

# Department of Justice Discussion Paper “Strengthening Child Sexual Abuse Laws in NSW”

## Submission of Professor Michael Quinlan in response to Questions 23, 24, 25 and 26

I refer to the Department of Justice Discussion Paper “Strengthening Child Sexual Abuse Laws in NSW” (the Paper). I am the Dean of the School of Law, Sydney of The University of Notre Dame Australia (the University). Prior to taking up the role of Dean in 2013, I worked at the commercial law firm Allens<sup>1</sup> 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 (the Society) and a member of the Wilberforce Foundation (the Foundation). 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. This submission is made in my personal capacity and not as representatives of the University, the Society or the Foundation.

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",<sup>2</sup> “Religion, Law and Social Stability in Australia,”<sup>3</sup> “Marriage, Tradition, Multiculturalism and the Accommodation of Difference in Australia,”<sup>4</sup> “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”<sup>5</sup> and “Such is Life” Euthanasia and capital punishment in Australia: consistency or contradiction?”<sup>6</sup>

I am grateful for the Paper’s invitation to make this written submission.<sup>7</sup> The submission begins with a discussion on religious freedom and on the nature of Catholicism which are generally relevant to the Paper. This submission specifically addresses the following questions raised by the Paper:

Q23. Should the Royal Commission’s model for a targeted failure to report offence be adopted? If yes, how should it be adapted for NSW?

Q24. Should the failure to report an offence be made partially retrospective as the Royal Commission recommends?

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<sup>1</sup> Previously known as Allen Allen & Hemsley and Allens Arthur Robinson

<sup>2</sup> *Catholics and Law Congress*, Turon, Poland, November, 2013 accessible at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2970833](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2970833)

<sup>3</sup> *22<sup>nd</sup> Annual International Law and Religion Symposium*, Brigham Young University, Provo, Utah, USA, October 2015 accessible at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2970897](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2970897)

<sup>4</sup> (2017) *The University of Notre Dame Australia Law Review*: Vol. 18 , Article 3. accessible at: <http://researchonline.nd.edu.au/undalr/vol18/iss1/3>

<sup>5</sup> (2016) *Brigham Young University Law Review* 1237 (2017) accessible at: <http://digitalcommons.law.byu.edu/lawreview/vol2016/iss4/7>

<sup>6</sup> (2016) *Solidarity: The Journal of Catholic Social Thought and Secular Ethics*: Vol. 6: Iss.1, Article 6. accessible at: <http://researchonline.nd.edu.au/solidarity/vol6/iss1/6>

<sup>7</sup> The Paper [1.18]-[1.20]

Q25.Should protection be afforded to people who make disclosures of child sexual abuse?

Q26.Should the Royal Commission’s model for a targeted failure to protect offence be adopted? If yes, how should it be adapted in NSW?

This submission responds solely to these questions as they relate to proposals to abrogate provisions which presently exist in New South Wales (NSW) to protect the confidentiality of confidential religious confessions. This submission focusses on the implications of those questions for adherents of the Catholic faith tradition because the recommendations made by the Royal Commission into Institutional Responses to Child Sexual Abuse (Royal Commission) in this regard concentrated on the seal of confession in the Catholic Church and because of the special significance of the sacrament of confession in that Church.

As confession is one of the sacraments of the Catholic Church it is central to the operation of the Catholic Church and at the heart of the Catholic religious faith. The revocation of the current protections afforded to protect confidential communications made in religious confession would present a serious challenge by the State to the freedom of religion of the Catholic Church, its priests and its adherents. This submission begins with a discussion of religious freedom generally before providing an explanation of the sacrament and the seal of confession. It then makes some comments about the universal nature of the Catholic Church and the difficulties that changes in approach to the current protection of religious confessions in NSW would pose to the priests and faithful of the Catholic Church. Given these challenges the submission then considers the necessity and utility of changing the present protections in NSW. In this section the submission considers whether the sexual assault of children by persons associated with the Catholic Church is a contemporary or historical phenomenon and the likely utility of any change in the law.

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 and to seek to eliminate.

## **1. Religious Freedom generally**

Australian Courts have made numerous statements recognising the importance of religious freedom. It has been described as “the paradigm freedom of conscience,”<sup>8</sup> “the essence of a free society,”<sup>9</sup> “a fundamental concern to the people of Australia,”<sup>10</sup> “a fundamental freedom”<sup>11</sup> 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.”<sup>12</sup> Australian Courts have recognised “the importance of the freedom of

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<sup>8</sup> *Church of the New Faith v Commissioner of Pay-Roll Tax (Vict)* 154 CLR 120 [1982-1983] 130 per Mason ACJ and Brennan J and *Aboriginal Legal Rights Movement Inc v State of South Australia and Iris Eliza Stevens* (1995) 64 SASR 551, 557

<sup>9</sup> *Church of the New Faith v Commissioner of Pay-Roll Tax (Vict)* 154 CLR 120 [1982-1983] 150 per Murphy J

<sup>10</sup> *Canterbury Municipal Council v Moslem Alawy Society Ltd* (1985) 1 NSWLR 525, 543

<sup>11</sup> *Aboriginal Legal Rights Movement Inc v State of South Australia and Iris Eliza Stevens* (1995) 64 SASR 551, 552 and 555

<sup>12</sup> *Christian Youth Camps Ltd v Cobaw Community Health Services Limited* [2014] VSCA 75 [560] per Redlich JA.

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.”<sup>13</sup>

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”<sup>14</sup> 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.<sup>15</sup> There have only been a few cases which have considered this section<sup>16</sup> and there is no over-arching Commonwealth or NSW law protecting religious freedom or proscribing religious discrimination in NSW or by the Commonwealth. It is 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:

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 ...<sup>17</sup>

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<sup>13</sup> *Evans v New South Wales* 168 FCR 576 [2008], 580

<sup>14</sup> *Russell v Russell* [1976] 134 CLR 495, 546 (*Russell v Russell*).

<sup>15</sup> 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.”

<sup>16</sup> *Krygger v Williams* (1912) 15 CLR 366; *Adelaide Company of Jehovah’s Witnesses v Commonwealth* (1943) 67 CLR 116; *Attorney-General (Vic); Ex Rel Black v Commonwealth* (1981) 146 CLR 559; *Church of the New Faith v Commissioner of Pay-Roll Tax (Vic)* (1983) 154 CLR 120; *Williams v Commonwealth* (2012) 288 ALR 410. See discussion in Denise Meyerson, *The Protection of Religious Rights Under Australian Law*, 2009 BYU L.Rev.529 (2009), 538-540. available at <http://digitalcommons.law.byu.edu/lawreview/vol2009/iss3/3> and Paul Babie and Neville Rochow, *Feels Like Déjà vu: An Australian Bill of Rights and Religious Freedom*, 2010 BYU.L.Rev.821 (2010), 829-832 available at <http://digitalcommons.law.byu.edu/lawreview/vol2010/iss3/8>

<sup>17</sup> General comment no 22 [4]

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.<sup>18</sup> 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.<sup>19</sup> The European Court of Human Rights (ECHR) has observed that the maintenance of pluralism is dependent on maintaining freedom of religion.<sup>20</sup> 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**<sup>21</sup>

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 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 antimonies between different statements of doctrine are or are not real of apparent only....The more humble but not

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<sup>18</sup> Australian Bureau of Statistics, *Report 2071.0 - Reflecting a Nation: Stories from the 2011 Census, 2012–2013* available at <http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/2071.0main+features902012-2013> accessed 26 October 2015. Roy Williams, *Post God Nation?* (ABC Books, 2015) at 113-114. This has been recognised by a number of Australian Courts see e.g. *Canterbury Municipal Council v Moslem Alawy Society* (1985) 1 NSWLR 525 at 543 [E] and *Christian Youth Camps Ltd v Cobaw Community Health Service Ltd* [2014] VSCA 75 at [560] per Redlich JA.

<sup>19</sup> 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 *ibid* n20.

<sup>20</sup> *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]

<sup>21</sup> *Sindicatul "Pastorul Cel Bun" v Romania* (2014) 58 EHRR 10 [136] as quoted in *Iliafi v Church of Jesus Christ Of Latter Day Saints Australia* (2014) 311 ALR 354 (*Iliafi*) [77] [emphasis added]

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.<sup>22</sup>

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.<sup>23</sup> With the majority he then dismissed the appeal by considering a mixed issue of trust and doctrine.<sup>24</sup> 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<sup>25</sup>

With respect to Chief Justice Latham, Justice Dixon's approach is to be preferred as it is more consistent with international norms and jurisprudence and it is the approach that ought to be followed. 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<sup>26</sup>

The nature of the right to freedom of religion in Australia, was considered by Kenny, Greenwood and Logan JJ of the Federal Court of Australia in *Iliafi*. 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 EHHR 13 (*Church of Bessarabia*), the European Court of Human Rights described religious freedom in the following way (at [114] and [117]):

[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 ...

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<sup>22</sup> *Wylde v Attorney-General for NSW* (1948) 77 CLR 22423 [19]

<sup>23</sup> *Ibid* [41]

<sup>24</sup> *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

<sup>25</sup> *Ibid* [9]

<sup>26</sup> Gerhard Robbers, *State and Church in Germany*, in *State and Church in the European Union*, (2nd ed., Gerhard Robbers ed., Nomos, 2005) 77, 79

[117] [I]n 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.]<sup>27</sup>

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.<sup>28</sup> As the Court in *Iliafi* 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].<sup>29</sup>

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] [S]ince 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<sup>30</sup> 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”<sup>31</sup> Whilst international law is not part of the common law it can influence the common law.<sup>32</sup> Where, for example, legislation is ambiguous Australian courts should favour a construction which is consistent with Australia’s obligations at international law<sup>33</sup>. The internationally recognised right of churches to enjoy an autonomous existence is of considerable importance to the questions raised by the Paper which are the subject of this submission particularly in the context of a global church, like the Catholic Church. In the Catholic Church areas such as doctrine and

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<sup>27</sup> *Iliafi* [74]

<sup>28</sup> *Ibid* [76]

<sup>29</sup> *Ibid* [75]

<sup>30</sup> Such as *the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based On Religion or Belief*, G.A.Res. 36/55, U.N.GAOR, 36<sup>th</sup> See Supp. No.51, U.N. Doc. A/RES/36/55 (Nov 25, 1981) [*Religion Declaration*]

<sup>31</sup> *Potter v Minahan* (1908) 7 CLR 277, 304 quoting from Sir Peter Benson Maxwell and J Anwyll Theobald, *On The Interpretation Of Statutes* (Sweet & Maxwell, 4<sup>th</sup> ed, 1905) 122

<sup>32</sup> *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

<sup>33</sup> *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273

Canon law are universal and outside the scope of a local or domestic part of the church to vary.<sup>34</sup>

Rather than introducing over-arching protections of freedom of religion of the type contemplated by the ICCPR and other international instruments Australian and NSW have instead provided some protections in specific legislation in designated areas.<sup>35</sup> Critically for the Paper the Commonwealth and NSW protect religious confession privilege by s127 of the NSW and Commonwealth *Evidence Acts*. It provides:

(1) 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 confession was made, or the contents of a religious confession made, to the person when a member of the clergy.

(2) Subsection (1) does not apply if the communication involved in the religious confession was made for a criminal purpose.

(3) This section applies even if an Act provides:

(a) that the rules of evidence do not apply or that a person or body is not bound by the rules of evidence, or

(b) that a person is not excused from answering any question or producing any document or other thing on the ground of privilege or any other ground.

(4) In this section:

"**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 and other "Evidence Act" States (that is all jurisdictions except Western Australia, South Australia and Queensland) also protect religious confession privilege by this statutory privilege.<sup>36</sup>

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<sup>34</sup> 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>

<sup>35</sup> 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 Backgrounders: 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, 5A,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, 38S(2)(c), 49ZT(2)(c), 49ZXB(2)(c),49ZYB,49Y and 56()) 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.

<sup>36</sup> 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 to them in NSW, the Commonwealth and Victoria (s127 *Evidence Act 1995* (NSW), s127 *Evidence Act* (Cth) s127, s127 *Evidence Act 2008* (Vic)) and in other States which have adopted the *Evidence Act*.

These are some of the very few good Australian examples of the accommodation of religious freedom and belief.<sup>37</sup> At a time when Australia is already in violation of its obligations to protect freedom of religion and belief, under the ICCPR and other international instruments, it would be a retrograde and regrettable step for NSW to interfere with one of the few legislative protections of this right. To alter the practice in NSW would also be to digress from the national standard put NSW law out of step with Commonwealth law and the laws of, at least, the other 'Evidence Act' states. At a Commonwealth level, changing that rule would arguably offend s 116 of the *Australian Constitution* since it may amount to prohibiting the free exercise of religion, particularly given the very clear focus of the Royal Commission on the practise in the context of the Catholic faith tradition.

## **2. What is the sacrament of confession and what is the seal of confession?**

In the Catholic faith tradition confession is a sacrament.<sup>38</sup> It is also known as penance. Today it is more commonly referred to as the sacrament of reconciliation by most Catholics. It is essential for serious sins to be confessed verbally to a priest in the Catholic tradition.<sup>39</sup> 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 and renounces them will find mercy."<sup>40</sup> For non-Catholics, including most importantly given the weight that the Royal Commission seeks to place on the very little utilised place of confession in the Anglican tradition, the forgiveness of God can be sought by a direct communication by the penitent to God – that is by way of silent thought. The Royal Commission's reliance on what are said by it to be changes in the approach to confession in the Anglican communion is misplaced and inappropriate given the vast differences in the prevalence, emphasis, sacramental and mandatory nature of confession in the Catholic tradition and given the vastly different structure of the traditions. As noted below Catholic dioceses simply have no power to alter the approach of the Catholic Church on matters relating to the sacrament or the seal of confession.

In the Catholic faith tradition, 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."<sup>41</sup> Of course, in this passage Christ was not making the disciples into God or into mini-Gods as only God Himself can forgive sins.<sup>42</sup> 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 through a

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<sup>37</sup> Michael Quinlan "The great divide where religious beliefs and the law meet" August 24, 2017 *The Conversation* <http://theconversation.com/the-great-divide-where-religious-beliefs-and-the-law-meet-81180>

<sup>38</sup> CCC [1425]-[1429]

<sup>39</sup> CCC [1456]

<sup>40</sup> New Jerusalem Bible (NJB)

<sup>41</sup> John 20:22-23 (NJB)

<sup>42</sup> CCC [1441]



priest or minister acting *in personi Christi* order 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.<sup>43</sup> The priest as a single celibate man stands *in personi Christi*, “fulfilling the ministry of the Good Shephard,”<sup>44</sup> 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 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.<sup>45</sup>

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.<sup>46</sup>

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 absolute 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 extent and core nature of this absolute confidentiality is demonstrated by the fact that Catholics are able to – they are required to – tell their confessor matters of such an intimate nature that they may never disclose them to anyone else.

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.

Child molesters have a great capacity for self-deception and engage in all kinds of minimisation and rationalisation to excuse their sinful behaviour. 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.<sup>47</sup> As the Royal Commission notes it “heard evidence from clergy who told [the Commission] that they had never heard a confession in which a penitent confessed they had sexually abused a child or in which a child told them they had been sexually abused.”<sup>48</sup> As the Royal Commission heard in the evidence of Gerard

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<sup>43</sup> *ibid*

<sup>44</sup> CCC [1465]

<sup>45</sup> Code of Canon Law [982]

<sup>46</sup> Code of Canon Law [984]; see also CCC [1467]

<sup>47</sup> See discussion below

<sup>48</sup> Royal Commission, *Criminal Justice Report*, Parts III-IV,-204 [16.6.2]

Risdale, for example, that infamous offender never confessed his sexual abuse in confession. On analysis there is no foundation for a conclusion that perpetrators of child abuse disclose that abuse in confession. There is also no foundation for the view that, if child sexual abusers did make any such disclosures, what they disclosed might be of any probative value in any subsequent legal proceedings or in any investigation of the possibility of a crime having taken place. Assertions from perpetrators – persons who, as noted above, engage in all kinds of minimisation and rationalisation – that they confessed their sins are inherently unreliable but even if accepted support the view that what might have been confessed would have had no probative value. For example, the Royal Commission’s relies on the evidence of Father Brennan that a woman told him that her serial abusing father had told her that he had regularly confessed his sins and this made the abuser feel vindicated and the abuse continued.<sup>49</sup> It is impossible to draw any conclusions at all from this because we do not have the evidence of the woman to whom the father spoke, we do not have the evidence of the father himself, we do not know exactly what was said by him assuming that he did make confession, we do not know whether anything he might have said may have been of any probative value and we do not know whether the offending father was seeking to justify his own offending by falsely stating that he made confession of his sins.

An example of the unreliability of such assertions is the content of an affidavit made by convicted child sexual offender Michael Joseph McArdle. This was provided in an effort to obtain a reduction in his sentence before the Queensland Court of Appeal. It is reported in John Cornwell’s book, *The Dark Box*.<sup>50</sup> A few things must be kept in mind about this “evidence.” First, McArdle was not cross examined on his affidavit which was not contradicted. Second, given the seal of the confessional, if McArdle did or did not confess and if he did what he said to his confessors could not be contradicted or confirmed by them as they could not give evidence to refute his assertions without breaking the seal of confession. Third, the research of Dr Marie Keenan, discussed below, demonstrates that if confessions were made what was said would not have enabled the priest hearing the confession to identify the true nature of the events being confessed even assuming that the priest hearing the confession knew of the identity of the penitent. Fourth, as McArdle’s affidavit was given as part of an attempt at sentence reduction there was clearly a self-serving context for the making of the assertions it contained and sound reasons for suspecting the veracity of its contents over and above the fact that the deponent was a convicted child sex offender. Fifth, the Queensland Court of Appeal rejected McArdle’s request for a more lenient sentence and so placed no reliance at all on his affidavit seeking to transfer blame for his own actions from himself to those priests to whom he asserted, without supporting evidence, that he had confessed.<sup>51</sup>

Confessions are often held in a confessional in which the identity of the penitent is not revealed and sins are often confessed by broad category rather than by the giving of any specific details such as names, places, dates and so on. This lack of detail in the celebration of the sacrament has only been exacerbated in the contemporary Catholic Church by the popularity and preponderance of the sacrament being celebrated in the form of the Second Rite. This form involves a public liturgy and whilst private confession forms part of the service, the time is truncated and penitents are often requested to confess in categories of

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<sup>49</sup> Royal Commission, *Criminal Justice Report*, Parts III-IV,-202-203 [16.6.2]

<sup>50</sup> John Cornwell, *The Dark Box, A Secret History of Confession* (New York, Basic Books, 2014).

<sup>51</sup> *R v McArdle* [2004] QCA 7.

sin – selfishness, lying etc – rather than in specifics. To the limited extent to which priests who engaged in child sexual assault might confess their sins there are very good reasons for concluding that whatever was said in the sacrament would be of no probative value. First, confession usually occurs anonymously in which the priest does not know who is confessing to them. Secondly, there is no requirement for a penitent to disclose their name let alone their occupation in confession. Thirdly, confession is not a forensic or police investigation of sins involving an interrogation of dates, times, locations and so on. Fourthly, the research conducted by Keenan in Ireland which involved her interviewing priests convicted of child sexual assault supports this view. Keenan found that child abusing priests who alleged they confessed, did not confess the true nature of their acts or disclose that their sins had involved a minor.<sup>52</sup>

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 reputation of someone slandered, pay compensation for injuries).<sup>53</sup>

In the unlikely event that a child sex abuser were to disclose his or her crimes to a priest in confession in a manner which enabled the priest to become aware of the actual nature of the activities to which the penitent was confessing, the priest would have the opportunity of encouraging that penitent to make satisfaction by confessing his or her crimes to the police. Some priests take the view that they could refuse absolution to a penitent who refused to go to the police and confess their crimes to them and that they could set that step as penance which forms a condition of forgiveness in the sacrament.<sup>54</sup> Some priests may argue that 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.<sup>55</sup>

and 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 fulfil these penances.<sup>56</sup>

Whether or not reporting to the police should or should not properly be set as a condition of absolution or as a penitential step, confession at the very least, may provide an opportunity for a priest to encourage the perpetrator to report to the police. 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

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<sup>52</sup> Marie Keenan, *Child Sexual Abuse and the Catholic Church: Gender, Power and Organizational Culture* (Oxford University Press, 2012), 162-164.

<sup>53</sup> CCC [1459]

<sup>54</sup> Royal Commission, *Criminal Justice Report*, Parts III-IV, 206 [16.6.2]

<sup>55</sup> CCC [1460]

<sup>56</sup> Code of Canon law [981]

confession and even less likely instance of doing so in a manner enabling the true nature of the crime or of the perpetrator) 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.<sup>57</sup>

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."<sup>58</sup>

As noted earlier, child sexual offenders have a great capacity for self-deception and engage in all kinds of minimisation and rationalisation to excuse their sinful behaviour. The suggestions made by Dr Keenan and Dr Robinson that the act of confession was "an important aspect" in continued offending by child sexual offenders, recorded by the Royal Commission, must be read in this light.<sup>59</sup> Any offender who was not truly penitent and did not have the intention not to re-offend would have engaged in an empty gesture having not made a confession resulting in the forgiveness of their sins. Neither expert opines that the offenders would not have continued to abuse children were confession not available.

The Royal Commission describes three instances of children who told a priest that they had been abused (in two cases) by religious brothers and in one by a priest.<sup>60</sup> Cases of this type do not provide any justification for abrogation of the seal. The seal of confession applies to prevent the priest from making disclosure of the penitent's sins. The *Catechism* provides that:

Given the delicacy and greatness of this ministry [of hearing confession] and the respect due to persons, the Church declares that every priest who hears confession is bound under very severe penalties to keep absolute secrecy regarding **the sins that his penitents have confessed to him.**<sup>61</sup>

Father Brennan explains the position in this way:

The church's canon law stipulates that "it is absolutely wrong for a confessor in any way to betray the penitent, for any reason whatsoever" and that "the confessor is wholly forbidden to use knowledge acquired in confession to the detriment of the penitent". The seal of the confessional applies strictly to the sins confessed by the penitent. It does not apply to information given to the priest about the sins or actions of someone other than the penitent.

At the royal commission hearings, much was made of the example of Sally, the little girl who presents at confession and confesses that she stole the jelly beans. She also tells the priest that she was interfered with by a family member. The priest bound by the seal of the confessional can never disclose that Sally stole the jelly beans. But the seal of the confessional does not apply to Sally's

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<sup>57</sup> Code of Canon Law [987]

<sup>58</sup> CCC [1451] (references omitted)

<sup>59</sup> Royal Commission, *Criminal Justice Report*, Parts III-IV, 203-204 [16.6.2]

<sup>60</sup> Royal Commission, *Criminal Justice Report*, Parts III-IV, 202 [16.6.2]

<sup>61</sup> CCC [1467] [emphasis added]

revelation of abuse. As a priest, I am at liberty and am subject to the same legal obligations in relation to that revelation as I would be if Sally made the claim to any other adult while walking down Pitt Street.<sup>62</sup>

Whilst not all Catholics regularly seek out the sacrament of confession in the contemporary Catholic Church<sup>63</sup> and some may not even do so once a year as the Church mandates they ought do,<sup>64</sup> it remains a fundamental aspect and sacrament of the Church. It is not the role of the State to determine whether or not confession is a requirement of the forgiveness of sins, nor whether God does or does not exist, nor whether life after death exists, nor whether a failure to confess one's sins may lead to eternal damnation. In a pluralist, multi-faith and multi-cultural society persons should be able to fully participate in their religious faith as international law recognises. For the State to intrude on a Church sacrament so as to undermine both the penitent's continued certainty in the confidentiality of the confession of his or her sins and to place priests in the invidious position of maintaining the seal of confession or complying with laws requiring the disclosure of such intimately confidential communications and in doing so automatically excommunicating themselves from their Church, would be a very major intrusion by the State into Church and faith. This would even more be so were such an intrusion to be retrospective in nature. Should the State act in this way in relation to one crime the logical foundation for it to do so in relation to other crimes would have been laid leaving the faithful unsure as to whether their confidences will be protected in the future and as to whether they may be putting their reports at risk of future prosecution by confessing to them. As section 2 explains Australia and NSW have been very slow to adequately protect the human right of religious freedom and freedom of belief but religious confessions have been one area where both have done so to date. They ought to remain protected.

### **3. The nature of Catholicism: universal, comprehensive, interconnected and interrelated**

As the name itself suggests, Catholicism is a global religion. To give some idea of the numbers of its adherents, 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).<sup>65</sup> These Catholics were served by 5,237 Catholic bishops, 415,792 diocesan priests and priests of particular religious orders and 44,566 permanent deacons.<sup>66</sup> 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.<sup>67</sup>

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<sup>62</sup> Fr Frank Brennan, "Frank Brennan: why I will break the law rather than the seal of confession." *Sydney Morning Herald*, August 15, 2017 <http://www.smh.com.au/comment/frank-brennan-why-i-will-break-the-law-rather-than-the-seal-of-confession-20170814-gxw7it.html>

<sup>63</sup> *ibid*

<sup>64</sup> CCC [1457]

<sup>65</sup> Junno Arocho Esteves, "Vatican statistics report increase in baptized Catholics worldwide" *Catholic News Service*, Mar. 7, 2016 accessible at <http://ncronline.org/news/vatican/vatican-statistics-report-increase-baptized-catholics-worldwide>

<sup>66</sup> *ibid*

<sup>67</sup> *ibid*

Given the international structure of the Catholic Church and its scriptural foundation, the sacramental nature of confession, the requirements for each Catholic to receive the sacrament at least once a year, the necessity for Catholic faithful to confess serious sins within the sacrament of confession and the inviolability of the seal of confession are all matters outside the control of the local bishops in the various diocese in NSW. As Catholic theology, doctrine, Canon Law and its Catechism governing confession are all deeply scriptural and with centuries of tradition, varying Canon law to enable Australian priests to comply with any legal requirements which might involve breaching the seal of the confessional is a step which the apostolic Church is most unlikely to take but it is clearly not a step that the Catholic Church in Australia could take. This leaves priests subject to State laws in conflict with Church law in an invidious position and will create anxiety in all Catholics as to the sanctity of their most private communications. As Laycock and Berg have observed:

[C]ommitted 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.<sup>68</sup>

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.<sup>69</sup>

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 and the role of the clergy as they relate to the sacrament of confession) are fundamental to Catholicism in a way quite unlike the role with religious confession might play in most other faith traditions.

#### **4. The necessity and utility of changing the present protections in NSW**

##### **4.1 A contemporary or historical phenomenon?**

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.

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<sup>68</sup> Douglas Laycock and Thomas Berg, *Same-Sex Marriage and Religious Liberty* 99 VIR. L.REV 1.[2013], 3

<sup>69</sup> *Ibid* 4.

These comments might equally be made in relation to the Australian experience. The Royal Commission found that, “[a]buse reported at private sessions reached a peak during the 1960s (see Table 4).”<sup>70</sup> 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 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. As Monica Doumit and Gerard Henderson have pointed out the Royal Commission’s findings (which are consistent in relation to Catholic clergy to the findings of the John Jay College) show a preponderance of allegations between 1960 to the 1980’s and to their subsequent decline.<sup>71</sup> As Henderson notes Gail Furness in her reassessment before the Royal Commission on February 16 said that:

Between January 1950 and February 2015, 4445 people alleged incidents of child sexual abuse in 4765 claims. The vast majority of claims alleged abuse that started in the period 1950 to 1989 inclusive. The largest proportion of first alleged incidents of child sexual abuse, 29 per cent, occurred in the 1970s.<sup>72</sup>

These facts found by the Royal Commission support the conclusions of the John Jay College in relation to the United States are similarly applicable in Australia and that child sexual abuse within institutions established by or run by Catholic clergy or the Catholic faithful is an historical rather than a current phenomenon.

The Royal Commission does not draw the conclusion from its 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.”<sup>73</sup> This statement is presumably made because survivors who attended the private sessions had on average

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<sup>70</sup> Royal Commission into Institutional Responses to Child Sexual Assault, *Interim Report*, Volume 1, June 2014 (Interim Report), 287, Appendix C Table 4

<sup>71</sup> see John Jay College of Criminal Justice *Nature and Scope Study*, 89-91 esp Table 5.2.1 and Table 5.2.2, John Jay College of Criminal Justice, The City University of New York, *The Causes And Context of Sexual Abuse of Minors By Catholic Priests in the United States 1950-2010 (Causes and Context Study)*, 2-3; e.g. Gerard Henderson, “The Royal Commission and the Church” *Quadrant* 4 July 2017: <https://quadrant.org.au/magazine/2017/07/royal-commission-media-church/> quotes Gail Furness’ reassessment of the evidence before the Royal Commission into Institutional Child Sexual Assault of February 16 and concludes that “paedophilia in the Catholic Church is essentially an historical crime; Monica Doumit, “Royal Commission statistics: what the media won't tell you” *Catholic talk* . 13 April 2017 <http://catholictalk.com.au/walking-the-talk/blog/item/843-royal-commission-statistics?highlight=WyJyb3IhbCIsImNvbW1pc3Npb24iLCJpbmRvIiwicm95YWwgY29tbWlzc2lvbiIsInJveWFsIGNvbW1pc3Npb24gaW50byIsImNvbW1pc3Npb24gaW50byJd>

<sup>72</sup> quoted by Henderson *ibid* [emphasis added]

<sup>73</sup> Royal Commission, *Interim Report* Appendix C Table 10

taken more than 22.2 years to disclose.<sup>74</sup> As the Paper observes<sup>75</sup> the Royal Commission considers that victim delay in reporting is not a historical phenomenon but a continuing phenomenon in its recommendations.<sup>76</sup> However there are good reasons for questioning that view and for considering that the low rates of contemporary reporting of institutional child sexual assault are an accurate representation of a dramatic diminution in the actual occurrence of those crimes.

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.<sup>77</sup> 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.<sup>78</sup>

Historically reasons for the delay in reporting child sexual assault included:

- (i) feelings of guilt or shame resulting from the abuse;<sup>79</sup>
- (ii) fear of not being believed;<sup>80</sup>
- (iii) had no one to disclose to;<sup>81</sup>
- (iv) severity of the abuse;<sup>82</sup>
- (v) older children were less likely to disclose as they were more aware of “the knowledge of social consequences”;<sup>83</sup>
- (vi) fear of negative consequences and in particular fear for personal safety;<sup>84</sup>
- (v) that the perpetrator was a relative or an acquaintance;<sup>85</sup>

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 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 the 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;<sup>86</sup>
- (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

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<sup>74</sup> *ibid*

<sup>75</sup> The Paper 61 [10.2]

<sup>76</sup> Royal Commission, *Criminal Justice Report*, August 2016, Part III-VI, 113-134

<sup>77</sup> John Jay College of Criminal Justice *Nature and Scope Study*, 84-86

<sup>78</sup> John Jay College of Criminal Justice *Nature and Scope Study*, 5

<sup>79</sup> John Jay College of Criminal Justice *Nature and Scope Study*, 86; Royal Commission Interim Report 296, Appendix C Table 11; Royal Commission, *Criminal Justice Report*, August 2016, Parts 111-VI. 133-134

<sup>80</sup> Royal Commission Interim Report 296, Appendix C Table 11; Royal Commission, *Criminal Justice Report*, August 2016, Parts 111-VI. 133-134

<sup>81</sup> *ibid*

<sup>82</sup> John Jay College of Criminal Justice *Nature and Scope Study*, 86

<sup>83</sup> *ibid* 86

<sup>84</sup> *ibid* 86

<sup>85</sup> *ibid* 85

<sup>86</sup> Philip Jenkins, *Pedophiles and Priests* (Oxford University Press, 1996), 8-10



if not disappeared in the Catholic Church in Australia today;

(iii) today, as result of media attention and the 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,<sup>87</sup> 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) substantial changes have been made in the laws to improve child protection.<sup>88</sup>

The Royal Commission identified very few cases of institutional child abuse which occurred after the introduction of Queensland's 'blue child protection card' regime in 1998.<sup>89</sup>

(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"<sup>90</sup>

(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"<sup>91</sup> and provided guidance for dealing with complaints of misconduct;<sup>92</sup>

(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;<sup>93</sup>

(ix) Pope Benedict XVI's apology to the victims of child sexual assault in Australia on 19 July 2008<sup>94</sup> and in Ireland;<sup>95</sup>

(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

<sup>87</sup> John Jay College of Criminal Justice *Nature and Scope Study* 81

<sup>88</sup> 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).

<sup>89</sup> Royal Commission, *Analysis of Claims of Child Sexual Abuse with respect to Catholic Church institutions in Australia*, June 2017, 21 (figure 3).

<sup>90</sup> Saint Pope John Paul II, *Address to the American Bishops*, 23 April 2002

<sup>91</sup> National Committee for professional Standards, 2004, *Integrity in Ministry*, June 2004, 3-4,9 [1.4]-[1.5],[3.5]

<sup>92</sup> *Ibid* 19-20 [8.1]-[8.3]

<sup>93</sup> Catholic Bishops Conference and Catholic Religious Australia *Towards Healing* (Jan 2010) accessible at <http://www.tjhcouncil.org.au/media/1002/towards-healing-2010-27032013-final-v2013.pdf> (*Towards Healing*)

<sup>94</sup> Pope Benedict XVI, "Words of Pope Benedict XVI" St Mary's Cathedral, Sydney, 19 July 2008 as quoted in *Towards Healing*, 2 *ibid*

<sup>95</sup> 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](http://w2.vatican.va/content/benedict-xvi/en/letters/2010/documents/hf_ben-xvi_let_20100319_church-ireland.html)

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;<sup>96</sup>

(xi) 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<sup>97</sup> and his more recently announced "zero tolerance" policy announced to Members of the Pontifical Commission for the Protection of Minors on 21 September, 2017;<sup>98</sup>

(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."<sup>99</sup>

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.<sup>100</sup> 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<sup>101</sup>

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 behaviour is consistent with the rise in other types of "deviant" behaviours such as drug use and crime, as well as changes in social behaviour such as an increase in

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<sup>96</sup> Congregation for the Doctrine of the Faith, *Circular Letter to Assist Episcopal Conferences in Developing Guidelines for dealing with Cases of Sexual Abuses of Minors Perpetuated by clerics*, (3 May 2011) accessible at [http://www.vatican.va/roman\\_curia/congregations/cfaith/documents/rc\\_con\\_cfaith\\_doc\\_20110503\\_abuso-minori\\_en.html](http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_20110503_abuso-minori_en.html)

<sup>97</sup> 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\\_come-una-madre-amorevole.html](https://w2.vatican.va/content/francesco/en/motu_proprio/documents/papa-francesco-motu-proprio_20160604_come-una-madre-amorevole.html)

<sup>98</sup> See report in "Pope stands firm: zero tolerance to abuse" *The Catholic Weekly*, 1 October, 2017, 7

<sup>99</sup> John Jay College of Criminal Justice *Nature and Scope Study*, 68

<sup>100</sup> John Jay College of Criminal Justice *Nature and Scope Study*, 89-91 esp. Table 5.2.1 and Table 5.2.2

<sup>101</sup> John Jay College of Criminal Justice, The City University of New York, *The Causes And Context of Sexual Abuse of Minors By Catholic Priests in the United States 1950-2010 (Causes and Context Study)*, 2-3

premarital sexual behaviours 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.<sup>102</sup>

The College found that:

When priests who abused minors are grouped by the decade of their ordination to the priesthood, each group displays a distinct pattern of behaviour. The social influences can be seen in the behaviour 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 behaviour much more quickly after their entrance into ministry.<sup>103</sup>

The Catholic Church today is vastly different from the Church of the 1960's to the 1980's. 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 many 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."<sup>104</sup>

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. There are thus very good reasons for concluding that the diminution of reporting of institutional child sexual assault, which is evident from the Royal Commission's

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<sup>102</sup> Ibid 3

<sup>103</sup> John Jay College of Criminal Justice, *Causes and Context Study 3*

<sup>104</sup> Report by the Superintendent of the Roman Catholic School Board for St John's Newfoundland, March 8, 1989 as quoted in "The Report of the Archdiocesan Commission into the Sexual Abuse of Children by Members of the Clergy," Archdiocese of St John's, 1990, viii

statistics, reflects the reality of contemporary Australia and is not explained by the historical evidence of substantial delay in reporting of this crime. This means that the necessity for taking the very substantial step of interfering with religious freedom in the form of the seal of confession has not been established.

#### **4.2 The likely utility of any change in the law.**

There are a range of explanations for the retention of comprehensive protections of religious confession privilege. This submission has observed the importance of religious freedom as an internationally recognised human right, it has also described the likely lack of any probative value in anything that might be disclosed and it has explained why there are strong reasons for concluding that child sexual assault was a heinous experience in an historical context which is not that of today. Other important reasons for rejecting the Royal Commission's recommendation to override religious confession privilege are futility and the risk of damaging the respect due to the court system. Given the consequences for a Catholic priest defying his Church in this regard it is most unlikely that they would do so. Given this the proposed laws would put the State in the invidious position of criminalising priests for acting in accordance with their religious faith. This 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 contempt of court as a consequence.<sup>105</sup> This would be manifestly unjust and risk damaging respect for the criminal justice system of NSW. 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, even in an environment in which the law protected religious confessions from disclosure. If the law were changed to mandate the disclosure of the content of religious confessions of child sexual assault, the prospects of perpetrators disclosing their actions, 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 admittedly, would be lost

The Royal Commission refers to one example, in Case Study 35, of an offending priest confessing to child sexual assault.<sup>106</sup> Even assuming that in that confession probative details were provided which might assist in any criminal prosecution, any such confession occurred in a legal framework which protected the confession from disclosure. The law should not be amended on any assumption that such a confession would be made and probative evidence obtained in a different legal framework. It ought be assumed that without the seal of confession applying (and protected by law) such a confession (rare as it seems in the current

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<sup>105</sup> CCC [1467], Seward Reese, *Confidential Communications to the Clergy*, (1963) 24 *Ohio State Law Journal* 1, 60-61; *R v Gruenke* [1991] 3 SCR 263, 303-304. This is not to suggest that futility is the only reason for the protection of religious confession privilege as there are a number of justifications for that protection: see Reese at 80-87. See also A. Keith Thompson, "Religious Confession Privilege at Common Law: An Historical Analysis", PhD Thesis Murdoch University, August 2006, 220 available at <http://researchrepository.murdoch.edu.au/358/2/02Whole.pdf>. A. Keith Thompson *Religious Confession Privilege and Common Law (Martinus Nijhoff, 2011)* 340-341 and Gregory J Zubacz, *The Seal of Confession and Canadian law* (Wilson and Lafleur, 2009) 102-106

<sup>106</sup> Royal Commission, *Criminal Justice Report*, Parts III-IV, 202[16.6.2]

legal framework) simply would not occur. In short the case for reform is not made out and outweighed by the negative consequences for priests, penitents and the community of doing so.

## **5. Conclusion: The answers to questions 23, 24, 25 and 26**

### **Q23. Should the Royal Commission's model for a targeted failure to report offence be adopted? If yes, how should it be adapted for NSW?**

For reasons including those set out above were any such offence introduced there should be a clear exemption for the clergy and for knowledge or suspicions formed or which it is asserted should have been formed in relation to anything said in the context of a religious confession.

### **Q24. Should the failure to report an offence be made partially retrospective as the Royal Commission recommends?**

Retrospective legislation is contrary to the rule of law. Our system of justice assumes that citizens know the law and they are entitled to act knowing the law and the penalties that might apply were they to breach the law. It is contrary to the rule of law for people to be at risk of punishment under legislation which they did not and could not have known at the time that they acted because it did not exist. In the context of that intimately personal communication which is a religious confession retrospectivity would be particularly egregious.

### **Q25. Should protection be afforded to people who make disclosures of child sexual abuse?**

The State would be incapable of protecting priests from the consequences of their actions under Church law were the State to seek to override the seal of the confessional and were any priests to comply with that unjust State law. Were it to attempt to do so it would be engaging in a serious transgression of internationally guaranteed rights of religious freedom. Any disclosure obligations which might be introduced ought not ignore the best interests of the child involved.<sup>107</sup>

### **Q26. Should the Royal Commission's model for a targeted failure to protect offence be adopted? If yes, how should it be adapted in NSW?**

For reasons including those set out above were any such offence introduced there should be a clear exemption for the clergy and for knowledge or suspicions formed or which it is asserted should have been formed in relation to anything said in the context of a religious confession.

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<sup>107</sup> See e.g. *Criminal Justice (Withholding of Information on Offences against Children and Vulnerable Persons) Bill 2012* (Ireland), <<http://www.irishstatutebook.ie/eli/2012/act/24/enacted/en/html>>.

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