

**ROYAL COMMISSION INTO INSTITUTIONAL RESPONSES
TO CHILD SEXUAL ABUSE
AT SYDNEY**

COMMONWEALTH OF AUSTRALIA
Royal Commissions Act 1902

**PUBLIC HEARING INTO
CATHOLIC CHURCH AUTHORITIES
CASE STUDY 50**

INTRODUCTION

CHURCH DISCIPLINE, SECRECY AND CONFESSION

1. The next part of the hearing will focus on the canon law processes for investigating and disciplining priests and religious.
2. The operation of the Sacrament of Reconciliation and issues concerning the initial and ongoing formation of priests and religious will then be the subject of evidence.
3. Evidence will be given by Dr Rodger Austin, a canon lawyer who prepared a report on canon law on behalf of the Truth Justice and Healing Council, Father Thomas Doyle, a canon lawyer from the United States who gave evidence earlier, Sister Moya Hanlen, a canon lawyer from Sydney, and Mr Kieran Tapsell, an Australian civil lawyer who has written on the subject of canon law.

4. Canon law is the body or system of laws and regulations created by popes and councils of the Church for the government of the Church and its members.
5. In 1917, the first Code of Canon law was promulgated by Pope Benedict XV. That code was repealed and replaced by the 1983 Code of Canon Law, promulgated by Pope John Paul II.
6. Canon law provides that the bishop exercises the legislative power of governance in respect of his diocese, and that the bishop has all of the 'ordinary, proper and immediate power required for the exercise of his pastoral office, except in those matters which the law or a decree of the Supreme Pontiff' – the pope – 'reserves to the supreme or to some other ecclesiastical authority'.
7. The Code of Canon Law, does not establish the method whereby each bishop is to promulgate laws for his diocese as that is a matter to be determined by the bishop.
8. There are a number of issues about aspects of canon law which regulate or proscribe the Church's response to allegations of child sexual abuse by clergy and religious to be explored with the panel.

Relationship between canon law and civil law

9. The first issue is the relationship between canon law and civil law. In canon law, the reference to 'civil law' is a reference to the laws and legislation that constitute the legal system of a particular nation or state.
10. Mr Tapsell is expected to say that bishops and those in official positions in the Church have 'a special obligation to follow canon law where it

conflicts with civil law’, because of the oaths they make. Dr Austin is expected to offer a different interpretation. An example of where conflicts may occur is in relation to matters of secrecy, about which I will say more shortly.

Investigating allegations and determining outcomes

11. The next issue is the process set out by Canon law in relation to investigating allegations and determining outcomes.
12. On 9 June 1922, the predecessor to the Congregation for the Doctrine of the Faith, issued an instruction known as *Crimen Sollicitationis*. It was amended in 1962.
13. Dr Austin will explain that *Crimen Sollicitationis* provided special procedural norms that were to be observed by bishops and their tribunals for dealing with crimes by clerics including the sexual abuse of minors.
14. *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. Mr Tapsell will say that 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’.
15. Mr Tapsell will give evidence that the effect of *Crimen Sollicitationis* was to ‘create a de facto privilege of clergy by the use of secrecy’. The ‘privilege of clergy’ was an ancient privilege granted to the Church by the Roman emperor Constantine in the 4th century, which gave clerics the

right to be tried in Church courts rather than civil courts. Mr Tapsell is expected to say that 'if the State did not know about the sexual assault by clergy there would be no state prosecutions, the Church could then treat the matter as a "canonical crime", to be dealt with exclusively and secretly in its own courts.

16. Dr Austin will give evidence that the purpose of *Crimen Sollicitationis* was to protect the reputation of any person involved and to enable those involved to speak freely. His statement that at all times before, during, or after the canonical process a victim had the right to take the matter to the secular courts, will be explored.
17. There has been commentary on whether the 1922 and 1962 Instructions were part of a conspiracy to hide sexually abusive priests or to prevent the disclosure of sexual crimes committed by clerics to the civil authorities. This will be explored in evidence.
18. In 1974, Pope Paul VI issued an instruction, known as *Secreta Continere*, which dealt with 'pontifical secrecy'. As a result of this instruction the 'secret of the Holy Office' was replaced with the 'pontifical secret'.
19. Mr Tapsell will say that *Secreta Continere* expanded the Church's highest form of secrecy other than the confessional to cover crimes against faith and morals by clergy and religious. 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, the allegation itself. *Secreta Continere* remains in force.

20. Mr Tapsell is expected to say that the pontifical secret imposed by *Secreta Continere* is a permanent silence that applies to all allegations of child sexual abuse by clerics and religious made to bishops or superiors and to all information obtained through preliminary investigations and any subsequent trial under the 1983 Code of Canon Law. He will say that 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.
21. The other panellists will be asked about their views about these matters.
22. The 'trial' in canon law refers to the investigative procedures which commence from the time an allegation is made.
23. Under the 1983 Code, where an allegation of child sexual abuse by clergy is made, the bishop first has to be satisfied that there is a semblance of truth to the allegations. If so, he is required to commence a preliminary investigation. 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.
24. Under the 1983 Code, ordinaries were required to commence a judicial or administrative canon law procedure for the imposition of penalties 'only where he perceives that neither by fraternal correction nor reproof, nor by any method of pastoral care, can the scandal be sufficiently repaired, justice restored and the offender reformed'.
25. An 'imputability' or 'diminished responsibility' test was also imposed, which stated that 'No one can be punished for the commission of an external violation of a law or precept unless it is gravely imputable by

reason of malice or of culpability'. In 2009, the Irish Murphy Report commented on the implications of this provision that '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'.

26. In 2001, Pope John Paul II modified the procedural norms under the 1983 Code of Canon Law for dealing with more serious delicts by clerics, including child sexual abuse, and confirmed that the pontifical secret still applied to all such cases.
27. Under the 2001 procedural norms, cases of child sexual abuse by clerics were reserved to the Congregation for the Doctrine of the Faith. This meant that the local bishop was still required to carry out a preliminary investigation in accordance with the 1983 Code, but now the Congregation for the Doctrine of the Faith was to be informed of the results of the preliminary investigation and it decided how to proceed. Dr Austin will give evidence that this reservation means that diocesan bishops or superiors of clerical religious institutes 'are no longer competent to deal with' these matters.
28. Also to be addressed is the extent to which the time in which a canonical trial could be commenced has affected the number of cases coming forward. Prior to the 1983 Code of Canon Law there was no time limit imposed on when a person could come forward with an allegation against a priest or religious. In 1983, the Code introduced a five year limitation period, from the date of the alleged incident. In 2001, that period was extended to ten years from when the complainant turned 18 years of age. The following year, the Congregation for the Doctrine of the Faith was given the discretion to waive the limitation period. In 2010, the limitation

period was further extended to 20 years from the complainant's 18th birthday.

29. Sister Moya Hanlen will explain to the Royal Commission that in each of the cases with which she has had involvement the careful application of substantive and procedural canon law led to a just response from the Congregation for the Doctrine of the Faith.

Reporting to civil authorities

30. The next issue to be explored is the relationship between canon law and reporting to civil authorities.
31. Father Doyle is expected to give evidence that the Catholic Church's canon law system has been a hindrance to effectively dealing with sexual abuse. He is expected to say that it is impossible to determine how many cases of sexual abuse were hidden by the bishops' adherence to canonical secrecy and how many were hidden by a wider culture of secrecy in the Catholic Church. He is also expected to say that before the question of reporting became public in 2002, some bishops did not believe they were under any canonical or moral obligation to report to the civil authorities, while others believed they were forbidden by canon law to report.
32. Mr Tapsell is expected to say that the promulgation of the 1983 Code of Canon Law repealed *Crimen Sollicitationis*, and that between 1983 and 2001, the 1983 Code and *Secreta Continere* regulated the Church disciplinary system for clerics. He will say that any reporting of child sexual abuse allegations to the civil authorities was prohibited.
33. Dr Austin will give evidence that the 1962 Instruction *Crimen Sollicitationis* did not prohibit or prevent compliance with any civil law requiring that a

crime of sexual abuse of minors, or any allegation of such a crime, be reported to the civil authorities.

34. Dr Austin will say that there is no norm of canon law that prohibits a bishop or religious superior from complying with civil law if that civil law requires that allegations or crimes of sexual abuse of minors be reported to civil authorities. Therefore, if there was a process in place in, for example, Australia that required civil reporting, canon law does not prohibit such reporting.
35. Dr Austin is also expected to say that there is no doubt whatsoever that, where the civil law does not require the reporting of allegations or crimes of the sexual abuse of minors to the civil authorities, bishops, religious superiors and other Church officials are not under any legal obligation to report. As the Commissioners are well aware, the system of reporting within Australia differs from state to state and territory.
36. On 12 April 2010, the Congregation for the Doctrine of the Faith 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.
37. This dispensation was limited to those jurisdictions that had reporting laws.
38. Sister Moya Hanlen is expected to say that in her understanding the current canon law legislation has no provisions which prohibit a bishop or other Church authority from reporting sexual abuse of minors to civil authorities even where there is no mandatory reporting requirement. She will explain that obligations under civil law must certainly be followed, but

beyond civil requirements, there is a moral and ethical responsibility to report suspected crime to the civil authorities who are charged with protecting society.

39. In relation to the system as a whole, Father Doyle is expected to say that the canon law system is *'a legal system in service to a hierarchical government. There is no system of checks and balances. There is no institutionalised consistency in the use of canon law as an instrument of due process and there is no assurance that the elements of canonical process will be consistently used in responding to reports of canonical crimes or other forms of abusive, destructive or otherwise problematic behaviour.'* He is expected to say that there are numerous examples of this inconsistency since the first Code was promulgated in 1917.

Secret archives

40. Finally, the keeping of documents concerning these processes will be addressed. Canon law establishes the obligation that each diocese must have a 'secret archive' which is to be separate from the general archive, or by way of exception it can be located in a specially secured portion of the general archive.
41. Mr Austin will give evidence that canon law explicitly states that all the documentation pertaining to the preliminary investigation into any alleged canonical offence including the sexual abuse of minors must be kept in the secret archive.
42. The circumstances in which such documents can be destroyed will be the subject of evidence.

SACRAMENT OF RECONCILIATION

43. After this panel, the Royal Commission will hear evidence from a panel of witnesses about the operation of the Sacrament of Reconciliation in the context of child sexual abuse in the Catholic Church.
44. Evidence will be given by Bishop Terence Curtin, the Chair of the Australian Catholic Bishops Conference Commission for Doctrine and Morals, Father Frank O'Loughlin, a sacramental theologian, Father Lawrence McNamara, a moral theologian, Father Ian Waters, a canon lawyer, Father Joe Grayland, a New Zealand liturgical theologian, and Father Frank Brennan, a Jesuit priest, former law professor, and human rights advocate who is now the Chief Executive Officer of Catholic Social Services Australia.

Confession – the Sacrament of Reconciliation

45. The Sacrament of Reconciliation or Penance is commonly referred to as a 'confession'. There will be evidence that in recent years the practice of attending confession among both adults and children has declined in Australia.
46. The Royal Commission has heard evidence about confession in case studies into Catholic Church institutions. That evidence included:
 - a. Case Study 35 where the Royal Commission heard evidence from a priest who had an offending priest attend on him and go into confessional mode making a confession of child sexual abuse. The evidence was the priest who heard the confession felt constrained in the action he could take.

- b. In Case Study 26, the Royal Commission heard evidence from a witness who was abused as a child during confession.
 - c. In Case Study 11 and Case Study 26 the Royal Commission heard evidence from witnesses who as children told a priest during their confession of their sexual abuse, and that priest subsequently told their abuser, or later abused them.
 - d. Also in Case Study 26 the Royal Commission heard evidence from a witness who as a child being abused by a priest was refused permission to visit any other priest for confession, and the offending priest told that witness that it was not a sin to 'have impurity with a priest' but that it was a mortal sin to tell anyone about it.
47. In Dr Marie Keenan's research, eight out of nine of her participants confessed their abusing. For those men, the confessional provided a site for them to acknowledge sin or wrongdoing and a space to ease their guilt after abusing. Dr Keenan found that the very process of confession itself might be seen as having enabled the abuse to continue, not only in how the men used the secrecy and safety of the confessional space to resolve the issues of guilt, but also in the fact that within the walls of confession, the problem of sexual abuse of children was contained.
48. Father Grayland wrote that in recent centuries, the focus in the sacrament has been on private individual confession and is inadequate in dealing with grave public sins such as child sexual abuse. He concluded that it ignores the need for just restitution towards the victim.

The 'seal of confession'

49. The 'seal of confession' is the obligation on the confessor to maintain the confidentiality of information a penitent discloses to him during the Sacrament of Reconciliation.
50. Under canon law, the confessional seal is inviolable and a priest is forbidden from betraying a penitent in any way. A priest is forbidden to use knowledge acquired in the confession to the detriment of the penitent even when all danger of disclosure is excluded.
51. Father Brennan is expected to tell the Royal Commission that if the civil law were to require priests to report disclosures made during the sacrament and they did so they would lose their faculties to practise as priests.
52. The Truth Justice and Healing Council submits that a religious confession should remain a privileged communication under the law in Australia and that the Commission ought not to make any recommendations abrogating civil law protections attaching to the seal of the confession. The Council also submitted that [c]urrent legal protections of the 'seal of confession' accord with the fundamental human right freely to practice one's religion.
53. Father Brennan has said that if a law were to be introduced requiring a priest to reveal a confession, he 'will disobey the law'. He is expected to tell the Royal Commission that as a priest he is morally obliged to honour the seal of the confessional and that the seal 'ought to be viewed akin to legal professional privilege because to do otherwise infringes religious freedom which is a fundamental human right'.

54. Father Grayland is expected to say that the use or misuse of the confessional seal in the context of crimes of child sexual abuse raises a debate about the relationship between the forgiveness by the Church, forgiveness by God, and the judgement of the civil state. Father Grayland questions whether a civil law requirement to refuse a priest to maintain the confessional seal in crimes of child sexual abuse would be a moral or reasonable precedent given that others rely upon it for many other reasons.
55. Father Frank O’Loughlin is expected to say that the confessional seal is not something that can be given up by the Church.
56. Father Ian Waters is expected to give evidence that not every conversation in a confessional is a celebration of the sacrament and that some use it as a safe place for counselling. Both he and Father O’Loughlin are expected to tell the Royal Commission that the confessional seal applies to the confessing person’s own sins, not that of anyone else.
57. There are four areas in which civil laws (as opposed to canon law) may compel disclosure by a priest of information obtained in the confessional. The application of each will obviously depend on the information given and the precise wording of the relevant statute. First, through a mandatory reporting regime, which is generally to child protection authorities. Secondly by reportable conduct schemes which are generally to the Ombudsman or similar body. Thirdly, the laws of evidence in relation to a civil or criminal proceedings and finally, laws relating to disclosure to police of a crime or suspected crime.

58. The laws about each of these matters differ around Australia. There is no consistency.
59. The views of panel participants will be sought on these issues.
60. Later in this hearing the Royal Commission will inquire into policies and practice among Australian dioceses on the celebration of the Sacrament of Reconciliation by children in parishes and in Catholic schools.