

**CANON LAW**

**A SYSTEMIC FACTOR IN CHILD**

**SEXUAL ABUSE**

**IN THE CATHOLIC CHURCH**

**SUBMISSION**

TO

**THE ROYAL COMMISSION INTO INSTITUTIONAL RESPONSES TO CHILD SEXUAL ABUSE**

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*I cannot accept your canon that we are to judge Pope and King unlike other men, with a favourable presumption that they did no wrong... There is no worse heresy than that the office sanctifies the holder of it.*

Lord Acton: Letter to Bishop Mandel Creighton, April 5 1887.

*Law functions as a teacher...It is capable of instigating great cultural change; it is capable of profoundly reinforcing a status quo...The law calls forth the ideology that defend(s) it, thus rationalizing and deepening the (ideology) that brought it into being in the first place.*

Cardinal Francis George (2003)

## **1: EXECUTIVE SUMMARY**

### **THE ROYAL COMMISSION'S TERMS OF REFERENCE**

1. The Letters Patent require the Royal Commission to inquire into child sexual abuse in “institutional contexts” and to focus on “systemic issues”.
2. There is nothing more systemic than law, whether civil or canon law.

### **CANON LAW**

3. Canon law is the body of laws and regulations created by popes and general councils of the Roman Catholic Church (“the Church”) for the government of the Church and its members. While Church Councils do create canon law, they are rarely held, and for practical purposes canon law derives from the popes who are absolute monarchs when it comes to canon law.

### **The Codes of Canon Law**

4. Prior to 1917, canon law was found in decrees of Councils and Popes stretching back 1500 years. In 1917, the first *Code of Canon Law* was promulgated by Pope Benedict XV. That was repealed and replaced by the *1983 Code of Canon Law*, promulgated by Pope John Paul II.
5. While the Codes are the principle source of canon law, supplementary laws are created by decrees of the popes, and by instructions from the Congregations of the Roman Curia, acting

under the authority of the popes. Those instructions are the equivalent of regulations under the Australian legal system.

### **Canonical Crimes**

6. The Codes and decrees of the popes create canonical crimes, called “delicts”. Some of these are peculiar to the Church (such as ordaining women as priests), and some are also crimes under civil law, such as homicide, kidnapping, mutilating or gravely wounding someone, fraud and the sexual abuse of minors.

### **Conflicts between Canon and Civil Law**

7. Catholics are obliged to follow canon law where it conflicts with civil law. Bishops and those occupying official positions in the Church have a special obligation to follow canon law where it conflicts with civil law because of oaths they make on assuming those offices.

### **The Popes as the Source of Canon Law**

8. Canon law is created by decrees of the popes and general councils of the Church. As the latter are rarely called, virtually all canon law, for practical purposes, derives from the popes.
9. Bishops, like the popes, are effectively monarchs in their own dioceses, and they can issue decrees for the governance of those dioceses. The only restraint on them is canon law.

### **Canonical Documents**

10. Canon law has a wider variety of documents that create canon law than civil law has. The decrees of the popes, by whatever name is attached to them, are the equivalent of statutes in civil law. Instructions signed by the prefects of the Roman Curia Congregations on behalf of the popes have the equivalent status of regulations in civil law.

### **National Catholic Bishops Conferences**

11. Canon law for particular areas can be created or changed by National Catholic Bishops Conferences provided those decrees have the approval or *recognitio* of the Holy See.<sup>2</sup> The Australian Catholic Bishops Conference (“ACBC”) never received a *recognitio* by the Holy See

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<sup>2</sup> The Church draws a distinction between the “Vatican” which is the miniature State consisting of some 44 hectares in Rome and “the Holy See”, which refers to the authority of the Bishop of Rome to govern Church members all over the world. Many official documents referred to in this text use the term “Holy See”. In everyday language and media reports, the word “Vatican” often refers to both. The term “Holy See” refers to the seat of the Bishop of Rome. The Holy See is analogous to a sovereign state, having a centralized government called the Roman Curia which is similar to ministries and executive departments of modern states. The Vatican City is its sovereign territory.

for its child sexual abuse protocol, *Towards Healing*. It was unenforceable both under canon and civil law.

### **The Interpretation of Canon Law**

12. The rules of interpretation of canon law are generally the same as in Australian civil law: the proper meaning of the words considered in their text and context. A significant difference between the two is that the ultimate meaning of civil law is determined by the courts, whereas in canon law, it is determined by the legislature, that is, the Holy See. There is no system of precedent and a decision in a particular case binds only the parties to it.
13. Lawyers in the common law system consult the decisions of courts for greater clarity, but in the canonical system such guidance is provided by “the jurisprudence and practice of the Roman Curia” and the “common and constant opinions of learned persons”. As will be seen below, the practice of the Roman Curia, and statements by its senior office holders, as well as the opinions of senior canon lawyers, are significant in that they perform the same role in our Australian legal system as non-binding court decisions.

### **Universal and Particular Laws**

14. Canon law can apply generally to the whole Church, but it can also be promulgated to apply only to a particular geographical area. In 2002, the Holy See approved of particular laws relating to child sexual abuse that allowed limited reporting to the civil authorities in the United States in those American states where there were civil reporting laws. That particular law was restricted to the area covered by the United States Catholic Bishops Conference. In 2010 that dispensation was extended to the whole world, at least as a general principle.

### **The Canonical System of Trials**

15. The canonical system of trials is an investigative procedure that starts the moment an allegation is made. It is analogous to this Royal Commission in terms of how the trial is conducted, except that all questioning is carried out by the judges.
16. Where an allegation of child sexual abuse by clergy is made, the bishop is required to commence a preliminary investigation under Canon 1717 of the *1983 Code of Canon Law*, and, prior to 2001, he was to make a determination of whether or not the cleric was to be subjected to a penal trial or dealt with in some other way. Under the 2001 *motu proprio* of Pope John Paul II, *Sacramentorum Sanctitatis Tutela* (“SST 2001”), the results of that

preliminary investigation are to be sent to the Congregation for the Doctrine of the Faith (“CDF”) which then decides if the cleric is to be subjected to a penal trial or dealt with in some other way.

#### **THE HISTORY OF CANON LAW ON CHILD SEXUAL ABUSE BY CLERGY**

17. Both the terms “canon law” and “child sexual abuse” are in some senses anachronistic to describe the history of both from the time of the establishment of Christianity. Nevertheless there were both civil and Church laws against what we would now call child sexual abuse dating from around the earliest times. For the purposes of this submission, the term will be applied to past practice while bearing in mind that it did not always carry the wider significance that it has today.
18. For most its history, the Church regarded the sexual abuse of children as not just a sin punishable in the next life, but as a crime punishable in this one. It further regarded such crimes as being so serious that until the 1920s, canon law required priests and religious not just to be dismissed from the priesthood or religious life, but also to be punished with imprisonment as a minimum, and in previous centuries with much harsher punishments, including the death penalty.
19. From the 12<sup>th</sup> century onwards, when the division between Church and State started to become more pronounced, the Church required clergy who were guilty of “sodomy”, which included all forms of sexual activity other than vaginal intercourse between a man and a woman, to be “degraded”, that is, to be dismissed from the clerical state. They were then handed over to the civil authorities to be punished in accordance with the civil law at the time. Depending on the circumstances, priests and monks were burned at the stake, garrotted in prison, whipped, sentenced to long periods in the galleys, imprisoned in monasteries with forced labour and fasting, and sent into exile.

#### **The Beginnings of a Cultural Shift**

20. In the mid-19<sup>th</sup> century this attitude started to change for a variety of historical and theological reasons, and it culminated in the promulgation of the *1917 Code of Canon Law* which abrogated all previous papal and Church council decrees requiring priests and religious guilty of serious crimes (including the sexual abuse of children) to be handed over to the civil authorities.

## The First Code of Canon Law in 1917

### The Cultural Shift towards Cover Up

21. There were a number of reasons for this radical about turn in the Church's attitude to child sexual abuse by clergy in the early part of the 20<sup>th</sup> century:
- 21.1. The theology that the priest was special, someone ontologically changed by God at ordination, came to the fore in Catholic thinking. This manifested itself in the Concordats entered into between the Holy See and sympathetic Catholic countries providing for special privileges for clergy convicted of State crimes. They would not serve their time in jail like other criminals, but in monasteries.
  - 21.2. The Protestant Reformation and anti-clericalism in Catholic Europe and Latin America may have created a fear that priests would not receive a fair trial in the secular courts.
  - 21.3. The invention of radio that would allow scandal about such crimes to be spread at the speed of light.
22. The *1917 Code* created a number of canonical crimes or "delicts", including adultery, debauchery, sodomy, bestiality and the sexual abuse of children. It also provided for clerics and religious accused of such crimes to be tried before a canonical court. The trial started when the bishop instigated a preliminary investigation of the allegation. If he was satisfied of the truth of the allegations, the accused was then subjected to a formal penal trial. In the case of religious brothers and nuns there was an analogous trial system within their religious orders.

## CANON LAW ON CHILD SEXUAL ABUSE SINCE 1922

### The Instruction, *Crimen Sollicitationis* of 1922

23. In 1922, the Instruction that came to be known as *Crimen Sollicitationis* was issued by Pope Pius XI.<sup>3</sup> It was a secret law. It was not to be promulgated in the usual way by publication in the *Acta Apostolicae Sedis* ("AAS"), and it had a large note stating that it was "to be kept

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<sup>3</sup> The title of the 1922 document was *Instructio de Modo Procendi in Causis Sollicitacionis.... De Modo procendi in causas de crimine sollicitationis*. It was reissued in 1962 by Pope John XXIII with some minor amendments extending its cover to include priests who were members of religious orders. It became known as *Crimen Sollicitationis*. The original Latin text can be found at [http://www.awrsipe.com/patrick\\_wall/selected\\_documents/1922%20Instruction.pdf](http://www.awrsipe.com/patrick_wall/selected_documents/1922%20Instruction.pdf) (Accessed 27 April 2015)

carefully in the secret archive of the Curia for internal use, not to be published or augmented with commentaries.”

24. *Crimen Sollicitationis* imposed the “secret of the Holy Office” on all information obtained by the Church in its inquiries and trials for soliciting sex in the confessional, homosexuality, bestiality and the sexual abuse of children. The secret of the Holy Office was a permanent silence that bound not only the bishop and those involved in the canonical inquiries and trials, but victims and witnesses who were sworn to observe that secrecy, on pain of automatic excommunication from the Church, which could only be lifted by the pope personally.
25. The “privilege of clergy” was a right given to clergy by the Emperor Constantine in about 312CE. It provided that clergy could only be tried in Church courts for any kind of crime. It was gradually abolished by the secular State over time, and was finally abolished in England in 1827. Vestiges of it remain to this day in some Catholic countries, like Colombia.
26. The effect of *Crimen Sollicitationis* was to create a de facto privilege of clergy by the use of secrecy. If the State did not know about these crimes, there would be no State trials of clergy, and those accused of such crimes would be dealt with exclusively in the canonical courts.

#### **The Reissue of *Crimen Sollicitationis* in 1962**

27. *Crimen Sollicitationis* was reissued in 1962 by Pope John XXIII, and expanded to include priests who were members of religious orders.

#### ***Secreta Continere* 1974**

28. In 1974, Pope Paul VI by his Instruction, *Secreta Continere* abolished the “secret of the Holy Office” and replaced it with the “pontifical secret”. He expanded the Church’s highest form of secrecy outside the confessional to cover “delicts against faith and morals” by both clergy, religious and lay persons. It more than doubled the number of people within the Church who would be covered by the pontifical secret in cases of the sexual abuse of children. It further expanded the strictest secrecy to cover not only the information obtained through a

canonical inquiry and trial but also the “extrajudicial denunciation”, that is, an allegation made to the accused’s superior.<sup>4</sup>

### **The 1983 Code of Canon Law**

29. The *1983 Code of Canon Law* repealed the *1917 Code* and with it *Crimen Sollicitationis*. Between 1983 and 2001, the *1983 Code* and *Secreta Continere* regulated the Church disciplinary system for clerics and any reporting of child sexual abuse allegations to the civil authorities was prohibited.

### **Sacramentorum Sanctitatis Tutela of 2001**

30. In 2001, by his *motu proprio*, *SST 2001*, Pope John Paul II changed the procedures for dealing with child sexual abuse by clerics under the *1983 Code of Canon Law*, and confirmed that the pontifical secret applied to all such cases in accordance with *Secreta Continere*. *SST 2001* did not apply to religious brothers and sisters, and disciplinary procedures against them continued to be covered by the *1983 Code of Canon Law* and *Secreta Continere*.

### **The 2010 Revision of Sacramentorum Sanctitatis Tutela**

31. On 21 May 2010, Pope Benedict XVI revised the procedures under *Sacramentorum Sanctitatis Tutela*, (“*SST 2010*”) and expanded the pontifical secret to cover cases of clergy abuse of intellectually disabled adults and those who possessed child pornography. The new procedures did not affect disciplinary procedures against religious brothers and sisters.

### **The Reporting Dispensation and its Limitation**

32. On 12 April 2010, the CDF announced that it would instruct bishops to comply with civil laws requiring reporting, which was a dispensation from observing the pontifical secret in such cases.
33. It was limited, however, to those civil jurisdictions that had reporting laws. Very few countries have them to cover most cases of the sexual abuse of children.

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<sup>4</sup> The secret of the Holy Office provided for automatic excommunication from the Church for breach, whereas the punishment for breach of the pontifical secret depended on a number of factors. Excommunication was not excluded. The secret of the Holy Office under *Crimen Sollicitationis* was restricted to four matters: soliciting sex in the confessional, homosexuality, bestiality and the sexual abuse of children. The pontifical secret under *Secreta Continere* extended to all matters involving faith and morals, including the sexual abuse of children.



### **The Pontifical Secret**

34. The pontifical secret as imposed by Art 1(4) of *Secreta Continere* is a permanent silence, and it applies to all allegations to superiors of child sexual abuse by clerics and religious and all information obtained by the Church through its preliminary inquiry and any subsequent trial under the *1983 Code of Canon Law* or under the disciplinary provisions of Canons 694-700 dealing with religious. It permanently prohibits the publication or communication of any such allegations and information even after the trial has ended, including the judgment of the canonical court.
35. The meaning of Art 1(4), as stated above, is confirmed by canon law's rules of interpretation: the proper meaning of the words considered in their text and context, (Canon 17), the interpretation provided by the pope, the "jurisprudence and practice of the Roman Curia, and the common and constant opinion of learned persons" (Canon 19), and by the evidence on the ground: the almost universal practice of bishops and religious superiors throughout the world of failing to report these crimes to the civil authorities.

### **CANONICAL AUTHORITIES ON THE PONTIFICAL SECRET**

36. The prime source of interpretation of the canon law is the proper meaning of the words in their text and context. But further clarification and confirmation of that meaning can come from statements by the pope himself and representatives of the Roman Curia, and from expressions of opinion by respected canon lawyers.

### **Pope Francis's Response to the United Nations Committees**

37. As discussed in more detail below, in 2014, the United Nations Committee on the Rights of the Child and the Committee against Torture requested the Holy See to abolish the pontifical secret in matters of child sexual abuse and to order mandatory reporting under canon law. On 26 September 2014, Pope Francis in a formal response rejected the request.
38. Had bishops or religious superiors been free under canon law to report clergy sex crimes against children in those countries that had no or inadequate reporting laws, one would have expected Pope Francis's response to have said so, because the United Nations Committees would have been operating under a misunderstanding of the effect of the pontifical secret.

39. The fact that Pope Francis made no effort to correct any misunderstanding by the United Nations Committees confirms that the pontifical secret does prevent reporting to the civil authorities in those countries that do not have such reporting laws.

#### **Statements from the Roman Curia Congregations**

##### **1984: Instructions from the Congregation of the Clergy to Archbishop Moreno**

40. Instructions from the Congregation of the Clergy in 1984 to Archbishop Moreno asserted that documents relating to canonical crimes against “morals” were entirely private, and that any attempt to have documents relating to them subpoenaed by the civil authorities should be challenged in the United States courts as being “an intolerable attack upon the free exercise of religion.”

##### **1997: Instruction from the Congregation to the Clergy to the Irish Bishops**

41. The Congregation for the Clergy by letter of 31 January 1997 informed the Irish bishops that their proposals for mandatory “gave rise to serious reservations of both a moral and a canonical nature.” The letter was an instruction to breach the misprision of felony law in force in Ireland at the time.
42. At meetings in 1997 and 1998 between the Irish bishops and Cardinal Castrillón, Prefect of the Congregation for the Clergy, Cardinal Castrillón again rejected their request for mandatory reporting and told them that they had to be “fathers and not policemen” to their priests.

##### **2001: Prefect of the Congregation for Clergy Congratulates French Bishop**

43. In September 2001, Cardinal Castrillón wrote to Bishop Pican, who had been given a suspended jail sentence by a French court for covering up a serial paedophile priest, and congratulated him for not reporting the priest to the police, and stating that bishops should be prepared to go to jail rather report priests to the police. He said he was sending a copy of his letter to all the Catholic bishops’ conferences to encourage them to do the same. He later said that the letter had been authorised by Pope John Paul II.

### **2002: Secretary of the Congregation for the Doctrine of the Faith Rejects Reporting to the Police**

44. In February 2002, Archbishop Bertone, then Secretary of CDF stated that “the demand that a bishop be obligated to contact the police in order to denounce a priest who has admitted the offense of paedophilia is unfounded.”

### **President of the Pontifical Council for the Interpretation of Legislative Texts Rejects Reporting**

45. In April 2002, Archbishop Julian Herranz (later Cardinal), President of the Pontifical Council for the Interpretation of Legislative Texts, the pope’s delegate for the interpretation of canon law, rejected the proposal that bishops should report paedophile priests to the police. He said the relationship between a priest and bishop was subject to secrecy with which the civil law had no right to interfere by requiring reporting.

### **Other Senior Cardinals Reject Reporting to the Civil Authorities**

46. In 2002, Cardinal Rodriguez Maradiaga, who currently heads Pope Francis’s committee of Cardinals to reform the Curia, repeated Cardinal Castrillón’s assertion in his letter to Bishop Pican: that bishops should be willing to go to jail rather than report a paedophile priest to the police.
47. In 2002, Cardinal Billé, the President of the French Catholic Bishops Conference, Cardinal Lehmann, Chairman of the German Catholic Bishops Conference and Cardinal Schotte, head of the Belgian Synod of Bishops said it was not the role of bishops to report paedophile priests to the police.

### **The Canon Lawyers Confirm Canon Law’s Prohibition on Reporting**

48. In 2002, Professor Gianfranco Ghirlanda SJ, Dean of the Faculty of Canon Law at the Gregorian University and judge of the Apostolic Signatura, considered the Holy See’s Supreme Court, rejected the idea that a bishop should report paedophile priests to the police, and said it was up to the victim.
49. In 2002 and 2010, Monsignor Maurice Dooley, an Irish canon lawyer, stated that the pontifical secret prevented anyone involved in a Church investigation of child sexual abuse from reporting that information to the police. He said that it did not prevent the victim from reporting the matter, or a priest or bishop who observed the priest abusing a child.

50. In 2010, the Vatican spokesman, Fr Federico Lombardi SJ, Professor John P. Beal of the Catholic University of America and one of the authors of the *New Commentary on the Code of Canon Law*, Professor Nicholas Cafardi of the Duquesne Catholic University and Martin Long, spokesman for the Irish Catholic Bishops Conference confirmed that strict confidentiality applied to all information that was obtained in the Church's internal proceedings.
51. On 13 July 2013, Dr Rodger Austin, an Australian canon lawyer, told 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 ("Cunneen Special Commission") that if anyone involved in a Church tribunal was required to disclose to a civil court what had been said there, or to produce any documents from it, a dispensation was required. Such dispensation would have to come from the Holy See.
52. Significantly, the vast majority of these statements by the Roman Curia and their representatives, by other senior cardinals and canon lawyers were made after the promulgation of *SST 2001* by Pope John Paul II, when he confirmed the application of the pontifical secret to allegations of child sexual abuse.

## **THE PERSISTENT PATTERN**

### **The Practice of the Holy See**

53. Canon law's prohibition on reporting child sexual abuse allegations against clergy to the civil authorities created a persistent pattern all over the world whereby these allegations were not reported to the civil authorities.
54. Since the 2001 reforms, bishops were required to conduct preliminary investigations under Canon 1717, and to send the results to the CDF, which would then instruct them what to do. The Congregation has dealt with some 4,000 such cases. In none of those has the Church indicated that it had advised a bishop to report the matter to the civil authorities.

### **The Practice of the Bishops**

55. In 1994, Bishop Bede Heather of Parramatta refused to hand over to the police a report from Dr Rodger Austin about allegations of sexual abuse by priests within his diocese. A search warrant was issued and executed at his presbytery and the diocesan offices.

56. On 1 June 1995, Bishop Mulkearns, a canon lawyer with a doctorate in canon law, and one of the founders of the Canon Law Society of Australia and New Zealand told an insurance investigator that it was not his role to report a paedophile priest to the police. He kept few notes of information about allegations of child abuse by two of his priests Gerald Ridsdale and Paul Ryan. Mulkearns' statement that it was not his role reflected the statements made two years later by Cardinal Castrillón, the Prefect of the Congregation for the Clergy.
57. In 1996, Fr Brian Lucas wrote a paper for the Canon Law Society of Australia and New Zealand entitled *Are Our Archives Safe? An Ecclesial View of Search Warrants*. He concluded that no form of privilege in civil law attached to documents created by a Church tribunal. He wrote:
- “There we may need to ask, in an extreme case, should the process even begin. Should the statement be taken? There may be cases that appear to be so sensitive that it is in the best interests of the parties, or one of them, and of the Church, that the documents not be created in the first place.”
58. On any measure, Fr Ridsdale and Fr Ryan were “extreme cases”. Fr Lucas was advising canon lawyers at a conference to put into practice what in fact Bishop Ronald Mulkearns had been doing in Ballarat for some time: not keeping notes so as to prevent any such evidence coming into the hands of the civil authorities.
59. In 2009, the Murphy Dublin Report had found that the obligation of secrecy/confidentiality for participants in the canonical process could undoubtedly inhibit reporting sexual abuse to the civil authorities.
60. In 2013, the Victorian Parliamentary Inquiry found that it was reasonable to infer that the Victorian bishops' failure to report was because of the secrecy imposed by canon law.
61. The end result was that clerics and religious were not prosecuted for these crimes, and this resulted in further abuse of children, which would not have otherwise occurred.

#### **NATIONAL CATHOLIC BISHOPS CONFERENCES AND CHILD SEXUAL ABUSE**

62. Canon law can be changed for a particular territory covered by national Catholic Bishops Conferences if their proposals receive the approval (*recognitio*) of the Holy See. There were

a number of unsuccessful attempts by National Catholic Bishops Conferences to persuade the Holy See to change canon law to allow reporting.

#### **The Irish Catholic Bishops Conference**

63. In 1996, the Irish bishops drew up a protocol that required mandatory reporting of all allegations of child sexual abuse to the police, and sent it to the Holy See for approval. On 31 January 1997, the Holy See refused the request, and advised that mandatory report was inconsistent with canon law, and it was immoral for a bishop to report any priest to the police. It further threatened that if Irish bishops did report such crimes to the police any canonical proceedings instituted over child sex abuse could be declared invalid by Rome.

#### **The Australian Catholic Bishops Conference**

64. In 1996, the ACBC adopted its protocol, *Towards Healing*, which required reporting to the civil authorities where Australian domestic law required it. No approval (“*recognitio*”) was sought from the Holy See to make it canon law applicable to Australia. *Towards Healing’s* reporting and administrative leave requirements conflicted with canon law.
65. Archbishop Pell of Melbourne created his own protocol, *The Melbourne Response*, a few months before the adoption by the ACBC of *Towards Healing*. The *Melbourne Response* had no requirement for reporting, but stated that it would encourage victims to report the matter to the police. The *Melbourne Response* was consistent with canon law and the policy stated by Cardinal Castrillón, the Prefect of the Congregation for the Clergy in 1997 and 1998 to the Irish bishops that the rights of victims to report their abuse to the police should not be hindered, but that bishops should be “fathers” to their priests and not “policemen”.
66. Victorian bishops had an advantage over their New South Wales counterparts because misprision of felony had been abolished in Victoria in 1981, and mandatory reporting laws did not apply to clergy. By not reporting, the Victorian bishops were not breaching civil law, and they complied with the pontifical secret under canon law.
67. The practical result in Victoria was that none of the 611 cases of child sexual abuse known to the Church in that State from 1996 to 2012 were directly reported by the Church to the police. In New South Wales, where there was an obligation to report under S.316 of the *Crimes Act 1900*, reporting was not done by the bishops or their canonical investigators, but

by independent counsellors to whom the victims were referred. Disclosure of abuse to a counsellor was not an “extrajudicial denunciation” subject to the pontifical secret under Art1(4) of *Secreta Continere*. In this way the civil law was obeyed and a breach of canon law was avoided.<sup>5</sup>

#### **The Catholic Bishops Conference of England and Wales**

68. In 2001, the Nolan Report, adopted by the Catholic Bishops Conference of England and Wales recommended mandatory reporting. No *recognitio* was given by the Holy See.

#### **The United States Catholic Bishops Conference**

69. In 2002, the American Catholic Bishops Conference (“USCCB”) sought a *recognitio* from the Holy See of its Dallas Charter which required mandatory reporting of all allegations. The Holy See rejected the request, but agreed to a compromise allowing reporting in those States where the civil law required it. This dispensation received a *recognitio* from the Holy See in December 2002, but its operation was limited to the United States.

#### **Extension of the Limited Dispensation to the Whole Church**

70. On 12 April 2010, the Holy See issued a document called *A Guide to Understanding Basic CDF Procedures concerning Sexual Abuse Allegations*, which it said was “an introductory guide which may be helpful to lay persons and non-canonists”. It explained the various procedures, and then said that: “Civil law concerning reporting of crimes to the appropriate authorities should always be followed.” Thus the limited dispensation given to the United States in 2002 was extended to the rest of the world.

#### **The Italian and Polish Catholic Bishops Conferences**

71. In 2012 and 2014, the Italian Catholic Conference, and in 2015, the Polish Catholic Bishops Conferences announced that their bishops would not be reporting allegations of child sexual abuse to the civil authorities because neither country had civil laws requiring them to do so. This stance is consistent with canon law at the present time – the only dispensation from the pontifical secret is where there is a civil law requiring reporting.

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<sup>5</sup> At the date of this submission, the extent of the reporting in New South Wales is not publicly known.

### **Uncertainty about the Extent of the Dispensation to Allow Reporting**

72. Some uncertainty about the extent of the dispensation to the pontifical secret was created by the Vatican spokesman, Fr Federico Lombardi on 15 July 2010, when he said that reporting had to take place “in good time and not during or subsequent to the canonical trial.” The possible effect of this is: if an allegation is made that a priest has sexually abused one child (which is reported in accordance with the civil law), but the preliminary investigation under Canon 1717 or the penal trial under Canon 1718 reveals that another 20 children were abused, the information about the other 20 cannot be disclosed to the civil authorities. The “trial” under canon law commences the moment the preliminary investigation commences.

### **CANON AND CIVIL LAW ON REPORTING TO THE CIVIL AUTHORITIES**

73. The pontifical secret over allegations and information about clergy sexual abuse of children is still imposed by canon law, and prevents bishops from reporting these allegations to the civil authorities except in the limited circumstances where there are civil laws requiring reporting (and subject to Fr Lombardi’s gloss).
74. Very few countries and jurisdictions in the world have comprehensive reporting laws.

### **Civil Mandatory Reporting Laws**

75. All States of Australia have mandatory reporting laws for children at risk, but only New South Wales and Victoria have comprehensive reporting laws that include the reporting of “historical” abuse, that is where the complainant is over the age of 18 years at the time of the complaint. If the figures from the Victorian Parliamentary Inquiry can be applied generally, historical abuse represents 99% of all complaints.
76. In all States and Territories other than New South Wales and Victoria, the pontifical secret prevents bishops and religious superiors from reporting historical allegations of child sexual abuse to the civil authorities, even if they want to.

### **POPE FRANCIS AND THE UNITED NATIONS COMMITTEES**

77. On 31 January 2014, the United Nations Committee on the Rights of the Child requested the Holy See to abolish the pontifical secret over allegations of child sexual abuse by clergy and



to impose mandatory reporting. On 22 May 2014, the United Nations Committee against Torture requested the same thing.

78. On 26 September 2014, Pope Francis responded to the report of the requests by the United Nations Committee on the Rights of the Child. He rejected the Committee's request.
79. The stated reason for the rejection of the United Nations request was that it would interfere with the sovereignty of independent nations. Mandatory reporting under canon law would only interfere with the sovereignty of independent nations if those nations had domestic laws prohibiting the reporting of such crimes to the civil authorities. No such country exists.
80. If Fr Lombardi's statement on 15 July 2010 that reporting had to take place "in good time and not during or subsequent to the canonical trial" amounts to a restriction on the right to report, then canon law in its current form does interfere with Australian sovereignty by requiring bishops and religious superiors and those involved in canonical investigations and trials to breach the reporting laws where they apply.

#### **LAW AND CULTURE**

81. There is a very strong connection between law and culture. Laws are a reflection of the dominant culture in the society when the laws are passed. But their very existence deepens and perpetuates the culture that gave rise to them in the first place. Law has this effect in civil society, but it is likely to be stronger with canon law because of the Church's teaching that the popes, who promulgate canon law, are the Vicars of Christ.
82. The Church's overturning of its 1500 year old tradition of handing over clergy sex abusers of children to the civil authorities taught those lower down in the Church ranks that child sex abuse was no longer a crime to be punished by the civil law, but was no more than a "moral failure".
83. The Church saw itself as the "societas perfecta", perfectly capable of protecting the community from sexually abusive priests. There was a theological reason behind the attachment to secrecy – the protection of the faithful from a loss of faith by reason of the conduct of its priests.

### **The “Trickle Down” Effect**

84. The “trickle down” effect of this teaching from canon law since 1922, led to behaviours that went beyond the strict requirements of canon law. Examples of this are the covering up child sexual abuse by lay teachers at Catholic schools, and to sending overseas priests and religious accused of the sexual abuse of children so as to put them beyond the reach of Australian courts.

### **THE FAILURE OF THE CANONICAL DISCIPLINARY SYSTEM**

#### **The Purpose behind *Crimen Sollicitationis***

85. According to the Spanish canon lawyer, Aurelio Yanguas, writing in 1946, the intention behind *Crimen Sollicitationis* in 1922 was to avoid the scandal of having priest sex abusers in the dock by having a swift and secret means of getting rid of them.

#### **The Pastoral Approach to Child Sexual Abusers**

86. It was impossible to achieve that purpose because the *1917 Code of Canon Law* and *Crimen Sollicitationis* introduced the “pastoral approach” to clerical sexual abuse by requiring the bishop to try and cure the priest, and to resort to dismissal only if it was impossible to cure him. The secret of the Holy Office imposed by *Crimen Sollicitationis* had the effect of keeping child sex abuse by clergy hidden from the civil authorities, while attempts were made to “cure” the priests. The treatment programs failed, and more children were abused as a result.

#### **The Abolition of Dismissal by Administrative Decree**

87. In 1980, Pope John Paul II, soon after being elected, abolished the simpler method of dismissing a priest by administrative decree. The only way in which a priest could be dismissed was by the judicial method, which was rarely used because of its complexities.

#### **The 1983 Code of Canon Law**

88. In 1983, Pope John Paul II promulgated a new *Code of Canon Law* that considerably exacerbated the difficulties that bishops had of dismissing child sexual abusers amongst clergy:
- 88.1. It extended the “pastoral approach” so that the bishop had to try and cure the priest even before putting him on trial. The standard of proof was effectively the criminal

standard in civil law, of proof of beyond reasonable doubt. In civil law, the standard of proof in disciplinary matters is the balance of probabilities with the *Briginshaw* rider.

- 88.2. It imposed a Catch 22 defence: a priest cannot be dismissed for paedophilia because he is a paedophile. A diagnosis of paedophilia had the same effect as a diagnosis of insanity in civil law. Two serial paedophiles in Ireland, Fr Tony Walsh and Fr Patrick Maguire had their dismissals by a Dublin canonical court overturned in Rome because they were diagnosed as paedophiles. Under canon law, the more children a priest abuses the less likely can he be dismissed.
- 88.3. The most serious impediment of all was the 5 year limitation period. *Crimen Sollicitationis* had no limitation period, but under the *1983 Code*, if a child did not complain within 5 years of the abuse occurring, the canonical crime was “extinguished”. The end result was that there were virtually no canonical trials for paedophile priests after 1983.
89. Fr Thomas Reese SJ, in a report to the 1992 USCBC wrote that the *1983 Code of Canon Law* makes it “almost impossible for bishops to dismiss priests for sexual abuse.” At the various inquiries in Australia, Cardinal Pell, Archbishops Hart and Coleridge, Bishop Malone and Fr Brian Lucas agreed with that assessment.
90. Under the *1983 Code of Canon Law*, the same principles applied to the dismissal of religious brothers and nuns.
91. The only alternative that the Church could adopt was to try and convince the priest or religious to resign and to consent to dismissal under canon law. Fr Brian Lucas dealt with about 35 priests in trying to convince them to agree to dismissal in the period 1990-1995/96, and he regarded what he was doing as being outside the canonical system. He was not successful in most cases. Unless a priest is dismissed, he is entitled to be supported by the Church under canon law. The same applies to religious brothers and nuns. Unless they are dismissed they are entitled to remain as members of the religious community and to be supported by it.

**SST 2001**

92. In 2001, Pope John Paul II introduced some modified procedures, making it easier to dismiss a cleric. The limitation period was extended from 5 years to 10 years from the 18th birthday of the victim. In 2003, the simpler method of dismissing a priest by “administrative” action was restored. But the Pope made no changes to the “pastoral approach”, the standard of proof or to the Catch 22 defence of “imputability”. *SST 2001* did not affect the disciplinary canons applying to religious, other than the same extension of the limitation period.

**The Revision of SST 2001 in 2010**

93. On 21 May 2010, Pope Benedict XVI revised the procedures, extending the limitation period to 20 years from the 18th birthday of the victim, but he made no changes to overcome the other problems with canon law’s disciplinary system.

**CURRENT PROBLEMS WITH THE CANONICAL DISCIPLINARY SYSTEM****Inherent Structural Problems in Canon Law**

94. There are inherent structural problems within canon law itself:
- 94.1. The confusing ways in which canon law can be promulgated.
  - 94.2. Changing canon law without making corresponding changes to the Code.
  - 94.3. The ten year embargo on the publication of reports of cases through the Roman canonical appeal courts prevents canonical courts and canon lawyers from knowing the law or its interpretation at the current time.

**The Limitation Period**

95. No limitation period existed prior to the *1983 Code of Canon Law* for the canonical crime of child sexual abuse. *SST 2001* extended the 5 year period, as did the 2010 revision, but even having any limitation period is worse than what existed before 1983. There is no limitation period under canon law for soliciting sex from an adult in the confessional, suggesting that the Church regards this as more serious than the sexual abuse of children outside it.

**The Imputability Defence**

96. The imputability defence: a priest or religious cannot be dismissed for paedophilia because he is a paedophile. Canon 1321 which embodies this defence still stands in the *Code* unchanged. There is nothing in *SST 2001* or its revision in 2010 that modifies it.

### **The Pastoral Approach to Clergy Sexual Abuse of Children**

97. The “pastoral approach”, contained in Canon 1341 (for clerics) and Canon 697 (for religious brothers and sisters) has not been changed. The Church suggests that these canons are now “interpreted” differently, but as the decisions of the CDF and of the religious orders and congregations are not made public, and as the decisions of the canonical appeal courts have an embargo of ten years, there is no way this can be independently verified.

### **The Standard of Proof**

98. The standard of proof for dismissal of a priest under Canon 1608 is “moral certitude”, a standard that is the equivalent to the criminal standard of proof under Australian, English and United States law. That has not changed under the reforms.

### **Other Effects of the Pontifical Secret**

99. The pontifical secret has other effects quite apart from the failure to report instances of child sexual abuse to the police. Those who should have known about accusations against priests and religious did not know, so as to take adequate precautions for the protection of children.
100. The pontifical secret meant that canon lawyers had insufficient knowledge and experience of the operation of canonical courts, and the courts were unable to develop a uniform set of procedures.

### **Lack of Resources and Experience**

101. The Church in Australia accepts that the police are far better trained and resourced to investigate sexual abuse allegations. Church personnel do not have those skills.

### **Insoluble Conflicts of Interest**

102. The lack of separation of powers within the Church system means that the bishop or religious superior is prosecutor, judge and pastor to the perpetrators of sexual abuse. Catholic doctrine requires bishops and religious superiors to have a father/son relationship with their priests or religious. This creates insoluble conflicts of interest.

## RECOMMENDATIONS

### Recommendations to State Governments

103. Uniform legislation should be enacted throughout Australia to make it a criminal offence to fail to disclose information about the sexual abuse of children and vulnerable persons (including historical abuse) and the possession of child pornography.
104. Uniform legislation should be enacted throughout Australia to provide for a supervisory role of the Ombudsman in the canonical investigation of sexual abuse of children and vulnerable persons (including historical abuse) and the possession of child pornography, along the lines of Part 3A of the New South Wales *Ombudsman Act 1974*, and subject to suggested amendments discussed below, and subject to any criticisms of interested parties on how the Ombudsman scheme has operated in New South Wales.

### Recommendations to the Catholic Church in Australia

105. The Church in Australia should cooperate with the Royal Commission into Institutional Responses to Child Sexual Abuse (“the Royal Commission”) to draw up a new protocol to replace *Towards Healing 2010*, and in particular to deal with:
- 105.1. Reporting allegations of child sexual abuse to the civil authorities.
  - 105.2. Cooperation between the Church and the civil authorities.
  - 105.3. The supervision of Church disciplinary proceedings by the Ombudsman.
106. As an alternative to supervision by the Ombudsman, a State body such as the New South Wales *Civil and Administrative Tribunal (NCAT)* should have jurisdiction to hear disciplinary complaints against clergy and religious where the conduct complained of might amount to professional misconduct or unprofessional conduct when dealing with children.

### Recommendations to the Holy See

107. The Holy See should change canon law in line with the demands of the United Nations Committees on the Rights of the Child and against Torture to abolish the pontifical secret on all matters involving child sexual abuse, the abuse of intellectually disabled adults and the possession of child pornography, and to impose mandatory reporting of all such matters including during and subsequent to a canonical trial.

108. The Holy See should adopt, in accordance with its previous traditions, the policy of a true zero tolerance for child sexual abuse, so that priests and religious found guilty of child sexual abuse should be dismissed from the priesthood or religious life.
109. The Holy See should amend Canon 1341 and Canon 697 to exclude the “pastoral approach” in cases of child sexual abuse by clergy and religious.
110. The Holy See should amend Canon 1321 and Canon 696, replacing “imputability” with “insanity”, as understood in the Anglo/American legal system, for child sexual abuse.
111. The Holy See should amend the Code to provide for a test based on the balance of probabilities in accordance with modern civil law standards for disciplinary action in other professions.
112. The *Code of Canon Law* should be changed in accordance with Continental European practice so that amending legislation should be reflected in the Code itself.
113. The Holy See should adopt a “firm, simple and unmistakeable procedure for the promulgation of a law” to avoid the confusion that arose in the Murphy Commission as to what canon law actually says on a particular subject.
114. In cases where there might be a change of interpretation of canon law, the decisions of the Roman Congregations and appeal courts should be published immediately, and made available to everyone online. The privacy of the people involved can be protected by the use of pseudonyms and redaction.
115. The Roman Congregations and canonical appeal courts should always provide reasons for their decisions in disciplinary matters so that everyone knows the basis upon which a priest is dismissed, otherwise disciplined, or declared innocent.
116. The Holy See should make available to the civil authorities the evidence and reasons for decisions of the Roman Congregations and canonical appeal courts of all past cases involving Australian priests and religious so that an independent assessment can be made as to the

fitness of those priests and religious to remain as priests or members of their religious communities.

117. The Holy See should grant a *recognitio* of a revised protocol for Australia, approved by the Royal Commission.

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## 2: INTRODUCTION

### The Royal Commission into Institutional Responses to Child Sexual Abuse

118. There is nothing more systemic than law, whether that is the civil law under which Australian society operates, or the internal laws of private institutions such as Churches, clubs, associations or organisations.
119. Canon law, the law of the Church, is a relevant issue for the Royal Commission under the following heads of the terms of reference:
- a. what institutions and governments should do to better protect children against child sexual abuse and related matters in institutional contexts in the future;
  - b. what institutions and governments should do to achieve best practice in encouraging the reporting of, and responding to reports or information about, allegations, incidents or risks of child sexual abuse and related matters in institutional contexts;
  - c. what should be done to eliminate or reduce impediments that currently exist for responding appropriately to child sexual abuse and related matters in institutional contexts, including addressing failures in, and impediments to, reporting, investigating and responding to allegations and incidents of abuse;
  - d. what institutions and governments should do to address, or alleviate the impact of, past and future child sexual abuse and related matters in institutional contexts, including, in particular, in ensuring justice for victims through the provision of redress by institutions, processes for referral for investigation and prosecution and support services.



- f. the need to focus your inquiry and recommendations on systemic issues, recognising nevertheless that you will be informed by individual cases and may need to make referrals to appropriate authorities in individual cases;
  - g. the adequacy and appropriateness of the responses by institutions, and their officials, to reports and information about allegations, incidents or risks of child sexual abuse and related matters in institutional contexts;
  - h. changes to laws, policies, practices and systems that have improved over time the ability of institutions and governments to better protect against and respond to child sexual abuse and related matters in institutional contexts.
120. There are two particular issues involving canon law that are relevant to the extent and the continuation of the sexual abuse of children within the Church:
- 120.1. Reporting of child sexual abuse to the civil authorities (Terms of Reference a, b, c, d, f, g and h)
  - 120.2. The Church's disciplinary system under canon law (Terms of Reference a, b, c, d, f, g and h)
121. The following particular matters in Issues Paper 11 of 5 May 2016 are dealt with in this submission: 1a, b, c, d, e, h, i, j, i, 2, 3, 4, 5 and 6.

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### 3: CANON LAW

122. Canon law is defined by the Catholic Encyclopaedia as

“... the body of laws and regulations made by or adopted by ecclesiastical authority, for the government of the Christian organization and its members.”<sup>6</sup>

#### The Codes of Canon Law

123. Prior to the promulgation of the first *Code of Canon Law* in 1917, canon law was contained in papal and Council decrees accumulated over centuries. Pope Pius X set up the first Commission that took fourteen years to pull it all together into a single Code.

124. Pope John XXIII is best known for having called the Second Vatican Council, but he also set up a Commission in 1963 to revise the *1917 Code*. Twenty years later on 25 January, 1983, Pope John Paul II put his signature to the *1983 Code of Canon Law* to replace the *1917 Code*. However, neither the *1917 Code of Canon Law* nor the *1983 Code* is the exclusive source of canon law.

125. Canon law derives from Roman law, and its official language is Latin. Translations are available on the Vatican website.<sup>7</sup> The word “norm” in English usually means a standard or

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<sup>6</sup> <http://www.newadvent.org/cathen/09056a.htm> (Accessed 9 February 2013). There are various jurisprudential theories about the nature of canon law, described by Fr Ladislav Orsy SJ in an essay entitled *Theology and Canon Law* in the *New Commentary on the Code of Canon Law*, p.1. The Italian School regards canon law as no different to civil law that happens to apply to the Church. The Navarra School is similar except that it says that the Church controls every aspect of that law, including its interpretation. The Munich School regards canon law as just another part of theology that happens to deal with rules of governance. Eugenio Corredo on the other hand, regarded it as virtually divine. Orsy seems to adopt a half way position between the extremes, and says that canon law is “part of the sacramental structure of the Church itself, a sign and symbol of our humanity *that is being redeemed*”, and that “in theology, the Church contemplative is speaking to the people and in canon law, the Church active is guiding the faithful”. Another canon lawyer, Fr John J. Coughlin OFM, sees the *1983 Code of Canon Law* as a “sacred symbol” and as having a “sacramental character of truth and trust and points to the fullest possibilities for the individual and community”: *Canon Law and the Human Person*, (2003). Scholarly Works. Paper 726. [http://scholarship.law.nd.edu/law\\_faculty\\_scholarship/726](http://scholarship.law.nd.edu/law_faculty_scholarship/726) (Accessed, 23 May 2015)

Both Orsy and Coughlin seem to regard canon law as “quasi divine”, reflecting their theology of the nature of the Church as a human institution inspired by the Holy Spirit. This might explain why clergy, and particularly canon lawyers, would look upon canon law with more reverence than ordinary citizens would regard civil law, and might then be less inclined to see canon law’s inherent faults. It also might explain why it is so difficult to change canon law. In secular society, civil law is often criticized for being an “ass”, and is always subject to debate and calls for reform. Another canon lawyer, Fr Thomas Doyle OP sees canon law in more human terms as a “collection of rules and norms that form the internal regulatory system of the institutional dimension of a worldwide religion.”: *Canon Law: What is it?*

[http://www.awrsipe.com/doyle/2006/2006-02-Canon\\_Law-What\\_Is\\_It.pdf](http://www.awrsipe.com/doyle/2006/2006-02-Canon_Law-What_Is_It.pdf) (Accessed 22 May 2015). The views of Orsy and Coughlin are more likely to have wider acceptance in the Church.

<sup>7</sup> [www.vatican.va](http://www.vatican.va)

level of behaviour, without it necessarily being legally binding, but general and particular laws are often referred to as “norms” in canon Law.

### Clerics and Lay Persons

126. Canon law draws a distinction between clerics or clergy and lay persons. Clerics are those who have been ordained into Holy Orders, and include deacons, priests and bishops.<sup>8</sup> Canon 1008 provides:

“By divine institution, the sacrament of orders establishes some among the Christian faithful as sacred ministers through an indelible character which marks them. They are consecrated and designated, each according to his grade, to nourish the people of God, fulfilling in the person of Christ the Head the functions of teaching, sanctifying, and governing.”

127. Religious brothers and nuns who have not received the sacrament of ordination are “lay persons”, although they have a special role in the life of the Church. Canon 208 asserts that the Christian faithful have a “true equality regarding dignity and action...according to each one’s own condition and function.”

128. This reflects the teachings of the Second Vatican Council.<sup>9</sup> In contrast, in 1906 Pope Pius X in his encyclical *Vehementer Nos* described the relationship between clergy and the laity (including religious brothers and nuns) in these terms:

“It follows that the Church is essentially an unequal society, that is, a society comprising two categories of persons, the Pastors and the flock, those who occupy a rank in the different degrees of the hierarchy and the multitude of the faithful. So distinct are these categories that with the pastoral body only rests the necessary right and authority for promoting the end of the society and directing all its members towards that end; the one duty of the multitude is to allow themselves to be led, and, like a docile flock, to follow the Pastors.”<sup>10</sup>

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<sup>8</sup> Canon 1009.

<sup>9</sup> *Lumen Gentium* 32

<sup>10</sup> [http://www.vatican.va/holy\\_father/pius\\_x/encyclicals/documents/hf\\_p-x\\_enc\\_11021906\\_vehementer-nos\\_en.html](http://www.vatican.va/holy_father/pius_x/encyclicals/documents/hf_p-x_enc_11021906_vehementer-nos_en.html). (Accessed 1 October 2013). John P. Beal in *As Idle as a Painted Ship upon a Painted Ocean”: a People Adrift in the Ecclesiastical Doldrums* in *The Structural Betrayal of Trust*, Concilium 2004/3 blames this “top-down” ecclesiology for fostering the sexual abuse crisis: “all lines of accountability lead upwards from the faithful, to presbyters and deacons, to the bishop, to the pope and ultimately Christ, rarely horizontally to fellow bishops, presbyters, deacons and ministerial collaborators and never downwards to those entrusted to the pastoral care of the ordained”, and leads to rejection of reforms based on secular standards on the basis that “the Church is not a democracy”. Another problem, he says is the Vatican bureaucracy which controls the one directional flow of information.

129. As will be described in more detail, this attitude that the clergy were special people and the laity docile followers infected the first *Code of Canon Law* in 1917, and it still has an influence, despite the changed emphasis of the Second Vatican Council.
130. Although religious brothers and nuns are categorised as “lay persons”, canon law has specific canons that apply to them, including disciplinary ones.<sup>11</sup>

### Canonical Crimes

131. Canon law creates its own crimes, which it calls “delicts”.<sup>12</sup> Some of those crimes are peculiar to the Church and do not constitute crimes under any civil law (a term used to cover both State criminal and civil law in this submission). Examples are desecrating the Holy Communion wafer or breaking the seal of the Confessional. But others overlap, and some matters are crimes both under both canon law and civil law: homicide, kidnapping, mutilating or gravely wounding someone, fraud, and sexual assaults on minors.<sup>13</sup> Some crimes can be committed by any Catholic, both clerical and lay (for example homicide, kidnapping, assaulting the Pope, etc.), and some only by clerics and religious (that is, brothers and sisters who have not taken Holy Orders), for example, the sex assaults against children under Canon 1395. A non-religious lay person who sexually assaults a child is still committing a mortal sin, but it is not a canonical crime that would see him or her subject to a penal procedure under canon law.

### Conflicts between Canon and Civil Law

132. Canon 22 deals with conflicts between canon and civil Law.

“Civil laws to which the law of the Church yields are to be observed in canon law with the same effects, insofar as they are not contrary to divine law and unless canon law provides otherwise.”<sup>14</sup>

133. Canon 22 can be interpreted narrowly to mean that it only applies where canon law specifically “yields” to or adopts the civil law.<sup>15</sup> Examples of this adoption are in relation to the age of minority, contracts and a number of other matters. On this interpretation, the

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<sup>11</sup> “The Obligations and Rights of Institutes and Their Members” : Canons 662-672, and the disciplinary provisions in Canons 694-700.

<sup>12</sup> The glossary attached to the Code provides: “*Delict: a crime in canon law, an external violation of a law or precept gravely imputable by reason of malice or negligence.*” [http://www.vatican.va/resources/resources\\_glossary-terms\\_en.html](http://www.vatican.va/resources/resources_glossary-terms_en.html) (Accessed 12 March 2013)

<sup>13</sup> Canons 1397 and 1395

<sup>14</sup> [http://www.vatican.va/archive/ENG1104/\\_P3.HTM](http://www.vatican.va/archive/ENG1104/_P3.HTM) (Accessed 6 March 2013)

<sup>15</sup> “Yield” is perhaps not the best translation of the Latin. The word “adopts” is better and refers to the fact that in some areas, canon law makes the civil law in certain subject matters (eg contracts, inheritance etc) part of canon law.

priority of canon law only applies in those particular subject matters where canon law prescribes something different to what is in the civil.<sup>16</sup>

134. The American canon lawyer, Ladislav Orsy, commenting on this canon in 1985 said:

“Most of the time, canon law and civil law operate side by side, independently of each other; thus there are many cases in which the same person, physical or juridical, is the subject of two distinct sets of rights and duties, one in canon law and another in civil law. If conflict arises, experts must find the best solution they can.”<sup>17</sup>

135. Orsy’s view seems to reflect the narrow interpretation that in general the *1983 Code* is silent on the issue of conflict between the two legal systems, but even on this view there is a complication in relation to the issue of reporting clergy sex abuse to the civil authorities, because, as we shall see later, *Secreta Continere* purports to take away the conscience of those bound by the pontifical secret. The only “solution” is to preserve the secret.<sup>18</sup>

136. On the other hand, Beal, Coriden and Green in *The New Commentary on the Code of Canon Law* and other canonists elsewhere say that Canon 22 expresses a more general principle whereby canon law has priority over civil law wherever there is a conflict.

“For Catholics, two systems of law oblige simultaneously, canon law (including divine law) and legitimate civil laws. While both systems are binding with separate but parallel systems, **canon law prevails where it conflicts with civil law.** (My emphasis)”<sup>19</sup>

<sup>16</sup> Canon 98§2, and 1290. The problem with the narrow interpretation is that the words “unless canon law provides otherwise” are superfluous. The “canonization” or adoption of the civil law will only happen if canon law specifically says so.

<sup>17</sup> L. Orsy, “General Norms” in J.A Coriden, T.J Green and D.E Heintschel (eds) *The Code of Canon Law. A Text and Commentary*, New York/Mahwah: Paulist Press 1985, p.38, quoted in Rik Torfs: *Child Abuse by Priests: The Interaction of State Law and Canon Law in The Structural Betrayal of Trust*, Concilium 2004/2003 SCM Press, London.

<sup>18</sup> See Chapter 6.

<sup>19</sup> This view is consistent with the *1917 Code* where the canonist, Stanislaus Woywod in his *1923 Commentary* said that both civil and spiritual power are instituted by God “and in that respect are alike competent and independent of each other, each in the proper sphere of its jurisdiction. If the two powers are compared in rank and importance, it is evident that the purpose for which God ordained the spiritual power is far above the purpose of the civil power. The spiritual power should, therefore, get the preference in a conflict of jurisdiction.” S Woywod, *Practical Commentary on the Code of Canon Law*, J F Wagner, New York, 19253, 3-5.

John P. Beal, James A. Coriden and Thomas J. Green, *New Commentary on the Code of Canon Law* (2000), Paulist Press, 85. Thomas J Paprocki in the same *New Commentary* at p. 1803 says: ‘...as long as civil laws are not contrary to divine law or unless canon law provides otherwise, canon law often defers to civil laws (c.22), especially civil contract law (c.1290), labour laws (cc231§2 and 1286), prescription (cc.197-199 and 1268-1270), the law of wills and inheritance (c.1299§2), and probably also tort law (compensation for negligent and intentional harms and injuries: see c128).’ He makes no mention of criminal law.

Monsignor Green appears to have repeated this broader interpretation of Canon 22 when discussing the Dallas Charter: *Critique of the Dallas Charter* at [http://natcath.org/NCR\\_Online/documents/Greencritique.htm](http://natcath.org/NCR_Online/documents/Greencritique.htm) par K (Accessed 17 August 2013): “Should there be a generic reference to issues of overlapping jurisdiction, canonical and civil, in this area (e.g., reporting obligations) and to the need for bishops and religious superiors to be duly attentive to the requirements of both? However, we also need to consider certain canonical qualifications regarding Church observance of civil law [c. 22], e.g.,

137. Whatever may be the situation for lay Catholics where there are conflicting provisions of canon and civil law, the position of office holders in the Church is clear: Canon 833 requires all those taking on positions in the Church hierarchy, and those in religious orders to make a

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privileged communications such as those subject to the inviolable confessional seal [cc. 983; 1388]. Such a nuanced approach to civil law is lacking in the last sentence of the penultimate paragraph of the document, which says simply: 'We also note that diocesan/eparchial policies must be in accord with the civil law.'

Fr Langes Silva JCL, JCD in "Canon Law and Secular Law: A Comparative Essay", Intermountain Catholic News Jun 14, 2007 states: "Where it applies, the civil laws are to be observed with the same effects in canon law. However, matters cannot be left to civil law if its prescriptions are contrary to divine law, or if canon law has made other provisions.":

<http://www.freerepublic.com/focus/f-religion/1850280/posts>. (Accessed 1 February 2013).

John E Date in 'Implications of Canon Law for Church Organisations Operating in Australia', Master of Laws thesis for Melbourne University Law School p.3 says: "When the law conflicts with canon law, the latter prevails."

<https://minerva-access.unimelb.edu.au/handle/11343/35832> (Accessed 8 Sept 2013).

Elizabeth Delaney in *Canonical Implications of the Response of the Catholic Church in Australia to Child Sexual Abuse in Australia*, a doctoral dissertation submitted to the Faculty of Canon Law, Saint Paul University, Ottawa, Canada, (2004)p. 222 argues that respect for civil law, unless it conflicts with divine law is an essential aspect of Christian morality. However, she makes no mention of Canon 22 or what is the position where there is a conflict between canon law and civil law. Canon 1282 §2.3 provides that administrators shall "observe the prescripts of both canon and civil law...and especially to be on guard so that no damage comes to the Church from the non-observance of civil laws." However, the context of this canon is limited to the protection of ecclesiastical property.

John J. Coughlin in *Canon Law: A Comparative Study with Anglo-American Legal Theory*, (Oxford University Press), 44 refers to the case of an obligation to attend Sunday Mass, where the driver has a suspended licence: "The civil law requiring a valid licence is not contrary to divine law; rather it is a reasonable requirement directed towards the common good.

Although the Sunday obligation reflects divine law, it does excuse (sic) one from the obligation of the civil law requiring a driver to have a valid licence. If canon law and civil law conflict, and canon law is merely ecclesiastical law, the canon law would not oblige in the case when obeying it would cause grave inconvenience." It is not clear what Coughlin means by "mere ecclesiastical law", but presumably he seems to think that going to Mass on Sunday is not one of them, and even though it is not "divine law", it "reflects" it, and would justify driving to Mass while on a suspended driving licence.

Coughlin's reference to "grave inconvenience" may have been a reference to Can. 1247, which provides: "On Sundays and other holy days of obligation, the faithful are obliged to participate in the Mass." Can. 1248 §2 provides. "If participation in the eucharistic celebration becomes impossible because of the absence of a sacred minister or for another grave cause, it is strongly recommended that the faithful take part in a liturgy of the word if such a liturgy is celebrated in a parish church or other sacred place according to the prescripts of the diocesan bishop or that they devote themselves to prayer for a suitable time alone, as a family, or, as the occasion permits, in groups of families." Coughlin seems to think that the loss of a licence is not a "grave cause" to justify not going to Mass. Although Coughlin does not mention the pontifical secret, *Secreta Continere* would suggest that this is not "mere ecclesiastical law", because it purports to take away the conscience of the person who is bound by the secret, but rather is part of "divine law". It may also be another ecclesiastical law that "reflects" divine law. Even assuming it is a "mere ecclesiastical law", *Secreta Continere* makes it clear that there is no situation, not even in conscience, that constitutes a "grave cause" that would justify a bishop breaking it.

A practical example the Church claiming the superiority of canon over civil law occurred in the case of Archbishop John Vlazny of Portland Oregon who stated publicly that he would follow Church law in spite of a civil court ruling which stated that ownership of property in secular society follows civil law: William McCall, *Associated Press in Corvallis Gazette-Times*, January 8, 2006, "The leader of the Roman Catholic Archdiocese of Portland says the church will follow its own law on ownership of its property despite a ruling by a federal bankruptcy judge declaring it potentially subject to sale to satisfy claims by victims of alleged priest sex abuse.", quoted in Doyle: *Canon Law: What is it?*

[http://www.awrsipe.com/doyle/2006/2006-02-Canon\\_Law-What\\_Is\\_It.pdf](http://www.awrsipe.com/doyle/2006/2006-02-Canon_Law-What_Is_It.pdf) (Accessed 22 May 2015). The Murphy Report on child sexual abuse in the Archdiocese of Dublin (2009), concluded that 'Catholic Church authorities, in dealing with complaints against its clerics, gave primacy to its own laws.': Par 4.1. This practice was consistent with the broader interpretation of Canon 22.

Bishop Gerald Kicanas of Tucson told a court in that city that he was required to operate under both sets of laws, civil and canon law. He conceded that he had to obey the civil law "unless they are in contradiction to the canon law, in which case, I'd have to find a way to work through that." Robert Blair Kaiser: *Whistle: Tom Doyle's Steadfast Witness for Victims of Clerical Sexual Abuse*, *Caritas Communications* (2015), loc. 2634.

Rodger Austin, the Australian canon lawyer, told the Cunneen Special Commission that anyone involved in canonical tribunal work would have to obtain a dispensation before revealing any information to a civil court about what was disclosed at the tribunal. Under canon law, such a dispensation would have to come from the Holy See. In other words, canon law takes precedence over civil law for Catholics in that situation, and that view is consistent with the requirement of *Secreta Continere* that keeping the secret is the bishop's conscience: :

[http://www.lawlink.nsw.gov.au/lawlink/Special\\_Projects/ll\\_splprojects.nsf/vwFiles/Transcript\\_Day\\_20\\_-\\_TOR\\_2\\_-\\_31\\_July\\_2013.pdf/\\$file/Transcript\\_Day\\_20\\_-\\_TOR\\_2\\_-\\_31\\_July\\_2013.pdf](http://www.lawlink.nsw.gov.au/lawlink/Special_Projects/ll_splprojects.nsf/vwFiles/Transcript_Day_20_-_TOR_2_-_31_July_2013.pdf/$file/Transcript_Day_20_-_TOR_2_-_31_July_2013.pdf), (Accessed 29 March 2015), p.2233

“profession of faith” according to an approved formula which also requires them to swear that they will obey all ecclesiastical laws and especially the *Code of Canon Law*.<sup>20</sup> They are not required to swear oaths to obey the civil law.

### The Pope as the Source of Canon Law

138. The source of all canon law is the Pope. The Pope is an absolute monarch in the political and legal sense. Canon 331 of the *1983 Code of Canon Law* provides that the Pope possesses, by virtue of his office, supreme, full, immediate, and universal ordinary power in the Church, which he is always able to exercise freely. There is no appeal from the decision of the Roman Pontiff, and the Pope is to be judged by no one.<sup>21</sup>
139. General councils of the Church, meetings of all the bishops of the Church, can pass decrees that become part of canon law, but they are called infrequently. The most recent general councils were the Council of Trent (1563), the First Vatican Council (1870) and the Second Vatican Council (1965). Virtually all canon law creating specific rights or obligations derives from the Pope at the time.
140. Theoretically the Pope governs the Church with the Bishops, but for practical reasons, he has his own “cabinet ministers” called the “Roman Curia”. It consists of a number of departments that are known as “dycasteries” or “congregations” that are headed by a senior Cardinal called a “Prefect”.<sup>22</sup>

### Canonical Documents

141. The documents that create canon law can take on a variety of forms, depending on the circumstances in which they are created, and whether they are signed by the pope or by one

<sup>20</sup> [http://www.vatican.va/archive/ENG1104/\\_P2R.HTM](http://www.vatican.va/archive/ENG1104/_P2R.HTM) (Accessed 3 March 2013), and [http://www.vatican.va/roman\\_curia/congregations/cfaith/documents/rc\\_con\\_cfaith\\_doc\\_19880701\\_professio-fidei\\_en.html](http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_19880701_professio-fidei_en.html) (Accessed 3 March 2013) “I shall follow and foster the common discipline of the entire Church and I shall maintain the observance of all ecclesiastical laws, especially those contained in the Code of Canon Law.”

<sup>21</sup> Canon 333§3 and Canon 1404 [http://www.vatican.va/archive/ENG1104/\\_INDEX.HTM](http://www.vatican.va/archive/ENG1104/_INDEX.HTM) (Accessed 9 February 2013)

<sup>22</sup> In the reorganisation of the Roman Curia by Pope Paul VI in his Apostolic Constitution *Regimini Ecclesiae Iniversae* issued on 15 August 1967, effective from 1 March 1968, Paul VI provided that “All Congregations are juridically equal and the Congregation for the Doctrine of the Faith over which the Pope had presided since 1908 now had its own Cardinal Prefect.”: Ian Waters, *The Law of Secrecy in the Latin Church, The Canonist* Vol 7 No 1, 75 at 82. Pope John Paul II carried out a further restructuring in 1988 with his Apostolic Constitution, *Pastor Bonus*. Brendan Daly states: Article 52 of *Pastor Bonus* gave exclusive penal jurisdiction to the Congregation for the Doctrine of the Faith. This ensured that the Congregation ..was not only competent with regard to offences against the faith or in the celebration of the sacraments, but also with regard to “more serious offences against morals.” However there was no public statement or advice to bishops about dealing with paedophilia and there was no action from the Congregation.”: *The Instruction Crimen Sollicitationis...*The Canonist Vol 7 No. 1 (2016) p 10 at 22.

of the Curia Prefects with his authority. The most important document is the Code itself and then apostolic constitutions, apostolic letters *motu proprio*, decrees, instructions and notifications. The precise classification of the document is not as important as the person from whom they derive.<sup>23</sup> The difference between a “law” signed by the pope and an “instruction” signed by the Prefect of a Curia congregation appears to be the same as the difference between a statute and a regulation under the English common law system.<sup>24</sup>

142. Regulations under the common law system and instructions under the canonical system provide further detail as to how the statutes passed by parliament and decrees signed by the pope are to be carried out. The regulation or instruction must be within the authority of the original decree or statute to be valid.<sup>25</sup> While instructions under canon law act as guides on how canon law is to be implemented, they are obligatory and have the force of law, especially if they are issued on the authority of the pope.<sup>26</sup>

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<sup>23</sup> Beal, Coriden and Green: *New Commentary on the Code of Canon Law* (Paulist Press, 2000) p.100ff. Address given by Rev Professor Ian Waters 29 October 2014, Melbourne, Australia: [http://www.youtube.com/watch?v=7\\_jaQKTe4VY&feature=youtu.be](http://www.youtube.com/watch?v=7_jaQKTe4VY&feature=youtu.be) (Accessed 30 November 2014), and see transcript and the author’s commentary: <http://www.awrsipe.com/Misc/Ian-Waters-Speech-with-Commentary5.pdf> (Accessed 22 April 2015)

<sup>24</sup> Canon law has the same concept of “ultra vires” in civil law. Canon 34§2 provides: “The ordinances of instructions do not derogate from laws. If those ordinances cannot be reconciled with the precepts of laws, they lack of all force.” However, if they are within the limits of the law, they have the force of law: see also Brendan Daly: *The Instruction Crimen Sollicitationis on the Crime of Sollicitation: Confusion or Cover up of paedophilia: The Canonist* Vol 7 No.1 (2016)10, at 18. Some question may arise as to whether the canonical “ultra vires” applies to an instruction given by the pope in *forma specifica*, but the issue is not of any relevance here.

<sup>25</sup> Canon 34 §1 says: “Instructions clarify the precepts of laws and elaborate on and determine the methods to be observed in fulfilling them. They are given for the use of those whose duty it is to see that laws are executed and **oblige them** in the execution of the laws. Those who possess executive power legitimately issue such instructions within the limits of their authority.” (my emphasis).

<sup>26</sup> Beal, Coriden and Green: *New Commentary on the Code of Canon Law* (Paulist Press, 2000) p,100. This is particularly true if the instructions are issued by the pope. Both *Crimen Sollicitationis* and *Secreta Continere* were instructions signed by Curia Cardinals, but they were instructions issued on the authority of Pope Pius XI and Pope Paul VI respectively. *Crimen Sollicitationis* has this note at the bottom: “FROM AN AUDIENCE WITH THE HOLY FATHER, 16 MARCH 1962, His Holiness Pope John XXIII, in an audience granted to the Most Eminent Cardinal Secretary of the Holy Office on 16 March 1962, graciously approved and confirmed this Instruction, ordering those responsible to observe it and to ensure that it is observed in every detail. Given in Rome, from the Office of the Sacred Congregation, 16 March 1962. L.+ S.A. Card. Ottaviani.” : [http://www.vatican.va/resources/resources\\_crimen-sollicitationis-1962\\_en.html](http://www.vatican.va/resources/resources_crimen-sollicitationis-1962_en.html) (Accessed 4 August 2013). Pope Benedict XVI in 2010 confirmed in his revision of the 2001 Moto Proprio that *Crimen Sollicitationis* “had the force of law”.: <http://www.documentcloud.org/documents/243690-10-sacramentorum-sanctitatis-2001-with-2003.html> (Accessed 4 August 2013). *Secreta Continere* has this notation: “In the audience to the undersigned on 4th day of the month of February in the year 1974, the Supreme Pontiff, Paul VI approved this instruction and ordered that it be published with the stipulation that it go into force on the 14th day of the month of March of the same year, all things to the contrary notwithstanding. Joannes Card. Villot, Secretary of State.”: William Woestman: *Ecclesiastical Sanctions and the Penal Process* (St. Paul University 2003) Appendix VII, p.237. Woestman also confirmed that *Secreta Continere* was not abrogated by the 1983 Code and was ‘ius vigens’, that is, that it had the force of law: Beal: *The 1962 Instruction: Crimen Sollicitationis: Caught Red Handed or Handed a Red Herring?* (2007) 41 *Studia Canonica* 199, p.232, fn 128 <http://www.vatican.va/resources/Beal-article-studia-canonica-41-2007-pp.199-236.pdf> ,(Accessed 5 August 2013). Brendan Daly says that “significant documents are sometimes approved by the Pope in *forma specifica*. This approval gives the document legislative force.” He concedes that *Crimen Sollicitationis* was approved in *forma specifica*: *The Instruction Crimen Sollicitationis on the Crime of Sollicitation: Confusion or Cover up of paedophilia: The Canonist* Vol 7 No.1 (2016)10, at 19.



143. But ultimately it is the Pope alone who makes canon law. Whereas the United States President, Harry Truman, once said “The buck stops here”, that was only partly true because he could always be inhibited by the United States Congress, the Senate, the Supreme Court or the United States Constitution itself. The Pope is answerable to no person, court or institution, and the “buck” for any policy expressed in canon law truly does stop with him.<sup>27</sup>
144. The 1983 Code of Canon Law requires that the universal law of the Church is to be promulgated by publication “in the official commentary, *Acta Apostolicae Sedis*, unless another manner of promulgation has been prescribed in particular cases.”<sup>28</sup>

### **The Promulgation of Canon Law**

145. Canon law requires not only promulgation by the legislator (the pope), but the law must also be ‘received’ or ‘accepted’ by those subject to it.<sup>29</sup> In the case of the pontifical secret imposed by canon law on allegations of child sexual abuse of clergy, these laws were ‘received’ by the bishops because the practice of observing the pontifical secret and not reporting these crimes to the police was almost universal.

### **The “Parallel” Systems of Law**

146. In his Pastoral Letter to the people of Ireland of 19 March 2010, Pope Benedict XVI told the Irish bishops that they had to “cooperate” with the civil authorities in matters of child abuse “in their area of competence”.<sup>30</sup> He did not elaborate on what he meant by the “area of competence” of the civil authorities, nor did he define what cooperation meant.

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<sup>27</sup>John P. Beal, James A. Coriden and Thomas J. Green, *New Commentary on the Code of Canon Law* (2000), 13: ‘No laws or general decrees with the force of law or derogations from laws may be issued without the specific approbation of the Roman Pontiff.’ The Pope is restrained by Scripture and the teachings of the Church as contained in the Magisterium handed down over the centuries. In the case of child sexual abuse, both Scriptures and the Church’s tradition are clear – and in the latter case at least until 1922: child sexual abuse is not only a most serious sin, but it is a crime that deserves severe punishment in this life as well as in the next: Mark 9:42 and see Chapter 4.

<sup>28</sup>Can. 8 §1. This is identical with canon 9 of the 1917 Code: Bachofen *Commentary on the New Code of Canon Law*, p 81, (1918) St. Louis, Mo., B. Herder book co., 1918-1922. *Crimen Sollicitationis* was one example of an instruction that was not promulgated by such publication, but the same was true of *Sacramentorum Sanctitatis Tutela* signed by Pope John Paul II: John P. Beal “*The 1962 Instruction: Crimen Sollicitationis: Caught Red Handed or Handed a Red Herring?*” 41 *Studia Canonica* 199 at 230: [http://www.vatican.va/resources/resources\\_introd-storica\\_en.html](http://www.vatican.va/resources/resources_introd-storica_en.html) (Accessed 5 August 2013). It was sent to all the bishops with an explanatory letter.

<sup>29</sup>James A Coriden: *The Doctrine of Reception*: [http://www.arcc-catholic-rights.net/doctrine\\_of\\_reception.htm](http://www.arcc-catholic-rights.net/doctrine_of_reception.htm) (Accessed 11 August 2014)

<sup>30</sup>[http://www.vatican.va/holy\\_father/benedict\\_xvi/letters/2010/documents/hf\\_ben-xvi\\_let\\_20100319\\_church-ireland\\_en.html](http://www.vatican.va/holy_father/benedict_xvi/letters/2010/documents/hf_ben-xvi_let_20100319_church-ireland_en.html) (Accessed 9 February 2013)

147. On 13 July 2011, the Murphy Commission handed down its Report on the Cloyne diocese of (*Murphy Cloyne Report*).<sup>31</sup> In a response to criticisms of the Holy See by the Irish Foreign Minister, Mr Ian Gilmore for interfering in Irish affairs, as revealed in that Report, the Vatican published a response on 3 September 2011, in which it said

“...canon law and civil law, while being two distinct systems, with distinct areas of application and competence, are not in competition and can operate in parallel.”<sup>32</sup>

148. The problem is that canon law does not always keep its areas of application distinct. It also creates canonical crimes of homicide, kidnapping, causing serious bodily harm, fraud, sexual assaults on minors and more recently sexual assaults on intellectually disabled people and the possession by clerics of child pornography, all of which are crimes under the civil law.

149. There is nothing wrong with that in principle. Rules of professional associations often provide for people to be deregistered or struck off the rolls for activities that are also crimes under civil law (doctors for drug dealing and lawyers for stealing money from trust accounts). The big difference is that canon law prevents those in the Church who are investigating those crimes to report the allegations and evidence to the police. If there is a requirement to report such crimes under the civil law, their oath of office requires them to follow canon law. Canon law and civil law have been in competition over clergy sex crimes against children since 1922 and over sexual crimes against children by religious nuns and brothers since 1974. The Church’s supposedly “parallel” line has crossed over into the legitimate area of competence of the State with disastrous consequences for children.

150. While the principle source of canon law is the Pope, and occasionally General Councils of the Bishops of the Church, there is another way that canon law can be declared for a particular geographical area. This is through Bishops Conference resolutions that are approved by the Holy See. Canon 20 distinguishes between universal laws that apply to the whole Church and particular laws which apply to the Church in a specific region.<sup>33</sup>

### **National Catholic Bishops Conferences**

151. Although the Catholic Church is hierarchical with its pope, cardinals, archbishops, bishops, monsignors, and priests in descending order, it is not organized strictly like an international

<sup>31</sup> [http://www.justice.ie/en/JELR/Cloyne\\_Rpt.pdf/Files/Cloyne\\_Rpt.pdf par 4.22](http://www.justice.ie/en/JELR/Cloyne_Rpt.pdf/Files/Cloyne_Rpt.pdf%20par%204.22) (Accessed 6 March 2013)

<sup>32</sup> [http://www.vatican.va/resources/resources\\_risposta-gilmore\\_20110903\\_en.html](http://www.vatican.va/resources/resources_risposta-gilmore_20110903_en.html) (Last accessed 30 March 2013)

<sup>33</sup> John P. Beal, James A. Coriden and Thomas J. Green, *New Commentary on the Code of Canon Law* (2000), 83

corporation where lower members of the hierarchy are answerable to the one higher in the pecking order. Each bishop is effectively the governor of his diocese, and controls it within the limits of canon law laid down by the popes.<sup>34</sup> But there were times in the past where the bishops came together, and agreed on laws to apply in their own regions. These Councils were usually named after the place where the meeting was held, such as Nicea, Carthage etc.<sup>35</sup>

152. The authority of these regional Councils was eventually formalised and incorporated into canon law which now recognizes national Conferences of Bishops which can only be set up by the pope.<sup>36</sup> Australia, for example, has its Australian Catholic Bishops Conference. These Conferences can pass resolutions which become canon law for the region provided that they receive the approval or “*recognitio*” of the Holy See.<sup>37</sup> If the resolutions were passed by a two thirds majority, and the Holy See approved the measure, then it becomes canon law for the particular region, forcing all to comply.<sup>38</sup>
153. The issue of a “*recognitio*” for the United States, Australia, Britain and Ireland whose bishops wanted to have the right to report clergy sex abusers to the police is a significant matter in

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<sup>34</sup> Ibid and

[http://www.parliament.vic.gov.au/images/stories/committees/fcdc/inquiries/57th/Child\\_Abuse\\_Inquiry/Submissions/Catholic\\_Church\\_in\\_Victoria.pdf](http://www.parliament.vic.gov.au/images/stories/committees/fcdc/inquiries/57th/Child_Abuse_Inquiry/Submissions/Catholic_Church_in_Victoria.pdf) (Accessed 6 April 2013) par 4.4, Cardinal George Pell, evidence before the Victorian Parliamentary Inquiry

[http://www.parliament.vic.gov.au/images/stories/committees/fcdc/inquiries/57th/Child\\_Abuse\\_Inquiry/Transcripts/Catholic\\_Archdiocese\\_of\\_Sydney\\_27-May-13.pdf](http://www.parliament.vic.gov.au/images/stories/committees/fcdc/inquiries/57th/Child_Abuse_Inquiry/Transcripts/Catholic_Archdiocese_of_Sydney_27-May-13.pdf) p. 3 (Accessed 22 June 2013)

<sup>35</sup> Thomas Doyle, Affidavit, Jane Doe v Omi of Texas, [http://www.bishop-accountability.org/news2008/03\\_04/2008\\_03\\_03\\_Doyle\\_TomDoyle.htm](http://www.bishop-accountability.org/news2008/03_04/2008_03_03_Doyle_TomDoyle.htm) (Accessed 19 June 2013)

<sup>36</sup> Canon 449

<sup>37</sup> Can. 455 §1. “A conference of bishops can only issue general decrees in cases where universal law has prescribed it or a special mandate of the Apostolic See has established it either *motu proprio* or at the request of the conference itself.” §2. “The decrees mentioned in §1, in order to be enacted validly in a plenary meeting, must be passed by at least a two thirds vote of the prelates who belong to the conference and possess a deliberative vote. They do not obtain binding force unless they have been legitimately promulgated after having been reviewed by the Apostolic See.”

[http://www.vatican.va/archive/ENG1104/\\_P1L.HTM](http://www.vatican.va/archive/ENG1104/_P1L.HTM) (Accessed 6 March 2013) An example of a “special mandate” is when the Vatican directed Bishops Conferences to provide detailed guidelines for transfer of seminarians from one religious institution to another: <http://www.catholicculture.org/culture/library/view.cfm?recnum=5107> (Accessed 13 June 2013)

In its response to the Irish Foreign Minister on 3 September 2011, the Vatican explained how Canon 455 operated: “As canon 455 makes clear, the *recognitio* of the Holy See is required for any validly adopted decision of an Episcopal Conference which is to have binding force on all its members but it is not required for guidelines as such, nor is it required for the particular norms of individual Dioceses.” [http://www.vatican.va/resources/resources\\_risposta-gilmore\\_20110903\\_en.html](http://www.vatican.va/resources/resources_risposta-gilmore_20110903_en.html) (Accessed 6 March 2013) See also *Apostolos Solus* of Pope John Paul II, par 18 [http://www.vatican.va/holy\\_father/john\\_paul\\_ii/motu\\_proprio/documents/hf\\_jp-ii\\_motu-proprio\\_22071998\\_apostolos-suos\\_en.html](http://www.vatican.va/holy_father/john_paul_ii/motu_proprio/documents/hf_jp-ii_motu-proprio_22071998_apostolos-suos_en.html) (Accessed 15 July 2013)

<sup>38</sup> Canons 455§4, 119§3. Nicholas Cafardi: *Another Long Lent The abuse crisis resurfaces in Philadelphia* <http://www.commonwealmagazine.org/another-long-lent> (Accessed 4 June 2013). James T. O’Reilly and Margaret Chambers: *The Sexual Abuse Crisis and the Legal Responses* (Oxford University Press 2014) p.285

If there was no unanimity amongst the bishops, the Vatican could issue a “special mandate”. In that case, all would then be bound.

- the cover up of sexual abuse by priests. As will be discussed in further detail below, in 1996, the Irish bishops sent off to the Holy See for comment the “*Framework Document*” which provided for mandatory reporting of clergy crimes against children to the civil authorities. It was a document prepared by an advisory committee of the Irish Catholic Bishops Conference. The bishops received back a letter from the Papal Nuncio, Archbishop Storero, dated 31 January 1997, (“the Storero letter”) expressing concerns that its proposals for mandatory reporting gave rise to “serious reservations of both a moral and a canonical nature.”<sup>39</sup>
154. The Murphy Cloyne Report criticized the letter because it cautioned against the implementation of the *Framework Document*.<sup>40</sup> The Holy See’s response was legalistic. It said that it could not approve the document because it came from an advisory committee and was not a validly passed decision of the Irish Catholic Bishops Conference. That was technically correct, but a very clear message was contained in the Papal Nuncio’s letter that even if the formalities were followed, the proposal for mandatory reporting would not be approved. It was not just a question of it breaching the secrecy provisions of canon law. The letter suggested it was immoral for a bishop to report a priest to the police, even if the priest was a serial paedophile. And that message was subsequently repeated by the highest Curia Cardinals and Holy See officials in the years 2001 and 2002.
155. On 14 July 2010, after the publication of the Murphy Cloyne Report, the Irish Minister for Foreign Affairs, Ian Gilmore called in the Papal Nuncio and handed him a note accusing the Holy See of intervening in Irish domestic affairs by making priests believe that they could in conscience evade their responsibilities under Irish law. On 3 September, 2011, the Holy See responded, and explained that bishops were free to make their own laws and guidelines without the need to have approval from the Holy See, provided that such laws and guidelines were “not contrary to canon law”.<sup>41</sup> But that was the problem with mandatory reporting, as the Storero letter pointed out.
156. There were many things such as education, awareness, behaviour protocols and counselling for victims that were not contrary to canon law, and could be adopted by individual bishops. But in relation to mandatory reporting to the police of the crimes of priests against children,

<sup>39</sup> <http://graphics8.nytimes.com/packages/pdf/world/Ireland-Catholic-Abuse.pdf?ref=europe>  
[http://www.nytimes.com/2011/01/19/world/europe/19vatican.html?\\_r=0](http://www.nytimes.com/2011/01/19/world/europe/19vatican.html?_r=0) (Accessed 9 July 2013)

<sup>40</sup> [http://www.justice.ie/en/JELR/Cloyne\\_Rpt.pdf/Files/Cloyne\\_Rpt.pdf\\_par\\_4.22](http://www.justice.ie/en/JELR/Cloyne_Rpt.pdf/Files/Cloyne_Rpt.pdf_par_4.22) (Accessed 6 March 2013)

<sup>41</sup> [http://www.vatican.va/resources/resources\\_risposta-gilmore\\_20110903\\_en.html](http://www.vatican.va/resources/resources_risposta-gilmore_20110903_en.html) (Accessed 6 March 2013)

- the Storero letter was quite specific: mandatory reporting by bishops conflicted with canon law. *Crimen Sollicitationis*, in force prior to 1983, imposed the secret of the Holy Office in the investigation of such matters, and there were no exceptions for reporting to the police. The same was true of Canon 1395 of the *1983 Code of Canon Law* to which the pontifical secret applied by reason of the instruction *Secreta Continere* (1974).
157. The Australian bishops never received a “*recognitio*” from Rome for their 1996 proposals for mandatory reporting contained in their *Towards Healing* protocol for dealing with clergy sex abuse. The bishops were not unanimous because Archbishop Pell of Melbourne declined to sign up to it. But given the attitude of the Holy See to the issue of reporting priests to the police at the time, and the other inadequacies of canon law, there was little point in applying for it.<sup>42</sup>
158. It followed that the secrecy provisions of *Secreta Continere* still applied, and the proposals for reporting in *Towards Healing* potentially conflicted with canon law. The Australian bishops were in the same position as their Irish brethren. *Towards Healing*, like the *Framework Document*, also dealt with matters such as counselling, care of the victims, education etc., none of which conflicted with canon law. Each bishop was free to adopt the guidelines on those matters, but they were not free to report to the police the allegations or the information that they had gained in the investigations they were required to undertake under Canon 1717.
159. In 2001, a distinguished Catholic lawyer and former member of the United Kingdom’s highest court, the judicial committee of House of Lords, Lord Nolan, advised the British bishops that they had to have a form of mandatory reporting. The Catholic Bishops Conference of England and Wales adopted his proposals. The Holy See did not provide a

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<sup>42</sup> The subsequent attempt by the United States Catholic Bishops Conference to change canon law in 2002 confirms the correctness of the Australian bishops’ assessment. See also the Statement of Bishop Geoffrey Robinson to the Royal Commission: “We then looked at the law of the universal Church and its provisions for processing criminal cases. We quickly found that this law would be so inadequate for cases of sexual abuse that it would be a sham. It was... of no use in cases of sexual abuse. For example, it had a statute of limitations of a mere five years from the time of the offence, and this alone would have excluded 99% of all victims of abuse. However great the faults of the Australian bishops have been over the last thirty years, it still remains true that the major obstacle to a better response from the Church has been the Vatican...*Towards Healing* created two serious difficulties for the Australian bishops. Firstly, it meant that they were acting outside, and indeed contrary to, canon law: CTJH.303.01002.0002\_R, p. 2 & 4. He further said that in April 2000, at a meeting in Rome, he reported to the meeting on the conflict between canon law and civil law, particularly insofar as *Towards Healing* was concerned: “I felt there could be conflicts between our obligations under church law and our obligations under civil law...” 7 Transcript of G J Robinson, Case Study 31, 24 August 2015, 16007:1-7 and 16049:8-10

*recognitio* for the proposals so as to make them canon law for the area covered by the Bishops Conference.<sup>43</sup>

160. The American Catholic Bishops Conference, however, did receive a “*recognitio*” for its proposals, but not for what they originally wanted – the right to report sex abusing clerics and religious to the police irrespective of whether there was a domestic law requiring reporting.<sup>44</sup> The Holy See would only approve an exception to the pontifical secret, where the domestic law required it.
161. On 3 May 2011, Cardinal Levada, the Prefect of the CDF, sent out a circular letter to all bishops providing guidelines to assist Bishops’ Conference write their protocols for dealing with clerical sexual abuse of minors, and required that all such guidelines contain a provision that “the prescriptions of civil law regarding the reporting of such crimes to the designated authority should always be followed.” (“the Levada Guidelines”)<sup>45</sup>
162. If the guidelines of Bishops Conferences are approved by the Holy See under Canon 455, this conflict between canon and civil law over child sex abuse may well disappear, provided there is a civil law requiring reporting. Canon law will then adopt the civil law on reporting as part of canon law under Canon 22. In the meantime, bishops and religious superiors were effectively given a dispensation from the pontifical secret to enable them to report sexual abuse to the police where the domestic civil law required it.<sup>46</sup> However, there were comments by the Vatican spokesman, Fr Federico Lombardi on 15 July 2010 that suggest

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<sup>43</sup> Cumberlege Review of the Nolan Report, par 2.17,

[http://www.cathcom.org/mysharedaccounts/cumberlege/report/downloads/CathCom\\_Cumberlege2.pdf](http://www.cathcom.org/mysharedaccounts/cumberlege/report/downloads/CathCom_Cumberlege2.pdf) Nor is there any indication on the Vatican website that it has been subsequently approved. (Accessed 9 February 2013)

Geoffrey Robertson QC *The Case of the Pope* Ch 2 par 45.

<sup>44</sup> [http://www.vatican.va/roman\\_curia/congregations/cbishops/documents/rc\\_con\\_cbishops\\_doc\\_20021216\\_recognitio-usa\\_en.html](http://www.vatican.va/roman_curia/congregations/cbishops/documents/rc_con_cbishops_doc_20021216_recognitio-usa_en.html) (Accessed 9 February 2013). See also Ladislav Orsy SJ : *Bishops Norms : Commentary and Evaluation* [http://www.bc.edu/dam/files/schools/law/lawreviews/journals/bclawr/44\\_4/04\\_FMS.htm](http://www.bc.edu/dam/files/schools/law/lawreviews/journals/bclawr/44_4/04_FMS.htm) (Accessed 9 February 2013)

See also Thomas Green: *Critique of the Dallas Charter*. [http://natcath.org/NCR\\_Online/documents/Greencritique.htm](http://natcath.org/NCR_Online/documents/Greencritique.htm) (Accessed 21 July 2013), Jo Renee Formicola: *Clerical Sexual Abuse: How the Crisis Changed U.S. Catholic Church-State Relations*, (Palgrave MacMillan, 2014), 125.

<sup>45</sup> [http://www.vatican.va/roman\\_curia/congregations/cfaith/documents/rc\\_con\\_cfaith\\_doc\\_20110503\\_abuso-minori\\_en.html](http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_20110503_abuso-minori_en.html) (Accessed 9 February 2013). O’Reilly and Chalmers in *The Sexual Abuse Crisis and the Legal Responses* p.294 say that the purpose of the letter was the recognition by the Vatican that other bishops’ conferences may wish to create particular binding norms of their own.

<sup>46</sup> Canons 85 and 87, and Beal, Coriden and Green, *New Commentary on the Code of Canon Law* p.130-132 and Dr Rodger Austin at the Cunneen Special Commission

[http://www.lawlink.nsw.gov.au/lawlink/Special\\_Projects/ll\\_splprojects.nsf/vwFiles/Transcript\\_Day\\_20\\_-\\_TOR\\_2\\_-\\_31\\_July\\_2013.pdf/\\$file/Transcript\\_Day\\_20\\_-\\_TOR\\_2\\_-\\_31\\_July\\_2013.pdf](http://www.lawlink.nsw.gov.au/lawlink/Special_Projects/ll_splprojects.nsf/vwFiles/Transcript_Day_20_-_TOR_2_-_31_July_2013.pdf/$file/Transcript_Day_20_-_TOR_2_-_31_July_2013.pdf) , 2233.

that reporting to the police cannot take place once the canonical investigation and trial starts.<sup>47</sup>

163. Because of the terms of the Holy See's guidelines, there are still systemic problems because of its continued insistence that the canonical investigation be subject to the pontifical secret. As will be shown below, the not so "parallel" system of justice, will in many places continue, simply because there are no civil laws requiring reporting, and for what seemed in the past to be a good reason.
164. Civil society in much of the English speaking world decided more than 30 years ago, that the moral sense in the community about reporting serious crimes to the police was so strong that there was no need for there to be laws to make it criminal not to report.<sup>48</sup> Misprision of felony was abolished in most jurisdictions.
165. For reasons that are set out in Chapter 4, in the early part of the 20<sup>th</sup> century, the Church at its highest levels abandoned this moral sense over the sexual abuse of children which it had shared with secular society for some fifteen hundred years, of regarding these crimes as deserving at least imprisonment.

### **The Interpretation of Canon Law**

166. The *1983 Code of Canon Law* has rules of interpretation which are generally the same as in our Australian legal system.<sup>49</sup> Canon law is to be understood according to the proper meaning of the words considered in their text and context, and if there is any ambiguity, resort can be had to other sources, such as to "parallel places...to the purposes and circumstances of the law, and to the mind of the legislator" to determine their meaning.<sup>50</sup> But if the meaning is clear, there is no need to resort to these other sources.<sup>51</sup>

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<sup>47</sup> [http://www.vatican.va/resources/resources\\_lombardi-nota-norme\\_en.html](http://www.vatican.va/resources/resources_lombardi-nota-norme_en.html) (Accessed 21 July 2013), and see further discussion below in relation to the case of Fr Mauro Inzoli.

<sup>48</sup> See New South Wales Law Reform Commission [http://www.lawreform.lawlink.nsw.gov.au/agdbasev7wr/lrc/documents/pdf/report\\_93.pdf](http://www.lawreform.lawlink.nsw.gov.au/agdbasev7wr/lrc/documents/pdf/report_93.pdf) par 3.58 (Accessed 16 July 2013)

<sup>49</sup> There are some differences of interpretation, the most significant being that if there is reasonable doubt about the meaning of a text (a "doubt of law"), the ordinance has no binding force, which has no equivalent in Australian civil law: Ladislav Orsy SJ: *Bishops Norms: Commentary and Evaluation* [http://www.bc.edu/dam/files/schools/law/lawreviews/journals/bclawr/44\\_4/04\\_FMS.htm](http://www.bc.edu/dam/files/schools/law/lawreviews/journals/bclawr/44_4/04_FMS.htm) (Accessed 9 February 2013)

<sup>50</sup> See Canon 17.

<sup>51</sup> Edward Peters: *Lest Amateurs Argue Canon Law: A reply to Patrick Gordon's brief against Bp. Thomas Daily, Angelicum* 83 (2006) 121-142. [http://www.canonlaw.info/a\\_gordon.htm](http://www.canonlaw.info/a_gordon.htm) (Accessed 3 July 2013), internet copy, between footnote 30 and 31. However, it is common, and good practice in both canon and civil law to refer to such other sources of authority in support of advice and decisions on particular matters.

167. There are some other differences between canon law, and the English common law system. The ultimate authority for the meaning of the law in the English common law system rests with the courts, whereas in canon law, it rests with the legislature.<sup>52</sup> Likewise, in canon law, there is no system of precedent, and a decision made in a particular case only binds those parties to it.<sup>53</sup> Lawyers in the common law system consult the decisions of Courts to determine what a particular law might mean. On the other hand, canon lawyers consult statements by the legislature and scholarly commentaries as well as decisions of the canonical courts to clarify the meaning.<sup>54</sup>

“Unlike the Anglo-American common law system, where the courts settle the meaning of laws, in canon law the competent legislator determines the law’s meaning and resolves doubts about it... The authentic interpretation of particular laws pertains to the competent legislator himself or to the supreme authority or delegate of same ...<sup>55</sup>

168. Authentic interpretation is a formal process and those interpretations are binding and have the same effect as the law itself.<sup>56</sup> However,

“Laws are also officially interpreted by judicial and executive authorities – by the judges in church tribunals and church administrators (Vatican congregations, diocesan bishops, major superiors, vicars etc.)...Judicial sentences and administrative decisions do not create binding precedents. Nevertheless the decisions of the Roman Curia do have a kind of precedential value. The sentences of the Roman Rota have a great impact on other courts around the world...Likewise, there is a kind of precedent in

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<sup>52</sup> Canon 16§1 ‘The legislator authentically interprets laws as does the one to whom the same legislator has entrusted the power of authentically interpreting.’ And see Peters *ibid*, “Common law is a system of judicial supremacy; canon law is a system of legislative supremacy”; Doyle: *Canon Law: What is it?* [http://www.awrsipe.com/doyle/2006/2006-02-Canon\\_Law-What\\_Is\\_It.pdf](http://www.awrsipe.com/doyle/2006/2006-02-Canon_Law-What_Is_It.pdf) (Accessed 24 July 2013), Beal, Coriden and Green: *New Commentary on the Code of Canon Law*, (2000) Paulist Press, 71

<sup>53</sup> Canon 16§3. Delaney criticises this aspect of canon law because it prevents a jurisprudence being developed to allow consistency of decision making in canonical courts: Delaney *Canonical Implications*, p.263ff.

<sup>54</sup> Canon 16, Edward Peters: *Lest Amateurs Argue Canon Law: A reply to Patrick Gordon’s brief against Bp. Thomas Daily*, *Angelicum* 83 (2006) 121-142. [http://www.canonlaw.info/a\\_gordon.htm](http://www.canonlaw.info/a_gordon.htm) (Accessed 3 July 2013), internet copy between footnotes 34 and 35. In common law systems, it has become much more common to cite academic writings than it used to be as authority for particular interpretations. German continental law has diverged from canon law and is now closer to the common law system. While the German courts will consult scholarly commentaries, which are not binding on them, they do not consult the legislature to determine the meaning. That is left to the courts, not the legislature. The decisions of the German Federal Constitutional Court are legally binding. On the other hand the decisions of other courts - even the highest Federal Courts – do not have the same legally binding effect. But the German State supreme courts have to enforce the Federal Courts decisions in order to ensure the consistency of jurisdiction. They will reverse decisions of the country and local courts which are out of line. The European Court of Justice in Luxembourg interprets the law of the European Union and their decisions are legally binding: Advice of Dr Stefan von der Beck, Chief Judge, Supreme Court, Oldenburg (Lower Saxony), Germany, in private correspondence with the author, January 2014.

<sup>55</sup> Certain powers of authentic interpretation are entrusted to the Pontifical Council for the Interpretation of Legislative Texts: John P. Beal, James A. Coriden and Thomas J. Green, *New Commentary on the Code of Canon Law* (2000), p.71. However no such interpretations have been made in respect of the pontifical secret.

<sup>56</sup> Canon 16§2



the administrative arena since repeated decisions by the Roman Curia contribute to the *praxis curiae* (canon 19) and the canonical tradition.”<sup>57</sup>

169. In canon law, the pope (or his delegate, the Pontifical Council for the Interpretation of Legislative Texts) provides for authentic and binding interpretations of canon law. But non-binding or persuasive assistance can come from the statements of the Roman Curia Congregations, the decisions of the Roman Rota or the Apostolic Signatura, and from commentaries in canon law textbooks and journals.<sup>58</sup> There is no hierarchy of authority amongst the Congregations of the Roman Curia. They are all juridically equal.<sup>59</sup>
170. Despite Canon 16§3, a form of jurisprudence based on decisions of the Roman Rota in marriage cases has developed, presumably in accordance with Canon 19. Sr Moya Hanlen told the Royal Commission in the Nestor case (Case Study No. 14) that these judgments provide a binding precedent, but it is difficult to reconcile that with Canon 16§3. Whatever their effect, binding or persuasive, they are not made available for 10 years.<sup>60</sup> Likewise, Bishop Peter Ingham and Archbishop Wilson in the same case study at the Royal Commission

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<sup>57</sup> John P. Beal, James A. Coriden and Thomas J. Green, *New Commentary on the Code of Canon Law* (2000), p.73. See also Chiegboka and Nwadior: *The Jurisprudence of the Tribunal of Roman Rota as Precedents to the Local Church Tribunals* “Roman Rota is a court of higher instance at the Apostolic See, usually at the appellate stage, with the purpose of safeguarding, and, by virtue of its own decisions, provides assistance to lower tribunals.” P.40 <http://www.ajol.info/index.php/ujah/article/viewFile/95413/84754> (Accessed 6 June 2016)

<sup>58</sup> O’Reilly and Chalmers: *The Sexual Abuse Crisis and the Legal Response*, p.313: “Unlike civil law, in canonical penal law the legal “gloss” does not come from precedential case law because there is no binding precedent in canon law. Rather it is derived from (1) official published opinions and recommendations from the pope or Vatican congregations; (2) unofficial, non-published opinions and recommendations from sources in the Vatican that work in the area, particularly the Congregation for the Doctrine of Faith; or (3) from judicious use of canon 19. This canon, in the case of a non-defined area or “hole” (lacuna) in the law gives the right for the bishop to fill the hole by using “laws in similar matters, general principles of law applied with canonical equity, the jurisprudence and practice of the Roman Curia, and the common ad constant opinion of learned persons.”. See also Fr Thomas Doyle: *Canon Law. What is it?* “...the various Vatican congregations, roughly equivalent to governmental cabinets, may issue responses to doubts about a particular canon or section of Canon Law presented to them or other forms of clarification. In most instances, these are considered “private replies” in that they were not issued by the pope. Nevertheless such replies have weight in determining how competing meanings are resolved.”, p. 70. [http://www.awrsipe.com/doyle/2006/2006-02-Canon\\_Law-What\\_Is\\_It.pdf](http://www.awrsipe.com/doyle/2006/2006-02-Canon_Law-What_Is_It.pdf) (Accessed 24 July 2013). Chiegboka and Nwadior in *The Jurisprudence of the Tribunal of Roman Rota as Precedents to the Local Church Tribunals*, p. 194, speaking of the role of the Roman Rota, quoting Mendonca say that “the interpretation of law be definite, constant over a long period of time. Therefore, consistent repetition of the pronouncement on a particular matter for a long a period of time is necessary... The Roman Rota remains not only sources of interpretation when there is lacuna legis (can 19) but also source of authentic and reasoned jurisprudence and even for the most part source of legislations.” <http://www.ajol.info/index.php/ujah/article/viewFile/95413/84754> (Accessed 6 June 2016)

<sup>59</sup> Ian Waters, *The Law of Secrecy in the Latin Church, The Canonist* Vol 7 No 1, 75 at 82, quoting the Apostolic Constitution, *Regimini Ecclesiae universae* of Pope Paul VI of 15 August 1967.

<sup>60</sup> <http://www.childabuseroyalcommission.gov.au/case-study/bb3eaadf-9283-41ef-9694-e560738d186a/case-study-14,-june-2014,-sydney.aspx> , (Accessed 28 March 2015) p.8148. Canon 16§3 would prevent them becoming “binding”, but they could have persuasive effect, analogous to that operating in the common law system with decisions outside the particular hierarchy of courts.

referred to discussions of various canonical matters in journals that might clarify the meaning of particular canons or laws.<sup>61</sup>

171. In summary, both Australian civil law and canon law provide for binding interpretations. In Australian civil law those interpretations come from the High Court and from decisions of State Courts of Appeal or Full Courts and Federal Courts over courts lower down in their particular hierarchies. Non-binding or persuasive assistance can come from courts on the same hierarchical level or from superior courts in other States and jurisdictions, from decisions from courts in other countries, particularly in the common law world, and from commentaries in legal journals. The big disadvantage of the canonical system is the 10 year embargo on publishing reports of cases. This can only have the effect that judgments of canonical courts are potentially always ten years out of date. It also makes it difficult, if not impossible, for an outside body, such as this Royal Commission, to make an independent assessment of whether or not past systemic problems with the canonical disciplinary system have been rectified.

#### **Universal and Particular Laws**

172. Canon 20 distinguishes between universal laws that apply to the whole Church and particular laws which apply to the Church in a specific region.<sup>62</sup> The particular law or “norm” created by the “*recognitio*” of the proposals arising from the Dallas Charter in 2002 became the particular law, that is, canon law for the United States requiring Church authorities to comply with reporting laws on child sexual abuse.
173. The universal law contained in *Crimen Sollicitationis*, the 1983 *Code of Canon Law*, the 1974 instruction *Secreta Continere*, and *SST* (2001 and 2010), imposing the pontifical secret on all allegations and the Church’s investigations, applied to all other regions of the Church covered by Bishops Conferences which did not have the benefit of such an exception. Australia was one of them.
174. In 2010, the Holy See granted the same limited exception enjoyed by the United States by way of a dispensation with an instruction from the CDF. Church authorities are now entitled

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<sup>61</sup> Case Study 14: Bishop Peter Ingham <http://www.childabuseroyalcommission.gov.au/case-study/bb3eaa9f-9283-41ef-9694-e560738d186a/case-study-14,-june-2014,-sydney.aspx>, p. 8068 (Accessed 22 April 2015), and Archbishop Wilson at p7899, 7889 and 7979 <http://www.childabuseroyalcommission.gov.au/case-study/bb3eaa9f-9283-41ef-9694-e560738d186a/case-study-14,-june-2014,-sydney.aspx> (Accessed 22 April 2015)

<sup>62</sup> John P. Beal, James A. Coriden and Thomas J. Green, *New Commentary on the Code of Canon Law* (2000), 83

to report allegations of sexual abuse to the civil authorities where there is a domestic law requiring reporting. Apart from mandatory reporting of “children at risk”, only New South Wales and Victoria currently have laws requiring reporting of “historical” abuse, that is, where the victims are no longer children.<sup>63</sup> In the other States and Territories, pontifical secrecy prevents Church authorities from reporting historical abuse to the police, even if they wanted to.<sup>64</sup>

### The Canonical System of Trials

175. Canon law is based on Roman law, and therefore its trial method is the European continental inquisitorial system, rather than the common law adversarial one.<sup>65</sup> In the common law system, the “trial” only starts once the investigation by the prosecution and defence has been completed. The European continental system, like canon law, gives the judge a much more active role, and the important difference with the common law system is that the trial begins as soon as complaint is made. That does not mean that the judge will personally carry out the investigation. In the German system, for example, this will be done by the State’s public prosecution department. The judge will be there to assist with matters such as search warrants and for signing arrest warrants at the prosecutor’s request. The process for finding facts and listening to testimony takes place in a series of hearings that are normally conducted over a long stretch of time rather than in a single trial as in the common law system.<sup>66</sup>

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<sup>63</sup> There is a difference between the New South Wales and Victorian legislation. The former requires all allegations to be reported to the police, while the latter does not require reporting where the complainant does not wish it to be reported. For further details see Chapter 10 on Mandatory Reporting.

<sup>64</sup> For details on the pontifical secret operating in other Australian States and Territories, see Appendix 4

<sup>65</sup> For a more detailed description of the differences between the two systems, see James T. O’Reilly and Margaret S.P. Chambers: *The Sexual Abuse Crisis and the Legal Responses* p.353ff. The most significant difference is that all questioning is done by the canonical judges, not by the canon lawyers. Lawyers can submit questions for the judge to ask, but they cannot ask them themselves: p.368. There are three possible verdicts: innocent, not proven and guilty: p.375. See also Brendan Daly in *Issues with Penal Law and the Proposed Revision of Book VI*, Proceedings Canon Law Society of Australia and New Zealand, 46th Annual Conference Auckland 2012, 55 at 61.

<sup>66</sup> The same is true of canon law: Rev. Kevin E. McKenna, JCD, *Canon Law Seminar for Media*, May 25, 2010, Canon Law Society of America., “The complaint is sometimes made about the confidentiality that is imposed on a canonical trial when an allegation of sexual abuse has been made. In the canonical system it is the role of the judges (or those delegated by the judges) rather than the representatives (or lawyers) of the parties, to gather oral and written evidence. The process for finding facts and testimony takes place in a series of hearings that are normally conducted over a long stretch of time rather than in a single trial as in a civil case. Because in the canonical system of law evidence is normally to be accumulated and assembled over time, judges typically impose “confidentiality” restrictions upon witnesses and their testimony to prevent the possible contamination of other witnesses who may appear later before the court.”

<http://www.docstoc.com/docs/83976670/USCCB-CANON-LAW-SEMINAR-2010-MCKENNAdoc---Welcome---The-Catholic> (Accessed 24 July 2013). Edward N. Peters, <http://www.themediareport.com/wp-content/uploads/2012/08/Peters-reply-to-Wall-and-Doyle.pdf>, page 73, footnote 116 (Accessed 9 February 2013). However, the requirements of this confidentiality under *Secreta Continerere* go well beyond the purpose of avoiding contamination of evidence. The pontifical secret is a permanent silence that is required to be observed after the canonical proceedings have been completed when there is no more evidence to be contaminated: See Chapter 6.

176. There is a certain amount of cross over in the two systems. Coronial inquiries in the common law system, where the Coroner investigates the cause of death or a fire, are similar to the inquisitorial system. Royal Commissions and State tribunals, like the New South Wales Independent Commission against Corruption (ICAC), are set up in the same way. The reality is that in modern times the two seem to be coming closer together with elements of both systems being used where they appear to be more appropriate.<sup>67</sup>
177. Where an allegation of child sexual abuse is made against a cleric, Canon 1717 of the 1983 *Code of Canon Law* requires a bishop to undertake a “preliminary investigation”, and under *SST 2001 and 2010*, he is to send off the results of his investigation to the CDF in Rome which will then instruct him on how to proceed. The Congregation may then order a penal trial. If that occurs, then the proceedings start to look more like the common law adversarial system, with canon lawyers appearing for the prosecution and the defence. The same occurs if the Congregation itself decides to conduct the trial. The Congregation has its own “Promoter of Justice”, and his function has all the hallmarks of a common law prosecutor, the main difference being that witnesses are only allowed to be questioned by the judges.<sup>68</sup>
178. The importance of this discussion on the difference between the two systems relates to the time when the secrecy provisions apply. If, for example, the secrecy provisions only applied when a formal penal trial was ordered after the results of the preliminary investigation went to Rome, then there was nothing to stop a bishop from going to the police with the results of his preliminary investigation. On the other hand, if secrecy applies from the time the allegation is made to a superior authority (the “extrajudicial denunciation” under Art 1(4) of *Secreta Continere* or a “report” to the bishop of child sexual abuse under *SST 2010*), then bishops are not free to go to the police – not even to report the allegation.
179. The decree *Secreta Continere*, discussed below, imposes the pontifical secret on “extrajudicial denunciations” and, on one translation of the Latin, “trials”, but the trial in the broad sense in the canon law system (as it does in the European continental system) commences the moment the complaint is made and the investigation starts.<sup>69</sup>

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<sup>67</sup> Marfolding and Eylandt: *Civil Litigation in New South Wales: Empirical and Analytical Comparisons with Germany*, University of New South Wales Faculty of Law Research Series 2010, Paper No. 28, p.8

<sup>68</sup> Cafardi, *Before Dallas*, 42, James T. O’Reilly and Margaret S.P. Chambers: *The Sexual Abuse Crisis and the Legal Responses* p.268

<sup>69</sup> Thomas Doyle, <http://reform-network.net/?p=3006> (Accessed 3 July 2013), par 23, John P. Beal in “*The 1962 Instruction: Crimen Sollicitationis: Caught Red Handed or Handed a Red Herring?*” 41 *Studia Canonica* 199 at 228ff. <http://www.vatican.va/resourcess/Beal-article-studia-canonica41-2007-pp.199-236.pdf> (Accessed 3 July 2013). The word

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#### 4: A HISTORY OF CANON LAW ON CHILD SEXUAL ABUSE

##### The Concepts of “Canon Law” and “Child Sexual Abuse”

180. Despite claims that canon law is the oldest continuing legal system in the Western world, the term “canon law”, in the sense of a volume of laws that applied to the whole Church is in some senses anachronistic until around 1140 CE.<sup>70</sup> In that year, an Italian monk, Gratian, regarded as the father of canon law, wrote his *Concordia Discordantium Canonum*, in which he compiled, and tried to harmonize Church laws up to that time in a single work. It soon became canon law’s standard textbook.<sup>71</sup>
181. The term “child sexual abuse” is partly anachronistic. Prior to the 12<sup>th</sup> century, there was no concept in Western thought of “childhood” as we understand it today. Children were “small adults”, and were regarded as “chattels” of their parents. In subsequent centuries, societal perceptions of children changed, and after about 1700CE, childhood was seen as a separate state from adulthood, characterised by innocence, purity and naïveté.<sup>72</sup>
182. The term “child sexual abuse” is defined more broadly these days in terms of the involvement of immature children in sexual activity with adults.<sup>73</sup> Nevertheless for the

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“trials” is used in the translation of footnote 31 of *Sacramentorum Sanctitatis Tutela*, undertaken by the United States Catholic Bishops Conference. <http://www.documentcloud.org/documents/243690-10-sacramentorum-sanctitatis-2001-with-2003.html> (Accessed 4 August 2013). Footnote (31) (English). [http://www.opusbonosacerdotii.org/sacramentorum\\_sanctitatis\\_tutela\\_english1.htm](http://www.opusbonosacerdotii.org/sacramentorum_sanctitatis_tutela_english1.htm); <http://www.bishop-accountability.org/resources/resource-files/churchdocs/SacramentorumAndNormaeEnglish.htm> (Accessed 13 November 2014). The better translation of the Latin is “process” which includes the preliminary inquiry under Canon 1717: See William Woestman translation in Appendix 5. However, nothing turns on the differences in translation because the “trial” in the canonical system includes the preliminary inquiry. For discussion on the translation of Art 1(4) of *Secreta Continere* see Chapters 5 & 6.

<sup>70</sup> The claim is made by Dr Edward Peters, an American canon lawyer: <http://www.canonlaw.info/> (Accessed 21 June 2013).

<sup>71</sup> Hartmann & Pennington: *The History of Medieval Canon Law in the Classical Period, 1140-1234: From Gratian to the Decretals of Pope Gregory IX*, (CUA Press, 2008), p.8

<sup>72</sup> *Historical Review of Sexual Offence and Child Sexual Abuse Legislation in Australia: 1788–2013*, 3- 6, 23: Australian Institute of Criminology 2014, research paper for the Royal Commission. [http://www.childabuseroyalcommission.gov.au/documents/historical-review-of-sexual-offence-and-child-\(1\).pdf](http://www.childabuseroyalcommission.gov.au/documents/historical-review-of-sexual-offence-and-child-(1).pdf) p.4, (Accessed 5 September 2014). Some support for this can be seen in the records of the Spanish Inquisition in Valencia in the 16<sup>th</sup> to the 18<sup>th</sup> century where no distinction seems to be drawn between “sodomy” (in its broad sense of any non-procreative sexual act) committed with a child and with an adult: Rafael Carrasco: *Inquisición y Represión Sexual en Valencia, Historia de los Sodomitas (1565-1785)*, Laertes 1985, p.187

<sup>73</sup> *Historical review of sexual offence and child sexual abuse legislation in Australia: 1788–2013*, 3- 6, 23: Australian Institute of Criminology 2014, research paper for the Australian Royal Commission, 2, quoting Kempe RS & Kempe CH 1978. *Child abuse*. London: Fontana/Open Books, 60 [http://www.childabuseroyalcommission.gov.au/documents/historical-review-of-sexual-offence-and-child-\(1\).pdf](http://www.childabuseroyalcommission.gov.au/documents/historical-review-of-sexual-offence-and-child-(1).pdf) 2, (Accessed 25 Dec 2014)

purposes of this submission it is convenient to apply the term to past practice while bearing in mind that it did not always carry the wider significance that it has today.

183. There were very ancient civil laws against the sexual abuse of some children. In Ancient Rome, Caesar Augustus's *Lex Iulia de vi publica* (18-17BC) imposed capital punishment on those who ravished a "boy or a woman or anyone through force". But successful seduction of "free" children was also punishable by death, and an attempt to do so was punishable by exile. This protection was not extended to slaves, and was motivated more by the impact of sexual relations upon social order rather than controlling sexual behaviour towards children generally.<sup>74</sup> Nevertheless, there were protections for some children enshrined in the law. The age of minority, like the ages for marriage and death, were lower than they are today.<sup>75</sup>
184. The most commonly accepted definition of child sexual abuse is that of Kempe:  
 "...involvement of dependent, developmentally immature children and adolescents in sexual activities that they do not fully comprehend, to which they are unable to give informed consent, or that violate the social taboos of family roles."<sup>76</sup>
185. Such a definition includes "rape", whether actual or statutory (because the other person is underage) and other criminal offences such as sexual assaults and acts of indecency. It also encompasses non-contact activities, like showing children pornography, downloading child pornography and even grooming. Such activities have only become crimes recently.

#### **Canon Law on Child Sexual Abuse from the 4<sup>th</sup> to the 11<sup>th</sup> Centuries**

186. Despite some tolerance of child sexual abuse, particularly of males in the Greek and Roman Empires, the Judaeo-Christian tradition had always condemned it as a sin. The first century handbook for Christians, the *Didache*, explicitly prohibits adult men having sex with boys.<sup>77</sup> But it was not long before Church communities came to accept that it was more than a sin punishable in the next life. It was also a crime, punishable in this life. The first Church law against the abuse of boys was passed at the Council of Elvira in 306CE which required

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<sup>74</sup> James A. Brundage: *Law, Sex and Christian Society in Medieval Europe*, (University of Chicago Press, 2009), p. 47 - 49, quoting Dig. 48.6.3.4 (Marcianus); Mestieri Estudo p.12.

<sup>75</sup> The canonical minimum age for marriage in the 12<sup>th</sup> century was 12 for girls and 14 for boys: Vern L Bullough & James A Brundage: *Handbook of Medieval Sexuality*, (Routledge 2000) p.36

<sup>76</sup> *Historical review of sexual offence and child sexual abuse legislation in Australia: 1788–2013*, 3- 6, 23: Australian Institute of Criminology 2014, research paper for the Royal Commission, 2, quoting Kempe RS & Kempe CH 1978. *Child abuse*. London: Fontana/Open Books, 60 [http://www.childabuseroyalcommission.gov.au/documents/historical-review-of-sexual-offence-and-child-\(1\).pdf](http://www.childabuseroyalcommission.gov.au/documents/historical-review-of-sexual-offence-and-child-(1).pdf) 2, (Accessed 25 Dec 2014)

<sup>77</sup> Aaron Milevec: *The Didache, Text, Translation, Analysis and Commentary* (Liturgical Press 2003) p. 54

offenders to be excluded from communion “even at the end”, which suggests that they were permanently excommunicated.<sup>78</sup> The Council of Ancyra in 314CE inflicted lengthy penances and excommunication for homosexuality.<sup>79</sup>

187. In the early third century, Councils were called by various Christian communities, and they promulgated norms for their governance. In the fourth century, Christianity became the official religion of the Roman Empire, and then the Roman Emperor legislated for the Church.<sup>80</sup> In addition to the imperial norms, Church Councils continued to promulgate their own rules for their local communities, but they generally dealt with ad hoc situations, and there was no intention to create a comprehensive set of rules to apply everywhere.<sup>81</sup>
188. In about 312CE, the Emperor Constantine gave to the Church a number of privileges, including the “privilege of clergy”, the right of clergy to be tried exclusively in the Church courts.<sup>82</sup> Constantine recognized that such courts might act partially towards their brethren, but he considered that “secret impunity would be less pernicious than public scandal.”<sup>83</sup>
189. St. Basil of Caesarea, the fourth century Church Father, (330-379CE), the main author of monastic rule of the Eastern Church, wrote that a cleric or monk who sexually molests youths or boys is to be publically whipped, his head shaved, spat upon, and kept in prison for six months in chains on a diet of bread and water, and after release is to be always subject to

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<sup>78</sup> Council of Elvira, Canons 18 and 7. Elvira was a town in Spain, and the Council produced canons that dealt with a wide range of matters, from clerical celibacy to apostasy. Their focus was on canons dealing with sexual morality of both laity and clergy. Its canons did not circulate widely. However, they were included in later collections of canons by Burchard in 1012CE and Ivo of Chartres in ca. 1091-1096:

[http://www.awrsipe.com/patrick\\_wall/selected\\_documents/309%20Council%20of%20Elvira.pdf](http://www.awrsipe.com/patrick_wall/selected_documents/309%20Council%20of%20Elvira.pdf) (Accessed 15 February 2014). Kenneth Pennington: *A Short History of Canon Law from Apostolic Times to 1917*:

<http://faculty.cua.edu/pennington/Canon%20Law/ShortHistoryCanonLaw.htm> (Accessed 6 January 2014), *Christianity, Social Tolerance, and Homosexuality: Gay People in Western Europe from the Beginning of the Christian Era to the Fourteenth Century* (University of Chicago Press 1980) pp. 69-74.

<sup>79</sup> Canons 16 and 17: Warren Johansson & William Percy, *Homosexuality*, in *Handbook of Medieval Sexuality*, (Vern Bullough & James Brundage eds., 1996), p. 162.

<sup>80</sup> There were assemblies in Asia Minor at Iconium, Synnada, Bostra, Carthage and other localities in the early third century and became more common in the latter part of the century: Pennington: *A Short History of Canon Law*:

<http://faculty.cua.edu/pennington/Canon%20Law/ShortHistoryCanonLaw.htm> (Accessed 6 January 2014)

<sup>81</sup> Pennington: *A Short History of Canon Law*:

<http://faculty.cua.edu/pennington/Canon%20Law/ShortHistoryCanonLaw.htm> (Accessed 6 January 2014)

<sup>82</sup> Gibbon: *Decline and Fall of the Roman Empire*, vol 2, p.335, Constant Van de Wiel: *History of Canon law* (Peeters Press Louvain 1991), loc. 286. Constantine permitted bishops “to have some influence in deciding between dissentient judges.” Under Valentinian III, “criminal cases against clerics had to be brought before the lay judge. Justinian excluded the competency of lay judges all causes of monks and nuns....in criminal cases the accused cleric was first to be cited before the episcopal court, and then punished by the civil court...with little difference, the same practice was followed in the West...since the 9<sup>th</sup> century the prelates and inferior clerics claimed immunity from the lay courts. After the Reformation, and even more so after the French Revolution, under the influence of Rationalism, the privilegium fori was curtailed, in some instances (Austria, Bavaria, Sicily) with the consent of the Holy See by way of concordat.”: Bachofen *Commentary on the New Code of Canon Law*, p 60-61.

<sup>83</sup> Gibbon, *ibid*

- supervision, and kept out of contact with young people.<sup>84</sup> Leaving out such antiquated punishments as whipping, spitting and head shaving, St. Basil seems remarkably modern in understanding the tendency of abusers to be recidivists and the need for them to be supervised.
190. Constantine's sons, Constantine II and Constantius II decreed anti-sodomy laws in 341CE, as did Theodosius the Great in 390CE.<sup>85</sup> The Emperor Justinian's *Digest* of Roman Law (533 CE) continued in the tradition of Augustus's *Lex Iulia de vi publica*, and imposed the death penalty for anyone who abducts or persuades a boy or a woman or girl to engage in an act of indecency.<sup>86</sup> Justinian's *Novellae* 77 and 141 of 556CE ordered death by burning for the "sin against nature".<sup>87</sup>
191. In the 6<sup>th</sup> century, Eastern Church scholars started to create collections of canons, such as the writings of St. Basil and others, and in the process, they also "canonized" the secular law, that is, they adopted the secular law as laid down by the Emperor as being part of its own canon law, because the Church regarded the Emperor's power as coming from God.<sup>88</sup> This was later followed in the West, but with the schism of 1054 between the Eastern and Western Churches, the West started to develop its own separate canon law.
192. The Church under Justinian adopted the military's practice of dishonourable discharge or "*degradatio*" to dismiss a priest for misconduct. The first record of it being used by the Church is in the 83<sup>rd</sup> *Novel of Justinian* (527-565 CE). *Degradatio* at this time did not

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<sup>84</sup> St. Basil of Caesarea, as quoted in Burchard of Worms, *Decretum. Liber Septimus* cap.35 in *Patrologiae*, ed. J.P. Migne (Paris: Migne, 1853), St. Peter Damian, *Letters 31-60, Fathers of the Church – Mediaeval Continuation Series*, trans. Owen P. Blum (Washington DC: Catholic University of America Press 1990), 29 (letter 31, chapter 8):referred by Nicholas P Cafardi: *Before Dallas*, (Paulist Press, 2008) p. 159. In the fifth century, the eastern canons were gradually accepted in Rome: Pennington: *A Short History of Canon Law*:

<http://faculty.cua.edu/pennington/Canon%20Law/ShortHistoryCanonLaw.htm> (Accessed 6 January 2014).

<sup>85</sup> Johansson & Percy, *Homosexuality* in Bullough & Brundage: *Handbook of Medieval Sexuality*, p.158.

<sup>86</sup> Momsen, Krueger and Watson: *Digest of Justinian*, Vol IV, University of Pennsylvania Press, [http://www.awrsipe.com/patrick\\_wall/selected\\_documents/Digest\\_of\\_Justinian.pdf](http://www.awrsipe.com/patrick_wall/selected_documents/Digest_of_Justinian.pdf) (Accessed 20 Sept 2014). For the *Lex Iulia de vi publica* (18-17BC) see: Brundage: *Law, Sex and Christian Society in Medieval Europe*, p. 47.

<sup>87</sup> Johansson & Percy, *Homosexuality* in Bullough & Brundage: *Handbook of Medieval Sexuality*, p.158.

<sup>88</sup> Pennington: *A Short History of Canon Law*:

<http://faculty.cua.edu/pennington/Canon%20Law/ShortHistoryCanonLaw.htm> (Accessed 6 January 2014). Constant Van de Wiel: *History of Canon law*, par 42 and 43, loc. 418-427. For example, John Skolasticos included 87 of Justinian's *Novellae* in his collection of canons. The "canonization" of secular law is also part of modern canon law (Canon 22). For example, the secular law of a place relating to contract and inheritance law (Canons 1290 and 1299) is deemed to be part of canon law. In other cases, canon law provides that particular crimes under secular law, such as murder, kidnapping, causing grievous bodily harm and clergy sexual assaults on minors are also separate canonical crimes (Canons 1397 and 1395). The close connection between Church and State continued in the 10<sup>th</sup> century with the reforms of Otto 1 (936-973) whereby administrative powers were given to ecclesiastical functionaries, thus giving rise to the German Imperial Church with its prince-bishops and abbots who had full ducal rights in their areas with the right to exercise both civil and ecclesiastical jurisdiction: id loc 769.



- necessarily mean the loss of clergy privilege.<sup>89</sup> As there was very little distinction between Church and State at this time, the privilege of clergy did not protect the accused priest from being dealt with by punishments such as imprisonment or worse that we now associate exclusively with the secular State. They could be imposed by the bishops themselves, who at that time were also secular judges.<sup>90</sup>
193. When the “barbarians” overran the Western Roman Empire, German codes gradually replaced Roman law, and they did not mention the “crime against nature”, except in Visigoth Spain where the Christian influence was still visible.<sup>91</sup>
194. As the early Church grew, rituals to reconcile sinners with the Church developed, and serious sinners were only readmitted after a series of painful public ceremonies.<sup>92</sup> Those public rituals went into decline over the next few centuries, and were replaced by a practice that is believed to have started in a 6<sup>th</sup> century Irish monastery, known as Skellig Michael. A form of repetitive private confession developed, and it spread within the monastic communities in Ireland, Scotland and Wales.<sup>93</sup> This eventually became the standard ritual right up to the present day.
195. From the 6<sup>th</sup> century onwards, scholars wrote the *Penitentials*, books of punishments for sins to be used by priests in the new rite of private confession. Many of these writers, including St Bede the Venerable in England (672 to 735CE), came to rank as canonical authorities.<sup>94</sup> These books contain detailed lists of sexual sins and their punishments, and they were used from the 6<sup>th</sup> to the 12<sup>th</sup> century. Although they do mention sex involving children, some of them are ambiguous when it comes to whether they are referring to adults having sex with

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<sup>89</sup> After complaints of lenient treatment for priests, Pope Innocent III in 1209 decreed that privilege of clergy was lost after degradation, and they were to be handed over to the civil authorities: Catholic Encyclopaedia:

<http://www.newadvent.org/cathen/04677c.htm> (Accessed 1 February 2014). Degradatio remained a penalty under the 1917 Code, (Canon 211), as did “deposition” or suspension from office and deprivation of any benefits from it (Canon 2303) and “defrocking”, or deprivation of ecclesiastical garb, but the 1983 Code of Canon Law has effectively combined them with the one penalty of “dismissal”: Edward N Peters: *The 1917 or Pio-Benedictine Code of Canon Law: in English Translation with Extensive Scholarly Apparatus*: Ignatius Press, page 90, John P Beal, James A Coriden & Thomas J Green, *New Commentary on the Code of Canon Law*, (Paulist Press, 2000),p.382

<sup>90</sup> Gibbon *Decline and Fall of the Roman Empire*, vol 2, p.336, H.A Drake: *Constantine and the Bishops: The Politics of Intolerance*, (JHU Press 2002), 327. This tradition of clerics being judges continued in England after the Norman Conquest, most of the King’s judges in England were in Holy Orders: John F. Wirenius: *Command and Coercion: Clerical Immunity, Scandal and the Sex Abuse Crisis in the Roman Catholic Church*: Journal of Law and Religion, Vol 27 No.2 2011-12 p.442

<sup>91</sup>Johansson & Percy, *Homosexuality in Bullough & Brundage: Handbook of Medieval Sexuality*, p.163.

<sup>92</sup> Cornwell: *The Dark Box*, (Profile Books, 2014), loc 307.

<sup>93</sup> Id, loc 331. Van de Wiel argues that the practice of private confession started much earlier, but the Celtic monasteries played a significant role in spreading the practice: Van de Wiel: *History of Canon law*, par 66, loc. 586

<sup>94</sup> Brundage: *Law, Sex and Christian Society in Medieval Europe*, p.2

children or children having sex with each other.<sup>95</sup> Nevertheless sexual abuse of children by adults comes within the general description of the various sexual sins.<sup>96</sup> Most treated homosexual sins more seriously than heterosexual ones, although there is no suggestion that the secular arm should punish them.<sup>97</sup>

196. The *Penitentials* recognized that many of these sins required forms of punishment like flagellation, forced labour and exile, which are significantly stronger than the maximum that contemporary canon law can impose, namely dismissal from the priesthood. Penances imposed on clerics were more severe than those imposed on the laity.<sup>98</sup> The word “sodomy” was used from the time of the *Penitentials* to describe any kind of non-reproductive sexual activity between men and women, and any sexual activity between persons of the same sex.<sup>99</sup>

### The Development of Canon Law in the 11<sup>th</sup> and 12<sup>th</sup> Centuries

197. By the 11<sup>th</sup> century, after the Great Schism, the decrees of the popes began to be the usual way in which canon law was promulgated in the West.<sup>100</sup> However, collections of imperial or royal laws were often accepted thereafter by the ecclesiastical authorities as representing canon law.<sup>101</sup> Canon law, as a body of law applicable to the whole of the Western Church,

<sup>95</sup> The *Penitentials of Cummean*, for example, refer to “a small boy misused by an older one”: John T. McNeill and Helena M. Gamer: *Medieval Handbooks of Penance* (Columbia University Press, 1938). Boswell says that in the literature of the time the words “boy” and “girl” did not necessarily mean someone under age, and the terms were used equally as we do today in talking about a “night out with the boys” or the “girls”: John Boswell: *Christianity, Social Tolerance, and Homosexuality: Gay People in Western Europe from the Beginning of the Christian Era to the Fourteenth Century* (University of Chicago Press 1980), loc 581. However, in this particular instance, the implication is that the misused boy is a minor.

<sup>96</sup> Cafardi: *Before Dallas*, p158, fn 11. Regino of Prum’s collection of canons (d.915CE) enjoyed widespread authority, and like most of his contemporaries, was largely gender blind. It was the act, not the parties involved that constituted the sin. The penalty for anal intercourse (3 years) was exactly the same for males as for a married couple and no more severe than simple heterosexual fornication. Despite quoting the harsher penalties of Basil of Caesarea and others, Regino did not adopt them for his own penance. It would seem that Regino did not think that an adult who had sex with a minor deserved a greater punishment than an adult who had sex with another adult. Boys and young men, however, received lighter sentences for the same sin: Boswell: *Christianity, Social Tolerance, and Homosexuality*, loc.4959.

<sup>97</sup> Johansson & Percy, *Homosexuality* in Bullough & Brundage: *Handbook of Medieval Sexuality*, p.164

<sup>98</sup> John T. McNeill and Helena M. Gamer: *Medieval Handbooks of Penance* (Columbia University Press, 1938) p.34-36

<sup>99</sup> From the time of the *Penitentials*, sodomy was “treated as a fluid and wide-ranging sin made up of a variety of non-reproductive bodily acts which can be, and presumably were performed in groups by men and women.”: William E. Burgwinkle in *Sodomy, Masculinity and Law in Medieval Literature: France and England, 1050-1230* (Cambridge Studies in Medieval Literature, Cambridge University Press, August 16, 2004), loc 92, Brundage, *Law, Sex and Christian Society*, 212-14, 313-14, 398-400, 472-74. Archbishop Hincmar of Reims’s (806-882CE) even described lesbian activity as “sodomy”. When Burchard, Bishop of Worms (d.1025) published his famous *Decretum* – the forerunner of the great collections of canon law of the twelfth and thirteenth centuries – he followed Hincmar in classifying homosexual acts as a variety of fornication: Boswell: *Christianity, Social Tolerance, and Homosexuality*: Loc 5263 – 5313. From the 16<sup>th</sup> to the 18<sup>th</sup> century, in Valencia, Spain, this same broad definition of sodomy applied, although the most severely punished by the Inquisition was anal intercourse between males (“perfect” sodomy, as distinct from “imperfect” sodomy between a male and a female): Carrasco: *Inquisición y Represión Sexual en Valencia*, p.38-47. These distinctions also applied in Peru in the 16<sup>th</sup> and 17<sup>th</sup> centuries: Molina: *Los Sodomitas Virreinales*, p.27

<sup>100</sup> Pennington, *ibid*.

<sup>101</sup> Van de Wiel: *History of Canon law* (Peeters Press Louvain 1991), par 60, loc 544.

- started to develop rapidly, and Roman law was revived with it, particularly at the University of Bologna, founded in 1088CE. Thereafter canon law's influence over civil law can be seen in the restoration of the Roman law against homosexuality. By the 16<sup>th</sup> century, homosexuality was again regarded as a social evil that needed to be purged.<sup>102</sup>
198. Burchard, the Bishop of Worms (d.1025CE) wrote 20 books of canon law in which he quotes St. Basil's rule about the proper punishment for monks who have sex with boys, making it part of the Western canon in dealing with the sexual abuse of minors by clerics.<sup>103</sup>
199. St. Peter Damian in his *Book of Gomorrah* (1051CE) was particularly harsh on clerics who had sex with young boys. The significance of this book from the point of view of canonical history is that it was endorsed by Pope Leo IX, and it quotes Burchard's *Decretum* that the appropriate punishment for clergy who sexually abuse boys and adolescents is as set out in St. Basil of Caesarea's rule.<sup>104</sup> Damian's final chapter is an appeal to Pope Leo IX to take action. But the Pope's response was to dismiss only repeat offenders, ignoring the effect on the victims and emphasising the need for forgiveness of the perpetrator.<sup>105</sup> The seeds of clericalism, the idea that clergy were special, and that the office sanctified the holder of it, had its origins as far back as Constantine, but they were always lying fallow beneath the surface.<sup>106</sup>
200. Another significant chronicler of canon law was Ivo of Chartres (d.1115) who emphasized the need for cooperation between Church and State, and regarded the decrees of Christian

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<sup>102</sup> John Boswell argues that for some time up until Gratian, a blind eye was turned by the authorities to adult homosexual behaviour, and then after that it came to be seen as dangerous, antisocial, and a severe aberration that needed to carry severe penalties under the civil law: Boswell: *Christianity, Social Tolerance, and Homosexuality* Loc. 8004, 8046. Thereafter most legal codes in Europe provided for severe penalties for homosexual acts of both sexes. Justinian's law had become popular everywhere in Europe, Loc. 7900 – 8004. However, the more correct view would seem to be that of Johansson and Percy that after the "barbarian" invasions, Roman law fell into disuse, and the serious penalties under civil law for adult homosexual activity were only revived in the 12<sup>th</sup> century under the influence of canon law: Johansson & Percy, *Homosexuality* in Bullough & Brundage: *Handbook of Medieval Sexuality*, p.176-178. Rafael Carrasco in a study of the Inquisition's dealing with homosexuality in Valencia in the 16<sup>th</sup> to 18<sup>th</sup> centuries says that "sodomy" in the broad sense of that term, was seen by both Church and State as corrupting the social order, and therefore had to be repressed as much as heresy: Carrasco: *Inquisición y Represión Sexual en Valencia*, p.164

<sup>103</sup> Burchard: *Decretum, Liber Decimus Septimus*, cap 35, in *Patrologiae* ed. J.P. Migne (Paris: Migne 1853) 140:925, referred to in Cafardi, *Before Dallas*, p.159.

<sup>104</sup> Cafardi: *Before Dallas* p.4 and Peter Damian: *Book of Gomorrah: An Eleventh Century Treatise against Homosexual Practices* (Wilfrid Laurier Univ. Press, 1982), p.61.

<sup>105</sup> Fr Thomas Doyle: *Affidavit in the case of Jane Doe v Oblates of Mary Immaculate*, District Court Bexar County Texas, Cause No. 2006CI09725, January 2008, par 21 <http://reform-network.net/?p=1464> (Accessed 6 May 2013).

<sup>106</sup> On privilege of clergy granted by Constantine, see Gibbon: *Decline and Fall of the Roman Empire*, vol 2, p.335. The seeds of clericalism kept sprouting up over the next four centuries when complaints were made that the Church courts dealt more leniently with clerical sex offenders than the laity: Mark D. Jordan: *The Silence of Sodom: Homosexuality in Modern Catholicism*, (University of Chicago Press, 2000) p.122-123

princes as having the force of canon law on the condition that they did not conflict with Church doctrine. He mixed rules of Roman law and laws of the Frankish kings with purely canonical rules.<sup>107</sup> Following Burchard, he provided severe penalties for fellatio, bestiality, pederasty and sodomy. The Council of Nablus in 1120 CE, decreed that in the Kingdom of Jerusalem, those guilty of sodomy should be burned.<sup>108</sup>

201. In 1140CE, Gratian from the University of Bologna wrote his “*Decrees*”, which combined all the previous collections of canon law, and provided the basis for other collections.<sup>109</sup> It has many sections dealing with the sexual transgressions of clerics, including sexual acts with young boys. Punishments for clerics were to be more severe than for laymen. While Burchard and Ivo were content to repeat St. Basil of Caesarea’s punishments for clerics who abuse boys, Gratian adopted the ancient Roman law that *stuprum pueri*, the sexual violation of young boys, should be punished by death.<sup>110</sup>

#### Church Council and Papal Decrees from the 12<sup>th</sup> to the 18<sup>th</sup> Centuries

202. At the Third Lateran Council in 1179CE, Pope Alexander III introduced into canon law the euphemism of a “crime against nature” for “sodomy” understood in its wide medieval wide sense, and it became part of the Church’s moral theology and jurisprudence.<sup>111</sup> It almost

<sup>107</sup> Constant Van de Wiel: *History of Canon law* (Peeters Press Louvain 1991), par 126, loc 986

<sup>108</sup> Johansson & Percy, *Homosexuality* in Bullough & Brundage: *Handbook of Medieval Sexuality*, p.166

<sup>109</sup> Van de Wiel: *History of Canon law*, par 128, loc 1013. Gratian’s *Decrees* were very influential in the teaching of canon law, but it was never officially recognised as the official version. Gregory IX (1227-1241) commissioned Raymond of Pennafort to prepare a new, uniform and simplified compilation that would contain only the laws in force, but he included in them Gratian’s *Decrees*. The *Decretals of Gregory IX* became the first official publication of canon law as a whole and it remained the most important collection until the 1917 Code: id par 141-143, loc, 1081-1092, and Doyle and Rubino: *Clergy Sexual Abuse Meets the Civil Law*, Fordham Urban Law Journal (2003) Vol. 31 Issue 2 p.582,n. 224: <http://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=1888&context=ulj> (Accessed 18 Jan 2015). There were subsequent attempts at compilations but none of them abrogated the old law of Gratian’s *Decrees*: Wiel, supra par 161, loc. 1164.

<sup>110</sup> *Decree of Gratian*, D. 1, de pen., c.15 in *Decretum Magistri Gratiani, editio Lipsiensis Secunda*, editor, A.L. Richter,( Graz, Friedberg, 1879, 1959). Here, Gratian was talking specifically about the sexual abuse of boys and not just homosexuality in general: John Boswell in *Christianity, Social Tolerance, and Homosexuality: Gay People in Western Europe from the Beginning of the Christian Era to the Fourteenth Century* (University of Chicago Press 1980), loc 6232. See also Fr Thomas Doyle: *Affidavit Jane Doe* par 22 <http://reform-network.net/?p=1464> (Accessed 6 May 2013); Cafardi *Before Dallas*, p.4. Gratian also included a canon from the 1102 Synod of London stating that clerics found guilty of sodomy, should either be deposed or excommunicated: Doyle and Rubino: *Clergy Sexual Abuse Meets the Civil Law*, p.583. John Boswell in *Christianity, Social Tolerance, and Homosexuality*: loc 7967 says that legal records for the Middle Ages are inadequate to determine the extent to which the death penalty was actually carried out. By the time of Gratian, the idea that imperial laws came from God had disappeared, and we then see statements that Church law is superior to secular laws: John F. Wirenius: “*Command and Coercion: Clerical Immunity, Scandal and the Sex Abuse Crisis in the Roman Catholic Church Journal of Law and Religion* Vol 27 No 2 (2011-12) p.453. This attitude continued with Thomas Aquinas who reasoned that secular judges who passed sentences on clerics exceeded their jurisdiction, to have acted not in law, but in violence and were guilty also of sacrilege: id p.455.

<sup>111</sup> It was taken up by St Thomas Aquinas a century later in his *Summa Theologica* 2-2.154.11, written between 1265 and 1274. Cafardi: *Before Dallas*, p.4-5

certainly included the sexual abuse of a minor by clergy.<sup>112</sup> Guilty clergy were to be kept indefinitely in a monastery or subjected to *degradatio*.<sup>113</sup> Nevertheless even if the decision was made not to “degrade” the priest, the punishment was effectively exile and extreme penance.<sup>114</sup>

203. The canonical literature from the early Middle Ages onwards did not always distinguish between sex with minors and sex with adults. “Sodomy” covered everything.<sup>115</sup> When committed by clerics it was not just a sin and a crime, but also a sacrilege because his body was a vessel consecrated to God.<sup>116</sup>
204. Subsequent theologians drew fine distinctions between the various kinds of crimes “against nature” and the relative seriousness of them. In 1517CE, Cardinal Cajetan in his *Commentaries on St Thomas Aquinas’s Summa Theologica* interpreted Aquinas to say that any necessarily sterile copulation was “against nature”, and the term was not confined to anal sex or same sex relationships. Masturbation by both sexes was also “against nature”.<sup>117</sup> Later moral theologians reverted to the medieval use of the word “sodomy” to describe any such sterile sexual activity.<sup>118</sup> In 1757, St Alphonsus Liguori used the word “sodomy” to describe any sexual contact with a person of the same sex, including between women.<sup>119</sup>

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<sup>112</sup> Ibid.

<sup>113</sup> “Let all who are found guilty of that unnatural vice... if they are clerics be expelled from the clergy or confined in monasteries to do penance”: <http://www.papalencyclicals.net/Councils/ecum11.htm> (Accessed 21 January 2015), Cafardi: *Before Dallas* p.4 and footnote 23, Johansson & Percy, *Homosexuality* in Bullough & Brundage: *Handbook of Medieval Sexuality*, p.166. Mark D. Jordan: *The Silence of Sodom: Homosexuality in Modern Catholicism*, (University of Chicago Press, 2000) p.123. Pope Alexander III prohibited secular punishments to clergy and limited canonical punishments to dismissal, and disapproved of any further punishment under the civil law: John F. Wirenius: *Command and Coercion: Clerical Immunity, Scandal and the Sex Abuse Crisis in the Roman Catholic Church*: *Journal of Law and Religion*, Vol 27 No.2 2011-12 p.448. Later popes, such as Innocent III had a different idea about handing over degraded clerics to be further punished by the civil authorities.

<sup>114</sup> Mark D. Jordan: *The Silence of Sodom*, p.123.

<sup>115</sup> Doyle and Rubino: *Clergy Sexual Abuse Meets the Civil Law*, p.576, and see Carrasco *Inquisición y Represión Sexual en Valencia* p.187 on the situation in Valencia from the 16<sup>th</sup> to the 18<sup>th</sup> centuries.

<sup>116</sup> Johansson & Percy, *Homosexuality* in Bullough & Brundage: *Handbook of Medieval Sexuality*, p.167.

<sup>117</sup> Thomas Aquinas, *Summa Theologica* 2-2.154.11, *Commentaria Cardinalis Caietani* Section 8 (Leonine 10:246a-b), Mark D. Jordan: *The Silence of Sodom*, pp. 64-65.

<sup>118</sup> Escobar and Mendoza: *Moral Theology of Twenty Four Theologians of the Society of Jesus* (1644), Mark D Jordan, *ibid* p.67.

<sup>119</sup> *Id* p.71. The gradual reduction of the meaning of “sodomy” to anal sex appears from the records of the Inquisition in the 16<sup>th</sup> and 17<sup>th</sup> centuries in Peru: Fernanda Molina *Los Sodomitas Virreinales: Anuario de Estudios Americanos*, 67, 1, enero-junio, 23-52, Sevilla (España) 2010, at p.25 <http://estudiosamericanos.revistas.csic.es/index.php/estudiosamericanos/article/view/330/335> (Accessed 28 January 2015). The Spanish canon lawyer, Fr Aurelio Yanguas SJ, writing in 1946, said that sexual intercourse with an underage girl (at that time under 12) was not a “crime against nature”, but it was effectively rape, and therefore part of the “crimen pessimum”: *De crimine pessimo et competentia S. Officia relate ad illud*, “*Revista Espanola de Derecho Canonico*. 1(1946): 427-439 [http://www.awrsipe.com/patrick\\_wall/Yanguas\\_crimen.pdf](http://www.awrsipe.com/patrick_wall/Yanguas_crimen.pdf) , (Accessed 26 December 2014) p.8

That continued until more recent times when it was replaced in Church discourse by the 19<sup>th</sup> century medico/legal word “homosexuality”.<sup>120</sup>

205. With Pope Innocent III (1198-1216CE), the Church theocracy reached its high point. The pope was the independent leader of the Church and had absolute power over both Church and State. He exercised supreme legislative power by issuing decrees and supreme judicial power by deciding disputes for the Christian West.<sup>121</sup> Innocent III thought that the Church should involve the “secular arm” in the punishment of delinquent clergy.<sup>122</sup> In 1209, he ruled that the degradation of a cleric should take place in the presence of someone from the secular authority who would then take custody of him.<sup>123</sup>
206. The Fourth Lateran Council in 1215 under Innocent III continued the condemnation of “crimes against nature”.<sup>124</sup> Clerics guilty of “incontinence” were to be suspended, and if they continued to “celebrate the divine mysteries”, they were to be forever deposed.<sup>125</sup> The Council also issued a special provision aimed at bishops who turned a blind eye to the sexual irregularities of their priests. They too were to be “deposed in perpetuity”.<sup>126</sup> The Church saw that some practices, such as capital punishment, were more appropriately handled by the secular authorities. The prohibition on clerics issuing sentences that “shed blood” was formalised at the Fourth Lateran Council. Such punishments henceforth were to be carried out by secular authorities.<sup>127</sup>

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<sup>120</sup> The first time the word “homosexual” was used appears to have been in 1869: John Boswell: *Christianity, Social Tolerance and Homosexuality*, (1981) p42-43 (1981).

<sup>121</sup> Van de Wiel: *History of Canon law*, par 100-101, loc. 789-799.

<sup>122</sup> Rosamond McKitterick: *New Cambridge Medieval History* pts.1-2.c.1024-c.1198, p. 441

<sup>123</sup> Catholic Encyclopaedia <http://www.newadvent.org/cathen/04677c.htm> (Accessed 9 July 2013)

<sup>124</sup> Cafardi, *Before Dallas*, p.5. The Fourth Lateran Council also insisted that clergy who are guilty of a second offence of incontinence should be “forever deposed.”

[http://www.awrsipe.com/patrick\\_wall/selected\\_documents/1215%20IV%20Lateran%20Council.pdf](http://www.awrsipe.com/patrick_wall/selected_documents/1215%20IV%20Lateran%20Council.pdf) (Accessed 9 February 2014).

<sup>125</sup> Canon 14, Fourth Lateran Council

[http://www.awrsipe.com/patrick\\_wall/selected\\_documents/1215%20IV%20Lateran%20Council.pdf](http://www.awrsipe.com/patrick_wall/selected_documents/1215%20IV%20Lateran%20Council.pdf) (Accessed 18 February 2015)

<sup>126</sup> Canon 14, Id: “Prelates who dare to support such persons (clerics) in their wickedness....are to be subject to like punishment.”- deprived of ecclesiastical benefices, and “deposed in perpetuity”. Seven hundred years later, *Crimen Sollicitationis* required crimes of sexual abuse of minors, homosexuality and bestiality to be reported to the Holy Office, but the pontifical secret prevented bishops from reporting to the civil authorities any information from a canonical investigation of the allegations. This marked the beginning of some 90 years where bishops turned a blind eye to such crimes under the civil law. The canons of the Fourth Lateran Council were abrogated by the *1917 Code of Canon Law*. On 7 February 2015, Cardinal Sean O'Malley of Boston, president of the Pontifical Commission for the Protection of Minors said he was “very, very concerned” about accountability of bishops. Bishops cannot be made accountable under canon law for covering up child sexual abuse while the pontifical secret is imposed on all such information: Kieran Tapsell: *Examining the Vatican's best practice: Who is being protected: the Holy See or children?*

<http://www.globalpulsemagazine.com/news/examining-the-vaticans-best-practice/763> (Accessed 5 March 2015)

<sup>127</sup> Canons 21 and 18 respectively <http://www.papalencyclicals.net/Councils/ecum12-2.htm> (Accessed 20 September 2014). Burning at the stake as a punishment for heresy throughout Europe was imposed by the constitutions of Frederick II

207. The Church still effectively had a veto over a priest being tried by the State for any kind of crime, because unless a priest was “degraded”, he still had the benefit of “privilege or benefit of clergy” (*Privilegium clericale*), to be tried only by the ecclesiastical courts. It was this veto that was the centre of the dispute between King Henry II of England and the Archbishop of Canterbury, Thomas A’Becket, culminating in the latter’s murder in Canterbury Cathedral on 29 December 1170.<sup>128</sup>
208. In 1232 CE, Pope Gregory IX commissioned the Dominicans to ferret out heretics, and Inquisitors in certain regions extended their jurisdiction to sodomites as well, seeing them as allies of demons, devils and witches. Those convicted were handed over to the civil authority which, in time, independently prescribed the death penalty.<sup>129</sup> Canon law, still under the influence of Roman law’s capital punishment for homosexuality and the sexual abuse of children, influenced civil law to impose punishments such as castration, exile and death. The first documented execution for homosexuality in Western Europe since the fall of the Roman Empire was in 1277.<sup>130</sup>
209. A further weapon in the Church’s armoury against “sodomy” from the late 13<sup>th</sup> century onwards was the declaration of perpetual “infamy”, which was a kind of civil death: their

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of 1224, and 1231, although it was more the adoption of popular custom. Since the clergy could have no direct or indirect part in the infliction of capital punishment, a prisoner found guilty of heresy was “relaxed” to the civil authority for the penalty under civil law to be applied: H.C. Lea: *A history of the Inquisition of the Middle Ages*, (McMillan, 1906) pp.221-224. The practice of burning at the stake for sodomy for homosexuals seems to have started shortly after the First Crusade (1095CE) in Jerusalem, and was copied more than a century later in the West when the “sodomitical” Muslims were seen as a greater threat to Europe. Homosexuality in the later Middle Ages then became more associated with heresy, and was viewed as much more serious than other types of heterosexual sexual offences: Boswell: *Christianity, Social Tolerance, and Homosexuality*, loc.7809-7860. In 14<sup>th</sup> century Spain, the penalty for sodomy was castration and stoning to death of the active partner, while minors under the age of 14 years and passive non-consenting partners were exempted. In 1497, Isabella and Fernando of Spain changed this to burning: Pete Sigal: *Infamous Desire: Male Homosexuality in Colonial Latin America*, (University of Chicago Press, 2003) p. 142. The same penalty seems to have applied to lesbians. The Salamancan jurist Antonio Gómez (1501-1561) argued that women who use dildos should be executed, but otherwise should be dealt with more leniently: Francois Soyer: *Ambiguous Gender in Early Modern Spain and Portugal: Inquisitors, Doctors and the Transgression of Gender Norms*(Brill Academic Publications, 2012), p.39. At that time in Portugal, execution was by burning at the stake: *Ibid*, p.41. Likewise in 16<sup>th</sup> century Valencia, burning at the stake continued to be the normal punishment. The civil authorities carried it out after the prisoner was handed over by the Inquisition. Confessions extracted under torture for heresy did not result in the death penalty if the accused retracted, but confession did not assist the sodomite to escape the death penalty, especially if he were the “active” one: Carrasco: *Inquisición y Represión Sexual en Valencia*, pp.95, 124. Quite apart from the view that passive anal sex was less deserving of the death penalty, many of these passive participants were minors to whom leniency was shown. (p.124, 134, 222).

<sup>128</sup> Spigelman J, *Becket & Henry*, The Becket Lectures, St. Thomas More Society (2004). A’Becket also claimed that even if the priest were deposed, that was sufficient punishment and the State could only punish him for crimes committed after deposition: John F. Wirenus: *Command and Coercion*: p.444. A’Becket’s attitude might have reflected the view of Pope Alexander III who prohibited secular punishments to clergy and limited canonical punishments to dismissal, and disapproved of any further punishment under the civil law: *Id*, p.448. Later popes, such as Innocent III had a completely different idea about handing over degraded clerics to be punished further by the civil authorities.

<sup>129</sup> Johansson & Percy, *Homosexuality* in Bullough & Brundage: *Handbook of Medieval Sexuality*, p.167

<sup>130</sup> *Id* p.173, Boswell: *Christianity, Social Tolerance, and Homosexuality* Loc 7900 – 8004

- families could be completely ostracized and economically boycotted; they could be murdered with impunity because civil authorities felt no obligation to prosecute.<sup>131</sup>
210. At the Fifth Lateran Council in 1514CE, Pope Leo X decreed that clerics involved in “crimes against nature” are to be punished “respectively according to the sacred canons or with penalties imposed by the civil law.”<sup>132</sup>
211. In the sixteenth century, there were complaints by lay people that the ecclesiastical courts were handing out less severe punishments to clergy for the same crimes, and for that reason, in 1529, Henry VIII of England, shortly before his break from Rome, ordered that the crime of “sodomy” was to be under the exclusive jurisdiction of the civil courts. Similar complaints about milder punishments for clerics in comparison to capital punishment meted out by the civil courts for lay people were made in Lucerne, Florence and Basle.<sup>133</sup>
212. The Council of Trent in 1551 marked a hardening of attitude towards priests who committed serious crimes. Whereas the previous decrees provided for a general discretion as to whether a cleric should be imprisoned in a monastery or “degraded”, the Council of Trent accepted that some crimes were “so grievous that on account of the atrocity thereof, they have to be deposed from sacred orders, and delivered over to a secular court.”<sup>134</sup>
213. Ten years later, in 1561, Pope Pius IV continued this stricter policy with his papal bull, *Cum Sicut Nuper*, directing the Inquisition in Spain to inquire into soliciting in the confessional there. Such activities were not limited to soliciting of children, but it is an indication that this Pope even considered that in the case of what would now be regarded as a purely canonical crime of soliciting sex from adults in the confessional, the civil authorities should still be

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<sup>131</sup> Johansson & Percy, *Homosexuality* in Bullough & Brundage: *Handbook of Medieval Sexuality*, p.173. The concept of “infamy” in canon law since that time seems to have changed so that by 1913, the Catholic Encyclopaedia’s definition of it was confined to a declaration that a person did not enjoy a good reputation. This seems to have been the meaning ascribed to it in the 1917 Code of Canon Law: <http://www.newadvent.org/cathen/08001a.htm> (Accessed 22 February 2015). Johansson and Percy, however, point out that there are still cultural elements of infamy that survive to the present day in the reluctance of police forces to prosecute those who assail homosexuals: id.

<sup>132</sup> Id p. 5 and footnote 27

<sup>133</sup> Mark D. Jordan: *The Silence of Sodom*: p.122-123.

<sup>134</sup> <http://www.thecounciloftrent.com/ch13.htm> (Accessed 9 February 2014). Chapter 1 also provided that transgressors were to be rebuked with gentleness and kindness in an attempt to reform them, but if the crime were so serious, they should be handed over to the civil authorities. After the Council of Trent, canon law was created primarily by the popes and the Roman dicasteries in his name: Van de Wiel: *History of Canon law*, par 199, loc 1481.



involved. Priests guilty of such matters were to be “degraded to the secular state”, and handed over “to a secular judge to be punished”.<sup>135</sup>

214. In 1566, Pope St Pius V (1566-72) issued his encyclical, *Cum Primum* requiring clerics who committed “an unspeakable crime against nature” to be first “degraded” by a canonical court and be subject to “fitting punishment”.<sup>136</sup> Two years later, the same Pope issued his constitution, *Horrendum Illud Scelus* against clerics who sinned “against nature” and decreed that were to be deterred by “the avenging secular sword of civil laws”. Those degraded by the ecclesiastical judge were to be “immediately delivered to the secular power”.<sup>137</sup> A good example is the case of Canon Fontino from the Italian town of Loreto, who was charged in 1570 before a canonical court with sodomy of a choirboy. He was degraded, and then handed over to the secular authority for punishment according to the civil law. He was executed by beheading. The choir boy was whipped and banned from the Papal States.<sup>138</sup>

### The Spanish Inquisition

215. In Spain and Portugal from the 15th to 18th centuries, the records of both the civil courts and the Inquisition indicate that both the aristocracy and clergy were treated more leniently for “sodomy” and the reasons were the loss of prestige and authority for the two institutions involved in keeping social order.<sup>139</sup> Nevertheless, severe punishments were imposed, and often the death penalty.
216. Between 1570 and 1630, the Spanish Inquisition handled over 1000 cases of “sodomy” in Aragon, and in some tribunals as many as one fifth of the accused were clergy. They were

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<sup>135</sup> [http://www.awrsipe.com/patrick\\_wall/selected\\_documents/1561%20Cum%20sicut%20super.pdf](http://www.awrsipe.com/patrick_wall/selected_documents/1561%20Cum%20sicut%20super.pdf) (Accessed 20 September 2014)

<sup>136</sup> Pope Pius V, *Cum Primum*, “Romani Pontifices”, 1 April 1566, in P. Gasparri, editor, *Codicem Iuris Canonici Fontes*, Vol. 1, (Vatican, Typis Polyglottis, 1926), p. 200

[http://www.awrsipe.com/patrick\\_wall/selected\\_documents/1566%20Cum%20primum.pdf](http://www.awrsipe.com/patrick_wall/selected_documents/1566%20Cum%20primum.pdf) (Accessed 21 September 2014.) “Sins against nature” or “sodomy” for the moral theologian, Cardinal Cajetan in 1517 included any form of sexual activity that could not result in conception. So male/female sodomy (anything but vaginal sex) was sinful, but not as seriously sinful as male/male sodomy: Mark D. Jordan: *The Silence of Sodom*, p. 64.

<sup>137</sup> [http://www.eurekaencyclopedia.com/index.php/Category:15th-18th\\_Centuries\\_Abuse](http://www.eurekaencyclopedia.com/index.php/Category:15th-18th_Centuries_Abuse) (Accessed 6 May 2016)

[http://www.awrsipe.com/patrick\\_wall/selected\\_documents/1568%20Horrendum.pdf](http://www.awrsipe.com/patrick_wall/selected_documents/1568%20Horrendum.pdf) (Accessed 4 August 2013)

<sup>138</sup> R. Sheer, “A Canon, a Choirboy and Homosexuality in Late Sixteenth Century Italy: a Case Study,” *Journal of Homosexuality* 21(1991): 1-22, Mark D. Jordan: *The Silence of Sodom*, p.122. The punishment imposed on the choirboy seems to be in contrast to the lenient line taken towards minors by the Spanish Inquisition in Valencia in the 16<sup>th</sup> to 18<sup>th</sup> centuries: Carrasco: *Inquisición y represión sexual en Valencia*, 222.

<sup>139</sup> Francois Soyer: *Ambiguous Gender*, p.36. Carrasco: *Inquisición y Represión Sexual en Valencia*, p.28, 169. A notorious aristocrat paedophile (in our modern sense of the term), Don Gesualdo Felices was not burned at the stake, but given a ten year jail sentence, his goods confiscated and perpetual exile thereafter from Madrid, Valencia and Meliano: p. 195.

- amongst the first to be executed.<sup>140</sup> Not all of these crimes involved sex with minors, but many of them did.
217. In Valencia between 1565 and 1785, most of the priests or religious were accused of committing sexual crimes with adolescents, either novices or students, or boys plying the “street trade”.<sup>141</sup> A Jesuit chaplain in Seville remarked that Jesuits rarely sin with women because they can so easily find partners amongst their students and novices.<sup>142</sup> The experience of modern times is that opportunity is a powerful factor in the sexual abuse of children, and there is every reason to think that it operated in the same way in earlier times when schools were attached to monasteries.<sup>143</sup>
218. Soliciting sex in the confessional had become a problem for the Church, and Pope Benedict XIV’s apostolic constitution, *Sacramentum Poenitentiae* of 1741 condemned it.<sup>144</sup> The Spanish Tribunals reveal 3,775 cases of solicitation between 1723 and 1820, or over 40 a year.<sup>145</sup>
219. In the 1780s, the Inquisition in Valencia and Zaragoza handed over to the civil authorities to be burned at the stake several monks where their sodomy had become public knowledge affecting the credibility and image of the Church.<sup>146</sup> In some cases where the crime had not become public, the monk was garrotted in prison, rather than being burned at the “so that the faithful did not hear about such a bad monk” and lose their respect for religion.<sup>147</sup> Depending on the circumstances, priests and monks were burned at the stake, garrotted in

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<sup>140</sup> Mark D. Jordan: *The Silence of Sodom*, p 126

<sup>141</sup> Mark D. Jordan: *The Silence of Sodom*, p. 127, and Carrasco: *Inquisición y represión sexual en Valencia*: pp.175-176

<sup>142</sup> Mark D Jordan: *The Silence of Sodom*, p.126, citing Mary Elizabeth Perry: “The ‘Nefarious Sin’ in Early Modern Seville”, *Journal of Homosexuality* 16, nos 1-2 (1988); pp.67-89

<sup>143</sup> Professors Desmond Cahill and Patrick Parkinson explain the significant drop off in complaints of sexual abuse in Australia since the 1980s on a number of factors, including the closure of boarding schools and the collapse of the altar boy system: Patrick Parkinson: *Child Sexual Abuse and the Churches: A Story of Moral Failure?*, *Current Issues in Criminal Justice*, July 2004, Vol. 26 No. 1 <http://www.austlii.edu.au/au/journals/CICrimJust/2014/16.pdf> (Accessed 26 December 2014)

<sup>144</sup> [http://www.awrsipe.com/patrick\\_wall/selected\\_documents/1842%20Augustinian%20dubium.pdf](http://www.awrsipe.com/patrick_wall/selected_documents/1842%20Augustinian%20dubium.pdf) (Accessed 20 September 2014)

<sup>145</sup> Fr Thomas Doyle *Affidavit Jane Doe*, [http://www.bishop-accountability.org/news2008/03\\_04/2008\\_03\\_03\\_Doyle\\_TomDoyle.htm](http://www.bishop-accountability.org/news2008/03_04/2008_03_03_Doyle_TomDoyle.htm) par 36 (Accessed 15 July 2013). Doyle does not provide a breakdown of how many involved children. The age for confession at this time was the age of puberty, between 12 and 14. It was later reduced to 7 by Pope Pius X in 1910: John Cornwell: *The Dark Box, A Secret History of Confession*, loc, 146-147. However, again, there were opportunities for soliciting adolescent boys through the confessional.

<sup>146</sup> Carrasco: *Inquisición y represión sexual en Valencia*, p179-181, and cases such as that of Fray Jeronimo Estruch, p.180.

<sup>147</sup> Id, p.61.

prison, whipped, sentenced to long periods in the galleys, imprisoned in monasteries with forced labour and fasting and sent into exile.<sup>148</sup>

220. In the 17<sup>th</sup> century, the Church's stand against these priests seemed to be very close to adopting what we might call these days, "zero tolerance". In 1635, Pope Urban VIII decreed that any priest who had been sentenced to the galleys must not, at the end of the sentence, be "vested in the exercise of their Orders".<sup>149</sup> In 1726, a priest who had sodomized young boys was sentenced to 7 years in the galleys, but it was never carried out, and he served his sentence working in a hospital. He petitioned the Sacred Congregation for the Council for permission to say Mass again on the grounds that Urban VIII's decree did not apply to him because he had not actually served in the galleys. The Council rejected his petition, confirming that the rationale behind Urban VIII's decree was not the particular punishment imposed under the civil law, but that the crime involved "infamy" – and sodomy of boys certainly did.<sup>150</sup> The Council also rejected the submission that leniency should be granted because the priest was heavy with age of "sixty or more years". Such a submission seems to have more traction these days in the Vatican where applications for dismissal of some notorious paedophiles have been rejected because of their age or poor health.<sup>151</sup>

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<sup>148</sup> Mark D. Jordan: *The Silence of Sodom*, p.123. Rafael Carrasco gives examples of lesser sentences for clergy imposed by the Inquisition from the 16<sup>th</sup> to 18<sup>th</sup> century in Valencia, such as 4 years imprisonment in a monastery, 3 and 5 years in the galleys and 200 lashes and heavy fines for "touching" or "embracing" boys: Carrasco: *Inquisición y Represión Sexual en Valencia*, p.48. In 1617, a priest named Ferrer was "degraded" and given 10 years on the galleys (p.64). Carrasco says that after about 1630, the Valencia Inquisition was less likely to hand people over to the civil authority to be burned at the stake, and preferred sentencing to the galleys, whipping and exile. In the case of clergy and religious, where they were not "degraded", they were imprisoned in a monastery designated by the Sacred Congregation of the Inquisition, and had forced labour imposed on them. They were forced to fast, as well as being forbidden to say Mass and preach. (p.82). Carrasco also says that 30% of all males brought before the Inquisition were between 9 and 19 years old, with an average of 15.4 years. Young males were the favourite prey of homosexuals (clerical or otherwise), whose methods of persuasion were perfectly adapted to the misery in which most of the population were living. Sex was a source of social mobility, or provided access to comforts and pleasures reserved to the economic elites. Very few of these young people were punished by the Inquisition, which tends to confirm that the Inquisition accepted that the fault was mainly with the adults who seduced them: (p.222-224). The same inequality in social position between sexual partners is found in studies of the Peruvian Inquisition of the 16<sup>th</sup> and 17<sup>th</sup> century, although there were also long standing relationships where there seemed to be more equality: Molina: *Los Sodomitas Virreinales*, p.36

<sup>149</sup> P. Gasparri, editor, *Codicem Iuris Canonici Fontes*, Vol. 1, p. 763:

[http://www.awrsipe.com/patrick\\_wall/selected\\_documents/1726%20Lavellana.pdf](http://www.awrsipe.com/patrick_wall/selected_documents/1726%20Lavellana.pdf) (Accessed 9 February 2014.)

<sup>150</sup> Nicholas Cafardi, *Before Dallas*, p. 6, and Gasparri, *ibid*.

<sup>151</sup> The term "paedophile", strictly speaking, refers to persons who are sexually attracted to pre-pubescent children both sexes and the term "ephebophile" refers to persons sexually attracted to post-pubescent children, and often of the same sex. However, the term "paedophile" is commonly used these days to refer to anyone who has sexual relationships with anyone who is legally underage, and for the sake of convenience the term will be used in this sense throughout this submission. Fr Desmond Gannon, who had been convicted four times and sentenced to jail terms twice, was aged 83 in 2012 when the Holy See refused to dismiss him on the petition of Archbishop Hart: [http://www.parliament.vic.gov.au/images/stories/committees/fcdc/inquiries/57th/Child\\_Abuse\\_Inquiry/Transcripts/Catholic\\_Archdiocese\\_of\\_Melbourne\\_20-May-13.pdf](http://www.parliament.vic.gov.au/images/stories/committees/fcdc/inquiries/57th/Child_Abuse_Inquiry/Transcripts/Catholic_Archdiocese_of_Melbourne_20-May-13.pdf) (Accessed 27 December 2014), Fr Lawrence Murphy, accused of sexually assaulting some 200 deaf mute boys, had suffered a stroke, but not seriously incapacitated, was 67 in 1998 when the CDF advised Archbishop Weakland to discontinue the penal proceedings against him: see the author's *Potiphar's Wife*, pp.220ff

## The Beginnings of a Cultural Shift

221. By 1842, in the reign of Pope Gregory XVI, we start to see a reluctance to hand over priests to the secular authorities in some countries. In that year, the Holy Office issued an instruction absolving penitents of their canonical obligation to denounce priests who solicited sex in the confessional in the lands of “schismatics, heretics and Mohammedans” where:

“...there is no hope of punishment of the accused, and women are unable to denounce without danger and infamy (and) where it is indeed thought easy for the accused to escape punishment by having recourse to schismatic bishops or infidel judges.”<sup>152</sup>

222. In 1866, we start to see a change, not only on the question of handing over priests to the civil authorities, but also a reluctance to impose dismissal or “degradatio” on priests even for soliciting in the confessional. An instruction from Pius IX through the Holy Office of 20 February 1866 makes no mention of handing over such priests to the secular authority, and states:

“There must nevertheless be restraint from inflicting loss of rank and demotion to the ‘secular’ branch”<sup>153</sup>

Because the seal of confession was involved in any investigation of such a canonical crime, absolute secrecy was imposed on the proceedings.<sup>154</sup>

223. On 20 July 1890, the Holy Office, under Pope Leo XIII, issued a further instruction imposing quite detailed procedures for keeping the proceedings for soliciting in the confessional secret, including requiring witnesses to swear oaths of secrecy. The reason given was:

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<sup>152</sup> Gasparri, *Codis Iuris Canonici Fontes, Volume IV Curia Romana* N714-2055, 889, SCS Off. Litt 20 maii 1842 [http://www.awrsipe.com/patrick\\_wall/selected\\_documents/1842%20Augustinian%20dubium.pdf](http://www.awrsipe.com/patrick_wall/selected_documents/1842%20Augustinian%20dubium.pdf) (Accessed 20 September 2014). On July 21, 1542, Pope Paul III proclaimed the Apostolic Constitution *Licet ab initio*, establishing the Supreme Sacred Congregation of the Roman and Universal Inquisition, staffed by cardinals and other officials whose task it was “to maintain and defend the integrity of the faith and to examine and proscribe errors and false doctrines”. In 1904, Pope Pius X changed its name to Supreme Sacred Congregation of the Holy Office. To avoid confusion, the term “Holy Office” is used in reference to the activities of this Congregation before 1904.

<sup>153</sup> S.C.S. Off. Instr., 20 Febr 1866, *Instruction under Sacramentum Poenitentiae*, par 12 [http://www.awrsipe.com/patrick\\_wall/selected\\_documents/1866%20Instruction%20on%20sacramentum%20poenitentiae.pdf](http://www.awrsipe.com/patrick_wall/selected_documents/1866%20Instruction%20on%20sacramentum%20poenitentiae.pdf) (Accessed 20 September 2014)

<sup>154</sup> Gasparri, editor, *Codicem Iuris Canonici Fontes*, Vol. 1, (Vatican, Typis Polyglottis, 1926), par 14 [http://www.awrsipe.com/patrick\\_wall/selected\\_documents/1866%20Instruction%20on%20sacramentum%20poenitentiae.pdf](http://www.awrsipe.com/patrick_wall/selected_documents/1866%20Instruction%20on%20sacramentum%20poenitentiae.pdf) (Accessed 9 February 2013) The secrecy instructions was repeated in 1897 [http://www.awrsipe.com/patrick\\_wall/selected\\_documents/1897\\_instructionis\\_circa\\_sacramentum\\_poenitentiae.pdf](http://www.awrsipe.com/patrick_wall/selected_documents/1897_instructionis_circa_sacramentum_poenitentiae.pdf) (Accessed 9 February 2013).

“..quite often these cases can no longer be prosecuted without becoming graver, and turning into a source of damnation and scandal to the faithful.”<sup>155</sup>

224. The procedures outlined in this instruction were designed to keep hidden not just the evidence that might be given, but the fact that a trial was being held at all. The trial was not to be conducted in the Chancery. Witnesses were to be called on different days, interviewed alone, and examinations were to take place in sacristies or some other private place.<sup>156</sup>
225. Here we find the Holy See being more concerned about the “scandal” that such trials might create rather than any breach of the confessional seal. Archbishop Hart explained to the Victorian Parliamentary Inquiry that scandal has technical meaning in the Church: the loss of faith amongst the faithful when those who are supposed to act in the place of Christ, namely priests, bishops and religious, do the opposite.<sup>157</sup>

### The First Code of Canon Law 1917

#### The Cultural Shift Towards Cover Up

226. In 1904, Pope St Pius X set up the Pontifical Commission for the Codification of Canon Law under Cardinal Gasparri. The Secretary to the Commission from 1904 until 1916 was Monsignor Eugenio Pacelli, the future Pope Pius XII who made a major contribution to the editorial work of the Code.<sup>158</sup> The work of creating the first Code of Canon Law involved adopting, modifying or discarding decrees that the Church thought were relevant or irrelevant for the time.<sup>159</sup> The Commission discarded the decrees of Innocent III, Leo X, Pius

<sup>155</sup> Gasparri, editor, *Codicem Iuris Canonici Fontes*, Vol. 1, N.714-2055, 1123

[http://www.awrsipe.com/patrick\\_wall/selected\\_documents/1890%20Denunciations%20of%20confessors.pdf](http://www.awrsipe.com/patrick_wall/selected_documents/1890%20Denunciations%20of%20confessors.pdf).

<sup>156</sup> Ibid.

<sup>157</sup> Archbishop Hart of Melbourne at the Victorian Parliamentary Inquiry.

[http://www.parliament.vic.gov.au/images/stories/committees/fcdc/inquiries/57th/Child\\_Abuse\\_Inquiry/Transcripts/Catholic\\_Archdiocese\\_of\\_Melbourne\\_20-May-13.pdf](http://www.parliament.vic.gov.au/images/stories/committees/fcdc/inquiries/57th/Child_Abuse_Inquiry/Transcripts/Catholic_Archdiocese_of_Melbourne_20-May-13.pdf), 19 (Accessed 18 June 2013). Brendan Daly has a slightly different meaning to the word. In *Issues with Penal Law and the Proposed Revision of Book VI*, Proceedings Canon Law Society of Australia and New Zealand, 46th Annual Conference Auckland 2012, 55, he states: “...scandal in the canonical sense means leading people into error: by letting people think that what the person is known to have done was not gravely wrong, or letting people think that it is acceptable for an unrepentant person to be functioning as a priest and to be both receiving and celebrating the sacraments.” In his footnote reference, he quotes from a declaration of the Pontifical Council for the Interpretation of Legislative Texts about allowing divorced and remarried persons to receive Communion. In the context of child sexual abuse, the “scandal” is likely to be more along the lines proposed by Archbishop Hart – the fact that the faithful would become aware that a priest was sexually abusing children. This was the sense in which Monsignor Wayne Peters used the word “scandal” in the case of “Father F”: see the author’s *Potiphar’s Wife: The Vatican’s Secret and Child Sexual Abuse* p.215.

<sup>158</sup> Edward Peters: [http://www.canonlaw.info/canonlaw\\_menbehindman.htm](http://www.canonlaw.info/canonlaw_menbehindman.htm) (Accessed 20 September 2014), Constant Van de Wiel: *History of Canon Law* (Peeters Press Louvain 1991), par 237, loc 1724.

<sup>159</sup>The Apostolic Constitution, *Providentissima Mater Ecclesia* of Pope Benedict XV of 27 May 1917 states how Pope Pius X had ‘...resolved to arrange in a clear and orderly collection all the laws of the Church which had been proclaimed down to

- IV, St Pius V, the Fourth and Fifth Lateran Councils and the Council of Trent, requiring priests guilty of serious crimes (which included the sexual assault of children) to be handed over to the civil authorities.
227. The Council of Trent in its 13<sup>th</sup> session, Chapter 1, decreed that transgressors should first be reprov'd "in all kindness and...gentleness", and to "proceed with sharper and more violent remedies" where required, but "without harshness". But then in Chapter IV it decreed that where the crimes of ecclesiastics are so serious, they are to be "deposed from sacred orders and delivered to the secular court".<sup>160</sup>
228. The Pontifical Commission accepted the spirit of forgiveness and gentleness in Chapter 1, but discarded entirely Chapter IV requiring them to be handed over to the secular court in the case of very serious crimes. Canon 2214 §2 states:
- "§2 The admonition of the Council of Trent (session XIII, dew ref. cap. 1) to the bishops and other Ordinaries is here repeated, from which it is evident that the Church does not favour the hasty and rash use of extreme penalties and censures but reminds the bishops to consider their subjects as children and brethren, and to try as long as possible, by patience and kindness, to influence them to strive after virtue and to desist from vice."
229. The canon law and practice of handing over the cleric for punishment in accordance with the civil law even for the most serious offences was officially abandoned everywhere, and not just for those countries ruled by "schismatics, heretics and Mohammedans". The Pontifical Commission had set in train the "pastoral approach" which, in later decades and combined with the strictest secrecy, would prove to be disastrous for children.
230. The *1917 Code of Canon Law* was promulgated on 27 May 1917 by Pope Benedict XV.<sup>161</sup>
231. Canon 2359§2 of the Code provided for various punishments for sexual "delicts":

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our day, abolishing those already abrogated or obsolete, adopting others to present needs and making new ones as necessity or expediency should required.' At the end of the Constitution appear the words: "All enactments, constitutions and privileges whatsoever...and customs even immemorial and all other things to the contrary notwithstanding : Edward N Peters: *The 1917 or Pio-Benedictine Code of Canon Law*, p. 22-23. This formula "all things to the contrary notwithstanding" is the term used in canon law to state that all previous laws dealing with that subject matter are repealed: Beal Coriden and Green: *New Commentary on the Code of Canon Law*, p81.

<sup>160</sup> <http://www.thecounciloftrent.com/ch13.htm> (Accessed 4 June 2016)

<sup>161</sup> <http://www.canonlaw.info/masterpage1917.htm> (Accessed 22 May 2015). Van de Wiel: *History of Canon law* (Peeters Press Louvain 1991), par 237, loc 1755, said of the Code: "The 1917 Code, of course, superseded all the other collections. At last the Catholic Church had its official, exclusive and universal collections of laws." All previous canon law was effectively abrogated.

“If they (clerics) engage in a delict against the sixth precept of the Decalogue with a minor below the age of sixteen, or engage in adultery, debauchery, bestiality, sodomy, pandering, incest with blood relatives or affines in the first degree, they are suspended, declared infamous and are deprived of any office, benefice, dignity, responsibility, if they have such, whatsoever, and in more serious cases, they are to be deposed.’<sup>162</sup>

232. The “sixth precept of the Decalogue” is the prohibition of adultery in the sixth of the Ten Commandments. As the earlier history demonstrates, this prohibition was understood to extend to any form of sexual activity except vaginal intercourse between a husband and wife. The maximum punishment that the Church could now impose was dismissal from the clerical state.
233. Five years later, by 1922, when the instruction *Crimen Sollicitationis* was issued by Pope Pius XI, these requirements were given greater particularity in the case of four specific canonical crimes, soliciting sex in the confessional, homosexuality, bestiality and the sexual abuse of children. The requirement to dismiss for “more serious cases” had become one where dismissal was only available in these cases where there was an impossibility of reform.<sup>163</sup>
234. The Church effectively imposed the equivalent of the seal of confession on any information that the Church obtained through its internal inquiries about these four canonical crimes.<sup>164</sup>

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<sup>162</sup> Edward N. Peters: *The 1917 or Pio Benedictine Code of Canon Law in English Translation* p.749. As shown in chapter 4, the word “sodomy” was used in Church documents to describe any form of non-reproductive sexual activity. The effects of a declaration of “infamy” seemed to have changed since the late 13<sup>th</sup> century where it appears as to be no more than a declaration that the accused has a bad reputation. In early times it created serious civil disabilities. Johansson & Percy in *Homosexuality* in Bullough & Brundage: *Handbook of Medieval Sexuality*, p. 173, and see Catholic Encyclopaedia <http://www.newadvent.org/cathen/08001a.htm> (Accessed 22 January 2015). The word is used twice in the *1983 Code*, but as an apparent synonym for “scandal”. <http://www.vatican.va/archive/ENG1104/2/NO.HTM> (Accessed 22 January 2015).

<sup>163</sup> *Crimen Sollicitationis* Art, 63. Since this was an Instruction under the authority of the Code, it provided more particularity, and this provision about dismissal as a last resort was consistent with Canon 2214§2. For the original 1922 Latin document, see [http://www.awrsipe.com/patrick\\_wall/selected\\_documents/1922%20Instruction.pdf](http://www.awrsipe.com/patrick_wall/selected_documents/1922%20Instruction.pdf) (Accessed 28 December 2014). The 1962 version is in identical terms except that its provisions were extended to priests who were members of religious orders: [http://www.vatican.va/resources/resources\\_crimen-sollicitationis-1962\\_en.html](http://www.vatican.va/resources/resources_crimen-sollicitationis-1962_en.html) (Accessed 4 August 2013) and <http://www.vatican.va/resources/Beal-article-studia-canonica41-2007-pp.199-236.pdf> (Accessed 16 July 2013). Like so many things in Church history, this idea of “impossibility of reform” did not come out of the blue. In 1178, Pope Alexander III promulgated his decree *At Si Clerici* in which he denied secular jurisdiction over clergy, limited ecclesiastical punishments to suspension and degradation and prohibited the imposition of secular punishments for any crimes committed by clergy: John F. Wirenius: *Command and Coercion*: p.448. A succession of subsequent popes overruled this and required priests to be handed over to the secular courts for punishment. They recognised that suspension and degradation of themselves were insufficient.

<sup>164</sup> Breaching the seal of the confessional incurred automatic excommunication, but that excommunication could be lifted by the Sacred Penitentiary (Canon 2369 1917 Code, Canon 1388, 1983 Code) but *Crimen Sollicitationis* went further because breach of the secret of the Holy Office could only be lifted by the Pope personally. On the other hand, the Holy See could always grant a dispensation against a breach of the secret of the Holy Office under Canon 85, but no such

In his revised historical introduction to *SST 2001*, Pope Benedict XVI said that strict confidentiality was imposed originally because cases of soliciting in the confessional involved the seal of confession. He then said:

“Over time and only analogously, these norms were extended to some cases of immoral conduct of priests.”<sup>165</sup>

235. Pope Benedict never explained why it was necessary to extend the strict confidentiality – the equivalent of the confessional seal – to homosexuality, bestiality and the sexual abuse of children when none of them had anything to do with confession. Further, for some reason, the secret of the Holy Office was not imposed on the other sexual delicts in Canon 2359§2: adultery, debauchery, pandering and incest with blood relatives or affines in the first degree.<sup>166</sup>
236. The instruction also envisaged that these priests could be transferred to another territory to avoid “scandal”.<sup>167</sup> These provisions reflected the twin concerns of the Holy See at the time: the avoidance of “scandal” and treating priests differently because they had been “ontologically changed” when they were anointed by God at ordination. The creation of a de facto privilege of clergy through the back door of secrecy had begun.<sup>168</sup>

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dispensation could be given for the seal of the confessional: Beal, Coriden and Green: *New Commentary on the Code of Canon Law*, p.1592

<sup>165</sup> [http://www.vatican.va/resources/resources\\_introd-storica\\_en.html](http://www.vatican.va/resources/resources_introd-storica_en.html) (Accessed 3 July 2013)

<sup>166</sup> This situation changed with *Secreta Continere* in 1974 when the secret of the Holy Office was replaced by the Pontifical Secret and the same strict confidentiality was imposed on all delicts against faith and morals.

<sup>167</sup> *Crimen Sollicitationis* Arts. 64(d), 68 & 69.

<sup>168</sup> <http://reform-network.net/?p=3006> par 27 (Accessed 3 July 2013). Apart from the fear of scandal, the Church in the 18<sup>th</sup> century was starting to adopt the view that canon law had priority over civil law. In 1704 the Holy Office placed on the Index of Forbidden Books the works of the Louvain canonist, Van Espen, who taught that canon law should give way to civil law where there was a conflict: Van der Wiel: *History of Canon Law*, loc 1620. In 1864, Pius IX issued his *Syllabus of Errors*, in par 42 of which he stated that it was an “error” to hold that “in the case of conflicting laws enacted by the two powers, the civil law prevails.” Likewise the priority of canon over civil law is reflected in par 30 of the *Syllabus of Errors* that the immunity of “the Church and of ecclesiastical persons derived its origin from civil law”, the implication being that it can be abrogated by the State: <http://www.papalencyclicals.net/Pius09/p9syll.htm> (Accessed 19 January 2015). The 1917 *Code of Canon Law* reflected this philosophy, asserting that both secular and ecclesiastical authorities are “instituted by God, and, in that respect are alike competent and independent of each other, each in the proper sphere or its jurisdiction...the spiritual power should...get preference in a conflict of jurisdiction.” Canon 120 § 1, of the 1917 Code provided that clerics should be brought before an ecclesiastical judge in civil and criminal matters, unless concordats with specific countries provide otherwise. If none exist, then the judge needs to obtain the permission from bishop or Holy See. Needless to say, these provisions were ignored and the requirement was dropped in the 1983 *Code*. John F. Wirenius: *Command and Coercion*: p.465ff. The view that canon law takes priority continues to be reflected in the current Canon 22: Beal, Coriden and Green, *New Commentary on the Code of Canon Law* (2000), Paulist Press, 85. No modern secular State was or is prepared to recognise the priority of canon law, (except to some extent in the Concordats with Franco’s Spain in 1953 and Colombia in 1973), but immunity of clergy from State prosecution could be achieved by the use of secrecy, and by dealing with these priests exclusively under canon law through the canonical courts. It was only in 2010 that the Vatican provided for a dispensation to the pontifical secret to allow reporting of allegations of sexual abuse by clergy, but limited to where there was a domestic law requiring reporting.



237. If the civil authorities did not know about these allegations, there would be no State trials, and the matter would be dealt with exclusively in the canonical courts where the maximum punishment was dismissal from the priesthood. The effect of this change of policy turned on its head a tradition for most of the life of the Catholic Church of seeing child sexual abuse as a crime that demanded at least imprisonment, which by the 19<sup>th</sup> century, had become an exclusive punishment of the State. There are a number of explanations for why this happened.

### The Priest as an Ontologically Changed Being

238. The theology that a priest is someone special reaches back to before St. Augustine, but it seems to have reached a peak around the early 1900s, and was personified in the 1905 beatification by Pope Pius X and 1925 canonization by Pope Pius XI of the French priest, John Vianney, who proclaimed, "After God, the priest is everything!"<sup>169</sup> Pope Benedict XVI in his letter to priests in 2009 quoted these words with approval.<sup>170</sup> It seems that the Church had accepted as orthodoxy, Lord Acton's worst heresy that "the office sanctifies the holder of it."<sup>171</sup> This theology was reflected in the Holy See entering into Concordats with sympathetic Catholic countries to provide special privileges for convicted priests, such as spending terms of imprisonment in monasteries rather than jails.

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<sup>169</sup> [http://www.vatican.va/holy\\_father/benedict\\_xvi/letters/2009/documents/hf\\_ben-xvi\\_let\\_20090616\\_anno-sacerdotale\\_en.html](http://www.vatican.va/holy_father/benedict_xvi/letters/2009/documents/hf_ben-xvi_let_20090616_anno-sacerdotale_en.html) (Accessed 15 May 2013). The idea, at least as it applies to bishops, can also be traced earlier to St. Ignatius of Antioch: Catholic Catechism par 1549: [http://www.vatican.va/archive/ccc\\_css/archive/catechism/p2s2c3a6.htm](http://www.vatican.va/archive/ccc_css/archive/catechism/p2s2c3a6.htm) (Accessed 26 October 2013). Gary Macy argues that this concept of the priest having a special power, rather than being called to perform a particular role in the Christian community only dates from the 12<sup>th</sup> century.

<http://scu.edu/ic/publications/upload/sci-0711-macy.pdf> (Accessed 6 September 2013). The 16<sup>th</sup> century Council of Trent continued the idea of ordination creating an indelible mark on the priest: Twenty Third Session (1658), Chapter IV: <https://history.hanover.edu/texts/trent/ct23.html> (Accessed 18 May 2015). But there seems little doubt that this culture of clericalism reached a peak at the beginning of the 20<sup>th</sup> century. Pope Pius X in a 1906 encyclical insisted that the Church was made up of two divisions, the hierarchy that led and the flock whose only duty was to obey: [http://www.vatican.va/holy\\_father/pius\\_x/encyclicals/documents/hf\\_p-x\\_enc\\_11021906\\_vehementer-nos\\_en.html](http://www.vatican.va/holy_father/pius_x/encyclicals/documents/hf_p-x_enc_11021906_vehementer-nos_en.html). (Accessed 1 October 2013)

<sup>170</sup> [http://www.vatican.va/holy\\_father/benedict\\_xvi/letters/2009/documents/hf\\_ben-xvi\\_let\\_20090616\\_anno-sacerdotale\\_en.html](http://www.vatican.va/holy_father/benedict_xvi/letters/2009/documents/hf_ben-xvi_let_20090616_anno-sacerdotale_en.html) (Accessed 3 October 2013). The theology is also expressed in Canon 1008 of the *1983 Code*: By divine institution, the sacrament of orders establishes some among the Christian faithful as sacred ministers through an indelible character which marks them." See David Timbs: *Clericalism*, *OMG! Journal of Religion and Culture* 1 April 2015, [http://ohmygodjournal.org/?page\\_id=434](http://ohmygodjournal.org/?page_id=434) (Accessed 6 April 2015)

<sup>171</sup> Lord Acton (1834 – 1902) "I cannot accept your canon that we are to judge Pope and King unlike other men, with a favourable presumption that they did no wrong... There is no worse heresy than that the office sanctifies the holder of it." Acton is best known for the words that follow in his letter to Bishop Mandell Creighton, 'Power tends to corrupt and absolute power corrupts absolutely.' Letter to Bishop Mandell Creighton, April 5, 1887 published in *Historical Essays and Studies*, edited by J. N. Figgis and R. V. Laurence (London: Macmillan, 1907)

### The Concordats Creating De Iure Privileges for Clergy

239. The 1922 Concordat between Latvia and the Holy See provided that if a priest or religious monk is sentenced to imprisonment by a State court, he will be treated in accordance with his status in the hierarchy, and his sentence will be served in a monastery unless in the meantime he had been dismissed from the priesthood.<sup>172</sup> By this means the Church had control over whether a priest went to jail or not. The 1925 Concordat between Poland and the Holy See and the 1929 Lateran Treaty between Mussolini and the Holy See have similar provisions.<sup>173</sup> These treaties reflect the belief that priests are different, and should be treated more leniently than other citizen/criminals.
240. A variation of the Lateran Treaty between the Holy See and the Italian State in 1985 provides that clergy are not required to give judges or other authorities, information on persons or matters which come to their knowledge by reason of their ministry.<sup>174</sup> This does not seem to be restricted to confession, and therefore bishops could not be interrogated about what priests have told them outside confession. A similar provision was included in the 1933 Concordat with Nazi Germany.<sup>175</sup>
241. Franco's 1953 Concordat between Spain and the Holy See restored many of the privileges that had been agreed to between the Holy See and the Spanish monarchs, and which were repudiated by the 1931 Republican government.<sup>176</sup> The 1953 Concordat provided that a bishop could only be put on trial in a civil court with the consent of the Holy See.<sup>177</sup> It allowed criminal proceedings against clerics but only with the consent of the bishop.<sup>178</sup> Any deprivation of liberty was to be spent in a religious house, not in jail, and the proceedings

<sup>172</sup> <http://www.worldlii.org/int/other/LNTSer/1923/80.html> (Accessed 13 January 2013)

<sup>173</sup> <http://www.racionalista.pl/kk.php/s,1369/k,2> (Accessed 13 January 2014) Lateran Treaty 1929, Article 8

<http://www.aloha.net/~mikesch/treaty.htm> (Accessed 14 December 2013)

<sup>174</sup> Agreement 3 June 1985, Art. 4(4). <http://original.religlaw.org/template.php?id=578> (Accessed 11 April 2015). In March, 2015, the CDF refused to hand over documents relating to the canonical trial of Fr Mauro Inzoli to Italian Magistrates. The reason given was that: "The procedures of the Congregation for the Doctrine of the Faith are of a canonical nature and, as such, are not an object for the exchange of information with civil magistrates." The newspaper report makes no mention of the Lateran Treaty, and the reason may have been the imposition of the pontifical secret under canon law which the Vatican was not prepared to waive. <http://www.globalpulsemagazine.com/news/pope-francis-issues-statutes-overseeing-financial-reform/887> (Accessed 8 March 2015)

<sup>175</sup> Article 9, [http://www.concordatwatch.eu/showkb.php?org\\_id=858&kb\\_header\\_id=752&kb\\_id=1211](http://www.concordatwatch.eu/showkb.php?org_id=858&kb_header_id=752&kb_id=1211) (Accessed 13 January 2014)

<sup>176</sup> The Republican government repudiated the 1851 Concordat between the Holy See and Queen Isabella that incorporated many clergy privileges. [http://www.concordatwatch.eu/showtopic.php?org\\_id=845&kb\\_header\\_id=34511](http://www.concordatwatch.eu/showtopic.php?org_id=845&kb_header_id=34511) (Accessed 13 January 2014)

<sup>177</sup> [http://www.vatican.va/roman\\_curia/secretariat\\_state/archivio/documents/rc\\_seg-st\\_19530827\\_concordato-spagna\\_sp.html](http://www.vatican.va/roman_curia/secretariat_state/archivio/documents/rc_seg-st_19530827_concordato-spagna_sp.html) (Accessed 7 May 2013) Art XVI (1.)

<sup>178</sup> *Id.*, Art XVI (4)

were not to be publicised – the first was a reflection of clericalism that the priest was someone special, to be treated more leniently than every other guilty citizen, and the second reflected the Church’s concern about the effects of “scandal”. Clerics and religious could be made to testify in court, but only with the consent of the bishop, and no cleric could be questioned about his knowledge of crimes of others that came to them while performing their ministry. Effectively, a bishop could not be questioned by the State about facts uncovered in canonical investigations into the sex crimes priests against children.<sup>179</sup> These privileges were abolished in Spain as late as 1985.<sup>180</sup>

242. The 1954 Concordat between the Holy See and Rafael Trujillo, the dictator of the Dominican Republic, provides that priests cannot be interrogated by judges or other authorities over things revealed to them in the exercise of their “sacred ministry”.<sup>181</sup> Priests would serve their jail sentences separate from lay persons.<sup>182</sup>

243. In Colombia, a form of de iure privilege of clergy survived under Concordats with the Holy See of 1887, 1928 and 12 July 1973.<sup>183</sup> Bishops could not be tried by the State Courts, but

<sup>179</sup> [http://www.vatican.va/roman\\_curia/secretariat\\_state/archivio/documents/rc\\_seg-st\\_19530827\\_concordato-spagna\\_sp.html](http://www.vatican.va/roman_curia/secretariat_state/archivio/documents/rc_seg-st_19530827_concordato-spagna_sp.html) (Accessed 7 May 2013) Art XVI (1.) This says, ‘In the case of arrest or detention, clergy and religious will be treated in accordance with their status and their position in the hierarchy. The penalty of deprivation of liberty will be spent in an ecclesiastical or religious house that, in the judgment of the bishop of the place and the judicial authority of the State offers the appropriate guarantees; or at least in local places different to where lay people are kept, unless the ecclesiastical authority has laicized the cleric.’

<sup>180</sup> [http://www.laicismo.org/data/docs/archivo\\_678.pdf](http://www.laicismo.org/data/docs/archivo_678.pdf) p. 58 (Accessed 7 May 2013)

<sup>181</sup> Concordat 16 June 1954 [http://www.vatican.va/roman\\_curia/secretariat\\_state/archivio/documents/rc\\_seg-st\\_19540616\\_concordato-dominicana\\_sp.html](http://www.vatican.va/roman_curia/secretariat_state/archivio/documents/rc_seg-st_19540616_concordato-dominicana_sp.html) Art XI(2)(Accessed 18 October 2013)

<sup>182</sup> Emilio Betances: *The Catholic Church and Power Politics in Latin America*, Roman and Littlefield (2007) p. 38

<sup>183</sup> The immunity of bishops was granted by the Concordat of 1887. It became part of Colombian law by Law No. 34 of 1892: <http://www.banrepcultural.org/node/32783> (Accessed 16 March 2015). The immunity was continued in 1928 by the Convention regarding Missions: League of Nations Treaty Series, Art XIV.

<http://www.worldlii.org/int/other/LNTSer/1928/192.html> (Accessed 16 March 2015). It was confirmed again by the Concordat of 1973, Art XIX and XX: [http://www.cec.org.co/sites/default/files/WEB\\_CEC/Documentos/Documentos-Historicos/1973%20Concordato%201973.pdf](http://www.cec.org.co/sites/default/files/WEB_CEC/Documentos/Documentos-Historicos/1973%20Concordato%201973.pdf) (Accessed 2 June 2016). Art III provides: “Canon law is independent of civil law and does not form part of civil law, but it will be respected by the authorities of the Republic.” Art IV provides that Colombia will recognise ecclesiastical entities that canon law recognises as “juridical persons”. Art VII says that the State will recognise marriages celebrated under canon law, and Art VIII says that it will recognise annulments given by canonical tribunals. Art XIX provides: “Continuarán deferidas a los Tribunales del Estado las causas civiles de los clérigos y religiosos y las que se refieren a la propiedad y derechos temporales de las personas jurídicas eclesiásticas, como también los procesos penales contra aquellos por contravenciones y delitos ajenos al ministerio eclesiástico, sancionados por las leyes de la República. Se exceptúan, sin embargo, los procesos penales contra los Obispos y quienes están asimilados a éstos en el derecho eclesiástico, que son de competencia exclusiva de la Sede Apostólica.” “Civil cases affecting clergy and religious will continue to be heard by the State Courts as well as those that deal with the property and temporal rights of ecclesiastical institutions that have juridic personality, as well penal processes for contraventions and crimes that are not part of ecclesiastical ministry and that are sanctioned by the laws of the Republic. This does not apply, however to penal processes against Bishops or who hold the equivalent rank under canon law, and over these, the Holy See has exclusive jurisdiction.” (The author’s translation)

Art XX provides: “En caso de procesos penales contra clérigos y religiosos, conocerán en primera instancia, sin intervención de Jurado, los Jueces Superiores o quienes los reemplacen y en segunda, los Tribunales Superiores. Al iniciarse el proceso se comunicará el hecho al Ordinario propio, el cual no pondrá obstáculo al procedimiento judicial. Los juicios no serán

only by the Church Courts. Priests on the other hand can be tried in State Courts but the proceedings are not to be publicised, and again, we have the Holy See's concern about the effect of "scandal". The Church's objection by 1973 was not so much about priests being punished by the State under the law of the land, but that anyone should know about it. But bishops were another matter. Under the 1973 Concordat, they could not even be tried by the Colombian State, no matter what they did. They were above the law. In 1993, the Colombian Constitutional Court declared the Concordat inconsistent with the 1991 Constitution requiring equal treatment under the law.<sup>184</sup> Despite controversy over the matter, the Holy See was still insisting in 2007 that Colombia respect the Concordat under the Vienna Convention: Colombian bishops were entitled to immunity and were above the law.<sup>185</sup> The matter is still unresolved.<sup>186</sup>

244. In 1994 the Colombian Attorney General, Gustavo de Grieff started proceedings against certain bishops, including Archbishop Dario Castrillón Hoyos of Bucaramanga for complicity with the FARC guerrillas, contrary to Colombian law. But he had to abandon the proceedings because of the immunity under the Concordat, which protected the bishops.<sup>187</sup> Two years later Castrillón was called to Rome, and appointed to head the Congregation for the Clergy. He was made a Cardinal in 1998. He remained in that post until 2006, and was one of the

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públicos. En la detención y arresto antes y durante el proceso, no podrán aquellos ser reclusos en cárceles comunes, pero si fueren condenados en última instancia se les aplicará el régimen ordinario sobre ejecución de las penas."

"In the case of penal proceedings against clergy and religious, they will be heard at the first instance without a jury by the Superior Judges, or those who replace them, and in the second instance by the Appeal Tribunals. The accused's bishop will be notified of the initiation of the process, and he shall not put anything in the way of the judicial procedure. The proceedings will not be made public. On arrest and detention before and during the process, they will not be kept in common jails, but if they are ultimately convicted, the ordinary processes of execution of sentences will apply." (The author's translation).

<sup>184</sup> <http://www.eltiempo.com/archivo/documento/MAM-217215> (Accessed 19 October 2013). It seems that there was some question about the jurisdiction of the Constitutional Court to issue judgments on international treaties:

<http://bibliotecanonica.net/docsad/btcadx.htm> (Accessed 19 October 2013).

[http://www.usergioarboleda.edu.co/civilizar/revista8/concordato\\_jurisprudencia.pdf](http://www.usergioarboleda.edu.co/civilizar/revista8/concordato_jurisprudencia.pdf) (Accessed 19 October 2013). There is currently no sign of any concordat with Colombia on the list of agreements with other countries on the Vatican website [http://www.vatican.va/roman\\_curia/secretariat\\_state/index\\_concordati-accordi\\_en.htm](http://www.vatican.va/roman_curia/secretariat_state/index_concordati-accordi_en.htm) (Accessed 19 October 2013)

<sup>185</sup> <http://www.caracol.com.co/noticias/actualidad/concordato-en-colombia-impide-encarcelar-al-arzobispo-de-manizales/20070423/nota/418074.aspx> (Accessed 19 October 2013)

<sup>186</sup> The matter is contentious with some lawyers arguing that the Constitutional Court had no jurisdiction to declare the Concordat as violating the Constitution. The difficulty is that parts of the Concordat have been made part of the domestic law, all of which is supposed to comply with the Constitution: <http://www.eltiempo.com/archivo/documento/MAM-92041> (Accessed 30 May 2013). See also discussion in <http://marioenelblog.blogspot.com.au/2016/04/que-paso-con-el-concordato-colombiano.html> dated 9 April 2016 (Accessed 2 June 2016), and the judgment of the Constitutional Court on 22 February 2016 in Sentencia T-073/16. This case did not involve issues of criminal law, but a dispute over property between the Church and "Christians", that is Protestants: <http://www.corteconstitucional.gov.co/RELATORIA/2016/T-073-16.htm> (Accessed 2 June 2016)

<sup>187</sup> <http://www.eltiempo.com/archivo/documento/MAM-92041> (Accessed 30 May 2013).

main advocates in the Roman Curia for the cover up by Catholic bishops of allegations against priests.<sup>188</sup>

245. These concordats reflect the theology that priests are special people and should not have to spend time in jail like every other convicted citizen, but in a place more appropriate to their status as ontologically changed beings, namely monasteries.

### The Rise of Anti-Clericalism

246. In the 16<sup>th</sup> century, the Protestant Reformation saw the Church lose control and influence over large sections of northern Europe. That did not seem to affect canon law's attitude to dealing with child sexual abuse because the Council of Trent was called as a response to the Reformation, and it still insisted on handing over offenders to the civil authorities for serious crimes.<sup>189</sup> The subsequent religious wars and persecution of Catholics in Protestant countries must have had some effect on Church thinking over the next four hundred years as to what to do with clerics who had breached the criminal laws of those States hostile to the Church. Another and perhaps more significant issue was the rise in anti-clericalism in Catholic Europe and Latin America.
247. At the time of the French Revolution the clergy were associated with the oppressing aristocracy. The end result of that was a significant amount of anti-clericalism that continued until the signing of the Concordat with Napoleon in 1801, and sporadically thereafter.<sup>190</sup> In Germany and Austria, there were attempts to reduce the role and power of the Church. The best known was Bismarck's "Kulturkampf", the "cultural struggle" in Prussia with laws passed between 1871 and 1878.<sup>191</sup>
248. In 1862, Pope Pius IX published his "*Syllabus of Errors*", in which he condemned as an error the idea that the civil law should have priority over canon law, and that Church and State should be separate.<sup>192</sup> In 1870, he lost control of the Italian Papal States, prompting him to declare himself a 'prisoner' in the Vatican.<sup>193</sup>

<sup>188</sup> Cardinal Castrillon's attitudes to clergy sexual abuse of children is particularly revealing in an interview with Patricia Janiot of CNN Colombia on 2 June 2011: the author's *Potiphar's Wife*: p.181, 230, 262-264, and for full text, see par 750.

<sup>189</sup> <http://www.thecounciloftrent.com/ch13.htm> (Accessed 9 February 2014)

<sup>190</sup> José Mariano Sánchez, *Anticlericalism: a brief history* (University of Notre Dame Press, 1972)

<sup>191</sup> Michael B. Gross: *The War Against Catholicism: Liberalism and the Anti-Catholic Imagination in Nineteenth-century Germany* (University of Michigan Press, 2004), 1.

<sup>192</sup> *Syllabus of Errors*, Art. 42 and 45. <http://www.papalencyclicals.net/Pius09/p9syll.htm> (Accessed 5 June 2014). Zegerus Bernardus Van Espen (1646-1728), a Louvain Professor of Canon Law published his *Ius Ecclesiasticum Universum* in which

249. In 1905, a former seminarian, Émile Combes, who had become Prime Minister of France, introduced a law separating the Church from the State, and most Catholic schools and educational institutions were closed.<sup>194</sup>
250. In 1922, Mussolini became Prime Minister of Italy after years of anti-clerical rhetoric. He moderated his stance in subsequent years, seeing the need to woo the Church in order to give his regime some legitimacy. The dispute with the Church over the Papal States was only settled with the signing of the Lateran Treaties in 1929, and the creation of the Vatican City State.<sup>195</sup> In Spain, there were similar movements against Church and its property from the early 1800s, culminating in the Second Republic of 1931.<sup>196</sup> The same occurred in Latin America.<sup>197</sup> While this anti-clericalism in these traditionally Catholic countries could have contributed to the Church's reluctance to involve the secular authorities in allegations of sexual abuse against clergy, a radical new development in technology could ensure that such scandals could be spread at the speed of light.

#### The Invention of Radio and the Fear of Scandal

251. After several decades of experimentation, Guglielmo Marconi sent the first transatlantic radio message in 1902.<sup>198</sup> The new invention captured the public and commercial imagination. The first commercial radio licence in the United States was issued to Westinghouse in 1920, and the BBC was established in 1922.<sup>199</sup> The Holy See itself was not slow to recognise the propaganda benefits of the new invention, and it was the first religious faith to use it for proselytising purposes in 1927.<sup>200</sup> In 1931, Marconi set up the Vatican

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he confirmed the authority of the royal courts to settle disputes over the scope of ecclesiastical immunity. It was condemned in 1704 by a decree of the Holy Office and listed on the *Index of Prohibited Books*. In his later work, the *Tractatus de Recursu ad Principem* of 1725, he placed the jurisdiction of the secular court above that of the Church. He was condemned by the University Court in 1728, and had his priestly faculties suspended: Van de Wiel: *History of Canon Law*, par 223, loc 1620.

<sup>193</sup> [http://www.vatican.va/news\\_services/liturgy/saints/ns\\_lit\\_doc\\_20000903\\_pius-ix\\_en.html](http://www.vatican.va/news_services/liturgy/saints/ns_lit_doc_20000903_pius-ix_en.html) (Accessed 4 December 2014)

<sup>194</sup> Sidney Z. Ehler, John B. Morrall: *Church and State Through the Centuries: A Collection of Historic Documents* (Biblio & Tannen Publishers, 1967) p.355

<sup>195</sup> Martin Clark, *Mussolini*, (Routledge, 2005), 31, 66 and 117.

<sup>196</sup> Stanley G. Payne: *Spain's First Democracy: The Second Republic, 1931-1936*, (University of Wisconsin Press, 1993) p.84

<sup>197</sup> Mexico's 1917 Constitution put severe restrictions on the Church's activities. Catholic (called "Los Cristeros") and anti-clericalist groups turned to terrorism which continued until 1929. Pius XI issued a series of encyclicals condemning the persecution of the Church. There were similar but not so violent anti-clerical movements in Ecuador, Venezuela, Colombia and Argentina.

<sup>198</sup> James Wood: *History of International Broadcasting*, (IET 1993) p.17

<sup>199</sup> *Id.*, p.25

<sup>200</sup> The Vatican adopted the same attitude towards cinema. Both Pope Pius XI and Pius XII could see the enormous advantages of this new media for spreading the Church's message, but they also recognised the "dangers". Pius XI issued

- Radio for Pius XI.<sup>201</sup> Two years after the first commercial radio stations started to appear, Pius XI imposed “the secret of the Holy Office” on all information about child sex abuse by clergy. One solution to the “scandal” problem was to cut off the information at its source.
252. By 1922, the culture of secrecy and its felt need to hide clergy sex crimes against children, had become so strong that it found its way into canon law. The Church had already abandoned its past practice of handing over priests guilty of the sexual abuse of children to the civil authorities with the promulgation of the 1917 *Code of Canon Law*. But in 1922, it went a step further by the imposition of the secret of the Holy Office.
253. Because of the prevailing anti-clericalism in the 1920s, it may have been understandable for the Church leadership to think that its priests, accused of serious crimes, would not receive a fair trial if they were handed over or if their crimes were reported. The fear that priests might not receive a fair trial may have been justified in Germany prior to 1945 and in the Soviet bloc until 1989, but there was no justification for it in the West, certainly after 1945.<sup>202</sup> The reimposition of the pontifical secret in 2001, and again by Benedict XVI in 2010, long after this anti-clericalism had disappeared, suggests that the fear of scandal and the protection of priests were the stronger motivations for maintaining and strengthening the culture of secrecy.

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an encyclical *Vigilanti Cura* in 1936 in which he warned about the corrupting influence of cinema, and proposed that national bishops' conferences set up a classification system to warn the faithful about dangerous films. Pius XII in his 1957 encyclical *Miranda Prorsus* also warned against “the very great dangers” of cinema by encouraging “uncontrolled passions”. Brian Lucas: *The Australian Bishops and National Media: Conflicts and Missed Opportunities*, *Journal of the Australian Catholic Historical Society* (2015), 202 at 204. The most that the Vatican could do about cinema (and later television and the internet) was to warn the faithful about the dangers of particular films or programs. But it could prevent scandals about clergy sexual abuses being spread by the use of secrecy.

<sup>201</sup> Id, p.126,

<sup>202</sup> Cardinal Pell told the Royal Commission that this thinking pervaded the Vatican until 2002 when the American bishops persuaded the Vatican that the people making the complaints were not just the “enemies of the Church”, like the “Nazis and possibly Communists” had done, but were good people.”: Transcript on 14 March 2014 at p.6260

## 5: CANON LAW ON CHILD SEXUAL ABUSE SINCE 1922

### The Instruction, *Crimen Sollicitationis* of 1922

254. The instruction, *Crimen Sollicitationis* was the equivalent of a regulation under civil law. It was signed by Cardinal Merry del Val after an audience with Pope Pius XI.<sup>203</sup> It was obligatory to follow it.<sup>204</sup>
255. *Crimen Sollicitationis* contains an introduction, followed by five parts or “titles”.<sup>205</sup> The first four titles deal with the crime of soliciting sex in the confessional, the procedures to be followed, and the penalties to be imposed. Title five has the heading “*Crimen Pessimum*”, (Latin for “the worst crime”), namely homosexuality, bestiality and sexually assaulting children.
256. On the front page of the document, in bold letters is this:

**“TO BE KEPT CAREFULLY IN THE SECRET ARCHIVE OF THE CURIA FOR INTERNAL USE.**

**NOT TO BE PUBLISHED OR AUGMENTED WITH COMMENTARIES”**

<sup>203</sup> The 1922 version of the document had this notation at the bottom: “Ssmus Dominus Noster Pius Papa XI, in audientia Emo Cardinali Secretario S.Officio die 8 junii 1922 impertita Instructionem hanc adprobare et confirmare dignitatis est, mandans ad quos spectat ut eam ad unguem servent et servare faciant, Romae ex aud. S.C. die 9 junii 1922. R. Card. MERRY DEL VAL”: [http://www.awrsipe.com/patrick\\_wall/selected\\_documents/1922%20Instruction.pdf](http://www.awrsipe.com/patrick_wall/selected_documents/1922%20Instruction.pdf) (Accessed 28 December 2014)

<sup>204</sup> Canon 34 §1 says: “Instructions clarify the precepts of laws and elaborate on and determine the methods to be observed in fulfilling them. They are given for the use of those whose duty it is to see that laws are executed and oblige them in the execution of the laws. Those who possess executive power legitimately issue such instructions within the limits of their authority.” Beal, Coriden and Green in the *New Commentary on the Code of Canon Law* state: “The guidelines for the application of the law found in an instruction, however, are not merely suggestions; they oblige those who are responsible for the application of the law. Instructions provide more detailed regulations in an attempt to ensure more uniform application of the law accommodated to current circumstances.” Any doubt about that was removed Pope Benedict XVI in his revision of *Sacramentorum Sanctitatis Tutela* when he said, “It is to be kept in mind that an Instruction of this kind had the force of law since the Supreme Pontiff, according to the norm of can. 247, § 1 of the Codex Iuris Canonici promulgated in 1917, presided over the Congregation of the Holy Office, and the Instruction proceeded from his own authority, with the Cardinal at the time only performing the function of Secretary.” <http://www.documentcloud.org/documents/243690-10-sacramentorum-sanctitatis-2001-with-2003.html> (Accessed 4 August 2013). Dr Ian Waters in an address in Melbourne, Australia on 29 October 2014 suggested that because *Crimen Sollicitationis* was an ‘instruction’, and not a decree signed by the Pope, it was only a guide, the implication being that bishops were free to abide by it or not. [http://www.youtube.com/watch?v=7\\_jaQKTe4VY&feature=youtu.be](http://www.youtube.com/watch?v=7_jaQKTe4VY&feature=youtu.be) (Accessed 30 November 2014), and see transcript and the author’s commentary: <http://www.awrsipe.com/Misc/Ian-Waters-Speech-with-Commentary5.pdf> (Accessed 22 April 2015). However, in an article in *The Canonist, The Law of Secrecy in the Latin Church*, Vol 7 No.1 (2016), Dr Waters conceded that Pope John Paul II said that it had “‘the force of law’ because the pope in accordance with Canon 247§1 of the 1917 Code ‘presided over the Congregation of the Holy Office and the instruction proceeded from his own authority.’”

<sup>205</sup> The 1962 version is in identical terms except that its provisions were extended to priests who were members of religious orders: [http://www.vatican.va/resources/resources\\_crimen-sollicitationis-1962\\_en.html](http://www.vatican.va/resources/resources_crimen-sollicitationis-1962_en.html) (Accessed 4 August 2013)



257. The “curia” referred to in this heading to the document is the central office of the bishop’s diocese. The *1917 Code of Canon Law* required every bishop to have a “secret archive of the curia” under the care of the chancellor, who alone was to have the key.<sup>206</sup> No one was to have access to this safe without the consent of the bishop, the vicar general or the chancellor.<sup>207</sup> Evidence of these crimes was to be burned on the death of the priest or after ten years, with only a brief summary of the facts and the decree retained.<sup>208</sup>
258. The requirement to keep a written law in a locked safe with very few people having access to it is strange, because generally a very important feature of any coherent legal system is that it be published, and available for anyone to consult it, especially those who are governed by it. Although one can now find *Crimen Sollicitationis* on the Vatican website, this publication only occurred in 2003.<sup>209</sup>
259. The first part of *Crimen Sollicitationis*, dealing with soliciting sex in the confessional required the Catholic faithful who had been “solicited” to report the matter to the bishop, who would then carry out an investigation.<sup>210</sup> The document then describes in fairly convoluted language the procedures that are to apply<sup>211</sup>. All those involved in the investigation, the bishop, the complainant, witnesses, note takers and canon lawyers, are bound by the “secret of the Holy Office”. Art 11 provides

“Since, however, in dealing with these causes, more than usual care and concern must be shown that they be treated with the utmost confidentiality, and that, once decided and the decision executed, they are covered by **permanent silence** (Instruction of the Holy Office, 20 February 1867, No. 14), all those persons in any way associated with the tribunal, or knowledgeable of these matters by reason of their office, are bound to observe inviolably the strictest confidentiality, commonly known as the secret of

<sup>206</sup> Code of Canon Law: Latin-English Edition (Washington: Canon Law Society of America, 1984) Canon 379 and Canon 372.4. [http://cssronline.org/CSSR/Archival/1997/1997\\_303.pdf](http://cssronline.org/CSSR/Archival/1997/1997_303.pdf) (Accessed 15 October 2013) Canon 377 provides that only the chancellor is to have the key. Canon 379 also provides: “Promptly, once a year, documents in criminal cases are to be burned in moral cases, or in which the defendant has died or ten years have passed since the condemnatory sentence, retaining only a brief summary of the facts, with the text of the definitive sentence” [http://books.google.com.tr/books?id=2XbtF6Y21LUC&pg=PA148&lpg=PA148&dq=1917+Code+of+Canon+law+diocesan+archives&source=bl&ots=onqWZGzhHf&sig=qAYDuBKJFhEQgJadplb2zbeeVwl&hl=en&sa=X&ei=z8VdUojvB-jb4QSwjohADw&redir\\_esc=y#v=onepage&q=1917%20Code%20of%20Canon%20law%20diocesan%20archives&f=false](http://books.google.com.tr/books?id=2XbtF6Y21LUC&pg=PA148&lpg=PA148&dq=1917+Code+of+Canon+law+diocesan+archives&source=bl&ots=onqWZGzhHf&sig=qAYDuBKJFhEQgJadplb2zbeeVwl&hl=en&sa=X&ei=z8VdUojvB-jb4QSwjohADw&redir_esc=y#v=onepage&q=1917%20Code%20of%20Canon%20law%20diocesan%20archives&f=false) (Accessed 16 October 2013)

<sup>207</sup> Canon 377.

<sup>208</sup> Id, Canon 379

<sup>209</sup> It was referred to in Cardinal Ratzinger’s letter of 18 May 2001 and became common knowledge after that, with several commentators in 2003 claiming it was the “smoking gun” on the cover up of sex abuse:

[http://www.natcath.org/NCR\\_Online/archives2/2003c/081503/081503n.htm](http://www.natcath.org/NCR_Online/archives2/2003c/081503/081503n.htm) (Accessed 15 July 2013). It was referred to in some court cases in the United States in 2005 and 2008: Fr Thomas Doyle <http://reform-network.net/?p=3006> par 6- 14ff (Accessed 3 July 2013). It was published on the Vatican website in 2003: Delaney, *Canonical Implications* p.152, note 21

<sup>210</sup> Clauses 5-28 [http://www.vatican.va/resources/resources\\_crimen-sollicitationis-1962\\_en.html](http://www.vatican.va/resources/resources_crimen-sollicitationis-1962_en.html) (Accessed 4 August 2013)

<sup>211</sup> This is a reflection on the translation rather than on the original Latin.

the Holy Office, **in all things and with all persons**, under pain of incurring automatic excommunication, ipso facto and undeclared, reserved to the sole person of the Supreme Pontiff, ....<sup>212</sup> (my emphasis)

Significantly, there is no exception for reporting these crimes to the civil authorities.

260. Title V, which includes sex abuse of children under the rubric of “*crimen pessimum*”, provides that the same procedures are to apply to canonical investigations of sex crimes against children with appropriate changes as the nature of the case requires.<sup>213</sup> The Latin phrase is “*mutatis mutandis*”, a term which is also used in civil law. It means that one can make more or less superficial modifications to procedure to suit the case.<sup>214</sup>
261. Graduated penalties are imposed including suspension from saying Mass, administering the sacraments, spiritual exercises in a religious house, etc. However, the penalty of dismissal is only available:

“..only when, all things considered, it appears evident that the Defendant, in the depth of his malice, has, in his abuse of the sacred ministry, with grave scandal to the faithful and harm to souls, attained

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<sup>212</sup> Id Art 11, and see also on secrecy, Arts. 13, 23 and 70. Gerardo Núñez in *La Competencia penal de la Congregation para la Doctrina de La Fe, Comentario al m.p. Sacramentorum Sanctitatis Tutela*, *Ius Canonicum*, XLIII, N. 85, 2003, 351-390 at 387 says “The secrecy requirement ended up being called ‘the secret of the Holy Office’, a secret that did not end with the finalization of the cases in the Congregation, as was the practice with the rest of the Roman Congregations. In effect the obligation to keep the secret over matters that it covered lasted forever. The persons who were bound by the secret were those that had anything to do with the Holy Office tribunal, and it applied equally to proceedings in the diocesan tribunal as the Roman one.”

<sup>213</sup> Id Arts 72 and 73

<sup>214</sup> There were matters relevant to soliciting in the confessional that were not relevant to sexual abuse of children outside the confessional, e.g., that the penitent had the obligation to “denounce” the priest to whom the confession was made. Such matters were ignored under *mutatis mutandis*. John P. Beal in “*The 1962 Instruction: Crimen Sollicitationis: Caught Red Handed or Handed a Red Herring?*” 41 *Studia Canonica* 199 at 228ff. <http://www.vatican.va/resources/Beal-article-studia-canonica41-2007-pp.199-236.pdf> at p 233 (Accessed 4 March 2013)

See also Edward N. Peters deposition: <http://www.themediareport.com/wp-content/uploads/2012/08/Peters-reply-to-Wall-and-Doyle.pdf> (Accessed 3 July 2013). The Holy See’s lawyer in America, Jeffrey Lena has claimed that bishops had a discretion to dispense with pontifical secrecy where there was conflict with civil law.

[http://www.nbcnews.com/id/37182162/ns/world\\_news-europe/](http://www.nbcnews.com/id/37182162/ns/world_news-europe/) (Accessed 6 March 2013). There is some suggestion of this in Beal’s 2007 *Studia Canonica* article at p223, but it contradicts what he had earlier written about “*mutatis mutandis*” being confined to superficial changes to procedure. Dispensing with pontifical secrecy to allow reporting to the police where the penalty for breach was automatic excommunication is hardly a superficial change of procedure. Whatever may have been the position prior to 1983, there is no such “*mutatis mutandis*” provision in the 1983 *Code of Canon Law and Secreta Continere*. Indeed, the preamble to *Secreta Continere* purports to take away the primacy of conscience in matters involving the pontifical secret. Canon 87 reserves dispensations in penal procedural matters to the Holy See. In its response to the Irish Foreign Minister who accused the Holy See of interfering in Irish affairs after the *Cloyne Report*, the Holy See did not suggest that bishops had a discretion on reporting. If the bishops did have this discretion it would have provided a complete defence to the claim that there had been interference in Irish affairs. Canon law does have a concept of ‘equity’ or ‘epikeia’ similar to that exercised by the Courts of Equity in common law countries. But it only applies where there is a gap in the law and it is based on the legislator’s ‘presumed intention’. It does not operate where the legislator’s intention has been made clear, and Canon 19 says specifically that it does not apply in a penal matter: Coughlin: *Canon Law and the Human Person*, *Journal of Law and Religion*, (2003) Vol 19, 43 [http://scholarship.law.nd.edu/cgi/viewcontent.cgi?article=1735&context=law\\_faculty\\_scholarship](http://scholarship.law.nd.edu/cgi/viewcontent.cgi?article=1735&context=law_faculty_scholarship) (Accessed 21 July 2014)

such a degree of temerity and habitude, that there seems to be no hope, humanly speaking, or almost no hope, of his amendment.”<sup>215</sup>

262. This formed the canonical basis before 1983, for what came to be known as the “pastoral approach” to clergy sex crimes. In other words, efforts would be made to “cure” him, and only if there was no hope, or almost no hope of being cured, was he to be dismissed.<sup>216</sup> Significantly, there was no “pastoral approach” to victims, other than to give them a right to claim damages in the course of a canonical trial, which was never likely to happen.

### **The Reissue of *Crimen Sollicitationis* in 1962**

263. It is not surprising that *Crimen Sollicitationis* is not mentioned in the canonical literature because the decree itself said that it was not to be published or commented on by canon lawyers. Despite this prohibition, in 1946, the Spanish canon lawyer, Fr Aurelio Yanguas SJ wrote an article in *Revista Espanola de Derecho Canonico* about it.<sup>217</sup> Yanguas said that the purpose behind *Crimen Sollicitationis* was to take “swift, decisive and secret action” before these crimes reach the civil courts so that the Church could be spared the humiliation of having priests in the public dock as sex offenders.<sup>218</sup> Perhaps if canon law had provided for “swift” and “decisive” action to dismiss clergy sex abusers from the priesthood, it might also have prevented many more children from being abused. The requirement to try and cure the priest made that impossible.

264. *Crimen Sollicitationis* continued in force until 1962 when it was reissued by Pope St John XXIII, with some minor changes.<sup>219</sup> The only real difference between the two was that the

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<sup>215</sup> *Crimen Sollicitationis* Art 63.

<sup>216</sup> Pope Benedict XVI in his revised introduction to *Sacramentorum Sanctitatis Tutela* claimed bishops had an “over-optimistic idea of the benefits of psychological therapy...sometimes without adequate regard for the possibility of recidivism.” He failed to mention that *Crimen Sollicitationis* had written this into canon law as far back as 1922 long before there was any such optimism. [http://www.vatican.va/resources/resources\\_introd-storica\\_en.html](http://www.vatican.va/resources/resources_introd-storica_en.html) (Accessed 5 August 2013). Freud had been developing his theories from about the 1900s, but the Church was hardly sympathetic to the theories of an atheist who described religion as a “collection of neuroses”.

<sup>217</sup> It was written in Latin, so it was highly unlikely that anyone except canon lawyers would be able to read it.

<sup>218</sup> “*De crimine pessimo et competentia S. Officia relate ad illud*,” *Revista Espanola de Derecho Canonico*. 1(1946): 427-439. John P. Beal: *The 1962 Instruction*, pp. 228ff. <http://www.vatican.va/resources/Beal-article-studia-canonica41-2007-pp.199-236.pdf> (Accessed 16 July 2013)

<sup>219</sup> The 1962 reissue of the document had this notation at the bottom: “FROM AN AUDIENCE WITH THE HOLY FATHER, 16 MARCH 1962 His Holiness Pope John XXIII, in an audience granted to the Most Eminent Cardinal Secretary of the Holy Office on 16 March 1962, graciously approved and confirmed this Instruction, ordering those responsible to observe it and to ensure that it is observed in every detail.

Given in Rome, from the Office of the Sacred Congregation, 16 March 1962.

L.+ S.A. Card. Ottaviani.” [http://www.vatican.va/resources/resources\\_crimen-sollicitationis-1962\\_en.html](http://www.vatican.va/resources/resources_crimen-sollicitationis-1962_en.html) (Accessed 4 August 2013)

- 1962 document applied the procedures to clerics who were also members of religious orders.<sup>220</sup>
265. Religious brothers and nuns were not covered by *Crimen Sollicitationis*, but there were equivalent provisions in the 1917 and 1983 *Codes of Canon Law* for dealing with their sexual abuse of children.<sup>221</sup> Confidentiality was not imposed on their cases until *Secreta Continere* in 1974.
266. Some Church spokesmen claimed that no one knew about *Crimen Sollicitationis*.<sup>222</sup> The evidence before the Murphy Commission was that Archbishop McQuaid of Dublin (1940-1971) had used the 1922 document in the case of Fr. Edwards in 1960, and that during his time as Archbishop, the document was well known to senior Church figures and was “well thumbed”, but there was no evidence that the Archdiocese had received a copy of the 1962 document.<sup>223</sup> In the United States, Cardinal Francis George of Chicago in court evidence said that the 1962 document was taught to him in the seminary, and Bishop Madera said that it was discussed at a meeting of clergy with Archbishop Manning of Los Angeles in the early 1960s.<sup>224</sup> According to Fr John P Beal, the general nature of the procedures were dealt with in manuals of moral theology and canon law taught in seminaries, for continuing formation after ordination, certainly from the late 1930s onwards. The Spanish canon lawyer, Aurelio Yanguas in 1946 said it was “universally known” amongst clerics. Beal says that not long after the 1962 document was disseminated, the study of canon law in seminaries declined, and it then “gathered dust” in the archives until it was mentioned in *SST 2001*.<sup>225</sup>
267. The Australian canon lawyer, Dr Ian Waters stated at a meeting in Melbourne on 29 October 2014, that *Crimen Sollicitationis* was never sent to Australia, because until 1986, Australia was a “missionary country”, and he did not find out about it until 2002.<sup>226</sup> However, a

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<sup>220</sup> Murphy Dublin Report Part 1 <http://www.justice.ie/en/JELR/DACOI%20Part%201.pdf/Files/DACOI%20Part%201.pdf> par 4.20 (Accessed 25 April 2013), John P. Beal: “*The 1962 Instruction*: p,201.: <http://www.vatican.va/resources/Beal-article-studia-canonica41-2007-pp.199-236.pdf> (Accessed 16 July 2013).

<sup>221</sup> Canon 695.

<sup>222</sup> See, for example, Archbishop Wilson before the Royal Commission, <http://www.childabuseroyalcommission.gov.au/case-study/bb3eaadf-9283-41ef-9694-e560738d186a/case-study-14,-june-2014,-sydney.aspx> (Accessed 28 March 2013), p.7890

<sup>223</sup> <http://www.justice.ie/en/JELR/DACOI%20Part%201.pdf/Files/DACOI%20Part%201.pdf> (Accessed 25 April 2013) par 1.89, 4.21 – 4.24.

<sup>224</sup> Fr Thomas Doyle <http://reform-network.net/?p=3006>, par 14 (Accessed 5 December 2013)

<sup>225</sup> John P. Beal: *The 1962 Instruction*, pp. 229 – 231: [http://www.vatican.va/resources/resources\\_introd-storica\\_en.html](http://www.vatican.va/resources/resources_introd-storica_en.html) (Accessed 5 August 2013).

<sup>226</sup> [http://www.youtube.com/watch?v=7\\_jaQKTe4VY&feature=youtu.be](http://www.youtube.com/watch?v=7_jaQKTe4VY&feature=youtu.be) (Accessed 30 November 2014), and see transcript and the author’s commentary: <http://www.awrsipe.com/Misc/Ian-Waters-Speech-with-Commentary5.pdf> (Accessed 22

former vice provincial of the Blessed Sacrament Society, Tony Lawless stated that he knew about it in 1962, and discussed it with the professor of canon law at the Society's seminary who told him he had been at a meeting of seminary professors of canon law where it was discussed. What Lawless said makes sense, because the 1962 revision of *Crimen Sollicitationis* applied its provisions to priests who were members of religious orders. From that time onwards, any allegations of child sexual abuse against priests who were members of religious orders were to be under the jurisdiction of the local bishop and not the particular religious order or congregation.<sup>227</sup>

268. The American canonist, Fr Thomas Doyle wrote on 22 April 2015:

“One common defence of the hierarchy is that very few bishops received copies of either edition of *Crimen Sollicitationis*, and that consequently it was largely irrelevant and unused. I have reviewed several thousand files of accused clerics over the past 27 years, cases from throughout the United States, Canada, Ireland, Great Britain, Italy, Mexico and Colombia. I have found a number of documents that were clearly part of the penal process mandated by *Crimen Sollicitationis*. It would be close to impossible to determine how often this procedure was used, in all or in part, but it has been used.”<sup>228</sup>

269. Any ignorance by current clergy is understandable because *Crimen Sollicitationis* was repealed in 1983 with the promulgation of the new *Code of Canon Law*.<sup>229</sup> Civil lawyers have no reason to learn about repealed procedural laws, and there is no reason to think that their canonical brethren are any different.

#### ***The Instruction, Secreta Continere 1974***

270. In 1974, Pope Paul VI issued his Instruction, *Secreta Continere* which replaced the secret of the Holy Office with the “pontifical secret”.<sup>230</sup> The reach of the secret of the Holy Office was expanded by Pope John XXIII in 1962 by applying it to the sexual abuse of children by priests

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April 2015). Bishop Geoffrey Robinson also told the Commission that he had not heard about *Crimen Sollicitationis* until 1996 when he was told about it by Bishop Wilson of Wollongong.

<sup>227</sup> <http://www.catholica.com.au/forum/index.php?id=164087> (Accessed 3 November 2014). Brendan Daly (from New Zealand) says: “*Crimen Sollicitationis* seems to have been sent to all the Superior Generals of Religious Orders because religious priests were now encompassed by these procedures...there was no copy at the Apostolic Nunciature in Wellington when I asked for a copy of it in 1994.”

<sup>228</sup> <http://ncronline.org/books/2015/04/book-offers-insight-canon-laws-role-sexual-abuse-crisis> (Accessed 27 April 2015)

<sup>229</sup> See the author's *Potiphar's Wife*, 103ff about the controversy over the repeal of *Crimen Sollicitationis*.

<sup>230</sup> The text of Art 1(4) is published in AAS, 1974, pages 89–92,

[http://www.vatican.va/resources/resources\\_norme\\_en.html](http://www.vatican.va/resources/resources_norme_en.html) Footnote 41 (Latin)(Accessed 4 August 2013). A translation of the whole document can be found at William Woestman: *Ecclesiastical Sanctions and the Penal Process* (St. Paul University 2003) Appendix VII, p.237. Woestman also confirmed that *Secreta Continere* was not abrogated by the 1983 Code and was ‘ius vigens’, that is, that it had the force of law: Beal: *The 1962 Instruction: Crimen Sollicitationis: Caught Red Handed or Handed a Red Herring?* (2007) 41 *Studia Canonica* 199, p.232, fn 128 <http://www.vatican.va/resources/Beal-article-studia-canonica-41-2007-pp.199-236.pdf> (Accessed 5 August 2013).

who were members of religious orders, increasing the reach of that secret by some 50%. His successor, Pope Paul VI, directed that the pontifical secret should cover all allegations to superiors about sexual abuse by members of religious orders who were not clerics. That included all the teaching and nursing orders of brothers and nuns throughout the world. The effect of that was to increase its reach by a further 250% for those in the Church accused of the canonical crime of the sexual abuse of children.<sup>231</sup>

271. It is ironic that in the decades that experienced the greatest number of cases of the sexual abuse of children (1960 and 1970), these two popes promulgated laws that significantly increased the coverage of the Church's highest secrecy classification to cover them.
272. There were significant differences between the secret of the Holy Office and the Pontifical Secret.
- 272.1. *Crimen Sollicitationis* provided for automatic excommunication for breach of the secret of the Holy Office. Breach of the pontifical secret imposed a punishment to fit the crime, but excommunication was not excluded.<sup>232</sup>
- 272.2. *Crimen Sollicitationis* had imposed the secret of the Holy Office on four canonical crimes by clerics: soliciting sex in the confessional, homosexuality, bestiality and the sexual abuse of children. *Secreta Continere* imposed the same permanent silence on all "delicts against faith and morals", which included those four, but also such things as homicide, kidnapping, causing serious bodily harm, fraud, debauchery, adultery, and any other breach of the celibacy rule.
- 272.3. The secret of the Holy Office under *Crimen Sollicitationis* applied only to those four canonical "delicts" committed by clerics. Religious brothers and nuns are not clerics and the secret of the Holy Office did not apply to canonical disciplinary proceedings

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<sup>231</sup> In 1970 there were 270,924 diocesan priests, and 148, 804 religious priests in the world. Assuming that these ratios were similar going back to 1962 (in the United States they seem to be constant going back to 1965), the effect of Pope John XXIII's reissue of *Crimen Sollicitationis* was to extend the reach of the pontifical secret by some 50%. In 1975, there were 259,332 diocesan priests and 145,452 religious priests in the world, a total of 404, 703. At the same time there were 70,395 religious brothers and 968,526 religious sisters. However, with *Secreta Continere* in 1974, Pope Paul VI increased the coverage of the pontifical secret by a further 250%. It should be said, however, the most of the religious in this case were nuns against whom allegations of sexual abuse of children were rare:

<http://cara.georgetown.edu/caraservices/requestedchurchstats.html> (Accessed 7 August 2015)

<sup>232</sup> Ian Waters in "*The Law of Secrecy in the Latin Church*", *The Canonist* (Vol 7, No1), p 75 at 82 refers to "professional secrecy" that pertains to one's office and the "pontifical secret": "the violation of the obligation resulted in suspension for professional secrecy and dismissal in the case of pontifical secrecy". He quotes the *Acta Apostolicae Sedis* (1968) *Regolamento Generale della Curia Romana* 129-176, English Translation in the Canon Law Digest Vol 7: 147-176, and Art 39(2) which states: "Any kind of violation of pontifical secrecy relative to the obligation spelled out in special instructions, carries with it dismissal from office, in addition to other sanctions provided for in the said instructions." The *Regolamento* issued on 4 February 1992 and 30 April 1999, states: "With particular care pontifical secrecy – il segreto pontificio – shall be observed in accordance with the norms of the Instruction *Secreta Continere* of 4 February 1974."

- against them. However, *Secreta Continere* extended the pontifical secret to cover disciplinary proceedings against religious brothers and nuns for all “delicts against morals”, which included the sexual abuse of children.<sup>233</sup>
- 272.4. Most importantly, *Secreta Continere* extended the pontifical secret to cover not just the information obtained in the Church’s internal proceedings about such matters, but the allegation to the accused’s superior.<sup>234</sup>
- 272.5. The pontifical secret was also imposed on other matters, including communications over the choice of bishops, cardinals, members of the Roman Curia, and the reports of papal legates
273. The instruction *Secreta Continere* was not repealed by the *1983 Code of Canon Law*.<sup>235</sup> *SST 2001* and its revision in 2010 specifically incorporated the pontifical secret into the *Substantive Norms* in Art 25 and footnote 31 and Art 30, footnote 41 respectively.
274. The preamble to *Secreta Continere* is instructive:
- “How greatly the maintaining of secrecy in conformity with human nature is evident, in the first place, from the fact that, although many things must be done in the external order, nevertheless their rise and consideration are initiated in the depths of the heart and only after mature thought are they prudently brought forth.
- To maintain silence, then – a very difficult thing indeed – just as to speak frankly and considerately, pertain to the perfect man: for there is time for keeping silent and a time for speaking (see Eccl 3:7), and that man is perfect who knows how to bridle his tongue (see James 3:2)
- And it so happens in the Church itself, the community of believers, that those who have been commissioned to preach and to bear witness to the Gospel of Christ (see Mk.16:15; Acts 10:42) are, nevertheless, obliged by their office to keep the secret and to ponder the words in their heart so that

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<sup>233</sup> Canon 695 deals with the dismissal of religious brothers and nuns for breaches of canons 1397, 1398 and 1395. Canon 1395 deals with the sexual abuse of children.

Canon 1395(2) is the section dealing with clerics who sexually abuse children.

<sup>234</sup> John G. Proctor: “*Clerical Misconduct: Canonical and Practical Consequences*”, Canon Law Society of American Proceedings 49 (1988) 227-244” “It is imperative that the good name of the accused or of the accuser not be placed in jeopardy. Thus, the investigation is confidential, even to the point of placing any acta in the secret archive of the chancery. Having completed the investigation (or having decided that it is superfluous), the bishop must make three determinations: ...If something further should be done, should the penal process be employed? If the penal process is seen as an adequate response to the situation, should the bishop then proceed administratively or judicially?” The author is obviously talking about the preliminary investigation and not the formal judicial trial, as being equally “confidential”. This interpretation is also supported by Woestman’s, Beal’s and Nuñez’s translations of Art 1 (4) of *Secreta Continere*. As to the “extrajudicial denunciation” being confidential, see further discussion in Chapter 6.

<sup>235</sup> John P. Beal: “The footnote to Normae, art. 25, §1, in WOESTMAN, p. 309, makes clear that the norms of *Secreta continere* remain the *ius vigens*; it cites the 1999 Regolamentoo generale della Curia Romana, art. 36, §2, in A.A.S. 91 (1999), p. 646: “*The 1962 Instruction: Crimen Sollicitationis: Caught Red Handed or Handed a Red Herring?*” 41 *Studia Canonica* 199, at 232, fn 128 <http://www.vatican.va/resources/Beal-article-studia-canonica41-2007-pp.199-236.pdf>

the works of God may be correctly and broadly manifested and His message may be spread quickly and be received with honour (see 2 Thess 3:1)

Deservedly, therefore, some things are entrusted to those who are assigned to the service of the People of God, which must be surrounded with secrecy, those things, namely, which, if revealed at the wrong time or in the wrong way, are prejudicial to the building up of the Church or destroy the public good, or, finally offend the inviolable rights of individuals and communities (see Instruction *Communio et progresso* no. 121).

All these matters are always an obligation in conscience, and, in the first place, the rigid observance of secrecy in view of the discipline of the sacrament of penance, and in the second place, the secrecy of office or, as it is called the trusted secret, in addition to papal secrecy which is treated of in this instruction. Since we are dealing with public matters which affect the good of the total community, it is evident then that when, or for what reason, or for what gravity secrecy of this kind must be imposed, is to be determined, **not by any private individual according to the dictates of his own conscience**, but for him who according to the law has the care of the community. On the other hand, those who are bound by such secrecy should not of themselves be obliged by a law existing apart from themselves, but rather by an imperative of proper human dignity, in other words, they should think it an honour for them to observe secrecy due to the public good.

As regards the Roman Curia, however, matters which are handled in the service of the universal Church are cloaked in general official secrecy. The moral obligation of this secrecy must be measured by the superior's prescription or by the nature of the importance of the matter. On the other hand, in certain matters of more serious consequence, special secrecy is obligatory; it is called papal secrecy and there is always a serious obligation to observe it. (my emphasis)

275. The Instruction accepts that the obligations of secrecy within the Roman Curia might depend on the matter in question, but *Secreta Continere* removes any such discretion.
276. But the other significant matter about the preamble of *Secreta Continere* is that it purports to take away the bishop's and religious superior's right to follow their "*conscience*" on matters covered by the secret, including reporting to the civil authorities.
277. The persons bound by the secret are set out Art II (1) of *Secreta Continere* which provides:
- "The following are under the obligation of observing papal secrecy;
- 1) Cardinals, **bishops**, prelate superiors, major and minor officials, consultants, experts and ministers of lower rank who are concerned with the treatment of questions which are subject to papal secrecy."<sup>236</sup>

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<sup>236</sup> Translation of William Woestman *Ecclesiastical Sanctions and the Penal Process* (St. Paul University 2003) Appendix VII, p.237. Woestman uses the term "papal secret" or secrecy, but the pontifical secret is the more common term.



278. The questions which are subject to the pontifical secret are set out in Art 1. They include reports of papal legates, consultations over the appointment of bishops, and significantly:

“Art. 1. Included under the pontifical secret are:...

4. ‘Extrajudicial denunciations received regarding delicts against faith and against morals, and regarding delicts perpetrated against the sacrament of penance. Likewise the process and decision which pertain to these denunciations, always safeguarding the rights the right of him who has been reported to authorities to know of the denunciation if such knowledge is necessary for his own defence....” (p. 90).”

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279. The term “extrajudicial denunciation” means an allegation to a superior outside any formal court processes.<sup>238</sup> The terms of Art 1§4, imposing the pontifical secret are very tight. A

<sup>237</sup> [http://www.vatican.va/resources/resources\\_norme\\_en.html](http://www.vatican.va/resources/resources_norme_en.html), Footnote 41 (Latin) Footnote 41 in the official English translation on the Vatican website of the 2010 revised version remains in Latin: Secretaria Status, Rescriptum ex Audientia SS.mi Il 4 febbraio, quo Ordinatio generalis Romanae Curiae foras datur, 30 aprilis 1999, Regolamento generale della Curia Romana, 30 aprile 1999, art. 36 § 2, in AAS 91 (1999) 646: «Con particolare cura sarà osservato il segreto pontificio, a norma dell'Istruzione Secreta continere del 4 febbraio 1974».

Secretaria Status seu Papalis, Rescriptum ex Audientia, instructio Secreta continere, De secreto pontificio, 4 februarii 1974, in AAS 66 (1974) 89-92:

«Art. 1.- Secreto pontificio comprehenduntur: ...

4) Denuntiationes extra iudicium acceptae circa delicta contra fidem et contra mores, et circa delicta contra Paenitentiae sacramentum patrata, nec non processus et decisio, quae ad hasce denuntiationes pertinent, salvo semper iure eius, qui ad auctoritatem delatus est, cognoscendae denuntiationis, si id necessarium ad propriam defensionem fuerit. Denuntiantis autem nomen tunc tantum patefieri licebit, cum auctoritati opportunum videatur ut denuntiatus et is, qui eum denuntiaverit, simul compareant; ...» (p. 90).

The English translation in the text above is that of the Canadian canon lawyer, William Woestman in *Ecclesiastical Sanctions*, Appendix VII. John P. Beal also uses the same expression regarding the matters covered by the pontifical secret: “Although the revisions of the law governing the ‘secret of the Holy Office’ by authority of Paul VI abrogated the latae sententiae excommunication incurred by violation of this secret, it retained the obligation of what was now called ‘the pontifical secret’ for all who in their official capacity became aware of ‘extrajudicial denunciations of delicts against faith and against morals and regarding delicts perpetrated against the sacrament of penance. Likewise, the process and decision which pertain to the denunciations.’ The more recent and substantive and procedural norms of the Congregation for the Doctrine of the Faith stipulate ‘Cases of this kind are subject to the pontifical secret.’” Beal: *The 1962 Instruction*, p. 231. <http://www.vatican.va/resources/Beal-article-studia-canonica41-2007-pp.199-236.pdf> (Accessed 15 July 2013). Gerardo Núñez in *La Competencia penal de la Congregation para la Doctrina de La Fe*, 351-390 and 389, also says that the pontifical secret applies to “extrajudicial denunciations received regarding delicts against faith and against morals;... likewise the proceedings and decision which pertain to those denunciations (‘el proceso y decisión sobre estas mismas denuncias’). The only reason for mentioning these different translations is that the USCCB engaged Gregory Ingels to do a translation. It was revised by Joseph R. Punderson and Charles J. Scicluna. Charles J. Scicluna, now the Archbishop of Malta who was the Promoter of Justice for the Congregation for the Doctrine of the Faith under Cardinal Ratzinger. This translation can be found at <http://www.bishop-accountability.org/resources/resource-files/churchdocs/SacramentorumAndNormaeEnglish.htm> (Accessed 13 November 2014) and <http://www.documentcloud.org/documents/243690-10-sacramentorum-sanctitatis-2001-with-2003.html> (Accessed 4 August 2013). This particular translation provides: “Art. 1. Included under the pontifical secret are: 4. Extrajudicial denunciations received regarding delicts against faith and against morals, and regarding delicts perpetrated against the sacrament of Penance; **likewise the trial and decision** which pertain to those denunciations..” As discussed in chapter 3, the canonical system of trials, the trial in the canonical system starts when the allegation is made. When canon law wishes to distinguish the whole process, it refers to the “penal trial”. For that reason, there is no disagreement between the translations for determining the moment when the pontifical secret begins.

<sup>238</sup> Bachofen in his *Commentary on the New Code of Canon Law*, (1918) St. Louis, Mo., B. Herder book co., 1918-1922, (<https://archive.org/stream/1917CodeOfCanonLawCommentary#page/n101/mode/2up> (Accessed 19 June 2015)) refers to the distinction between a “judicial denunciation” and an “extrajudicial denunciation” in his *Commentary* on Canon 1935 of

specific exception is made so that the accused is allowed to know about the allegation (the “denunciation”) against him or her. One might have thought that this was implied, because the *1917 Code* (like the *1983 Code* later) provided for a right of defence. In matters involving the pontifical secret, any exceptions are stated expressly. There is no exception for reporting to the civil authorities, and one cannot be implied from any other provision of the Code.<sup>239</sup>

280. Art. II (4) provides that even those who come across the allegations and information by accident are bound by the secret:

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the *1917 Code of Canon Law*: “Every criminal procedure involves three essential points – the accusation, the trial and the sentence...But there is a noticeable distinction between judicial accusation and simple accusation, which is more properly styled denunciation. The judicial accusation may be most properly called an indictment which ensures legal actions and procedure.” (p.360). “Different from the indictment is the simple denunciation...Canon 1935 defines the right of denunciation as follows 1. Every Catholic has the right to denounce the crime of another...” (p.362) Canon 1936 describes the mode of denunciation: “The accusation should be made in writing and signed by the accuser or orally to the local Ordinary, the diocesan chancellor or the rural dean or pastor (assistants or curates are not mentioned and therefore cannot lawfully accept a denunciation”(p.364). It follows from this that a complaint by someone to a curate that he has been abused by the parish priest (“pastor”) is not an extrajudicial denunciation, but once that curate passes on the allegation to the bishop, it becomes an extrajudicial denunciation over which the bishop is bound by the pontifical secret. The *Catholic Encyclopaedia* defines a “denunciation” as “denunciation (Latin denunciare) is making known the crime of another to one who is his superior.” <http://www.newadvent.org/cathen/04733b.htm> (Accessed 9 August 2013). Likewise, the role of the fiscal procurator is “in preventing crime and safeguarding ecclesiastical law. In case of notification or denunciation it is his duty to institute proceedings and to represent the law. His office is comparable to that of the state attorney in criminal cases.” <http://www.newadvent.org/cathen/06082b.htm> (Accessed 9 August 2013). Elizabeth Delaney accepts this definition of the expression as a complaint to a superior in the hierarchical order: *Canonical implications of the response of the Catholic Church in Australia to child sexual abuse*, Doctor of Canon Law dissertation, Saint Paul University, Ottawa, 2004, 232 and n. 61.

The term “extrajudicial denunciations” is also referred to in the documents of the Spanish Inquisition where informers accused people in their community of heresy: Andrew Dixon White: *Records of the Spanish Inquisition* (2012) Goodrich p.267. Canon 1537 deals with “extra-judicial confessions”, which Beal in the *New Commentary of the Code of Canon Law* p. 1673 says refers to a confession “made out of the context of the trial. The statement is later brought to the attention of the court, often by a witness who heard the confession.” The word “confession” in Canon 1535 seems to be the same as an “admission” in civil law. The Canon Law Centre has this definition of “extrajudicial evidence”: “Evidence which is presented outside of a judicial process. The term applies to evidence which is introduced before the judicial process has begun. After the process has begun, it applies to evidence which is not given to a judge or duly appointed delegate, auditor or the like. Such evidence can be admitted into the acts by judicial decree and thereby obtain probative force.”

<http://www.canonlawcentre.com/glossary-of-canonical-terms/> (Accessed 9 August 2013). The English word, “denounce” still has the meaning of reporting a crime to the police or other civil authority, but the word “report” is more commonly used. Spanish still uses the term “denunciar” to refer to reporting a crime to the police. Cardinals Castrillón and Bertone, and Monsignor Scicluna in arguing that bishops should not report paedophile priests to the police also used (or their translators did) the word “denounce” to the police. Fr John Beal considered that the secrecy applied to the allegations themselves: John P. Beal “*The 1962 Instruction: Crimen Sollicitationis: Caught Red Handed or Handed a Red Herring?*” 41 *Studia Canonica* 199 at 231 – 233: “Blanketing everything connected with denunciations and the penal process under the ‘pontifical secret’ in perpetuity seems inimical to other ecclesial values and, quite frankly, counterproductive.” [http://www.vatican.va/resources/resources\\_introd-storica\\_en.html](http://www.vatican.va/resources/resources_introd-storica_en.html) (Accessed 5 August 2013).

<sup>239</sup> Edward Peters in his article, “*Lest Amateurs Argue Canon Law: A reply to Patrick Gordon’s brief against Bp. Thomas Daily*”, *Angelicum* 83 (2006) 121-142. [http://www.canonlaw.info/a\\_gordon.htm](http://www.canonlaw.info/a_gordon.htm) (Accessed 3 July 2013) refers to the differences between the canonical and common law systems, pointing out that the canonical draftsman may not be as precise as his common law counterpart because he knows that if difficulties of interpretation come up, then the legislature can make it clear what the law means. Civil lawyers in Australia are familiar with this kind of system with “rulings” given by the Australian Taxation Office. However, in the case of pontifical secrecy, as will be seen below, there were statements from the highest levels in the Vatican from 1997-2002 that reporting to the police conflicted with canon law one way or another. Despite what Peters says, canon law frequently uses exceptions by the use of the Latin term, ‘nisi’ (‘unless’) or some equivalent term. Such expressions appear over 1300 times in the 1983 Code: John E Date in ‘*Implications of Canon Law for Church Organisations Operating in Australia*’, Master of Laws thesis for Melbourne University Law School p.18ff: <https://minerva-access.unimelb.edu.au/handle/11343/35832> (Accessed 8 Sept 2013)

“4) All those who have culpably received information of documents and matters which are subject to papal secrecy, or even if they have received this kind of information inculpably, they should know for certain that these matters are still covered by papal secrecy.”

281. The bishop has to know of the “extrajudicial denunciation” because Canon 1717 provides:

“Whenever an ordinary has knowledge, which at least seems true, of a delict, he is carefully to inquire personally or through another suitable person about the facts, circumstances and imputability, unless an inquiry seems entirely superfluous.”

282. In order to make a decision as to whether or not an “extrajudicial denunciation” seems true, he has to know what it is, and then he has to carry out the inquiry himself or through some other suitable person.

283. Likewise, Art 16 of SST 2010 provides that whenever a bishop “receives a report of a more grave delict, which has at least the semblance of truth”, he is to conduct a preliminary investigation and communicate the matter to the CDF.

284. The CDF may instruct him to carry out an administrative or judicial trial, and the bishop then has to issue decrees to set that in train. Alternatively the CDF may deal with the matter itself and dismiss the priest. That has to be communicated to the bishop who will then notify the priest. These functions of the bishop are part of the “process” and “decision” within Art. 1(4) of *Secreta Continere*, and part of the “case” within Art 25 of *SST 2001* and Art 30 of *SST 2010*.

285. The pontifical secret imposes a permanent silence. Whether the priest is declared innocent or guilty, the pontifical secret covers the result. This derives from Art III (1)

“Whoever is bound by papal secrecy is always under grave obligation to observe it.”

286. Unlike *Crimen Sollicitationis*, *Secreta Continere* was published in the AAS, and the same issues about “knowledge” of it, as occurred with *Crimen Sollicitationis*, do not arise. It was not a secret law like *Crimen Sollicitationis*. *Secreta Continere* was used in the everyday life of the Church and not just for sexual abuse.<sup>240</sup>

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<sup>240</sup> It applied to reports of papal legates and consultations about the appointment of bishops. A former priest, Denis Nichol told a meeting organised by Catholics for Renewal at the Pumphouse Hotel in Melbourne on 29 October 2014, that he

287. Whether or not the Australian superiors of the various religious congregations were aware of *Secreta Continere* is another matter, but those in Rome and their canonical advisers certainly would have been. If the Australian superiors did not know about it, their acting in accordance with its provisions is another example of the “trickle down” effect of a culture expressed in canon law. As Cardinal Francis George pointed out, people tend to internalize the culture behind a law, and act without even thinking about it.<sup>241</sup> Professor Marie Keenan says that within any organisation, there arises “informal organizational practices that everybody knows about but nobody talks about openly”. In the case of the Catholic Church, these derive from the hierarchical nature of the Catholic Church where, “inferiors in the hierarchical ladder will strive to exemplify the institution’s values”.<sup>242</sup>
288. In 1983, the new *Code of Canon Law* repealed *Crimen Sollicitationis*, and had its own canons to deal with the sex abuse of minors by clerics and religious.<sup>243</sup> *Secreta Continere* continued to apply to allegations of sexual abuse of children by clerics and religious.<sup>244</sup>

#### **The 1980 Repeal of Administrative Dismissal**

289. The *1917 Code of Canon Law* had allowed a bishop to suspend a priest on the basis of an “informed conscience” if he was satisfied that he had sexually abused children. There was no trial or dismissal as such, and the bishop still had the obligations to support him. Canon 2186§2 provided that the procedure was “extraordinary”, and was only to be used when “grave inconvenience prevents him from using the normal penal process”.<sup>245</sup>
290. In 1971, the CDF issued new instructions for “administrative laicisation”, allowing bishops to petition the Congregation for a decree of dismissal of a priest on the basis of his living a “depraved life”.<sup>246</sup>

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received letters from the Vatican seeking his opinion about the choice of particular priests to be appointed bishops. The documents were marked with the words, “Pontifical Secret”, and that discussing the matter with others had caused him concern. <http://www.catholicsforrenewal.org/news2014.htm> (Accessed 27 May 2015)

<sup>241</sup> See chapter 12 on the relationship between law and culture.

<sup>242</sup> Marie Keenan: *Child Sexual Abuse and the Catholic Church, Gender, Power and Organizational Culture*, at loc 1557.

<sup>243</sup> Canon 1395

<sup>244</sup> “The footnote to Normae, art. 25, §1, in WOESTMAN, p. 309, makes clear that the norms of *Secreta continere* remain the *ius vigens*; it cites the 1999 Regolamento generale della Curia Romana, art. 36, §2, in A.A.S. 91 (1999), p. 646: Beal: *The 1962 Instruction*, p. 232, fn 128 <http://www.vatican.va/resources/Beal-article-studia-canonica41-2007-pp.199-236.pdf>

<sup>245</sup> *1917 Code of Canon Law* 2186§1, Nicholas Cafardi: “*Before Dallas*”, 58.

<sup>246</sup> Nicholas Cafardi: “*Before Dallas*”, 62, Congregation for the Doctrine of the Faith, October 14 1980, *Acta Apostolicae Sedis* 72 (1980): 1132-37

291. In 1980 Pope John Paul II, two years after becoming pope, introduced changes to the role of the CDF in relation to the simpler form of dismissal. In the 1970s many priests were leaving the priesthood, and Pope John Paul II, on his election as pope in 1978, decided to make it harder for them to be “laicised”.
292. On 14 October, 1980 he brought in new rules that not only achieved that, but also abolished the right of the bishop to petition the Congregation for “administrative laicisation”. Only the priest himself could request to be laicised.<sup>247</sup> If the bishop thought it was appropriate to dismiss a priest, he had to use the convoluted judicial procedure as laid down by the *1917 Code* and *Crimen Sollicitationis* - and he could only dismiss a priest once he was satisfied that the “pastoral approach” had failed.

### The 1983 Code of Canon Law

293. The *1983 Code of Canon Law* repealed and replaced the *1917 Code*.<sup>248</sup> Since *Crimen Sollicitationis* was an instruction (the equivalent of a regulation in civil law) under the *1917 Code*, it would normally be repealed with the new *1983 Code*.<sup>249</sup> At least until the late 1990s, the conduct of the Holy See itself indicated that it regarded *Crimen Sollicitationis* as having been repealed.<sup>250</sup>
294. In about 1996, the CDF started to claim that it still had jurisdiction to deal with child sexual abuse under *Crimen Sollicitationis*. In a letter dated 18 May 2001, Cardinal Ratzinger, the Prefect of the CDF specifically said that *Crimen Sollicitationis* had been “in force until now”.<sup>251</sup>

<sup>247</sup> Nicholas Cafardi: “*Before Dallas*”, 62, Congregation for the Doctrine of the Faith, October 14 1980, AAS 72 (1980): 1132-37.

<sup>248</sup> Canon 6, *1983 Code of Canon Law*

<sup>249</sup> Elizabeth Delaney says that its repeal depended on whether *Crimen Sollicitationis* was a “penal” law or a “procedural” law. The difficulty is that it appears to be both. It set out procedures but also imposed serious penal consequences for breaches of those procedures: p.211, footnote 10.

<sup>250</sup> See the author’s *Potiphar’s Wife*, p.110 – 126 for further details of this issue. Brendan Daly says “the wording in Cardinal Ratzinger’s letter (to Cardinal Castillo Lara) would seem to indicate that he did not seem to think that the Congregation for the Doctrine of the Faith was competent to hear paedophilia cases. Perhaps this is because canon 6 of the 1983 Code had abrogated many penal laws.” Brendan Daly: *The instruction Crimen Sollicitationis* ..The Canonist, Vol 7 No. 1 (2016) p.10 at 21

<sup>251</sup> <http://www.bishop-accountability.org/resources/resource-files/churchdocs/EpistulaEnglish.htm> (Accessed 23 August 2013)

295. In the revised historical introduction to *SST 2001*, Pope Benedict XVI effectively conceded that *Crimen Sollicitationis* had been repealed by the *1983 Code*. What he had written in his 2001 letter was incorrect.<sup>252</sup>
296. The language of the *1983 Code* about priests who committed sex crimes against children was much milder than that used in the *1917 Code*. But worse than that, it made it even more difficult to dismiss them.<sup>253</sup>
297. The *1983 Code* continued, and expanded the “pastoral approach” of *Crimen Sollicitationis*, and required the bishop to try to cure the priest before even putting him on trial for dismissal.<sup>254</sup> It imposed a high “imputability” test for dismissal so that a paedophile priest could avoid dismissal simply by his being diagnosed a paedophile.<sup>255</sup> But the most serious impediment of all was the imposition of a 5 year limitation period for child sex abuse cases. If a child did not complain within 5 years of the abuse occurring, the canonical crime was “extinguished”.<sup>256</sup> *Crimen Sollicitationis* had no limitation period.<sup>257</sup> The end result was that there were virtually no canonical trials for paedophile priests during this period.<sup>258</sup>

#### ***The Motu Proprio, Sacramentorum Sanctitatis Tutela 2001***

298. In 2001, Pope John Paul II by his *Motu Proprio*, *SST 2001* introduced some modified procedures. Art. 13 provided:

“Whenever the Ordinary or Hierarch receives a report of a reserved delict which has at least a semblance of truth [notitiam saltem verisimilem], once the preliminary investigation has been completed, he is to communicate the matter to the Congregation for the Doctrine of the Faith which, unless it calls the case to itself due to particular circumstances, will direct the Ordinary or Hierarch [how] to proceed further...”<sup>259</sup>

<sup>252</sup> Nicholas Cafardi, “*The Scandal of Secrecy: Canon Law and the Sexual-abuse Crisis*”, *Commonweal*, 21 July 2010 <http://commonwealmagazine.org/scandal-secrecy> (Accessed 27 May 2013) and see the author’s *Potiphar’s Wife*, p.110 – 126 for further details of this issue. Dr Ian Waters agreed that *Crimen Sollicitationis* had been repealed by the *1983 Code of Canon Law*: <http://www.awrsipe.com/Misc/Ian-Waters-Speech-with-Commentary5.pdf> (Accessed 22 April 2015)

<sup>253</sup> Cafardi: “*Before Dallas*”, 62.

<sup>254</sup> Canon 1341

<sup>255</sup> Canon 1321.

<sup>256</sup> Canon 1362§2: Ladislav Orsy SJ, says that the canonical “prescription” is different to civil law statutes of limitation because the former extinguishes the cause of action, but the latter only prevent reliance on it (estoppel). That may be the situation in the United States, but many limitation statutes in Australia provide for extinguishment. [http://www.bc.edu/dam/files/schools/law/lawreviews/journals/bclawr/44\\_4/04\\_FMS.htm](http://www.bc.edu/dam/files/schools/law/lawreviews/journals/bclawr/44_4/04_FMS.htm) (Accessed 2 October 2013)

<sup>257</sup> Canon 1362§1, [http://www.vatican.va/archive/ENG1104/\\_P51.HTM](http://www.vatican.va/archive/ENG1104/_P51.HTM) (Accessed 29 May 2013)

<sup>258</sup> Cafardi *Before Dallas*, 25-28, O’Reilly and Chambers: *The Sexual Abuse Crisis and the Legal Responses* p.263

<sup>259</sup> A more detailed description of the alternatives is contained in the article by the former Vatican prosecutor Monsignor Scicluna at the Annual Canon Law Conference of the Canon Law Society of Australia and New Zealand, Canberra, 2006 in a paper called “*The Procedure and Praxis of the Congregation for the Doctrine of the Faith regarding Graviora Delicta*.” [http://www.vatican.va/resources/resources\\_mons-scicluna-graviora-delicta\\_en.html](http://www.vatican.va/resources/resources_mons-scicluna-graviora-delicta_en.html) (Accessed 14 June 2013)

299. Included amongst those matters to be referred under the heading, “Delicts against morality” were

“The violation of the sixth commandment of the Decalogue, committed by a cleric with a minor under the age of 18.”

The sixth commandment of the Decalogue was the prohibition on adultery, but which the Church over time extended towards all non-reproductive sexual activity outside of marriage.

300. Art. 25 of the norms provided:

“Cases of this kind are subject to the pontifical secret.”<sup>260</sup>

Footnote 31 attached to Art. 25 referred to Art. 1(4) of *Secreta Continere*. There were no exceptions for reporting child sex abuse allegations to the police.

301. The requirement of pontifical secrecy is repeated in the letter of explanation of 18 May 2001 from Cardinal Ratzinger to the bishops of the world.<sup>261</sup> But unlike *Crimen Sollicitationis*, *SST 2001* did not impose secrecy on accusers or witnesses.<sup>262</sup>

302. The limitation period was extended from 5 years to 10 years from the 18<sup>th</sup> birthday of the complainant. This extension had been granted to the United States in 1994 and to Ireland in 1996, but was now extended universally.

303. In 2003, the simpler method of dismissing a priest by “administrative” action was restored by an authorisation to the CDF.<sup>263</sup> However, no changes were made to canon law requiring the bishop or the CDF to apply “pastoral methods” to try and cure the abuser, nor was there

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<sup>260</sup> <http://www.documentcloud.org/documents/243690-10-sacramentorum-sanctitatis-2001-with-2003.html> Art. 25 and footnote 31 specifically referring to *Secreta Continere*. (Accessed 4 August 2013).

<sup>261</sup> <http://www.bishop-accountability.org/resources/resource-files/churchdocs/EpistulaEnglish.htm> (Accessed 5 August 2013)

<sup>262</sup> Thomas Doyle, *A Very Short History of Clergy Sexual Abuse in the Catholic Church* <http://www.crusadeagainstclergyabuse.com/htm/AShortHistory.htm> (Accessed 5 May 2013)

<sup>263</sup> *Facing the Truth*, p 33: [http://www.parliament.vic.gov.au/images/stories/committees/fcdc/inquiries/57th/Child\\_Abuse\\_Inquiry/Submissions/Catholic\\_Church\\_in\\_Victoria.pdf](http://www.parliament.vic.gov.au/images/stories/committees/fcdc/inquiries/57th/Child_Abuse_Inquiry/Submissions/Catholic_Church_in_Victoria.pdf) (Accessed 6 April 2013) This was effectively the same method that had been in force between 1971 to 1980 whereby a bishop could request the Congregation for the Doctrine of the Faith to laicize a priest against his will for living a “depraved life”. Under these 2003 procedures, the bishop could ask the Congregation to do the same thing on the basis of the material that he had gathered in his preliminary investigation and sent off to the Congregation in accordance with the norms of *Sacramentorum Sanctitatis Tutela*.

any change to the “imputability” defence which meant that the more children a priest abused, the less likely he would be dismissed because an attraction to children had the same effect as insanity in the civil law.<sup>264</sup>

### The 2010 Revision of *Sacramentorum Sanctitatis Tutela*

304. On 21 May 2010, Pope Benedict XVI revised the norms of Pope John Paul II’s decree, and extended them to cover cases involving the attempted ordination of women, the sexual abuse of those who “habitually lacked the use of reason”, and the possession of child pornography.<sup>265</sup>

305. Art. 16 provided:

“Whenever the Ordinary or Hierarch receives a report of a more grave delict, which has at least the semblance of truth, once the preliminary investigation has been completed, he is to communicate the matter to the Congregation for the Doctrine of the Faith...”

306. Art 30 of the revised norms expanded the reach of the pontifical secret:

“Cases of this nature are subject to the pontifical secret.”<sup>266</sup>

<sup>264</sup> Murphy Dublin Report Part 1, and Canon Law Society of Great Britain and Ireland, *Canon Law: Letter & Spirit: A Practical Guide to the Code of Canon Law* (London: Geoffrey Chapman, (1995), 805, <http://www.justice.ie/en/JELR/DACOI%20Part%201.pdf/Files/DACOI%20Part%201.pdf> par 4.59 (Accessed 25 April 2013, O’Reilly and Chambers: *The Sexual Abuse Crisis and the Legal Responses* p.274

<sup>265</sup> Art 5. 6 §1, 6 §2. [http://www.vatican.va/resources/resources\\_introd-storica\\_en.html](http://www.vatican.va/resources/resources_introd-storica_en.html) (Accessed 3 July 2013)

<sup>266</sup> “Huiusmodi causae secreto pontificio subiectae sunt” is the Latin used in both SST 2001 and SST 2010, but there is a slight change in the English translation: SST 2001 has “cases of this kind”, and SST 2010 has “cases of this nature”.

[http://www.vatican.va/roman\\_curia/congregations/cfaith/documents/rc\\_con\\_cfaith\\_doc\\_20010518\\_epistula-graviora-delicta\\_it.html](http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_20010518_epistula-graviora-delicta_it.html) and [http://www.vatican.va/resources/resources\\_norme\\_it.html](http://www.vatican.va/resources/resources_norme_it.html) (Accessed 18 June 2016 | Art 30§2.

Provides: “Whoever has violated the secret, whether deliberately (ex dolo) or through grave negligence, and has caused some harm to the accused or to the witnesses, is to be punished with an appropriate penalty by the higher turnus at the insistence of the injured party or even ex officio.” This would seem to be referring to a punishment in the case of disclosure of information within the tribunal. The “higher turnus” refers to an appeal court. Art 25§2 of SST 2001 is in the same terms. On the other hand, *Secreta Continere* provides in Art II: 2) If a violation has reached the external form, he who is accused of violating the secrecy, will be judged by the a certain special commission which will be constituted by the cardinal prefect of the competent Department, or if he is unavailable by the office moderator concerned; this commission will inflict penalties in keeping with the gravity of the delict or of the harm done; 3) If he who has violated the secrecy is in the service of the Roman Curia, he incurs the penalties set down in the General Regulations. The pontifical secret under *Secreta Continere* is not confined to disclosures to canonical tribunals, but to “extrajudicial denunciations” (Art 1(4)) or “reports” to bishops about child sexual abuse (Art 25 SST 2001 and Art 30 SST 2010) that precede the setting up of such tribunals, as well as to reports of papal legates etc. Art 30§2 SST 2010 can be read together with Art II(2) of *Secreta Continere*. Where a tribunal official violates the pontifical secret, he is to be punished by the appeal court, but where the bishop or some other person violates it, the punishment will be imposed by the Cardinal Prefect of the competent Department – which in this case would be the CDF. The main argument against the view that Art 30§2 confines the secret to the members of the tribunal is that after 2001, five senior members of the Roman Curia, all of them canon lawyers stated that bishops (not members of the tribunal) should not report child sexual abuse allegations by clergy to the civil authorities and in the cases of Cardinals Castrillon and Re, that it breached canon law. See: O’Reilly and Chalmers: *The Sexual Abuse Crisis and the Legal Response*, p.313: “Unlike civil law, in canonical penal law the legal “gloss” does not come from precedential case law because there is no binding precedent in canon law. Rather it is derived from (1) official published opinions and recommendations from the



307. As discussed in chapter 13, the imposition of the pontifical secret not only affects the issue of reporting to the civil authorities. It also affects the extent to which civil society can be satisfied that the Church's disciplinary system is capable of operating in accordance with today's best practice for dealing with child sexual abuse.

### The Reporting Dispensation

308. On 12 April, 2010, the Holy See issued a document called "*A Guide to Understanding Basic CDF Procedures concerning Sexual Abuse Allegations*", which it said was "an introductory guide which may be helpful to lay persons and non-canonists". It explained the various procedures, and then said that:

"Civil law concerning reporting of crimes to the appropriate authorities should always be followed."<sup>267</sup>

309. There is nothing in canon law that suggests that it can be changed by issuing a "*guide to lay persons and non-canonists*", and indeed, the Vatican spokesman, Fr Lombardi admitted as much in his explanatory statement on 15 July 2010 published on the Vatican website.<sup>268</sup> There is no exception in the revised norms of *SST 2010* to allow reporting to the civil authorities. The words in the Guide to "lay persons and non-canonists" about reporting crimes to the appropriate authorities were not incorporated into the revision. It would have been a simple thing to do, by adding the words "except for reporting such matters to the civil authorities where the civil law requires it," to Art. 30, imposing pontifical secrecy, but they are not there.

310. *SST 2001* and *SST 2010* followed the *1983 Code of Canon Law* by requiring the bishop to carry out a "preliminary investigation" either personally or through a delegate. Under the Code, it was then up to the bishop to decide if he had sufficient evidence for a formal trial.<sup>269</sup> However, *SST 2001* and *SST 2010* provided that in the case of the sex abuse of children, the results of that investigation had to be sent to the CDF which would then instruct the bishop

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pope or Vatican congregations; (2) unofficial, non-published opinions and recommendations from sources in the Vatican that work in the area, particularly the Congregation for the Doctrine of Faith;

<sup>267</sup> [http://www.vatican.va/resources/resources\\_guide-CDF-procedures\\_en.html](http://www.vatican.va/resources/resources_guide-CDF-procedures_en.html) (Accessed 17 July 2013)

<sup>268</sup> Fr Lombardi said "An initial clarification - especially for use by the media - was provided recently with the publication on the Holy See website of a brief "*Guide to Understanding Basic CDF Procedures concerning Sexual Abuse Allegations*". The publication of the new Norms is, however, quite a different thing, providing us with an official and updated legal text which is valid for the whole Church." [http://www.vatican.va/resources/resources\\_lombardi-nota-norme\\_en.html](http://www.vatican.va/resources/resources_lombardi-nota-norme_en.html) (Accessed 21 July 2013)

<sup>269</sup> [http://www.vatican.va/archive/ENG1104/\\_P6V.HTM](http://www.vatican.va/archive/ENG1104/_P6V.HTM) (Accessed 3 July 2013)

on how to proceed. That might involve a formal trial by the bishop or by the Congregation itself, or some other action.<sup>270</sup>

311. The announcement by Fr Lombardi on 15 July 2010 that the CDF would also be giving an instruction to bishops obey civil laws relating to the reporting of sex crimes against children would seem to amount to a dispensation from pontifical secrecy, but limited to where there was a local law requiring reporting.<sup>271</sup> This was a strange way to do things. Why did the Holy See not incorporate that requirement as an exception to Art. 30 imposing the pontifical secret?
312. Fr Lombardi said that the idea of reporting where the civil law required it was a “practice suggested by the CDF”. Such a practice was new because all the public statements issued by the Holy See prior to 2010, including that from Cardinal Castrillón, the Prefect of the Congregation for Clergy, and Cardinal Re, the Prefect of the Congregation for Bishops in his letter of October 2002 to the United States Catholic Bishops Conference, Archbishop Herranz, the President of the Pontifical Council for the Interpretation of Pontifical Texts, Archbishop Bertone, the Secretary of the Congregation for the Doctrine of the Faith and Professor Ghirlanda SJ from the Apostolic Signatura were to the effect that such a “practice” of reporting by Church authorities was contrary to canon law or was in some way “immoral”. Cardinals, Castrillón and Cardinal Rodriguez Maradiaga had said that bishops should be prepared to go to jail rather than do that.

### **The Limitation on the Dispensation**

313. The characterisation of this instruction was a dispensation from the pontifical secret.<sup>272</sup> But even that concession by the Holy See had a catch. Fr Federico Lombardi, the Vatican spokesman, when announcing the concession on 15 July 2010, said,

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<sup>270</sup> A more detailed description of the alternatives is contained in the article by the former Vatican prosecutor Monsignor Scicluna at the Annual Canon Law Conference of the Canon Law Society of Australia and New Zealand, Canberra, 2006 in a paper called “*The Procedure and Praxis of the Congregation for the Doctrine of the Faith regarding Graviora Delicta.*” [http://www.vatican.va/resources/resources\\_mons-sciicluna-graviora-delicta\\_en.html](http://www.vatican.va/resources/resources_mons-sciicluna-graviora-delicta_en.html) (Accessed 14 June 2013)

<sup>271</sup> Canons 85 & 87, and Beal, Coriden and Green, *New Commentary on the Code of Canon Law* p.130-132, and see evidence of Dr. Rodger Austin at the Cunneen Special Commission [http://www.lawlink.nsw.gov.au/lawlink/Special\\_Projects/ll\\_splprojects.nsf/vwFiles/Transcript\\_Day\\_20\\_-\\_TOR\\_2\\_-\\_31\\_July\\_2013.pdf/\\$file/Transcript\\_Day\\_20\\_-\\_TOR\\_2\\_-\\_31\\_July\\_2013.pdf](http://www.lawlink.nsw.gov.au/lawlink/Special_Projects/ll_splprojects.nsf/vwFiles/Transcript_Day_20_-_TOR_2_-_31_July_2013.pdf/$file/Transcript_Day_20_-_TOR_2_-_31_July_2013.pdf), 2233, Canon 85 & 87, and Beal, Coriden and Green, *New Commentary on the Code of Canon Law* p.130-132.

<sup>272</sup> The Australian canon lawyer, Rodger Austin stated at the Cunneen Special Commission that revealing anything that was disclosed in a canonical tribunal required a dispensation: [http://www.lawlink.nsw.gov.au/lawlink/Special\\_Projects/ll\\_splprojects.nsf/vwFiles/Transcript\\_Day\\_20\\_-\\_TOR\\_2\\_-\\_31\\_July\\_2013.pdf/\\$file/Transcript\\_Day\\_20\\_-\\_TOR\\_2\\_-\\_31\\_July\\_2013.pdf](http://www.lawlink.nsw.gov.au/lawlink/Special_Projects/ll_splprojects.nsf/vwFiles/Transcript_Day_20_-_TOR_2_-_31_July_2013.pdf/$file/Transcript_Day_20_-_TOR_2_-_31_July_2013.pdf), 2233 Sr Moya Hanlen told the Royal

“This means that in the practice suggested by the Congregation for the Doctrine of the Faith it is necessary to comply with the requirements of law in the various countries, and to do so in good time, not during or subsequent to the canonical trial.”<sup>273</sup>

314. The “trial” in the canonical system includes the investigation under Canon 1717. It was not entirely clear if Fr Lombardi was simply giving bishops advice about the best time to report, or that he was putting restrictions on the concession. The matter is of some importance, because if it were the latter, the bishop would be precluded from reporting once the preliminary investigation started, even where there were local civil reporting laws.
315. In 2015, the Holy See seemed to confirm the limitations on reporting in the case of Fr Mauro Inzoli, accused of abusing dozens of children over a ten year period. He was dismissed by Pope Benedict in 2012, but Pope Francis reinstated him and applied the practice of the CDF of allowing him to live a “life of prayer and penance” and restricting his public ministry. When the Italian magistrates wanted documentation on his case, the Holy See refused saying:
- “The procedures of the Congregation for the Doctrine of the Faith are of a canonical nature and, as such, are not an object for the exchange of information with civil magistrates,”<sup>274</sup>
316. The documents sought to be produced by the Italian magistrates were created after the commencement of the canonical trial. The Vatican statement tends to suggest that even where there is a civil law requiring reporting, the pontifical secret prevents the disclosure of any information arising out of the preliminary investigation or penal trial.
317. The effect of this that if there is a single allegation of sexual abuse against a priest (and that reported to the police), but the canonical investigation reveals another twenty, those twenty sexual assaults cannot be reported.
318. Apart from that problem, very few countries have laws requiring reporting of all allegations of child sexual abuse. In Australia, only two States, New South Wales and recently Victoria have such requirements, and in Victoria an exemption is provided where the victim does not wish to report. All States have differing laws about reporting children at risk, but not for

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Commission that a dispensation had been granted by the CDF to reveal the outcome of the Nestor case. <http://www.childabuseroyalcommission.gov.au/case-study/bb3eaadf-9283-41ef-9694-e560738d186a/case-study-14,-june-2014,-sydney.aspx>, 8144

<sup>273</sup> [http://www.vatican.va/resources/resources\\_lombardi-nota-norme\\_en.html](http://www.vatican.va/resources/resources_lombardi-nota-norme_en.html) (Accessed 21 July 2013).

<sup>274</sup> <http://www.globalpulemagazine.com/news/pope-francis-issues-statutes-overseeing-financial-reform/887>, (Accessed 7 March 2015)

historical abuse.<sup>275</sup> Where there are inadequate reporting laws, the pontifical secret applies, even if the bishop wanted to report the allegations to the police.

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## 6. THE SECRET OF THE HOLY OFFICE AND THE PONTIFICAL SECRET

319. Secrecy was imposed on penal trials under the 1917 Code of Canon Law.<sup>276</sup> Likewise, the documents relating to such trials were to be kept in the secret archive, and were to be systematically destroyed.<sup>277</sup> The reason behind this was said to be:

“...to protect the secrecy of criminal trials in moral matters, protect the reputation of delinquents by destroying artificial memory of the crime, and to ‘prevent scandal and avoid unjust, unnecessary and embarrassing attacks upon the Church, by making it impossible for such documents to fall into the hands of her enemies.’”<sup>278</sup>

320. But that secrecy only applied to the penal trial itself. It did not apply to the allegation, and it did not apply to the preliminary investigation, because a distinction is drawn in canon law between “trials” generally (which commence the moment the preliminary investigation of the allegation starts) and the “penal trial”, which occurs after the preliminary investigation.

321. The secret of the Holy Office was something entirely different, and was imposed originally on cases against priests for soliciting sex in the confessional by Pope Pius IX in 1866:

“In handling these cases, either by Apostolic commission or the appropriate ruling of the bishops, the greatest care and vigilance must be exercised so that these procedures, inasmuch as they pertain to (matters of) faith, are to be completed in absolute secrecy, and after they have been settled and given

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<sup>275</sup> S.316 of the *Crimes Act 1900 (NSW)*. The *Crimes Amendment (Protection of Children) Act 2014 (Vic)* was passed by the Victorian Parliament and assented to on 3 June 2014, and has similar provisions to S.316 of the *NSW Crimes Act* relating to the abuse of vulnerable persons. It was proclaimed to commence on 27 October 2014.

<http://www.gazette.vic.gov.au/gazette/Gazettes2014/GG2014S350.pdf> (Accessed 14 Oct 2014)

See Appendix 4 for details of the various State laws on reporting. It should be noted that Victoria also provides an exception where the victim does not wish to report.

<sup>276</sup> Canon 1623.

<sup>277</sup> Canons 379 and 382

<sup>278</sup> Stephen Braunlich: *The Competing Claims of Canon and Civil Law to Accessing Diocesan Secret Archives* (2011), p. 12, quoting William Francis Louis: *Diocesan Archives: A Historical Synopsis and Commentary* 82-83 (Sep. 22, 1941) (unpublished J.C.D. dissertation, The Catholic University of America)

[http://works.bepress.com/cgi/viewcontent.cgi?article=1001&context=stephen\\_braunlich](http://works.bepress.com/cgi/viewcontent.cgi?article=1001&context=stephen_braunlich) (Accessed 15 May 2015)

over to sentencing, are to be completely suppressed by perpetual silence. All the ecclesiastic ministers of the Curia, and whoever else is summoned to the proceedings, including counsels for the defence, must submit oaths of maintaining secrecy, and even the bishops themselves are obligated to keep the secret...but those who satisfy the burden of denunciation are bound to swear an oath at the beginning to tell the truth, and then, when the dealings are complete, must swear to maintain secrecy even if they are priests.”<sup>279</sup>

322. *Crimen Sollicitationis* applied the secret of the Holy Office not only to such penal trials, but to the preliminary investigation of the allegations of soliciting sex in the confessional, because the seal of the confessional was involved. Child sexual abuse, homosexuality and bestiality did not involve the confessional seal. The extension of the secret of the Holy Office to these crimes had to be related to the prevention of scandal and to prevent embarrassing documents falling into the hands of the Church’s “enemies”.
323. The “strictest confidentiality” of the secret of the Holy Office was imposed at the start of the investigation into an allegation of a cleric sexually assaulting a child.<sup>280</sup> Before he started an investigation, the bishop was free to go to the civil authorities to report allegations against a priest.<sup>281</sup> That all changed in 1974 with *Secreta Continere* and the pontifical secret.

### The Pontifical Secret

324. The pontifical secret is imposed on “extrajudicial denunciations” and the “process and decision” involving child sexual abuse by the Instruction *Secreta Continere* of 1974 and Canon 1395 of the 1983 *Code of Canon Law*. It was also imposed on a “case” where the bishop had “at least probable knowledge of the commission” of child sexual abuse by a cleric under Art 25 of SST 2001. It is also imposed by on the “report” to the bishop of child sexual abuse by a cleric by Art. 16 of SST 2010.

<sup>279</sup> S.C.S. Off. Instr., 20 Febr 1866, *Instruction under Sacramentum Poenitentiae*, par 12

[http://www.awrsipe.com/patrick\\_wall/selected\\_documents/1866%20Instruction%20on%20sacramentum%20poenitentiae.pdf](http://www.awrsipe.com/patrick_wall/selected_documents/1866%20Instruction%20on%20sacramentum%20poenitentiae.pdf) (Accessed 20 September 2014)

<sup>280</sup> Clause 33. ‘Once the Ordinary has received any denunciation of the crime of solicitation, he will...summon two witnesses...who know well both the accused and the accuser. In the presence of the notary ...he is to place them under a solemn oath to tell the truth and to maintain confidentiality, under threat, if necessary, of excommunication reserved to the local Ordinary or to the Holy See...’ [http://www.vatican.va/resources/resources\\_crimen-sollicitationis-1962\\_en.html](http://www.vatican.va/resources/resources_crimen-sollicitationis-1962_en.html) (Accessed 4 August 2013)

<sup>281</sup> Fr Thomas Doyle, <http://reform-network.net/?p=3006> par 5(d) (Accessed 3 July 2013) ‘The highest degree of secrecy, the Secret of the Holy Office, was imposed on everyone involved in the process from the time it started.’ Ioanna Cismas: *Religious Actors and International Law*, OUP Oxford (2014) p.202. Geoffrey Robertson QC in *The Case of the Pope* argues that in practical terms that meant no reporting at all because the complainant was first required to swear his or her evidence on oath and to swear to secrecy: loc. 968 par. 71-72

325. Sr Moya Hanlen, a canon lawyer who gave evidence to the Royal Commission in Case Study No 14 (Nestor) said,

“The pontifical secret is actually really a secret of the highest order. There would be a pontifical secret, for example, around any consultation of bishops around who should be a bishop appointed to a particular vacancy, and they would not be able to speak about that to anyone at all. In this context, I believed that the pontifical secret related to all details of the case that were not known in the public arena.”<sup>282</sup>

326. Another canon lawyer, Sr Elizabeth Delaney, in discussing “unresolved canonical issues” in relation to *Towards Healing*, wrote:

“As we have noted previously, the Norms of *Sacramentorum sanctitatis tutela* require that cases of sexual abuse of minors be subject to pontifical secrecy. This is both consistent with and an extension of the 1974 Instruction of the Secretariate of State, *Secreta continere*, which stated that:

Included under pontifical secrecy are:...

4. Extrajudicial denunciations received regarding delicts against faith and against morals, and regarding delicts perpetrated against the sacrament of Penance. Likewise the process and decision which pertain to those denunciations, always safeguarding the right of one who has been reported to authorities to know of the denunciation if such knowledge is necessary for his own defense

Accordingly, not only the acts of the process, including the judgement, but also the denunciation itself are subject to pontifical secrecy. This article follows the requirement of *Crimen sollicitationis* that all who participate in cases to which it applies should observe the strictest secrecy, the secrecy of the Holy Office. Several factors make the observance of such secrecy difficult: the requirements of mandatory reporting, the nature of some forms of sexual abuse of minors, and the need for healing for the victim.”<sup>283</sup>

327. Sr Delaney’s statement could be expressed more accurately and historically around the other way: “the observance of the pontifical secret made the requirements of mandatory reporting, and the desirability of reporting given the nature of some forms of sexual abuse of minors, and the need for the healing of the victim” more difficult. Indeed, the observance of the pontifical secret can be seen from worldwide pattern of cover up and its consequences.

<sup>282</sup> <http://www.childabuseroyalcommission.gov.au/case-study/bb3eaadf-9283-41ef-9694-e560738d186a/case-study-14,-june-2014,-sydney.aspx> (Accessed 27 June 2014), 8143

<sup>283</sup> Elizabeth M. Delaney sgs, *Canonical Implications of the Response of the Catholic Church in Australia to Child Sexual in Australia*, a doctoral dissertation submitted to the Faculty of Canon Law, Saint Paul University, Ottawa, Canada, (2004), 231. Delaney also says that under canon law, a person’s good name is “held to be sacred” (p.152) and that “A person’s reputation is at risk of being harmed after an Ordinary initiates a preliminary investigation,” confirming that the pontifical secret also applies to that investigation (p.153).

328. Sr Delaney then goes on to say:

“According to Towards Healing 2000, the complainant is encouraged to take the matter to the secular authority. If the person chooses not to do so, the one who receives the complaint bears the obligation according to provisions of the secular legislation.(61)

329. In footnote 61, Sr Delaney states:

“For this reason, it is appropriate that the person who receives such complaints not be the Ordinary or hierarchical superior.”

330. In this footnote the author recognises that a bishop who receives a complaint (an “extrajudicial denunciation”) is bound by the pontifical secret under *Secreta Continere* not to reveal it to anyone, including the civil authorities. If the bishop did receive the complaint, he would then be in a position where he has a conflict of duties under canon and civil law. In New South Wales where there was such a civil law obligation under S.316 of the *Crimes Act (NSW) 1900*, complainants were referred to counsellors who made the report in accordance with the law. Disclosure of abuse to a counsellor was not an “extrajudicial denunciation” covered by the pontifical secret within Art 1(4) of *Secreta Continere*. The counsellors were not the bishop or a “hierarchical superior”.<sup>284</sup> Nor was such a disclosure a “report” to a bishop about child sexual abuse within Art 16 of *SST 2010*.

331. Sr Delaney goes on to argue that a report could be made to the civil authorities before the canonical proceedings commenced:

“Where such legislation does not exist, it could be argued that the person receiving the complaint might have a moral obligation to provide information to the police or civil authority. This approach is somewhat consistent with *Crimen sollicitationis* which stresses the moral obligation of the person solicited or of any person having certain knowledge to make a denunciation on account of the possible public harm.<sup>62</sup> The reporting to a secular authority, therefore, generally would not be in conflict with the requirement of the norms, since the report would be made at the time of receiving an allegation, that is, prior to any canonical process subject to pontifical secrecy.”

332. The difficulty with this argument is that *Crimen Sollicitationis* did not prohibit reporting to the civil authorities before the canonical proceedings started. The secret of the Holy Office

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<sup>284</sup> See chapter 8 and [http://www.lawlink.nsw.gov.au/lawlink/Special\\_Projects/ll\\_splprojects.nsf/vwFiles/Day\\_22\\_-\\_9\\_September\\_2013.pdf/\\$file/Day\\_22\\_-\\_9\\_September\\_2013.pdf](http://www.lawlink.nsw.gov.au/lawlink/Special_Projects/ll_splprojects.nsf/vwFiles/Day_22_-_9_September_2013.pdf/$file/Day_22_-_9_September_2013.pdf) p. 2361 (Accessed 11 September 2013)

only covered the information obtained through the canonical process, not the allegation itself. That all changed in 1974 with *Secreta Continere* that extended the pontifical secret to the “extrajudicial denunciation”, and it was confirmed by *SST 2001* and *SST 2010* by applying the pontifical secret to a “report” to the bishop. Further, the denunciation referred to in *Crimen Sollicitationis* was for soliciting sex in the confessional and it was to be made to the bishop or the Holy Office, not to the civil authorities, and there was a specific exemption for making such a denunciation for the “*crimen pessimum*”, homosexuality, bestiality and the sexual abuse of minors.<sup>285</sup>

333. The “extrajudicial denunciation” itself is subject to pontifical secrecy under *Secreta Continere*, and so is any preliminary investigation under Canon 1717, because it is part of the “process”.<sup>286</sup> Likewise, in *SST 2001* and *SST 2010*, the pontifical secret is not just imposed on “trials” even in the broad sense. The decrees say that “*cases of this kind*” and “*cases of this nature*” are subject to the pontifical secret. The “case” includes the “report” to a bishop of child sexual abuse by a cleric under Art. 13 of *SST 2001* and Art. 16 of *SST 2010*, as well as any communications between the CDF and the bishop on how to proceed and any subsequent action and decision. This would also be part of the “process” under *Secreta Continere*. So, when is “in good time” under canon law? Never, because even the allegation itself is subject to the pontifical secret.

334. On 19 July 2010, Fr Lombardi expanded on these comments on the revised norms on the Vatican website through the Catholic News Service, and said that the “Church’s judicial handling” of sex abuse by clergy were “dealt with in strict confidentiality”, and that the reason was: “to protect the dignity of everyone involved.” He said that while the norms:

“..do not directly address the reporting of sex abuse to civil authorities, it remains the Vatican’s policy to encourage bishops to report such crimes wherever required by civil law. These norms are part of canon law; that is, they exclusively concern the church. For this reason they do not deal with the subject of reporting offenders to the civil authorities.”<sup>287</sup>

335. Part of the statement is true and part is not. Breaches of Church rules regarding the sacraments and the ordination of women (which the norms also covered) do “exclusively

<sup>285</sup> *Crimen Sollicitationis* Articles 16 – 27, 30, 32, 33, 66 and 72.

<sup>286</sup> This interpretation is also supported by the translations of Art 1(4) discussed above in Chapter 5 under the heading, *Secreta Continere* and see also John G. Proctor: “*Clerical Misconduct: Canonical and Practical Consequences*”, Canon Law Society of American Proceedings 49 (1988) 227-244”

<sup>287</sup> <http://www.catholicnews.com/data/stories/cns/1002901.htm> (Accessed 6 March 2013)

[http://en.radiovaticana.va/storico/2010/07/16/vatican%E2%80%99s\\_revised\\_rules\\_on\\_sexual\\_abuse\\_of\\_children/in2-408723](http://en.radiovaticana.va/storico/2010/07/16/vatican%E2%80%99s_revised_rules_on_sexual_abuse_of_children/in2-408723) (Accessed 25 August 2013)



concern the Church". But the sexual abuse of children and people with intellectual disabilities, and the possession of child pornography do not "exclusively concern the Church". They are serious crimes under the civil law of practically every country in the world.

336. When the norms imposed "strict confidentiality" on any information obtained through the Church investigation and trial of such matters, it is incorrect to assert, as Fr Lombardi did, that they "do not directly address" reporting of sex abuse to civil authorities. They prohibit any allegation or information obtained from the Church investigation and trial being reported to anyone except the accused priest and his bishop. Reporting to the civil authorities could not have been more directly addressed. The only dispensation to that prohibition, from 2010 onwards, is when the civil law required reporting.

### **The Justification for the Pontifical Secret**

337. Edward N. Peters, an American canon lawyer argued that *Crimen Sollicitationis* was simply a more detailed instruction on how to proceed under the *1917 Code of Canon Law*. He points out that the *1917 Code* also dealt with sex abuse of minors, as well as homosexuality, bestiality etc. and that confidentiality was already part of the inquiry based system based on Roman law.<sup>288</sup>
338. But *Crimen Sollicitationis* took secrecy to new levels. The *1917 Code of Canon Law* imposed confidentiality on matters involving Church tribunals in terms similar to the *1983 Code of Canon Law*.<sup>289</sup> *Crimen Sollicitationis*, however, imposed "the secret of the Holy Office" the breach of which carried automatic excommunication, the same punishment that was applied to breaking the seal of confession. Further, the excommunication could only be lifted by the pope personally and not even by the Sacred Penitentiary which normally handled such matters.<sup>290</sup> Further, when Pope Paul VI modified the "secret of the Holy Office" and renamed it the "pontifical secret", he referred to various levels of secrecy required, and in some matters of major importance, a special secret with a much more serious obligation, called the "pontifical secret" is applied.<sup>291</sup> It is the Church's "Top Secret" classification which overrides an individual's conscience.

<sup>288</sup> 1917 Code cc.364 § 2 n.3, 1623 § 1.

<sup>289</sup> 1917 Code 1623, and 1983 Code of Canon Law 1455.

<sup>290</sup> <http://www.catholicculture.org/culture/library/dictionary/index.cfm?id=31912> (Accessed 10 July 2013)

<sup>291</sup> *Pero en ciertos asuntos de mayor importancia se requiere un secreto particular, que es llamado secreto pontificio y que debe ser custodiado con obligación grave.* (Spanish translation of *Secreta Continere*)

<http://www.iuscanonicum.org/index.php/documentos/70-discursos-del-romano-pontifice/380> (Accessed 10 July 2013)

339. Peters talks about the secrecy provisions in *Crimen Sollicitationis* as if they were no more than the confidentiality required by the continental European system to prevent the contamination of evidence.<sup>292</sup> Whatever may be the situation in other European countries, German law does not impose any such confidentiality.<sup>293</sup> In the common law adversarial system, witnesses under cross examination may be asked not to speak to other witnesses until the trial is over to avoid this “contamination” that Peters talks about. But then their evidence is usually given in open courts with access to the public, and afterwards, there is nothing to stop anyone involved in the process from talking about it in the pub, to the press, or over the back fence. Further, except in some rare cases, the transcript of evidence is available, as are the reasons for judgment. The secrecy imposed by *Crimen Sollicitationis*, and *Secreta Continere* was of an entirely different character.
340. Fr John P Beal, another eminent canon lawyer, also argues that there was nothing sinister about such a requirement of secrecy, because it is standard practice in law enforcement agencies, such as the CIA and the FBI to protect the confidentiality of their sources and investigative manuals.<sup>294</sup> Fr Beal’s reference to law enforcement agencies such as the FBI and CIA in the common law system emphasises the difference between the common law system and the canonical system. In the latter, the “trial” starts with the allegation and investigation, and not subsequent to it, as in the common law system.<sup>295</sup> The same is true of the European continental system.<sup>296</sup>
341. The secrecy required by *Crimen Sollicitationis* and *Secreta Continere* went well beyond the requirements to prevent contamination of evidence or the protection of investigative

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<sup>292</sup> <http://www.themediareport.com/wp-content/uploads/2012/08/Peters-reply-to-Wall-and-Doyle.pdf>, par 73, footnote 116 (Accessed 3 July 2013). O’Reilly and Chalmers, quoting McKenna (see fn 54), provide the same justification: *The Clergy Sexual Abuse Crisis and the Legal Responses*, p.359. Likewise the canon lawyer Edmund Condon gave this as the reason in a letter to editor of the UK *Catholic Herald* on 22 April 2016: “...penal cases in canon law, as in civil law, cannot be discussed by those involved while they are sub judice. Upon their resolution, the matter becomes what the law itself calls “public juridic fact”.” These justifications overlook the fact that *Secreta Continere* imposes a permanent silence on the information gained during a canonical trial.

<sup>293</sup> Dr Stefan von der Beck, Chief Judge, Supreme Court, Oldenburg (Lower Saxony), Germany, in private correspondence with the author, January 2014.

<sup>294</sup> John P. Beal in “*The 1962 Instruction: Crimen Sollicitationis: Caught Red Handed or Handed a Red Herring?*” 41 *Studia Canonica* 199 at 228ff. <http://www.vatican.va/resources/Beal-article-studia-canonica41-2007-pp.199-236.pdf> (Accessed 3 July 2013)

<sup>295</sup> Another canon lawyer, Fr Kevin E. McKenna JCD expressed a similar view in his 2010 paper to the Canon Law Society of America: May 25, 2010, Canon Law Society of America. <http://www.docstoc.com/docs/83976670/USCCB-CANON-LAW-SEMINAR-2010-MCKENNAAdoc---Welcome---The-Catholic> (Accessed 24 July 2013)

<sup>296</sup> Dr Stefan von der Beck, Chief Judge, Supreme Court, Oldenburg (Lower Saxony), Germany, in private correspondence with the author, January 2014.

manuals because everyone involved in the process, witnesses, prosecutors, defence canon lawyers and judges were required to observe the secret for the rest of their lives.<sup>297</sup>

342. Fr Beal concedes that the oath of secrecy that witnesses were required to make under *Crimen Sollicitationis* may have been interpreted beyond what were its strict terms, that is, it only prevented witnesses disclosing the questioning in the tribunal, and not about what happened to them when they were abused. But then, he concedes that ordinary people may not be expected to make such “casuistic distinctions”, and the effect of the oath was to prevent witnesses from reporting the crime to the civil authorities.<sup>298</sup>
343. The *1983 Code of Canon Law* did not require victims and witnesses to be sworn to secrecy as did *Crimen Sollicitationis*, except at the discretion of the judge to avoid “scandal”, but the whole rationale of avoiding the contamination of evidence makes no sense when applied to the judges of the tribunal and the bishop to whom they report. They were also bound by pontifical secrecy not to disclose anything that they had discovered in their investigations even after the whole process has been completed.
344. On 16 July 2010, the Vatican spokesman Fr Federico Lombardi also used the justification that secrecy was necessary to protect the “dignity” of the people involved in the investigation.<sup>299</sup> Canon law regards a person’s right to a good reputation as “sacred”, and this has been used as a justification for the secrecy involved in canonical investigations and trials.<sup>300</sup> Since criminal matters in civil society are held in open court, any communication to the civil authorities of criminal activity discovered during the canonical process would inevitably affect this “sacred right” if charges were subsequently laid.

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<sup>297</sup> Fr. Thomas Doyle in *Mea Maxima Culpa* at 54.20, and see Article 11, *Crimen Sollicitationis* “...in dealing with these causes, more than usual care and concern must be shown that they be treated with the utmost confidentiality, and that, once decided and the decision executed, they are covered by permanent silence.” *Secreta Continere* replaced the secret of the Holy Office with the pontifical secret, and in Art III (1) says: ‘Whoever is bound by papal secrecy is always under grave obligation to observe it.’ William Woestman translation: *Ecclesiastical Sanctions and the Penal Process* (St. Paul University 2003), 237. Gerardo Núñez in *La Competencia penal de la Congregación para la Doctrina de La Fe, Comentario al m.p. Sacramentorum Sanctitatis Tutela*, *Ius Canonicum*, XLIII, N. 85, 2003, 351-390 at 387 said in relation to the secret of the Holy Office: “Everything had to be treated very carefully and under the strictest confidentiality. Once the investigation and trial was finished and the sentence handed down, all those involved in it were obliged to keep the silence of the Holy Office...” In discussing the pontifical secret under the *Sacramentorum Sanctitatis Tutela*, he suggests that all those involved in the tribunal should still be required to take an oath of secrecy in order to guarantee that confidentiality.

<sup>298</sup> John P. Beal: “*The 1962 Instruction: Crimen Sollicitationis: Caught Red Handed or Handed a Red Herring?*” 41 *Studia Canonica* 199 at 231. <http://www.vatican.va/resources/Beal-article-studia-canonica41-2007-pp.199-236.pdf> (Accessed 3 July 2013)

<sup>299</sup> [http://www.vatican.va/resources/resources\\_lombardi-nota-norme\\_en.html](http://www.vatican.va/resources/resources_lombardi-nota-norme_en.html) (Accessed 21 July 2013)

<sup>300</sup> Canon 220. Elizabeth Delaney: *Canonical Implications*, p. 151, 152.

345. The big difference between European continental civil law system and canon law, not mentioned by Peters, Beal and Lombardi, is that in European continental civil law, it is **the State** that is doing the investigating, not a private organization like the Church. The Court or police investigators **are** the State. So any confidentiality imposed on witnesses, court staff and investigators in the civil law system is not going to have the effect of keeping the information from the State. That has been the effect of imposing the same confidentiality in canonical proceedings. The State was not allowed to know about it. And *Crimen Sollicitationis* made sure the State did not know about it by requiring the victim and witnesses to observe the same secrecy.
346. Fr Beal also concedes that this kind of strict secrecy is pointless, and indeed harmful to preserving the reputations of the accuser and accused. He points out that after the case is concluded, the bishop is barred by the pontifical secret from telling anyone that the accused was either found guilty or innocent:

“Concern for the reputations of victims and defendants and for the good reputation he enjoys, are certainly legitimate reasons for maintaining confidentiality about denunciations and investigations and prosecutions that are still in progress. However, insisting on secrecy even long after the process has reached its conclusion is more difficult to justify. Blanketing everything connected with denunciations and the penal process under the ‘pontifical secret’ in perpetuity seems inimical to other ecclesial values and, quite frankly, counterproductive.... Nor is it clear that enjoining perpetual silence under the pontifical secret was or is a particularly effective way to safeguard the reputation either of the accuser or of the accused. When word of a complaint leaked out, as it inevitably would and does in an open society, even after the case has been concluded, the diocesan bishop was and is barred by the pontifical secret from stating publicly that the ecclesiastical process had established either that the accuser’s complaint was founded or that the accused was found not guilty of the offense.”<sup>301</sup>

347. The canon lawyer, Elizabeth Delaney, when discussing “unresolved canonical issues”, in 2004, pointed out that it is common for civil courts to impose conditions on child sex offenders, such as a prohibition on working with children. On the other hand, a canonical court may dismiss a priest from the clerical state, but then “if the matter is subject to pontifical secrecy, then that restriction may need to be observed.” In other words, unless the matter comes within the dispensation granted in 2010, allowing reporting where there is

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<sup>301</sup> John P. Beal: “*The 1962 Instruction: Crimen Sollicitationis: Caught Red Handed or Handed a Red Herring?*” 41 *Studia Canonica* 199 at 231 - 233. <http://www.vatican.va/resources/Beal-article-studia-canonica41-2007-pp.199-236.pdf> (Accessed 3 July 2013). Sr Moya Hanlen implied that this was correct in the Nestor case (Case Study No. 14) when she said that the bishop received a dispensation from the Vatican to publicise the result of the canonical proceedings. <http://www.childabuseroyalcommission.gov.au/case-study/bb3eaadf-9283-41ef-9694-e560738d186a/case-study-14,-june-2014,-sydney.aspx>, 8144 (Accessed 28 April 2015)

a civil law obligation to do so, the canonical courts would be prohibited from telling the civil authorities about any of the allegations or evidence in the canonical trial, or even the fact that the priest had been dismissed for child sexual abuse.<sup>302</sup>

348. This position seems to have been confirmed by the Holy See in March 2015 by the Holy See's refusal to hand over documents relating to the canonical trial Fr Mauro Inzoli.
349. The Vatican spokesman, Fr Federico Lombardi confirmed that the pontifical secret went well beyond preventing contamination of evidence, in his comments on *SST 2010*. He said that any reporting to the civil authorities had to be done "in good time, not during or subsequent to the canonical trial."<sup>303</sup> That can only mean that judges, canon lawyers and staff involved in the process are forbidden to reveal the evidence given in the proceedings, even to the police. In 2010, Fr Beal referred to the requirements of secrecy after the conclusion of a trial: "It's canon law, but it's a stupid law."<sup>304</sup>
350. On 27 May 2013, Cardinal George Pell, the Archbishop of Sydney gave evidence before the Victorian Parliamentary Inquiry. He was asked about *Crimen Sollicitationis* and its requirements of "strict confidentiality". He said the original requirement of secrecy was because of the seal of confession, and another reason was to protect the privacy of the person making the allegations. He then said that "we regard those restrictions now as inappropriate".<sup>305</sup> Cardinal Pell may consider those restrictions inappropriate, but Pope Francis does not, as can be seen by his refusal to accede to the requests of the United

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<sup>302</sup> Elizabeth M. Delaney sgs, *Canonical Implications of the Response of the Catholic Church in Australia to Child Sexual in Australia*, a doctoral dissertation submitted to the Faculty of Canon Law, Saint Paul University, Ottawa, Canada, (2004), 228

<sup>303</sup> [http://www.vatican.va/resources/resources\\_lombardi-nota-norme\\_en.html](http://www.vatican.va/resources/resources_lombardi-nota-norme_en.html) (Accessed 21 July 2013)

<sup>304</sup> <http://ncronline.org/news/vatican/vatican-secrecy-keeps-victims-accused-dark> (Accessed 22 July 2013). The Spanish canon lawyer, Gerardo Núñez in *La Competencia penal de la Congregación para la Doctrina de La Fe, Comentario al m.p. Sacramentorum Sanctitatis Tutela*, *Ius Canonicum*, XLIII, N. 85, 2003, 351-390 at 387, confirms that the pontifical secret involves a 'permanent silence' over matters covered by it. Another canon lawyer, Ladislav Orsy is quoted as saying in 2003: "I think actually there has been, and there is still, an unnecessary and exaggerated cult of secrecy in the church, which was even greater in those days than it is today...there is a nearly neurotic fear of scandal. The bishops always tried to cover up things that might reflect badly on the church, and you can see that in the sexual abuse cases." Alan Cooperman, *Washington Post* 25 August 2003: [http://www.bishop-accountability.org/news2003\\_07\\_12/2003\\_08\\_25\\_Cooperman\\_VaticanMemo.htm](http://www.bishop-accountability.org/news2003_07_12/2003_08_25_Cooperman_VaticanMemo.htm) (Accessed 20 July 2014)

<sup>305</sup> [http://www.parliament.vic.gov.au/images/stories/committees/fcdc/inquiries/57th/Child\\_Abuse\\_Inquiry/Transcripts/Catholic\\_Archdiocese\\_of\\_Sydney\\_27-May-13.pdf\\_page\\_12.1](http://www.parliament.vic.gov.au/images/stories/committees/fcdc/inquiries/57th/Child_Abuse_Inquiry/Transcripts/Catholic_Archdiocese_of_Sydney_27-May-13.pdf_page_12.1) (Accessed 3 July 2013). O'Reilly and Chalmers criticise the American bishops for trying to protect the reputation of the priest and giving it "priority over protecting children from priests who the diocese knew were repeat offenders": *The Clergy Sexual Abuse Crisis and the Legal Responses*, p.225. But the priority given to the "sacred" right of reputation is firmly grounded in Canon 220, and by the imposition of the pontifical secret over clergy sexual abuse allegations, preventing "damage" to the reputations of the accused priests if they were to be tried before in a civil court.

Nations Committees to abolish the pontifical secret and to provide for mandatory reporting under canon law.

351. It was put to Cardinal Pell by one of the Parliamentarians, Frank McGuire, that the crime of sexually assaulting children used to be a capital offence in the State of Victoria, and has always had a serious term of imprisonment attached to it. Pell agreed it was a reprehensible crime, and then conceded that the primary motivation for secrecy was the “fear of scandal” and to protect the reputation of the Church.<sup>306</sup>
352. In other words, secrecy wasn’t just to “protect the dignity of everyone involved”. Nor could it have been to protect the “integrity of evidence”, because once the investigation and trial was over, there was no evidence to be contaminated by witnesses talking to each other. The main motivation for the imposition of the pontifical secret was the avoidance of “scandal”, and it still is.

#### **The Expansion of the Pontifical Secret by Pope Benedict XVI**

353. In 2010, Pope Benedict XVI had an opportunity to abolish the pontifical secret once and for all, or at least to provide an exception to it, applicable everywhere in the world, that would allow bishops to report sexual abuse by clergy to the police, irrespective of what the civil law required. This was, after all, what the Irish, British and American Catholic Bishops Conferences were requesting and what the Australian bishops wanted. Pope Benedict was the absolute monarch who could abolish it with the stroke of a pen. But instead of abolishing the backdoor privilege of clergy through the use of the pontifical secret, he expanded it to cover clerics having sex with those who “habitually lack the use of reason”, and to priests’ possessing child pornography. He thus ensured that civil authorities would be further deprived of evidence about clergy sex crimes.<sup>307</sup>
354. On 3 May 2011, Cardinal Levada sent out his guidelines to the bishops of the world as to what should be contained in their child sexual abuse protocols, and these included reporting to the civil authorities, but only where there was a civil law requiring it.<sup>308</sup>

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<sup>306</sup> [http://www.parliament.vic.gov.au/images/stories/committees/fcdc/inquiries/57th/Child\\_Abuse\\_Inquiry/Transcripts/Catholic\\_Archdiocese\\_of\\_Sydney\\_27-May-13.pdf\\_page\\_12.8](http://www.parliament.vic.gov.au/images/stories/committees/fcdc/inquiries/57th/Child_Abuse_Inquiry/Transcripts/Catholic_Archdiocese_of_Sydney_27-May-13.pdf_page_12.8) (Accessed 3 July 2013)

<sup>307</sup> See also Geoffrey Robertson QC, *The Case of the Pope* par 83  
[http://www.vatican.va/resources/resources\\_norme\\_en.html](http://www.vatican.va/resources/resources_norme_en.html) (Accessed 19 February 2003)

<sup>308</sup> <http://americamagazine.org/node/127573> (Accessed 27 April 2015)

355. Professor Patrick Parkinson made these observations about the Levada guidelines:

“That document, appropriately, required bishops and leaders to comply with the applicable civil laws of their countries concerning the mandatory reporting of crimes, and noted that child sexual abuse ‘is not just a canonical delict but a crime prosecuted by civil law.’ It also urged bishops to cooperate with the civil authorities in dealing with such crimes. There is no indication from the document that such cases ought to be dealt with by the police and criminal courts wherever possible, and only in the absence of a successful prosecution, by ecclesiastical law. The document reads as if the canon law is primary, and the civil law secondary, or at least that the duties of bishops are limited to obeying mandatory reporting laws and cooperating with the police, not that they should encourage victims to go to the police or themselves initiate police involvement”.<sup>309</sup>

356. On 16 May 2011, the Vatican spokesman, Fr Federico Lombardi said the Holy See could not issue universal requirements for mandatory reporting to civil authorities because it also operated in countries with repressive governments.<sup>310</sup>

357. This was a strange reason, because every coherent legal system in the world makes exceptions where the general rule is inappropriate. In 1842, the Holy Office under Pope Gregory XVI issued an instruction absolving penitents of their canonical obligation to denounce priests who solicited sex in the confessional in the lands of “schismatics, heretics and Mohammedans”.<sup>311</sup>

358. When the issue of mandatory reporting was raised before the United Nations Committees on the Rights of the Child, and on Torture in 2014, the “repressive regimes” excuse was never raised. Further, when it was announced in 2010 that bishops were obliged to obey civil laws on reporting, there was no mention of this not applying in the case of “repressive regimes”.

359. The only available inference from the failure to require mandatory reporting under canon law is that it is the intention of the Holy See to continue the cover up of child sexual abuse in

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<sup>309</sup> Patrick Parkinson: “*The Smith Lecture 2013: Child Sexual Abuse and the Churches – a Story of Moral Failure?*” <http://smithlecture.org/sites/smithlecture.org/files/downloads/lecture/smith-2013-transcript.pdf> (Accessed 25 October 2013) Patrick Parkinson: *Child Sexual Abuse and the Churches: A Story of Moral Failure?* Current Issues in Criminal Justice Vol 26 No. 1.

<sup>310</sup> <http://www.nytimes.com/2011/05/17/world/europe/17vatican.html> (Accessed 27 April 2015). O’Reilly and Chalmers in *The Sexual Abuse Crisis and the Legal Responses* raised the same justification. See the author’s review of their book, *Defending the Indefensible*, Global Pulse Magazine <http://www.globalpulsemagazine.com/news/defending-the-indefensible/1186> (Accessed 9 August 2015)

<sup>311</sup> Gasparri, *Codis Iuris Canonici Fontes, Volume IV Curia Romana* N714-2055, 889, SCS Off. Litt 20 maii 1842 [http://www.awrsipe.com/patrick\\_wall/selected\\_documents/1842%20Augustinian%20dubium.pdf](http://www.awrsipe.com/patrick_wall/selected_documents/1842%20Augustinian%20dubium.pdf) (Accessed 20 September 2014).

those countries which do not have adequate reporting laws, and that is more likely to occur in developing countries.

### Other Secrecy Provisions in the 1983 Code of Canon Law

#### Penal and Contentious Trials

360. There are other secrecy provisions throughout the *1983 Code of Canon Law*, including secrecy imposed on judges and personnel involved in a penal trial and also in a contentious trial (such as annulment cases) in certain circumstances. Canon 1455 provides:

“Judges and tribunal personnel are always bound to observe secrecy of office in a penal trial as well as in a contentious trial if the revelation of some procedural act could bring disadvantage to the parties.”<sup>312</sup>

361. A penal trial only begins after the preliminary investigation is completed under Canon 1717. In addition, where there a risk of “scandal” (as there always will be in the case of sex abuse of children), the judges can make the witnesses take an oath of secrecy.<sup>313</sup>

362. Canon 1455 itself does not prevent reporting to the civil authorities before the penal trial begins. The prohibition on reporting to the civil authorities at any time after the receipt of the allegation is imposed by *Secreta Continere* not by Canon 1455.

363. *Crimen Sollicitationis*, in force until 1983, required the witnesses in cases involving soliciting sex in the confessional, homosexuality, bestiality and child sexual abuse by clergy, to be sworn to observe the secret of the Holy Office (and after 1974, the pontifical secret). But after its repeal by the *1983 Code*, this requirement for oaths of secrecy for witnesses was not continued.

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<sup>312</sup> Canon 1455§1, §2. Can. 1455 §1. ‘Judges and tribunal personnel are always bound to observe secrecy of office in a penal trial, as well as in a contentious trial if the revelation of some procedural act could bring disadvantage to the parties. §2. They are also always bound to observe secrecy concerning the discussion among the judges in a collegiate tribunal before the sentence is passed and concerning the various votes and opinions expressed there, without prejudice to the prescript of ⇒ can. 1609, §4.

§3. Whenever the nature of the case or the proofs is such that disclosure of the acts or proofs will endanger the reputation of others, provide opportunity for discord, or give rise to scandal or some other disadvantage, the judge can bind the witnesses, the experts, the parties, and their advocates or procurators by oath to observe secrecy. In the case of a “contentious trial”, that is, the canonical equivalent of a civil claim for damages or other remedy, the secrecy of office is to be observed, “if the revelation of some procedural act could bring disadvantage to the parties.’ [http://www.vatican.va/archive/ENG1104/\\_P5H.HTM](http://www.vatican.va/archive/ENG1104/_P5H.HTM) (Accessed 6 October, 2013). See also, Delaney *Canonical Implications*, p. 152 and 165, and Ian Waters *The Law of Secrecy in the Latin Church*, *The Canonist* Vol 7 No 1, 75 at 79. Canon 1457 provides that the “competent authority can punish with fitting penalties...judges...who violate the law of secrecy.”

<sup>313</sup> Canon 1455§3



364. Nevertheless, Professor Gerardo Núñez from the University of Navarra has expressed the opinion that the pontifical secret imposed since 1974 (and confirmed by *SST 2001* and *SST 2010*) also requires the witnesses to be sworn to observe the pontifical secret because it is the only way to guarantee confidentiality.<sup>314</sup>
365. All the documentary evidence created during the preliminary trial under Canon 1717 is to be kept in the secret archive of the diocese.<sup>315</sup> There are no exceptions for communicating either that information or documents to the civil authorities.
366. The canon lawyer, Rodger Austin expressed the view to the Cunneen Special Commission that if a civil court required the disclosure of material revealed to a Church tribunal, the appropriate thing would be to seek a dispensation to reveal it. He did not indicate who could “dispense” with such secrecy, but canon law says that it would have to come from the Holy See.<sup>316</sup> The fact that a person involved in the tribunal would have to get a “dispensation” because they had been subpoenaed to appear in a civil court is further confirmation that canon law prohibited the voluntary disclosure of such matters to the civil authorities.

#### Diocesan Office Holders

367. Clergy who hold diocesan offices, such as vicars general or members of the colleges of consultors are required to observe secrecy.<sup>317</sup> Canon 471§2 provides:

<sup>314</sup> *La Competencia penal de la Congregation para la Doctrina de La Fe, Comentario al m.p. Sacramentorum Sanctitatis Tutela*, *Ius Canonicum*, XLIII, N. 85, 2003, 351-390 at 387

<sup>315</sup> Canon 1719

<sup>316</sup> Canon 87, and Beal, Coriden and Green, *New Commentary on the Code of Canon Law* p.130-132. Canon 85 provides ‘A dispensation, or the relaxation of a merely ecclesiastical law in a particular case, can be granted by those who possess executive power within the limits of their competence, as well as by those who have the power to dispense explicitly or implicitly either by the law itself or by legitimate delegation.’ Canon 87 provides that a bishop: “is not able to dispense, however, from procedural or penal laws nor from those whose dispensation is specially reserved to the Apostolic See or some other authority.’ See also Delaney, *Canonical Implications*, p. 182

and Rodger Austin at the Cunneen Special Commission

[http://www.lawlink.nsw.gov.au/lawlink/Special\\_Projects/ll\\_splprojects.nsf/vwFiles/Transcript\\_Day\\_20\\_-\\_TOR\\_2\\_-\\_31\\_July\\_2013.pdf/\\$file/Transcript\\_Day\\_20\\_-\\_TOR\\_2\\_-\\_31\\_July\\_2013.pdf](http://www.lawlink.nsw.gov.au/lawlink/Special_Projects/ll_splprojects.nsf/vwFiles/Transcript_Day_20_-_TOR_2_-_31_July_2013.pdf/$file/Transcript_Day_20_-_TOR_2_-_31_July_2013.pdf), (Accessed 29 March 2015), p.2233. Austin’s assertion at 2230 that there are no restrictions under canon law on reporting allegations of sexual abuse to the civil authorities is contradicted by his later evidence that if a civil court required the disclosure of material before a canonical tribunal, the witness would have to seek a “dispensation” from the Church to reveal it. Sr Moya Hanlen, another canon lawyer, at the Royal Commission advised that in the Nestor case, the CDF “relieved” the bishop of the pontifical secret because it was important that the problem surrounding this priest be made public. This is consistent with Austin’s opinion that the evidence about the sexual assaults of a priest cannot be revealed without a dispensation. <http://www.childabuseroyalcommission.gov.au/case-study/bb3eaadf-9283-41ef-9694-e560738d186a/case-study-14,-june-2014,-sydney.aspx>, 8144. Sr Hanlen’s evidence was accepted by the Royal Commission Report Case No. 14 (Nestor) : <http://childabuseroyalcommission.gov.au/getattachment/e1f91ddb-2ba2-4eb4-b487-c43a0c8989e4/Report-of-Case-Study-no-14> p.40 (Accessed 20 December 2014)

<sup>317</sup> Canon 471/2, Delaney *Canonical Implications* p.165

“All those admitted to offices in the curia must...

§2 observe secrecy within the limits and according to the manner determined by law or by the bishop.

368. This is a different level of secrecy to the pontifical secret because its extent can be determined by the bishop himself. However, as the preamble to *Secreta Continere* makes clear, the bishop has no such power over matters covered by the pontifical secret.

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## 7. CANONICAL AUTHORITIES ON THE PONTIFICAL SECRET

369. In the common law and canonical systems of law, the primary tool of interpretation is the proper or natural meaning of words taking into account the context and purpose for which the laws are made. Both systems have supplementary but different tools of interpretation.
370. In the common law system, the courts are the ultimate authority on the meaning of the law, and their standing in the judicial hierarchy determines whether the interpretations are binding or merely advisory or influential. In the canonical system, the pope is the supreme interpreter of canon law, but in the absence of any statement by him or his delegate, the Pontifical Commission for the Interpretation of Legislative Texts, the interpretation of a particular law is assisted by “the jurisprudence and practice of the Roman Curia, and the common and constant opinion of learned persons.”<sup>318</sup>
371. It is therefore useful to see what the popes, members of the Roman Curia and “learned persons” had to say about the pontifical secret and its application.

### Pope Francis’s Response to the United Nations Committees

372. As discussed in more detail in chapter 11, in 2014, the United Nations Committee on the Rights of the Child and the Committee against Torture requested the Holy See to abolish the pontifical secret in matters of child sexual abuse and to order mandatory reporting under canon law.

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<sup>318</sup> Canon 19

373. On 26 September 2014, Pope Francis in a formal response rejected the request.
374. The Argentinean protocol for clergy sexual abuse drawn up in accordance with the 2011 Levada Guidelines, while Cardinal Bergoglio was Archbishop of Buenos Aires and Primate of Argentina, was approved in April 2013, one month after he was elected Pope. It specifically states that subject to any civil reporting laws, cases dealt with under the protocol are subject to the pontifical secret and that all those involved in the preliminary inquiry have to observe “the most absolute confidentiality.”<sup>319</sup>
375. Had bishops been free under canon law to report clergy sex crimes against children in those countries that had no or inadequate reporting laws, one would have expected Pope Francis’s response to have said so, because the United Nations Committees would have been operating under a misunderstanding of the effect of the pontifical secret.

#### Statements from the Roman Curia Congregations

##### 1984: Letter from the Congregation for the Clergy to Archbishop Moreno

376. Archbishop Moreno of Tucson, Arizona had written to the Congregation for the Clergy in Rome, about disciplinary action taken against a priest. The complaints against the priest did not include sexual assaults on minors, but things like drunkenness and womanising. But in relation to handing over his files to civil lawyers, the Congregation stated in a letter dated 31 January 1984,

“...under no condition whatever ought the afore-mentioned files be surrendered to any lawyer or judge whatsoever... The files of a Bishop concerning his priests are altogether private; their forced acquisition by civil authority would be an intolerable attack upon the free exercise of religion in the United States....”<sup>320</sup>

377. The pontifical secret applied not just to the sex abuse of minors, but to all “delicts” under canon law which included the persistent breach of the celibacy rule.<sup>321</sup> The letter indicates

<sup>319</sup> Art 17 and 16. Art 25 also says that the instructor and the notary carrying out the preliminary inquiry are to observe the secret “sobre lo actuado”, the evidence of the events given during the investigation. Art 49 and 55 contain the requirement that the provisions of the Argentinean penal code are to be observed.

[http://www.episcopado.org/portal/2000-2009/cat\\_view/173-secretaria-general-2015.html](http://www.episcopado.org/portal/2000-2009/cat_view/173-secretaria-general-2015.html) (Accessed 15 June 2016).

While Archbishop of Buenos Aires, Cardinal Bergoglio was a member of the Congregation for Clergy.

<sup>320</sup> [http://www.bishop-accountability.org/Vatican/Documents/1984\\_01\\_31\\_Oddi\\_to\\_Moreno\\_Priest\\_Files\\_R.pdf](http://www.bishop-accountability.org/Vatican/Documents/1984_01_31_Oddi_to_Moreno_Priest_Files_R.pdf)

(Accessed 23 June 2013).

<sup>321</sup> Canon 1395§1

the attitude of the Holy See to handing over Church documents to civil authority, especially where the pontifical secret applied. The Congregation for the Clergy was claiming a special kind of privilege akin to lawyer/client privilege. The Church in the United States has, for the last 30 years, been fighting for the right to keep its documents out of the hands of the Courts. It has lost that fight.<sup>322</sup>

### 1996 The Irish Bishops Forward *Framework Document* for Comment by the Holy See

378. On 4 January 1996, the Irish bishops forwarded to the Holy See the “*Framework Document*” which outlined their proposals for dealing with sexual abuse of children by clergy, including proposals for mandatory reporting to the civil authorities of all complaints about sexual abuse, irrespective of whether the law required reporting or not, and irrespective of whether the victim was then an adult or not.<sup>323</sup>

379. *The Cloyne Report* stated that “*recognitio*” was sought for the document which would have given it the status of canon law for Ireland, but the approval was not forthcoming.<sup>324</sup>

### 31 January 1997: The Response of the Papal Nuncio, Archbishop Storero

380. The response came in the Storero letter dated 31 January 1997.

“The Congregation for the Clergy has attentively studied the complex question of sexual abuse of minors by clerics and documents entitled “Child Sexual Abuse : Framework for a Church Response”, published by the Irish Bishops Advisory Committee. The Congregation wishes to emphasize the need for this document to conform to the canonical norms presently in force. The text, however, contains “procedures and dispositions which appear contrary to canonical discipline and which, if applied, could invalidate the acts of the same Bishops who are attempting to put a stop to these problems. If such

<sup>322</sup> [http://www.huffingtonpost.com/2013/01/30/la-catholic-church-abuse-files\\_n\\_2586028.html](http://www.huffingtonpost.com/2013/01/30/la-catholic-church-abuse-files_n_2586028.html) (Accessed 23 June 2013)

<sup>323</sup> Paragraph 2.2.3 “In all instances where it is known or suspected that a child has been, or is being, sexually abused by a priest or religious the matter should be reported to the civil authorities. Where the suspicion or knowledge results from the complaint of an adult of abuse during his or her childhood, this should also be reported to the civil authorities.” [http://www.bishop-accountability.org/reports/1996\\_Irish\\_Catholic\\_Bishops\\_Advisory\\_Committee\\_Framework.pdf](http://www.bishop-accountability.org/reports/1996_Irish_Catholic_Bishops_Advisory_Committee_Framework.pdf) par 2.2.1 (Accessed 19 May 2013) The former Irish President, Mary McAleese told an audience at the Sydney Town Hall on 7 September 2014, that she had strongly advised the Irish bishops to insist on mandatory reporting for all allegations of sexual abuse, whether there was a law requiring it or not. Nicholas Tonti-Filippini, the ethicist had told the Australian bishops the same thing in 1990.

[http://www.lawlink.nsw.gov.au/lawlink/Special\\_Projects/ll\\_splprojects.nsf/vwFiles/Transcript\\_Day\\_16\\_-\\_TOR\\_2\\_-\\_25\\_July\\_2013.pdf/\\$file/Transcript\\_Day\\_16\\_-\\_TOR\\_2\\_-\\_25\\_July\\_2013.pdf](http://www.lawlink.nsw.gov.au/lawlink/Special_Projects/ll_splprojects.nsf/vwFiles/Transcript_Day_16_-_TOR_2_-_25_July_2013.pdf/$file/Transcript_Day_16_-_TOR_2_-_25_July_2013.pdf), 1744-45 (Accessed 28 July 2013)

<sup>324</sup> [http://www.justice.ie/en/JELR/Cloyne\\_Rpt.pdf/Files/Cloyne\\_Rpt.pdf](http://www.justice.ie/en/JELR/Cloyne_Rpt.pdf/Files/Cloyne_Rpt.pdf) par 4.21 (Accessed 16 July 2013). The Vatican in its response to the Irish Foreign Minister after the Cloyne Report said that the *Framework Document* was not the work of the Irish Bishops Catholic Conference, but only of an advisory committee, and as such it could not receive a *recognitio* from Rome under canon law. That was technically correct, and to that extent the Cloyne Report was not correct, but the response of the Vatican make it very clear that even if the formalities were observed, a protocol that provided for mandatory reporting would not be given a *recognitio*. [http://www.vatican.va/resources/resources\\_risposta-gilmore\\_20110903\\_en.html](http://www.vatican.va/resources/resources_risposta-gilmore_20110903_en.html) (Accessed 16 July 2013)

procedures were to be followed by the Bishops and there were cases of eventual hierarchical recourse lodged at the Holy See, the results could be highly embarrassing and detrimental to those same Diocesan authorities.

In particular, the situation of ‘mandatory reporting’ gives rise to serious reservations of both a moral and a canonical nature.

.....the procedures established by the Code of Canon Law must be meticulously followed under pain of invalidity of the acts involved if the priests so punished were to make hierarchical recourse against his Bishop.<sup>325</sup>

381. The letter came from the Papal Nuncio on behalf of the Congregation for the Clergy, whose Pro-Prefect at the time was Cardinal Castrillón, (1996 - 2006). At this time, the Congregation for the Clergy dealt with issues of clergy sex abuse of children.<sup>326</sup>
382. The canonical reservations about “mandatory reporting” were the requirements to observe the pontifical secret, and the requirement to adopt “pastoral” methods for dealing with sex abusing priests.
383. The “moral reservations” relate to what Cardinal Castrillón said in his meeting in November 1998 with the Irish bishops that bishops had to be “fathers” to their priests and not “policemen”, and in his letter to Bishop Pican in September 2001 he said that there was a “sacramental” relationship between a bishop and his priests.
384. The latter part of the letter contains an implied threat, described by the Murphy Dublin Report as follows:

“Monsignor Dolan’s view was that this placed the bishops in an invidious position because, if they did seek to operate the Framework Document, then any priest against whom disciplinary or penal measures were taken had a right of appeal to Rome and was most likely to succeed. The bishops, on the other hand, were not in a position to strengthen the Framework Document by enacting it into law.

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<sup>325</sup> <http://graphics8.nytimes.com/packages/pdf/world/Ireland-Catholic-Abuse.pdf?ref=europe>  
[http://www.nytimes.com/2011/01/19/world/europe/19vatican.html?\\_r=0](http://www.nytimes.com/2011/01/19/world/europe/19vatican.html?_r=0) (Accessed 9 July 2013)

<sup>326</sup> Nicholas Cafardi, “*The Scandal of Secrecy: Canon Law and the Sexual-abuse Crisis*”, *Commonweal*, 21 July 2010  
<http://commonwealmagazine.org/scandal-secrecy> (Accessed 27 May 2013). The jurisdiction of the Congregation for Clergy related to administrative decrees, but it seems from the letter itself, that it was also involved in dealing with advice generally on the issue.

It was his view that the only way a bishop could properly precede canonically was with the accused priest's co-operation."<sup>327</sup>

385. In March 1997, in another letter to the Irish bishops, the Congregation for the Clergy repeated the threat:

"Lacking congruence with canonical norms and other aspects of discipline, Episcopal acts, based on the abovementioned policies and procedures could be canonically null, with consequent negative impact on the same Episcopal authority which is, at the same time, trying to deal effectively with the serious and delicate problems of sexual abuse."<sup>328</sup>

386. These were no empty threats. The experience of appeals to Rome suggested that the Vatican appeal courts were more concerned with procedural niceties than the substance of the matter.<sup>329</sup> If the Irish bishops did report sex abusing priests to the police, and a prosecution failed or did not proceed, any canonical disciplinary proceedings against the priest was also likely to fail because of the breach of the pontifical secret.

#### **1998/1999 Cardinal Castrillón Meets with the Irish Bishops**

387. In 1998, according to the Irish Television program, *Would You Believe*, "*Unspeakable Crimes*", Cardinal Castrillón met with the Irish bishops at Sligo in Ireland.<sup>330</sup> The Archbishop of Dublin, Cardinal Desmond Connell insisted on the right to report clergy sex abusers to the police. But Cardinal Castrillón disagreed, saying that it was the policy of the Holy See to defend the rights of the accused priest. Bishop Michael Smith was interviewed on the program, and he said that the Colombian Cardinal and his Congregation regarded the sexual abuse of children as no more than a moral issue between the individual priest and his bishop. They did not understand that there was criminality involved with serious effects on children and their families. At a later meeting to discuss the letter, one of the Irish bishops made a note:

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<sup>327</sup> <http://www.justice.ie/en/JELR/DACOI%20Fr%20Jovito%20published.pdf/Files/DACOI%20Fr%20Jovito%20published.pdf> par 7.14 (Accessed 7 May 2013).

<sup>328</sup> Marie Keenan: *Child Sexual Abuse and the Catholic Church, Gender, Power and Organizational Culture*, Oxford University Press (2012), at loc 5417

<sup>329</sup> Cafardi: *Before Dallas*, 38.

<sup>330</sup> *Unspeakable Crimes*: 17 January, 2011, <http://www.rte.ie/tv/wouldyoubelieve/unspeakablecrimes.html> (Accessed January 2011, but since archived by RTE)

“We have received a mandate from the Congregation for the Clergy asking us to conceal the reported crimes of a priest.”<sup>331</sup>

388. According to the program at a later meeting in Rome in 1999 between Castrillón and the Irish bishops, the meeting is reported to have ended in “uproar” as Castrillón told the Irish bishops to be “fathers to your priests, not policemen.”

### **8 September 2001: Cardinal Castrillón’s Letter to Bishop Pican**

389. A court in the French city of Caen handed Bishop Pierre Pican, 66, a three-month suspended prison sentence for concealing knowledge that a priest in his diocese, the Rev. René Bissey, had sexually assaulted a number of boys.<sup>332</sup> According to the report in the New York Times, the bishop regretted that the court’s decision had set a precedent limiting the Roman Catholic clergy’s right to keep “professional secrets”.<sup>333</sup>
390. Cardinal Castrillón, then Prefect of the Congregation for the Clergy, wrote to Bishop Pican in these terms:

“Most Reverend Excellency I write to you as Prefect of the Congregation for the Clergy entrusted with aiding the Holy Father is his responsibility for the priests of the world. I congratulate you on not denouncing a priest to the civil authorities. You have acted wisely, and I am delighted to have a fellow member of the episcopate who, in the eyes of history and of other bishops, would prefer to go to prison rather than denounce his priest-son. For the relationship between priests and their bishop is not professional but a sacramental relationship which forges very special bonds of spiritual paternity....The bishop has other means of acting, as the Conference of French Bishops recently restated; but a bishop cannot be required to make the denunciation himself. In all civilised legal systems it is acknowledged that close relations have the possibility of not testifying against a direct relative. ...This Congregation, in order to encourage brothers in the episcopate in this delicate matter, will forward a copy of this letter to all the conferences of bishops...”<sup>334</sup>

391. In a radio interview later, Cardinal Castrillón justified his actions, saying the late Pope John Paul II authorised him to send the letter.

<sup>331</sup> <http://www.cinews.ie/article.php?artid=8053> (Accessed 16 July 2013)

<sup>332</sup> Pican was prosecuted under Article 434-3 of the French Penal Code: Pierre-Antoine Cals, French lawyer in private correspondence. See also Report of Assoc. Prof Ben Mathews to the Royal Commission, p 125, fn 278: “Penal Code art 434.” <http://www.childabuseroyalcommission.gov.au/documents/royal-commission-report-ben-mathews-for-rc-publica> (Accessed 17 March 2016)

<sup>333</sup> <http://www.nytimes.com/2001/09/08/world/world-briefing-europe-france-bishop-won-t-appeal.html> (Accessed 23 June 2013)

<sup>334</sup> <http://www.reuters.com/article/2010/04/15/us-pope-abuse-france-idUSLDE63E2H420100415> (Accessed 23 June 2013)  
<http://blogs.reuters.com/faithworld/tag/castrillon-hoyos/> (Accessed 23 June 2013)

<http://www.reuters.com/article/2010/04/15/us-pope-abuse-france-idUSLDE63E2H420100415> (Accessed 23 June 2013)  
<http://www.eltiempo.com/archivo/documento/MAM-3925512> (Accessed 23 June 2013)

"After consulting the Pope, I wrote a letter to the bishop, congratulating him as a model of a father who does not turn in his children,"<sup>335</sup>

392. The Vatican spokesman Fr Federico Lombardi SJ did not dispute the authenticity of the letter but said,

"...how opportune it was to centralize treatment of Catholic sex abuse cases by clerics under the Congregation for the Doctrine of the Faith."<sup>336</sup>

393. Nor did he dispute the claim that the letter had been sent with the approval of Pope John Paul II.

394. Cardinal Castrillón, was the Prefect of the Congregation for the Clergy, a canon lawyer with a doctorate in canon law and a member of the Roman Curia, and as such a non binding canonical authority on the authentic interpretation of canon law. Fr Lombardi implies that Cardinal Ratzinger (now emeritus Pope Benedict XVI), who was in charge of the CDF, had a different view of reporting clergy crimes to the police to his colleague, Cardinal Castrillón. The evidence shows that Cardinal Ratzinger in substance did not.<sup>337</sup>

395. The letter is evidence that Cardinal Castrillón, as Prefect of the relevant Congregation for Clergy, intended instructing bishops to breach any civil reporting laws on the sexual abuse of children where clergy were accused.<sup>338</sup>

### **2001: Cardinal Billé & Bishop Fihey on Bishop Pican's Case**

396. Cardinal Castrillón was not alone in defending Bishop Pican. At his trial, the President of the French Catholic Bishops' Conference, Cardinal Louis Marie Billé, gave evidence at Pican's trial, and condemned the "intellectual terrorism" of those who demanded that such crimes should always be reported. Bishop Fihey, who was also called to give evidence, spoke of "the

<sup>335</sup> [http://www.nytimes.com/2010/04/22/us/22priest.html?\\_r=0](http://www.nytimes.com/2010/04/22/us/22priest.html?_r=0) (Accessed 23 June 2013)

[http://article.wn.com/view/2010/04/23/Colombia\\_Cardinal\\_Defends\\_Churchs\\_Abuse\\_Policies\\_d/](http://article.wn.com/view/2010/04/23/Colombia_Cardinal_Defends_Churchs_Abuse_Policies_d/)

<sup>336</sup> <http://news.bbc.co.uk/2/hi/europe/8624763.stm> (Accessed 23 June 2013)

<sup>337</sup> As described below in relation to the situation in the United States, the American bishops wanted mandatory reporting irrespective of whether there were civil laws requiring it. In 2002, they had a meeting with Cardinal Ratzinger who by then had taken over from Cardinal Castrillon under *Sacramentorum Sanctitatis Tutela* as the authority in Rome for dealing with child sexual abuse by clergy. Cardinal Ratzinger rejected their request, but agreed to a compromise whereby reporting was allowed but only where there was a civil law requiring it. The only reasonable inference that can be drawn from this is that Cardinal Ratzinger and his colleagues were more concerned about priests and bishops going to jail than the welfare of children. It was a matter of pure chance of where a child resided whether or not it had the protection created by reporting. Just over half the American States had mandatory reporting laws applying to clergy. Twenty three States do not have clergy as mandated reporters : <http://www.childabuseroyalcommission.gov.au/documents/royal-commission-report-ben-mathews-for-rc-publica> par 1.2.3, par 16. and p.125

<sup>338</sup> Geoffrey Robertson QC, *The Case of the Pope* Ch 2, par 53



special relationship both fraternal and paternal that unites a priest to his bishop,” implying that this was an excuse for not reporting.<sup>339</sup> Billé at the November 2001 French Bishops Conference said that the conviction of Pican was an infringement by secular authorities of the norms of professional secrecy.<sup>340</sup>

### **February 2002 Archbishop Bertone’s Interview with *30 Giorni***

397. In a February 2002 interview with the Italian journal *30 Giorni*, Archbishop Bertone, a canon lawyer with a doctorate in canon law, who was Secretary of the CDF, and second in charge to Cardinal Ratzinger, said:

“In my opinion, the demand that a bishop be obligated to contact the police in order to denounce a priest who has admitted the offense of paedophilia is unfounded,” Bertone said. “Naturally civil society has the obligation to defend its citizens. But it must also respect the ‘professional secrecy’ of priests, as it respects the professional secrecy of other categories, a respect that cannot be reduced simply to the inviolable seal of the confessional. If a priest cannot confide in his bishop for fear of being denounced, then it would mean that there is no more liberty of conscience.”<sup>341</sup>

398. It is not clear what Archbishop Bertone meant by “liberty of conscience”, but in any event, it appears that his views were the same as those of Cardinal Castrillón and the Congregation for the Clergy – that communications between a bishop and a priest are protected by something akin to legal professional privilege, and this should be recognized by the civil law.

### **29 April 2002: Archbishop Herranz Address to the Catholic University of Milan**

399. Archbishop Julian Herranz (later Cardinal) was head of the Pontifical Council for the Interpretation of Legislative Texts, that is, he was the Church’s most senior canon lawyer. In an address to the Catholic University of Milan, he is reported to have said,

“When ecclesiastical authorities deal with these delicate problems, they not only must respect the presumption of innocence, they also have to honour the rapport of trust, and the consequent secrecy of the office, inherent in relations between a bishop and his priest collaborators,” Herranz said. “Not to honour these exigencies would bring damages of great seriousness for the church.”<sup>342</sup>

<sup>339</sup> <http://www.thetablet.co.uk/article/5114> (Accessed 16 July 2913)

<sup>340</sup> Delaney, *Canonical Implications*, p. 69

<sup>341</sup> John L.Allen, May 30, 2002, National Catholic Reporter [http://natcath.org/NCR\\_Online/archives/053102/053102h.htm](http://natcath.org/NCR_Online/archives/053102/053102h.htm) (Accessed 16 July 2913) .See also <http://www.guardian.co.uk/world/2005/apr/24/children.childprotection>(Accessed 16 July 2913) FrThomas Doyle, <http://reform-network.net/?p=3006> , par 26. (Accessed 16 July 2913)

<sup>342</sup> [http://natcath.org/NCR\\_Online/archives/053102/053102h.htm](http://natcath.org/NCR_Online/archives/053102/053102h.htm) (Accessed 16 July 2913)

400. According to the Vatican correspondent, John L. Allen, Herranz had this to say about demands in the United States for the right for bishops to report clergy sex crimes to civil authorities,

“While recognizing the competence of civil authorities, Herranz expressed strong reservations about the application to the Catholic church of two hallmarks of American civil law -- an obligation to report misconduct and monetary damages for institutional negligence. Given the emotional wave of public clamour,’ Herranz said, ‘some envision an obligation on the part of ecclesiastical authority to denounce to civil judges all the cases that come to their attention, as well an obligation to communicate to judges all the documentation from ecclesiastical archives.’ “Herranz rejected the idea. ‘The rapport of trust and the secrecy of the office inherent to the relationship between the bishop and his priest collaborators, and between priests and the faithful, must be respected.’”<sup>343</sup>

401. Archbishop Herranz (later Cardinal Herranz) has a doctorate in canon law, as well as being Professor of Canon Law at the well-known Faculty of Canon Law at the University of Navarra. His position as head of the Pontifical Council for the Interpretation of Legislative Texts gives him particular authority on the meaning of canon law.<sup>344</sup> Herranz’s words reflect the proper meaning of the words of *Crimen Sollicitationis*, *Secreta Continere* and *SST 2001* and *SST 2010* about the imposition of the pontifical secret over all allegations of child sexual abuse by clergy.

#### **16 May 2002: Cardinal Oscar Rodríguez Maradiaga**

402. Cardinal Oscar Rodriguez Maradiaga of Honduras in 2002 was not a member of the Roman Curia, but he was a prominent Cardinal, and was seen as a leading Latin American candidate to succeed John Paul II. He is now in charge of a group of senior Cardinals appointed by Pope Francis I to reform the Curia. At a news conference on 16 May 2002, he stated,

“Paedophilia is a sickness, and those with this sickness must leave the priesthood. But we must not move from this to remedies that are non-Christian. ... For me it would be a tragedy to reduce the role of a pastor to that of a cop. We are totally different, and I’d be prepared to go to jail rather than harm one of my priests. I say this with great clarity. We must not forget that we are pastors, not agents of the FBI or CIA.”<sup>345</sup>

<sup>343</sup> <http://www.natcath.org/crisis/051702e.htm> (Accessed 16 July 2913)

<sup>344</sup> The Pontifical Council for the Interpretation of Legislative Texts interprets laws for the Church and publishes such laws with papal confirmation. “The Council also examines the juridical aspects of the general decrees of episcopal conferences during the necessary review (recognitio) process.” Beal, Coriden & Green: *New Commentary on the Code of Canon Law*, 488

<sup>345</sup> [http://natcath.org/NCR\\_Online/archives/053102/053102h.htm](http://natcath.org/NCR_Online/archives/053102/053102h.htm) (Accessed 18 February 2013)

403. Cardinal Maradiaga's views reflect those of Cardinal Castrillón: civil laws on reporting should be disobeyed, and the protection of priests from civil prosecution through the pontifical secret was more important than the protection of children from being sexually abused.

**18 May 2002: Fr Gianfranco Ghirlanda SJ in *La Civiltà Cattolica***

404. Fr Gianfranco Ghirlanda SJ was Dean of the Faculty of Canon Law at Rome's Gregorian University and a judge for the Apostolic Signatura, considered the Holy See's Supreme Court. He is thus well qualified to come within the canonical authorities "learned persons", referred to in Canon 19. He wrote an article for *La Civiltà Cattolica*, a journal considered quasi-official since it is reviewed by the Holy See's Secretariat of State prior to publication.<sup>346</sup> Ghirlanda wrote:

"Certainly it does not seem pastoral behaviour when a bishop or religious superior who has received a complaint informs the legal authorities of the fact in order to avoid being implicated in a civil process that the victim could undertake,"<sup>347</sup>

405. Fr Ghirlanda's reference to "pastoral behaviour", relates to Canon 1341 of the *1983 Code of Canon Law* which says a bishop can only commence formal disciplinary proceedings against a priest after he is satisfied that "fraternal correction or reproof", or "any methods of pastoral care" cannot "repair the scandal, restore justice and reform the offender". In other words, quite apart from the specific requirements of the pontifical secret, reporting a sex abusing priest to the police is also inconsistent with Canon 1341.
406. Ghirlanda's assertion that it was up to the victim to report the priest and not the Church was emphasised by Cardinal Castrillón in his letter to the Irish bishops of November 1998, and it is an attitude that has continued right up to the present day. It was reflected in the statement by Francis Sullivan, the CEO of the Truth, Justice and Healing Council ("TJHC") on 3 April 2013, on the Australian ABC's *7.30 Report*.<sup>348</sup> It is also reflected in the Melbourne Response and in the responses of the Holy See to the United Nations Committees on the Rights of the Child and against Torture, and in statements from the Italian Catholic Bishops

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<sup>346</sup> John L Allen, Vatican Correspondent for National Catholic Reporter: <http://www.natcath.org/crisis/053102h.htm>

<sup>347</sup> Ibid and <http://www.nytimes.com/2002/05/18/us/a-vatican-lawyer-says-bishops-should-not-reveal-abuse-claims.html> (Accessed 9 July 2013)

<sup>348</sup> Sullivan was asked what steps the Church should take if one of its teachers reported to Church authorities that he suspected that a priest was sexually abusing children at their school. He said it was up to the teacher to report it, and not the Church authorities <http://www.abc.net.au/news/2013-04-03/justice-mcclellan-opens-royal-commission/4608378> (Accessed 6 April 2013)

Conference in 2012 and 2014, and the Polish Catholic Bishops Conferences as recently as March 2015.

407. Fr Murphy's case, involving the abuse of 200 deaf mute boys, is indicative of the unacceptability of these statements that it should be up to the victims to go to the police. These boys were under the care of the Church, and quite apart from the fact that they were children, their capacity to report was severely handicapped.
408. But the statement is even more unacceptable in the light of changes made to the *Graviora Delicta* or *Substantive Norms* in *SST 2010*. The revision expanded the matters to be dealt by the CDF. They included cases where a priest sexually abuses a person "who habitually lacks the use of reason". Such cases are now covered by the pontifical secret. And the same comment can be made of the extension to include the possession of child pornography, whose victims, the children in the photos or videos, would have no idea that the priest had them in his possession.

#### **8 June 2002 Cardinal Schotte of Belgium interview with National Catholic Reporter**

409. Cardinal Schotte was not a member of the Roman Curia, but he was a senior member of the Catholic hierarchy, and head of the Belgian Synod of Bishops. In 2002, he expressed reservations about reporting requirements being proposed by the American Bishops in their Dallas Charter. John L. Allen states:

"Schotte expressed reservations about calls for quasi-automatic cooperation with the police and the courts. He said that in Belgium the bishops had successfully resisted demands to turn over their records about priests accused of misconduct, on the grounds that these are confidential Church documents."

410. It seems, however, that Schotte was mistaken. Allen adds that in the five cases of criminal actions against priests, the Church had to turn its files over each time. Nevertheless Schotte's statement reflects the secrecy requirements of canon law and that he agreed with those requirements as a matter of policy.<sup>349</sup>

#### **July 2002, Cardinal Lehmann interview with Der Spiegel**

411. In 2002 the Chairman of the German Catholic Bishops Conference, Cardinal Lehmann, was asked by *Der Spiegel* whether or not the bishops reported allegations of clergy abuse to the

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<sup>349</sup> John L. Allen: *All the Popes Men: The Inside Story of How the Vatican Thinks*: Doubleday Image, at 69%..

civil authorities. He said that was not the bishops' role. They can "motivate the culprit to self-denunciation".<sup>350</sup>

## 2002 and 2010: Monsignor Maurice Dooley

412. Monsignor Maurice Dooley was a senior Irish canon lawyer who was widely reported as expressing views in 2002 and 2010 that bishops could not report allegations and evidence that they had gathered about clergy sex abusers to the police without breaching canon law.<sup>351</sup> According to a report in the *Belfast Telegraph* of 20 March, 2010:

"Mgr Dooley's views were clearly no different in 2002 when he said: 'A bishop swears allegiance to canon law. If there was a real conflict, he would simply have to maintain canon law, even if there was a chance of going to jail...A bishop's relationship with a priest was similar to that of a parent and child,' Fr Dooley said. 'As a parent, you are entitled to protect your child or even to conceal him from punishment'."<sup>352</sup>

413. Monsignor Dooley repeated that view in 2010 when he was interviewed over the matter of Cardinal Brady who, as a 36 year old priest and canon lawyer, was part of a canonical investigation of Fr Brendan Smyth, and did not report the serious allegations against Smyth to the police. Dooley said,

"He (Brady) got this information within a canonical procedure, the rules of which bound him not to reveal the matter to people outside the particular process, and that would involve the Gards (*the police*). Now if it was a matter of Fr Sean Brady as an ordinary public citizen and he saw someone abusing a child, he would be perfectly entitled to use that information personally."<sup>353</sup> (my insertion)

414. Monsignor Dooley was correct. That was the proper meaning of the words of canon law. Very few clergy did see children abused. They found out about it because of allegations made by victims or other witnesses and by carrying out investigations as they were required to do by canon law. Both the "extrajudicial denunciation" to the bishop and the

<sup>350</sup> <http://www.spiegel.de/spiegel/print/d-22955262.html> (Accessed 16 July 2013)(translation as appears in David Yallop's *Beyond Belief*.

<sup>351</sup> [http://www.bishop-accountability.org/news2010/03\\_04/2010\\_03\\_18\\_IrishTimes\\_ViewOf.htm](http://www.bishop-accountability.org/news2010/03_04/2010_03_18_IrishTimes_ViewOf.htm) (Accessed 16 July 2013)

<sup>352</sup> [http://www.theinquiry.ca/Dooley\\_200310.hide.php](http://www.theinquiry.ca/Dooley_200310.hide.php) (Accessed 10 June 2013)

<sup>353</sup> [http://www.fifavideos.com/Colm-OGorman-and-Monsignor-Maurice-Dooley-The-Last-Word-with-Matt-Cooper\\_F9wtljHDT-c.html#at5.56](http://www.fifavideos.com/Colm-OGorman-and-Monsignor-Maurice-Dooley-The-Last-Word-with-Matt-Cooper_F9wtljHDT-c.html#at5.56) (Accessed 16 July 2013). At that time in Ireland, there was an obligation to report these allegations to the police because misprision of felony was not abolished until 22 years later in 1997. Brady's behaviour is explained by the teaching that canon law was "quasi divine", and that he was obliged to obey canon law where it conflicted with civil law. Marie Keenan also refers to the culture of "blind obedience", and quoting Joan Chichester, she says: "... 'blind obedience', once theologised as the ultimate step to holiness, is itself blind. It blinds a person to the insights and foresight and moral perspective of anyone other than the authority figure." Keenan continues: "Loyalty and obedience to the institution and to the pope influenced the bishops' decisions when it came to the handling of child sexual abuse." Marie Keenan: *Child Sexual Abuse and the Catholic Church, Gender, Power and Organizational Culture*, at loc 6214-6219.

information obtained from witnesses could not be reported to the police because they were covered by the pontifical secret imposed to *Secreta Continere* of 1974.

## 2002: The Holy See and the US Catholic Bishops' Dallas Charter

415. At the Dallas Conference of the United States Catholic Bishops Conference in June 2002, the bishops agreed to a proposal for all allegations of sexual abuse to be reported to civil authorities, irrespective of whether or not the law required it, and submitted it to Rome. Art 4 provided:

“Dioceses/eparchies will report an allegation of sexual abuse of a person who is a minor to the public authorities. They will cooperate in their investigation in accord with the law of the jurisdiction in question. Dioceses/eparchies will cooperate with public authorities about reporting in cases when the person is no longer a minor. In every instance, dioceses/eparchies will advise victims of their right to make a report to public authorities and will support this right.”<sup>354</sup>

416. There were a number of proposals, such as suspension of priests pending the preliminary investigation, a zero tolerance approach to sexual abuse and the role and powers of lay review boards that potentially involved conflicts with the *1983 Code of Canon Law*.<sup>355</sup> The only provision that involved a conflict with *SST 2001* was mandatory reporting under Art. 4 that in most circumstances would mean breaching the pontifical secret.

417. Cardinal Re, then Prefect of the Congregation for Bishops sent the American bishops a letter on 14 October 2002. This acknowledged their efforts to protect minors, but said that:

“...the "Norms" and "Charter" contain provisions which in some aspects are difficult to reconcile with the universal law of the Church.... Questions also remain concerning the concrete manner in which the procedures outlined in the "Norms" and "Charter" are to be applied in conjunction with the

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<sup>354</sup> <http://www.bishop-accountability.org/resources/resource-files/churchdocs/DallasCharter.pdf> (Accessed 13 June 2016) See also Thomas Green: *Critique of the Dallas Charter*. [http://natcath.org/NCR\\_Online/documents/Greencritique.htm](http://natcath.org/NCR_Online/documents/Greencritique.htm) (Accessed 21 July 2013), Article 4, par B: “Is reporting in cases where no minor is involved civilly necessary? This is a civil law question about which I am unsure. However, if there is no civil obligation to report, why should we do so as long as we proceed canonically where appropriate?” Green interpreted the original Dallas Charter to mean that there was a requirement to report where there was no civil law requirement to do and where the victim is now an adult. The Vatican ultimately adopted Green’s argument, and Art 4 was deleted from the norms. See also Pallone: *Sin, Crime, Arrogance, Betrayal: A psychodynamic Perspective on the Crisis in American Catholicism*, Brief Treatment and Crisis Intervention/2:4 Winter 2002, (2002) Oxford University Press, “...the Charter for the Protection of Children and Young People adopted by the bishops in Dallas (Fay,2002) mandated that (a) allegations of sexual abuse by clergy should be reported to law enforcement authorities...” Jo Renee Formicola: *Clerical Sexual Abuse: How the Crisis Changed U.S. Catholic Church-State Relations*, (Palgrave MacMillan, 2014 ), 125: “The Charter...required bishops to cooperate with the police even when the person alleged to have been abused was no longer a minor. It placed the onus on bishops, rather than the accuser, to bring the matter to the civil authorities.”

<sup>355</sup> Thomas Green: *Critique of the Dallas Charter* [http://natcath.org/NCR\\_Online/documents/Greencritique.htm](http://natcath.org/NCR_Online/documents/Greencritique.htm) (Accessed 21 July 2013), John L. Allen *All the Popes Men*, 69-70%

requirements of the *Code of Canon Law* and the *Motu proprio Sacramentorum sanctitatis tutela* (AAS 93, 2001, p. 787).<sup>356</sup>

418. Since Cardinal Re specifically mentioned the difficulty of reconciling the proposals with the *SST 2001*, he must have had in mind its requirements for observing the pontifical secret. All of the other potential conflicts with the “universal law of the Church” involved the *1983 Code of Canon Law*. That he was thinking about the pontifical secret was confirmed by the compromise that was reached in Rome to the effect that an exception would only be made when the civil law required reporting.

#### **December 2002: *Recognitio* of the Modified Dallas Charter.**

419. On 26 March 2010, Cardinal Levada, who later became the Prefect of the CDF from 2005 to 2012 under Pope Benedict XVI, gave an interview with the *New York Times* in which he described being part of a delegation to see Cardinal Ratzinger after the receipt of the letter from Cardinal Re.<sup>357</sup> He said that because the norms developed by the 2002 Dallas Charter “intersected with existing canon law, they required approval before being implemented as particular law for our country”. He said that Cardinal Ratzinger and his canonical experts gave them a “sympathetic understanding” of the problems the American bishops faced.

420. One problem was the fact that some American States had mandatory reporting laws requiring reporting of all clergy sex crimes against minors to the civil authorities, contrary to the requirements of the pontifical secret. Twenty seven American States listed clergy as mandated reporters under mandatory welfare reporting laws dealing with children at risk.<sup>358</sup> American cardinals and bishops would be going to jail unless they were allowed to report where the law required it.<sup>359</sup>

<sup>356</sup> [http://www.boston.com/globe/spotlight/abuse/documents/vatican\\_response\\_101802.htm](http://www.boston.com/globe/spotlight/abuse/documents/vatican_response_101802.htm) (Accessed 16 July 2013)  
[http://www.vatican.va/resources/resources\\_card-levada2010\\_en.html](http://www.vatican.va/resources/resources_card-levada2010_en.html) (Accessed 16 July 2013)

<sup>357</sup> [http://www.vatican.va/resources/resources\\_card-levada2010\\_en.html](http://www.vatican.va/resources/resources_card-levada2010_en.html) (Accessed 3 July 2013). John L. Allen *All the Popes Men* at 70%, John L. Allen says that those representing the Vatican were Herranz, Bertone, Castrillón and Monterisi. The U.S. delegation included Cardinal George, Archbishops Levada and Bishops Doran and Lori.

<sup>358</sup> [https://www.childwelfare.gov/systemwide/laws\\_policies/statutes/clergymandated.pdf#Page=4&view=Fit](https://www.childwelfare.gov/systemwide/laws_policies/statutes/clergymandated.pdf#Page=4&view=Fit) (Accessed 15 July 2013) Report of Assoc. Prof Ben Mathews to the Royal Commission says that all United States jurisdictions have mandatory reporting laws: <http://www.childabuseroyalcommission.gov.au/documents/royal-commission-report-ben-mathews-for-rc-publica> par 1.2.3, par 16. Twenty seven States have clergy as mandated reporters: p.125

<sup>359</sup> See Jo Renee Formicol: *Clerical Sexual Abuse: How the Crisis Changed U.S. Catholic Church-State Relations* (Palgrave MacMillan 2014) p.127: “The rejection of the ‘Essential Norms’ ...could have brought about a major disruption of church-state relations in the United States and with the Vatican”. Rik Torfs says that the real reason for the introduction of new procedures within individual Churches was because of “powerful state law and the fear experienced by church leaders of suffering severe sanctions.” “Child Abuse by Priests: the Interaction of State Law and Canon Law”: *Concilium 2004/3 The Structural Betrayal of Trust* (SCM Press, London) at 117.

421. The Holy See was only prepared to allow the minimum reporting to keep bishops out of jail, and the American bishops accepted the compromise.<sup>360</sup> Art 4 was deleted, and Art. 11 of the norms substituted. The norms were approved by the Holy See on 8 December 2002 and became a particular law for the United States only:

11. The diocese/eparchy will comply with all applicable civil laws with respect to the reporting of allegations of sexual abuse of minors to civil authorities and will cooperate in their investigation. In every instance, the diocese/eparchy will advise and support a person's right to make a report to public authorities."<sup>361</sup>

422. If the Church wanted to avoid bishops going to jail, it had no choice but to cooperate where subpoenas had been issued, or where civil laws required reporting. But if there were no laws requiring reporting, and the police did not have any information about the crimes, there was no obligation to report anything, and the pontifical secret forbade it. If the police did not know about the allegations, there would be no search warrants, no subpoenas and no trials in the civil courts.

### **2008: Bishop Morlino**

423. In 2008, Rev. Gerald Vosen wrote a book about his account of his canonical trial. Bishop Robert Morlino of Maddison told Catholics to destroy or return the book, because even buying the book could be in breach of the pontifical secret and "may result in a canonical crime being declared on the individual involved."<sup>362</sup> That stance by Bishop Morlino is in accord with *Secreta Continere* and the interpretation placed upon it by members of the Roman Curia and "learned persons" within Canon 19.

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<sup>360</sup> Art 4 in the 2011 revision of the Charter adopts some of the wording of the approved norms in relation to compliance with civil laws, but is otherwise the same: "Dioceses/eparchies are to report an allegation of sexual abuse of a person who is a minor to the public authorities. Dioceses/eparchies are to comply with all applicable civil laws with respect to the reporting of allegations of sexual abuse of minors to civil authorities and cooperate in their investigation in accord with the law of the jurisdiction in question. Dioceses/eparchies are to cooperate with public authorities about reporting cases even when the person is no longer a minor. In every instance, dioceses/eparchies are to advise victims of their right to make a report to public authorities and support this right." <http://www.usccb.org/issues-and-action/child-and-youth-protection/upload/Charter-for-the-Protection-of-Children-and-Young-People-revised-2011.pdf> (Accessed 13 June 2016)

<sup>361</sup> [http://www.vatican.va/roman\\_curia/congregations/cbishops/documents/rc\\_con\\_cbishops\\_doc\\_20021216\\_recognitio-usa\\_en.html](http://www.vatican.va/roman_curia/congregations/cbishops/documents/rc_con_cbishops_doc_20021216_recognitio-usa_en.html) (Accessed 9 February 2013). The norms were revised in 2005, but this clause remains the same: <http://old.usccb.org/ocyp/2005EssentialNormsFinalHighlighted.pdf> (Accessed 30 September 2013). The Canadian Protocol, *From Pain to Hope* has a similar clause requiring reporting only where the civil law requires it: [http://www.cccb.ca/site/images/stories/pdf/orientations-diocesan\\_protocols.pdf par 2.3](http://www.cccb.ca/site/images/stories/pdf/orientations-diocesan_protocols.pdf_par_2.3) (Accessed 30 September 2013)

<sup>362</sup> <http://ncronline.org/news/vatican/vatican-secrecy-keeps-victims-accused-dark> (Accessed 22 July 2013). <http://www.catholicculture.org/news/headlines/index.cfm?storyid=1387> (Accessed 22 July 2013)



### Cardinal Connell and his Oath of Office

424. Cardinal Connell served as a member of the CDF for 12 years from 1992 to 2004 under Cardinal Ratzinger, and it was during those years that he also had his disagreements with Cardinal Castrillón from the Congregation for the Clergy about reporting abuse allegations to the police. Cardinal Connell is not a canon lawyer, and he freely admitted that he left all such matters to others so qualified.<sup>363</sup> But he knew enough about canon law to be concerned about the pontifical secret.
425. In late 1995, the year before the *Framework Document* was adopted by the Irish Catholic Bishops Conference, he handed over to the police the names of 17 priests against whom complaints were made. It wasn't a complete disclosure as the Commission found there were 28.<sup>364</sup> Nevertheless, it was a start. The Murphy Commission also found that in 2002, he handed over some diocesan files, but he was concerned that in doing so, he was breaching his ordination oath.<sup>365</sup> He tried to explain that on the basis of some special confidentiality between priest and bishop, but his ordination oath said nothing about that.<sup>366</sup> It required him to follow canon law which imposed the pontifical secret on allegations of sex abuse by priests, and indeed, as has been shown, the pontifical secret overrides any "conscience" that he may have had about the matter.<sup>367</sup>
426. Cardinal Connell was unsuccessful in convincing the Holy See that bishops should be able to report all allegations of sexual abuse to the police.

### 2009: Martin Long, Spokesman for the Irish Catholic Bishops Conference

427. On 7 December 2009, soon after the publication of the Murphy Dublin Report, a prominent Irish priest, Fr Sean McDonagh wrote a letter to the Irish Times, stating that *SST 2001* had encouraged bishops to commit criminal offences by not reporting clergy crimes to the police.<sup>368</sup> The former Prime Minister of Ireland and prominent Catholic layman, Garrett

<sup>363</sup> <http://www.justice.ie/en/JELR/DACOI%20Part%201.pdf/Files/DACOI%20Part%201.pdf> ,par 4.21

<sup>364</sup> Id par 5.15(Accessed 16 July 2013)

<sup>365</sup> Id par 3.46

<sup>366</sup> The father/son relationship between a bishop and his priests seems to be based more on theology than canon law. The theological basis of the relationship is discussed by Cardinal Hummes in *Fatherhood of the bishop in relation to presbyters* <http://opusbono.org/Fatherhoodofthebishopinrelationtopresbyters.html> (Accessed 27 May 2015). Canon 384 says the bishop is to treat priests with "special solicitude". There are obligations on bishops to provide sustenance and support (Canon 281, 384), education etc, but there is nothing specific about the confidentiality of their communications.

<sup>367</sup> Canon 833 [http://www.vatican.va/roman\\_curia/congregations/cfaith/documents/rc\\_con\\_cfaith\\_doc\\_1998\\_professio-fidei\\_en.html](http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_1998_professio-fidei_en.html) (Accessed 16 July 2013)

<sup>368</sup> <http://www.alliancesupport.org/news/archives/003257.html> (Accessed 16 July 2013)

Fitzgerald had also stated that the Irish bishops considered that the secrecy provisions prevented them from going to the police.<sup>369</sup> The Murphy Dublin Report had found that the obligation of secrecy/confidentiality for participants in the canonical process could undoubtedly inhibit reporting sexual abuse to the civil authorities.<sup>370</sup>

428. On 10 December 2009, Martin Long, the spokesman for the Irish Catholic Bishops Conference, wrote a letter to the Irish Times, saying that the secrecy provisions of canon law only applied to the “internal disciplinary procedures” of the Church, and were not intended to frustrate or undermine any civil investigation or prosecution.<sup>371</sup>

429. The difficulty with this statement is that if the police did not know about the allegations of sexual abuse, there would be no civil investigation or prosecution to be frustrated.

#### **2010: Monsignor Scicluna**

430. On 20 March 2010, Monsignor Scicluna, the chief prosecutor for the CDF in an interview with the British Catholic magazine, *The Tablet*, said:

“The norms on sexual abuse were never understood as a ban on denouncing [the crimes] to the civil authorities.”<sup>372</sup>

431. Monsignor Scicluna’s statement is another good example of the use of “mental reservation”.<sup>373</sup> Cardinal Desmond Connell, the former Archbishop of Dublin, explained “mental reservation” to the Murphy Commission, as deceiving someone without telling a lie:

“...there may be circumstances in which you can use an ambiguous expression realising that the person who you are talking to will accept an untrue version of whatever it may be ....”<sup>374</sup>

432. At a Vatican briefing on 15 July 2010, Monsignor Scicluna said:

<sup>369</sup> <http://www.irishtimes.com/newspaper/letters/2009/1222/1224261109324.html> (Accessed January 2013)  
Martin Long, letter to the Irish Times 10 December 2009

<http://www.irishtimes.com/newspaper/letters/2009/1210/1224260419632.html> (Accessed January 2013)

<sup>370</sup> Murphy Dublin Report Part 1 <http://www.justice.ie/en/JELR/DACOI%20Part%201.pdf/Files/DACOI%20Part%201.pdf> par 4.82(Accessed 16 July 2013)

<sup>371</sup> Martin Long, letter to the Irish Times 10 December 2009

<http://www.irishtimes.com/newspaper/letters/2009/1210/1224260419632.html> (Accessed January 2013)

<sup>372</sup> <http://www.thetablet.co.uk/article/14451> (Accessed 30 April 2013)

<sup>373</sup> Catholic theology says that it is permissible to use “mental reservation” to avoid “scandal” and to preserve “professional secrets”: *Catholic Catechism* [http://www.vatican.va/archive/ccc\\_css/archive/catechism/p3s2c2a8.htm](http://www.vatican.va/archive/ccc_css/archive/catechism/p3s2c2a8.htm) par 2489 and 2491 (Accessed 7 May 2013) and *Catholic Encyclopaedia* <http://www.newadvent.org/cathen/10195b.htm> (Accessed 7 May 2013). The “scandal” to be avoided in this case was the role of the popes in the cover up of child sexual abuse through canon law.

<sup>374</sup> Murphy Dublin Report, Part 2 <http://www.justice.ie/en/JELR/DACOI%20Part%202.pdf/Files/DACOI%20Part%202.pdf> par 58.20 (Accessed 9 July 2013).

“Confidentiality of canonical proceedings is never an impediment to the duty to denounce [crimes], and is never to the detriment of obedience to civil law.... [But] it is not the task of the pope to give indications about civil law. The indication to obey the law of the state was already stated by St. Paul.”<sup>375</sup>

433. Monsignor Scicluna’s statements are partly true and partly false, and the false parts can be “mentally reserved”, and the true part then asserted without telling a lie. In this particular case, the pontifical secret did not prevent:

- 433.1. The victim or other direct witnesses of the abuse from reporting the abuse to the police.
- 433.2. A bishop or religious superior from reporting abuse committed by a lay person who was not a religious brother or nun, for example a lay teacher in a Catholic school. Sexual abuse of minors by such persons were not canonical crimes or “delicts” covered by the pontifical secret.
- 433.3. Reporting where the bishop or religious superior witnessed the abuse because his knowledge did not come from an allegation, but from his own eyes.

To that extent Scicluna’s statement is true. But it is false to the extent that bishops, religious superiors and those involved in canonical investigations could report “extrajudicial denunciations” of child sexual abuse by clerics and religious to the (Art 1(4) *Secreta Continerere*) or “reports” to the bishop of such matters (Art 13 of *SST 2001* and Art 16 of *SST 2010*).

434. Monsignor Scicluna represented the Holy See before the United Nations Committee on the Rights of the Child on 16 January 2014. Scicluna was asked by Committee members why Church policy did not provide that in “all cases these crimes should be reported”, and not just where there were reporting laws. His answer was that every local Church has the duty to educate people about their rights and to “empower” them.<sup>376</sup> In other words, he was repeating Cardinal Castrillón instruction in his November 1998 letter to the Irish bishops that it was up to the victims to report the matter to the police, not the Church.

<sup>375</sup> <http://www.catholicnews.com/services/englishnews/2010/church-already-mandates-reporting-of-sex-abuse-to-civil-authorities.cfm> (Accessed 1 June 2016)

<sup>376</sup> <http://www.treatybodywebcast.org/> (Viewed 16 January 2014)  
[http://www.nytimes.com/2014/01/17/world/europe/un-sex-abuse-panel-questions-vatican-officials.html?\\_r=0](http://www.nytimes.com/2014/01/17/world/europe/un-sex-abuse-panel-questions-vatican-officials.html?_r=0) (Accessed 21 January 2014)

435. On 18 July 2014, Bishop Scicluna, was interviewed by the Italian paper, *La Repubblica*. A report in the *Malta Independent* says that he was asked why it is not obligatory to report allegations of child sex abuse in the Church to the police. Scicluna gave a similar answer to what he had given to the United Nations - the church insisted on following domestic law, and in any case "one must not hinder the victim from reporting the case."<sup>377</sup> He did not explain how Church reporting such allegations to the police would hinder the victim doing so.
436. Scicluna did not say that bishops or canonical judges were free to take to the police any allegations of child sexual abuse against clergy or any information that they had obtained from their canonical inquiries, but his restatement of the policy enunciated by Cardinal Castrillon to the Irish bishops suggests that he knew they were so prevented by canon law.

#### **2010: Fr Federico Lombardi**

437. On 25 March 2010, Fr Federico Lombardi SJ, the Vatican spokesman, issued a statement on the notorious Fr Lawrence Murphy who sexually assaulted some 200 deaf mute boys in the United States. In the course of discussing this he said

"...Indeed, contrary to some statements that have circulated in the press, neither Crimen nor the Code of Canon Law ever prohibited the reporting of child abuse to law enforcement authorities."<sup>378</sup>

438. Fr Lombardi's statement was also an exercise in mental reservation for the same reasons as Monsignor Scicluna's statement was. In his case, there was some additional mental reservation when he said that the *Code of Canon Law* did not prohibit reporting. That is true. He mentally reserved the fact that the pontifical secret is not found in either the 1917 or the 1983 *Codes*, but in *Secreta Continere* and *SST 2001* which are not part of the *Codes*.

439. On 15 July 2010, after Pope Benedict XVI revised the norms of *SST 2001*, Fr Lombardi said:

"One point that remains untouched, though it has often been the subject of discussion in recent times, concerns collaboration with the civil authorities. It must be borne in mind that the Norms being published today are part of the penal code of canon law, which is complete in itself and entirely distinct from the law of States. On this subject, however, it is important to take note of the 'Guide to Understanding Basic CDF Procedures concerning Sexual Abuse Allegations', as published on the Holy

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<sup>377</sup> <http://www.independent.com.mt/articles/2014-07-19/news/mgrscicluna-the-paedophile-tragedy-could-have-been-avoided-5896011778/#prettyPhoto> (Accessed 22 July 2014).

<sup>378</sup> <http://www.zenit.org/article-28746?l=english> (Accessed 25 June 2013)

See website. In that Guide, the phrase 'Civil law concerning reporting of crimes to the appropriate authorities should always be followed' is contained in the section dedicated to 'Preliminary Procedures'. This means that in the practice suggested by the Congregation for the Doctrine of the Faith it is necessary to comply with the requirements of law in the various countries, and to do so in good time, not during or subsequent to the canonical trial."<sup>379</sup>

440. The problem is that canon law might well be complete in itself and distinct from the civil law, but it creates canonical crimes of homicide, kidnapping mutilating or gravely wounding someone, fraud, and sexual assaults on minors, all of which are serious crimes under the civil law. It then imposes the pontifical secret on all allegations and information that the Church has about them. Further, as we have seen, the last sentence of this statement suggests that once a canonical trial starts, the pontifical secret still applies even where there is a civil law requiring reporting.

441. Four days later, on 19 July 2010, Fr Lombardi gave a further explanation through the Catholic News Service,

"The revised norms maintain the imposition of 'pontifical secret' on the church's judicial handling of priestly sex abuse and other grave crimes, which means they are dealt with in strict confidentiality. Father Lombardi said the provision on the secrecy of trials was designed 'to protect the dignity of everyone involved.' The spokesman said that while the Vatican norms do not directly address the reporting of sex abuse to civil authorities, it remains the Vatican's policy to encourage bishops to report such crimes wherever required by civil law. 'These norms are part of canon law; that is, they exclusively concern the church. For this reason they do not deal with the subject of reporting offenders to the civil authorities. It should be noted, however, that compliance with civil law is contained in the instructions issued by the Congregation for the Doctrine of the Faith as part of the preliminary procedures to be followed in abuse cases,' he said."<sup>380</sup>

442. The only amount of reporting allowed under the dispensation given in 2010 is where there are domestic laws requiring reporting. If there are no such domestic laws, any other reporting is forbidden because strict confidentiality applied, with no exceptions for reporting to the police.

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<sup>379</sup> [http://www.vatican.va/resources/resources\\_lombardi-nota-norme\\_en.html](http://www.vatican.va/resources/resources_lombardi-nota-norme_en.html) (Accessed 21 July 2013)

<sup>380</sup> <http://www.catholicnews.com/data/stories/cns/1002901.htm> (Accessed 6 March 2013)

[http://en.radiovaticana.va/storico/2010/07/16/vatican%E2%80%99s\\_revised\\_rules\\_on\\_sexual\\_abuse\\_of\\_children/in2-408723](http://en.radiovaticana.va/storico/2010/07/16/vatican%E2%80%99s_revised_rules_on_sexual_abuse_of_children/in2-408723) (Accessed 25 August 2013)

**2010: Professor John P. Beal**

443. On 25 June, 2010, according to the *National Catholic Reporter*, the canon lawyer, Fr John P Beal called the secrecy requirements that stop participants talking about the proceedings after the case is over, a “stupid law”. Then he said.

“Pontifical secrecy does not prevent Catholic officials from reporting sexual abuse to civil authorities, Beal said. It applies only to internal church proceedings.”<sup>381</sup>

444. Beal had stated in his 2007 *Studia Canonica* article that the pontifical secret prevented such officials revealing “everything that they learned as part of the penal process” and which they did not discover by other means. He also said that it prevented a bishop from informing anyone that the priest had been found innocent or guilty.<sup>382</sup> But if the information came from the “internal church proceedings”, Beal concedes that there was a prohibition on reporting.<sup>383</sup>

**2010: Professor Nicholas Cafardi**

445. On 21 July 2010, the American canon lawyer, Nicholas Cafardi, wrote:

“But that’s all the secrecy requirement covers: the internal church legal process, not the crime itself. It does not prevent victims, their families, or even church officials from reporting a civil crime to the civil authorities or to the media.”<sup>384</sup>

446. The “church officials” referred to by Cafardi can only be those who had some direct knowledge of the abuse and not from what they learned through an allegation made by the victim to the perpetrator’s superior or through canonical investigations.

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<sup>381</sup><http://ncronline.org/news/vatican/vatican-secrecy-keeps-victims-accused-dark> (Accessed 22 July 2013)

<sup>382</sup> John P. Beal: “*The 1962 Instruction: Crimen Sollicitationis: Caught Red Handed or Handed a Red Herring?*” 41 *Studia Canonica* 199 at 212 and 233. <http://www.vatican.va/resources/Beal-article-studia-canonica41-2007-pp.199-236.pdf> (Accessed 3 July 2013). O’Reilly and Chambers: *The Sexual Abuse Crisis and the Legal Responses* p.375 do not discuss the pontifical secrecy nor do they mention *Secreta Continere*. They state that if the priest is exonerated, “it is the duty of the bishop to try to rehabilitate the priest and his ministry as much as possible. Announcements in the local paper and in the diocesan paper can help restore the priest’s reputation.” This is not consistent with the pontifical secret as described by Professor Beal and by Sr. Moya Hanlen in the Nestor case (Case Study No. 14)

<sup>383</sup> “Unlike tribunal officials who were bound to maintain confidentiality about everything they learned as part of the penal process, and who knew nothing about the case except what they learned during their official participation in the process, accusers and witnesses were bound to confidentiality only about the fact that they had been interrogated, the questions asked them, and their own responses during the process itself. This obligation did not bar them from speaking about what they know independently of the canonical process.” John P. Beal: “*The 1962 Instruction: Crimen Sollicitationis: Caught Red Handed or Handed a Red Herring?*” 41 *Studia Canonica* 199 at 212.

<sup>384</sup> Nicholas Cafardi, “*The Scandal of Secrecy: Canon Law and the Sexual-abuse Crisis*”, *Commonweal*, 21 July 2010 <http://commonwealmagazine.org/scandal-secrecy> (Accessed 27 May 2013)

## 2011: The Holy See's Response to the Irish Foreign Minister

447. On 14 July 2011, after the publication of the Murphy Cloyne Report, the Irish Foreign Minister, Mr Ian Gilmore, called in the Papal Nuncio, and handed him a note which referred to the Storero letter. The note said, said:

“Frankly, it is unacceptable to the Irish Government that the Vatican intervened to effectively have priests believe they could in conscience evade their responsibilities under Irish law.”<sup>385</sup>

448. On 20 July 2011, the Irish Prime Minister, Enda Kenny, a Catholic, made a pointed attack on the Holy See in the Irish Parliament accusing the Vatican of interfering in Irish domestic affairs. The Holy See had refused to cooperate with the Murphy Commissions, claiming sovereign immunity.

“It's fair to say that after the Ryan and Murphy Reports Ireland is, perhaps, unshockable when it comes to the abuse of children. But Cloyne has proved to be of a different order. Because for the first time in Ireland, a report into child sexual-abuse exposes an attempt by the Holy See, to frustrate an Inquiry in a sovereign, democratic republic...as little as three years ago, not three decades ago. And in doing so, the Cloyne Report excavates the dysfunction, disconnection, elitism....the narcissism that dominate the culture of the Vatican to this day. The rape and torture of children were downplayed or 'managed' to uphold instead, the primacy of the institution, its power, standing and 'reputation'.”

449. And at the end of his speech, Kenny said,

“Cardinal Josef Ratzinger said: ‘Standards of conduct appropriate to civil society or the workings of a democracy cannot be purely and simply applied to the Church.’ As the Holy See prepares its considered response to the Cloyne Report, as Taoiseach, I am making it absolutely clear, that when it comes to the protection of the children of this State, the standards of conduct which the Church deems appropriate to itself, cannot and will not, be applied to the workings of democracy and civil society in this republic. Not purely, or simply or otherwise. Children.... first.”<sup>386</sup>

450. In addition, the Irish Parliament passed a motion that it:

“...deplores the Vatican's intervention which contributed to the undermining of the child protection framework and guidelines of the Irish State and the Irish Bishops”.

<sup>385</sup> [http://www.vatican.va/resources/resources\\_risposta-gilmore\\_20110903\\_en.html](http://www.vatican.va/resources/resources_risposta-gilmore_20110903_en.html) (Accessed 5 April 2013)

<sup>386</sup> <http://www.rte.ie/news/2011/0720/cloyne1.html> (Accessed 16 July 2013)

See also Mea Maxima Culpa at 59.31.

451. On 3 September 2011, the Holy See published its 11,000 word formal response.<sup>387</sup> It mentions *Crimen Sollicitationis* and *SST 2001* and *SST 2010* in general terms, but there is not one word about the secret of the Holy Office imposed by *Crimen Sollicitationis* or the pontifical secret imposed by *Secreta Continere* and *SST 2001* and *SST 2010*.
452. The response explained that the *Framework Document* was not the work of the Irish Catholic Bishops Conference, but only of an advisory committee, and as such it could not receive a “*recognitio*” from Rome under canon law. However, it went on to say,
- “However, the lack of *recognitio* would not of itself prevent the application of the Framework Document in individual Dioceses. Despite the fact that the Framework Document was not an official publication of the Conference as such, each individual Bishop was free to adopt it as particular law in his Diocese and apply its guidelines, **provided these were not contrary to canon law.**” (my emphasis)
453. And there’s the rub because that is exactly what the Storero letter was pointing out in reference to the proposal for mandatory reporting. The proposals for mandatory reporting were contrary to canon law – and they were, on any reading of *Crimen Sollicitationis*, *Secreta Continere*, the *1983 Code of Canon Law* and *SST 2001* and *SST 2010*.
454. The Vatican Response then makes an extraordinary statement in the light of the plain words of both *Crimen Sollicitationis* and *Secreta Continere* and the barrage of statements from Curia and other cardinals and the Church’s most senior canon lawyers, particularly in the period 2001/2002 rejecting any suggestion that bishops should report cases of abuse involving priests to the civil authorities:
- “It should be borne in mind that, without ever having to consult the Holy See, every Bishop, is free to apply the penal measures of canon law to offending priests, and has never been impeded under canon law from reporting cases of abuse to the civil authorities.”
455. The statement has all the hallmarks of mental reservation, which the Catholic Catechism says is justified to avoid “scandal” and revealing “professional secrets”. If the statement refers to bishops receiving an allegation of abuse by anyone *other than a priest or religious brother or nun*, (for example, a lay teacher in a Catholic school), then it is true, because *Secreta Continere* only applied to canonical crimes or “delicts”. Child sexual abuse by non-religious lay persons was not a canonical crime. If it refers to the bishop having first hand

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<sup>387</sup> [http://www.vatican.va/resources/resposta\\_risposta-gilmore\\_20110903\\_en.html](http://www.vatican.va/resources/resposta_risposta-gilmore_20110903_en.html) (Accessed 16 July 2013)



evidence of abuse, because he caught a priest *in flagrante delicto*, in bed with a child, it is also true. If it refers to what the bishop found out in the course of a canonical investigation, it is false. If the Holy See's statement means that bishops could reveal what they had discovered in their inquiries they were required to carry out under canon law, then it flies in the face of the plain words of *Crimen Sollicitationis*, *Secreta Continere* and the *1983 Code of Canon Law*, and *SST 2001* and *SST 2010*, and the opinions of Curia cardinals and canon lawyers. It makes the whole concept of the pontifical secret meaningless. And in support of its statement, the Response quotes another letter from Cardinal Castrillón of 12 November 1998, as if it really supported its assertion about the bishops never being impeded from reporting.

“I also wish to say with great clarity that the Church, especially through its Pastors (Bishops), should not in any way put an obstacle in the legitimate path of civil justice, **when such is initiated by those who have such rights**, while at the same time, she should move forward with her own canonical procedures, in truth, justice and charity towards all.”<sup>388</sup> (my emphasis)

456. In other words, no obstacle should be put in the path of the victims to go to the police (ignoring of course, that under *Crimen Sollicitationis* they would have been sworn to secrecy). But that has never been the issue. The issue was the obligation under civil law for bishops to report under the misprision of felony laws where they then still existed. This response says nothing about that, and Cardinal Castrillón's other public statements made it clear that bishops should be prepared to go to jail rather than to report one of their paedophile priests to the police.

457. The Response then continued,

“In 1996, apart from cases relating to misprision of felony, the reporting of incidents of child sexual abuse to either the relevant health board or the Irish police was not mandatory. Furthermore, misprision of felony was removed from the Irish Statute Book by the Criminal Justice Act of 1997”<sup>389</sup>

458. Child sexual abuse was almost always a felony – reporting was mandatory. Misprision of felony was removed from the Irish Statutes by the *Criminal Law Act 1997* of 22 April 1997,

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<sup>388</sup> Cardinal Castrillón had his supporters in Ireland. Monsignor Callaghan from the diocese of Cloyne thought that the matter of reporting should be left to the victim, as reporting to the police interfered with the Church's “pastoral approach” to the question of sex abuse. Murphy Dublin Report Part 1

<http://www.justice.ie/en/JELR/DACOI%20Part%201.pdf/Files/DACOI%20Part%201.pdf> (Accessed 7 May 2013) par 4.74ff

<sup>389</sup> [http://www.vatican.va/resources/resources\\_risposta-gilmore\\_20110903\\_en.html](http://www.vatican.va/resources/resources_risposta-gilmore_20110903_en.html) (Accessed 16 July 2013)

coming into effect three months, later on 22 July 1997.<sup>390</sup> At the time the Storero letter was written on 31 January 1997, there was mandatory reporting under the misprision of felony law. The Holy See's response did not mention the date in 1997, when misprision of felony was abolished. It had also mentally reserved the fact that at the time of the Storero letter, misprision of felony was still part of the law of Ireland.

459. Some three months earlier, on 20 July 2011, the Vatican spokesman, Fr Federico Lombardi had repeated this statement about Irish law. In reference to the Storero letter, he said:

“Moreover, there is absolutely nothing in the letter that is an invitation to disregard the laws of the country,” Father Lombardi added. “The objection the letter referred to regarded the obligation to provide information to civil authorities (‘mandatory reporting’), it did not object to any civil law to that effect, because it did not exist in Ireland at that time (and proposals to introduce it were subject to discussion for various reasons in the same civil sphere).”<sup>391</sup>

460. The statement that such a law “did not exist” in Ireland as at 31 January 1997 was false. The proposals under discussion were to require some professionals in a confidential relationship to report, similar to the proposals for mandatory “welfare” reporting to child welfare authorities in Australia for children at risk. That had nothing to do with the obligation to report under the existing misprision of felony law at the date of the Storero letter. The instruction from the Vatican in 1997, through Archbishop Storero, was to breach Irish law in the case of allegations of sex crimes against children by priests.

## 2016: Professor Ian Waters

461. In an article in *The Canonist*, the journal of the Canon Law Society of Australia and New Zealand, Professor Ian Waters, a canon lawyer wrote concerning Art. 30 of *SST 2010*.

“Given the context in which this norm appears, it is evident that the obligation to observe secrecy, albeit in its strongest form, obliges only those tribunal officials who are involved in respect of a particular case being heard in an ecclesiastical tribunal. Without prejudice to the norms of canon law

<sup>390</sup> <http://www.irishstatutebook.ie/1997/en/act/pub/0014/print.html#sec1> (Accessed 16 July 2013). After the abolition, failure to report only became an offence if there was a benefit in return, as in the United Kingdom and all Australian States, other than NSW: <http://www.independent.ie/opinion/analysis/change-in-the-law-means-there-is-now-no-criminal-offence-for-failure-to-report-crime-26031940.html> (Accessed 16 July 2013)

<sup>391</sup> <http://www.zenit.org/article-33112?!=english> (Accessed 16 July 2013). Professor Marie Keenan in *Child Sexual Abuse and the Catholic Church, Gender, Power and Organizational Culture*, Oxford University Press (2012), at loc 5425 criticized Fr Lombardi's defence of the Storero letter when he asserted that all it was doing was reminding the bishops that they had to follow the procedures laid down by canon law: “Lombardi failed to point out how inadequate the then norms of canon law (Church law) had been for dealing with the problem of abuse, a situation that necessitated revision of the norms many times since 2001...Lombardi also plays down the letter's concern regarding mandatory reporting, saying the concerns related to the sacrament of confession (Allen, 2001), but this is something that makes no sense in the light of the problems the *Framework Document* (1996) was attempting to address.”

regarding the inviolability of the secret of the sacrament of penance, the present canonical legislation has no provisions which prohibit a bishop or any other Church authority from reporting sexual abuse of minors to civil authorities even where such reporting is not mandatory.”<sup>392</sup>

462. Professor Waters here argues that the only persons who are prevented from reporting information to the civil authorities are those involved in the ecclesiastical tribunal and not the bishop who sets it up or his advisers. That view, with the greatest respect, is not consistent with *Secreta Continere*. Art II (1) says that the persons under the obligation to observe the pontifical secret are:
- “Cardinals, **bishops**, prelate superiors, major and minor officials, consultors, experts and ministers of lower rank who are concerned with the treatment of questions which are subject to papal secrecy.”  
(my emphasis)<sup>393</sup>
463. The “ministers of lower rank concerned with the treatment of questions which are subject to papal secrecy” would include those involved in the ecclesiastical tribunal. But Professor Waters wishes to exclude those who are specifically listed, like “bishops, major and minor officials, consultors” etc.
464. Likewise Art 1(4) sets out the “questions” which are subject to the pontifical secret and which bind the people referred to in (1) above. They are the “extrajudicial denunciations” and the “process and decisions which pertain to these denunciations.” As previously stated the former are the allegations addressed to the bishop or other superior.
465. The “process and decisions” which pertain to them are the preliminary investigation under Canon 1717, the communications between the bishop and the Congregation for the Doctrine of the Faith under *SST 2010* any penal or administrative trial and the final judgment against the cleric.
466. The bishop has to know of the “extrajudicial denunciation” because Canon 1717 provides:
- “Whenever an ordinary has knowledge, which at least seems true, of a delict, he is carefully to inquire personally or through another suitable person about the facts, circumstances and imputability, unless an inquiry seems entirely superfluous.”
467. Art 13 of *SST 2001* and Art 16 of *SST 2010* repeat this requirement:

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<sup>392</sup> The Canonist, Vol 7 No 1 (2016) 75 at 87.

<sup>393</sup> Translation of William Woestman *Ecclesiastical Sanctions and the Penal Process* (St. Paul University 2003) Appendix VII, p.237. Woestman uses the term “papal secret” or secrecy, but the pontifical secret is the more common term.

“Whenever the Ordinary or Hierarch receives a report of a more grave delict (“reserved delict” in SST 2001) which has at least a semblance of truth, once the preliminary investigation has been completed, he is to communicate the matter to the Congregation for the Doctrine of the Faith...”

468. In order to make a decision as to whether or not an “extrajudicial denunciation” of a “report” seems true, or “at least has a semblance of truth”, the bishop has to know what it is, and then he has to carry out the inquiry himself or through some other suitable person.

469. Once he has received the results of that inquiry he has to send off the evidence to the CDF. Since the members of the tribunal conducting the inquiry are his delegates, he has to know the results of that inquiry, that is, the information that his delegates have obtained.

470. Art 21 of *SST 2010* gives the bishop the right to ask the CDF to

“...proceed by way of in individual cases, ex officio or when requested by the Ordinary or Hierarch, to proceed by extrajudicial decree, as provided in can. 1720 of the Code of Canon Law.”

In order to make this request, the bishop has to know the basis upon which a request should be made.<sup>394</sup>

471. Further, assuming that there is a penal or administrative trial directed by the CDF, and the priest is either acquitted or found guilty, or even if the CDF decides to dismiss the priest, he has to know the result.

472. Whatever the result, the bishop is precluded from telling anyone other than the priest because of the permanent silence imposed by Art III (1):

“Whoever is bound by papal secrecy is always under grave obligation to observe it.”

473. That the bishop is bound by the pontifical secret is confirmed by Art. II (4) which provides that even those who come across the allegations and information by accident are bound by the secret:

“4) All those who have culpably received information of documents and matters which are subject to papal secrecy, or even if they have received this kind of information inculpably, they should know for certain that these matters are still covered by papal secrecy.”

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<sup>394</sup> It is for this reason that Art 38 (l) of the Argentinean protocol requires that when the bishop sends the results of the preliminary inquiry to the CDF, he should also provide his opinion as to whether a judicial or administrative procedure or an *ex officio* dismissal should follow.

474. On Ian Waters' argument, the bishop has nothing to do with the "extrajudicial denunciation", "the process and decision", or in the terms used by *SST 2001* and *SST 2010*, "the report" to the bishop or "the case". But he is at the centre of them all.
475. Canon law puts the bishop at the centre of it all because there is no separation of powers under canon law. Canon 391 provides:
- "§1. It is for the diocesan bishop to govern the particular church entrusted to him with legislative, executive, and judicial power according to the norm of law.
- §2. The bishop exercises legislative power himself. He exercises executive power either personally or through vicars general or episcopal vicars according to the norm of law. He exercises judicial power either personally or through the judicial vicar and judges according to the norm of law."
476. The judicial power to inquire into an "extrajudicial denunciation" or "report" of child sexual abuse by a cleric is in the bishop, but he can appoint "another suitable person" to conduct the inquiry under Canon 1717 on his behalf. Likewise, judicial vicars and judges can hear penal cases on his behalf should he be instructed by the CDF to conduct one.<sup>395</sup>
477. Canon 1420 provides for the appointment a judicial vicar for the diocese and Canon 1420§2 provides:
- "The judicial vicar constitutes one tribunal with the bishop but cannot judge cases which the bishop reserves for himself."<sup>396</sup>
478. The bishop is part of the "case" (*SST 2010*) or the "process" (*Secreta Continere*) because all judicial power is held by him.
479. Leaving aside the proper meaning of the words of *Secreta Continere*, if the bishop is not bound by the pontifical secret, then he is not only free to tell the civil authorities, he is also free to everyone – the press, the town gossip and his barber. Since the claimed purpose behind the pontifical secret, asserted by the Vatican spokesman, Fr Lombardi, is to protect the reputation of the people involved in the "process", this is hardly an interpretation that lends itself to achieving that purpose.

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<sup>395</sup> John P. Beal: "Who should conduct the initial assessment and any subsequent canonical investigation of an accusation of clerical sexual misconduct? It is clearly the diocesan bishop alone who is competent to initiate such assessments and investigations and under whose authority they are conducted." *Doing What One Can: Clerical Sexual Misconduct: The Jurist* 52 (1992) 642-683

<sup>396</sup> Beal, Coriden and Green: *New Commentary on the Code of Canon Law* state at p. 1624: "that paragraph 2 implies that an appeal against a decision of a tribunal cannot be lodged with the bishop, and the bishop is not free to change or modify a decision given by a judicial vicar."

### **The Pontifical Secret and Internal Church Proceedings**

480. There is unanimous agreement amongst canon lawyers and Roman Curia officials that the pontifical secret at least prevents the reporting to the civil authorities of anything disclosed to a canonical tribunal.

#### **Statements from Canon Lawyers**

- 480.1. Professors John P. Beal and Nicholas Cafardi in 2010 that the pontifical secret applies to the Church's internal procedures.
- 480.2. Monsignor Dooley's statements in 2002 and 2010 to the same effect,
- 480.3. Dr Rodger Austin's evidence of 13 July 2013 to the Cunneen Special Commission on the need for a dispensation to reveal information given to a canonical tribunal.
- 480.4. Professor Waters statement that those involved in the canonical tribunal are subject to the pontifical secret.

#### **Statements from Church Spokesmen**

- 480.5. The statement from Martin Long, spokesman for the Irish Catholic Bishops Conference on 10 December 2009.
- 480.6. Statements from Fr Federico Lombardi, the Vatican spokesman in 2010 that the strictest confidentiality applied to the Church's canonical proceedings.
481. However, there are statements from Pope Francis, senior members of the Roman Curia and other senior Cardinals that the pontifical secret goes beyond what is disclosed in canonical tribunals and those who work in them, and binds bishops and senior Church personnel from reporting anything relating to the sexual abuse of clerics to the civil authorities.

#### **Statements from Pope Francis**

- 481.1. Pope Francis, in his 2014 response to the United Nations Committees on the Rights of the Child and on Torture did not deny their allegations that the confidentiality provisions of canon law prevented reporting to the civil authorities.

#### **Statements from the Roman Curia**

- 481.2. Two letters from the Congregation of the Clergy: 1984 to Archbishop Moreno of 31 January 1984 and the Storero letter to the Irish bishops of 31 January 1997.

- 481.3. Two separate statements from Cardinal Castrillon, the Prefect of the Congregation for Clergy, to the Irish Bishops of 1998 and 1999.
- 481.4. Cardinal Castrillon's 2001 letter to Bishop Pican of 8 September 2001.
- 481.5. The interview of Archbishop Bertone, the Secretary of the CDF with *30 Giorni* in February 2002.
- 481.6. The address of Archbishop Herranz, the President of the Pontifical Council for the Interpretation of Legislative Texts, of 29 April 2002 to the Catholic University of Milan.
- 481.7. The article of Fr Ghirlanda SJ, Judge of the Apostolic Signatura and Dean of the Faculty of Canon Law at Rome's Gregorian University of 18 May 2002 in *Civiltà Cattolica*.
- 481.8. The letter of Cardinal Re, the Prefect of the Congregation of Bishops of 14 October 2002 to the United States Catholic Bishops Conference.
- 481.9. The compromise reached by the USCBC with the CDF to allow mandatory reporting but only where a civil law required it, and the *recognitio* to that effect given on 8 December 2002.

#### **Statements from Other Senior Members of the Hierarchy**

- 481.10. Statements from Cardinals Bille, Schotte, Lehmann and Maradiaga rejecting any suggestion that bishops should report paedophile priests to the police, and in Cardinal Rodriguez Maradiaga's case that bishops should be prepared to go to jail rather than do that.

#### **Statements to the Contrary**

- 482. As against the above statements that support the prohibition on disclosure of information given to canonical tribunal or a broader prohibition on the reporting, there are these statements which assert there is no prohibition whatsoever:
  - 482.1. The Holy See's Response (Pope Benedict XVI) in 2011 to the Irish Foreign Minister stating that bishops have never been impeded under canon law from reporting cases of abuse to the civil authorities.
  - 482.2. Monsignor Scicluna's statement in 2010 to the same effect.
  - 482.3. Fr Federico Lombardi's statement to the same effect in 2010.

483. All of the latter statements meet the standards required for “mental reservation” because they are half true. The pontifical secret has never prevented a bishop from reporting a case of the sex abuse of a child by a Catholic lay teacher, for example, or one which he himself has witnessed. The only way in which a bishop is not bound by the pontifical secret is if he is not the recipient of the “extrajudicial denunciation” or part of the “process and decision” (Art 1(4) of *Secreta Continere*) and not part of the “report” to the bishop (Art 13 of *SST 2001* and Art 16 of *SST 2010*) and not part of “the case” (Art 25 of *SST 2001* and Art 30 of *SST 2010*). Invariably he is, and has to be.
484. The vast bulk of information that the Church had about the sex crimes of its priests against children was obtained through “the internal church legal process”: its preliminary inquiries under Canon 1717 and any subsequent judicial or administrative trial.<sup>397</sup> Child sexual abuse is very rarely directly observed by anyone.
485. When information or a document is covered by pontifical secret, the Church’s highest secrecy classification akin to the confessional seal, it immediately raises the question: who can or can’t be told? Saying that the information only applies to “internal church proceedings” does not answer that question.
486. The reports of papal legates, and information obtained officially with regard to the appointment of cardinals, bishops and papal legates are also covered by the pontifical secret under *Secreta Continere*.<sup>398</sup> They are also “internal Church” matters, or to use Fr Lombardi’s

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<sup>397</sup> In New South Wales where there was an obligation to report all cases of sex abuse to the police, Church officials found a way around canon law that would have done any tax avoidance accountant proud. The bishop would refer the victim to Fr John Usher, a social worker, for counselling. He or another counsellor would then report the matter to the police. Counselling was not part of the “internal church process” laid down under canon law. The New South Wales Church officials should be given full credit for their creativeness in finding a way around the pontifical secret.

<https://cdn.fairfaxregional.com.au/transcripts/inquiry/Exhibit%20226%20Statutory%20Declaration%20of%20Monsignor%20Usher.pdf> (Accessed 10 September 2013).

[http://www.lawlink.nsw.gov.au/lawlink/Special\\_Projects/ll\\_splprojects.nsf/vwFiles/Day\\_22\\_-\\_9\\_September\\_2013.pdf/\\$file/Day\\_22\\_-\\_9\\_September\\_2013.pdf](http://www.lawlink.nsw.gov.au/lawlink/Special_Projects/ll_splprojects.nsf/vwFiles/Day_22_-_9_September_2013.pdf/$file/Day_22_-_9_September_2013.pdf) p. 2361 (Accessed 11 September 2013). However the extent of reporting in New South Wales is not clear. In an article in the Sydney Morning Herald of 17 November 2012 about the Church’s offender treatment program, Encompass, says: “Bishop Geoffrey Robinson, who has won plaudits for his efforts to improve the Catholic Church’s response to child sex abuse, led the Encompass Australasia board between 1997 and 2005. Bishop Robinson told Fairfax Media that Encompass Australasia’s ability to treat clergy for psycho-sexual disorders would have been greatly compromised had those attending the clinic been reported to police. ‘No one would come for treatment if they thought they would be referred to the police,’ he said.”

<http://www.smh.com.au/national/church-holds-sex-dossiers-20121116-29hst.html#ixzz45umFAts9> (Accessed 16 April 2016)

<sup>397</sup> Canon 1425

<sup>398</sup> [http://www.tutorgigpedia.com/ed/Pontifical\\_secret](http://www.tutorgigpedia.com/ed/Pontifical_secret) (Accessed 25 June 2013)



words below, “exclusively concern the Church.” But that does not mean that they can be communicated to the local shopkeeper, town gossip or the police.

487. A basic principle of legal drafting in any system of law is that if there is a general prohibition, exceptions have to be created or they can be implied. “No parking” means no parking for everyone, and if police and ambulance vehicles are to be an exception, that is specifically provided in the regulations or in some other legislation that allows them to park where they like.
488. Canon law follows this basic principle of legal drafting all the time by the use of the Latin term, ‘nisi’ (‘unless’) or some equivalent term. Such expressions appear over 1300 times in the *1983 Code*.<sup>399</sup>
489. The appropriate and logical way in any coherent legal system is to allow reporting to the civil authorities by means of an exception, written into the canons, and not stuck away in some public relations pamphlet for “laypersons and non-canonists”, which has no standing in canon law. It was not difficult to draft. All it needed to say was:
- “The strictest confidentiality (or pontifical secrecy) is to be observed in all things and to all persons except for the purposes of reporting the matter to the civil authorities.” (*Crimen Sollicitationis*) or “Cases of this nature are subject to the pontifical secret except for the purposes of reporting the matter to the civil authorities.” (*Sacramentorum Sanctitatis Tutela*)
490. The opinions of senior Roman Curia officials and respected canon lawyers are the equivalent in canon law of non-binding court judgments in our common law system. These “judgments” point in the one direction: not only do the words of *Crimen Sollicitationis*, *Secreta Continere* and *SST 2001* and *SST 2010* mean what they say, but the Roman Curia and the “learned persons” under Canon 19 interpreted those words to mean that canon law prevented bishops and senior Church officials from reporting to the civil authorities any allegations of child sexual abuse by clerics and, after 1974, by religious. It also prohibited the reporting of any information about it obtained through canonical investigations. After 2010, reporting was allowed where there were civil laws requiring it, but where there are no such civil laws, the pontifical secret applies.

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<sup>399</sup> John E Date in ‘*Implications of Canon Law for Church Organisations Operating in Australia*’, Master of Laws thesis for Melbourne University Law School p.18ff: <https://minerva-access.unimelb.edu.au/handle/11343/35832> (Accessed 8 Sept 2013)

### Bishop Geoffrey Robinson's Opinion on the Pontifical Secret

491. On 24 August 2015, Bishop Geoffrey Robinson gave evidence to the Royal Commission and was asked about the culture of secrecy in the Church. He said:

“Every Italian knows the two phrases, "bella figura" and "brutta figura". The first means literally "a beautiful figure"; the second means "an ugly figure". What they mean is keeping up appearances. You tell others - you appear in the best light possible. You keep secret anything that would put you in a bad light.....

Q. The fact that the Congregation for the Doctrine of the Faith has reserved those delicts to it and the pontifical secret is imposed on them - that's an obvious example of the culture of secrecy?

A. Yes, yes, it is. It comes up against another factor of that culture, that, look, I remember when we were dealing with the revision of the code before 1983, and as a canon lawyer I was heavily involved, and they had sent out the draft documents to us but they had "pontifical secret" stamped on them. At one stage I said to them, "Hey, look, we're supposed to offer you a considered reply. That means we have to have discussions amongst ourselves. How can we do that if you've got 'pontifical secret'?" He said, "Oh, 'pontifical secret' means you don't give it to the media." You see, the principle there is: Latins believe in a strict law with a liberal interpretation; Anglo-Saxons believe in a liberal law with a strict interpretation. So the worst of both worlds is when you had strict Anglo-Saxons interpreting strict Latin laws, and we had an awful lot of that."<sup>400</sup>

492. This evidence does not appear to be consistent with other evidence where he was describing how he and the then Bishop of Wollongong, Philip Wilson, attended a conference of English speaking bishops in Rome in April 2000 convened by the Vatican Secretariat of State, and reported to the meeting on the conflict between canon law and civil law, particularly insofar as *Towards Healing* was concerned. In a report of the Australian Catholic Bishops Conference, Bishop Robinson discussed a number of areas where there was a conflict between canon law and Australian civil law.<sup>401</sup> One of them was in relation to an “unacceptable risk” of a child being subjected to sexual abuse. There are various different formulations of this in the State mandatory reporting laws, but this term encapsulates most of them. They provide for an obligation on certain people to report where there is an unacceptable risk of sexual abuse. The ACBC Report states:

“This law is an attempt to protect innocent children from sexual abuse in cases where no conviction or admission exists, but there are good reasons to fear the risk of abuse. In Australia these cases are matters of law, but throughout the world they can easily be matters of conscience. The laws and

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<sup>400</sup> Case Study No. 31, Transcript p.16094

<sup>401</sup> Case Study No. 31, Exh. #31-002, p. CTJH.303.01001.0003-5

procedures of the Church must not prevent a bishop from obeying the reasonable laws of the State and they must not prevent a bishop from following his conscience.”<sup>402</sup>

493. When questioned about this part of the document, Robinson said:

“I felt there could be conflicts between our obligations under church law and our obligations under civil law...”<sup>403</sup>

494. The conflict he was talking about was the requirement to report where there was an “unacceptable risk”. If the pontifical secret meant no more than “don’t give it to the media”, there could be no conflict with civil law because the civil authorities were not “the media”. The inference to be drawn from this evidence is that he was aware of the possible conflict between canon and civil law on reporting. The pontifical secret under *Secreta Continere* not only prevented compliance with the “reasonable laws of the State”, but its preamble also purported to prevent a bishop from acting in accordance with his conscience.

495. With great respect to Bishop Robinson, his opinion that the pontifical secret only meant “don’t give it to the media” is idiosyncratic, is not supported by the plain meaning of the words of *Secreta Continere* and the interpretations placed on it by any canonical authorities. His being told by the authorities in Rome that he could discuss the draft of the *1983 Code* with colleagues was a classic case of a dispensation under Canon 85.

496. As to the difference between the “Latin” and “Anglo-Saxon” way of interpreting law, the evidence shows that whatever validity Bishop Robinson’s opinion might have in other areas, it worked in the opposite direction when it came to secrecy and the sexual abuse of children.

497. “The Latins”, the Italians and Spanish speakers in the Roman Curia, were the ones who interpreted the pontifical secret much more strictly than the Anglo-Saxon Geoffrey Robinson. Indeed their stance is consistent with the culture of secrecy in Rome and “brutta figura”, because the whole point of the secret was the prevention of scandal, as the Spanish canon lawyer, Aurelio Yanguas SJ stated in 1946.

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<sup>402</sup> Id, CTJH.303.01001.0004

<sup>403</sup> Transcript 16049:8-10: “Q. You were saying in the conflict with civil law, you were giving information about what you saw to be the conflicts; is that right?

A. Yes.

Q. Then if we can turn over to the next page, you conclude, before the next heading, that the laws and procedures of the church must not prevent a bishop from obeying the reasonable laws of the State?...

A. I felt there could be conflicts between our obligations under church law and our obligations under civil law.”

498. Chapter 7 of this submission sets out the statements of a number canonical authorities – the equivalent of non-binding court decisions in our civil law – which do not support Bishop Robinson’s opinion on the Latin/Anglo-Saxon divide when it comes to secrecy: Cardinal Re (Congregation for Bishops) (Italian), Archbishop Bertone (Congregation for the Doctrine of the Faith) (Italian), Professor Ghirlanda (Dean of the Faculty of Law at the Gregorian and member of the Apostolic Signatura (Italian), Cardinal Castrillon (Congregation for the Clergy)(Colombian), Archbishop Herranz (President of the Pontifical Council for the Interpretation of Legislative Texts (Spanish), all said that bishops should not report these crimes to the police.
499. Castrillon said that bishops should be prepared to go to jail rather than do that. His fellow “Latin”, Cardinal Rodriguez Maradiaga of Honduras said the same. Cardinal Castrillon told the Irish bishops in 1997 that their proposals for mandatory reporting conflicted with canon law, and in 2002, he wrote to the French Bishop Pican who had been given a suspended sentence for covering up a serial paedophile priest, congratulating him for doing so, and saying that he was writing to the bishops of the world to hold him up as an example to be followed.
500. The Vatican spokesman, Fr Lombardi (Italian) also said that canonical proceedings are subject to “strict confidentiality” and that any reporting under the 2010 dispensation (which allowed reporting where the civil law required it) has to be done “in good time and not during or subsequent to a canonical trial”.
501. Further, the Italian Catholic Bishops Conference as recently as 2012 and 2014 has confirmed that Italian bishops will not be reporting clergy crimes against children to the police because the civil law in Italy, under the Lateran Treaty with the Vatican does not require them to do so. They interpreted Italian law literally to avoid the “brutta figura” of reporting, and it also allows them to comply with the pontifical secret, again taken literally, to preserve the “bella figura”.
502. On 31 January 1997, the papal nuncio, Archbishop Storero on behalf of the Congregation for Clergy (Cardinal Castrillon) wrote to the Irish bishops effectively telling them that their proposals for mandatory reporting conflicted with canon law. The letter also contained a

threat that if they did report to the police, any canonical proceedings against the priest would be set aside as null and void in Rome.

503. If *Secreta Continere* were a statute in any Anglo-Saxon legal system, it would be difficult to imagine how a breach of the pontifical secret could nullify disciplinary proceedings. It might be a punishable offence, but it would have nothing to do with the validity of any such proceedings, unless the statute itself provided for such invalidity. To use a concrete example, trust account investigators in NSW have confidentiality imposed on them (with an exception for reporting to the police). If a trust account inspector leaked some information to the press in breach of the confidentiality requirements, he could be punished for doing so, but it would not affect the validity of any disciplinary proceedings against the solicitor based on those investigations. In other words, here we have a “Latin”, Cardinal Castrillon, interpreting a law far more strictly than would have occurred in the Anglo-Saxon world.
504. Bishop Robinson’s aphorism about “Latin” and “Anglo-Saxon” ways of interpreting canon law does not stand up to examination in the case of the controversy over “administrative leave” pending the preliminary investigation under Canon 1717. In 1985, Fr Thomas Doyle, the American canon lawyer (Anglo-Saxon) and his colleagues put forward a liberal interpretation of Canon 1722 to allow a bishop to place a priest on administrative leave pending the preliminary investigation. But there is no doubt that the Vatican did not agree with this liberal interpretation either, and a number of priests were reinstated in Melbourne after being placed on “administrative leave”.<sup>404</sup> Nevertheless, here you had Anglo-Saxons unsuccessfully trying to interpret a strict law liberally so as to overcome an obvious defect in canon law.
505. The Nestor case in Wollongong (Case Study No 14) is another example that does not support Bishop Robinson’s opinion. In that case, Bishop Wilson used the Towards Healing process to conduct an inquiry into Fr Nestor, and regarded that as his preliminary inquiry under Canon 1717. The American canon lawyer, an Anglo-Saxon, Dr James Provost from the Catholic University of America advised Wilson that his inquiry complied with canon law.
506. The Congregation for the Clergy (Cardinal Castrillon, the Latin) did not agree, and decided that it did not comply with canon law. The distinction seems to be that a *Towards Healing*

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<sup>404</sup> Dr Kevin Matthews, 26 June 2014, <http://www.childabuseroyalcommission.gov.au/case-study/bb3eaadf-9283-41ef-9694-e560738d186a/case-study-14,-june-2014,-sydney.aspx>, p.7989.

inquiry could be used as part of the “acts” or the evidence in a preliminary inquiry but could not itself be the preliminary inquiry. This distinction is honoured in the Australian Church Guidelines forwarded to the Vatican in accordance with the direction from Cardinal Levada in 2011.<sup>405</sup>

507. The Latins in the Congregation for the Clergy adopted a much stricter interpretation of canon law than the Anglo-Saxon Dr Provost, and the ACBC in its Australian Church Guidelines has now adopted the Congregation for the Clergy’s interpretation. Since the rulings from the Congregation for the Clergy are the equivalent of non-binding authorities in Australian civil law, the ACBC’s position is consistent with the canonical system of authority. Although the Apostolic Signatura overruled the Congregation for Clergy in the Nestor case, it decided the matter on another basis, and specifically declined to say that the *Towards Healing* investigation was consistent with canon law.
508. With great respect, Bishop Robinson’s interpretation of *Secreta Continere* is not supported by the canonical authorities. His liberal interpretation of the restrictions imposed by the pontifical secret at least provided him with an argument, albeit a weak one, that the reporting provisions in *Towards Healing* did not breach canon law, should the matter ever be raised as an issue by the Vatican.
509. But in any event, even if he did consider that reporting was prohibited (whether under *Crimen Sollicitationis* or *Secreta Continere*) he and his fellow bishops would still have defied it. He was asked about finding out about *Crimen Sollicitationis* in 2000.

Q. So when you found out about it in 2000, did you consider that bishops or, indeed, the Bishops Conference, in Australia were bound to follow it?

A. Well, we had already made the decision to have *Towards Healing* and to follow that, and when they made that decision, the Australian bishops were well aware that they were outside church law and that their document had no standing in church law. They knew that.<sup>406</sup>

### ***Crimen Sollicitationis: A Red Herring?***

510. In 2007, the American canon lawyer and one of the authors of the *New Commentary on the Code of Canon Law*, Professor John P. Beal wrote an article in *Studia Canonica*: “*The 1962*

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<sup>405</sup> CTJH.304.07001.0001 par (e) “Dealing with cases of abuse”

<sup>406</sup> Case No. 31, Transcript 16054

*Instruction: Crimen Sollicitationis: Caught Red Handed or Handed a Red Herring?*” which is referred to on a number of occasions throughout this submission.

511. It is not a red herring in the history of the cover up because it was in force from 1922 until 1983 when it was abrogated by the 1983 *Code of Canon Law*.<sup>407</sup> But it is a red herring in terms of the more recent attempts to deal with child sexual abuse. While there were many instances of child sexual abuse prior to 1983, most of the complaints about them occurred after that date, and Church authorities dealt with them under the procedures of the 1983 *Code* and the pontifical secret imposed by *Secreta Continere* of 1974.
512. In his evidence before the Royal Commission Bishop Robinson said that Bishop Wilson had only told him about *Crimen Sollicitationis* in 1998.<sup>408</sup> *Crimen Sollicitationis* is a very important historical document because it marks the start of where the culture of secrecy had found its way into canon law. It’s legal relevance for the secrecy issue disappeared in 1974 when the secret of the Holy Office was replaced by the pontifical secret under *Secreta Continere*, which was well publicised and was used every day in the life of the Church and not just for sexual abuse matters.
513. *Crimen Sollicitationis* in terms of all other procedural matters was repealed by the 1983 *Code of Canon Law*. By the time the Special Issues Committee was formed in 1988, it was largely irrelevant to the way sexual abuse issues were to be handled by the Church, but its importance remains as a cultural ancestor to the regime existing after 1983.
514. The only reason why it has assume prominence in public discourse is firstly because some journalists called it a “smoking gun”, when it first came to light under a subpoena issued in a

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<sup>407</sup> The American canon lawyer, Nicholas Cafardi has demonstrated that Cardinals Ratzinger and Bertone were mistaken in stating from 1996 to 2001 that *Crimen Sollicitationis* was “in force”, until then. It had been repealed by the 1983 *Code of Canon Law* – an opinion with which, Dr Ian Waters agrees: [http://www.youtube.com/watch?v=7\\_jaQKTe4VY&feature=youtu.be](http://www.youtube.com/watch?v=7_jaQKTe4VY&feature=youtu.be) (Accessed 30 November 2014), and see transcript and the author’s commentary: <http://www.awrsipe.com/Misc/Ian-Waters-Speech-with-Commentary5.pdf> (Accessed 22 April 2015). In 2010, Pope Benedict XVI, rewrote the historical introduction to *Sacramentorum Sanctitatis Tutela* (“SST 2010”) and in effect conceded that it had been so repealed by the 1983 *Code*: Nicholas Cafardi, “The Scandal of Secrecy: Canon Law and the Sexual-abuse Crisis”, *Commonweal*, 21 July 2010 <http://commonwealmagazine.org/scandal-secrecy> (Accessed 27 May 2013). Brendan Daly concedes at page 21, that certainly at one time Cardinal Ratzinger believed that *Crimen Sollicitationis* had been abrogated by the 1983 *Code*.

<sup>408</sup> Transcript 24 August 2015, p 16054, and at 16104 he again mentioned his lack of knowledge of the document.

court case in the United States, and because Cardinal Ratzinger and Archbishop Bertone from the CDF started telling bishops around 1996 that it was still “in force”.<sup>409</sup>

515. So, the question of whether people in authority in the Church in Australia knew about *Crimen Sollicitationis* is irrelevant to the way bishops behaved in terms of reporting to the police at least since 1974 when *Secreta Continere* was promulgated. Irrespective of how many of the Church authorities knew about it in Australia, *Crimen Sollicitationis* was widely known and used at least from time to time throughout the world from 1922 to 1983 while it was in force.

516. The New Zealand canon lawyer, Brendan Daly wrote about *Crimen Sollicitationis* in 2016:

“Cover-ups and the extent of the problem has been a huge scandal for the Catholic Church in recent years. The secrecy surrounding *Crimen Sollicitationis* is a scandal in itself. It has led to inept handling of abuse cases in the upper levels of Church administration. The secret procedures in *Crimen Sollicitationis* have caused confusion, inaction and facilitated “geographical cures” of moving clergy from place to place.”<sup>410</sup>

517. These comments apply equally to canon law after *Crimen Sollicitationis*’s repeal in 1983. The Church’s strictest secrecy outside the confessional was imposed by *Secret Continere* and there were even worse problems with the Church’s disciplinary system after 1983.

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## 8. THE PERSISTENT PATTERN

518. The pattern was the same, all over the world. History has shown that the Church through secrecy under canon law was very successful in keeping its sex abusing clerics and religious out of the civil courts, and this itself is evidence that bishops observed the pontifical secret.

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<sup>409</sup> [http://www.natcath.org/NCR\\_Online/archives2/2003c/081503/081503n.htm](http://www.natcath.org/NCR_Online/archives2/2003c/081503/081503n.htm) (Accessed 15 July 2013). It was referred to in some court cases in the United States in 2005 and 2008: Fr Thomas Doyle <http://reform-network.net/?p=3006> par 6-14ff (Accessed 3 July 2013).

<sup>410</sup> Brendan Daly: *The Instruction Crimen Sollicitationis on the Crime of Solicitation: Confusion or Cover-up of Paedophilia* The Canonist, Vol 7, No. 1, 10, at 30.



519. Fr Thomas Doyle, a Dominican priest and canon lawyer in the documentary, *Sex Crimes and the Vatican*, said:

“..the priests when they are discovered, the systemic response has been not to investigate and prosecute, but to move them...this is not just in the United States where this is happening. This is all over the world. You see the same pattern and practice no matter what country you go to.”<sup>411</sup>

520. Professor Patrick Parkinson, an adviser to the Australian Catholic bishops, made the same observation.<sup>412</sup> Professor Marie Keenan: says that investigations throughout the world shows:

“...some remarkable consistency in the patterns that can be discerned in the Church response to the abuse complaints.”<sup>413</sup>

521. The consistent pattern was understandable because it reflected canon law and the practice of the Holy See itself.

### **The Practice of the Holy See**

522. Monsignor Scicluna, in his 2010 interview with *The Tablet* said that since 2001, when all complaints had to be sent to Cardinal Ratzinger’s CDF, 3,000 cases had been dealt with, some of them from countries with misprision of felony type laws.<sup>414</sup> In 2012, the number had risen to more than 4,000.<sup>415</sup> The terms of *SST 2001* and *SST 2010* were that the matter was to be reported to the Congregation, and it would instruct the bishop how to proceed. In the 15 years since that was in force, and despite all the allegations of cover up, and statements by the Holy See in 2010 that there should be cooperation with the civil authorities, it has not produced one instance where it has instructed the bishop to report the matter to the civil authorities, or where it has reported the matter itself.

<sup>411</sup> <http://vimeo.com/654677> at 20.2mins(Accessed 12 September 2013)

<sup>412</sup> *The Smith Lecture 2013: Child Sexual Abuse and the Churches – a Story of Moral Failure?* <http://smithlecture.org/sites/smithlecture.org/files/downloads/lecture/smith-2013-transcript.pdf> (Accessed 25 October 2013)

<sup>413</sup> *Child Sexual Abuse and the Catholic Church, Gender, Power and Organizational Culture*, Oxford University Press (2012), at loc 5034

<sup>414</sup> <http://www.thetablet.co.uk/article/14451> (Accessed 30 April 2013)

<sup>415</sup> <http://blogs.voanews.com/breaking-news/2012/02/08/vatican-prosecutor-denounces-deadly-culture-of-silence/> (Accessed 16 July 2013). On 17 January 2014, the Vatican released figures for 2011 and 2012. There were an additional 418 new cases of allegations of abuse of minors made in 2012: <http://ncronline.org/blogs/ncr-today/anatomy-now-you-see-it-now-you-dont-vatican-denial> (Accessed 21 January 2012). The earlier report of 4,000 was made on 12 February 2012, so it is highly likely that the 418 cases was in addition to those.

523. In December 2013, the United Nations Committee for the Rights of the Child asked the Holy See to provide data relating to abuse cases it has dealt with. On 5 December 2013, the Holy See initially refused, but on 16 January 2014, Archbishop Tomasi told the Committee that they would “consider it”.<sup>416</sup> On 17 January, 2014, some figures were produced in a spreadsheet about complaints and dismissals from 2005 on. The information did not contain any information of whether any of these crimes had been reported to the civil authorities.<sup>417</sup>

## The Practice of the Bishops

### The John Jay Report (United States)

524. The consistent pattern of how canon law operated is illustrated by the 2004 study done by the John Jay College of Criminal Justice in New York, commissioned by the American bishops. Their report, entitled, *The Nature and Scope of the Problem of Sexual Abuse of Minors by Catholic Priests and Deacons in the United States 2004* looked at some 4,000 priests involved in sexual abuse of minors, and it studied the extent of reporting to the civil authorities. Only 15% were reported to the police by the victim, and a much smaller percentage were reported by a diocese or religious community. Only 217 were criminally charged.<sup>418</sup>

525. The Report examined 10,519 substantiated allegations against priests. Only 3.6% of the priests involved were removed from the ministry. Another 3.7% sought laicisation, 18.7% resigned or retired, and 26.3% had either died or were no longer in active ministry. That left some 48% who were reprimanded, given administrative leave, sent to spiritual retreats or treatment, suspended, or some other action taken.<sup>419</sup>

### The Report of the Massachusetts Attorney General 2003

526. On 23 July 2003, the Massachusetts Attorney General delivered his report entitled, *The Sexual Abuse of Children in the Roman Catholic Diocese of Boston*. He stated:

<sup>416</sup> <http://www.theglobeandmail.com/news/world/un-rights-committee-grills-vatican-over-its-handling-of-child-sex-abuse/article16370203/> (Accessed 17 January 2014).

<sup>417</sup> <http://worldnews.nbcnews.com/news/2014/01/17/22340073-pope-benedict-defrocked-400-priests-in-2-years-report?lite> (Accessed 17 January 2014)

<sup>418</sup> <http://www.jjay.cuny.edu/churchstudy/main.asp> par 3.7 (Accessed 16 July 2013). The accuracy of the numbers in this report has been questioned because the researchers relied only on answers to questionnaires sent to bishops who had an interest in underestimating the numbers. They did no independent research on the number of priests who abused children and none of the victims were interviewed. The bishops also defined the limits of the investigation. There was no investigation of the cover up by bishops: Robert Blair Kaiser: *Whistle: Tom Doyle's Steadfast Witness for Victims of Clerical Sexual Abuse*, *Caritas Communications* (2015), loc. 1969 -1991. The lead researcher, Karen Terry, instead of looking into the behaviour of bishops blamed “the increased levels of deviant behaviour in the general society”: loc. 2029.

<sup>419</sup> Id par 5.3.1

“For decades, Cardinals, Bishops and others in positions of authority within the Archdiocese chose to protect the image and reputation of their institutions rather than the safety and well-being of children. They acted with a misguided devotion to secrecy and a mistaken belief that they were accountable only to themselves.”<sup>420</sup>

527. The Report also stated:

“The Archdiocese also believed that Canon Law – the church’s internal policies and procedures – prohibited it from reporting abuse to civil authorities in most instances.”<sup>421</sup>

528. The Report describes in detail how each bishop and Church official involved with allegations of child sexual abuse dealt with it in strict confidentiality, even going to extraordinary lengths to do so.<sup>422</sup>

### **The Murphy Dublin Report**

529. Bishops throughout the world understandably interpreted canon law to mean that they could not take these allegations to the police. The Murphy Dublin Report stated:

“Most officials in the Archdiocese were, however, greatly exercised by the provisions of canon law which deal with secrecy. It was often spoken of as a reason for not informing the Gardaí about known criminal offences. A similar “culture of secrecy” was identified by the Attorney General for Massachusetts in his report on child sexual abuse in the Boston Archdiocese. In the case of that diocese, as in the case of Dublin, secrecy “protected the institution at the expense of children”.<sup>423</sup>

530. In the thirty year period covered by the Murphy Commission, there were only three Church trials of clergy sex abusers in the Archdiocese of Dublin amongst the 102 cases examined where there was credible evidence of a criminal offence.<sup>424</sup> And there was no serious reporting to the police by the Archdiocese until 2002 when Cardinal Connell decided to hand

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<sup>420</sup> <http://www.bishop-accountability.org/downloads/archdiocese.pdf> p.3 (Accessed 22 May 2015)

<sup>421</sup> *Id.*, p.53

<sup>422</sup> Fr Flatley in his first Annual Report of the Office in charge of such allegations in the Archdiocese of Boston stated: “The material in this report was collected with the utmost attention to confidentiality. Individual sections of the report were produced by those staff who have access to that specific material, however, Father Flatley is the only person who has access to the composite report i.e., all the sections. Whenever possible, the production of individual sections i.e., typing and copying etc., was done directly by the person responsible for the material and not delegated to other staff...the total report is not stored in any word processors. There are only three paper copies of the total report and they are all in Father Flatley’s control.”*Id.*, p.45

<sup>423</sup> Murphy Dublin Report Part 1 <http://www.justice.ie/en/JELR/DACOI%20Part%201.pdf/Files/DACOI%20Part%201.pdf> par 1.27, 1.28(Accessed 16 July 2013)

<sup>424</sup> <http://www.justice.ie/en/JELR/DACOI%20Fr%20Jovito%20published.pdf/Files/DACOI%20Fr%20Jovito%20published.pdf>. Par 4.60. (Accessed 15 July 2013)

over some files to the Irish police. The figures for non-reporting to the civil authorities and low levels of punishment under the Church processes are hardly surprising because of the restrictions imposed by canon law.

### The Victorian Parliamentary Inquiry Report

531. At the Victorian Parliamentary Inquiry, Archbishop Hart of Melbourne was questioned about *Crimen Sollicitationis*. He initially said that confidentiality was for the protection of the child, but he was then asked about the obligation to report such crimes to the police. He admitted that there was “too much” confidentiality in an attempt to preserve the reputation of the Church.<sup>425</sup>

532. Archbishop Hart was then asked about a predecessor, the late Archbishop Little, Archbishop of Melbourne from 1975 to 1996, who kept no records of allegations against two notorious clergy sex abusers. He agreed that in failing to keep records, Archbishop Little was covering up “the foulest crime”, but he said that the person ultimately responsible was Little himself. It was then put to him that his “riding instructions from Rome were strict confidentiality”. Hart admitted that that was what *Crimen Sollicitationis* required, and that he assumed that Little abided by the rules.<sup>426</sup>

533. In evidence to the Royal Commission, Archbishop Hart was asked about Church structures.

Q. And part of that structure is effectively to keep decision making about these matters in-house?

A. I think more recently there are references made in our dealings with Rome about how we have to act in a manner which is consonant with the civil law as well as with church law and the importance of that, and I think that's been a significant change.<sup>427</sup>

<sup>425</sup>[http://www.parliament.vic.gov.au/images/stories/committees/fcdc/inquiries/57th/Child\\_Abuse\\_Inquiry/Transcripts/Catholic\\_Archdiocese\\_of\\_Melbourne\\_20-May-13.pdf](http://www.parliament.vic.gov.au/images/stories/committees/fcdc/inquiries/57th/Child_Abuse_Inquiry/Transcripts/Catholic_Archdiocese_of_Melbourne_20-May-13.pdf) p. 11 (Accessed 18 June 2013)

<sup>426</sup> Id p.12 -13 and 35. Frank Little was Archbishop of Melbourne from 1974 until 1996, that is, the year in which *Secreta Continere* was promulgated. It extended the Church's highest form of secrecy outside the confessional even to the allegation. *Crimen Sollicitationis* was still in force as the procedure to be followed for the sexual abuse of children and would continue to be in force until the promulgation of the 1983 *Code of Canon Law*, but the secrecy imposed during his time as Archbishop came from *Secreta Continere*. A former Melbourne priest, Philip O'Donnell who eventually resigned over the way the Church was dealing with clergy sexual abuse, told the Royal Commission that Archbishop Little “would try everything not to cause a problem or a scandal, and he was particularly loyal to Rome.” When asked what Rome had to do with the cover up of sexual abuse, he replied, “I don't think there's much doubt that Rome pulled the strings and instructed various Bishops around Australia, around the world, how to handle the matter.”:

<http://www.childabuseroyalcommission.gov.au/case-study/dfd4d51d-77aa-4ec1-ac0a-cde229940650/case-study-35,-november-2015,-melbourne.aspx> Transcript p. 13215. (Accessed 26 November 2015)

<sup>427</sup> Royal Commission Case Study No. 35, 30 November 2015, Transcript p.13642

534. The only inference from this answer is that prior to 2010 canon law did forbid reporting to the police and required bishops to breach the civil law where there was a requirement to report.
535. The Victorian Parliamentary Committee Report *Betrayal of Trust* states that the extent to which the Church in Australia followed the secrecy provisions of canon law is not known. But, it said:

“... given the clergy’s obligations to be obedient, and the Church’s hierarchical structure, the Committee believes it is reasonable to think that Church members followed the instruction. At the very least, the instruction would have been highly influential. This could partly explain why an apparent policy of concealment continued for the next 30 years. Certainly, the instruction would have provided comfort to those who were reluctant to attract public embarrassment or expose fellow religious to criminal prosecution by reporting their offending. It probably also increased perpetrators’ sense of freedom to act, and let them assume that their Church would protect them if their crimes were detected.”<sup>428</sup>

#### Reporting of Clergy Sexual Abuse in Australia

536. The extent to which the Church in Australia followed the secrecy provisions of canon law is not known at least publicly.<sup>429</sup> Nevertheless, a comparison with what happened in New South Wales, compared to Victoria is instructive. The State of Victoria abolished misprision of felony in 1981 and replaced it with a formulation that did not match the common law one, requiring some positive impediment to a police investigation or some benefit being received for concealing the crime.<sup>430</sup> In Victoria, the *Children, Youth and Families Act 2005* (Vic) that required certain people to report children at risk did not apply to clergy.
537. The *Crimes Amendment (Protection of Children) Act 2014* was passed by the Victorian Parliament and assented to on 3 June 2014, and has similar provisions to S.316 of the *Crimes Act 1900 (NSW)* relating to the abuse of vulnerable persons, and applies generally. It was

<sup>428</sup> *Betrayal of Trust*, Report of the Victorian Parliamentary Committee, par 1.3, page 11 <https://s3-ap-southeast-2.amazonaws.com/family-and-community-development-committee/Inquiry+into+Handling+of+Abuse+Volume+1+FINAL+web.pdf>

<sup>429</sup> *Betrayal of Trust*, Report of the Victorian Parliamentary Committee, par 1.3, page 11 <https://s3-ap-southeast-2.amazonaws.com/family-and-community-development-committee/Inquiry+into+Handling+of+Abuse+Volume+1+FINAL+web.pdf>

<sup>430</sup> *S.322B Crime (Classification of Offences Act) (Vic) 1981*  
[http://www.austlii.edu.au/au/legis/vic/hist\\_act/cooa1981292.pdf](http://www.austlii.edu.au/au/legis/vic/hist_act/cooa1981292.pdf)

See also advice of Nicholas Pappas SC to the Victorian Parliamentary Inquiry  
<http://www.parliament.vic.gov.au/images/stories/committees/fcdc/inquiries/57th/Child+Abuse+Inquiry/Submissions/COIN+9.pdf> (Accessed 10 February 2013).

- proclaimed to commence on 27 October 2014.<sup>431</sup> However, prior to 2014, there was no obligation on Church personnel in Victoria to make any report of child sexual abuse to the civil authorities.
538. The *Towards Healing* protocol drawn up by the ACBC required reporting to the civil authorities where the civil law required it from its inception in 1996 until 2010.<sup>432</sup> In 2010, it required reporting irrespective of whether there was an obligation under the civil law to do so. As indicated above, there was no obligation under the civil law on Victorian Church personnel to report.
539. On 18 October 2012, the Victoria Deputy Police Commissioner, Graham Ashton told the Victorian Parliamentary Inquiry that of the 620 cases of clergy sex abuse dealt with internally by the four Victorian dioceses since 1996, none had been reported by the Church to the police.<sup>433</sup> The Victorian Church's submission to the Inquiry did not dispute that figure, but a later submission on behalf of the Archdiocese of Melbourne said it was 611 in total, with 304 dealt with by the Melbourne Archdiocese's *Melbourne Response* protocol and the balance of 307 by the *Towards Healing* protocol of the other three Victorian dioceses.<sup>434</sup>
540. Mr Peter O'Callaghan QC, the Melbourne Response's Independent Commissioner who handled 304 complaints said that the majority of them had been reported by the victims.<sup>435</sup>

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<sup>431</sup> <http://www.gazette.vic.gov.au/gazette/Gazettes2014/GG2014S350.pdf> (Accessed 14 Oct 2014). S.327(2) Crimes Act 1958 now provides that "subject to subsections (5) and (7), a person of or over the age of 18 years (whether in Victoria or elsewhere) who has information that leads the person to form a reasonable belief that a sexual offence has been committed in Victoria against a child under the age of 16 years by another person of or over the age of 18 years must disclose that information to a member of the police force of Victoria as soon as it is practicable to do so, unless the person has a reasonable excuse for not doing so." Subsection (5) provides a defence if the victim requested that it not be reported. Subsection (7) provides protection for privileged information under the Evidence Act. The legislation extends to historical abuse and not just to children "at risk" at the time of receiving the information.

<sup>432</sup> Bishop Geoffrey Robinson told the Royal Commission was under the impression that the reporting laws in other Australian jurisdictions were the same as in New South Wales where there was an obligation to report virtually all abuse under S.316 of the Crimes Act 1900 (NSW). In other words, he thought the original formulation of *Towards Healing* effectively created mandatory reporting under the protocol. He said that it was "only recently" that he found out that the laws of the other States and Territories were not the same: Statement of Bishop Geoffrey Robinson, Exhibit # 31-001, CTJH.303.01002.0002\_R, page 1.

<sup>433</sup> For the terms of reference and the submissions, see [http://www.parliament.vic.gov.au/images/stories/committees/fcdc/inquiries/57th/Child\\_Abuse\\_Inquiry/Final\\_FCDC\\_CAI\\_n\\_ROs\\_Submission\\_Guide.pdf](http://www.parliament.vic.gov.au/images/stories/committees/fcdc/inquiries/57th/Child_Abuse_Inquiry/Final_FCDC_CAI_n_ROs_Submission_Guide.pdf) (Accessed 3 July 2013).

[http://www.parliament.vic.gov.au/images/stories/committees/fcdc/inquiries/57th/Child\\_Abuse\\_Inquiry/Right\\_of\\_Reply/Right\\_of\\_Reply\\_Francis\\_Moore.pdf](http://www.parliament.vic.gov.au/images/stories/committees/fcdc/inquiries/57th/Child_Abuse_Inquiry/Right_of_Reply/Right_of_Reply_Francis_Moore.pdf) (Accessed 10 August 2013)

<sup>434</sup> [http://www.parliament.vic.gov.au/images/stories/committees/fcdc/inquiries/57th/Child\\_Abuse\\_Inquiry/Submissions/Catholic\\_Church\\_in\\_Victoria.pdf](http://www.parliament.vic.gov.au/images/stories/committees/fcdc/inquiries/57th/Child_Abuse_Inquiry/Submissions/Catholic_Church_in_Victoria.pdf) (Accessed 6 April 2013) p. 3, and

[http://www.parliament.vic.gov.au/images/stories/committees/fcdc/inquiries/57th/Child\\_Abuse\\_Inquiry/Right\\_of\\_Reply/Right\\_of\\_Reply\\_Francis\\_Moore.pdf](http://www.parliament.vic.gov.au/images/stories/committees/fcdc/inquiries/57th/Child_Abuse_Inquiry/Right_of_Reply/Right_of_Reply_Francis_Moore.pdf) (Accessed 10 August 2013)

<sup>435</sup> [http://www.parliament.vic.gov.au/images/stories/committees/fcdc/inquiries/57th/Child\\_Abuse\\_Inquiry/Right\\_of\\_Reply/Right\\_of\\_Reply\\_P.\\_O'Callaghan\\_Part\\_1.pdf](http://www.parliament.vic.gov.au/images/stories/committees/fcdc/inquiries/57th/Child_Abuse_Inquiry/Right_of_Reply/Right_of_Reply_P._O'Callaghan_Part_1.pdf) (Accessed 3 July 2013). The Royal Commission found that O'Callaghan had

In fact, he had investigated 350 complaints, and 29% had been reported to the police prior to the victim approaching the Melbourne response. Only 17 of the remaining 233, or 7%, were reported after the victims had been interviewed by Mr. O'Callaghan.<sup>436</sup> He said that he had "effectively" referred complaints to the police by making appointments for victims who were willing to go to the police to do so.<sup>437</sup> But the whole point that Ashton was making, and Victorian Parliamentary Committee accepted, was that *the Church* had never reported any of these incidents to the police.<sup>438</sup> This was not surprising because O'Callaghan had agreed to abide by canon law, and was also carrying out the preliminary inquiry under Canon 1717.<sup>439</sup> O'Callaghan explained his failure to report these crimes to the police on the basis of his confidentiality undertaking to the complainant, and that it would have been "futile" unless the complainant was prepared to go to the police.<sup>440</sup>

541. Mr O'Callaghan was in a position of conflict when advising complainants of their right to go to the police. The Royal Commission made the following finding:

We are satisfied that Mr O'Callaghan QC provided advice about the police process to Mr Hersbach and Mr AFA that discouraged them from going to the police. Having regard to Mr O'Callaghan QC's defined role, this advice was not appropriate. Advice about the approach that the police might take to any prosecution, and the likely outcome, should have been left to the police. They were the body with all of the relevant information.<sup>441</sup>

542. In the three other dioceses in Victoria, none of the bishops reported any of their 307 complaints to the police. They were not obliged to do so under the civil law and *Towards Healing* until 2010 did not require reporting if there was no legal obligation to do so. But

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found 326 cases of abuse by 77 different individuals established. 84% of the abusers were diocesan priests. Opening Address of Gail Furness SC, par 112,113, <http://www.childabuseroyalcommission.gov.au/case-study/791fd480-ba30-45bc-ba79-cbad85f27023/case-study-16,-august-2014,-melbourne> (Accessed 18 August 2014)

<sup>436</sup> Id, par 120. On 19 August 2014, O'Callaghan said that there were 81 priests, religious and lay persons against whom he had made findings of sexual abuse, but who had not been reported to the police. Of that number, 39 priests were deceased at the time the complaint was made, 17 were still living, and the balance were: 1 deacon, 8 religious priests, 1 religious brother, 5 religious sisters, 10 lay persons, and 15 unidentified offenders: transcript, 4236

<sup>437</sup> [http://www.parliament.vic.gov.au/images/stories/committees/fcdc/inquiries/57th/Child\\_Abuse\\_Inquiry/Right\\_of\\_Reply/Right\\_of\\_Reply\\_P.\\_OCallaghan\\_Part\\_1.pdf](http://www.parliament.vic.gov.au/images/stories/committees/fcdc/inquiries/57th/Child_Abuse_Inquiry/Right_of_Reply/Right_of_Reply_P._OCallaghan_Part_1.pdf) page 3(c) (Accessed 25 June 2013)

<sup>438</sup> *Betrayal of Trust*, Report of the Victorian Parliamentary Committee, par 7.3.6, page 170 [https://s3-ap-southeast-2.amazonaws.com/family-and-community-development-committee/Inquiry+into+Handling+of+Abuse\\_Volume+1\\_FINAL\\_web.pdf](https://s3-ap-southeast-2.amazonaws.com/family-and-community-development-committee/Inquiry+into+Handling+of+Abuse_Volume+1_FINAL_web.pdf) (Accessed 14 November 2013)

<sup>439</sup> Opening Address of Gail Furness SC, par 25, <http://www.childabuseroyalcommission.gov.au/case-study/791fd480-ba30-45bc-ba79-cbad85f27023/case-study-16,-august-2014,-melbourne> (Accessed 18 August 2014)

<sup>440</sup> Ibid, Statement O'Callaghan, page13 and 14, Exh STAT.0320.001.0001\_R. The original Melbourne Response document, and the terms of the Commissioner's appointment had a provision that subject to confidentiality obligations, the Commissioner "may, if he considers it appropriate, report matters to the police": Exh COM.1001.0001.0009. That does not appear on the public brochure subsequently provided by the Melbourne Archdiocese.

<sup>441</sup> Report of Case Study No 16, the Melbourne Response, p.23

their failure to report is also consistent with these bishops abiding by the pontifical secret imposed by canon law.

543. In New South Wales where there was an obligation to report all cases of sex abuse to the police, Church officials found a way around canon law. Any complaints of sexual abuse were referred to Fr John Usher, a social worker, for counselling. He or another counsellor would then report the matter to the police as was required by S.316 of the *Crimes Act 1900*. Disclosure by a victim of sexual abuse to a counsellor was not an “extrajudicial denunciation” under *Secreta Continere*. In that way the civil law was complied with and the bishops avoided breaching the pontifical secret under canon law.<sup>442</sup>
544. Two Australian cases and a paper delivered by a senior Australian cleric illustrate the consistency with which bishops acted in accordance with canon law.<sup>443</sup>

#### **1994: Bishop Bede Heather and the St. Gerard Majella Society**

545. In 1994 there were allegations of sex crimes against some members of the St. Gerard Majella Society, which operated in Bishop Bede Heather’s Diocese of Parramatta. The Society had been founded by Fr John Sweeney in 1958 to conduct religious classes for Catholic students in State high schools.<sup>444</sup> It recruited young men to become brothers, some being upgraded to priests. Bishop Heather engaged a canon lawyer, Fr Rodger Austin and another priest, Peter Blayney to carry out an investigation. The victims eventually reported the matter to the police who then approached Bishop Heather to hand over any documents relating to the allegations, including statements of witnesses and Fr Austin’s report. Bishop Heather refused. The police obtained a search warrant, and executed it at his presbytery and the Archdiocesan offices, seizing documents. Three of the priests belonging to the Society, including its founder were sentenced to jail terms ranging from 2 to 6 years, and shortly before the sentencing of one of them, Bishop Heather resigned.<sup>445</sup>

<sup>442</sup><https://cdn.fairfaxregional.com.au/transcripts/inquiry/Exhibit%20226%20Statutory%20Declaration%20of%20Monsignor%20Usher.pdf> (Accessed 10 September 2013).

[http://www.lawlink.nsw.gov.au/lawlink/Special\\_Projects/II\\_splprojects.nsf/vwFiles/Day\\_22\\_-\\_9\\_September\\_2013.pdf/\\$file/Day\\_22\\_-\\_9\\_September\\_2013.pdf](http://www.lawlink.nsw.gov.au/lawlink/Special_Projects/II_splprojects.nsf/vwFiles/Day_22_-_9_September_2013.pdf/$file/Day_22_-_9_September_2013.pdf) p. 2361 (Accessed 11 September 2013). The action taken by Usher in NSW was in accordance with the advice of Elizabeth Delaney that complaints of sexual abuse should not go to the bishop or to someone higher than the accused in the hierarchy: *Canonical Implications of the Response of the Catholic Church in Australia to Child Sexual in Australia*, a doctoral dissertation submitted to the Faculty of Canon Law, Saint Paul University, Ottawa, Canada, (2004), footnote 61.

<sup>443</sup> More examples within and outside Australia can be found in the author’s *Potiphar’s Wife*, ch 15, p. 207

<sup>444</sup> <http://brokenrites.org.au/drupal/node/12>

<sup>445</sup> Various aspects of the case were reported in some newspapers: Sydney Daily Telegraph 19-7-1997, 13-11-1997, Sydney Morning Herald 13-11-1997, 3-3-1998, 4-3-1998, 28-3-1998; The Australian, 23-12-1994, p13, Sydney Sun-Herald 16-11-



546. In May 1996, two years after Bishop Heather refused to hand over the files, the Irish police made a similar demand on Monsignor Stenson, a canon lawyer and Chancellor of the Archdiocese of Dublin. Stenson refused to give them a copy or an opportunity to look at it. In the words of the Murphy Commission:

“He refused stating he would need legal advice first. He said that canon law did not permit him to give permission for the file to be read.”<sup>446</sup>

547. Twenty years later after Bishop Heather refused to hand over Rodger Austin’s report, Austin himself, who by then had left the priesthood but still practiced as a canon lawyer, gave evidence to the Cunneen Special Commission. He was asked this:

Q. So, for example, anyone who had previously taken an oath of secrecy and who was then required to give evidence in a civil court - tell me if this is wrong as a proposition - would not be restrained by canon law or church law from giving full evidence?

A. I think that if it was a matter where the law clearly said that - I'm thinking, for example, of tribunal work where this confidentiality is involved, if it was said that what you learned in that process had to be given under civil law, my view would be that one would seek to be dispensed from that obligation in that particular case.<sup>447</sup>

548. Austin did not say who could provide the dispensation, but Canon 87 says that it would have to come from the Holy See.<sup>448</sup> Austin’s statement is consistent with the opinions expressed by other canon lawyers, Fr Maurice Dooley and Professors Beal, Cafardi and Waters.

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1997, p56 <http://brokenrites.alphalink.com.au/nletter/page12.html> (Accessed 16 July 2013), [http://www.bishop-accountability.org/reports/2000\\_Coldrey\\_Integrity/integrity\\_23.htm#pp4](http://www.bishop-accountability.org/reports/2000_Coldrey_Integrity/integrity_23.htm#pp4) (Accessed 10 March 2015), Alex Mitchell in Sydney Morning Herald 16 November 1997 [http://newsstore.smh.com.au/apps/viewDocument.ac?page=1&sy=smh&kw=Bede+Heather&pb=all\\_ffx&dt=selectRange&dr=entire&so=relevance&sf=text&sf=headline&rc=10&rm=200&sp=nrm&clsPage=1&docID=news971116\\_0147\\_3012](http://newsstore.smh.com.au/apps/viewDocument.ac?page=1&sy=smh&kw=Bede+Heather&pb=all_ffx&dt=selectRange&dr=entire&so=relevance&sf=text&sf=headline&rc=10&rm=200&sp=nrm&clsPage=1&docID=news971116_0147_3012) (Accessed 10 March 2015).

<sup>446</sup> Murphy Dublin Report, part 2, par 13.39.

<http://www.justice.ie/en/JELR/DACOI%20Part%202.pdf/Files/DACOI%20Part%202.pdf> (Accessed 23 Dec 2015).

<sup>447</sup> [http://www.lawlink.nsw.gov.au/lawlink/Special\\_Projects/ll\\_splprojects.nsf/vwFiles/Transcript\\_Day\\_20\\_-\\_TOR\\_2\\_-\\_31\\_July\\_2013.pdf/\\$file/Transcript\\_Day\\_20\\_-\\_TOR\\_2\\_-\\_31\\_July\\_2013.pdf](http://www.lawlink.nsw.gov.au/lawlink/Special_Projects/ll_splprojects.nsf/vwFiles/Transcript_Day_20_-_TOR_2_-_31_July_2013.pdf/$file/Transcript_Day_20_-_TOR_2_-_31_July_2013.pdf), (Accessed 29 March 2015), p.2233

<sup>448</sup> Canon 87, and *Beal, Coriden and Green, New Commentary on the Code of Canon Law* p.130-132. Canon 85 provides ‘A dispensation, or the relaxation of a merely ecclesiastical law in a particular case, can be granted by those who possess executive power within the limits of their competence, as well as by those who have the power to dispense explicitly or implicitly either by the law itself or by legitimate delegation.’ Canon 87 provides that a bishop: “is not able to dispense, however, from procedural or penal laws nor from those whose dispensation is specially reserved to the Apostolic See or some other authority.’ See also Delaney, *Canonical Implications* p. 182 says: “a diocesan bishop cannot dispense from procedural laws or from penal laws.”

549. Bishop Heather's refusal to hand over the documents relating the inquiry conducted by Frs Austin and Blayney was consistent with his acting in accordance with the pontifical secret, and consistent with the current practice of the Holy See not to provide dispensations to hand over such documents to the civil authority.<sup>449</sup>

**1996: Fr. Brian Lucas: *Are Our Archives Safe?***

550. From about 1988 onwards, Fr Brian Lucas who was also a civil lawyer had been part of a "special issues" committee to find ways of dealing with priests and religious who had sexually abused children. At the Royal Commission in Case No. 13, Fr Lucas gave evidence about his practice of trying to convince these offenders to resign to avoid the necessity of having to commence canonical proceedings against them.

"Q. Whilst on the topic of canon law, are you able to enlighten us as to whether or not canon law, as at the mid to late 1980s, had anything to say about a cleric or religious engaged in sexual assault of a child?

A. Yes, sexual assault of a child was of course a crime in church law. The difficulty we had with the code of canon law was the question of due process and the need for, obviously, statements by witnesses. This is in the context, of course, of people who have refused to go to the police, who have absolutely no protection in giving statements in a canonical trial - there is no privilege attaching to that - and the practice was thought to be somewhat unworkable. Now, that's a contentious issue among the canon lawyers. For those of us that tried to deal with these men in a way that, to some extent, put some pressure on them to resign and to step outside the formal due process, we were criticised by some of the canon lawyers for that - and I understand why - but the general understanding at the time was that the canon law was deficient in that it required a fairly detailed and sophisticated process in order to come to a decision to laicise someone or to remove them from ministry."<sup>450</sup>

551. Fr Lucas has stated on a number of occasions, both to the Cunneen Special Commission and to this Royal Commission that his attempts to convince priests and religious accused of sexual crimes against children were outside the canonical system in the sense that it was not a justified procedure under canon law. In his statement above, he gave two reasons for this. The first, the unworkability of canon law, is well documented and established by its procedures being heavily weighted to protect the priest and religious by the use of secrecy

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<sup>449</sup> See the Inzoli case in Chapter 5.

<sup>450</sup> Transcript p. 3566, <http://www.childabuseroyalcommission.gov.au/case-study/4194ab1e-26a0-4d5c-83c6-30acc93c3977/case-study-13,-june-2014,-canberra-> (7 August 2015)

and by the “pastoral approach”, “imputability” and the short periods of limitation (5 years between 1983 and 2001).

552. But the second reason he gave was to protect people who had refused to go to the police and “who have absolutely no protection in giving statements in a canonical trial.” Lucas was obviously talking about the victims, and not the priests or religious accused of abusing them. Assuming there was an obligation on the victim to report such abuse to the police (and at the time, such an obligation only applied to New South Wales under S.316 of the *Crimes Act*), they may well have had a reasonable excuse for not doing so under that section. On the other hand, and more importantly, the lack of “protection” was much more significant for the accused priest or religious and for those involved in the canonical process, which was invariably a written one.
553. The protection of the victim was not the reason that Fr Lucas gave in evidence elsewhere about his practice of not keeping notes. Fr Lucas dealt with about 35 priests in trying to convince them to agree to voluntary laicisation, in the period 1990-1995/96.<sup>451</sup> The reason he then gave for not keeping notes was because, had he done so, the priest would not agree to talk with him. When asked why he did not take notes afterwards, he said that in fairness the priest “ought to see them and endorse them as accurate”.<sup>452</sup> Fr Lucas had been a practising solicitor before becoming a priest, and this explanation is difficult to accept given the universal practice of lawyers to keep notes without having to check with the other party to the conversation that the notes are accurate.
554. Further, in a paper written in 1996 for the Canon Law Society of Australia and New Zealand, “*Are Our Archives Safe: An Ecclesial View of Search Warrants*”, two years after the police had issued a search warrant on the presbytery and diocesan offices of Bishop Bede Heather in Parramatta, Fr Lucas’s concerns were not about the “protection” of victims, but about protecting priests and religious (as well as others involved in annulments cases) who might make damaging admissions in the canonical proceedings.

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<sup>451</sup> Transcript 24 July 2013, p 1568 and 1632

<sup>452</sup> Ibid, 1563, 1632. Lucas’s colleague, Fr John Usher had the practice of taking notes after a meeting with a priest or a victim. [http://www.lawlink.nsw.gov.au/lawlink/Special\\_Projects/ll\\_splprojects.nsf/vwFiles/Day\\_22\\_-\\_9\\_September\\_2013.pdf/\\$file/Day\\_22\\_-\\_9\\_September\\_2013.pdf](http://www.lawlink.nsw.gov.au/lawlink/Special_Projects/ll_splprojects.nsf/vwFiles/Day_22_-_9_September_2013.pdf/$file/Day_22_-_9_September_2013.pdf) p. 2360 (Accessed 11 September 2013)

555. Lucas described his paper as “an academic paper raising questions for canon lawyers to further reflect on and discuss” and was not making “authoritative recommendations”.<sup>453</sup> He discussed the problem where parties to canonical proceedings might have been assured of confidentiality, and may have made admissions that they might not otherwise have made.<sup>454</sup> He concluded that no form of privilege attached to such documents produced in Church tribunal proceedings under the civil law.<sup>455</sup> While he warned against selective destruction of documents, he wrote,

“There we may need to ask, in an extreme case, should the process even begin. Should the statement be taken? There may be cases that appear to be so sensitive that it is in the best interests of the parties, or one of them, and of the Church, that the documents not be created in the first place.”<sup>456</sup>

556. Fr Lucas’s analysis of Australian civil law on privilege was impeccable. But the question remains as to whether he was inviting canon lawyers and their clients, the bishops and religious superiors, to flout canon law by refusing to initiate a preliminary inquiry under Canon 1717 in “an extreme case” of child sexual abuse by clergy or the disciplinary procedures under Canons 694-700 in respect of religious.

557. There is one important difference between canon law and civil law. Both civil law and canon law provide for order in the affairs of the State and the Church respectively. But civil law has as its end purpose the good of the community. The end purpose of canon law is stated to be the spiritual good of the members of the Church and ultimately their eternal salvation.<sup>457</sup> The very last canon in the *1983 Code of Canon Law* provides that “the salvation of souls...must always be the supreme law of the Church.”<sup>458</sup> One result of that is described by the canon lawyer, James A. Coriden, one of the authors of the *New Commentary on the Code of Canon Law*:

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<sup>453</sup> Fr Brian Lucas : *Are Our Archives Safe? An Ecclesial View of Search Warrants*, at 69, referred to at [http://www.lawlink.nsw.gov.au/lawlink/Special\\_Projects/ll\\_splprojects.nsf/vwFiles/Transcript\\_Day\\_15\\_-\\_TOR\\_2\\_-\\_24\\_July\\_2013.pdf/\\$file/Transcript\\_Day\\_15\\_-\\_TOR\\_2\\_-\\_24\\_July\\_2013.pdf](http://www.lawlink.nsw.gov.au/lawlink/Special_Projects/ll_splprojects.nsf/vwFiles/Transcript_Day_15_-_TOR_2_-_24_July_2013.pdf/$file/Transcript_Day_15_-_TOR_2_-_24_July_2013.pdf) (Accessed 6 April 2015) , 1621, 1629.

<sup>454</sup> Page 54: “A greater risk is that admission of guilt of a criminal offence by a party, either in marriage cases or a canonical penal process, could be used in the civil forum. This is of serious concern if the person felt induced to make the admission on the basis of a promise of confidentiality.” If the Church gave such a promise of confidentiality, it was misleading because it could not resist a subpoena or a search warrant.

<sup>455</sup> Page 68 -69 of the paper: ‘In order to attract legal professional privilege the document must have been brought into existence solely for purpose of obtaining legal advice.’

<sup>456</sup> Id page 73

<sup>457</sup> James A Coriden: *The Doctrine of Reception*: [http://www.arcc-catholic-rights.net/doctrine\\_of\\_reception.htm](http://www.arcc-catholic-rights.net/doctrine_of_reception.htm) (Accessed 22 May 2015)

<sup>458</sup> Canon 1752

“Actions which are taken in contravention of canonical rules still very often achieve their basic religious purposes.”<sup>459</sup>

558. While one of the justifications for secrecy was the preservation of the reputations of the parties involved, the more important religious one was the avoidance of scandal, understood in the technical Catholic sense of the loss of faith of adherents because of the behaviour of clergy and religious.
559. The canonical system of investigation and trial for clerics is almost entirely a written one. Everything has to be reduced to writing and they form the “acts” of the proceedings to be kept in the secret archive. But the same emphasis on writing also applies in Canons 694-700 dealing with religious.
560. In countries like Australia and New Zealand which do not recognise any form of privilege attaching to canonical investigations and trials, the religious purpose of avoiding scandal is severely hampered if civil authority could force production of the documents these tribunals create.
561. Lucas could also justify his advice about not commencing the preliminary inquiry in “an extreme case” on the basis of the canonical doctrine of *epikeia*, from which the English civil law notion of equity is derived. *Epikeia* or canonical equity covers a situation where there is a “lacuna” in the law, and is based on the presumed intention of the legislator in a situation where canon law does not adequately achieve its particular purpose.<sup>460</sup> Canon law cannot achieve its particular purpose of avoiding the scandal of child sexual abuse by clergy and religious where the civil laws of a particular country do not recognize that documents created in canonical tribunals are protected by some form of privilege. The canonical purpose of avoiding scandal could best be achieved by not having anything in writing. This was the practice adopted by Archbishop Little in Melbourne and Bishop Mulkearns in Ballarat long before Fr Lucas wrote his article.<sup>461</sup>

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<sup>459</sup> James A Coriden: *The Doctrine of Reception*: [http://www.arcc-catholic-rights.net/doctrine\\_of\\_reception.htm](http://www.arcc-catholic-rights.net/doctrine_of_reception.htm) (Accessed 22 May 2015)

<sup>460</sup> Coughlin: *Canon Law and the Human Person*, Journal of Law and Religion, (2003) Vol 19, 43 [http://scholarship.law.nd.edu/cgi/viewcontent.cgi?article=1735&context=law\\_faculty\\_scholarship](http://scholarship.law.nd.edu/cgi/viewcontent.cgi?article=1735&context=law_faculty_scholarship) (Accessed 21 July 2014). “Equity is an ethical principle by which judges and superiors apply the law with mercy. Avoiding mere juridical formalism, they seek an interpretation and enforcement of the law that, while faithful to the law’s meaning, take into account the situation of persons and the concrete circumstances of the case, bearing in mind the overall purpose of the law, which is to promote the common good and the *salus animarum* (“salvation of souls”)(cf c.1752)”: Beal, Coriden and Green: *New Commentary on the Code of Canon Law*, p.29

<sup>461</sup> See par 532 above and 571 below.

562. Bearing in mind that senior Curia and other Cardinals, and some senior canon lawyers especially in the period 2001-2002, were claiming this privilege over all communications between bishops and priests, and that the Church in the United States had been unsuccessfully trying to have this recognized by American civil law, there was ample justification in canon law for Fr Lucas doing what he did.<sup>462</sup> Nor was he going to be criticized by his superiors in Rome, particularly when the Prefect of the Congregation for the Clergy was advising bishops that they should be prepared to go to jail rather than report a paedophile priest.<sup>463</sup>

563. In his concluding remarks to his article for the Canon Law Society of Australia and New Zealand, *Are Our Archives Safe?*, Fr Lucas wrote that there was growing community sentiment to extend mandatory reporting to clergy, and that failure to report might be seen as an “active cover-up”.

“One way of avoiding such provisions is not to acquire the knowledge in the first place. It seems rather problematic, however, that one should deliberately embark upon such a policy with the stated intention of remaining ignorant in order to avoid co-operating with authorities. The only justification for a policy of calculated ignorance would be a desire to avoid a conflict of duties. There are legitimate rights about privacy and there is a right which an accused person has to remain silent. Against this is the need to protect people from harm. If, through a tribunal process, it comes to light that a person is abusing children, might it not be argued that the greater good would be served by disclosing this concern to the authorities. Is this a higher value than the value of preserving the confidentiality of the church process? This is a matter that is at least worth discussing.”<sup>464</sup>

564. It might have been a matter for a future discussion, but it was not something he had put into practice in the previous 6 years when dealing with child sex abusing priests. Fr Lucas did not think that there was a “greater good” in disclosing child sexual abuse to the civil authorities over preserving the “confidentiality of the church process”. This is hardly surprising because, apart from the plain words of canon law, the priority of such confidentiality was stated repeatedly by Curia Cardinals and canon lawyers in the following years, and particularly in the period 2001 -2002 after the promulgation of *SST 2001*. It is still being stated today by the rejection of Pope Francis of mandatory reporting under canon law in those countries that have no or inadequate reporting laws.

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<sup>462</sup> There were a number of concordats between the Holy See and predominantly Catholic countries that provided for a form of privilege attaching to communications between bishops and priests in their “ministry” or “sacred ministry”. Amongst these were Italy, Nazi Germany and Franco’s Spain. See par 240ff above

<sup>463</sup> See Chapter 7.

<sup>464</sup> Fr Brian Lucas : *Are Our Archives Safe?* p.74

565. The *1983 Code of Canon Law* itself has a privilege against self-incrimination. Canon 1728§2 provides:

“The accused is not bound to confess the delict nor can an oath be administered to the accused.”

566. In any proceedings under canon law, whether against a priest or religious, the accused is fully protected against self-incrimination by refusing to answer questions or to give evidence.<sup>465</sup> The accused in a canonical trial is in exactly the same position as one in a civil trial – he has the right to silence.

567. That raises the question of what it was that Fr Lucas was concerned about if a subpoena was to be issued by a civil court for the production of the canonical documents. The accused could be warned beforehand in canonical proceedings that anything he says could be used in evidence against him in civil proceedings, just as these warnings are given routinely in the civil courts. If the accused had the right not to incriminate himself, then the only thing that Fr Lucas could have been concerned about coming into the hands of the civil authorities were the statements of the victims and other witnesses against the accused.

568. The real inference from Fr Lucas’s evidence is that his motivation for not having anything in writing was the protection of the Church from scandal, and this was the conclusion of the Cunneen Special Commission

“The purpose of this practice was to avoid the creation of documentary records, and a consequence of it was that documents that could later reveal to church outsiders (including the police or complainants in civil litigation) matters that might bring scandal on the Church – including admissions of child sexual abuse by a priest – did not come into existence.”<sup>466</sup>

569. This Royal Commission came to a similar conclusion in relation to not keeping notes of his discussions with Fr Nestor.

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<sup>465</sup> Delaney: *Canonical Implications* p.182 “While consent can be presumed from silence, this is not the case in a penal trial. The principle of the *regulae iuris*, he who is silent does not confess, nor does he appear to deny, is affirmed in c. 1728 §2, which ensures that an accused person is not bound to admit to an offence in a penal trial. For this reason, the oath is not administered to an accused person.”

<sup>466</sup> Report Vol 1, p 15. [http://www.dpc.nsw.gov.au/data/assets/pdf\\_file/0007/163924/Report - Volume 1 - Hunter Special Commission of Inquiry.pdf](http://www.dpc.nsw.gov.au/data/assets/pdf_file/0007/163924/Report_-_Volume_1_-_Hunter_Special_Commission_of_Inquiry.pdf)

“Father Lucas accepted that an outcome of his practice of not taking notes of interviews, such as his interview with Nestor, was to ensure that was no written record of any admissions of criminal conduct in order to protect the priest or religious concerned and the Church.”<sup>467</sup>

570. The Royal Commission found that in the Melbourne Archdiocese, it was not just Archbishop Little who supported a policy of not keeping written records on child sexual abuse matters, but the whole diocesan Curia. When issues of moving a priest were discussed by the Curia, because of child sexual abuse matters, euphemisms were used in the minutes of the meeting to hide the reason for the move.<sup>468</sup> Bishop Connors, private secretary to Archbishop Little, later Vicar General and then auxiliary bishop, said that it was “a way of protecting the good name of the Church.”<sup>469</sup>

### **1971-1997 Bishop Ronald Mulkearns of Ballarat**

571. Ronald Mulkearns, the Bishop of Ballarat, had a doctorate in canon law and was one of the founders of the Canon Law Society of Australia and New Zealand. He was bishop of Ballarat from 1971 to 1997, and the first chairman of the Special Issues Committee set up by the ACBC to find a better way of dealing with child sexual abuse by priests and religious.

572. Mulkearns knew of the serious allegations against two of his priests Gerald Ridsdale and Paul David Ryan. He shifted Ridsdale to different parishes of his own diocese before he was transferred to Melbourne, Sydney and the United States.<sup>470</sup> Ryan was shifted to the United States for treatment where he continued to practice as a priest. He then returned to Melbourne and to Ballarat, where he continued to his sexual abuse of children.<sup>471</sup> He was arrested and jailed in Australia in 2006. A number of his victims committed suicide. Mulkearns destroyed a number of documents, such as reports from psychiatrists.<sup>472</sup>

573. Mulkearns actions were consistent with *Crimen Sollicitationis* and the 1983 Code of Canon Law. *Crimen Sollicitationis* determined the procedures for these allegations from the time he

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<sup>467</sup> In Case Study No. 14 re (Nestor): <http://childabuseroyalcommission.gov.au/getattachment/e1f91ddb-2ba2-4eb4-b487-c43a0c8989e4/Report-of-Case-Study-no-14-p.11> (Accessed 20 December 2014)

<sup>468</sup> Case No. 35, Melbourne Archdiocese, Trans 2 December 1915, p. C13962

<sup>469</sup> Id, p. C13963.

<sup>470</sup> <http://brokenrites.alphalink.com.au/nletter/page116-ridsdale.html> (Accessed 16 July 2013)

<sup>471</sup> <http://brokenrites.alphalink.com.au/nletter/page117-ryan.html> (Accessed 16 July 2013)

<sup>472</sup> Evidence of Bishop Connors, Victorian Parliamentary Inquiry page 16  
[http://www.parliament.vic.gov.au/images/stories/committees/fcdc/inquiries/57th/Child\\_Abuse\\_Inquiry/Transcripts/Catholic\\_Diocese\\_of\\_Ballarat\\_29-April-13.pdf](http://www.parliament.vic.gov.au/images/stories/committees/fcdc/inquiries/57th/Child_Abuse_Inquiry/Transcripts/Catholic_Diocese_of_Ballarat_29-April-13.pdf) (Accessed 24 May 2015)



became bishop in 1971 until 1983, when the new *Code of Canon Law* was promulgated, and the latter covered his time as bishop from 1983 to 1997.

- 573.1. *Crimen Sollicitationis* in Art. 11 required him to observe the “strictest confidentiality” in any investigation of sex abuse by his priests, preventing him from reporting these crimes to the police.
- 573.2. From 1974, the instruction, *Secreta Continere*, prohibited him from even reporting the allegations to the police, as well as any information from his preliminary investigation and penal trial should he commence them.
- 573.3. *Crimen Sollicitationis* Art. 42 provided that if the evidence of a crime is considered “grave enough”, but not yet sufficient to file a formal complaint, he was to “admonish” these priests “paternally” and “gravely” with a first or second warning, and to threaten them with a trial if a new accusation is brought.
- 573.4. *Crimen Sollicitationis* in Art. 63 prevented the bishop from imposing the penalty of dismissal from the priesthood unless he showed “no hope humanly speaking, or almost no hope of amendment”. The bishop’s first obligation was to try to “cure” these priests.
- 573.5. There was no limitation period under *Crimen Sollicitationis*.
- 573.6. *Crimen Sollicitationis* Art. 64 allows the bishop to shift the priest if “it seems necessary either for the amendment of the delinquent, the removal of a near occasion [of sin], or the prevention or repair of scandal.” The shifting of Ridsdale and Ryan “the removal of a near occasion of sin” and the “prevention of scandal”. The purpose of the referral to treatment centres was to “amend the delinquent.”
- 573.7. Between 1971 and 1980, Mulkearns had the option of referring the allegations then made against Ryan and Ridsdale to the CDF for an administrative dismissal, but that was abolished by Pope John Paul II in 1980.
- 573.8. Canon 1395 of the 1983 *Code of Canon Law* made the sexual abuse of children a “delict against morals”, and therefore all allegations and processes relating to them were covered by the pontifical secret under the instruction, *Secreta Continere* of 1974.
- 573.9. Canon 1362 imposed a 5 year limitation period on taking action to dismiss a priest starting from the last act of sexual abuse. If a bishop did not commence these proceedings within that time, the canonical crime was “extinguished”.
- 573.10. Canon 1341 of the 1983 *Code of Canon Law* says a bishop can only commence formal disciplinary proceedings against a priest after he is satisfied that “fraternal

correction or reproof”, or “any methods of pastoral care” cannot “repair the scandal, restore justice, reform the offender.” Attempts by bishops to “reform the offender” did not stop the limitation period from running.

- 573.11. Canon 1321 required the bishop to prove “full imputability” for dismissal. A diagnosis of paedophilia was the same as a diagnosis of insanity in civil law. Both Ridsdale and Ryan were serial paedophiles like Fr Tony Walsh and Fr Patrick Maguire in Ireland whose dismissals by the Dublin canonical court were set aside the appeal court on Rome because they had been diagnosed as paedophiles.<sup>473</sup>
- 573.12. Canon 1741 allows a bishop to remove a pastor from a parish and to shift him elsewhere because of a “loss of a good reputation among upright and responsible parishioners”.
- 573.13. Bishop Mulkearns destroyed a report about Ridsdale from the early to mid-1960s from a psychiatrist, Dr Seal, stating that he did so because one of the conditions of the engagement was that the report be destroyed after it was read.<sup>474</sup> Canon 489 of the *1983 Code of Canon Law* required the destruction of ten year old documents relating to clergy sexual abuse, kept in the secret archive of every bishop, with only a brief summary of what occurred with the text of the final sentence being retained.<sup>475</sup> But this requirement applies only to where a criminal trial has taken place. It seems that there was no canonical justification for destroying this report, and Mulkearns conceded that destroying the document could well have been “an inappropriate thing to have done”.<sup>476</sup>
574. Mulkearns’ actions not only followed the “proper meaning of the words” in canon law, but the interpretations that the Holy See itself had placed on them. They were also consistent with what virtually every other bishop in the world was doing on the advice of their canon lawyers.
575. The Victorian Parliamentary Inquiry Report concluded that the evidence showed that Mulkearns had dealt with complaints of sexual abuse in the strictest confidentiality, and had

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<sup>473</sup> For further details about these cases, see *Potiphar’s Wife*, p.216, 265, 291, and 223.

<sup>474</sup> Royal Commission, Case No. 28 (Ballarat) Exh . CTJH.120.01098.0060.

<sup>475</sup> Canon 489 provides: ‘§1. In the diocesan curia there is also to be a secret archive, or at least in the common archive there is to be a safe or cabinet, completely closed and locked, which cannot be removed; in it documents to be kept secret are to be protected most securely.

§2. Each year documents of criminal cases in matters of morals, in which the accused parties have died or ten years have elapsed from the condemnatory sentence, are to be destroyed. A brief summary of what occurred along with the text of the definitive sentence is to be retained.’

<sup>476</sup> Royal Commission, Case No. 28 (Ballarat) Exh . CTJH.120.01098.0060.

- tried to “quarantine the information as far as possible”, in accordance with the policy laid down by *Crimen Sollicitationis*.<sup>477</sup>
576. There was one aspect of Bishop Mulkearn’s actions that at first sight does not appear to be consistent with the letter of canon law. Bishop Mulkearns admitted in a 1993 interview that he “did not want to keep much in writing”, and this has been confirmed in the Royal Commission’s Case Study No. 28. One can only assume from this that he did not instigate a preliminary investigation as he was required to do under Canon 1717, where everything had to be committed to writing.
577. Fr Brian Lucas’s article, *Are Our Archives Safe?* was not published until 1996, a year before Mulkearns’ retirement, but it seems that Mulkearns had adopted the policy of having as few documents as possible long before. Had Mulkearns consulted civil lawyers about whether documents created in the course of their canonical inquiries had to be produced to a civil court, the answer would have been the same as that provided by Lucas: the only way to avoid the production of such documents was not to have any. The most likely inference one can draw from Mulkearns’ failure to keep records was the same as the Commission found with Fr Lucas: a desire to protect the Church from “scandal”, or to protect priests, or both.
578. As a canon lawyer, Mulkearns would have been aware of the purpose behind the secrecy provisions, and that on the principles of *epikeia* or canonical equity, it was permissible to ignore the strict letter of the law if the canonical purpose of avoiding the loss of faith amongst members of the Church through scandal could be better achieved by doing so. It is also significant that exactly the same policy of not keeping any notes or documents had been adopted by the Archbishop of Melbourne from 1974 to 1996, Frank Little.<sup>478</sup> Both Mulkearns and Little were doing what Fr Lucas was advising in his address to canon lawyers at the 1996 Conference of the Canon Law Society of Australia and New Zealand.
579. On 1 January 1995, Bishop Mulkearns was asked by Catholic Church Insurance investigators why he had not reported the allegations about Gerald Ridsdale to the police. He replied:

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<sup>477</sup> *Betrayal of Trust*: Report of Victorian Parliamentary Inquiry, p.42 <https://s3-ap-southeast-2.amazonaws.com/family-and-community-development-committee/Inquiry+into+Handling+of+Abuse+Volume+1+FINAL+web.pdf> (Accessed 14 November 2013)

<sup>478</sup> <http://www.parliament.vic.gov.au/images/stories/committees/fcdc/inquiries/57th/Child+Abuse+Inquiry/Transcripts/Catholic+Archdiocese+of+Melbourne+20-May-13.pdf> p. 12-13, p.35 (Accessed 18 June 2013)

“I didn't take it as my position to report it to the Police, I thought the parents were the ones to report it.”<sup>479</sup>

580. This was the same policy that had been espoused by Cardinal Castrillón in 1996-1998, and is still the Holy See's policy as shown by its responses to the United Nations Committees. Mulkearns was acting in accordance with Church policy.

581. The minutes of the meeting of the College of Consultors on 16 January 1976, over which Bishop Mulkearns presided, states:

“After stressing again the confidentiality of all matters dealt with in Consultors Meetings, Bishop Mulkearns announced that some matters had arisen in the diocese which might make it advisable to delay many appointments” .<sup>480</sup>

582. Canon 471§2 requires all those who are admitted to offices in the Curia to observe secrecy as determined by law or the bishop, but *Secreta Continere* takes away any such discretion when the issue is clergy sexual abuse.

583. Fr Adrian McInerney, Bishop Mulkearns' secretary, told the Royal Commission that he had no recollection of that meeting, but that he would have expected Mulkearns to have explained what he meant by confidentiality. He admitted that it was exceptional for Mulkearns to stress confidentiality and that in doing so, Mulkearns was going to tell them something that needed to be kept confidential. He was then asked:

Q. And, in relation to what those matters might have been in January 1976, having regard to Ridsdale's movement and short appointment, what do you think the Bishop might have been talking to you about?

A. Given what we now know of his life, it may well have been that he was talking about some sort of sexual abuse issue, but I couldn't say that for certain at this point, but I would speculate that.<sup>481</sup>

584. These minutes of 16 January 1976 were created just two years after Pope Paul VI instructed Cardinal Villot to issue *Secreta Continere* in which he replaced the secret of the Holy Office with the pontifical secret. Unlike *Crimen Sollicitationis*, *Secreta Continere* was published in

<sup>479</sup> Opening Address, Gail Furness SC par 89: <http://www.childabuseroyalcommission.gov.au/case-study/860eabc6-e0fc-453a-b9d4-51a89852fede/case-study-28,-may-2015,-sydney> (Accessed 20 May 2015), and Exhibit CCI.0001.00659.0139\_R

<sup>480</sup> Id, par 71 and Exhibit CTJH.120.01095.0125\_E

<sup>481</sup> Royal Commission, Case Study 28, Transcript 26 May 2015, p.8556

the AAS, and it provided that even the allegations of child sexual abuse by clergy should be subject to the "pontifical secret", and not just the information obtained through canonical investigations and trials. Other matters were subject to the pontifical secret, such as, consultations about the appointments of bishops and reports from papal legates. *Secreta Continere* was not a secret law like *Crimen Sollicitationis*, and was something that one would have expected Mulkearns, the canon lawyer, to know about because it was in use in the everyday life of the Church.

585. As already explained, the preamble to *Secreta Continere* not only takes away the bishop's discretion that he has under Canon 471 to determine the limits of secrecy, but it also purports to take away the bishop's capacity to act in accordance with his conscience. The teaching of the Church has always been that conscience is primary, but one's conscience is "informed" by the teachings of the Church.<sup>482</sup> But here the teaching of the Church was that observance of the pontifical secret was his conscience.<sup>483</sup>

586. In 1996, Mulkearns was interviewed on the ABC *Four Corners* program and stated:

"I believed I acted in accordance with my conscience."<sup>484</sup>

587. Mulkearns was doing the same as the Irish bishops, as found by the Murphy Commission, and the bishops and senior clergy from the Archdiocese of Boston, as found by the Attorney General of Massachusetts report.

588. In failing to report Ridsdale and Ryan to the police after 1981, Bishop Mulkearns was not breaching Victorian law because misprision of felony had been abolished in 1981, and the mandatory reporting laws for children at risk did not apply to clergy. In failing to report these allegations to the police Bishop Mulkearns and the consultants were complying with the pontifical secret imposed by *Secreta Continere* of 1974. Under his oath of office, Bishop Mulkearns and the consultants were obliged to obey canon law.

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<sup>482</sup> Pope John Paul II, *Veritatis splendor* par 64.2: "Christians have a great help for the formation of conscience in the Church and her Magisterium" [http://w2.vatican.va/content/john-paul-ii/en/encyclicals/documents/hf\\_jp-ii\\_enc\\_06081993\\_veritatis-splendor.html](http://w2.vatican.va/content/john-paul-ii/en/encyclicals/documents/hf_jp-ii_enc_06081993_veritatis-splendor.html) (Accessed 20 May 2015)

<sup>483</sup> Translation William Woestman: *Ecclesiastical Sanctions*, Appendix VII

<sup>484</sup> <http://www.abc.net.au/7.30/content/2015/s4236045.htm> (Accessed 20 May 2015)

589. After almost 20 years of continuous complaints of abuse against Ryan, Mulkearns finally removed his faculties in 1993.<sup>485</sup> Mulkearns also asked him to sign a request for laicisation, but Ryan refused, and he later refused the same request by Bishop Connors.<sup>486</sup>
590. During most of Mulkearn's time as Bishop of Ballarat (1971-1997), it was impossible under canon law to dismiss priests for child sexual abuse. At the time when most of the complaints were made to Bishop Mulkearns, the 5 year limitation period had expired.<sup>487</sup> Nor could he place Ridsdale and Ryan on "administrative leave" in any kind of permanent way because that could be set aside by the Congregation for the Clergy. In the meantime, Mulkearns, as bishop, had an obligation to treat them as "sons", and to try to reform them.
591. Mulkearns may well be criticised for the same reasons that some Irish bishops were criticized by the Murphy Commission in its Dublin and Cloyne Reports for not taking earlier action under canon law to restrict the ministry of Ridsdale and Ryan, when it was clear that attempts to reform them had failed.<sup>488</sup> But at that time, the only option open to Mulkearns under canon law was to provide a temporary "medicinal" remedy of restricting his faculties, which, as the Murphy Commission pointed out, was an inadequate way of dealing with the problem because they were impossible to enforce.<sup>489</sup> Ridsdale's activities while working at the Catholic Inquiry Centre in Sydney provide further justification for the Murphy Commission's opinion.<sup>490</sup> Even an office job did not stop him abusing children.

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<sup>485</sup> <http://www.childabuseroyalcommission.gov.au/exhibits/860eabc6-e0fc-453a-b9d4-51a89852fede/case-study-28,-may-2015,-ballarat> (Exhibit CTJH.120.01099.0155\_R) (Accessed 23 May 2015). That was also the year that Ryan left the ministry: Transcript of Private Hearing with Paul David Ryan 25 February 2015: TRAN.5002.001.0001\_E\_R, p. 909. Ryan expressed the view that the Church should have done something about him earlier and stopped him being a priest: p.911. Mulkearns knew about Ryan's sexual problems from 1977 to 1993: p. 923. Ryan agreed with the proposition that Mulkearns dealt with the problem by "moving you from parish to parish and send you to for treatment that didn't work?" p.924. The diocese continued to support him financially until 1996, but then refused and asked him to consent to laicisation. He refused. He thought they would take action to defrock him but he had no idea how difficult it was for the bishop to do that: p.930. He was charged in 2006 and sentenced to 18 months imprisonment: p. 931

<sup>486</sup> [http://www.parliament.vic.gov.au/images/stories/committees/fcdc/inquiries/57th/Child\\_Abuse\\_Inquiry/Transcripts/Catholic\\_Diocese\\_of\\_Ballarat\\_29-April-13.pdf](http://www.parliament.vic.gov.au/images/stories/committees/fcdc/inquiries/57th/Child_Abuse_Inquiry/Transcripts/Catholic_Diocese_of_Ballarat_29-April-13.pdf) p.18 (Accessed 20 May 2013)

<sup>487</sup> In 2003, the CDF was given jurisdiction to extend the limitation period, but it did not extend to canonical crimes that had already been extinguished by the 5 year limitation period. All the canonical crimes of Ryan and Ridsdale had been extinguished by that time, and Mulkearns had retired in 1997.

<sup>488</sup> Murphy Dublin Report Part 1 <http://www.justice.ie/en/JELR/DACOI%20Part%201.pdf/Files/DACOI%20Part%201.pdf> par 4.17-4.28 (Accessed 25 April 2013) par 4.53

<sup>489</sup> Murphy Dublin Report Part 1 <http://www.justice.ie/en/JELR/DACOI%20Part%201.pdf/Files/DACOI%20Part%201.pdf> par 4.17-4.28, 4.90 (Accessed 25 April 2013)

<sup>490</sup> Ridsdale contacted a prayer group at Yarra Bay while working at the centre where he offended again. It was not an activity of the Yarra Bay parish. He was, however, still a priest with faculties from the Archdiocese of Sydney, and his "desk job" at the Catholic Inquiry Centre gave him the necessary status as a priest: Royal Commission, Case No. 28, Transcript 28 May 2015, p.8697

592. The evidence in the Commission's Case No. 28 confirms that it was not just a question of Bishop Mulkearn making "terrible mistakes", as Bishop Bird told the Victorian Parliamentary Inquiry.<sup>491</sup> The Archdiocese of Sydney, Cardinals Freeman and Clancy and their consultants made the same "terrible mistakes" during the time that Ridsdale was working in Sydney. But Australia was not peculiar either, because the same "mistakes" were made by bishops all over the world. The roots of the problem lay in canon law and the culture that it reflected and reinforced.
593. Appendix 2 sets out the opening address of Gail Furness SC regarding Ridsdale and Ryan with notations as to the canon law that applied at the time, and the options available under canon law for Bishop Mulkearns.

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## 9. NATIONAL CATHOLIC BISHOPS CONFERENCES ON CHILD SEXUAL ABUSE

### The Australian Catholic Bishops Conference

594. The ACBC first became concerned about issue of child sexual abuse in 1988 when it set up the "Special Issues Committee". A series of protocols were drawn up in subsequent years, the final one under the Committee led by Bishop Geoffrey Robinson. Cardinal George Pell said at the Victorian Parliamentary Inquiry that the "Special Issues Committee" was set up by the Australian bishops in 1988 because:

"...there were no protocols and no procedures in the archdiocese before that. In 88 people were trying to come to grips with this and they put into place...Then nationally they drew up some rudimentary protocols in 92. I suppose it was a recognition that things had not been handled well and we needed to do better."<sup>492</sup>

<sup>491</sup>[http://www.parliament.vic.gov.au/images/stories/committees/fcdc/inquiries/57th/Child\\_Abuse\\_Inquiry/Transcripts/Catholic\\_Diocese\\_of\\_Ballarat\\_29-April-13.pdf](http://www.parliament.vic.gov.au/images/stories/committees/fcdc/inquiries/57th/Child_Abuse_Inquiry/Transcripts/Catholic_Diocese_of_Ballarat_29-April-13.pdf), 10, 14 (Accessed 20 May 2013) and see the finding in *Betrayal of Trust*, Report of the Victorian Parliamentary Committee to that effect, par 7.3.6, page 174 [https://s3-ap-southeast-2.amazonaws.com/family-and-community-development-committee/Inquiry+into+Handling+of+Abuse\\_Volume+1\\_FINAL\\_web.pdf](https://s3-ap-southeast-2.amazonaws.com/family-and-community-development-committee/Inquiry+into+Handling+of+Abuse_Volume+1_FINAL_web.pdf) (Accessed 14 November 2013)

<sup>492</sup>[http://www.parliament.vic.gov.au/images/stories/committees/fcdc/inquiries/57th/Child\\_Abuse\\_Inquiry/Transcripts/Catholic\\_Archdiocese\\_of\\_Sydney\\_27-May-13.pdf](http://www.parliament.vic.gov.au/images/stories/committees/fcdc/inquiries/57th/Child_Abuse_Inquiry/Transcripts/Catholic_Archdiocese_of_Sydney_27-May-13.pdf) page 6.7. (Accessed 16 July 2013)

595. There was a protocol, and there was a procedure in place: *the 1983 Code of Canon Law* and its secrecy decreed by *Secreta Continere*. Bishop Connors made the same assertion of there being no procedures prior to 1988 to the Royal Commission, but conceded that there was a procedure in place and it was called “canon law”.<sup>493</sup>
596. In 1996, the ACBC published its protocol, *Towards Healing*, for dealing with child sexual abuse by clergy, religious and Church employees. The ACBC did not apply for a *recognitio* for *Towards Healing*. It was inconsistent with canon law, in relation to reporting to the civil authorities and in relation to priests being required to go on “administrative leave” while an allegation was being investigated.<sup>494</sup> Bishop Robinson acknowledged that this was one of its weaknesses.<sup>495</sup>
597. Archbishop Pell of Melbourne created his own protocol, *The Melbourne Response*, a few months before the adoption by the ACBC of *Towards Healing*. The *Melbourne Response* had no requirement for reporting, but stated that it would encourage victims to report the matter to the police. The *Melbourne Response* was consistent with canon law and the policy stated by Cardinal Castrillón, the Prefect of the Congregation for the Clergy in 1997 and 1998 to the Irish bishops that the rights of victims to report their abuse to the police should not be hindered, but that bishops should be “fathers” to their priests and not “policemen”. At the Victorian Parliamentary Inquiry, speaking about his meetings in Rome as a member of the CDF, Pell said that the people in Rome from 1996 onwards were aware of the Melbourne Response and were “pleased with it.”<sup>496</sup> This was not surprising because, unlike *Towards Healing*, it had no provision for the Church to report the abuse to the police.
598. As the Holy See’s Response to the Irish Foreign Minister pointed out, every bishop is the governor of his own diocese, and the only constraint on him is canon law. So even though bishops might have signed up to *Towards Healing*, they were prohibited by canon law to follow its procedures for reporting, so long as it did not have the Holy See’s approval to

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<sup>493</sup> Case No. 35, the Melbourne Archdiocese, Transcript p. C13983

<sup>494</sup> Bishop Geoffrey Robinson: Statement to the Royal Commission, Case No. 31 Exh. #31-001, CTJH.303.01002.0002\_R page 4. He acknowledged that *Towards Healing* had no legislative force without the *recognitio* of the Vatican. “We could not do this, for we knew that Rome would have insisted that our process conform to Canon Law, with its five-year statute of limitations and its provisions for a collegiate tribunal of priests etc.” In 2000, a study showed that of the 402 cases of sexual abuse of minors from all parts of Australia, the limitation period had expired in all but 3.23%. Exh. CTJH.301.11004.0030.

<sup>495</sup> Ibid.

<sup>496</sup> Evidence to Victorian Parliamentary Inquiry

[http://www.parliament.vic.gov.au/images/stories/committees/fcdc/inquiries/57th/Child\\_Abuse\\_Inquiry/Transcripts/Catholic\\_Archdiocese\\_of\\_Sydney\\_27-May-13.pdf](http://www.parliament.vic.gov.au/images/stories/committees/fcdc/inquiries/57th/Child_Abuse_Inquiry/Transcripts/Catholic_Archdiocese_of_Sydney_27-May-13.pdf) page 23(Accessed 16 July 2013)



become canon law for Australia. But neither was *Towards Healing* enforceable under civil law as a contract because of a lack of consideration.<sup>497</sup> In addition, as priests had not signed the document, they could not be forced to take administrative leave under the civil law, or indeed do anything as required by *Towards Healing*. The suspension of a priest under Canon 1722 could only be imposed after the preliminary inquiry has been completed and a canonical trial commenced. If priests were asked to take “administrative leave”, they could simply ignore it under both civil and canon law. *Towards Healing* was no more than a piece of paper, so long as it had not received a *recognitio* under canon law.<sup>498</sup>

599. Professor Patrick Parkinson, writing in 2003, pointed out that one of the main problems with the ACBC’s protocols was that they were not consistent with canon law. If a priest was disciplined under their provisions, he simply appealed to Rome and the decision overturned.

“The complaints procedure has been grafted onto existing processes, or created alongside existing processes, but without having any formal standing in the rules of the Church...The lack of consistency between the complaints procedure and the law of the Church has been a problem in the Catholic Church in Australia....As a consequence, the best intentions of the Church leadership in Australia concerning the removal of offenders from ministry have not always been achieved.”<sup>499</sup>

<sup>497</sup> Advice of Makinson and D’Apice Solicitors to Wollongong Diocese dated 28 November 1997 re Fr Nestor, <http://www.childabuseroyalcommission.gov.au/exhibits/bb3eaadf-9283-41ef-9694-e560738d186a/case-study-14,-june-2014,-sydney> , Doc CTJH.001.12003.0204 (Accessed 28 June 2014)

<sup>498</sup> Archbishop Wilson, Royal Commission, Nestor Case, transcript p.7899 in commenting on the letter from the Congregation for Clergy of 15 July 1998: CTJH.001.12001.1051 : “The Congregation for the Clergy are referring to decisions or arrangements made, like *Towards Healing*, that they would have regarded as not being operative, because they hadn’t received the *recognitio* of the Holy See.” The Congregation of the Clergy by letter of 21 December 2000 to the then Bishop Wilson of Wollongong who had used the procedures under *Towards Healing* as the basis for making a decree suspending Fr Nestor, set aside his decree because those procedures were not in accordance with the 1983 Code. That decision was ultimately overruled by the Apostolic Signatura after reserving its decision for 5.5 years. The Royal Commission Report, Case No. 14 (Nestor) : <http://childabuseroyalcommission.gov.au/getattachment/e1f91ddb-2ba2-4eb4-b487-c43a0c8989e4/Report-of-Case-Study-no-14> p.27 (Accessed 20 December 2014).

<sup>499</sup> Patrick Parkinson: *Child Sex Abuse and the Churches, Understanding the Issues* (2003) Aquila Press. The problem of clergy being “disciplined” in accordance with *Towards Healing* and then having the decision overturned in Rome because *Towards Healing* was inconsistent with canon law, is also mentioned by Delaney *Canonical Implications*, page xi and footnote 3. A good example of the effect of this inconsistency can be found in the Nestor case in Wollongong. James Provost, a canon lawyer from the Catholic University of America in an advice given to Bishop Wilson, dated March 5, 1998, said that the procedure under *Towards Healing* that Bishop Wilson followed was in accordance with canon law, but queried whether *Towards Healing* had received a “*recognitio*”, and if it had, Bishop Wilson’s actions were on “solid ground”: Exh CTJH.001.12003.0145. On 15 July 1998, the Congregation of the Clergy told Bishop Wilson: “It must always be borne in mind that any particular norms must be in conformity with the Code of Canon Law. Refuge cannot be sought in these when such norms are in conflict with the Code or disregard the canonical norms of procedure. Under such circumstances, such particular norms would be without juridic effect.” CTJH.001.12001.1051 (Accessed 28 June 2014). On 21 December, 2000, the Congregation of the Clergy held that the procedures of *Towards Healing* adopted by Bishop Wilson did not comply with canon law and therefore the decision to place him on administrative leave was void. <http://www.childabuseroyalcommission.gov.au/case-study/bb3eaadf-9283-41ef-9694-e560738d186a/case-study-14,-june-2014,-sydney.aspx> (Accessed 24 June 2014) and Exh CTJH.001.12001.0388 On 20 July 2006, the Apostolic Signatura allowed the appeal of the Wollongong Diocese against the decision of the Congregation for the Clergy for reinstatement of Fr Nestor on the ground that the Congregation had erroneously found that the action taken by Bishop Wilson was “penal”, requiring compliance with Canon 1717. Instead it found that the action was a disciplinary one but a non-penal disciplinary

600. Parkinson says that a new version of *Towards Healing* was brought out in 2000 with the aim of bringing it in line with canon law. The following clause was added:

“The procedures for determining the future ministry of a priest or religious shall be consistent with the requirements of canon law.”<sup>500</sup>

601. Bishop Geoffrey Robinson in his Statement in Case Study No. 31 on 24 August 2015 provides the context for this change of wording.

“Towards Healing created two serious difficulties for the Australian bishops. Firstly, it meant that they were acting outside, and indeed contrary to, canon law. This led to a situation where a Cardinal in Rome told an Australian bishop that Towards Healing was a nothing, an empty piece of paper and that he was obliged to give a certain priest a new appointment. The bishop refused to do so, cited his judgement in conscience before God alone, declared the priest an “unacceptable risk” and refused to give him an appointment. For some years there was a stand-off between the two. Had the matter been pushed further, the bishop could have been dismissed from his office.”<sup>501</sup>

602. The change of wording did not solve anything, because the conflicts between *Towards Healing* and canon law still existed. The TJHC submission to the Royal Commission acknowledges that any disciplinary action against priests has to be consistent with canon law.<sup>502</sup>

603. The problem with administrative leave was resolved in 2010 with the revision of the norms under *SST 2001*. A priest can now be stood down pending the preliminary investigation.<sup>503</sup> However, the pontifical secret, and the consistency of the *Towards Healing* procedures with canon law are still systemic problems.

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decision under canons 764 and 974 §1, “which may be imposed because of a positive and probable doubt concerning the suitability of the cleric in the matter concerned”. Having come to that decision, it did not have to examine whether or not the *Towards Healing* procedure adopted by Bishop Wilson complied with canon law. It said: “It is also not up to this tribunal to decide on the conformity with the universal law of that manner of proceeding entitled ‘Towards Healing’; if it is warranted, this is a matter for the Pontifical Council for Legislative Texts.”: The Royal Commission Report, Case No. 14 (Nestor) : <http://childabuseroyalcommission.gov.au/getattachment/e1f91ddb-2ba2-4eb4-b487-c43a0c8989e4/Report-of-Case-Study-no-14> p.21 (Accessed 20 December 2014), and Exh CTJH.001.12001.0350. In the Archdiocese of Melbourne a number of priests were successful in having the Apostolic Signatura overturn the decrees of the Archbishop based on the procedure laid down by the Melbourne Response, because its procedures were not consistent with canon law: Evidence of Dr Kevin Matthews, 26 June 2014, <http://www.childabuseroyalcommission.gov.au/case-study/bb3eADF-9283-41ef-9694-e560738d186a/case-study-14,-june-2014,-sydney.aspx>, p.7989.

<sup>500</sup> Clause 42.4. A footnote then refers to Canons 1720-1728, 1740-1747, 1041 and 1014.

<sup>501</sup> Statement Bishop Geoffrey Robinson, p.4, Case Study No. 31 Exh. CTJH.303.01002.0006\_R

<sup>502</sup> TJHC Submission, page 136, par 34. <http://dev.childabuseroyalcommission.gov.au/wp-content/uploads/2013/10/14.-Truth-Justice-and-Healing-Council.pdf> (Accessed 12 October 2013).

<sup>503</sup> The “Substantive Norms” of the *Motu Proprio Sacramentorum Sanctitatis Tutela*, as revised in 2010, Article 19, [http://www.vatican.va/resources/resources\\_norme\\_en.html](http://www.vatican.va/resources/resources_norme_en.html) (Accessed 5 August 2013), the Australian Church Submission, p 134, par 35 <http://dev.childabuseroyalcommission.gov.au/wp-content/uploads/2013/10/14.-Truth-Justice-and-Healing-Council.pdf> (Accessed 12 October 2013)

## The Irish Catholic Bishops Conference

604. In 1996, the Irish bishops approached the Holy See with a proposal to allow mandatory reporting to the police of all allegations of child sex abuse against priests. The Storero letter in reply said that such a proposal raised “serious reservations of both a moral and a canonical nature”. It further threatened that the effect of reporting could result in the invalidation of any attempts by the bishops under canon law to discipline abusive priests.<sup>504</sup>
605. In 2005, the Irish Bishops’ Conference adopted a new set of guidelines called “*Our Children, Our Church 2005*”. This document also provided for all allegations of child abuse to be taken to the civil authorities, including historical abuse.<sup>505</sup> The Murphy Dublin Report said that it did not receive a “*recognitio*” by the Holy See, and was left “without legal status under canon law.”<sup>506</sup>
606. In 2009, a new set of guidelines was drawn up, “*Safeguarding Children, Standards and Guidance Document for the Catholic Church in Ireland*”, commissioned and produced in February 2009 by the National Board for Safeguarding Children in the Church. All allegations were to be referred to the Irish Police or the Health Board, irrespective of any legal requirement to do so.<sup>507</sup>
607. A Vatican Press release of 31 May 2010 referred to the “norms” contained in this document, which would tend to suggest that it had been approved by the Holy See.<sup>508</sup> Likewise the *Summary of Findings of the Apostolic Visitation* also referred to these “norms”.<sup>509</sup> But there is no indication on the Holy See website that the document had ever been approved, so as to become part of the local canon law pursuant to Canon 455. At most, Ireland had the benefit of a dispensation from pontifical secrecy in an instruction from the CDF, referred to in the Holy See’s 2010 Guide to “lay persons and non-canonists” of 12 April 2010, to comply with any local laws requiring reporting.

<sup>504</sup> <http://graphics8.nytimes.com/packages/pdf/world/Ireland-Catholic-Abuse.pdf?ref=europe>  
[http://www.nytimes.com/2011/01/19/world/europe/19vatican.html?\\_r=0](http://www.nytimes.com/2011/01/19/world/europe/19vatican.html?_r=0) (Accessed 9 July 2013) A Papal Nuncio is the diplomatic representative of the Holy See, holding ambassadorial status.

<sup>505</sup> Cloyne Report, par 4.50 – 4.55 [http://www.justice.ie/en/JELR/Cloyne\\_Rpt.pdf/Files/Cloyne\\_Rpt.pdf](http://www.justice.ie/en/JELR/Cloyne_Rpt.pdf/Files/Cloyne_Rpt.pdf) (Accessed 9 February 2013)

<sup>506</sup> <http://www.justice.ie/en/JELR/DACOI%20Part%201.pdf/Files/DACOI%20Part%201.pdf> par 3.42 (Accessed 16 July 2013)

<sup>507</sup> [http://www.catholicbishops.ie/wp-content/uploads/images/stories/cco\\_publications/Safeguarding/safeguarding\\_children\\_standards.pdf](http://www.catholicbishops.ie/wp-content/uploads/images/stories/cco_publications/Safeguarding/safeguarding_children_standards.pdf) p,55, 60, 62, 77, 84 and 87. (Accessed 16 October 2013)

<sup>508</sup> [http://www.vatican.va/resources/resources\\_comunicato-irlanda-2010\\_en.html](http://www.vatican.va/resources/resources_comunicato-irlanda-2010_en.html). (Accessed 9 February 2013)

<sup>509</sup> [http://www.vatican.va/resources/resources\\_sintesi\\_20120320\\_en.html](http://www.vatican.va/resources/resources_sintesi_20120320_en.html) (Accessed 25 March 2013)

608. On 12 November 2010, the Holy See sent out a press release at the beginning of the “Apostolic Visit to Ireland”, which was effectively a private Vatican investigation of the situation in Ireland. If any new or old allegations of abuse were to arise during the course of that investigation, the release said that Church authorities had to comply with any civil and ecclesiastical laws relating to reporting.<sup>510</sup> At the time this 2010 press release was issued, there were no civil law requirements to report, and the only “ecclesiastical law” was that of pontifical secrecy and the requirement to report to the Holy See, imposed by *SST 2010*.
609. In 2012, the *Criminal Justice (Withholding of information on offences against children and vulnerable persons) Act 2012* was passed, making it an offence not to report information about the exploitation of “vulnerable persons”.<sup>511</sup> Once that Act was passed, the Holy See’s dispensation from pontifical secrecy applied, (subject to the qualification about canonical trials mentioned by Fr Lombardi) and bishops were able to report those matters without breaching canon law.

#### **The Catholic Bishops Conference of England and Wales**

610. In September 2000, the Catholic Bishops Conference of England and Wales engaged Lord Nolan, a recently retired member of the House of Lords to prepare two reports.<sup>512</sup> The effect of the reports was to recommend openness and reporting to the police, and prosecution of offenders.<sup>513</sup>
611. Lord Nolan said that if any difficulties with canon law over his recommendations emerged, he trusted that Church authorities would deal with them “responsively”.<sup>514</sup> The Catholic Bishops Conference of England and Wales adopted Lord Nolan’s Final Report.<sup>515</sup> There was no response from the Holy See to change canon law.<sup>516</sup>
612. The Cumberlege Commission in 2007 reviewed the Nolan Report in which it criticized the lack of implementation of the Report, and noting that there were conflicts with canon law.

<sup>510</sup> [http://www.vatican.va/resources/resources\\_irlanda-inizio-visita-2010\\_en.html](http://www.vatican.va/resources/resources_irlanda-inizio-visita-2010_en.html) (Accessed 16 October 2013)

<sup>511</sup> <http://www.irishstatutebook.ie/2012/en/act/pub/0024/print.html> (Accessed 19 May 2013)

<sup>512</sup> <http://www.cathcom.org/mysharedaccounts/cumberlege/finalnolan2.htm> (Accessed 16 July 2013)

<sup>513</sup> Summarised by Lord Rees-Mogg in *The Times*, on March 30, 2010

[http://www.timesonline.co.uk/tol/comment/columnists/william\\_rees\\_mogg/article7079471.ec](http://www.timesonline.co.uk/tol/comment/columnists/william_rees_mogg/article7079471.ec) .. (Accessed August 2012).

<sup>514</sup> <http://www.cathcom.org/mysharedaccounts/cumberlege/finalnolan2.htm> par 2.3.1(Accessed 16 July 2013)

<sup>515</sup> [http://www.cathcom.org/mysharedaccounts/cumberlege/report/downloads/CathCom\\_Cumberlege2.pdf](http://www.cathcom.org/mysharedaccounts/cumberlege/report/downloads/CathCom_Cumberlege2.pdf) par 2.2(Accessed 16 July 2013)

<sup>516</sup> [http://www.rcdow.org.uk/cardinal/default.asp?content\\_ref=259](http://www.rcdow.org.uk/cardinal/default.asp?content_ref=259) (Last accessed 18 February 2013)

See also Cardinal Levada’s speech to the *Symposium on Sex Abuse at the Pontifical Gregorian University* on 6 February 2012. The only “*recognitio*” that he mentions is that of the United States.

One of its recommendations was for a “*recognitio*” by the Holy See, similar to what had occurred after the Dallas Charter for the United States.<sup>517</sup>

613. The importance of the *recognitio* is that once approval had been given to the proposals for reporting clergy sex crimes to the police, there was no longer any conflict between canon and civil law. Great Britain, however, has the same problem as all Australian States other than New South Wales and Victoria. Misprision of felony was abolished in Britain in 1967, and it has no mandatory reporting requirements, even for children at risk.<sup>518</sup>

614. It was useless having a local proposal for reporting which conflicted with canon law, and which had not been approved as an exception by Rome, because then each bishop was placed in a position of conflict as to whether or not they should report. The Commission made exactly the same point that Professor Parkinson did about *Towards Healing*, a disciplinary system and protocol system for protecting children that does not have the support of canon law, is seriously defective.

#### **The United States Catholic Bishops Conference**

615. In 2002, the USCCB sought a change to canon law to allow reporting of all allegations of sexual abuse against clergy. The Holy See rejected the request by the American bishops in 2002, but agreed to a compromise whereby limited reporting was allowed where the domestic law required it.<sup>519</sup> That limited dispensation was extended to the whole world in 2010.<sup>520</sup>

#### **The Italian Catholic Bishops Conference**

616. The Levada Guidelines for national protocols for dealing with sexual abuse required compliance with domestic law on reporting.<sup>521</sup> In May 2012 and March 2014, the Italian

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<sup>517</sup> [http://www.cathcom.org/mysharedaccounts/cumberlege/report/downloads/CathCom\\_Cumberlege2.pdf](http://www.cathcom.org/mysharedaccounts/cumberlege/report/downloads/CathCom_Cumberlege2.pdf) (Accessed 18 February 2013)

<sup>518</sup> *Criminal Law Act 1967. A v Hayden (“ASIS case”)* [1984] HCA 67; (1984) 156 CLR 532 (6 November 1984) per Mason J par 7,

<http://www.guardian.co.uk/society/2012/nov/09/uk-ireland-report-child-abuse> (Accessed 15 July 2013)

<http://www.change.org/en-GB/petitions/educationgovuk-introduce-law-requiring-adults-working-with-children-to-report-alleged-abuse-mandatenow> (Accessed 21 August 2013)

<sup>519</sup> For historical detail, see the author’s *Potiphar’s Wife*: p. 273

<sup>520</sup> [http://www.vatican.va/resources/resources\\_guide-CDF-procedures\\_en.html](http://www.vatican.va/resources/resources_guide-CDF-procedures_en.html) (Accessed 17 July 2013), and see generally *Potiphar’s Wife*, p. 118

<sup>521</sup> Cardinal O’Malley, President of the Pontifical Commission for the Protection of Minors reported on 7 February 2015 that 96% of all bishops conferences had complied with the request to submit their protocols on sexual abuse of children. <https://www.commonwealmagazine.org/blog/vatican-presser-sexual-abuse-commission> (Accessed 27 March 2015)

Catholic Bishops Conference announced that bishops had no obligation to report clergy crimes against children to the civil authorities because of the terms of 1929 Concordat between the Holy See and the Italian State.<sup>522</sup> That stance is consistent with canon law. Unless there is a domestic law requiring reporting, the pontifical secret applies to all allegations and information about child sexual abuse by clergy.

### The Polish Catholic Bishops Conference

617. On 25 March 2015, the spokesman for the Polish Catholic Bishops Conference, Fr Jozef Kloch stated that there is “no obligation” under Polish law for bishops to report child sex abusing priests to the civil authorities, and therefore “as a matter of policy”, bishops will not be reporting them. “Such a victim is told they have the right to report it to the prosecutors. That is the correct way.”<sup>523</sup> That stance is also consistent with canon law.

### The Levada Guidelines for National Protocols on Sexual Abuse

618. On 3 May 2011, Cardinal Levada, the Prefect of the CDF, sent out a circular letter (“the Levada Guidelines”) to all bishops providing guidelines to assist Bishops’ Conference set their own protocols for dealing with clerical sexual abuse of minors by clerics.<sup>524</sup> The letter required that all such protocols contain this:

“Specifically, without prejudice to the sacramental internal forum, the prescriptions of civil law regarding the reporting of such crimes to the designated authority should always be followed.”<sup>525</sup>

The “sacramental internal forum” is a reference to Confession.

619. It is not clear from the announcement whether the Holy See intends to approve such guidelines by means of a “*recognitio*” under Canon 455. The United States in 2002 was given

<sup>522</sup> <http://www.irishtimes.com/newspaper/world/2012/0525/1224316664040.html> (last accessed 9 February 2013) <http://www.belfasttelegraph.co.uk/news/world-news/bishops-not-obliged-to-report-sexual-abuse-to-police-28753674.html> (last accessed 9 February 2013). <http://www.thetablet.co.uk/news/619/0/italian-bishops-exempt-clergy-from-reporting-abuse-allegations-> (Accessed 15 June 2014).

<sup>523</sup> Interview with TOK Radio, reported in Radio Poland <http://www.thenews.pl/1/9/Artykul/201446,Roman-Catholic-Church-says-no-obligation-to-report-child-abuse-by-priests> (Accessed 27 March 2015)

<sup>524</sup> Cardinal Levada was a member of the American delegation that negotiated this agreement with the Vatican in 2002. [http://www.vatican.va/resources/resources\\_card-levada2010\\_en.html](http://www.vatican.va/resources/resources_card-levada2010_en.html) (Accessed 3 July 2013). John L. Allen *All the Popes Men* at 70%, John L. Allen says that those representing the Vatican were Herranz, Bertone, Castrillon and Monterisi. The U.S. delegation included Cardinal George, Archbishops Levada and Bishops Doran and Lori.

<sup>525</sup> [http://www.vatican.va/roman\\_curia/congregations/cfaith/documents/rc\\_con\\_cfaith\\_doc\\_20110503\\_abuso-minori\\_en.html](http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_20110503_abuso-minori_en.html) (Accessed 9 February 2013)

such a “*recognitio*” to allow reporting to the civil authorities where there was a local law requiring it, and that effectively became canon law for the United States.<sup>526</sup>

### The Argentinean Church Guidelines

620. In April 2013, just one month after the Archbishop of Buenos Aires, Cardinal Jorge Bergoglio, was elected pope, the Argentinian Catholic Bishops Conference published their guidelines, *Lineas-Guias de Actuación*, in accordance the 2011 direction of Cardinal Levada.<sup>527</sup> Unlike *Towards Healing* which was designed to deal with allegations of child sexual abuse by all Church personnel, it struck strictly to Cardinal Levada’s instruction to provide the CDF with a protocol dealing with sexual abuse by clerics, priests and deacons alone.
621. The Argentinean Guidelines follow strictly the 1983 Code of Canon Law and SST 2010. It specifically states that these matters are subject to the pontifical secret, and it even requires the bishop ensure that all those who are involved in the preliminary investigation or subsequent trial, including the complainant and witnesses are subject to the “most absolute confidentiality.”<sup>528</sup>
622. The Guidelines also provide for the possibility that further crimes will be discovered in the course of the investigation. In that case, the bishop is to be notified immediately and he will decide if the new matters are to be included in the investigation or through a separate one.<sup>529</sup>
623. The Guidelines require compliance with Argentinean law, where it applies.<sup>530</sup> Significantly and unlike *Towards Healing*, it provides for no reporting to the civil authorities unless there are civil reporting laws.

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<sup>526</sup> O’Reilly and Chalmers: *The Sexual Abuse Crisis and the Legal Responses*, p.294

<sup>527</sup> [http://www.episcopado.org/portal/2000-2009/cat\\_view/173-secretaria-general-2015.html](http://www.episcopado.org/portal/2000-2009/cat_view/173-secretaria-general-2015.html) (Accessed 15 June 2016)

<sup>528</sup> Art. 16 and 17. It seems that the Argentinean bishops have adopted the view of Professor Núñez of Navarra University that the only way to ensure confidentiality required under *SST 2001* is to swear the complainant and witnesses to silence as well.

<sup>529</sup> Art 27.

<sup>530</sup> Art 49.

### The Australian Church Guidelines

624. Subsequent to Cardinal Levada's announcement, the ACBC submitted its "Australian Church Guidelines" that it said had to be:

"...read and implemented in the context of and in conformity with the *Code of Canon Law*, (CIC), The *Code of Canon Law for the Eastern Churches* (CCEO), *Sacramentum sanctitatis tutela*, *Apostolic Exhortation Pastores dabo vobis*, *Towards Healing*, *Guidelines for Church Authorities*, *Integrity in Ministry*, *Integrity in the Service of the Church*, *Programme for Priestly Formation Australia* ( Ratio Nationalis Institutionis Sacerdotalis) 2007, and the *Constitution of the Australian Council for Clergy Life and Ministry*.<sup>531</sup>

### The Response of the CDF to the Australian Church Guidelines

625. On 22 February 2013, the CDF replied.<sup>532</sup> It requested the ACBC, not unreasonably, to put the Australian Church Guidelines, which included *Towards Healing 2010* and a number of other documents into a single document:

"The multiplicity of documents can lead to confusion regarding different procedures to be followed when an accusation is made against a cleric as opposed to those to be followed in accusations made against a layperson."

626. It then stated:

"2. Concerning 39, page 21: It must be made clear that provided there is a semblance of truth to the allegation, the acts of the case are to be sent to the Congregation for evaluation and decision. It is the Congregation that will determine the "appropriate process" for clerics accused of sexual abuse of minors. In effect, sections 39 and 40 are applicable only to non-clerics. <sup>533</sup>

627. Clause 39 of *Towards Healing 2010* is subtitled "Selecting the Appropriate Process" when an allegation of sexual abuse is made. Clause 39.1 deals with allegations against non-clerical employees. Clause 39.2-4 provide:

"If a Church penal process under canon law is commenced, the Church Authority should liaise with the Director of Professional Standards concerning how to respond to the victim if the complaint is validated. The response to the victim should follow the principles and procedures outlined in this document.

39.3 In all other cases where the facts of a case are in dispute, the Director of Professional Standards shall act in accordance with Clause 40 of these procedures.

<sup>531</sup> Commission document CTJH.304.07001.0001.

<sup>532</sup> Commission document CTJH.304.07001.0027.

<sup>533</sup> Case Study No. 31, Exh. CTJH.304.07001.0028



- 39.4 If in the course of a Church procedure, allegations emerge for the first time, which indicate that a criminal offence may have been committed, the Church procedure shall cease immediately and the matter will be dealt with in accordance with 37.1-37.6. If the complainant indicates an intention not to take the matter to the police, this should be recorded and confirmed by the signature of the complainant before the Church procedure resumes.”
628. Clause 37.1 -37.6 deals with the situation where the complaint indicates that a criminal offence has been committed. Clause 37.4 creates the obligation of “blind reporting” where there is no mandatory reporting for clergy (e.g. Queensland and Western Australia)
- “37.1 When the complaint concerns an alleged crime, the contact person or Director of Professional Standards shall explain to the complainant that the Church has a strong preference that the allegation be referred to the police so that the case can be dealt with appropriately through the justice system. If desired, the complainant will be assisted to do this. Where it applies, the contact person shall also explain the requirements of the law of mandatory reporting.
- 37.2 If the complainant takes the matter to the police, the Director may make recommendations to the Church Authority concerning the funding of counselling or other such assistance for the complainant pending the outcome of the criminal justice process. The complainant should be advised that he or she may approach the Church again under Towards Healing when the criminal justice process has been concluded.
- 37.3 In all cases other than those in which reporting is mandatory, if the complainant indicates an intention not to take the matter to the police, this shall be recorded and confirmed by the signature of the complainant. Unless and until the complainant signs this document, the matter cannot proceed to an assessment.
- 37.4 In the case of an alleged criminal offence, if the complainant does not want to take the matter to the police, all Church personnel should nonetheless pass details of the complaint to the Director of Professional Standards, who should provide information to the Police other than giving those details that could lead to the identification of the complainant.
- 37.5 Church personnel who are required by law to report suspected child abuse shall conscientiously comply with their obligations. State or Territory law regarding the reporting of knowledge of a criminal offence must also be observed. The appropriate Church Authority shall also be notified of any such report.
- 37.6 No Church investigation shall be undertaken in such a manner as to interfere in any way with the proper processes of criminal or civil law, whether such processes are in progress or contemplated for the foreseeable future. However, where the complainant has chosen not to report the matter to the police or other civil authority, or the civil authorities have decided not to take further action under the criminal law.”

629. The letter of the CDF of 22 February 2013 is specific: the provisions of *Towards Healing* in regard to reporting allegations of child sexual abuse against clerics (as distinct from lay people) to the police, is governed by canon law, and not *Towards Healing*.
630. Further, there is no suggestion that any canonical inquiry under Canon 1717 can be postponed so as not to interfere with any police investigation. Canon 1717 is in these terms:
- §1. Whenever an ordinary has knowledge, which at least seems true, of a delict, he is carefully to inquire personally or through another suitable person about the facts, circumstances, and imputability, unless such an inquiry seems entirely superfluous.
- §2. Care must be taken so that the good name of anyone is not endangered from this investigation.
631. The procedure for what happens after the preliminary investigation has been modified by *SST 2001* and *SST 2010*. Whereas before 2001, the bishop had to decide whether or not the cleric was to be subjected to a penal trial, now the matter is to be referred to the CDF who will advise the bishop what to do. Art 16 of *SST 2010* provides:
- “Whenever the Ordinary or Hierarch receives a report of a more grave delict, which has at least the semblance of truth, once the preliminary investigation has been completed, he is to communicate the matter to the Congregation for the Doctrine of the Faith which, unless it calls the case to itself due to particular circumstances, will direct the Ordinary or Hierarch how to proceed further, with due regard, however, for the right to appeal, if the case warrants, against a sentence of the first instance only to the Supreme Tribunal of this same Congregation.”
632. Art 30 imposes the pontifical secret under *Secreta Continere* in all such cases, and there is no exception for reporting to the civil authorities, except under the 2010 dispensation where the civil law requires it.
633. The letter from the CDF of 22 February 2013 further says:
- “Concerning 42.5 and 42.6, page 27: While the Ordinary may discuss future options with a cleric or religious who has admitted to or been found guilty of the sexual abuse of minors, ultimately the final decision rests with the Congregation.”<sup>534</sup>
634. Subject to clarification from the Vatican arising from Fr Lombardi’s statement in 2010 that reporting to the police should take place “in good time and not during or subsequent to the canonical trial”, the problem of the pontifical secret can be overcome throughout Australia

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<sup>534</sup> Ibid

by a recommendation from the Royal Commission for uniform mandatory reporting laws in all States and Territories along the lines of the NSW legislation, which the TJHC supports.<sup>535</sup>

635. However, of some concern is the rejection by the CDF of Clause 39 of *Towards Healing* which incorporates Clause 37.6 about not interfering with any criminal investigation. It would be impossible to avoid such interference if the canonical processes were carried on at the same time as the criminal investigation. The same witnesses would have to be interviewed by both police officers and Church officials. The problem of a civil and canonical investigation being carried out at the same time is recognised by Brendan Daly:

“There are obvious difficulties for the Church to carry out an investigation of the sexual abuse of young children while they are still in that age group. Usually a diocese would lack the expertise and any investigation could complicate future proceedings in a secular court.”<sup>536</sup>

636. Art 16 of the *SST 2010* contemplates the carrying out of a preliminary investigation under Canon 1717 before the CDF gives instructions to the bishop on what to do. Canon law should be changed to allow postponement of the canonical inquiry until all criminal process has been completed. In the meantime, the cleric can be suspended in accordance with Art. 19 of *SST*, referred to in the CDF letter of 22 February 2013. Art. 19 allows for the suspension of the cleric while the preliminary investigation took place.<sup>537</sup>
637. As at the date of this submission, no *recognitio* of any national protocol has appeared on the Vatican website, other than revised Norms derived from Dallas Charter for the United States of 2002.
638. On 7 February 2015, Cardinal Sean O'Malley of Boston, president of the Pontifical Commission for the Protection of Minors announced that 96% of all Catholic Bishops Conferences had forwarded their draft protocols to the Holy See for consideration. It is now five years since the bishops were asked to submit them. It took the Holy See only six months

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<sup>535</sup> For more detailed discussion about this, see Chapter 10.

<sup>536</sup> Brendan Daly: *Issues with Penal Law and the Proposed Revision of Book VI*, 2012, 55 at 63. Rik Torfs also recognises this problem. He points out that the particular norms in the Netherlands and Belgium (like *Towards Healing*) require the postponement of any canonical proceedings while civil investigation is taking place: “once the state court has taken a decision, the church can continue in its internal procedure...and even if a priest has been acquitted by this court, he may remain guilty in the eyes of the Church”: *Child Abuse by Priests: the Interaction of State Law and Canon Law: Concilium 2004/3 The Structural Betrayal of Trust* (SCM Press, London) at 117.

<sup>537</sup> Art 19: With due regard for the right of the Ordinary to impose from the outset of the preliminary investigation those measures which are established in can. 1722 of the Code of Canon Law... the respective presiding judge may, at the request of the Promotor of Justice, exercise the same power under the same conditions determined in the canons themselves.

to consider and approve the Norms to make it canon law for the United States. One can only speculate about the reasons for the delay, but the following would appear to be relevant:

- 638.1. The Irish, British, Australian and United States Bishops Conferences at various times since 1996 wanted mandatory reporting of all complaints irrespective of whether there are civil reporting laws or not.
- 638.2. The Irish and British protocols and the Australian *Towards Healing* protocol provide for mandatory reporting irrespective of whether there are local reporting laws.
- 638.3. The original Dallas Charter which the USCBC sent to the Holy See for approval in Art. 4 provided for the reporting of all cases of the sexual abuse of a minor, irrespective of whether the civil law required reprint, and in relation to historical abuse, it provided:

“Dioceses/eparchies are to cooperate with public authorities about reporting cases even when the person is no longer a minor.”<sup>538</sup>

- 638.4. The Holy See deleted Art 4, and in Art. 11 of the approved norms, it only allowed reporting of the abuse of minors where the civil law required it.<sup>539</sup>
- 638.5. The current *Charter for the Protection of Children and Young People*, approved by the USCBC in June 2011, includes a modified version of Art. 4 but in substantially the same terms. The difference between the Norms and the Charter is explained by the USCCB by its booklet, *Promise to Protect, Pledge to Heal* from Diocesan Review Board

“The two documents approved by the United States Conference of Catholic Bishops (USCCB), the Charter for the Protection of Children and Young People and Essential Norms together form a unity, but are different in nature.

The Charter contains an extensive declaration of intent on the part of the bishops regarding future policies and provides a framework for the implementation of Essential Norms.

The Essential Norms, which have received the required recognitio from the Holy See, constitute particular law for the dioceses/eparchies that belong to the United States conference of Catholic Bishops. As such, the Essential Norms bind those subject to them.”<sup>540</sup>

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<sup>538</sup> Jo Renee Formicola’s: *Clerical Sexual Abuse: How the Crisis Changed U.S. Catholic Church-State Relations*, (Palgrave MacMillan, 2014 ), 125: “The Charter...required bishops to cooperate with the police even when the person alleged to have been abused was no longer a minor. It placed the onus on bishops, rather than the accuser, to bring the matter to the civil authorities.” That is also the way the canon lawyer, Monsignor Thomas J. Green, one of the authors of the *New Commentary on the Code of Canon Law*, interpreted that clause. Thomas Green: *Critique of the Dallas Charter*. [http://natcath.org/NCR\\_Online/documents/Greencritique.htm](http://natcath.org/NCR_Online/documents/Greencritique.htm) (Accessed 21 July 2013)

<sup>539</sup> [http://www.vatican.va/roman\\_curia/congregations/cbishops/documents/rc\\_con\\_cbishops\\_doc\\_20021216\\_recognitio-usa\\_en.html](http://www.vatican.va/roman_curia/congregations/cbishops/documents/rc_con_cbishops_doc_20021216_recognitio-usa_en.html) (Accessed 13 June 2016)

639. In other words, the canonical situation of the Irish, British, Australian and United States bishops is exactly the same: they are required by canon law to obey domestic laws on reporting, and where there are no domestic laws on reporting, they *may* report but only where it does not conflict with the pontifical secret under canon law. If a bishop in such a jurisdiction walks into a priest's bedroom and finds him *in flagrante delicto* with a minor, he can report that matter directly to the police. If he knows about it because of an allegation made by a minor or any other witness to the priest's superior (the "extrajudicial denunciation"), or because of any preliminary inquiry he makes under Canon 1717, he is prohibited by the pontifical secret from reporting it. The only way around that dilemma is for bishops to do what the New South Wales bishops did, and refer victims of sexual abuse to counsellors who might report the matter independently of the bishop.
640. The United Nations on two occasions has requested the Holy See to impose mandatory reporting under canon law. The United Nations request is no more than that requested by the Irish, British, Australian and United States Bishops Conferences.
641. On 26 September 2014, Pope Francis rejected these requests for mandatory reporting in a formal response to the United Nations.<sup>541</sup>

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## 10. MANDATORY REPORTING LAWS IN AUSTRALIA

### Reporting of Historical Abuse

642. The John Jay Study of 2004, commissioned by the American Catholic Bishops Conference, stated that virtually every published empirical study shows that victims delay reporting sex abuse, and do so many years after it occurred.<sup>542</sup>

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<sup>540</sup> <http://www.usccb.org/issues-and-action/child-and-youth-protection/upload/Charter-for-the-Protection-of-Children-and-Young-People-revised-2011.pdf> (Accessed 2 May 2015). See also O'Reilly and Chalmers: *The Sexual Abuse Crisis and the Legal Responses*, p. 284

<sup>541</sup> The Response was entitled *Comments of the Holy See on the Concluding Observations of the Committee on the Rights of the Child*

[http://en.radiovaticana.va/news/2014/09/26/holy\\_see\\_publishes\\_reply\\_to\\_un\\_committee\\_/1107343](http://en.radiovaticana.va/news/2014/09/26/holy_see_publishes_reply_to_un_committee_/1107343) (accessed 27 September 2014). The Argentinean protocol was approved in April 2013, the month after Francis became Pope. It confirms the application of the pontifical secret to child sexual abuse, and only requires reporting where the civil law requires it.

[http://www.episcopado.org/portal/2000-2009/cat\\_view/173-secretaria-general-2015.html](http://www.episcopado.org/portal/2000-2009/cat_view/173-secretaria-general-2015.html), Cl. 17, 25 and 49

<sup>542</sup> <http://johnjay.jjay.cuny.edu/churchstudy/pdffiles/response1.pdf> par 5.1 (Accessed 15 July 2013)

643. The Cloyne Report examined 40 complaints of sexual abuse. Only 2 of them involved children at risk, and 38 were cases of historical abuse, that is, complaints by victims who are no longer children.<sup>543</sup> The Commissioner for the *Melbourne Response* stated to the Victorian Parliamentary inquiry that he investigated 304 complaints of sexual abuse, and only 2 involved victims who were still children at the time.<sup>544</sup> If those figures apply generally that means that historical abuse represents more than 99% all complaints.
644. The significance of this is that most countries have some form of welfare mandatory reporting of sexual abuse of children “at risk”.<sup>545</sup> But where complaints are made by adults to the Church about being sexually abused by priests as children, the mandatory reporting laws generally don’t apply, even if clergy are included amongst those listed as having the obligation to report. Only two jurisdictions in Australia, New South Wales, and Victoria (since 2014), have mandatory reporting laws that apply to historical abuse.

### Misprision of Felony

645. In *Sykes v The Director of Public Prosecutions*, Lord Denning said that the crime of “misprision of felony” had been part of the common law of “700 years or more”.<sup>546</sup> The elements of the crime were “knowledge” of a felony (a serious crime), and “concealment” from the civil authorities.<sup>547</sup> He also said that non-disclosure may sometimes be justified if there was a duty to keep the information confidential. Examples are the relationship between lawyer and client, doctor and patient. He also said that an employer who catches an employee involved in petty stealing (which could still be a felony) might be justified in giving him another chance. But where the crime was of a serious nature, even close family ties were no excuse. The other members of the House of Lords agreed. Lord Goddard added that there was no obligation to disclose mere rumours and gossip, but citizens are bound to disclose facts within their knowledge that might assist in arresting the felon.<sup>548</sup>

<sup>543</sup> Cloyne Report, par 1.8 [http://www.justice.ie/en/JELR/Cloyne\\_Rpt.pdf/Files/Cloyne\\_Rpt.pdf](http://www.justice.ie/en/JELR/Cloyne_Rpt.pdf/Files/Cloyne_Rpt.pdf) (Accessed 9 February 2013)

<sup>544</sup> [http://www.parliament.vic.gov.au/images/stories/committees/fcdc/inquiries/57th/Child\\_Abuse\\_Inquiry/Right\\_of\\_Reply/Right\\_of\\_Reply\\_P.\\_OCallaghan\\_Part\\_1.pdf](http://www.parliament.vic.gov.au/images/stories/committees/fcdc/inquiries/57th/Child_Abuse_Inquiry/Right_of_Reply/Right_of_Reply_P._OCallaghan_Part_1.pdf) par 7(b) (Accessed 15 July 2013)

<sup>545</sup> Report of Professor Ben Mathew for the Royal Commission p 127 <http://www.childabuseroyalcommission.gov.au/documents/royal-commission-report-ben-mathews-for-rc-publica> (Accessed 15 August 2014)

<sup>546</sup> (1962) AC 528. <http://www.uniset.ca/other/cs5/1962AC528.html> (Accessed 3 July 2013) at 555

<sup>547</sup> Id at 564

<sup>548</sup> Id at 570

646. In the 1980s there were a number of recommendations of Law Reform Commissions to abolish the archaic distinction between felonies and misdemeanours from the criminal law, and to abolish the common law offence of misprision of felony. It was argued that the crime was necessary when there were no police forces. If someone had committed a serious crime, known as a “felony”, ordinary citizens had the obligation to raise the “hue and cry”.

### **S.316 Crimes Act 1900 (NSW)**

647. Some jurisdictions, such as NSW, abolished the offence in 1990, but replaced it with a statutory form in S.316 *Crimes Act (1900) NSW* where it was an offence not to report a serious crime, unless there was a reasonable excuse – a provision designed to include the confidential relationships outlined by Lord Denning in *Sykes*.<sup>549</sup>

648. But the relationship of confidentiality does not exist where a bishop is carrying out a canonical investigation of clergy sex crimes. Such people are investigators, not counsellors. And an employer’s wish to avoid bad publicity as a result of a crime by an employee was not regarded as a reasonable excuse where serious crime was involved.<sup>550</sup>

649. The Cunneen Special Commission found that where a victim of child sexual abuse requested that the matter not be reported to the police, this would amount to a reasonable excuse under S.316.<sup>551</sup> The Police Integrity Commissioner, Bruce James QC came to a different view

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<sup>549</sup> Misprision of felony was abolished and Section 316 was inserted into the *Crimes Act 1900 (NSW)* by the *Crimes (Public Justice) Amendment Act (1990) NSW*, which was proclaimed on 25 November 1990: New South Wales Government Gazette No 141 of 9 November 1990 at 9816. The consent of the Attorney General to a prosecution is required for a prosecution of persons in prescribed professions, such as lawyers, doctors, etc.: S.316(4) See

<sup>549</sup> S.316(1) provides: ‘If a person has committed a serious indictable offence and another person who knows or believes that the offence has been committed and that he or she has information which might be of material assistance in securing the apprehension of the offender or the prosecution or conviction of the offender for it fails without reasonable excuse to bring that information to the attention of a member of the Police Force or other appropriate authority, that other person is liable to imprisonment for 2 years.’ There is one unreported decision in NSW that deals with the section. In *R v Crofts*, Meagher JA observed: ‘The section is a comparatively new section and this is the first case, so far as one knows, which has been brought under it. It is a section which has many potential difficulties, the chief of which is the meaning of the words ‘without reasonable excuse’, difficulties which are magnified when one endeavours to contemplate how those words would apply to the victim of the crime.’ Gleeson CJ added: ‘... depending upon the circumstances of an individual case, it may be extremely difficult to form a judgment as to whether a failure to provide information to the police was ‘without reasonable excuse’.

[http://www.judcom.nsw.gov.au/publications/benchbks/sentencing/public\\_justice\\_offences.html#d5e25503](http://www.judcom.nsw.gov.au/publications/benchbks/sentencing/public_justice_offences.html#d5e25503).

<sup>550</sup> [http://www.lawreform.lawlink.nsw.gov.au/agdbasev7wr/lrc/documents/pdf/report\\_93.pdf](http://www.lawreform.lawlink.nsw.gov.au/agdbasev7wr/lrc/documents/pdf/report_93.pdf) par 3.30. (Accessed 16 July 2013)

<sup>551</sup> The Cunneen Special Commission report said about the “reasonable excuse” defence: “‘Without reasonable excuse’ is not an element to be established initially by the prosecution. Rather, a defendant may seek to rely on reasonable excuse and if so bears an evidentiary burden to elicit, or point to, evidence that legitimately raises the issue of reasonable excuse. If reasonable excuse is so raised, the prosecution is then obliged to negative the reasonable excuse raised beyond reasonable doubt as part of its general onus to prove the elements beyond reasonable doubt.” p.94 fn3. She found that a jury would be unlikely to convict various persons if they raised the excuse that they had been specifically asked not to report the abuse to the police: Hart, p.95, Lucas, p96, par 13.21, Malone, p98, par 13.32,

in the 2015 *Protea Report* and found that the practice of “blind reporting” where the victim did not want to report the matter to the police was in breach of the Act.<sup>552</sup>

650. In 1999, the NSW Law Reform Commission Report 93 - *Review of Section 316 of the Crimes Act 1900 (NSW)* recommended, by a majority, that S.316 be abolished. A minority wanted it retained but suggested some amendments. The majority accepted a number of submissions in favour of abolition, but the most telling reason for abolition was because they disapproved of substituting a legal duty, backed up by criminal sanction, for a moral one, unless there are “overall substantial benefits to society”.<sup>553</sup>
651. New South Wales has not acted on this recommendation of the Law Reform Commission. The case studies examined by the Royal Commission have established that many institutions (and not just the Catholic Church) did not have this moral sense to report cases of child sexual abuse to the civil authorities. There are not only “overall substantial benefits” in retaining S.316 or something like it, but there is now a pressing need.<sup>554</sup> In the case of the Catholic Church, the secrecy provisions of canon law and the oath of office that requires Catholic clergy to obey canon law are peculiar to it. The dispensation given in 2010 to allow reporting where the civil law requires it goes some way to overcoming the problems posed by canon law, but only if all States and Territories have such legislation.<sup>555</sup>
652. The State of Victoria abolished misprision of felony in 1981 and replaced it with a formulation that did not match the common law one, requiring some positive impediment to

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[http://www.dpc.nsw.gov.au/\\_data/assets/pdf\\_file/0005/163922/Report - Volume 2 - Hunter Special Commission of Inquiry.pdf](http://www.dpc.nsw.gov.au/_data/assets/pdf_file/0005/163922/Report_-_Volume_2_-_Hunter_Special_Commission_of_Inquiry.pdf) (Accessed 2 April 2015)

<sup>552</sup> Report of Commissioner Bruce James QC <https://www.pic.nsw.gov.au/files/News/Protea%20Report.pdf> (Accessed 9 August 2015). While this and the Cunneen Report deal with those to whom the victim complained, the victim himself or herself may have good reasons for not reporting. The Victorian *Crimes Amendment (Protection of Children) Act 2014* which amends S.327 of the Crimes Act 1958, impliedly acknowledges this.

<sup>553</sup> New South Wales Law Reform Commission [http://www.lawreform.lawlink.nsw.gov.au/agdbasev7wr/lrc/documents/pdf/report\\_93.pdf](http://www.lawreform.lawlink.nsw.gov.au/agdbasev7wr/lrc/documents/pdf/report_93.pdf) par 3.58 (Accessed 16 July 2013)

<sup>554</sup> The Victorian Police and Catholics for Renewal submissions to the Victorian Parliamentary Inquiry called for similar laws to those in NSW to be enacted in Victoria, and they were subsequently enacted in 2014.

<http://www.catholicsforrenewal.org/Reports/CFR%20Submission%20on%20handling%20Religious%20and%20other%20NGO%20Child%20Abuse.pdf> at par 79. (Accessed 3 July 2013). This has now occurred.

<sup>554</sup> [http://www.parliament.vic.gov.au/images/stories/committees/fcdc/inquiries/57th/Child\\_Abuse\\_Inquiry/Submissions/Victoria\\_Police](http://www.parliament.vic.gov.au/images/stories/committees/fcdc/inquiries/57th/Child_Abuse_Inquiry/Submissions/Victoria_Police) at p.10 (Accessed 3 July 2013)

<sup>555</sup> This is subject to the clarification of Fr Lombardi’s statement that reporting had to take place “in good time, not during or subsequent to the canonical trial.”



a police investigation or some benefit being received for concealing the crime.<sup>556</sup> Merely not reporting it was no longer a crime. The other States have similar formulations.<sup>557</sup>

***Crimes Amendment (Protection of Children) Act 2014 (Victoria).***

653. Victoria restored a misprision of felony kind of offence with its *Crimes Amendment (Protection of Children) Act 2014*.<sup>558</sup> S.327(2) *Crimes Act 1958* (Vic) now provides that “subject to subsections (5) and (7), a person of or over the age of 18 years (whether in Victoria or elsewhere) who has information that leads the person to form a reasonable belief that a sexual offence has been committed in Victoria against a child under the age of 16 years by another person of or over the age of 18 years must disclose that information to a member of the police force of Victoria as soon as it is practicable to do so, unless the person has a reasonable excuse for not doing so.”<sup>559</sup> Subsection (5) provides a defence if the victim requested that it not be reported.<sup>560</sup> Subsection (7) provides protection for privileged

<sup>556</sup> S.322B *Crime (Classification of Offences Act) (Vic)* 1981

[http://www.austlii.edu.au/au/legis/vic/hist\\_act/cooa1981292.pdf](http://www.austlii.edu.au/au/legis/vic/hist_act/cooa1981292.pdf)

See also advice of Nicholas Pappas SC to the Victorian Parliamentary Inquiry

[http://www.parliament.vic.gov.au/images/stories/committees/fcdc/inquiries/57th/Child\\_Abuse\\_Inquiry/Submissions/COIN\\_9.pdf](http://www.parliament.vic.gov.au/images/stories/committees/fcdc/inquiries/57th/Child_Abuse_Inquiry/Submissions/COIN_9.pdf) (Accessed 10 February 2013).

<sup>557</sup> *Crimes Act 1958* (Vic) S.325, Schedule 11 of the South Australian *Criminal Law Consolidation Act* abolished misprision of felony in 1994. S.241 creates an offence to impede the investigation or prosecution of an offence but it requires some positive act rather than simply knowing about a crime and doing nothing. S.326 provides for an offence of concealment if there was some “gain” in return: [http://www.austlii.edu.au/au/legis/sa/consol\\_act/clca1935262/s241.html](http://www.austlii.edu.au/au/legis/sa/consol_act/clca1935262/s241.html) (Accessed 10 February 2013). The Victorian Parliamentary Committee in its Final Report recommended the removal of the “gain” provision: <https://s3-ap-southeast-2.amazonaws.com/family-and-community-development-committee/Executive+summary+%26+recommendations.pdf> p. XXVIII. Queensland, Northern Territory and Western Australia have similar formulations of the Victorian legislation, and Tasmania has no general obligation to report, except for treason: <http://www.lawlink.nsw.gov.au/lrc.nsf/pages/r93chp3> (Accessed 10 February 2013) See also *Crimes Act 1958* (Vic) s 326; *Criminal Code (Qld)* s 133; *Criminal Code (WA)* s 136; *Criminal Code (NT)* s 104; *Criminal Code (Tas)* s 102; *Crimes Act 1914* (Cth) s 44, *Criminal Law Consolidation Act 1935* (SA) s 241. For a summary of the position in other States, see [http://www.lawreform.lawlink.nsw.gov.au/agdbasev7wr/lrc/documents/pdf/report\\_93.pdf](http://www.lawreform.lawlink.nsw.gov.au/agdbasev7wr/lrc/documents/pdf/report_93.pdf) par 3.73 (Accessed 1 August 2013). A similar summary is contained in the Victorian bishops’ submission to the Victorian Parliamentary Inquiry, *Facing the Truth* at par 16.2.

<sup>558</sup> The Act was passed by the Victorian Parliament and assented to on 3 June 2014. It was proclaimed to commence on 27 October 2014. <http://www.gazette.vic.gov.au/gazette/Gazettes2014/GG2014S350.pdf> (Accessed 14 Oct 2014).

<sup>559</sup> S.327(3) provides: For the purposes of subsection (2) and without limiting that subsection, a person has a reasonable excuse for failing to comply with that subsection if—

- (a) the person fears on reasonable grounds for the safety of any person (other than the person reasonably believed to have committed, or to have been involved in, the sexual offence) were the person to disclose the information to police (irrespective of whether the fear arises because of the fact of disclosure or the information disclosed) and the failure to disclose the information to police is a reasonable response in the circumstances; or
- (b) the person believes on reasonable grounds that the information has already been disclosed to police by another person and the first mentioned person has no further information.

<sup>560</sup> The section provides: A person does not contravene subsection (2) if—

- (a) the information forming the basis of the person's belief that a sexual offence has been committed came from the victim of the alleged offence, whether directly or indirectly; and
- (b) the victim was of or over the age of 16 years at the time of providing that information to any person; and
- (c) the victim requested that the information not be disclosed.

information under the Evidence Act. The legislation extends to historical abuse and not just to children “at risk” at the time of receiving the information.

654. New South Wales and Victoria are the only two Australian States or Territories that have legislation that covers the reporting of historical abuse. The form of the Victorian legislation is preferable because it clarifies what is and what is not a reasonable excuse, but the Royal Commission may consider that the protection of children may require at least some form of reporting irrespective of the wishes of the victim.
655. In 2010, the Australian Church (other than the Melbourne Archdiocese) amended *Towards Healing* so as to require all Church personnel to report allegations of child sexual abuse, even though there is no legal obligation to do so. But this is contrary to canon law in all States and Territories other than in New South Wales and Victoria where there is a legal obligation to report.

### Blind Reporting

656. *Towards Healing* 2010 has a provision for what is known as “blind reporting”:

“In the case of an alleged criminal offence, if the complainant does not want to take the matter to the police, all Church personnel should nonetheless pass details of the complaint to the Director of

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- (6) Subsection (5) does not apply if—
- (a) at the time of providing the information, the victim of the alleged sexual offence—
    - (i) has an intellectual disability (within the meaning of the Disability Act 2006 ); and
    - (ii) does not have the capacity to make an informed decision about whether or not the information should be disclosed; and
  - (b) the person to whom the information is provided is aware, or ought reasonably to have been aware, of those facts.
- (7) A person does not contravene subsection (2) if—
- (a) the person comes into possession of the information referred to in subsection (2) when a child; or
  - (b) the information referred to in subsection (2) would be privileged under Part 3.10 of Chapter 3 of the Evidence Act 2008 ; or
  - (c) the information referred to in subsection (2) is a confidential communication within the meaning of section 32B of the Evidence (Miscellaneous Provisions) Act 1958 ; or
  - (d) the person comes into possession of the information referred to in subsection (2) solely through the public domain or forms the belief referred to in subsection (2) solely from information in the public domain; or
- Part 3.10 of Chapter 3 of the Evidence Act 2008 deals with legal professional privilege as well as privilege arising from religious confessions. S.32B of Evidence (Miscellaneous Provisions) Act 1958 deals with disclosure of sexual offences to a registered medical practitioner or counsellor in a confidential situation. Counsellor is defined as one who “is treating a person for an emotional or psychological condition.” Under S.32C(1) the Court can grant leave to compel the production of the document on the basis that the public interest is greater than the harm caused by its production and that it has probative value: D.32D. There are also other limitations on the privilege under S.32E.

Professional Standards, who should provide information to the Police other than giving those details that could lead to the identification of the complainant.”<sup>561</sup>

657. Although the Police Integrity Commission found that the practice breached S.316 of the *Crimes Act 1900 (NSW)*, it acknowledged that a number of witnesses before it gave evidence of matters which they believed justified blind reporting.<sup>562</sup>

658. The Police Integrity Commission made no recommendation about blind reporting, other than that:

“...there is an urgent need for a reconsideration of blind reporting and of s 316 of the Crimes Act, including whether it should be repealed or substantially amended.”<sup>563</sup>

659. On 27 August 2015, the Truth Justice and Healing Council published its Submission on the Royal Commission’s Issues Paper No 8 on *Police and Prosecution Responses*.

660. The submission notes that since the publication of the recent Police Integrity Commission Report, the practice of “blind reporting” in NSW has ceased, and the identity of the victim is now disclosed.<sup>564</sup>

661. The submission also notes that the 2014 amendments to the *Crimes Act (1958) (Vic)* provides for the reporting of all information about child sexual abuse, but

“...it respects the position of a victim who does not want details of the offending disclosed and is sufficiently mature to make that judgment. However, the Council has concerns whether the provision is adequate. The fact that an obligation to report child sexual abuse does not apply in circumstances where the victim is now mature and requests that the information not be disclosed means that the section does not fully meet the interests of child safety in a case where the alleged perpetrator may still be alive.”<sup>565</sup>

662. In other words, the TJHC supports uniform legislation that is in line with the interpretation of S.316 of the *NSW Crimes Act* by the Police Integrity Commission in which “blind reporting” is not an option.

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<sup>561</sup> *Towards Healing* as at 27 March 2013, 37.5.

[http://www.catholic.org.au/index.php?option=com\\_docman&task=cat\\_view&gid=38&Itemid=395](http://www.catholic.org.au/index.php?option=com_docman&task=cat_view&gid=38&Itemid=395)  
(Accessed 6 April 2013)

<sup>562</sup> Protea Report 2015, par 11.25.

<sup>563</sup> *Id*, par 15.7

<sup>564</sup> Page 9, par. 2.3.

<sup>565</sup> Page 9, par 2.4-6

## Other Countries

### New Zealand

663. Misprision of felony is not part of New Zealand law, and there is no duty to inform on others.<sup>566</sup>

### Ireland

664. On 22 July 1997, the Irish Parliament also repealed misprision of felony, and replaced it with statutory offences similar to those in the United Kingdom and the State of Victoria.<sup>567</sup> The *Criminal Justice (Withholding of information on offences against children and vulnerable persons) Act 2012* came into effect on 18 July 2012. It effectively restores misprision of felony to the Irish law in so far as “vulnerable persons” are concerned. They are defined as children and those suffering from physical or intellectual disability restricting their capacity to guard against exploitation or abuse. The offence applies to historical abuse. There is a defence available where the victim or guardian has made it known to the person who has the information that he or she does not want it reported.<sup>568</sup>

### The United Kingdom

665. Misprision of felony was abolished in the United Kingdom in 1967, and the failure to report only becomes a crime when some benefit is received as a result.<sup>569</sup> All Australian States, other than New South Wales, have followed that formulation.

### France

666. The French Penal Code has a form of misprision of felony that applies to the deprivation or abuse of children or vulnerable people, and it applies to knowledge of historical abuse and not just those who are children or under a disability at the time the person becomes aware of it.<sup>570</sup> In September 2001, Bishop Pierre Pican was convicted under this section of the Code

<sup>566</sup> <http://www.teara.govt.nz/en/1966/freedom-of-speech>

<sup>567</sup> <http://www.irishstatutebook.ie/1997/en/act/pub/0014/print.html#sec1> (Accessed 16 July 2013)

<http://www.independent.ie/opinion/analysis/change-in-the-law-means-there-is-now-no-criminal-offence-for-failure-to-report-crime-26031940.html> (Accessed 16 July 2013)

<sup>568</sup> <http://www.irishstatutebook.ie/2012/en/act/pub/0024/print.html> (Accessed 19 May 2013)

<sup>569</sup> *Criminal Law Act 1967. A v Hayden (“ASIS case”)* [1984] HCA 67; (1984) 156 CLR 532 (6 November 1984) per Mason J par 7

<sup>570</sup> Article 434-3 Translation: “The fact for anyone who has knowledge about deprivation, abuse or sexual abuse inflicted on a minor under fifteen years of age or a person who is not able to protect themselves because of age, a disease, disability, physical or mental disability or pregnancy, not to inform the judicial or administrative authorities is punished by three years imprisonment. Except where otherwise provided by law, are excepted from the foregoing persons permanently

which does provide for certain exceptions in cases of professional secrecy, but which the Court found did not apply in his case. Cardinal Barbarin of Lyon is currently under investigation for breaching this law.<sup>571</sup>

### Austria

667. In general, there is no general duty to report serious crimes, but there is an exception for public servants. Failure to report may result into the criminal act of abuse of office.<sup>572</sup> The obligation is extended to some specific categories, like doctors who are required to notify where it appears that death, injury or damage to health has been inflicted on the patient. This also applies to tormenting or neglecting of minors, youth, or helpless persons.<sup>573</sup>

668. There is an express exception from the duty to report for family members and for recognized professional confidentiality of doctors, lawyers, social workers, psychotherapists and clerics in respect of knowledge acquired in confessions.<sup>574</sup>

### Germany

669. There is no equivalent of misprision of felony in German law, other than the requirements of mandatory welfare reporting where children are at risk.<sup>575</sup>

### The United States

670. Misprision of felony is not a common law offence in the United States, but it has been put into statutory form in the *United States Code*.<sup>576</sup> However the requirement has been

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bound to secrecy under the conditions provided for in Article 226-13 provisions.” The section also provide for a fine of E45,000. The crime of failing to disclose the abuse is committed even though the accused became aware of it after the victim was an adult. In other words, it applies to “historic” abuse. In the case of Bishop Pican, it did not matter that the abused person was no longer a child at the time Pican became aware of it: Translation and advice by French lawyer, Pierre-Antoine Cals.

<sup>571</sup> <http://www.globalpulsemagazine.com/news/police-question-cardinal-barbarin/3341> (Accessed 10 June 2016), Kieran Tapsell: “Church laws may justify calls for French cardinal's resignation”, *National Catholic Reporter*, 4 May 2016, <http://ncronline.org/blogs/examining-crisis/church-laws-may-justify-calls-french-cardinals-resignation> (Accessed 5 June 2016)

<sup>572</sup> *The Austrian Code of Criminal Procedure* (§ 84 StPO).

<sup>573</sup> § 27 *Medical Practitioners' Act*.

<sup>574</sup> Advice to the author by Dr. Friedrich Schwank, Vienna, in private correspondence with the author.

<sup>575</sup> Advice of Dr Stefan von der Beck, Chief Judge, Supreme Court, Oldenburg (Lower Saxony), Germany, in private correspondence with the author, January 2014.

<sup>576</sup> <http://www.law.cornell.edu/uscode/text/18/4> (Accessed 15 July 2013) ‘Whoever, having knowledge of the actual commission of a felony cognizable by a court of the United States, conceals and does not as soon as possible make known the same to some judge or other person in civil or military authority under the United States, shall be fined under this title or imprisoned not more than three years, or both. (Title 18, §4)’

narrowly interpreted to mean that simply saying nothing is not itself a crime. It requires some form of active concealment which seems to suggest that the requirement is more like the U.K. and Victorian one.<sup>577</sup>

671. Some States in the United States also have misprision type statutes, and others require reporting in specific situations.<sup>578</sup> Overall, however, it seems that there is no general duty to report. The prominent American lawyer and Law Professor, Alan Dershowitz has written:

“Unlike many European countries, most American states place no affirmative duty on citizens to report even crimes they have themselves seen, and certainly no duty to report crimes that others have told them about.”<sup>579</sup>

### Canada

672. The position in Canada is generally the same as in the United States, and all Australian States, other than NSW and Victoria. There is no general obligation to report under the Canadian *Criminal Code*, although there are welfare reporting laws in most Provinces that generally only apply to children at risk, but not to historic abuse.<sup>580</sup>

### Colombia

673. Colombia has a form of misprision of felony which makes it a crime not to report a serious crime to the civil authorities.<sup>581</sup>

### Mandatory Welfare Reporting

674. Some 80.3% of countries have mandatory welfare reporting laws. Germany, the Netherlands and the United Kingdom do not have them. New Zealand has limited mandatory reporting laws.<sup>582</sup>

<sup>577</sup> <http://heinonline.org/HOL/LandingPage?collection=journals&handle=hein.journals/kentlj84&div=27&id=&page=> (Accessed 15 July 2013)

<sup>578</sup> <http://www.sfu.ca/~palys/ICJR2001.pdf>, Cafardi *Before Dallas*, 52, Gerard E. Lynch: *The Lawyer as Informer*, (1986) *Duke Law Journal*, 491 - 548 <http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=2948&context=dlij&sei-redir=1&referer=http%3A%2F%2Fwww.google.ca%2Furl%3Fsa%3Dt%26rct%3Dj%26q%3D%2522Duty%2Bto%2Breport%2Bcrimes%2522.Monsignor+Lynn+was+convicted> under 18 Pa.C.S. § 4304 (relating to endangering welfare of children). <http://law.onecle.com/pennsylvania/crimes-and-offenses/00.043.004.000.html> (Accessed 26 September 2013)

<sup>579</sup> [http://www.huffingtonpost.com/alan-dershowitz/is-paterno-getting-a-bum-b\\_1101933.html](http://www.huffingtonpost.com/alan-dershowitz/is-paterno-getting-a-bum-b_1101933.html) (Accessed 15 July 2013)

<sup>580</sup> [http://www.victimsofviolence.on.ca/rev2/index.php?option=com\\_content&task=view&id=404&Itemid=284](http://www.victimsofviolence.on.ca/rev2/index.php?option=com_content&task=view&id=404&Itemid=284) (Accessed 15 July 2013)

<sup>581</sup> Art 441 *Colombian Penal Code*. Article 446 also provides for an offence of cover up by a person who knows about a crime. The Colombian Constitution however, preserves the right not to have to incriminate oneself, and does not oblige reporting crimes of spouses or family relatives.

[http://www.secretariassenado.gov.co/senado/basedoc/ley/2000/ley\\_0599\\_2000\\_pr017.html](http://www.secretariassenado.gov.co/senado/basedoc/ley/2000/ley_0599_2000_pr017.html) (Accessed 15 July 2013)

<sup>582</sup> Report of Professor Ben Mathew for the Royal Commission p 126-127: In 2012, New Zealand added s 195A to the Crimes Act 1961, which imposes a limited criminal law-based duty on household members, and on staff members of any hospital, institution, or residence where the child (or a vulnerable adult) resides. The duty is to “take reasonable steps to

675. All Australian jurisdictions have mandatory reporting laws relating to the sexual abuse of children, with marked differences between them.<sup>583</sup>
676. None of them apply to historical abuse, where the victim at the time of the complaint is over the age of majority, generally 18 years.<sup>584</sup> Professor Ben Mathews was commissioned by the Royal Commission to provide a report on the different mandatory welfare reporting laws in Australia: *Mandatory Reporting Laws for Child Sexual Abuse in Australia: A Legislative History* ("Mathews Report"). The Mathews Report states that its advice about the law is current to 13 December 2013 (p ii).

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protect" the child if she or he knows that the child is 'at risk of death, grievous bodily harm, or sexual assault': <http://www.childabuseroyalcommission.gov.au/documents/royal-commission-report-ben-mathews-for-rc-publica> (Accessed 15 August 2014)

<sup>583</sup> Report of Professor Ben Mathew for the Royal Commission

<http://www.childabuseroyalcommission.gov.au/documents/royal-commission-report-ben-mathews-for-rc-publica> (Accessed 15 August 2014)

<sup>584</sup> Ibid. Report of Professor Ben Mathew for the Royal Commission

<http://www.childabuseroyalcommission.gov.au/documents/royal-commission-report-ben-mathews-for-rc-publica> (Accessed 15 August 2014). See Table 7 of Report on definitions of child for each State: **NSW**: "applies the reporting duty to a very broad range of persons. The duty is worded in a somewhat complex fashion but applies to **current concerns for the safety, welfare or well-being of a child** because of a suspicion of the child having been, or being at risk of being, sexually abused": p.67 (my emphasis). **NT**: S.26 *Care and Protection of Children Amendment Act 2009*. **NT**: obliged reporting "on reasonable grounds that a **child aged less than 14** has been or is likely to be a victim of a sexual offence.": p.72. **Qld**: "Queensland is unique in having two separate statutes containing professionals' mandatory reporting duties, neither of which appears in its child protection statute. Doctors and nurses have a mandatory reporting duty under the Public Health Act 2005 to report reasonable suspicions of harm caused by sexual abuse. School staff have a duty under the Education (General Provisions) Act 2006 to report reasonable suspicions of child sexual abuse." p.80 ... "the duty applied to 'any of the following' who the staff member was aware or reasonably suspected had been sexually abused by another person who is an employee of the school – ... **A student under 18 years attending the school.**" p.79. **SA**: "The duty to report reasonable suspicions of sexual abuse is applied to a very broad range of persons. Uniquely in Australia, the duty applies to a minister of religion and to employees and volunteers in organisations formed for religious or spiritual purposes. There is also a duty to report suspected risk of future sexual abuse where there is a reasonable suspicion of a reasonable likelihood **of the child being** sexually abused by a person with whom the child resides." p.92. *Children's Protection (Implementation of Report Recommendations) Amendment Act 2009* (No 65) (commenced 31 December 2009) S11—"Notification of abuse or neglect (1) If—(a) a person to whom this section applies suspects on reasonable grounds that a child has been or is being abused or neglected". S.6 of the *Children's Protection Act 1993* is defined as "child" means a person under 18 years of age". **TAS**: "Tasmania has a wide duty to report knowledge or reasonable belief or reasonable suspicion of child sexual abuse, applying to past cases and with a limited application to risk of future abuse. It is imposed on a broad range of professionals." p.100. "Child" is defined as a person under the age of 18 years: p. 98. **VIC**: "Victoria has a relatively small class of mandated reporters. It has a unique approach to imposing the mandatory reporting duty, characterized by its use of the '**child in need of protection**' provision and its concepts of harm and the protective parent." p.117. **WA**: "Since 1 January 2009, Western Australia has had legislative mandatory reporting of a reasonable belief of child sexual abuse, imposed on doctors, nurses, midwives, police and teachers (including kindergarten teachers and child care teachers). The duty applies to cases of past or current sexual abuse, but does not apply to suspicions of likely future abuse." p.123. Child is defined in S.3 of the *Children and Community Services Act 2004* as a person who is under 18 years of age. Despite suggestions in Professor Mathew's summary by the use of the word, "past or current sexual abuse", that the legislation might refer to historical abuse, the purposes of the Act in S 6 referring to the protection and welfare of "children" indicates that the reporting provisions only apply to where the victim is still under the age of 18. Likewise, S.8 dealing with matters to be taken into account in determining the "child's" best interests point to it applying only to those under the age of 18. See also S.28.

677. Appendix 4 sets out any changes in the law in respect of each State and Territory since that date, and until 22 March 2016, and describes how the pontifical secret applies in respect of each State and Territory.
678. In summary, the pontifical secret in geographic terms operates in varying degrees over some 89% of the Australian land mass, and potentially affects some 68% of the Australian population, of which the Catholics some 25%. New South Wales is the only State able to take full advantage of the 2010 dispensation. The worst affected States and Territories are Queensland, Western Australia, Tasmania and the Australian Capital Territory, where the 2010 dispensation to report to the civil authorities does not apply because in general there is no legal obligation to report in the case of the vast majority of complaints of sexual abuse by clergy and religious.

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## 11. THE HOLY SEE BEFORE THE UNITED NATIONS COMMITTEES

### The United Nations Committee on the Rights of the Child

679. On 16 January 2014 Bishop Scicluna, the former Vatican Chief Prosecutor gave evidence before the United Nations Committee for the Rights of the Child on behalf of the Holy See, and said,

“It is not the policy of the Holy See to encourage cover-ups. Only the truth will help us move on to a situation where we can start being an example of best practice.”<sup>585</sup>

680. Scicluna was asked by Committee members why Church policy did not provide that in “all cases these crimes should be reported”, and not just where there were reporting laws. His answer was that every local Church has the duty to educate people about their rights and to “empower” them.<sup>586</sup> In other words, he was repeating Cardinal Castrillón instruction in his

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<sup>585</sup> <http://www.treatybodywebcast.org/> (Viewed 16 January 2014)  
[http://www.nytimes.com/2014/01/17/world/europe/un-sex-abuse-panel-questions-vatican-officials.html?\\_r=0](http://www.nytimes.com/2014/01/17/world/europe/un-sex-abuse-panel-questions-vatican-officials.html?_r=0) (Accessed 21 January 2014)

<sup>586</sup> Ibid. On 18 July 2014, Bishop Scicluna, who is now the Archbishop of Malta was interviewed by the Italian paper, *La Repubblica*. A report in the *Malta Independent* says that he was asked why it is not obligatory to report allegations of child sex abuse in the Church to the police. Mgr Scicluna gave the same answer as he had given to the United Nations - the



November 1998 letter to the Irish bishops that it was up to the victims to report the matter to the police, not the Church, even if, after the Pope Benedict's 2010 "reforms", the victims "habitually lack the use of reason".

681. But apart from that, the Church has a conflict of interest in advising complainants about their rights to report to the police, particularly in view of its concern about "scandal", its theological teaching of the father/son relationship between a bishop and a priest, and its history of cover up.
682. The Holy See's response shows that despite all the assertions that everything has changed, the crux of the problem has not.<sup>587</sup> The pontifical secret remains in canon law. The dispensation to allow limiting reporting where the civil law requires it reveals where the Holy See's true priorities lie: keeping bishops and priests out of jail, rather than the welfare of children. In November 2009, the Murphy Commission pointed out that the focus of the Church then was:

"..on the avoidance of scandal and the preservation of the good name, status and assets of the institution and of what the institution regarded as its most important members – the priests."<sup>588</sup>

Nothing much has changed.

683. On 31 January 2014, the United Nations Committee on the Rights of the Child handed down its *Concluding Observations on the Second Periodic Report of the Holy See*.<sup>589</sup> The Committee

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church insisted on following domestic law and in any case "one must not hinder the victim from reporting the case." <http://www.independent.com.mt/articles/2014-07-19/news/mgrscicluna-the-paedophile-tragedy-could-have-been-avoided-5896011778/#prettyPhoto> (Accessed 22 July 2014). It is difficult to understand this argument. The Catholic Church in Victoria supported the idea of mandatory reporting of all allegations of sexual abuse to the police for investigation while recognizing the right of victims not to report. This is reflected in the only two Australian states that have such reporting requirements, New South Wales, and now Victoria. If civil law can be changed to reflect that policy, it is impossible to understand why canon law cannot also be changed to reflect it. Scicluna's answer also reflects the answer given by Cardinal Castrillon to the Irish bishops in 1998: it is up to the victim to report, not the Church. [http://www.parliament.vic.gov.au/images/stories/committees/fcdc/inquiries/57th/Child\\_Abuse\\_Inquiry/Submissions/Catholic\\_Church\\_in\\_Victoria.pdf](http://www.parliament.vic.gov.au/images/stories/committees/fcdc/inquiries/57th/Child_Abuse_Inquiry/Submissions/Catholic_Church_in_Victoria.pdf) at 16.5 (Accessed 6 April 2013).

<sup>587</sup> On 12 November 2012, the ACBC issued a press release promising cooperation with the Royal Commission, and said that the criticisms of the Church centred on what happened 20 years ago, and that major procedural changes have since been introduced and implemented. It said: "It is unacceptable, because it is untrue, to claim that the Catholic Church does not have proper procedures, and to claim that Catholic authorities refuse to cooperate with the police."<sup>587</sup> <http://mediablog.catholic.org.au/?p=1364> (Accessed 5 March 2013). The Australian Church accepts that its protocols have to comply with canon law. In fact, they don't.

<sup>588</sup> Murphy Dublin Report Part 1 <http://www.justice.ie/en/JELR/DACOI%20Part%201.pdf/Files/DACOI%20Part%201.pdf> (Accessed 25 April 2013) 1.15, 1.113 (Conclusion).

<sup>589</sup> [http://tbinternet.ohchr.org/Treaties/CRC/Shared%20Documents/VAT/CRC\\_C\\_VAT\\_CO\\_2\\_16302\\_E.pdf](http://tbinternet.ohchr.org/Treaties/CRC/Shared%20Documents/VAT/CRC_C_VAT_CO_2_16302_E.pdf) (Accessed 6 February 2014)

noted that some of the rules of canon law are not in conformity with the provisions of the Convention on the Rights of the Child, and it recommended a comprehensive review of canon law to ensure compliance.<sup>590</sup>

684. It accused the Holy See of adopting policies and practices which have led to the continuation of the abuse and to impunity of the perpetrators. It noted the practice of covering up known sex abusers and transferring them to other institutions under Church control. It said that despite the fact that the Church has full control of these personnel under canon law, it had declined to provide the UN Committee with information about the outcome of the canonical procedures against them.<sup>591</sup> It accused the Holy See of allowing the vast majority of abusers to escape criminal prosecution by its use of its confidential disciplinary proceedings, and that:

“Due to a code of silence imposed on all members of the clergy under penalty of excommunication, cases of child sexual abuse have hardly ever been reported to the law enforcement authorities in the countries where such crimes occurred. On the contrary, cases of nuns and priests ostracized, demoted and fired for not having respected the obligation of silence have been reported to the Committee as well as cases of priests who have been congratulated for refusing to denounce child abusers, as shown in the letter addressed by Cardinal Castrillon Hojos to Bishop Pierre Pican in 2001.”<sup>592</sup>

685. The Committee also noted that reporting to national law enforcement authorities has never been made compulsory and was expressly rejected by the Storero letter of 1997. It also noted that in many cases, the Holy See has refused to cooperate with judicial inquiries.<sup>593</sup>
686. On 7 February 2014, the Holy See responded through its spokesman, Fr Federico Lombardi, who seemed to contradict what Pope Francis’ legates to the United Nations were saying. Lombardi gratuitously accused the United Nations Committee of having written the report before hearing the Holy See’s response.<sup>594</sup> He claimed that the Committee did not understand “the Holy See’s responsibilities”, which had to be a reference back to his claim of

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<sup>590</sup> Id par 8, 13

<sup>591</sup> Id par 43

<sup>592</sup> Id par 43(d)

<sup>593</sup> Ibid par 43(e) The most recent case of lack of cooperation relates to the case of Fr Inzoli where the Congregation for the Doctrine of the Faith refused to hand over documents relating to the disciplinary proceedings against him to Italian investigating magistrates. <http://www.globalpulsemagazine.com/news/pope-francis-issues-statutes-overseeing-financial-reform/887> (Accessed 8 March 2015)

<sup>594</sup> <http://www.news.va/en/news/fr-lombardi-sj-note-on-childrens-rights-committee> (Accessed 16 February 2014)

5 December 2013, that those responsibilities were limited to the 31 children of the Swiss Guards and others who resided in the Vatican City.<sup>595</sup>

687. But on 16 January 2014, the Holy See's legates, Archbishop Tomasi and Bishop Scicluna, when fronting the Committee in Geneva, accepted its international responsibility for child abuse by reason of its control under canon law.<sup>596</sup> On 17 January 2014, they even produced some figures on how many priests had been dismissed since 2005 for child sexual abuse out of the more than 4000 the Holy See had been investigating since 2001. These priests were not abusing the children of the Swiss Guards.
688. Fr Lombardi criticized the Committee for paying more attention to "certain NGOs, the prejudices of which against the Catholic Church and the Holy See are well known" and for "going beyond its powers" by attempting to interfere in the moral and doctrinal positions of the Catholic Church regarding contraception, abortion, and its vision of "human sexuality".
689. Fr Lombardi said nothing about the central criticism of the United Nations Report: the pontifical secret over the Church's investigations of clergy sexual abuse of children.

#### **The United Nations Committee against Torture**

690. On 6 May 2014, the Holy See's envoy to the United Nations, Archbishop Tomasi, appeared before the Committee against Torture in Geneva.<sup>597</sup> He told the Committee that the Holy See had complied with the Convention against Torture so far as the Vatican City State was concerned, but he pointed out that Catholics living outside it were governed by the laws in their particular jurisdictions. The Pope has absolute power to sack bishops and priests, but

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<sup>595</sup> <http://www.news.com.au/world/vatican-denies-legal-responsibility-for-catholic-child-abuse/story-fndir2ev-1226775551025> (Accessed 16 February 2014) Ivor Roberts: "UN report: who speaks for the Church?" The Tablet, 5 February 2014 p.13 (Accessed 16 February 2014)

<sup>596</sup> The Vatican bulletin dated 16 January 2014, containing its periodic report on the Rights of the Child, confirmed its ratification of the Convention on the Rights of the Child. It contains this passage acknowledging its responsibility beyond the Vatican City: '...the Holy See as the central organ of the Catholic Church has formulated guidelines to facilitate the work of the local Churches to develop effective measures within their jurisdiction and in conformity with canonical legislation.' <http://press.vatican.va/content/salastampa/it/bollettino/pubblico/2014/01/16/0032/00067.html> (Accessed 16 February 2014)

<sup>597</sup> Committee against Torture, Fifty-second session, Summary record of the 1223rd meeting Held at the Palais Wilson, Geneva, on Thursday, 6 May 2014, at 3 p.m. [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/TBSearch.aspx?Lang=En&CountryID=75&ctl00\\_PlaceHolderMain\\_radResultsGridChangePage=1\\_50](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?Lang=En&CountryID=75&ctl00_PlaceHolderMain_radResultsGridChangePage=1_50) (Accessed 25 October 2014)

- when it suits, the Holy See would have the world believe that bishops are more or less medieval princelings, entirely subject to the civil law of the place where they live.<sup>598</sup>
691. Archbishop Tomasi conceded however, that the Holy See did conduct canonical proceedings against priests who had abused children, and that the most severe penalty was dismissal. He said that since 2004, more than 3,400 credible allegations of sexual abuse of minors had been referred to the CDF. As a result, 848 clerics had been dismissed and other disciplinary measures had been applied in more than 2,500 other cases.<sup>599</sup> He also mentioned the various protocols drawn up by local bishops' conferences.
692. When questioned by the Committee, Archbishop Tomasi said he did not know how many clerics had been directly referred to the civil authorities, but said that clerics who had not been laicized had been asked to live in a monastery or a private place in order to ensure that they had no more contact with children. He then said that whenever a credible accusation of sexual abuse of a minor was made, the cleric concerned was reported to the civil authorities of the State of which the cleric was a citizen.<sup>600</sup> That statement was not true, as canon law attests, and as the statement of the President of the Italian Bishops Conference, Cardinal Bagnasco of 29 March 2014, and the spokesman for the Polish Catholic Bishops Conference confirms.<sup>601</sup>
693. In a meeting with the American bishops, in March 2002, Pope John Paul II said "there is no place in the priesthood or religious life for those who would harm the young." This statement was incorporated into the Dallas Charter.<sup>602</sup> It suggests that the Church would be adopting a "zero tolerance" of clergy sexual abuse of children, and that those priests who had been abusing children should be dismissed.<sup>603</sup>

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<sup>598</sup> Marie Keenan: *Child Sexual Abuse and the Catholic Church, Gender, Power and Organizational Culture*, Oxford University Press (2012), at loc 6145, quoting Dorgan: "Ours when it suits us; on their own when it suits us, is the message from the Pontiff and the Curia"

<sup>599</sup> Committee against Torture, Fifty-second session, Summary record of the 1223rd meeting Held at the Palais Wilson, Geneva, on Thursday, 6 May 2014, at 3 p.m., par 12

<sup>600</sup> Committee against Torture, Fifty-second session, Summary record of the 1223rd meeting Held at the Palais Wilson, Geneva, on Thursday, 6 May 2014, at 3 p.m, par 36.

<sup>601</sup> <http://www.thetablet.co.uk/news/619/0/italian-bishops-exempt-clergy-from-reporting-abuse-allegations-> (Accessed 15 June 2014), Spokesman for the Polish Catholic Bishops Conference, interview with TOK Radio, reported in Radio Poland <http://www.thenews.pl/1/9/Artykul/201446,Roman-Catholic-Church-says-no-obligation-to-report-child-abuse-by-priests> (Accessed 27 March 2015)

<sup>602</sup> <http://old.usccb.org/ocyp/charter.pdf> Article 4, (Accessed 17 August 2013) There is little doubt about what the Americans meant by "zero tolerance", as it was colloquially called, "One strike and you are out". Robert Blair Kaiser: *Whistle: Tom Doyle's Steadfast Witness for Victims of Clerical Sexual Abuse*, Caritas Communications (2015), loc. 1911.

<sup>603</sup> See Affidavit of Jennifer Haselberger, <http://www.andersonadvocates.com/Posts/News-or-Event/1855/Affidavit-of-Jennifer-Haselberger.aspx> par 21 (Accessed 17 July 2014).

694. On 19 March, 2014, Pope Francis said that Pope Benedict had supported “zero tolerance” for clergy who sexually abused children.<sup>604</sup> On 27 May 2014, he promised that he would apply the same “zero tolerance” standard.<sup>605</sup> But the figures produced by Archbishop Tomasi show that the Holy See’s tolerance is not zero but sixty six percent. Less than one third of all priests against whom credible allegations of sexual abuse of children have been made have been dismissed.<sup>606</sup>

695. On 22 May 2014, the Committee published its concluding observations.<sup>607</sup> It confirmed its view that the Holy See had responsibility under the Convention:

“...for the acts and omissions of their officials and others acting in an official capacity or acting on behalf of the State, in conjunction with the State, under its direction or control, or otherwise under colour of law.”<sup>608</sup>

696. The Committee demanded mandatory reporting and that the Holy See:

“Take effective measures to ensure that allegations received by its officials concerning violations of the Convention are communicated to the proper civil authorities to facilitate their investigation and prosecution of alleged perpetrators.”<sup>609</sup>

697. It also required the Holy See to provide the Committee with details of when and where such reporting took place, and to set up an independent complaints organization, independent of the hierarchy, which can receive complainants of sexual or other abuse by clergy or other representatives of the Holy See.

698. The Committee also required the Holy See to review its concordats with other countries which provide for protection from investigation or prosecution by civil authorities of those alleged to have violated the Convention or are believed to have information about such violations, because of their status or affiliation with the Catholic Church. The Committee did

<sup>604</sup> <http://ncronline.org/blogs/ncr-today/pope-francis-supports-zero-tolerance-child-abuse> (Accessed 25 October 2014)

<sup>605</sup> <https://www.osv.com/OSVNewsweekly/Vatican/Article/TabId/719/ArtMID/13626/ArticleID/14793/Pontiff-to-meet-with-sex-abuse-victims.aspx> (Accessed 25 October 2014)

<sup>606</sup> On 6 May 2014, the Holy See’s envoy to the United Nations, Archbishop Tomasi said that of 3,400 credible allegations referred to the CDF since 2004, only 848 had been dismissed and the others dealt with by some unstated disciplinary measures: <http://vaticaninsider.lastampa.it/en/world-news/detail/articolo/pedofilia-pedophilia-pedofilia-33935/> (Accessed 19 February 2015)

<sup>607</sup> [http://ccrjustice.org/files/CAT\\_C\\_VAT\\_CO\\_1\\_17271\\_E.pdf](http://ccrjustice.org/files/CAT_C_VAT_CO_1_17271_E.pdf) (Accessed 17 June 2014)

<sup>608</sup> Id par 8

<sup>609</sup> Id par 10(e)

not name any countries, but Italy, the Dominican Republic and Colombia are three countries that have such Concordats.

699. The Holy See said that it “will give serious consideration to these recommendations.”<sup>610</sup> It published its response to the Committee on the Rights of the Child on 26 September 2014.<sup>611</sup> It said that its only responsibility under the Convention was to the children resident in the Vatican City, and said that attempting to implement the provisions of the Convention in the territory of other States could constitute a violation of the principle of non-interference in the internal affairs of States.<sup>612</sup>
700. This new found sensitivity to the sovereignty of States when it came to reporting clergy to the police is in marked contrast to its riding rough shod over it when demanding the cover up of such sexual abuse under canon law, when that conflicted with local reporting laws. The national sovereignty of a country would only be infringed by mandatory reporting under canon law if the domestic law forbade such reporting. No such country exists. The hearings on the Convention on Torture in May 2014 suggest that the Holy See intends to continue the cover up wherever the civil law allows it.

### **A Shift of Position**

701. In September 2015, French Monsignor, Tony Anatrella, a psychologist known for his views on homosexuality and “gender theory,” told bishops they had no obligation to report abuse charges to law enforcement.<sup>613</sup> In response to that, the President of the Pontifical Commission for the Protection of Minors, Cardinal O’Malley issued a statement:

“The crimes and sins of the sexual abuse of children must not be kept secret for any longer... We, the President and the Members of the Commission, wish to affirm that our obligations under civil law must certainly be followed, but even beyond these civil requirements, we all have a moral and ethical

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<sup>610</sup> [http://en.radiovaticana.va/news/2014/05/23/holy\\_see\\_responds\\_to\\_un\\_torture\\_committee\\_report/1100853](http://en.radiovaticana.va/news/2014/05/23/holy_see_responds_to_un_torture_committee_report/1100853) (Accessed 27 September 2014)

<sup>611</sup> The Response was entitled “Comments of the Holy See on the Concluding Observations of the Committee on the Rights of the Child” [http://en.radiovaticana.va/news/2014/09/26/holy\\_see\\_publishes\\_reply\\_to\\_un\\_committee\\_/1107343](http://en.radiovaticana.va/news/2014/09/26/holy_see_publishes_reply_to_un_committee_/1107343) (accessed 27 September 2014)

<sup>612</sup> Id, par 3.

<sup>613</sup> Crux, 15 February 2016: <http://www.cruxnow.com/church/2016/02/15/papal-commission-bishops-must-report-sex-abuse-charges/> (Accessed 17 March 2016)

responsibility to report suspected abuse to the civil authorities who are charged with protecting our society".<sup>614</sup>

702. This is a significant shift in position from that adopted by the Holy See before the United Nations Committee on the Rights of the Child. However, until there is a change in canon law, the statement is meaningless, because bishops on their consecration take an oath to obey "all ecclesiastical laws", and not Cardinal O'Malley's opinion about their moral and ethical obligations. The preamble to *Secreta Continere* purports to take away a bishop's conscience in matters covered by the pontifical secret. Keeping the secret is his conscience.

703. On 17 February 2016, Archbishop Charles J. Scicluna of Malta, formerly the chief prosecutor, or Promoter of Justice for the Congregation for the Doctrine of the Faith and currently head of its appeals tribunal for clergy accused of the sexual abuse of children, spoke to the Italian daily La Repubblica after seeing the movie, *Spotlight*:

"The movie shows how the instinct -- that unfortunately was present in the church -- to protect a reputation was completely wrong. All bishops and cardinals must see this film, because they must understand that it is reporting that will save the church, not 'omerta.'<sup>615</sup>

704. The "omerta" is a reference to the Mafia code of silence. Archbishop Scicluna's statement is in marked contrast to the submission that he made before the United Nations Committee for the Rights of the Child on behalf of the Holy See, that it was up to the victim to report to the police, not the Church.

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## 12. LAW AND CULTURE

### The Relationship between Law and Culture

705. Canon law is not the only explanation for why the sexual abuse of children was concealed by institutions. The Royal Commission has examined a number of institutions, both religious and secular where there has been a culture of cover up of child sexual abuse. All

<sup>614</sup> [http://en.radiovaticana.va/news/2016/02/15/card\\_omalley\\_reiterates\\_responsibility\\_to\\_report\\_sex\\_abuse/1208856](http://en.radiovaticana.va/news/2016/02/15/card_omalley_reiterates_responsibility_to_report_sex_abuse/1208856) (Accessed 17 March 2016)

<sup>615</sup> <http://ncronline.org/news/art-media/abuse-expert-bishops-must-watch-spotlight-learn-reporting-key> (Accessed 17 March 2016)

organizations have a tendency to protect themselves and their reputations, whether they are the military, the police force, volunteer fire-fighters or charities. The innate tribalism of the human species comes to the surface, and every member decks themselves out in their team colours to come to its defence. But the Catholic Church is unique in having internal laws that demanded the cover up.

706. German jurisprudence of the first half of the 19th century regarded law as no more than a reflection of culture, but the better view is the constitutive approach developed in the United States in the 1980s where law also influences culture, as well as being a reflection of it.<sup>616</sup> Law and culture are inextricably linked. Law is part of culture and it cannot be divorced from it.<sup>617</sup> Laws will reflect the culture in which they are made. But, in addition to that, they will reinforce that culture once made. Law shapes culture as much as culture shapes law. It is a two way interactive process, with both influencing each other.<sup>618</sup>
707. The fact that there is a law in place does not necessarily mean that it was always enforced, and laws can “stay on the books” without reflecting the fact that the culture had changed in the meantime.<sup>619</sup> Nevertheless, if there are successions of laws creating the same obligations, it is legitimate to conclude that they represented the dominant culture of the lawmakers at the time. The history of canon law in the Catholic Church dealt with in Chapter 4 establishes that the dominant Church culture up until the early 20<sup>th</sup> century required clergy sexual abusers of children to be imprisoned as a minimum, and they were often subjected to much worse.

### The Influence of Law on Culture

708. The Church is a strong believer in the influence of law on culture, and explains why the Church is so often opposed to law reform involving matters which it regards as immoral. Mary Ann Glendon, one of America’s most prominent conservative Catholics, and Harvard

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<sup>616</sup> Mautner, <http://www.lawschool.cornell.edu/research/cornell-law-review/upload/Mautner-final.pdf> (Accessed 1 March 2015)

<sup>617</sup> Naomi Mezey: Law as Culture

<http://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=1310&context=facpub> (Accessed 15 July 2013)

<sup>618</sup> James L. Nolan jnr: *Legal Accents, Legal Borrowing*, Princeton University Press at p.37. .

<sup>619</sup> A good example of this is provided by Michelle Armstrong-Partida in *Priestly Marriage: The Tradition of Clerical Concubinage in the Spanish Church* (Brepols Publishers 2009). She says that the episcopal visitation records in 14<sup>th</sup> century Catalunya show that clerical concubinage was widespread despite 200 years of condemnation by canon law and synod decrees: “Clerical concubinage was a custom entrenched in Spanish society. Synodal decrees banning concubinage and the fines attached to them did not to deter clerics from forming long-term unions with women. Ecclesiastical officials tolerated the tradition of concubinous unions and did little to change clerical culture and practice.” Nevertheless, over time, the culture of celibacy reflected in the law did eventually prevail.



Law Professor says that law influences the way people interpret the world around them, and it indicates that certain values have a privileged place in society.<sup>620</sup> Cardinal Francis George, the former President of the United States Bishops Conference was also a strong believer in the connection between the two. In his paper “*Law and Culture*”, he discussed the famous U.S. Supreme Court case of *Brown v The Board of Education*, which ended legal segregation in the United States. He pointed out that law, whether just or unjust, acts as a teacher, and the Supreme Court knew that if racial discrimination was to end, the law had to be changed. The segregation laws were a reflection of the culture at the time when they were passed, but their very existence deepened and entrenched that culture.<sup>621</sup> Justice Ronald Sackville, formerly of the Australian Federal Court, has made a similar point about the connection between law and social change when applied to the decisions of superior Courts.<sup>622</sup>

709. The laws against homosexuality are a good example of the application of this principle. Exactly the same thing happened to homophobia as occurred with segregation after the decision of the United States Supreme Court in *Brown v The Board of Education*. The criminal laws targeting homosexual behaviour were the result of a culture of homophobia in Victorian times.<sup>623</sup> But their very existence on the statute books meant that homophobia continued, and, to use Cardinal Francis George’s words, it was “reinforced and perpetuated...rationalized and deepened.” Once these laws were repealed the levels of homophobia decreased significantly. The converse is also the case. It is not surprising that there has been a reported increase in physical assaults on gays and lesbians as a result of the recent anti-homosexual laws in Russia.<sup>624</sup>

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<sup>620</sup> Ibid.

<sup>621</sup> Ave Maria Law Review Volume 1, Issue 1 (2003) p.1

<http://legacy.avemarialaw.edu/lr/assets/articles/v1i1.george.copyright.pdf> (Accessed 15 May 2013) Cardinal George was stating this principle to illustrate his opposition of same sex marriage. Senator Penny Wong, an advocate of same sex marriage accepted Cardinal George’s principle when she said on SBS television that “laws do have a normative function..about declaring what is okay in society”. For Cardinal George, laws permitting same sex marriage indicate that homosexual behaviour is “okay”, contrary to the teachings of the Church, whereas for Wong, it is a case of recognizing that gays and lesbians are not inferior citizens. They agree on the principle that law acts as a teacher, but disagree about the lesson that in this particular case it teaches: <http://www.sbs.com.au/news/insight/tvepisode/gay-marriage> (Accessed 16 January 2015). The American canon lawyer, Ladislav Orsy SJ, writing in the *New Commentary on the Code of Canon Law* p.2 also concedes that canon law acts as a teacher: “The purpose of canon law is to assist the church in fulfilling its task which is to reveal and to communicate God’s saving power to the world....the law can be also a teacher to the people, as the Torah once was guiding them towards the kingdom.”

<sup>622</sup> <http://flr.law.anu.edu.au/sites/flr.anulaw.anu.edu.au/files/flr/Sackville.pdf> (Accessed 16 July 2013). Sackville points out that the court’s role in creating social change is much more limited, but he accepts that court decisions often do reflect social change that has occurred through other means.

<sup>623</sup> There were laws against homosexuality that predated the Victorian era, as shown in Chapter 4, but the modern legislation against male homosexuality is most often associated with the Victorian era.

<sup>624</sup> Human Rights Watch <http://www.hrw.org/news/2014/02/03/russia-sochi-games-highlight-homophobic-violence> (Accessed 22 February 2014)

710. Canon law within the Church is no different in terms of its influence on the behaviour of people governed by it, and even more so when it comes to the clergy who are taught canon law in seminaries. It is even arguable that the influence of canon law is stronger in a closed society like the clergy than civil law is in the broader society.
711. Fr Thomas Doyle has correctly stated that canon law did not create the culture of secrecy.<sup>625</sup> But then the other side of the culture/law equation cannot be ignored. *Crimen Sollicitationis* may have been a product of the culture of secrecy, rather than its cause, but then by remaining in canon law, by being followed and obeyed, it served to “reinforce and perpetuate” and to “rationalize and deepen” (to use Cardinal Francis George’s terms) the culture of secrecy.
712. When you have bishops, who have taken an oath to obey canon law, being threatened with excommunication if they go to the civil authorities, it is pretty obvious what they are going to do. But you also have the influence of the fact that the belief system says that these laws derive from six Vicars of Christ: Pius XI, Pius XII, John XXIII, Paul VI, John Paul II and Benedict XVI, all of whom, with the exception of Pius XII, confirmed in one way or another the requirement of the pontifical secret. When the Vicars of Christ repeat such canonical decrees, they take on a religious and spiritual dimension, particularly since Catholic doctrine teaches that the Church is inspired by the Holy Spirit.<sup>626</sup>
713. You can transpose “canon law” for “law”, “hierarchy” for “whites”, and “clericalism” and its practices for “racism” and its practices, in a passage from Cardinal George’s article in the *Ave Maria Law Review*, and his comments are equally valid when applied to canon law:

“...Canon law, whether just or unjust, functions as a teacher. It is capable of instigating great cultural change; it is capable of profoundly reinforcing a status quo....clericalism, as a cultural practice, would not end so long as canon law testified, and thus taught, in season and out, that clergy were different,

<sup>625</sup> <http://reform-network.net/?p=3006> , par 35 (Accessed 19 June 2013)

<sup>626</sup> The American canon lawyer, Ladislav Orsy SJ, writing in Beal, Coriden & Green *New Commentary on the Code of Canon Law*, says “The nature of canon law reflects the nature of the Church: it is truly human because the Church is a human community; it has an affinity with the divine because it is an integral part of the Church as sacrament. In the law itself, human prudence blends with divine wisdom in a close union but without fusion or confusion.” p.2. Stephen Braunlich says “However, ‘doing’ and obeying civil law is not a matter of religious belief in the same way that ‘doing’ and obeying canon law is. Rather, there must be something else unique about canon law as religious law, as something based ‘upon divine authority’ with ‘its assizes in the next world.’, quoting Rene Metz: *What is Canon Law?* p. 22(1960, trans. Michael Derrick) *The Competing Claims of Canon and Civil Law to Accessing Diocesan Secret Archives* (2011), p. 8: [http://works.bepress.com/cgi/viewcontent.cgi?article=1001&context=stephen\\_braunlich](http://works.bepress.com/cgi/viewcontent.cgi?article=1001&context=stephen_braunlich) (Accessed 15 May 2015)

that they were ontologically changed by God, and that the faithful should be protected from “scandal” that would occur if priests were prosecuted in the civil courts for sexual assaults on children.....

*Crimen Sollicitationis* of 1922 was, in the beginning, the effect of clericalism rather than its cause. Its secrecy manifested cultural prejudices, the widespread belief among the hierarchy that clergy ought not to be tried as criminals in the ordinary courts for sex abuse of children because of the loss of faith that it might cause. Does anyone doubt for a second, however, that canonically required secrecy —with bishops refusing to hand over documents to police, refusing to notify police about complaints of child sex abuse, shifting clergy sex abusers around, relying on treatment programs to solve the problem, and being reluctant to dismiss them except in the most extreme cases —reinforced, perpetuated, and over time helped to create that culture?...

Clergy and lay people involved in the Church’s institutions, tended to internalize the norms of canon law protecting patterns of behaviour . Canon law called forth the ideology that defended it, thus rationalizing and deepening the clericalism that brought it into being in the first place.

Canon law and the clerical culture stand in a complex dialectical relationship. Neither comes first; neither comes last. Canon law contributes massively to the formation of the clerical culture. Culture influences and shapes canon law. Inescapably, inevitably, canon law and the clerical culture stand in a mutually informing, formative, and reinforcing relationship.”<sup>627</sup>

714. The same pattern of behaviour by bishops all over the world is explained by a strong legal framework, underpinning the culture.<sup>628</sup> The fact that some clergy or religious may not have known about *Crimen Sollicitationis* or even later decrees imposing secrecy, or even thought about canon law at the time they covered up these crimes, does not affect the role that canon law played in their behaviour. As Cardinal George points out “culture is second nature to those who live in it”, and people “tend to internalize” the norms behind the law.<sup>629</sup>

715. The canonist, John P. Beal states that long before the sexual abuse crisis erupted on the public scene in 2002, there was a climate within the Church that fostered mismanagement of child sexual abuse. The role of the priest (and in turn the bishop and pope) with his special place by sacred ordination is to “represent Christ”. Their roles were to preserve the truth already received. They were over and above the community rather than being situated within it.

“The problem is that in this ecclesiology, all power in the church, all authentic teaching, sanctifying and governing, are conceived as proceeding in one direction, downward from Christ through the ordained

<sup>627</sup> Ave Maria Law Review Volume 1, Issue 1 (2003) p.1, at 6

<http://legacy.avemarialaw.edu/lr/assets/articles/v1i1.george.copyright.pdf> (Accessed 15 May 2013),

<sup>628</sup> Geoffrey Robertson QC “*The Case of the Pope*” Ch. 2 where the author goes into some detail on the persistent pattern.

<sup>629</sup> Ave Maria Law Review Volume 1, Issue 1 (2003) p.1, at 7

to the faithful...the only roles “in the church” this ecclesiology leaves for the non-ordained (and those at the lower end of the hierarchy) are passive – assenting to authoritative teaching, receiving sacramental ministries, and obeying legitimate directives...all lines of accountability lead upward from the faithful, to the presbyters and deacons, to the bishop, to the pope, and ultimately to Christ, rarely horizontally to fellow bishops, presbyters, deacons and ministerial collaborators and never downward to those entrusted to the pastoral care of the ordained.”<sup>630</sup>

716. Beal says that this attitude means that Church leaders are “prone to resist the suggestion that they need to learn before they teach...and listen before they govern.” If one wants to find examples of what Beal is talking about, there is no need to look further than Pope Benedict XVI’s Pastoral Letter to the people of Ireland, where he simply ignored the Murphy Commission’s analysis of canon law, and blamed the Irish bishops for not following it. Other examples are statements by Cardinals Herranz and Burke that canon law has all the tools necessary to protect the community from clergy sexual abuse (see below).
717. Beal also says that this attitude flows into the way structures, designed to provide feedback to the hierarchy, are treated.

“The Synod of Bishops which was intended to provide a regular forum for dialogue between the pope and bishops throughout the world has been hijacked by the Roman Curia...although the regular synods are held their ‘deliberations’ now result in papal exhortations that could have been written – and sometimes seem to have been written – even without the bishops’ contribution.”<sup>631</sup>

718. If one wishes to find more examples that fit Beal’s descriptions, there is no need to look further than: the attempts by the Irish, United States, Australian and British bishops since 1996 to have mandatory reporting of all allegations of child sexual abuse to the civil authorities, and their continued rejection by the Vatican; the Roman Curia’s insistence that clergy sexual abuse was an Anglo-Saxon problem;<sup>632</sup> and the view of the Congregation of the Clergy and its Prefect, Cardinal Castrillon that the sexual abuse of children was nothing more than a moral problem between the priest and his bishop and that criminality was not involved.<sup>633</sup>

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<sup>630</sup> John P. Beal: “‘As Idle as a Painted Ship upon a Painted Ocean’ : A People Adrift in The Ecclesiological Doldrums” : *Concilium 2004/3 The Structural Betrayal of Trust* (SCM Press, London) at 111, Part III

<sup>631</sup> Id, and he suggests that Vatican rules for the conduct of diocesan synods have the same stringent conditions placed on free discussion.

<sup>632</sup> Bishop Geoffrey Robinson’s observations about a meeting with Vatican officials on 4 April 2000, Royal Commission document CTJH.303.01001.0006.

<sup>633</sup> Bishop Michael Smith “*Unspeakable Crimes*”, 17 January, 2011, <http://www.rte.ie/tv/wouldyoubelieve/unspeakablecrimes.html> (Accessed January 2011, but since archived by RTE), and

719. And relevant to the issue of secrecy, Beal says:

“One cannot escape the impression that church leaders were so consumed by the need to maintain the appearance of health and holiness in the church that they were paralyzed when confronted with the cancer of evil eating away at the heart of the church.”<sup>634</sup>

720. Professor Marie Keenan, who carried out extensive research into the situation in Ireland also points out that because of the Church’s hierarchical structure, accountability operates from the bottom up, but not the reverse.

“To gain approval and remain in good standing, inferiors in the hierarchical ladder will strive to exemplify the institution’s values and deny or repress their own realities when they are in conflict with institutional values...Taken-for-granted scripts become normalized and turn into invisible rules for behaviour. Individual action is pushed into certain directions, in the long run leading to informal organizational practices that everybody knows about but nobody talks about openly.”<sup>635</sup>

721. In their report to the Royal Commission, *Hear no Evil, See no Evil*, Professors Munro and Fish make the same point:

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interview between Cardinal Castrillon and Patricia Janiot on Colombian CNN  
[http://www.youtube.com/watch?v=gnlwp\\_d3Ue8](http://www.youtube.com/watch?v=gnlwp_d3Ue8) (Accessed 12 April 2013):

<sup>634</sup> John P. Beal: *‘As Idle as a Painted Ship upon a Painted Ocean’ : A People Adrift in The Ecclesiological Doldrums’ : Concilium 2004/3 The Structural Betrayal of Trust* (SCM Press, London) at 111, Part III

<sup>635</sup> Marie Keenan: *Child Sexual Abuse and the Catholic Church, Gender, Power and Organizational Culture*, at loc 1557. In the Royal Commission inquiry into Toowoomba Catholic Education Office (Case Study No. 6), there was some intriguing evidence given by a Catholic school principal, Terence Hayes, who did not report allegations of sexual abuse by a teacher to the bishop, but to the CEO of the Education office because his understanding was that “the bishop must not be compromised”. By that he explained that “things had to be done properly”. Unfortunately, Mr Hayes never satisfactorily explained how or from where he had derived that understanding or explained how the bishop could have been compromised. It is obvious from other evidence that this understanding did not come from Bishop Morris who sacked him. But it could well have come for a word of mouth culture that ultimately derived from canon law’s imposition of the pontifical secret whereby the bishop could not report to the police, but others who were not recipients of an “extrajudicial denunciation”, such as counsellors, could. The “compromise” would arise from an obligation under civil law to report and a requirement of canon law to disobey the civil. Whether there was a requirement to report in Queensland at the time is irrelevant because cultures never make such fine distinctions: Day 19, Transcript p. 381.  
<http://www.childabuseroyalcommission.gov.au/case-study/173775f1-a5c4-4e0f-b269-e22d5c5bd331/case-study-6,-february-2014,-brisbane> (Accessed 2 May 2015). Sr Elizabeth Delaney at footnote 61 on page 232 of her thesis, says that complaints should not be received by the bishop or hierarchical superior, because it would then be covered by the pontifical secret putting the bishop in conflict with the civil law to report where it existed: Delaney, *Canonical Implications*, p. 232. Hayes’ evidence may be an instance the “internalization of the culture” and of the “informal organizational practices that everybody knows about but nobody talks about openly” that Marie Keenan discusses.

“Culture is partly created by explicit strategies and messages from senior managers but is also strongly influenced by the covert messages that run through the organisation and influence individual behaviour.”<sup>636</sup>

722. Professor Patrick Parkinson, Professor of Law at Sydney University and an acknowledged expert on child protection law, carried out two reviews for the ACBC of the *Towards Healing* protocol for dealing with sexual abuse.<sup>637</sup> He had previously chaired a review of child protection laws in the State of New South Wales. His submission to the Victorian Parliamentary Inquiry on the Church’s handling of sex abuse allegations, both before and after 1996, is critical of the Church, and particularly of the Salesian Congregation of Catholic priests.<sup>638</sup>

723. Parkinson told the Victorian Parliamentary Inquiry into sex abuse that the culture of the Church is weakly committed to obedience to State law because it has its own legal system, and when local bishops tried develop their own protocols (e.g. Ireland), they were countermanded by the Vatican:

“The real authority lies in the Vatican and the Pope. That structure of an international church with hierarchy and law and disciplinary procedures in canon law means that somehow things are dealt with internally as a culture rather than through the state as a culture...”<sup>639</sup>

724. In his 2013 Smith Lecture, Parkinson expanded on that by saying that the culture of international Catholicism is that the Church has its own jurisdiction and legal system, and the proper place for judging clergy is through canon law. It is no part of canonical thinking that child sex abuse is a crime and should be routinely reported to the police and be dealt with by the criminal courts.<sup>640</sup> As the Concordats with Franco’s Spain and with Colombia show, the Church culture still harks back to the days of Constantine and the “privilege of clergy”.

725. Christopher Geraghty, a former Catholic priest and seminary professor at the Sydney Archdiocesan seminaries, describes his experience inside the Church:

<sup>636</sup> <http://staging.childabuseroyalcommission.gov.au/getattachment/61b4ba7b-400a-4335-b4c3-aa85dcf014d0/Hear-no-evil,-see-no-evil> (Accessed 8 October 2015)

<sup>637</sup> [http://www.parliament.vic.gov.au/images/stories/committees/fcdc/inquiries/57th/Child\\_Abuse\\_Inquiry/Submissions/Parkinson\\_Patrick.pdf](http://www.parliament.vic.gov.au/images/stories/committees/fcdc/inquiries/57th/Child_Abuse_Inquiry/Submissions/Parkinson_Patrick.pdf) (Accessed 29 April 2013)

<sup>638</sup> *Id* p. 7

<sup>639</sup> [http://www.parliament.vic.gov.au/images/stories/committees/fcdc/inquiries/57th/Child\\_Abuse\\_Inquiry/Transcripts/Pr\\_of\\_Patrick\\_Parkinson\\_19-Oct-12.pdf](http://www.parliament.vic.gov.au/images/stories/committees/fcdc/inquiries/57th/Child_Abuse_Inquiry/Transcripts/Pr_of_Patrick_Parkinson_19-Oct-12.pdf), p.8 (Accessed 10 February 2013)

<sup>640</sup> Patrick Parkinson: *The Smith Lecture 2013: Child Sexual Abuse and the Churches – a Story of Moral Failure?* <http://smithlecture.org/sites/smithlecture.org/files/downloads/lecture/smith-2013-transcript.pdf> (Accessed 25 October 2013)

“... the Church has for centuries presumed that it can police its own borders, that it is an independent empire, not answerable to any secular power. It has had its own language, its own administration and training programmes, its own schools and universities, its own system of laws and regulations, its police force and lawyers, a developed list of penalties and its own courts and processes. A law unto itself—an organisation founded by God and answerable only to God.”<sup>641</sup>

### The Church as *Societas Perfecta*

726. Parkinson and Geraghty reflect the view held in the Church for a long time that it was a *societas perfecta*, a perfect society. This view was influential at the time of the 1917 *Code of Canon Law*. The canonist, Thomas J. Green says that the 1917 *Code of Canon Law* was “pre-eminently a juridical and clerical code governing the Church viewed as a ‘perfect society’”.<sup>642</sup> Canons 2214 §1 and 2198 of the 1917 *Code* state that the Church can punish its own subjects with both spiritual and temporal penalties independent of any other human authority, and it recognises that both Church and State can have overlapping jurisdiction in respect of the same acts.

727. Rik Torfs, a canon lawyer and now Rector of the Catholic University of Leuven, argues that the idea of the Church as a perfect society was predominant at the First Vatican Council (1869-70). Joseph Kleutgen drafted the schema *Tametsi Deus* for that Council. Torfs states:

“For him, *societas perfecta* is ‘a society distinct from every other assembly of men, which moves towards its proper end and by its own ways and reasons, which is absolute, complete and sufficient in itself to attain those things which pertain to it and which is neither subject to, joined as part, or mixed and confused with any society.’ Clearly *autonomy* is the key notion. The canonists used the term *societas perfecta* to refute the Protestant jurists who held that the church is not a perfect society but a *collegium* within the state....Before Vatican II updated theological thinking, it was clear that the position of *societas perfecta* developed as a theoretical construction to demonstrate independence of the church from unjustified civil interference.”<sup>643</sup>

<sup>641</sup> Christopher Geraghty in “*Sexuality and the Clerical Life*” in “*Sexual Abuse, Society and the Future of the Church*”, Interface: A Forum for Theology in the World Volume 16, Number 1, 2013, ATF Theology, Adelaide (2013)

<sup>642</sup> TJ Green, “The Revised Code of Canon Law: Some theological issues”, *Theological Studies* 47, 1986, 620, <http://cdn.theologicalstudies.net/47/47.4/47.4.3.pdf>. (Accessed 1 June 2016). Green says that the difference between the two Codes was that under the 1917 Code, the laity were just assistants for the clergy while the Second Vatican Council emphasises the complementary roles of both and that this is reflected at least in some parts of the 1983 *Code*.

<sup>643</sup> Rik Torfs *Child Abuse by Priests: the Interaction of State Law and Canon Law: Concilium 2004/3 The Structural Betrayal of Trust* (SCM Press, London) at 111.

728. While the Church's ecclesiology changed at the Second Vatican Council, Torfs says that the idea of the Church as a perfect society was not entirely rejected, and finds its expression in Canon 22 giving priority to canon law over civil law.<sup>644</sup>

"Canon law can defer to secular norms, although not always. In the case of divine law, secular norms have to give way. God comes first. Moreover, even if divine law is not in danger, canon law remains autonomous. Church authorities can freely decide whether or not they want to make use of civil norms....the relationship between canonical and secular norms is a one-way relationship: the church can include secular norms in its own system, but is never obliged to do so. It is quite clear that such a one way choice could turn out to be slightly naïve in a modern democratic society....an implicit *societas perfecta* thinking remains in the canonical context."<sup>645</sup>

729. Torfs argues that the failure of the Church to deal adequately with child sexual abuse arises from the idea that the Church is the *perfect society*, and therefore quite capable of protecting the faithful from sexual predators through its own laws, and that the Church's legal culture falls short of modern standards in relation to the disciplining of professional people.

730. Examples of the influence of this ideology and canonical culture that Beal, Torfs, Parkinson and Geraghty speak about are the restrictions on reporting to the police (because it is unnecessary – the Church is perfectly capable of protecting children), insistence on the equivalent of the criminal standard of proof under civil law for disciplinary matters when civil society has long adopted the balance of probabilities, and the idea that there should be a lawyer/client privilege for all communications between bishops and priests, something which has not been accepted in most Western countries.<sup>646</sup>

731. This reluctance to adopt the standards of civil society is also reflected in a document given to bishops from Anglo-Saxon countries by the Vatican at a meeting in April 2000 to discuss the sex abuse crisis. In his notes of the meeting, Bishop Geoffrey Robinson quoted from the document:

"The Church can not let itself be influenced by public opinion, at times deliberately stirred up, in order to adapt itself to the mentality and way of acting of the secular world."<sup>647</sup>

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<sup>644</sup> Id, 112-113.

<sup>645</sup> Ibid. However, as pointed out earlier, in the case of the pontifical secret and clergy sexual abuse, *Secreta Continere* purports to take away the conscience of the person bound by the secret.

<sup>646</sup> An exception is that provided for under the Lateran Treaty between the Vatican and Italy: Agreement 3 June 1984, Art 4(4)

<sup>647</sup> EXHIBIT #31-002, Doc CTJH.303.01001.0006



732. Cardinal Ratzinger, later Pope Benedict XVI, said much the same thing:

“The standards of conduct appropriate for civil society or the workings of democracy cannot be purely and simply applied to the Church.”<sup>648</sup>

733. The attitude that canon law has always been adequate to deal with child sex abuse was reflected by the Holy See’s most senior canon lawyer, Archbishop (now Cardinal) Julian Herranz, President of the Pontifical Council for the Interpretation of Legislative Texts, at a conference in Milan in April 2002. He criticized attempts by some Church leaders (notably in Australia, Ireland and the United States) to change canon law to allow reporting of all abuse accusations to civil authorities, and to hand over relevant documents to them. He also said in December 2002 that church law “provides all the trial and punishment tools necessary” to deliver justice and protect the community in clerical sex abuse cases.<sup>649</sup> The history of the Church from the earliest times reveals that it never did have those tools, and until the *1917 Code of Canon Law*, it recognized that it did not have them. That is why for virtually its whole history, the Church required clergy sex abusers to be handed over to the civil authorities.

734. Yet not everyone in the Church took the view that the Church could not learn from secular society. On 26 July 1990, Dr Nicholas Tonti-Filippini, a well-respected Catholic ethicist advised the Australian bishops:

“For the sake of the Church, reasonable suspicion of a crime must be reported to the authorities. Any attempt to contain it within an in-house investigation and management risks bringing the Church into disrepute.”<sup>650</sup>

735. The original 1996 *Towards Healing* protocol provided for reporting but only where the civil law required it, as the Australian bishops were not prepared to adopt Dr Tonti-Filippini’s advice completely. However, it seems that by 2003, they were convinced that they should take the matter further, despite its conflict with canon law, and the Australian Catholic

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<sup>648</sup> Quoted by the Irish Prime Minister Enda Kenny in his speech to parliament after the Cloyne Report <http://www.rte.ie/news/2011/0720/cloyne1.html> (Accessed 16 July 2013)

See also *Mea Maxima Culpa* at 59.31.

<sup>649</sup> [www.cf.americamagazine.org/content/article.cfm?article\\_id=1953](http://www.cf.americamagazine.org/content/article.cfm?article_id=1953) (Accessed 11 June 2013), since removed, but the citation is found in *America staff, Signs of the Times: Vatican Official Says Church Has Legal Tools to Address Sex Abuse, America* (20 May 2002), 4-5, at 4, and cited by Cafardi, *Before Dallas*, 46

<sup>650</sup> [http://www.lawlink.nsw.gov.au/lawlink/Special\\_Projects/ll\\_splprojects.nsf/vwFiles/Transcript\\_Day\\_16\\_-\\_TOR\\_2\\_-\\_25\\_July\\_2013.pdf/\\$file/Transcript\\_Day\\_16\\_-\\_TOR\\_2\\_-\\_25\\_July\\_2013.pdf](http://www.lawlink.nsw.gov.au/lawlink/Special_Projects/ll_splprojects.nsf/vwFiles/Transcript_Day_16_-_TOR_2_-_25_July_2013.pdf/$file/Transcript_Day_16_-_TOR_2_-_25_July_2013.pdf), 1744-45 (Accessed 28 July 2013)

Bishops Conference passed a resolution in that year to require reporting irrespective of the requirements of civil law.<sup>651</sup> But this was not written into *Towards Healing* until January 2010 because:

“..the proposal was specific to the regulatory context of New South Wales, and a broader approach might be required.”

736. The timing of this postponement cannot have been coincidental, and it reveals once again the influence of the Vatican culture on what actually happened on the ground. The postponement of the change to *Towards Healing* occurred just some 5 months after the Vatican had approved a change to canon law for the United States to allow reporting, but **only** where the civil law required it. Despite the fact that *Towards Healing* had never received a *recognitio*, the original wording was at least in accordance with the concession given to the United States. The proposed change for mandatory reporting of all complaints was not, and it had been specifically rejected by the Vatican for the United States.

737. Despite all that has happened since 2002, and despite all the judicial inquiries, the books and articles written about the inadequacy of the canonical disciplinary system, Cardinal Raymond Burke, at the time the Cardinal Prefect of the Supreme Tribunal of the Apostolic Signatura (the Church’s highest court) told a canon law conference in Kenya on 28 August 2012:

“It is profoundly sad to note, for instance, how the failure of knowledge and application of the canon law, which was indeed still in force, contributed significantly to the scandal of the sexual abuse of minors by the clergy in our (sic) some parts of the world.”<sup>652</sup>

738. When Pope Benedict XVI revised *SST 2001* in 2010, the Vatican spokesman, Fr Federico Lombardi SJ expressed a similar view that canon law was “complete in itself and entirely distinct from the law of States”, as if there was never any cross over with civil law.<sup>653</sup>

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<sup>651</sup> *Towards Healing* 2010 par 37.4. In the previous versions, 2003 at par 37 did not require the Church to report, except where it was “mandatory”: 37.2, 37.3. *Facing the Truth*, Appendix 1A. [http://www.parliament.vic.gov.au/images/stories/committees/fcdc/inquiries/57th/Child\\_Abuse\\_Inquiry/Submissions/Catholic\\_Church\\_in\\_Victoria\\_Appendix\\_1\\_Part\\_A.pdf](http://www.parliament.vic.gov.au/images/stories/committees/fcdc/inquiries/57th/Child_Abuse_Inquiry/Submissions/Catholic_Church_in_Victoria_Appendix_1_Part_A.pdf) (Accessed 15 August 2013). The same was true of the 2000 version (Appendix 1B), and the original 1996 version, par.4.3, *Facing the Truth*, Appendix 1B, [http://www.parliament.vic.gov.au/images/stories/committees/fcdc/inquiries/57th/Child\\_Abuse\\_Inquiry/Submissions/Catholic\\_Church\\_in\\_Victoria\\_Appendix\\_1\\_Part\\_B.pdf](http://www.parliament.vic.gov.au/images/stories/committees/fcdc/inquiries/57th/Child_Abuse_Inquiry/Submissions/Catholic_Church_in_Victoria_Appendix_1_Part_B.pdf) (Access 15 August 2013). The Australian Catholic Bishops Conference in 2003 had accepted reporting irrespective of a law requiring it, but it was not written into the document until 2010, because it was only relevant to New South Wales because of S.316 *Crimes Act NSW 1900:Truth Justice and Healing Council* submission to the Australian Royal Commission: <http://dev.childabuseroyalcommission.gov.au/wp-content/uploads/2013/10/14.-Truth-Justice-and-Healing-Council.pdf> par 71 (Accessed 3 October 2013)

<sup>652</sup> <http://nconline.org/blogs/ncr-today/cardinal-burke-links-sex-abuse-disrespect-canon-law> (Accessed 20 May 2015)

<sup>653</sup> [http://www.vatican.va/resources/resources\\_lombardi-nota-norme\\_en.html](http://www.vatican.va/resources/resources_lombardi-nota-norme_en.html) (Accessed 21 July 2013)

739. As Cardinal George said, in his *Ave Maria Law Review* article, the Justices of the Supreme Court of the United States in *Brown v The Board of Education* knew that segregation would continue unless the legal framework justifying it was removed. The problem for civil society is that there are no indications from the Church that it has any intention to abolish the pontifical secret in relation to its canonical proceedings against clergy sex abusers. This is predictable, because there is a strong theological culture behind its liking for secrecy.

### **The Theological Culture behind Secrecy**

740. Two of the major religions, Islam and Christianity have added on a layer to the natural tribal tendency of institutions to protect their reputations, and it derives from their obligation to proselytize. One of the central instructions of Jesus Christ to his followers was to go out into the world and to preach the “Gospel”, the “Good News” of salvation.<sup>654</sup> All Christian Churches take this instruction seriously because salvation in the next life only comes from faith in Jesus Christ. They might differ in what they mean by faith in Jesus Christ, but they all take seriously the injunction to convert others to the faith as they interpret it.

741. The Catholic Church is no different with its “New Evangelization” programs, designed to win new converts.<sup>655</sup> There is little point in bringing people in through the front door of the Church through evangelization programs, if they are fleeing out the back as a result of “scandal”. The scandal of sex abuse not only affected the reputation of the Church, but it attacked one of its core values and missions, namely bringing in converts to Catholicism, and keeping them.

742. The odd thing is that this core mission of evangelization has been around since the Church was founded, and the acceptance of the need to punish sexually abusive priests by more than dismissal had been around almost as long – until the *1917 Code of Canon Law*. So, from the 4<sup>th</sup> century to the early 20<sup>th</sup>, the Church could live with the bad publicity coming from public punishment of priests who sexually assaulted children. In the late 19<sup>th</sup> century Church thinking changed. As outlined in Chapter 4, the theology that the priest was someone special reached its zenith in the early 20<sup>th</sup> century. As we have seen, this theology was reflected in the attempts by the Holy See to incorporate into the civil laws of sympathetic countries special privileges for priests, such as spending terms of imprisonment in

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<sup>654</sup> Mark 16:15.

<sup>655</sup> [http://articles.washingtonpost.com/2013-06-07/local/39815655\\_1\\_catholics-new-evangelization-vatican](http://articles.washingtonpost.com/2013-06-07/local/39815655_1_catholics-new-evangelization-vatican) (Accessed 15 July 2013)

monasteries rather than jails. But there were also other reasons, including the invention of radio and the rise of anticlericalism throughout Europe and Latin America that could have influenced the change of culture. Whatever the reasons, with the *1917 Code of Canon Law*, the Church abandoned its former practice of handing over priests guilty of serious crimes to the civil authorities, and then with *Crimen Sollicitationis* of 1922, it imposed the strictest confidentiality on any information about child sexual abuse.

### **Deepening the Culture of Secrecy through Canon Law: The Trickle-down Effect**

743. Within a strictly hierarchical structure like the Church, the influence of canon law on culture is likely to be even more profound, if for no other reason than the “trickle-down effect.”<sup>656</sup> Lower ranks of the clergy look up to the higher ones for guidance.

744. *Crimen Sollicitationis* starts off as a law dealing with soliciting in the confessional, that is, it was only dealing with priests, and not religious brothers and nuns who do not hear confessions. Indeed Title VI of *Crimen Sollicitationis* which extends the procedures for dealing with solicitation in the confessional to homosexuality, bestiality and paedophilia refers throughout to “clerics”. The same is true of *SST 2001* and *SST 2010* and the revised *Delicta Graviora* or *Substantive Norms*. Likewise Canon 1395 §2 dealing with sex assaults on minors, also only refers to “clerics”.

745. Canon 207 reserves the word “cleric” to those in Holy Orders, while acknowledging those who are not priests, and have taken vows in the religious life are important in the life of the Church.<sup>657</sup> Canon 695 does provide for the dismissal of nuns and religious brothers for breach of their vow of chastity, including sex assaults on children.

746. The *1983 Code of Canon Law* does not apply to sex crimes of lay teachers at Catholic schools. Their sexual abuse of children were not canonical crimes under Canon 1395§2, which applies only to clerics, or under Canon 695, which extends Canon 1395§2 to cover religious. Quite apart from the “trickle-down” effect, canon lawyers were advising school administrators and others that canon law served as a guide for how to deal with such lay people accused of abusing minors, even though it did not apply to them.<sup>658</sup> One of the significant features of

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<sup>656</sup> Marie Keenan: *Child Sexual Abuse and the Catholic Church, Gender, Power and Organizational Culture*, at loc 1557, cited above.

<sup>657</sup> [http://www.vatican.va/archive/ENG1104/\\_PT.HTM](http://www.vatican.va/archive/ENG1104/_PT.HTM) (Accessed 15 July 2013)

<sup>658</sup> Morrissey: *Procedures to be Applied in the case of Sexual Misconduct by a Priest: Studia Canonica* 26 (1992) 39-73 at 42 [http://www.attorneygeneral.jus.gov.on.ca/inquiries/cornwall/en/hearings/exhibits/Frank\\_Morrissey/pdf/06\\_Morrissey\\_Pro](http://www.attorneygeneral.jus.gov.on.ca/inquiries/cornwall/en/hearings/exhibits/Frank_Morrissey/pdf/06_Morrissey_Pro)

canon law is the pontifical secret. There have been cases in the State of New South Wales where charges have been laid against priests for allegedly not reporting the crimes of lay teachers to the police.<sup>659</sup>

747. But a more serious deepening of the culture occurs when people adopt practices that go beyond what the law itself provides. The United States laws on segregation did not allow lynching, but as Cardinal George points out in his article, the law called forth the ideology that gave rise to it, thus rationalizing and deepening the racism that brought it into being in the first place. One might also apply that to the criminalizing of homosexuality. The laws never justified “poofster bashing”, but it happened, and was encouraged by the existence of the law which reflected a view that homosexuals were inferior, dirty criminals and animals to be beaten.
748. And we can see exactly the same pattern in the Church. *Crimen Sollicitationis*, the 1983 Code of Canon Law with *Secreta Continere*, and SST 2001 and SST 2010 prohibited reporting to the civil authorities. These laws did not sanction protecting clergy sex abusers from the police in other ways. They did not of themselves sanction the protection of those involved in covering up clergy sex abusers. Those who covered up were obeying canon law and doing “the right thing”. They too needed to be protected from the civil law that threatened to prosecute them, but there was no requirement in canon law to do so.
- 748.1. Cardinal Bernard Law was Archbishop of Boston against whom allegations were made of covering up clergy sex abuse.<sup>660</sup> On 13 December 2002, while in Rome, he resigned his position as Archbishop of Boston, and was appointed as Archpriest of the basilica of Santa Maria Maggiore.<sup>661</sup> Whatever the truth of the allegations

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[cedures.pdf](#) (Accessed 30 July 2013). One of the other effects of this is that canon law is sometimes said to operate as a ‘guideline’ so that the purpose of the law can still be achieved by breach of its conditions. An example has already been referred to of Bishop Mulkearns not keeping notes. But the same principle can be applied to Fr Brian Lucas’s attempts to convince priests to resign. As he pointed out, this was not authorised by canon law. The ‘spirit’ of the law of preventing scandal could be achieved by having the priest resign before he was brought before a civil court. This was one of the purposes behind *Crimen Sollicitationis*, according to the Spanish canonist Aurelio Yanguas, writing in 1946.

<http://www.vatican.va/resources/Beal-article-studia-canonica41-2007-pp.199-236.pdf> (Accessed 16 July 2013)

<sup>659</sup> <http://www.abc.net.au/radionational/programs/religionandethicsreport/priest-charged-with-concealing-sex-offences/4244662> (Accessed 25 June 2013) Fr Brennan died shortly after being charged, and the charges against Fr Fenton were dismissed. <http://www.theherald.com.au/story/1266748/priest-aided-crime-police/> (Accessed 13 July 2013). [http://newsstore.fairfax.com.au/apps/viewDocument.ac?jsessionid=492FDC5BF1CE00995A7203C0944150EA?sy=af&pb=al\\_l\\_ffx&dt=selectRange&dr=1month&so=relevance&sf=text&sf=headline&rc=10&rm=200&sp=brs&cls=17333&clsPage=1&d\\_oCID=NCH131024CL7GL5V7EDP](http://newsstore.fairfax.com.au/apps/viewDocument.ac?jsessionid=492FDC5BF1CE00995A7203C0944150EA?sy=af&pb=al_l_ffx&dt=selectRange&dr=1month&so=relevance&sf=text&sf=headline&rc=10&rm=200&sp=brs&cls=17333&clsPage=1&d_oCID=NCH131024CL7GL5V7EDP) (Accessed 14 February 2014)

<sup>660</sup> <http://www.theguardian.com/world/2010/apr/21/boston-globe-abuse-scandal-catholic?guni=Article:in%20body%20link>. (Accessed 19 February 2014)

<sup>661</sup> <http://www.nytimes.com/2004/05/28/us/cardinal-law-given-post-in-rome.html> (Accessed 23 June 2013)

against Law, his new position ensured that he would not have to answer to the allegations.

- 748.2. According to the 1929 Lateran Treaty, the basilica, located in Italian territory, is owned by the Vatican, and enjoys extraterritorial status similar to that of foreign embassies.<sup>662</sup> Cardinal Law was therefore protected by diplomatic immunity, and while he resides in the Vatican, he is protected because the Vatican also has no extradition treaty with any other State.<sup>663</sup> Here you have an extension of clericalism that went right up to Pope John Paul II, now canonized: clergy are special people, above the civil law, and the only law that should apply to them is canon law because they have sworn to obey canon law.
- 748.3. In 2013, the Los Angeles Archdiocese finally agreed to hand over its documents in some long standing litigation, after losing case after case trying to withhold their production on the grounds of a “privilege” that the American civil law does not recognize. According to reports, the documents showed that not only did Cardinal Mahony not report clergy sex abusers to the police, but he encouraged them to stay interstate to avoid being arrested.<sup>664</sup> Canon law did not authorize that kind of conduct, but it is exactly the sort of thing that you would expect in accordance with the principles laid down by Cardinal Francis George about the effect of law – this time, canon law. The existence of the law “rationalizes and deepens” the clericalism.
- 748.4. Geoffrey Robertson QC refers to a Canadian case in 1993 where the Papal Nuncio’s assistance was sought for ferreting clergy sex abusers out of the country to take up positions overseas where they would be beyond the reach of the Canadian courts.<sup>665</sup> The same comments apply.
- 748.5. In Australia, Salesian priests accused of sex abuse were shifted to Samoa and to Rome. Professor Patrick Parkinson told the Victorian Parliamentary Inquiry that

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John L. Allen, *All the Popes Men* at 71%

<sup>662</sup> Lateran Treaty, Articles 13 and 15 <http://spcp.prf.cuni.cz/dokument/lateran.htm> (Accessed 23 June 2013)

<sup>663</sup> The former papal nuncio to the Dominican Republic, Archbishop Josef Wesolowski has been accused of sex abuse of minors, both there and in Poland, and was wanted for questioning both by Polish and Dominican Republic investigators. The Vatican confirmed that it has no extradition treaty with any other State, but said that it had not received any request for extradition in respect of the Archbishop. <http://www.ucanews.com/news/vatican-denies-lack-of-cooperation-in-nuncio-abuse-case/70074> (Accessed 15 January 2013)

<sup>664</sup> <http://m.thetablet.co.uk/article/163741> (Accessed 9 February 2013), Michael D’Antonio: *Mortal Sins* p.344

<sup>665</sup> *The Case of the Pope* Ch.2 par 44

when the Australian Provincial of the Salesians, tried to bring back a priest from Rome to face his accusers, the second in charge of the Salesians, who is now the Bishop of Ghent in Belgium, suggested that he be sent to another country without an extradition treaty with Australia.<sup>666</sup> Professor Parkinson gave other examples of where Australian priests accused of sex crimes against children were kept overseas by their religious orders.<sup>667</sup>

748.6. In April 1990, Bishop A.J. Quinn, a civil as well as a canon lawyer, told the Midwest Canon Law Society how to hide incriminating documents to avoid production on subpoena. He told them to send anything they considered “dangerous” to the papal nuncio who could refuse production on the grounds of diplomatic immunity.<sup>668</sup> Canon law did not require that, but its effect was to achieve the purpose behind the pontifical secret of avoiding scandal.

748.7. On 12 November 2011, the Australian Jesuit and Professor of Law at the Australian Catholic University, Fr Frank Brennan SJ, was interviewed on the ABC’s *Lateline* program. He was asked about the clergy abuse problem.

“FRANK BRENNAN:.... If I may say, I think the real problem with the Catholic Church is the sort of unaccountable clericalism.....I'd been in Rome two years ago. I attended a meeting. I went across with two of my brother Jesuits from the United States. I attended a splendid concert that the Vatican put on and there was Pope Benedict and as the symphony played, an American priest turned to me and said, "That man beside the Pope, that's Cardinal Law." He said, "If he was back home, he'd be in jail."

I was very ashamed at that moment and I thought there is a structural problem, but it's not in terms as you've discussed. I think it's more the sort of unaccountable clericalism of a male celibate hierarchy and I think there are fundamental challenges for the Church in the 21st Century.

EMMA ALBERICI: He'd been in jail for what?

FRANK BRENNAN: Well, for things to do with failure to deal adequately with priests who'd been proven to be engaged in child abuse.

<sup>666</sup>[http://www.parliament.vic.gov.au/images/stories/committees/fcdc/inquiries/57th/Child\\_Abuse\\_Inquiry/Transcripts/Pr\\_of\\_Patrick\\_Parkinson\\_19-Oct-12.pdf](http://www.parliament.vic.gov.au/images/stories/committees/fcdc/inquiries/57th/Child_Abuse_Inquiry/Transcripts/Pr_of_Patrick_Parkinson_19-Oct-12.pdf) p. 7 (Accessed 29 April 2013)

<sup>667</sup>[http://www.parliament.vic.gov.au/images/stories/committees/fcdc/inquiries/57th/Child\\_Abuse\\_Inquiry/Submissions/Parkinson\\_Patrick.pdf](http://www.parliament.vic.gov.au/images/stories/committees/fcdc/inquiries/57th/Child_Abuse_Inquiry/Submissions/Parkinson_Patrick.pdf) p. 17 (Accessed 29 April 2013).

<sup>668</sup> Robert Blair Kaiser: *Whistle: Tom Doyle's Steadfast Witness for Victims of Clerical Sexual Abuse*, Caritas Communications (2015), loc. 852. Quinn denied in court that he had ever given that advice, until a transcript of his speech was produced: loc. 859.

EMMA ALBERICI: So the accountability or the lack of accountability goes that high up within the Church?

FRANK BRENNAN: Sadly it does.<sup>669</sup>

### **Clericalism: The Sexual Abuse of Children as only a Moral Failure**

749. The culture of clericalism also affected the way that Church personnel viewed the sexual abuse of children. It was seen not as a crime punishable by the State, but a moral failure.<sup>670</sup>
750. This view was held by the Holy See's most senior Curia Cardinals, the Church equivalent of the civil law's legislative leaders and judges of its highest courts. It was best expressed by Cardinal Castrillón, the Prefect of the Congregation for Clergy (1996-2006) in his interview with Patrice Janiot on Colombia CNN. He denied that there was any such thing as a paedophile, and said that it was simply a matter of priests "making a mistake", and if the priest acknowledges his crime, the bishop punishes him in accordance with canon law.<sup>671</sup>

<sup>669</sup> <http://www.abc.net.au/lateline/content/2012/s3631260.htm> (Accessed 15 July 2013) Fr Brennan made similar comments about clericalism in *Church-State Issues and the Royal Commission Eureka Street* on 3 September 2013 [www.eurekastreet.com.au](http://www.eurekastreet.com.au) (Accessed 4 September 2013)

<sup>670</sup> Br Crowe, the provincial of the Marist Brothers and Br Shanahan, a senior member of the Christian brothers were asked how the Orders intellectually came to the position of regarding sexual abuse of children only as a "moral failure". Neither were able to explain it. Br Crowe, 24 January 2014: [http://www.childabuseroyalcommission.gov.au/wp-content/uploads/2014/01/Transcript-RC\\_IRCSA\\_Day-036A\\_24-Jan-2014-2013\\_Public.pdf](http://www.childabuseroyalcommission.gov.au/wp-content/uploads/2014/01/Transcript-RC_IRCSA_Day-036A_24-Jan-2014-2013_Public.pdf) (Accessed 5 December 2014), Br Shanahan: <http://www.childabuseroyalcommission.gov.au/case-study/e7ba58da-609c-4854-aa74-c8992ec75d3c/case-study-11,-april-2014,-perth> 5 May 2014, p.2098 (Accessed 5 December 2014) [http://www.childabuseroyalcommission.gov.au/wp-content/uploads/2014/01/Transcript-RC\\_IRCSA\\_Day-036A\\_24-Jan-2014-2013\\_Public.pdf](http://www.childabuseroyalcommission.gov.au/wp-content/uploads/2014/01/Transcript-RC_IRCSA_Day-036A_24-Jan-2014-2013_Public.pdf) p. 3765 (Accessed 5 December 2014), Br Shanahan: <http://www.childabuseroyalcommission.gov.au/case-study/e7ba58da-609c-4854-aa74-c8992ec75d3c/case-study-11,-april-2014,-perth> 5 May 2014, p.2098 (Accessed 5 December 2014). The Ferns Report in Ireland found that Bishop Donal Herlihy of Ferns (1964-1983) had the same attitude: Ferns Report, p. 250: [http://www.bishop-accountability.org/reports/2005\\_10\\_Ferns/ferns\\_8\\_0\\_conclusions.pdf](http://www.bishop-accountability.org/reports/2005_10_Ferns/ferns_8_0_conclusions.pdf) (Accessed 16 May 2015). The Ryan Report came to the same conclusion about clergy and religious orders: Marie Keenan : *Sex Abuse and the Catholic Church* , loc 5288.

<sup>671</sup> Interview with Patrice Janiot and Cardinal Castrillon on CNN Colombia, [http://www.youtube.com/watch?v=gnlwp\\_d3Ue8](http://www.youtube.com/watch?v=gnlwp_d3Ue8) (Accessed 12 April 2013) (the author's translation)

Janiot: Cardinal Castrillon, it seems that the Vatican is more concerned about its image than for the damage caused to its victims, especially when they have moved priests from parish to parish after they have been accused, and questioned by their superiors who have then not been concerned that they could continue abusing children. Do not the bishops or the hierarchy have to take some responsibility, some greater responsibility?

Castrillon: That is not so clear. You are making a statement that seems very clear. If it were so, it would be very clear. As Prefect of the Clergy, I had meetings with scientists and a group of scientists who say that paedophiles do not exist. There are people who commit acts of paedophilia. But the sickness of the paedophile does not exist. And for that reason when a person makes a mistake and often it is a tiny mistake, and this person, this accused person confesses his crime and acknowledges his crime, the bishop punishes him with what the law permits. There is a suspension, he is taken away from his parish, and he shows correction, and then he is sent to another parish. That is not a crime. It is not covering it up. It is following the law, like civil society does in the case of doctors and lawyers. They are not struck off for all eternity.

Janiot: But for the Church, isn't the sexual abuse of children a crime, an offence?

Castrillon: Patricia, for the love of God, you don't understand me. Aren't I speaking in your language? I am talking to you in Spanish. The Church punishes paedophilia as a very serious crime. I've said this a thousand



751. As discussed in the Chapter 4 on the history of canon law, this culture in the Church only arose in the last 150 years. It permeated throughout the whole Church and is still reflected in canon law.<sup>672</sup>

### Clericalism and the Treatment of Victims

752. The cultural effects of canon law go even further than the actions and words of senior clergy protecting clergy sex abusers and those who covered them up. It also affected the way that the hierarchy treated the victims. They saw them as dishonest, greedy people out to make false accusations against clerics.<sup>673</sup>

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Janiot:	times. They are punished in accordance with the law. The law says that it is a serious crime, and the bishop is not authorised to punish without going through the processes to which the person has a right. And what are the processes to which the delinquent has some rights? His rights according to Canon law?
Castrillon:	We are talking on television. I'm not going to give a lecture now on procedural law. Simply, it must be shown that he has committed a crime, there are witnesses or there is some credibility established in the person. But when on top of that you have enormous sums of money that are benefiting a large number of people, with these kinds of crimes, all of us have the right to cast doubt the honesty of these procedures.
Janiot:	There seems to be a lot more reporting of crimes than of punishments, and the Church has not been efficient in taking the cases forward, because there are dozens of them, hundreds of them.
Castrillon:	Patricia, give me one concrete case in any part of the world where a priest has been reported, the crime proved, and he has not been punished. Give me one in the whole Catholic world. And it is big. There are in total four hundred thousand priests in the world. I don't want there to be a kind of unproved cloud over a group of people who are sacrificing their lives precisely for the honesty and holiness of children. Are there four hundred thousand priests, for the love of God who are involved in that? If we look at history, how many cases can one say that have occurred in the United States. How many cases have gone to court and how many involve the Church, where there has been an allegation, a trial and conviction?
Janiot:	But I believe, Cardinal that you cannot base a defence by looking at the speck in the eye of another. We are talking about a respected institution, and in the world it is very big, and you cannot base your defence on accusing other sectors of society that have committed crimes. I believe that people are expecting openness at least in the evaluation of what went wrong, because if not, the Church is involved in a scandal...my last question: if Pope John Paul had acted more decisively on the scandal of the sexual abuse, you would not have this problem.
Castrillon:	Pope John Paul did everything he had to do. He did it through the clearest norms of justice, charity, equity and maintaining the purity of the Church. He did exactly what he had to do...I witnessed his concern, his sorrow. It is very easy for the world's press to latch onto unproven cases in which an unreal image of the clergy is projected. There are no cases within the Church which are known, and have not been punished. Show me just one...in any part of the world that is known and proved that has not been punished.
Janiot:	In the case of Fr. Marcial Maciel, he was never brought to justice. The priest died and his case was in the Vatican during the nineties and it was never heard by the judicial processes, while his own companions in his Order actually accepted that he had committed serious crimes.
Castrillon:	I don't want to answer that.

<sup>672</sup>For further examples of the extent of the culture of clericalism and of secrecy over child sexual abuse, see the author's *Potiphar's Wife* at p.170-183.

<sup>673</sup>Such claims were made by Cardinal Obando y Bravo, comparing those complaining about sexual abuse as acting like Potiphar's wife: Interview on 1 September 2002 with the Italian monthly, *30 Giorni*, quoted in John R. Allen *All the Pope's Men: The Inside Story of How the Vatican Really Thinks*. (Hardcover) New York: Doubleday, 2004. ISBN 0-385-50966-9. (Trade Paperback) New York: Doubleday/Image October 2006. ISBN 0-385-50967-7, Electronic copy at 70%, by

753. Claims by victims were met with every legal device possible if they did not agree to go along with the Church's protocols for limited compensation.<sup>674</sup>
754. The *1983 Code of Canon Law*, oddly enough, did say something about the rights of victims: Canon 1729 provided that a party who has suffered harm can bring a "contentious action" for damages in the course of the penal case against a priest, but as the Murphy Commission noted, victims were never told about this right.<sup>675</sup> And, in any event, the *1983 Code of Canon Law* made such penal cases virtually impossible.
755. There are voices within the Church who have spoken about the problems created by this clerical culture, like Bishop Geoffrey Robinson, Fr Frank Brennan SJ and Archbishop Martin of Dublin.<sup>676</sup> Even Pope Francis I has made mention of the problem, but in a different context.<sup>677</sup>
756. In modern secular society, religions have the right, within certain limits, (like racial vilification), to preach and believe whatever they like – Jehovah's Witnesses can believe that blood transfusions are sinful, Catholics that contraception is sinful – and that priests are "special" because they have been ontologically changed at ordination. All civil society can do is to protect itself against the fallout from such doctrines. So adult Jehovah's Witness can refuse a blood transfusion, and let themselves die rather than have one, but society will not let that happen to their children who are not old enough to make an informed decision.

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Fr. Benedict Groeschel, a prominent Catholic Franciscan priest from New York, with his own television show in August 2012 [http://www.huffingtonpost.com/2012/08/30/benedict-groeschel-sex-abuse-apology\\_n\\_1844947.html](http://www.huffingtonpost.com/2012/08/30/benedict-groeschel-sex-abuse-apology_n_1844947.html) (Accessed 10 July 2013)

<sup>673</sup> [http://www.huffingtonpost.com/2013/10/08/polish-archbishop-jozef-michalik-sex-abuse-comments\\_n\\_4065751.html](http://www.huffingtonpost.com/2013/10/08/polish-archbishop-jozef-michalik-sex-abuse-comments_n_4065751.html) (Accessed 11 October 2013)

<sup>674</sup> David Marr "The Prince, Faith, Abuse and George Pell", *Quarterly Essay 51*, September 2013, at 30%.

<sup>675</sup> Murphy Dublin Report Part 1 <http://www.justice.ie/en/JELR/DACOI%20Part%201.pdf/Files/DACOI%20Part%201.pdf> par 4.17-4.28 (Accessed 25 April 2013) par 4.73

<sup>676</sup> Bishop Geoffrey Robinson: "One of the saddest sights in the Church today is that of some young, newly-ordained priests insisting that there is an "ontological difference" between them and laypersons, and enthusiastically embracing the mystique of a superior priesthood. Whenever I see young priests doing this I feel a sense of despair, and I wonder whether we have learned anything at all from the revelations of abuse." *For Christ's Sake End Sexual Abuse in the Catholic Church for Good*, Garratt Publishing, Melbourne, (2013) 83-84; Frank Brennan SJ: *Church-State Issues and the Royal Commission, Eureka Street*, 3 September 2013, <http://www.eurekastreet.com.au/article.aspx?aeid=38146#.Ui5vaKt-8qQ> (Accessed 10 September 2013) and on Archbishop Martin, <http://www.catholicbishops.ie/2013/04/24/address-archbishop-diarmuid-martin-russo-family-lecture/> (Accessed 15 May 2013). It seems, however, that this clericalism is still being taught in the Church's seminaries: see the author's *Potiphar's Wife*, p.174.

<sup>677</sup> <http://cathnews.co.nz/2013/04/23/clericalism-criticised-by-future-pope-francis/> (Accessed 15 May 2013)

757. Likewise the Church can have as much clericalism as it wants, but society has to protect its children against the fallout, the sexual abuse of children, and the covering up by the hierarchy that has been the outcome of this culture expressed in and deepened by canon law over the last 100 years. That can only mean strict civil laws on reporting to protect children and some supervision over the disciplining of clergy and religious.

### Cultural Inertia

758. Once a law is changed by the emergence of a new culture (racial integration in the United States, tolerance of homosexuality etc.) the reinforcing of the new culture does not happen overnight. There is a certain cultural inertia which might be manifested in some resistance to the new way of thinking.<sup>678</sup> Cardinal Francis George, the leader of the delegation that went to Rome to convince Cardinal Ratzinger that he should allow the American bishops to report clergy sex abusers to the police, is living proof of this.

759. In 2005 his archdiocese of Chicago was receiving complaints of sexual assault by a priest, Fr Dan McCormack who was being investigated by the police. George did not act on the Independent Board of Review Recommendation for his removal. He eventually did, but in March 2006, after McCormack was arrested a second time. George publicly apologised for not acting earlier.<sup>679</sup> His was a case of cultural inertia and the continuing influence of the cultural effects of the old canon law before the Dallas amendments.<sup>680</sup>

760. But cultural inertia did not only affect Cardinal Francis George. It was widespread across the United States. The BBC Panorama Program, *Sex Crimes and the Vatican* in 2006 referred to the independent body called the National Review Board set up by the American Catholic

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<sup>678</sup> Juan D. Carrillo: *Cultural Inertia and Uniformity in Organizations*, *Journal of Law, Economics, & Organization* <http://www-bcf.usc.edu/~juandc/PDFpapers/wp-cult.pdf> (Accessed 15 July 2013). Legislation is also needed to prevent people from acting in the old ways. As Martin Luther King said: "Legislation may not change the heart, but it will restrain the heartless." Acceptance speech for honorary degree from Newcastle University, November 1967

<http://www.ncl.ac.uk/congregations/ceremonies/honorary/martinlutherking.php> (Accessed 10 April 2015)

<sup>679</sup> <http://www.npr.org/templates/story/story.php?storyId=16235278> (Accessed 11 March 2013)

[http://www.bishop-accountability.org/news2006/01\\_02/2006\\_02\\_19\\_CBS2\\_CardinalApologizes.htm](http://www.bishop-accountability.org/news2006/01_02/2006_02_19_CBS2_CardinalApologizes.htm) (accessed 11 March 2013) "I should have found at least some fashion in the canons to remove provisionally Father McCormack," he said in a news conference after releasing the results of two investigations that showed how the McCormack case went wrong. "I take responsibility for not doing that, and I'm saddened by my own failure, very much so."

[http://www.catholicnewsagency.com/news/cardinal\\_george\\_apologizes\\_to\\_disgruntled\\_chicago\\_parishioners/](http://www.catholicnewsagency.com/news/cardinal_george_apologizes_to_disgruntled_chicago_parishioners/) (accessed 11 March 2013). The Vatican in 2002 refused to allow suspension to take place before a preliminary inquiry – that right only being granted in the 2010 reforms. But he could have removed or put restrictions on his faculties.

<sup>680</sup> On 12 January 2012, in his weekly column, Cardinal George tried to justify his handling of the McCormack case, seemingly having forgotten about his apology. <http://ncronline.org/blogs/ncr-today/doyle-rebuts-cardinal-george-regarding-chicago-abuse-files> (Accessed 1 February 2014). Fr Thomas Doyle responded in a blistering reply. <http://ncronline.org/blogs/ncr-today/doyle-rebuts-cardinal-george-regarding-chicago-abuse-files> (Accessed 1 February 2014)

Bishops Conference to monitor the 2002 Dallas Charter.<sup>681</sup> The Chairman of the Board was former Oklahoma governor, Frank Keating, but he resigned after a year in the job in June 2003. He compared some Church leaders to the Cosa Nostra. In his resignation letter, Keating said:

“To resist Grand Jury subpoenas, to suppress the names of offending clerics, to deny, to obfuscate, to explain away. That is the model of a criminal organization, not my Church”.<sup>682</sup>

761. The program also interviewed Judge Anne Burke, a Judge of the Illinois Appeals Court, who was vice-chairman of the Board and who took over as interim chairman from Keating, and continued to sit on the National Review Board until 2005. She said that despite the change of policy in the American Church in 2002, nothing much seemed to have changed, and there was a continual watering down of the Charter. Priests were not stood down when allegations were made, and it seemed to her that every month something indicated that bishops had not learned from their mistakes.<sup>683</sup>
762. The Panorama program also interviewed a District Attorney from Phoenix Arizona, Rick Romley, who said that he never received any cooperation from the Church, only obstruction, including instructions to bishops to ship all their documentation to the Papal Nuncio who would be entitled to oppose the production of documents on subpoena because of his diplomatic status.<sup>684</sup>
763. Likewise, after the Bishops Conference of England and Wales adopted the Nolan Report 2001 recommendations (without a “*recognitio*” from the Holy See), the Cumberlege review committee found in 2007 that there was opposition from a “strong and vocal lobby of priests”.<sup>685</sup>

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<sup>681</sup><http://vimeo.com/654677> at 18 mins. (Accessed 12 September 2013)

<sup>682</sup> See also <http://richgibson.com/abuse.html> (Accessed 15 July 2013),

<sup>683</sup> <http://vimeo.com/654677> (Accessed 12 September 2013). Another example of cultural inertia appears in the Affidavit of Jennifer M Haselberger in litigation against the Archdiocese of St Paul and Minneapolis where she accused Archbishop Nienstedt of continuing to cover up allegations of child sexual abuse in 2004, contrary to the Dallas Charter.

<http://www.andersonadvocates.com/Posts/News-or-Event/1855/Affidavit-of-Jennifer-Haselberger.aspx> (Accessed 17 July 2014)

<sup>684</sup> Ibid at 32.47 mins. Bishop James Quinn of Cleveland, a civil lawyer advised bishops in a speech in 1990 to ship all documents they considered “dangerous” to the papal nuncio who could then claim diplomatic immunity against production: The Investigative Staff of the Boston Globe: *Betrayal: The Crisis in the Catholic Church*, (Hachette 2008)

<sup>685</sup> [http://www.cathcom.org/mysharedaccounts/cumberlege/report/downloads/CathCom\\_Cumberlege2.pdf](http://www.cathcom.org/mysharedaccounts/cumberlege/report/downloads/CathCom_Cumberlege2.pdf) par 2.17 (Accessed 15 July 2013)

764. The same thing happened in Ireland, where the Cloyne Report found that while the Bishop John Magee of the Cloyne diocese ostensibly supported child protection procedures, he was “never genuinely committed to their implementation.”<sup>686</sup>
765. The evidence given by Professor Patrick Parkinson and Deputy Commissioner Ashton to the Victorian Parliamentary Inquiry would seem to suggest that the same attitude applied in Australia after the adoption by the ACBC of *Towards Healing* in 1996. Bishop Michael Malone in his evidence to the Cunneen Special Commission said that he encountered resistance amongst both priests and bishops from other dioceses to his measures to deal with child sexual abuse.<sup>687</sup>
766. Even if canon law were to change, and pontifical secrecy abandoned, or civil laws changed to make reporting compulsory in all circumstances, there is always the problem of cultural inertia.

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### 13. THE CHURCH DISCIPLINARY SYSTEM

#### A History of the Failure of the Church Disciplinary System

767. From the time of the first Code of Canon Law in 1917, the Church’s disciplinary system was based on:
- For Clerics**
- 767.1. For diocesan clerics: from 1917 to 1974: The *1917 Code of Canon Law* with *Crimen Sollicitationis* added on in 1922.
- 767.2. For religious clerics: From 1917 to 1962: The *1917 Code of Canon Law*.
- 767.3. For religious clerics: From 1962 until 1974: The *1917 Code of Canon Law* and *Crimen Sollicitationis*.
- 767.4. For both diocesan and religious clerics: From 1974 to 1983: The *1917 Code of Canon Law* and *Crimen Sollicitationis* with its secret of the Holy Office replaced by the pontifical secret under *Secreta Continere*.

<sup>686</sup> [http://www.justice.ie/en/JELR/Cloyne\\_Rpt.pdf/Files/Cloyne\\_Rpt.pdf](http://www.justice.ie/en/JELR/Cloyne_Rpt.pdf/Files/Cloyne_Rpt.pdf) (Accessed 6 March 2013) par 4.88

<sup>687</sup> [http://www.lawlink.nsw.gov.au/lawlink/Special\\_Projects/ll\\_splprojects.nsf/vwFiles/Transcript\\_Day\\_9\\_-\\_TOR\\_2\\_-\\_12\\_July\\_2013.pdf/\\$file/Transcript\\_Day\\_9\\_-\\_TOR\\_2\\_-\\_12\\_July\\_2013.pdf](http://www.lawlink.nsw.gov.au/lawlink/Special_Projects/ll_splprojects.nsf/vwFiles/Transcript_Day_9_-_TOR_2_-_12_July_2013.pdf/$file/Transcript_Day_9_-_TOR_2_-_12_July_2013.pdf), 1011.28ff (Accessed 16 July 2013)

- 767.5. From 1983 to 2001: The *1983 Code of Canon Law* and *Secreta Continere*.
- 767.6. From 2001 to 2010: The *1983 Code of Canon Law* as amended by *SST 2001* and *Secreta Continere*.
- 767.7. From 2010 to the present: The *1983 Code of Canon Law* and *SST 2010*, as revised by Pope Benedict XVI and *Secreta Continere*, with a dispensation to report clerical sexual abuse of children where there were civil laws requiring reporting.

#### **For Religious not in Holy Orders**

- 767.8. From 1917 to 1974: The *1917 Code of Canon Law*
- 767.9. From 1974 to 1983: The *1917 Code of Canon Law* and *Secreta Continere*.
- 767.10. From 1983 to 2001: The *1983 Code of Canon Law* and *Secreta Continere*.
- 767.11. From 2001 to 2010: The *1983 Code of Canon Law* with the 5 year limitation period extended by *SST 2001*, and *Secreta Continere*.
- 767.12. From 2010 to the present: The *1983 Code of Canon Law* with a further extension of the limitation period by *SST 2010*, and *Secreta Continere*.
768. As referred to earlier, the Spanish canon lawyer, Fr Aurelio Yanguas SJ, in 1946 wrote that the purpose behind *Crimen Sollicitationis* was to take “swift, decisive and secret action” before these crimes reach the civil courts so that the Church could be spared the humiliation of having priests in the public dock as sex offenders.<sup>688</sup> In other words, the primary purpose was the prevention of scandal which could result in loss of faith amongst the Church’s members. But another purpose was the laudable one to get rid of abusers from the priesthood and religious life so that they would not be in positions of power within the Church to repeat their offences.
769. The Australian Church has conceded that the failure to dismiss these priests and religious did result in more children being abused than might otherwise have occurred. The TJHC in its submission to the Royal Commission on *Towards Healing* stated:

“6 The Church is also ashamed to acknowledge that, in some cases, those in positions of authority concealed or covered up what they knew of the facts, moved perpetrators to another place, thereby enabling them to offend again, or failed to report matters to the police when they should have. That behaviour too is indefensible.

<sup>688</sup> “*De crimine pessimo et competentia S. Officia relate ad illud,*” *Revista Espanola de Derecho Canonico*. 1(1946): 427-439. John P. Beal: *The 1962 Instruction*, pp. 228ff. <http://www.vatican.va/resources/Beal-article-studia-canonica41-2007-pp.199-236.pdf> (Accessed 16 July 2013)

7 Too often in the past it is clear some Church leaders gave too high a priority to protecting the reputation of the Church, its priests, religious and other personnel, over the protection of children and their families, and over compassion and concern for those who suffered at the hands of Church personnel. That too was and is inexcusable.”<sup>689</sup>

770. The disappointing thing about the TJHC submission, described by its CEO, Francis Sullivan, as a “warts and all history, going back many decades”, is its attempt to blame individuals in the Church. It makes no attempt even to discuss the systemic issues created by canon law, both in relation to the issue of reporting and the failure of the Church’s disciplinary system.<sup>690</sup> The submission makes no mention of *Crimen Sollicitationis* and *Secreta Continere*, and while it does mention *SST 2001* and *SST 2010*, it makes no mention of the pontifical secret imposed in Art 25 of *SST 2001* and Art 30 of *SST 2010*.
771. The submission mentions the Irish Murphy Commission, but makes no mention of its criticisms of canon law’s disciplinary system. The closest it comes to dealing with the systemic issues created by canon law is the mention of a report of Bishop Robinson referring to a difficulty created by the 5 year limitation period under the 1983 Code of Canon Law.<sup>691</sup>
772. The Australian Church response is hardly surprising. It follows the same line followed by Pope Benedict XVI in his Pastoral Letter to the People of Ireland of 19 March 2010 in response to the Murphy Commission report on the Archdiocese of Dublin.

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<sup>689</sup> <http://www.childabuseroyalcommission.gov.au/wp-content/uploads/2013/10/15.-Truth-Justice-and-Healing-Council1.pdf> page 1 (Accessed 25 November 2013)

<sup>690</sup> Francis Sullivan, ABC Religion and Ethics Report, 15 October 2013 <http://www.abc.net.au/religion/articles/2013/10/15/3869414.htm>, David Marr: “Catholic church admits grave faults in dealing with Australian abuse victims” <http://www.theguardian.com/world/2013/oct/03/catholic-church-grave-faults-abuse> (Accessed 29 October 2013).

<sup>691</sup> <http://www.childabuseroyalcommission.gov.au/wp-content/uploads/2013/10/15.-Truth-Justice-and-Healing-Council1.pdf> p 90, par 50-57 (Accessed 25 November 2013) On 26 June, 2014, when commenting on the Nestor case, Francis Sullivan said, “This case demonstrates how, in the past, canonical issues have struggled to keep pace with the realities of how to deal with sex abuse cases in Australia” <http://www.tjhcouncil.org.au/media/77154/BLOG-57-Wollongong-hearing-begins-.pdf> (Accessed 22 October 2014). On 2 July 2014, in discussing the Nestor case, he referred to the “convoluted processes of the Vatican in dealing with sexual abuse issues.” <http://www.tjhcouncil.org.au/media/78026/Blog-58-Royal-Commission-Interim-Report.pdf> (Accessed 22 October 2014). Other than those two mentions of the problems with the disciplinary system under canon law, there has been no attempt by the TJHC to analyse them.

## Pope Benedict XVI's Pastoral Letter to the People of Ireland

773. The Murphy Commission made a detailed examination of the secrecy aspects of canon law and of its disciplinary system, and concluded that:

“...the structures and rules of the Catholic Church facilitated that cover up”<sup>692</sup>

774. The kindest thing that one can say about Pope Benedict's response in his Pastoral Letter to the people of Ireland was that it was less than frank. He ignored the findings of the Commission about the defects in canon law, and his own role, and the role of the Roman Curia in the cover up. Instead, he blamed the bishops.

775. In paragraph 11, addressing the Irish bishops, the Pope said,

“It cannot be denied that some of you and your predecessors failed, at times grievously, to apply the long-established norms of canon law to the crime of child abuse. Serious mistakes were made in responding to allegations. I recognize how difficult it was to grasp the extent and complexity of the problem, to obtain reliable information and to make the right decisions in the light of conflicting expert advice. Nevertheless, it must be admitted that grave errors of judgement were made and failures of leadership occurred. All this has seriously undermined your credibility and effectiveness. I appreciate the efforts you have made to remedy past mistakes and to guarantee that they do not happen again. Besides fully implementing the norms of canon law in addressing cases of child abuse, continue to cooperate with the civil authorities in their area of competence.”<sup>693</sup>

776. In 1988, as Cardinal Ratzinger, the Prefect of the CDF, Benedict had written to the Church's then chief canon lawyer, Cardinal Castillo Lara, the President of the Pontifical Council for Legislative Texts, asking for a change to canon law to have a more streamlined way of dealing with clergy who had sexually abused children, because the formal judicial trial was too unwieldy. At that time, Cardinal Ratzinger's Congregation for the Doctrine of the Faith had no role in canonical trials for sex abuse except where there had also been soliciting sex in the confessional. His Congregation was also involved in dealing with applications by priests to be laicised so that they could marry. He was finding that coming across his desk were many applications for voluntary laicisation from clergy who had been sexually assaulting children – that being the only feasible way for a priest sex abuser to be

<sup>692</sup> Murphy Dublin Report Part 1 <http://www.justice.ie/en/JELR/DACOI%20Part%201.pdf/Files/DACOI%20Part%201.pdf> (Accessed 25 April 2013) 1.15, 1.113 (Conclusion)

<sup>693</sup> [http://www.vatican.va/holy\\_father/benedict\\_xvi/letters/2010/documents/hf\\_ben-xvi\\_let\\_20100319\\_church-ireland\\_en.html](http://www.vatican.va/holy_father/benedict_xvi/letters/2010/documents/hf_ben-xvi_let_20100319_church-ireland_en.html) (Accessed 16 July 2013)



- dismissed.<sup>694</sup> Ratzinger thought that this was inappropriate and those priests should be put on trial and dismissed from the priesthood.<sup>695</sup>
777. Cardinal Castillo Lara rejected the request saying that any change to canon law would endanger the priest's "fundamental right of defence".<sup>696</sup>
778. As a former senior member of the Roman Curia, Pope Benedict must also have known of the six year negotiations from 1988 to 1994 between the American bishops and the Vatican to extend the 5 year limitation period. In 1994, an extension was granted to 10 years from the 18<sup>th</sup> birthday of the victim, but limited to the United States. The same extension was given to Ireland in 1996, and confirmed again on 4 December 1998 for the United States.<sup>697</sup> But canonical actions against priests for the rest of the world, including Australia, were still subject to the 5 year limitation period until 2001.
779. Pope Benedict was also aware that *Crimen Sollicitationis* and the *1983 Code of Canon Law* required a "pastoral approach", that is, to try and cure the priest before taking proceedings to dismiss him. This is exactly what the Irish bishops were doing, and were roundly criticized by the Murphy Commission for doing so. The American canon lawyer, Nicholas Cafardi, after quoting numerous opinions of American canon lawyers about the *1983 Code of Canon Law* says that there was nearly unanimous opinion that canon law regarded it as improper to start penal proceedings to dismiss a priest except as a last resort. Canon law insisted that the first response of a bishop was to try and cure the priest.<sup>698</sup>
780. Yet, in his letter, Benedict said,
- "The programme of renewal proposed by the Second Vatican Council was sometimes misinterpreted and indeed, in the light of the profound social changes that were taking place, it was far from easy to

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<sup>694</sup> See evidence of Cardinal Pell

[http://www.parliament.vic.gov.au/images/stories/committees/fcdc/inquiries/57th/Child\\_Abuse\\_Inquiry/Transcripts/Catholic\\_Archdiocese\\_of\\_Sydney\\_27-May-13.pdf](http://www.parliament.vic.gov.au/images/stories/committees/fcdc/inquiries/57th/Child_Abuse_Inquiry/Transcripts/Catholic_Archdiocese_of_Sydney_27-May-13.pdf) page 21.8, and Report of Antony Whitlam QC, <http://www.parra.catholic.org.au> (Accessed 9 February 2013), par 58

<sup>695</sup> Article by Archbishop Arrieta, the Secretary of the Pontifical Council for Legislative Texts in *La Civiltà Cattolica* on 4 December 2010 [http://www.vatican.va/resources/resources\\_arrieta-20101204\\_en.html](http://www.vatican.va/resources/resources_arrieta-20101204_en.html) (Accessed 21 June 2013). *Pastor Bonus* reorganised the Roman Curia in 1988 and from 1989 onwards requests for voluntary laicization were handled by the Congregation for Divine Worship and Discipline of the Sacraments (Art 68): Beal, Corriden & Green: *New Commentary on Code of Canon Law*, 385

<sup>696</sup> *Ibid*

<sup>697</sup> Letter of the Secretariat of State, 4 December 1998, Prot. N. 445.119/G.N, quote in Delaney p.72. The ACBC did not apply for the same extension because an examination of the complaints revealed that the number that could be dealt with under canon law had increased from 3% to only 19%: Exh CJH.301.11004.0030,.

<sup>698</sup> Cafardi, *Before Dallas*, 20-21, Rik Torfs "Child Abuse by Priests: the Interaction of State Law and Canon Law": *Concilium 2004/3 The Structural Betrayal of Trust* (SCM Press, London) at 111.

know how best to implement it. In particular, there was a well-intentioned but misguided tendency to avoid penal approaches to canonically irregular situations.”

781. Two months later, on 21 May 2010, Pope Benedict repeated this criticism of bishops and religious superiors in his rewritten historical introduction to *SST 2010*.<sup>699</sup>
782. However, the practice of the CDF, of which he was Prefect until his election as Pope in 2005, even after the reforms he introduced in 2001 was to insist on this same pastoral approach.<sup>700</sup>
783. Then Pope Benedict blamed the Irish bishops for their

“...misplaced concern for the reputation of the Church and the avoidance of scandal, resulting in failure to apply existing canonical penalties.”

But the actions of the CDF during these years were exactly the same.

784. In July 2011, a draft schema for the Revision of Book VI of the *1983 Code of Canon Law* was sent out from the Pontifical Council for Legislative Texts to Bishops’ Conferences for consultation in July 2011.<sup>701</sup> The introduction stated:

“Moreover the juridical experience of the Church in recent decades brings to light that Pastors have used the canonical penal system too sparingly in exercising their responsibility of governance, sadly not because the faithful are substantially keeping the prescriptions of the law, but rather for two fundamental reasons: firstly because of an erroneous way of understanding the role of penal sanctions in the Church, as if it were opposed to the prevailing needs of charity; secondly – this also must be admitted – because of some defects in the current canonical penal system.”<sup>702</sup>

785. If there was an “erroneous way of understanding the role of penal sanctions in the Church”, it was shared by the CDF. The introduction then continues:

“...charity requires Pastors to have recourse to the penal system considering the three ends which make it necessary in ecclesial society, namely that the demands of justice are restored, the offender is reformed and scandals prevented...Moreover, negligence in having recourse to the canonical penal

<sup>699</sup> [http://www.vatican.va/resources/resources\\_introd-storica\\_en.html](http://www.vatican.va/resources/resources_introd-storica_en.html) (Accessed 3 June 2016)

<sup>700</sup> See the author’s *Potiphar’s Wife: The Vatican’s Secret and Child Sexual Abuse* p. 291 for examples.

<sup>701</sup> Pontifical Council for Legislative Texts, *Schema Recognitionis Libri VI Codici Iuris Canonici*, Typis Vaticanis 2011

<sup>702</sup> Gordon Read, unofficial translation, *Schema Recognitionis Libri VI CIC (Reservatum)*, Council for the Interpretation of Legislative Texts, as quoted in Brendan Daly *Issues with Penal Law and the Proposed Revision of Book VI*, p. 64

system many times points to the omission of the obligation of vigilance (invigilandi) on the part of Pastors.”

786. This statement ignores the requirement of Canon 1341 to try to reform the priest prior to even putting him on trial.

#### **Dismissal under the 1917 Code and *Crimen Sollicitationis* 1922**

787. As described earlier, the 1917 Code of Canon Law allowed the dismissal of a priest for “more serious cases”. But in 1922, the Instruction *Crimen Sollicitationis* allowed dismissal only where the priest had “no hope, humanly speaking, or almost no hope, of his amendment.”<sup>703</sup> This introduced into canon law what became known as the “pastoral approach” to clergy sexual abuse where the prime responsibility of the bishop was to try and cure the priest.

#### **The 1980 Repeal of Administrative Dismissal**

788. As discussed earlier, in 1971 the CDF issued instructions for “administrative laicisation” if the bishop was satisfied that a priest had been sexually abusing children. Pope John Paul II abolished this power in 1980.
789. The removal of this measure was disastrous because it became virtually impossible to dismiss a priest from the priesthood without his consent, and not all of them consented, because while they were still not dismissed, they were entitled, under canon law, to receive an income and support from the Church.
790. In the late 1990s, the American bishops complained to the Holy See that they were unable to dismiss problem priests, even those who were in jail. The Congregation of Clergy replied that it had developed administrative procedures to dismiss those priests but only where their crimes were “public” and the priests had refused voluntary dismissal.<sup>704</sup> In other words, serial paedophiles that the Church knew about, but who had not been arrested would not be subjected to the same streamlined procedures for dismissal. This is further evidence of the intention of the Vatican at the highest levels to continue the cover up.

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<sup>703</sup> *Crimen Sollicitationis*, Art 63.

<sup>704</sup> Congregation for the Clergy, “Private Reply” (11 November 1998), prot. No. 2169/98: referred to in O’Reilly and Chambers: *The Sexual Abuse Crisis and the Legal Responses* p.249

791. The simpler method for dismissing a priest by “administrative” action was restored by an authorisation to the CDF in 2003.<sup>705</sup> In the meantime the period between 1980 and 2003 saw an explosion of reports of child sexual abuse by priests when the capacity of canon law to deal with them was severely crippled.

### **The 1983 Code of Canon Law**

792. The *1983 Code of Canon Law* had an even more disastrous effect on the capacity of bishops to deal with priest sex abusers, because it not only entrenched Pope John Paul II’s changes to administrative dismissal, but it also introduced limitation periods that did not exist under *Crimen Sollicitationis*.

793. Sex abuse of children under the *1983 Code* is a canonical crime if committed by clerics and religious, but not if committed by ordinary lay people.<sup>706</sup> It continued in the tradition of the *1917 Code of Canon Law* which had similar provisions.

794. Dismissal of clerics from the priesthood under the *1983 Code* could only take place through the more formal judicial process with three judges who were priests with doctorates or licentiates in canon law sitting on the tribunal.<sup>707</sup> In other words, the *1983 Code* entrenched the position that Pope John Paul II had decreed in 1980, that the administrative procedure for dismissal could only be used where the priest consented. The “judicial” procedure of dismissal is, according to the *New Commentary on the Code of Canon Law*, a penalty “rarely inflicted because of the complexity of the process.”<sup>708</sup>

### **The Limitation Period under the 1983 Code and its Extension**

795. The worst impediment that the new Code created for dealing with priests who sexually abused children was the 5 year limitation period from the time of the offence. After 5 years the canonical crime of sexual abuse was “extinguished”, and then no action could be taken

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<sup>705</sup> Facing the Truth, p 33:

[http://www.parliament.vic.gov.au/images/stories/committees/fcdc/inquiries/57th/Child\\_Abuse\\_Inquiry/Submissions/Catholic\\_Church\\_in\\_Victoria.pdf](http://www.parliament.vic.gov.au/images/stories/committees/fcdc/inquiries/57th/Child_Abuse_Inquiry/Submissions/Catholic_Church_in_Victoria.pdf) (Accessed 6 April 2013)

<sup>706</sup> Canons 1395 §2, and 207. Religious brothers and sisters, although “lay persons” can be dismissed or disciplined under Canons 694 -704.

<sup>707</sup> Canon 1421§3. By a decree of Pope John Paul II in 2003, the requirement that all judges have doctorates could be dispensed with by the CDF: Delaney, *Canonical Implications*, p. 75

<sup>708</sup> John P. Beal, James A. Coriden and Thomas J. Green, *New Commentary on the Code of Canon Law* (2000), 383.

against the priest.<sup>709</sup> On the other hand these crimes that had previously been reserved to the CDF under *Crimen Sollicitationis* had no limitation period at all.<sup>710</sup>

796. In 1988, the American bishops approached the Holy See with a view to extending the 5 year limitation period because, in just about every case, it precluded them from prosecuting clergy sex abusers. Children often did not come to terms with what has happened to them until well into adulthood.<sup>711</sup> These 6 year negotiations from 1988 to 1994 were a clear indication from the Holy See that it regarded *Crimen Sollicitationis* as having been repealed by the 1983 Code. Were it otherwise, these negotiations were unnecessary.<sup>712</sup>
797. In 1994, the Holy See granted an extension to the limitation period to 10 years from the 18<sup>th</sup> birthday of the victim, but limited to the United States. The same extension was given to Ireland in 1996, and confirmed again on 4 December 1998 for the United States.<sup>713</sup>
798. In 2000, Bishop Geoffrey Robinson reported back to the ACBC that very few cases could be dealt with under the judicial process because of the limitation period.<sup>714</sup> The American canon lawyer, Nicholas Cafardi points out that American canon lawyers during the whole clergy abuse crisis thought and advised that if the abuse had taken place more than five years previously, they could do nothing under canon law.<sup>715</sup>
799. The extraordinary thing is that Australia and the rest of the world had to wait until 2001 when *SST 2001* extended the period generally to 10 years from the 18<sup>th</sup> birthday of the victim. The Holy See was aware from 1988 that the 5 year limitation period was preventing the dismissal of serial sex abusers amongst priests, and yet waited some 13 years until 2001

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<sup>709</sup> Canon 1362§2: Ladislav Orsy SJ, says that the canonical "prescription" is different to civil law statutes of limitation because the former extinguishes the cause of action, but the latter only prevent reliance on it (estoppel). That may be the situation in the United States, but many limitation statutes in Australia provide for extinguishment. [http://www.bc.edu/dam/files/schools/law/lawreviews/journals/bclawr/44\\_4/04\\_FMS.htm](http://www.bc.edu/dam/files/schools/law/lawreviews/journals/bclawr/44_4/04_FMS.htm) (Accessed 2 October 2013)

<sup>710</sup> Canon 1362§1, [http://www.vatican.va/archive/ENG1104/\\_P51.HTM](http://www.vatican.va/archive/ENG1104/_P51.HTM) (Accessed 29 May 2013)

<sup>711</sup> Nicholas Cafardi/Gallichio: The *NYT*, the *CDF* & *Church Law--a Canonist Responds* <http://www.commonwealmagazine.org/blog/nyt-cdf-church-law-canonist-responds> (Accessed 27 May 2013) and Nicholas Cafardi, "The Scandal of Secrecy: Canon Law and the Sexual-abuse Crisis", *Commonweal*, 21 July 2010 <http://commonwealmagazine.org/scandal-secrecy> (Accessed 27 May 2013)

<sup>712</sup> The confusion over which Vatican Congregation had jurisdiction over child sexual abuse by clergy is dealt with in the author's *Potiphar's Wife* p.106-126.

<sup>713</sup> Letter of the Secretariat of State, 4 December 1998, Prot. N. 445.119/G.N, quote in Delaney *Canonical Implications*, p.72

<sup>714</sup> NCPS Meeting Minutes 10 May 2000, TJHC Submission to the Royal Commission p. 90, par 50-54 <http://dev.childabuseroyalcommission.gov.au/wp-content/uploads/2013/10/14.-Truth-Justice-and-Healing-Council.pdf> (Accessed 12 October 2013)

<sup>715</sup> Cafardi *Before Dallas*, 30.

before extending it generally. Even that extension was inadequate, as was conceded by Bishop Jarrett at the Royal Commission.<sup>716</sup>

800. In 2002 a further concession was made whereby the CDF could extend the limitation period on a discretionary basis.<sup>717</sup> However, the Congregation was unable to deal with the vast number of referrals, and instructed the bishops to “apply disciplinary measures” to priests where the cases were outside the limitation period, thus ensuring that there would be no dismissals in the case of those priests, because only the Holy See could dismiss a priest.<sup>718</sup>

801. The extension of the limitation period did not operate retrospectively so that if the abuse occurred prior to 30 April 2001, and 5 years had expired, the canonical crime was still “extinguished”.<sup>719</sup> It is hardly surprising that there were very few canonical trials for even the worst abusers after the *1983 Code*, and even after the extension granted by *SST 2001*.<sup>720</sup>

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<sup>716</sup> Evidence of Bishop Jarrett, Royal Commission [http://www.childabuseroyalcommission.gov.au/wp-content/uploads/2013/12/Transcript-RC\\_IRCSA\\_Day-032\\_19-Dec-2013\\_TBC\\_Public.pdf](http://www.childabuseroyalcommission.gov.au/wp-content/uploads/2013/12/Transcript-RC_IRCSA_Day-032_19-Dec-2013_TBC_Public.pdf) p. 3396.14ff (Accessed 20 December 2013). Jarrett agreed with Commissioner McLellan that the period of 10 years was too short because the ‘overwhelming majority’ of complaints would not be reported to the Vatican because ‘many people don’t report their abuse until well after a 10-year period.’ The documents tendered in Case No. 21 (Bishop Geoffrey Robinson’s evidence) now reveal why the ACBC did not apply to the Holy See for a similar extension given to the United States and Ireland. The ACBC had written to Pope John Paul II for a review of the limitation period on 12 June 1998, but nothing came of it: CTJH.301.11003.1173 In a report dated 17 July 2000 and entitled “Prescription in Canon Law” states: “Since the meeting in Rome in April a study has been made of 402 cases of sexual abuse of persons under the age of majority from all parts of Australia. It was found that in only thirteen of these cases (3.23%) was the complaint lodged before the term of five years specified in canon 1362. If the faculties given to the U.S.A. and Ireland had been given to Australia and the age of 23 applied, the number of cases lodged before that age would have risen only to 49 (12.18%). Even for the future and a possible age limit of 28 (currently not retroactive), the figure would rise to only 77 (19.15%). If a time of ten years from the offence were established, only about 13% of cases would be admitted.” Exh. CTJH.301.11004.0030. On 17 July 2000 the ACBC wrote to the Holy See pointing out the problem, as well as others CTJH.301.11004.0027 <http://www.childabuseroyalcommission.gov.au/exhibits/67173cc9-3256-4cf9-8564-8df9f7357195/case-study-31-august-2015-sydney> (Accessed 26 Aug 2015)

<sup>717</sup> Id. at 4.63 and Charles Scicluna: *The Procedure and Praxis of the Congregation for the Doctrine of the Faith regarding Graviora Delicta* (2006) [http://www.vatican.va/resources/resources\\_mons-sciicluna-graviora-delicta\\_en.html](http://www.vatican.va/resources/resources_mons-sciicluna-graviora-delicta_en.html) (Accessed 14 June 2013)

<sup>718</sup> Murphy Dublin Report Part 1, par 4.29

<http://www.justice.ie/en/JELR/DACOI%20Part%201.pdf/Files/DACOI%20Part%201.pdf> (Accessed 16 July 2013),

<sup>719</sup> Elizabeth M. Delaney sgs, *Canonical Implications*, p. 189. If prescription is regarded as a “substantive” matter, rather than a “procedural” one, then it does not operate retrospectively. Delaney says: “Writing in 1994, J. Alesandro asserted that prescription is a matter of procedural law. In the 2001 CDF norms, the article on prescription is the last article in Part One, Substantive Norms, suggesting that the CDF viewed prescription as substantive rather than procedural law.” See J.A. Alesandro: *Dismissal from the Clerical State in Cases of Sexual Misconduct: Recent Derogations*, p. 37. Since the CDF is the “legislature”, and has the role of interpreting canon law, the extension of the limitation period could not operate retrospectively. See also Delaney *Canonical Implications*, p229: “...outside the United States of America, the change in the law concerning the period of prescription is applicable only to offences perpetrated after 30 April 2001. Hence, normally, for offences that occurred before this date, the period of prescription is five years.” According to O’Reilly and Chambers: *The Sexual Abuse Crisis and the Legal Responses* p. 323, the ability to extend the limitation period was given by an instruction to the CDF on 7 November 2002, and that was reiterated in the 2010 revised norms of *Sacramentorum Sanctitatis Tutela* Art 7§1, which says that the prescription is 20 years from the 18<sup>th</sup> birthday of the victim, “with due regard to the right of the Congregation for the Doctrine of the Faith to derogate from prescription in individual cases”. The authors say: “Currently though prescription is still a factor in a bishop’s ability to adjudicate a case, it is no longer the absolute bar that it once was in bringing older cases.” The norms approved for the United States on 8 December 2002, par 8A state: “If the case would otherwise be barred by prescription, because sexual abuse of a minor is a grave offense, the

802. In 2010, Pope Benedict XVI revised the norms of *SST 2001* and further extended the limitation period to 20 years from the 18<sup>th</sup> birthday of the victim. But this extension did not operate retrospectively either.<sup>721</sup> While this was an improvement, it does not explain why it was necessary to have a limitation period at all. There is no limitation period under canon law for soliciting sex in the confessional, even of adults. Since any limitation period operates in favour of the perpetrator, canon law creates the impression that soliciting sex from adults in the confessional is seen as more serious than the actual sexual abuse of children outside of it.<sup>722</sup>
803. The figures produced by the Victorian Church at the Victorian Parliamentary Inquiry in its submission, *Facing the Truth*, indicate the significance of these limitations periods and the incapacity of the Australian Church to deal with the problem under canon law. The submission has two tables setting out when the abuse took place and when the complaints were made for the Victorian dioceses. The first table in Appendix 3 is of complaints upheld under both *Towards Healing* and the *Melbourne Response* from 1996 to 2012 by decade of ‘incident’, that is, when the actual abuse took place. The second table in Appendix 4 sets out the date when the complaint was upheld.

Decades	Incidents		Complaints Upheld	
1940s	24		1997	81
1950s	83		1998	22
1960s	190		1999	32
1970s	224		2000	42
1980s	82		2001	22
1990s	12		2002	110

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bishop/eparch shall apply to the Congregation for the Doctrine of the Faith for a dispensation from the prescription, while indicating appropriate pastoral reasons.”

[http://www.vatican.va/roman\\_curia/congregations/cbishops/documents/rc\\_con\\_cbishops\\_doc\\_20021216\\_recognitio-usa\\_en.html](http://www.vatican.va/roman_curia/congregations/cbishops/documents/rc_con_cbishops_doc_20021216_recognitio-usa_en.html) (Accessed 9 February 2013). It seems that since 2010 the CDF can grant an extension even where the delict has been extinguished because of these added words in Art7§1 of *SST 2010* “with due regard for...” that did not appear in Art 5§1 of *SST 2001*.

<sup>720</sup> Cafardi: *Before Dallas*,74

<sup>721</sup> Elizabeth M. Delaney: *Canonical Implications*, p 189.

<sup>722</sup> O’Reilly and Chambers: *The Sexual Abuse Crisis and the Legal Responses* p.272, and 323 accept that limitation periods for sexual abuse are inappropriate but point out that the CDF does waive the period completely from time to time, but such waiver did not operate retrospectively prior to 2010 for those canonical crimes that had already been extinguished. It still does not explain why it is necessary to have a limitation period when from 1922 to 1983 there was none, and there still is none for soliciting sex in the confessional.

2000	2		2003	29
2010	nil		2004	46
			2005	37
			2006	47
			2007	34
			2008	29
			2009	23
			2010	23
			2011	23
			2012	18
	<b>617</b>			<b>618</b>

804. Prior to 2001, there were 177 complaints dealt with under *Towards Healing* and the *Melbourne Response*. After *SST 2001*, there were 441 complaints dealt with. Both protocols started in 1996, and we don't know from these figures when these allegations were first brought to the Church's attention – only that they were dealt with under the two protocols after 1996. Nevertheless, it is safe to conclude that the situation in Australia was the same as in the United States, Canada and other places, that there were very few canonical trials because the crimes under canon law had been “extinguished” by the limitation period under the *1983 Code*. This is consistent with Bishop Robinson's opinion expressed to the ACBC in 2000, and with the findings of the John Jay Report and the Royal Commission, that people can take decades to come to terms with what happened to them as children.<sup>723</sup>

<sup>723</sup> According to the 2004 John Jay Report, commissioned by the American Conference of Catholic Bishops, the number of alleged abuses increased in the 1960s, peaked in the 1970s, declined in the 1980s, and by the 1990s had returned to the levels of the 1950s <http://www.usccb.org/issues-and-action/child-and-youth-protection/upload/The-Nature-and-Scope-of-Sexual-Abuse-of-Minors-by-Catholic-Priests-and-Deacons-in-the-United-States-1950-2002.pdf> (Accessed 29 April 2013). This is consistent with the Victorian Church's submission to the Victorian Parliamentary Inquiry, *Facing the Truth*, except that the decline in the 1990s was more significant. *Facing the Truth*, page 4, [http://www.parliament.vic.gov.au/images/stories/committees/fcdc/inquiries/57th/Child\\_Abuse\\_Inquiry/Submissions/Catholic\\_Church\\_in\\_Victoria.pdf](http://www.parliament.vic.gov.au/images/stories/committees/fcdc/inquiries/57th/Child_Abuse_Inquiry/Submissions/Catholic_Church_in_Victoria.pdf) (Accessed 6 April 2013). The full text of Bishop Robinson's report states: The data presented to Rome was discussed and also the summary of the recent data giving the number of cases of paedophilia that had been reported within 5 years of the offence, those reported before the victim was 23 and those before the victim had turned 28 years of age. A copy of the data, amended to meet the understanding of the criteria, is included with these minutes. It is noted that in general 3% come forward in the first 5 years, approximately 10% before the age of 23 and approximately 20% before the age of 28: Minutes of Meeting of the National Committee for Professional Standards 11 July 2000, Case No. 31, Exhibit CTJH.300.02001.0096\_E\_R



## The Pastoral Approach to the Perpetrators of Child Sexual Abuse

805. Despite claims by the Church that the pastoral approach to perpetrators of sexual abuse arose after the Second Vatican Council, or because bishops were beguiled by psychological theories of the 1970s, the truth is that it was written the *1917 Code of Canon Law*.

806. Canon 2358 of the *1917 Code* stated that:

“Clerics in minor orders guilty of very serious crimes against the Sixth Commandment, for instance fornication with minors under sixteen years of age, sodomy, incest, may be deprived of the clerical state.”

807. Canon 2312 §2 stated that penances were to be

“..modified not so much in proportion to the gravity of the offence as rather to the contrition of the penitent, taking into account the condition of the person and the circumstances of the offence”.

808. Canon 2214 §2 of the *1917 Code* stated that:

§2 The admonition of the Council of Trent (session XIII, dew ref. cap. 1) to the bishops and other Ordinaries is here repeated, from which it is evident that the Church does not favour the hasty and rash use of extreme penalties and censures but reminds the bishops to consider their subjects as children and brethren, and to try as long as possible, by patience and kindness, to influence them to strive after virtue and to desist from vice.

809. The *1917 Code of Canon Law* was selective in its reliance on the Council of Trent for pastoral approach. The same Council decided that some crimes are so serious that the cleric should be dismissed and delivered over to the secular court.<sup>724</sup>

810. *Crimen Sollicitationis* in 1922 also embodied the pastoral approach: Article 42 directed that if the evidence of a crime is considered ‘grave enough’, but not yet sufficient to file a formal complaint, the bishop was to ‘admonish’ priests accused of grave delicts including child sexual abuse, ‘paternally’ and ‘gravely’ with a first or second warning, and to threaten them with a trial if a new accusation is brought.

811. Article 63 of *Crimen Sollicitationis* prevented the bishop from imposing the penalty of

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<sup>724</sup> <http://www.thecounciloftrent.com/ch13.htm> (Accessed 9 February 2014). After the Council of Trent, canon law was created primarily by the popes and the Roman dicasteries in his name: Van de Wiel: *History of Canon law*, par 199, loc 1481.

dismissal from the priesthood unless the offender showed ‘no hope humanly speaking, or almost no hope of amendment’. The bishop’s first obligation was to try to ‘cure’ these priests:

“Resort is to be had to the extreme penalty of reduction to the lay state – which for accused religious can be commuted to reduction to the status of a lay brother – only when, all things considered, it appears evident that the Defendant, in the depth of his malice, has, in his abuse of the sacred ministry, with grave scandal to the faithful and harm to souls, attained such a degree of temerity and habitude, that there seems to be no hope, humanly speaking, or almost no hope, of his amendment.”

812. Article 64 (a) of *Crimen Sollicitationis* allowed clergy who had been canonically convicted of solicitation in confession, homosexuality, bestiality or child sexual abuse, to have complementary penalties imposed on them, in addition to the penalties mentioned in Canon 2312 (see above):

“chiefly spiritual exercises, to be made for a certain number of days in some religious house, with suspension from the celebration of Mass during that period”.

813. Article 64 (d) of *Crimen Sollicitationis* allowed the bishop to transfer an accused priest if ‘it seems necessary either for the amendment of the delinquent, the removal of a near occasion [of sin], or the prevention or repair of scandal’.
814. The confidence of psychologists from the 1970s onwards that they could cure paedophiles may have encouraged bishops to continue with the attempts to reform priests in accordance with the directives of canon law. All a priest had to do was to promise not to do it again, and to impress his or her psychologist or counsellor enough for a favourable report to be given. It was not unreasonable for bishops to hope that priests would be reformed if they promised hard enough.<sup>725</sup>
815. Pope John Paul II and his Curia continued the “pastoral approach” towards child sex abusing priests, because the 1983 *Code of Canon Law* required it before even commencing a formal trial.<sup>726</sup> They even strengthened this requirement because under *Crimen Sollicitationis* the “pastoral approach” was a matter to be taken into account on sentence.<sup>727</sup> Under the 1983 *Code*, it was a matter to be taken into account in deciding if the priest should be subjected to

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<sup>725</sup> It is also significant that in the Ridsdale and Ryan cases the psychologists, counsellors and treatment institutions were associated with the Church.

<sup>726</sup> Canon 1341

<sup>727</sup> Clause 63

a formal trial at all. If there is any doubt about the meaning of the “pastoral” approach, one only has to look at the way the CDF handled the Fr Lawrence Murphy case in 1998, just three years before the issue of *SST 2001*.<sup>728</sup>

816. Canon 1341 stated that the bishop could only initiate the administrative or judicial process to impose a penalty:

“... after he has ascertained that fraternal correction or rebuke or other means of pastoral solicitude cannot sufficiently repair the scandal, restore justice, reform the offender.”

817. The Murphy Commission pointed out:

“This canon was interpreted to mean that bishops are required to attempt to reform the abusers in the first instance. In the Archdiocese of Dublin, significant efforts were made to reform abusers. They were sent to therapeutic facilities, very often at considerable expense. In a number of the earlier cases in particular, the Archdiocese seems to have been reluctant to go beyond the reform process even when it was abundantly clear that the reform process had failed.”<sup>729</sup>

818. That criticism of the Irish bishops was legitimate, but their behaviour is understandable because of the difficulties imposed by canon law to taking the matter further, particularly in relation to the defence of “imputability”. Canon 1341 was not the only hurdle.

819. Nicholas Cafardi writes that, after the promulgation of the *1983 Code of Canon Law*, there was “nearly unanimous” agreement amongst canon lawyers in the United States that the proper approach, required by canon law was “the therapeutic and pastoral approach”, that is, sending off these priests to treatment centres rather than having them prosecuted either under civil law or canon law.<sup>730</sup> The Holy See did not think any differently.

820. Francis G Morrissey of the Faculty of Canon Law at St Paul’s University in Ottawa, who gave a presentation to the Canon Law Society of America in 1991, in which he described himself as ‘very reluctant’ to recommend using penal processes: The imposition of penalties, and

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<sup>728</sup> The case of Fr Lawrence Murphy is discussed in detail in *Potiphar’s Wife*, Chapter 15. In another case, Cardinal Ratzinger himself signed a letter in 1982 advising Bishop Cummins of Oakland who wanted to dismiss a paedophile priest, Stephen Kiesle. Ratzinger told Cummins to “wait a while” because he was still a young man. He was 38 and would continue to abuse children until he was finally defrocked in 1985: Robert Blair Kaiser: *Whistle: Tom Doyle’s Steadfast Witness for Victims of Clerical Sexual Abuse*, Caritas Communications (2015), loc. 2073.

<sup>729</sup> Murphy Dublin Report Part 1 <http://www.justice.ie/en/JELR/DACOI%20Part%201.pdf/Files/DACOI%20Part%201.pdf> par 4.17-4.28 (Accessed 25 April 2013) par 4.53

<sup>730</sup> Cafardi, *Before Dallas*, 20-21, O’Reilly and Chambers: *The Sexual Abuse Crisis and the Legal Responses* p.274-277

particularly of a return to the lay state, should be a last resort, a measure not applied until all other possibilities have been exhausted.<sup>731</sup>

821. Another example of the “pastoral” attitude towards child sex abusing priests appears in the 2010 *Vatican Guide to Understanding Basic CDF Procedures*, which represents current Vatican practice. If the priest “has admitted to his crimes and accepted to live a life of prayer and penance”, the bishop can issue a decree prohibiting or restricting the priest’s public ministry. It is only if he violates those conditions that he can then be dismissed. This remedy has been used in cases of diocesan priests because of “age or infirmity”.<sup>732</sup>

822. O’Reilly and Chalmers describe what the “life of prayer and penance” means:

“What some dioceses have done is to give the cleric specific instructions regarding what prayer and penance means within the context of a penal precept. For example, the bishop could mandate such things as attending a support group or counselling, spiritual direction, specific time for prayer for victims of sexual abuse, a specific time for types of prayer etc.”<sup>733</sup>

823. Restrictions on ministry were the penalties imposed on the notorious Fr Marcial Maciel by Pope Benedict XVI in 2006. He was not dismissed from the priesthood. He was suspended, and asked to go to a monastery to lead “a reserved life of prayer and penance”.<sup>734</sup> His “monastery” was a house with a pool in a gated community in Jacksonville, Florida, bought for him by the Legion of Christ which he founded. He died there in 2008.<sup>735</sup>

824. Closer to home, a priest identified as “DS” in the Lismore diocese was not dismissed by the CDF in 2008. He was required to say Mass for the victims every Friday and to live a life of “prayer and penance”. He continued to live in a presbytery with other priests.<sup>736</sup>

825. When asked at the Victorian Parliamentary Inquiry, why it took 18 years to try to dismiss Fr Desmond Gannon, Archbishop Hart said steps had been taken as early as 1993 to remove

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<sup>731</sup> Cafardi Ibid. Cafardi also says that a year earlier, canonist Elizabeth McDonough, a member of the canon law faculty at the Catholic University of America, had pointed out that: “The competent ordinary must first take cognisance of canon 1341 which....certainly seems to present use of penalties as a last resort.”

<sup>732</sup> [http://www.vatican.va/resources/resources\\_guide-CDF-procedures\\_en.html](http://www.vatican.va/resources/resources_guide-CDF-procedures_en.html) (Accessed 24 December 2013). O’Reilly and Chambers: *The Sexual Abuse Crisis and the Legal Responses* p.341-342

<sup>733</sup> Ibid.

<sup>734</sup> <http://www.thetablet.co.uk/article/57> (Accessed 12 September 2013). For details relating to the Holy See’s handling of the abuse allegations against Fr Marcial Maciel, see the author’s *Potiphar’s Wife*, p.223

<sup>735</sup> <http://www.associationofcatholicpriests.ie/2013/02/legion-of-christs-deception-unearthed-in-new-documents-indicates-wider-cover-up/> (Accessed 16 July 2013)

<sup>736</sup> The Royal Commission [http://www.childabuseroyalcommission.gov.au/wp-content/uploads/2013/12/Transcript-RC\\_IRCSA\\_Day-032\\_19-Dec-2013\\_TBC\\_Public.pdf](http://www.childabuseroyalcommission.gov.au/wp-content/uploads/2013/12/Transcript-RC_IRCSA_Day-032_19-Dec-2013_TBC_Public.pdf) p. 3392.36 (Accessed 20 December 2013)

- Gannon's faculties but Rome required "absolute certitude as to what took place" for dismissal.<sup>737</sup> Gannon had been sentenced four times (in 1995, 1997, 2000, and 2009) for sexual crimes against children, but this, was not enough to satisfy the "absolute certitude" of the Vatican.<sup>738</sup>
826. In 2012, Hart wrote to the Holy See, saying that the steps taken to dismiss Gannon would be seen as 'inadequate and a cause of scandal for the faithful'.<sup>739</sup> The Holy See declined to dismiss him because of his 'extreme age'. He was 83.
827. In 2012, Pope Benedict dismissed a serial abuser priest, Fr Mauro Inzoli, accused of abusing dozens of children over a ten year period. In 2014, Pope Francis reinstated him and applied the punishment of a life of "prayer and penance".<sup>740</sup>
828. O'Reilly and Chalmers argue that requiring such a priest to live in a presbytery or religious house with others provides a better form of supervision than if they were living in society on their own.<sup>741</sup>
829. The problem that this poses for the Church is that this is the solution that the Church adopted for the last fifty years and the history of repeat cases of abuse shows that it was an abject failure.

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<sup>737</sup>[http://www.parliament.vic.gov.au/images/stories/committees/fcdc/inquiries/57th/Child\\_Abuse\\_Inquiry/Transcripts/Catholic\\_Archdiocese\\_of\\_Melbourne\\_20-May-13.pdf](http://www.parliament.vic.gov.au/images/stories/committees/fcdc/inquiries/57th/Child_Abuse_Inquiry/Transcripts/Catholic_Archdiocese_of_Melbourne_20-May-13.pdf) p. 9 (Accessed 18 June 2013)

<sup>738</sup>Transcript Hart, Victorian Parliamentary Inquiry

[http://www.parliament.vic.gov.au/images/stories/committees/fcdc/inquiries/57th/Child\\_Abuse\\_Inquiry/Transcripts/Catholic\\_Archdiocese\\_of\\_Melbourne\\_20-May-13.pdf](http://www.parliament.vic.gov.au/images/stories/committees/fcdc/inquiries/57th/Child_Abuse_Inquiry/Transcripts/Catholic_Archdiocese_of_Melbourne_20-May-13.pdf) ,8-9 (Accessed 18 June 2013) and *Betrayal of Trust*, Report of the Victorian Parliamentary Committee, Table 7.4 p. 192 [https://s3-ap-southeast-2.amazonaws.com/family-and-community-development-committee/Inquiry+into+Handling+of+Abuse\\_Volume+1\\_FINAL\\_web.pdf](https://s3-ap-southeast-2.amazonaws.com/family-and-community-development-committee/Inquiry+into+Handling+of+Abuse_Volume+1_FINAL_web.pdf) (Accessed 14 November 2013)

<sup>739</sup> Ibid.

<sup>740</sup> <http://www.globalpulsemagazine.com/news/pope-francis-issues-statutes-overseeing-financial-reform/887>, (Accessed 7 March 2015)

<sup>741</sup> *O'Reilly and Chambers: The Sexual Abuse Crisis and the Legal Responses* p.311. The Australian Catholic Bishops Conference accepted that such supervision was not practical. In a document issued 26 April 2002, the ACBC wrote: Supervision can give no guarantees. It is possible to put such a person in a job where he is supervised while he is at work, but it is virtually impossible to provide supervision at night time and weekends...Indeed, the problem does not ultimately lie in the work the person does, but in his being able to dress as a cleric and call himself "Father" or "Reverend". If one compares two people with an equal inclination to offend against minors, a cleric and another man, the cleric is more likely to offend because he has three things the other man does not have. Through his work as a cleric and his contacts with families, he has greater access to potential victims. The potential victim will have a greater trust in him than in the other man. And the cleric will have a spiritual authority over the potential victim that the other man does not have. In brief, the cleric has a privileged access to victims that the other does not, and this privileged access comes from the clothes he wears and his ability to introduce himself as "Father" or "Reverend". These factors are far more important than the particular work he carries out." Royal Commission into Institutional Responses to Child Sexual Abuse, Case Study 31, Exh CJH.301.11003.1302 'The Possibility of a new assignment to ministry for a cleric after a criminal conviction on a sexual charge' 26 April 2002 <http://www.childabuseroyalcommission.gov.au/exhibits/67173cc9-3256-4cf9-8564-8df9f7357195/case-study-31,-august-2015,-sydney> (Accessed 26 August 2015)

830. Apart from the problems of supervision and the failure of this method in the past, there has to be considerable community disquiet about this kind of penalty when Rolf Harris, convicted of the same kinds of crimes, was jailed for 5 years and 9 months at the age of 84, and was stripped of his imperial and Australian honours.<sup>742</sup>
831. In 1726, the Holy See seemed to have an attitude more in keeping with modern community standards. A priest who had served his sentence imposed by a civil court for sodomy of boys applied to be reinstated. The ground on which he relied was his “extreme age” of “sixty or more years”.<sup>743</sup> The Sacred Congregation of the Council rejected his application. As the life expectancy in the early 1700s was about 45 years of age, this priest was relatively a lot “older” than Harris or Gannon.<sup>744</sup>

### The Imputability Defence

832. Even where the judicial process for dismissal was commenced against a priest, there was an extraordinary defence available. Canon 1321 has a kind of ‘diminished responsibility’ defence, and paedophilia itself was a canonical defence to a charge of sexual abuse of minors. The Murphy Dublin Report quotes a commentary on Canon 1395 (dealing with sex assaults on minors) by the Canon Law Society of Great Britain and Ireland, which said that a priest who sexually assaulted a child might well be guilty and liable to imprisonment under civil law, but might not be guilty under canon law because of ‘diminished imputability’, or, if he is found guilty, the sentence might be no more than a warning.<sup>745</sup> The Murphy Commission commented:

“This is a major point of difference between the Church and the State law. In the former, it appears that paedophilia may be an actual defence to a claim of child sexual abuse just as insanity would be in the law of the State.”<sup>746</sup>

833. The Commission also noted that even where three priests were dismissed after local Church trials, their appeals against dismissal in two cases were upheld in Rome on this ground:

<sup>742</sup> <http://www.bbc.com/news/entertainment-arts-28156387> (Accessed 29 April 2015)

<sup>743</sup> Nicholas Cafardi, *Before Dallas*, p. 6, and Gasparri, editor, *Codicem Iuris Canonici Fontes*, Vol. 1, p. 763: [http://www.awrsipe.com/patrick\\_wall/selected\\_documents/1726%20Lavellana.pdf](http://www.awrsipe.com/patrick_wall/selected_documents/1726%20Lavellana.pdf) (Accessed 9 February 2014.)

<sup>744</sup> <http://mappinghistory.uoregon.edu/english/US/US39-01.html> (Accessed 29 April 2015)

<sup>745</sup> Canon Law Society of Great Britain and Ireland, *Canon Law: Letter & Spirit: A Practical Guide to the Code of Canon Law* (London: Geoffrey Chapman, (1995), 805, Murphy Dublin Report Part 1

<http://www.justice.ie/en/JELR/DACOI%20Part%201.pdf/Files/DACOI%20Part%201.pdf> par 4.59 (Accessed 25 April 2013)

<sup>746</sup> *Ibid*

“This Commission finds it a matter of grave concern that, under canon law, a serial child sexual abuser might receive more favourable treatment from the Archdiocese or from Rome by reason of the fact that he was diagnosed as a paedophile.”<sup>747</sup>

834. The irony of this defence is that the more children a priest abused, the more likely he would avoid dismissal. The British canon lawyers were not the only ones to think that this defence was likely to succeed under canon law. In 1996, the American canon lawyer, John A. Alesandro said that the prevalent opinion in 1992 in relation to paedophilia was that such priests were almost automatically exempted from dismissal because dismissal required not merely “grave” imputability, but “full” imputability.<sup>748</sup> Thomas J. Reese SJ, the editor of *America* magazine, in a report to the 1992 USCCB wrote that the *1983 Code of Canon Law* makes it “almost impossible for bishops to dismiss priests for sexual abuse.”<sup>749</sup>
835. Canon lawyers in the United States also considered that the imputability defence under Canon 1321 was another reason for not using the judicial processes. It was pointless, because the main reason for starting the judicial process was to dismiss the priest, and because of the diminished mental capacity defence, it was highly unlikely that he would be.<sup>750</sup> The cases referred to by the Murphy Commission, where appeals had gone to Rome, show that these canon lawyers were not just theorising.
836. Despite the Church’s claim that everything has improved since *SST 2001* of 2001, Canons 1321 is still there in the *1983 Code*, unaffected by the changes. Whoever decides a case under the new procedures, whether it is the CDF or the bishop, they are still obliged to apply Canon 1321.

#### **Administrative Leave**

837. The *1983 Code of Canon Law* created another problem with regard to standing down a priest pending the investigation of the allegation. A priest could only be suspended once the preliminary investigation is complete – and this may take some time.<sup>751</sup> Further, suspension

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<sup>747</sup> Id, 4.60

<sup>748</sup> J.A. Alesandro, “A Study of Canon Law: Dismissal from the Clerical State in Cases of Sexual Misconduct,” in *The Catholic Lawyer*, 36 (1996), p. 262, quoted in Delaney, *Canonical Implications*, at 194.

<sup>749</sup> Id p.36 and *America* (December 5 1992) 443-44 at 444

<sup>750</sup> Cafardi, *Before Dallas*, 35.

<sup>751</sup> Cafardi: *Before Dallas* , 41

was regarded as a canonical penalty, and it can only be given after a warning, and the offender has time to mend his ways.<sup>752</sup>

838. In 1985, Fr Thomas Doyle, a canon lawyer who was then attached to the Papal Nuncio's Office in Washington DC, with a group of colleagues, put together a manual for dealing with the growing sexual abuse crisis in the Church in the United States. It was common practice in secular society for persons in positions of authority, against whom allegations had been made concerning their duties, to stand aside from their position pending the outcome of any hearing or inquiry. Doyle and his team proposed something similar for priests against whom allegations were made. They would go on "administrative leave".<sup>753</sup>

839. The difficulty with this idea was that it was a concept unknown to canon law, at least in those terms. The closest thing was suspension under Canon 1722, but that was only authorized after the preliminary investigation was over, and the canonical trial had commenced. In 1991, the noted canon lawyer, Fr John P Beal, described it as:

"...a canonically flawed attempt to expand the circumstances in which the restrictions that can be imposed on the accused in the course of the penal process (c.1722) to include situations where no penal process is in prospect."<sup>754</sup>

840. The canonical justification for "administrative leave" was the interpretation of Canon 1722 that allowed a priest to be stood down "to prevent scandals, to protect the freedom of witnesses and to guard the course of justice", but as indicated previously, this could only occur once the preliminary investigation was over, and the canonical trial commenced.<sup>755</sup>

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<sup>752</sup> Canon 1347§1 and id p.191 footnote 14. This was the attitude taken by the Congregation of the Clergy in the Nestor Case (Case Study 14), but that decision was overturned by the Apostolic Signatura:

<http://childabuseroyalcommission.gov.au/getattachment/e1f91ddb-2ba2-4eb4-b487-c43a0c8989e4/Report-of-Case-Study-no-14> p.28, 30, 32(Accessed 20 December 2014)

<sup>753</sup> Cafardi: *Before Dallas*, 51

<sup>754</sup> John P. Beal: "At the Crossroads of Two Laws" *Louvain Studies* 25 (2000) quoted in Cafardi ibid p.191, footnote 14. Beal made the same point in *Doing What One Can, Clerical Sexual Misconduct* 52 *Jurist* (1992) 642-683 at 662. As will be shown below, this was one of the problems with the 1996 *Towards Healing* document: if there is a finding by an assessor under that protocol, or a finding of guilt by a civil court then the priest was to go on "administrative leave" pursuant to Canon 1722. But canon law only authorized a "suspension" during the course of a canonical trial. That situation changed in 2010 with the revision of *Sacramentorum Sanctitatis Tutela*, under which the bishop can stand the priest down pending the preliminary inquiry. The conflicts between such protocols and canon law were matters that concerned both Professor Parkinson in his reviews of *Towards Healing*, and the Cumberlege Commission in England in its reviews of *Lord Nolan's Report*. While the issue of "administrative leave" has now been resolved for *Towards Healing* by a change in canon law, the problem of pontifical secrecy remains.

<sup>755</sup> Delaney, *Canonical Implications*, p 219: "In terms of processes, the imposition of administrative leave during a preliminary investigation, while its use may be wise, does not have the support of universal law." And see also p. 156. Dr Kevin Matthews at the Royal Commission referred to there being a "lacuna" in canon law where the evidence may not be sufficient to submit a priest to a canonical penal trial, (because the behaviour might be inappropriate rather than being a



What Doyle and others tried to do was to justify the suspension *before* the preliminary investigation, but this was not justified by Canon 1722.<sup>756</sup> This issue over “administrative leave” became a matter of contention between the American bishops and the Holy See when the Dallas proposals were submitted to it. The Holy See insisted on the *1983 Code of Canon Law* being followed before granting the “*recognitio*” in 2002. However, with *SST 2010*, it relented to allow a priest to be stood down pending the preliminary investigation.<sup>757</sup>

### Removal of Faculties

841. The bishop has the right under Canon 1333 to impose restrictions on the ministry of priests, commonly referred to as the “removal of faculties”. The restrictions that can be imposed are the right to say Mass, publicly or privately, to preach and to hear confessions or administer the other sacraments.
842. Other restrictions could also be imposed by Canon 1333§3, being restrictions on some of the rights or functions attached to the office. Conditions for keeping away from children could be imposed under this Canon. These restrictions are classified as “censures” until Title IV, Chapter 1 of the *1983 Code*.
843. Censures are what are called “medicinal” penalties. They are contrasted with “expiatory” penalties that are designed to punish the offender and to act as a deterrent to others. Censures are designed to motivate the cleric to be “reinstated into ecclesiastical communion and restored to full ministerial functioning.”<sup>758</sup>
844. However, there were restrictions on their imposition. The bishop was required to give the priest at least one official warning before imposing it, and it had to be for a determined period of time. The bishop also had to set conditions under which the administrative penalty could be lifted. If the penalty looked being perpetual, the priest could appeal to Rome.<sup>759</sup> As O’Reilly and Chalmers point out:

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sexual assault), yet there is a significant risk to children. <http://www.childabuseroyalcommission.gov.au/case-study/bb3eaadf-9283-41ef-9694-e560738d186a/case-study-14,-june-2014,-sydney.aspx> at 7991

<sup>756</sup> Cafardi: *Before Dallas*, 119

<sup>757</sup> The “Substantive Norms” of *Sacramentorum Sanctitatis Tutela*, as revised in 2010, Article 19, [http://www.vatican.va/resources/resources\\_norme\\_en.html](http://www.vatican.va/resources/resources_norme_en.html) (Accessed 5 August 2013), the TJHC Submission, p 134, par 35 <http://dev.childabuseroyalcommission.gov.au/wp-content/uploads/2013/10/14.-Truth-Justice-and-Healing-Council.pdf> (Accessed 12 October 2013)

<sup>758</sup> Beal, Coriden and Green, *New Commentary on the Code of Canon Law* p.1552

<sup>759</sup> Canon 1347: James T. O’Reilly and Margaret Chambers: *The Sexual Abuse Crisis and the Legal Responses*, p259

“It was not uncommon for the bishop’s decision to be overturned and for the bishop to be told to reassign the priest....Because of this limitation, and the concern that Rome would insist that the bishop return an abusive priest to ministry, oftentimes bishops were left with having to convince their abusive priest to voluntarily petition for laicisation, and they had little recourse if they refused.”<sup>760</sup>

845. Because of the difficulties of dismissing a priest, the removal of faculties was how bishops tried to “control” them, but if the intention was to permanently remove a priest from public ministry it could be set aside by appeal to Rome.<sup>761</sup>

846. Now that the difficulties of dismissal have been reduced by the 2001 reforms, this remedy has taken on another guise with the “prayer and penance” option, announced in 2010 by the CDF in its “Guide”, except in this case it is no longer a temporary “medicinal” penalty, but an “expiatory” one because it could be made permanent.

847. The Murphy Commission said this about removing a priest’s faculties :

“The Commission does not consider that an order to stay away from children, or to minister only to adults, or to meet children only when accompanied by another adult, is adequate. It is virtually impossible for such orders to be enforced.”<sup>762</sup>

848. While there may be some argument for the supervision of members of religious institutes who live in communities, it does not apply to diocesan priests where it is becoming more common for only one priest to be living in a presbytery because of the falling number of priests. Presbyteries and religious houses are often situated very close to schools.

849. The only practical way of controlling people who sexually abuse children is through the criminal justice system, which is not perfect either, but it is better than the secret system imposed by canon law.

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<sup>760</sup> Ibid.

<sup>761</sup> This is effectively what happened in the Royal Commission’s Case No. 14 (Nestor) where the Congregation of the Clergy ordered the reinstatement of Nestor.

<sup>762</sup> Murphy Dublin Report Part 1 <http://www.justice.ie/en/JELR/DACOI%20Part%201.pdf/Files/DACOI%20Part%201.pdf> par 4.17-4.28, 4.90 (Accessed 25 April 2013). The inadequacy of using these provisions for matters of sexual abuse of children was acknowledged by the ACBC’s Professional Standards Report of 7 May 2002. “It enables only removal from office and does not enable any other penalty to be applied. Thus it can be quite insufficient to prevent the cleric from offending again.” National Committee for Professional Standards Report – ‘Towards Healing and the CDF document of 18th May 2001’, dated 7 May 2002 Exh CTJH.301.11003.1286: <http://www.childabuseroyalcommission.gov.au/exhibits/67173cc9-3256-4cf9-8564-8df9f7357195/case-study-31,-august-2015,-sydney> (Accessed 26 August 2015)

## Canonical Proceedings against Religious

850. According to the Irish Ryan Report in 2009 canon law shaped disciplinary procedures within the Christian Brothers, including the transfer of offenders from place to place:

“A perpetually professed Brother could not be dismissed unless he had committed an ‘external grave delict’, had received two warnings about his conduct and had failed to correct his behaviour. These admonitions were known as Canonical Warnings, and the immediate Major Superior administered them personally or had them administered by a colleague acting on his instructions. The warning was composed of two parts: the first was a call to correct the offending activity and do the appropriate penances; and the second was a threat of dismissal. In addition, the Superior was ‘bound’ under Canon Law to remove the offending Brother ‘from the occasion of relapse even by transfer if it is necessary to another house where vigilance is easier and the occasion of delinquency is more remote’.<sup>763</sup>

851. As previously explained, religious brothers (unless they are ordained deacons or priests) and sisters are not “clerics” under canon law. However, there are parallel provisions under canon law dealing with them if they sexually abuse children. Canon 694 provides that a religious who “defects notoriously” from the Catholic faith or who marries or attempts to marry is automatically dismissed for their order or congregation. The superior of the institute’s council is to make a declaration to that effect when the “proofs have been collected.”

852. Canon 695§1 deals with religious involvement in certain canonical crimes or “delicts”:

Can. 695 §1. A member must be dismissed for the delicts mentioned in cann. ⇒ 1397, ⇒ 1398, and ⇒ 1395, unless in the delicts mentioned in ⇒ can. 1395, §2, the superior decides that dismissal is not completely necessary and that correction of the member, restitution of justice, and reparation of scandal can be resolved sufficiently in another way.

853. Canons 1397 and 1398 provide for dismissal where religious have been guilty of homicide, kidnapping, mutilation, seriously wounding, fraud and procuring abortions.

854. Canon 1395 deals with clerics who breached the celibacy rule and who have sexually abused children:

§1. A cleric who lives in concubinage, other than the case mentioned in ⇒ can. 1394, and a cleric who persists with scandal in another external sin against the sixth commandment of the Decalogue is to be punished by a suspension. If he persists in the delict after a warning, other penalties can gradually be added, including dismissal from the clerical state.

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<sup>763</sup> Justice S Ryan, Final Report of the Commission to Inquire into Child Abuse, Ireland, 2009, 6.79.

§2. A cleric who in another way has committed an offense against the sixth commandment of the Decalogue, if the delict was committed by force or threats or publicly or with a minor below the age of sixteen years, is to be punished with just penalties, not excluding dismissal from the clerical state if the case so warrants.

855. The sixth commandment of the Decalogue is the prohibition of adultery, but over time in the life of the Church, this was extended to any form of sexual activity outside marriage, and any form of non-creative sex within marriage.<sup>764</sup>

856. It could be argued that because Canon 1395 applies only to “clerics”, then Canon 695 in terms of the sexual abuse of children might only apply to clerics who are also religious. But the *New Commentary on the Code of Canon Law* provides that Canon 695 with its application of Canon 1395§2 applies to both clerics and non-clerics alike:

“...although Canon 1395 defines a delict for clerics, Canon 695 makes the same acts the cause of dismissal of any religious.”<sup>765</sup>

857. The curious thing about Canon 695 §1 is that it appears to have a stricter rule for consensual sex with adults than for the sexual abuse of children. The *New Commentary on the Code of Canon Law* notes laconically,

“Somewhat surprisingly, the code does not seem to view such delicts (i.e. against minors) as seriously as other violations of clerical continence....”<sup>766</sup>

858. Canon 696 then describes the procedures for taking action against the religious brother or nun. The criteria to be applied are effectively the same as the criteria for dealing with clerics as earlier described, and all come under the definition of “delicts against faith or morals” in Art 1(4) of *Secreta Continere*.

“Can. 696 §1. A member can also be dismissed for other causes provided that they are grave, external, imputable, and juridically proven such as: habitual neglect of the obligations of consecrated life; repeated violations of the sacred bonds; stubborn disobedience to the legitimate prescripts of superiors in a grave matter; grave scandal arising from the culpable behavior of the member; stubborn upholding or diffusion of doctrines condemned by the magisterium of the Church; public adherence to ideologies infected by materialism or atheism; the illegitimate absence mentioned in ⇒ can. 665, §2,

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<sup>764</sup> See Chapter 4.

<sup>765</sup> Beal, Coriden and Green: *New Commentary on the Code of Canon Law* p 865. Ian Waters in *The Law of Secrecy of the Latin Church in The Canonist* Vol 7, No 1 (2016) p 75 at 86 seems to have a different view: “Both in the 1917 Code and as provided in Canon 1395§2, of the 1983 Code, only clerics can commit the canonical offence (sic) of the sexual abuse of a person under the age of 18 years. Therefore, members of religious institutes who are not ordained do not commit the canonical offence.” Waters does not discuss how the reference to Canon 1395§2 in Canon 695 is to be interpreted.

<sup>766</sup> Beal, Coriden and Green: *New Commentary on the Code of Canon Law* p.1600.

lasting six months; other causes of similar gravity which the proper law of the institute may determine...”

859. Canon 697 then deals with the “canonical warning”. The wording of this canon suggests that there must be good grounds for dismissal under one of the above complaints before a canonical warning can be given.

In the cases mentioned in ⇒ can. 696, if the major superior, after having heard the council, has decided that a process of dismissal must be begun:

- 1/ the major superior is to collect or complete the proofs;
- 2/ the major superior is to warn the member in writing or before two witnesses with an explicit threat of subsequent dismissal unless the member reforms, with the cause for dismissal clearly indicated and full opportunity for self-defense given to the member; if the warning occurs in vain, however, the superior is to proceed to another warning after an intervening space of at least fifteen days;
- 3/ if this warning also occurs in vain and the major superior with the council decides that incorrigibility is sufficiently evident and that the defenses of the member are insufficient, after fifteen days have elapsed from the last warning without effect, the major superior is to transmit to the supreme moderator all the acts, signed personally and by a notary, along with the signed responses of the member.

860. Canons 1339 and 1340 of the *1983 Code of Canon Law* suggest that such warnings or corrections are to be (secretly) documented, although it is not entirely clear if these canons refer only to relationships between bishops and priests because of its reference to “ordinary” and to the “the secret archive of the curia”.

Can. 1339 §1. An ordinary, personally or through another, can warn a person who is in the proximate occasion of committing a delict or upon whom, after investigation, grave suspicion of having committed a delict has fallen.

§2. He can also rebuke a person whose behavior causes scandal or a grave disturbance of order, in a manner accommodated to the special conditions of the person and the deed.

§3. The warning or rebuke must always be established at least by some document which is to be kept in the secret archive of the curia.”

861. Canons 698 – 700 deal with the right of the accused to a proper defence before the religious institute’s council headed by its “supreme moderator”, and the decision of the council is to be made by secret ballot after which the supreme moderator can issue a decree of dismissal.

862. Canons 696 and 697 incorporate the same criteria to be taking into account for the discipline of religious as the Code provides for the discipline of clerics, such as imputability and that they be “juridically proven”

### **The “Pastoral Approach” and Repair of Scandal (cf Canon 1341)**

862.1. Canon 1341, which incorporates the “pastoral approach” in the discipline of clerics, requires the bishop to take into account the possibility of reform of the cleric and the “repair of scandal”. Although Canon 696 uses a different formulation, the essential meaning is the same. The religious is only to be dismissed if his or her “incurability is sufficiently evident.” The same concern about “scandal”, in the technical sense of loss of faith as a result of the conduct of the religious, is also apparent.<sup>767</sup>

862.2. Brother Crowe, the Provincial of the Marist Brothers, told the Royal Commission about the matters that the superior had to take into account in dealing with a religious brother against whom allegations of child abuse had been made:

“But there are other criteria..the scandal...So they are the two big arguments, whether the person has committed crimes and whether it's a matter of public scandal....A superior needs to exercise their judgment as to whether there would be a dismissal or whether they believe that, under certain circumstances, the person has a genuine desire to continue to live under the vows and that that is not going to be a source of public scandal.”<sup>768</sup>

862.3. The very last canon in the *1983 Code of Canon Law* provides that “the salvation of souls...must always be the supreme law of the Church.”<sup>769</sup> The problem with “scandal” is that a loss of faith amongst the Church’s adherents will lead to damnation, not salvation. Scandal not only affected the reputation of the Church, but it attacked one of its core values and missions, namely bringing in converts to Catholicism, and keeping them.

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<sup>767</sup> See Archbishop Hart’s definition of scandal at the Victorian Parliamentary Inquiry. [http://www.parliament.vic.gov.au/images/stories/committees/fcdc/inquiries/57th/Child\\_Abuse\\_Inquiry/Transcripts/Catholic\\_Archdiocese\\_of\\_Melbourne\\_20-May-13.pdf](http://www.parliament.vic.gov.au/images/stories/committees/fcdc/inquiries/57th/Child_Abuse_Inquiry/Transcripts/Catholic_Archdiocese_of_Melbourne_20-May-13.pdf) , 19 (Accessed 18 June 2013), Beal, Coriden & Green: *New Commentary on the Code of Canon Law*, 865

<sup>768</sup> [http://www.childabuseroyalcommission.gov.au/wp-content/uploads/2014/01/Transcript-RC\\_IRCSA\\_Day-035\\_23-Jan-2014-2013\\_Public.pdf](http://www.childabuseroyalcommission.gov.au/wp-content/uploads/2014/01/Transcript-RC_IRCSA_Day-035_23-Jan-2014-2013_Public.pdf) p. 3754, 3757 (Accessed 25 January 2014).

<sup>769</sup> Canon 1752

862.4. The “canonical warning” is an application of the “pastoral approach” that Canon 1341 applied to priests, but which is phrased in terms of “rebuke or correction”.<sup>770</sup>

### **Imputability (cf Canon 1321)**

863. The “imputability defence” that applies to priests under Canon 1321 is specifically referred to in Canon 696§1. This is one of the most contentious parts of the Code because it effectively means that the more children a priest or religious abuses, the less likely he will be dismissed.<sup>771</sup>

### **The Limitation Period:**

864. The matter of the limitation period is more contentious, and it illustrates one of the structural weaknesses of the whole canonical legal system. Br Crowe, the Provincial of the Marist Brothers told the Royal Commission:

“(dismissal) is at the initiative of the provincial and his local council, who would decide on a particular matter, according to canon law, that this person should no longer be a brother.... in the case of sexual abuse, there is a statute of limitations...20 years after the victim turns 18...”<sup>772</sup>

865. Crowe admitted that he was not a canon lawyer, and it is not clear from where he derives his opinion that the 20 limitation period applies in the case of religious. Undoubtedly he was told by his superiors or canonical advisers. The limitation period of 20 years from the 18<sup>th</sup> birthday of the victim was introduced by Pope Benedict XVI *SST 2010*. But those procedures applied only to clerics and not religious. It may well be that there is another instruction by one of the Curia Congregations that the same limitation period applies, but the Code itself has not been changed. The period in the Code is still 5 years from the date of the abuse.

### **The Pontifical Secret**

866. As explained in chapters 5, the secret of the Holy Office was imposed *by Crimen Sollicitationis* on all information obtained by the Church’s canonical procedures in relation to the sexual abuse of children by clerics. It did not apply to religious brothers and nuns.

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<sup>770</sup> Canon 1341

<sup>771</sup> See above par 832ff.

<sup>772</sup> [http://www.childabuseroyalcommission.gov.au/wp-content/uploads/2014/01/Transcript-RC\\_IRCSA\\_Day-035\\_23-Jan-2014-2013\\_Public.pdf](http://www.childabuseroyalcommission.gov.au/wp-content/uploads/2014/01/Transcript-RC_IRCSA_Day-035_23-Jan-2014-2013_Public.pdf) p. 3754, 3757 (Accessed 25 January 2014).

867. It is quite possible that from the period 1922 until 1974 when *Secreta Continere* was promulgated, that religious orders, strictly speaking, did not need to observe the strictest confidentiality in its disciplinary procedures of religious, but it would not be surprising if they did because of the “trickle down” effect of culture of secrecy, of which *Crimen Sollicitationis* was its legal expression. However, there was no requirement in canon law itself prior to 1974 for those involved in the disciplining of religious to observe the secret of the Holy Office.
868. That all changed in 1974 with the promulgation of *Secreta Continere*. The pontifical secret was imposed on all allegations and information about “delicts against faith and morals”, and it was not confined to actions against clerics.
869. Appendix 3 sets out the opening address of Gail Furness SC regarding Case No 13 (Marish Brothers, Canberra) with notations as to the canon law that applied at the time, and the options available under canon law for the Marish Brothers superiors.

### The Canonical Appeal Process

870. Appeals to the Holy See were long drawn out processes, where procedural correctness seemed to be more important than matters of substance.<sup>773</sup> A good illustration of this is Cardinal Castrillón’s advice to the Irish bishops through the Storero letter of 31 January 1997, that reporting allegations of sex abuse to the police could be sufficient to allow a priest’s appeal against dismissal.<sup>774</sup> The priest has every reason to appeal because unless he is dismissed, he is entitled to his salary from the Church.<sup>775</sup> The history of successful appeals

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<sup>773</sup> Cafardi: *Before Dallas*, p.38, Bishop Peter Ingham at the Royal Commission on the Nestor Case: <http://www.childabuseroyalcommission.gov.au/case-study/bb3eaadf-9283-41ef-9694-e560738d186a/case-study-14,-june-2014,-sydney.aspx>, 8106, Archbishop Hart at the Royal Commission, Case No. 16 into the Melbourne Response, <http://www.childabuseroyalcommission.gov.au/case-study/791fd480-ba30-45bc-ba79-cbad85f27023/case-study-16,-august-2014,-melbourne>, 25 August 2014, C4679 (Accessed 25 August 2014) In the Nestor case where the Congregation for the Clergy overturned the decision of Bishop Wilson of Wollongong to stand down Fr Nestor because of allegations of inappropriate behaviour with children. The Australian bishops supported the diocese’s appeal to the Apostolic Signatura, but the latter reserved its decision for 5.5 years: Royal Commission Report, Case No. 14 (Nestor) : <http://childabuseroyalcommission.gov.au/getattachment/e1f91ddb-2ba2-4eb4-b487-c43a0c8989e4/Report-of-Case-Study-no-14> p.28, 30, 32(Accessed 20 December 2014). The documents produced to an American court by the Archdiocese of Milwaukee and St. Paul showed similar kinds of delays within the Vatican with what should have been rubber stamping of applications for voluntary laicisation: see the author’s *Potiphar’s Wife*, p. 331

<sup>774</sup> See page 116 above.

<sup>775</sup> Cardinal Pell at the Victorian Parliamentary Inquiry [http://www.parliament.vic.gov.au/images/stories/committees/fcdc/inquiries/57th/Child\\_Abuse\\_Inquiry/Transcripts/Catholic\\_Archdiocese\\_of\\_Sydney\\_27-May-13.pdf](http://www.parliament.vic.gov.au/images/stories/committees/fcdc/inquiries/57th/Child_Abuse_Inquiry/Transcripts/Catholic_Archdiocese_of_Sydney_27-May-13.pdf) page 40.8 (Accessed 22 June 2013)



to Rome seems to have been one of the factors impeding American bishops from pursuing the canonical course.<sup>776</sup>

### Other Effects of the Pontifical Secret

871. Secrecy not only had the effect on preventing clergy sex abusers to be prosecuted under the civil law. The Murphy Dublin Report found that secrecy imposed by canon law on the Church's investigations and trials created serious problems for its own administration and disciplinary system. It meant that often people within the Church administration who needed to know were frequently not told.<sup>777</sup> The Massachusetts Attorney General came to the same conclusion in his report on the Archdiocese of Boston.<sup>778</sup> The same thing occurred in Australia where Cardinal Pell, as auxiliary bishop to Archbishop Little of Melbourne, did not know about some allegations against priests within the diocese.<sup>779</sup> Antony Whitlam QC found the same thing occurred in the "Father F" case.<sup>780</sup> There were similar instances of the failure of Marist brothers superiors to pass on information about brothers who had offended.<sup>781</sup>

872. Since the pontifical secret prevented those involved in canonical proceedings from discussing these cases with their colleagues, there was no way of developing uniform procedures.<sup>782</sup>

### The Lack of Resources and Personnel

873. The sad history of the Church's attempts to deal with clergy sex abuse is sufficient proof of its inadequacy. But the systemic problems from which it suffers are obvious from canon law itself. The Church does not have any jails to keep clergy sex abusers. It has no trained police force or powers of search and arrest. It has no access to DNA and scientific testing, an independent judiciary and public hearings. Nor does it have parole and supervision facilities.

<sup>776</sup> Cafardi *Before Dallas*, 38-39

<sup>777</sup> <http://www.dacoi.ie> par 1.64 (Accessed 9 February 2013)

<sup>778</sup> <http://www.bishop-accountability.org/downloads/archdiocese.pdf>, p.30 (Accessed 22 May 2015)

<sup>779</sup> Cardinal Pell at the Victorian Parliamentary Inquiry

[http://www.parliament.vic.gov.au/images/stories/committees/fcdc/inquiries/57th/Child\\_Abuse\\_Inquiry/Transcripts/Catholic\\_Archdiocese\\_of\\_Sydney\\_27-May-13.pdf](http://www.parliament.vic.gov.au/images/stories/committees/fcdc/inquiries/57th/Child_Abuse_Inquiry/Transcripts/Catholic_Archdiocese_of_Sydney_27-May-13.pdf) page 7 & 13 (Accessed 22 June 2013)

<sup>780</sup> <http://www.parra.catholic.org.au/> par 168 (Accessed 9 February 2013)

<sup>781</sup> Case No. 13, opening address of Counsel assisting: <http://www.childabuseroyalcommission.gov.au/case-study/4194ab1e-26a0-4d5c-83c6-30acc93c3977/case-study-13,-june-2014,-canberra-> (Accessed 7 August 2015)

<sup>782</sup> O'Reilly and Chalmers: *The Sexual Abuse Crisis and the Legal Responses* p. 373

874. The Victorian Church in its submission to the Victorian Parliamentary Inquiry and the TJHC submission to the Royal Commission acknowledges that the police are more experienced and better resourced to be able to investigate criminal behaviour.<sup>783</sup> *Towards Healing* makes the same acknowledgment and accepts that Church penalties are inadequate for these kinds of crimes.<sup>784</sup> Bishop Malone at the Cunneen Special Commission admitted that dismissing the priest from the priesthood did not stop him assaulting children, and that was a further reason for such crimes to be reported to the police.<sup>785</sup>
875. It is therefore highly surprising that the Holy See retains pontifical secrecy that will still apply to the majority of complaints about sex crimes against priests and religious, because the 2010 dispensation only applies where there is a local law requiring reporting, and historic abuse generally does not have to be reported. That can only have the effect of continuing to protect offending priests from being dealt with under the civil law.
876. Not only did the canonical system not have the resources of the State available to it, but even within its own system it lacked experienced canon lawyers to deal with the dismissal process. That was a necessary consequence of the *1983 Code of Canon Law* making it virtually impossible to have a canonical trial because of the limitation period and the Code's insistence on the adoption of the "pastoral and therapeutic" approach. The end result was that there were virtually no canonical trials, and if there were no canonical trials, there were no canon lawyers with experience in the trial procedures.<sup>786</sup>

### Conflicts of Interest

877. A further problem was the theological attitude to the priesthood and to the relationship between a priest and his bishop. Both Pope John Paul II and Pope Benedict XVI have spoken

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<sup>783</sup> Facing the Truth, par 16.1

[http://www.parliament.vic.gov.au/images/stories/committees/fcdc/inquiries/57th/Child\\_Abuse\\_Inquiry/Submissions/Catholic\\_Church\\_in\\_Victoria.pdf](http://www.parliament.vic.gov.au/images/stories/committees/fcdc/inquiries/57th/Child_Abuse_Inquiry/Submissions/Catholic_Church_in_Victoria.pdf) (Accessed 6 April 2013) TJHC Submission, p.115, par 8.1.

<http://dev.childabuseroyalcommission.gov.au/wp-content/uploads/2013/10/14.-Truth-Justice-and-Healing-Council.pdf> (Accessed 12 October 2013)

<http://dev.childabuseroyalcommission.gov.au/wp-content/uploads/2013/10/14.-Truth-Justice-and-Healing-Council.pdf> (Accessed 12 October 2013)

<sup>784</sup> *Towards Healing*, par 37.3

<sup>785</sup> Cunneen Special Commission

[http://www.lawlink.nsw.gov.au/lawlink/Special\\_Projects/ll\\_splprojects.nsf/vwFiles/Transcript\\_Day\\_8\\_-\\_TOR\\_2\\_-\\_11\\_July\\_2013.pdf/\\$file/Transcript\\_Day\\_8\\_-\\_TOR\\_2\\_-\\_11\\_July\\_2013.pdf](http://www.lawlink.nsw.gov.au/lawlink/Special_Projects/ll_splprojects.nsf/vwFiles/Transcript_Day_8_-_TOR_2_-_11_July_2013.pdf/$file/Transcript_Day_8_-_TOR_2_-_11_July_2013.pdf), 872.33-39 (Accessed 14 July 2013)

<sup>786</sup> Cafardi *Before Dallas*, 25-28, O'Reilly and Chambers: *The Sexual Abuse Crisis and the Legal Responses* p.263

about priests on ordination becoming “ontologically changed”, i.e. they have been specially marked out by God in a way that changes their very nature.<sup>787</sup>

878. Further, there are numerous instances where senior clerics have stated that the relationship between a bishop and a priest is a “sacramental” one, and one like “father and son”. Cardinal Castrillón, for example, in his letter to Bishop Pican after his conviction for covering up a French paedophile priest said,

“For the relationship between priests and their bishop is not professional but a **sacramental relationship** which forges **very special bonds of spiritual paternity**. ..But a bishop cannot be required to make the denunciation himself. In all civilised legal systems it is acknowledged that close relations have the possibility of not testifying against a direct relative.” (my emphasis).

879. At Bishop Pican’s trial, Bishop Fihey told the Court that there was a special “fraternal and paternal” relationship that unites a priest to his bishop – the implication being that he should not be expected to report a paedophile priest to the police.<sup>788</sup>

880. In his 2010 interview with *The Tablet*, the Vatican Prosecutor, Monsignor Scicluna, said,

“We’re dealing with an onerous duty because these bishops are forced to make a gesture comparable to that of a parent who denounces his or her own son.”<sup>789</sup>

881. These statements reflect what is in the Catholic Catechism, that there is “an intimate sacramental brotherhood” between priest and his bishop.<sup>790</sup>

882. Yet, under canon law, the person who is to conduct the preliminary investigation is the bishop or his delegate, and it is the bishop who is to decide if the priest is to be subjected to a canonical trial. This “theology” creates a conflict of interest, and it is hardly surprising that

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<sup>787</sup> [http://www.vatican.va/holy\\_father/benedict\\_xvi/audiences/2009/documents/hf\\_ben-xvi\\_aud\\_20090624\\_en.html](http://www.vatican.va/holy_father/benedict_xvi/audiences/2009/documents/hf_ben-xvi_aud_20090624_en.html) (Accessed 16 July 2013)

See also Richard Sipe in “*Mea Maxima Culpa*” at 1:23.04.

<sup>788</sup> <http://www.thetablet.co.uk/article/5114> (Accessed 16 July 2013)

<sup>789</sup> <http://www.thetablet.co.uk/article/14451> (Accessed 4 April 2013). Scicluna was also asked what were the Vatican’s instructions where there were no reporting laws. He said: ‘In these cases we do not force bishops to denounce their own priests, but encourage them to contact the victims and invite them to denounce the priests by whom they became victims.’ It was not just a question of bishops not being ‘forced’ to report these priests. The pontifical secret prohibited it.

<sup>790</sup> [http://www.vatican.va/archive/ccc\\_css/archive/catechism/p2s2c3a6.htm](http://www.vatican.va/archive/ccc_css/archive/catechism/p2s2c3a6.htm) (Accessed 5 April 2013). The Catechism reflects the language of the Vatican II declaration on the priesthood, *Presbyterorum ordinis*. John P. Beal suggests that for this reason, the bishop should not carry out the preliminary investigation himself: “... should the cleric confess to the offense in the course of the investigation, the investigating bishop may find himself faced with the prospect of being summoned to civil court to testify against the cleric in a criminal trial, an unpleasant prospect fraught with consequences for the bishop’s necessarily ongoing relationship with the cleric.” *Doing What One Can: Clerical Sexual Misconduct: The Jurist* 52 (1992) 642-683 at 648.

- recidivist clergy sex abusers were treated leniently.<sup>791</sup> The same problems arise with religious congregations of brothers and nuns where religious superiors are expected to have a similar relationship with other members.
883. In cases of purely canonical crimes, like desecrating Holy Communion or ordaining women, such a conflict of interest is a matter for the Church. They are not matters that concern or affect wider society. But where the issues are serious breaches of the civil law, particularly involving the welfare of children and canon law prohibits reporting the results of the bishop's or religious superior's investigations to the civil authorities, it is inevitable that justice will never be achieved in a Church trial.
884. The Cloyne Report refers to a letter of June 2002 from Monsignor O'Callaghan, the canon lawyer for the Cloyne diocese that indicated a curious conflict not only arising from the relationship between the bishop and the priest, but between the priest and those investigating his alleged criminal behaviour on behalf of the bishop. He wrote to a friend outlining his opposition to the requirement to report such crimes to the police and said that it seriously "compromised" the investigators relationship with the priest they were investigating.<sup>792</sup> One would have thought that the only "relationship" that a canon law investigator should have is objectivity, the application of canon law to the facts, and to report the allegations to the police.
885. Disciplinary tribunals in secular professions have also had to face perceptions of conflicts of interest and allegations of being lenient with their own members. In larger professions where the members are not in frequent contact with each other, this is more a matter of perception. But perception is also important, and for this reason there are often "lay" members appointed to those tribunals. There is no reason why the Church could not adopt similar practices, and some of their protocols have done so. However, because these bodies can only be advisory bodies for the bishop in the current state of canon law, the problem will never go away.
886. The conflict problem for clerics has been alleviated to some extent by *SST 2001* and *SST 2010*, which requires the bishop to receive instructions from the CDF on the manner of

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<sup>791</sup> Conflicts of interest create problems of perception even if there is no actual conflict in the particular case: O'Reilly and Chambers: *The Sexual Abuse Crisis and the Legal Responses* p.265.

<sup>792</sup> [http://www.justice.ie/en/JELR/Cloyne\\_Rpt.pdf/Files/Cloyne\\_Rpt.pdf](http://www.justice.ie/en/JELR/Cloyne_Rpt.pdf/Files/Cloyne_Rpt.pdf) par 1.23 (Accessed 5 April 2013)

proceeding. Some distance is thereby created. But the Congregation generally directs the bishop to conduct an administrative or judicial trial, and the same problem arises.<sup>793</sup> The procedures under *SST 2001* and *SST 2010* do not apply to religious brothers and nuns.

887. Despite all these problems with the canonical system, the Church's most senior canon lawyer, Archbishop Julian Herranz, President of the Pontifical Council for the Interpretation of Legislative Texts, said in 2002 that canon law is perfectly capable of dealing with the problems of sex abuse by clergy.<sup>794</sup> This is precisely the clericalist attitude that gave rise to the revival of privilege of clergy in the first place, with such disastrous effects on children.

### **Disciplinary Proceedings of Other Professions**

888. Any organization has the right to make its own rules and to discipline its members in accordance with those rules. But when the "misconduct" also amounts to a serious crime, the right of the State to deal with that should be paramount with the organization being limited to suspending the member. It is only when the State criminal procedures have been exhausted that an organization should be able to deal with permanent sanctions on the basis of its disciplinary rules.
889. Quite apart from any laws relating to misprision of felony, this is the system adopted by all professions in Australia and in most parts of the world. Allegations of a criminal misuse of trust funds by lawyers, sexual abuse of patients by doctors and other professionals are dealt with first by the criminal justice system. None of these professional bodies have rules that say that any information gathered by their internal investigators should not be disclosed to the police. Protecting the good name of the people involved in such proceedings does not require anything like the pontifical secret – something which the canon lawyer, Fr John P Beal concedes. If a person's identity needs to be withheld for some good reason, the use of pseudonyms and redaction is effective, as many of the Commissions of Inquiry in various countries, including this Royal Commission have demonstrated.
890. Disciplinary bodies for professions in Australia do not need a law to tell them to report any crimes to the police, because they are imbued with the culture of the State – the point made

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<sup>793</sup> According to Monsignor Scicluna in 2013, 60% of all cases are dealt with by the administrative procedure. He said: 'The general practice is to allow the local church to exercise its jurisdiction under the supervision of CDF,' <http://ncronline.org/news/accountability/canon-lawyers-hear-church-prosecutor-sex-abuse-cases> (Accessed 27 October 2013)

<sup>794</sup> [http://cf.americamagazine.org/content/article.cfm?article\\_id=1953](http://cf.americamagazine.org/content/article.cfm?article_id=1953) (Accessed 11 June 2013)

- by Professor Parkinson and by the NSW Law Reform Commission in 1999 when recommending the abolition of S.316 of the *Crimes Act 1900 (NSW)*. On the other hand, so long as the Church thinks it is a “perfect society” and a law unto itself, there will be continuous problems.
891. Legislation that sets up professional disciplinary tribunals in modern democracies creates an exception to confidentiality to allow reporting crimes to the police. The *Legal Profession Uniform Law Application Act (NSW) 2014* and the various State *Ombudsman Acts* require their investigators to observe confidentiality, but there is always an exception where allegations of crimes or other breaches of discipline arise.<sup>795</sup>
892. As already stated, that was the kind of simple exception to pontifical secrecy that the Holy See could have included in *Crimen Sollicitationis* in 1922 and 1962, in the *Sanctamentorum Sanctitatis Tutela* and at the time of its revision in 2010. The omission of such an exception and the limited extent to which the Holy See will allow reporting is an indication of its deliberate intent to preserve privilege of clergy as much as it can, and wherever it can. It cannot be an oversight.
893. Because of different standards of proof in criminal and disciplinary matters, it is quite possible for a lawyer or doctor, for example, to be acquitted of a criminal charge, but still disciplined for professional misconduct over the same facts. That is entirely appropriate, and there is every reason for the Church to have a similar system. But that is not how the Church system has worked because of its secrecy provisions which prevented any civil prosecution from taking place.
894. Quite apart from issues of reporting criminal behaviour to police, civil society also has an interest in appropriate standards being applied by professional bodies because of the standard of proof for striking someone off a professional register is not as high as that required for a criminal prosecution. Numerous superior courts have said that the purpose of disciplinary proceedings is not to punish the offender, but to protect the public.<sup>796</sup>

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<sup>795</sup> S.362(2)(d) *Legal Profession Uniform Law Application Act 2014*, and before that, *Legal Profession Act 1974 (NSW)* S.722(2)(d). S.34 *Ombudsman Act 1974 (NSW)*, 26A *Ombudsman Act 1973 (Victoria)*

<sup>796</sup> *Smith v New South Wales Bar Association* [1992] HCA 36; (1992) 176 CLR 256 (13 August 1992)

895. But it is absurd to have a convoluted disciplinary system whereby a person can only be struck off the rolls of their profession if they consent to it. That is what canon law did, and the people in charge of it at the Vatican were aware of it, but did nothing about it, at least until 2001, and even then, in many cases, it seems to have been ineffective. Even with recent improvements to canonical procedures, the problem for Australian civil society is that the disciplinary rules for Catholic clergy are determined not by a local association that can be controlled by civil law, but by a foreign government.
896. A secular society that respects the freedom of religion has an interest in seeing that priests (or rabbis, imams or pastors) who sexually assault children are not allowed to continue to practice, just as much as it has an interest in seeing that fraudulent lawyers, predatory psychologists and drug dealing doctors are struck off the register. The standards and procedures that should be applied are a matter for the religious organization, but if those standards are not satisfactory, it only has itself to blame if there is a public demand for the State to intervene.<sup>797</sup>
897. Since 2001, the Church has claimed that its disciplinary procedures have improved. Archbishop Hart of Melbourne, in evidence before the Victorian Parliamentary Inquiry was asked about the situation in 2013. He said that he had no power to dismiss priests, but could remove them from ministry and restrict their activities. If it is a serious matter, he can refer it to the Holy See and petition it to dismiss the priest, or he can take the matter to the pope directly. He said it is a “much simpler” procedure now.<sup>798</sup> But the evidence suggests that this claim is questionable.

### **Structural Problems of Canon Law: The Promulgation of Laws**

898. At the Murphy Commission there was considerable confusion about what canon law said about child sexual abuse. The Commission said:

“Even the best attempts of competent people to discover the norms which, according to canon law, should be applied to cases of sexual abuse were in vain.....There seems to have been a total absence of any straightforward, easily verifiable system for ascertaining which decrees or statements had the force of canon law and which had not, and what the effects of new canonical instruments, such as the code

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<sup>797</sup> Fr Frank Brennan SJ in *Church-State Issues and the Royal Commission* Eureka Street 3 September 2013: “Clearly, the Church itself cannot be left alone to get its house in order. That would be a wrongful invocation of freedom of religion in a pluralist, democratic society.”, [www.eurekastreet.com.au](http://www.eurekastreet.com.au) (Accessed 3 September 2013)

<sup>798</sup> [http://www.parliament.vic.gov.au/images/stories/committees/fcdc/inquiries/57th/Child\\_Abuse\\_Inquiry/Transcripts/Catholic\\_Archdiocese\\_of\\_Melbourne\\_20-May-13.pdf](http://www.parliament.vic.gov.au/images/stories/committees/fcdc/inquiries/57th/Child_Abuse_Inquiry/Transcripts/Catholic_Archdiocese_of_Melbourne_20-May-13.pdf) p.16 (Accessed 18 June 2013)

of 1983, or the 2001 procedural rules, had on previous instruments which had been treated as having the force of law...It is a basic feature of every coherent legal system that there is a firm, simple and unmistakable procedure for the promulgation of a law. The absence of any such procedure within Church law, in the Commission's view, makes that law difficult to access, and very difficult to implement and to monitor compliance."<sup>799</sup>

899. Canon law has a bewildering array of different kinds of official documents which may or may not affect a change in canon law: apostolic constitutions, apostolic letters *motu proprio*, decrees, instructions, notifications, encyclicals and pastoral letters.

900. Canon 8 §1 provides for promulgation of a universal law of the Church by publication:

"in the official commentary, *Acta Apostolicae Sedis*, unless another manner of promulgation has been prescribed in particular cases."<sup>800</sup>

901. The provision of alternative methods of promulgation only creates confusion as what is or is not obligatory as law. For example, *SST 2001* was a universal law of the Church but it was not promulgated by publication in the AAS.<sup>801</sup> It was sent out to all the bishops with an explanatory letter from the CDF.<sup>802</sup> *Crimen Sollicitationis* was an instruction that was not published on the AAS, and its terms stated specifically that it was not to be published. It is clear that it had "the force of law".<sup>803</sup> On the other hand, *Secreta Continere* of 1974 was an instruction that was published on the AAS.<sup>804</sup>

### Amendments to Canon Law and the Code

902. In any respectable legal system, where a particular law is found to be defective or inadequate, the legislature will change the wording of the law so that those involved in obeying and applying it know that they have to act differently. At the Royal Commission, Archbishop Coleridge of Brisbane said that the Vatican is "neuralgic" about changing the

<sup>799</sup> <http://www.justice.ie/en/JELR/DACOI%20Part%201.pdf/Files/DACOI%20Part%201.pdf> (Accessed 25 April 2013) par 4.87 - 4.89

<sup>800</sup> Can. 8 §1. This is identical with canon 9 of the 1917 Code: Bachofen *Commentary on the New Code of Canon Law*, p 81, (1918) St. Louis, Mo., B. Herder book co., 1918-1922.

<sup>801</sup> John P. Beal "The 1962 Instruction: *Crimen Sollicitationis*: Caught Red Handed or Handed a Red Herring?" 41 *Studia Canonica* 199 at 230: [http://www.vatican.va/resources/resources\\_introd-storica\\_en.html](http://www.vatican.va/resources/resources_introd-storica_en.html) (Accessed 5 August 2013).

<sup>802</sup> *Potiphar's Wife* p.112

<sup>803</sup> *Id.*, p.98

<sup>804</sup> *Id.* p.128



canons and prefers to change their “interpretation”. He said that the Vatican can suffer from a “lack of coordination” in such matters.<sup>805</sup>

903. Changes in the law through reinterpretation of its provisions are an appropriate way of changing any system of law. It is a method that is being used daily in the common law system where superior appeal courts interpret statutes passed by parliaments. However, reinterpretation has to be possible within the language of the particular statute.
904. A limitation period of 5 years cannot be “reinterpreted” to mean 10 years from the 18<sup>th</sup> birthday of a victim of child sexual abuse, and even worse 20 years from that date. The only appropriate way to deal with such a change is by changing the Code itself. On the other hand, Canon 1341 which encompasses the “pastoral approach” could be reinterpreted to mean that in cases of child sexual abuse, “fraternal correction or rebuke or other means of pastoral solicitude” can never sufficiently “restore justice”.

#### **The Interpretation of Canon Law**

905. In a legal system where there is a separation of the judicial from the parliamentary and executive functions, the courts develop a jurisprudence of interpretation.<sup>806</sup> The same can happen in the canonical system, but without immediate publication of the reasons that change the interpretation, those who have to obey the law and those who have to apply it and advise on it have no way of knowing what the interpretation is. Such jurisprudence has developed in canon law in relation to marriage cases, but not in sexual abuse cases, and it is hampered by an embargo of 10 years on the publications of decisions.<sup>807</sup> By the time the canon lawyers find out about it, that interpretation may have changed.
906. Likewise, civil authorities who have an interest in knowing how the Church’s disciplinary system works, and the standards that are being applied in child sexual abuse cases, have no way of knowing the current interpretations of the problematical canons.

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<sup>805</sup> [http://www.childabuseroyalcommission.gov.au/wp-content/uploads/2013/08/Transcript-RC\\_IRCSA\\_Day-026\\_11-Dec-2013\\_Public.pdf](http://www.childabuseroyalcommission.gov.au/wp-content/uploads/2013/08/Transcript-RC_IRCSA_Day-026_11-Dec-2013_Public.pdf) p.2740-2741 (Accessed 12 December 2013). It is difficult to reconcile this with the principle stated by James A. Coriden: “The Code of Canon Law...has the ‘force of law’ for the entire Latin Church. It is the *ius vigens*, the canonical collection of unique juridical effect. This Code is the operative centre of the church’s system of canonical regulations. It does not contain all of the norms or even the majority of them, but all the others are to accord with those in the Code”: *An Introduction to Canon Law*, Paulist Press (2004)

<sup>806</sup> Samuel C. Damren: *Stare Decisis: The Maker of Customs* (2000) *New England Law Review* Vol 35,1 <http://www.nesl.edu/userfiles/file/lawreview/vol35/1/damren.pdf> (Accessed 2 May 2015)

<sup>807</sup> The Royal Commission: Sr Hanlen 27 June 2014, 8148. <http://www.childabuseroyalcommission.gov.au/case-study/bb3eaadf-9283-41ef-9694-e560738d186a/case-study-14,-june-2014,-sydney.aspx> (Accessed 2 May 2015). See also O’Reilly and Chalmers: *The Sexual Abuse Crisis and the Legal Responses*, p.314.

907. *SST 2001* simplified the procedures for dismissing a priest, but it did not change the standards for dismissal that had to be applied by those simplified procedures.
908. In his 2010 historical introduction to *SST 2010*, Pope Benedict criticized the “pastoral attitude” and that “the bishop was expected to ‘heal’ rather than ‘punish’.” But this was and is the “proper meaning of the words” of Canon 1341, and one that was interpreted that way by the world’s canon lawyers and by the Holy See itself. If Pope Benedict wanted those applying canon law to act differently, the terms of Canon 1341 needed to be changed, or at least that it be made abundantly clear by a process of legislative direction or judicial interpretation that the words “reform the offender” in Canon 1341 did not apply in the future to the sexual abuse of children. But the words have not been changed, and it has not been made clear that “reform the offender” in Canon 1341 does not now apply to child sex abusers.
909. The end result has been that despite all the claims that everything changed after 2001, it is not surprising that there seems little change at all. The attempts to dismiss Fr Desmond Gannon and “DS” in the Lismore diocese are just two illustrations.<sup>808</sup>
910. The Australian bishops were not the only ones to have had this kind of problem, even after the so called “reforms” of 2001. The recently released Milwaukee documents suggest that the Holy See still had this reluctance to dismiss even when the priest was a serial paedophile and requested voluntary laicisation.<sup>809</sup>
911. On 23 September 2003, Archbishop Dolan of Milwaukee wrote to Cardinal Josef Ratzinger requesting the laicisation of Fr John A. O’Brien who pleaded guilty to a charge of sexually abusing a 17 year old boy, and against whom there were other allegations. O’Brien signed a letter agreeing to voluntary laicisation. Nothing happened for 2 years, despite Dolan continually requesting a reply. When he finally did get a reply on 6 September 2005, the

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<sup>808</sup>[http://www.parliament.vic.gov.au/images/stories/committees/fcdc/inquiries/57th/Child\\_Abuse\\_Inquiry/Transcripts/Catholic\\_Archdiocese\\_of\\_Melbourne\\_20-May-13.pdf](http://www.parliament.vic.gov.au/images/stories/committees/fcdc/inquiries/57th/Child_Abuse_Inquiry/Transcripts/Catholic_Archdiocese_of_Melbourne_20-May-13.pdf) p. 9 (Accessed 18 June 2013), The Royal Commission [http://www.childabuseroyalcommission.gov.au/wp-content/uploads/2013/12/Transcript-RC\\_IRCSA\\_Day-032\\_19-Dec-2013\\_TBC\\_Public.pdf](http://www.childabuseroyalcommission.gov.au/wp-content/uploads/2013/12/Transcript-RC_IRCSA_Day-032_19-Dec-2013_TBC_Public.pdf) p. 3392.36 (Accessed 20 December 2013)

<sup>809</sup> [http://www.andersonadvocates.com/documents/Key\\_Milwaukee\\_Documents/Lacization\\_All.pdf](http://www.andersonadvocates.com/documents/Key_Milwaukee_Documents/Lacization_All.pdf) (Accessed 2 July 2013) These are documents produced by the victim’s lawyer, Jeffrey Anderson, and it might be argued that he has highlighted the worst cases. If it is suggested that they are not a representative sample, the solution is simple: the Vatican should open its files to an independent assessment.

Congregation said the impossibility of returning to the ministry was not sufficient reason, and that O'Brien's letter must contain an admission of guilt and "a sincere expression of remorse", before it could be passed on to the pope for approval. The plea of guilty before a civil court was apparently not sufficient proof. The laicisation decree came through on 3 April 2009, five and a half years after it was requested.<sup>810</sup>

912. Then there are the three other cases where the priests did not agree to voluntary laicisation, and where Archbishop Dolan requested permission to conduct a penal administrative or judicial trial to dismiss them. The Holy See then asked Dolan to try to convince the priests to submit to voluntary laicisation despite the fact that they had refused prior requests, and hardly showed remorse.<sup>811</sup> The Holy See was still insisting on this "pastoral" approach by asking Dolan to try to convince the priests to agree to voluntary laicisation, rather than impose on them the Church's version of a "dishonourable discharge".

913. Bishop Connors in Victoria had the same problem in 2006 when he tried to have the CDF dismiss Paul David Ryan. He wrote to the CDF on 13th November 2006 requesting it to dismiss Ryan under the 2001 procedures.<sup>812</sup> The CDF wanted copies of all original documents or authenticated copies of all the allegations against Ryan, and suggested that Connors attempt to convince Ryan to apply for voluntary laicisation. Had Connors gone to the trouble of providing the CDF with authenticated copies of original documents, it was highly likely that laicisation would have been refused on the grounds that Ryan's canonical crimes had been "extinguished". The CDF was given jurisdiction to extend the limitation period on 7 November 2002, but there is an issue as to whether this was made retrospective.<sup>813</sup>

914. On the question of voluntary laicisation, the CDF's letter said:

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<sup>810</sup> [http://www.andersonadvocates.com/documents/Key\\_Milwaukee\\_Documents/Lacization\\_All.pdf](http://www.andersonadvocates.com/documents/Key_Milwaukee_Documents/Lacization_All.pdf) (Accessed 2 July 2013).

<sup>811</sup> *Id.* In the cases of Frs. Wagner, Benham and Lanser.

<sup>812</sup> Case Study No. 28, Royal Commission, Exh CTJH.120.01099.0241

<sup>813</sup> O'Reilly and Chambers: *The Sexual Abuse Crisis and the Legal Responses* p. 323. O'Reilly and Chambers say that in cases outside the limitation period, "the CDF may extend the prescriptive period for a particular case if the bishop requests it....currently though prescription is still a factor in a bishop's ability to adjudicate a case, it is no longer the absolute bar that it once was in bringing older cases". Footnote 31 says: "Ex audientia Summi Pontificis 7 Nov 2002. Nicholas Cafardi points out, the big difference between the common law and canon law is that in the former case, the limitation period operates as an estoppel (at least in the US), but in canon law the crime is "extinguished" (Before Dallas p.29, quoting Beal). In footnote 29 on page 323, O'Reilly and Chambers say that although this is true, the CDF had begun to regard prescription as really limitations which can be waived: Charles D Renati: *Prescription ad Derogation from Prescription in Sexual Abuse of Minor case* (2007). In SST 2010, Art 7§1 provides: "A criminal action for delicts reserved to the CDF is extinguished by prescription after twenty years, with due regard to the right of the CDF to derogate from prescription in individual cases." This latter phrase, "with due regard..." does not appear in the 10 year period in SST 2001, Art. 5§1. It is arguable that the CDF can now derogate where the delict has been extinguished.

“A request for such a dispensation should denote that the cleric recognizes the seriousness of the matter and that he is penitent for his actions.”<sup>814</sup>

915. This was the same requirement for voluntary laicisation that the CDF had required in the O'Brien case. Connors was unable to find Ryan and the matter went no further.
916. In all the above cases where there is now public knowledge of how the Holy See has treated particular cases, the information has come through the issuing of court processes against bishops and dioceses to produce documents. But the Holy See still refuses to cooperate with civil authorities in making known how its disciplinary processes work.
917. The documents released by the Archdiocese of Milwaukee in 2013, the Gannon case in the State of Victoria, the 'DS' case in Lismore and the Ryan case in Ballarat, would suggest that the requirements for dismissing a priest after 2001 are still not so “simple”. Whether these cases are indications of a systemic problem or the occasional aberrations one might expect in any legal system is a matter than can only be resolved by an independent assessment of the 4,400 cases that the Holy See has handled since 2001.
918. The Royal Commission attempted to carry out such an assessment in respect of Australian priests accused of sexual abuse of children and whose cases had been referred to the Holy See pursuant to *SST 2001* and *SST 2010*. Despite assurances from Cardinal Pell that the Holy See would produce relevant documents, the Holy See refused to do so on the grounds that the Holy was a “sovereign subject under international law”:

“..the Holy See maintains the confidentiality of internal deliberations related to its judicial and administrative proceedings, and indeed depends upon deliberative confidentiality to ensure the integrity and efficacy of its judicial and administrative processes.”<sup>815</sup>

919. It is not clear what the Holy See meant by “internal deliberations” and such a term could include all communications between the Holy See and Australian bishops about particular cases referred to it under *SST 2001* and *SST 2010*, including the final decision. It seems from this that the Holy See is repeating the Irish experience: an instruction is given to local

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<sup>814</sup>Case Study No. 28, Royal Commission, Exh. CTJH.120.01099.0243

<sup>815</sup><http://www.childabuseroyalcommission.gov.au/media-centre/speeches/care-leavers-australia-network> , (Accessed 8 July 2014), Case Study No 16, transcript 25 August 2014, C4678 <http://www.childabuseroyalcommission.gov.au/case-study/791fd480-ba30-45bc-ba79-cbad85f27023/case-study-16-august-2014,-melbourne> (Accessed 26 August 2014)

bishops to cooperate with the civil authorities, but the Holy See then relies on the status of its sovereignty under international law to justify the denial of access to such documents. None of the matters referred to the CDF about Australian clergy concern citizens of the Vatican City or the abuse of children within its 44 hectares.<sup>816</sup>

920. The Holy See seems to have taken the same attitude towards request by Italian magistrates for access to documents relating to the disciplinary proceedings against Fr Mauro Inzoli.<sup>817</sup> The difficulty with this stance is that no one knows the basis upon which the Holy See will agree to the dismissal of a priest, and where it would apply some other disciplinary measure, such as a “life of prayer and penance”.

921. Assuming that the CDF has changed its interpretation of canon law regarding disciplinary action against priests, the law effectively remains secret. Nicholas Cafardi stated in 2010:

“No legal system...can be effective when its highest value is secrecy... when changes are made in the law, the revision needs to be clearly announced and explained...Secret laws serve no one.”<sup>818</sup>

922. The draft *Schema for the Revision of Book VI of the Code of Canon Law* sent out to Bishops Conferences in July 2011 by the Pontifical Council for the Interpretation of Legislative Texts contains a proposal for a change to Canon 1341.<sup>819</sup>

923. The proposed change to Canon 1341 (in italics) in the *Schema* is:

“An Ordinary, *paying attention to canon 1376, must take care to initiate a judicial or administrative process to impose or declare penalties only after he has ascertained that fraternal correction or rebuke or other means of pastoral solicitude, do not suffice for justice to be restored, the offender to be reformed and repair the scandal.*”<sup>820</sup>

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<sup>816</sup> In its Concluding Observations on Australia’s Fourth and Fifth Periodic Reports on the Convention against Torture, the United Nations Committee expressed concern that the Holy See had told the Royal Commission that it was “unreasonable” for the Commission to request all documents that include “internal working documents of a sovereign State”: [http://tbinternet.ohchr.org/Treaties/CAT/Shared%20Documents/AUS/CAT\\_C\\_AUS\\_CO\\_4-5\\_18888\\_E.pdf](http://tbinternet.ohchr.org/Treaties/CAT/Shared%20Documents/AUS/CAT_C_AUS_CO_4-5_18888_E.pdf) (Accessed 4 December 2014)

<sup>817</sup> The CDF response to the request was: “The procedures of the Congregation for the Doctrine of the Faith are of a canonical nature and, as such, are not an object for the exchange of information with civil magistrates,” <http://www.globalpulemagazine.com/news/pope-francis-issues-statutes-overseeing-financial-reform/887>, (Accessed 7 March 2015)

<sup>818</sup> Nicholas Cafardi, “*The Scandal of Secrecy: Canon Law and the Sexual-abuse Crisis*”, *Commonweal*, 21 July 2010 <http://commonwealmagazine.org/scandal-secrecy> (Accessed 27 May 2013)

<sup>819</sup> Pontifical Council for Legislative Texts, *Schema Recognitionis Libri VI Codici Iuris Canonici*, Typis Vaticanis 2011, which is a draft of the *textus emendatus Libri VI De sanctionibus in Ecclesia of the Codex Iuris Canonici (CIC 1983)*.

<sup>820</sup> Gordon Read, unofficial translation, *Schema Recognitionis Libri VI CIC (Reservatum)*, Council for the Interpretation of Legislative Texts, as quoted in Brendan Daly *Issues with Penal Law and the Proposed Revision of Book VI*, p. 67

924. The reference to canon 1376 appears to be a mistake. That canon refers to punishment of those who profane sacred objects. Whatever the correct canon, the new tribunal announced by Pope Francis 4 June 2016 has jurisdiction over negligence of a bishop in the exercise his office, and in particular to cases of sexual abuse governed by *SST 2010*.<sup>821</sup> Canon 1389§1 and 2 already provides for penalties for “abuse of an ecclesiastical power or function” and for culpable negligence in their exercise.
925. The problem with this new formulation is that, other than the reference to canon 1376 (1389?), there is no apparent difference in meaning from the original Canon 1341, and it is not clear that it is going to make any difference to the problems outlined above.

### **Zero Tolerance: The TJHC Proposal for Sexual Abuse Protocols**

926. The TJHC has proposed the establishing of an authority to oversee how the Church deals with sexual abuse issues in the future. It has proposed:
- “Pope Francis has made it plain that the Church must adopt zero tolerance culture. Bishops and religious leaders must get with this program”
927. Pope Francis has called for zero tolerance, but he has never explained what that means. The term “zero tolerance” was first used in political discourse in the United States in 1972, and referred to the strict enforcement of the law, and is often associated with mandatory sentencing and “one strike and you are out” policing policies. It has its critics because it does not take into account the seriousness of the offence and the circumstances of the offender.<sup>822</sup>
928. Despite those criticisms, there is general community acceptance in Australia at least that certain types of offences will attract a jail term or the deregistering from a profession. In New South Wales, for example, there has been zero tolerance for solicitors’ stealing from trust accounts – as distinct from mismanagement of it. The offender is struck off the rolls, and never allowed back on. But that does not seem to be what Pope Francis understands by zero tolerance because two thirds of all priests against whom credible accusations of child

<sup>821</sup> [http://w2.vatican.va/content/francesco/it/motu\\_proprio/documents/papa-francesco-motu-proprio\\_20160604\\_come-una-madre-amorevole.html](http://w2.vatican.va/content/francesco/it/motu_proprio/documents/papa-francesco-motu-proprio_20160604_come-una-madre-amorevole.html) (Accessed 5 June 2016)

<sup>822</sup> Online Etymology Dictionary. <http://www.etymonline.com/index.php?term=zero> (Accessed 20 June 2016) One strike and you are out”. Robert Blair Kaiser: *Whistle: Tom Doyle’s Steadfast Witness for Victims of Clerical Sexual Abuse*, Caritas Communications (2015), loc. 1911. Mandatory sentencing, for example, resulted in an increase of incarceration of indigenous women by 223% in its first year of operation: Australian Women Lawyer’s Association (1999), *Submission to Senate Legal and Constitutional Legislation Committee inquiry into mandatory detention laws*, pp. 26–36

sexual abuse have not been dismissed, and at most restrictions of various types have been placed on their public ministry.

929. The Church's highest form of punishment for a cleric or religious under canon law is dismissal or enforced laicisation. The effect of child sexual abuse on the victims can be disastrous, and yet, in the two thirds of cases determined by the CDF since 2004, this punishment has not been imposed, and the perpetrators have continued to be supported by the Church while all legal means have been used to deny the victims proper compensation.
930. There should be a true zero tolerance of child sexual abuse for both clerics and religious in the same way as solicitors are treated for stealing from trust accounts.
931. The TJHC proposal further provides:

"Establish an entity with broad organisational authority over all dioceses and religious orders when dealing with sexual abuse issues";

and also:

"An independent national corporate Church backed entity to develop and administer national child protection standards. It would monitor adherence to these standards and publicly report on compliance".<sup>823</sup>

932. These proposals suffer from the same problems that plagued *Towards Healing*. They would be nothing more than pieces of paper which has no standing in civil law and no standing in canon law unless they received the *recognitio* of the Vatican under Canon 455. To paraphrase Professor Patrick Parkinson, it would be just another graft onto "existing processes ...without having any formal standing in the rules of the Church."<sup>824</sup>

## Confession

933. The seal of confession is said to be "inviolable".<sup>825</sup> A priest who directly violates the sacramental seal is automatically excommunicated from the Church.<sup>826</sup>

<sup>823</sup> <http://www.tjhcouncil.org.au/media/89075/141117-Four-point-plan-for-reform.pdf> (Accessed 20 May 2015)

<sup>824</sup> Patrick Parkinson: *Child Sex Abuse and the Churches, Understanding the Issues* (2003) Aquila Press.

<sup>825</sup> Catholic Catechism par. 1467: "...the Church declares that every priest who hears confessions is bound under very severe penalties to keep absolute secrecy regarding the sins that his penitents have confessed to him....This secret, which admits of no exceptions, is called the "sacramental seal," because what the penitent has made known to the priest remains "sealed" by the sacrament."

<sup>826</sup> See also Canon 1388 *1983 Code of Canon Law*.

934. One might have thought that priests who sexually abuse children are unlikely to be going to confession to confess their sins. This is the view of Bishop Geoffrey Robinson.<sup>827</sup> However, the evidence before this Commission indicates that some did. Paul David Ryan told the Commission that it was easier for him to go on offending against adolescent boys because he could go to confession. He further said that if his confessor was required to report such matters to the police, his problem would have been “corrected”.<sup>828</sup>
935. Fr Michael McArdle filed an affidavit at his sentencing hearing in Rockhampton in 2004, stating that he had confessed to child sexual abuse some 1500 times and it was “like a magic wand had been waved over me”.<sup>829</sup>
936. On the other hand, Gerald Ridsdale fits Bishop Robinson’s stereotype. He never confessed his sins of sexually abusing children.<sup>830</sup>
937. Australian law provides for a form of privilege for sacramental confession.<sup>831</sup> Any proposal for change would provide an excuse for some sections of the Church to claim persecution without there being a corresponding social advantage.<sup>832</sup> Fr Adrian McInerney’s evidence at the Royal Commission indicates that this attitude is not uniform. He was prepared to report a crime confessed to him.<sup>833</sup>
938. The recent Victorian legislation to provide for mandatory reporting of all kinds of child sexual abuse, including historical abuse, recognises that privilege for some communications is appropriate. The legislation does not affect the lawyer/client privilege, and it specifically

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<sup>827</sup> Geoffrey Robinson: *Eureka Street* 22 November 2013;

<http://www.eurekastreet.com.au/article.aspx?aeid=34262#.VWCcaY0w-AI> (Accessed 24 May 2015)

<sup>828</sup> Private Hearing of Paul David Ryan, p. 927-929, Exh TRAN.5002.001.0002\_E\_R

<sup>829</sup> [http://www.bishop-accountability.org/news2004\\_01\\_06/2004\\_01\\_12\\_DailyTelegraph\\_ChurchRefuses.htm](http://www.bishop-accountability.org/news2004_01_06/2004_01_12_DailyTelegraph_ChurchRefuses.htm) (Accessed 24 May 2015)

<sup>830</sup> Royal Commission, Case Study No. 28 (Ballarat) p.8617

<sup>831</sup> For example, S.127 Evidence Act (Commonwealth).

<sup>832</sup> Cardinal Obando y Bravo described the civil actions against paedophile priests and their bishops and dioceses in the United States as a “persecution” and a “bloodless martyrdom”: *Potiphar’s Wife*, p. 49. Cardinal Francis George of Chicago described the effect of secularism in modern society (e.g. same sex marriage) thus: “I expect to die in bed, my successor will die in prison and his successor will die a martyr in the public square. His successor will pick up the shards of a ruined society and slowly help rebuild civilization, as the church has done so often in human history.” Id, p.51. Cardinals Castrillón and Rodriguez Maradiaga both said that bishops should be prepared to go to jail rather than report a paedophile priest to the police – and they were not talking about confession, Id, p.178, 230, 236. Martyrdom, i.e., dying for the faith is an ideal that is taught in seminaries, Id, p.176. Cardinal Pell has often spoken in praise of Catholic martyrs:

<http://thomasquinas.edu/news/cardinal-pell-life-characterized-wisdom-learning-courage-and-holiness> (Accessed 24 May 2015), <http://www.hprweb.com/2009/04/truth-in-the-pulpit/> (Accessed 24 May 2015).

<sup>833</sup> Royal Commission, Adrian McInerney: Transcript 26 May 2015, p.8531



- respects communications in therapeutic relationships and in religious confession.<sup>834</sup> The rationale behind the seal of confession is exactly the same as with lawyer/client and therapeutic privilege: unless it is recognised by law, clients, patients and the faithful will not disclose matters relevant for the pursuit of their legal rights, mental health or salvation. Even assuming the law was changed to require reporting of crimes admitted in the confessional, there is also the practical problem of a priest “forum shopping” amongst confessors, and going to confession on the “dark box” so as not to be recognized.<sup>835</sup>
939. There is also the political problem that as every State and Territory would have to change its laws, it is highly unlikely that any recommendation from the Commission would be adopted. Besides, such a solution would seem to be using a baseball bat to crack a nut when the practice of confession itself has gone into rapid decline within Catholicism.<sup>836</sup>
940. The simplest solution would be for the Church to revert to its 600 year old practice of the Penitentials of the 6<sup>th</sup> century whereby penances in confession were fixed for certain sins, and often included imprisonment. Canon law could be changed to require as a condition of absolution that the penitent hand himself over to the civil authorities, with appropriate exceptions for repressive regimes.
941. The refusal by the Church to change canon law in this way will only be seen as bad faith in the light of its past canonical history of providing severe penances that often included imprisonment, which is significantly less than that prescribed by the Church’s founder, namely that millstones be put around such priests’ necks and they be cast into the sea.<sup>837</sup>

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<sup>834</sup> S.327(3) *Crimes Act* 1958 (Victoria) defines the circumstances where there is a defence of “reasonable excuse” to concealment of an offence and provides that there is no contravention if the information would be privileged under Part 3.10 of Chapter 3 of the *Evidence Act* 2008. Part 3.10 of Chapter 3 of the Evidence Act 2008 deals with legal professional privilege as well as privilege arising from religious confessions. S.32B of Evidence (Miscellaneous Provisions) Act 1958 deals with disclosure of sexual offences to a registered medical practitioner or counsellor in a confidential situation. Counsellor is defined as one who “is treating a person for an emotional or psychological condition.”

<sup>835</sup> Bishop Geoffrey Robinson: *Eureka Street* 22 November 2013. See Fr Adrian McNerney’s evidence, Royal Commission transcript 26 May 2015, p. 8530. John Cornwall’s book, *The Dark Box* is about confession.

<sup>836</sup> Royal Commission, Adrian McNerney: Transcript 26 May 2015, p.8531, Andrew Santella *The Sin Box Why have Catholics stopped lining up at the confessional?* *Slate Magazine*:

[http://www.slate.com/articles/life/faithbased/2005/11/the\\_sin\\_box.html](http://www.slate.com/articles/life/faithbased/2005/11/the_sin_box.html) (Accessed 27 May 2015)

<sup>837</sup> Mark 9:42

## The Vatican Accountability Tribunal

942. On 10 June 2015, Pope Francis announced the creation of a new Vatican tribunal within the CDF to hear cases of bishops who fail to protect children from sexually abusive priests, after a meeting with the Council of nine cardinals appointed to reform the Roman Curia.<sup>838</sup>

943. The Vatican spokesman, Fr Lombardi, said Pope Francis would appoint a Secretary and some permanent staff for the new department, which will have a five year period to develop and evaluate the effectiveness of these new procedures.

944. On 28 September on board the papal plane returning him from the a visit to the United States, Pope Francis said,

“...one must not cover these things up. Those who covered this up are guilty. Even some bishops who covered this up.”<sup>839</sup>

945. On 4 June 2016, Pope Francis issued a motu proprio letter *Come Una Madre Amorevole* in which he abandoned the idea of a tribunal within the CDF and gave jurisdiction to the “competent Congregation of the Roman Curia”. Bishops can be prosecuted before it for “grave causes”, which include:

“...the negligence of a bishop in the exercise of his role, in the exercise of their office, in particular in relation to cases of sexual abuse of minors and vulnerable adults, provided by the motu proprio *Sacramentorum Sanctitatis Tutela* promulgated by Saint John Paul II and amended by my beloved predecessor Pope Benedict XVI.”<sup>840</sup>

946. *SST 2010* requires a bishop to conduct a preliminary investigation of any allegation of child sexual abuse by clergy that has a semblance of truth. He is to forward the results of that investigation to the CDF which will then instruct the bishop how to proceed.

947. This new tribunal can now prosecute bishops who have not followed the norms of canon law in dealing with child sexual abuse. Cardinal Barbarin of Lyon is currently being investigated by French police for covering up the sexual abuse of children by his priests in 2007 and 2009. However, he cannot be prosecuted under canon law for the cover up, because canon law at

<sup>838</sup> [http://en.radiovaticana.va/news/2015/06/10/pope\\_approves\\_abuse\\_of\\_office\\_proposals\\_for\\_bishops/1150485](http://en.radiovaticana.va/news/2015/06/10/pope_approves_abuse_of_office_proposals_for_bishops/1150485)

<sup>839</sup> [http://www.nytimes.com/2015/09/29/world/europe/pope-francis-sexual-abuse.html?\\_r=0](http://www.nytimes.com/2015/09/29/world/europe/pope-francis-sexual-abuse.html?_r=0) (Accessed 17 March 2016)

<sup>840</sup> [http://w2.vatican.va/content/francesco/it/motu\\_proprio/documents/papa-francesco-motu-proprio\\_20160604\\_come-una-madre-amorevole.html](http://w2.vatican.va/content/francesco/it/motu_proprio/documents/papa-francesco-motu-proprio_20160604_come-una-madre-amorevole.html) (Accessed 5 June 2016)

the time required him to cover it up. The direction to obey civil laws on reporting did not come from the Vatican until 2010. However, a later announcement by the Vicar General of Lyon admitted that in relation to the two matters, the Archdiocese failed “to fulfil our obligation to investigate and to seek the truth”, that is, the Cardinal had failed to instigate an inquiry as required by *Sacramentorum Sanctitatis Tutela*.<sup>841</sup> This would now be a ground for prosecuting him before the “competent Congregation”, presumably the Congregation for Bishops.

948. If the Congregation for Bishops can prosecute bishops for failing to carry out a preliminary inquiry, then it can also prosecute them for failing to observe other requirements of *Sacramentorum Sanctitatis Tutela*, including the failure to observe the pontifical secret under Art. 30.
949. If a bishop reports child sexual abuse to the police in countries where there is no obligation to report, he has breached the pontifical secret under *Sacramentorum Sanctitatis Tutela*, and can be removed from office for failing to cover up the abuse. This anomaly is another example of “bella figura”: trying to patch over past mistakes without acknowledging the real problem – the pontifical secret.

### Summary of Inadequacies of the Canonical Disciplinary System

950. At the various inquiries in Australia, the chances of dismissing a priest through a canonical trial were variously described as “very difficult” (Cardinal Pell), “close to hopeless” (Bishop Malone) “very, very difficult” (Archbishop Hart) “extraordinarily difficult” (Archbishop Coleridge) and the whole procedure was “unworkable” (Fr Brian Lucas).<sup>842</sup>

<sup>841</sup> <http://ncronline.org/blogs/examining-crisis/church-laws-may-justify-calls-french-cardinals-resignation> (Accessed 5 June 2016) .

<sup>842</sup> Cardinal Pell: Victorian Parliamentary Inquiry [http://www.parliament.vic.gov.au/images/stories/committees/fcdc/inquiries/57th/Child\\_Abuse\\_Inquiry/Transcripts/Catholic\\_Archdiocese\\_of\\_Sydney\\_27-May-13.pdf](http://www.parliament.vic.gov.au/images/stories/committees/fcdc/inquiries/57th/Child_Abuse_Inquiry/Transcripts/Catholic_Archdiocese_of_Sydney_27-May-13.pdf) page 21.8 (Accessed 3 July 2013), Bishop Malone at the Cunneen Special Commission, [http://www.lawlink.nsw.gov.au/lawlink/Special\\_Projects/ll\\_splprojects.nsf/vwFiles/Transcript\\_Day\\_8\\_-\\_TOR\\_2\\_-\\_11\\_July\\_2013.pdf/\\$file/Transcript\\_Day\\_8\\_-\\_TOR\\_2\\_-\\_11\\_July\\_2013.pdf](http://www.lawlink.nsw.gov.au/lawlink/Special_Projects/ll_splprojects.nsf/vwFiles/Transcript_Day_8_-_TOR_2_-_11_July_2013.pdf/$file/Transcript_Day_8_-_TOR_2_-_11_July_2013.pdf) , 873.43ff (Accessed 14 July 2013); Archbishop Hart, Victorian Parliamentary Inquiry [http://www.parliament.vic.gov.au/images/stories/committees/fcdc/inquiries/57th/Child\\_Abuse\\_Inquiry/Transcripts/Catholic\\_Archdiocese\\_of\\_Melbourne\\_20-May-13.pdf](http://www.parliament.vic.gov.au/images/stories/committees/fcdc/inquiries/57th/Child_Abuse_Inquiry/Transcripts/Catholic_Archdiocese_of_Melbourne_20-May-13.pdf) p. 9 (Accessed 18 June 2013); Archbishop Coleridge, the Royal Commission: [http://www.childabuseroyalcommission.gov.au/wp-content/uploads/2013/08/Transcript-RC\\_IRCSA\\_Day-026\\_11-Dec-2013\\_Public.pdf.p.2733](http://www.childabuseroyalcommission.gov.au/wp-content/uploads/2013/08/Transcript-RC_IRCSA_Day-026_11-Dec-2013_Public.pdf.p.2733) (Accessed 12 December 2013) Fr Lucas, Cunneen Special Commission [http://www.lawlink.nsw.gov.au/lawlink/Special\\_Projects/ll\\_splprojects.nsf/vwFiles/Transcript\\_Day\\_15\\_-\\_TOR\\_2\\_-\\_24\\_July\\_2013.pdf/\\$file/Transcript\\_Day\\_15\\_-\\_TOR\\_2\\_-\\_24\\_July\\_2013.pdf](http://www.lawlink.nsw.gov.au/lawlink/Special_Projects/ll_splprojects.nsf/vwFiles/Transcript_Day_15_-_TOR_2_-_24_July_2013.pdf/$file/Transcript_Day_15_-_TOR_2_-_24_July_2013.pdf) , 1570 (Accessed 18 August 2013).

951. In the United States, canon lawyers did not think that the process was likely to end in dismissal, or if it did, an appeal to Rome would be successful.<sup>843</sup>
952. One of the senior canon lawyers for the Dublin Archdiocese, Monsignor Sheehy considered that the penal aspects of canon law to dismiss a priest should rarely be invoked. This was understandable because canon law made it the absolute last resort.<sup>844</sup> The Irish Ferns Report (2005) noted that the Bishop of Ferns, Brendan Comiskey, found that canon law was of no benefit at all, and in one case in 1995, when he tried to implement a canon law procedure with the aid of the Framework document, he failed.<sup>845</sup> Cardinal Connell had a similar experience in Dublin.
953. The 1992 Canadian ad hoc committee to the Canadian Catholic Bishops Conference, in their report, *From Pain to Hope*, noted that canonical proceedings against clergy sex abusers were rare.<sup>846</sup>
954. The “reforms” initiated by the then Cardinal Ratzinger in 2001 were widely lauded by the Church press which painted him as the great reformer who was really doing more than anyone else about the sex abuse problem. In comparison with everyone else in the Roman Curia he was.<sup>847</sup> But an analysis of *SST 2001* and *SST 2010* reveals that little more was achieved than restoring the simplified method of administrative dismissal abolished by Pope John Paul II in 1980, and allowing priests to be placed on administrative leave prior to the preliminary hearing.<sup>848</sup> *SST 2001* and *SST 2010* created the possibility of some degree of uniformity by requiring all complaints to be sent to the Congregation to the Doctrine of the

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<sup>843</sup> Cafardi: *Before Dallas*, 37ff

<sup>844</sup> Murphy Dublin Report Part 1 <http://www.justice.ie/en/JELR/DACOI%20Part%201.pdf/Files/DACOI%20Part%201.pdf> par 1.26 (Accessed 25 April 2013)

<sup>845</sup> F D Murphy, H Buckley, and L Joyce, *The Ferns Report*, Department of Health and Children, Ireland, 2005, 41

<sup>846</sup> [http://www.cccb.ca/site/Files/From\\_Pain\\_To\\_Hope.pdf](http://www.cccb.ca/site/Files/From_Pain_To_Hope.pdf) par 14 (Accessed 19 May 2013)

<sup>847</sup> <http://northlandcatholic.blogspot.com.au/2010/07/did-pope-benedict-xvi-drop-ball-on.html> (Accessed 21 October 2013) <http://www.cbc.ca/news/world/former-pope-benedict-defends-sex-abuse-record-1.1866637> (Accessed 21 October 2013)

<sup>848</sup> According to Monsignor Scicluna in 2013, 60% of all cases are dealt with by the administrative procedure. It is not entirely clear what he meant by the “administrative procedure”. It could mean the practice of asking the CDF to dismiss a priest on the basis of the evidence obtained through a preliminary conference, for example, where the priest has been convicted in a civil court of sexual assault on children. But he could also be referring to the simplified procedure provided for in the Code of Canon Law: <http://ncronline.org/news/accountability/canon-lawyers-hear-church-prosecutor-sex-abuse-cases> (Accessed 27 October 2013) The former procedure was not in the original *Sacramentorum Sanctitatis Tutela*, but it was amended in 2003 to include this procedure: Facing the Truth, p 33: [http://www.parliament.vic.gov.au/images/stories/committees/fcdc/inquiries/57th/Child\\_Abuse\\_Inquiry/Submissions/Catholic\\_Church\\_in\\_Victoria.pdf](http://www.parliament.vic.gov.au/images/stories/committees/fcdc/inquiries/57th/Child_Abuse_Inquiry/Submissions/Catholic_Church_in_Victoria.pdf) (Accessed 6 April 2013)

Faith, but this was often the practice anyway under *Crimen Sollicitationis* and the 1983 Code of Canon Law.<sup>849</sup>

955. The central problems of the Church's disciplinary system are:

- 955.1. The confusing ways in which canon law can be promulgated.
- 955.2. Changing canon law without making corresponding changes to the Code.
- 955.3. The ten year embargo on the publication of reports of cases through the Roman canonical appeal courts.<sup>850</sup>
- 955.4. The limitation period for child sexual abuse cases.
- 955.5. The imputability defence: a priest cannot be dismissed for paedophilia because he is a paedophile.
- 955.6. The "pastoral approach", contained in Canon 1341 has not been changed.<sup>851</sup>
- 955.7. The standard of proof for dismissal of a priest under Canon 1608 is "moral certitude", a standard that appears to be the equivalent of the criminal standard of proof under Australian, English and United States law.<sup>852</sup> That has not changed

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<sup>849</sup> *Crimen Sollicitationis* required the bishop to notify the Vatican about the allegations, and any appeals went to the Congregation for the Doctrine of the Faith. The Lawrence Murphy case illustrates how Archbishop Weakland in 1998 (prior to *Sacramentorum Sanctitatis Tutela*) wrote to the Congregation seeking directions – even approval – for starting a judicial trial against Murphy.

<sup>850</sup> O'Reilly and Chalmers identify the lack of jurisprudence arising from reported cases as being one of the current weaknesses in the canonical system: O'Reilly and Chambers: *The Sexual Abuse Crisis and the Legal Responses* p.392

<sup>851</sup> Monsignor Charles Scicluna in 2006 stated that this Canon applies and has not been affected by *Sacramentorum Sanctitatis Tutela*: [http://www.vatican.va/resources/resources\\_mons-sciicluna-graviora-delicta\\_en.html](http://www.vatican.va/resources/resources_mons-sciicluna-graviora-delicta_en.html) O'Reilly and Chambers: *The Sexual Abuse Crisis and the Legal Responses*, p. 271 acknowledge that Canon 1341 continues to be a problem.

<sup>852</sup> Beale and others in the *New Commentary on the Code of Canon Law* p. 1716 state: 'moral certitude is distinguished from absolute certitude on the one hand, and probability on the other. Pope Pius XII gave the classic description of moral certitude in an address to the Roman Rota on January 10, 1942. To reach moral certitude, judges must be able to exclude the probability of error, but are not held to the impossible and paralysing standard of excluding all possibility or error.' Delaney, *Canonical Implications*, at p.186, quotes Pope Pius XII saying that moral certainty involves on the 'positive side by the exclusion of well-founded or reasonable doubt, [and] on the negative side it does admit the absolute possibility of the contrary.' This would appear to be the criminal standard of proof under English law. In fairness, it should be said that where allegations of a serious nature are made in disciplinary proceedings under civil law, a higher standard is required than mere balance of probabilities: Professor Patrick Parkinson: "*The Smith Lecture 2013: Child Sexual Abuse and the Churches – a Story of Moral Failure?*" <http://smithlecture.org/sites/smithlecture.org/files/downloads/lecture/smith-2013-transcript.pdf> p. 11 (Accessed 25 October 2013). The Royal Commission, referring to *Briginshaw v Briginshaw* (1938) 60 CLR 336, said this: 'The more serious the allegation, the higher degree of probability that is required before the Royal Commission can be reasonably satisfied as to the truth of that allegation.' <http://childabuseroyalcommission.gov.au/getattachment/e1f91ddb-2ba2-4eb4-b487-c43a0c8989e4/Report-of-Case-Study-no-14> p.2 (Accessed 19 December 2014). The relevant text of *Briginshaw* is: "It is enough that the affirmative of an allegation is made out to the reasonable satisfaction of the tribunal. But reasonable satisfaction is not a state of mind that is attained or established independently of the nature and consequence of the fact or facts to be proved. The seriousness of an allegation made, the inherent likelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal...the nature of the issue necessarily affects the process by which reasonable satisfaction is attained." In the Nestor case in Wollongong, the Congregation of the Clergy set aside a decree of Bishop Wilson on the grounds that that the standards of 'balance of probabilities' and 'unacceptable risk' as applied by the

under the reforms. Further, where a matter is referred to the pope for an ex officio dismissal under the norms of *SST 2010*, the guilt of the cleric has to be “beyond doubt and well documented”.<sup>853</sup> This is an even higher standard than that required for criminal cases in civil law.

955.8. The lack of separation of powers within the Church system so that the bishop is both prosecutor, judge, pastor to both victims of sexual abuse and the clerical perpetrators, while having a special father/son relationship with the perpetrator.<sup>854</sup>

955.9. O’Reilly and Chalmers identify other weaknesses in the system, but they related more to the operation of a code based system within the American common law system and the fact that the clergy, the laity and the general public do not understand it. It is seen as Byzantine, inefficient and patently unjust.<sup>855</sup> On top of that is the insufficiency of adequately trained people to make the system work, particularly in the United States where the number of cases has ballooned.<sup>856</sup>

#### **Resolution of Church Disciplinary Problems**

956. The terms of reference of the Royal Commission require it to make recommendations on “systemic issues”. The matters outlined above are systemic issues that are peculiar to the Catholic Church.

957. Given the experience with the Murphy Commission in Ireland, and of the United Nations Committees, it is unlikely that the Holy See will take any notice of any recommendation from the Royal Commission, but as with the Murphy Commission in Ireland, it is appropriate that

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*Towards Healing* process were “foreign to canon law”. Ibid p.27. On 20 July 2006, the Apostolic Signatura in the *Nestor Case* confirmed that “moral certainty” applied to the penal provisions for dismissing a priest, but that in the case of removal of faculties, the Bishop was entitled to make this decision on the basis of a ‘positive and probable doubt’: Ibid p.33. On 6 December 2013, a canonical tribunal of the Archdiocese of Sydney, conducted an administrative penal process in the case of Fr Guy Hartcher who had been acquitted by a civil court because the magistrate could not be satisfied beyond reasonable doubt. The Tribunal reviewed the evidence and came to the same conclusion, stating, “To come to moral certainty on a matter, those making the decision must reach a decision which excludes well-founded or reasonable doubt. In this case, those judging the matter cannot arrive at such a position.” It is clear from this that the criminal standard of proof in civil law still applies for dismissing a priest, but a lesser standard for removal of faculties. Dr Brendan Daly in *Issues with Penal Law and the Proposed Revision of Book VI*, Proceedings Canon Law Society of Australia and New Zealand, 46th Annual Conference Auckland 2012, 55 at 60: “Moral certainty is much more than probability, and really means that one is confident that in the future no evidence could be produced to contradict the judgment or decision that is made.”

<sup>853</sup> Monsignor Scicluna: *The Procedure and Praxis of the Congregation for the Doctrine of the Faith regarding Graviora Delicta* [http://www.vatican.va/resources/resources\\_mons-sciicluna-graviora-delicta\\_en.html](http://www.vatican.va/resources/resources_mons-sciicluna-graviora-delicta_en.html)

<sup>854</sup> O’Reilly and Chambers: *The Sexual Abuse Crisis and the Legal Responses* p.385

<sup>855</sup> O’Reilly and Chambers: *The Sexual Abuse Crisis and the Legal Responses* p.381

<sup>856</sup> Id, 385.

defects in the disciplinary system be pointed out because the sexual abuse of children is not just a canonical crime, but a civil law crime as well.

958. The Commission can make recommendations as to changes to civil laws to ensure that the Church's disciplinary processes comply with acceptable modern standards. One way of achieving that is through a process akin to the operation of Part 3A of the *Ombudsman Act 1974* in New South Wales.<sup>857</sup> 25E provides for monitoring by the Ombudsman of the investigation of "reportable allegations", and that an officer of the Ombudsman's office may be present as an observer during interviews and may confer with those investigating the conduct and progress of the investigation. The person conducting the investigation is obliged to provide the Ombudsman with all documents requested.
959. The New South Wales *Ombudsman Act 1974* in Part 3A requires reporting of all sexual abuse by an "employee" which is defined to include both employees and volunteers who "provide services to children". It is difficult to know whether or not this includes "pastoral work", such as visiting families. Some of the worst cases of clergy sex abuse of children have occurred during this activity.<sup>858</sup> In view of the claims made by the Church from time to time that priests are not "employees", any uniform legislation should make it clear that provisions similar to the *Ombudsman Act 1974* relate to clergy.
960. While the Ombudsman scheme generally looks good on paper, the opinions of those who have been involved in its operation or have been in a position to observe its operation should be sought.
961. The Truth Justice and Healing Council supports a scheme akin to that under the NSW *Ombudsman Act 1974* to be applied Australia wide.<sup>859</sup> So long as the pontifical secret still applies to child sexual abuse and the Church's own investigative procedures under canon law, there is a potential clash with civil law. This is unacceptable.

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<sup>857</sup> [http://www.austlii.edu.au/au/legis/nsw/consol\\_act/oa1974114/s25e.html](http://www.austlii.edu.au/au/legis/nsw/consol_act/oa1974114/s25e.html) (Accessed 30 March 2015). The legislation does not explicitly say that Part 3A applies to historical abuse, but the Ombudsman's office has interpreted the Act to apply equally to historical abuse: <https://www.childabuseroyalcommission.gov.au/getattachment/c9cb8ab0-2f81-4936-b0d1-10442feff353/62-NSW-Ombudsman> (Accessed 30 March 2015).

<sup>858</sup> A particularly disturbing account is given by Patricia Feenan in her book *Holy Hell*, about the sexual abuse of her son Daniel by Fr James Fletcher who died in jail. [http://books.google.com.au/books?id=pn09PgggTAoC&printsec=frontcover&dq=Holy+Hell+Patricia+Feenan&hl=en&sa=X&ei=sRWXUcqvJsSriAeQ44GADQ&redir\\_esc=y](http://books.google.com.au/books?id=pn09PgggTAoC&printsec=frontcover&dq=Holy+Hell+Patricia+Feenan&hl=en&sa=X&ei=sRWXUcqvJsSriAeQ44GADQ&redir_esc=y) (Accessed 15 July 2013)

<sup>859</sup> <http://www.tjhcouncil.org.au/media/67829/-As-submitted-to-RC-131115-Submission-Issues-Paper-No-4-Out-of-Home-Care-Royal-Commission.pdf> p. 44 (Accessed 31 March 2015)

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**14: THE CHURCH'S ATTEMPTS TO DEFLECT CRITICISM OF CANON LAW**

962. As mentioned above, Pope Benedict XVI in his Pastoral Letter to the People of Ireland ignored the criticisms of canon law by the Murphy Commission in Ireland, and instead blamed the bishops for not following the long established norms of canon law. It is worthwhile recapping the history before and after this event because it establishes a concerted effort by the Vatican, some church spokesmen, bishops and canon lawyers to deflect criticism away from canon law, and therefore the Vatican.
963. In January 1997, Cardinal Castrillon of the Congregation for Clergy wrote to the Irish bishops advising them that their proposals for mandatory reporting of all allegations of child sexual abuse by clerics conflicted with canon law. *SST 2001* introduced some new procedures for dealing with sexual abuse cases, and confirmed the application of the pontifical secret.
964. During 2002, the American bishops drafted proposals for the Dallas Conference in June 2002, which provided for mandatory reporting of all allegations to the police. Between February 2002 and October 2002, five members of Roman Curia (Bertone, Herranz, Ghirlanda, Castrillon and Re) attacked these proposals as being contrary to canon law or in some other ways were immoral. The leaders of the Catholic Bishops Conferences of France, Germany, Belgium and Honduras also strongly disagreed with these proposals to change canon law. After the American delegation met with the CDF, a compromise was reached and limited dispensation to report was agreed to, which formed the basis of the December 2002 *recognitio* for the United States.
965. In 2006, the BBC Panorama program produced its documentary, *Sex Crimes and the Vatican*, accusing Pope Benedict XVI and his predecessors of being responsible for the cover up through secrecy imposed by canon law. In 2008, the BBC rejected the formal complaint of the Catholic Bishops Conference of England and Wales, stating that the program had accurately reflected what was in the documents.



966. In November 2009, the Murphy Commission handed down its findings, and there were accusations in the press about the Vatican ordering the cover up through canon law. None of the Curia Cardinals and Archbishops who were adamant in 2002 about the prohibitions on reporting in canon law resiled from their earlier statements. In his Pastoral Letter, Pope Benedict XVI wrote the script for a new cover up: blame the bishops for the cover up, and deflect any criticism of canon law and in particular its secrecy provisions.
967. On 12 April 2010, the Vatican published *A Guide to Understanding Basic CDF Procedures concerning Sexual Abuse Allegations*, which stated that the CDF gives directions to bishops to obey civil laws on reporting.
968. On 21 May 2010, Pope Benedict revised the procedures of *SST 2001*, and in Art 30 *SST 2010* confirmed that cases of this nature are subject to the pontifical secret, with no exceptions for reporting to the police – the suggestion being that the CDF direction to report had always existed.
969. Fr Lombardi, Monsignor Scicluna and the Vatican itself in its 2011 response to the Irish Foreign Minister made statements that were loaded with mental reservation: bishops had never been prohibited from reporting to the civil authorities. The cover up was therefore the fault of individual bishops.
970. This practice of blaming the bishops for the cover up, and failing to mention the defects in canon law was followed by the Victorian Church in its submission, *Facing the Truth* to the Victorian Parliamentary Inquiry, and in the submissions of the TJHC to this Royal Commission.<sup>860</sup> There is no mention of the pontifical secret, and not even an attempt at an explanation of how it will operate even in the limited circumstances now conceded by Professor Ian Waters in relation to “tribunal” proceedings.
971. Pope Francis himself, as Cardinal Bergoglio, made the same kind of accusation of it being “the bishops’ fault” in 2012. In a conversation with Rabbi Shorka in Buenos Aires, he said that a bishop once called him for advice about what to do about a priest who had sexually abused children.

“I told him to take away the priest’s licences, not to allow him to exercise the priesthood anymore, and to begin a canonical trial in the diocese’s court...I do not believe in taking the positions that uphold a

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<sup>860</sup> See the author’s *Potiphar’s Wife, the Vatican’s Secret and Child Sexual Abuse* (ATF Press 2014), chapters 23 & 24.

certain corporative spirit in order to avoid damage the image of the institution. That solution was proposed once in the United State: they proposed switching the priests to a different parish. It is a stupid idea; that way, the priest just takes the problem with him wherever he goes.”<sup>861</sup>

972. This idea that shifting a priest around was some kind of invention emanating from the United States is untrue. It happened everywhere, including Australia, and it was a practice that arose out of the secrecy imposed by canon law and the canonical obligation to try to cure the priest. It is also significant that Cardinal Bergoglio makes no mention of reporting the priest to the civil authorities in his conversation with Rabbi Shorka.

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## 15. RECOMMENDATIONS

### Recommendations to State and Territory Governments

973. Uniform legislation should be enacted throughout Australia to make it a criminal offence to fail to disclose information about the sexual abuse of children and vulnerable persons (including historical abuse) and the possession of child pornography. The TJHC supports such legislation.<sup>862</sup>
974. Uniform legislation should be enacted throughout Australia to provide for a supervisory role of the Ombudsman in the investigation of sexual abuse of children and vulnerable persons (including historical abuse) and the possession of child pornography by institutions, along the lines of New South Wales *Ombudsman Act 1974* in Part 3A, and subject to suggested amendments and further investigations discussed above.

### Recommendations to the Catholic Church in Australia

975. The Church in Australia should cooperate with the Royal Commission to draw up a new protocol to replace *Towards Healing 2010*.

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<sup>861</sup> Abraham Skorka & Jorge Bergoglio *Sobre el cielo y la tierra* (Editorial Sudamerica, Buenos Aires 2012), Kindle version, loc. 599

<sup>862</sup> TJHC Submission 27 August 2015, on Issues Paper No 8 on Police and Prosecution Responses. The Council’s submission on page 10, par 7.

976. While many of the provisions of *Towards Healing 2010* can be continued (for example, Parts 1 and 2), there should be a new Part 3 dealing with complaints, which should provide for the following in principle:
- 976.1. All complaints of sexual abuse of children or vulnerable adults, and the possession of child pornography against anyone associated with Church activities should be immediately referred to the police.
  - 976.2. Assuming the Commission agrees with the practice of “blind reporting”, if the complainant does not wish the matter to be referred to the police, he or she should be referred to independent lawyers or counsellors for advice. Those lawyers and counsellors should not act for, nor have matters referred to them by the Church, other than for the purpose of obtaining this advice.
  - 976.3. In the event that the complainant, after receiving such advice, persists with the request that the matter not be reported to the police, the Church authorities should still report the allegation against the accused while preserving the anonymity of the complainant along the lines of Cl.37.4 of *Towards Healing 2010*.
  - 976.4. Those accused of sexual abuse or the possession of child pornography should be placed on administrative leave, without access to children, pending the outcome of any criminal or disciplinary proceedings against them.
  - 976.5. Where the matter is reported to the police, or the police have commenced investigations of their own accord, disciplinary proceedings against the accused should be postponed until the completion of any criminal process, or the police have indicated that they intend taking no action against the accused.
  - 976.6. During the process of investigation by the police, Church authorities are not to interview witnesses or interfere in any way with the police investigation.
  - 976.7. Issues of counselling, assistance and compensation should be determined in accordance with the redress scheme approved by the Royal Commission.
  - 976.8. In the event of disciplinary proceedings being commenced against the accused under canon law, all documents forwarded to the Holy See in accordance canon law shall also be forwarded to the Ombudsman under the appropriate State legislation.
977. An alternative to the scheme described above, (that is, the Church proceeds with its canonical investigation under Canon 1717, subject to the supervision of the Ombudsman), the Commission might consider that a State body, such as the New South Wales Civil and Administrative Tribunal (NCAT) should have jurisdiction to hear disciplinary complaints

against clergy and religious where the conduct complained of might amount to professional misconduct or unprofessional conduct when dealing with children.

978. While any decision of the Tribunal might be ignored by the Holy See in determining whether or not an accused should retain their status within the Church as a priest or religious, conditions enforceable under the civil law could be imposed on such a person, such as where they live, wearing clerical garb or using titles and their access to children.

### **Recommendations to the Holy See**

979. The Holy See should change canon law in line with the demands of the United Nations Committees on the Rights of the Child and against Torture to abolish the pontifical secret on all matters involving child sexual abuse, the abuse of intellectually disabled adults and the possession of child pornography, or at least provide that the secret does not restrict reporting such crimes to the civil authorities at any time, including during and subsequent to a canonical trial.<sup>863</sup>
980. The Holy See should impose mandatory reporting under canon law for all matters involving child sexual abuse, the abuse of intellectually disabled adults and the possession of child pornography. Whether a provision allowing “blind reporting” should be included is a matter to be decided by the Commission. But if it is decided that blind reporting should be allowed, any advice on that issue should not be given by Church personnel.
981. The Holy See should adopt, in accordance with its previous traditions, the policy of a true zero tolerance for child sexual abuse, so that priests and religious found guilty of child sexual abuse should be dismissed from the priesthood or religious life.
982. The Holy See should amend Canon 1341 to exclude the “pastoral approach” in cases of child sexual abuse by clergy and religious, and to provide that justice can only be done by dismissal.

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<sup>863</sup> The Holy See’s refusal to budge on the issue of pontifical secrecy where there are no civil laws requiring reporting is indeed mysterious and seems to run counter to everything the Church preaches. The respected canon lawyer and committed Catholic, Nicholas Cafardi in *Before Dallas* at p154 wrote: “The idea that secrecy should be a value, let alone a foundational one, in Christ’s Church, its legal system or its system of governance should be abhorrent. Secrecy is the enemy of openness and truth.”

983. The Holy See should amend Canon 1321 and Canon 696, replacing “imputabiliy” with “insanity”, as understood in the Anglo/American legal system, for child sexual abuse.
984. The Holy See should amend the Code to provide for a test based on the balance of probabilities in accordance with modern civil law standards for the dismissal or other disciplinary action against priests.
985. The *Code of Canon Law* should be changed in accordance with Continental European practice so that amending legislation that changes the Code should be reflected in the Code itself.
986. The Holy See should adopt a “firm, simple and unmistakeable procedure for the promulgation of a law” to avoid the confusion that arose in the Murphy Commission as to what canon law actually says on a particular subject.<sup>864</sup>
987. In cases where there might be a change of interpretation arising from decisions of the Roman Congregations or the canonical appeal courts, those decisions should be published immediately and made available to everyone online with appropriate pseudonyms and redactions.
988. The Roman Congregations and canonical appeal courts should always provide reasons for their decisions in disciplinary matters.<sup>865</sup>
989. The Holy See should make available to the civil authorities the evidence and reasons for decisions of the Roman Congregations and canonical appeal courts of all cases involving Australian priests so that an independent assessment can be made as to the fitness of those priests to remain as priests.
990. The Holy See should grant a *recognitio* of a revised protocol approved by the Royal Commission.

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<sup>864</sup> The Murphy Commission, Dublin Report

<http://www.justice.ie/en/JELR/DACOI%20Part%201.pdf/Files/DACOI%20Part%201.pdf> (Accessed 25 April 2013) par 4.87 - 4.89

<sup>865</sup> Canon law does provide that the judgment in a canonical trial must contain reasons: O’Reilly and Chambers: *The Sexual Abuse Crisis and the Legal Responses* p.373. However, the pontifical secret prevents disclosure to others.

991. The Holy See should provide in its canon law as a condition for absolution in the sacrament of Confession that the priest agree to hand himself over to the civil authorities to be dealt with in accordance with the civil law.

**Kieran Tapsell**

27 June 2016

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## APPENDIX 1. CHRONOLOGY OF CHURCH RESPONSE

TO

## CLERGY SEXUAL ABUSE OF CHILDREN

DATE CE	EVENT	DESCRIPTION
18-17BC	The <i>Lex Iulia de vi publica</i> of Caesar Augustus	Imposed capital punishment on those who ravished a “boy or a woman or anyone through force”. Successful seduction of free minors was also punishable by death, and an attempt to do so was punishable by exile.
153	The <i>Didache</i>	Prohibition on adult men having sex with boys.
306	The Council of Elvira	First Church law against the sexual abuse of boys.
312	Emperor Constantine	Christianity becomes the official religion of the Roman Empire and thereafter the Roman Emperor legislated for the Church. Church Councils continued to legislate for their communities on an ad hoc basis. Decreed ‘privilege of clergy’, that is the right of clergy to be tried exclusively in Church courts. Privilege of clergy did not protect clergy from harsh punishments because bishops were civil judges. Church adopts the military practice of ‘ <i>degradatio</i> ’ or dishonourable discharge to strip clergy of status as priests.
314	The Council of Ancyra	Inflicted lengthy penances and excommunication for homosexuality
330-379	St. Basil of Caesarea	Monastic rule of the Eastern Church. A cleric or monk who sexually molests youths or boys is to be publically whipped, his head shaved, he be spat upon, and kept in prison for six months in chains on a diet of bread and water, and after release is to be subject to supervision and kept out of contact with

		young people.
341 and 390	Constantine's sons, Constantine II and Constantius II	Decreed anti-sodomy laws.
390CE	Theodosius the Great	Introduces further anti-sodomy laws
410CE	German "barbarians" sack Rome	Start of the decline of the western Roman Empire and the replacement of Roman law with German codes. Disappearance of the "crime against nature", in the West except in Visigoth Spain where the Christian influence was still visible.
500 onwards	Eastern Church scholars	Started to create collections of canons, such as the writings of St. Basil and others, and in the process, they also "canonized" the secular law, that is, they adopted the secular law as laid down by the Emperor as being part of its own canon law. They regarded the Emperor's power as coming from God. Later followed in the West, but with the schism of 1054 between the Eastern and Western Churches, the West started to develop its own separate canon law.
533	Emperor Justinian's Digest of Roman Law	Continues Augustus's <i>Lex Iulia de vi publica</i> , and imposed the death penalty for anyone who abducts or persuades a boy or a woman or girl to engage in an act of indecency.
556	Emperor Justinian's Novellae	Novellae 77 and 141 decreed death by burning for the "sin against nature". The 83 Novellae, adopted by the Church, extends the military practice of "degradatio", or dishonourable discharge for misconduct to the clergy.
6 <sup>th</sup> -12 <sup>th</sup> c	<i>The Penitentials</i> , guides for penances to be imposed by the new form of private confession	Recognized that many sexual sins required forms of punishment like flagellation, forced labour and exile. Penances imposed on clerics were more severe than those imposed on the laity. The word "sodomy" was used from this time onwards in the medieval period to describe any kind of non-reproductive sexual



		activity between men and women, and any sexual activity between persons of the same sex. The punishments meted out to clergy were more severe than for laymen.
1008	Burchard, Bishop of Worms, books of canon law	Repeated many of these earlier condemnations of canon law about clergy sex abuse, including St. Basil's rule about the proper punishment for monks who have sex with boys.
1051	St. Peter Damian, " <i>Book of Gomorrah</i> "	Quotes Burchard's <i>Decretum</i> that the appropriate punishment for clergy who sexually abuse boys and adolescents is as set out in St. Basil of Caesarea's rule. Damian appealed to Pope Leo IX to take action against child sex abuse by clergy. The Pope's response was to dismiss only repeat offenders, ignoring the effect on the victims and emphasising the need for forgiveness of the perpetrator.
1054	The Great Schism between the Eastern and Western Church	Western scholars start to develop a separate canon law, based not on decrees of the emperors, but of the popes.
1115	Ivo of Chartres	His collection of canon law emphasizes the need for cooperation between Church and State, and regards the decrees of Christian princes as having the force of canon law on the condition that they did not conflict with Church doctrine. He mixes rules of Roman law and laws of the Frankish kings with purely canonical rules. Following Burchard, he provides severe penalties for fellatio, bestiality, pederasty and sodomy.
1120		The Council of Nablus decrees that in the Kingdom of Jerusalem, those guilty of sodomy should be burned.
1140	Gratian, " <i>The Concordance of Discordant Canons</i> "	His "decrees" are the most important source in the history of canon law. Supports the policy that clergy who violate young boys should also be punished by the civil law, which at that time meant execution

		according to the Roman law of <i>stuprum pueri</i> . The revival of Roman Law continues at the University of Bologna.
29 Dec 1170	Thomas a'Becket	The Archbishop of Canterbury murdered in Canterbury Cathedral by knights of King Henry II with whom he had been in dispute over 'privilege of clergy'.
1179	<b>Third Lateran Council, Pope Alexander III</b>	Condemnation of unnatural acts of both laity and clergy, but in the case of clergy, they were to be kept indefinitely in a monastery or subjected to <i>degradatio</i> . Introduces into canonical jurisprudence the euphemism of the "crime against nature" for "sodomy" which covered non-reproductive sex between adults as well as between adults and children.
1209	<b>Pope Innocent III</b> , decree c. viii, <i>De Crimine Falsi</i> , X, v, 20.	Clerics who have been degraded should be handed over to the secular power, to be punished according to the law of the land.
1215	<b>Fourth Lateran Council (Innocent III)</b>	Continues the condemnation of "crimes against nature". Clerics guilty of "incontinence" were to be suspended, and if they continued to "celebrate the divine mysteries", they were to be forever deposed. Clergy who turned a blind eye to the sexual irregularities of their priests were to be "deposed in perpetuity". The Church saw that some practices, such as capital punishment, were more appropriately handled by the secular authorities. The prohibition on clerics issuing sentences that "shed blood" was formalised at this Council. Such punishments henceforth were to be carried out by secular authorities.
1232	<b>Pope Gregory IX</b>	Commissions the Dominicans to ferret out heretics. Inquisitors in certain regions extended their jurisdiction to sodomites as well, seeing them as

		<p>allies of demons, devils and witches. Those convicted were handed over to the civil authority which, in time, independently prescribed the death penalty. Canon law, still under the influence of Roman law's capital punishment for homosexuality and the sexual abuse of children, influenced civil law to impose punishments such as castration, exile and death. A further weapon in the Church's armoury against sodomy from the late 13th century onwards was the declaration of perpetual "infamy", which was a kind of civil death: their families could be ostracized and economically boycotted; they could be murdered with impunity because civil authorities felt no obligation to prosecute.</p>
1514	<b>Fifth Lateran Council, Pope Leo X</b>	Sex abusing clerics are to be punished 'respectively according to the sacred canons or with penalties imposed by the civil law'.
1517	Cardinal Cajetan	In his <i>Commentaries on St Thomas Aquinas's Summa Theologica</i> interprets Aquinas to say that any necessarily sterile copulation was "against nature", and the term was not confined to anal sex or same sex relationships. Masturbation by both sexes was also "against nature". Later moral theologians reverted to the medieval use of the word "sodomy" to describe any such sterile sexual activity.
1517	Martin Luther	Publishes his <i>Ninety Five Theses</i> , marking the start of the Protestant Reformation whereby the Church gradually lost control over large parts of Northern Europe. Handing priests over to the civil authorities in those countries becomes a problem, with possible fears about failure to receive a fair trial.
1529	Henry VIII of England	Decrees that the crime of "sodomy" was to be under the exclusive jurisdiction of the civil courts because of complaints that the ecclesiastical courts were

		handing out less severe penalties to clerics. Similar complaints about milder punishments for clerics in comparison to capital punishment meted out by the civil courts for lay people were made in Lucerne, Florence and Basle.
1551	<b>The Council of Trent</b>	Clergy convicted of 'grievous crimes' were to be 'defrocked' publicly and then handed over to a lay judge, who was to be present during the trial, for further punishment according to the civil law.
1565-1785	The Spanish Inquisition in Valencia	Sodomy regarded by inquisition as a contagious plague to be destroyed because it threatens the natural order between the sexes and the propagation of the species, whether the offence involved adults or adults and minors. Most of the priests or religious were accused of committing sexual crimes with adolescents, either novices or students, or boys plying the "street trade". Depending on the circumstances, priests and monks were burned at the stake, garrotted in prison, whipped, sentenced to long periods in the galleys, imprisoned in monasteries with forced labour and fasting and sent into exile.
1561	<b>Pope Pius IV</b> , papal bull, <i>Cum Sicut Nuper</i>	Directed the Inquisition in Spain to inquire into soliciting in the confessional. Priests guilty of such matters were to be "degraded to the secular state", and handed over "to a secular judge to be punished".
1566	<b>Pope St. Pius V</b> , <i>Constitution Romani Pontifici</i>	Clerics who committed sodomy to be first 'degraded' by a canonical court, and then handed over to the secular authorities for punishment.
1635	<b>Pope Urban VIII</b>	Decrees that any priest who had been sentenced to the galleys must not be "vested in the exercise of their Orders" at the end of the sentence. Adoption of an apparent "zero tolerance" approach to clergy sexual abuse.

1568	<b>Pope St. Pius V</b> , decree, <i>Horrendum Illud Scelus</i>	Decree condemning clerics who ‘sinned against nature’ with children. They were to be cast out of the clergy to be deterred by ‘the avenging secular sword of civil laws’.
1570	Priest named Fontino charged before a canonical court of sodomy with a choirboy.	He was defrocked, and then handed over to the secular authority for punishment according to the civil law. He was executed by beheading.
1570-1630	Spanish Inquisition in Aragon	Dealt with some 1000 cases of “sodomy” in Aragon, and clergymen of various kinds appear frequently in the records. They were amongst the first to be executed.
1723-1823	Spanish Canonical Tribunals	Deals with 3,775 cases of priests attempting to solicit sex in the confessional between 1723 and 1820, or over 40 a year. Not all of these involved minors, but as schools were attached to monasteries, many did.
1726	Sacred Congregation of the Council	A priest who sodomized boys was sentenced to work in a hospital. The Council refused to reinstate him as a priest after serving his sentence. It also rejected the submission that leniency should be granted because the priest was heavy with age of “sixty or more years”. An example of 18 <sup>th</sup> century zero tolerance.
1741	<b>Pope Benedict XIV</b> , decree <i>Sacramentum Poenitentiae</i>	Canonical procedures for dealing with cases of priests soliciting sex in the confessional. Such cases come under jurisdiction of The Holy Office (later called CDF).
1757	St. Alphonsus Liguori	Uses the word “sodomy” to describe any sexual contact with a person of the same sex, including between women. That continued until 19 <sup>th</sup> century when it was replaced in Church discourse by the medico/legal word “homosexuality”
1780s	Spanish Inquisition in Valencia and Zaragoza	Increasing sensitivity to “scandal”. Several monks handed over to the civil authorities for burning alive because their sodomy, “pecado nefando” had

		become public knowledge affecting the credibility and image of the Church.
1789	The French Revolution	The rise of anti-clericalism in France until signing of Concordat by Napoleon in 1801, and sporadically thereafter.
1790	<b>The United States</b>	All vestiges of privilege of clergy abolished in Federal Courts.
1827	<b>The United Kingdom and its colonies</b>	All vestiges of privilege of clergy abolished by the U.K. Parliament. The abolition applies to Australia, Canada and other colonies.
1842	<b>Pope Gregory XVI</b>	The start of the reluctance to hand over priests to the secular authorities in some countries. The Holy Office issued an instruction absolving penitents of their canonical obligation to denounce priests who solicited sex in the confessional in the lands of "schismatics, heretics and Mohammedans" where the accused might escape punishment because "schismatic bishops or infidel judges."
1846	<b>Pope Pius IX</b>	Giovanni Maria Mastai-Ferretti elected Pope
1862	<b>Pope Pius IX: The Syllabus of Errors.</b>	Condemns as an error the idea that the civil law should have priority over canon law, and that Church and State should be separate.
1866	<b>Pope Pius IX, Instruction</b>	The start of a softening of attitude towards imposing dismissal or "degradatio" on priests even for soliciting in the confessional. The Holy Office Instruction of 20 February 1866 makes no mention of handing over such priests to the secular authority, and cautions restraint on inflicting loss of rank and demotion to the 'secular' branch".  Because the seal of confession was involved in any investigation of such a canonical crime, absolute secrecy was imposed on the proceedings.
1870	<b>Pope Pius IX</b>	Loses control of the Italian Papal States, prompting him to declare himself a 'prisoner' in the Vatican.

1871	Bismarcks "Kulturkampf"	Attempts by the German Chancellor to reduce the influence of the Church in Germany. Similar movements took place in Austria, and other European countries.
1890	<b>Pope Leo XIII</b> , Instruction from Holy Office 20 July 1980	Growing concern about the spread of scandal to the faithful. Detailed procedures for keeping the proceedings for soliciting in the confessional secret, including requiring witnesses to swear oaths of secrecy. The Instruction required that not only was the evidence to be kept secret but also the fact that a trial was being held: it was not to be conducted in the Chancery; witnesses were to be called on different days, interviewed alone; and examinations were to take place in sacristies or some other private place.
1904	<b>Pope St. Pius X</b>	Sets up commission to codify canon law, under Cardinal Gasparri and Monsignor Eugenio Pacelli, later Pope Pius XII
1905	Émile Combes	Becomes Prime Minister of France and introduces a law separating the Church from the State; most Catholic schools and educational institutions were closed.
1905	Beatification of John Vianney	John Vianney taught, 'After Christ, the priest is everything'. Clericalism within the Church surges.
1917	<b>Pope Benedict XV</b>	Code of Canon Law promulgated. The Commission discards the decrees of Innocent III, Leo X, Pius IV, St Pius V, the Fourth and Fifth Lateran Councils and the Council of Trent, requiring priests guilty of serious crimes (which included the sexual assault of children) to be handed over to the civil authorities. The canon law and practice of handing over the priest for punishment in accordance with the civil law was officially abandoned everywhere, and not just for those countries ruled by "schismatics, heretics and Mohammedans".

1917 to 1929	Anti-clericalism in Latin America	Mexico's 1917 Constitution put severe restrictions on the Church's activities. Catholic (called "Los Cristeros") and anti-clericalist groups turned to terrorism which continued until 1929. Pius XI issued a series of encyclicals condemning the persecution of the Church. There were similar but not so violent anti-clerical movements in Ecuador, Venezuela, Colombia and Argentina.
1920	First Commercial Radio licence granted	First commercial radio licence in the world granted to Westinghouse in the United States.
1922	The British Broadcasting Corporation	BBC established. The Church recognizes the propaganda benefits of radio, but also its disadvantages in spreading 'scandal' and its effect on Church membership. Secrecy is the solution.
6 Feb 1922	<b>Pope Pius XI</b>	Achille Ratti elected Pope.
1922	<b>Pope Pius XI</b> Instruction <i>Crimen Sollicitationis</i> , 9 June 1922	Applies to soliciting sex in the confessional, homosexuality, bestiality and abuse of children by clerics. Bishops to conduct preliminary investigation of such allegations, to notify the Holy Office, and to conduct a penal trial. Dismissal from the priesthood was only permitted when there was 'no hope, or almost no hope of amendment'. The proceedings were to be subject to 'the secret of the Holy Office', the breach of which was automatic excommunication that could only be lifted by the Pope personally. There were no exceptions for reporting to the civil authorities. The results of any such trial were to be sent to the Holy Office. Any requirement under the Code for such priests to be declared 'infamous' dropped.
1922	Benito Mussolini	In October 1922 becomes Prime Minister of Italy after years of anti-clerical rhetoric. He moderated his stance in subsequent years, seeing the need to woo the Church in order to give his regime some



		legitimacy.
1925	<b>Pope Pius XI</b>	Canonizes St. John Vianney.
1922-1933	Concordats between the Holy See and Latvia, Poland, Italy, Austria and Germany.	The Concordats with Latvia (1922), Poland (1925) and Italy (1929) provided for modified forms of privilege of clergy: they would be treated by civil authorities with due regard to their level in the hierarchy and any jail sentence would be served in a 'place separated from lay people' or in a monastery. The Lateran Treaty with Italy (1929) and the treaty with Nazi Germany (1933) provided for privilege in the clergy's 'pastoral ministry' communications, that is, the State is denied access to them. The dispute with the Church over the Papal States settled with the signing of the Lateran Treaties in 1929, and the creation of the Vatican City State.
1931	Spain, The Second Republic	After movements against the Church in its property dating from the 1880s, the Second Republic commences. Clergy privileges abolished.
1931	<b>Pope Pius XI</b>	Engages Marconi to set up the Vatican Radio.
2 March 1938	<b>Pope Pius XII</b>	Eugenio Pacelli elected Pope.
1946	Aurelio Yanguas	The Spanish canon lawyer says that the purpose of <i>Crimen Sollicitationis</i> was to preserve the Church's reputation by taking 'swift, decisive and secret action' before these crimes reach the civil courts so that the Church would be spared the humiliation of having priests in the public dock as sex offenders.
1947	Fr Gerald Fitzgerald	Fr Gerald Fitzgerald establishes <i>The Servants of the Paraclete</i> to deal with alcohol and sexual problems of clergy. Recommends zero tolerance approach to clergy child sex abusers.
1953	<b>Pope Pius XII: Concordat</b> between Spain and the Vatican	The Spanish dictator, General Franco restores many of the privileges of clergy that were abrogated by the 1931 Republic. He and the Vatican agree that a bishop can only be put on trial in a civil court with the

		consent of the Vatican. Criminal proceedings against clerics can only be brought with the consent of the bishop. Any deprivation of liberty was to be spent in a religious house, not in jail, and the proceedings were not to be publicised. Clerics and religious could be made to testify in court, but only with the consent of the bishop, and no cleric could be questioned about his knowledge of crimes of others that came to them while performing their ministry. Effectively, a bishop could not be questioned by the State about facts uncovered in canonical investigations about child abuse.
16 June 1954	Concordat between the Dominican Republic and the Vatican	Priests cannot be interrogated by judges or other authorities over things revealed to them in the exercise of their 'sacred ministry'. Priests would serve their sentences separate from lay persons.
28 Oct 1958	<b>Pope John XXIII</b>	Angelo Roncalli elected Pope
1962	<b>Pope John XXIII</b>	Reissues <i>Crimen Sollicitationis</i> with some minor changes. Sets up Commission to revise the <i>1917 Code of Canon Law</i> .
21 June 1963	<b>Pope Paul VI</b>	Giovanni Batista Montini elected Pope.
1963	Fr Gerald Fitzgerald	Recommends to Pope Paul VI a zero tolerance approach to sex abusing priests, and warns him about the repercussions of not acting to dismiss them.
1960-1980	Significant increase in sex abuse of children worldwide by Catholic clergy and religious.	
1967	The United Kingdom	Misprision of felony abolished. Mere failure to report a serious crime is not itself a crime.
1971	Congregation for the Doctrine of the Faith (CDF)	Issues instruction that bishops may petition the CDF for an 'administrative laicization' or dismissal of a priest for living a 'depraved life', which includes the

		sex abuse of children.
12 July 1973	<b>Pope Paul VI:</b> Concordat between Colombia and the Vatican	Bishops cannot be tried by the State Courts, but only by the Church Courts. Priests can be tried in State Courts but the proceedings are not to be publicised. This and other parts of the Concordat were declared unconstitutional by the Colombian Constitutional Court in 1993. Despite controversy over the matter, the Vatican was still insisting in 2007 that under the Concordat, Colombian bishops were entitled to impunity, and were above the law. The matter is still unresolved.
1974	<b>Pope Paul VI,</b> Instruction <i>Secreta Continere</i>	The 'Secret of the Holy Office' is renamed 'the Pontifical Secret'. Excommunication for breach is not automatic, but it could still be imposed. Pontifical secret applies to communications between the Vatican and its legates, and for all 'delicts against faith and moral'. The pontifical secret not only applies to the investigation and trial of sex abuse cases against children, but also applies to the allegation itself. Unlike <i>Crimen Sollicitationis</i> , <i>Secreta Continere</i> was published on the AAS, and was in constant use in the daily life of the Church
1974-1996	Archbishop Frank Little of Melbourne	Little kept no records of abuse allegations made against abusive priests and shifted them around. None of the allegations were reported to the police. At the Victorian Parliamentary Inquiry in 2012, Archbishop Hart of Melbourne said he assumed that Little was abiding by the confidentiality provisions of <i>Crimen Sollicitationis</i> . Little had also adopted the practice of keeping no notes of such matters.
1975	Fr. Sean Brady, later Cardinal Brady	Then a 36 year old priest with a doctorate in canon law interviews a boy with a more senior member of the clergy about the boy's being abused by a serial paedophile, Fr Brendan Smyth. The boy's father was

		asked to remain outside, and the boy was sworn to secrecy. The report of the two priests was sent to the bishop and nothing was reported to the police. Brady was following the procedures laid down by <i>Crimen Sollicitationis</i> . The Irish canon lawyer, Maurice Dooley confirms that canon law prohibited Brady from reporting the matter to the police.
1976-1998	Fr Marcial Maciel	Numerous allegations of sexual abuse made against the founder of the Legion of Christ. Maciel has a budget of \$650m and makes generous donations to the Vatican. No action is taken against him until 2006.
1978	Fr. Tony Walsh (Ireland)	First allegations of abuse of children by this serial paedophile.
26 Aug 1978	<b>Pope John Paul I</b>	Albino Luciani elected Pope
16 Oct 1978	<b>Pope John Paul II</b>	Karol Wojtyla elected Pope
1980	Pope John Paul II	Abolishes 'administrative laicisation'. The only method now available under canon law to dismiss a priest from the priesthood is through the judicial trial. The accused priest alone can apply for an 'administrative laicization'.
1981	The State of Victoria, Australia.	Misprision of felony abolished. The States of Queensland and Western Australia, and the Northern Territory have similar formulations requiring a benefit of some kind for the concealment to be punishable. The State of Tasmania never adopted misprision in its criminal law.
1983	<b>Pope John Paul II</b>	The <i>1983 Code of Canon Law</i> promulgated. It continues and extends the 'pastoral approach' to sex abusing priests, requiring the bishop to try to reform the priest before subjecting him to a canonical trial for dismissal. It introduces a 'Catch 22' defence: a priest cannot be dismissed for paedophilia because he is a paedophile, i.e. he cannot help himself. It

		imposes, for the first time, a limitation period for child sex abuse offences. If canonical proceedings are not commenced within 5 years of the abuse, the canonical crime is 'extinguished'. <i>Secreta Continere</i> not repealed by the Code.
1984	Congregation for Clergy to Archbishop Moreno	Archbishop Moreno writes to the Congregation for the Clergy about a womanising priest, and asked about whether he should hand over his files in the case of a subpoena. The Congregation said he should not, and should instruct lawyers to fight the matter because it involved 'an intolerable attack on the free exercise of religion in the United States.'
1987	Cardinal Roger Mahony, Archbishop of Los Angeles	Together with his advisers, concealed clergy sex crimes from the police, and even warned priests who were wanted by the police not to return to California so as to avoid arrest.
1988	Cardinal Ratzinger	Writes to Cardinal Castillo Lara, the President of the Pontifical Council for Legislative Texts, asking for a more streamlined way of dealing with clergy who had sexually abused children, because the formal judicial trial was too unwieldy. Castillo Lara rejects the request because it would interfere with the 'priest's fundamental right of defence.'
1988	The American bishops ask for an extension to the limitation period.	The American bishops explain to the Vatican that the 5 year limitation period would mean very few canonical trials because abused children take some time to come to terms with what has happened to them. The negotiations continue for 6 years, and in 1994 an extension is granted for 10 years from the victim's 18 <sup>th</sup> birthday. The extension only applies to the United States.
1988	Australian Catholic Bishops Conference	Sets up a Special Issues Committee to establish a protocol where allegations of a criminal nature were made against priests and religious.

26 July 1990	Dr Nicholas Tonti-Filippini,	The Catholic ethicist advised the Australian bishops: 'For the sake of the Church, reasonable suspicion of a crime must be reported to the authorities. Any attempt to contain it within an in-house investigation and management risks bringing the Church into disrepute.' Advice ignored, except where there is a civil law requiring reporting, until 2010. Apart from New South Wales and Victoria no other State requires reporting of 'historic abuse' that accounts for more than 99% of all complaints.
25 Nov 1990	New South Wales	Misprision of felony abolished but replaced by a statutory form of it in S.316 Crimes Act 1900 (NSW).
1900-1995	Fr Brian Lucas	As member of the Special Issues Committee, Lucas was of the view that the canonical procedures for dismissing sex abusing priests were 'unworkable'. He then tried to convince accused priests to resign. He dealt with about 35 priests during that period. He kept no notes of any conversations he had with such priests. No reports made by the Church to the police. Only NSW had law requiring reporting historic abuse. Bishops and canonical investigators avoid breaching canon law by referring victims to counsellors who then arranged for the reporting. Counselling was not part of the canonical disciplinary procedure.
Sept 1992	The "Father F" Case	Fr Brian Lucas, Fr John Usher and Fr Wayne Peters interviewed 'Father F', a serial paedophile with a view to convincing him to agree to voluntary laicization. Father F finally agrees to laicization in 2005. In 2012 Antony Whitlam QC appointed to conduct a private Church enquiry and concludes that the admissions contained in Fr Peter's letter were not shared by his colleagues. Fr Peter's letter indicates that the main concern was the avoidance of scandal.
1992	Australian Catholic Bishops	Special issues Committee drafts protocol that

	Conference	required bishops and religious superiors to abide by any laws relating to compulsory reporting.
1993 onwards	Australian States	Introduced mandatory welfare reporting laws requiring specific categories of professionals, such as teachers and doctors to report reasonable suspicions about the abuse or mistreatment of a child. The obligation to report ceases once the child turns 18. Non-teaching clergy did not have to report in Victoria, and may not have to in Tasmania, Queensland and Western Australia, depending on their activities.
1993	Archdiocese of Melbourne	First attempts to discipline Fr Desmond Gannon dismissed. Gannon was convicted in a civil court in 1995, 1997, 2000, and 2009 for sexual crimes against children, but this was not enough to satisfy the 'absolute certitude' of the Vatican. In 2012, the Holy See refuses to dismiss Gannon on account of his "extreme age" at 83.
1994	South Australia	Misprision of felony abolished.
1994	Archbishop Castrillón of Bucaramanga, Colombia	Proceedings started by the Colombian Attorney General, Gustavo de Grieff against certain bishops, including Archbishop Dario Castrillón Hoyos of Bucaramanga for complicity with the FARC guerrillas, contrary to Colombian law. He had to abandon the proceedings because of the immunity under the Concordat, which protected the bishops from any criminal proceedings.
1994	Bishop Bede Heather	Heather engages Dr Rodger Austin, a canon lawyer, to investigate allegations of sexual abuse amongst the St. Gerard Majella religious congregation. Heather refuses to hand over Austin's report and other evidence to the police. Police issue search warrant and search his presbytery. Priests convicted and sent to jail.

June 1994	Fr Tony Walsh (Ireland)	In 1993, the Dublin Canonical Tribunal dismisses Fr Walsh, described by the Murphy Commission as Ireland's worst serial paedophile priest, but his appeal is upheld by the Roman Rota, the Vatican's appeal court on the basis of the 'Catch 22' defence, the lack of 'full' imputability, that is, that Walsh could not be dismissed for paedophilia because he was a paedophile. Under this defence, the more children a priest abused the less likely he will be dismissed.
1994	Australian Catholic Bishops Conference	Bishop Geoffrey Robinson asked to draw up a protocol to deal with sex abusing priests and victims.
1994	United States Catholic Bishops Conference	Extension of the limitation period from 5 years to 10 years from the 18 <sup>th</sup> birthday of the victim, but not to operate retrospectively. Limited to the United States
1995	Fr Denis McAlinden (Newcastle, NSW)/Fr Phillip Wilson	McAlinden was a serial paedophile. Fr. Philip Wilson, now Archbishop of Adelaide, and a canon lawyer with a doctorate in canon law, interviews the victims. No report was made to the police.
1996	Fr Brian Lucas	Writes article for the Canon Law Society of Australia and New Zealand: <i>Are Our Archives Safe: An Ecclesial View of Search Warrants</i> , and concluded that no form of privilege attached to documents relating to investigations of sex abusing priests (as well as other matters) under the civil law. While he warned against selective destruction of documents, he wrote that there may be cases that appear to be so sensitive that it is in the best interests of the parties, and of the Church, that the documents not be created in the first place.
January 1996	Fr Tony Walsh	Dismissed from the priesthood by the Pope on petition by Cardinal Connell of Dublin, after the Roman Rota allowed his appeal on the basis of the 'Catch 22' defence.



15 June 1996	Archbishop Castrillón of Bucaramanga, Colombia.	Appointed Pro-Prefect of the Congregation for the Clergy and made Cardinal in 1998 and appointed full Prefect the same year.
7 Aug 1996	Bishop Geoffrey Robinson	Receives an official letter from the Congregation for Bishops rebuking him for criticism of the 'magisterial teaching and discipline of the Church', for saying that he was not happy with the levels of support from Rome. The only significant difference between <i>Towards Healing</i> and the <i>Melbourne Response</i> from the point of view of canon law was that <i>Towards Healing</i> required bishops to report allegations of sexual abuse where the law required it, in breach of canon law, and the <i>Melbourne Response</i> did not.
October 1996	Archbishop George Pell	Sets up the <i>Melbourne Response</i> . Pell was a member of CDF from 1990 to 2000. The <i>Melbourne Response</i> , in contrast with Bishop Robinson's proposals for <i>Towards Healing</i> had no proposals for reporting to the police, although it stated that the victim would be encouraged to do so. This was in keeping with the policy expressed in the letters of Cardinal Castrillón the Prefect of the Congregation of the Clergy to the Irish Bishops in 1997 and 1998. Pell tells Victorian Parliamentary Inquiry in 2013 that the CDF was 'pleased with' the <i>Melbourne Response</i> .
1996	United States Canon Law Society has meeting with Archbishop Bertone of the CDF.	Bertone tells Society members that <i>Crimen Sollicitationis</i> was not repealed by the 1983 Code of Canon Law, and that it can be used for dealing with sex abusing priests outside soliciting in the confessional.
1996	Congregation for the Doctrine of the Faith	The CDF extends limitation period for Ireland – 10 years from the 18 <sup>th</sup> birthday of the victim.
4 Jan 1996	Catholic Bishops Conference of Ireland	Forwards to the Vatican the <i>Framework Document</i> that has a provision for mandatory reporting of all complaints of clergy sex abuse to the police.

31 Jan 1997	Archbishop Storero on behalf of Congregation of Clergy	Advises that their proposals for 'mandatory reporting gives rise to serious reservations of both a moral and a canonical nature.' Further advises that non-compliance with canon law on reporting could mean that any canonical action against a priest may fail on appeal to Rome.
March 1997	Australian Catholic Bishops Conference	Adopts the 1996 <i>Towards Healing</i> protocol.
24 Mar 1997	Archbishop Weakland of Milwaukee	Obtains the consent of Archbishop Bertone of the CDF to proceed with a judicial trial of Fr Lawrence Murphy for the sexual abuse of deaf mute boys.
6 April 1998	Archbishop Weakland/Archbishop Bertone CDF	After receiving a letter from Fr. Lawrence Murphy, Bertone instructs Archbishop Weakland to consider 'pastoral methods' again in his case.
13 May 1998	Archbishops Weakland/Bertone	At a meeting in Rome, Bertone advises Weakland to withdraw the judicial action against Murphy, because Rome would allow an appeal.
1998	Congregation for the Doctrine of the Faith	CDF confirms extension of limitation period for the United States of 10 years from 18 <sup>th</sup> birthday of the victim. Only the United States and Ireland have this extension. The limitation period is still 5 years for the rest of the world.
1998	Fr Marcial Maciel	Eight former members of the Legion of Christ make allegations of sexual abuse against the Congregation's founder. Cardinal Ratzinger pressured by Curia Cardinals not to continue investigation.
Nov 1998	Cardinal Castrillón meets with Irish bishops in Sligo, Ireland.	Irish bishops again request permission to report clergy sex abuse crimes to the police. Castrillón refuses. Castrillon Castrillón writes to Irish bishops saying that any complaints to the police had to be by the victim, not by bishops.
1999	Irish Bishops and Cardinal Castrillón meet in Rome	Castrillón tells bishops to be 'fathers to your priests and not policemen.'
July 1999	Fr Patrick Maguire (Ireland)	Canonical proceedings for dismissal commenced

		against Maguire, a serial paedophile. In June 1998 he had been sentenced to 18 months imprisonment for indecent assault on two boys. On release in March 1999, extradited to Ireland on 12 more charges and sentenced to 6 years imprisonment in January 2000.
Dec 1999	New South Wales Law Reform Commission Report on S.316 Crimes Act 1900 (NSW)	Recommends the abolition of S.316 on the ground (amongst others) that 'The Commission disapproves of substituting a legal duty which is enforced by a criminal sanction for a moral one unless there are overall substantial benefits to society in doing so.'
Sept 2000	Fr. Patrick Maguire	Dublin Canonical Tribunal dismisses Maguire from the priesthood. Maguire appeals to the Roman Rota.
30 Apr 2001	Pope John Paul II, <i>Motu Proprio Sacramentorum Sanctitatis Tutela</i>	Requires bishops to send results of their preliminary inquiries under canon 1717 in respect of child sex abuse to the CDF which will then instruct them what to do. Restores the situation that existed before 1983 where the CDF could dismiss a priest on petition by the bishop. Pontifical secrecy applies to 'cases of this nature' under <i>Secreta Continere</i> . The <i>Motu Proprio</i> has an historical introduction that states that <i>Crimen Sollicitationis</i> was in force until then, despite the Vatican sending a clear message to all the world's bishops that it had been repealed by the 1983 Code of Canon Law by its negotiations for an extension of the Code's limitation period. There was no limitation period under <i>Crimen Sollicitationis</i> .
18 May 2001	Cardinals Ratzinger and Archbishop Bertone	Writes a letter to the bishops explaining the changes and asserting, contrary to the Vatican behaviour over the previous 18 years, that <i>Crimen Sollicitationis</i> was 'in force until now.'
8 Sept 2001	Cardinal Castrillón writes to Bishop Pican	French Bishop Pican was given a three-month suspended prison sentence for concealing knowledge that a priest in his diocese, the Rev. René Bissey, had sexually assaulted a number of boys. Cardinal

		<p>Castrillón then Prefect of the Congregation for the Clergy wrote to him, congratulating him. ‘You have acted wisely, and I am delighted to have a fellow member of the episcopate who, in the eyes of history and of other bishops, would prefer to go to prison rather than denounce his priest-son. For the relationship between priests and their bishop is not professional but a sacramental relationship which forges very special bonds of spiritual paternity.’</p> <p>Castrillón will write to all the bishops of the world to advise them to do the same – do not report clergy crimes to the police and be prepared to go to jail. He later says that he sent the letter with the approval of Pope John Paul II.</p>
Nov 2001	Cardinal Billé, President of the French Catholic Bishop’s Conference	<p>Accuses those who demand that sex crimes by priests against children be reported to the police of being ‘intellectual terrorists’. At the French Catholic Bishops Conference said he said that the conviction of Pican was an infringement by secular authorities of the norms of professional secrecy</p>
17 Sep 2001	Lord Nolan Final Report to Catholic Bishops Conference of England and Wales	<p>The effect of the Nolan reports was to recommend openness, reporting to the police, and prosecution of offenders, amongst other matters. Nolan trusted that any difficulties with canon law would be dealt with ‘responsively’. That turned out to be wishful thinking.</p>
February 2002	Archbishop Bertone, Secretary of the CDF	<p>Interview with <i>30 Giorni</i> says that ‘the demand that a bishop be obligated to contact the police in order to denounce a priest who has admitted the offense of paedophilia is unfounded.’</p>
23 April 2002	Vatican and United States Bishops	<p>Meeting in Rome to discuss sex abuse crisis.</p>
29 April 2002	Archbishop Herranz, President Pontifical Council for the Interpretation of	<p>At a conference in Milan rejected the idea that there was any obligation for a bishop to report a paedophile priest to the police. He said there was a</p>

	Legislative Texts,	'The rapport of trust and the secrecy of the office inherent to the relationship between the bishop and his priests', and it must be respected.
16 May 2002	Cardinal Rodriguez Maradiaga of Honduras	At a news conference says that paedophile priests should leave the priesthood, but rejects reporting to the police. 'For me it would be a tragedy to reduce the role of a pastor (bishop) to that of a cop. We are totally different, and I'd be prepared to go to jail rather than harm one of my priests. ...We must not forget that we are pastors, not agents of the FBI or CIA.'
18 May 2002	Fr Gianfranco Ghirlanda SJ, Dean of the Faculty of Canon Law at Rome's Gregorian University and a judge for the Apostolic Signatura	Writing in the quasi-official <i>La Civiltà Cattolica</i> , says it is not 'pastoral behaviour' for a bishop to report a priest to the police if the victim could do it. His reference to "pastoral behaviour" is a reference to Canon 1341 of the <i>1983 Code of Canon Law</i> which requires a bishop to try to reform the priest before starting proceedings to dismiss him.
June 2002	Meeting of United States bishops in Dallas	Bishops wanted the right to report clergy sex abuse crimes to the civil authorities, irrespective of whether or not the law required it, zero tolerance approach to sexual abuse, suspension of priests pending investigation, and the use of lay review boards. Proposal submitted to the Vatican.
June 2002	Fr Patrick Maguire	The Roman Rota (the Vatican Appeal Court) allows his appeal against dismissal on the grounds of the 'Catch 22' defence: he could not be dismissed for paedophilia because he was a paedophile. He lacked 'full' imputability, that is, he could not restrain himself.
8 June 2002	Cardinal Schotte of Belgium	Says he has reservations about bishops cooperating with police over sex abuse allegations against clergy, and that the Church should not have to hand over its documents as these are 'confidential to the Church'.

July 2002	Cardinal Lehmann, Chairman of the German Catholic Bishops Conference	Says it is not the bishops' role to report sex abusing priests to the police. Their only role is to try to convince the priest to hand himself in.
2002 and 2010	Monsignor Maurice Dooley, Senior Irish Canon Lawyer	Says a bishop swears allegiance to canon law, and if there is a conflict with civil law, he has to choose canon law, even if that means going to jail. He confirms that canon law prohibits the bishop from revealing to the police anything he has learned through his canonical investigations.
14 Oct 2002	Cardinal Re, Congregation for Bishops	Writes to United States bishops stating that it is difficult to reconcile their Dallas proposals with the <i>1983 Code of Canon Law</i> and the <i>2001 Motu Proprio</i> . The latter imposed 'pontifical secrecy', and the US bishops wanted to report accused priests to the police.
October 2002	Cardinal Ratzinger and United States Bishops	Meeting at the Vatican. Compromised reached on reporting – only allowable where there is a local civil law requiring it.
8 Dec 2002	<i>Recognitio</i> by the Vatican of amended Dallas proposals	New canon law for the United States, but restricted to that region.
2003	Cardinal Francis George	Writes an article: ' <i>Law and Culture</i> ' for the <i>2003 Ave Maria Law Review</i> in which he says that laws are a reflection of a culture when they are made, but thereafter they reinforce, perpetuate, rationalize and deepen that culture. His remarks apply equally to canon law and its culture of clericalism.
2003	Authorization to CDF	The simpler method of dismissing a priest by "administrative" action was restored by an authorisation from the pope.
2003	Professor Patrick Parkinson	Publishes <i>Child Sex Abuse and the Churches, Understanding the Issues</i> . The inconsistency between <i>Towards Healing</i> and canon law over the disciplining

		of priests is unacceptable. The priest could (and did) appeal to Rome and have the decision overturned.
19 Feb 2005	<b>Pope Benedict XVI</b>	Josef Ratzinger elected Pope
2005	Irish Catholic Bishops Conference	Adopts a new set of guidelines called <i>Our Children, Our Church 2005</i> , providing for all allegations of child abuse to be taken to the civil authorities, including historic abuse. It is inconsistent with canon law, and never receives the Vatican <i>recognitio</i> to make it canon law for Ireland.
2006	Fr Marcial Maciel	Pope Benedict suspends him from the priesthood and requires him to spend the rest of his days in 'prayer and doing penance'. Until his death in 2008 he lives in a house in a gated community in Florida that the Legion of Christ bought for him. He is not handed over to the police for child sex abuse.
17 May 2006	Priest known as "DS"	Bishop Jarrett of Lismore receives a complaint of sexual abuse. Carries out preliminary inquiry and reports it to the CDF in accordance with the <i>2001 Motu Proprio</i> .
1 Oct 2006	BBC documentary: <i>Sex Crimes and the Vatican</i>	Accuses Benedict XVI, as Cardinal Ratzinger, of being in charge of enforcing secrecy about sex crimes of clergy on minors, as laid down in <i>Crimen Sollicitationis</i>
2 Oct 2006	Catholic Bishops Conference of England and Wales	Says it will make a formal protest to the BBC about the program. It said that according to Archbishop Nichols of Birmingham, <i>Crimen Sollicitationis</i> was 'not directly concerned with child abuse at all, but with the misuse of the confessional.' This statement was not correct.
2007	John P. Beal writes on <i>Crimen Sollicitationis</i>	'The 1962 Instruction: <i>Crimen Sollicitationis: Caught Red Handed or Handed a Red Herring?</i> ' 41 <i>Studia Canonica</i> 199. Confirms that the 'secret of the Holy Office' (later known as the 'pontifical secret') prevents bishops and canonical investigators from

		revealing 'everything that they have learned as part of the penal process'
2007	Bishop Geoffrey Robinson	Publishes <i>Confronting Power and Sex in the Catholic Church</i> . Says that 'creeping infallibility' in the Church prevents popes from admitting mistakes.
2007	Cumberlege Report, United Kingdom	The Cumberlege Commission was established to report on the operation of the Nolan Report since its adoption by the British bishops in 2001. It criticized the lack of <i>recognitio</i> which would have made its provisions the canon law for England and Wales. It identifies the same problems outlined by Professor Parkinson about <i>Towards Healing</i> , where there is conflict between canon and law and the protocols.
2008	Priest known as 'DS'	The CDF advises Bishop Jarrett of Lismore that the penalty imposed on DS is to require him to say Mass for the victims every Friday and to live a life of 'prayer and penance'. He continues to live in a presbytery with other priests.
April 2008	BBC	Rejects complaint of the Catholic Bishops Conference of England and Wales, saying that 'The programme had accurately reported the effect of the 1962 and 2001 documents, in that the documents ensured that allegations of child sexual abuse by priests were bound by secrecy within the Catholic Church.'
Feb 2009	Irish Catholic Bishops Conference	" <i>Safeguarding Children, Standards and Guidance Document for the Catholic Church in Ireland</i> ". All allegations were to be referred to the Irish Police or the Health Board, irrespective of any legal requirement to do so. The document is inconsistent with canon law on reporting, and it does not receive the Holy See's <i>recognitio</i> to become canon law for Ireland.
20 May 2009	Ryan Commission Report	Report on widespread abuse of children in Irish institutions.



26 Nov 2009	The Murphy Commission Report on the Archdiocese of Dublin	It criticized the Irish bishops, the Irish State, canon law and the Vatican for facilitating the cover up of child sex abuse in the Archdiocese. It expresses concern about the letter of 31 January 1997 from Archbishop Storero (“the Storero letter”) that encouraged the non-implementation of the <i>Framework Document</i> , and criticizes the ‘Catch 22’ defence, and refers to two out of three cases where appeals went to Rome were allowed on this ground. It also criticized canon law for its lack of coherency and confusion on child sex abuse. Some of that confusion arose from misleading statements made by Cardinal Ratzinger and Archbishop Bertone about the repeal of <i>Crimen Sollicitationis</i> .
7 Dec 2009	Fr Sean McDonagh, prominent Irish priest.	Writes to the <i>Irish Times</i> , commenting on calls for some Irish bishops to resign. Says that the <i>2001 Motu Proprio</i> had encouraged bishops to commit criminal offences by not reporting clergy crimes to the police, and, perhaps in a moment of prescience, wondered if Pope Benedict should also resign.
10 Dec 2009	Martin Long, Director of Catholic Communications Centre, the media voice of the Irish Catholic Bishops Conference	In response to McDonagh, Long writes to the <i>Irish Times</i> , saying that the secrecy provisions of canon law only applied to the Church’s ‘internal disciplinary procedures’, and were not intended to frustrate or undermine any civil investigation or prosecution. Makes no mention that nearly all information the Church had about child sex abuse by clergy came from the Church’s ‘internal disciplinary procedures’, and there would not be a police investigation to be frustrated if they did not know of the allegations.
11 Dec 2009	Vatican Press Release	Announces that Pope Benedict had given the Murphy Dublin Report ‘careful study’, and was ‘deeply disturbed and distressed by its contents’, and that he would respond with a Pastoral Letter to the people of

		Ireland.
19 Mar 2010	Benedict XVI: <i>Pastoral Letter to the people of Ireland</i>	Makes no mention of his own role, or the role of any other member of the Roman Curia or the role of canon law in the cover up. Blames the Irish bishops for failing to follow the 'long established norms of canon law'. He blames them for a 'misplaced concern for the reputation of the Church and the avoidance of scandal, resulting in failure to apply existing canonical penalties', when that was Vatican policy for some 90 years, since 1922. Benedict writes the script for the second cover up: blame the bishops and ignore any involvement of the Vatican and the popes in the cover up.
20 Mar 2010	Monsignor Scicluna, the Vatican prosecutor for the CDF	In an interview with the, The Tablet, he says: "The norms on sexual abuse were never understood as a ban on denouncing [the crimes] to the civil authorities." That statement was only correct if he was referring to direct observations of abuse and not allegations being made to the bishop by others. He also said that since 2001, the CDF had handled 3,000 cases. He makes no mention of any case where the CDF had instructed the bishop to report a case of child sexual abuse to the civil authorities.
25 Mar 2010	Fr Federico Lombardi SJ, the Vatican spokesman	Issues a statement on the notorious Fr Lawrence Murphy who sexually assaulted some 200 deaf mute boys in the United States. '...Indeed, contrary to some statements that have circulated in the press, neither Crimen nor the Code of Canon Law ever prohibited the reporting of child abuse to law enforcement authorities.' That statement was partly true in that the <i>Code of Canon Law</i> did not impose pontifical secrecy. It was imposed by <i>Secreta Continere</i> which is not part of the Code. His statement is contradicted by some of his later

		statements admitting that information obtained through a canonical investigation was subject to the strictest confidentiality.
12 April 2010	The Congregation for the Doctrine of the Faith	Issues a document called " <i>A Guide to Understanding Basic CDF Procedures concerning Sexual Abuse Allegations</i> ", which it said was 'an introductory guide which may be helpful to lay persons and non-canonists'. It explained the various procedures, and then said that:  'Civil law concerning reporting of crimes to the appropriate authorities should always be followed.' Such an instruction amounted to a dispensation from pontifical secrecy under canon 85, for those countries that have such laws. All Australian States and Territories, other than NSW and Victoria, do not have such laws for the vast majority of such complaints. Fr Lombardi's statement of 15 July 2010 casts some doubt as to whether the dispensation applies once a canonical investigation and trial starts.
21 May 2010	Pope Benedict XVI	Issues decree revising the <i>2001 Motu Proprio</i> . The historical introduction is rewritten, and corrects the 2001 historical introduction by conceding that the <i>1983 Code of Canon Law</i> did, in effect, repeal <i>Crimen Sollicitationis</i> . It reimposes pontifical secrecy under <i>Secreta Continere</i> , and expands it to cover the sex abuse of persons who 'habitually lack the use of reason' and to priests who have child pornography in their possession.
25 June, 2010	Canon lawyer, Fr John P Beal, one of the authors of the <i>New Commentary on the Code of Canon Law</i>	Reported in the National Catholic Reporter to have said: 'Pontifical secrecy does not prevent Catholic officials from reporting sexual abuse to civil authorities. It applies only to internal church proceedings.' The vast bulk of all information the Church has about clergy sex abuse comes from

		'internal Church proceedings'.
15 July 2010	Fr Federico Lombardi, Vatican spokesman.	Explains the 2010 revision of the <i>2001 Motu Proprio</i> and he referred to cooperating with the civil authorities as provided for in the Guide for 'lay persons and non-canonists'. He said that such cooperation had to be done:  '...in good time, not during or subsequent to the canonical trial.' This statement contradicts what he said on 25 March 2010 that canon law did not preclude reporting to the police. In March 2015 in the case of Fr Mauro Inzoli, the Vatican refused to hand over to the Italian police documents relating to his dismissal in 2012, stating, "The procedures of the CDF are of a canonical nature and, as such, are not an object for the exchange of information with civil magistrates."
19 July 2010	Fr Federico Lombardi, Vatican spokesman.	Through the Vatican Radio service, he says:  'The revised norms maintain the imposition of 'pontifical secret' on the church's judicial handling of priestly sex abuse and other grave crimes, which means they are dealt with in strict confidentiality.'
21 July 2010	Nicholas Cafardi, canon and civil lawyer and Professor of Law at Duquesne University	Writes in <i>Commonweal Magazine</i> :  "But that's all the secrecy requirement covers: the internal church legal process, not the crime itself. It does not prevent victims, their families, or even church officials from reporting a civil crime to the civil authorities or to the media." The vast bulk of the information that the Church had about child sex abuse by clergy came through its own 'internal legal processes'.
3 May 2011	The Holy See	Cardinal Levada of the CDF asks all Bishops Conferences to present it with guidelines for dealing with sex abuse by clergy. Once approved under Canon 455, those guidelines then become canon law

		for the area covered by the Bishops Conference. Like the dispensation given in 2010, those guidelines only provide for an exception to pontifical secrecy where the local law requires reporting.
2 June 2011	Cardinal Castrillón former Prefect of the Congregation for the Clergy	Interviewed by Patricia Janiot for Colombian CNN. He denies that there is such a thing as paedophilia, and says that priests who abuse children make 'mistakes', and are punished by canon law by being suspended. If they show 'correction', canon law requires them to be reinstated and he is sent to another parish. He says that every priest who has been proven to have sexually abused children has been punished under canon law. When asked why Fr Marcial Maciel had not been punished, he refused to answer.
13 July 2011	The Murphy Commission Cloyne Report	Found that Bishop Magee of Cloyne failed to report 9 out of 15 complaints that should have been reported to the police, that he had two different files on abusive priests, one for the Vatican and a sanitized version in answer to a subpoena or search warrant, and that the Storero letter of 31 January 1997 had cautioned against the implementation of the <i>Framework Document</i> , which required reporting of all child abuse allegations to the police.
14 July 2011	Irish Foreign Minister, Ian Gilmore	Calls in the Papal Nuncio to Ireland and gives him a note saying: 'it is unacceptable to the Irish Government that the Vatican intervened to effectively have priests believe they could in conscience evade their responsibilities under Irish law.'
20 July 2011	Fr Federico Lombardi	Says that the Storero letter 'did not object to any civil law (regarding the obligation to provide information to civil authority)...because it did not exist in Ireland at that time.' That statement was not correct.

		Misprision of felony was repealed on 22 July 1997, six months after the Storero letter.
20 July 2011	Irish Prime Minister, Enda Kenny	Speech in Parliament alleging that there was ‘an attempt by the Holy See, to frustrate an Inquiry in a sovereign, democratic republic... the standards of conduct which the Church deems appropriate to itself, cannot and will not, be applied to the workings of democracy and civil society in this republic. Not purely, or simply or otherwise. Children.... first..’ The Irish Parliament passed a motion that it ‘...deplores the Vatican’s intervention which contributed to the undermining of the child protection framework and guidelines of the Irish State and the Irish Bishops’.
25 July 2011	The Holy See	Recalls its Papal Nuncio for ‘consultations’.
3 Sept 2011	The Holy See’s Response to Cloyne Report	The Response makes no mention of the ‘secret of the Holy Office’ or ‘the pontifical secret’, and says that the <i>Framework Document</i> could not be given a <i>recognitio</i> under canon law because it was not a resolution of the Bishops Conference under canon 455. That statement was correct, but its assertion that the Storero letter did not have the effect of instructing the bishops to break Irish law was misleading. It said, ‘In 1996, apart from cases relating to misprision of felony, the reporting of incidents of child sexual abuse to either the relevant health board or the Irish police was not mandatory. Furthermore, misprision of felony was removed from the Irish Statute Book by the Criminal Justice Act of 1997.’ The letter failed to state that misprision of felony was repealed on 22 July 1997, six months after the Storero letter.
5 Sept 2011	Archbishop Martin of Dublin	Blames the Irish bishops for the cover up. Makes no mention of the role of canon law or the Vatican’s

		responsibility and the finding of the Murphy report that the rules and structures of the Catholic Church facilitated the cover up.
2011	Australian Catholic Bishops Conference	Forwards to Rome the Australian Church Guidelines for dealing with child sexual abuse in accordance with the direction of Cardinal Levada of 3 May 2011
2012/2013	Victorian Parliamentary Inquiry, the Whitlam Inquiry into the "Father F" case, and the Cunneen Special Commission, and the Royal Commission.	The chances of dismissing a priest through a canonical trial were variously described in these inquiries as "very difficult" (Cardinal Pell), "close to hopeless" (Bishop Malone) "very, very difficult" (Archbishop Hart) "extraordinarily difficult" (Archbishop Coleridge), and the whole procedure was "unworkable" (Fr Brian Lucas).
8 Feb 2012	Congregation for the Doctrine of the Faith.	Announces that it has handled 4,000 child sex abuse cases. No indication of the number of cases where an instruction was given by the CDF to report the matter to the police.
May 2012	The Italian Catholic Bishops Conference.	Announces that under Italian law it has no obligation to report clergy sex abuse to the civil authorities. It will cooperate with the civil authorities once criminal proceedings have commenced against a priest (under Italian law, this includes the investigation), but will otherwise not be volunteering any information. This is consistent with the bishops' obligations under the 2010 dispensation to pontifical secrecy, where reporting is only permissible where there is a local civil law requiring it.
12 June 2012	Monsignor Lynn (USA)	Convicted of child endangerment by not reporting sex abusing priests to the civil authorities. Sentenced to 3-6 years' imprisonment.
21 Sept 2012	The Victorian Church submission to the Victorian Parliamentary Inquiry entitled, " <i>Facing the Truth</i> "	Submission to the Victorian Parliamentary Inquiry by the Church in Victoria. It follows the lead of Pope Benedict XVI in his Pastoral Letter to the people of Ireland of ignoring criticisms of canon law. Its

		<p>chronology of significant events starts in 1961 and contains a list of 150 reports, inquiries, legislation both civil and canonical, books and research. There is no mention of <i>Crimen Sollicitationis</i> of 1962, nor is there any mention of pontifical secrecy imposed by <i>Secreta Continere</i> and confirmed in the 2001 <i>Motu Proprio</i> and its revision in 2010. It cherry picks passages from the Murphy Dublin Report, but ignores the criticism of canon law and the Vatican and the finding that the ‘structure and rules of the Catholic Church facilitated the cover up’. It claims that the Church, like the rest of society has been on a ‘learning curve’ about sexual abuse and blames the bishops for the cover up.</p>
Nov 2012	Bishop Geoffrey Robinson	<p>Publishes <i>For Christ's Sake End Sexual Abuse in the Catholic Church for Good</i>, and writes, ‘..the entire response of the Church to the scandal of sexual abuse has taken place in an atmosphere that the Pope cannot have been wrong in any matter that involved papal energy and prestige.’</p>
12 Nov 2012	Australian Prime Minister, Julia Gillard	<p>Announces the setting up of a <i>Royal Commission into Institutional Responses to Sex Abuse</i>.</p>
12 Dec 2012	The Australian Catholic Bishops Conference	<p>Announces the setting up of the <i>Truth, Justice and Healing Council (TJHC)</i> to represent the Church at the Royal Commission.</p>
22 Feb 2013	Congregation for the Doctrine of the Faith replies to the Australian Church Guidelines for dealing with child sexual abuse	<p>Requests that the Guidelines be in one document rather than many. Confirms that the CDF has exclusive jurisdiction over clerics and that the provisions of canon law must be followed. States that sections 39 and 40 of <i>Towards Healing</i> are “applicable only to non-clerics.” The CDF rejects the requirement that Church procedures be postponed if there is a police investigation pending.</p>
13 Mar 2013	<b>Pope Francis I</b>	<p>Jorge Bergoglio elected Pope</p>



3 April 2013	Francis Sullivan, CEO, Truth Justice and Healing Council	Interviewed on 7.30 Report, and asked what steps the Church should take if one of its teachers reported to Church authorities that he suspected that a priest was sexually abusing children at their school. He said it was up to the teacher to report it, and not the Church authorities. This is consistent with the Holy See's position that bishops should not be doing any reporting.
22 April 2013	Francis Sullivan	Addresses the St. Thomas More Forum in Canberra. Admits cover ups, says Church on a 'learning curve', and that things are much better now than 20 years ago. He makes no mention of pontifical secrecy or of the current conflict between canon law and <i>Towards Healing</i> where there is no civil law obligation to report to the police, and no mention that the Holy See has not approved <i>Towards Healing</i> under Canon 455 to make it part of canon law for Australia
29 April 2013	Victorian Parliamentary Inquiry	Bishops Connors and Bird, criticise their predecessor, Bishop Ronald Mulkearns of Ballarat for being 'very naïve', for having 'effectively facilitated child sexual abuse' and for making terrible mistakes. Mulkearns has a doctorate in canon law, was one of the founders of the Canon Law Society of Australia and New Zealand, and was the first chairman of the Special Issues Committee set up by the Australian Catholic Bishops Conference to find a better way of dealing with sex abusing priests. Everything he did was in accordance with canon law, as interpreted by the Vatican.
20 May 2013	Victorian Parliamentary Inquiry	Archbishop Hart of Melbourne questioned about <i>Crimen Sollicitationis</i> . He initially said that confidentiality was for the protection of the child, but he was then asked about the obligation to report such crimes to the police. He admitted that there was

		“too much” confidentiality in an attempt to preserve the reputation of the Church.
27 May 2013	Victorian Parliamentary Inquiry	Cardinal George Pell asked about <i>Crimen Sollicitationis</i> and its requirements of “strict confidentiality”. He then said that “we regard those restrictions now as inappropriate”. He then said the cover up was the bishops’ responsibility and not “Rome’s”.
31 July 2013	Rodger Austin, canon lawyer	Tells the Cunneen Special Commission that in “tribunal work where this confidentiality is involved, if it was said that what you learned in that process had to be given under civil law, my view would be that one would seek to be dispensed from that obligation in that particular case.”
30 Sept 2013	TJHC submission on <i>Towards Healing</i> to the Royal Commission, Issues Paper No. 2	Section 10 entitled “Dealing with the Accused” discusses canon law at length, but nowhere is there any mention of <i>Crimen Sollicitationis</i> . The <i>2001 Motu Proprio</i> is mentioned, but there is no mention of the pontifical secret applying to the cases of sexual abuse of children by clergy. It says: ‘There is nothing in the 1983 Code that is in conflict with any applicable civil law obligations relating to the reporting of allegations of child sexual abuse.’ That statement is correct, but the <i>1983 Code</i> is not the only source of canon law. The pontifical secret is imposed by <i>Secreta Continere</i> which is not part of the Code. Until the dispensation given in 2010, reporting to the police of information obtained by the Church’s internal procedures was prohibited by canon law. Under canon 22, bishops were required to breach civil law.
3 Oct 2013	Francis Sullivan	Says that the TJHC submission to the Royal Commission was a ‘warts and all’ approach, but the main warts, the pontifical secret, and the problems created by Canons 1321 and 1341 for dismissing sex

		abusing priests are not mentioned either in his speech or in the TJHC submission.
12 Nov 2013	Victoria Parliamentary Committee Report, <i>Betrayal of Trust</i>	<p>Found that no representatives of the Church directly reported the criminal conduct of its members to the police, and that there was no justification for this. The probable explanation was the secrecy imposed by canon law. It rejected the claim that the Church was on a “learning curve” about sexual abuse and notes that if there was a lack of awareness of it within society, the Church contributed to that by actively concealing it within its own ranks. It found: ‘Various structures, laws and teachings of the Catholic Church contributed to the concealment of the issue from wider society and civil authorities. The manner in which the Catholic Church responded (or failed to respond) to complaints gave perpetrators the opportunity to commit further abuse.’ In relation to the criticisms of Bishops Mulkearns and Archbishop Little by their successors, the Committee stated: ‘...it is unfair to allow the full blame to rest with these individuals, given that they were acting in accordance with a Catholic Church policy.’</p> <p>It recommended: reinstatement of misprision of felony so far as sexual abuse is concerned and other law reform measures.</p>
19 Dec 2013	The Royal Commission	Bishop Jarrett of Lismore agrees with Commissioner McLellan that the limitation period of 10 years from the 18 <sup>th</sup> birthday of the victim was too short because the ‘overwhelming majority’ of complaints would not be reported to the Vatican because ‘many people don't report their abuse until well after a 10-year period.’
16 Jan 2014	United Nations Committee	Archbishop Tomasi and Bishop Scicluna appear on

	on the Rights of the Child	behalf of Pope Francis. When questioned by the Committee as to why the Holy See would not require mandatory reporting, Bishop Scicluna told the Committee that the Church's duty was to educate people as to their rights to report and to "empower" them. Since 2010, included amongst those who were to be "empowered" by the Church to report their abuse to the police were those victims who "habitually lack the use of reason".
23 Jan 2014	Br Crowe, Provincial of Marist Brothers at the Royal Commission	Told the Commission that the Orders that the brothers would not have seen touching a student's genitals as a crime, but only as a "moral failure".
31 Jan 2014	United Nations Committee on the Rights of the Child hands down its Concluding Observations on the Second Periodic Report of the Holy See.	The Report notes that: Some of the rules of canon law not in conformity with the Convention on the Rights of the Child. The Holy See had adopted policies and practices that led to the continuation of the abuse and impunity of perpetrators. The Holy See covered up known sex abusers and shifted them elsewhere. The Holy See had declined to provide the Committee with information on the outcome of its canonical disciplinary procedures. The Holy See had allowed the vast majority of abusers to escape criminal prosecution by its confidential disciplinary proceedings. The code of silence imposed on clergy under penalty of excommunication meant that few cases of child sexual abuse were reported. The reporting to national law enforcement agencies has never been made compulsory and was expressly rejected in the Storero letter of 1997. In many cases the Holy See has refused to cooperate with judicial authorities.
18 Feb 2014	Catholic School principal, Terence Hayes at the Royal	Tells the Commission that he was required to report cases of sexual abuse to his superiors in Catholic

	Commission into Institutional Responses to Child Sexual Abuse (Case Study No.6)	Education “so that the bishop would not be compromised.” He provides no further explanation for that other than the procedures had to be followed.
5 May 2014	Br Shanahan of Christian Brothers at the Royal Commission	Asked by Justice McLellan how the brothers “brought themselves intellectually to that position, describing it only as a moral failure and not a criminal offence?... A. No, I can't explain it.”
22 May 2014	The United Nations Committee against Torture	The Committee against Torture requested the Holy See to provide for mandatory reporting, irrespective of whether or not there was a local civil law requiring it.
27 May 2014	<b>Pope Francis</b>	On 19 March, 2014, Pope Francis said that Pope Benedict had supported “zero tolerance” for clergy who sexually abused children. On 27 May 2014, he promised that he would apply the same “zero tolerance” standard. The figures produced by Archbishop Tomasi to the United Nations show that the Vatican’s tolerance is not zero but sixty six percent. Less than one third of all priests against whom credible allegations of sexual abuse of children had been made had been dismissed.
30 May 2014	Commissioner Cunneen SC hands down her report in the Cunneen Special Commission .	Finds that Fr Brian Lucas’s failure to keep notes of his interviews with priests against whom allegations of child sexual abuse had been made were “to avoid the creation of documentary records, and a consequence of it was that documents that could later reveal to church outsiders (including the police or complainants in civil litigation) matters that might bring scandal on the Church – including admissions of child sexual abuse by a priest – did not come into existence.” She also finds that the request by the victims of clergy sexual abuse not to report to the

		police could amount to a reasonable excuse under S.316 of the <i>Crimes Act 1900 (NSW)</i>
18 July 2014	Bishop Charles Scicluna	In a newspaper interview, Bishop Scicluna explained why the Church would not impose mandatory reporting under canon law: “one must not hinder the victim from reporting the case.” He never explained how mandatory reporting by the Church could “hinder” the victim from reporting.
26 Sept 2014	The Holy See	Publishes its response to the Committee on the Rights of the Child. It says that it is only responsibility under the Convention was to the handful of children resident in the Vatican City, and said that attempting to implement the provisions of the Convention in the territory of other States could constitute a violation of the principle of non-interference in the internal affairs of States. The national sovereignty of a country would only be infringed by mandatory reporting under canon law if the domestic law forbade such reporting. No such country exists.
19 Dec 2014	The Royal Commission	Report of Case Study No. 14 (Nestor). Finds that Fr Brian Lucas “accepted that an outcome of his practice of not taking notes of interviews, such as his interview with Nestor, was to ensure that was no written record of any admissions of criminal conduct in order to protect the priest or religious concerned and the Church.” It also finds that the canon law procedures for dismissing a priest are “very complex” and that there was confusion “at the time in both the Holy See and the wider Catholic Church about where in the Curia of the Holy See jurisdiction over allegations of child sexual abuse by clergy lay.” From the time of Nestor’s acquittal by the District Court on appeal in 1997, it took 11 years for him to be dismissed by the Pope in 2008. The Apostolic

		Signatura reserved its decision for 5.5 years on an appeal from the Congregation for the Clergy to reinstate Nestor.
19 Dec 2014	The Royal Commission into Institutional Responses to Child Sexual Abuse	Report Case Study 16 (Christian Brothers, Western Australia) found that according to Brother McDonald, the message in the Directory and Rule of the Christian Brothers was that Brothers were to treat pupils with respect and dignity and there was a clear implication that it was a crime to invade a child's sexuality, and that Canons 646–662 of the Code of Canon Law and Constitutions 211–224 of the Constitutions defined the conditions to be observed regarding departure or dismissal from the congregation. The Report also found that that by the 1950s the Christian Brothers leadership thought that "sexual abuse of children was viewed as and referred to as a 'moral lapse' or 'weakness'", that lapses tended to be repeated, that an abused may become an abuser, that the administration may be at fault when a brother was an abuser, abuser brothers were transferred to other institutions and between 1947 to 1968 failed to prevent abuse.
7 Feb 2015	Cardinal O'Malley, President of the Pontifical Commission for the Protection of Minors	Announces that 96% of all Catholic Bishops Conferences had forwarded their protocols for dealing with child sexual abuse to the Vatican.
July 2015	Royal Commission issues its Report on Case Study No. 16, the Melbourne Response	"We are satisfied that Mr O'Callaghan QC provided advice about the police process to Mr Hersbach and Mr AFA that discouraged them from going to the police. Having regard to Mr O'Callaghan QC's defined role, this advice was not appropriate. Advice about the approach that the police might take to any prosecution, and the likely outcome, should have

		been left to the police. They were the body with all of the relevant information.”
Sept 2015	Monsignor Tony Anatrella	At a training session for bishops, tells them they had no obligation to report abuse charges to law enforcement.
20 Feb 2016	Cardinal O'Malley	Issues a statement: “The crimes and sins of the sexual abuse of children must not be kept secret for any longer... We, the President and the Members of the Commission, wish to affirm that our obligations under civil law must certainly be followed, but even beyond these civil requirements, we all have a moral and ethical responsibility to report suspected abuse to the civil authorities who are charged with protecting our society”.
17 Feb 2016	Archbishop Scicluna	After seeing the movie, <i>Spotlight</i> , says: “The movie shows how the instinct -- that unfortunately was present in the church -- to protect a reputation was completely wrong. All bishops and cardinals must see this film, because they must understand that it is reporting that will save the church, not 'omerta.”
4 June 2016	Pope Francis	Issues Apostolic Letter <i>Come una madre amorevole</i> setting up a new tribunal with Vatican Congregations to discipline bishops, particularly for failure to act in accordance with <i>SST 2010</i> .

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## 16. APPENDIX 2:



**CASE STUDY 28 (BALLARAT)**  
**OPENING ADDRESS OF GAIL FURNESS SC**  
**WITH**  
**CANON LAW CHRONOLOGY AND COMMENT by KIERAN TAPSELL (IN RED)**

**ROYAL COMMISSION INTO INSTITUTIONAL RESPONSES  
TO CHILD SEXUAL ABUSE  
AT BALLARAT**

**PUBLIC HEARING INTO VARIOUS INSTITUTIONS RUN BY CATHOLIC CHURCH AUTHORITIES IN AND  
AROUND BALLARAT**

**CASE STUDY 28**

**OPENING ADDRESS BY SENIOR COUNSEL ASSISTING**

**INTRODUCTION**

1. This is the 28<sup>th</sup> case study the subject of a public hearing by the Royal Commission. It is the first of two public hearings which will examine various institutions run by Catholic Church authorities in and around Ballarat, and the responses of those authorities to allegations of child sexual abuse and to the convictions of a number of priests and religious for child sexual offences.
2. This public hearing is primarily concerned with the impact of child sexual abuse on a number of survivors who were abused by Catholic clergy and religious in
  - a. St Joseph's Home in Ballarat, a children's home administered by the Sisters of Nazareth, a female Catholic religious order
  - b. St Alipius, a primary school within the Diocese of Ballarat staffed by Christian Brothers
  - c. St Alipius Parish, Ballarat East
  - d. St Patrick's College, a secondary school run by the Christian Brothers in Ballarat and

e. St Patrick's Christian Brothers Boys Primary School, Ballarat.

3. The impact of the abuse of children in these institutions on the community of Ballarat will also be a focus of inquiry.
4. The Royal Commission will examine the response of the Diocese of Ballarat and the Christian Brothers to survivors of child sexual abuse, their families and the community of Ballarat.
5. The Royal Commission's terms of reference include a requirement that it ensure that evidence that may be received by it, and that identifies particular individuals as having been involved in child sexual abuse or related matters, is dealt with in a way that does not prejudice current or future criminal proceedings. It is for this reason that this public hearing will not be inquiring into allegations of abuse at Ballarat Orphanage.
6. This public hearing will hear evidence from Gerald Francis Ridsdale, a former priest of the Diocese of Ballarat who is incarcerated following convictions for indecent assault, gross indecency and buggery of children in Victoria. His evidence will be given by video link.
7. Paul David Ryan was ordained as a priest in the Diocese of Ballarat in 1976. Ryan has given evidence at a private hearing before the Royal Commission and the transcript of that hearing will be tendered. Ryan has been convicted of three charges of indecent assault against one victim in Victoria.
8. I will say more about these offenders later.

#### **The second hearing in Ballarat**

9. The Royal Commission's investigations into institutions run by the Catholic Church in and around Ballarat are not complete. The Royal Commission will return to Ballarat towards the end of the year for the second Ballarat case study.

#### **The Catholic Diocese of Ballarat**

10. The Catholic Diocese of Ballarat is geographically extensive. It has 51 parishes that cover the western third of Victoria. It extends from the Murray River in the north to the Southern Ocean in the south. In the west it is bound at the South Australian boarder by the Archdiocese of Adelaide and the Diocese of Port Pirie. In the east it is bound by the Diocese of Sandhurst and

the Archdiocese of Melbourne. The geographic area of the Diocese includes the City of Ballarat, which is located in the east of the Diocese.

11. James O'Collins was the bishop of the Diocese between 1941 and 1971. Ronald Mulkearns was the coadjutor bishop from 1968 until 1971 when he became the bishop of Ballarat. His vicars general were Father Frank Madden until 1976, Monsignor Leo Fiscalini until 1982 and Monsignor Henry Nolan until 1991. Father Brian Finnegan was in the position from 1991 until 1998.
12. Bishop Mulkearns retired in 1997 and was replaced by Bishop Peter Connors who held that position until August 2012. Bishop Paul Bird is the current bishop of Ballarat.
13. The College of Consultors is a group of priests who serve as an advisory body to the bishop in the pastoral care of the Diocese. From at least the 1960s, a Diocesan Consultors Committee ('the Consultors') over which the bishop presided, operated within the Diocese of Ballarat. Among other matters, the Consultors advised on the appointment and movement of priests in the Diocese.
14. Within the Ballarat Diocese is the parish of Ballarat East, also known as the St Alipius Parish, where the St Alipius Church, presbytery and St Alipius Parish School are located.

#### **Christian Brothers in Ballarat**

15. The Congregation of the Christian Brothers operated or provided teaching staff to schools within the geographic area of the Diocese, including within the City of Ballarat. A Christian Brothers community was resident at St Patrick's College in Ballarat.
16. St Alipius School was established in Ballarat East in the 1850s. In 1881, the Sisters of Mercy took over education of girls in the school. In 1888, the Christian Brothers established St Alipius Boys' School.
17. The Royal Commission will hear evidence that in the 1970s, the girls' school was coeducational from preparatory until grade two. Once boys completed grade two, they would attend the boys' school. The boys' school was known formally as St Alipius Boys' School and is often referred to as St Alipius Primary School.

18. Between 1971 and 1974, at St Alipius Boys' School, Brother Fitzgerald was the grade three teacher, Brother Dowlan and Brother Farrell were the grade five teachers and Brother Best was the grade six teacher and headmaster. Gerald Ridsdale was the assistant priest and school chaplain in 1972 and 1973.
19. Each of those Brothers, except Brother Fitzgerald who died in 1987, has been convicted of child sexual offences in relation to children who attended the school.
20. In 1976, St Alipius Boys' School closed. Since that time St Alipius Parish School has catered for boys and girls until grade six.

## **IMPACT**

21. The Royal Commission has been working in the Ballarat community over the past 18 months. Royal Commissioners and Commission staff have met with community leaders, local police, health and support services, politicians and advocates as well as survivors and their families. Community forums have been held.
22. In these meetings and forums Ballarat community members have described wide ranging impacts of systemic institutional child sexual assault including
  - a. significant social, health and mental health issues for survivors
  - b. a large number of reported suicides and premature deaths
  - c. neglect and shunning of victims by their own families, and the institutions in which they were abused
  - d. a loss of faith and connectedness to the Catholic Church communities and
  - e. a lack of community cohesion.
23. In this case study there will be evidence from the Centre Against Sexual Assault in Ballarat and Moving Towards Justice, an independent movement of lay people in the Diocese of Ballarat which seeks to support victims of sexual abuse and to promote healing within the Church.

24. For the first time, the Royal Commission will hear evidence from a psychiatrist who has particular expertise in the assessment and management of trauma and abuse and the consequences of child and adult sexual abuse including abuse by religious.
25. Associate Conjoint Professor Carolyn Quadrio will give evidence about the literature attesting to the wide ranging psychological and physical effects, both long and short term, of child sexual abuse. She is expected to say that post-traumatic stress is common in adult survivors of child sexual abuse and describe the common physical symptoms in young children.
26. Associate Conjoint Professor Quadrio will also give evidence about the spiritual effects of child sexual abuse on children and their family, and the ripple effects which may lead to ostracism of victims within their religious communities. The support needed for survivors will also be addressed.

## **SURVIVORS**

27. The Royal Commission will hear from 17 men, each of whom was abused as a child at a Catholic institution in Ballarat.
28. Each is expected to speak about the impact of the abuse on their lives from their schooling and work history through to their marriages and relationships with their children. The impact on their parents and siblings and the effect on their faith will also be the subject of evidence. One witness is expected to say that his siblings have told him that they despise the Church and have lost their faith after being heavily involved in the Church for three generations.
29. The Royal Commission will hear that the impact of child sexual abuse is ongoing. Many witnesses are expected to say that they continue to suffer from mental health issues and that they have attempted suicide as a result of the abuse they experienced as children.
30. Some common themes are expected to arise from their evidence, including feelings of guilt and humiliation, a feeling of under achievement or loss of potential, struggles with substance abuse, disruptive behaviour, distrust, withdrawal, learning difficulties and problems in employment and financial matters.

31. The Royal Commission is expected to hear evidence from ten witnesses that they were sexually abused at St Alipius Boys' School.
32. The Royal Commission is expected to hear seven witnesses say they were sexually abused at St Patrick's College, Ballarat. Most of these allegations relate to abuse by Brother Edward Dowlan, who was sentenced in March this year in relation to 34 charges of indecent assault and gross indecency for abusing young boys between 1971 and 1985.
33. Former students of St Patrick's College and St Alipius Boys' School are expected to give evidence that there was an awareness of risk of sexual abuse among students and some staff members about Brothers Best, Fitzgerald and Dowlan, and Father Ridsdale.
34. A witness given the pseudonym BAC is expected to give evidence that when he first commenced school at St Alipius Boys' School, he was told by other boys to avoid Brother Best and to never let him get you alone. He was also told to be careful around Brother Fitzgerald. He understood this to mean that they would hurt children.
35. Paul Auchetti is expected to give evidence that other children warned him not to get out of the car with Father Ridsdale when they went on trips together. He is also expected to give evidence that he felt his teacher in grade five at St Alipius Boys' School was warning him when he talked to a group of boys about 'sticking together and being aware of how queens behaved'.
36. Timothy Green is expected to give evidence that children at St Patrick's used to snigger about Brother Dowlan's behaviour, and say things like, 'He's touching the kids again'. He is expected to say that it was common knowledge among the students in his year that Brother Dowlan was abusing many of the boys at the school but that this was not discussed.
37. Timothy Green is expected to say that he finds it inconceivable that none of the Brothers, lay teachers, nurses or even some of the parents knew about the abuse by Brother Dowlan. He is expected to say, 'it was just so blatantly obvious and every boy in the class knew that their turn was going to come up at some stage'.

38. The Royal Commission will hear evidence from a survivor who is expected to say he was sexually abused at St Joseph's Home, an orphanage in Ballarat run by the Sisters of Nazareth. Gordon Hill is expected to give evidence that he tried to explain to a doctor and a police officer that he had been sexually abused at the Home after ending up in hospital. He was told about the abuse, 'nobody does that sort of thing'. From that day on, he trusted no one.
39. The Royal Commission will hear evidence from several survivors who are expected to say that they have contemplated suicide or struggled with suicidal thoughts as a result of the sexual abuse they suffered as children. In addition, it is expected that several witnesses will tell the Royal Commission that they know of others who they believe suffered sexual abuse as children and who they believe later went on to die prematurely or commit suicide.
40. Helen Watson will give evidence about her son Peter's experience. She is expected to say that he was abused by a Catholic priest in the Ararat presbytery. He did not disclose to his mother for some time. After a period of being in and out of jobs and psychiatric hospitals he eventually took his own life, three years after telling his mother.
41. The Royal Commission will also hear evidence that one survivor has a photograph of the 1974 grade four class at St Alipius Boys' School. Of the 33 boys shown in the photograph, this survivor is expected to tell the Royal Commission that 12 are dead and that he believes suicide to be the cause of death.

#### **Reluctance to disclose**

42. Many witnesses are expected to say that they were reluctant to disclose their abuse to anyone. They are expected to give reasons such as feelings of shame, guilt, disgust, fear of punishment, fear of judgment and a belief that they would be disbelieved.
43. The witness given the pseudonym BAB is expected to say that he did not disclose his abuse at the time that it occurred because his parents were such an integral part of the Catholic community and he did not want to shake their faith or devastate them. He did not want them to know that they had put him in a position where sexual abuse could happen, even though he knew they had no role in that.

44. Andrew Collins is expected to say:

f. Ballarat is a very Catholic town, and the Catholic community is very closed. The Catholic culture is very strong. Coming forward and talking publicly about child sexual abuse in Catholic institutions not only has repercussions at the family level, but also at the business and social level in Ballarat. It is these impacts that stop other victims from coming forward.

#### **CHURCH AUTHORITY WITNESSES**

45. The Royal Commission will hear evidence from Bishop Paul Bird, the current Bishop of Ballarat about what he has done to address the impact of child sexual abuse in the Diocese.

46. The Provincial Leader of the Christian Brother Oceania Province, Peter Clinch, will give evidence about the Christian Brothers in Victoria, the involvement of the Christian Brothers in schools in Ballarat and the response of the Order to criminal convictions of Brothers for child sexual abuse.

47. The current Parish Priest of St Alipius, Father McNerney will give evidence about his views on the impact on the community of sexual abuse of children by clergy.

#### **SOURCE OF DOCUMENTS**

48. The Royal Commission compelled the production of a range of documents for the purpose of this case study. Catholic Church Insurances Limited provided insurance for the Diocese of Ballarat at the relevant time. When claims were made to the Diocese about the conduct of Ridsdale, Catholic Church Insurances arranged for investigators to conduct interviews with people within the Diocese and elsewhere who were likely to have information relevant to the claims made.

49. Transcripts of interviews held for this purpose were produced and form part of the tender bundle. Those transcripts detail interviews with, among others Ridsdale, Bishop Ronald Mulkearns, Father Brian Finnegan, the former vicar general of the Diocese of Ballarat, Father Eugene McKinnon, the former parish priest of Edenhope and Monsignor Henry Nolan, the former parish priest of Warrnambool.



**RIDSDALE****Convictions**

50. On 27 May 1993, Gerald Ridsdale pleaded guilty in the Magistrates Court of Victoria at Melbourne to 27 offences against children involving eight victims. He was sentenced to two years and three months imprisonment, suspended after three months. He was released from custody on 26 August 1993.
51. On 6 August 1994, Ridsdale pleaded guilty in the County Court of Victoria to a further 46 offences committed against children. These offences were committed over 20 years between 1961 and 1981 and involved 21 victims aged between nine and 15 years. On 14 October 1994, Ridsdale was sentenced to 18 years imprisonment with a non-parole period of 15 years.
52. On 11 August 2006, Ridsdale pleaded guilty in the County Court of Victoria to a further 35 offences against children aged between six or seven to 15 years old. The offences occurred over 17 years between 1970 and 1987. He was sentenced to 13 years imprisonment with a non-parole period of 7 years.
53. On 8 April 2014, Ridsdale pleaded guilty in the County Court of Victoria to a further 30 offences against 14 children aged between four and 13 years old, including three female victims. The offences occurred over 19 years between 1961 and 1980. He was sentenced to eight years imprisonment with a non-parole period of five years.
54. Ridsdale will be eligible for parole on 8 April 2019. He will be almost 85 years old.

**History of offending**

- 27 May 1917: First Code of Canon Law promulgated by Pope Benedict XV
- 9 June 1922 Instruction *Crimen Sollicitationis* issued by Pope Pius XI. Information about child sexual abuse obtained through preliminary investigation and penal trials subject to the secret of the Holy Office, the breach of which incurred automatic excommunication from the Church. It could only be lifted by the pope personally. There were no exceptions for reporting these crimes to the civil authorities. Introduces the “pastoral approach” to child sexual abuse by clergy.

Dismissal from the priesthood only allowed where no possibility of reform.

23 July 1961 Ridsdale ordained (Transcript 27 May 2015 p. 8617, Exh CTJH.120.01095.0001\_R)

16 March 1962 Pope John XXIII reissues *Crimen Sollicitationis* in same terms except that its provisions are extended to priests who are members of religious orders.

There was no limitation period under *Crimen Sollicitationis* for bringing canonical proceedings against priests for the sexual abuse of children.

55. The evidence about his history of offending is expected to be as follows.
56. Ridsdale began offending against children, mainly boys, between 1954 and 1958 when he was in the seminary at Corpus Christi.
57. Ridsdale abused children at parishes or church locations throughout Victoria. These include Horsham, Inglewood, Camperdown, Ballarat North parish (including institutions such as Nazareth House and St Joseph's Home), Mildura, Swan Hill, Warrnambool, Ballarat East (including institutions such as St Alipius Boy's School), Apollo Bay, Inglewood again, Edenhope, the National Pastoral Institute in Melbourne, Mortlake and Horsham parish.
58. In addition, he offended against an altar boy from a parish in Sydney.
59. Why and by whom he was moved from parish to parish will begin to be explored in the evidence in this first hearing in Ballarat.
60. In the early 1960s Ridsdale was at North Ballarat as an assistant priest. Ridsdale molested a boy from Villa Maria, a boarding school for boys in East Ballarat. It was his first year as a priest. A complaint by the boy's parents was made to the Bishop, Bishop O'Collins. It was the first complaint Ridsdale knew of.

61. Ridsdale told the Catholic Church Insurances investigator that Bishop O'Collins told him there had been a complaint and said 'if this thing happens again then you are off to the Missions'. Bishop O'Collins sent him to Mildura. There is expected to be evidence that Bishop O'Collins referred Ridsdale to a psychiatrist.

This incident of fondling a boy occurred "in the first year of his priesthood", which is probably 1962. The psychiatrist was Dr Seal, but Ridsdale does not remember seeing him: Transcript 27 May 2015, p.8624.

Bishop Mulkearns in his Memorandum on Ridsdale's file dated 4 October 1996 (Exh CTJH.120.01098.0060) says that he destroyed Dr Seal's report because of the requirements of the American Institution of Jemez Springs that all documents be destroyed after they were read. He did this "some months before charges were laid against G. F. Ridsdale". The first charges were brought against Ridsdale in 1993. The date of the letter was "from the early to mid sixties".

### **Applicable Canon Law**

#### *1917 Code of Canon Law and Crimen Sollicitationis (1962)*

The evidence suggests that Bishop O'Collins did not carry out a preliminary investigation under the *1917 Code*, but simply gave a warning. The secret of the Holy Office under Art 11 of *Crimen Sollicitationis* only applied to information obtained through the canonical processes. Bishop O'Collins was not prohibited by canon law from referring the allegation to the police prior to commencing the preliminary investigation.

*Crimen Sollicitationis* Art. 42 provided that if the evidence of a crime is considered "grave enough", but not yet sufficient to file a formal complaint, he was to "admonish" these priests "paternally" and "gravely" with a first or second warning, and to threaten them with a trial if a new accusation is brought. It appears that Bishop O'Collins did this. Ridsdale said in evidence that the statement "You're off to the missions" was a mistake and it should have read "You're off the mission", meaning not working as a priest in a parish. : Transcript 27 May 2015, p.8622

*Crimen Sollicitationis* in Art. 63 prevented the bishop from imposing the penalty of dismissal from the priesthood unless he showed “no hope humanly speaking, or almost no hope of amendment”. The bishop’s first obligation was to try to “cure” these priests.

Bishop O’Collins acted in accordance with Arts.42 and 63 of *Crimen Sollicitationis* in acting as he did.

Mulkearns’ stated reason for destroying the medical report was the requirement of the American Institute for whom Dr Seal worked (Exh. CTJH.120.01098.0060). Fr Brian Lucas, in his article, *Are Our Archives Safe: An Ecclesial View of Search Warrants* reviewed canon law on the retention and destruction of documents.

“The Church recognises that documents might need to be kept secret. In the context of the canonical process, Canon 1546 provides that no one is obliged to produce documents where there is reason to fear loss of reputation, dangerous harassment or some other grave evil or where there is the danger of violating a secret which should be observed. One could argue, by implication, that one is entitled not to create, or if created, to destroy documents, which have this character.”

On p.71, he stated that:

“Selection based simply on what is potentially embarrassing or unhelpful in litigation will be counter productive and courts would draw adverse inferences if certain documents only were missing from files. A selective culling of all the incriminating material will be likely to be discovered. It is easy enough to discover the existence of documents from other sources, such as from a copy kept by the author of a complaint letter. The criteria for selection must be related to a standard that is not connected with potential litigation, or able to be interpreted as an attempt to thwart the process of justice.

Canon 489 provides for the destruction of documents “of criminal cases in matters of morals, in which the accused parties have died or ten years have elapsed since the sentence.” Dr Seal’s report does not come into that category as there was no penal trial. It follows from this that there was no canonical justification for the destruction of the report.

62. The next time Ridsdale spoke to a bishop about his offending, was to Bishop Mulkearns in 1975. The evidence is expected to reveal that that came about in the following way.
63. Ridsdale was appointed parish priest of Apollo Bay Parish in 1974. He sexually abused boys in that parish. Ridsdale told the Catholic Church Insurances investigator that he left Apollo Bay in

February 1975 because he was confronted by a man who accused him of interfering with children. Ridsdale put in for a transfer.

### **Applicable Canon Law**

#### *Secreta Continere* (Promulgated 14 February 1974)

The secret of the Holy Office was replaced with the pontifical secret, the only significant difference is that the penalty for breaching it could be excommunication, but it was not automatic. It was still a “permanent silence”, and it was extended to all “delicts against faith and morals”, and not just the four mentioned in *Crimen Sollicitationis*: soliciting sex in the confessional, homosexuality, bestiality and the sexual abuse of children. It also covered allegations and information from the canonical processes about adultery, homicide, kidnapping, seriously wounding, fraud and incest by a priest.

The strictest confidentiality was extended to cover not just information about child sexual abuse but the “extrajudicial denunciation” as well. Any allegation reported to the bishop amounts to an “extrajudicial denunciation” because he is the priest’s superior. There was only one exception – the accused priest could be told of the allegation if it were necessary for this defence. There were no exceptions for reporting to the civil authorities.

*Crimen Sollicitationis* was still in force and there was no limitation period for bringing canonical proceedings against Ridsdale for dismissal or other forms of permanent restriction on ministry.

64. The Consultors minutes record the decision to move him to Inglewood in 1975. The Consultors present at that meeting were Bishop Mulkearns, Father F Madden, Vicar General, Monsignors Fiscalini, O’Brien, W McMahan, O’Keefe, McKenzie and McNerney and Fathers P Calligan, W Mellican and K Arundell.
65. Ridsdale was in Inglewood from February 1975 until late 1975 or early 1976. Ridsdale was later convicted of offending against nine children while parish priest at Inglewood. The Royal Commission has had contact from another two people reporting sexual abuse by Ridsdale during his time there.

This conviction occurred in 1993 (Broken Rites site)

66. The evidence is expected to show that Ridsdale told Bishop Mulkearns in 1975 to expect a complaint by a parent that Ridsdale had interfered with his son. (Transcript 8655). That parent was a police officer. A complaint was made to Bishop Mulkearns whose response was to send Ridsdale for counselling by a Franciscan priest, Father Peter Evans. Bishop Mulkearns kept no notes of that referral.

### Applicable Canon Law

On 13 January 1971, Pope Paul VI authorised the CDF to dismiss a priest administratively for living a “depraved life”, which would include the sexual abuse of children.

On 14 October 1980, Pope John Paul II took away this jurisdiction and the only way that such jurisdiction could be exercised by the CDF was with the consent of the accused priest. The only way to dismiss a priest after 1980 was through a judicial penal trial under *Crimen Sollicitationis*.

Until 1980, Mulkearns had two means of having Ridsdale dismissed, and the limitation period of 5 years from the date of the complaint had not yet been introduced with the *1983 Code of Canon Law*.

It is arguable, however, that Mulkearns was still acting in accordance with Art 42. and Art. 63 of *Crimen Sollicitationis* in referring Ridsdale to counselling, and not taking proceedings against him.

67. Then Father, now Mr Evans was contacted by Victoria Police in 1995. The police record him as having told them that he did not see Ridsdale in a professional sense for counselling.
68. I will say more about the treatment Ridsdale received.
69. Catholic Church Insurances did not indemnify the Diocese of Ballarat for any claims arising from events after 31 December 1975, presumably because of the knowledge Bishop Mulkearns had of Ridsdale’s offending from that time.

70. In January 1976, the Consultors meeting minutes record Ridsdale as being appointed temporarily to Bungaree until the end of February. Most of the Consultors present were at the 1975 meeting when Ridsdale was moved to Inglewood.
71. The same minutes record that Bishop Mulkearns discussed the need for confidentiality and that 'some matters had arisen in the diocese which might make it advisable to delay making any appointments. At this stage moves should be kept to a minimum'.

### **Applicable Canon Law**

The warning about confidentiality is consistent with *Secreta Continere* which had been promulgated the year before, and which applied to allegations of child sexual abuse by clergy as well as any information obtained through canonical investigations and trials. Canon 471§2 requires all those who are admitted to offices in the Curia to "observe secrecy within the limits and according to the manner determined by law or by the bishop." In this case, the secrecy was determined by law, namely *Secreta Continere*. It was the Church's highest form of secrecy. The preamble to *Secreta Continere* took away any discretion in the bishop and effectively took away any appeal to conscience of the bishop or his consultors.

"In fact it is clear that in the public arena, the good of the whole community is involved, and it is not a matter where it is appropriate to act in accordance with one's conscience in accordance with the instructions of the one who has legitimate care of the community and who can establish when and in what manner and over what serious matters the secret ought to be imposed.... in certain matters of greater importance, there has to be a particular secret that is called the pontifical secret and it must be kept under a serious obligation."

72. In March 1976, Ridsdale was appointed to Edenhope as an administrator, and then in January 1977 as the parish priest. Each appointment was discussed with the Consultors. Bishop Mulkearns has said that the appointment to Edenhope was based on advice from Father Evans, however he did not keep any record of that communication.

Mulkearns says he "never heard of any problems during the time he was at Edenhope: Exh. CCI.0001.00632.0160\_R, p. 2

73. No record has been produced indicating any condition or restriction was placed on Ridsdale when he was appointed to Bungaree or Edenhope.

#### **Applicable Canon Law**

Bishop Mulkearns could have withdrawn Ridsdale's faculties to operate publicly as a priest under the 1917 Code of Canon Law, but the withdrawal was a "medicinal" penalty and could only be temporary.

74. Ridsdale was convicted of offending against 13 children while parish priest at Edenhope. The Royal Commission has had contact from an additional 11 persons reporting sexual abuse by Ridsdale during his time there.
75. Monsignor Henry Nolan was a priest at Edenhope less than two years after Ridsdale. He told the Catholic Church Insurances investigator that no one told him about Ridsdale's activities.
76. Father McKinnon became parish priest of Edenhope in July 1991. He told the Catholic Church Insurances investigator that he knew as a priest coming into the area about Ridsdale abusing children. He told the Catholic Church Insurances investigator that 'that was just what we talked about as priests and so on'.

#### **Applicable Canon Law**

During the time in Edenhope, *Crimen Sollicitationis* of 1962 was still in force, with its secrecy provisions modified by *Secreta Continere* of 1974 (and with the pontifical secret now applying to the allegation). There was no limitation period applicable, and the simpler administrative procedure (which existed between 1971 and 1980) was available for dismissing a priest by request to the CDF. However, Bishop Mulkearns denies any knowledge of offending at Edenhope, and information about this only came to him much later. (Exh CCI.0001.00632.0160\_R, p.2)



77. Ridsdale took a year off in 1980 to study at the National Pastoral Institute in Melbourne. He offended there.

There appears to be no allegation, at least in this address, that Mulkearns knew about these allegations up until this time.

### **Mortlake**

78. Ridsdale was appointed parish priest of Mortlake in January 1981. The Consultors present at the meeting where this was decided were Bishop Mulkearns, Monsignor Fiscalini and Fathers McKenzie, Downes, Arundell, Frank Madden and Melican. Father Pell was an apology.
79. Ridsdale was a prolific offender during this appointment. There will be evidence that his behaviour around boys was no secret in Mortlake.
80. Father Brian Finnegan was the bishop's secretary in 1981 and 1982. He told the Catholic Church Insurances investigator that he had received complaints about Ridsdale's being over-friendly with boys at Mortlake and confronted Ridsdale about those complaints. He reported that Ridsdale was 'most crestfallen'.
81. There were at least two reports to Bishop Mulkearns from different sources about Ridsdale's offending in Mortlake.
82. Monsignor Fiscalini was the Vicar General of the Diocese of Ballarat until July 1982. In that capacity he was approached by a parent distressed about their child being sexually molested by Ridsdale. He told the Catholic Church Insurances investigator that he reported it to Bishop Mulkearns and Ridsdale was removed.
83. The principal of the school, a nun, told the Catholic Church Insurances investigator that she was told by one of the parents that Ridsdale was abusing 'half the boys in the school'. She spoke with Sister Vagg, the superior at the convent. Sister Vagg then rang the Bishop who told her to tell Ridsdale about the complaint, so that he would stop. She did that, and she said that Ridsdale said he did not know why it had come up at that stage.

84. The evidence is likely to reveal that Monsignor Nolan was told by Bishop Mulkearns, after Bishop Mulkearns spoke to the nuns, to go to Mortlake. Monsignor Nolan recalled to the Catholic Church Insurances investigator that while he was at Mortlake, a boy might have been staying in the presbytery. Monsignor Nolan said when he raised it with Ridsdale, Ridsdale said, 'what's the problem'.
85. A transcript of an interview Bishop Mulkearns had with the Catholic Church Insurances investigator in 1993, records him as saying there were complaints of inappropriate behaviour with young children, boys from Mortlake, 'so he was taken out of there'. He told the investigator:
- I know there were specific complaints that he was engaging in inappropriate behaviour with young children and I think, boys. As I said there were no specific complaints made, but there was an approach to Monsignor Fiscalini, who was Vicar General at the time by people from Mortlake, complaining about his behaviour and there was also a Doctor in Mortlake who contacted me about it and that people were concerned about what was going on.
86. In a further interview in 1994, Bishop Mulkearns said that two parents from Mortlake came to see him on 11 and 12 August 1982. On 15 August he went to Mortlake for a confirmation. On that visit he became aware that a boy was living at the presbytery. He did not think it appropriate. He did not confront Ridsdale about it. He said there was no suggestion that there had been any interference 'whatsoever' with that boy in the house.
87. The principal told the Catholic Church Insurances investigator that she was forbidden by the Bishop to speak to the rest of the staff about what had happened. She said she told the Bishop something should be done for the children and he said there would be nothing done because that would admit guilt.

### **Applicable Canon Law**

Mulkearns' instruction to the staff is consistent with *Secreta Continere* that imposes the pontifical secret on all allegations of child sexual abuse by clergy, and binds even those who accidentally come across the information: Art 1(4) and II(4). It did not, however, prevent the

victim from going to the police because his knowledge derived from his personal knowledge of what happened and not from any allegation.

88. Ridsdale was referred by Bishop Mulkearns for counselling from Father Augustine Watson, described by Bishop Mulkearns as a 'Franciscan Priest Psychologist'. No notes of this referral have been produced to the Royal Commission.
89. Bishop Mulkearns told the Catholic Church Insurances investigator that he did not take it as his position to report Ridsdale to the police.

### **Applicable Canon Law**

Mulkearns' statement is consistent with *Secreta Continere*, and with the policy that has been stated continuously by senior Curia Cardinals and officials, other senior Cardinals and canon lawyers especially in the period from 1996 to 2002. The dispensation to allow reporting to the police was only given in 2010, and then it was limited to where the civil law required reporting. There were no reporting laws in Victoria that would have required a bishop to report until 2014.

90. Ridsdale was discussed at the Consultors' meeting on 14 September 1982. Present at that meeting were Bishop Mulkearns, Monsignor Leo Fiscalini and Fathers Henry Nolan VG, George Pell, David Arundell, J Martin and E Bryant. The minutes of that meeting note the following under the heading 'staffing':

The Bishop advised that it had become necessary for Fr Gerald Ridsdale to move from the Parish of Mortlake. Negotiations are under way to have him work with the Catholic Enquiry Centre in Sydney. A new appointment to Mortlake will be necessary to take effect after October 17<sup>th</sup>.

91. The minutes do not disclose what the Bishop said about why it became necessary. However, as indicated earlier, it is expected that there will be evidence that Bishop Mulkearns knew it was because Ridsdale had abused boys in Mortlake, and that he had offended in this manner in 1975. Several of the Consultors had been present at meetings of, or were members of the College of Consultors on each occasion in the past when Ridsdale had been moved.

92. After Ridsdale was removed from Mortlake, the Consultors agreed that as no one had applied for the position of parish priest there, Father Denis Denehy be appointed as Mortlake parish priest from 23 October 1982.
93. Father McKinnon told the Catholic Church Insurances investigator that Father Denehy had told him the following: on his first night there, Father Denehy was stood up against the wall by four parents who told him if he interfered with any of the kids he would be gutted. Father Denehy was told that Ridsdale had attempted to molest nearly every boy in the school. Father Denehy organised counselling from a non-Catholic source for parents.
94. Father Denehy told the Catholic Church Insurances investigator that he thought every male child between the ages of ten years and sixteen years who was at the school was molested by Ridsdale.

#### **Applicable Canon Law**

During Ridsdale's time at Mortlake, *Crimen Sollicitationis* was still in force, with its secrecy provisions modified by *Secreta Continerere*. The simpler administrative procedure of requesting a dismissal from the CDF had been abolished in 1980. Leaving aside suspension of faculties, the only other avenue available to Bishop Mulkearns was the judicial procedure. There was no limitation period, but the obligation was still on the bishop to "cure" the priest.

#### **Catholic Enquiry Centre, Sydney**

95. On 15 November 1982, Ridsdale was moved to the Catholic Enquiry Centre in Sydney. A priest was needed to answer the written enquiries of a correspondence course offered. Bishop Mulkearns offered the services of Ridsdale to the Centre.
96. Father Fitzpatrick was the director of the Centre. Father Fitzpatrick and Ridsdale lived at the Centre with a housekeeper.
97. Father Fitzpatrick told the Catholic Church Insurances lawyer that Bishop Mulkearns had told him the transfer was as a result of sexual matters. He also said that Bishop Mulkearns told him that before Ridsdale came to Sydney Ridsdale had trouble with little boys and he wanted him out of the situation in the Diocese of Ballarat.

98. In his 1994 interview with the Catholic Church Insurances investigator, Bishop Mulkearns said that Father Fitzpatrick was advised of the problem, 'but I just cannot remember who else was advised'.
99. The secretary of the Centre told the Catholic Church Insurances investigator that Father Fitzpatrick had been told that there was some sort of problem with Ridsdale and a young boy in Ballarat which is why they preferred to have him out of their diocese.
100. On 19 November 1982, Bishop Carroll granted Ridsdale faculties of the Archdiocese of Sydney for the duration of his stay. The Archbishop of Sydney at that time was Cardinal Freeman.
101. In early 1983, Archbishop Clancy became Archbishop of Sydney. A summary of what Cardinal Clancy told the Catholic Church Insurances investigator in 1993, records that Bishop Mulkearns had taken him aside at the Australian Catholic Bishops Conference meeting in 1983 and explained that Ridsdale had certain sexual problems and was under professional treatment. Ridsdale had come to Sydney to get away from the problems in Victoria.
102. Cardinal Clancy said he accepted Ridsdale on the same basis that Cardinal Freeman had. That is, that he would work at the Centre, that he would not be in contact with children and he would continue with his counselling. No notes were taken of the discussions between Bishop Mulkearns and the Cardinal.
103. Cardinal Clancy is recorded as having also told the Catholic Church Insurances investigator that letters involving transfers often did not include explicit details of the reasons the transfer was taking place.
104. There is expected to be evidence that the secretary of the Centre told the Catholic Church Insurances investigator that Father Fitzpatrick used to go away for weekends and that many children visited Ridsdale at the Centre while he was away. Occasionally, she said, children stayed overnight. They were mainly young boys and Ridsdale regularly used to take an unaccompanied boy and girl to White Cliffs in NSW, usually for school holidays. White Cliffs was where Ridsdale had a holiday home.

105. Father Fitzpatrick told the Catholic Church Insurances lawyer that his job was not to supervise Ridsdale out of hours.
106. The Centre was across the road from a primary school.
107. Within 12 months, the secretary said Ridsdale had established a 'firm friendship' with the Maroubra Beach Parish. He also had a Prayer Group. He offended against a boy who was part of that group.

### **Applicable Canon Law**

On 27 October 1983 the *1983 Code of Canon Law* came into force. It significantly restricted the capacity of a bishop to deal with a priest sex abuser.

Canon 1362: imposed 5 year limitation period. The canonical crime of sexual abuse of children was "extinguished" once 5 years had expired since the abuse took place.

Canon 1321: The "imputability" defence was the equivalent to insanity in civil law. It effectively meant that the more children a priest abused, the less likely he could be dismissed.

Canon 1341: The "pastoral approach" to offenders was expanded so that the bishop had to try to cure the priest before he subjected him to a canonical trial.

Canon 1722: Allowed suspension of a priest only after preliminary inquiry completed and penal trial commenced, that is, only after the "pastoral approach" had failed.

Canon 1741: Allows a bishop to remove a pastor from a parish and to shift him elsewhere because of a "loss of a good reputation among upright and responsible parishioners". But all he could do was to shift the priest somewhere else.

Canon 1333: The Bishop can suspend or restrict the priest's faculties, limiting his power of orders (which would include saying Mass and administering the sacraments) but it is a "medicinal" measure". Canon 1333 "seeks to motivate the cleric to be reinstated." Beal, Coriden & Green: *New Commentary on the Code of Canon Law* p. 1552.

Canon 974: Bishops are "not to revoke the faculty to hear confessions habitually except for grave cause."

108. Marika Gubacsi was the President of the Yarra Bay Eucharistic Prayer Community. In 1993 she signed a statement that in early 1983, Ridsdale was celebrating Mass at Yarra Bay and BAO became his altar boy. This was at a time when one of the conditions on which he was in Sydney was no contact with children. There is expected to be no evidence that he was supervised or limited in any way as to the work he carried out while at the Centre.

The Yarra Bay Eucharistic Prayer Community was a private prayer group that was not part of “parish activity”. Ridsdale could not remember how he came across them: Transcript 28 May 2015, p.8697. His work at the Catholic Inquiry Centre was a “desk” job, and did not entail of itself contact with children, although he did have to visit parishes from time to time. This is an illustration of the point made by the Murphy Commission about the removal of faculties:

“The Commission does not consider that an order to stay away from children, or to minister only to adults, or to meet children only when accompanied by another adult, is adequate. It is virtually impossible for such orders to be enforced.”<sup>866</sup>

109. Ridsdale told the Catholic Church Insurances investigator that while he was in Sydney he relieved at the Bulli Parish, in the Diocese of Wollongong, for three consecutive weekends. BAO came and stayed with him on at least two of those weekends, and Ridsdale offended against him.

110. Father Fitzpatrick told the Catholic Church Insurances lawyer that Ridsdale did some parish supply work at his instigation on one or two occasions, and that any other parish supply work was of a private nature, and not known to him.

111. In June 1983, Father Fitzpatrick asked Bishop Mulkearns to allow Ridsdale to stay for a further year. This request was approved at the Consultors meeting on 8 August 1983, which included Bishop Mulkearns, Monsignor L Fiscalini, Vicar General Father Henry Nolan, Fathers G Pell, Arundell and J Martin. These members had been present at the meeting where Bishop Mulkearns advised that Ridsdale had to leave Mortlake.

112. Father Fitzpatrick is recorded as having told the Catholic Church Insurances lawyer that by mid-1984, he had heard a number of things about Ridsdale which made him suspicious. He told Bishop Mulkearns about those things, although at the time of the interview in 1993 he

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<sup>866</sup> Murphy Dublin Report Part 1 <http://www.justice.ie/en/JELR/DACOI%20Part%201.pdf/Files/DACOI%20Part%201.pdf> par 4.17-4.28, 4.90 (Accessed 25 April 2013)

could not remember what they were. He remembers saying words to the effect that 'something should be done about this. I can't be his therapist.'

### **Applicable Canon Law**

Ridsdale went to the Catholic Inquiry Office in 1982. The five year limitation period would not have expired at this time. However, there were no specific allegations, only Fr Fitzpatrick's "suspicions".

113. Father Fitzpatrick said that Bishop Mulkearns responded in a letter dated 3 September 1984. In that letter, Bishop Mulkearns wrote:

I might add that I had a good discussion with him about the problem which arose early in the year and of which we spoke prior to your departure for overseas. He was quite open about the situation and said that he has discussed it with the Melbourne priest who is advising him and certainly hopes that it is not something which will crop up again.

114. In 1985, Bishop Mulkearns wrote to Father Fitzpatrick and said that he contacted Father Augustine Watson about the possibility of Ridsdale helping out in one or more of the parishes close to the Centre. He also spoke with Bishop Heaps and Archbishop Clancy. They approved this plan.
115. The Archdiocese of Sydney Consultors meeting minutes of 4 December 1985 state 'Mention was also made of Rev. G. Ridsdale's availability during 1986 to work in the diocese. He could possibly help at Narraweena until a new pastor appointed.'
116. By December 1985, Father Fitzpatrick said that he had been told that a boy stayed the night at the Centre. He contacted Bishop Mulkearns and said 'I want him out of here'. Ridsdale left the Centre by the end of that year.
117. Notwithstanding these complaints, Ridsdale was appointed to Woy Woy Parish as an assistant priest in January 1986, and as the administrator of Forestville in April 1986 for six weeks. Both of these parishes were in the Archdiocese of Sydney. Bishop Mulkearns said he thought it



would not be a problem for Ridsdale to go to a parish because he had been in counselling for two years.

### **Applicable Canon Law**

It is arguable that Mulkearns was still acting within the pastoral approach required by Canon 1341 of the 1983 Code. The previous requirement in *Crimen Sollicitationis* that existed within the Church for some 61 years provided that dismissal of a priest was possible only if there was “no hope humanly speaking, or almost no hope of amendment.” Even though these words were not repeated in the 1983 Code, that was the culture that *Crimen Sollicitationis* had endorsed and deepened within the Church over that time, and it was reflected in Canon 1341.

### **Horsham**

118. Ridsdale then returned to Victoria and was appointed assistant priest in Horsham from July 1986. Ridsdale was appointed to Horsham on the advice of Father Augustine Watson, because Ridsdale was friends with Father Frank Madden who was the parish priest of Horsham.
119. In a 1993 interview with the Catholic Church Insurances investigator, Father Madden said that when Ridsdale was appointed to Horsham in July 1986, he ‘knew that he had been in some sort of trouble, but I was not told what had occurred and I really did not want to know’.
120. Father Madden also said, ‘I did not know his prior history and what I did know was, that he had had some trouble and he had had counselling, I believe, and he was supposedly quite fit for Parish work’. He said he became aware of Ridsdale’s propensity towards young boys when Ridsdale was transferred from Horsham Parish in 1989.
121. Bishop Mulkearns explained the decision to appoint Ridsdale to the Horsham Parish. He told the Catholic Church Insurances investigator that Father Watson advised that it would be ‘a responsible thing to put him back into parish work’. Again no notes were taken of this discussion. Bishop Mulkearns also said that ‘we did not know anything that had happened in Sydney’. That statement is not consistent with the expected evidence which is set out above.
122. This appointment to Horsham was discussed with the Consultors, most of whom were present at the 1982 meeting where Bishop Mulkearns revealed that it had become necessary to move Ridsdale from Mortlake.

123. A written complaint was received by Bishop Mulkearns in August 1987 about Ridsdale's offending against BAE while in Horsham Parish. The abuse occurred at White Cliffs. Ridsdale was not moved from the Parish for about another six months, and then only after Bishop Mulkearns received a letter from BAE's solicitor.

This complaint was within the 5 year limitation period imposed by the 1983 Code of Canon Law.

124. It was not until April 1988 that Ridsdale stepped down from parish work. Bishop Mulkearns advised his Vicar General and the Consultors in similar terms to his description of why Ridsdale had to move from Mortlake. That is, it became necessary to remove him from parish ministry.

125. Ridsdale's faculties were suspended in June 1988 for 12 months.

#### **Applicable Canon Law**

Suspension of faculties is provided by Canon 1333. However, the suspension of faculties cannot be a permanent measure and the 12 month period is consistent with the requirements of suspension being a "medicinal" remedy.

Had Mulkearns carried out a preliminary investigation and subjected Ridsdale to a canonical trial, he would have been able to suspend him from the priesthood pending the outcome of the trial. But without such a canonical trial, there was no jurisdiction to suspend him indefinitely by what was sometimes termed, "administrative leave". Such a jurisdiction to suspend while the investigation was carried out was only given to bishops by *SST 2010*.

There were other impediments to conducting a canonical trial, and that was the existence of the 'imputability' defence in canon 1341 and was one of the main reasons why in the United States canon lawyers there saw little point in having a canonical trial.

These fears were confirmed by the decision of the Roman appeal courts when two serial paedophiles, Fr Tony Walsh and Fr Patrick Maguire had their dismissals by the Dublin canonical court overturned because they had been diagnosed as paedophiles. Ridsdale and Ryan were in the same league.

We do not know about Mulkearns' thought processes, but as a canon lawyer and being heavily involved in these issues as part of the Canon Law Society of Australia and New Zealand and as being the first chairman of the Special Issues Committee set up by the Australian Catholic Bishops Conference in 1988, he would have been aware of the problems that canon lawyers in other parts of the world were experiencing. Fr Thomas Reese SJ, in a report to the 1992 United States Catholic Bishops Conference wrote that the *1983 Code of Canon Law* makes it "almost impossible for bishops to dismiss priests for sexual abuse."

126. Thirteen years had passed since Bishop Mulkearns first knew that Ridsdale was sexually abusing boys he met during his work as a priest. Ridsdale had been at some nine parishes and other church locations during this time and abused more than 50 children.
127. Ridsdale will not be asked about the details of his offending conduct nor will the names of those he offended against be revealed. The questioning will concern his formation and what shaped him early in his religious life, who he told about his offending, who spoke to him about complaints, and what was done as a result of those complaints or disclosures.
128. In 1995, Victoria Police investigated allegations that Bishop Mulkearns may have committed offences in relation to concealing a felony or a serious indictable offence. Although the police found that there was evidence that Bishop Mulkearns was aware that criminal offences were committed by Ridsdale, they found that there was no evidence to support charging him with a concealing offence.

Misprision of felony was abolished in Victoria in 1981, and it was replaced by a provision that only made it an offence to receive some benefit in return for concealment. The mandatory reporting legislation for children at risk did not apply to clergy.

#### **Treatment**

129. As has been indicated, from 1961 and particularly between 1975 and 1990 Ridsdale is reported as having received treatment from a number of practitioners or institutions. Who sent him and why, and with what effect, will begin to be addressed in the evidence.
130. Ridsdale told the Catholic Church Insurances investigator that he was not sent to a doctor by Bishop O'Collins in the early 1960s following a complaint made during his first year as a priest.

However, there is expected to be evidence that Bishop Mulkearns removed from Ridsdale's file and destroyed a letter sent by a psychiatrist, Dr R E Seal, to Bishop O'Collins.

131. Bishop Mulkearns is recorded as having destroyed this letter before Ridsdale was charged and before Bishop Mulkearns himself was interviewed by the Catholic Church Insurances investigator. In a memorandum he signed, Bishop Mulkearns said he did that because he thought the letter was 'privileged', and because he had in mind the effect on other priests of the diocese if the documents were made public.

Many senior Church figures believed that such communications were "privileged" in civil law, or at least ought to be: see statements by Archbishop Bertone, Cardinals Castrillon and Bille referred to in the submission. The American Church had also been trying to establish this privilege through the American Courts.

132. Bishop Mulkearns said that the letter made no reference to the reason Ridsdale had been referred to Dr Seal by Bishop O'Collins. He recalled that the letter said that Dr Seal had seen Ridsdale and was confident that, with appropriate care, he could function as a priest in the future. The letter was dated in the early to mid-sixties.
133. Bishop Mulkearns has said that he sent Ridsdale for counselling shortly after Ridsdale admitted to offending against a boy at Inglewood in 1975. The evidence is likely to reveal that Ridsdale was initially sent to Father Peter Evans for one week of treatment which Ridsdale described as 'simply relaxation technique stuff'.
134. There is expected to be evidence that Peter Evans told Victoria Police in 1995 that he did not treat Ridsdale in a professional capacity. Mr Evans thought it likely that Ridsdale attended a 'retreat' which he described as a 'drop in centre'.
135. In his 1995 interview with the Catholic Church Insurances investigator, Bishop Mulkearns reported that Ridsdale was first sent to Father Evans and then to Father Watson for counselling. He reported, 'I only appointed him after I was given assurance that he was ready to be appointed again. However, I am not sure who gave the assurance.' Specifically, he said that he was not sure whether it was Father Evans, or Ridsdale himself, who had told him that

Father Evans had said that Ridsdale could be appointed again. That advice was not given in writing and Bishop Mulkearns did not make a record of this telephone conversation.

136. Ridsdale then was appointed to Edenhope. In his 1993 interview with the Catholic Church Insurances investigator, Bishop Mulkearns reported that to his knowledge Ridsdale was having counselling while he was at Edenhope. The evidence is expected to be that Ridsdale commenced counselling again after he left Mortlake Parish.
137. In 1982, following his departure from Mortlake Parish, Ridsdale received counselling from Father Watson. The evidence is expected to be that this counselling continued, off and on, until Ridsdale travelled to the United States of America for treatment in late 1989.
138. In a 1989 letter to Bishop Mulkearns, Father Watson described the methodology he used with Ridsdale as being based on the work of Victor Frankl and drawing together emotional, rational and spiritual dimensions. He said:

I do not believe that this – or any other serious problem – can be resolved purely by psychology. At the best, psychology is only a useful tool. And I am sure that Frankl's Logotherapy is the best available, mainly because he insists that man is essentially a spiritual being and that the most prevalent psychological illness in the modern world is a spiritual neurosis. Therefore, the ultimate solution is in our Faith, if thoroughly understood and practised.

139. Bishop Mulkearns told the Catholic Church Insurances investigator that on at least two occasions he consulted with Father Watson regarding Ridsdale's placements. Bishop Mulkearns suggests he discussed with Father Watson the possibility of Ridsdale helping out in one or more parishes close to the Catholic Enquiry Centre in Sydney.
140. Bishop Mulkearns also said that he consulted with Father Watson about placing Ridsdale in Horsham in 1986. In his 1994 interview with the Catholic Church Insurances investigator, Bishop Mulkearns said that Father Watson had advised that it would be 'a responsible thing to put him back into parish work'.

141. No records have been produced of any discussion between Bishop Mulkearns and Father Watson about these matters.
142. In a 1989 letter to Bishop Mulkearns, Father Watson wrote 'I insisted that he [Ridsdale] should see a spiritual director regularly, and this worked well while he was in Sydney and had a director available.' He also wrote, 'at one stage, I think I did not see him [Ridsdale] at all for something like 12 months'.
143. From November 1989 until September 1990, Ridsdale attended a residential program at a centre run by the Servants of the Paraclete in New Mexico. The director of the centre informed Bishop Mulkearns that the program was both psychological and spiritual.
144. The psychological component was reported as involving both individual and group therapies, while the spiritual component was reported as involving spiritual direction and both common and personal prayer. At the end of his time in New Mexico, staff of the centre, including a spiritual director, art therapist and psychodramatist made positive comments about Ridsdale's progress while at the centre.
145. The director of the centre sent regular reports on Ridsdale to Bishop Mulkearns, however requested that these reports be either returned or destroyed. None of these reports have been produced to the Royal Commission.
146. The evidence is likely to reveal that an Australian psychiatrist, Professor Richard Ball, commented in 1993 that none of the treatment at this centre was behavioural, that there was limited specific attention to sexual matters and that much exploration and monitoring was by self-report.
147. Professor Ball also reported that the centre had either been closed or markedly reduced in activity and was itself under litigation in relation to the abnormal sexual behaviour of someone who was there at the same time as Ridsdale.

Religious Orders and Congregations within the Church have arisen historically in response to a particular social problem. In 1947, Fr Gerald Fitzgerald saw that there were serious enough alcohol and sexual problems within the clergy in the United States to justify founding a

separate religious congregation called the Servants of the Paraclete. Fitzgerald had consistently recommended a zero tolerance approach for priests who sexually assaulted children, because of their tendency to recidivism. He told the hierarchy that such clergy should be immediately dismissed from the priesthood. He did this in letters to American bishops and to the Vatican, and to Pope Paul VI with whom he discussed the matter in 1963.<sup>867</sup> His warnings were ignored.

All of the treatment that Ridsdale received was within the confines of the Catholic Church. In 1993, Professor Ball observed that this was a common approach of the Catholic Church at that time.

This reflects what Christopher Geraghty wrote in 2013 from his experience as a priest and seminary professor within the Church, but one might also add now “treatment centres”:

“... the Church has for centuries presumed that it can police its own borders, that it is an independent empire, not answerable to any secular power. It has had its own language, its own administration and training programmes, its own schools and universities, its own system of laws and regulations, its police force and lawyers, a developed list of penalties and its own courts and processes. A law unto itself—an organisation founded by God and answerable only to God.”<sup>868</sup>

148. The evidence is expected to be that notwithstanding that Ridsdale received counselling from Father Evans and Father Watson, he continued to offend. This observation was made by Professor Ball who specifically noted that the help Ridsdale received from Father Watson decreased but in no way eliminated his behaviour.
149. Professor Ball reported that ‘Father Watson’s treatment whilst helpful was in no way specific or specifically remedial in any sense and ... if helpful at all was only partially so’. Despite the fact that Ridsdale continued to offend while receiving counselling, no alternative treatment was sought outside the confines of the Catholic Church.

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<sup>867</sup> See Potiphar’s Wife, p. 335 and the list of letters by Fitzgerald: <http://ncronline.org/news/accountability/bishops-were-warned-abusive-priests> (Accessed 19 May 2013), Michael D’Antonio: *Mortal Sins* at 299. And see <http://ncronline.org/news/accountability/disagreement-why-abuse-warnings-were-ignored> (Accessed 9 July 2013)

<sup>868</sup> Christopher Geraghty in “Sexuality and the Clerical Life” in *Sexual Abuse, Society and the Future of the Church*, Interface: A Forum for Theology in the World Volume 16, Number 1, 2013, ATF Theology, Adelaide (2013)

## THE ROLE OF FATHER LUCAS

150. There are a number of matters relevant to this case study which involved Father Brian Lucas.
151. By October 1989 Father Lucas was a member of the Special Issues Committee of the Australian Catholic Bishops Conference, and a member of the National Committee for Professional Standards. His role was to act as a source of advice and assistance to leaders within the Catholic Church in respect of providing guidance on and dealing with concerns about and complaints of child sexual abuse.
152. The operation of these committees is relevant to the Royal Commission's examination of the Church authorities' response to, among other matters, the offending by Ridsdale.
153. First, the evidence is expected to be that Father Lucas had discussions with the family of BAE after their complaint to Bishop Mulkearns in 1987 and that he met with Bishop Mulkearns about their complaint.

### Applicable Canon Law

Father Lucas was equally bound by the pontifical secret under *Secreta Continere* of 1974, because it applied to all allegations of sexual abuse made to the accused priest's superior, the bishop or other diocesan officia. If the matter was referred on to Father Lucas in that way, he was bound by the pontifical secret under Art II(1) and (4) of *Secreta Continere*.

154. Second, Cardinal Clancy told the Catholic Church Insurances investigator that he discussed a complaint from the BAL family with Father Lucas. He said that by that time, the Church had prepared a protocol for handling such matters. Part of that protocol was for Father Lucas and Father Usher to visit the family.
155. According to a record of a 1994 meeting between Bishop Mulkearns and the Church and Catholic Church Insurances' legal advisers, Bishop Mulkearns said 'The complaint was made to the Cardinal and brought to my attention. I spoke to Brian Lucas about it. They thought it was going all right.'



156. Third, in 1988 Ms Gubasci, the president of a Yarra Bay prayer community, was told that BAO had disclosed that he had been abused by Ridsdale. She told the group's spiritual director, Father Keith Comer. In a statement, she said she was told that Fathers Lucas and Usher visited the family the next evening.
157. In this statement she also records that in early 1993, having read that Ridsdale had been charged with sexual offences on boys in Victoria, she spoke to the Dean of St Mary's Cathedral about Ridsdale's conduct in Sydney. She states she asked the Dean, Father Redden, whether there would be other media reports about Ridsdale. Father Redden replied, 'I give you my word it will never come to the Hinch program, or anything like that'.
158. She then contacted Father Lucas who she quotes as saying 'you don't have to worry about the media, Gerry's case will never come to Sydney. I am in touch with BAO family and we will take care of BAO'.
159. Fourth, Father Glynn Murphy, the Diocesan Secretary to Bishop Mulkearns, told the Catholic Church Insurances investigator that around 1993 he had spoken to Father Lucas who told him that he and Father Usher were 'dealing with' mothers of children in a prayer group who said they were interfered with by Ridsdale while he was working at the Centre.
160. Fifth, also in 1993, Father Lucas engaged solicitors on behalf of Bishop Mulkearns about 'employment issues'. Father Lucas signed the letter of engagement as 'client' for Bishop Mulkearns.
161. Finally, in October 1993, the Catholic Church Insurances investigator recommended further interviews with parish priests in the Archdiocese of Sydney about their knowledge of Ridsdale. He suggested that Father Lucas should initially contact them in order to put them at their ease and to gain their full co-operation.

The opening address is not specific enough to determine whether Bishop Mulkearns in other cases could have brought canonical proceedings to dismiss Ridsdale. However, even if some of them were within the 5 year limitation period, there were other provisions in the canons that made such a resort pointless. At the various inquiries in Australia, the chances of dismissing a priest through a canonical trial were variously described as "very difficult" (Cardinal Pell),

“close to hopeless” (Bishop Malone) “very, very difficult” (Archbishop Hart) “extraordinarily difficult” (Archbishop Coleridge) and the whole procedure was “unworkable” (Fr Brian Lucas). These views are supported by experience overseas, particularly in the United States and Ireland.

## **RYAN**

162. The Royal Commission will receive into evidence a transcript of a private hearing conducted with Paul David Ryan. Ryan is a Catholic cleric ordained in the Diocese of Ballarat. Ryan gave the following evidence.
163. Ryan joined the St Francis Xavier Seminary in Adelaide when he was about 19 or 20 years old in his second year after completing high school. Ryan told the Royal Commission that he remained there for two years until he was asked to leave. Ryan explained that he was never given a reason for being asked to leave other than they might have said he was unsuitable. He said, in hindsight, he may have been asked to leave because they knew he was gay.
164. A few years later, he entered the Corpus Christi Seminary in Werribee, Victoria. While a seminarian there, Ryan engaged in sexual activity with other seminarians. He did not know whether those running the seminary were aware of his activities.
165. Ryan said that he thought he was doing the wrong thing and that he reconciled his activities by going to confession with his regular confessor and mentor, Father Ronald Pickering. Ryan felt the need to confess because he believed the sexual act itself was a sin. After going to confession Ryan felt that his relationship with God was re-established.
166. Ryan gave evidence that when he was at Corpus Christi, the challenges and issues of dealing with celibacy were not formally addressed. He said that the implication was that celibacy was learnt by abstinence. Celibacy was put in a positive light – along the lines of ‘you give this up so that you can serve’.
167. Ryan worked as a deacon for three months at St Columba’s Parish in Ballarat North prior to his ordination. While at St Columba’s he was involved with a boy or young man from the choir. Ryan said he thought that the boy or young man was over 18 years old, but accepted that he

could have been younger than 18. Ryan gave evidence that he probably went to confession about this. If he did confess to his parish priest, Ryan said that priest was bound not to disclose what had been confessed to him.

168. On 28 May 1976, Ryan was ordained as a priest of the Diocese of Ballarat.

### **Applicable Canon Law**

*At the time of his ordination, clergy sexual abuse was still governed by *Crimen Sollicitationis* 1962, but the secret of the Holy Office had been replaced by the pontifical secret by *Secreta Continere* of 1974.*

169. Ryan told the Royal Commission that after his ordination he returned to Corpus Christi for some time and then lived with Father Pickering for about a year. During this time he was referred by the rector of Corpus Christi to see Ronald Conway, a psychologist used by the Catholic Church. Ryan said he thought that the reason he went to see Mr Conway was because of his sexual activity with other seminarians.

170. After seeing Mr Conway, Ryan was referred to Dr Seal. Ryan said he saw Dr Seal to correct his behaviours – his sexual ‘acting out’ in the seminary. Ryan understood that Dr Seal recommended he spend a year’s spiritual formation in a religious community overseas.

171. Ryan gave evidence that he believed that ‘spiritual formation’ was religious language for dealing with the fact that he had engaged in sexual conduct notwithstanding his vow of celibacy.

172. Ryan travelled to Maryland in 1977 where he remembered seeing Dr John Kinnane, a psychologist at the Catholic University of America in Washington DC. Ryan said that he did not recall any discussion with anybody about the age group he was interested in. He thought Dr Kinnane was trying to help him understand that he was homosexual.

173. On 13 April 1978, Reverend Harvey wrote to Bishop Mulkearns and told him that Dr Kinnane was of the opinion that Ryan should return home after he had completed his therapy.

Reverend Harvey said that Dr Kinnane recognised the difficulties that Ryan may have returning but that he felt it was better that Ryan ‘make re-entry now’.

174. Ryan was in the United States at Star of the Sea Parish in the late 1970s. Ryan gave evidence that before the end of his time at Star of the Sea he became aware of allegations that he was involved with adolescent boys. He was asked to leave by Father Gaughan, the parish priest.
175. Ryan said he thought that by March 1980 he had told Bishop Mulkearns about ‘acting out’ on his attraction to adolescent boys.

### **Applicable Canon Law**

The same comments apply as with Ridsdale. At this time, the bishop’s primary obligation under *Crimen Sollicitationis* was to try and “cure” the priest.

176. Ryan gave evidence that in about 1991, when he was at Penshurst Parish a complaint was made against him offending against an adolescent boy. Ryan gave evidence that he accepted that the complaint was valid when called to the bishop’s office by, he thought, Father Brian Finnegan and confronted about it. He left Penshurst Parish. Ryan gave evidence that he confessed these acts to his confessor and in this way he reconciled his relationship with God.

### **Applicable Canon Law**

At this time, this information was governed by the pontifical secret under *Secreta Continere* and by the procedures under the 1983 *Code of Canon Law*, including the restrictions on the canonical proceedings, and the requirement first to use the “pastoral approach”.

177. From Penshurst Ryan went to Ararat for a few months where, he gave evidence, he was not placed under any formal supervision.
178. After Ararat he went to the United States for treatment, he went to Rome to attend a retreat and to the St Luke’s Institute in Washington for treatment. Ryan said all of this was funded by

the Diocese. Ryan also travelled to London and stayed with Father Pickering where, Ryan gave evidence, he found out that Father Pickering was trying to avoid facing issues of his own sex with adolescents which were being raised with him by the Archbishop of Melbourne, Archbishop Little.

179. Ryan gave evidence that in 1992 Bishop Mulkearns arranged for him to have counselling with Father Dan Torpey. He thought the purpose of the counselling was because of his sexual behaviour with adolescents.

180. Ryan thought Bishop Mulkearns buried his head in the sand about the sexual abuse issues in the Diocese. Ryan said Bishop Mulkearns knew about him in 1977 but did not revoke his faculties until 1993.

In 1993, Ryan had effectively abandoned the priesthood in any event. It was highly unlikely that he would have had recourse to the Congregation for the Clergy over any revocation of his faculties that was considered to be permanent.

181. The Diocese continued to financially support Ryan until about the end of 1996. In 1996, the Diocese asked him to consent to being laicised. Ryan refused.

182. On 8 September 2006, Ryan pleaded guilty to three charges of indecent assault between 1990 and 1991 against one victim. He was sentenced in the Magistrates Court of Victoria at Warrnambool to 18 months' imprisonment with a non-parole period of 12 months.

Gail Furness SC

Senior Counsel Assisting the Royal Commission

19 May 2015

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## 17. APPENDIX 3:

**CASE STUDY 13 (Marist Brothers Canberra)****OPENING ADDRESS OF GAIL FURNESS SC****WITH****CANON LAW CHRONOLOGY AND COMMENT by KIERAN TAPSELL (IN RED)****OPENING ADDRESS OF COUNSEL ASSISTING****Introduction**

1. The Royal Commission will commence its thirteenth case study in Canberra today with a consideration of the response of the Marist Brothers to allegations of child sexual abuse against two of its brothers: Brother John Chute (aka Brother Kostka) and Brother Gregory Sutton.
2. The Royal Commission is sitting under the *Royal Commissions Act 1902 (Cth)*, the *Royal Commissions Act 1923 (NSW)* and the *Constitution Act 1975 (Vic)*.
3. The pseudonym ZA was used in publicity for this public hearing for Brother Sutton's name before today because there was an outstanding suppression order issued by the District Court of New South Wales during criminal proceedings 18 years ago. Last Thursday the District Court lifted the suppression order from 10.00am today as a result of the Royal Commission's application. This is the first occasion upon which Gregory Sutton's name can be published since he was convicted in 1996.
4. Both Brother Chute and Brother Sutton taught at a large number of schools operated by the Marist Brothers or to which the Marist Brothers sent brothers to teach. The two brothers have been selected for this case study because of the large number of allegations of child sexual abuse that have been made against both and the number of schools at which they taught. In Brother Chute's case the Marist Brothers have received allegations from 48 different individuals of child sexual abuse by Brother Chute.
5. He was charged and convicted in 2008 of 19 sex offences involving 6 children. By operation of s. 6 of the ACT's *Law Reform (Sexual Behaviour) Ordinance 1976* a person could not be convicted of certain sexual offences, including those involving those individuals, 12 months

after they were committed. The provision was repealed in 1985 but still applies to pre-1985 offences. In Brother Sutton's case the Marist brothers have received allegations from 21 individuals of child sexual abuse by him. Brother Sutton was charged and convicted in NSW in 1996 of 67 counts of sexual offences against 15 different children. NSW does not have such a time limitation on sexual offences. Both brothers have served extended periods of imprisonment for their respective offences.

6. The public hearing will have significant resonance for Canberra because Brother Chute taught at Marist College, Canberra from 1976 until 1993 when he was removed from teaching. The vast majority of allegations against Brother Chute arose from this time in his teaching career. Brother Sutton also taught at the primary school at Marist College Canberra from 1980 to 1982 where 7 boys who attended the junior school have, as adults, made allegations against him. I should emphasise that neither of these men has had any association with those schools for many years.
7. The public hearing will consider how it was that both brothers were able to teach at a number of schools over a considerable period given the large number of allegations of child sexual abuse that were later made. The evidence will focus on what allegations were made at the time, who they were communicated to and what action was taken by the Marist Brothers, at all relevant levels, to address the allegations. It is likely that the evidence will show that many children, but not all, did not communicate their abuse to a Marist Brother or to the school they attended. In the majority of cases, the allegations were made many years after the events. The public hearing will explore whether and how such allegations were recorded and whether they were communicated by the Marist Brothers to each new school to which the brother was transferred.
8. The public hearing is also expected to hear evidence from State and Territory government representatives as to what their respective officials knew of the allegations against both Brothers.
9. A further part of the public hearing concerns the manner in which claims for compensation have been handled by the Marist Brothers, particularly with respect to Brother Chute. While some of the allegations against Brother Chute have been handled under the Towards Healing protocol the evidence is likely to reveal that the majority have been settled following the commencement of legal proceedings. The public hearing will explore whether

this has had an impact on the amount of settlements and what other factors may have affected the process and its resolution.

### **History and Training of the Marist Brothers**

10. The Institute of the Marist Brothers is an international body founded in France in 1817 by priest Marcellin Champagnat. The Marist Brothers are engaged in education, welfare, group faith formation and youth outreach in 80 countries. The Order is engaged directly in schools both day and boarding, as well as universities and non-formal education centres.
11. The Marist Brothers came to Australia in 1872 and have since that time operated 21 schools in their own right, including 12 boarding schools. The Marist Brothers have administered a further 74 schools on behalf of parishes or dioceses. The primary focus of the Marist Brothers ministry has been on primary and secondary education as part of the Australian Catholic school system.
12. Until December 2012 the Marist Brothers were divided into two provinces. The Sydney Province had responsibility for NSW, Queensland and the ACT and the Melbourne Province for the remainder. The two provinces have since been amalgamated and are now known as the Australian Province.
13. At the time to be explored in this public hearing the head of the Sydney Province was the Provincial. Below him was a Vice-Provincial and, generally speaking, below him the superiors of each community of Marist Brothers.
14. The stages of 'formation' of a Marist Brother has changed over the last decades but generally commence with a period as a young man at a Juniorate or as a Postulant, often as young as 17. This is followed by a Novitiate which is the key phase of formation. At the end of the Novitiate the Novices take their vows for the first time. The period of the Novitiate was extended to two years in 1979. For the Sydney Province the Marist Brothers' Novitiate was located at Dundas. From 1957 a further stage was added, called the 'Scholasticate' until 1986 and then 'post-Novitiate'. At that stage members studied at a tertiary institute, typically at a teacher training college or for a relevant degree at university. From 1986 post-Novitiates also lived in a dedicated community of brothers known as a 'House of Studies'. The post-Novitiate stage provides direct preparation for ministry. 'Mid-life renewal programs', also sometimes known as 'Second Novitiates', are available for Marist Brothers at Fribourg in Switzerland and Manziana in Italy.



15. Until the 1990s there were no initial or ongoing programs of education and training in matters of child protection for the Marist Brothers. Brothers were historically taught about human reproduction and sexuality, and relationships in the context of a brother's vow of celibacy. In the 1980s a clinical psychologist provided a more comprehensive introduction to sexuality and chastity to novices. In the 1990s institutional training has been replaced by personalised training due to the reduction in numbers of new brothers. Post-Novitiates currently have a 'guide' who is typically an experienced psychologist or spiritual director who is not a member of the Order.

### **Child Protection Policies**

16. The evidence to be tendered at this public hearing is likely to reveal that the Marist Brothers had no written child protection policies in place prior to 1994. In addition the Marist Brothers had no written policies or procedures in relation to the handling of complaints of child sexual abuse, prior to the 1990s. In the period after both Brothers Chute and Sutton were removed from their teaching positions the Marist Brothers instituted a number of new child protection policies which govern both its brothers and the Marist Brothers schools including *Integrity in Ministry* and *Integrity in the Service of the Church*. The Marist Brothers have also adopted the *Towards Healing* protocol for claims of child sexual abuse which has been the subject of a number of other hearings of the Royal Commission. The evidence is likely to reveal that of those who made allegations of child sexual abuse against Brothers Chute and Sutton a number went through the Towards Healing process. It is expected that the current Provincial of the Marist Brothers, Brother Jeffrey Crowe, will provide evidence of current policies and procedures concerning child protection and child sexual abuse matters.

### **Brother John Chute**

17. Brother Chute taught in Marist Brothers and related schools for over 40 years from 1952 to 1993. He took his vows as a brother in 1949 and commenced teaching at Marist Brothers High School in Maitland in 1952. He taught at a further three primary schools before being posted to Marcellin College, Randwick, New South Wales.
18. The evidence is likely to reveal that while at Marcellin College in or about 1960 Brother Chute touched a boy on the genitals. Brother Chute admitted that it had occurred when reported to the Principal and this was communicated to the then Provincial of the Marist Brothers, Brother Quentin Duffy. The hearing will explore what response the Marist Brothers

had to the admission made by Brother Chute. The evidence is also likely to reveal that Brother Chute sexually abused AAJ whilst he was at Marcellin College.

### **Applicable Canon Law**

The applicable canon law in 1960 was the *1917 Code*. Like the *1983 Code*, a distinction was drawn between those in Holy Orders (clerics) and lay persons. The *1983 Code*, Canon 207 provides:

“§1 By divine institution, there are among the Christian faithful in the Church sacred ministers who in law are also called clerics; the other members of the Christian faithful are called lay persons.”

Religious brothers and nuns are lay persons under canon law, while occupying a special position in the life of the Church, and they are governed by their own canons in the Codes. There were similar provisions in the *1917 Code*, but the provisions of the *1983 Code of Canon Law* are set out here. The *1983 Code* applied to most of the offences discussed.

### **Dismissal and Canonical Warnings**

Canons 694 to 700 deal with disciplinary action against religious.

Can. 694 §1. A member must be held as ipso facto dismissed from an institute who:

- 1/ has defected notoriously from the Catholic faith;
- 2/ has contracted marriage or attempted it, even only civilly.

§2. In these cases, after the proofs have been collected, the major superior with the council is to issue without any delay a declaration of fact so that the dismissal is established juridically.

The Code envisages that there will be a formal hearing of the complaints in accordance with the procedures laid down so that the dismissal will be “established juridically”.

Can. 695 §1. A member must be dismissed for the delicts mentioned in cann. ⇒ 1397, ⇒ 1398, and ⇒ 1395, unless in the delicts mentioned in ⇒ can. 1395, §2, the superior decides that dismissal is not completely necessary and that correction of the member, restitution of justice, and reparation of scandal can be resolved sufficiently in another way.

Canon 1395 deals with clerics who breached the celibacy rule and who have sexually abused minors. It is in these terms:

Can. 1395 §1. A cleric who lives in concubinage, other than the case mentioned in ⇒ can. 1394, and a cleric who persists with scandal in another external sin against the sixth commandment of the Decalogue is to be punished by a suspension. If he persists in the delict after a warning, other penalties can gradually be added, including dismissal from the clerical state.

§2. A cleric who in another way has committed an offense against the sixth commandment of the Decalogue, if the delict was committed by force or threats or publicly or with a minor below the age of sixteen years, is to be punished with just penalties, not excluding dismissal from the clerical state if the case so warrants.

The sixth commandment of the Decalogue is the prohibition of adultery, but over time in the life of the Church, this was extended to any form of sexual activity outside marriage, and any form of non-creative sex within marriage.<sup>869</sup>

The canons then provide:

“Can. 696 §1. A member can also be dismissed for other causes provided that they are grave, external, imputable, and juridically proven such as: habitual neglect of the obligations of consecrated life; repeated violations of the sacred bonds; stubborn disobedience to the legitimate precepts of superiors in a grave matter; grave scandal arising from the culpable behavior of the member; stubborn upholding or diffusion of doctrines condemned by the magisterium of the Church; public adherence to ideologies infected by materialism or atheism; the illegitimate absence mentioned in ⇒ can. 665, §2, lasting six months; other causes of similar gravity which the proper law of the institute may determine...”

Canon 697 then deals with the canonical warning. The wording of this canon suggests that before a canonical warning can be given, there must be good grounds for dismissal under one of the above complaints.

Can. 697 In the cases mentioned in ⇒ can. 696, if the major superior, after having heard the council, has decided that a process of dismissal must be begun:

1/ the major superior is to collect or complete the proofs;

2/ the major superior is to warn the member in writing or before two witnesses with an explicit threat of subsequent dismissal unless the member reforms, with the cause for dismissal clearly indicated and full opportunity for self-defense given to the member; if the warning occurs in vain, however, the superior is to proceed to another warning after an intervening space of at least fifteen days;

3/ if this warning also occurs in vain and the major superior with the council decides that incorrigibility is sufficiently evident and that the defenses of the member are insufficient, after fifteen days have elapsed from the last warning without effect, the major superior is to transmit to the supreme

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<sup>869</sup> See chapter 4 this submission.

moderator all the acts, signed personally and by a notary, along with the signed responses of the member.

Can. 698 In all the cases mentioned in cann. ⇒ 695 and ⇒ 696, the right of the member to communicate with and to offer defenses directly to the supreme moderator always remains intact.

Can. 699 §1. The supreme moderator with the council, which must consist of at least four members for validity, is to proceed collegially to the accurate consideration of the proofs, arguments, and defenses; if it has been decided through secret ballot, the supreme moderator is to issue a decree of dismissal with the reasons in law and in fact expressed at least summarily for validity.

§2. In the autonomous monasteries mentioned in ⇒ can. 615, it belongs to the diocesan bishop, to whom the superior is to submit the acts examined by the council, to decide on dismissal.

Canons 696 and 697 incorporate by implication the provisions relating to the discipline of clerics:

In Canon 696 the Church's concern about "scandal" is apparent.<sup>870</sup> The very last canon in the *1983 Code of Canon Law* provides that "the salvation of souls...must always be the supreme law of the Church."<sup>871</sup> The supreme law of the Church included the avoidance of scandal which could lead to the loss of faith, and therefore loss of salvation.

The "canonical warning" is an application of the "pastoral approach" that Canon 1341 applied to priests.<sup>872</sup>

The "imputability defence" that applies to priests under Canon 1321 is specifically referred to in Canon 696 §1. This is one of the most contentious parts of the Code because it effectively means that the more children a priest or religious abuses, the less likely he will be dismissed.<sup>873</sup>

The matter of the limitation period is more contentious.<sup>874</sup>

Canon 700 then deals with the decree of dismissal.

"Can. 700 A decree of dismissal does not have effect unless it has been confirmed by the Holy See, to which the decree and all the acts must be transmitted; if it concerns an institute of diocesan right, confirmation belongs to the bishop of the diocese where the house to which the religious has been attached is situated. To be valid, however, the decree must indicate the right which the dismissed

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<sup>870</sup> See Canonical Proceedings against Religious page 251ff above.

<sup>871</sup> Canon 1752

<sup>872</sup> Canonical Proceedings against Religious page 251ff.

<sup>873</sup> Ibid

<sup>874</sup> Ibid

possesses to make recourse to the competent authority within ten days from receiving notification. The recourse has suspensive effect.

*Crimen Sollicitationis* of 1922 had imposed the secret of the Holy Office on four canonical crimes by clerics: soliciting sex in the confessional, homosexuality, bestiality and the sexual abuse of children. There was no equivalent secrecy provision that applied to religious brothers and nuns between 1922 and 1974. Canons 694 – 700 dealt with the sexual abuse of children by religious brothers and nuns, but there is no imposition of secrecy by the 1983 Code itself, nor by its predecessor. The imposition of the pontifical secret on allegations of sexual abuse by religious was introduced by *Secreta Continere* in 1974.

19. Brother Chute was transferred at the start of the next year to St Anne's Primary School at Bondi Beach. The evidence is likely to reveal that three boys have made allegations of sexual abuse against Brother Chute while he taught at St Anne's Primary School in 1961-1962: ACF, ACP and AAI. One of those boys complained at the time and Brother Chute admitted to inappropriate touching. The Superior of the community, Brother Des Phillips, met with the boy's father. The Royal Commission is likely to hear that the primary response was that Brother Chute agreed to see Father Cox for spiritual advice. Brother Chute left St Anne's at the end of 1962.
20. In 1963 he taught at Marist Primary School, Queanbeyan and then he was transferred to Villa Maria School, Hunters Hill for 1964-1966. At Villa Maria he is alleged to have sexually abused a boy AAW but this allegation did not surface until some decades later. In 1967 he was transferred to St Joseph's School, Lismore where he took the position of principal.
21. A boy alleged in 1967 that Brother Chute had sexually abused him at St Joseph's. Allegations were communicated to the then Provincial of the Marist Brothers, Othmar Weldon. Brother Weldon spoke with Brother Chute who again admitted what he had done. The evidence is likely to reveal that the Provincial considered it a "good idea" to move Brother Chute to another school.
22. In July 1969 the Provincial Council met and amongst other matters, considered Brother Chute's case. The minutes reveal that "it was thought advisable to give Brother Chute a canonical warning". The hearing will explore the basis for the canonical warning, the effect of the canonical warning and whether the warning was followed up. The same day Brother Chute was transferred to teach primary school and be the principal at Marist College Penshurst, NSW.

23. While at Penshurst he was again accused of sexual abuse of a child and this was reported to the then Provincial Brother Howard. Again Brother Chute admitted what he had done and the evidence is likely to reveal that he was counselled by Brother Howard. He remained at Penshurst until the end of 1972.
24. Brother Chute then spent two years teaching at Marcellin Junior School in Coogee and 6 months at Marist Brothers School, Parramatta. However, in the middle of 1975 he left for his second novitiate at Fribourg in Switzerland. The hearing will explore whether Brother Chute had also been referred to Fribourg because of concerns about child sexual abuse.
25. On his return from Fribourg Brother Chute was transferred to Marist College, Canberra in 1976 where he was to teach for the next 17 years. The majority of the 48 allegations of child sexual abuse referred to above concern Brother Chute's time at Marist College, Canberra. The evidence is likely to reveal that Brother Chute is alleged to have sexually abused boys at Marist College throughout that period.
26. The allegations are that Brother Chute sexually abused the 39 students in the following years at Marist College, Canberra:
- In 1976-1980: 16 boys – AAD, AAN, AAC, ACC, ACJ, ACR, AAG, ACS, AAT, AAU, ACH, ACI, AAL, AAO, ACM, LAE;
  - In 1981-1985: 14 boys – AAR, AAS, ACG, ACL, ACO, AAE, AAM, AAP, AAV, ACD, ACQ, LAF, LAH, LAI;
  - In 1986-1990: 8 boys – AAK, AAQ, ACK, AAF, AAX, AAH, AAZ, ACN;
  - AAY at a date unknown.

### **Applicable Canon Law**

The offences prior to 1983 were governed by the *1917 Code of Canon Law* and those afterwards, by the *1983 Code*. Despite some differences between them, the basic scheme for religious was the same with "canonical warnings" being required prior to procedures that could lead dismissal. Brother Chute was given such a warning in 1969.

However, the significant date is not the changeover from the *1917 Code* to the *1983 Code*, but 14 March 1974 when *Secreta Continere* came into force, and imposed the pontifical

secret on all allegations and procedures regarding “delicts against morals”, which included the sexual abuse of children by non-clerical religious. The vast majority of offences committed by Chute occurred after 1974.

Whether or not the Australian superiors of the Marist Brothers were aware of *Secreta Continere* is another matter, but those in Rome and their canonical advisers certainly would have been, and if the Australian superiors did not know, their acting in accordance with its provisions is another example of the “trickle down” effect of a culture expressed in canon law. The secrecy imposed on this information and the failure to report to the civil authorities is a good example of what Professor Marie Keenan talks about as “informal organizational practices that everybody knows about but nobody talks about openly”. These derive from the hierarchical nature of the Catholic Church where, “inferiors in the hierarchical ladder will strive to exemplify the institution’s values”.<sup>875</sup>

27. The public hearing will explore whether the Marist Brothers informed successive principals of the allegations that had been made against Brother Chute, his admissions of inappropriate and sexual conduct at Marcellin College, at St Anne’s, at St Joseph’s and at Penshurst or of the canonical warning he was given in 1969.
28. The allegations against Brother Chute have a high degree of similarity over the three decades during which he is alleged to have sexually abused children. Most involve Brother Chute reaching into a boy’s underpants and touching the boy’s penis. Some involve Brother Chute rubbing his penis up against boys while fully clothed or having boys touch him on the penis. Sometimes he would have them masturbate him and sometimes he would masturbate them. Some of the allegations include Brother Chute touching a boy on the penis in class while other boys were present. Many of the alleged acts of child sexual abuse occurred, however, in an empty classroom, in Brother Chute’s office and in a store room. Still others occurred at a film night and in the pie wagon at the school.
29. Victims of Brother Chute have provided the following accounts. One boy, ACF, described what happened to him at St Anne’s in 1961-1962:

“While the class was doing work [Brother Kostka] would come and sit beside me and put his arm around me and fondle my genitals – his hand was inside my underpants. The whole class knew it was happening. This was generally a daily event.”

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<sup>875</sup> *Child Sexual Abuse and the Catholic Church, Gender, Power and Organizational Culture*, at loc 1557.

30. ACH described what happened to him while he was a student at Marist College Canberra in the early 1980s:

“The events occurred in his office, in his dark room, in his garden shed behind the monastery, in the chapel, in the monastery, at a picnic spot ... wherever and whenever he felt he could do it without being interrupted or caught. ... [H]e would undo my pants or pull them down depending on what I was wearing, he would stroke, pull and play with my penis and testicles and would fondle my bottom, kiss and stroke my body all over, he would also undo his pants and remove his erect penis and then make me, and I stress make me, pull his penis until ... ejaculation.”

31. AAE had Brother Kostka as his religion teacher in Year 7 in 1985:

“I remember early in Year 7 I was in Brother Kostka’s classroom. I was sitting at my desk and Brother Kostka came up behind me and placed his chin on the top of my head and then put his hands down the front of my pants and underneath my underpants. Brother Kostka then touched and played with my penis for about five to ten minutes. This happened in front of the other students that were in the class. This type of thing happened almost every time I was in Brother Kostka’s class.

My friends and I were always welcome in Brother Kostka’s office, and we often used his office as a place to hang out. ... There was a TV on a rolling trolley. His office was great, he had a big video collection and we were always allowed to watch movies in there. ... I remember one occasion ... he turned the lights off, as he usually did, and started to cuddle me from behind, he put his hands down my pants and touched and played with my penis. ... He would sometimes get me to sit on his lap and he would play with my penis and other times he would get me to put my hand on his penis over his white cloak.”

32. Brother Chute, together with other brothers, wore a long white free-flowing robe over his trousers which came down to mid-calf. The robe was secured at the waist with a cord.

33. The following account is available of the abuse suffered by ACK, a Year 7 student at Marist College in 1986:

“At one movie night, towards the end of the year, ACK was sitting on the stairs outside the theatrette when Chute sat beside him. Chute pulled ACK close to him



and commenced to touch ACK's genitals outside his trousers. When ACK went inside to watch the movie Chute sat beside him and continued to touch ACK in the same way."

34. The abuse continued into 1989. The following account was given of the sexual abuse of AAH, also a student at Marist College:

"Towards the end of the first term AAH was in Chute's office. The door was shut. Chute hugged AAH and then he took hold of AAH's hands and brought his hands down to his thighs and started patting his hands against the front of AAH's legs. He then moved both their hands towards AAH's groin. AAH could feel that Chute had an erection. Chute then began to rub his hands against AAH's penis and he moved AAH's hand towards his groin area and started to rub his own penis with AAH's hand."

35. The hearing will explore whether certain behaviour of Brother Chute came to the attention of the school authorities and the Marist Brothers. Specifically, the evidence is likely to reveal that Brother Chute often had boys hanging around him in his classroom or his office often outside of class hours. The door to his office was often closed. Some of the alleged abuse is said to have occurred in front of other boys in the classroom. Brother Chute is also said to have had pornography in his office which he sometimes showed to the boys. The evidence is likely to show that in 1976-77 Brother Chute had boys accompany him to dinner at the monastery or seminary associated with the school and then to his room. Further, on one occasion in 1982 a school cleaner is said to have opened the door to Brother Chute's office to find Brother Chute and AAU pulling up their trousers. The hearing will explore whether these matters were ever communicated to the senior members of the school and the Marist Brothers.
36. The evidence is also likely to reveal that there were many reasons why the boys did not complain at the time. In one case, it was because Brother Chute was the only person that one boy thought understood him. With another boy it was because Brother Chute said he would tell the boy's parents about contraband pornography the boy had if he revealed the abuse. A third boy did not think he would be believed. One of the boys is using counselling to address the very issue of why he did not pass on information about Brother Chute sooner.
37. However, the evidence is likely to reveal that some boys and their parents did come forward to report abuse by Brother Chute. One allegation to be explored in evidence is whether

ACS's mother came forward in 1979 and spoke with the then principal Brother McMahon about sexual abuse of her son. Another is that in 1986 ACK's parents reported abuse of their son to the then Principal Brother Terrence Heinrich. The hearing will explore whether Brother Heinrich informed the Provincial Brother Alman Dwyer of what he had been told and what action if any was taken with respect to the allegations of child sexual abuse of ACK. The evidence is also likely to reveal that another boy, AAL, says in 1986 he reported earlier abuse by Brother Chute to a teacher at Marist College. The hearing will explore what AAL told the teacher and whether anything was done with that information.

38. The evidence is also likely to reveal that in 1991 AAZ complained to his cricket coach Brother Wayne Duncan that he has been abused by Brother Chute.
39. In about September or October 1993 AAL reported to the then Principal Brother Christopher Wade that he was abused at Marist College by Brother Chute. The Provincial Brother Alexis Turon flew to Canberra to investigate. The evidence will explore the outcome of the investigation and why Brother Chute was able to continue teaching at Marist College for the ensuing months. In late November ACN told the school counsellor LAJ that Brother Chute had indecently assaulted him. The school counsellor then took the matter directly to the Provincial, Brother Turton. The hearing will explore what action was taken by the Provincial and the reasons behind the subsequent withdrawal of Brother Chute from the school from 1 January 1994. This was Brother Chute's last position as a teacher.

This pattern of superiors not being told about matters involving the sexual abuse of children is one of the other effects of the secrecy imposed by canon law. Secrecy not only had the effect on preventing clergy and religious sex abusers from being prosecuted under the civil law, but it also prevented those who should have been told about the allegations being told.<sup>876</sup> It is not surprising that the same patterns of behaviour should have occurred in religious orders of non-clerics where the same pontifical secret was imposed on child sex abuse allegations since 1974.

40. After Marist College Canberra Brother Chute was transferred to the Dundas Centre in Sydney and then in 1997 to the Marist Farmhouse at Mittagong. The hearing will explore whether he had any contact with children there and the nature of the contact.

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<sup>876</sup> See page 257 above.

41. Further complainants, ACF, AAA and ACP, came forward in 2002 to assert that Brother Chute had sexually abused them. Still further complainants came forward to the Australian Federal Police.
42. In January 2008 Brother Chute was charged with 19 counts of child sexual abuse against AAE, AAM, ACD, ACK, AAQ and AAH. In February 2008 he pleaded guilty and in June 2008 was sentenced to six years imprisonment with the third year to be spent in weekend detention and the remaining three years suspended.
43. Brother Chute has been released from imprisonment. He spent a number of years living at an old person's home in Canberra until he was approved to move to NSW where he currently resides.

### **Brother Gregory Sutton**

44. Brother Gregory Sutton was professed as a Marist Brother in 1970 and commenced his first teaching post at a North Queensland school in 1973 at the age of 21. He taught continuously for the Marist Brothers in Queensland, the ACT and NSW from 1973 until he was removed from teaching in 1987.
45. Section 10 of the *Criminal Law (Sexual Offences) Act 1978* of Queensland prevents the publication of the name of the North Queensland school at which he taught in the 1970s.
46. Dennis Doherty, who was then the headmaster of the North Queensland school complained to the Community Superior, Brother Holdsworth about Brother Sutton in 1974. Mr Doherty, who will give evidence at this public hearing, is likely to say that he told the Superior for the North Queensland school about Brother Sutton's actions. He said that Brother Sutton had selected a number of children as his pets and allowed them to misbehave, that he had been found wrestling with two boys and that Brother Sutton had taken a further boy on tractor rides with the boy sitting between his legs. The hearing will explore what action was taken by the Superior.
47. Mr Doherty also says that he told the then Provincial Brother Charles Howard that "*I am suspicious about Sutton. I fear he may be interfering with children.*" Mr Doherty is likely to say that the Provincial proposed that Sutton be transferred to Sydney and counselled; but there is also evidence that Brother Howard does not recall the conversation.

48. Both ACW and ADO allege that they were sexually abused at the North Queensland school by Brother Sutton in 1973-1975. The evidence is likely to reveal that Brother Sutton admitted to Brother Turton in 1989 that he had abused ADO at the school.
49. Brother Sutton was next transferred to Sydney and commenced teaching at Marist Sacred Heart Primary School, Mosman in January 1976. The hearing will explore why Brother Sutton was transferred.
50. Brother Sutton was charged with and convicted of offences against ADA, ADP, and ADI which occurred at Marist Sacred Heart Primary School in 1976-1977. All four boys were 10 years old at the time. The evidence is likely to reveal that a teacher at the school told Brother Hopson, the Superior of the Mosman Community, that Brother Sutton should not be alone in the sports room with just one or two children. The hearing will explore what action Brother Hopson took as a result of this conversation.
51. In January 1978 Brother Sutton was transferred to Marist Brothers Primary School, Eastwood. Sutton has been charged and convicted of offences against ADU, ADX and ADV while at the school. All were 10 or 11 year old boys at the time. The Principal of the school, Brother Blayney, told the Community Superior, Brother John Callaghan, that Brother Sutton often teaches with the door closed. The evidence is likely to show that Brother Callaghan was also aware that Brother Sutton took boys with him out in his car. The public hearing will explore what was known about Brother Sutton and, if passed on, what was done as a result of such knowledge by senior members of the Marist Brothers.
52. Brother Sutton then commenced teaching at Marist College, Canberra at the Junior School where he was from 1980 to the end of 1982. Allegations have been made, subsequent to the period when he taught there, that he sexually abused the following seven children: ADJ, ADK, ADC, ADT, ADD, ADR and ACX. All were boys and aged about 10-11 years old at the time of the alleged abuse. The evidence is likely to reveal that no complaints were made to the school save for one parent complaining about a tape of a boy using sexually explicit language.
53. From 1984 to 1985 Brother Sutton spent two years at St Thomas Moore School, Campbelltown, NSW. During that time he allegedly sexually abused a further two Year 5 girls and one boy: ACY, ADM, and ADQ. ADQ and ADM will give oral evidence today of the abuse they suffered at the hands of Brother Sutton.

54. The public hearing will explore what was known about Brother Sutton and sexual abuse of children at each of the abovementioned schools and whether relevant information was passed onto any of the schools at which he taught including the last school, St Carthage's in Lismore.
55. Brother Sutton commenced teaching at St Carthage's Primary School in Lismore in January 1985. The school was operated by the Lismore Catholic Education Office for the Diocese of Lismore, and the principal was a Presentation Sister, Sister Julia O'Sullivan. ACT, ADB and ACV have alleged that they were sexually abused by Brother Sutton in 1985. ACT's mother complained to a teacher at the school that her daughter had been touched on the upper thigh by Brother Sutton. The complaint was referred to Sister Julia. Other teachers had concerns about Brother Sutton and favouritism shown to certain students. The then Vice-Provincial of the Marist Brothers, Brother Alexis Turton, visited St Carthage's and investigated the concerns expressed to him. The public hearing will explore what Brother Turton was told and what action he took with respect to Brother Sutton. Brother Sutton remained at the school and the evidence is likely to reveal that in December of that year the executive of the school sought assurances from Brother Sutton including that he not be in a classroom with any children out of school hours.
56. In February 1986 Brother Turton returned to St Carthage's and together with the principal had Brother Sutton sign a letter of undertaking about his behaviour. Assistant Principal is likely to give oral evidence that throughout 1986 she considered that Brother Sutton had breached the undertaking and took those concerns to the Principal. The hearing will explore what action, if any, was taken by the school and the Marist Brothers about such apparent breaches.
57. Brother Sutton was convicted of performing an act of indecency on ACZ in 1986 at St Carthage's when he was 10 or 11 years old.
58. In November and December of 1986 Brother Sutton went on a 'personal renewal' course to New Zealand. The public hearing will explore whether he was sent on that course because of concerns about sexual offending with children. He returned to teach at St Carthage's in 1987.
59. The evidence is likely to reveal that discussions were had about Brother Sutton between the then Provincial Brother Alman Dwyer and the Director of the local Catholic Education Office, John Kelly, apparently "about problems Greg was causing at Lismore". The evidence is likely

to reveal that by April 1987 there were serious concerns about the welfare of ACU as she was frequently in Brother Sutton's company and her parents had said that he often took her out on car trips, picnics and even to Byron Bay. The Royal Commission is also likely to hear that Brother Sutton asked to be moved from the school at about this time. On 30 April 1987 Brother Sutton was removed from St Carthage's by the Provincial who placed him in an administrative role in Drummoyne, NSW.

60. Evidence available from the criminal trial of Brother Sutton reveals the true extent of his offending against ACU. Brother Sutton pleaded guilty to 5 counts of sexual intercourse being digitally penetrating ACU's vagina and 3 counts of assault with an act of indecency being touching ACU's vagina or forcing her to touch his penis. ACU was ten or eleven years old at the time. The majority of the acts occurred well before he was removed at the end of April 1987.
61. The public hearing will hear from those involved with Brother Sutton at St Carthage's including the Assistant Principal Jan O'Grady, the Vice Provincial Brother Turton, the Superior of Lismore, Brother Anthony Hunt, and the Director of the Catholic Education Office, John Kelly.
62. The evidence is likely to reveal that in 1989 Brother Sutton admitted he had engaged in sexual conduct with ADO to Brother Turton. The public hearing will explore whether the admission to Brother Turton was reported to the police. Shortly thereafter Brother Sutton was sent for counselling at Southdown in Canada an institute to which sexual offenders could attend for therapy. Brother Sutton left the Marist Brothers in 1991 and received formal "dispensation", meaning that he no longer maintained the title "Brother". The hearing will explore what assistance the Marist Brothers provided to him to attend Southdown and what connection, if any, he maintained with the Marist Brothers.
63. Meanwhile in Australia 14 warrants were issued for his arrest in 1992 and a further 10 in 1993. However, the evidence is likely to reveal that Brother Sutton continued at Southdown until 1992 and then from 1994-1996 became a headmaster at a school in St Louis, Missouri. Extradition proceedings were commenced and Sutton returned to Australia. The hearing will also explore what assistance, if any, was provided by the Marist Brothers to the NSW Police in seeking his extradition.
64. On 8 November 1996 Sutton pleaded guilty to 67 charges of child sexual assault and was sentenced in the District Court, Sydney, to 18 years imprisonment, with a 12 year non-parole

period. Sutton has completed his term of imprisonment and lives in the community. He was released in 2008.

65. The public hearing will examine what was known about allegations of child sexual abuse or other indicative conduct concerning Brother Sutton at the points at which he was transferred between each of the relevant schools and whether those allegations were the reasons for all, some or none of the transfers.

The same comments about *Secreta Continere* of 1974 apply to Brother Sutton. Virtually all the offences committed by him occurred after that 1974.

### Claims made against Brother Chute and Brother Sutton

66. The evidence is likely to reveal that a considerable number of claims have been made to the Marist Brothers concerning child sexual abuse by Brother Chute and former Brother Sutton. 48 people have made claims against Brother Chute and 38 have received financial settlements. 2 of the 48 have gone through the Towards Healing protocol. Total payments of \$6.84m have been made to those with complaints against Brother Chute with an average of \$178,000 for each claimant. The average payments for Towards Healing are substantially less than those which have been negotiated as part of the court process. There have been 19 claims of child sexual abuse by Brother Sutton made to the Marist Brothers, 16 of which have resulted in financial payment. One went through Towards Healing. Total payments for those with complaints against Sutton have reached \$1.82m with an average of \$100,989 each.
67. The hearing will also hear what steps were taken by the Marist brothers to establish whether the Marist Brothers had prior knowledge of child sexual abuse by Brother Chute and whether this had any effect on arrangements for the payment of claims between the Marist brothers and its insurer Catholic Church Insurances (CCI).

### Systemic Issues

68. The systemic issues for the Royal Commission which are likely to arise in this public hearing are:
- Understanding the scope and impact of child sexual abuse:

- What institutions are particularly vulnerable to offending and why?
- What environments encourage or facilitate offending?
- Arrangements within Institutions to prevent child sexual abuse:
  - Training and professional development of staff working with children;
  - Supervision, performance management and disciplinary processes of staff working with children;
- Responding to concerns, allegations and incidents of child sexual abuse:
  - Arrangements within the institutional hierarchy to facilitate and receive reports or disclosures of child sexual abuse or concerning conduct; and to apply the outcomes of investigations to systems improvement;
  - Arrangements within the institutional hierarchy to report incidents to external agencies including police;
  - Arrangements within the institution to respond to victims and their families, and to the relevant community;
  - Arrangements within the institution respond to those accused of child sexual abuse;
  - Arrangements within the institution to respond to historical claims of child sexual abuse;
  - Institution centred offender treatment, rehabilitation and disciplinary processes;
- Redress and civil liability
  - Civil claims;
  - Institutional redress schemes.

69. The witnesses who will be called are:

No	Witness	
1.	ADM	Student of former Brother Sutton
2.	ADQ	Student of former Brother Sutton
3.	Damian De Marco	Student of Brother Chute
4.	AAJ	Student of Brother Chute
5.	AAP	Student of Brother Chute
6.	John Doyle	Former teacher at Marist College, Canberra
7.	Brother Terence Heinrich	Former Principal of Marist College, Canberra
8.	Brother Christopher Wade	Former Principal of Marist College, Canberra
9.	Father Brian Lucas	General Secretary of the Australian Catholic Bishops Conference
10.	Denis Doherty	Ex Marist Brother and former Head Teacher of a Marist Brothers



		primary school in North Queensland
11.	Brother John Holdsworth	Former Community Superior and Principal of a Marist Brothers primary school in North Queensland
12.	Jan O'Grady	Former Deputy Principal of St Carthage's School, Lismore
13.	John Kelly	Former Director of Catholic Education for the Diocese of Lismore
14.	Brother Anthony Hunt	Former Superior of the Marist Brothers community in Lismore
15.	Brother Alexis Turton	Former Provincial of the Marist Brothers Order Australia
16.	Brother Jeffrey Crowe	Provincial of the Marist Brothers Order Australia

Simeon Beckett

Counsel Assisting

10 June 2014

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## Appendix 4

### The Application of the Pontifical Secret in Australia

Kieran Tapsell

1. The purpose of this Appendix 4 is to examine civil legislation within Australia to determine the extent to which the pontifical secret which prevents bishops and senior Church officials in receipt of complaints of sexual abuse of children by priests (“extrajudicial denunciations) are prevented from reporting those crimes to the civil authorities. Bishops are required by their consecration oaths to “obey all ecclesiastical laws”.<sup>877</sup> Bishops are not required to swear oaths to obey the civil law.<sup>878</sup>

### The Application of Canon Law to Australia

2. For the purposes of determining the effect of canon law on the reporting of child sexual abuse in Australia, this Appendix 4 relies on the civil law as stated in the Report of Associate Professor Ben Mathews to the Royal Commission, *Mandatory Reporting Laws for Child Sexual Abuse in Australia: A Legislative History* (“Mathews Report”).
3. The Mathews Report states that its advice about the law is current to 13 December 2013 (p ii). This Appendix notes any changes in the law in respect of each State and Territory from that date until 22 March 2016.

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<sup>877</sup> [http://www.vatican.va/archive/ENG1104/\\_P2R.HTM](http://www.vatican.va/archive/ENG1104/_P2R.HTM) (Accessed 3 March 2013), and [http://www.vatican.va/roman\\_curia/congregations/cfaith/documents/rc\\_con\\_cfaith\\_doc\\_19880701\\_professio-fidei\\_en.html](http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_19880701_professio-fidei_en.html) (Accessed 3 March 2013) “I shall follow and foster the common discipline of the entire Church and I shall maintain the observance of all ecclesiastical laws, especially those contained in the Code of Canon Law.”

<sup>878</sup> Bishop Gerald Kicanas of Tucson told a court in that city that he was required to operate under both sets of laws, civil and canon law. He conceded that he had to obey the civil law “unless they are in contradiction to the canon law, in which case, I’d have to find a way to work through that.” Robert Blair Kaiser: *Whistle: Tom Doyle’s Steadfast Witness for Victims of Clerical Sexual Abuse*, *Caritas Communications* (2015), loc. 2634. Dr Rodger Austin, the Australian canon lawyer, told the Cunneen Special Commission that anyone involved in canonical tribunal work would have to obtain a dispensation before revealing any information to a civil court about what was disclosed at the tribunal. Under canon law, such a dispensation would have to come from the Holy See. In other words, canon law takes precedence over civil law for Catholics in that situation: [http://www.lawlink.nsw.gov.au/lawlink/Special\\_Projects/ll\\_splprojects.nsf/vwFiles/Transcript\\_Day\\_20\\_-\\_TOR\\_2\\_-\\_31\\_July\\_2013.pdf/\\$file/Transcript\\_Day\\_20\\_-\\_TOR\\_2\\_-\\_31\\_July\\_2013.pdf](http://www.lawlink.nsw.gov.au/lawlink/Special_Projects/ll_splprojects.nsf/vwFiles/Transcript_Day_20_-_TOR_2_-_31_July_2013.pdf/$file/Transcript_Day_20_-_TOR_2_-_31_July_2013.pdf), (Accessed 29 March 2015), p.2233

4. There are three kinds of reporting required by law in Australia which can affect the application of the pontifical secret in Australia.
  - 4.1. Reporting of serious crimes under the *Crimes Acts* or *Codes* of the Australian States and Territories.
  - 4.2. Reporting in New South Wales under the *Ombudsman Act (NSW) 1974*.
  - 4.3. Mandatory welfare reporting required under the various child protection statutes of the States and Territories.
5. Reporting under the *Crimes Act* or *Code* legislation involves a report being made to the police of a crime having been committed, whereas a report under the mandatory welfare reporting legislation is broader, and involves reporting of the risk of harm to a child, which may or may not involve the commission of a crime. The report is made to an officer of the child protection department of the State or Territory.
6. If the report to the child protection department of the State reveals the commission of a crime, the department usually involves the police.<sup>879</sup>

## New South Wales

### Misprision of Felony

7. In *Sykes v The Director of Public Prosecutions*, Lord Denning said that the crime of “misprision of felony” had been part of the common law of “700 years or more”.<sup>880</sup> The elements of the crime were “knowledge” of a felony (a serious crime), and “concealment” from the civil authorities.<sup>881</sup> He also said that non-disclosure may sometimes be justified if there was a duty to keep the information confidential. Examples are the relationship between lawyer and client, doctor and patient. He also said that an employer who catches an employee involved in petty stealing (which could still be a felony) might be justified in giving him another chance. But where the crime was of a serious nature, even close family ties were no excuse. The other members of the House of Lords agreed. Lord Goddard added

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<sup>879</sup> Mathews Report p.39.

<sup>880</sup> (1962) AC 528. <http://www.uniset.ca/other/cs5/1962AC528.html> (Accessed 3 July 2013) at 555

<sup>881</sup> Id at 564

that there was no obligation to disclose mere rumours and gossip, but citizens are bound to disclose facts within their knowledge that might assist in arresting the felon.<sup>882</sup>

8. In the 1980s there were a number of recommendations of Law Reform Commissions to abolish the archaic distinction between felonies and misdemeanours from the criminal law, and to abolish the common law offence of misprision of felony. It was argued that the crime was necessary when there were no police forces. If someone had committed a serious crime, known as a “felony”, ordinary citizens had the obligation to raise the “hue and cry”. All jurisdictions in Australia have abolished the common law offence of misprision of felony.

### **S.316 Crimes Act 1900 (NSW)**

9. New South Wales abolished misprision of felony in 1990, but replaced it with a statutory form in S.316 *Crimes Act (1900) NSW* where it was an offence not to report a serious crime, unless there was a reasonable excuse – a provision designed to include the confidential relationships outlined by Lord Denning in *Sykes*.<sup>883</sup>

10. S.316 of the *Crimes Act 1900* provides:

(1) If a [person](#) has committed a [serious indictable offence](#) and another [person](#) who knows or believes that the offence has been committed and that he or she has information which might be of material assistance in securing the apprehension of the offender or the prosecution or conviction of the offender for it fails without reasonable excuse to bring that information to the attention of a member of the Police Force or other appropriate authority, that other [person](#) is liable to imprisonment for 2 years.

11. Section 4 of the *Crimes Act* defines “serious indictable offence” as:

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<sup>882</sup> Id at 570

<sup>883</sup> Misprision of felony was abolished and Section 316 was inserted into the *Crimes Act 1900 (NSW)* by the *Crimes (Public Justice) Amendment Act (1990) NSW*, which was proclaimed on 25 November 1990: New South Wales Government Gazette No 141 of 9 November 1990 at 9816. The consent of the Attorney General to a prosecution is required for a prosecution of persons in prescribed professions, such as lawyers, doctors, etc.: S.316(4) See

<sup>883</sup> There is one unreported decision in NSW that deals with the section. In *R v Crofts*, Meagher JA observed: ‘The section is a comparatively new section and this is the first case, so far as one knows, which has been brought under it. It is a section which has many potential difficulties, the chief of which is the meaning of the words ‘without reasonable excuse’, difficulties which are magnified when one endeavours to contemplate how those words would apply to the victim of the crime.’ Gleeson CJ added: ‘... depending upon the circumstances of an individual case, it may be extremely difficult to form a judgment as to whether a failure to provide information to the police was ‘without reasonable excuse’.

[http://www.judcom.nsw.gov.au/publications/benchbks/sentencing/public\\_justice\\_offences.html#d5e25503](http://www.judcom.nsw.gov.au/publications/benchbks/sentencing/public_justice_offences.html#d5e25503). A more thorough examination of the law was made by Bruce James QC of the PIC: <https://www.pic.nsw.gov.au/files/News/Protea%20Report.pdf> (Accessed 9 August 2015)

"Serious indictable offence" means an indictable offence that is punishable by imprisonment for life or for a term of 5 years or more."

12. Serious sexual assaults in terms of sexual assault (formerly known as rape), sexual assault with violence etc carry jail sentences of between 14 and 20 years (S.61I -61K). Indecent assault, which often involves touching, carries a jail term of 5 years. On the other hand S.61N, dealing with "acts of indecency" is in these terms:

"(1) Any person who commits an act of indecency with or towards a person under the age of 16 years, or incites a person under that age to an act of indecency with or towards that or another person, is liable to imprisonment for 2 years.

(2) Any person who commits an act of indecency with or towards a person of the age of 16 years or above, or incites a person of the age of 16 years or above to an act of indecency with or towards that or another person, is liable to imprisonment for 18 months."

13. Common examples of the offence of an "act of indecency" include, exposing a penis or vagina and masturbating in a public place or in front of children or showing a naked photo of oneself to third parties. As these offences carry sentences of fewer than 5 years, there is no requirement to report under S.316. Child sexual abuse can, and often does, involve these kinds of crimes.
14. The relationship of confidentiality, which might otherwise have been a "reasonable excuse", does not exist where a bishop is carrying out a canonical investigation of clergy sex crimes. Such people are investigators, not counsellors. An employer's wish to avoid bad publicity as a result of a crime by an employee was not regarded as a reasonable excuse where serious crime was involved.<sup>884</sup>
15. 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 ("Cunneen Special Commission") found that where a victim of child sexual abuse requested that the

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<sup>884</sup> [http://www.lawreform.lawlink.nsw.gov.au/agdbasev7wr/lrc/documents/pdf/report\\_93.pdf](http://www.lawreform.lawlink.nsw.gov.au/agdbasev7wr/lrc/documents/pdf/report_93.pdf) par 3.30. (Accessed 16 July 2013)

matter not be reported to the police, this would amount to a reasonable excuse under S.316.<sup>885</sup>

16. The Police Integrity Commissioner, Bruce James QC came to a different view in the *2015 Protea Report* and found that the practice of “blind reporting” where the victim did not want to report the matter to the police was in breach of the Act.<sup>886</sup>
17. The issue of the desirability or otherwise of blind reporting is to be considered by the Royal Commission.

### **Mandatory Welfare Reporting**

18. One of the purposes behind the introduction of mandatory welfare reporting in the 1980s and 1990s was to get around the relationship of confidentiality that exists at common law or under contract between a doctor and patient, psychologist and client, etc. But the legislation was also extended to cover other categories of people to make them mandatory reporters even though they were not in any recognized confidential relationships.
19. The Mathews Report in Table 7 sets out the definitions of a child in each State, and the circumstances under which reporting is required. In New South Wales, the position is set out in the *Children and Young Persons (Care and Protection) Act 1998 (NSW)*
20. Mandated reporters under that Act are defined in S.27 as:

“(a) a person who, in the course of his or her professional work or other paid employment delivers health care, welfare, education, children’s services, residential services, or law enforcement, wholly or partly, to children, and

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<sup>885</sup> The Cunneen Special Commission report said about the “reasonable excuse” defence: “‘Without reasonable excuse’ is not an element to be established initially by the prosecution. Rather, a defendant may seek to rely on reasonable excuse and if so bears an evidentiary burden to elicit, or point to, evidence that legitimately raises the issue of reasonable excuse. If reasonable excuse is so raised, the prosecution is then obliged to negative the reasonable excuse raised beyond reasonable doubt as part of its general onus to prove the elements beyond reasonable doubt.” p.94 fn3. She found that a jury would be unlikely to convict various persons if they raised the excuse that they had been specifically asked not to report the abuse to the police: Hart, p.95, Lucas, p96, par 13.21, Malone, p98, par 13.32, [http://www.dpc.nsw.gov.au/\\_data/assets/pdf\\_file/0005/163922/Report - Volume 2 - Hunter Special Commission of Inquiry.pdf](http://www.dpc.nsw.gov.au/_data/assets/pdf_file/0005/163922/Report_-_Volume_2_-_Hunter_Special_Commission_of_Inquiry.pdf) (Accessed 2 April 2015)

<sup>886</sup> Report of Commissioner Bruce James QC <https://www.pic.nsw.gov.au/files/News/Protea%20Report.pdf> (Accessed 9 August 2015). While this and the Cunneen Report deal with those to whom the victim complained, the victim himself or herself may have good reasons for not reporting. The Victorian *Crimes Amendment (Protection of Children) Act 2014* which amends S.327 of the Crimes Act 1958, impliedly acknowledges this.

(b) a person who holds a management position in an organisation the duties of which include direct responsibility for, or direct supervision of, the provision of health care, welfare, education, children's services, residential services, or law enforcement, wholly or partly, to children.

it is the duty of the person to report, as soon as practicable, to the Secretary the name, or a description, of the child and the grounds for suspecting that the child is at risk of significant harm.”

21. Section 27 limits the obligation to where the suspicion arises from work:

If the mandated reporter 'has reasonable grounds to suspect that a child is at risk of significant harm; and those grounds arise during the course of or from the person's work' the person must report it.<sup>887</sup>

22. The circumstances giving rise to the obligation to report arise from the following:

S3: 'child' is a person who is under the age of 16 years; 'young person' is a person who is aged 16 or above but who is under the age of 18 years

23. Section 23(1):

A child is at risk of significant harm if current concerns exist for the safety, welfare or well-being of the child because of the presence, to a significant extent, of any one or more of the following circumstances:

(c) the child or young person has been, or is at risk of being, physically or sexually abused or ill-treated”

24. Section 24 defines the mental element required for reporting:

“A person who has reasonable grounds to suspect that a child or young person is, or that a class of children or young persons are, at risk of significant harm may make a report to the Secretary.”

25. It can be seen from the above that in NSW, a distinction is drawn between a “child” and a “young person”. The mandatory reporting requirement in S.27 only applies to a “child”, and the reporting of significant harm to a “young person” under S.24 is discretionary.

26. Where reporting is required, it is to be made to the Secretary of the Department of Community Services: S.27(2).

27. These mandatory reporting provisions do not relate to “historical” abuse, that is, where the victim is now an adult.<sup>888</sup> The vast majority of complaints of child sexual abuse are from adults who have been abused as children.<sup>889</sup>

<sup>887</sup> <http://www.childabuseroyalcommission.gov.au/documents/royal-commission-report-ben-mathews-for-rc-publ> (Accessed 15 August 2014)

<sup>888</sup> In Victoria, for example, the *Children, Youth and Families Act 2005* (Vic) refers to “a child is in need of protection”, and therefore does not apply to historical abuse. Other States and Territories (Queensland, South Australia, Western Australia, Tasmania, the Australian Capital Territory and the Northern Territory) refer to a child who “has experienced or is

## Changes to the Legislation since the Mathews Report

28. The law as stated in the Mathews Report is current to 13 December 2013 (p ii).
29. There has been no change to the definition of child or young person as at 18 March 2016, or to S.23 or 27.

## Are Church Personnel Mandatory Welfare Reporters in New South Wales?

30. *Towards Healing 2010* provides for the appointment in each State of a Director of Professional Services (CI 35.3) as well as Assessors who are to investigate the complaint (CI 35.5). Clause 40 then deals with assessment where the facts are in dispute. *Towards Healing* does not specifically state that the Assessor is to be the “suitable person” required to carry out the preliminary investigation under Canon 1717 of the *1983 Code of Canon Law*, but there is no reason why he or she could not be suitable under canon law.
31. There has been some controversy over whether the *Towards Healing* procedure is consistent with canon law.<sup>890</sup> Whatever the correct canonical procedure for disciplining

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experiencing” abuse or similar expressions. As these are sections involving criminal sanctions, the normal rule of interpretation is that the stricter interpretation is to be preferred. See Table 7 for the definitions in each State.

<sup>889</sup> John Jay Report 2004 [http://johnjay.jjay.cuny.edu/churchstudy/\\_pdf/files/response1.pdf](http://johnjay.jjay.cuny.edu/churchstudy/_pdf/files/response1.pdf) par 5.1 (Accessed 15 July 2013). The Cloyne Report examined 40 complaints of sexual abuse. Only 2 of them involved children at risk, and 38 were cases of historical abuse, that is, complaints by victims who are no longer children Cloyne Report, par 1.8, ie some 5% of all cases. [http://www.justice.ie/en/JELR/Cloyne\\_Rpt.pdf/Files/Cloyne\\_Rpt.pdf](http://www.justice.ie/en/JELR/Cloyne_Rpt.pdf/Files/Cloyne_Rpt.pdf) (Accessed 9 February 2013) The Commissioner for the *Melbourne Response* stated to the Victorian Parliamentary inquiry that he investigated 304 complaints of sexual abuse, and only 2 involved victims who were still children at the time. This represents less than 1% of all cases. [http://www.parliament.vic.gov.au/images/stories/committees/fcdc/inquiries/57th/Child\\_Abuse\\_Inquiry/Right\\_of\\_Reply/Right\\_of\\_Reply\\_P.\\_OCallaghan\\_Part\\_1.pdf](http://www.parliament.vic.gov.au/images/stories/committees/fcdc/inquiries/57th/Child_Abuse_Inquiry/Right_of_Reply/Right_of_Reply_P._OCallaghan_Part_1.pdf) par 7(b) (Accessed 15 July 2013). If those figures apply generally that means that historical abuse represents more than 99% all complaints.

<sup>890</sup> Patrick Parkinson: *Child Sex Abuse and the Churches, Understanding the Issues* (2003) Aquila Press. The problem of clergy being “disciplined” in accordance with *Towards Healing* and then having the decision overturned in Rome because *Towards Healing* was inconsistent with canon law, is also mentioned by Delaney *Canonical Implications*, page xi and footnote 3. A good example of the effect of this inconsistency can be found in the Nestor case in Wollongong. James Provost, a canon lawyer from the Catholic University of America in an advice given to Bishop Wilson, dated March 5, 1998, said that the procedure under *Towards Healing* that Bishop Wilson followed was in accordance with canon law, but queried whether *Towards Healing* had received a “*recognitio*”, and if it had, Bishop Wilson’s actions were on “solid ground”: Exh CTJH.001.12003.0145. On 15 July 1998, the Congregation of the Clergy told Bishop Wilson: “It must always be borne in mind that any particular norms must be in conformity with the Code of Canon Law. Refuge cannot be sought in these when such norms are in conflict with the Code or disregard the canonical norms of procedure. Under such circumstances, such particular norms would be without juridic effect.” CTJH.001.12001.1051 (Accessed 28 June 2014). On 21 December, 2000, the Congregation of the Clergy held that the procedures of *Towards Healing* adopted by Bishop Wilson did not comply with canon law and therefore the decision to place him on administrative leave was void. <http://www.childabuseroyalcommission.gov.au/case-study/bb3eaadf-9283-41ef-9694-e560738d186a/case-study-14,-june-2014,-sydney.aspx> (Accessed 24 June 2014) and Exh CTJH.001.12001.0388 On 20 July 2006, the Apostolic Signatura allowed the appeal of the Wollongong Diocese against the decision of the Congregation for the Clergy for reinstatement of Fr Nestor on the ground that the Congregation had erroneously found that the action taken by Bishop Wilson was “penal”, requiring compliance with Canon 1717. Instead it found that the action was a disciplinary one but a non-penal disciplinary decision under canons 764 and 974 §1, “which may be imposed because of a positive and probable doubt concerning the



clerics, it is highly doubtful if the Director of Professional Services or a canonical judge could be regarded as a “mandatory reporter” under the NSW welfare legislation merely by undertaking that role. They are not providing services to children, but are investigating an alleged canonical crime.

32. However, bishops and senior clergy are also in management positions where the Church provides welfare, education, and children’s services and out of home care where the diocese has children’s homes, orphanages and boarding schools. They would for that reason come within the definition of mandatory reporters.

### **Reporting under the *Ombudsman Act (NSW) 1974***

33. New South Wales has another form of mandatory welfare reporting imposed by Part 3A of the *Ombudsman Act 1974*.

34. S.25C requires the head of a designated government or non-government agency to notify the Ombudsman of:

“(a) any reportable allegation, or reportable conviction, against an employee of the agency of which the head of the agency becomes aware.”

(b) whether or not the agency proposes to take any disciplinary or other action in relation to the employee and the reasons why it intends to take or not to take any such action.”

35. A reportable allegation is an allegation of “reportable conduct”, which is then defined in S.25A as:

“(a) Any sexual offence, or sexual misconduct, committed against, with or in the presence of a child (including a child pornography offence or an offence involving child abuse material (within the meaning of Division 15A of Part 3 of the *Crimes Act 1900*)), or

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suitability of the cleric in the matter concerned”. Having come to that decision, it did not have to examine whether or not the *Towards Healing* procedure adopted by Bishop Wilson complied with canon law. It said: “It is also not up to this tribunal to decide on the conformity with the universal law of that manner of proceeding entitled ‘Towards Healing’; if it is warranted, this is a matter for the Pontifical Council for Legislative Texts.”: The Royal Commission Report, Case No. 14 (Nestor) : <http://childabuseroyalcommission.gov.au/getattachment/e1f91ddb-2ba2-4eb4-b487-c43a0c8989e4/Report-of-Case-Study-no-14> p.21 (Accessed 20 December 2014), and Exh CTJH.001.12001.0350. In the Archdiocese of Melbourne a number of priests were successful in having the Apostolic Signatura overturn the decrees of the Archbishop based on the procedure laid down by the Melbourne Response, because its procedures were not consistent with canon law: Evidence of Dr Kevin Matthews, 26 June 2014, <http://www.childabuseroyalcommission.gov.au/case-study/bb3eaadf-9283-41ef-9694-e560738d186a/case-study-14,-june-2014,-sydney.aspx>, p.7989.

- (b) any assault, ill-treatment or neglect of a child , or
- (c) any behaviour that causes psychological harm to a child”

36. The head of the agency is the Catholic Bishop who has authority over the agency concerned.<sup>891</sup> The obligation to report includes the obligation to report historical sexual abuse.<sup>892</sup>

37. A “designated non-government agency” is defined as non-government schools, out of home care agencies, an approved education and care service, an agency providing substitute residential care for children, and any other body prescribed by the regulations and

“(b) a designated agency within the meaning of the *Children and Young Persons (Care and Protection) Act 1998*...”

38. S. 139 of the *Children and Young Persons (Care and Protection) Act 1998* defines a “designated agency” as

(b) an organisation (or part of an organisation) that arranges the provision of out-of-home care,

39. “Out of home care” is defined by S. 135 as

“residential care and control of a child or young person that is provided:

- (a) by a person other than a parent of the child or young person, and
- (b) at a place other than the usual home of the child or young person, whether or not for fee, gain or reward.”

40. S.135C includes voluntary out of home care provided by an organisation in this definition.

41. These definitions are wide enough to include all of the activities carried out in a diocese with children, including such things as Church camps.<sup>893</sup>

42. “Employee” is given a wide definition, and includes:

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<sup>891</sup> Ombudsman Regulation 2011, reg. 6

<sup>892</sup> Royal Commission Report Case Study No. 10 Salvation Army p.18

<http://www.childabuseroyalcommission.gov.au/getattachment/7249b2f5-a9c7-4811-9daf-43b9bc879755/Report-of-Case-Study-No-10> (Accessed 21 March 2016)

<sup>893</sup> See generally Royal Commission Report on Case Study No. 14: Wollongong Diocese and Nestor

“(a) any employee of the agency, whether or not employed in connection with any work or activities of the agency that relates to children, and  
 (b) any individual engaged by the agency to provide services to children (including in the capacity of a volunteer).”

43. The issue of whether or not a priest or religious is in a relationship of employer/employee that has arisen in cases of legal liability of Church organisations does not arise here because of (b).
44. It follows from this that there is a requirement to report to the Ombudsman even the “acts of indecency” which would not be reportable under S.316 of the *Crimes Act (NSW) 1900*, and even though that abuse is historical.

### **The Pontifical Secret and New South Wales**

45. S.316 of the *Crimes Act 1900* creates an obligation on bishops and others who have knowledge of the sexual abuse of children, to report in most cases. The only cases which are not included are those involving “indecent acts” for reasons stated above.
46. Bishops, clergy and lay people in senior management positions are “mandatory reporters” under the New South Wales mandatory reporting laws for children at risk.
47. The *Ombudsman Act (NSW) 1974* requires the bishop to report all allegations of child sexual abuse in his diocese to the Ombudsman, including historical abuse.
48. The pontifical secret does not apply to any case of child sexual abuse coming to the attention of a bishop or his senior clergy in New South Wales.
49. Fr Lombardi’s statement in 2010 that reporting had to take place “in good time, not during or subsequent to the canonical trial” creates some doubt as to whether bishops and canonical judges and staff are allowed to report once a canonical tribunal hearing against a priest commences. The Australian canon lawyer, Rodger Austin stated at the Cunneen Special Commission that revealing anything that was disclosed in a canonical tribunal

required a dispensation.<sup>894</sup> Such a dispensation under canon law would have to come from the Vatican.<sup>895</sup>

50. If a canonical investigator under Canon 1717 (who could be the Director or Professional Services or his delegate), or canonical judges at a penal trial receive evidence of further crimes committed by a priest in addition to those which have already been reported under New South Wales law, an obligation to report would arise under S.316 *Crimes Act (NSW)* 1900, the mandatory welfare reporting laws, and the *Ombudsman Act (NSW)* 1974, depending on the circumstances. The existence of the pontifical secret under canon law is irrelevant to any liability under State law. Canon law has the same status in civil law as the rules of golf.<sup>896</sup> But the bishop may feel obliged to break the civil law because of his consecration oath.

## Victoria

51. Misprision of felony was abolished in Victoria in 1981, and it was replaced with a formulation that did not match the common law one, requiring some positive impediment to a police investigation or some benefit being received for concealing the crime.<sup>897</sup> Merely not reporting it was no longer a crime.

<sup>894</sup> [http://www.lawlink.nsw.gov.au/lawlink/Special\\_Projects/ll\\_splprojects.nsf/vwFiles/Transcript\\_Day\\_20\\_-\\_TOR\\_2\\_-\\_31\\_July\\_2013.pdf/\\$file/Transcript\\_Day\\_20\\_-\\_TOR\\_2\\_-\\_31\\_July\\_2013.pdf](http://www.lawlink.nsw.gov.au/lawlink/Special_Projects/ll_splprojects.nsf/vwFiles/Transcript_Day_20_-_TOR_2_-_31_July_2013.pdf/$file/Transcript_Day_20_-_TOR_2_-_31_July_2013.pdf) , 2233

<sup>895</sup> Canon 87, and Beal, Coriden and Green, *New Commentary on the Code of Canon Law* p.130-132. Canon 85 provides ‘A dispensation, or the relaxation of a merely ecclesiastical law in a particular case, can be granted by those who possess executive power within the limits of their competence, as well as by those who have the power to dispense explicitly or implicitly either by the law itself or by legitimate delegation.’ Canon 87 provides that a bishop: “is not able to dispense, however, from procedural or penal laws nor from those whose dispensation is specially reserved to the Apostolic See or some other authority.’ See also Delaney, *Canonical Implications*, p. 182

and Dr Rodger Austin at the Cunneen Special Commission

[http://www.lawlink.nsw.gov.au/lawlink/Special\\_Projects/ll\\_splprojects.nsf/vwFiles/Transcript\\_Day\\_20\\_-\\_TOR\\_2\\_-\\_31\\_July\\_2013.pdf](http://www.lawlink.nsw.gov.au/lawlink/Special_Projects/ll_splprojects.nsf/vwFiles/Transcript_Day_20_-_TOR_2_-_31_July_2013.pdf/$file/Transcript_Day_20_-_TOR_2_-_31_July_2013.pdf) , (Accessed 29 March 2015), p.2233. Austin’s

assertion at 2230 that there are no restrictions under canon law on reporting allegations of sexual abuse to the civil authorities is contradicted by his later evidence that if a civil court required the disclosure of material before a canonical tribunal, the witness would have to seek a “dispensation” from the Church to reveal it. Sr Moya Hanlen, another canon lawyer, at the Royal Commission advised that in the Nestor case, the CDF “relieved” the bishop of the pontifical secret because it was important that the problem surrounding this priest be made public. This is consistent with Austin’s view that the evidence about the sexual assaults of a priest cannot be revealed without a dispensation.

<http://www.childabuseroyalcommission.gov.au/case-study/bb3eaadf-9283-41ef-9694-e560738d186a/case-study-14-june-2014-sydney.aspx> , 8144. Sr Hanlen’s evidence was accepted by the Royal Commission Report Case No. 14 (Nestor) : <http://childabuseroyalcommission.gov.au/getattachment/e1f91ddb-2ba2-4eb4-b487-c43a0c8989e4/Report-of-Case-Study-no-14> p.40 (Accessed 20 December 2014)

<sup>896</sup> Irish Justice Minister McDowell <http://www.independent.ie/irish-news/canon-law-has-same-status-as-golf-rules-26032154.html> (Accessed 21 March 2016)

<sup>897</sup> S.322B *Crime (Classification of Offences Act) (Vic)* 1981

[http://www.austlii.edu.au/au/legis/vic/hist\\_act/cooa1981292.pdf](http://www.austlii.edu.au/au/legis/vic/hist_act/cooa1981292.pdf)

See also advice of Nicholas Pappas SC to the Victorian Parliamentary Inquiry

[http://www.parliament.vic.gov.au/images/stories/committees/fcdc/inquiries/57th/Child\\_Abuse\\_Inquiry/Submissions/COI\\_N\\_9.pdf](http://www.parliament.vic.gov.au/images/stories/committees/fcdc/inquiries/57th/Child_Abuse_Inquiry/Submissions/COI_N_9.pdf) (Accessed 10 February 2013).

***Crimes Amendment (Protection of Children) Act 2014 (Victoria).***

52. In 2014, Victoria restored a misprision of felony kind of offence, limited to child sexual abuse, with its *Crimes Amendment (Protection of Children) Act 2014*.<sup>898</sup> S.327(2) *Crimes Act 1958* now provides:

“subject to subsections (5) and (7), a person of or over the age of 18 years (whether in Victoria or elsewhere) who has information that leads the person to form a reasonable belief that a sexual offence has been committed in Victoria against a child under the age of 16 years by another person of or over the age of 18 years must disclose that information to a member of the police force of Victoria as soon as it is practicable to do so, unless the person has a reasonable excuse for not doing so.”<sup>899</sup>

53. Subsection (5) provides that there is a reasonable excuse if the victim requested that it not be reported.<sup>900</sup>

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<sup>898</sup> The Act was passed by the Victorian Parliament and assented to on 3 June 2014. It was proclaimed to commence on 27 October 2014. <http://www.gazette.vic.gov.au/gazette/Gazettes2014/GG2014S350.pdf> (Accessed 14 Oct 2014).

<sup>899</sup> S.327(3) provides: For the purposes of subsection (2) and without limiting that subsection, a person has a reasonable excuse for failing to comply with that subsection if—

- (a) the person fears on reasonable grounds for the safety of any person (other than the person reasonably believed to have committed, or to have been involved in, the sexual offence) were the person to disclose the information to police (irrespective of whether the fear arises because of the fact of disclosure or the information disclosed) and the failure to disclose the information to police is a reasonable response in the circumstances; or
- (b) the person believes on reasonable grounds that the information has already been disclosed to police by another person and the firstmentioned person has no further information.

<sup>900</sup> The section provides: A person does not contravene subsection (2) if—

- (a) the information forming the basis of the person's belief that a sexual offence has been committed came from the victim of the alleged offence, whether directly or indirectly; and
  - (b) the victim was of or over the age of 16 years at the time of providing that information to any person; and
  - (c) the victim requested that the information not be disclosed.
- (6) Subsection (5) does not apply if—
- (a) at the time of providing the information, the victim of the alleged sexual offence—
    - (i) has an intellectual disability (within the meaning of the Disability Act 2006); and
    - (ii) does not have the capacity to make an informed decision about whether or not the information should be disclosed; and
  - (b) the person to whom the information is provided is aware, or ought reasonably to have been aware, of those facts.
- (7) A person does not contravene subsection (2) if—
- (a) the person comes into possession of the information referred to in subsection (2) when a child; or
  - (b) the information referred to in subsection (2) would be privileged under Part 3.10 of Chapter 3 of the Evidence Act 2008; or
  - (c) the information referred to in subsection (2) is a confidential communication within the meaning of section 32B of the Evidence (Miscellaneous Provisions) Act 1958; or
  - (d) the person comes into possession of the information referred to in subsection (2) solely through the public domain or forms the belief referred to in subsection (2) solely from information in the public domain; or

Part 3.10 of Chapter 3 of the Evidence Act 2008 deals with legal professional privilege as well as privilege arising from religious confessions. S.32B of Evidence (Miscellaneous Provisions) Act 1958 deals with disclosure of sexual offences to a registered medical practitioner or counsellor in a confidential situation. Counsellor is defined as one who “is treating a person for an emotional or psychological condition.” Under S.32C(1) the Court can grant leave to compel the production of the document on the basis that the public interest is greater than the harm caused by its production and that it has probative value: D.32D. There are also other limitations on the privilege under S.32E.

54. The legislation extends to historical abuse and not just to children “at risk” at the time of receiving the information.

### **Mandatory Welfare Reporting**

55. The current mandatory reporting legislation is *Children, Youth and Families Act 2005* (Mathews Report par 3.7.2). S.184 (1) provides that a

“A mandatory reporter who, in the course of practising his or her profession or carrying out the duties of his or her office, position or employment as set out in section 182, forms the belief on reasonable grounds that a child is in need of protection on a ground referred to in section 162(1)(c) or 162(1)(d) must report it.” (Mathews Report, Table 4) .

56. The persons referred to in S.182 are teachers, police, nurses, doctors, midwives and school principals (Mathews Report, Table 5).

### **Changes to the Legislation since the Mathews Report**

57. There was no significant change to the mandatory reporting legislation, but there was a significant change to the *Crimes Act 1958*, as set out above.

### **The Pontifical Secret and Victoria**

58. The Victorian legislation does not even provide for “blind reporting”. If the victim requests that the sexual abuse not be reported by the Church, there is no breach of any Victorian law in failing to do so.
59. It follows from this that the pontifical secret prevents a bishop or his investigators from engaging in “blind reporting” as provided by *Towards Healing*. Once they have been requested not to do so by the complainant, the 2010 dispensation no longer applies, and the pontifical secret binds both the allegation and the information that they obtain through their investigation.
60. The unsatisfactory position arising from this legislation is that when a complainant takes the complaint to the Church, its officials are in a position of conflict of interest in giving advice as to whether a report should be made to the police or not. By encouraging the complainant not to go to the police, the scandal of a public trial of a priest is avoided.

61. On 18 October 2012, the Victorian Deputy Police Commissioner, Graham Ashton told the Victorian Parliamentary Inquiry that of the 620 cases of clergy sex abuse dealt with internally by the four Victorian dioceses since 1996, none had been reported by the Church to the police.<sup>901</sup> The Victorian Church's submission to the Inquiry did not dispute that figure, but a later submission on behalf of the Archdiocese of Melbourne said it was 611 in total, with 304 dealt with by the Melbourne Archdiocese's *Melbourne Response* protocol and the balance of 307 by the *Towards Healing* protocol of the other three Victorian dioceses.<sup>902</sup>
62. The Royal Commission found that Peter O'Callaghan QC, the Melbourne Response's Independent Commissioner had investigated 350 complaints, and 29% had been reported to the police prior to the victim approaching the Melbourne response. Only 17 of the remaining 233, or 7%, were reported after the victims had been interviewed by Mr. O'Callaghan.<sup>903</sup>
63. O'Callaghan said that he had "effectively" referred complaints to the police by making appointments for victims who were willing to go to the police to do so.<sup>904</sup> But the whole point that Commissioner Ashton was making, and Victorian Parliamentary Committee accepted, was that *the Church* had never reported any of these incidents to the police.<sup>905</sup> This was not surprising because O'Callaghan had agreed to abide by canon law, and was also carrying out the preliminary inquiry under Canon 1717.<sup>906</sup> O'Callaghan explained his failure to report these crimes to the police on the basis of his confidentiality undertaking to the

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<sup>901</sup> For the terms of reference and the submissions, see

[http://www.parliament.vic.gov.au/images/stories/committees/fcdc/inquiries/57th/Child\\_Abuse\\_Inquiry/Final\\_FCDC\\_CAI\\_n\\_ROs\\_Submission\\_Guide.pdf](http://www.parliament.vic.gov.au/images/stories/committees/fcdc/inquiries/57th/Child_Abuse_Inquiry/Final_FCDC_CAI_n_ROs_Submission_Guide.pdf) (Accessed 3 July 2013).

[http://www.parliament.vic.gov.au/images/stories/committees/fcdc/inquiries/57th/Child\\_Abuse\\_Inquiry/Right\\_of\\_Reply/R\\_ight\\_of\\_Reply\\_Francis\\_Moore.pdf](http://www.parliament.vic.gov.au/images/stories/committees/fcdc/inquiries/57th/Child_Abuse_Inquiry/Right_of_Reply/R_ight_of_Reply_Francis_Moore.pdf) (Accessed 10 August 2013)

<sup>902</sup> [http://www.parliament.vic.gov.au/images/stories/committees/fcdc/inquiries/57th/Child\\_Abuse\\_Inquiry/Submissions/C\\_atholic\\_Church\\_in\\_Victoria.pdf](http://www.parliament.vic.gov.au/images/stories/committees/fcdc/inquiries/57th/Child_Abuse_Inquiry/Submissions/C_atholic_Church_in_Victoria.pdf) (Accessed 6 April 2013) p. 3, and

[http://www.parliament.vic.gov.au/images/stories/committees/fcdc/inquiries/57th/Child\\_Abuse\\_Inquiry/Right\\_of\\_Reply/R\\_ight\\_of\\_Reply\\_Francis\\_Moore.pdf](http://www.parliament.vic.gov.au/images/stories/committees/fcdc/inquiries/57th/Child_Abuse_Inquiry/Right_of_Reply/R_ight_of_Reply_Francis_Moore.pdf) (Accessed 10 August 2013)

<sup>903</sup> Id, par 120. On 19 August 2014, O'Callaghan said that there were 81 priests, religious and lay persons against whom he had made findings of sexual abuse, but who had not been reported to the police. Of that number, 39 priests were deceased at the time the complaint was made, 17 were still living, and the balance were: 1 deacon, 8 religious priests, 1 religious brother, 5 religious sisters, 10 lay persons, and 15 unidentified offenders: transcript, 4236

<sup>904</sup> [http://www.parliament.vic.gov.au/images/stories/committees/fcdc/inquiries/57th/Child\\_Abuse\\_Inquiry/Right\\_of\\_Reply/R\\_ight\\_of\\_Reply\\_P.\\_O'Callaghan\\_Part\\_1.pdf](http://www.parliament.vic.gov.au/images/stories/committees/fcdc/inquiries/57th/Child_Abuse_Inquiry/Right_of_Reply/R_ight_of_Reply_P._O'Callaghan_Part_1.pdf) page 3(c) (Accessed 25 June 2013)

<sup>905</sup> *Betrayal of Trust*, Report of the Victorian Parliamentary Committee, par 7.3.6, page 170 [https://s3-ap-southeast-2.amazonaws.com/family-and-community-development-committee/Inquiry+into+Handling+of+Abuse\\_Volume+1\\_FINAL\\_web.pdf](https://s3-ap-southeast-2.amazonaws.com/family-and-community-development-committee/Inquiry+into+Handling+of+Abuse_Volume+1_FINAL_web.pdf) (Accessed 14 November 2013)

<sup>906</sup> Opening Address of Gail Furness SC, par 25, <http://www.childabuseroyalcommission.gov.au/case-study/791fd480-ba30-45bc-ba79-cbad85f27023/case-study-16,-august-2014,-melbourne> (Accessed 18 August 2014)

complainant, and that it would have been “futile” unless the complainant was prepared to go to the police.<sup>907</sup> But the pontifical secret was also imposed on him by canon law.

64. In the Royal Commission Report of Case Study No. 16 on the Melbourne Response, the Commission said:

“We are satisfied that Mr O’Callaghan QC provided advice about the police process to Mr Hersbach and Mr AFA that discouraged them from going to the police. Having regard to Mr O’Callaghan QC’s defined role, this advice was not appropriate. Advice about the approach that the police might take to any prosecution, and the likely outcome, should have been left to the police. They were the body with all of the relevant information.

We note the current view of the Victoria Police is that:

“it is our view that victims should be afforded the opportunity to speak with a specialist police investigator to discuss the options fully and answer any queries that may arise.”

Mr AFA’s experience with the police after he had been through the Melbourne Response illustrates why Victoria Police suggest that they are best placed to advise victims on the prospects of criminal action.”

65. The Victorian legislation is defective because it establishes a system of conflict of interest in reporting where the Church, as in the past, has benefited from the failure to report.
66. In 1946, the Spanish canon lawyer, Fr Aurelio Yanguas SJ wrote that the purpose behind *Crimen Sollicitationis* was to take “swift, decisive and secret action” before these crimes reach the civil courts so that the Church could be spared the humiliation of having clerics in the public dock as sex offenders.<sup>908</sup> This has always been the motivation behind the cover up of child sexual abuse in the Church.

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<sup>907</sup> Ibid, Statement O’Callaghan, page13 and 14, Exh STAT.0320.001.0001\_R. The original Melbourne Response document, and the terms of the Commissioner’s appointment had a provision that subject to confidentiality obligations, the Commissioner “may, if he considers it appropriate, report matters to the police”: Exh COM.1001.0001.0009. That does not appear on the public brochure subsequently provided by the Melbourne Archdiocese.

<sup>908</sup> “*De crimine pessimo et competentia S. Officia relate ad illud,*” *Revista Espanola de Derecho Canonico*. 1(1946): 427-439. John P. Beal: *The 1962 Instruction*, pp. 228ff. <http://www.vatican.va/resources/Beal-article-studia-canonica41-2007-pp.199-236.pdf> (Accessed 16 July 2013)



## Queensland

67. Queensland has a similar formulation of the offence of concealment to Victoria – there had to be some benefit to the person concealing the crime. There is no equivalent of S.316 of the *Crimes Act (NSW) 1900*.

### Mandatory Welfare Reporting

68. The position as at December 2013 in Queensland is summarised in the Mathews Report at page 81 which stated that Queensland was unique in having two separate statutes governing reporting, but neither of them appeared in its child protection statute. Its range of reporters is the narrowest in Australia: doctors, nurses and school staff. It noted that the 2013 Queensland Child Protection Commission of Inquiry recommended that there be a review and consolidation of all existing legislative reporting obligations into the Child Protection Act 1999. At the time of the Mathews Report, no legislation had been put into place to achieve that consolidation.

### Changes to the Legislation since the Mathews Report

69. Amendments were made to the *Child Protection Act 1999* in 2014, to consolidate in one act mandatory reporters. The mandatory reporters are doctors, registered nurses, teachers, police officers who are required to report under the *Police Service Administration Act 1990*, and guardians (S.13E). Various persons responsible for children in care are also mandatory reporters (S.13F). Clergy are not included. The report is to be made to the chief executive of the Department of Communities, Child Safety and Disability Services.

### The Pontifical Secret and Queensland

70. The pontifical secret applies under canon law for all allegations of child sexual abuse against clergy and religious. Since the terms of the 2010 dispensation apply only where there are civil laws requiring reporting, the pontifical secret applies. The bishop or his investigators are not mandatory welfare reporters.

## South Australia

71. South Australia has no equivalent of S.316 *Crimes Act (NSW) 1900*.<sup>909</sup> The common law offence of misprision of felony was abolished in 1994 by amendments to the *Criminal Law Consolidation Act (SA)1935*.<sup>910</sup>

### Mandatory Welfare Reporting

72. South Australia's mandatory reporting provisions are contained in the amended *Children's Protection Act 1993 (SA)*, (commenced 2006), and is the only Australian statute that specifically includes ministers of religion amongst the mandatory reporters. The list includes:

“Pharmacists, dentists, psychologists, community corrections officers, social workers, religious ministers, employees and volunteers in religious organisations, teachers in educational institutions; family day care providers; employees and volunteers in organisations providing health, education, welfare, sporting or recreational services to children; managers in relevant organisations.”

73. Child is defined as a person under the age of 18: (Mathews Report Table 7). The legislation does not apply to historical abuse.

74. Section 11(1) provides:

“If (a) a person to whom this section applies suspects on reasonable grounds that a child has been or is being abused or neglected; and (b) the suspicion is formed in the course of the person's work (whether paid or voluntary) or of carrying out official duties’, the person must report it.”

75. This legislation obliges any bishop or priest to report all allegations of child sexual abuse against a person who is still a child.

### Changes to the Legislation since the Mathews Report

76. There does not appear to be any change to the legislation since the Mathews Report.

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<sup>909</sup> The closest it has relates to accessories: *Criminal Law Consolidation Act 1935 (SA)*s 241

<sup>910</sup> S.370 Schedule 11. *Criminal Law Consolidation (Felonies and Misdemeanours) Amendment Act 1994*

## The Pontifical Secret and South Australia

77. In the case of children at risk, that is, those under the age of 18 at the time of the complaint, the pontifical secret does not apply under the 2010 dispensation because clergy are included as mandatory reporters.
78. In the case of historical abuse, the pontifical secret applies because there is no equivalent of the New South Wales or Victorian *Crimes Acts* or *Ombudsman Act (NSW) 1974* requiring reporting of such crimes.

## Western Australia

79. Misprision of felony was abolished by the *Criminal Code Act Compilation Act 1913*, S. 4 which provided:

“No person shall be liable to be tried or punished in Western Australia as for an offence, except under the express provisions of the Code.”

80. The only concealment offence in the Western Australia Code is the concealment of treason under S.38. There is no equivalent of S.316 *Crimes Act (NSW) 1900*.

## Mandatory Welfare Reporting

81. The mandatory reporting provisions are contained in the *Children and Community Services Act 2004* as amended by *Children and Community Services Amendment (Reporting Sexual Abuse of Children) Act 2008* (No 26 of 2008): (Mathews Report Table 1 & 2).

82. Section 124B(1) requires a mandated reporter to report where, in the course of their work, he or she:

“believes on reasonable grounds that a child (i) has been the subject of sexual abuse that occurred on or after commencement day; or (ii) is the subject of ongoing sexual abuse” . (Mathews Report, Table 4)

83. Mandatory Reporters are teachers, (including members of the teaching staff of a community kindergarten) police, nurses, doctors and midwives. Clergy are not included.

84. Bishops and their investigators have no obligation to report under the Western Australian legislation.

#### **Changes to the Legislation since the Mathews Report**

85. The Act was amended by the *Children and Community Services Legislation Amendment and Repeal Act 2015* with the insertion of S.124A. The amendment related to various definitions and to whom reports should be made, but did not expand the list of mandatory reporters.

#### **The Pontifical Secret and Western Australia**

86. Since there is no obligation on bishops or their investigators to report under Western Australian legislation, they are bound by the pontifical secret not to report, and the 2010 dispensation under canon law to allow reporting does not apply.

#### **Tasmania**

87. S.6 of the *Criminal Code Act 1924* abolished the prosecution of common law offences. Misprision of felony was a common law offence.
88. Like Western Australia, Tasmania has an offence of concealment of treason in S.58 of the Code, and there is no equivalent of S.316 of the *Crimes Act (NSW) 1900*.
89. S.102 is in similar terms to the Victorian legislation that concealment of a crime only becomes an offence if it is in return for some benefit.

#### **Mandatory Welfare Reporting**

90. Tasmania's mandatory reporting provisions are set out in *Children, Young Persons and Their Families Act 1997* (Tas) ss 3, 14 (Mathews Report Table 1)
91. Child is defined as a person under the age of 18 years. (S.3(1), Mathews Report Table 7)

92. Mandatory reporters are teachers, police, nurses, doctors, midwives, dentists, psychologists, probation officers, principals and teachers in any educational institution, child care providers, employees and volunteers in government funded agencies providing health, welfare or education services to children (Mathews Report Table 5). Clergy are not included.

#### **Changes to the Legislation since the Mathews Report**

93. There are no changes to the Act since the Mathews Report. The Act does provide that the list of mandatory reporters can be prescribed by regulations, but there does not appear to be any extension of the categories by this means.

#### **The Pontifical Secret and Tasmania**

94. As there is no misprision of felony or statutory equivalent in Tasmania, and as the mandatory reporting laws only apply to persons who are children at the time of the complaint, there is no obligation on bishops or Church personnel to report historical abuse.
95. In the case of children at risk, bishops and their investigators and clergy are not included amongst the mandatory reporters.
96. The pontifical secret under canon law operates in Tasmania to prevent the reporting of any child sexual abuse by clergy in that State.

#### **Australian Capital Territory**

97. S.9 of the *Crimes Act (ACT) 1900* abolished the distinction between misdemeanours and felonies. There is therefore no common law offence of misprision of felony.
98. There is no equivalent of S.316 *Crimes Act (NSW) 1900* in the ACT.
99. S.44 of the Commonwealth *Crimes Act 1914* has a similar formulation of concealment in return for a benefit.

100. There is therefore no duty to report except under the welfare mandatory reporting legislation.

### **Mandatory Welfare Reporting**

101. The mandatory provisions are found in the *Children and Young People Act 2008 (ACT)* s 356.

102. The legislation draws a distinction between a “child” and “young adult”, but for the purposes of the reporting provisions, they apply to anyone under the age of 18: (Mathews Report Table 7)

103. The mandated reporters are: teachers, police, nurses, doctors, dentists, midwives, home education inspectors, school counsellors, childcare centre carers, home-based care officers, public servants working in services related to families and children, the public advocate, the official visitor, paid teacher’s assistants/aides, paid childcare assistants/aide. (Mathews Report Table 5). Clergy are not included.

### **Changes to the Legislation since the Mathews Report**

104. There has been no change to the ACT legislation.

### **The Pontifical Secret and the ACT**

105. As there is no misprision of felony or statutory equivalent in the ACT, and as the mandatory reporting laws only apply to persons who are children at the time of the complaint, there is no obligation on bishops or Church personnel to report historical abuse.

106. In the case of children at risk, persons involved in specific occupations are defined as mandatory reporters. Clergy are not included.

107. The pontifical secret under canon law operates in the ACT to prevent the reporting of any child sexual abuse by clergy in the Territory.

## Northern Territory

108. Prior to the passing of the *Criminal Code Act* 1983, South Australian criminal legislation was in force in the Northern Territory, and it was repealed with the passing of the Code. The formal abolition of misprision of felony took place in South Australia in 1994.
109. However, it is unlikely that the common law offence of misprision of felony survived the introduction of the *Code* because S.4 defines offences as: crimes, simple offences and regulatory offences.
110. S.104 of the *Criminal Code Act* 1983 has the same formulation as in Victoria about requiring a benefit before concealing a crime can itself be a criminal offence.
111. There is therefore no duty to report except under the welfare mandatory reporting legislation.

## Mandatory Welfare Reporting

112. The mandatory reporting provisions are contained in the *Care and Protection of Children Act* (NT) ss 15, 16, 26
113. S.13 defines a “child as a person who is under the age of 18 years.
114. Northern Territory is unique in the Australian States and Territories in putting the reporting obligations on “all persons”: S.26.
115. Section 26(1) provides:  
 “A person is guilty of an offence if the person (a) ‘believes, on reasonable grounds, any of the following:  
 i. a child has suffered or is likely to suffer harm or exploitation;  
 ii. a child aged less than 14 years has been or is likely to be a victim of a sexual offence;  
 iii. a child has been or is likely to be a victim of an offence against section 128 of the Criminal Code’ and does not report it.”

### **Changes to the Legislation since the Mathews Report**

116. There is no change to the mandatory reporting laws since the Mathews Report.

### **The Pontifical Secret and the Northern Territory**

117. As there is no misprision of felony or statutory equivalent in the Northern Territory, and as the mandatory reporting laws only apply to persons who are children at the time of the complaint, there is no obligation on bishops or Church personnel to report historical abuse.

118. The Northern Territory does not have specific categories of mandated reporters, and the obligation to report applies to “all persons”. Bishops and their investigators therefore come within the category of mandated reporters. It follows that there is a civil law obligation to report in respect of abuse of children who are currently under the age of 18 years. The 2010 dispensation from the pontifical secret would therefore apply, and compliance with these mandatory reporting laws can take place without any breach of canon law.

## **Conclusion**

### **Historical Abuse**

119. In all States and Territories of Australia, except New South Wales and Victoria, the pontifical secret prevents Church officials from reporting historical abuse to the civil authorities.

120. New South Wales is the only State in Australia to have comprehensive reporting laws, and therefore the pontifical secret does not apply because of the 2010 dispensation (but subject to clarification of the Lombardi statement).

121. In Victoria, the pontifical secret prevents reporting to the civil authorities where the complainant indicates a wish that the abuse not be reported. The pontifical secret prevents “blind reporting”. There is a conflict of interest in the Church providing advice to a complainant about reporting, as identified by the Royal Commission’s Melbourne Response Report.



## Children at Risk

122. South Australia is the only State or Territory of Australia that names “religious ministers, employees and volunteers in religious organisations” as mandatory reporters, and the Northern Territory has everyone as a mandatory reporter. In South Australia and the Northern Territory, the pontifical secret does not apply where the other conditions of reporting apply so as to create an obligation to report children at risk.
123. In Queensland, Western Australia, Tasmania and the A.C.T, clergy are not mandatory reporters. The pontifical secret therefore applies to the sexual abuse of children at risk in those jurisdictions, and bishops and clergy are required under canon law not to report.
124. New South Wales is the only State in Australia that has comprehensive reporting laws requiring the reporting of all historical abuse and where children are at risk. It is the only State where the pontifical secret has no application under canon law.
125. In Victoria, where reporting is not required under S.357(2) of the *Crimes Act (Vic) 1958*, because the complainant does not wish the matter to be reported to the police, and there is no requirement for clergy to report because they are not listed as mandatory reporters in the case of children at risk, the pontifical secret applies in those circumstances.
126. If the direction from Fr Lombardi in 2010 about reporting having to take place before a canonical investigation, then the reach of the pontifical secret to prevent reporting will be accordingly expanded, because canon law will then in many cases require Church personnel to defy the civil law.
127. Leaving aside the Lombardi qualification, canon law of itself does not create a conflict between canon and civil law because of the 2010 dispensation requiring observance of civil reporting laws.
128. However, canon law creates a conflict between it and the requirements of *Towards Healing 2010* with its requirement to report all instances of child sexual abuse to the civil authorities, albeit in some cases the reporting may be “blind”. *Towards Healing* has no status in canon law and is not binding on individual bishops. Since bishops take a consecration oath to “obey

all ecclesiastical laws", (of which *Towards Healing* is not one), there is a serious risk that bishops will take that oath seriously.

129. Assuming the Lombardi statement is not a limitation on the 2010 dispensation to allow reporting to the civil authorities, the pontifical secret in geographic terms operates in varying degrees over some 89% of the Australian land mass, and potentially affects some 68% of the Australian population, of which the Catholics some 25%. New South Wales is the only State able to take full advantage of the 2010 dispensation. The worst affected States and Territories are Queensland, Western Australia, Tasmania and the Australian Capital Territory, where the dispensation does not apply at all.
  
130. The existence of the pontifical secret under canon law poses a serious threat to the continuation of the cover up of child sexual abuse within the Catholic Church in Australia.

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## APPENDIX 5

### SECRETA CONTINERE

Translation by William Woestman: *Ecclesiastical Sanctions and the Penal Process*, Appendix VII, p.237 (St. Paul University 2003)

#### **Rescript from an Audience Instruction Concerning Pontifical Confidentiality**

How greatly the maintaining of secrecy is in conformity with human nature is evident, in the first place, from the fact that, although many things must be done in the external order, nevertheless their rise and consideration are initiated in the depths of the heart and only after mature thought are they prudently brought forth.

To maintain silence, then – a very difficult thing indeed – just as to speak frankly and considerately, pertain to the perfect man: for there is time for keeping silent and a time for speaking (see *Eccl* 3:7), and that man is perfect who knows how to bridle his tongue (see *James* 3:2)

And it so happens in the Church itself, the community of believers, that those who have been commissioned to preach and to bear witness to the Gospel of Christ (see *Mk*.16:15; *Acts* 10:42) are, nevertheless, obliged by their office to keep the secret and to ponder the words in their heart so that the works of God may be correctly and broadly manifested and His message may be spread quickly and be received with honour (see *2 Thess* 3:1)

Deservedly, therefore, some things are entrusted to those who are assigned to the service of the People of God, which must be surrounded with secrecy, those things, namely, which, if revealed at the wrong time or in the wrong way, are prejudicial to the building up of the Church or destroy the public good, or, finally offend the inviolable rights of individuals and communities (see instruction *Communio et progresso* no. 121).

All these matters are always an obligation in conscience, and, in the first place, the rigid observance of secrecy in view of the discipline of the sacrament of penance, and in the second place, the secrecy of office or, as it is called the trusted secret, in addition to papal secrecy which is treated of in this instruction. Since we are dealing with public matters which affect the good of the total community,

it is evident then that when, or for what reason, or for what gravity secrecy of this kind must be imposed, is to be determined, not by any private individual according to the dictates of his own conscience, but for him who according to the law has the care of the community. On the other hand, those who are bound by such secrecy should not of themselves be obliged by a law existing apart from themselves, but rather by an imperative of proper human dignity, in other words, they should think it an honour for them to observe secrecy due to the public good.

As regards the Roman Curia, however, matters which are handled in the service of the universal Church are cloaked in general official secrecy. The moral obligation of this secrecy must be measured by the superior's prescription or by the nature of the importance of the matter. On the other hand, in certain matters of more serious consequence, special secrecy is obligatory; it is called papal secrecy and there is always a serious obligation to observe it.

The Secretariat of State issued an instruction on papal secrecy on the 24<sup>th</sup> day of June, 1968. Later, however, the question was considered at an assembly of the cardinals moderator of the departments of the Roman Curia and it seemed advisable to change certain norms of the instruction so that the matter and the obligation of secrecy might be more accurately defined and its observance more fittingly urged.

Following, therefore are the norms:

Art 1: Included under papal confidentiality are:

- 1) The preparation and composition of papal documents for which this kind of secrecy should be required in express terms;
- 2) Information learned by reason of one's office concerning matters which are handled by the Secretariat of State or by the council for the Public Affairs of the Church which must be treated of (sic) under papal secrecy;
- 3) The pointing out and denunciation of doctrines and published writings made to the S. Congregation for the Doctrine of the Faith, as well as examination of those charges instituted by order of the said Department.
- 4) Extrajudicial denunciations received regarding delicts against the faith and against morals, and regarding delicts perpetrated against the sacrament of penance. Likewise, the process and decision which pertain to those denunciations, always safeguarding the right of him who has been reported to authorities to know of the denunciation if such knowledge is necessary for his own

defence. However, it will be permissible to make known the name of the denouncer then only when authorities think it opportune that the denounced and the denouncer come face to face.

- 5) Reports drawn up by legates of the Holy See regarding matters having reference to papal secrecy.
- 6) Information learned by reason of one's office, pertaining to the creation of cardinals.
- 7) Information learned by reason of one's office, pertaining to the nomination of bishops, apostolic administrators and other Ordinaries endowed with the episcopal rank; vicars and prefects apostolic, and papal legates; likewise investigations relative to these cases.
- 8) Information learned by reason of one's office, pertaining to the nomination of prelate superiors and of major officials of the Roman Curia;
- 9) Whatever pertains to codes (commonly: *Cifrari*) and to writings drawn up in codes;
- 10) Business and causes which are considered by the Supreme Pontiff, by the cardinal prefect of a given Department, or by legates of the Holy See to be of such grave importance that they demand the protection of papal secrecy.

## Art II

The following are under the obligation of observing papal secrecy;

- 1) Cardinals, bishops, prelate superiors, major and minor officials, consultants, experts and ministers of lower rank who are concerned with the treatment of questions which are subject to papal secrecy.
- 2) Legates of the Holy See and their ministers who treat of the aforesaid questions; also those who are called in by those persons for consultation on these cases.
- 3) All those on whom the observance of papal secrecy is imposed in special cases.
- 4) All those who have culpably received information of documents and matters which are subject to papal secrecy, or even if they have received this kind of information inculpably, they should know for certain that these matters are still covered by papal secrecy.

## Art III

- 1) Whoever is bound by papal secrecy is always under grave obligation to observe it.
- 2) If a violation has reached the external form, he who is accused of violating the secrecy, will be judged by the a certain special commission which will be constituted by the cardinal prefect of the competent Department, or if he is unavailable by the office moderator concerned; this commission will inflict penalties in keeping with the gravity of the delict or of the harm done.
- 3) If he who has violated the secrecy is in the service of the Roman Curia, he incurs the penalties set down in the General Regulations.

## Art. IV

Those who are admitted to papal secrecy by reason of assignment must take an oath according to the following formula:

*I....in the presence of....personally touching the sacred gospels of God, promise that I will faithfully maintain "papal secrecy" in the cases and in the business which must be handled under the said secrecy, in such wise that in no way, under any pretext, whether of greater good or of very urgent and very grave reason is it permissible for me to violate the aforesaid secrecy.*

*I promise that I shall maintain the above secrecy also when the causes and business for which such secrecy has been expressly imposed have been concluded. And if it should happen in a given case that I am in doubt whether there is an obligation of the aforesaid secrecy, I shall give the interpretation in favour of the said secrecy.*

*So help me God and these, His holy gospels, which I touch with my hands.*

In the audience to the undersigned on 4th day of the month of February 1974, the Supreme Pontiff, Paul VI, approved this instruction and ordered that it be published with the stipulation that it go into force on 14th day of the month of March of the same year, all things to the contrary notwithstanding.

Joannes Card. Villot, Secretary of State.