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AUSTRALIAN INQUIRIES INTO INSTITUTIONAL RESPONSE
TO THE SEXUAL ABUSE OF CHILDREN:
Some Legal and Policy Issues
by
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National Royal Commission
Victorian Parliamentary Committee Inquiry
NSW Commission of Inquiry: Maitland-Newcastle Diocese

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Currently, three “formal” inquiries are proceeding in Australia into institutional responses
to the sexual abuse of children at the national, Victorian and NSW levels. Before this audience, I
shall focus upon the national and Victorian state inquiries.

1 Victorian Bar: see www.bryankeoncohen.com. Many thanks to Maggie Mc Gowan for research assistance. Any
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National Royal Commission This federal initiative – described by Attorney General Mark Dreyfus QC as “the most far-reaching of any royal commission held in Australia”\(^2\) – was announced by the Prime Minister in November 2012. It has attracted the support of all state and territory governments\(^3\) and considerable publicity – almost all of it favorable. It seems that following continuing controversy surrounding, in the PM’s words, this “hideous, shocking and vile crime” (much of that focusing upon the Roman Catholic Church (“RCC”) community sentiment in Australia had reached a tipping point. Factors at play, in my view, include a sexual abuse crisis engulfing the RCC world-wide with numerous exposés,\(^4\) inquiries, documentary films,\(^5\) and reports;\(^6\) decades of resistance by Australian authorities in the face of agitation from numerous victims,\(^7\) their support groups,\(^8\) and sections of the media;\(^9\) a sad procession of convictions arising from child sexual abuse (recorded against, overwhelmingly, catholic clergy) in the criminal courts;\(^10\) the Victorian Government’s decision, in April 2012, to initiate, not a judicial inquiry, but an investigation by a Parliamentary Joint Committee (discussed below) and some highly publicized and damning evidence (especially, again, concerning the RCC) emerging before that Committee;\(^11\) and the commissioning of former Federal Court justice Tony Whitlam QC to investigate failings by the Catholic hierarchy and cover-ups involving a paedophile priest


\(^{3}\) The Royal Commission website states: “State and Territory Governments have committed at the most recent COAG meeting to support this inquiry, and giving it their full cooperation.” See “Explaining the Letters Patent and Terms of Reference”, www.childabuseroyalcommission.gov.au. As to cooperative funding, and the need for complementary state legislation, however, see below.

\(^{4}\) See, amongst many: J Berry & G Penner, Vows of Silence: The Abuse of Power in the Papacy of John Paul II (Hodder, 2004); M Porter, Sex Power and the Clergy (Hardie Grant, 2003); G Robertson, The Case of the Pope (Penguin, 2010); J Cornwell, The Pope in Winter (Viking, 2004) dealing with John Paul II’s “dark” legacy.

\(^{5}\) See recently the Alex Gibney documentary Silence in the House of God: Mea Maxima Culpa, (Madman Films) regarding the abuse of over 200 deaf boys by Fr Laurence Murphy in Milwaukee, Wisconsin, USA and the RCC hierarchy’s cover up which implicates former Pope Benedict xvi.

\(^{6}\) For a brief review see below, COIN’s website at www.coinau.org; Appendix 3, Submissions Nos 6, 7; and for legal issues, Victoria Law Reform Commission, Sexual Offences: Law and Procedure: Final Report (VLRC 2004).

\(^{7}\) See particularly C Foster & P Kennedy, Hell on the Way to Heaven (Bantam, 2010).

\(^{8}\) There are several in Australia, and many overseas. See, locally, those making submissions to the Victorian Inquiry mentioned below. In the USA see especially Survivors Network of those abused by priests (SNAP).

\(^{9}\) See especially ABC TV, Fairfax and Murdoch press, particularly the work of Barney Zwart at The Age, eg. “The Truth about Sex Abuse”, 31/1/2013, p 20.

\(^{10}\) See especially the long list of prosecutions collected at Broken Rites’ website, supra.

\(^{11}\) See eg, evidence of former priest Phillip O’Donnell, at B Zwart, “Child sex abuse link to celibacy”, The Age, 24/1/2013, p 7; and of Catholics for Renewal, being “committed Catholics who loved the church but felt ‘very let down’ by the way it had been run”: S. Rentoul, “Church ‘centuries out of date’, The Australian, 24/1/2013, p 5.
in two NSW Dioceses.\textsuperscript{12} One could go on.\textsuperscript{13} As late entrants to this fraught political scene, COIN during 2012 played a small part in that community campaign.\textsuperscript{14}

After “receiving input from more than 800 individuals and organizations”\textsuperscript{15} on the terms of reference, the Letters Patent appointing the six Commissioner’s and containing their very broad Terms of Reference, were issued by the Governor General pursuant to the Royal Commissions Act\textsuperscript{1902} (Cwth) on 11/1/2013. These are attached at Annexure 1. They appear to be founded on Constitution, s 51(29) – the external affairs power - but will still require complementary legislation from the states and territories to enable the Commission to function in those jurisdictions. That particular federal tangle should be watched with interest.\textsuperscript{16}

In short, the Terms of Reference require the Commissioners to examine past and current child sexual abuse in organizations and to make findings and recommendations on the following matters:

- How organizations with a responsibility for children have managed and responded to claims of sexual abuse and other forms of abuse and neglect associated with child sexual abuse;
- Whether organizations have done enough to respond to child sexual abuse when it has happened;
- What organizations can do to better protect children under their care;
- What organizations should do to identify child sexual abuse and encourage people to report it;
- How organizations should respond when they discover information that suggests that sexual abuse of children under their responsibility is happening, or has happened in the past;
- What the barriers and failures have been to reporting, investigating and dealing with cases of child sexual abuse in organizations, and how these barriers can be removed in the future;
- What organizations should do to support survivors where child sexual abuse does occur;

\textsuperscript{12} Whitlam QC’s report was released on 17/1/2013. See J Owens, “Former priest hit with further child sex charges”, \textit{The Australian}, 24/1/2013, p 5.

\textsuperscript{13} See, eg, the revelations of Detective Chief Inspector Peter Fox, discussed below and at ABC TV \textit{Lateline}, 29/4/2013.\textsuperscript{14} See COIN’s website, \textit{supra}, for details. The Victorian victim support group, Broken Rites, has been agitating for fifteen years. See its website.

\textsuperscript{15} The Hon Jenny Macklin, Minister for Families, Community Services and Indigenous Affairs, Fact Sheet, 11/1/2013, at the RCASC website, \textit{supra}. For COIN’s submission, see its website, \textit{supra}.

\textsuperscript{16} See RCASC website, \textit{supra}, “Fact Sheet: Powers of a Royal Commission.” After referring to the Royal Commissions Act 1902, this states, intriguingly: “In this case the Royal Commission is also expected to be established under relevant State legislation in several jurisdictions. This will allow the ... Commissioners to act in multiple capacities, performing functions under Commonwealth and State laws.” Presumably, the Territories are not referred to by reason of the territories power, Constitution, s 122. Watch this space.
- What organizations should do to ensure victims receive justice, including through redress by organizations, and investigation and prosecution of perpetrators.

The Commission can examine any public or private organization or institution that is, or was in the past, involved with children, including non-government organizations and government agencies (eg., police and justice), schools, sporting clubs, orphanages, foster care homes, and religious organizations. Inquiries will not extend to adult victims, or outside “organizations”, eg, the family. Similarly, other forms of child abuse, when not connected with sexual abuse, are beyond the terms of reference – a focus I consider necessary, if only to render the exercise manageable, but one subjected to criticism. The Commission can refer individual cases to relevant law enforcement agencies, such as police, for investigation and, where appropriate, prosecution in a timely fashion. The Commission is directed to have regard to past and current relevant inquiries, and to avoid impeding current police inquiries or prosecutions.

The Commission thus faces an enormous, daunting task, since it is required to investigate the responses of all institutions, be they sacred or secular, to allegations of child sexual abuse against their personnel. RCSAC is required to provide a “initial” Report by 30/6/2014; and a final report by 31/12/2015. Unsurprisingly, there is provision for the Commissioners to seek an extension of time. Experience around the world suggests they will need it.

**Victorian Parliamentary Committee** On 17 April 2013 a press conference convened in Parliament House, the then Premier Ted Baillieu, and Attorney-General Robert Clark, announced a reference to a Joint Parliamentary Committee in this topic in Victoria. Its Terms of Reference, contained in a press release, are attached: see Appendix 2. These cover virtually identical ground as those of the National Royal Commission. Its inquiries continue. To date, some damning evidence highly critical of various institutions – especially the Catholic Church and the Salvation Army – has emerged: see further below. The Joint Committee was originally required to report to the Parliament by 30/4/2013 but that deadline has now been extended to 30 September 2013.

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17 See eg B Hall and J Lee, “Child abuse inquiry criticized”, *The Age*, 16/1/2013, p 4. According to Leonie Sheedy, chief executive of Care Leavers Australia Network, many of the about 1,000 people it represents “who spent time as children in homes, orphanages and other institutions, ... were shattered that physical abuse, neglect, forced and unpaid work and other forms of abuse (they suffered) would not be investigation by the commission.” *Ibid.*

18 See generally terms of reference, and “Fact Sheet” as RCSAC website, *supra.*

19 Ted Baillieu and Robert Clark, “Statement concerning the handing of child abuse by religious and other organizations”, 17/4/2012, containing the terms of reference provided to the Victorian Parliament’s Family and Community Development Committee.
To 3rd May, based on incomplete details posted on the Committee’s website, the Committee has conducted hearings on 30 days, four of these in Bendigo, Ballarat (twice) and Geelong, with the remainder at Parliament House; received 69 written submissions; heard from 114 witnesses representing themselves or organizations; and published much of this evidence on its website. Oral and/or written evidence has included may key players: 57 victims; 24 support groups; several government departments and agencies, especially Victoria Police; dissatisfied or resigned clergy (couragously given the unlimited disciplinary powers of their Bishop, himself answerable to Rome); academic and other experts; and four from the legal profession: ie, the Victorian Law Institute, firms Ryan Carlisle Thomas and Waller Legal, the National Children’s Youth Law Centre, and this organization – the ALA.

After a good deal of sometimes highly critical evidence, various institutions variously impugned have recently begun to appear, while the RCC, apparently outraged, arranged for an additional segment, called “Right of Reply”, to be added to the Inquiry’s webpage. There Cardinal George Pell and Archbishop of Melbourne Dennis Hart have posted, in Pell’s case, refutations of criticisms leveled at him personally (by solicitor Vivian Waller); and, in Hart’s case, criticisms by Victorian Police Commissioner Ken Lay that the Church hindered and obstructed Victorian police in their inquiries.

Further religious and secular institutions to present submissions have included the Anglican, Uniting, Presbyterian, Baptist, 7th Day Adventist, and Jewish Churches, the Salvation Army, Scouts Victoria, Girl Guides Victoria, Childcare Australia, the Justice Department, the Department of Human Services, and the Australian Institute of Family Studies. At the time of writing, more key players are scheduled to appear, including the Church’s Independent Commissioner, Peter O’Callaghan QC, discussed below.

A final assessment of the role of various institutions, and their motivation and ability to reform (if any) must await this “reply” material. However, expert evidence to date to the

20 The Committee explains that some written submissions have been received but not posted (as at time of writing), due to confidentiality concerns, pending court proceedings, or a need to review and approve a submission, etc; while oral submissions noted on the website sometimes do not include written submissions also submitted on the day.

21 Eg, Broken Rites, National Association for Prevention of Child Abuse and Neglect, Bravehearts, Care Leavers Australia Network (CLAN), In Good Faith and Associates (IGFA) and the associated Melbourne Collective, Catholics for Renewal, Child Wise, COIN, various Centres Against Sexual Assault, Australian Childhood Foundation, SNAP, Children’s Protection Society, Save the Children Australia, Liberty Victoria, and others.

22 See Inquiry website; and B Zwart, “Church leaders hit back at clergy abuse inquiry claims”, Saturday Age, 29-30/3/13, p 7.
Victorian Inquiry asserts that "Catholic priests abused children at six times the rate of all other churches put together"; that "one in fifteen Catholic priests in Melbourne was a child abuser," and that, on the church's own admission, a serial abuser – Monsignor Penn Jones who died in 1995 - oversaw the Church's insurance scheme that settled abuse claims (Catholic Church Insurance) for twenty years! The Salvation Army, described as having "an appalling record in Victoria" currently appears to occupy second-place on the podium in this vile and criminal arena.

**NSW Commission of Inquiry: Maitland-Newcastle Diocese** On 8th November 2012 an ABC Lateline TV report featured Detective Chief Inspector Peter Fox of the NSW Police Force. He 'blew the whistle' in two respects. First, were statements regarding alleged child sexual abuse by Catholic priests, including Fr Denis McAlinden and Fr James Fletcher, both now dead. They were associated with the Maitland-Newcastle Diocese. Fox referred to cover-up, re-location of the impugned priests, and the hindering of associated police investigations by the RCC hierarchy. Second, Fox indicated that he had been ordered by senior police to cease investigating these matters and to hand over all relevant files to his superiors. The matter was again aired by the ABC Lateline program on 29 April 2013.

After considerable media attention Margaret Cunneen SC was appointed Commissioner to enquire into and report upon these matters. Her Letters Patent were issued by the Governor of NSW on 21/11/2012, and amended on 25/1/2013 to take into account the National Inquiry. The Commissioner's Terms of Reference require her to examine two matters:

1. "The circumstances in which Fox was asked to cease investigating relevant matters, and whether it was appropriate to do so; and
2. Whether, and the extent to which, Catholic Church officials co-operated with police investigations of relevant matters, including whether any investigation was hindered or obstructed by, *inter alia*, the failure to report alleged criminal offences, the discouraging of witnesses to come forward, the alerting of alleged offenders to possible police actions or the destruction of evidence."

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24 Professor Patrick Parkinson of Sydney University, who specializes in child protection: see B Zwart, "The truth about sex abuse", *The Age*, 31/1/2013, p 20.
25 Desmond Cahill of RMIT, cited *Ibid*.
26 Carly Crawford, "Abuser priest led church scheme," *Herald Sun*, 9/4/2013, p 10. I cannot imagine a more blatant conflict of interest. And if Jones' Bishop did not know, why not? Further, did the lawyers advising Jones know? See below my analogy between the RCC with outlaw motor cycle gangs, etc.
27 B Zwart, "Scale of the task ahead in daunting" *Saturday Age*, 12/1/2013, p 6.
28 Issued pursuant to the *Special Commission of Inquiry Act 1983* (NSW).
29 See summary by Commissioner Cunneen SC, at the Formal Opening, Sydney, 13/2/2013, TS, p 3.
The Inquiry’s further Terms of Reference of 23/1/2013 establish arrangements for referral and sharing of evidence, that may fall outside its ambit, to the national Royal Commission. Its website is www.lawlink.nsw.gov.au. On 13 February 2013 the Commissioner advised that “extensive investigative work” had been pursued including “issuing (many) summonses compelling the production if documents from relevant persons and organizations.” Public hearings will commence in Newcastle on 6 May 2013. The Report (like the Victorian Parliamentary Committee’s Report) is due by 30 September 2013. That day promises to be something of a “milestone” in this sorry saga.

Other Inquiries These initiative follow many prior inquiries into this, or related, topics, recently completed in Australia and overseas, or still underway. In Australia, according to counsel assisting the National Inquiry, Gail Furness QC, more than 40 such inquiries had been pursued in the past 20 years. As to Australia, I mention just two: the abovementioned Cummins J Inquiry which recommended a “formal investigation … into the processes by which religious organizations respond” to clergy sexual abuse; and the recently completed inquiry into the mis-management of a paedophile priest “F” by church officials in two dioceses in NSW conducted by former Federal Court Justice Tony Whitlam QC.

In Ireland, “in the past twenty years, inquiries have generated fourteen reports on the abuse of children in schools, orphanages and churches.” The most significant of these, for current purposes, were the Ferns Report (2005), the Murphy Report (2009) and especially the

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30 Angela Sdrinis, of Ryan Carlisle Thomas, solicitors, who has reportedly acted for “more than 1,000 child sexual and physical abuse victims over the past 20 years” and who is a foundation member of COIN, has argued that “Australia is not ‘starting from scratch’ with at least 11 inquiries and redress schemes across the country on child abuse in institutional settings;” see Milana Rout, “Churches and victims give inquiry support”, The Weekend Australian, 12-13/1/2013, p 14. Amongst state-based inquiries, see the Mullighan Inquiries in SA, which investigated abuse of children in state-run institutions and, later, on Anangu, Pitjantjatjara and Yankunytjatjara lands: Ted Mullighan, Reports, Children in State Care Commission of Inquiry (31/3/2008); Children in APT Lands Commission of Inquiry (30/4/2008); Editorial, The Age, 12/1/2013, p 18.


33 The report, published on 17/1/2013, has been only briefly discussed: see eg, D. Box, “Alleged abusers still paid by church”, The Australian, 18/1/2013, p 6; D Box, “Bishop ‘sat on’ claims priest abused kids” 17/1/2013, p 1.


Ryan Commission (1999 – 2009) concerning abuse of children in Irish institutions between 1940 – 2,000. This lasted nine years and heard 1,090 witnesses.37

All of these inquiries warrant close attention. All have revealed, or are revealing, a shocking history of failure to adequately respond to the sexual abuse of children by personnel in various institutions, religious or otherwise, but in particular by the Catholic Church.

Approaching the Issues Before proceeding, I offer some general observations.

(a) Faith v Reason First, most of the evidence in the public domain on this topic, and much of this paper, is extremely critical of the Catholic Church culture, hierarchy, priests, religious and even, to some degree, the devoted laity. Let me be clear. I am a mere barrister, not a theologian. Further, I confess that while knowing not much about particular belief systems (though I have read the Catechism) I do not, a priori, hate all religions nor all persons of faith. As to the Church of Rome, my middle name is Andrew, not Martin nor Luther. If you press me, I would describe myself as a travelling agnostic who, especially after my experiences as President of COIN, is running as fast and as far as is possible from all forms of Christianity (particularly the Roman variety).

This personal stand-point is not merely self-promotion nor idle chatter. In this vile arena of clergy sexual abuse (a part only, but a major part, of institutional sexual abuse), I think it important to identify, and recognize the impact of, a faith-reason divide – alive at least since the Enlightenment – and to clarify one’s own position. Reliance upon “objective” reason as against “subjective” faith is important when dealing with victims of child sexual abuse. As the leader over the past year of a community lobby group – COIN38 - I have spoken with numerous such victims, and heard many harrowing stories. Amongst tales of brutal criminal conduct by pedophile priests, ruined lives suffered by victims, and the arguably criminal failing to prevent, or respond, let alone report complaints of clergy abuse by the Catholic Church hierarchy, two aspects repeatedly surprise me as an agnostic barrister trained to assess evidence objectively. One is the courage and persistence shown by many victims in seeking to both heal themselves and achieve justice from an often actively hostile hierarchy.

38 COIN, ie, “Commission of Inquiry Now” is a community group established at a meeting at Parliament House, Melbourne in February 2012. For its membership, aims and objectives, and submissions made to the Victorian Parliamentary Inquiry into Sexual Abuse see its website, supra.
The second is the obverse: faith suborning intelligence, the (to me) astonishing inability of many otherwise intelligent Catholic laity of faith (including lawyers) to think independently of their early Catholic teaching, the “pray, pay and obey” mantra, to break from a seemingly mindless acceptance not just of the Catechism, but of paedophiles posing as men of God and from a medieval church culture that considers sexual abuse primarily a sin worthy of forgiveness rather than a secular crime to be reported. The Jesuit boast – “Give me a child to the age of seven and I’ll show you the man” – is alive and well, perhaps even in this audience. As one victim support group stated to the Victorian Inquiry: 40

“... victims find it very hard to move outside the bubble of the societas perfecta and to actually go against how they have been raised, which is to keep everything inside ... it takes such a long time for them to do that ... to go to the police .. (is seen) as a betrayal of their families ... of their Catholic or other denomination educational places ..”

This inability to abandon comfort zones and face facts pervades not only the devoted laity but, more importantly, the hierarchy. Its refusal to recognize assault as a crime first and not merely a sin amounts to prioritizing Catholic doctrine and Canon law above the law of the land – conduct which can never be accepted and which places these officials, in my agnostic view, in the same smelly bed as outlaw motor-cycle gangs, the mafia, drug cartels and people smugglers. Sometimes my attempts to comprehend the RCC hierarchy’s conduct in this arena is greatly assisted by this intellectual leap: ie, I take the position that these guys are just another bunch of criminals who consider themselves above the law, who condone and ignore (perhaps even actively pursue) outrageous and harmful criminal conduct, who are concerned first and foremost with protecting their reputation and considerable assets, and who maintain a strict code of secrecy. From this standpoint, the hierarchy’s baffling inability or refusal to accept responsibility and accord justice to victims all becomes, to me at least, easier to comprehend. In my view, the blindly obedient faithful must learn to bring reason to bear, to stand at arm’s length and assess, for themselves, the distressing facts and allegations now in the public realm, detailing

39 In his evidence to the Victorian Parliamentary Inquiry, mentioned above, former priest Phillip O’Donnell reportedly stated: “Many Catholic priests take a flexible approach to celibacy, tolerated by church leaders, and some believe sex with children or men does not count ... There’s a tolerance for imperfection in celibacy, and that may have led to a lessening of outrage at sex with children.” Asked in evidence whether priests believed only sex with women counted as real sex (breaking celibacy vows) and that homosexual and child sex did not, Mr O’Donnell answered: “Sometimes.” See B Zwart, “Child sex abuse link to celibacy”, The Age, 24/1/2013, p 7. (“B Zwart, 24/1/2013”)

40 Family & Community Development Committee, Ts of Evidence, 12/11/2012, p 12, Ms H Last, Director, In Good Faith and Associates.
day by day, what their spiritual leaders have done, and are still doing, in their name. After all, the laity is the church: they need, (recalling the second Vatican Council), to claim it back.

(b) Roman Control and Liability? A related problem for victims is that around the world, the reforms initiated by the Second Vatican Council (1963–65) have withered and died, crushed by the powerful entrenched in the Roman Curia, bureaucrats that, it seems, even the Pope cannot, or chooses not to, control. Thus the hierarchy has insisted upon “loyalty and obedience to Rome” over the care and protection of children,\(^{41}\) has sacked Bishops who disagree with the Vatican line,\(^{42}\) has restrained priests and religious from speaking out through “rigid vows of obedience,” and has exploited this regime of servile obedience amongst priests, religious and laity for all its worth. And it it is undoubtedly worth, world-wide, hundreds of millions of dollars, not to mention enabling various officials to avoid jail sentences, and protecting what’s left of the Church’s reputation in the community. Meanwhile, at the parish level – with some notable exceptions - serving priests refuse to themselves engage in public discussion of social issues save parroting, from their pulpits, political propaganda delivered to them by their diocese Head Office.

In 2012, I experienced, when engaged in COIN lobbying, this failure of intellectual independence, coupled with the hierarchy’s culture of “obstruction, obfuscation and concealment”\(^{43}\) sourced, ultimately, in Rome. In April 2012, just before Easter, I wrote, as President of COIN, to over 400 parish priests in Victoria, inviting them to meet with me and discuss whether they might assist (ie, speak out to) the Victorian Parliamentary Inquiry; and to read out at Easter Mass and distribute to their parishioners my letter concerning that Inquiry. I also sought donations to support COIN! One priest replied, refusing my invitation. The Church’s Head Office however, responded forcefully by writing to the same priests, stating that my letter was not “authorized” and strongly intimating that it should be ignored. However, to my surprise, this exercise, described as “controversial,” hit the front pages of the press! The Ballarat Courier accurately reported that I had “adopted the (lobbying) tactics (on issues of public importance) of

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\(^{41}\) B Zwartz, 24/1/2013, p 7; S Rintoul, “Church ‘centuries out of date,’ The Australian, 24/1/2013, citing the evidence of former priest Phil O’Donnell. O’Donnell was a priest in the Melbourne archdiocese from 1969 – 1999.  
\(^{42}\) See eg., the fate of the Bishop of Toowoomba, Bill Morris, sacked by the Pope in May 2012 “after suggesting the church might consider revisiting the question of women priests”: B Zwartz, 24/1/2013, p 7. On the other hand, bishops Pat Power of Canberra and Geoffrey Robinson of Sydney, who have both “trenchantly criticized Vatican structures” were, it seems, allowed to retire: B Zwartz, 24/1/2013, p 7. See G Robinson, Confronting Power and Sex in the Catholic Church (John Garratt Publishing, 2007); Paul Collins, Between the Rock and a Hard Place (ABC Books, 2004), From Inquisition to Freedom (Simon & Schuster, 2001).  
Melbourne Archbishop Denis Hart who (the prior week) sent more than 80,000 letters to Victorian parishioners expressing opposition to same-sex marriage.”

One of COIN’s important tasks, as I see it, is to help expose this hypocritical regime of obedience and silence imposed ultimately by Rome, to embolden victims, to provide some basis for confidence that if they speak out, they will be listened to and treated with care and consideration, and further, when telling the truth, that they will be believed, and that personal healing, and a measure of justice, will be pursued. These considerations for fragile victims are now important elements built into RCSAC’s charter.

A further important question, however, remains: given the rigid hierarchical control, the lines of authority whereby neighboring Bishops, conveniently, know not what the other does but only informs Rome when moving offenders out of harms’ way, what, if any, legal liability lies with the Curia, and ultimately, the Pope? Australia’s very own Geoffrey Robinson QC has advocated suing the Holy Father to find out, and deaf victims of the Church’s familiar denial and coverup in Milwaukee, Wisconsin, USA have also recently launched such litigation.

Solicitors in this audience with (a) relatively young, obviously damaged, and very determined victims as clients; (b) funds or access to same; (c) an interest in making new law, and (d) lots of spare time, might give the matter some thought.

(c) Secondary Abuse: Prosecuting Officials: My second observation is that we are here dealing with a host of personal, social, economic, legal and policy issues. Amongst these, obviously, are repeated and serious breaches of the criminal law. Sexual abuse of children, or vulnerable adults, and crimes flowing there-from, occur at two levels. First is the obvious: the criminal assault by, eg, a priest, teacher, scout-master, or other adult in a position of trust and power.

The second level of abuse, less obvious but now repeatedly exposed, and perhaps equally reprehensible, occurs when officials responsible for and/or employing the primary offender turn a blind eye. Such conduct attracts possible offences such as aiding and abetting, criminal conspiracy, the common law offence of misprision of felony (abolished in Victoria in 1981) and

46 See the documentary film Silence in the House of God: Mea Maxima Culpa, cited above.
47 A relatively unexplored, but significant area, not covered by RCSAC’s terms of reference. See above, fn 16.
the like. In the context of the RCC, as the Victorian and NSW Whitlam QC inquiries have repeatedly revealed, these potential offenders occupy various positions in the Church hierarchy: the Archbishops, Bishops, Monsignors, and others, reaching all the way up the line to Rome. Recent damning findings in the Whitlam report concerning the rejection out of hand of complaints to the relevant Bishop who “sat on his hands” and did nothing are just one example. Such callous disregard for a victim’s plight, the prioritizing of the Church’s reputation and property over acknowledgment of wrong-doing, acceptance of responsibility, provision of support and fair compensation, let alone a repeated failure to accord Christian compassion for victims, amounts to not merely rank hypocrisy, but a second round of abuse, and probably further criminal offences, that often revives, and compounds, the victim’s original trauma.

In June 2012 in the USA, where relevant laws (and/or their administration) seem more robust, a Catholic Church official was prosecuted and convicted (an American first) for “child endangerment”, ie, in this case, ignoring repeated complaints about and failing to control, a paedophile priest. A similar prosecution – alleging misprision of felony (failing to disclose a serious crime) was launched in NSW against a bishop’s “right hand man” and occasional acting bishop, Fr Tom Brennan, aged 74. Fr Brennan was arrested and charged on 30/8/2012 - an Australian first. The counts related to alleged child sex offences against two boys by defrocked priest Fr John Denham in the late 1970s at St Pius X school, Newcastle, NSW. It appears that Fr Denham was a teacher, Fr Brennan the school principle. Fr Brennan was also charged with assaulting the boys by caning them after the reported Denham’s assaults. That prosecution however, collapsed, when Fr Brennan died.

To my knowledge, no such “failing to report” prosecutions have been to date launched in Victoria despite dramatic evidence by Deputy Police Commissioner Graham Ashton to the Victorian Inquiry that over past decades, not once had the RCC hierarchy reported complaints

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48 See eg, Crimes Act 1958 (Vic) ss 325, 326 and their equivalents in other jurisdictions. See further below.
50 Jc, Monsignor William Lynn, in the archdiocese of Philadelphia. See The Philadelphia Inquirer, 24/6/2012; Los Angeles Times, “Monsignor found guilty of child endangerment”, 22/6/2012. See a further prosecution of Bishop Robert Finn, of the diocese of Kansas City-St Joseph, Missouri.
51 J McCarthy, “Priest charged with abuse cover-up”, 31/8/2012, p 5. See Crimes 1900 (NSW) s 316(1); cf Crimes Act 1958 (Vic) s 325 (1)
52 J McCarthy, “First priest charged with concealing child sex crimes dies before trial”, Sydney Morning Herald, 2/10/2012.
53 See particularly N Papas SC, Advice, at COIN submissions, No 9; Appendix 3.
against a priest to Victoria police.\textsuperscript{54} Not once. Meanwhile, Archbishop Dennis Hart denies that the church has obstructed police inquiries.\textsuperscript{55} This history, plus a lack of investigation and prosecution by police, in itself, cries out for examination. The Royal Commission is now specifically requested to pursue such inquiries into the inadequate responses, over recent decades, of the police and justice systems in all jurisdictions. This truly is a mammoth inquiry that runs in many directions.

This scandal of “secondary abuse” and the responsibility, criminal and civil, of those in authority in the relevant institutions, are now important issues before the Royal Commission. The terms of reference have enabled the establishing of a special unit to work with police to assist in the investigation of specific cases of sexual assault and organizational cover-ups. One recent indication of a more “co-operative” approach by the Roman Curia with Australian police is the decision of the Curia to return Fr Julian Fox, former Principal of the infamous Salesian College at Rupertswood, Sunbury, to Australia to face sexual abuse charges – having protected him since 1999. In that year, following allegations by students, the Salesians nopttoriously moved Fox to Fiji, then to the Order’s headquarters in Rome, thus avoiding prosecution for fourteen years.\textsuperscript{56} Archbishop Law of Boston suffered a similar fate but he is still protected in Rome. Whether we are witnessing the start of serious reform amongst the all-powerful Curia remains to be seen. Commentary following the election of Pope Francis suggests we should not hold our breath. Still, His Holiness too is in “early days.”

\textit{Early Days} This brings me to my third observation: these are also “early days”, in Australia at least, in these inquiries. As mentioned, the Victorian Committee and the NSW Commissioner continue, including holding public hearings.\textsuperscript{57} The Committee will last only to long as the electoral cycle. The next Victorian election is to be held not later than 29/11/2014.

Meanwhile, the national Royal Commission is in its \textit{very} early days. Six Commissioners have been appointed;\textsuperscript{58} the Chairman, Justice Peter McClellan, Chief Judge at Common Law of

\textsuperscript{54} G Ashton, \textit{TS of Evidence}, Victoria Inquiry, 19/10/2012, p 2; B Zwartz, “The truth about sex abuse”, \textit{The Age}, 31/1/2013, p 20. Meanwhile, the Church upheld 618 cases of child abuse in Victoria in the past 16 years, though most occurred earlier: \textit{Ibid}.

\textsuperscript{55} See the Committee’s website, “Right of Reply”; B Zwartz, “Church leaders hit back at clergy abuse claims”, \textit{The Saturday Age}, 29-30/3/2013, p 7.

\textsuperscript{56} Don Oakes, “Former Principle on sex charges”, \textit{The Age}, 23/4/2013, p 4. Fox was charged with ten offences, including buggery and indecent assault, alleged to have occurred between 1976 – 1985.

\textsuperscript{57} See, for its activities, its website

\textsuperscript{58} Ie, Justice Peter McClelland (chair), Bob Atkinson, (former Queensland Police Commissioner), Jennifer Coate, (former Victorian State Coroner and Family Court Judge), Robert Fitzgerald, (Productivity Commissioner), Professor Helen Milroy, (consultant psychiatrist), Andrew Murray, former WA Democrats Senator.
the NSW Supreme Court, quickly took the unusual course of issuing a statement scotching
rumors that witnesses might be restrained by confidentiality agreements concerning settlements,
indicated that he would not hesitate to use the Commission's extensive powers to compel
evidence, and warned that RCSAC would need considerable time establish itself and get going.59
Much preparatory work is now underway including the appointment of staff and counsel
assisting – Ms Gail Furness QC (Sydney) and Melinda Richards SC (Melbourne) - organizing
premises, developing hearing timetabling, issuing Practice Guidelines (available on its
website),60 and the like – all of which had cost $22 M by April. An Interim Report is due by 30
June 2014 and Justice McLellan J has already indicated that it is “unlikely that the Commission
would finish by December 2015,” its current deadline.61

At its first public sitting in Melbourne on 3/4/2013, Justice McLellan spoke further of the
Commission’s plans. He noted, ominously, that notices to produce documents had already been
issued against various institutions, including Catholic Church insurers; and that witnesses could
provide background information, or evidence to be relied upon, in a range of ways and settings.
In ascending formality, these were by telephone hot-line; by letter or written submission; in
“private” hearings in hotel or motel conference rooms around the country;62 in private
Commission hearings,63 and finally, in full-blown public hearings with the possibility of cross-
examination.64 Natural justice for those impugned will be accorded,65 but leave to appear will be
strictly controlled, ie, upon application and only in relation to specific witnesses or issues. His
Honor also stated that all Commissioners recognized that there would be limits to the number of

59 “Media Statement from Justice Peter McClellan AM – Chair of the Royal Commission into Institutional
Responses to Child Sexual Abuse”, 16/1/2013, at RCSAC website, supra.
60 See Practice Guideline 1, 28/3/2013 dealing with provision of information, leave to appear, conduct of public and
private hearings; confidentiality, publication of and access to evidence, standard of proof, and Liaison; Practice
Guideline 2, 28/3/2013, “Producing Material to the Commission under Summons or Notice to Produce”; Practice
Guideline 3, 28/3/2013, “Guide Questions for Providing a Statement of Information to the Royal Commission”; and
61 B Zwart, “Inquiry expects to hear from more than 5,000”, The Age, 4/4/2013, p 8.
62 Involving the victim, his/her supporter(s), a Commissioner, his/her assistant, and transcription services. Such
material would be considered as background information only, and not as “evidence” to be relied upon or quoted in
any final report.
63 As to the use of “information,” not “evidence” thus obtained, see below and the Commission’s Practice Guideline
1, 28/3/2013, para 65-68.
64 See Royal Commission, Practice Note No 2: Conduct of Public Hearings. 14/2/2013.
65 See, eg, the Commission’s Practice Guideline 1, 28/3/2013, para 36: “If information provided during a private
session is to form part of the evidence before the Royal Commission, and is to be relied on when considering what
findings are made, a more formal hearing is necessary. That hearing is designed for the purpose of further
investigation, to test matters that have been raised and to allow the Commission to inform itself on relevant matters
and issues that may be the subject of findings or recommendations. The Royal Commission is not a court and cannot
make decisions about criminal matters.” See also para 64: “Anticipated adverse evidence"
victims' stories they could listen to in any one day. This 'transferred trauma' problem, not to mention the serious issue of possibly re-traumatizing victims themselves when asked to re-live these childhood assaults by way of giving evidence, reflects my own experience and, I'm sure, that of many personal injury and family law specialists in this audience.

Of further interest to this audience, in early April, the federal government established "a free national legal advisory service" to be provided by "the national association of Community Legal Centres" for people "engaging with the Royal Commission". Advice will embrace submission preparation, confidentiality agreements with, eg, the RCC, and civil and criminal legal options for victims as apart from the Royal Commission process. Of interest, private hearings are now underway. Public hearings will commence in September. By early April 2013 the Commission had apparently received 1200 unsolicited phone calls.

The Extent of the problem: As mentioned above, my best guess, as a determined spiritual outsider, is that the "pray pay and obey" mentality is increasingly being rejected amongst victims who may have remained silent for perhaps fifty years, for good or bad reasons. "Good" might include wishing to get on with their lives, to forget and overcome the past; "bad" might include misguided loyalty to a hypocritical, self-obsessed hierarchy. In any event, we simply have little idea of how many victims might, for the first time, step forward. One can only speculate. Based on evidence that has emerged in recent times, the numbers of victims, across sacred and secular realms, Australia-wide, may certainly be conservatively estimated at tens of thousands, and may easily extend to hundreds of thousands.

Some evidence to the Victorian inquiry reveals a little of the extent of abuse in Victoria. For example, Uniting Church representatives stated that it had paid out, by way of settlements, $2 million to 63 victims of its personnel operating in Victoria and Tasmania from the 1940s to 1986, but "many records had been lost or destroyed". Further, this church, (like its Catholic colleagues), had not reported one case to police during this period while its most recent

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68 See, of course, Colin Wilson, The Outsider (1956), still in print. Did not everyone read this book?
69 One approach is to calculate by reference to criminal prosecutions - a fraction of all assaults that occur in the community - and extrapolate from there. The consensus amongst criminologists seems to be that 1 in 10 persons in the community experience sexual assault; and 1 in 30 are children. Australia's current population is approx 22 million - a calculation which leads to about 600,000 victims, nationwide.
complaint occurred in September 2012—a time, let it be said, when this issue was subject to intense media attention. It seems predatory clergy live in an evil world of their own. The Anglican Church admitted, to the Committee, “46 complaints against clergy and church workers”, with compensation payments totaling a paltry $268,000 since 2003.

Justice McLellan, at the National inquiry’s initial Melbourne hearing, expected “at least 5,000 witnesses” and acknowledged the final number could be much higher.

One study concludes that up to 30% of children are experiencing sexual abuse; another from the Australian Institute of Family Studies, states that in 2010-11, 5,437 cases of child sexual abuse occurred. A recent press account states, further, that the number of adults “abused … by their priests might be greater than the child abuse scandal.” This then is another major part of the Royal Commission’s task: to attempt to understand, as accurately as possible, the full nature and extent of child sexual abuse, and, more to the point, institutional responses to such conduct, in Australia. Basically, in Australia, nobody knows precisely—and we may never know.

Costs of the Royal Commission The Royal Commission thus faces a very large, as yet ill-defined task which is likely to be “the most expensive in the history of royal commissions.” The total bill, like the number of witnesses, is anybody’s guess. Professor Scott Prasser and The Age have separately estimated “at least $100 million.” My best guess—estimate, for what it’s worth, is in the order of $500 million. This is based on the reputed cost of the 2009 Victorian Bushfires Royal Commission (Teague J) of approx $50 million. Justice McClellan indicated that his inquiry “will be expensive.” The Commission he said, had already committed to spending $22 million, while running costs, including hearings across Australia, would “continue to require the

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71 Ibid.
72 Ibid. Evidence from Archbishop Philip Freier.
73 B Zwart, “Inquiry expects to hear from more than 5,000”, The Age, 4/4/2013, p 8.
76 N McKenzie & R Baker, “Priest in pulpit after big payout”, Sunday Age, 20/1/2013, p 1, detailing the sexual abuse of a physically disabled woman for 14 years, commencing when she was 22 years old, by Fr. Toan Knowles, and the Church’s decision of December 2012 to allow him to “return to full community life and to public ministry” at St Francis’ Church in Melbourne’s CBD—“one of the nation’s busiest churches”.
77 See R Morton, “Sex abuse inquiry to cost $100 m”, The Australian, 14/1/2013, p 2, citing Professor Scott Prasser, a member of the Australian Law Reform Commission’s reference committee concerning its 2009 review into minimizing costs of public inquiries in Australia.
79 See my submission to Attorney General Roxon on the terms of reference, at COIN’s website supra; and quoted at M Rout, “Abusers ‘must pay for inquiry’s costs’”, The Australian, 10/1/2013, p 5.
commitment of very significant sums of public money." He indicated that at full compliment, 110 support staff would be retained.

These costs raise a significant policy issue: who should pay? One thinks immediately of the Commonwealth, States and Territories, (ie, the long-suffering taxpayer) based no doubt on hard-fought "co-operative" financial arrangements. Funding hospitals or education will be chicken-feed compared to this! To current date, at least, no serious complaints have been raised – one indication, perhaps, of how far public sentiment has moved on this issue in the past year.80

But in a submission to the Attorney General concerning RCSAC’s terms of reference, quoted by The Australian, I suggested that the RCSAC be required to examine a further source of funds: ie, wealthy organizations found, on the evidence, to have substantially contributed, due to their derelict practices, to the sexual abuse scandal. Their several contributions should be based, I suggested, on a calculation that reflected, in a "fair and reasonable" way, their assets and degree of culpability. Further, the costs to be defrayed were, I suggested, two-fold: first, the cost of the Royal Commission itself; second, compensation processes for victims that might be recommended and adopted by government.81 How far or high that kite might fly remains to be seen, but the question of compensation for victims is now squarely before the Royal Commission. The Victorian Parliamentary Inquiry, interestingly, has also pursued this issue of impugned (wealthy) institutions contributing to a victims’ future compensation scheme with officials of the Anglican and Presbyterian churches.82

Some Legal Issues The highly respected religious affairs journalist, Barny Zwartz, lists seven areas of reform requested by victims’ advocates, all if them focused on the principal perpetrator, the Catholic Church:83

- Laws enabling the RCC to be sued, ie, issues of statutory trusts (see below);
- Extending the statue of limitations in civil cases;
- Concealment of child sex abuse to become “an explicit crime”;
- Mandatory reporting by church officials to police, with failure to be a criminal offence;

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80 Further indications include the fact that all state and territory governments supported the PM’s initiative; and that immediately following her announcement of the Royal Commission, the Melbourne Age conducted a survey. It asked its readers, basically: do you approve? Of about 1400 respondent, 97% said yes. See citations above.
81 Ibid.
82 To date of writing, on 23/4/2013, in Melbourne, the Anglican Primate was asked whether, in his view, his church should contribute to such a fund. He obfuscated, saying, in effect, that his church was but a minor perpetrator. See ABC TV News, 7 pm, Victoria, 22/4/2013.
- Doctrine of corporation sole to be extended such that eg, current Bishops may be legally accountable for their conduct of former Bishops, ie, their predecessors in office;
- Vicarious liability to apply between church hierarchy and offenders;
- The Church’s internal protocols dealing with abuse since 1996 – The Melbourne Response and Towards Healing (discussed below) – to be shut down and replaced with a federal redress system, run by the state, but funded by the RCC.

I agree: indeed, this list reflects COIN’s submissions to the Committee: see Appendix 3. I shall here briefly survey some only of this formidable list.

(a) Catholic Church Property Trusts Legislation\textsuperscript{84} For current purposes, I explore briefly some of the more obvious legal anomalies thrown up in the civil arena.\textsuperscript{85} The short point is that existing legal frameworks throughout Australia regarding the main perpetrator – the RCC - function as a barrier between victims of abuse and the wealth held (in trust) by the Church. Legally, the “Catholic Church”, whatever else it is or pretends to be, lurks mysteriously in an existential black hole where “it” (whatever it is) successfully evades justice. This structure has exacerbated victims’ situation when seeking redress at law and should be corrected. The following matters are highlighted:

- The “RCC”, an unincorporated organization, is not an entity known to law that can be sued by a victim for damages;
- Although the Church has investigation and negotiation procedures such as the national Towards Healing and the Melbourne Response in place to deal with abuse, they are insufficient, and objectionable in principle since, inter alia, they seek to replace due process of civil and criminal law, while not being open for public scrutiny and accountability. These “private” processes are discussed below.
- Extensive property worth hundreds of millions of dollars owned by the RCC in Australia is held under a series of statutory property trusts operating in all jurisdictions, eg, in Victoria, under the \textit{Roman Catholic Trusts Act 1907} (Vic) (“the 1907 Act”);
- Sections 3 and 6 of the 1907 Act provides for the incorporation of trustees who shall acquire, take, hold, manage and deal with church property in trust on behalf of the Church. The governing council of a diocese may form such a body corporate to hold church property. Such incorporation is voluntary, leading to complexity and a lack of transparency, as property matters are dealt with differently by various Dioceses;

\textsuperscript{84} See COIN submissions No 3, website, \textit{supra}.
\textsuperscript{85} For further discussion, see COIN’s submissions to the Victorian Inquiry at its website, \textit{supra}. 
• No provisions in the 1907 Act allow a person to sue the body corporate for harm caused by a particular individual, for example a parish priest, or teacher in a Catholic school in the relevant diocese.

The courts have held that under the NSW equivalent of the 1907 Act, a diocesan property trust cannot be accessed by victims of clerical abuse as the trust’s sole role relates to property matters: it cannot be held responsible for any sexual abuse by a priest merely because he offended within the diocese. This is the Ellis Defence - a decision of the NSW Court of Appeal. \(^{85}\) Special leave to appeal to the High Court was refused in that case. The RCC may thus rely upon such legislation throughout Australia, and shelter its assets from any court order requiring an offending priest to pay compensation to a victim.

(i) Reform Proposals: New South Wales

In order to enable just results in civil litigation concerning clergy sexual abuse, the current “property trust” legislation in all jurisdictions should be amended. A recent law-reform effort in NSW deserves attention: the Roman Catholic Church Trust Property Amendment (Justice for Victims) Bill 2011 (NSW). This Bill aims to place the Church in a position where it must defend claims brought against it and, in appropriate cases, provide remedies based on the merits of the particular case. The church could no longer – like tobacco companies – rely on technical defences and artificial legal structures designed to insulate its assets against orders for damages concerning individual priests. \(^{87}\)

Section 18 of the 2011 Bill allows a person suing a member of the clergy, church official or teacher with regard to sexual abuse or negligence to join the relevant body corporate holding church property in trust as a defendant. Section 19 provides a person owed a judgment debt arising from abuse or negligence the right to recover that debt from the body corporate of the relevant diocese.

Various submissions were made to a NSW Parliamentary Committee with regard to this 2011 Bill. The majority were in support of victims and holding the Church hierarchy and priests accountable for their actions. \(^{88}\) No submission suggested that the Bill unfairly trespassed upon

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\(^{85}\) Trustees of the Roman Catholic Church v Ellis & Anor [2007] NSWCA 117.

\(^{87}\) See Shoebridge, David, Roman Catholic Property Trust Property Amendment (Justice for Victims) Bill Consultation Paper, 8 December 2011.

\(^{88}\) Shoebridge, David, Roman Catholic Property Trust Property Amendment (Justice for Victims) Bill Report on Submissions Received, 28 May 2012, 20.
the rights of the church.\textsuperscript{89} The Bill merely provides an avenue for victims to recover damages from Church assets. It does not prohibit the Church from exercising any of its property rights.\textsuperscript{90} Following consideration, the Parliamentary Committee recommended that the Bill not proceed: it remains stalled in the Parliament, going nowhere fast. Hopefully, the Victorian Committee and RCSAC will review this issue. COIN has presented written submissions on this issue.\textsuperscript{91}

(b) Who to sue? It is trite law that a plaintiff is entitled to compensation from a tort-feasor for any tortious acts committed against him or her, or from the tort-feasor’s employer if vicarious liability can be established. In the present context, however, a victim of clergy abuse faces peculiar difficulties.

First, priests and religious typically take a vow of poverty, i.e., they have little or no assets to satisfy a judgment order for damages made against them. Church property (for example, diocesan buildings) are, as mentioned, held in legally separate property trusts established by legislation.

Thus, our pragmatic plaintiff would be well advised to “look around” and bring an action against the relevant diocesan trustees who hold assets that may be made available to pay any compensation ordered. Such an action was brought in \textit{Trustees of the Roman Catholic Church v Ellis.}\textsuperscript{92} In \textit{Ellis}, the claimant (now a NSW solicitor) John Ellis, was abused as an altar boy. He argued that the relevant trustees were directly and vicariously liable for a failure to implement adequate systems and controls to prevent clergy sexual abuse from occurring. This argument was rejected by the NSW Court of Appeal. The court held that the purpose of the trust was solely to manage the property and other financial interests of the Church. The trust could not be held liable for the actions of a priest that offended in the relevant archdiocese. Mason P stated:

\textit{The fact that the trustees hold property for and on behalf of “the Church”... cannot be inverted into the proposition that the trustees... can be rendered subject to all legal claims associated with Church activities.}\textsuperscript{93}

\textsuperscript{89} Shoebridge, David, \textit{Roman Catholic Property Trust Property Amendment (Justice for Victims) Bill Consultation Paper}, 8 December 2011.
\textsuperscript{90} Ibid.
\textsuperscript{91} See Appendix 3.
\textsuperscript{92} [2007] NSWCA 117.
\textsuperscript{93} Ibid at [149].
(c) Vicarious Liability. Similarly, the Court in *Ellis* refused to attach vicarious liability to the Church for the conduct of the relevant priest. The Church argued that priests are not Church employees and thus it cannot be held vicariously liable; trustees of the relevant property trust were not employers of diocesan priests as the trustees were not involved in the priest’s appointment or removal; the offending priest in *Ellis* was appointed by the Bishop in charge of the relevant Diocese at the time but, at the time of the trial, the relevant Bishop was long dead and thus no action could be initiated against him personally. Notions of corporation sole and continuing rights and liabilities imposed on the e.g., office of bishop, do not apply to the Church – contrary to the situation in the USA.  

Similarly, *New South Wales v Lepore* concerned abuse by a school teacher employed in a government school. The court held that the school authority was not vicariously liable to the victim as sexual assault was outside the perpetrator’s course of employment. 

As a result of these cases, in Australia the legally non-existing “Catholic Church” and all its limbs enjoys, in practice and in law, complete immunity from civil proceedings with regards to sexual abuse committed by its priests and religious. Even where evidence has been accepted that Church officials knew, or had reasonable grounds to suspect, that abuse had occurred yet failed to prevent it, the courts have been unwilling to accept that the Church itself is the appropriate body to sue.

(i) Canada Recent developments of the common law in Canada offer a more progressive approach to the issue. In 1999 the Supreme Court of Canada articulated a new (and expanded) test for vicarious liability in *Bazley v Curry*. According to this test, the courts must consider:

- Whether the tort was “sufficiently connected” with conduct authorised by the employer to justify imposing vicarious liability; and
- Whether public policy is a relevant consideration when deciding whether to uphold a vicarious liability action.

*Bazley* established what is known as the “close connection” test. The court held:

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94 See COIN submissions Nos 5, 14, website, supra, and Appendix 3.
95 See COIN website; Submission No 4; Appendix 3.
97 The victim was a student and the sexual assault was committed by a teacher employed by a school authority during school hours.
99 Ibid at [41].
Vicarious liability is generally appropriate where there is a significant connection between the creation or enhancement of a risk and the wrong that accrues therefrom, even if unrelated to the employer’s desires. (emphasis added)

The Court went further, saying: 100

Applying these general considerations to sexual abuse by employees, there must be a strong connection between what the employer was asking the employee to do (the risk created by the employer’s enterprise) and the wrongful act. It must be possible to say that the employer significantly increased the risk of the harm by putting the employee in his or her position and requiring him to perform the assigned tasks.

(ii) United Kingdom Bazley was closely followed in 2001 in Lister v Hesley Hall in the House of Lords. 101 Lord Steyn held that the traditional Salmond test for vicarious liability was inadequate and strongly approved Bazley v Curry: 102

My Lords, I have been greatly assisted by the luminous and illuminating judgments of the Canadian Supreme Court in Bazley v Curry... Wherever such problems are considered in future in the common law world these judgments will be the starting point.

His Lordship continued: 103

The question is whether the warden’s torts were so closely connected with his employment that it would be fair and just to hold the employers vicariously liable.

Maga, 104 decided in 2010, concerned abuse by a priest, Fr Clonan in the archdiocese of Birmingham. The English Court of Appeal held that there was a sufficiently close connection between Fr Clonan’s employment as a priest in the Archdiocese and the abuse inflicted on the claimant by him such that it was fair and just to impose vicarious liability on the archdiocese trustees. The court found that the priest’s intimate relationship with the victim was only possible because of his status and authority. This gave him ample opportunities to be alone with his victim without any suspicions being raised. 105

A Canadian case Jacobi v Griffiths 106 was also considered and approved in Maga. In Jacobi, the Canadian Supreme Court held that to establish vicarious liability, the claimant must show that there was a material increase in the risk of harm occurring in the sense that the employment significantly contributed to the occurrence of the harm. As mentioned, the court in Maga was satisfied that this condition had been met and found that the sexual abuse of the

100 Ibid at [42].
102 Ibid at [27].
103 Ibid at [28].
105 For example, Father Clonan was given responsibility for youth work at the Church.
claimant was so closely connected with Fr Clonan’s employment as a priest that it would be fair
and just to hold the Church vicariously liable.

While Maga represents a significant development in the common law, in that the Court
of Appeal was willing to attribute vicarious liability to the trustees, one further issue remained
unresolved. The RCC did not, in that case, for whatever reason, raise the defence commonly
relied upon in the UK and Australia: that Fr Clonan was not an “employee.”

However, the issue was squarely resolved in 2011 in JGE v English Province of Our
Lady of Charity and another107 (the JGE Case). JGE was another action for damages where
vicarious liability had been claimed arising from alleged sexual abuse by a priest.108 This time,
however, the defendant argued that the priest was not a Church “employee” and tendered
evidence that no formal employment contract existed between the priest and the Church. Nor
was the priest paid by the diocese; rather he relied upon donations. The Church also relied upon
Canon Law to reinforce this position. The trial judge rejected the Church’s argument. MacDuff J
held that the offending priest, Fr Baldwin:

... was appointed by and on behalf of the defendant. He was so appointed in order to do
their work; to undertake the ministry on behalf of the defendant for the benefit of the
church. He was given the full authority of the defendants to fulfill that role.109

His Honor found there was a relationship between the Bishop and the offending priest to which
vicarious liability could be attached. The Church appealed – and failed: see JGE v Trustees of the
Portsmouth Roman Catholic Diocesan.110 The UK Court of Appeal dismissed the appeal and
endorsed the decision of the High Court in full. Ward LJ supported the High Court’s use of the
“close connection”111 test, saying:

the test I set myself is whether the relationship of the bishop and Father Baldwin is so
close in character to one of employer/employee that it is just and fair to hold the
employer vicariously liable.

The Court of Appeal affirmed the trial judge’s view that vicarious liability extends to
persons who are employed through means other than a traditional employment contract. This
would seem to strike down – at least in the UK - the established defence that priests are not
employees of the RCC and thus it cannot be held vicariously liable for a priest’s actions.

(iii) Australia This decision, like Maga, is important, I suggest, not only for the UK but
for all common law jurisdictions, including Australia. These recent cases suggest that victims of

108 The vicarious liability in this instance was argued to be attached to the Bishop of the Roman Catholic Diocese of
Portsmouth at the material time. However, the trustees of the Portsmouth Roman Catholic Diocesan Trust, for the
purposes of the litigation, stood in place the Bishop.
109 [2011] EWHC 2871, [35].
clergy sexual abuse may have a stronger foundation to rely upon if contemplating civil actions for damages against the RCC as the perpetrator’s employer.

**RCC Private Compensation Schemes** The abovementioned lack of access to compensation through the courts has funneled victims into Church-operated in-house programs such as the *Melbourne Response* (Melbourne archdiocese) or *Towards Healing* (which operates throughout Australia save for the Melbourne archdiocese). These programs conduct internal inquiries into complaints brought to them by victims, and are not publicly transparent or accountable. If compensation is offered to the victim, a Deed of Release with confidentiality clauses is required.

This presents an apparent conflict of interest, as the Church that seeks to deny or minimize liability is also conducting the investigations albeit through its “independent” Commissioner Peter O’Callaghan QC, (in the case of the *Melbourne Response*) who is retained and funded by the Church. Further, these processes are not subject to any external supervision or review. This aspect was criticized by Cummins J in his 2012 Report. His Honor concluded:

> “A private system of investigation and compensation, no matter how faithfully conducted, by definition cannot fulfill the responsibility of the State to investigate and prosecute crime. Crime is a public, not a private matter. The substantial number of established complaints of clerical sexual abuse found by Mr O’Callaghan (many of which are likely to relate to offences committed against children), reveal profound harm and any private process that attempts to address that harm that [sic] should be publicly assessed.”

I, and COIN, with respect, agree. In relation to investigations into the criminal abuse of children by “religious personnel”, the Cummins Inquiry Report concluded:

> Any private system of investigation and compensation which has the tendency... to divert victims from recourse to the State, and to prevent abusers from being held responsible and punished by the State, is a system that should come other clear public scrutiny.

Again, COIN supports these observations. Mr O’Callaghan’s evidence to the Committee, delivered on 30 April and not available at time of writing, is obviously an important component in reaching final conclusions on this topic.

The unwillingness of Australian courts to find the RCC and/or its hierarchy vicariously liable, to pierce the corporate veil, and thus enable victims to receive fair compensation that they are entitled to by access to the Church’s extensive assets, coupled with the inadequacies of the Church’s internal investigation and compensation system, demands reform. All of these matters are now before both the Victorian Committee and the Royal Commission.

113 Ibid.
**Law reform** The question arises: what can be done to make the justice system responsive for victims? Two reforms, which aim to replicate the above developments in the United Kingdom, are suggested.

(a) **Property trust legislation** The court in *Ellis* accepted the RCC’s submission that the trustee’s activities were strictly concerned with property dealings and were “well removed from the matter of appointing, managing and disciplining priests.”¹¹⁴ Clearly, by sheltering trustees from the torts (and crimes) of priests, the law is denying victims substantial justice. The relevant *Trusts Acts* throughout Australia should be amended to allow for actions against RCC trustees for wrongful acts committed by: (1) persons directly employed by the diocese for which the trust operates; and (2) persons not formally employed by such a diocese but where a relationship exists between the person and the diocese from which a court could infer that an employer-employee relationship exists, eg., where a priest had been delegated responsibility to carry out the Church’s business.

(b) **Vicarious liability and RCC property trustees** Simply making the various property trusts open to civil litigation for civil wrongs committed by clergymen would be fruitless if the courts still favored the approach in *Lepore* and *Ellis*, ie, denying any vicarious liability of the employer.

The *Lepore* principle (where sexual abuse was held to be outside the scope of employment) should be repealed by statute in favor of the adoption of the “close connection” test referred to above. That is, if the tort in question was so closely connected with the employment that it is fair and just to attach vicarious liability, then such liability should apply by force of statute. In addition, the principle in *Jacobi* ¹¹⁵ must also be taken into account. If the appointment of a priest significantly increased the risk of harm occurring, then vicarious liability should be attached to the Archdiocese responsible for the appointment.

(c) **Impact of law reform** The first point allows for the attachment of vicarious liability to the trustees for the wrongful acts of priests and thus exposes the RCC’s assets to satisfy a judgment debt. The second allows vicarious liability to be **successfully** argued by the claimant as was the case in *Maga* and *JGE*. The overall result is to provide victims an avenue to obtain just compensation in an appropriate case.

¹¹⁴ [2007] NSWCA 117, [140].
Opponents of these proposed reforms might argue that exposing Church assets to civil liability for damages will “open floodgates” and severely disrupt the Church’s many unquestionably valuable social contributions, eg, charitable and educational activities. However, first, before accepting such a claim at face value, the RCC’s complex property holdings and finances would need to be exposed and examined, probably for the first time. Second, even if such detriment were shown, the greater public interest would need to be carefully assessed. In that debate, the simple proposition that a society that cares for those most at risk must apply the law fairly, and ensure justice to victims of these appalling crimes for the community’s most vulnerable - its children – must carry great weight. The point is that with a well resourced national Commission of Inquiry now underway, we have an opportunity to conduct that debate. Hopefully, we should all end up better equipped as a society to prevent this “vile crime”, to provide justice to victims and offenders alike, and to enable our children to be much, much safer.

Appendix 1: Royal Commission, Letters Patent
Appendix 2: Victorian Parliamentary Committee of Inquiry, Terms of Reference
Appendix 3: COIN submissions to Victorian Parliamentary Committee

29 April 2013
Owen Dixon Chambers East
205 William St., Melbourne, 3000
Australian Sexual Abuse Inquiries

Appendix I

Letters Patent

Letters Patent
State Letters Patent

ELIZABETH THE SECOND, by the Grace of God Queen of Australia and Her other Realms and Territories, Head of the Commonwealth:

TO
The Honourable Justice Peter David McClellan AM,
Mr Robert Ackerson,
The Honourable Justice Jennifer Ann Coate,
Mr Robert William Fitzgerald AM,
Dr Helen Mary Milroy, and
Mr Andrew James Marshall Murray

GREETING

WHEREAS all children deserve a safe and happy childhood.

AND Australia has undertaken international obligations to take all appropriate legislative, administrative, social and educational measures to protect children from sexual abuse and other forms of abuse, including measures for the prevention, identification, reporting, referral, investigation, treatment and follow up of incidents of child abuse.

AND all forms of child sexual abuse are a gross violation of a child's right to protection and a crime under Australian law and may be accompanied by other unlawful or improper treatment of children, including physical assault, exploitation, deprivation and neglect.

AND child sexual abuse and other related unlawful or improper treatment of children have a long-term cost to individuals, the economy and society.

AND public and private institutions, including child-care, cultural, educational, religious, sporting and other institutions, provide important services and support for children and their families that are beneficial to children’s development.

AND it is important that claims of systemic failures by institutions in relation to allegations and incidents of child sexual abuse and any related unlawful or improper treatment of children be fully explored, and that best practice is identified so that it may be followed in the future both to protect against the occurrence of child sexual abuse and to respond appropriately when any allegations and incidents of child sexual abuse occur, including holding perpetrators to account and providing justice to victims.

AND it is important that those affected by child sexual abuse can share their experiences to assist with healing and to inform the development of strategies and reforms that your Inquiry will seek to identify.

AND noting that, without diminishing its criminality or seriousness, your inquiry will not specifically examine the issue of child sexual abuse and related matters outside institutional contexts, but that any recommendations you make are likely to improve the response to all forms of child sexual abuse in all contexts.

AND all Australian Governments have expressed their support for, and undertaken to cooperate with, your inquiry.

NOW THEREFORE We do, by these Our Letters Patent issued in Our name by Our Governor-General of the Commonwealth of Australia on the advice of the Federal Executive Council and under the Constitution of the Commonwealth of Australia, the Royal Commissions Act 1902 and every other enabling power, appoint you to be a Commission of Inquiry, and require and authorise you, to inquire into institutional responses to allegations and incidents of child sexual abuse and related matters, and in particular, without limiting the scope of your inquiry, the following matters:

what institutions and governments should do to better protect children against child sexual abuse and related matters in institutional contexts in the future;
what institutions and governments should do to achieve best practices in encouraging the reporting of, and responding to reports or information about, allegations, incidents or risk of child sexual abuse and related matters in institutional contexts;
what should be done to eliminate or reduce impediments that currently exist for responding appropriately to child sexual abuse and related matters in institutional contexts, including addressing failures in, and impediments to, reporting, investigating and responding to allegations and incidents of abuse;
what institutions and governments should do to address, or alleviate the impact of, past and future child sexual abuse and related matters in institutional contexts, including, in particular, in ensuring justice for victims through the provision of redress by institutions, processes for referral for investigation and provision of support services.

AND We direct you to make any recommendations arising out of your inquiry that you consider appropriate, including recommendations about any policy, legislative, administrative or structural reforms.

AND, without limiting the scope of your inquiry or the scope of any recommendations arising out of your inquiry that you may consider appropriate, We direct you, for the purposes of your inquiry and recommendations, to have regard to the following matters:
the experience of people directly or indirectly affected by child sexual abuse and related matters in institutional contexts, and the provision of opportunities for them to share their experiences in appropriate ways while recognising that many of them will be severely traumatised or will have special support needs;

the need to focus your inquiry and recommendations on systemic issues, recognising nevertheless that you will be informed by individual cases and may need to make referrals to appropriate authorities in individual cases;

the adequacy and appropriateness of the responses by institutions, and their officials, to reports and information about allegations, incidents or risks of child sexual abuse and related matters in institutional contexts;

changes to laws, policies, practices and systems that have improved over time the ability of institutions and governments to better protect against and respond to child sexual abuse and related matters in institutional contexts;

and we further declare that you are not required by these Our Letters Patent to inquire, or to continue to inquire, into a particular matter to the extent that you are satisfied that the matter has been, is being, or will be, sufficiently and appropriately dealt with by another inquiry or investigation or a criminal or civil proceeding.

AND, without limiting the scope of your inquiry or the scope of any recommendations arising out of your inquiry that you may consider appropriate, we direct you, for the purposes of your inquiry and recommendations, to consider the following matters, and we authorise you to take (or refrain from taking) any action that you consider appropriate arising out of your consideration:

the need to establish mechanisms to facilitate the timely communication of information, or the furnishing of evidence, documents or things, in accordance with section 69 of the Royal Commissions Act 1902 or any other relevant law, including, for example, for the purpose of enabling the timely investigation and prosecution of offences;

the need to establish investigation units to support your inquiry;

the need to ensure that evidence that may be received by you that identifies particular individuals as having been involved in child sexual abuse or related matters is dealt with in a way that does not prejudice current or future criminal or civil proceedings or other contemporaneous inquiries;

the need to establish appropriate arrangements in relation to current and previous inquiries, in Australia and elsewhere, for evidence and information to be shared with you on a basis consistent with relevant obligations so that the work of those inquiries, including, with any necessary consents, the testimony of witnesses, can be taken into account by you in a way that avoids unnecessary duplication, improves efficiency and avoids unnecessary trauma to witnesses;

the need to ensure that institutions and other parties are given a sufficient opportunity to respond to requests and requirements for information, documents and things, including, for example, having regard to any need to obtain archived material.

AND we appoint you, the Honourable Justice Peter David McClellan AM, to be the Chair of the Commission.

AND we declare that you are a relevant Commissioner for the purposes of sections 4 and 5 of the Royal Commissions Act 1902.

AND we declare that you are authorised to conduct your inquiry into any matter under these Our Letters Patent in combination with any inquiry into the same matter, or a matter related to that matter, that you are directed or authorised to conduct by any Commission, or under any order or appointment, made by any of Our Governors of the States or by the Government of any of Our Territories.

AND we declare that in these Our Letters Patent:

child means a child within the meaning of the Convention on the Rights of the Child of 20 November 1989;

government means the Government of the Commonwealth or of a State or Territory, and includes any non-government institution that undertakes, or has undertaken, activities on behalf of a government;

institution means any public or private body, agency, association, club, institution, organisation or other entity or group of entities of any kind (whether incorporated or unincorporated), and however described, and:

includes, for example, an entity or group of entities (including an entity or group of entities that no longer exists) that provides, or has at any time provided, activities, facilities, programs or services of any kind that provide the means through which adults have contact with children, including through their families; and
does not include the family;

institutional context: child sexual abuse happens in an institutional context if, for example:

it happens on premises of an institution, where activities of an institution take place, or in connection with the activities of an institution; or

it is engaged in by an official of an institution in circumstances (including circumstances involving settings not directly controlled by the institution) where you consider that the institution has, or its activities have, created, facilitated, increased, or in any way contributed to, (whether by act or omission) the risk of child sexual abuse or the circumstances or conditions giving rise to that risk; or

it happens in any other circumstances where you consider that an institution is, or should be treated as being, responsible for adults having contact with children.

law means a law of the Commonwealth or of a State or Territory;

official, of an institution, includes:

any representative (however described) of the institution or a related entity; and

any member, officer, employee, associate, contractor or volunteer (however described) of the institution or a related entity; and

any person, or any member, officer, employee, associate, contractor or volunteer (however described) of a body or other entity, who provides services to, or for, the institution or a related entity; and

any other person who you consider is, or should be treated as if the person were, an official of the institution.

related matters means any unlawful or improper treatment of children that is, either generally or in any particular instance, connected or associated with child sexual abuse.

AND we:

require you to begin your inquiry as soon as practicable, and

require you to make your inquiry as expeditiously as possible; and

require you to submit to our Governor-General:

first and as soon as possible, and in any event not later than 30 June 2014, or such later date as our Prime Minister may, by notice in the Gazette, fix, on your recommendation, an initial report of the results of your inquiry; and

in your recommendation, your final report of the results of your inquiry and your recommendations; and

authorise you to submit to our Governor-General any additional interim reports that you consider appropriate.

IN WITNESS, we have caused these Our Letters to be made Patent.

WITNESS Quentin Bryce, Governor-General of the Commonwealth of Australia.

Australian Sexual Abuse Inquiries

Appendix 2

Reference

Parliamentary Committees Act 2003
REFERRAL OF TERMS OF REFERENCE TO THE
FAMILY AND COMMUNITY DEVELOPMENT COMMITTEE
Order in Council

The Governor in Council, under section 33(1)(b) of the Parliamentary Committees Act 2003, an order be made that, the Family and Community Development Committee inquire into, consider and report to the Parliament on the processes by which religious and other non-government organisations respond to the criminal abuse of children by personnel within their organisations.

The Terms of Reference for this Inquiry are contained in the attached Schedule.

This Order is effective from the date it is published in the Government Gazette.

Dated 17 April 2012
Responsible Minister:
TED BAILEY MLA
Premier

MATTHEW McGowan
Clerk of the Executive Council

SCHEDULE

The Family and Community Development Committee is requested to inquire into, consider and report to the Parliament on the processes by which religious and other non-government organisations respond to the criminal abuse of children by personnel within their organisations, including:

1. the practices, policies and protocols in such organisations for the handling of allegations of criminal abuse of children, including measures put in place by various organisations in response to concerns about such abuse within the organisation or the potential for such abuse to occur;
2. whether there are systemic practices in such organisations that operate to prejudice or discourage the reporting of suspected criminal abuse of children to State authorities, and
3. whether changes to law or to practices, policies and protocols in such organisations are required to help prevent criminal abuse of children by personnel in such organisations and to deal with allegations of such abuse.

In undertaking the inquiry, the Committee should be mindful of not encroaching upon the responsibilities of investigatory agencies or the courts in relation to particular cases or prejudicing the conduct or outcome of investigations or court proceedings.

The Committee is requested to report to the Parliament no later than 30 April 2013.

The deadline for reporting was subsequently extended to 28 September 2013.
# COIN Submissions to the Victorian Parliamentary Inquiry into the Handling of Child Abuse by Religious and Other Organisations

<table>
<thead>
<tr>
<th>Sub.</th>
<th>Date</th>
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<td>Ethical matters; Request RCC Doc's</td>
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<td>European Inquiries into clergy sexual abuse</td>
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<td>04/09/12</td>
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<td>15</td>
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<td>BKC/VMG</td>
<td>Details and questioning of RCC hierarchy re accessory to abuse</td>
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All of COIN's submissions are available at [www.coinau.org](http://www.coinau.org).

Dr Bryan Keon-Cohen AM QC  
President, COIN  
24/9/2012

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**Key:**  
BKC: Dr Bryan Keon-Cohen AM QC, President, COIN  
JP: Dr Joseph Poznanski, Consultant Psychologist, Vice-President, COIN  
IZ: Mr Ignatiou Zorzi, volunteer, law student, La Trobe University  
DV: Ms Dyanne Vucic, volunteer, law student, La Trobe University  
CC: Mr Chary Chen, volunteer, law student, La Trobe University  
AG: Ms Alexandra Galanti, volunteer, law student, La Trobe University  
EH: Ms Ellen Henshall, volunteer, law student, La Trobe University  
VMG: Ms Viviane Gauthschl, Secretary, COIN, law student, La Trobe University  
R Miller: Mr Robert Miller, Barrister, Victorian Bar  
N Papas: Mr Nicholas Papas, SC, Victorian Bar  

President: Dr Bryan Keon-Cohen AM QC; coinbkc@optusnet.com.au; (03) 9225 7519  
Vice-President: Dr Joseph Poznanski; Consultant Psychologist  
Secretary: Viviane Gauthschl; coinoffice@gmail.com; 0438 319 225  
COIN HQ: coinoffice@gmail.com; (03) 9240 1414; PO Box 13006, Law Courts, Vic, 8010  
www.coinau.org; www.facebook.com/coinreport
### APPENDIX 4
Victorian Parliamentary Committee of Inquiry into Responses of Institutions to Sexual Abuse of Children

**Incomplete Table of Written & Oral Submissions as at 3/5/2013**

<table>
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<td>Child Safety Commissioner</td>
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<td>Department of Human Services</td>
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<td>Advisory Committee – S-W Centre against Sexual Assault</td>
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<td>Australian Childhood Foundation</td>
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1 See http://www.parliament.vic.gov.au/fcdc/article/1789. The website explains that the list of submission posted, from which this analysis is drawn, is incomplete. Some written submissions have been withheld due to late receipt by the Committee (eg, on the day of giving oral evidence), privacy considerations, a risk of compromising court proceedings, a need to check material, or other reasons. The classification adopted here, and the list, is subject to review.
## 4. Professionals/Experts

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<td>Professor Des Cahill</td>
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<td>Professor Stephen Smallbone</td>
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## 4. Victims

114 statements, written and/or oral; various dates for oral evidence; witnesses named on website.

## 5. Institutions/Government

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<td>Vic Sport</td>
<td>12/4/13</td>
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<tr>
<td>Uniting Church in Australia, of Victoria and Tasmania</td>
<td>22/4/13</td>
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<td>Yeshivah Centre</td>
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### 6. Catholics, Priests and Former Parish

<table>
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<tbody>
<tr>
<td>For the Innocents</td>
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<tr>
<td>Fr Kevin Dillon (St Mary’s Geelong)</td>
<td>15/2/13</td>
</tr>
<tr>
<td>Fr Paul Walliker</td>
<td>14/3/13</td>
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<tr>
<td>Michael Parer</td>
<td>25/3/13</td>
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<td>Catholics for Renewal</td>
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### 7. Law Firms and Associations

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<tr>
<td>Australian Lawyers Alliance</td>
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<tr>
<td>National Children’s and Youth Law Centre</td>
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<tr>
<td>Ryan Carlisle Thomas, Lawyers</td>
<td>17/12/12</td>
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<tr>
<td>Law Institute of Victoria</td>
<td>17/12/12</td>
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<td>Waller Legal, solicitors</td>
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