

A Response to Dr Rodger Austin's Report

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Executive Summary

1. Dr Austin's report of 28 November 2016 to the Royal Commission states that bishops and religious superiors have an obligation to report child sexual abuse to the civil authorities where the civil law requires it because of Church moral teaching contained in an 1885 encyclical of Pope Leo XIII, *Immortale Dei*, and par 2242 of the *Catholic Catechism* requiring Catholics to obey civil laws that do not offend divine law, morality or the Gospels.
2. Canon law, like civil law, requires a moral obligation to be promulgated as law before it can become a legal obligation. Exceptions to such legal obligations also have to be promulgated as part of the law.
3. Pope Leo XIII's encyclical and the *Catholic Catechism* are teaching documents setting out the beliefs and moral teachings of the Church. They are not legislative documents having legal effect, and they have never been promulgated as such to create, amend or qualify canon law.
4. The obligation to observe the pontifical secret over child sexual abuse was imposed by canon law with no exception within the law for reporting to the civil authorities until 2010 when a limited dispensation was given under Canon 85.
5. If moral obligations can create exceptions to canonical obligations, then canon law ceases to be a coherent legal system.

Dr Austin's Argument

6. Dr Austin's explanation of canon law (with some minor exceptions) is consistent with that set out in my submission of 27 June 2016.¹ A major disagreement arises from par 288-299 of his Report:

¹ In this response, the reference to "submission" refers to my submission of 27 June 2016: *Canon Law as a Systemic Factor in Child Sexual Abuse in the Catholic Church*.

“288 According to Pope Leo XIII in his teaching on the relationship between the State and the Church, it is a matter of justice and duty incumbent on all members of the Church to obey the civil law. As expressed in the teaching of the Church “citizens are bound in conscience to obey” the civil law unless the laws are “contrary to the demands of the moral order, to the fundamental rights of persons or the teachings of the Gospel”.

289 As was acknowledged with the promulgation of the 1917 Code of Canon Law the sexual abuse of a minor was a matter both for the State and for the Church. Other than in those places where the privilege of the forum was recognized and operative, the secular courts were competent to hear cases of sexual abuse of minors by clerics. And as has been stated in this submission the privilege of the forum was not operative in many countries including Australia and was abolished in 1983.

290 It is evident that the competent civil authorities have the right and duty to enact legislation in respect of the crime of the sexual abuse of minors. Civil authorities also have the right to enact legislation requiring that an allegation of sexual abuse of a minor, or the fact that a minor has been sexually abused, be reported to the relevant civil authority.

291 It is evident that insofar as legislation obliges a bishop or religious superior to report such matters they are obliged, in accordance with the teaching of the Church, to comply with that legislation.

292 There is no norm of canon law which prohibits a bishop or religious superior from complying with the civil law if it requires that allegations or crimes of sexual abuse of minors be reported to civil authorities...

299 There is no doubt whatsoever that, whenever the civil law requires the reporting of allegations or crimes of the sexual abuse of minors to the civil authorities, the relevant Church officials, for example bishops or religious superiors, are obliged to comply with the requirements of the civil law. There is no law or other provision within the Church’s canonical system that prohibits Church officials from complying with such requirements of the civil law.”

7. Dr Austin’s argument can be summarised as follows:
 - 7.1 The abolition of the privilege of the forum is relevant to whether canon law prohibits reporting child sexual abuse to the civil authorities.
 - 7.2 The 1917 and 1983 *Codes of Canon Law, Sacramentorum Sanctitatis Tutela* (“SST 2001”) and its revision in 2010 (“SST 2010”) and *Secreta Continere* do not contain any express prohibition on reporting child sexual abuse to the civil authorities.
 - 7.3 Church teaching requires citizens to obey civil laws where they are not contrary to the moral order or the teachings of the gospels.

- 7.4. Assuming that the imposition of the pontifical secret imposed by *SST 2001*, *SST 2010* and *Secreta Continere* requires an exception, the teaching of the Church provides that exception.
- 7.5 By inference, the 2010 direction to obey civil laws was not a dispensation from the pontifical secret, but a reminder to comply with what has always been canon law.

The Privilege of the Forum (par 158,289 Austin Report)

8. There are two kinds of privilege of the forum. One was the canonical restriction on Catholics taking legal proceedings in the secular courts against clerics. Its non-applicability to Australia and its repeal in 1983 has nothing to do with restrictions on reporting clergy sexual abuse to the civil authorities.
9. The second kind – often referred to as the privilege of clergy – was the recognition by the State from the time of Constantine that clergy could only be tried for civil crimes in the canonical courts. It was gradually whittled away, and remnants of it finally abolished in Britain (and the colonies) in 1827. Secrecy was used in canon law from 1922 onwards to create a de facto privilege of clergy whereby sex abusing priests would only be tried (if at all) in the canonical courts because their crimes would be hidden from the State.²

The No Prohibition Argument

10. All coherent legal systems make rules of general application that apply to everyone within the regions where they operate.
11. If exceptions are to be made to that general rule, they are written into the law itself either expressly or by necessary implication.
12. To use a simple analogy, “No Parking” means no parking for everyone. If exceptions are to be made for police or ambulance vehicles, the exception is stated in the sign (the law

² Submission par 188, 189, 236-245,724, 892. The Spanish canonist, Aurelio Yanguas SJ, said in 1946 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. The problem was that the requirement to try and reform the priest made it impossible for the action to be swift and decisive. Secrecy to avoid Church humiliation was very successful: Submission par 263.

requires obedience to traffic signs) or it is contained in other parts of the law to the effect that police and ambulance vehicles can park where they like.

13. Canon law adopts that principle by the use of the Latin term, “nisi” (“unless”) or some equivalent to create exceptions to general laws. Such expressions appear over 1,300 times in the *1983 Code*.³
14. Some prohibitions in both civil and canon law only apply to particular people. A good example in canon law is *Secreta Continere*, which by Art II, defines those who are bound by the pontifical secret: Cardinals, bishops, major and minor officials and lower ranks who are concerned with the treatment of questions subject to the pontifical secret. Those who come across that information accidentally are also obliged to keep it strictly confidential.
15. Canon law does not have a provision addressed to senior Church officials stating: “do not report clerical sexual abuse to the police”. But there is also no provision: “do not report clerical sexual abuse to housekeepers, butchers and the media”. Canon law does not tell papal legates whose reports are also covered by the pontifical secret not to give them to journalists, their mates at the pub or the town gossip. There is no need to. The whole notion of confidentiality becomes meaningless if it is necessary to list the people who cannot be given the information. Confidentiality for child sexual abuse cases means not giving the information to anyone not involved in the investigative process.⁴ Any exception has to be written into the law either expressly or by necessary implication.

An Argument Emasculating Canon Law as a Coherent Legal System

16. I don’t think Dr Austin means to say that because canon law does not specifically instruct bishops “don’t go to the police”, therefore it is permitted. His argument seems to be that there is no civil law requiring disclosure to housekeepers, butchers and town gossips, but there may be such laws for reporting to the police. Catholic teaching requires compliance with civil laws that are not immoral or against the teachings of the Gospels. Reporting child

³ Submission par 488.

⁴ R.Lucien Millette in “*An Analysis of the Preliminary Investigation in Light of the Rights of the Accused*” *The Jurist* 75(2015) 109-195 at : “In general, a secret is a moral imperative to not manifest to anyone else information which has been received in confidence.” That moral imperative became a legal imperative by *Secreta Continere* by the imposition of the strictest confidentiality over the extrajudicial denunciation and any canonical processes relating to it.

sexual abuse to the police comes into that category, and therefore Catholic teaching provides an exception to the strict confidentiality imposed by canon law.

17. This argument emasculates a fundamental feature of every coherent legal system. The principle was stated by the Murphy Commission in Ireland:

“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.”⁵

18. To go back to the parking analogy, the moral obligation of the State to look after the disabled does not create a legal exception for disabled people to park in a “no parking” zone. If they are to be exempt from that general prohibition, the exemption must be found in the law and not outside of it.

Papal Encyclicals, the Catholic Catechism and Canon Law

19. Canon law does not provide a general obligation to obey the civil law. Indeed, Dr Austin does not suggest that it does. His argument is that the exception to the pontifical secret is provided by the general teaching of the Church to obey civil laws as stated in Pope Leo XIII’s 1885 encyclical *Immortale Dei* and in the *Catholic Catechism* par 2242.
20. Papal encyclicals and the *Catholic Catechism* are statements of the doctrines of the Church on faith and morals. They are not legislative or juridical documents.⁶

⁵ <http://www.justice.ie/en/JELR/DACOI%20Part%201.pdf/Files/DACOI%20Part%201.pdf> (Accessed 25 April 2013) par 4.87 - 4.89. Canon law does have a system of promulgation. It is not as simple as the civil law system, and the complexity arises out of the variety of legislative documents coming from the Pope and his delegates: Morrisey: *Papal and Curial Pronouncements: Their Significance in the Light of the 1983 Code of Canon Law*, *The Jurist* 50 (1990) 102, J.M. Huels: *Papal and Curial Pronouncements: Their Canonical Significance in Light of the 1983 Code of Canon Law* *The Jurist* 50 (1990) 124-125, par 3.1. Although the complexity can give rise to confusion, there is no doubt that canon law has a system of promulgation and amendment of laws: Submission, par 901. The Murphy Commission had difficulty working out what canon law said about child sexual abuse by clergy. Canon lawyers were confused, but not because of the complexity of the methods of promulgation, but because in the late 1990s, Cardinal Ratzinger and his CDF asserted that the Instruction, *Crimen Sollicitationis* was still in force, when it would normally have been abrogated by the *1983 Code*, in much the same way as a regulation under our civil law system would be repealed when the statute under which it was made was repealed. In 2010, Ratzinger, as Benedict XVI, effectively admitted that *Crimen Sollicitationis* had been abrogated by the *1983 Code* when he rewrote the historical introduction to *SST 2001*: see *Potiphar’s Wife: The Vatican’s Secret and Child Sexual Abuse* p.103-126.

⁶ The *Catholic Catechism* was described by Pope John Paul II in his Apostolic Constitution, *Fidei Depositum* (“the deposit of faith”) of 11 October, 1992 as a “compendium of all Catholic doctrine regarding both faith and morals”: http://www.vatican.va/archive/ccc_css/archive/catechism/aposcons.htm (Accessed 17 January 2017). Prologue III(11) of the 1992 *Catholic Catechism* states: “This catechism aims at presenting an organic synthesis of the essential and fundamental contents of Catholic doctrine, as regards both faith and morals, in the light of the Second Vatican Council and the whole of the Church’s Tradition.” http://www.vatican.va/archive/ENG0015/_P4.HTM (Accessed 17 January 2017). The only mentions of catechisms in the *1983 Code of Canon Law* are in Canons 755 and 827 which requires bishops and pastors to make catechisms available. The only mentions of canon law in the *Catechism* are in No. 1463 and 2272 describing how

21. Even if Pope Leo XIII's 1885 encyclical *Immortale Dei* were a juridical document, it was abrogated by the *1917 Code of Canon Law*.⁷
22. If the *Catholic Catechism* were a juridical document, adultery would be a canonical crime, but it isn't. Adultery remains a sin arising from a moral obligation and nothing more. Likewise the sexual abuse of children by those who are not clerics is not a canonical crime that could bring them before a canonical court.⁸
23. According to Professor J.M. Huels, the only way to determine whether an ecclesiastical document is magisterial (that is part of the Church's teaching) or juridical (part of canon law) is by examining its contents.

"If it is dealing with a doctrinal or moral matter, it is magisterial; if it deals with a matter related to discipline, procedures, structures, rights and obligations and so forth, it is juridical... a magisterial text, such as an apostolic exhortation, may refer to canonical norms and urge their observance, but the nature of the document is not altered."⁹

24. There is a very good and practical reason why all coherent legal systems respect this distinction between legal obligations and moral ones.
- 24.1 Opinions about moral rights and obligations can widely differ within any community. If legal obligations were determined by moral obligations without some "procedure

excommunication can only be lifted in accordance with canon law. The new profession of faith issued by Pope Paul VI in 1968 is a magisterial document, similar to the *Catechism*. Francis G. Morrissey says of it: "While this text is of the most solemn nature and recalls the various dogmas and beliefs of the Church, it does not fit into the category of legislative documents. No prescriptions were issued concerning the use of this formula, nor were any penalties laid down as such for the non-acceptance of any of its articles. This solemn document pertains to the teaching Magisterium of the Church and not to the legislative order." Encyclicals, apostolic letters and exhortations are not legislative texts for the same reason: Morrissey: "*Papal and Curial Pronouncements: Their Canonical Significance in Light of the 1983 Code of Canon Law*" *The Jurist* 50 (1990) 124-125. J.M. Huels says that simply because a text is "promulgated" does not make it a legislative text: "A magisterial text can also be promulgated, but this does not make it law. It simply indicates its approval and authorization for publication (see John Paul II, Apostolic Letter *Laetamus magnopere*, 15 August 1997, PS, 43 [1998], pp. 33-35. By means of this apostolic letter the Latin edition of the *Catechism of the Catholic Church* was approved and promulgated": *A Theory of Juridical Documents Based on Canons 29-34*, *Studia Canonica*; Ottawa32.2 (1998): 337-370, and fn 70.

⁷ *Providentissima Mater Ecclesia* of Pope Benedict XV of 27 May 1917; Submission par 226 and fn 159.

⁸ Canon law not only demands obedience from Catholics, but it is also a restriction on the rights of the Vatican and bishops to impose measures on them which are not sanctioned by canon law itself. Canon 221, §3: "Christ's faithful have the right not to be punished with canonical penalties except according to the norm of law." Canon law is no different from civil law in that regard: William L. Daniel, *The Principle of Legality in Canon Law*, *The Jurist* 70 (2010) 29-85 at 31

⁹ J.M. Huels: *A Theory of Juridical Documents Based on Canons 29-34*, *Studia Canonica*; Ottawa32.2 (1998): 337-370. J. M. Huels is Professor of Canon Law at St Paul University, Ottawa and one of the contributors to the *New Commentary on the Code of Canon Law*.

of promulgation,” to turn them into law, the legal system would grind to a halt with endless arguments about whether something was illegal or not.

- 24.2 There are often competing moral obligations. A good example within the Catholic Church is the moral obligation to obey civil laws, but on the other hand, there is the moral obligation to avoid scandal and for bishops to treat their priests as their “sons”.¹⁰ Until 2010, Church leaders in the Vatican and elsewhere were adamant that bishops had a moral obligation not to report sex abusing priests to the civil authorities even if they were obliged to do so by civil reporting laws. The moral obligation to avoid scandal and the “father/son sacramental” relationship between bishop and priest overrode any moral obligation to obey civil laws.¹¹
- 24.3 Opinions about moral obligations may change with time, e.g. homosexuality in the civil sphere. One would never know at what point the new moral opinion had become law. Likewise within the Church, opinions about moral obligations to obey the civil law may be changing: Cardinal O’Malley on reporting child sexual abuse by clerics (2016) as against Cardinals Castrillón and Rodríguez Maradiaga (1997-2002). Even if ultimately O’Malley’s opinion is universally accepted, one would never know at what point the law changed.

Conflicts between Canon and Civil Law

25. Catholics are obliged to obey canon law.¹² If there were an overriding obligation under canon law to follow civil laws (assuming they are not immoral or contrary to the Gospels), then there could never be any conflict between canon and civil law because the civil law would always trump canon law within the canonical system.
26. In the civil law system, civil law always trumps canon law because of the nature of civil law in a democratic society. The laws of private institutions whether religious or secular never

¹⁰ Catholic Catechism 2284-2287. “Scandal” is mentioned 18 times in the Catechism, and 28 times in the *1983 Code*, twice as many times as the word “Scripture”. For statements about the father/son “sacramental” relationship between a bishop and his priests, see Submission par 383 - 402, 880.

¹¹ The motivation behind the strictest secrecy imposed by canon law over child sexual abuse by clerics was the avoidance of scandal: Aurelio Yanguas SJ, Submission par 263, Cardinal Pell, Submission par 351. Cardinals Castrillón and Rodríguez Maradiaga required bishops to break civil reporting laws. They should be prepared to go to jail rather than do that: Submission par 389 and 402.

¹² Austin Report par 34-35

override civil law, but they may require their members to break the civil law and suffer the consequences – like going to jail.

27. The existence of potential conflicts between canon and civil law is recognized in Canon 22 which provides:

“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.”¹³

28. Dr Austin has adopted a narrow interpretation of Canon 22.¹⁴ That narrow interpretation suggests that the words “insofar as they are not contrary to divine law and unless canon law provides otherwise” only applies to civil laws remitted or adopted and not generally. The narrow interpretation of Canon 22 does not mean that canon law gives way to civil law where there is a conflict. It means that Catholics are bound by two legal obligations, and in that situation, Ladislav Orsy says that “experts must find the best solution they can.”¹⁵ However, there are two matters imposed by canon law that effectively prevent “the best solution” ever resulting in a choice by Catholic officials of the civil law obligation over the canonical one: the oaths of office and the removal of the right of conscience in *Secreta Continere*.

The Oaths of Office and the Removal of the Right of Conscience

29. Canon law requires bishops and office holders in the Church to take oaths to obey canon law. Canon 380 deals with newly appointed bishops:

“Before he takes canonical possession of his office, the one promoted is to make the profession of faith and take the oath of fidelity to the Apostolic See according to the formula approved by the Apostolic See.”

30. That oath of fidelity is in the following terms:

“Do you resolve to render obedience faithfully to the successor of the Blessed Apostle Peter?”¹⁶

¹³ http://www.vatican.va/archive/ENG1104/_P3.HTM (Accessed 6 March 2013).

¹⁴ In par 55 Austin Report, and for further explanation of this narrow interpretation, see Submission, par 132.

¹⁵ Submission par 134, L. Orsy, “General Norms” in J.A Coriden, T.I Green and D.E Heintschel (eds) *The Code of Canon Law. A Text and Commentary*, New York/Mahwah: Paulist Press 1985, p.38

¹⁶ <http://www.sydneycatholic.org/downloads/ARC-448%20Booklet%20210x210.pdf> (Accessed 25 August 2016)

31. Canon 833 requires all those taking on positions in the Church hierarchy, and those in religious orders to make a “profession of faith” according to an approved formula which also requires them to swear:

“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.”¹⁷

32. Bishops and other office holders are not required by the Church to swear oaths to obey the civil law. The Church requires its office holders to follow canon law over civil law where there is a conflict.
33. *Secreta Continere* requires those bound by the pontifical secret to observe the strictest confidentiality over information about clergy sexual abuse of children even if their personal conscience suggests otherwise.¹⁸
34. Even assuming that the narrow interpretation of Canon 22 is correct, Church officials have little option but to observe canon law over the civil where there is a conflict.

The Broader Interpretation of Canon 22

35. The authors of the *New Commentary on the Code of Canon Law* and other canon lawyers do not agree with Dr Austin’s narrow interpretation of Canon 22.¹⁹ Professor J.M Huels says in the *New Commentary*:

“Where the civil law conflicts with divine law or canon law, the latter prevails...canon law does not yield to civil laws in general, but only in certain matters...While both are binding within separate but parallel systems, the canon law prevails whenever it conflicts with the civil law.”²⁰

36. Huels points out that the “canonization” of civil laws avoids conflicts between canon and civil law in those particular subject matters. There has been no canonization of civil laws regarding the reporting of child sexual abuse to the civil authorities, and Dr Austin does not suggest otherwise.

¹⁷ http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_19880701_professio-fidei_en.html (Accessed 3 March 2013)

¹⁸ Submission par 274.

¹⁹ Submission par 132ff.

²⁰ p.85.

37. Huels also says that sometimes canon law:

“...exhorts or requires the observance of civil laws on a certain matter, which is another way in which the canon law recognizes the applicability of the civil laws without canonizing them. Recognition of the civil laws does not eliminate the possibility that, in individual instances, competent church authorities may determine that a certain civil law should not be observed if it would harm the interests of the church.”

38. Prior to 2010, senior Church authorities in the Vatican, and especially the Prefect of the Congregation for the Clergy, Cardinal Castrillón, exhorted bishops not to comply with civil reporting laws for child sexual abuse.²¹ Only in 2010, did the Vatican require bishops and local Church authorities to comply with civil laws on reporting.
39. Rik Torfs, Professor of Canon Law and Rector of the Catholic University at Leuven, says that the idea of the Church as a *societas perfecta*, the “perfect society”, while not expressly rejected by the Second Vatican Council, has survived in the *1983 Code of Canon Law*, and its retention has a lot to do with the failure of the Church to deal effectively with child sexual abuse.
40. In his opinion Canon 22 is an example of this retention:
- “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.”
41. Torfs uses the conviction of the Bishop Pican for failing to report a priest sex abuser to the civil authorities in accordance with French law as an example of how strongly this idea of the Church as a “perfect society” is still embedded in the hierarchy. Reporting laws were as an unjustified State interference in the Church’s independence.²²
42. Even assuming that a moral obligation can create a legal one without some procedure of promulgation as law, the Church leadership in the Vatican and elsewhere, prior to 2010,

²¹ Submission par 376 – 408.

²² Submission par 389-396. This independence, Torf says, is being eroded, whether the Church likes it or not, by civil liability cases which are forcing the Church to adopt standards that have become unquestioned in secular society. One such standard is transparency: *Ecclesia Semper Reformanda, a European Perspective on the Future of the Law, the Journey Ahead*, CLSA Proceedings 61 (1999) 49, at 53, 87 & 90.

regarded the moral obligation of not reporting priest sex offenders to the civil authorities as overriding any moral requirement to obey civil laws.

The Teaching of the Church as an Exception to Canon Law

43. Behind many civil laws there is a moral obligation, for example, the law of contracts. People should be bound by their bargains. Canon law has specifically adopted the civil law of contract in the regions where the Church operates.²³ But there has to be a specific adoption or “canonization” in canon law before there is any canonical obligation to be bound by one’s bargains. A mere moral obligation to keep one’s bargains does not create a legal obligation under canon law.
44. By not including an exception to allow reporting to the civil authorities in *SST 2001*, *SST 2010* and *Secreta Continere*, the Church decided not to adopt the civil law on reporting where it existed, at least not until 2010, and then with a significant limitation.
45. In the case of the pontifical secret over allegations of child sexual abuse, there was, prior to 2010, a conflict between Art 25 of *SST 2001* and Art 1(4) of *Secreta Continere* and the civil law requirement to report, for example, under S.316 of the *Crimes Act 1900* (NSW), which required reporting of practically all forms of child sexual abuse.²⁴
46. That conflict was recognised by Dr Elizabeth Delaney in her doctoral thesis *Canonical Implications of the Response of the Catholic Church in Australia to Child Sexual in Australia*.²⁵
47. The conflict was also recognized by the Prefect for the Congregation for Clergy Cardinal Castrillón (a canon lawyer) in his letter through the papal nuncio, Archbishop Storero, to the Irish bishops of 31 January 1997.²⁶ Misprision of felony was still the law in Ireland at the date of that letter. The letter was an instruction to breach Irish law.²⁷
48. The conflict was recognised by Cardinal Castrillón’s congratulatory letter to Bishop Pican of 8 September 2001, stating that bishops should prefer to go to jail rather than denounce a

²³ Canon 1290

²⁴ There still is a conflict between S.316 *Crimes Act 1900* (NSW) once a canonical proceeding begins: see below.

²⁵ Submission par 328.

²⁶ Submission par 380, 385 & 395

²⁷ Submission par 458-460.

“priest-son”.²⁸ It was also recognised by a similar statement of Cardinal Rodríguez Maradiaga on 16 May 2002.²⁹

49. It doesn't matter whether the basis of these remarks was the pontifical secret, the canonical requirement under canon 1341 to try to cure the priest before putting him on a canonical trial or because of the requirement on bishops in Canon 384 to pay “special solicitude” towards his priests.³⁰ Reporting, for these senior members of the Curia and hierarchy, conflicted with canon law to the extent whereby bishops were obliged to break the civil law.

Church Teaching on Obeying Civil Laws

50. Dr Austin says that the Church's teaching on obeying civil law is that “citizens are bound in conscience to obey” the laws of the State but they are “obliged in conscience not to follow the directives of civil authorities when they are contrary to the demands of the moral order, to the fundamental rights of persons or the teachings of the Gospel.”³¹
51. Canon 22 in both its narrow and broad interpretations also requires disobedience when civil laws are contrary to canon law, and that was certainly the view of senior members of the Roman Curia and hierarchy in respect of reporting. Statements of the Roman Curia are the equivalent of non-binding court decisions in the Anglo/American civil law system.³²
52. The direction by the Vatican to obey civil laws in 2010 was an example of a dispensation from the pontifical secret under Canon 85, where such civil reporting laws existed, or it was an adoption of the civil laws on reporting under Canon 22.
53. In paragraph 299 Dr Austin says:

²⁸ Submission par 389.

²⁹ Submission par 402. Cardinals Castrillón and Rodríguez Maradiaga were the only two who said that bishops should be prepared to go to jail rather than report a priest to the police. However, statements in opposition to reporting were made by members of other members of Curia with Cardinal Castrillón (Congregation for Clergy), Cardinal Re (Congregation for Bishops), Archbishop Bertone (CDF), Archbishop Herranz, (Pontifical Council for the Interpretation of Canonical Texts) and Professor Ghirlanda (Apostolic Signatura) and other heads of Catholic Bishops Conferences, Cardinals Billé, Lehmann and Schotte.

³⁰ Canon 384: “With special solicitude, a diocesan bishop is to attend presbyters and to listen to them as assistants and counsellors. He is to protect their rights.” Cardinal Castrillón thought the relationship went beyond special solicitude and it was a “sacramental relationship which forges very special bonds of spiritual paternity.” Submission par 390. Monsignor Scicluna, the Vatican's chief sexual abuse prosecutor thought the same: Submission par 880.

³¹ Austin Report par 6.

³² Submission par 169.

299 There is no doubt whatsoever that, whenever the civil law requires the reporting of allegations or crimes of the sexual abuse of minors to the civil authorities, the relevant Church officials, for example bishops or religious superiors, are obliged to comply with the requirements of the civil law. There is no law or other provision within the Church's canonical system that prohibits Church officials from complying with such requirements of the civil law.

54. These statements are correct since 2010 for all cases except where further crimes are disclosed in the course of a canonical inquiry. Prior to 2010, these assertions were not correct.³³ The pontifical secret prohibited the bishop or his investigating delegates and their staff from disclosing to anyone, other than the accused, the extrajudicial denunciation or information obtained through their inquiries. Disclosure to the civil authorities could only be permitted by way of an exception which can only be found in canon law itself and not in the *Catechism*.

The Limitation on the Dispensation to Obey Civil Laws on Reporting

55. Fr Federico Lombardi, the Vatican spokesman, when announcing the concession to obey civil laws on 15 July 2010, said,

“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.”

56. In the case of Fr Inzoli, the Congregation for the Doctrine of the Faith (“CDF”) refused Italian magistrates access to documents relating to the canonical trial of the priest:

“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.”

57. On 31 July 2013, Dr Austin gave evidence to the Cunneen Special Commission. He was asked about oaths of secrecy taken by priests:

Q. I want to also you ask about the concept of an oath of secrecy that's sworn by priests. Is that a matter that is dealt with by canon law or is it dealt with by other aspects of church affairs?

³³ Submission at par 254 (*Crimen Sollicitationis*) and 270 (*Secreta Continere*), and were not regarded as correct by the Vatican itself.

A. In certain circumstances an oath of secrecy or, more correctly, confidentiality is to be taken. That applies, say, to people working in tribunals, for example, and other offices. So there are some things that are subject to confidentiality...

Q. Is an oath of secrecy taken by every person who becomes a priest? Is it something that --

A. It depends on the office that one holds or what the particular thing is. It's not a general thing that every priest takes by virtue of ordination.

Q. But if you hold particular diocesan office, you may be required to take an oath of secrecy?

A. Yes.

Q. And that would include a vicar general?

A. It would include a vicar general, yes.

Q. Does canon law or church law impose any obligations that would supersede civil law in any respect in terms of an oath of secrecy?

A. I don't believe it does at all.

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.**

Q. Dispensed from the church law obligation?

A. Yes, so the church law obligation could be dispensed with.

Q. And to certainly notify the civil law authority if there were any restrictions?

A. Yes.³⁴ (my emphasis)

58. No civil law privilege attaches to evidence given to a canonical court.³⁵ If a dispensation is required by Church law to obey the civil law obligation to answer questions truthfully in court, then it must follow that Church law prohibits the disclosure. Such a dispensation would have to come from the Holy See.³⁶

59. In Dr Austin's opinion, the prohibition applies not just to matters covered by the much stricter pontifical secret, but by the ordinary confidentiality required of judges and tribunal personnel.³⁷

³⁴ [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), p2232 -2233 (Accessed 12 January 2017). See also Par 547 Submission

³⁵ Submission par 550ff.

³⁶ A bishop has no power to dispense from procedural or penal laws: Canon 87: Submission par 548.

³⁷ Canon 1455 deals with the secrecy of office of judges and tribunal personnel: "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." A penal trial is the equivalent in civil law of a criminal trial and a contentious trial is the equivalent of a civil suit.

60. The pontifical secret, which applies to child sexual abuse by clergy, involves a permanent silence, the same as the secret of the confessional, with the exception that the pontifical secret is not “inviolable” and can be dispensed with under Canon 85: Art III (1).³⁸ Further, the preamble to *Secreta Continere* takes away the consciences of those obliged to observe the pontifical secret. Their conscience is to observe the pontifical secret.³⁹
61. Dr Austin’s evidence about the need for a dispensation from confidentiality applying to Church tribunals is consistent with the opinions expressed by Church spokesmen, Fr Lombardi and Martin Long and senior canon lawyers, Professors Beal, Cafardi and Waters, Monsignors Stenson and Dooley and Sr Moya Hanlen, that the Church’s strictest confidentiality, the pontifical secret, applies to the church’s internal proceedings over child sexual abuse by clerics.⁴⁰
62. Dr Austin’s evidence to the Cunneen Special Commission is consistent with Canon 22 requiring canon law to have precedence over civil law wherever there is a conflict, and with the general principle that any exception to the pontifical secret must come from within canon law itself and not from the *Catechism*. His evidence to the Cunneen Special Commission is not consistent with his opinion expressed in this Report to the Royal Commission.
63. Art 1(4) of *Secreta Continere* itself confirms that reporting to the civil authorities is not an exception to the observance of the pontifical secret. It allows only one exception: the accused can be told of the extra judicial denunciation if it is necessary for his defence. Since many canons in the *Code* deal with an accused’s right to self-defence, it could be argued that the right of the accused to know of the extra judicial denunciation is implied.⁴¹ Such an implication would come from those provisions within canon law, not from some general moral principle that people should have the right to defend themselves against accusations.

³⁸ Submission par 933.

³⁹ Submission par 274.

⁴⁰ Vatican spokesman, Fr Lombardi, Submission par 334, Martin Long, spokesman for the Irish Catholic Bishops Conference, Submission 428, canon lawyers, Monsignor Maurice Dooley, Submission par 545, 412 Monsignor Stenson Submission par 546, Professors Beal, Submission par 346 and 443, Cafardi, Submission par 445 and Waters, Submission par 461ff, Sr Hanlen Submission par 325, fn 272 (Nestor Case Study 14: dispensation from the pontifical secret to allow bishop to announce the result of a canonical hearing.)

⁴¹ On the accused’s right to defence, see Canons 1720, 1723, 1724, 1725, 1726, 1727, 1728, 1732-1752.

64. Even in the case where an implied exception could arise from other sections of the Codes, *Secreta Continere* is careful to state the exception expressly in Art 1(4). There is no such exception for reporting to the civil authorities either express or implied.
65. The pontifical secret applies not just to information that comes out of canonical proceedings, but applies to the “extra judicial denunciation” as well. Dr Elizabeth Delaney concedes this.⁴² So does Professor John P. Beal.⁴³
66. If the general moral obligation of Catholics to obey civil laws is not sufficient to create an exception to the pontifical secret under Art 1(4) of *Secreta Continere* once a canonical proceeding starts, then it must also be insufficient to create an exception in the case of the “extrajudicial denunciation” under the same Article.

Where There Are No Civil Laws Requiring Reporting

67. Dr Austin states at par 300 of his report.

“Similarly there is no doubt whatsoever that, if 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.”

68. That statement is correct, and it reveals the inconsistency and fallacy in Dr Austin’s argument. Cardinal O’Malley said in February 2016 that there is an ethical and moral obligation to report all cases of abuse to the civil authorities – and few would disagree with him. A civil law obligation to report does not arise because of a moral or ethical duty even if universally acknowledged by the community. It has to be turned into a legal obligation by the civil law itself. Likewise, canon law, if it is to remain a coherent legal system, has to turn a moral obligation expressed in the *Catechism* or in Cardinal O’Malley’s statement into a legal exception to the requirement to observe the pontifical secret.⁴⁴ It has not done so.

⁴² Submission par 326.

⁴³ Submission par 346.

⁴⁴ Ladislav Orsy in *Theology and Canon Law*, in Beal, Coriden and Green: *New Commentary on the Code of Canon Law* p 7 recognises the need to turn a value into a legal requirement: “Of course, not all values suitable for the community need to be objects of legislation; it will always be a matter of prudence to select the ones that ought to be promoted into legislative acts.”

69. Cardinal O'Malley's views about the moral and ethical obligation to report were not shared by the Vatican and senior Church figures prior to February 2016.⁴⁵ The non-inclusion of this statement of moral obligation in the Guidelines issued on 6 December 2016 by the Pontifical Commission for the Protection of Minors is evidence that they are still not accepted.⁴⁶
70. Bishop Scicluna at the United Nations in 2014 did not share Cardinal O'Malley's view. When pressed by members of the Committee on the Rights of the Child as to why the Vatican did not require reporting of all child sex abuse allegations irrespective of whether there were civil reporting laws, his response was that it was up to the victim to report and it was the role of the Church to "empower" them to do so.⁴⁷
71. Bishop Scicluna was appearing as the Holy See's representative at the United Nations and his statements therefore reflected the views of Pope Francis. However, on 17 February 2016, as Archbishop Scicluna of Malta, he expressed a different and no doubt personal view 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.'"⁴⁸
72. Prior to *Towards Healing 2010* (which required all allegations of criminal behaviour to be reported), the Victorian bishops did not believe that they had any moral obligation to report child sexual abuse to the civil authorities, or if they did, it was overridden by canon law. Victoria had no reporting laws obliging clergy to report, and none of the 611 cases were reported to the civil authorities by the Church.⁴⁹
73. The Catholic Bishops Conferences of Italy and Poland in 2012, 2014 and 2015 respectively, stated that their bishops would not report priest sex abusers to the civil authorities because their civil laws did not require it.

⁴⁵ Submission par 372ff.

⁴⁶ http://www.protectionofminors.va/content/tuteladeiminori/en/resources_section/new_guidelines_page/guidelines-template_page.html

⁴⁷ Submission par 434. Bishop Scicluna's response to the United Nations Committees is consistent with the opinion of Cardinal Castrillón, that the Church should not report and that this was up to the victim: Submission par 455. The *Melbourne Response* was also consistent with the Vatican policy. It had no provision for the Church to report (unlike *Towards Healing*), but only encouragement of the complainant to do so.

⁴⁸ Submission par 703.

⁴⁹ Submission par 539.

74. These differences and shifts of opinion about moral obligations illustrate the fundamental reason for the sharp distinction being drawn between legal and moral obligations in coherent legal systems.

The Uniqueness of the Catholic Church's Response to the Sexual Abuse of Children

75. The Church may claim that it should be treated no differently to other institutions under civil law, and therefore it should not be required to impose mandatory reporting under canon law unless the civil law is changed to impose that obligation on everyone.
76. There are many Catholics who would think that the Church should adopt a higher standard, bearing in mind its claim to be a moral authority. That higher standard of mandatory reporting of priest sex abusers to the civil authority was part of a long canonical tradition which the Church abandoned with the *1917 Code*.⁵⁰ Indeed, canon law prior to 1917 required not just reporting, but the *handing over* of these priests to the civil authority.
77. Nevertheless, the Catholic Church, as an institution in secular society, is entitled to claim equal treatment.
78. However, the Catholic Church does not treat child sexual abuse by its clergy in the same way as other institutions. It is unique, because no other institution that has come before the Royal Commission (except perhaps in the belief of some members of the Yashiva community in Melbourne) has internal laws requiring a cover up of sexual abuse by clergy where there are no applicable civil reporting laws, and where information of further abuse is revealed in its own internal inquiries. No other religious institution through its internal laws purports to take away the conscience of its senior clergy to report other clergy to the police over child sexual abuse.
79. Cardinal O'Malley's statement, as welcome as it is, does not represent a change to canon law. On 6 December 2016 the Pontifical Commission issued the Vatican guidelines for national Catholic bishops' conferences, which may in the future be approved under Canon

⁵⁰ Submission par 180ff.

455 making them canon law for the areas covered by the particular Bishops' conference.⁵¹ Cardinal O'Malley's statement is not included in those guidelines.

80. Section 9 of those Guidelines requires:

"There should be a clear statement about referral of criminal behaviour to the police or relevant authority."

81. The Australian Catholic Bishops Conference submitted to the CDF a very clear statement in *Towards Healing 2010*. Clause 39 says that if allegations amount to criminal offences, they must be reported to the police. On 22 February 2013, the CDF advised the Australian bishops that clause 39 of *Towards Healing* was "only applicable to non-clerics."

82. At par 231 of his report, Dr Austin says:

"The authorisation by the bishop for the procedures in *Towards Healing* to be used in the diocese constitutes an authoritative act of governance on his part. Although not juridically binding *Towards Healing* does have moral authority."

83. The advice by the CDF takes away any moral authority imposed by clause 39 of *Towards Healing*. Clerics are to be dealt with under *SST 2010* which imposes the pontifical secret pursuant to *Secreta Continere*, with no exceptions for reporting to the civil authorities and with no room for the exercise of private conscience.

The Supreme Law of the Church

84. Dr Austin explains at par 45 that canon and civil law are different in that canon law is part of the redeeming mission of the Church, and that one should not look at canon law through the lens of civil law. In other words, canon law has an overlying interpretation in addition to the proper meaning of the words that is common to both canon and civil law. The last canon of the Code, Canon 1752, says that the Supreme Law of the Church is the salvation of souls.⁵²

85. Archbishop Hart explained to the Victorian Parliamentary Inquiry that scandal has technical meaning in the Church:

⁵¹ The Holy See approved ("recognitio") a protocol for the United States in 2002. It could also be argued that by including Cardinal O'Malley's statement in those protocols, the dispensation over the pontifical secret was extended to places where there were no applicable reporting laws. However, that does not arise because of the lack of inclusion.

⁵² Submission par 557.

“First of all, when I use the word ‘scandal’, I mean that a person who is supposed to act in the place of Christ acts in the very opposite and this causes people a loss of faith, so I am using a technical term.”⁵³

86. The imposition of the pontifical secret was a means of preventing a loss of faith (and therefore loss of redemption) amongst the faithful by their knowledge of scandal. At the Victorian Parliamentary Inquiry, Cardinal Pell conceded that the primary motivation for imposing secrecy was the “fear of scandal” and to protect the reputation of the Church.⁵⁴ Bishop Malone told this Royal Commission that the Church was concerned about the loss of faith arising from revelations of child sexual abuse amongst clergy and religious.⁵⁵
87. The special nature of canon law is a further factor militating against any suggestion that the general moral obligation of Catholics to obey civil laws provides an implied exception to the pontifical secret under Art 1(4) of *Secreta Continere*. The Church’s concern for the loss of faith through scandal meant that any moral obligation on senior clergy to obey civil reporting laws gave way to the need to avoid scandal and the subsequent loss of faith.⁵⁶

Law and Culture

88. The existence of these secrecy laws with no exceptions for reporting to the police unless there is a civil law will ensure the continuation of the culture of secrecy in the Church. The laws did not create the culture, but were a reflection it. But, having been passed and still being in force, they will entrench that culture. Archbishop Scicluna was correct to use the words “instinct...to protect the Church’s reputation” because that is what happens when culture, entrenched by law, becomes internalised.⁵⁷

⁵³

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).

⁵⁴http://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)

⁵⁵ Case No. 43, 1 September 2016, Transcript p. C17738.

⁵⁶ There are a number of examples set out in my submission where the “supreme law of the Church” justified not only the overriding of moral obligations to report to the police, but to other practices that went beyond the requirements of canon law, and in some cases even technically breached it for the sake of avoiding “scandal”: par 561 (Fr Brian Lucas), 578 (Bishop Mulkearns), 748 (Cardinal Mahony, Bishop Quinn, the Salesians)

⁵⁷ Submission par 708ff.

89. As Cardinal Francis George pointed out in 2003, a culture will never change while there is a law embodying that culture.⁵⁸ That principle applies equally to canon law as to civil law.

Conclusion

90. Dr Austin's assertion that there is no prohibition in canon law on reporting to the civil authorities is not correct because canon law, whatever its complications, requires a form of promulgation to create law and to amend it. Despite the many different ways of creating legislative documents in canon law, one thing is certain: moral obligations in the *Catholic Catechism* and in the encyclical of Pope Leo XIII in 1885 have never been promulgated into law.
91. A moral obligation to obey civil laws can become canon law by amendment to existing law (for example, by changes to *SST 2010* to provide for an exception to the pontifical secret to allow reporting) or by the use of the dispensation power under Canon 85, or by the "canonization" of civil reporting laws under Canon 22.
92. Cardinal O'Malley's "moral and ethical obligation" to report even if there are no applicable civil reporting laws has not been adopted by the Vatican to bring about an amendment to the pontifical secret under *SST 2010* and *Secreta Continere*.

24 January 2017

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⁵⁸ Id.