

RESPONSIBILITY AND REDRESS: THEORISING GENDER JUSTICE IN THE CONTEXT OF CATHOLIC CLERICAL CHILD SEXUAL ABUSE IN IRELAND AND AUSTRALIA

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I INTRODUCTION

Justice for survivors of institutional child sexual abuse is a defining theme of this age. Inspired by remedies associated with transitional justice and human rights abuses, various governments have sought to investigate and make amends for institutional child abuse perpetrated in the context of welfare and services provided on behalf of states, often by autonomous organisations such as Christian churches. The investigatory-commission model of justice predicated on individual ‘truth recovery’ and restorative outcomes for survivors has predominated since the Republic of Ireland’s Commission to Inquire into Child Abuse (‘Ryan Commission’) commenced in 1999.¹ Internationally, outcomes for complainants have varied, with all investigatory bodies and redress schemes facing limitations regarding the forms and functions of justice that may be delivered at the meta level of state apparatus.² In some countries, much more than others, civil justice has been delivered as the outcome of mass and individual lawsuits brought against religious organisations and individuals with a duty of care to protect children.³ In general, the international institutional child abuse scandal of the past 30 years presents a conundrum concerning the ways in which sexual harms are understood. Institutional child abuse has been a feature perhaps

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1 The 1979 US Senate Hearings on Abuse and Neglect of Children in Institutions and the 1987 UK Cleveland Inquiry marked the start of public inquiry approaches to child abuse, but did not incorporate survivor testimonies or other restorative functions. See Kathleen Daly, ‘Conceptualising Responses to Institutional Abuse of Children’ (2014) 26 *Current Issues in Criminal Justice* 5; Samantha Ashenden, *Governing Child Sexual Abuse: Negotiating the Boundaries of Public and Private, Law and Science* (Routledge, 2004).

2 Kathleen Daly, *Redressing Institutional Abuse of Children* (Palgrave MacMillan, 2014).

3 For example, in the US the Catholic Church is reported to have paid up to US\$3 billion in awards and settlements: BishopAccountability.org, *Sexual Abuse by US Catholic Clergy: Settlements and Monetary Awards in Civil Suits* (2014) <<http://www.bishop-accountability.org/settlements/>>.

of all societies with institutionalised ‘care’. It was only the intense media attention paid to child *sexual* abuse scandals in the 1980s and 1990s that forged the issue as a problem for public policy.⁴ And yet, as I will demonstrate here, intense attention paid to sex crimes has, at times, failed to translate into justice concerned with holding institutions, rather than merely individuals, accountable for abuse.

In this article I sketch a preliminary methodological dialogue of feminist political science speaking to justice, as a means by which to understand the treatment of the Catholic Church with regard to child sexual abuse scandals in the Republic of Ireland and Australia since the 1980s. This analysis is a response to the unusually privileged status of the Church in both countries that is associated with a de facto immunity from civil justice in a majority of historical child abuse claims. In Ireland and Australia, despite the ostensible commitment of governments to ‘investigating the issue’ of institutional child abuse, the Church has routinely been shielded from the public interrogation of lawsuits and determinations of damages that have provided for compensation and significant advancements in child protection policies in other common law states. While both countries have put in place remedies to provide different forms of redress, a defining feature of each response is that the Church has typically been protected from accepting responsibility for the abuse of children. In Ireland the historical ‘State-like’ status of the Church⁵ appears to provide some clues to understanding this outcome, but the conditions in Australia are more curious and may complicate simplistic readings of the Irish situation.

The significance of responsibility, redress and remedies for systemic crime is represented in the work of Margaret Urban Walker, who characterises making amends for mass crimes of political violence in terms of ‘moral repair’. Walker describes the ‘moral repair’ work of amends as ‘restoring or creating trust and hope in a shared sense of value and responsibility’.⁶ Although no harm is ‘ever undone’, it is the ‘sequel to the wrong that either “does right” by the victim or does not do so’.⁷ The most fundamental of all conditions for making amends is the ‘placing [of] responsibility on wrongdoers and others who share responsibility for wrongs’.⁸ When responsibility for wrongs is not placed, or assumed by perpetrators and their enablers, victims of mass crimes may experience profound existential crises of ‘normative abandonment’⁹ by state and society. This abandonment is, I argue, not soothed by a focus on individualistic justice at the expense of pursuing institutional accountability. The individualistic focus of the criminal law shapes the consciousness and reflexive understandings

4 Daly, *Redressing Institutional Abuse of Children*, above n 2, 94.

5 Anne-Marie McAlinden, ‘An Inconvenient Truth: Barriers to Truth Recovery in the Aftermath of Institutional Child Abuse in Ireland’ (2012) 33 *Legal Studies* 189, 192.

6 Margaret Urban Walker, *Moral Repair: Reconstructing Moral Relations after Wrongdoing* (Cambridge University Press, 2006) 28.

7 *Ibid* 7.

8 *Ibid* 28.

9 *Ibid* 20.

of self and society of entire communities, including and beyond survivors of abuse. Hence, in the context of systemic abuse, this focus makes for a ‘truncation’ of the ‘meaning-making process’ of communities as they grapple with the nature and magnitude of institutional abuse, especially that sanctioned by patriarchal religious cultures and organisations based on gendered power regimes, such as the Catholic Church.¹⁰ With this article, I hope to contribute to the meaning-making processes of survivors and others coming to terms with the incidence and nature of enduring institutional abuses that appear now to have hid ‘in plain sight’ for generations.

Blame of the Church and state for perpetuating child abuse has been vigorously debated, particularly in Ireland, but few theoretical explanations have been provided for the international phenomenon.¹¹ To address this gap in understanding, here I investigate theories and methods of political science associated with gender justice and equality in the sub-field of feminist institutionalism (‘FI’) – a recent incarnation of neo-institutionalism. I suggest that FI methods identifying the historically embedded, normative constraints on political institutions to deliver gender justice can contribute to understanding the confounding paradox of why it is that justice for crimes of Catholic child sexual abuse is stymied in Ireland and Australia in the contemporary age in which paedophilia is almost universally abhorred and governments claim to treat child sexual abuse as a profound crime constituting a grave abuse of power. In my analysis, FI scholarship points to one way to comprehend the political significance of governments maintaining the integrity of institutions in the face of scandal, even those institutions shown repeatedly to lack internal capacities for integrity. These insights are relevant to and, in part, mirror important analyses of critical feminist legal theory concerning the treatment of institutional sexual harms in law. I do not claim to explain *why* Ireland and Australia differ from other international jurisdictions (which would form a much more comprehensive project). Rather, I aim to provide an *interpretive framework* for understanding the situation within each country. I also use this article as an opportunity to briefly address existing debates about the use of orthodox political science methodologies in feminist research advanced by post-structuralist scholars such as Carol Bacchi. The fundamental questions raised by Bacchi about the production of knowledge performed by different methodological interventions in research are acutely relevant to the project of meaning-making I wish to undertake.

The focus of this article is the Catholic Church and historical child sexual abuse committed by its clergy and other male religious personnel.¹² As repeated

10 Marie Keenan, *Child Sexual Abuse and the Catholic Church: Gender, Power and Organizational Culture* (Oxford University Press, 2011) 111.

11 Susie Donnelly and Tom Inglis, ‘The Media and the Catholic Church in Ireland: Reporting Clerical Child Sex Abuse’ (2010) 25 *Journal of Contemporary Religion* 1, 14.

12 Although there are occasional reports of child sexual abuse by nuns and female lay staff of Catholic institutions, my focus in this article is male religious personnel, as men have been identified as perpetrators in the civil lawsuits I refer to throughout this article.

investigations and feminist analyses have shown, systemic child sexual abuse is a liability of institutions, not least of all the family.¹³ It is not simply a liability of Catholicism. Regardless, the Catholic Church has been implicated in significant enduring abuse in both Ireland and Australia, for which it has been granted special legal and political status. In both countries, national commissions of inquiry have identified Catholic institutions such as schools and orphanages as the sites of the greatest proportion of institutional sexual abuses of the 20th century.¹⁴ My focus on sexual abuse, as opposed to other forms of abuse, reflects the contradiction noted above: that of all forms of child abuse it is sex crimes that have garnered the attentions of state and society, and yet, justice in this area remains subverted.

First, I introduce the theoretical focus of gender justice, before incorporating the insights of feminist legal and criminological theories about institutional sexual harms in this analysis. I then briefly explain the different outcomes of institutional sexual abuse trials in jurisdictions comparable to Ireland and Australia, and how these have evolved to respond to feminist critiques. Second, I provide a detailed summary of the public history of the Catholic child sexual abuse scandals in Ireland and Australia to illustrate the different state actions (of commission and omission) that shield the Church from civil justice in each country. Third, I outline the features and far-reaching significance of the Church's de facto immunity from suit in each country. Fourth, I introduce the methodologies of neo-institutionalism and feminist institutionalism as a means by which to understand the actions of the state in producing this immunity. I conclude that while the institutions of politics and law may have an interest in pursuing individualistic criminal justice in cases of child sexual abuse, lawsuits and perceptions of institutional liability made in the context of the Catholic Church present fundamental challenges to the internal gendered logic of all state institutions. Hence, they are less likely to be pursued – an outcome that has significant implications for the capacities of governments to make amends for child sexual abuse.

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- 13 See, eg. Queensland, Commission of Inquiry into Abuse of Children in Queensland Institutions, *Final Report* (1999); South Australia, Children in State Care Commission of Inquiry, *Final Report: Allegations of Sexual Abuse and Death from Criminal Conduct* (2008); Florence Rush, *The Best Kept Secret: Sexual Abuse of Children* (McGraw Hill, 1980); Anne Cossins, *Masculinities, Sexualities and Child Sexual Abuse* (Kluwer Law International, 2000); Michael Salter, *Organised Sexual Abuse* (Routledge, 2012).
- 14 Ireland, Commission to Inquire into Child Abuse, *The Investigation Committee Report on Institutions* (2009) vol 1 ('*Ryan Report*'). See also Adam Brereton, 'The Truth Is That Child Abuse in Australia Has a Distinctively Catholic Character', *The Guardian* (online), 1 July 2014 <<http://www.theguardian.com/commentisfree/2014/jul/01/the-truth-is-that-child-abuse-in-australia-has-a-distinctively-catholic-character>>.

II GENDER JUSTICE, LEGAL THEORY AND INSTITUTIONAL LIABILITY IN OTHER JURISDICTIONS

A premise of this article is that Catholic clerical child sexual abuse represents an institutionalised, gendered abuse of power. Associated remedies should be understood in terms of gender justice. This premise is informed by scholars such as R W Connell, Australian feminist legal academic Anne Cossins, who identifies the role of hegemonic and subordinate masculinities in child sexual abuse perpetrated by men,¹⁵ and Irish psychotherapist and academic Marie Keenan, who applies related analyses to the abuse cultures of the Catholic Church.¹⁶ Connell has shown how state institutions constitute ‘gender regimes’ which are characterised by the three factors: a gendered division of labour; a gendered structure of power; and a gendered structure of cathexis (meaning the pattern of emotional attachments to political and other leaders).¹⁷ Such an analysis is descriptive of the Catholic Church which, along with institutionalising a gendered division of labour and power, allows only men the emotive possibility of performing the role of *alter Christus* (another Christ). Indeed, Keenan describes Catholic clerical child sexual abuse as institutional, and as the ‘inevitable’¹⁸ outcome of the power dynamics and structures of the Church that are inherently gendered and function by reifying hegemonic masculinity, which dominates and marginalises men as well as women and children. She identifies Catholic religious perpetrators as inhabiting, in the Church, a ‘total institution’ (in Goffman’s sense) of absolute masculine hierarchy, in which they live an ‘unreflective script of private powerlessness whilst ministering in a site of unsupervised and unchallenged public dominance’.¹⁹ Similarly, Richard Sipe characterises sexual abuse by Catholic clergy as the outcome of an ‘essentially flawed celibate/sexual system of ecclesiastical power’²⁰ premised on a highly gendered, impoverished view of human sexuality in which ‘[s]ex, pleasure, sin and women were woven into a theological equation that solidified the celibate/sexual structure’ of the Church,²¹ and only celibate men could hope to be sanctified. This is particularly true of Irish clerical culture, forged in the context of population concerns of the famine era to deny and disparage sexual expression and congress.²²

Within the totalising gender regime of the Church, for a significant minority of men, a feeling of gendered private powerlessness ‘eclipsed an awareness of the power context from which and in which they operated, as adult males and as

15 Cossins, above n 13.

16 Keenan, above n 10.

17 R W Connell, ‘The State, Gender, and Sexual Politics: Theory and Appraisal’ (1990) 19 *Theory and Society* 507, 523–7.

18 Keenan, above n 10, 255 (emphasis added).

19 Ibid 238. See also Erving Goffman, *Asylums: Essays on the Social Situation of Mental Patients and Other Inmates* (Anchor Books, 1961).

20 A W Richard Sipe, *Sex, Priests and Power: Anatomy of a Crisis* (Brunner/Mazel, 1995) 4.

21 Ibid 6.

22 Tom Inglis, *Lessons in Irish Sexuality* (University College Dublin Press, 1998) 29–31.

ministers of the Catholic Church, [and] became a deadly combination of circumstances that resulted in the sexual abuse of minors'.²³ Hence, for them, the sexual abuse of children in private 'functioned to preserve the priesthood in the public sphere', so long as it was secret.²⁴ Although she does not address female offenders, Keenan's emphasis on the Church as a patriarchal gender regime allows for the consideration of abuse by nuns who report ultimately to a patriarchal hierarchy.²⁵ The subordinate status and suppressed sexuality of both men and women within the Church has resulted in the acquittal of that status in the form of the sexual abuse of those powerless individuals (boys and girls) entrusted to the Church's 'care'. However, it is the organisational response of the Church that has confirmed the role of the gendered institution in perpetuating abuse as a 'syndrome',²⁶ rather than a collection of unrelated incidents. Keenan notes how in 'almost every country in the world' in which Catholic clerical sexual abuse 'has come to light', abuse by individuals was compounded or facilitated by the organisational response of the Church when handling complaints or suspicions about abuse.²⁷ She concludes that the two problems of sexual abuse and organisational responses are entwined and form part of an 'institutional culture';²⁸ they should not be understood as separate and/or distinct problems.

A primary conclusion of Keenan's extensive work with Irish clerical offenders was that, just as these men were generally not 'psychological or moral "deviants" who infiltrated the system', neither were the bishops and other superiors who failed to act on complaints of abuse 'nonconforming deviants who did not obey the institution's rules'.²⁹ On the contrary, she found that 'both were rule-keepers in an organization whose very institutional condition gave shape to the contours of the problem'.³⁰ Despite this finding, and other related analyses,³¹ it nonetheless remains common for courts and government bodies to treat institutional sex offenders as *outsiders* motivated by personal sexual urges unrelated to institutionalised power regimes, and therefore as difficult to predict, control or be forewarned of: 'the paedophile [is] like a hurricane or wild animal attack'.³² For example, many courts remain fixed on the sexual desire of an individual offending employee as a reason to exempt an employer from liability in institutional sexual abuse cases in which 'the "course and scope of

23 Keenan, above n 10, 238.

24 *Ibid.*

25 I am grateful to the anonymous reviewers of this journal for emphasising the importance of considering women as offenders.

26 Margaret Hall, 'After Waterhouse: Vicarious Liability and the Tort of Institutional Abuse' (2000) 22 *Journal of Social Welfare and Family Law* 159.

27 Keenan, above n 10, xiii.

28 *Ibid.* xiv.

29 *Ibid.* 53.

30 *Ibid.*

31 Hall, above n 26.

32 *Ibid.* 171. See also Jane Wangmann, 'Liability for Institutional Child Sexual Assault: Where Does *Lepore* Leave Australia?' (2004) 28 *Melbourne University Law Review* 169, 195–7.

employment’ test has been applied much more restrictively’ than when addressing intentional torts in other contexts.³³ For orthodox tort lawyers this reflects the usual ‘bread and butter function’ of vicarious liability – of making commercial employers only pay for the negligence of their regular employees acting *in the regular course of employment*.³⁴ However, for Martha Chamallas, this distinction instead echoes the sentiments of ‘criminal laws that once approached ... sexual assault as qualitatively different from other forms of violence and erected special legal barriers to prosecution’.³⁵

Orthodox vicarious liability doctrine also corresponds with the treatment of institutional sexual abuse by other arms of the state (such as policing and child protection agencies). The radical and significant reforms made to child protection policies by governments and churches in the West over the past 20 years have mostly involved ‘uncertain, insecure and unsafe’ risk management strategies targeting rogue individuals who might *infiltrate* organisations, such as employment screenings, sex offender registers, reporting protocols (mandatory notification), and surveillance.³⁶ These initiatives, reflecting the biopower focus of contemporary governance, tend to target identities (‘the paedophile’) more than behaviours, and rely on the binary of ‘innocent children’ and ‘pathological perverts’ derived from the 19th century medicalisation of sex to situate sex offenders outside the bounds of society.³⁷ In such approaches, institutions are portrayed as secondary victims, rather than liable parties to abuse, and patriarchal organisational cultures are ignored despite, in the case of the Catholic Church, being implicated in the sex crimes of numerous individuals having been minimised, if not facilitated, and concealed via international criminal conspiracy.³⁸ In Catholicism, the ‘wild animal’ sex offender was housed in a very accommodating animal sanctuary, for very many years – a situation that is obscured by individualistic approaches to abuse focused on ‘deviants’.

It is only recently that courts have moved to more ready acceptance of vicarious liability, identifying the institutional role in child sexual abuse.³⁹ In

33 Martha Chamallas, ‘Vicarious Liability in Torts: The Sex Exception’ (2013) 48 *Valparaiso University Law Review* 133, 136. See also Wangmann, above n 32.

34 Janet O’Sullivan, ‘The Sins of the Father – Vicarious Liability Extended’ (2012) 71 *Cambridge Law Journal* 485 (emphasis added).

35 Chamallas, above n 33, 137.

36 Anne-Marie McAlinden, ‘Vetting Sexual Offenders: State Over-extension, the Punishment Deficit and the Failure to Manage Risk’ (2010) *Social and Legal Studies* 19, 25–6, 28–9. See also Ashenden, *Governing Child Sexual Abuse*, above n 1.

37 Samantha Ashenden, ‘Policing Perversion: The Contemporary Governance of Paedophilia’ (2002) *Cultural Values* 197, 197.

38 Geoffrey Robertson, *The Case of the Pope: Vatican Accountability for Human Rights Abuse* (Penguin, 2010).

39 Most suits in the context of Catholic clerical child abuse in the USA have concerned negligence. However, the first US trial, relating to the sexual abuse by Louisiana priest Father Gilbert Gauthé in 1984, involved claims of both respondent superior and negligent supervision. Regardless, that trial was not understood to advance rulings of institutional liability for child sexual abuse, because it was settled on appeal: *Gastal v Hannan*, 459, So 2d 526 (La, 1984); Timothy D Lytton, ‘Framing Clergy Sexual Abuse as an Institutional Failure: How Tort Litigation Influences Media Coverage’ (2009) 36 *William Mitchell Law Review* 169, 170.

1999, in *Bazley v Curry* ('Bazley'), the Supreme Court of Canada imposed vicarious liability in regard to child abuse within the Children's Foundation, a non-profit organisation that operated facilities for the treatment of children.⁴⁰ *Bazley* constituted the first incorporation of the feminist-informed, policy-driven idea that, when assessing the material risk introduced by an employer, 'special attention should be paid to the existence of a power or dependency relationship' between the victim and offender, because this 'often creates a considerable risk of wrongdoing'.⁴¹ In 2004 in *John Doe v Bennett*, the Court then found that a Catholic priest's relationship with the Church was akin to an employment relationship, and could give rise to vicarious liability.⁴² These transformative Canadian decisions have since been upheld in landmark English cases that have responded to feminist critiques of tort to 'refashion' the doctrine of vicarious liability to highlight the importance of institutional factors such as 'opportunity, power, intimacy, and vulnerability' in assessing the employer's causal role in sexual abuse in the employment context.⁴³ Chamallas describes the standard applied in *Bazley* (and in English courts) as having the potential to finally move the discourse on child abuse in institutions away from an attempt to 'ferret out those bad individuals who infiltrate an organization' to a focus on what feminists identify as the organisational cultures of institutions that facilitate abuse.⁴⁴ Alternatively, some feminists argue for the creation of a new tort of 'institutional abuse' to respond to this 'syndrome'.⁴⁵ *Bazley* and associated judgments are recent and exceptional moves that have not been followed in Australian courts in regard to Catholic institutions, and have been rejected by the Supreme Court of Ireland.⁴⁶ Similarly, there exist no criminal provisions for holding institutions accountable in either Ireland or Australia.⁴⁷ And as the following examples

40 [1999] 2 SCR 534.

41 Ibid 563 [46] (McLachlin J).

42 [2004] 1 SCR 436.

43 Chamallas, above n 33, 138, 141. See also *Lister v Hesley Hall Ltd* [2002] 1 AC 215; *Maga v Trustees of the Birmingham Archdiocese of the Roman Catholic Church* [2010] 1 WLR 1441; *JGE v Trustees of the Portsmouth Roman Catholic Diocesan Trust* [2012] EWCA Civ 938; *Catholic Child Welfare Society v The Institute of Brothers of the Christian Schools* [2012] UKSC 56.

44 Chamallas, above n 33, 186.

45 Hall, above n 26, 159, 164–70.

46 *O'Keefe v Hickey* [2008] IESC 72. In late 2015 the *Bazley* standard was considered and upheld in regard to lawsuits brought against the Adass Israel School in Melbourne and Prince Alfred College (formerly run by the Methodist Church) in Adelaide. This suggests a new era of assessing vicarious liability in regard to child sexual abuse in schools in Australia. However, it is notable that both cases involved particular, quite obvious, situations of intimacy and power: a boarding school where the perpetrator was tasked with putting the children to bed; an ultra-orthodox community in a sex-segregated school with no sex education. Neither involved the Catholic Church, nor systemic allegations involving priests and brothers relocated only to continue abusing (the concern of many complainants in the Catholic context). See *Erlich v Leifer* [2015] VSC 499; *A. DC v Prince Alfred College Inc* [2015] SASFC 161.

47 Research prepared for the Australian Royal Commission into Institutional Responses to Child Sexual Abuse recommends the creation of the new criminal offences of an organisation 'being negligently responsible for the commission of a CSA offence' and 'institutional child sexual abuse': Arie Freiberg, Hugh Donnelly and Karen Gelb, *Sentencing for Child Sexual Assault in Institutional Contexts* (Research Report, Royal Commission into Institutional Responses to Child Sexual Abuse, July 2015) 235–7, 244–5.

demonstrate, a reluctance to address the organisational and socialised nature of sexual abuse in institutions associated with gender and power may be the product of governments as much as the law; the impetus may be political even more than it is jurisprudential. As I illustrate in the following two sections of this article, in Ireland and Australia it is mostly domestic governments that have shielded the Church from justice sought for institutional liability.

III THE CATHOLIC CLERICAL CHILD SEXUAL ABUSE SCANDAL IN IRELAND

The Catholic Church in Ireland is commonly described as having had state-like status associated with Irish nationalism and independence, and the British interest in allowing a church-led ‘civilising mission’ in Ireland prior to the 20th century.⁴⁸ The defining text on the Irish Catholic Church describes it as having exercised a ‘moral monopoly’ over Irish society until its decline in influence commencing in the 1970s, and marked by the 1972 referendum to amend the constitution to no longer recognise the ‘special position’ of the Roman Catholic Church.⁴⁹ Regardless, Ireland still remains nominally very Catholic, with 84 per cent of Irish citizens identifying as Roman Catholics in the 2011 Census of Population.⁵⁰ The Catholic abuse scandal was exposed by the trials of Father Brendan Smyth, commencing in 1993, resulting in his conviction of 43 counts of sexually abusing children over 35 years in Ireland and Northern Ireland.⁵¹ Although parents of victims had made complaints to church authorities since the 1970s, Smyth was shielded by the Church, which moved him between parishes and countries.⁵² Media coverage of Smyth’s criminal trials, including allegations revealed in the Ulster TV documentary *Counterpoint*, brought the spectre of ‘paedophile priests’ to the consciousness of Irish society, with instant political fallout associated with the ongoing peace process.⁵³

Allegations continued to be made against priests across the Republic before attentions turned to state institutions. In 1998 the Irish government began to consider the need for a comprehensive response to institutional abuse, citing

48 Tom Inglis, *Moral Monopoly: The Rise and Fall of the Catholic Church in Modern Ireland* (University College Dublin Press, 2nd ed, 1998) 129–30, 157–8.

49 Ibid.

50 Christine Bohan, ‘Census 2011: Surge in Non-Religious – but 84 Per Cent Remain Catholic’, *TheJournal.ie* (online), 29 March 2012 <<http://www.thejournal.ie/census-2011-surge-in-non-religious-but-84-per-cent-remain-catholic-400443-Mar2012/>>.

51 Smyth was later found guilty of another 26 charges and may have abused over 200 children. See ‘Profile of Father Brendan Smyth’ *BBC News* (online) 15 March 2010 <http://news.bbc.co.uk/2/hi/uk_news/northern_ireland/8567868.stm>; Gerry Moriarty, ‘Brendan Smyth May Have Abused More Than 200 Children’ *The Irish Times* (online) 22 June 2015 <<http://www.irishtimes.com/news/crime-and-law/brendan-smyth-may-have-abused-more-than-200-children-1.2258487>>.

52 Keenan, above n 10, 109; Yvonne Murphy, ‘Institutional Child Sexual Abuse: The Irish Experience’ (2013) 25(4) *Judicial Officer’s Bulletin* 29, 30.

53 Murphy, above n 52, 30.

the South African Truth and Reconciliation Commission as inspiration.⁵⁴ The government failed to act on its own recommendations before the public broadcaster RTÉ aired the three-part documentary *States of Fear* in May 1999. The series detailed what director Mary Raftery described as the ‘extremely vicious and sadistic physical abuse, way off the scale, and horrific emotional abuse, designed to break the children’ perpetrated in Irish state- and church-run industrial and reformatory schools, to which approximately 30 000 children were committed by the courts between the 1930s and 1970s.⁵⁵ *States of Fear* is credited with ‘changing Irish society’.⁵⁶ It prompted an immediate ‘sincere and long-overdue’ apology by Taoiseach Bertie Ahern ‘to the victims of childhood abuse for our collective failure to intervene, to detect their pain, to come to their rescue’⁵⁷ and the establishment of the Ryan Commission. The Ryan Commission was tasked with investigating and reporting on the cause and nature of abuse in residential institutions by hearing allegations of ex-residents, with church and state representatives acting as respondents, and making recommendations for addressing and preventing abuse. About 1000 survivors also testified to a ‘Confidential Committee’, where their stories were recorded unchallenged. Complaints were received in relation to over 200 institutions. The majority related to 60 residential reformatory and industrial schools operated by 18 Catholic orders, funded and supervised by the Irish Department of Education.⁵⁸

The Christian Brothers, facing over 700 individual complaints, delayed the investigation for over a year with a lawsuit challenging the authority of the Ryan Commission to investigate historical abuse. They also successfully defended their members’ rights to anonymity in the Commission’s report, even in cases in which individual brothers had been convicted of child abuse offences.⁵⁹ Anne-Marie McAlinden identifies the refusal to ‘publicly identify abusers’ as undermining justice for survivors in regard to public recognition of the crimes committed against them.⁶⁰ After having its tenure and budget extended twice, at the culmination of the inquiry in 2009, the Commission produced the 2600-page Ryan Report, representing around 30 000 complaints made.⁶¹ Along with physical abuse, rape and sexual molestation, especially of boys, were found to have been ‘endemic’ in Christian Brothers’ institutions in particular.⁶² Eleven

54 Carol Brennan, ‘Facing What Cannot Be Changed: The Irish Experience of Confronting Institutional Child Abuse’ (2008) 29 *Journal of Social Welfare and Family Law* 245, 248–9.

55 Christine Bohan, ‘Fifteen Years On, How *States of Fear* Changed Irish Society’, *TheJournal.ie* (online), 3 May 2014 <<http://www.thejournal.ie/states-of-fear-anniversary-1443458-May2014/>>.

56 *Ibid.*

57 Bertie Ahern and Richard Aldous, *Bertie Ahern: The Autobiography* (Arrow Books, 2009) 288.

58 *The Ryan Report*, above n 14; Keenan, above n 10, 188–90.

59 *Murray v Commission to Inquire into Child Abuse* [2004] IEHC 102.

60 McAlinden, ‘An Inconvenient Truth’, above n 5, 202.

61 Carole Holohan, ‘In Plain Sight: Responding to the Ferns, Ryan, Murphy and Cloyne Reports’ (Report, Amnesty International Ireland, 2011) 25.

62 *The Ryan Report*, above, n 14.

cases were referred to the Director of Public Prosecutions; three were proceeded with.⁶³

By the time the government established the Residential Institutions Redress Board in 2002, an estimated 2500 civil claims were ‘underway or threatened’ in the High Court concerning historical abuse in Catholic-run state institutions.⁶⁴ The Irish Residential Institutions Redress Scheme (‘Redress Scheme’) operated independently of the Ryan Commission to provide flexible ‘banded’ ex gratia compensation based on evidence of abuse established in ‘non adversarial’ processes, and a denial of liability by the state and religious orders. In exchange, survivors were required to waive rights to bring a claim for damages in the courts for abuse and injuries covered by the award.⁶⁵ Despite claims of ‘non-adversarialism’ the scheme was criticised for requiring claimants’ legal representation and for protecting members of religious organisations while imposing ‘penalties on the abused if they gave wrong information, or if they disclose[d] details of claims made by them’.⁶⁶ The board ceased accepting applications for redress at the end of 2011. By the end of 2013 awards made to survivors had totalled €944.1 million: the average value of awards was €62 530, and the largest €300 500.⁶⁷ At 31 December 2014, the board had approved legal costs of €192.9 million paid to 1020 law firms in respect of 15 064 applications for redress.⁶⁸ Total costs of the scheme are estimated at €1.5 billion.⁶⁹

The Redress Scheme was funded on the premise of shared liability with a contribution of cash, property and assets worth €128 million made by religious orders – an amount vastly underestimated in 2002 as likely to cover 50 per cent of the costs of the scheme, which has come to represent 10 per cent or less of the actual costs.⁷⁰ In exchange, the government made an agreement with the Conference of Religious of Ireland to indemnify and pay legal defences of all contributing religious orders and their members against any existing and future claims for damages made against them in the courts, in regard to any action arising from circumstances such as those addressed by the Redress Board. No representatives of survivors were involved in the indemnity negotiations, which were conducted by outgoing Minister for Education and Science Michael Woods in the last days of a caretaker government at the time of the national election, with no involvement of the Cabinet or the Office of the Attorney

63 Holohan above n 61, 25.

64 Brennan, above n 54, 252.

65 Bruce Arnold, *The Irish Gulag: How the State Betrayed Its Innocent Children* (Gill & McMillan, 2009) 123.

66 Ibid.

67 The Residential Institutions Redress Board, ‘Annual Report of the Residential Institutions Redress Board 2013’ (Report, 2013) 13 <<http://www.rirb.ie/annualReport.asp>> (‘Redress Board’).

68 Ibid 53.

69 Editorial, ‘Lifting the Veil on Orders’ €500m Redress Bill Battle’, *Irish Examiner* (online), 4 November 2013 <<http://www.irishexaminer.com/ireland/lifting-the-veil-on-orders-500m-redress-bill-battle-248355.html>>.

70 Brennan, above n 54, 253.

General, and no parliamentary debate.⁷¹ Survivors' advocate Colm O'Gorman describes the indemnity deal and associated court cases as allowing the Church

to escape much financial liability and all moral responsibility while still being allowed the power to challenge or dispute cases. This is being foisted on claimants while the church and its organisations operating under all-embracing immunity, are free to unleash all their legal forces on the compensation process to gain access to all statements of claim and to challenge any claims made.⁷²

Periodically, reports suggest the magnitude of awards paid by the state acting as defendants in cases concerning residential institutions. The final Report of the Redress Board refers to €12.5 million paid in regard to 'associated High Court Proceedings'.⁷³ In 2006 it was reported that the government paid €745 000 to three former residents of St Joseph's Orphanage in Kilkenny in response to negligence claims brought in the High Court for sexual and physical assaults by lay staff members.⁷⁴ In all three cases, due to the indemnity deal, the ruling was made against government defendants (such as the Minister for Education) who paid general (though not exemplary) damages awarded by the court.⁷⁵ It was not until the release of The Ryan Report that the scale of abuse and associated costs to be borne by the state began to become apparent to the people of Ireland. Since 2010, the government has tried, and failed, to secure at least another €500 million from religious orders to meet up to half the costs of redress.⁷⁶

The Ryan Commission and the Redress Scheme concerned only abuses committed in residential institutions. High profile allegations continued to be made against parish priests, such as those aired in the 2002 BBC documentary *Suing the Pope*, against Father Sean Fortune, who suicided in 1999 after being charged with 66 counts of historical child sex offences. That documentary marked a documented sea change in public opinion against the Catholic Church in Ireland.⁷⁷ Three diocesan inquiries into Catholic child sexual abuse followed, concerning Dublin, Ferns and Cloyne dioceses. Each unearthed church policies and practices of shielding alleged offenders, moving them nationally and abroad; denials of abuse; and in some cases, the swearing of juvenile victims to secrecy in the process of canonical trials.⁷⁸ Other risk management strategies were also reported, including the Church's purchase of insurance against claims for child sexual abuse in 1987, accompanied by a failure to report any apparent crimes to

71 Arnold, above n 65, 22–7.

72 Colm O'Gorman, 'State Has Put the Interest of the Church Ahead of Victims' Needs', *The Irish Times* (online), 8 February 2003 <<http://www.irishtimes.com/opinion/state-has-put-the-interest-of-the-church-ahead-of-victims-needs-1.348254>>.

73 Redress Board, above n 67, 53.

74 Patsy McGarry, 'Three Orphanage Residents Awarded Total of €745,000', *Irish Times* (Dublin), 1 June 2006, 9.

75 *Delahunty v South Eastern Health Board* [2003] 4 IR 361; *Noctor v Ireland* [2005] 1 IR 433; *Connellan v Saint Joseph's Kilkenny* [2006] IEHC 119.

76 'Lifting the Veil on Orders' €500m Redress Bill Battle', above n 69.

77 Michael J Breen et al, "'Suing the Pope" and Scandalising the People: Irish Attitudes to Sexual Abuse by Clergy Pre- and Post-screening of a Critical Documentary' (2009) 11 *Irish Communications Review* 77.

78 Murphy, above n 52, 31.

the gardai prior to 1995.⁷⁹ The Ferns Inquiry identified around 100 complaints made against 21 priests over approximately 40 years.⁸⁰ The Dublin Inquiry received information about allegations pertaining to around 180 priests over a similar period.⁸¹ Since 1975, across Ireland, only 26 prosecutions have ever arisen from 723 criminal allegations made against 320 priests.⁸²

The Church began to reform its policies ostensibly from 1996 when the Irish Catholic Bishops' Conference produced 'Child Sexual Abuse: Framework for a Church Response'.⁸³ In 2005 the Church established the National Board for Child Protection and instigated the child protection policy *Our Children, Our Church*.⁸⁴ However, the Cloyne Inquiry found that during the period 1996–2009 the Church did not follow these protocols and procedures.⁸⁵ It would appear that no suit brought against a Catholic order, or church leader, regarding child sexual abuse perpetrated outside of a school or residential institution has been determined by an Irish court. Numerous claims have been struck out for reasons of delay. Otherwise, the Church has been remarkably successful in mediating settlements out of court and avoiding publicity and the courts' determination of damages. In a rare public statement, as terms of settlement in a case defended for five years, in 2003 Bishop of Ferns Eamonn Oliver Walsh admitted the Church's negligence in court and issued a public apology on behalf of the diocese to Colm O'Gorman – the first victim of Sean Fortune to go public with allegations, and the subject of *Suing the Pope*.⁸⁶ It is notable that only since the Redress Scheme was finalised in 2014, has the Irish High Court found religious orders such as the Marist Brothers and the Christian Brothers liable for child sexual abuse perpetrated in non-residential schools, suggesting a legal culture shift may be underway concerning responsibility and the Church now that the state has receded from taking financial responsibility for abuse claims.⁸⁷

79 Ibid 32.

80 Keenan, above n 10, 186.

81 Ibid 190.

82 Allison Bray, 'Concern at Low Rate of Convictions for Clerical Abuse Cases', *Irish News* (online), 21 May 2013 <<http://www.independent.ie/irish-news/concern-at-low-rate-of-convictions-for-clerical-abuse-cases-29281949.html>>.

83 Irish Catholic Bishops' Advisory Committee on Child Sexual Abuse by Priests and Religious, 'Child Sexual Abuse: Framework for a Church Response' (Report, 1996).

84 Keenan above n 10, 182–4. See Irish Bishops' Conference, Conference of Religious of Ireland and Irish Missionary Union, *Our Children, Our Church: Child Protection Policies and Procedures for the Catholic Church in Ireland* (Veritas, 2005).

85 Catholic Church in Victoria, Submission No 1 to the Parliamentary Inquiry into the Handling of Child Abuse by Religious and Other Non-government Organisations, *Facing the Truth: Learning From the Past: How the Catholic Church in Victoria Has Responded to Child Abuse*, 21 September 2012, 24–6 <http://www.parliament.vic.gov.au/images/stories/committees/fcdc/inquiries/57th/Child_Abuse_Inquiry/Submissions/Catholic_Church_in_Victoria.pdf>.

86 '1 in 4 Founder Settles High Court Action', *RTE News* (online), 9 April 2003 <<http://www.rte.ie/news/2003/0409/37073-abuse01/>>.

87 *Brennan v Mullan* [2014] IEHC 61; *Hickey v McGowan* (2014) 1 JIC 2405.

IV THE CATHOLIC CLERICAL CHILD SEXUAL ABUSE SCANDAL IN AUSTRALIA

The Catholic Church in Australia has always occupied a different role and status to that in Ireland. There was no established church in the colonies, the religious diversity and interdenominational tolerance of which is considered a hallmark of the Australian constitution and political life of the country established in 1901.⁸⁸ Regardless, sectarianism and vociferous debates over state aid for denominational schooling were characteristic of the historical church-state relationship. Early Catholic priests were Irish political prisoners transported to New South Wales ('NSW'). The first Catholic mass was celebrated in 1803.⁸⁹ Irish leadership of the Church was sustained into the 20th century, and until the post-war migration boom of the 1950s, Australian Catholics were a minority overwhelmingly of Irish descent. Mostly due to migration, Catholics now constitute the largest single Christian population in Australia, representing about 25 per cent of the population.⁹⁰ Particularly since the election of the conservative Howard coalition government in 1996, the Church has worked more in 'partnership'⁹¹ with federal governments to deliver services and influence social policy, often dealing directly with high-profile Catholic politicians such as former Prime Minister (2013–2015) Tony Abbott.

Institutional child abuse came to light in Australia in the late 1980s, in the context of child migrants who had been abused in orphanages and schools, notably including Christian Brothers institutions. From 1912 to 1969, approximately 7000 mostly British children were forcibly expatriated to Australia, almost half to Western Australia ('WA').⁹² In 1987, the *Western Mail* described the abuse of the past residents of local institutions including St Joseph's Farm and Trade school in Bindoon.⁹³ A number of books were published about child migrants before, in 1992, the public broadcaster ABC TV aired the dramatic miniseries *The Leaving of Liverpool*, concerning two English children transported to Australia in the years following World War II. From 1992, the sexual and physical abuse of child migrants became 'a scandal of immense proportions' in Australia.⁹⁴ That same year, the sex crimes of clerics were brought to the popular consciousness when ABC TV aired the *Compass*

88 Patrick O'Farrell, 'Double Jeopardy: Catholic and Irish' (2005) 12(1) *Humanities Research* 7.

89 State Library of New South Wales, *Catholics in the Colony* (24 May 2012) <http://www.sl.nsw.gov.au/discover_collections/history_nation/religion/catholics/>.

90 Australian Bureau of Statistics, *Losing My Religion?* (Publication No 4102.0 – Australian Social Trends, 20 November 2013) <<http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/4102.0Main+Features30Nov+2013>>.

91 John Warhurst, 'Catholic Voices in Australian Politics' (2006) 1 *Public Policy* 102, 104–5.

92 Daly, *Redressing Institutional Abuse of Children*, above n 2, 14.

93 Muriel Porter, *Sex, Power & the Clergy* (Hardie Grant Books, 2003) 78–9.

94 See, eg, *ibid* 79; Philip Bean and Joy Melville, *Lost Children of the Empire: The Untold Story of Britain's Child Migrants* (Unwin Hyman, 1989); Gwenda Davey, *A Strange Place to Go: Child Migrants to Australia – A Resource Book* (Australian Institute of Multicultural Affairs, 1986); Barry M Coldrey, *Child Migration, the Australian Government and the Catholic Church, 1926–1966* (Tamanaraik Publishing, 1992).

documentary *The Ultimate Betrayal: Sexual Violence in the Church*, followed by a related documentary: *Conduct Unbecoming*.⁹⁵

In 1993, a class action was brought against the Christian Brothers by over 200 claimants for abuse suffered in WA orphanages. The claim was filed first in NSW and then Victoria, where a number of the claimants resided, in an attempt to avail themselves of the more flexible interpretations of statutes of limitations in those states. The Christian Brothers succeeded in having the proceedings transferred to WA where, due to the *Limitation Act 1935* (WA), the case was ‘dead in the water’.⁹⁶ In 1996, the claimants were ‘pressured to accept a settlement’ of A\$5.1 million, A\$1.5 million of which constituted legal fees.⁹⁷ Individual claimants received between A\$4000 and A\$25 000 each.⁹⁸ The WA Director of Public Prosecutions announced it was investigating related claims of criminal abuse by 23 individual Christian Brothers, but no cases proceeded, due to ‘the passage of time’.⁹⁹ In 1997, the Australian government rejected the recommendation of the government of the United Kingdom (‘UK’) that Australia suspend statutes of limitations in all child migrant cases so that victims could be ‘awarded the maximum possible damages’.¹⁰⁰ The Australian government instead conducted its own inquiry into child migrants, but did not amend any limitation Acts, or provide for redress.¹⁰¹ The government instead established a fund for services for former child migrants, mirroring initiatives of the UK government.¹⁰²

While scholars of Ireland lament the continual conducting of inquiries as an Irish political trait,¹⁰³ it is the Australian response to institutional and religious child abuse that may be characterised by ongoing public investigation, typically without substantial accompanying redress. Select relevant inquiries and reports include the following. In 1994, the NSW government established the Royal Commission into the New South Wales Police Service (‘Wood Royal Commission’) with a focus on organised paedophile activity in the State, including within churches. In 1997, the Human Rights and Equal Opportunity Commission published *Bringing Them Home* (the ‘Stolen Children’ Report) detailing the experiences of Indigenous Australians removed from their

95 Porter, above n 93, 82, 84.

96 Senate Standing Committees on Community Affairs, Parliament of Australia, *Lost Innocents: Righting the Record – Report on Child Migration* (2001) 221.

97 Ibid 221, 224.

98 Ibid. In 2015, in response to the Royal Commission into Institutional Responses to Child Sexual Abuse, the Christian Brothers renegotiated settlements with a number of complainants. See Jade Macmillan, ‘Christian Brothers Settle More Payouts to Child Sex Abuse Victims Following Royal Commission Hearings’ *ABC News* (online), 7 July 2015 <<http://www.abc.net.au/news/2015-07-07/christian-brothers-say-settled-more-payouts-to-abuse-victims/6599418>>.

99 Senate Standing Committees on Community Affairs, above n 96, 219.

100 Ibid 222, quoting Health Committee, House of Commons, *The Welfare of Former British Child Migrants* (1998) [111].

101 Ibid. In 2007 the Western Australian government established a redress scheme for those abused in state care (including in religious institutions). Payments were capped at A\$45 000. See Daly, *Redressing Institutional Abuse of Children*, above n 2, 50.

102 Daly, *Redressing Institutional Abuse of Children*, above n 2, 152.

103 Brennan, above n 54.

families and communities and placed in religious and state institutions throughout the 20th century. It recommended a national redress scheme be implemented in accordance with the international van Boven principles.¹⁰⁴ The Australian government rejected this recommendation and instead provided A\$63 million in ‘practical assistance’ for affected families.¹⁰⁵ Tasmania was the only state to provide reparations.¹⁰⁶ In 1998, the Queensland government established the Forde Inquiry into abuse of children in Queensland institutions (including religious institutions) and eventually established a A\$100 million redress scheme that made payments to around 7000 individuals.¹⁰⁷

In 2004, the Australian parliament released *Forgotten Australians: A Report on Australians Who Experienced Institutional or Out-of-Home Care as Children*,¹⁰⁸ recommending, inter alia, that the Commonwealth establish and manage a national reparations fund for victims of abuse in institutions and out-of-home care settings.¹⁰⁹ The government did not accept the recommendations. In 2009, Prime Minister Kevin Rudd apologised to the 500 000 forgotten Australians and former child migrants, but also declined to provide reparations. Funds were instead provided for various services for ex-residents of ‘care’ facilities, including adult education, counselling and advocacy services.¹¹⁰ In 2012, the Victorian government established a Parliamentary Inquiry into the Handling of Child Abuse in Religious and other Non-Government Organisations (‘Victorian Inquiry’).¹¹¹ Primary recommendations mirrored those of the *Forgotten Australians* report and included waiving or amending limitation Acts and other reforms to the civil law, such as forcing churches to be incorporated and adequately insured, to allow survivors to sue churches and other non-government organisations. Such reforms might open up avenues of pursuing suits of vicarious liability and negligence of religious orders and dioceses, and even the Trustees of the Church: some of the successful routes to litigation undertaken in the United States (‘US’), the UK and Canada. In Victoria, the *Limitation of Actions Amendment (Child Abuse) Act 2015* (Vic) was passed (and in 2016 the NSW Parliament passed a similar act),¹¹² but the other recommendations have not been implemented.

104 Human Rights and Equal Opportunity Commission, *Bringing them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families* (Final Report, 1997).

105 Daly, *Redressing Institutional Abuse of Children*, above n 2, 150.

106 *Ibid* 49.

107 Queensland, Commission of Inquiry into Abuse of Children in Queensland Institutions, above n 13; Find and Connect, *Redress Scheme (2007-2010)* (31 October 2014) <<http://www.findandconnect.gov.au/ref/qld/biogs/QE00466b.htm>>.

108 Community Affairs References Committee, Parliament of Australia, *Forgotten Australian: A Report on Australians Who Experienced Institutional or Out-of-Home Care as Children* (2004).

109 Daly, *Redressing Institutional Abuse of Children*, above n 2, 153.

110 *Ibid*.

111 Family and Community Development Committee, Parliament of Victoria, *Betrayal of Trust: Inquiry into the Handling of Child Abuse by Religious and Other Non-government Organisations* (2013) vols 1, 2 <<http://www.parliament.vic.gov.au/fcdc/article/1788>>.

112 *Limitations Amendment (Child Abuse) Act 2016* (NSW).

Two inquiries focused solely on the Catholic Church. In 2012, Catholic Bishops commissioned an independent report into the Church's handling of an alleged paedophile priest ('Whitlam Inquiry'),¹¹³ and the NSW government appointed the Special Commission of Inquiry into Matters Relating to the Police Investigation of Certain Child Sexual Abuse Allegations in the Catholic Diocese of Maitland-Newcastle ('Newcastle Inquiry').¹¹⁴ Allegations made in the context of the Newcastle Inquiry prompted the establishment of the 2013 Commonwealth Royal Commission into Institutional Responses to Child Sexual Abuse ('Royal Commission'), due to run until December 2017. Along with hearing survivors' testimonies and determining what institutions and governments should do to protect children in institutional contexts, its terms of reference included making recommendations about redress.¹¹⁵ By July 2015, the Royal Commission had received more than 13 000 complaints relating to a range of institutions (religious and secular) and had referred 666 matters to the police for investigation.¹¹⁶

The background to all of these inquiries was the escalating media attention paid to trials of individual priests. National data are difficult to establish, but in 2009 the survivors' support group Broken Rites claimed to have collected the details of 112 Catholic priests and other religious who have been convicted of child sex offences in Australia.¹¹⁷ For example, the trials of 'Australia's worst known paedophile', Father Gerald Ridsdale, commenced in 1993 for serial offences committed on 50 victims between 1961 and 1987.¹¹⁸ Similar to Ireland, the Newcastle and Victorian Inquiries revealed longstanding church policies and practices of denial, obfuscation and shielding alleged offenders by moving them between parishes and countries, especially before 1996 and the publication of the Wood Royal Commission findings. In 1987, Catholic Church Insurance Ltd set aside A\$1.2 million dedicated to sex abuse claims and underwrote the Church for alleged incidents dating to 1969, after warning that such claims were 'increasingly being excluded by worldwide insurance markets'.¹¹⁹ The Australian Catholic Bishops Conference ('ACBC')

113 Antony Whitlam, 'Report Commissioned by the Bishops of Armidale and Parramatta into Processes Related to the Management of "F"' (Report, Catholic Bishops of Armidale and Parramatta, 17 January 2013) <<http://www.parra.catholic.org.au/news---events/latest-news/latest-news.aspx/report-by-the-hon-antony-whitlam-qc-released.aspx>>.

114 New South Wales, Special Commission of Inquiry into Matters Relating to the Police Investigation of Certain Child Sexual Abuse Allegations in the Catholic Diocese of Maitland–Newcastle, *Report* (2014) vols 1–3.

115 Commonwealth, Royal Commission into Institutional Responses to Child Sexual Abuse, *Terms of Reference* (Letters Patent, 13 November 2014) <<https://www.childabuseroyalcommission.gov.au/about-us/terms-of-reference>>.

116 Irena Ceranic, 'Hundreds of Child Sexual Abuse Complaints Referred to Police: Royal Commission Chair', *ABC News* (online), 15 July 2015 <<http://www.abc.net.au/news/2015-07-15/child-abuse-royal-commission-chair-speaks/6621742>>.

117 Keenan, above n 10, 8.

118 ABC Radio National, 'Royal Commission Hears Ridsdale Didn't Know George Pell Well', *PM*, 27 May 2015 (Samantha Donovan) <<http://www.abc.net.au/pm/content/2015/s4243655.htm>>.

119 Chris Vedelago and Jane Lee, 'Catholic Church Abuse Claims Were Anticipated Years before Allegations Were Made', *The Age* (online), 12 April 2015 <<http://www.theage.com.au/victoria/catholic-church-abuse-claims-were-anticipated-years-before-allegations-were-made-20150411-1mix8a.html>>.

then established a Special Issues Committee to develop the Protocol for Dealing with Allegations of Criminal Behaviour (sex offences).¹²⁰ The protocol, advocating a ‘very defensive approach’, aimed to ‘prevent or remedy scandal’ and was adopted in 1992.¹²¹ By 1996, the Church had in place new protocols to address claims of abuse. That year, Archbishop of Melbourne George Pell launched the ex gratia compensation scheme, the *Melbourne Response*, for allegations made in that diocese – the first such compensation scheme in the world. One month later the ACBC launched the national *Towards Healing* scheme for allegations made elsewhere. In 1996, the ACBC also commissioned a study to determine factors specific to the Church that might lead to sexual abuse. The report, *Towards Understanding*, ‘took three years to complete’ and ‘has never been released publicly’.¹²² It is evident that the Church’s rehabilitation program for ‘sexual boundary violators’ made not one referral to the police throughout its operations, from 1997 to 2008.¹²³

As in Ireland, the Church in Australia has been remarkably successful at avoiding the publicity of trials and the courts’ determinations of damages. Numerous claims have been settled out of court, confidentially. For example, the Maitland-Newcastle Diocese is reported to have paid A\$13 million in confidential settlements related to the actions of two priests.¹²⁴ Along with obstacles associated with limitation acts, the leading judgment in NSW, *Trustees of the Roman Catholic Church v Ellis* (‘*Ellis*’), highlights the difficulties in suing an unincorporated entity such as the Church in Australia, as well as the Australian courts’ conservative treatments of vicarious liability regarding the employment relationship.¹²⁵ The NSW Supreme Court decision found in favour of the Church and left claimant John Ellis with no legal remedy for the ongoing sexual abuse perpetrated by his parish priest in the 1970s, after the judge affirmed that an unincorporated association (such as the Catholic Church in Australia) cannot sue or be sued in its own name because, inter alia, ‘it does not exist as a juridical entity’.¹²⁶ Along with the ill-fated Christian Brothers suit of 1993, *Ellis* has deterred other claimants across Australia from pursuing justice via civil means, after special leave to appeal was refused by the High Court of

120 Special Issues Committee, ‘Protocol for Dealing with Allegations of Criminal Behaviour’ (Protocol, Australian Catholic Bishops Conference, April 1991).

121 Family and Community Development Committee, Parliament of Victoria, *Inquiry into the Handling of Child Abuse by Religious and Other Organisations* (2013) 8 <http://www.parliament.vic.gov.au/images/stories/committees/fcdc/inquiries/57th/Child_Abuse_Inquiry/Transcripts/Catholic_Diocese_of_Ballarat_29-April-13.pdf>.

122 Kelly Burke, ‘Schools for Scandal’, *The Sydney Morning Herald* (online), 15 June 2002 <<http://www.smh.com.au/articles/2002/06/14/1023864353158.html>>.

123 Richard Baker and Nick McKenzie, ‘Catholic Church’s Secret Sex Files’, *The Sydney Morning Herald* (online), 17 November 2012 <<http://www.smh.com.au/national/catholic-churchs-secret-sex-files-20121116-29hkb.html>>.

124 Joanne McCarthy, ‘Maitland-Newcastle Catholic Diocese Pays \$13m Compo to Abuse Victims’, *The Newcastle Herald* (online), 19 July 2011 <<http://www.theherald.com.au/story/473062/maitland-newcastle-catholic-diocese-pays-13m-compo-to-abuse-victims/>>.

125 *Trustees of the Roman Catholic Church for the Archdiocese of Sydney v Ellis* (2007) 70 NSWLR 565.

126 *Ibid* 576 [47] (Mason P).

Australia in 2007.¹²⁷ Since 2013, the Greens political party has tried to introduce legislation to the NSW parliament forcing the Catholic Church to incorporate.¹²⁸

Unlike Ireland, however, the Australian government has not provided redress. On the contrary, in 2015, the Australian government indicated that under the then current administration, there would be no national redress scheme for victims of sexual abuse in institutions. The government instead ‘invited’ the Royal Commission to ‘make recommendations’ that individual institutions (mostly run by religious organisations) ‘must accept the legal, financial and moral responsibility for failing to protect children’.¹²⁹ The twin lacunae of effective civil justice and standardised national redress in Australia has invited the Church to dominate survivors’ claims and experiences of justice through its in-house ex gratia schemes. It is estimated that since 1996, under *Towards Healing*, A\$43 million has been paid to 1700 claimants;¹³⁰ under the *Melbourne Response*, A\$17 million has been paid to 300 claimants.¹³¹ Both schemes were subject to trenchant criticisms in the Victorian Inquiry and Royal Commission. Despite the government’s direction that institutions accept responsibility for the abuse of children, it is well-known that both schemes operate on the basis that the Church does *not* acknowledge responsibility for abuse, and both provide relatively meagre compensation. Hence, the Australian Lawyers Alliance describes the legal and political response in Australia as ‘forcing claimants to take a pittance’ from church compensation schemes.¹³²

V THE IMPACT OF IMMUNITY IN IRELAND AND AUSTRALIA

In Ireland and Australia numerous victims of Catholic child sexual abuse have been thwarted in their efforts to seek justice and damages determined by civil means in political arenas in which the Church would appear to have been granted de facto immunity from suit. In both countries, in different contexts, the

127 Transcript of Proceedings, *Ellis v Trustees of the Roman Catholic Church for the Archdiocese of Sydney* (2007) HCATrans 697 (16 November 2007). Upheld in *PAO v Trustees of the Roman Catholic Church for the Archdiocese of Sydney* [2011] NSWSC 1216.

128 Roman Catholic Church Trust Property Amendment (Justice for Victims) Bill 2014 (NSW).

129 Australian Government, Submission No 1 to Royal Commission into Institutional Responses to Child Sexual Abuse, *Consultation Paper: Redress and Civil Litigation* (19 March 2015), 2–3 <<https://www.childabuseroyalcommission.gov.au/getattachment/2efe0fa6-ae6b-4cd3-bc37-a856dc485cc5/Australian-Government>>.

130 Kate Gleeson, ‘The Money Problem: Reparation and Restorative Justice in the Catholic Church’s *Towards Healing* Program’ (2015) 26 *Current Issues in Criminal Justice* 317, 324.

131 Shannon Deery, ‘Sex Abuse Victims Paid \$17 Million by Catholic Church, Royal Commission Hears’, *The Herald Sun* (online), 18 August 2014 <<http://www.heraldsun.com.au/news/victoria/sex-abuse-victims-paid-17-million-by-catholic-church-royal-commission-hears/story-fni0fit3-1227027933319>>.

132 Australian Lawyers Alliance, Submission No 5 to the Royal Commission into Institutional Responses to Child Sexual Abuse, *‘Towards Healing’: Designed Primarily for the Church, Not Victims*, 3 September 2013, 39, citing Andrew Morrison, ‘Compensation for Child Sexual Abuse in Religious Institutions’ (2013) 116 *Precedent* 35, 39.

Church has been spared the moral task of accepting responsibility for abuse. Walker identifies this condition as disqualifying amends, for '[n]othing anyone does to relieve a harmed person's pain or suffering, stress, anger, resentment, indignation or outrage will count as "making amends" without an acceptance of responsibility as the reason for the effort'.¹³³ In Ireland, the state has undertaken the extraordinary measures of defending claims and funding settlements and awards associated with church-run residential institutions, thereby nullifying the punitive and public-interest effects of damages on religious orders in this context. In Australia, the state has refused responsibility for redress and effectively directed survivors to continue to seek compensation directly from their abusers' institutions, with little to no opportunity to negotiate substantial payments or acknowledgment of institutional liability within the terms of in-house ex gratia schemes that, up until very recently, operated beyond civil scrutiny. In both countries settlements continue to be negotiated confidentially, avoiding the public determination, acknowledgement of harm and punitive functions that court judgments and damages perform. Regimes of secrecy, silence and institutional dominance (some of the most disturbing and defining features of religious child sexual abuse) are perpetuated by the systems of compensation made available to survivors.

The immediate fear is that, in a wasteland of a litigation landscape such as in Australia or Ireland, the Church has 'very little to lose'; whereas were church resources seriously threatened by lawsuits, church authorities would 'become vigilant and act to ensure that children were not placed at risk'.¹³⁴ As the Victorian Inquiry found, court judgments 'provide a valuable and practically available form of public condemnation for criminal child abuse, and create a powerful incentive for organisations to change their practices to prevent child abuse'.¹³⁵ They also help set the parameters of settlements. In contrast to Ireland and Australia, for example, Timothy D Lytton identifies the manifest public interest benefits of 'holding bishops accountable' by lawsuits in the US.¹³⁶ Examining a relatively small number of negligence suits determined in American courts including punitive damages, Lytton argues for tort litigation to be viewed as a process of public regulation and public policy formation. High profile lawsuits against the Church in the US encouraged survivors to come forward with allegations across the West. Furthermore, through the *process* of litigation commencing in the 1980s, including subpoenaing bishops' records and arcane secret files, the institutional and systemic nature of Catholic child sexual abuse was exposed and brought to the attention of authorities and the public,

133 Urban Walker, above n 6, 191.

134 Family and Community Development Committee, Parliament of Victoria, *Inquiry into the Handling of Child Abuse by Religious and Other Organisations* (2012) 4 <http://www.parliament.vic.gov.au/images/stories/committees/fcdc/inquiries/57th/Child_Abuse_Inquiry/Transcripts/Dr_Tom_Keating_10-Dec-12.pdf>.

135 Family and Community Development Committee, Parliament of Victoria, *Betrayal of Trust: Inquiry into the Handling of Child Abuse by Religious and Other Non-government Organisations* (2013) vol 2, 523.

136 Timothy D Lytton, *Holding Bishops Accountable: How Lawsuits Helped the Catholic Church Confront Clergy Sexual Abuse* (Harvard University Press, 2008).

internationally.¹³⁷ While occasional criminal trials of individuals have revealed incidents of clerical abuse, prior to the civil trials of Louisiana priest Father Gilbert Gauthe commencing in 1983, the systemic nature of this abuse was completely hidden from public view and public justice. Survivors themselves did not know of the true nature of their abuse. It is litigation that has performed the ‘truth recovery’ of this international scandal – although not in Ireland, nor Australia.

Comparing the public interest to that in the cases of tobacco, firearm and pharmaceutical litigation, Lytton concludes that litigation against bishops in the US has not only provided justice and compensation for survivors. It has also ‘enhanced the efforts of policymaking institutions such as the US Conference of Catholic Bishops (‘USCCB’), law enforcement agencies, and state legislatures’ to address child sexual abuse.¹³⁸ In response to landmark US cases, the USCCB drafted the first policies and protocols for responding to abuse claims that were not reliant on canon law and conducted the first research into Catholic religious sex offenders.¹³⁹ The Holy See’s response can also be traced to punctuated legal developments in the US, as can the developments in church protocols and procedures in other countries, including Ireland and Australia, in the 1980s, 1990s and 2000s. While clearly inadequate, all were necessary steps taken towards justice. In contrast, the public spectacle of commissions such as the Ryan Commission and the Australian Royal Commission may give an impression of publicly orchestrated justice, and provide important restorative avenues for survivors, but in the broader associated context of confidential redress (Ireland) and church-controlled redress (Australia), their capacities for justice are stymied. Such initiatives can thereby give the impression of symbolic, rather than actual, justice and give weight to arguments that the role of public inquiries is to restore confidence in government rather than right wrongs.¹⁴⁰

It is my argument that an evasion of moral responsibility in both countries contributes to a cognitive dissonance among survivors and the general community struggling to comprehend the nature and meaning of institutionalised abuse. In Ireland, the state has promulgated a profound national fiction by performing a two-step dance to avoid both the *placing* and *assuming* of responsibility. By apologising to ex-residents of industrial schools for a ‘failure to intervene’ in 1999, the government denied the state’s role in committing up to 30 000 children to institutions, often without trial.¹⁴¹ At the same time, the terms of the Irish redress scheme precluded either the Catholic Church or the state being held responsible for abuse. By acting as a defendant in cases such as the St Joseph’s Orphanage trials, the government appeared to accept responsibility for damages (representing harm), but this was *only* on the basis of the indemnity deal

137 Ibid 19.

138 Ibid 8.

139 Ibid.

140 See Ashenden, *Governing Child Sexual Abuse*, above n 1, 135.

141 Arnold, above n 65, 122–7.

negotiated in secret with religious orders. *Moral* responsibility was neither assumed by the state, nor placed on the Church.

The situation in Australia is not dissimilar. There, the federal government has proclaimed that individual institutions should accept responsibility for abuse, but over the past two decades various governments have consistently refused to provide the architecture of a national redress scheme that might be funded or contributed to by churches (and other organisations). No federal government has ever accepted recommendations or suggestions made regarding legal barriers to litigation (such as limitation acts and the unincorporated status of churches).¹⁴² The government has thereby approvingly perpetuated the status quo associated with the Church's much criticised in-house *ex gratia* compensation schemes that also preclude the Church acknowledging responsibility for abuse. In Australia, the state has evaded placing or assuming moral responsibility for all. As I noted above, feminist legal theory identifies some of the limitations of courts and torts addressing institutional liability for sexual harms. To understand the role of governments in this story, I turn now to a discussion of political science approaches and methods associated with the study of institutions, and recent feminist interventions in this area.

VI NEO-INSTITUTIONALISM

Neo-institutionalism ('NI') is a sub-field of political science developed in the 1970s in response to neoliberal reforms that introduced institutional changes across the West on a scale not seen since the post-war reconstruction era. It was developed to explain the different profiles and manifestations of neoliberalism in different states and economies by countering both master narrative (Marxist) and individualistic, behaviourist approaches to political science through a renewed focus on institutions as the critical determinants of economic and political performance.¹⁴³ Rather than a singular methodology, NI is an approach to the study of government that considers the various contextual settings in which social and political action takes place.¹⁴⁴ Institutions are understood as the embodiment of rules and routines that define appropriate actions of governments

142 Limitation Acts are generally a matter for state and territory governments. However, in 1997, the federal government was tasked with responding to the recommendations of the government of the UK that state and territory limitation Acts be amended to allow child migrants to sue for damages. The Australian government's response – that 'neither State and Territory Governments, nor the Commonwealth Government has plans to alter their Statute of Limitations legislation' – indicates its lack of leadership in this area, cited in Senate Standing Committee on Community Affairs, above n 96, 222.

143 John L Campbell and Ove K Pedersen, 'The Rise of Neoliberalism and Institutional Analysis' in John L Campbell and Ove K Pedersen (eds), *The Rise of Neoliberalism and Institutional Analysis* (Princeton University Press, 2001) 1.

144 Moira Gatens, 'Institutions, Embodiment and Sexual Difference' in Moira Gatens and Alison MacKinnon (eds), *Gender and Institutions: Welfare Work and Citizenship* (Cambridge University Press, 1998) 1, 3, quoting Robert E Goodin, 'Institutions and Their Design' in Robert E Goodin (ed), *The Theory of Institutional Design* (Cambridge University Press, 1996) 1, 2.

and individual citizens, including *formal* institutions such as the parliament, law, bureaucracies, tax and business programs and labour-market relations, as well as amorphous *informal* institutions such as class and culture. The premise of NI is that ‘institutions “matter”, an “argument that the organization of political life makes a difference”’.¹⁴⁵ Institutions matter because they prescribe how ‘authority and power [are] constituted, exercised, legitimated, controlled, and redistributed’.¹⁴⁶ Up to five different schools of NI¹⁴⁷ are now used to explain the role of institutions in different government programs, why these differ across time and place, and the constraints that institutions place on the actions and projects of individuals and groups working within them.

A tension in NI concerns the role of actors and their agency within institutions, which, although they create and select actors working within them, are designed and constrained not by individuals, but by history, path dependency, policy feedback loops and exogenic factors. While individuals within institutions can act with agency, individual reformers are typically ‘institutional gardeners more than architects and engineers’.¹⁴⁸ A primary claim of founding theorists James March and Johan Olsen is that ‘history is “inefficient”’,¹⁴⁹ meaning that consistencies and contingencies shape institutions and are, in turn, perpetuated by these same institutions. Institutional change is possible, but it can be slow, and one goal of NI is to explain not only consistencies, but also the rigidity and failures of institutions and policies to adapt to new needs, situations and populations.¹⁵⁰ This analysis appears to limit the agentic capacities of individuals and poses questions of the role of individuals in institutional design.

In considering agency, sociological NI emphasises the importance of *rules* in the form of ‘norms, cognitive frames and meaning systems’ of established institutions that may impact on or hinder agency.¹⁵¹ Rules are valued by government because they generate and promote beliefs in a legitimate order, such as democratic governance, by simplifying politics to ensure that ‘some things are taken as given. ... Rules and practices specify what is normal, what must be expected, what can be relied upon, and what makes sense in the community’.¹⁵² The primary rule institutions possess is a ‘logic of

- 145 Mona Lena Krook and Fiona Mackay, ‘Introduction: Gender, Politics, and Institutions’ in Mona Lena Krook and Fiona Mackay (eds), *Gender, Politics and Institutions: Towards a Feminist Institutionalism* (Palgrave Macmillan, 2011) 1, 8, quoting James G March and Johan P Olsen, ‘The New Institutionalism: Organizational Factors in Political Life’ (1984) *American Political Science Review* 734, 747.
- 146 James G March and Johan P Olsen, ‘Elaborating the “New Institutionalism”’ in RAW Rhodes, Sarah A Binder and Bert A Rockman (eds), *The Oxford Handbook of Political Institutions* (Oxford University Press, 2006) 3, 8.
- 147 These are: Historical, Sociological, Rational Choice, Discursive and Feminist Institutionalism.
- 148 Johan P Olsen, ‘Understanding Institutions and Logics of Appropriateness: Introductory Essay’ (Working Paper No 13, ARENA Centre for European Studies University of Oslo, 2007) 9.
- 149 Ibid 9–10.
- 150 Louise Chappell, ‘Comparative Gender and Institutions: Directions for Research’ (2010) 8 *Perspectives on Politics* 183, 185.
- 151 Vivien A Schmidt, ‘Comparative Institutional Analysis’ in Todd Landman and Neil Robinson (eds), *The SAGE Handbook of Comparative Politics* (Sage Publications, 2009) 125, 131.
- 152 March and Olsen, ‘Elaborating the “New Institutionalism”’, above n 146, 8.

appropriateness', which includes both cognitive and normative elements that direct the behaviours of individuals acting in concert with the norms of institutions. Contrary to the tenets of neoliberalism, individuals working within an institution are not necessarily 'naturally driven by a self-interested, instrumental rationality'.¹⁵³ Rather, they act in accordance with socially constructed and historically contingent institutional norms and they are, in turn, shaped by the institution: 'a logic of appropriateness suggests that institutions constrain certain types of behavior' among individuals and encourage others.¹⁵⁴ Although this logic 'is not impermeable, it is difficult to unsettle as it is perpetuated by institutional actors who "embody and reflect existing norms and beliefs" and who seek to maintain the rules'.¹⁵⁵ A logic of appropriateness stands in contrast to a logic of *consequentiality*, characteristic of behaviourist approaches to political science, which portray rules as simply reflecting interests and power, or as irrelevant. According to NI, rules such as those represented by the logic of appropriateness are followed not necessarily due to predicted outcomes (consequences), but

because they are seen as natural, rightful, expected, and legitimate. Actors seek to fulfill the obligations encapsulated in a role, an identity, a membership in a political community or group, and the ethos, practices and expectations of its institutions. Embedded in a social collectivity, they do what they see as appropriate for themselves in a specific type of situation.¹⁵⁶

Along with considerations of agency, central questions to NI studies of politics and government therefore concern 'how an understanding of the role of rule-driven behavior in life might illuminate thinking about political life, how the codification of experience into rules, institutional memories and information processing is shaped in, and shapes, a democratic political system'.¹⁵⁷

VII FEMINIST INSTITUTIONALISM

Even in their attention paid to informal institutions, NI theorists failed to assess and address gender, either as a *variable* relevant to comparative outcomes, or as an *element* of institutions. Hence, many feminist scholars of politics have been sceptical about engaging with orthodox political science theories and methods such as NI, which appears to undermine or ignore the significance of individual sexual, racial and other 'embodied differences' that relate to agency regarding the ways in which individuals are affected by and are able to 'engage

153 Campbell and Pederson, above n 143, 7.

154 Louise Chappell, 'Comparing Political Institutions: Revealing the Gendered "Logic of Appropriateness"' (2006) 2 *Politics & Gender* 223, 225.

155 Ibid, citing Doug McAdam and W Richard Scott, 'Organizations and Movements' in Doug McAdam et al (eds), *Social Movements and Organization Theory* (Cambridge University Press, 2005) 4, 15.

156 James G March and Johan P Olsen, 'The Logic of Appropriateness' (Working Paper No 4, ARENA Centre for European Studies University of Oslo, 2009) 2.

157 Ibid 3.

with institutions'.¹⁵⁸ Over the past 20 years, however, an international field of FI informed by Connell has developed, aiming to engage with the strengths and limitations of NI to transcend concerns about its capacity for assessing and addressing gender inequalities in the political and policy realm. That *institutions matter for gender* is the premise of FI, which emphasises the 'normative and dynamic' potential of various institutions to make a difference to gender.¹⁵⁹

Feminist institutionalism foregrounds power in the analysis of institutions to highlight how gendered power relations and inequalities are 'constructed, shaped, and maintained through institutional processes, practices and rules', and thus how these may be interrupted to advance feminist goals.¹⁶⁰ One significant and simple contribution of feminists to NI is the idea that, although typically promoted as a norm of neutrality, the logic of appropriateness of both formal and informal institutions is *gendered*. Therefore, institutions are gendered. This means that the constructions of masculinity and femininity are intertwined in the daily culture and logic of political institutions rather than existing 'out in society or fixed within individuals which they then bring whole to the institution'.¹⁶¹ Moreover, '[w]hile constructions of masculinity and femininity are both present in political institutions, the masculine ideal underpins institutional structures, practices, discourses, and norms'.¹⁶² Once the bias of 'neutrality' has been exposed, institutions may be infiltrated, changed and gendered to advance gender equality outcomes. The concept of 'institutional dynamism' suggests that although institutions do tend toward stability and path dependency, they are 'not fixed, permanent, or completely stable entities'.¹⁶³ Even though they are imbued with a steadfast (gendered) logic of appropriateness, institutions of course do react and change over time, such as in response to 'critical junctures': these may be '[c]rises or shocks, such as a natural disaster, terrorist attack, or an economic recession',¹⁶⁴ or perhaps a global crisis in organised religion such as the Catholic child sexual abuse scandal. Typically, however, institutional change is incremental and one goal of normative feminist political science should be to harness opportunities for change that favour gender equality and gender justice outcomes.

158 Gatens, above n 144, 1.

159 Chappell, 'Comparing Political Institutions', above n 154, 225.

160 Mona Lena Krook and Fiona Mackay, *Gender, Politics and Institutions: Towards a Feminist Institutionalism* (Palgrave Macmillan, 2011) 4, cited in Marian Sawer, 'Gender and Institutions: Room with a View?' (2012) 27 *Australian Feminist Studies* 325, 329.

161 Sally J Kenney, 'New Research on Gendered Political Institutions' (1996) 49 *Political Research Quarterly* 445, 456, cited in Mona Lena Krook and Fiona Mackay, 'Introduction: Gender, Politics, and Institutions' in Mona Lena Krook and Fiona Mackay (eds), *Gender, Politics and Institutions: Towards a Feminist Institutionalism* (Palgrave Macmillan, 2011) 1, 6.

162 Mona Lena Krook and Fiona Mackay, 'Introduction: Gender, Politics, and Institutions' in Mona Lena Krook and Fiona Mackay (eds), *Gender, Politics and Institutions: Towards a Feminist Institutionalism* (Palgrave Macmillan, 2011) 1, 6, citing Georgia Duerst-Lahti and Rita Mae Kelly, 'On Governance, Leadership, and Gender' (1995) in Georgia Duerst-Lahti and Rita Mae Kelly (eds), *Gender Power, Leadership and Governance* (University of Michigan Press, 1995) 11, 20.

163 Chappell, 'Comparing Political Institutions', above n 154, 230.

164 *Ibid.*

To date, FI scholarship has been particularly adept at examining the role of institutions in creating and sustaining gender equality outcomes in comparative contexts (for example, in the context of women's representation, electoral systems and the provision of gender sensitive policy, and so on). Only recently have FI scholars come to consider gender justice. Most notable is Louise Chappell's analysis of the International Criminal Court's ('ICC') prosecution of international crimes of sexual violence. Chappell found that although the ICC is a new institution, and it explicitly addresses gendered injustices in new authoritative ways, it remains influenced by being 'nested' in a web of prior inefficient historical norms of past legal and political institutions that fail to adequately conceive of sex crimes.¹⁶⁵ Institutions such as the ICC 'have an embedded and often hidden gender dimension – expressed through norms, rules, and structures – which can be carried forward through institutional legacies and through their interaction with surrounding institutions'.¹⁶⁶ Hence, it is unlikely that even 'new' institutions will offer 'an entirely "clean slate"' for actors advancing gender equality or justice.¹⁶⁷ Chappell thus offers a novel analysis of the shortcomings of the court that transcends questions of jurisprudence or execution of design.

Still, some feminist theorists, such as Carol Bacchi and Moira Gatens, are wary of approaches such as FI, which could be characterised as 'add women and stir' treatments of orthodox political science.¹⁶⁸ From a post-structuralist perspective, Bacchi cautions that the failure of NI to address gender is not simply an oversight that can be remedied 'through a gender lens', as suggested by FI,¹⁶⁹ but instead represents a fundamental function of positivist political science which does not *represent* political realities so much as it *produces* them, with no acknowledgement (instead, a denial) of this function of knowledge-production as power. The political realities produced by a doctrinal focus on institutions have routinely excluded the different subjectivities of individuals who are produced in culture *through* various institutions constituted of rules and norms that 'constrain [some] forms of behaviour and restrict [individuals'] options for action'.¹⁷⁰ Bacchi's primary problem with FI therefore concerns the production of knowledge (discourse) performed by research methods such as NI, which, she argues, *reifies* the power structures of institutions in the name of neutral explanatory power ('research').

According to Bacchi, rather than just 'adding women' or gender, feminist scholars of politics should be concerned with exposing the ways in which different research methods shape a singular reality while 'rendering invisible'

165 Louise Chappell, 'Nested Newness and Institutional Innovation: Expanding Gender Justice in the International Criminal Court' in Mona Lena Krook and Fiona Mackay (eds), *Gender, Politics and Institutions: Towards a Feminist Institutionalism* (Palgrave Macmillan, 2011) 163.

166 *Ibid* 163, 179.

167 *Ibid*.

168 Gatens, above n 144, 1.

169 Fiona Mackay, Meryl Kenny and Louise Chappell, 'New Institutionalism through a Gender Lens: Towards a Feminist Institutionalism?' (2011) 31 *International Political Science Review* 573.

170 Gatens, above n 144, 3.

multiplicities.¹⁷¹ The almost ethereal, eternal quality bestowed on institutions in NI appears to situate them outside of discourse, thereby obscuring power relations and the role of people in institutional design, as well as the effects of institutions on people. This disempowering of individuals and obscuring of the problematisation of agency and resistance is an approach to politics that feminists should interrogate rather than adopt as a method.¹⁷² Hence, Bacchi concludes that we must insist on ‘seeing institutions as peopled’.¹⁷³ Moreover, it is unwise for feminists to privilege institutions in political analysis – a ‘privileging unavoidable in any institutionalism’,¹⁷⁴ including FI. This is because ‘[s]o long as the suggestion is that there is something “out there” that can be contacted or referenced outside of politics, so long are those who claim access to “the real” empowered’.¹⁷⁵ Despite Bacchi’s argument, which I find very compelling, in the following section, I proceed to apply insights from FI to the examples of gender justice for Catholic clerical child sexual abuse in Ireland and Australia, mainly because the specific problem of the legal and political treatment of institutions in this context has otherwise defied comprehensive explanation. By this I mean that the treatment of child sexual abuse in institutions, in both senses – of the Catholic Church as a formal institution in NI terms, and schools and orphanages as state institutions – has defied explanations that incorporate the logic of governments and the courts when failing to place or assume responsibility for the grave crime of child abuse. I proceed with Bacchi’s critique in mind, however, and continue to apply her insights about the study of institutions in this analysis.

VIII FEMINIST INSTITUTIONALISM AND RESPONSIBILITY FOR CATHOLIC CLERICAL CHILD SEXUAL ABUSE

I have argued that the Catholic Church in both Ireland and Australia has effectively been granted de facto immunity from suit by numerous national and state governments. The consequences of this are material and discursive: they relate to justice as well as morality, meaning and understanding. While critical feminist legal scholarship provides important insights into the limitations of tort and the courts in addressing institutional sexual harms, to make sense of this situation more whole-of-government insights are required. The question of

171 Carol Bacchi, ‘Strategic Interventions and Ontological Politics: Research as Political Practice’ in Angelique Bletsas and Chris Beasley (eds), *Engaging With Carol Bacchi: Strategic Interventions and Exchanges* (University of Adelaide Press, 2012), 141.

172 Carol Bacchi and Malin Rönnblom, ‘Feminist Discursive Institutionalism – A Poststructural Alternative’ (2014) 22 *NORA – Nordic Journal of Feminist and Gender Research* 170. See also Malin Rönnblom and Carol Bacchi, ‘Feminist Discursive Institutionalism – What’s Discursive About It?’ (Paper presented at the 2nd European Conference on Politics and Gender, Budapest, 13–15 January 2011).

173 Carol Bacchi, ‘Changing the Sexual Harassment Agenda’ in Moira Gatens and Alison MacKinnon (eds), *Gender and Institutions: Welfare, Work and Citizenship* (Cambridge University Press, 1998) 75, 85.

174 Bacchi and Rönnblom, above n 172, 1.

175 Carol Bacchi and Jennifer Bonham, ‘Reclaiming Discursive Practices as an Analytic Focus: Political Implications’ [2014] (17) *Foucault Studies* 173, 191.

immunity ultimately concerns the conundrum of addressing child sexual abuse as a grave social evil while failing to acknowledge institutional liability in the form of responsibility – a condition of making amends and performing ‘moral repair’.¹⁷⁶ It is clear that over the past 40 years there have been formidable changes to the ways in which formal institutions including police services, the government, the Church and the criminal law address crimes of religious (and all) child sexual abuse in most, if not all, Western nations.¹⁷⁷ These changes, which suggest profound institutional dynamism, developed incrementally, informed at times by sudden advances in discourse, such as the medical naming/diagnosing of child sexual abuse in 1969,¹⁷⁸ and discourses of justice produced by litigation in the US and Canada.¹⁷⁹ They also reflect a more gradual incorporation of discourses such as feminism, secularism, children’s and victim’s rights and medicalised theories of psycho-sexual development and injury. In Australia, enduring significant changes to child protection policies and procedures were implemented by governments and churches in response to the ‘critical juncture’ of the recommendations of the Wood Royal Commission in 1996.¹⁸⁰

At the same time, perplexingly, it is evident that select, powerful, historically embedded institutions have persisted in the face of compelling political change. In both Ireland and Australia, the immunity of the Church to publicly court-determined civil justice has been upheld by a mix of historically contingent and enduring formal and informal institutions privileging the patriarchal institution of the Church, which has succeeded in framing the problem of child sexual abuse as one of individual deviants for whom it is neither morally nor legally responsible. In both countries, a tacit pact has been made in which individual ‘paedophile priests’ have (finally) been sacrificed on the altar of public opinion via the criminal law, while state and church institutions work together to defend their integrity as secondary victims of monstrous individuals.

To make sense of this situation, an initial pragmatic and ‘common sense’ instinct might be to look to the logic of consequentiality of governments. In both Ireland and Australia the Church performs significant social services on which state and society depend, such as charity provision and school and hospital services. In Ireland, for example, there are no state-run primary schools. Ninety-eight per cent of primary schools are privately run religious schools, mostly Catholic.¹⁸¹ In Australia, Catholic schools only accommodate around 20 per cent

176 Urban Walker, above n 6.

177 Ashenden, *Governing Child Sexual Abuse*, above n 1.

178 Daly, *Redressing Institutional Abuse of Children*, above n 2, 17.

179 Lytton, *Holding Bishops Accountable*, above n 136; Daly, *Redressing Institutional Abuse of Children*, above n 2.

180 For example, the NSW government abolished the NSW Child Protection Council and established the NSW Commission for Children and Young People with a statutory responsibility for working with children screening.

181 Alison Mawhinney, ‘A Discriminating Education System: Religious Admission Policies in Irish Schools and International Human Rights Law’ (2012) 20 *International Journal of Children’s Rights* 603, 603.

of all students.¹⁸² But the state depends on the Church to fill the void of neoliberal privatisation of welfare commenced in the 1970s and consolidated in the 1990s, as part of an ideological advance that Malcolm Voyce characterises as ‘enterprise theology’.¹⁸³ Throughout this period federal governments paid substantial subsidies to charities, including Christian churches, to deliver services ‘[e]specially in the health, employment and education sectors’.¹⁸⁴ Non-government community service organisations, including Catholic organisations, are today ‘major providers of [Australian] welfare services’.¹⁸⁵ These types of observations, and the other recognised benefits of organised religion in society related to social cohesion and individual belonging, might suggest a logic of consequentiality is driving governments shielding the Church from civil liability determined by the courts, which could result in financial awards made against it and significant undermining of its power. However, in my analysis, such a logic does not adequately explain the moral failure to place responsibility for child abuse on the Church as an institution.

An instrumental analysis of finances, for example, reveals that the amount paid by the Irish state and Catholic Church for redress (€1.5 billion) constitutes a not insignificant proportion of the country’s GDP, estimated at €189.49 billion for 2015.¹⁸⁶ This does not include the costs of the ten-year Ryan Commission. The Australian Royal Commission recently had its budget and tenure doubled and is estimated now to cost the state half a billion Australian dollars.¹⁸⁷ Other methods of compensation to former children in ‘care’ documented in this article have cost Australian state and federal governments hundreds of millions of dollars, but all preclude the placing and assuming of moral responsibility through publicly acknowledged accountability for abuse. Amounts paid by individual Catholic dioceses in confidential settlements in Ireland and Australia would appear to range dramatically, but some are significant, such as the €300–400 million reportedly paid by the Archdiocese of Dublin to one claimant¹⁸⁸ and the A\$13 million reportedly paid by the Newcastle-Maitland Diocese in regard to two priests.¹⁸⁹

182 McCrindle Research, ‘A Snapshot of Schools in Australia 2013’ (Research Report, 2013) 2.

183 Malcolm Voyce, ‘Enterprise Theology and Welfare Discourse in the United Kingdom’ (2006) 19 *Australian Religious Studies Review* 75.

184 Meredith Lake, *Faith in Action: HammondCare* (NewSouth Publishing, 2013) 264.

185 Australian Institute of Health and Welfare, ‘Welfare Expenditure Australia 2005–06’ (Report Series No 31, November 2007) 12.

186 ‘Lifting the Veil on Orders’ €500m Redress Bill Battle’, above n 69; Trading Economics, *Ireland GDP at Constant Prices* (2015) <<http://www.tradingeconomics.com/ireland/gdp-at-constant-prices-imf-data.html>>.

187 Latika Bourke, ‘Royal Commission into Child Sex Abuse Extended for Two Years’, *Sydney Morning Herald* (online), 2 September 2014 <<http://www.smh.com.au/federal-politics/political-news/royal-commission-into-child-sex-abuse-extended-for-two-years-20140902-10bhle.html>>.

188 Patsy McGarry, ‘Largest Settlement Yet in Clerical Sex Abuse Cases’, *The Irish Times* (online), 28 January 2003 <<http://www.irishtimes.com/news/largest-settlement-yet-in-clerical-sex-abuse-cases-1.346774>>.

189 McCarthy, above n 124.

The ten-year public ordeal of the Ryan Commission and relentless media reporting of church sex scandals has significantly undermined the power of the Church in Ireland to the point that it may no longer be considered to maintain a 'moral monopoly' in Ireland.¹⁹⁰ Between the 2006 and 2011 Population Census the proportion of Irish citizens identifying as of no religion rose by 44 per cent.¹⁹¹ At the culmination of the Ryan Commission in 2009, the website CountMeOut.ie was established to assist Irish citizens in formally disaffiliating from the Church. Approximately 12 000 people downloaded the defection form before the Vatican intervened.¹⁹² Some commentators consider the decline in church dominance to have rapidly progressed secular causes such as the 2015 populist campaign for marriage equality as a direct reaction against the historical role of the Church in Irish politics and society.¹⁹³ The public interrogation of individual church leaders currently being performed by the Australian Royal Commission has led some authors to speculate similar, less dramatic consequences for the Church in Australia.¹⁹⁴ Alternatively, some church representatives suggest a logic of consequentiality concerned with shielding claimants from the ordeal of litigation drives the push for confidential settlements and the promotion of 'pastoral' ex gratia compensation schemes, rather than 'legalistic' civil trials.¹⁹⁵ But Australian research conducted with participants in both *Towards Healing* and the *Melbourne Response* indicates that these schemes are experienced as highly legalistic, and often traumatic, by survivors of abuse.¹⁹⁶ Similarly, a primary criticism of the Irish redress scheme concerned its legal adversarialism.¹⁹⁷ The confidentiality of private settlements and redress would also appear to counter, for some survivors, best practice medical and psychiatric advice that they be no longer bound by the secrecy associated with their abuse.¹⁹⁸

Together, these outcomes for the Church and for survivors suggest that a rational logic of consequentiality cannot fully account for the actions or

190 Donnelly et al, above n 11, 1.

191 Bohan, 'Census 2011', above n 50. This cannot simply be accounted for by immigration because the primary migration (which peaked by 2008 anyhow) is by Roman Catholic Polish. See 'Polish Families Reuniting in Ireland as They Become Largest Non-Irish Group', *TheJournal.ie* (online) 29 March 2012 <<http://www.thejournal.ie/polish-families-reuniting-in-ireland-as-they-become-largest-non-irish-group-400769-Mar2012>>.

192 David Donaldson, 'Royal Commission Will Make Churches Pray for Parishioners', *Crikey* (online), 22 November 2012 <http://www.crikey.com.au/2012/11/22/royal-commission-will-make-churches-pray-for-parishioners/?wpmp_switcher=mobile>.

193 Shaun McDaid, 'Irish Catholic Church's Stance on Gay Marriage Is Unconvincing', *The Conversation* (online), 20 May 2015 <<https://theconversation.com/irish-catholic-churchs-stance-on-gay-marriage-is-unconvincing-42034>>.

194 Donaldson, above n 192.

195 Chompsky, 'The Church Will Say We're Sorry but Sue Us and We'll Pound You into the Ground', *Broadsheet* (online), 6 September 2012 <<http://www.broadsheet.ie/2012/09/06/the-church-will-say-were-sorry-but-sue-us-and-well-pound-you-into-the-ground>>; Truth Justice and Healing Council, Issues Paper No 2 to Royal Commission into Institutional Responses to Child Sexual Abuse, 30 September 2013.

196 Gleeson, above n 130, 325.

197 Arnold, above n 65, 122–7.

198 Commonwealth, Royal Commission into Institutional Responses to Child Sexual Abuse, *Report of Case Study No 4: The Experiences of Four Survivors with the Towards Healing Process* (2015) 7–42.

motivations of the state in its treatment of the Church in either country. Hence, I argue that, while it is reasonable to assume that an instrumental logic of consequentiality associated with power *informs* the state's treatment of the Church, understanding the general failure of governments to comprehend institutional liability, legally and politically, would be enhanced by also considering the logic of appropriateness of institutions, especially in the context of gendered abuses of power, such as child sexual abuse. Such an analysis may also perform the ontological function of shifting emphasis from consequences for the Church to consequences for survivors, to help make sense of their 'normative abandonment'¹⁹⁹ by the state failing to allocate responsibility for harms. What is really being avoided in Ireland and Australia is not the rational consequences of financial and legal penalties for church and state, but the normative consequences of making amends via moral responsibility assumed by institutions, which is what so many claimants explain they require.²⁰⁰ A focus on institutional *rules* such as the logic of appropriateness illuminates various governments' motivations in this failure of morality. Rules are valued by governments because they are efficient, but their outcomes are more than strategic.²⁰¹ Rules perpetuate institutions and maintain the status quo, even when society and public opinion has moved on, such as in the case of viewing the Church as responsible for child abuse within its institutions.

In contrast to rational consequentialist analyses focused on material outcomes for the state, FI methods would look to the ways in which gendered power regimes are maintained by the contradictory discourses surrounding child sexual abuse and justice that continue to compete with each other in law and governments. These discourses (identified by critical feminist legal theory), alternatively present the problem as one of individual sexual urges and violence, and of institutional 'failure', but rarely one of institutional fault. This elision of institutional fault from government responses reflects the likelihood that any government institution complicit in maintaining the privileged legal position of the Church – such as a bureaucracy, legislature, judiciary, investigatory commission or inquiry – will struggle to reconcile and incorporate discourses of institutional liability while maintaining its own internal logic of appropriateness. The 'masculine' logic of appropriateness is typically blind to the considerations of socialised gender and power informing feminist appraisals of sexual abuse as a function of patriarchal organisational cultures, while also being invested in upholding *all* institutions as detached neutral arbiters of justice and national interest. A logic of appropriateness suggests that within all institutions there prevails a 'set of universal norms that can be used as a reliable prism through which to view the world', and the operations of other institutions.²⁰² These norms tend to presuppose and emphasise the coherence, neutrality and 'just' nature of

199 Urban Walker, above n 6, 20.

200 Jennifer M Balboni, *Clergy Sexual Abuse Litigation: Survivors Seeking Justice* (First Forum Press, 2011).

201 March and Olsen, above n 146, 10.

202 Chappell, 'Comparing Political Institutions', above n 154, 227.

the institution. In this logic, undesirable behaviour and ‘irrational’ outcomes are naturally classified as antithetical to the institution itself.

The logic of appropriateness of the Catholic Church in regard to child sexual abuse is clearly identified by Keenan, who stresses the role of bishops and other superiors as ‘rule-keepers’ of the patriarchal institution in compounding the problem of child abuse to the point of making it systemic, even after the international scandal broke in the early 1990s.²⁰³ Different but related logics of appropriateness are also apparent in the contemporary treatment of child sexual abuse exemplified by the predominant modes of ‘prevention’, such as sex offender registers and employment screenings, which function to privilege personal, rather than cultural, organisational or institutional factors in abuse. The rules of orthodox vicarious liability doctrine, the rules of the Church, and the rules of child protection all explain, in part, the elision of institutional liability from the treatment of child sexual abuse. Acknowledging as well the gendered logic of appropriateness of the numerous government institutions that have worked in concert to shield the Catholic Church from liability in Ireland and Australia would contribute even further to making meaning from this contradictory situation in which child sexual abuse, we are told, is universally abhorred and must be accounted for, but routinely is not.

In those instances where institutions such as the courts in Canada and the UK have radically changed the rules of vicarious liability to place responsibility for institutional child abuse at the foot of the Church, those dynamics may be understood in FI terms as the actions of ‘institutional entrepreneurs’ or ‘gender equity entrepreneurs’, in Chappell’s terms.²⁰⁴ who have acted with agency in response to catastrophic circumstances to abruptly change rules to try to catch up with the ‘drift’ of public opinion.²⁰⁵ It is one aim of this article that an illustration of the institutional reliance on rules and logic in *all* arms of government implicated in the treatment of the Catholic Church in Ireland and Australia will help illuminate the extraordinary agentic break with ‘the rules’ performed by those entrepreneurial courts of other jurisdictions, and therefore, what is radically required by institutions, of both government and law, to further justice in both countries. The work of the Australian Royal Commission currently investigating the hierarchy of the Catholic Church may yet prove to be another example of gender justice entrepreneurialism. I also hope that this emphasis on the role of gender equity entrepreneurs who ‘people institutions’,²⁰⁶ such as select courts in Canada and the UK, might go part way to addressing some of the critiques of the value of institutional studies by feminists.

203 Keenan, above n 10, 53.

204 Chappell, ‘Comparing Political Institutions’, above n 154, 230.

205 For a discussion of the concept of drift, see Jacob S Hacker, ‘Policy Drift: The Hidden Politics of US Welfare State Retrenchment’ in Wolfgang Streeck and Kathleen Thelen (eds), *Beyond Continuity: Institutional Change in Advanced Political Economies* (Oxford University Press, 2005) 40. Since at least the 1960s tort theorists have acknowledged that the ‘man in the street’ tends to approve more than the courts of vicarious liability for identified harms. See Chamallas, above n 33, 134.

206 Bacchi, ‘Changing the Sexual Harassment Agenda’, above n 173, 85.

IX CONCLUSION

Scholars of the Irish experience of Catholic child sexual abuse tend to perceive of the scandal as politically and socially unique in its devastating impact on the ostensibly Catholic country. Much has been made of the 'special position' granted in De Valera's 1937 constitution to the Holy Catholic Apostolic and Roman Church as 'the guardian of the Faith professed by the great majority of the citizens', in explaining and illustrating the enduring power and immunity of the Church.²⁰⁷ Undoubtedly, the mass institutionalisation of 'care' as poverty alleviation and independence from Britain in postcolonial Ireland has made for a national experience different from that of other common law countries coming to terms with the Catholic child abuse scandal. However, these differences only make the similarities in legal immunity for the Church in Ireland and Australia all the more curious and all the more compelling to investigate. I have argued that both feminist critical legal theory and feminist institutionalist methods provide explanatory power for analysing failures of justice in both Ireland and Australia, in which a church occupying distinctly different roles in state and society has received similar treatment at the hands of numerous governments. A final contribution to making meaning of this scandal may be gleaned from the work of Bacchi, who reminds us not to accept government agendas as neutral approaches to problem-solving (as governments might have us believe), but as problem formations performed by states to advance ideological and instrumental interests. Bacchi's most significant and enduring contribution to the study of government is the application of 'problematizations' to policies, through which she astutely reminds us that the answer lies in the question.²⁰⁸ By this Bacchi means that to ascertain the agenda of governments we should look to the ways in which they create the problems they proceed to 'solve' on their own terms.

Applying such an approach to the FI analysis provided here vividly illustrates the logic or rules of government institutions that preclude any serious acceptance or understanding of institutional liability, and therefore the allocation of moral responsibility, a condition of 'moral repair'.²⁰⁹ While NI informs us that governments rely on rules to solve problems, Bacchi's approach would encourage us to look to the ways in which governments rely on rules to create problems. In both Ireland and Australia, the giveaway is found in names of the relevant commissions of inquiry: in Ireland it was the Commission to Inquire into Child Abuse; in Australia it is the Royal Commission into Institutional Responses to Child Sexual Abuse. Even more than in Ireland, in Australia the government's problematisation of institutional child sexual abuse is revealed to concern at best, failures of response, rather than institutional causes. Similarly, the promotion of *ex gratia* redress, by the state in Ireland, and the Church in Australia, reveals a further reluctance to engage with questions of moral

207 McAlinden, 'An Inconvenient Truth', above n 5, 203.

208 Carol Bacchi, *Analysing Policy: What's the Problem Represented To Be?* (Pearson Australia, 2009).

209 Urban Walker, above n 6.

responsibility, which ‘embodies the will to set right something for which amends are owed’.²¹⁰ *Ex gratia* translates to grace or kindness,²¹¹ and therefore exemplifies the types of ‘charitable’, perhaps even *dutiful*, actions that reflect the morally bereft logic of state responses to Catholic clerical child sexual abuse in Ireland and Australia that fails to make amends for past wrongs.²¹²

210 Ibid 191 (emphasis added).

211 Daly, *Redressing Institutional Abuse of Children*, above n 2, 142.

212 Urban Walker, above n 6, 191.