How Might the Church Change in Response to the Sexual Abuse Crisis?

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This paper is a very early reflection in what is likely to be a much longer project. When inquiries began multiplying into sexual abuse of children in institutions and particularly in the Catholic Church several of my colleagues talked about what we might do. As academics we were not involved in direct dealings with victims or processes, but we thought we should do something. There was hope that a redemptive moment might grow out of the experience, but to my mind it was far too early to expect this. A lot of pain would have to be gone through first. So, I decided to read each of the various reports of inquiries as they became available, including those from overseas. That project is proceeding, and it has been painful.

Three inquiries in particular have focussed Australian attention on the issues. The first to be completed was the Victorian Parliamentary Inquiry, and their report Betrayal of Trust: Inquiry into the Handling of Child Abuse by Religious and other Non-Government Organisations runs to 677 pages. It is a detailed and judicious report that begins with the victims’ experiences, examines the contexts of abuse, looks at prevention both in the past and how it might be best done and finally suggests avenues for reform of the law. The report of Margaret Cunneen SC, Special Commission of Inquiry into matters relating to the police investigation of certain child sexual abuse allegations in the Catholic Diocese of Maitland-Newcastle is necessarily more forensic in nature and runs to some 700 pages. The Royal Commission into Institutional Responses to Child Sexual Abuse has produced a two volume interim report of over 600 pages. The first volume outlines the work of the Royal Commission so far and what more it needs to do to complete its task. The second volume is comprised of the stories of victims. Although some of its public hearings have been dramatic and much publicised, we have yet to hear the considered judgements of the Royal Commission.

In this paper, I want to focus on only the Catholic Church. It is the church to which I belong, whose short-comings I see and a church that I would like to see reformed. These inquiries have constituted an enormous intervention into the internal affairs of the church by state authorities. Such intervention would have been unimaginable a few decades ago, but the gravity of the matter has brought it on. I was uncertain whether I should title this paper, ‘How Might the Church Change ...’ or ‘Might the Church Change ...?’ I oscillated. Knowledgeable people have told me that the church will not change, because that is not the sort of thing it does. Yet, I believe that unless the Catholic Church does change significantly, it will be very seriously diminished. In fact, it has already begun to change, even if begrudgingly. I will begin with what the victims of abuse are seeking and end with some suggestions about how the church might change.

What do the Victims Want?

The Victorian inquiry wisely and sensitively gave its first post-introductory section to consideration of the victims of criminal sexual abuse in institutions. Part B (Chapters 3 – 5), which I believe is well-worth careful reading and meditation, deals with the experience of victims, with the impact of that experience on them and in Chapter 5 with the question of how they might achieve justice. It is this chapter that I intend to discuss.

That victims would want justice is virtually a given, but what that justice entails is more difficult to discern. During the inquiry the Committee Chair asked nearly every victim of abuse that it interviewed, “What does justice mean to you as a victim of abuse?” Although it found that answers varied with different individuals, the Committee was able to distinguish some clear lines of analysis. First, justice is sought in relation to the criminal act of the perpetrator. Secondly, justice is sought in relation to the organisation that was at the time responsible for their care. Thirdly, where that organisation has failed in its response to a complaint, justice is again sought. We can deal with each of these in turn.

In relation to the crime itself, again three things proved to be important. First, victims wanted to be believed. As the Committee pointed out, ‘When adults did not believe disclosures of criminal child abuse, children were left unprotected and at
continued risk and exposure to abuse. Children have often not been believed. Adults reporting past abuse still face difficult forensic processes. Although the truth has to be ascertained, these processes need to be executed as gently as possible. Secondly, the victims expected that there would be serious consequences for the perpetrator. These may involve criminal prosecution, but in the case of the church the questions of defrocking or of a ban from ministry are also raised. A particular question arises around funerals. Should a proven abuser be buried as a priest or honoured in a priest’s grave? Thirdly, victims were adamant that abusers should be prevented from abusing again. Anger remains about those cases in which known abusers were moved from parish to parish.

In their dealings with institutions, the victims asked first to be heard. Here the Committee makes a distinction between being believed, which would lead to some action, and being listened to with sympathy and empathy. Validation of their experience was an important stage of healing, but its opposite, minimisation was destructive. Where listening was followed by remorse and acknowledgement of failure by the authority concerned, victims often reported a positive experience of dealing with the church. Where they were treated legalistically and coldly they remained angry. Victims also asked for support in dealing with the consequences of abuse by counselling, ongoing contact or some sort of help to get their lives in order. The Committee found the question of financial compensation to be quite ambiguous. To some victims, compensation would be dirty money. When, however, other elements of justice failed, victims were more likely to pursue this form of compensation. It may well be that things will become more litigious in the future, but that is not what victims first sought.

The Committee found that certain behaviours on the part of institutions and in this case particularly of the Catholic Church left victims feeling that justice had failed. The first was inconsistency in its approach to perpetrators and victims. This has been highlighted in cases where the church paid large legal fees for perpetrators but left the victims to their own resources. It relates also to how the church continues to support convicted abusers. The second was the perceived hypocrisy of the church that puts itself forward as a strong moral advocate on public issues, while failing to deal in any way adequately with the criminal activity of its own clergy. It is particularly unfortunate that Pope John Paul II failed to act on the abuse issue at the same time as he was making moral issues around sexuality and life the touchstones of Catholic identity. The third was failure to take responsibility for wrongs that had happened and lack of accountability of leaders and processes. The Committee heard both Archbishop Hart and Cardinal Pell claim that the responsibility for past wrongs lay with a now dead bishop.

None of this is surprising or even extraordinary. What the victims sought by way of justice in relation to either the crime or to the institution that had responsibility for their care is quite ordinary – truth, justice and love. The failures that offended them are, indeed, offensive. If one reflects for a moment on the Gospels, what the victims seek should be there for them, and particularly in their dealings with the Church. How is it that they have been failed?

How Have the Victims Been Failed?

In order to get a picture of what has happened in the Catholic Church, I turn to two reports commissioned by the United States Catholic Bishops’ Conference and produced by the John Jay College of Criminal Justice. The 2004 Report titled ‘The Nature and Scope of Sexual Abuse of Minors by Catholic Priests and Deacons in the United States 1950 – 2002” was forensic and factual in nature. It was commissioned by the bishops, who knew that something was dreadfully wrong and undertaken by the college with considerable reservation. The 2011 Report titled ‘The Causes and Context of Sexual Abuse of Minors by Catholic Priests in the United States, 1950-2010” attempted to interpret the earlier data.

I want to consider just two graphs from the reports (see following page). The first (Figure 1.1 of the 2011 Report) shows the incidence of reported abuse by year in which the abuse took place. What we see is an extraordinary increase in incidents from about 1960 to a peak in 1975-80 and then a decline back to 1950s levels by 1995. The Report identified a long-term rate of 0.17% of priests offending, which climbed to 4.0% during the period in question. Australian statistics appear to follow a similar pattern.

The second graph (Figure 1.2 of the 2011 Report) shows the number of accusations received by bishops and major superiors by year. Again it is an extraordinary picture. The peaks of reporting coincide with major scandals involving serious paedophiles and bishops who had failed to act in Louisiana and Boston.

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1 Victorian Report, p. 92.
2 For example, the movement of Fr Ryan by Bishop Mulkearns in Ballarat, Victorian Report, p. 94.
Figure 1.1 Nature and Scope: Incidents of Sexual Abuse by Year of Occurrence, 1950-2002

Figure 1.2 Nature and Scope: Incidents of Sexual Abuse by Year of Report, 1950-2002

Reports of Abuse Received in 2002 = 3399
Some points can be drawn from this data. First, the bishops and major superiors did get a surprise when the number of priests who had abused in this period was eventually revealed to them. Dealing with this was necessarily difficult, but action particularly at the level of psycho-sexual education in seminaries, normally called human formation, was taken early and at least in part has been responsible for the decline in the rate of abuse. Secondly, the problem of abuse was not new to the church, and leaders should have known about it and known how to respond. The 0.17% of clergy offenders mentioned above appears to correspond to pathological paedophiles and is similar to rates in the broader community. The table below of numbers of accusers and accused in the Archdiocese of Los Angeles from 1930 to 2003 shows a spread between what may have been opportunistic attempts at sexual gratification and what was clearly serial pathological abuse. Thirdly, because of what happened between 1955 and 1995, whatever the church does now by way of preventing sexual abuse of children and rectifying the injustice done to those who have been abused will be done in the context of a very large number of victims and the hurt they have felt.

**LOS ANGELES ARCHDIOCESE**

**NUMBER OF ACCUSERS PER ACCUSED**

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It is the failure to act decisively once knowledge of current offences had been gained that has resulted in most damage to victims, as abusers went on to abuse more children. It is also what has done most damage to the church, which has made itself complicit in the abuse. We are now well familiar with the cases in Newcastle, where the bishop was clearly incompetent but others knew and did nothing; in Ballarat, where the inaction of the bishop and his readiness to move men around ensured that abuse went on for years; in Melbourne, where an otherwise liked and competent bishop dealt with cases so secretly that he did not even leave records.

It is not as if the church did not have the knowledge of how to deal with these situations. As far back as the fourth century, Basil of Caesarea ‘wrote that a cleric or monk who sexually molests youths or boys is to be publically whipped, his head shaved, spat upon, and kept in prison for six months in chains on a diet of bread and water, and after release is to be always subject to supervision and kept out of contact with young people’. Imprisonment in monasteries or by civil authorities remained standard until the nineteenth century, but was lost in the twentieth century. Canon 1395 in the current 1983 Code of Canon Law among other things indicates dismissal from the priesthood for the crime of sexual abuse of minors. Bishops, however, have failed to apply the canon.

Salt has been rubbed into the wounds of victims by the sometimes aggressive ways in which they have been treated by the church, and in Australia, we cannot avoid talking about Cardinal George Pell. In him, we see an extraordinary failure to accept responsibility for wrong done in the church, though as a churchman of exalted position and unusual strength he has insisted that the areas of the church he controlled conform to his will. The Royal Commission has questioned him twice, and although we await its judgements, the public hearings revealed a lot. In Case Study 8, the Royal Commission inquired into the conduct of the Archbishop and of his Chancery in the Ellis case, which resulted in the so-called Ellis defence: the church is not a legal entity that can be sued. The case was aggressively fought by lawyers Corrs Chambers Westgarth, even though the Archdiocese had formed the judgement that Ellis’s claims were true. This firm was criticised by the Chair of the Commission for their action. In case 16, the Royal Commission, examined the so-called ‘Melbourne Response’ instituted by Pell a short time before the Towards Healing protocol was adopted. By splitting from all the other Australian bishops, Pell destroyed unanimity in the Bishops’ Conference, which in turn made their negotiations with Rome difficult. It was in this hearing that he made the infamous comparison of the church to a trucking company. We have to wonder what to make of Pell. My own view is that he is not an aberration. He is, rather, to the church what Thomas Hobbes was to early modern political philosophy. Hobbes said what he thought without concealing the

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What Has Allowed this to Happen?

I would like now to move from forensic analysis to political analysis to try and understand how in so many cases it was difficult for victims of abuse to find truth and justice in their dealings with the church. In other words, what is it about the constitution of the church that enabled this to happen? 4 For this I turn to Canon Law. As Pope John Paul I said in the Apostolic Constitution introducing the 1983 Code, its task was to translate the ecclesiological teaching of the Second Vatican Council into canonical terms. In the same document he proclaimed the church as an ‘ecclesial society’ ordered and structured by its laws. 5

There is often ambiguity in our language when we speak about the church. Is it just those old men in Rome, or does it bear some relation to the people with whom we worship? Canon 204 attempts to clear this up. It speaks first of Christ’s faithful who are constituted as the People of God by baptism and who are called to exercise Christ’s mission. It indicates that this mission is entrusted to the church, and goes on to say that ‘this church, established and ordered in this world as a society, subsists in the catholic church, governed by the successor of Peter and the bishops in communion with him.’ 6 It was an achievement of the Council to put the People of God first and to emphasise the mission of Christ. I prefer the scriptural language of the mission of bringing the Kingdom of God to bear in the world, though canon law does not use this language. There is likely, then, to be a tension between our hopes for the realisation of the Kingdom and the concrete reality of the earthly structured society. The tension is heightened when we look at governance. Canon 129 makes it clear that governance in the church, whether legislative, executive or judicial, is restricted to the ordained. According to law, lay people can cooperate but they cannot govern. 7

4 Here I will focus on abuse by diocesan priests and on the actions of the bishops. Abuse has also occurred among clerical and lay religious and has been dealt with by their major superiors. While much may be the same, there are differences, and so I will leave the latter to another discussion.


6 Canon 204, n. 2.

7 It is important to recognise that this exclusion is according to human law not divine law. The topic is under discussion by canon lawyers. I am grateful to John Dougherty for this clarification.

Viewed in Aristotelian terms, this suggests that lay people are not citizens of this earthly society called the church. 8 To be a citizen is to be able to participate in office. Non-participants stand outside the constitution. Since the Council, this has been a source of singular disappointment for committed and talented lay people, who had hoped that there would be new ways in which their voices would be heard. Women feel especially excluded. Such exclusion and the consequent limiting of perspective are, I suggest, complementary sources of the problem that confronts us.

A second source, I suggest, lies in the nature of the power exercised. This is starkest in Canon 331, which says of the Pope that ‘by virtue of his office, he has supreme, full, immediate and universal ordinary power in the Church, and can always freely exercise this power’. Similar powers though limited to place and subject to higher authority are expressed for bishops in Canon 381 and for Parish Priests in Canon 519. In political terms, the church is an absolute monarchy, or rather a hierarchy, that is, a structured series of monarchies. It is without the rule of law, because the monarch is not subject to the law. There have been attempts in the Council and in the Code to moderate this power – the college of bishops, synods, national bishops’ conferences -, but none to my knowledge have quite got off the ground. Final decisions are reserved to the Pope. 9

This structure has, I suggest, produced a culture that underpins the problem before us. Bishops, or parish priests, do not answer to anyone unless it is the pope or bishop above them. They rarely, if at all, accept peer review or undertake supervision. The formal source of their authority, namely, ordination, is so strong that they can survive without informal sources such as their ability to inspire others by word and deed. Their authority is protected even if they fail to perform, and it is not dependent on those whom they inspire by word or deed. When their authority is challenged, they dig in rather than address issues and negotiate compromise. Progression is through patronage, so that all eyes are on the man above. Transparency

8 Aristotle defines a citizen as ‘whoever is entitled to participate in an office involving deliberation or decision’. Politics III, 1 (1275b16), translated by Carnes Lord (Chicago: Chicago University Press, 1984), p. 87.

9 Aristotle would be very uncomfortable with this degree of power seeing it as likely to lead to tyranny, particularly when difficulties arise and some form of force has to be used. Aristotle suggests that in order to survive a monarch needs to live as a kind of steward of the well-being of his people and also to share his authority with others who are respected in the community. See Politics III, 14 – 18; V, 10 – 11.
and accountability even at the local level are rare. In this environment, a claim against a priest may easily be viewed as a challenge to the bishop’s own authority, thereby generating a hostile response. Not all are as bad as this, of course, but the point I am making is that the political constitution of the church is likely to generate a culture like this.

The third source, I suggest, is the penal law of the church itself and the exemptions from civil law claimed or expected by clerics. We in Australia are not familiar with the notion that clerics might be exempt from civil criminal law, but it has a long history. In 312, the emperor Constantine granted the ‘privilege of the clergy’ according to which clerics could be tried for criminal offences only in ecclesiastical courts. This state of affairs was maintained throughout the medieval period, and ecclesiastical courts were quite active about criminal matters. It was not uncommon for the ecclesiastical courts to hand clerics over to civil authorities for punishment after conviction and defrocking.

The 1983 Code of Canon Law maintains criminal provisions against rape, sexual abuse of children, murder, abduction, mutilation and the like. There are not many and they sit in the midst of offences that are more strictly religious in Book VI of the Code. Exemption of clerics from civil trials is subtly allowed by Canon 3, which affirms ‘agreements entered into by the Apostolic See with nations or other civil entities’. These include the concordats or treaties that the Holy See has with various countries, and it is in the concordats that the clergy privilege of exemption from civil law has been maintained. 10 While the remaining agreements are mainly with Italian or Spanish speaking countries that do not apply in the English speaking world, they have maintained a culture in which authorities in the church expected that clerics would be exempt from civil process and would be tried only by ecclesiastical process. In 2001, Cardinal Castrillon, Prefect of the Congregation for the Clergy, wrote to a French bishop complimenting him for shielding a priest child abuser from the police. Both priest and bishop were later successfully prosecuted by the French courts. 11 At the present time, the former nuncio to the Dominican Republic already laicised is under house arrest in Vatican City awaiting criminal trial in an ecclesiastical court for abuse of children in the Dominican Republic. Surely he should be returned to the Dominican Republic or to his native Poland to face a civil court. 12

The fourth and final source of the problem that confronts us is, I suggest, secrecy, and much has been made of this by commentators. The church is naturally given to secrecy because the offences we are dealing with give great scandal, and an institution that claims high moral standing is very vulnerable when its operatives offend so badly. As well, the kind of authority we described earlier is given to secrecy because secrecy allows it to maintain its power, and information can be withheld and used strategically. Canon 1455 obliges judges and tribunal assistants to secrecy about all of the proceedings of a trial in stark contrast to civil courts, which usually conduct public trials. 13

In Australia, secrecy has been particularly painful to victims, who have been bound or who thought they were bound to secrecy after going through some form of ecclesiastical process. The culture of secrecy has also allowed perpetrators to go unchecked for long periods of time. The Commission of Investigation led by Judge Yvonne Murphy in Dublin found that in the area of sexual abuse of minors even the law supplementing the Code was secret and in some cases unknown even by those charged with implementing it. She concluded that ‘even the best attempts of competent people to discover the norms which, according to canon law, should be applied to cases of sexual abuse were in vain’. 14

Might the Church Change?

In the Catholic Church, things cannot change until they do change. Aristotle would have found the church unnatural for all the wrong reasons. 15 An apparent immobility can suddenly give way to the pragmatic response to a crisis or on occasion to moments of light, such as in the Second Vatican Council. The decision of the Australian bishops to constitute the “Truth, Justice and Healing Council” to manage the Church’s interaction with the Royal Commission happened just 40 days after the signing of the letters patent of the Royal Commission. Although the Council is carefully contained and we are yet to see whether it is

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10 See http://www.vatican.va/roman_curia/secretariat_state/index_concordati-accordi_en.htm
11 Tapsell, Potiphar’s Wife, p. 28.
13 Canon 489 mandates a secret archive and also destruction of documents. Kieran Tapsell in Potiphar’s Wife: The Vatican Secret and Child Sexual Abuse (Adelaide: ATF Press, 2014), make much of the 1922 decree of Pius XI, Crimen Sollicitationis, and its insistence on secrecy. It was mainly about solicitation in the confessional but dealt also with sexual abuse of children.
14 Murphy Dublin Report, 4.87, p. 78.
15 To be natural is to have ‘within itself a principle of motion or of stationariness’. Physics II, 1 (192b13), The Complete Works of Aristotle, edited by Jonathan Barnes (Princeton: Princeton University Press, 1984), p. 329. On the other hand, divine things are beyond us and are to be esteemed and wondered about.
listened to once the heat is off, it is quite remarkable that the bishops would give this kind of authority to a largely lay group so quickly.

Other things have happened. The Archdiocese of Boston lost the High Court case, in which it attempted to protect its secret files. The Australian Royal Commission has simply demanded and received masses of documentation that church leaders learnt could not be protected by legal or other privilege. The need to actually keep files and the wrongness of destroying them has also been raised. The Holy See has reluctantly decreed that where the civil law demands it, Bishops should report abuse of children to the local authorities. These seem minor changes, but they are significant because they are removing privileges and exemptions that the church has expected since Constantine.

I will conclude with my hopes, which I will limit to three. First, I hope that the lay faithful will be made citizens of the church, that is, be given some role in the governance of the church. Second, I hope that truly collegial governance will be instituted in the church — synods with bite; real powers for the conferences of bishops, and so on. Third, I hope for a revision of the penal laws of the church, so that clerics who commit crimes of any kind are first prosecuted by the state and then subject to relevant ecclesiastical penalties.

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Commentary


