JASR 31.3 (2018) 143-164
https://doi.org/10.1558/jasr.37572

JASR ISSN 2047-704X (print)
JASR ISSN 2047-7058 (online)

Civil and Canon Law on Reporting Child Sexual Abuse to the Civil Authorities

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Abstract

The Royal Commission into Institutional Responses to Child Sexual Abuse ('Royal Commission') found that virtually all the institutions it examined had concealed from the civil authorities information about the sexual abuse of children under their care. The predominant motivation was the preservation of the reputation of the institution. The Royal Commission found that three religious institutions had written into their internal laws a requirement to conceal the abuse. The most significant of these is the Catholic Church. Reporting to the civil authorities involves using the state's criminal laws to punish those who abuse children and to provide a deterrence to others from doing the same thing. Where there are suspicions that a child's welfare is in danger, the state's child welfare laws require reporting by particular professions (doctors, nurses etc.) to specialist units to enable them to take necessary steps to protect them. This article argues that the Royal Commission found that the Catholic Church's canon law since 1922 required Church authorities to conceal child sexual abuse by clergy from the civil authorities. At a meeting of the heads of national bishops' conferences with Pope Francis in Rome in February 2019, an indication was given that the "pontifical secret" would be abolished. At the time of writing, this has yet to be enacted.

Keywords

Royal Commission into Institutional Responses; child sexual abuse; pontifical secret; canon law.

Introduction

The terms of reference of the Royal Commission emphasised the importance of 'systemic failures by institutions in relation to allegations and

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incidents of child sexual abuse' (Royal Commission 2017a: 88). The internal rules of an institution are part of its system and so are cultures and practices that are not mandated by rules. The Royal Commission examined both kinds of systems and their contributions to the failure of institutional responses, but this article is limited to the concealment of child sexual abuse by not reporting it to the civil authorities where the institution's internal rules prohibited such reporting. The Catholic Church's canon law is not the only example of Church internal rules prohibiting reporting, but it is the most significant and is therefore dealt with in more detail.

The Royal Commission found that the ultra-orthodox Jewish Yeshiva sect campuses in Bondi and Melbourne relied on an interpretation of the Jewish scriptures for a law of *mesirah* that prevented reporting of any sexual abuse within those communities to the civil authorities (Royal Commission 2017d: 169). The Royal Commission recommended its abolition (Recommendation 16.30, in Royal Commission 2017d: 202).

The Jehovah's Witnesses also prohibited reporting to the civil authorities, based on an interpretation of 1 Cor. 6:1-8, but allowed an exception where the civil law required it (Royal Commission 2017d: 83, 100, 106).

The most significant institution that enshrines the concealment of child sexual offences in its internal laws is the Catholic Church. This article examines the history of the Church's attitude to child sexual abuse as expressed in its canon law, and the circumstances where canon law still requires that concealment.

The Catholic Church and the Royal Commission

The Catholic Church is the largest Christian church in the world which, at 2015, had 1,285 billion adherents, representing 17.7% of the world's population. In the previous nine years, the number of baptised Catholics worldwide grew by 14.1%, exceeding world population growth (10.8%) for the same period (Royal Commission 2017c: 8).

A total of 15 case studies undertaken by the Royal Commission involved the Catholic Church (Royal Commission 2017c: 4). The Royal Commission found from its private sessions with survivors that 61.8% stated that their abuse occurred while they were under the care of the Catholic Church (Royal Commission 2017c: 75). These figures 'almost certainly under-represent the total number of victims of child sexual abuse' (Royal Commission 2017c: 76). In looking for systemic factors for this abuse, the Royal Commission examined the structure of the Church, as it did with the other institutions that it examined.

The Structure of the Catholic Church

The Catholic Church is a global entity under the leadership of the pope, the bishop of Rome. Bishops are responsible for specific areas in the world where the Church operates, called dioceses. There are also many hundreds of semi-autonomous and self-governing religious institutes and associations, over which the diocesan bishop may or may not have jurisdiction, and in some cases, these bodies are answerable to superiors stationed in Rome, but all are governed by the Church's centralised canon law (Royal Commission 2017c: 8–9).

The pope is an absolute monarch in the political and legal sense (Tapsell 2015a: 138). He can be judged by no one (Canon 1404). Historically, governance in the Church followed the imperial, monarchical and feudal systems operating in the secular world of the time, with accountability flowing upwards, but not downwards (Cozzens 2004: 13).

Bishops are subject to the pope who has the right to intervene in the affairs of local churches and is assisted in that task by the Roman Curia and papal ambassadors, known as nuncios. The pope has the exclusive right to appoint and remove bishops (Royal Commission 2017c: 12). Nine Congregations in the Roman Curia advise and assist the pope, and they have power to issue binding decrees within their jurisdictions. The judicial branch of the Church has three tribunals, which deal with first instance matters and appeals, and oversees the work of local church tribunals (Royal Commission 2017c: 15).

Bishops, like the pope, are effectively monarchs in their own dioceses, except that they are subject to the pope and to canon law. They exercise legislative, executive and judicial power, but can delegate executive and judicial power to vicars general, episcopal and judicial vicars (Royal Commission 2017c: 16).

National bishops' conferences can be set up or suppressed by the pope. They have no power of governance over individual bishops, and their decrees are not binding unless they receive the approval of the Holy See, known as a *recognitio* (Royal Commission 2017c: 16).

Canon Law

Canon law is the Church's internal legal system and is one of the oldest continuing legal systems in the western world. It is found in 'the Code of Canon Law and many other canonical documents issued by popes, Vatican congregations, bishops' conferences and diocesan bishops'. It

covers all areas of Church life, including the punishment of those guilty of canonical crimes (Royal Commission 2017c: 48).

While Church Councils can change canon law, these are rarely called, and their decrees must be approved by the pope (Tapsell 2015a: 3, 8; Royal Commission 2017c: 33). The pope alone changes canon law for the universal Church, and he can delegate that authority. In all cases involving canon law, an ultimate recourse can be made to the pope, and his decision is final (Royal Commission 2017c: 12).

A History of Canon Law and Child Sexual Abuse in the Church

Because the concealment of child sexual abuse by the Church has been global, it would be natural to assume that it had always been official Church policy. The Royal Commission's Final Report demonstrates that this was not the case. The concealment mandated by canon law only started some 100 years ago with the 1917 *Code of Canon Law* and the 1922 Instruction *Crimen Sollicitationis*. Prior to that, canon law required such priests to be stripped of their status as clergy and delivered over to the secular authority for punishment.

The Early Church

The Final Report contains an extensive history of how the Church dealt with the problem of child sexual abuse starting from the Council of Elvira in 305–306 CE. The Church regarded such abuse not just as a sin to be punished in the next life, but as a crime to be punished in this one by excommunication from the Church (Cafardi 2008: 2; Tapsell 2015a: 186; Cahill and Wilkinson 2017: 39; Doyle 2006: 14; Doyle 2017).

St Basil of Caesarea's monastic rule for the Eastern Church required that monks who sexually abused boys should be severely punished (Royal Commission 2017b: 167, citing Migne 1853 and Cafardi 2008: 3; see also Tapsell 2015a: 189). The importance of St Basil's rule is that it continued to be included in the collections of canons in the eleventh and twelfth centuries by Burchard and Ivo when canon law started to be developed as a body of law distinct from civil law (Tapsell 2015a: 197–200).

Later Middle Ages

Gratian, the father of canon law, thought that the sexual violation of boys should be punished by death (Royal Commission 2017b: 170; Richter

1959: D.1, de pen., c.15; Tapsell 2015a: 201). Thomas Doyle states that 'when the medieval ecclesiastical literature refers to clerics committing *sodomia* it is most probable that the reference is to sexual relations with young adolescent boys' (Royal Commission 2017b: 168).

The Emperor Constantine gave to Christian clergy the 'privilege of clergy', the right of clergy to be tried exclusively in church courts (Royal Commission 2017b: 170; Tapsell 2014: 69–75). However, from the twelfth century onwards when the division between church and state became more pronounced, four church councils and three papal decrees required clergy guilty of *sodomia* to be dismissed from the clerical state and handed over to the civil authorities to be dealt with by the civil law of the time (Royal Commission 2017b: 170; Tapsell 2015a: 205–219).

Numerous historians who have examined the records have found that the sexual abuse of children was a continuous problem for the Church despite the canonical strictures against it, and the severe punishments meted out under civil law (Royal Commission 2017b: 171–72).

Canon law was not always followed, and senior clergy did cover up child sexual abuse by clergy and religious under their charge. The most notorious case involved the founder of the Piarist Order, St Joseph Calasanz (1557–1648), who is ironically still the patron saint of Catholic schools (Liebreich 2004; Royal Commission 2017b: 173). Despite these aberrations, the official policy expressed in canon law until the early twentieth century was that child sexual abuse was a crime that needed to be punished with means that we now only associate with the secular state. Just over 100 years ago, the Church turned that policy on its head.

The Beginnings of a Cultural Shift

From the mid-nineteenth century there was a growing separation of church and state, and the Church's reaction to this was largely defensive and negative, and the result was the adoption of a siege mentality that still exists, with the reluctance to hand over abuse priests to the civil authorities (Royal Commission 2017b: 175). This reluctance became evident in 1842, when the Holy Office under Pope Gregory XVI issued a decree absolving penitents of their canonical obligation to denounce priests who solicited sex in the confessional in the lands of 'schismatics, heretics and Mohammedans', noting that it was easy for such priests to escape punishment at the hands of schismatic bishops or infidel judges (Gasparri 1926, Vol. I: 763).

In 1866, Pope Pius IX through the Holy Office imposed absolute secrecy on soliciting proceedings, makes no mention of handing over

such priests to the secular authority, and states that restraint must be exercised in demoting priests to 'the secular branch' (Gasparri 1842, Vol. IV: 89). On 20 July 1890, the Holy Office, under Pope Leo XIII, issued a further instruction imposing stricter secrecy to avoid scandal. The trial was not to be held in the Chancery and witnesses were called on different days and sworn to secrecy (Tapsell 2015a: 223–25).

The 1917 Code of Canon Law

In 1904, Pope Pius X set up the Pontifical Commission for the Codification of Canon Law under Cardinal Gasparri. 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. The *1917 Code* was promulgated by Pope Benedict XV on 27 May 1917 (Benedict XV 1917).

The *1917 Code* abrogated 'all previous papal and church council decrees that had required priests and religious guilty of serious crimes (including the sexual abuse of children) to be handed over to the civil authorities' (Royal Commission 2017b: 176). Such decrees included those of the four Church Councils and the three popes, referred to above (Royal Commission 2017b: 170; Tapsell 2015a: 226; Tapsell 2015b: 109–110).

From then on, the Church would deal with child sexual abuse of its clergy on its own, without any assistance from the state. This decision had a disastrous effect on the welfare of children, firstly because it deprived children of the protection of state criminal laws, and secondly, because the Church's canonical disciplinary system became dysfunctional, making it virtually impossible to dismiss a priest without his consent (O'Reilly and Chambers 2014: 249; Royal Commission 2017c: 396, 692).

Crimen Sollicitationis

Soliciting sex in the confessional had long been a problem in the Church from the time that individual confession became the norm from the sixth century onwards. The penitents solicited were mostly women, sometimes men, but less so children (Haliczer 1996: 105–106). Children did not go to confession until the ages of 12 to 14 (Cahill and Wilkinson 2017: 16). Pius X in 1910 reduced the age to seven, thus opening up new possibilities for clergy inclined to abuse children (Royal Commission 2017b: 177). The reactions of Pius XI (1922–1939) and his successors

were twofold: better screening for seminarians, and the imposition of the strictest secrecy over information of clergy sexual abuse of children through his 1922 Instruction *Crimen Sollicitationis* (Royal Commission 2017b: 77).

Crimen Sollicitationis mainly dealt with soliciting sex in the confessional, but it extended its provisions to cover homosexuality, bestiality and child sexual abuse. It was a secret law that was not to be published or commented on by canonists (Pius XI 1922; Royal Commission 2017c: 52). The Instruction imposed the 'secret of the Holy Office', a permanent silence on all information obtained by the Church in its inquiries and trials for the four mentioned canonical crimes. There was no exception for reporting to the civil authorities. Victims and witnesses were also sworn to secrecy. Any breach of the pontifical secret meant automatic excommunication from the Church, which could only be lifted by the pope personally (Royal Commission 2017c: 53). *Crimen Sollicitationis* continued in force until 1962 when it was reissued by Pope John XXIII, who extended its procedures to clerics who were also members of religious orders (Beal 2007: 201).

Reasons for the Radical Cultural Shift

The Catholic Church has always insisted on tradition as being one of its guides to future action (Catholic Catechism 1993: 75–83). It is therefore strange that in the early part of the twentieth century, the Church overturned some 15 centuries of tradition in dealing with child sexual abuse through its canon law and through cooperating with the civil authorities in seeing it punished. There are several explanations for why this happened.

The Priest as an Ontologically Changed Being

The theology that a priest is someone special reaches back to before St Augustine (354–430 CE), but it seems to have reached a peak around the early 1900s and was personified in the 1905 beatification by Pope Pius X of the French priest, John Vianney, who proclaimed, 'After God, the priest is everything!' (Royal Commission 2017c: 612). In 1925, Pope Pius XI canonised him.

This theology was reflected in the Holy See signing Concordats with sympathetic Catholic countries to provide special privileges for convicted priests, such as spending terms of imprisonment in monasteries rather than jails (Tapsell 2015a: 238; Royal Commission 2017c: 623). They were not to be treated as ordinary criminals. These Concordats

were made with Latvia, Poland, Italy, Spain, the Dominican Republic and Colombia (Tapsell 2015a: 239–45).

Anti-clericalism

In the sixteenth century, the Protestant Reformation saw the Church lose control and influence over large sections of northern Europe. 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. There may well have been a fear that they may not receive a fair trial (Tapsell 2015a: 253).

Another issue was the rise in anti-clericalism in Catholic Europe and Latin America, with Bismarck's *Kulturkampf* in Germany, the closure of Catholic schools in France, the moves against Church property by Spain's Second Republic and similar actions in Latin America (Sánchez 1972; Tapsell 2015a: 246–50).

The Church as a 'Societas Perfecta'

The idea of the Church as a 'perfect society', complete and independent of the civil state, was developed in the mid-eighteenth century by German canonists (Minnerath 1998: 467). The concept became predominant at the first Vatican Council (1869–1870) under Pius IX, as a 'theoretical construction to demonstrate independence of the church from unjustified civil interference' (Torfs 2004: 111). By 1922, the idea of 'unjustified civil interference' included the state's involvement in the criminal prosecution of clergy who sexually abused children.

The secrecy laws effectively reinstated through the back door the privilege of clergy given by the Emperor Constantine, which had been gradually whittled away by civil society since the time of Henry II in England. The privilege entitled a cleric to be tried for any kind of crime by the canonical courts and not the civil courts. The secrecy laws had the effect that if the state did not know about these crimes, there would be no civil trials, and the matter would be dealt with exclusively by the canonical courts (Tapsell 2014: 74).

Another effect of this way of thinking was that the sexual abuse of children came to be nothing more than a 'moral failure', and not a crime to be punished by the state. It was a matter that came up continually in evidence before the Royal Commission (Royal Commission 2017c: 232, 262, 264, 589, 635, 856, 857). It recommended that child sexual abuse should be a canonical crime that is not confined to clerics but to all who hold positions of authority in the Church (Royal Commission 2017c: 697).

Apart from these theological and political factors leading to a radical change in the Church's policy, the invention of radio by Guglielmo Marconi in 1902 meant that scandal about clergy sexual abuse of children could be spread at the speed of light.

The Invention of Radio and the Fear of Scandal

Marconi's invention captured the public and commercial imagination. The first radio licence was issued to Westinghouse in 1920, and the BBC was established in 1922, the same year that *Crimen Sollicitationis* came into force. In 1927, the Holy See was the first religion to use radio for propaganda purposes. Its solution to the spread of scandal about clergy sexual abuse was to cut off the information at its source (Aurelio Yanguas SJ, as quoted in Beal 2007: 228; Tapsell 2015a: 251).

Secreta Continere 1974

While *Crimen Sollicitationis* remained in force until the 1983 *Code of Canon Law*, the secret of the Holy Office was replaced by the pontifical secret in Pope Paul VI's 1974 Instruction, *Secreta Continere*. Unlike *Crimen Sollicitationis*, it was not a secret law, and was duly promulgated (Woestman 2003: 237). *Secreta Continere* was used in the everyday life of the Church. It was applied to consultations over the appointment of bishops, papal legates' reports, child sexual abuse and other matters. The Instruction changed the name of the secret of the Holy Office to the pontifical secret and expanded the matters covered by the secret to include the 'extrajudicial denunciation', the allegation of child sexual abuse by a cleric to his superior (Delaney 2004: 232 n. 61; Royal Commission 2017c: 708). Under the secret of the Holy Office, the bishop could report an allegation to the police before he started the preliminary inquiry under canon law, but *Secreta Continere* put a ban on reporting even the allegation (Royal Commission 2017c: 53, 708). The preamble also left no room for the exercise of conscience in the matter (Woestman 2003: 237).

The only difference between both permanent silences was that excommunication for breach of the pontifical secret was not automatic but would fit the crime. The secret bound all Church officials, and even those who accidentally came across the information. The only exception allowed was that the accused could be told about the allegations if it were necessary for his defence (Tapsell 2015a: 270–80; Royal Commission 2017c: 56). There was no exception for reporting to the civil authorities.

Between 1974 and the 1983 *Code of Canon Law*, the procedure for dealing with clergy sexual abuse was governed by the 1917 *Code of Canon Law*, *Crimen Sollicitationis* and the modification to the secrecy provisions by *Secreta Continere*. Between 1983 and 2001, the procedure was governed by the 1983 *Code of Canon Law* and *Secreta Continere*.

There was considerable disquiet among bishops after the promulgation of the 1983 *Code of Canon Law* about the restrictions placed on their ability to dismiss abuser priests, particularly because of the limitation period of five years (Cafardi 2008: 28). If an abused child of 10 did not complain to the Church about the abuse by the age of 15, the canonical crime was extinguished. A study carried out by the Australian Catholic Bishops Conference (ACBC) in 2000 revealed that of the 402 cases of sexual abuse of minors from all parts of Australia, the limitation period of five years had expired in all but 3.23% of cases (Tapsell 2015a: 176 n. 494). Since the Royal Commission found that the average time in which an abuse survivor made a complaint to the Church was 33 years, this result is hardly surprising (Royal Commission 2017c: 79).

Sacramentorum Sanctitatis Tutela 2001 (SST 2001)

Pope John Paul II, issued his motu proprio, *Sacramentorum Sanctitatis Tutela* on 30 April 2001 which extended the limitation period to 10 years from the 18th birthday of the survivor, and altered some of the canonical procedures for dealing with child sexual abuse. It required the results of bishops' preliminary inquiries under Canon 1717 to be sent to the Congregation for the Doctrine of the Faith (CDF) which would then instruct the bishop what to do. Article 25 imposed the pontifical secret on such cases in accordance with *Secreta Continere* (John Paul II 2001; Royal Commission 2017c: 63). Pope Benedict XVI made some changes to the new procedures (Benedict XVI 2010), but again confirmed that the pontifical secret applied to such cases (Benedict XVI 2010: Article 30).

The Dispensation to Report where Civil Law Required Reporting

In 2002, the United States Catholic Bishops Conference (USCBC) requested the Holy See to approve a change to canon law to allow reporting to the civil authorities. The permission was refused but a limited dispensation was given to allow reporting in those jurisdictions where there were civil reporting laws, but it was limited to the United States (Tapsell 2015a: 415–22; Royal Commission 2017c: 64). As the Final Report

noted, 'At that time, not all American states had mandatory reporting laws that applied to priests and religious' (Royal Commission 2017c: 331). That limited dispensation was extended to the rest of the world in 2010 (Tapsell 2015a: 267; Royal Commission 2017c: 66).

The Holy See seemed more concerned about bishops going to jail for breaching reporting laws than the welfare of children. The protection of children provided by a state's criminal laws by prosecuting offenders can only occur if the state's prosecuting authorities know of allegations of abuse and can investigate them. Where there are no applicable reporting laws, the pontifical secret prohibits Church officials from reporting such allegations.

Attempts by Other Bishops' Conferences to Change Canon Law on Reporting

In 1996, the Irish Catholic Bishops' Conference approached the Holy See with a proposal to allow mandatory reporting of all allegations of child sex abuse by priests. The Holy See rejected it, saying that it conflicted with canon law (Tapsell 2014: 262–68; Royal Commission 2017c: 704).

The Catholic Bishops Conference of England and Wales through its Nolan Report wanted mandatory reporting in 2001. It did not seek a *recognitio*, or approval of the Vatican, and this was one of its weaknesses (Cumberlege 2007; Tapsell 2015a: 610–14).

In 1996, the ACBC in its protocol *Towards Healing* required compliance with civil reporting laws, despite the potential conflicts with canon law (Tapsell 2014: 244; Royal Commission 2017c: 703). Unlike the United States, the Australian bishops did not seek a *recognitio* under Canon 455 of the *1983 Code*, which would have made it canon law for Australia. This was one of its weaknesses (Parkinson 2003). The ACBC from 1998 to 2001 unsuccessfully sought changes to canon law that would enable bishops to comply with the civil laws of the land relating to child sexual abuse (Royal Commission 2017c: 326ff.).

The Royal Commission noted:

> In 2010, the Catholic Church in Australia amended its *Towards Healing* protocol to require all Church personnel to report allegations of child sexual abuse, even where there is no civil law requirement to do so. The ACBC knew that requirement was in conflict with canon law but chose to do so regardless (Royal Commission 2017c: 706).

The Australian bishops have since backtracked. The ACBC forwarded *Towards Healing* 2010 to Rome, in accordance with the 2011 direction of Cardinal Levada, the Prefect of the CDF, that all national bishops'

conferences should forward their child sexual abuse protocols to the CDF for review. On 22 February 2013, the ACBC received a letter from the CDF effectively telling it that it could have mandatory reporting for everyone else, but not for clerics, and that SST 2001 (with its pontifical secret) applied to clerics (Case Study No. 31 2016). In 2016, the ACBC amended *Towards Healing* accordingly (*Towards Healing* 2016: para. 38.1a).

Towards Healing now requires the concealment of clergy sexual abuse of children in those Australian States and Territories where there is no applicable reporting law. As at the end of 2018, only New South Wales and Victoria have comprehensive reporting laws.

It is not surprising that the Royal Commission found no evidence in its case studies of the Catholic Church that these crimes were reported to the police prior to the development of national protocols (Royal Commission 2017c: 236). Complaints were dealt with internally by the Church. In several Australian states, there was an obligation on persons with knowledge of these crimes to report them to the police, but no such reports were made (Royal Commission 2017c: 358). This was consistent with canon law until 2010. The result was that many more children were abused than would otherwise have been (Royal Commission 2017c: 236ff.). Very often these priests were left in ministry where they abused more children (Royal Commission 2017c: 242ff.).

While the Royal Commission said that it did not intend to resolve controversies between canonists on the meaning of the secrecy laws, it noted that the avoidance of scandal occurs in 24 different canons in the *1983 Code*, and in particular the provisions on penalties 'reflect an explicit concern with avoiding or remedying scandal' (Royal Commission 2017c: 703). It also found that 'the references to scandal and its avoidance are likely to strongly influence a bishop in the actions he takes on receipt of a complaint against one of his priests' (Royal Commission 2017c: 703).

Despite having said that it did not intend to resolve differences of interpretation by canonists, the Royal Commission made clear what it thought these laws meant by looking at the way the Church approached reporting to the civil authorities (Royal Commission 2017c: 699, 708). In doing so, the Commission followed the rules of interpretation provided by the *1983 Code*.

In the Anglo/American civil law system, guidance to interpretation is provided predominantly by judgments in earlier cases, some of which are binding and others persuasive, and while academic opinion is relevant, it plays a lesser role. In canon law, authentic interpretation is provided

by the legislature, that is, the pope and his authorised delegates, such as the Pontifical Council for the Interpretation of Legislative Texts and 'the jurisprudence and practice of the Roman Curia' (Canon 19). Canon 19 also provides that guidance can come from the 'common and constant opinions of learned persons'. Given that the learned persons who gave evidence before the Royal Commission did not have a common or constant opinion on the restrictions imposed by canon law on reporting to the civil authorities, it is not surprising that the Royal Commission turned to the 'jurisprudence and practice of the Roman Curia'.

As noted above, the Congregation for Clergy in 1997 told the Irish bishops that their proposals for mandatory reporting to the civil authorities breached canon law. In 2002, the Congregation for Bishops told the American Catholic Bishops Conference the same thing about its proposals for mandatory reporting of child sexual abuse by clergy contained in their Dallas Charter.

The Royal Commission found:

> In 2002, a number of senior Holy See officials made statements emphasising the 'special nature' of the relationship between bishop and priest and opposing the proposition that bishops should be prepared to report allegations of child sexual abuse by their clergy to the civil authorities (Royal Commission 2017c: 705).

These Curia officials included Cardinals Re and Castrillón, Archbishops Bertone and Herranz, and Professor Ghirlanda. The Royal Commission concluded:

> It appears to us that regardless of the interpretation of canon law by canonists, the Holy See considered that bishops were not free to report allegations of child sexual abuse by clergy to civil authorities before and during the 1990s and early 2000s (Royal Commission 2017c: 705).

Significantly, five of these statements by Curia officials occurred after SST 2001, which again confirmed the application of the pontifical secret over cases of child sexual abuse by clergy pursuant to *Secreta Continere*. None of these Curia officials has resiled from those statements, which are the equivalent of non-binding but persuasive precedents in the Anglo/American civil law system (Peters 2006: 121).

In addition, the four heads of the Bishops' Conferences of France, Germany, Belgium and Honduras made similar statements opposing any kind of reporting to the civil authorities (Tapsell 2015a: 376–411).

The letter from the CDF to the ACBC of 22 February 2013, referred to above, confirms that apart from the limited 2010 dispensation to obey civil reporting laws, the 'jurisprudence' of the Curia about reporting had

not changed since 2002. The Royal Commission correctly found that the pontifical secret still applies where there are no applicable reporting laws (Royal Commission 2017c: 705–706).

The United Nations Committees on the Rights of the Child and Torture

In January 2014, the United Nations Committee on the Rights of the Child stated that allegations of child sexual abuse were still dealt with under a 'code of silence' and 'strongly urged' the Holy See to impose mandatory reporting under canon law. A similar request was made by the United Nations Committee against Torture (Royal Commission 2017c: 706; Tapsell 2015a: 679–700).

In a formal response in September 2014, the Holy See claimed that it did not have the capacity or legal obligation to impose the Convention principles on Catholic Churches in other countries. It stated that those Churches were governed by the laws on which their activities were carried out (Royal Commission 2017c: 707; Tapsell 2015a: 699).

This was an extraordinary statement because canon law imposes all kinds of obligations on bishops that do not conflict with local civil laws. While states have differing and sometimes no mandatory reporting laws for child sexual abuse, none of them prohibit such reporting. Mandatory reporting to the civil authorities under canon law would assist states in the enforcement of their criminal laws designed to protect children by punishing the perpetrator, and deterring others.

Pope Francis's response confirmed by implication the Royal Commission's interpretation of the secrecy provisions of canon law. Had bishops and religious superiors been free to report to the civil authorities where there was no civil law requirement to do so, he would have said so, because both UN Committees would have been under a misapprehension as to the effect of the pontifical secret (Royal Commission 2017c: 707; Tapsell 2015a: 375).

The Pontifical Commission for the Protection of Minors

On 22 March 2014, Pope Francis established the Pontifical Commission for the Protection of Minors, as an advisory body to the pope (Royal Commission 2017c: 15). On 15 February 2016, the President of that Commission, Cardinal O'Malley, said that Catholic Church authorities had a 'moral and ethical responsibility' to report child sexual abuse to the civil authorities irrespective of civil law requirements to do so (O'Malley

2016a). The Royal Commission observed that this statement appears to be 'in tension with' the requirements of the pontifical secret and with the dispensation to report that is limited to where there are applicable civil reporting laws (Royal Commission 2017c: 707).

In December 2016, the Pontifical Commission produced its guidelines for national protocols. The guidelines required bishops to comply with canon law. Nowhere was O'Malley's statement to be found (O'Malley 2016b). In September 2017, at a meeting with Pope Francis, the Commission recommended the exclusion of child sexual abuse matters from the imposition of the pontifical secret (O'Malley 2017).

The Royal Commission stated:

> We are very clear that there should be no provision in canon law that attempts to prevent, hinder or discourage compliance with mandatory reporting laws by Australian bishops and others or to impede those who choose to report to the civil authorities…
>
> We understand that, aside from the exception for reporting to civil authorities in jurisdictions where there are reporting laws, the pontifical secret currently applies to allegations of child sexual abuse made against clergy, as well as canonical proceedings relating to those allegations (Royal Commission 2017c: 708).

The Royal Commission's Recommendations on the Pontifical Secret

In Volume 16, Book 1 of the Final Report, the Royal Commission summarised the Church's history and tradition over many centuries up until the *1917 Code*, including the handing over of clerics for punishment in accordance with the civil law at the time. In Book 2, it stated:

> We are persuaded that *Crimen sollicitationis* and the secret of the Holy Office reflected and reinforced a cultural mindset that regarded child sexual abuse by clergy and religious as a matter to be dealt with internally, and in secret, rather than be reported to the civil authorities… in relation to child sexual abuse it is hard to avoid the conclusion that the overriding motivation underlying the imposition of the secret of the Holy Office, and later the pontifical secret, was to protect the reputation of the Church (Royal Commission 2017c: 709; Beal 2007: 235).

Recommendation 16.10 of the Royal Commission states:

> The Australian Catholic Bishops Conference should request the Holy See to amend canon law so that the pontifical secret does not apply to any aspect of allegations or canonical disciplinary processes relating to child sexual abuse (Royal Commission 2017c: 710).

Has Pope Francis Changed His Mind?

In 2015, Bishop Geoffrey Robinson called Pope Francis 'an enigma' (Robinson 2015), and nowhere is that more apparent than in the way he has handled the issue of child sexual abuse. Pope Francis has been rightly praised for his statements on poverty, inequality, refugees and climate change. These are matters about which he can do little, other than to encourage governments and individuals to act.

On the other hand, there are serious matters involving child sexual abuse within his own Church, such as the pontifical secret, which he can repeal with the stroke of his pen. Until February 2019, he had refused to do so, despite a history of four national Catholic bishops' conferences since 1996 requesting the Holy See to allow mandatory reporting; the 2003 Report by the Attorney General for Massachusetts (Reilly 2003: 30), and the Murphy Commission in Ireland in 2009 (Murphy 2009: 1.15, 1.113) on the contribution of secrecy to further sexual abuse; the requests by two Committees of the United Nations to abolish the pontifical secret; a recommendation to do so from his own Pontifical Commission for the Protection of Minors, and a strong recommendation from the Royal Commission.

Cardinal Bergoglio, Archbishop of Buenos Aires

In 2012, Cardinal Bergoglio, as Pope Francis then was, wrote a book with Rabbi Skorka in which he told of an Argentinian bishop calling him for advice about a priest who had been sexually abusing 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. For me, that is the right way to do things' (Skorka and Bergoglio 2012: 599). There was no mention of involving the police. Argentinian law at the time did not require reporting (Lombardi 2017). Bergoglio's response was in keeping with canon law at the time.

The Argentinian Catholic Bishops' Conference's Protocol

In 2011, the CDF requested all Catholic Bishops' conferences to forward their protocols for dealing with child sexual abuse by clergy for checking (Levada 2011). The Argentinian protocol for clergy sexual abuse was drawn up in accordance with that directive, while Cardinal Bergoglio was Archbishop of Buenos Aires and Primate of Argentina.

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 must observe 'the most absolute confidentiality' (Argentinian CBC 2013).

Pope Francis, Primate of Italy, and the Italian Catholic Bishops' Conference

In March 2014, one year after Cardinal Bergoglio had been elected Bishop of Rome and therefore Pope, the Italian Catholic Bishops' Conference (ICBC) stated that bishops had no obligation to report child sexual abuse by clergy because Italian law did not require it under the 1929 Concordat between the Holy See and the Italian state, a statement consistent with canon law (Tapsell 2015a 611, 692; ICBC 2014). If Pope Francis, as Primate of Italy, followed canon law, he would cover up child sexual abuse in his own diocese of Rome.

Pope Francis has repeatedly condemned the abuse, the cover up, and clericalism. There could be no better example of clericalism than a Church law which allows national Catholic bishops' conferences to impose mandatory reporting of child sexual abuse for the laity holding positions in the Church but forbids it for clerics.

There were, however, some signs that canon law might change. On 21 September 2017, the Pontifical Commission for the Protection of Minors had a meeting with Pope Francis in which one of its recommendations was the abolition of the pontifical secret (O'Malley 2017).

After his meeting with the Chilean bishops in May 2018, Pope Francis said that resignation of some bishops was not enough and that it was necessary to look at structures (Francis 2018a). He seemed to recognise that the concealment of child sexual abuse within the Church was not just a case of 'bad apples' among the bishops, but of something seriously wrong with the barrel of which canon law forms a critical part. On 12 September 2018, Pope Francis summoned all the bishops across the world, to a conference in Rome in February 2019 to discuss the sexual abuse crisis (Francis 2018b). Two speakers at the conference, Linda Ghosina, a canon lawyer, and Archbishop Marx of Munich, called for the repeal of the pontifical secret over child sexual abuse, and Archbishop Scicluna said it was 'counterproductive'. On 29 March 2019, the Vatican imposed mandatory reporting of child sexual abuse within the Vatican City itself. That protection applies to the 30 or so children who reside in the Vatican City (Vatican 2019). On 7 May 2019, Pope Francis issued his Apostolic Letter, *Vos Estis Lux Mundi* (Francis 2019). It confirmed the requirement to obey civil reporting laws, but did not expressly impose mandatory reporting where there were no

such laws. Article 1§1(b) created a canonical crime for bishops and religious superiors for 'actions or omissions intended to…avoid civil investigations…'. If the civil authorities don't know about the allegations, then it is arguable that by failing to report the matter, the bishop is 'avoiding' a civil investigation. In other words, Article 1§1(b) indirectly requires mandatory reporting in all cases. When Vatican spokesman, Archbishop Scicluna was asked about the failure of *Vos Estis Lux Mundi* to provide for mandatory reporting, he made no mention of Article 1§1(b), and said, 'we cannot tell states what their citizens should be doing' (Scicluna 2019). This was essentially the same answer that Francis gave to the United Nations in 2014, which suggests that one of the principal drafters of the legislation does not believe that Article 1§1(b) imposes mandatory reporting.

Conclusion

The Catholic Church's canon law for some 1,500 years until 1917 was that clergy sexual abuse of children was a crime that needed to be punished at least with imprisonment. In 1917 the Church turned that policy on its head by rejecting the involvement of the civil authorities, and then in 1922 by imposing the strictest secrecy over such allegations. The effect of the Church's secrecy laws was to reinstate via the back door the ancient privilege of clergy, whereby clerics could only be tried in the canonical courts. If the state did not know about these crimes, there would be no state trials of clergy, and the maximum punishment in the canonical courts was dismissal from the priesthood.

Pope Francis has resisted demands for a change to canon law on reporting to the civil authorities. In May 2019, he issued his Apostolic Letter *Vos Estis Lux Mundi* which does not abolish the pontifical secret, and does not appear to impose mandatory reporting to the civil authorities. It seems that the Church is determined to continue the cover up of child sexual abuse wherever the civil law of a country allows the Church to get away with it.

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