaugh Jr's study, which was published in 1996, found that:

the odds that one who had been exposed to sexual abuse in childhood would become a child molester in adulthood did not differ between clerics [Catholic priests and brothers] and non-clerics.\textsuperscript{152}

If celibacy were causative of child sexual assault it would be expected that victims of child sexual assault, who later took religious vows of celibacy as Catholic priests or brothers, would be more likely to sexually abuse children than other victims of child sexual assault.

4.7 Clergy molesters rationalising abusing boys as not offending the vow of celibacy

It appears that some clergy molesters rationalise abusing boys as not offending the vow of celibacy.\textsuperscript{153} This sort of thinking is clearly flawed and symptomatic of child abusers self-rationalisation. It is a complete distortion of the reality but it is not a basis for concluding that the vow of celibacy is causative of child sexual assault. Child sexual abusers engage in self-deception and self-justification. The vow of celibacy cannot be blamed as the cause for child sex abusers to take a position which clearly has no rational or moral foundation and is demonstrably contrary to the clear teachings of the Catholic Church.\textsuperscript{154}

4.8 Conclusion: celibacy is not a cause of child sexual abuse

The celibacy of Catholic priests and religious orders has been a longstanding and important tradition within the Catholic Church for centuries and there are strong arguments for its retention including that:

(i) it has been critical to the ability of the Catholic Church to perform its educative and charitable work;
(ii) it must be seen in a context in which all Catholics are called to a life of chastity and all unmarried Catholics are called to remain celibate;
(iii) there are deep scriptural and theological foundations for the celibacy of the Catholic priests and religious; and
(iv) it has been a key element in the ability of the Catholic Church and its agencies to deliver educational, charitable and spiritual benefits to the Australian and global community.

Given the fact that:

(i) the vast majority of child sexual abuse happens within the homes of families;
(ii) child sexual assault has been perpetrated in organisations where the perpetrators were

\textsuperscript{149} Patrick Parkinson, Smith Lecture, above n37, 8
\textsuperscript{150} Haywood, Krawitz, Wasyliw, Goldberg and Cavanaugh Jr above n92, 1234,
\textsuperscript{151} Ibid 1239
\textsuperscript{152} Ibid 1239
\textsuperscript{153} Patrick Parkinson, Smith Lecture, above n37, 16
\textsuperscript{154} See 6 below
not celibate;
(iii) there were very substantial differences in the percentages of priests who perpetrated child sexual assault who were diocesan compared to religious priests but all took the same vows of celibacy;
(iv) child sexual assault appears to have been historical but celibacy requirements have remained unchanged;
(v) celibacy is not a cause of the sexual assault by men of boys;
(vi) the potential for clergy molesters to rationalise abusing boys as not offending the vow of celibacy is symptomatic of child abusers self-rationalisation but not a basis for concluding that the vow of celibacy is actually causative of child sexual assault; and that
(vii) victims of child sexual assault, who later enter the Catholic priesthood or become Catholic religious brothers, are no more likely to commit child sexual assault than victims of child sexual assault who choose other vocations

celibacy is demonstrably not a contributor to child sexual abuse.

5. The sacrament of confession

The sacrament of penance is also known as confession. It is more commonly referred to as reconciliation by many Catholics today. Most, if not all, Christian Churches recognise the need for Christians to repent from their sins and to seek the forgiveness of God. There is a deep scriptural foundation for this view. For example Proverbs 28:13 provides that “[n]o man who conceals his sins will prosper, whoever confesses them will find mercy.” It can be seen that for non-Catholics the forgiveness of God can be sought by the penitent to God – that is by way of silent thought.

In Catholic theology, particular emphasis is given to the passage recorded in Saint John’s Gospel when Christ appeared to the disciples, breathed on them and said: “receive the Holy Spirit. If you forgive anyone’s sins, they are forgiven; if you retain anyone’s sins they are retained.” Of course, in this passage Christ was not making the disciples into God or into mini-Gods as only God Himself can forgive sins. Through the disciples – through the priests of the Church today in the sacrament of confession – when a good confession is made and the penance served, a penitent can receive God’s forgiveness. The incredible confidentiality of those matters disclosed in confession is evident when it is remembered that, for most Christians, it is not essential to verbalise your confession to God to seek and obtain His forgiveness for even the most egregious of sins.

In the sacrament of confession the penitent is effectively speaking to God. The priest is not personally forgiving sin – God is forgiving sin. The priest as a single celibate man stands in person Christi, “fulfilling the ministry of the Good Shepherd,” when hearing a confession. Requiring disclosure of the content of a confession is therefore akin to requiring anyone under compulsion of law to disclose their innermost thoughts, their prayerful silent (or in the case of Catholic confession verbally expressed) communication with God. This is why the

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155 NJB
156 John 20:22-23 (NJB)
157 CCC [1441]
158 Ibid
159 CCC [1465]
seal of confession is so fundamental to Catholics and why the Code of Canon law provides that:

The sacramental seal is inviolable. Accordingly, it is absolutely wrong for a confessor in any way to betray the penitent, for any reason whatsoever, by word or in any fashion.\(^{160}\)

The confessor is wholly forbidden to use knowledge acquired in confession to the detriment of the penitent even when all danger of disclosure is excluded.\(^{161}\)

As noted in 2.2 above, Catholicism is a comprehensive, interconnected and interrelated approach to the human being and to life. The Canon Law and the Catechism provisions on the inviolability of the seal of confession are fundamental to a Catholic’s ability to access the sacrament with confidence that their conversation – the confession of their most private and personal sinfulness to God seeking God’s forgiveness of them – will never be disclosed to anyone else. The celibacy of a Catholic priest is also key to the trust that a penitent puts in his or her priest. As a married man, I can attest to the difficulty involved in keeping matters confidential from a spouse. I am sure that it would be extremely difficult for a married priest to maintain this sacramental seal throughout a marriage.

The fact that a Catholic confession must be verbal provides an opportunity for priests to hear of actions of penitents which might not otherwise be disclosed to anyone. In the sacrament, the priest does not purport to and does not, act in any way on behalf of the State or forgive the crimes of a criminal vis a vis the State. Criminals are no less liable to imprisonment or any other form of State punishment for crimes which they have committed whether they have confessed them to a priest or not. Just as a criminal from another faith tradition who had made an honest confession directly to God within the theology of that faith tradition would remain liable for criminal prosecution by the State for that crime. Catholics are not confused about the difference between the laws of the Church and the laws of the State.

Priests hearing confession are not required or expected to be silent sponges. On the contrary. Where a penitent has committed sins which have injured another confession is not enough, satisfaction is required. As the Catechism states:

Many sins wrong our neighbour. One must do what is possible in order to repair the harm (e.g. return stolen goods, restore the restoration of someone slandered, pay compensation for injuries).\(^{162}\)

Child molesters have a great capacity for self-deception and engage in all kinds of minimisation and rationalisation to excuse for their sinful behaviour.\(^{163}\) This makes it unlikely that they would seek to confess, what to others obviously are and what the Catechism and Canon Law clearly recognise, as grievous sins.\(^{164}\) As the Royal Commission heard in the evidence of Gerard Risdale, for example, he never confessed his sexual abuse in confession. In the unlikely event that a child sex abuser were to disclose his or her crimes to a priest in confession, the priest would have the opportunity of encouraging that penitent to make satisfaction by confessing his or her crimes to the police. The priest could require the

\(^{160}\) Code of Canon Law [982]

\(^{161}\) Code of Canon Law [964]; see also CCC [1467]

\(^{162}\) CCC [1459]

\(^{163}\) Parkinson, Smith Lecture, above n38, 11, Parkinson, Book, above n93, 55-59.

\(^{164}\) See discussion in 7 below
penitent to go to the police and confess to them as penance which forms a condition of forgiveness in the sacrament. This accords with the Catechism’s description of penance:

The penance the confessor imposes must take into account the penitent’s personal situation and must seek his spiritual good. It must correspond as far as possible with the gravity and nature of the sins committed.\textsuperscript{165}

It also accords with Canon Law which provides that:

The confessor is to impose salutary and appropriate penances, in proportion to the kind and number of sins confessed, taking into account, however, the condition of the penitent. The penitent is bound personally to fulfill these penances.\textsuperscript{166}

Without confession – for example, in a faith tradition in which sins are forgiven by silent admonition – such an opportunity may never present. Rather than being somehow causative of child sexual abuse, the Catholic sacrament of confession, provides an opportunity (in what are likely to be extremely rare instances of a child sexual abuser disclosing his or her crimes in confession) to encourage that abuser to come forward.

Confession is not a licence for a child sex abuser to continue to abuse children. In confession, a penitent must be truly penitent to obtain the forgiveness of sins by God offered by the sacrament:

In order that the faithful may receive the saving remedy of the sacrament of penance, they must be so disposed that, repudiating the sins they have committed and having the purpose of amending their lives, they turn back to God.\textsuperscript{167}

The penitent must also have the definite intention not to sin again in order to gain forgiveness through the sacrament. As the Catechism explains:

Among the penitent’s acts contrition occupies first place. Contrition is “sorrow of the soul and detestation for the sin committed, together with the resolution not to sin again.” \textsuperscript{168}

In the Commonwealth and NSW religious confession privilege is protected by s127 of the NSW and Commonwealth \textit{Evidence} Acts. It provides:

A person who is or was a member of the clergy of any church or religious denomination is entitled to refuse to divulge that a religious was made, or the contents of a religious confession made, to the person when a member of the clergy....

In this section: “\textit{religious confession}” means a confession made by a person to a member of the clergy in the member’s professional capacity according to the ritual of the church or religious denomination concerned.

Victoria also protects religious confession privilege by a statutory privilege. There are a range of explanations for the retention of protections of this kind but one is futility and the risk of damaging the respect due to the court system which would arise if, for example, a Catholic priest (rather than defying his Church and incurring the penalty of excommunication) refused to disclose the contents of a confession and was jailed for

\textsuperscript{165} CCC (1460)
\textsuperscript{166} Code of Canon law (981)
\textsuperscript{167} Code of Canon Law (987)
\textsuperscript{168} CCC (1451) (references omitted)
contempt of court as a consequence. Were the seal of confession not protected by Canon Law, by the Catechism and by civil law, penitents would not be able to avail themselves of the sacrament. As noted above, it seems very unlikely that a child molester would seek the sacrament of confession, but the prospects of perpetrators doing so if the seal of confession were not inviolate and respected by law must be nil. The sacrament of confession provides an opportunity for a priest to encourage an abuser to come forward. Without the seal of confession applying even in this most heinous of crimes, this opportunity, likely to arise rarely admitted, would be lost. For these reasons, there is no basis for the view that the seal of confession has contributed in any way to the occurrence of child sexual abuse.

6. Conclusion: The Catholic Church and the risk of child sexual assault today

The crime of child sexual abuse has always been a clear and terrible sin. Child sexual abuse – incestuous and otherwise - is clearly condemned by the Catholic Church:

Incest designates intimate relations between relatives or in-laws within a degree that prohibits marriage between them. St Paul stigmatizes this especially grave offence...Incest corrupts family relationships and marks a regression towards animality.

Connected to incest is any sexual abuse perpetrated by adults on children or adolescents entrusted to their care. The offense is compounded by the scandalous harm done to the physical and moral integrity of the young, who will remain scared by it all their lives; and the violation of responsibility for their upbringing.

Rape is the forcible violation of the sexual intimacy of another person. It does injury to justice and charity. Rape deeply wounds the respect, freedom, and physical and moral integrity to which every person has a right. It causes great damage that can mark the victim for life. It is always an intrinsically evil act. Graver still is the rape of children committed by parents (incest) or those responsible for the education of the children entrusted to them.

A cleric who has offended ... against the sixth commandment of the Decalogue, if the crime was committed by force, or by threats or in public, or with a minor under the age of sixteen years, is to be punished with just penalties, not excluding dismissal from the clerical state if the case so warrants.

As noted in 4.1 above, it appears that child sexual assault occurs most distressingly and most commonly (in an area which is outside the remit of the Royal Commission) within domestic households and families. As noted in 4.2 above, and as the Royal Commission is investigating, it has also happened in a wide range of institutions. Evidently the causes of

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170 CCC [2388] (references omitted)

171 CCC [2389]

172 CCC [2356]

173 Code of Canon Law [1395.2]
child sexual abuse are not factors specific to the Catholic Church. Any child sexual abuse is unacceptable but the levels of child sexual abuse appear to be much lower today than they were in the mid 1960's to 1980's. As noted in 4.4 above there appear to be many reasons for this including changes in reporting laws, media and public focus on this crime within institutions, schools etc and growing recognition, acknowledgement of and action in relation to the issue within the Catholic Church.

It is important to retain an awareness of the size and nature of Church activity when considering past child sexual abuse. It is also worth noting that the Catholic Church today is vastly different from the Church of the period under examination by the Commission. Historically celibate religious – priests, brothers and nuns – provided the majority of labour which was required to run, operate and carry out tasks within Catholic parishes, schools, hospitals, aged care facilities, orphanages etc etc. This meant that celibate religious were in regular contact with children across a wide range of circumstances across the country. This is not the case today. With the decline in ordinations to the priesthood and in vocations to the religious orders, lay people – some of whom are Catholics and some of whom are not – occupy the vast number of teaching, nursing and other positions largely to the exclusion of celibate religious orders. Today all persons who engage with children across the Catholic network are required to provide the mandatory working with children clearances.

There has also been a significant change in the attitude of our society to religious. If priests and other religious were once put on a pedestal and considered (by some) to be incapable of sin - and in particular of the most heinous of sins, child sexual assault - that is no longer true. The reality for priests and religious today is entirely the opposite - they are constantly under surveillance and suspicion. Although a work of fiction and based in Ireland, the current position that many priests and religious in Australia experience or feel today, is accurately portrayed in the 2011 film Priest where a Catholic priest stopping to help a child faces a derogatory call of "paedophile" from a passing motorist. In Australia today there is some force in the statement made in Newfoundland in 1989 that “[t]he Roman collar, once worn with pride, is now becoming a source of embarrassment and suspicion.”

Demonstrably, the crime of child sexual abuse by Catholic priests and religious was not the focus of the historical Church's attention and nor was the possibility of child sexual assault by members of the clergy the focus of attention of the family members of children or of the community at large. This is no longer the case within the Catholic Church, within families or in the general Australian community. The terrible fact of historical child sexual abuse is transparently clear.

Given the analysis above, it is evident that celibacy and the seal of confession are not causative of child sexual assault. In my submission, the Commission should make positive findings to this effect. Were the Commission, to take a different view, the religious freedom of the Catholic Church and her faithful, the universality of the Church and the negative

impacts which might obtain were the Commission to make recommendations which the Catholic Church in Australia would be incapable of implementing, ought militate against recommendations of change to the celibacy requirements of Catholic priests and religious orders and to the inviolability of the seal of confession.

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