ROYAL COMMISSION INTO INSTITUTIONAL RESPONSES TO CHILD SEXUAL ABUSE

Public Hearing - Case Study 50 (Day 245)

Level 17, Governor Macquarie Tower
1 Farrer Place, Sydney

On Thursday, 9 February 2017 at 10am

Before:

The Chair: Justice Peter McClellan AM
Before Commissioners: Justice Jennifer Ann Coate
Mr Bob Atkinson AO APM
Mr Robert Fitzgerald AM
Professor Helen Milroy
Mr Andrew Murray

Counsel Assisting: Ms Gail Furness SC
Mr Stephen Free
MS FURNESS: Thank you, your Honour. There will be four panelists who will be sworn in shortly, your Honour. I will provide a short introduction to the panel today, which is Church discipline, secrecy and confession. My friend will be taking the witnesses.

The next part of the hearing will focus on the canon law processes for investigating and disciplining priests and religious.

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.

Evidence this morning 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, whom we have heard from earlier, a canon lawyer from the United States; Sister Moya Hanlen, a canon lawyer from Sydney, who gave evidence in the Nestor public hearing; and Mr Kieran Tapsell, an Australian civil lawyer, who has written on the subject of canon law.

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.

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 That Code was repealed and replaced by the 1983 Code of Canon Law promulgated by Pope John Paul II.

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 reserves to the supreme or to some other ecclesiastical authority".

The Code of Canon Law does not establish the method whereby each bishop is to promulgate laws for his diocese, and that is a matter to be determined by the bishop.

There are a number of issues about aspects of canon law which regulate or prescribe the Church's response to
allegations of child sexual abuse by clergy and religious
which will be explored this morning with the panel.

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.

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.

The next issue is the process by which canon law sets
out investigating allegations and determining outcomes.

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.

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.

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 is expected to 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".

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.

Dr Austin is expected to 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.

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 also will be explored in evidence.

In 1974, Pope Paul IV 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".

Mr Tapsell is expected to say that Secreta Continere expanded the Church's highest form of secrecy, other than that of the confessional, to cover crimes against faith and morals by clergy and religious. He will say it more than doubled the number of people within the Church who would be covered by the pontifical secret in cases of 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 "extrajudicial denunciation", that is, the allegation itself. Secreta Continere remains in force.

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 as well as 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.
The other panel members will be asked about their views on these matters.

The "trial" in canon law refers to the investigative procedures which commence from the time an allegation is made.

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 satisfied, he is required to commence a preliminary investigation. Prior to 2001, the bishop was to make a determination of whether or not the cleric was to be subjected to a penal trial or dealt with in some other way.

Under the 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".

An "imputability" or "diminished responsibility" test was also imposed, which stated, "No-one can be punished for the commission of an external violation of law or precept unless it is gravely imputable by reason of malice or 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".

In 2001, Pope John Paul II modified the procedural norms under the 1983 Code of Canon Law for dealing with the more serious delicts by clerics, including child sexual abuse, and confirmed that the pontifical secret still applied to all cases.

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.

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 10 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.

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

The next issue to be explored is the relationship
between canon law and reporting to civil authorities.

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.

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.
Dr Austin is expected to give evidence that the 1962 instruction 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.

Dr Austin is expected to 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. As Commissioners are well aware, the system of reporting within Australia differs from state to state and territory.

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.

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. This dispensation was limited to those jurisdictions that had reporting laws.

Sister Moya Hanlen is expected to say that, in her understanding, the current canon law has no provisions which prohibit a bishop or other Church authority from reporting child 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.

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.

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.

Dr Austin is expected to give evidence that canon law explicitly states that all documentation pertaining to the preliminary investigation into any alleged canonical offence, including the sexual abuse of minors, must be kept in the secret archive.

The circumstances in which such documents can be destroyed will be the subject of evidence.

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 Church.

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.
The Sacrament of Reconciliation or Penance is commonly referred to as "confession". There will be evidence that in recent years the practice of attending confession among both adults and children has declined in Australia.

The Royal Commission has heard evidence about confession in case studies into Catholic Church institutions. That evidence included 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 that the priest who heard the confession felt constrained in the action he could take.

In Case Study 26, the Royal Commission heard evidence from a witness who was abused as a child during confession.

In Case Study 11 and Case Study 26, the Royal Commission heard evidence from witnesses who, as children, told the priest during their confession of their sexual abuse, and that priest subsequently told their abuser or later abused them.

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.

In Dr Marie Keenan's research, which I referred to earlier, 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.

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 has concluded that it ignores the need for just restitution towards the victim.
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.

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.

Father Brennan is expected to tell the Royal Commission, as he has told others, 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.

The Truth, Justice and Healing Council submits that a religious confession should remain a privileged communication under the law in Australia and that the Royal Commission ought not make any recommendations abrogating civil law protections attaching to the seal of confession. The Council also submitted that current legal protections of the "seal of confession" accord with the fundamental human right freely to practise one's religion.

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".

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 judgment 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.
Father Frank O'Loughlin is expected to say that the confessional seal is not something that can be given up by the Church.

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 those of anyone else.

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 upon the information given and the precise wording of the relevant statute: firstly, through a mandatory reporting regime, which generally is to child protection authorities; secondly, by reportable conduct schemes, which are generally to the Ombudsman or similar body; thirdly, the laws of evidence generally in relation to civil or criminal proceedings; and, finally, laws relating to the disclosure to police of a crime or suspected crime.

As I said, the laws about each of these matters differ around Australia and there is no consistency.

The views of panel participants will be sought on these issues.

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.

MR FREE: Your Honour and Commissioners, there are four witnesses to be sworn.

THE CHAIR: I think Dr Doyle is still on his oath given a few days ago, but the other three need to be sworn.

<THOMAS PATRICK MICHAEL DOYLE, on former oath:[10.30am]

<RODGER JOSEPH AUSTIN, sworn: [10.30am]
<MOYA PATRICIA HANLEN, sworn: [10.30am]

<KIERAN JOHN TAPSELL, affirmed: [10.30am]

<EXAMINATION BY MR FREE:

MR FREE: Dr Doyle, if I could begin with you, you were introduced to the Commission a few days ago in giving your evidence, and I won't ask you to recap that, but just to reiterate, you were trained in canon law and hold a doctorate; is that correct?

DR DOYLE: Yes, that's correct.

MR FREE: And you have lectured in canon law for some period of time?

DR DOYLE: I did, as a visiting lecturer at Catholic University of America, and I've taught at a couple of seminaries along the way, too.

MR FREE: Mr Tapsell, can I start, please, by asking you to state your full name?

MR TAPSELL: Kieran John Tapsell.

MR FREE: You were educated in a Catholic school growing up; is that right?

MR TAPSELL: Yes, that's right, De La Salle College, Cronulla.

MR FREE: You were brought up in a Catholic family?

MR TAPSELL: That's right.

MR FREE: You attended the seminary in Springwood for some time, did you?

MR TAPSELL: Yes, for three years.

MR FREE: Were you intending to become a priest?

MR TAPSELL: Yes, of course.

MR FREE: Did you proceed to ordination?
MR TAPSELL: No. I left in 1967. I can't remember the exact date, but I was certainly there for one half of my sixth year.

MR FREE: You instead went on to have a career in commercial law; is that right?

MR TAPSELL: That's right.

MR FREE: And served for a time as an acting judge of the District Court?

MR TAPSELL: That's right, yes.

MR FREE: You developed an interest in canon law more recently; is that correct?

MR TAPSELL: That's right.

MR FREE: Do you have any formal training in canon law?

MR TAPSELL: Well, I had three - well, two and a half years, if you like, of canon law at Manly, but that doesn't really count for anything. It was the old Code. It was all in Latin.

MR FREE: But you have independently researched canon law?

MR TAPSELL: Yes, from about 2007 onwards, I've been researching it, yes.

MR FREE: You have published a book on the subject?

MR TAPSELL: Yes, I have.

MR FREE: That's specifically on the subject of canon law and its treatment of child sexual abuse?

MR TAPSELL: That's right, yes.

MR FREE: What is the name of that book?


MR FREE: Thank you.
Dr Austin, if I could turn to you, could you please state your full name?

DR AUSTIN: Rodger Joseph Austin.

MR FREE: You were ordained as a priest in 1967; is that right?

DR AUSTIN: Yes, that is correct.

MR FREE: You were dispensed from all obligations of ordination in 2004; is that so?

DR AUSTIN: That is true, yes.

MR FREE: You held various ecclesiastical offices throughout the 1970s and 1980s; is that right?

DR AUSTIN: Yes.

MR FREE: What's your training in canon law, doctor?

DR AUSTIN: I was a contemporary of Mr Tapsell's at Springwood and Manly. Manly was four years of theology, in which we did do basic canon law studies in preparation for ordination. In September 1968, I began a course in canon law at the Pontifical Urban University in Rome. In July 1972, I obtained a doctorate in canon law.

MR FREE: Thank you. You have also lectured on the subject of canon law?

DR AUSTIN: Yes, between 1972 and 1996, I was lecturing at various stages at the three theological institutes in Sydney.

MR FREE: You also served as a judge of some ecclesiastical bodies?

DR AUSTIN: The ecclesiastical tribunal relating to New South Wales, yes.

MR FREE: You were also on the tribunal of appeal for Australia and New Zealand for a time?

DR AUSTIN: That is correct, yes.
MR FREE: What do you do now, Dr Austin?

DR AUSTIN: I operate as an independent canon lawyer. I offer canonical services and advice to dioceses or to bishops, to religious congregations, religious superiors, individuals, laypeople, religious clergy, and various organisations that seek my advice.

I had a particular role from 1970 onwards when religious institutes started looking at new ways of governance of their schools and apostolic works, and that was talked about as incorporation. I had a role in that.

I guess because I had studied theology through the years at the Vatican Council, that gave me an insight as to - one of the fruits of the Council was the empowerment of laity in the Church. I worked hard at that.

These structures that were set up in the 1970s were a means of empowering laypeople to take true genuine responsibility for governance in the Church, and that has moved on to another model now, with new legal entities being set up in the Church for apostolic work, such as education and that. But that was the driving force of many of those changes. Clearly some religious institutes were running short of numbers, so to speak, but a driving force for many of them was that they saw an opportunity to change that face of the Church.

MR FREE: Thank you. Sister, if I could turn to you, can you please state your full name?

SISTER HANLEN: Moya Patricia Hanlen.

MR FREE: Sister, you are a member of the Daughters of Our Lady of the Sacred Heart?

SISTER HANLEN: Yes, Mr Free.

MR FREE: You joined that order in 1964; is that right?

SISTER HANLEN: I was professed in 1964. I joined the order in 1961.

MR FREE: Thank you. You have served as a teacher and principal in secondary schools?
SISTER HANLEN: I did, Mr Free.

MR FREE: You have also had leadership roles within the order; is that right?

SISTER HANLEN: That's correct.

MR FREE: What canonical training have you received, sister?

SISTER HANLEN: I actually did a Licentiate of Canon Law at the University of Ottawa - beg your pardon, at the University of Saint Paul in Ottawa.

MR FREE: That was in, I think, 2004; is that right?


MR FREE: After that time, you served as a canonical consultant to the Diocese of Wollongong; is that right?

SISTER HANLEN: That's right. I held that position for 10 years.

MR FREE: What did that involve?

SISTER HANLEN: That actually was not a big part of the position. I was appointed the chancellor for the Diocese of Wollongong, and the role of the chancellor is very limited under the Code. It actually means that you ensure that the official documents of the diocese are correctly executed and that also copies are archived. Then it's up to the bishop of the diocese if he wishes to give you more responsibility.

I worked with Bishop Peter Ingham of Wollongong and I was really part of the executive government of the diocese. Now, one of the responsibilities he gave to me was to be his delegate in relation to child sexual abuse with the Ombudsman’s office of New South Wales. He also asked me to investigate various cases. He actually gave me full freedom to do that, and though my experience was really quite limited over those years, it took me into this area.

MR FREE: You have described, in the statements you have given to the Royal Commission, that you, in that capacity,
had some responsibility for applying the canonical processes for dealing with allegations of child sexual abuse?

SISTER HANLEN: I did, Mr Free.

MR FREE: There are four cases you have referred to where you had that involvement?

SISTER HANLEN: Yes.

MR FREE: One of those was the Nestor case.

SISTER HANLEN: Yes, one was the subject of Case Study 14.

MR FREE: I will come back to you and ask you some more questions about your experiences with canon law, sister.

If I could turn more generally to some introductory points about the nature of canon law, and, Dr Austin, perhaps if I could ask you, you will have heard Ms Furness describe canon law in the opening as a system of laws created by popes and councils of the Church for the government of the Church and its members. Is that a correct definition?

DR AUSTIN: It is, but it needs to be expanded that they are not the only sources of legislation in the Church. For our purposes in terms of Australia, law can also be promulgated by the Bishops Conference, Plenary and Provincial Councils and also diocesan bishops, so there are levels of legislation.

MR FREE: So there is a range of sources?

DR AUSTIN: Yes, that is correct.

MR FREE: In terms of the subject matter of the law, would you agree with that description - they are laws for the government of the Church and its members?

DR AUSTIN: Yes, that's a general description, yes.

MR FREE: It's contrasted in the language of canon law with what canon lawyers refer to as civil law, and civil law is all of the laws of a particular state or nation, whether they be civil or criminal?
DR AUSTIN: Yes, from the 11th century, the phrase "canon law" was used about ecclesiastical legislation, and the phrase "civil law" was used in regard to, if you like, secular or state legislation. Canon lawyers never use it as a term in contrast with criminal law. It is a generic term to explain all laws enacted by civil authorities.

MR FREE: Thank you. A lot of the subject matter of canon law concerns matters that are peculiar to the governance of the Church.

DR AUSTIN: Yes, that is true.

MR FREE: But they also include matters that overlap with the civil law. For example, what canon lawyers call delicts would overlap with what might constitute criminal wrongs in the civil law?

DR AUSTIN: There is an interface. Rather than talk about an overlap, there is an interface between the canonical system and the civil system in a number of matters, but the issue of crimes is certainly one. The 1917 Code spoke about the crimes that we have as the subject of discussion under a mixed forum. They said the Church has a system in which these matters are dealt with; there is also a civil system in which the same matters are dealt with.

MR FREE: So does the 1917 Code have an express concept of a mixed forum?

DR AUSTIN: It does, indeed. It uses that phrase.

MR FREE: Is that still present in the 1983 Code?

DR AUSTIN: The phrase is not, but quite clearly it exists in reality because the subject matter here is clearly saying that there are two systems involved in these issues of child sexual abuse.

MR FREE: One of the topics that you and the other witnesses have touched on in your statements is whether there is a general law within canon law which governs any inconsistency between canon law and civil law. In particular, you and Mr Tapsell have expressed some views about what Canon 22 has to say on this topic. Can you just briefly outline what you say is the position? Does canon
law have a general rule about whether canon law or civil law prevails in the event of an inconsistency?

DR AUSTIN: No, it doesn't, because Canon 22, which was not in the 1917 Code, now states as a general principle of law, the legal system of the Church, that in situations where the law, canon law - or the Church authorities have a responsibility to make laws regarding some matter within their authority, there is the possibility in some circumstances that rather than the Church enacting its own legislation, then it adapts or adopts the legislation that is in force in the civil law, whatever that happens to be, in whatever country, et cetera.

There are two points to that. One is that a decision has to be made that the Church legislature will not enact canon law in this matter but will take into account the law relating to the civil - or the civil law, and the second part of that is to insert it into the canon law system. It remains civil law. It is interpreted in all the ways in which civil law requires it to be interpreted. It is simply saying we take that on.

The example in the 1917 Code which started this was about contracts. Canon law says that if the Church were to adopt the law of the state in regard to a matter, it would not apply if the law of the state in fact, as Canon 22 says, was contrary to divine law.

That simply means that if there were some regulations in the law of the state that, say, violated human rights, if the law of the state said you can't have contracts with a certain group of people, they are not allowed, we don't recognise them as capable of making contracts - I'm not talking about people not capable or anything like that - then we would simply say we cannot accept that if the civil law discriminates against a particular group of people for reasons of race, colour, whatever.

But Canon 22 is not a statement about the conflict between civil law and canon law in general terms.

MR FREE: Mr Tapsell, I understand you have a different view of that issue?

MR TAPSELL: Yes, look, I'm not a canon lawyer. I can only rely on what canon lawyers say. The New Commentary in
Professor Huels says something quite different. He says:

> When 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.

Can I just say this about that: that's a narrow interpretation that Dr Austin has given. It doesn't do damage to the language of the section. It could mean that; I accept that. But the trouble is, when we are going to find out what it really means - and I've said that not only in my response to Dr Austin but also in my larger submission - the authorities put a different view. Maybe Dr Doyle has a different view, too.

MR FREE: Can you just explain for us for a moment what the source is that you are referring to, the new commentary?

MR TAPSELL: Yes, it's the New Commentary on the Code of Canon Law by Beal, Coriden and Green.

MR FREE: Can I ask Dr Doyle and Sister Moya if you have a view on that issue?

SISTER HANLEN: I actually would be in support of Dr Austin. I do not believe that all the laws of the Church are contained within this document. I believe it is one document.

But I think we need to go back. I know that with Vatican II, with its Constitution on the Church in the Modern World, it actually stated that political authority, either within the political community as such or through organisations representing the state, must be exercised within the limits of the moral order and directed toward the common good according to the juridical order legitimately established. Citizens then are bound to obey the juridical order legitimately established.

The reference that it gives to that actually goes back...
to Paul's letter to the Romans, where we are told we are to obey the governing authority unless it is contrary to the divine law.

There are many laws outside of this. This is looking at a particularly narrow segment of Church law. There is the Commandments, for example. Nowhere in this document, I don't think, will you find, "Thou shalt not kill." You will find consequences if you do kill.

MR TAPSELL: Can I comment on that? That raises an issue, which no doubt we will talk about: what is a legal system and how are laws promulgated? Actually, what Sister Hanlen said I don't think is quite correct. It does say that homicide is a canonical crime.

There is a difference between a teaching of the Church, a moral obligation, and the promulgation of a law, because if the teaching of the catechism or an encyclical or a document of Vatican II was part of the law, then adultery would be a canonical crime, and it isn't. No doubt we'll talk about that in the future.

THE CHAIR: Sister Hanlen, I'm a little intrigued by your comment that Paul's letter to the Romans says "we are told to obey the governing authority unless it is contrary to the divine law".

SISTER HANLEN: No, Paul's letter to the Romans --

THE CHAIR: I just read back your words.

SISTER HANLEN: No, Paul's letter to the Romans doesn't say that, your Honour. That's what Gaudium et spes says. It references Paul's letter to the Romans: everyone is to obey the governing authority and you must be obedient for your conscience sake - but there are bits in between.

THE CHAIR: What does that mean?

SISTER HANLEN: Morally, you do the right thing.

THE CHAIR: So where do we end up if there is a conflict between canon law and the civil law?

SISTER HANLEN: Except if it is contrary to divine law - and it is obviously not contrary to divine law to own the
abuse of children for what it is and to report it to the appropriate authorities.

THE CHAIR: When you say "divine law", you are meaning canon law?

SISTER HANLEN: No, no, no, no, no. I mean the law as we understand it from God. The Ten Commandments, for example. No, not this (indicating). The law as it comes from God, which we will find in the scriptures and in documents like the Ten Commandments.

THE CHAIR: Right. So we are to understand that there's a set of laws, if you like, which are divine, and then there is canon law. What is the relationship between the two?

SISTER HANLEN: Canon law actually looks at specific situations in relation to the Church, its governance, et cetera, and spells that out in detail. There are many other laws beside the Code of Canon Law. There are books with liturgical laws. My own lifestyle, your Honour, is governed by a set of laws that are not sitting here in canon law. This is not the only law in the Church. Dioceses enact laws that apply to that particular diocese.

THE CHAIR: Leaving aside divine law, if there is a conflict between the civil law and any other law of the Church, canon law or whatever, which prevails?

SISTER HANLEN: My practice would indicate that in relation to the abuse of children, civil law must be followed.

THE CHAIR: But what about otherwise? What about other issues?

SISTER HANLEN: I can't think of one, to be honest with you. What would be an example?

THE CHAIR: I don't know. I don't know what you know about the Church law.

SISTER HANLEN: Oh, right.

DR AUSTIN: Mr Free, could perhaps I give an example that might make it clearer?
MR FREE: Certainly.

DR AUSTIN: If we look at canon law, the laws that are in the Code of Canon Law, and we go to the sacrament of marriage, for example, the teaching of the Church is that marriage is indissoluble. Therefore, if a couple get married in the Catholic Church and that marriage fails, and there is a divorce, they are free in our civil law to remarry; they are not free to remarry in the Catholic Church. It is more a conflict about teaching, but the teaching is reflected in the law.

Another example is, as I understand the Marriage Act, first cousins can get married according to our civil law. There is an impediment in canon law about first cousins getting married, from which they can get a dispensation.

So if you look at it just in theory, there is a conflict, because in one system, first cousins can go and get married; in another system, there is a regulation that says you need to get dispensation for that to happen.

Another example would be a woman whose husband has died marrying her brother-in-law. As I understand it, our civil law doesn't prohibit that from taking place, but there is that regulation.

So they are simple examples, but Professor John Huels talks about that. They are the sorts of practical examples that we have.

But Canon 22 - there is no application of the distinction in canon law between a narrow or a strict interpretation and a broad one. There are only three lots of laws in canon law that have to have a narrow or strict interpretation, which are laws that impose a penalty, laws that restrict a free exercise of rights and laws that are in fact an exception to an established law.

So the interpretation has to be: what is the context of the law, what does the law say? The context of Canon 22 is very clear: it is about the Church having to make laws because it has to make them for its community, and whether or not, in a particular instance, it will use the laws that are in place in the state and say, "Those laws we will abide by."
The Code has some 36 references to the civil law in the canons, but those are not - they talk about "canonising the civil law", which is a totally inaccurate phrase in one sense, but the other ones do not talk about any conflict. For example, the law would say that whatever the civil law says about the adoption of a child, if a child in the civil law is recognised as adopted, that is what the canon law means when it uses the word "adoption".

THE CHAIR: Dr Austin, the impression I have from what you have said is that the canon law or other laws of the Church may impose a greater restriction on a person's personal or legal capacity --

DR AUSTIN: That is correct, your Honour.

THE CHAIR: -- than the civil law, and in that way there will be a conflict.

DR AUSTIN: Yes.

THE CHAIR: But the conflict is one way; is that what you are saying?

DR AUSTIN: That is correct. And in regard to the example I gave about marriage, it's resolved, if you like, by a dispensation being given, yes.

THE CHAIR: Mr Tapsell, do you want to comment on that?

MR TAPSELL: The only comment I would like to make is that the rules about restriction on marriage are written in canon law. So it is written in canon law. It doesn't come from the gospels, it doesn't come from anywhere else. It is written in canon law. That is the point I was trying to make, that there is a strict division between what is in law and papal encyclicals, Church doctrines, catechisms. What Sister Hanlen is trying to say is that all these things are somehow laws, but they are not. Laws have to be promulgated in some way to become laws, as I said; otherwise, adultery is a canonical crime, when it is not.

MR FREE: I might return a little later to this topic of conflict when I ask you some questions about the nature of reporting obligations, but if I could ask you to address a slightly different topic first, and this is really by way
of introduction to your view about the role that canon law played, if any, in impeding the Church from responding appropriately to allegations of child sexual abuse. I will just ask you to briefly outline your views on this topic and respond to a couple of comments that have been made in submissions to the Royal Commission.

Baroness Hollins, who is a member of the Pontifical Commission for the Protection of Minors, has stated in her submission that the 1983 Code has been "ill equipped to deal with cases of child abuse", and Professor Parkinson, who some of you may have heard give evidence yesterday, has said in his submission that canon law is "woefully deficient as a means of addressing child sexual abuse and remains so, notwithstanding that the limitation period has now been extended to 20 years after reaching adulthood."

So perhaps, Dr Doyle, if I could begin with you, would you just give us your response to those submissions?

DR DOYLE: First, I would agree with both of those submissions. My own opinion, based on my experience, is that canon law has been used as an excuse in some instances by ecclesiastical authorities for not proceeding in taking direct action against reports of sexual abuse. It has been used as an excuse for not reporting to civil authorities, and it has been used as an excuse for allowing accused clerics to continue in ministry.

Contrary to those excuses, it is possible to look into the canon laws, the laws that are in the Code, and find instances that did empower a bishop to do something significant when he received a report. Now, that's one side.

The other side is the reality. Now, I can't speak directly from my experience in Australia, but I can from the United States, the United Kingdom, Ireland, Belgium and I believe Mexico, places where I've been involved.

The reality there is, in spite of what the canons have said or provide for bishops, in many instances they are completely bypassed and the action that is taken is something that, whether it's contrary or not to canon law, really doesn't seem to have mattered much. But the rule or the norm that was governing this action was expediency with regard to protecting the image of the institution.
In reality, the Code, unfortunately, as I've said and as Ms Furness mentioned, is a legal system that is in service to a hierarchical or monarchical government. I don't think anyone has mentioned yet the fact that in the institutional Catholic Church, in the office of Pope and in the office of diocesan bishop, the three common functions of government - which are judicial, executive and legislative - are combined in one person. Consequently, there are no checks and balances and it is much easier for an ecclesiastical person, an ecclesiastical authority, to act contrary to or outside of the norms of law, and there would be no way to rein that person in, no appellate process that could be effectively used.

MR FREE: When you speak of canon law being used as an excuse for inaction, are there features of the canon law that have made that possible, in your view, or is it entirely a question of poor administration of the law?

DR DOYLE: I think the answer to that is in three parts. one, those for whom it simply doesn't matter what the law says or doesn't say, they will take an action such as simply removing a priest secretly and sending him to another parish secretly. That's clearly outside of canon law, because you are dealing with a man who is suspected or known to have committed crimes that put children at great risk. That's number 1.

Number 2, as far as the law itself is concerned, one of the things that has come up - and this is after the new millennium, maybe in the late 1990s up to the present, when this issue rose into the public forum and people knew what had been going on - one of the excuses that was offered was, "Well, we couldn't act because we were bound by secrecy". Simply a broad statement like that. I think you would be hard pressed to find a chancery office, when reports came in, where the bishop and his staff engaged in a discussion or a debate as we have been doing here over the meaning of the law. There may have been some that did that; none in my own experience. So that's one issue where the issue of secrecy, rightly or wrongly understood, was used.

Next, the provisions that were possible were simply not used. And another issue is the awareness that some have had that in the canonical criminal process,
imputability or responsibility for the crime committed
could be reduced if the individual acted under the force of
some form of mental illness or in the heat of passion.
That has been used as an excuse, because paedophilia is
considered to be a psychosexual disorder, listed in the
Diagnostic and Statistical Manual of Mental Disorders which
is published in the United States, and in some countries,
English speaking countries, used in general to enumerate
these issues. So when you have that, that means you can
try a man, but the penalty, the ultimate penalty, cannot be
imposed, which is dismissal from the clerical state, or
defrocking in secular terms.

MR FREE: Having raised that topic of imputability, does
canon law deal with any other consequences for a person who
is engaged in conduct that might be wrongful but they have
some disorder? You would be aware in the criminal law, for
instance, in the civil law systems, a person, if found
insane, might be committed to an institution rather than
convicted. Is there some equivalent in canon law?

DR DOYLE: The Church no longer can commit priests to
their own confinement facilities, their own gaols. They
could at one time. However, in the Code, the canon that
speaks of sexual abuse of children, of minors, which in the
new Code is 1395.2, lists as possible penalties to be
imposed a number, up to and including dismissal from the
clerical state, but that is not mandatory. Another is
suspension, removal from office and so on. And in some
instances we have seen over the past few years when men
have been dismissed or have been tried by an administrative
process by the Holy See, they have been sentenced to what
is called a life of prayer and penance and removed from
active ministry. That's usually done when the man is quite
old or suffering from some infirmity that would render him
incapable of taking care of himself in any way if he's
dismissed outright.

MR FREE: But what about if you are found not to have
breached the canon because the conduct is not imputable?

DR DOYLE: If the conduct is not imputable and he is
subjected to an ecclesiastical trial, then it would be up
to the judges: if they found that it was not imputable,
they could acquit him or, rather than acquit, in canon law
they would say there was not enough evidence to convict.
Not that he was innocent, but that we don't have enough
evidence to convict him on this particular charge.

MR FREE: And canon law doesn't then impose any consequence?

DR DOYLE: No, if he is exonerated, if there is no evidence of wrongdoing, if there is not acceptable evidence of wrongdoing, let's say, then there are no consequences.

MR FREE: Sister Hanlen, could I turn to you, and just coming back to that general question that I asked, I understand from your submission that based on your own experience with canon law you haven't found it to be an impediment to dealing with allegations of child sexual abuse. Is that accurate?

SISTER HANLEN: That is accurate, Mr Free. My experience is very limited - I have not been in this field very long at all and that has been my experience, that if the law has been applied well and procedurally, and if the substance is there, the result that was required is got.

I know with the Nestor case, in dealing with the CDF, the Congregation for the Doctrine of the Faith, there has never been any document from the office of the bishop in Wollongong there for more than a couple of months.

In the Nestor case, which was quite different, that had begun with an appeal to the Congregation for the Clergy and appeals against that, and it then went to the Apostolic Signatura. That was with the Signatura for five years. I find that quite inexcusable and indefensible. But it was only with the CDF for less than two months, when it came back, "Invite the priest to apply for laicisation or he will be insisted".

There was another case where we did what, in actual fact, you are not exactly invited to do. You are invited to put the document to the CDF and ask their opinion on how you proceed. But in this particular case, the man was very elderly, he had dementia, and we saw it as an injustice if he were dismissed because he would then become the responsibility of his nieces and nephews and we just saw that as not right. So we asked that he be put under penal precept, that he be unable to use the title or wear any insignia of a priest and obviously to practise any ministry; that he would be in a high-security dwelling of
the bishop's choosing. That was granted. A high-security aged-care facility into which he was placed was very modest, with shared accommodation, nothing lavish. But it was more a consideration for his family, as against himself, that we asked that he not be dismissed.

MR FREE: When you are referring there to asking, are you talking about asking the Congregation for the Doctrine of the Faith?

SISTER HANLEN: Yes. Now, I have also found in dealing with the Congregation in several of the cases with which I have dealt with them, the statute of limitation had long expired, and in each case, we requested the Congregation to disregard that, and in each case they did.

THE CHAIR: Sister, why couldn't that person have been dismissed but the Church continued to have cared for him in an aged persons' facility?

SISTER HANLEN: Because when the person is dismissed, your Honour, the Church has really no authority over him. He is a free person. So all he really retained was the fact, as far as anybody in the public arena was concerned, that he used to be a priest. He didn't seem like one, he couldn't use the title, "Father", he was not referred to as "Father". I have to say that when approaching the aged-care facility, we told them upfront, they knew exactly the situation. We weren't trying to disguise anything. And he was under penal precept; he had no freedom.

MR FREE: Dr Doyle, I gather you have a comment to make, and can I ask you, perhaps as you do it, to address in particular the proposition that the Royal Commission has heard from various witnesses in various case studies that there has been a problem with the timeliness of these processes, particularly in Rome?

DR DOYLE: That I would totally agree with. The short comment I wish to make is that, objectively, the canons in the Code provide what would be necessary and effective to deal with the issue of sexual abuse of children by clerics, if they were properly applied in an equitable, intelligent manner.

The problem is, that has not been done. I personally would separate the consideration of this - and I think
a good example is what Sister Moya has been talking about, a situation where the law has been used on the local level effectively, but then there are encountered, at the top level, totally unacceptable delays, for reasons that are never revealed.

Prior to the widespread public knowledge of sexual abuse by clerics, which began in the middle 1980s in the United States - and I know it was known in Australia by the end of the 1980s because I was asked to come over here in 1989 and address the issue at a canon law convention. Prior to that era, there is very little evidence that I have seen that the proper use of the Code of Canon Law and the available canons - under the old Code they were very, very, very, very rarely used. And so what you had there was a wholesale negligence and abuse of what could have been done, for other reasons than, you know, protecting due process or protecting the rights of those who had been violated and those who had been accused.

MR FREE: Thank you. Dr Austin, what is your position on this general overview of the role of canon law?

DR AUSTIN: Mr Free, I think Father Tom the other day explained that they wanted to put something to the Bishops Conference, a manual of how to deal with this, and the response was, "Ignore it".

In Australia, Bishop Geoffrey Robinson has told the Royal Commission that the document of 1962 was unknown to him until the late 1990s. If Bishop Geoff didn't know about it, I think the Royal Commission can safely assume that neither did any other bishop.

If they didn't know about the procedures in that, then clearly, at least from 1983 but also under the 1917 Code, as Father Tom has just said, there was a procedure to be followed.

What has been happening is that the focus of the conversation has been about penalties and penalising people and punishment. The example that Father Tom gave, that a case may have come where it was found that the person had not committed a crime for some reason - in a sense, that's not the end of the story or, indeed, the real issue. The real issue is that some priest has sexually violated a child, and no bishop or no authority in the Church can
say, "Well, we didn't get a conviction in the tribunal, therefore, there is nothing to be done." Quite the contrary. There is something to be done, and that is an obligation in justice to the victims. But I don't see that surfacing in the conversation, where the conversation is driven towards a sort of legalistic approach in that context.

So my concern, then, is bishops did not follow the procedures in the Code of Canon Law, either under the 1917 or the 1983, I don't believe the law that we had was a conspiracy to anything; they just did not do it. And I think Father Tom's example the other day speaks volumes.

Why didn't they do it? Well, I think we have heard that they didn't want to face up, they didn't want to acknowledge it; some would have been paralysed by what to do. I have to say from my point of view, as a canon lawyer, very often canon lawyers were not asked advice.

Your Honour, could I mention an example that concerns yourself? It was in the John Ellis case, where the way in which the whole case was handled - I think you said at the end to Cardinal Pell that the way it was dealt with, it wasn't very Christian.

THE CHAIR: They were his words, actually.

DR AUSTIN: Yes. And he agreed. I would add to that, if he had been advised by a canon lawyer, if he had known canon law, the law says quite clearly, in keeping with the scriptural responsibilities of reconciliation, any disputes should be attempted to be resolved with due regard for justice without having to have it dealt with in a litigation, but, above all, bishops had that responsibility.

So I do not know why, in the case of John Ellis - as you know, I was an expert witness for that case - why did it come to a point where a victim of sexual abuse had to go through that process, when canon law clearly said that if John Ellis had to, for reasons of the civil law, put in a claim because of the statute of limitations - why did civil lawyers say, "Well, that's that and we can't continue mediation"? That is a complete violation of gospel teaching and, indeed, of canon law. I do not understand why that happened, but it did.
MR FREE: Thank you, doctor. Mr Tapsell, can I turn to you. I understand that you have a different view about features of the canon law that have contributed to the problem of the Church’s response?

MR TAPSELL: Yes. The problem is - and every Bishop that I've seen come before this Commission, including Archbishop Coleridge who was here yesterday, said it was extremely difficult, if not impossible, to dismiss a priest.

Now, when you actually look at the canon law, up until 2001 there was a five-year limitation period. That meant that if a child who was 10 was sexually abused, if they did not complain to the Church by the age of 15, the canonical crime which would allow for dismissal disappeared.

The Catholic bishops did a survey in 2000 as to how many cases - and they examined 400 of them - were outside the limitation period. Well, put it the other way: how many were inside? 3.2 per cent of all of those cases. They could not be dismissed. Now, I agree with what my friend is saying. That doesn't mean that nothing could be done. They could have their faculties removed, for example. But that was not a permanent thing. And so you had people in Melbourne and so forth, also Nestor, appealing to the Congregation, "You can't take away my faculties permanently." It is a permanent punishment.

The comment that Justice McClellan mentioned I think is quite pertinent. You have these victims who have had their lives ruined and then, when it goes up before the CDF and there is then a possibility of dismissing them, they say, "Oh, no, well, you won't be able to call yourself a priest", et cetera, et cetera. Wouldn't you think that the Church's maximum punishment, dismissal, would be imposed?

Now, the point that Sister Hanlen makes is a good one. Okay, if they are old, and so forth. The Church runs lots of old people's homes. If this man's in trouble, he doesn't have to be looked after by his nieces or nephews; the Church can look after him. The point that she makes is that if he's not dismissed, the canon law requires the Church to look after him. But if he is dismissed, they can still look after him, just like they do with lots of people.
who aren't even priests.

DR AUSTIN: How do you control him?

SISTER HANLEN: Mr Free, look, once a priest is dismissed, technically, the Church has no authority. We may be able to say to him, "We have this aged-care facility and we would like you to go there", if he says, "no", that's it, and in this case, the priest concerned was not from the state of New South Wales. We had no way.

I believe that if these crimes are committed it is shocking, and they really demand the greatest punishment, but I think there are always some exceptions that actually are for the good of a community, not for the good of that person. It was not a nice place where he was, I can assure you of that. I would not have liked to be there myself.

DR DOYLE: I would just like to make a comment and follow on from what Sister Moya said. Laicisation is the ultimate punishment for a priest. I mean, there is one other one, which is excommunication, and that has not been applied. But apart from the legality of it, one of the issues that has come up significantly in the United States and Ireland to some extent is this: if we laicise some of these men who are predators, sexual predators, we will have no authority over them and no way to control what they are doing, and so for the sake of the safety of the community, some have urged - and I'm one of them - that they not, in fact, be laicised, but they be placed in a situation such as she described, where there is strict monitoring, where there is psychological assistance, and all of this for the good of the community, so that these men will not be roaming around as if they were back out of prison, where they had no care, and could then go and molest other children.

The evidence of the possible validity of that argument has been the experience on the other side of the world, where a number of men have been laicised and have then disappeared into the ether, and then reappeared when there was a report or they had been arrested because they had reoffended. Then the local bishop or the religious order is asked, "Why did you let them go."

THE CHAIR: Doctor, what power does the Church have to restrain?
DR DOYLE: They have no power if the man is laicised.

THE CHAIR: If he is not laicised, what power does the Church have to restrain his movement?

DR DOYLE: The only power they would have, for example, if he was still a priest, still in the clerical state but with no faculties, nothing of that nature - one would be a moral power, appealing to his sense of right and wrong - if there was anything left of his sense of right and wrong; but the other would be practical, and that is, "If we're going to take care of you, we're going to feed you and house you and give you medical care, we can cut all that off and you will be destitute on the streets." That's the only other possibility.

THE CHAIR: Why isn't that the same if the man is laicised? Why couldn't that be the same if the person is laicised? The Church offers sustenance. They will cut it off if they don't obey the rules of the house, or whatever they are?

DR DOYLE: If they don't obey the rules? If they are laicised there is no obligation.

THE CHAIR: I understand that. But if the incentive, you say, the restraining capacity, when he has not been laicised, is that the Church will continue to provide sustenance, why couldn't the same prevail even when the person is laicised: the Church provides sustenance on condition that the former priest obeys the rules of the house?

DR DOYLE: You are totally correct. The answer to the question you are posing, your Honour, I think, is that in fact that would be possible, because you would have the same hammer over his head, so to speak. "If you stay within the boundaries that we are setting up for you, we will continue to take care of you." But, as I said, one of the arguments that has come forward at home, at least, is that we have at least some connection if they are not laicised.

I guess my ultimate answer to that is to take it on a case-by-case situation. But that is not being done. In fact, they are being laicised if a man is - unless he is
old and infirm, they are being laicised and cut loose.

COMMISSIONER FITZGERALD: Yet in the religious institutions both in Australia and elsewhere, a number of the male orders have retained within the orders and congregations those that have been convicted and released from gaol, and that is not an uncommon phenomenon in the religious orders in Australia. What is your view about that?

DR DOYLE: That's a similar situation in other countries, where their connection to the Church and to the religious order is different than the connection of a diocesan priest to his diocese or his bishop. If he takes vows to a religious order, he is, in a sense, part of a family, and there is still an obligation to care for that man as long as he remains part of that family.

Practically speaking, a number of these men have gotten out, and they've had nothing, they've had nothing in their pocket except what they had when they left the penitentiary, and so the order takes them back in. In some places, some religious orders have had very capable, very responsible programs to keep an eye on these men where they in fact are back in confinement, only there is a cross on the wall.

Others, one instance that I know of - unfortunately the men who have been brought back to the religious order are each given a credit card and they are given access to automobiles, and there is no supervision and there are no questions asked. One priest in this particular environment, this particular religious community, challenged this to the superior, and he was removed from the community.

COMMISSIONER FITZGERALD: But in some of the communities, some of them retain the title of Brother, for example, and others have removed the title of Brother, and to the external world, in the first case, they remain a vowed Brother. Is there anything in canon law or anywhere else that guides religious orders as to how to deal with those circumstances?

Sister, you mentioned that the priest was not allowed to be called Father.
SISTER HANLEN: That's correct.

COMMISSIONER FITZGERALD: In some of the religious orders, that's the case. But in other religious orders, that's not the case. Is there any guidance by the Church at large to religious orders of priests or brothers or nuns, indeed, that guides how one should respond to those sorts of circumstances?

DR DOYLE: None that I know of, your Honour, none.

COMMISSIONER FITZGERALD: Why is that, given this is an issue that has been confronting religious institutes for at least the last 20 years?

DR DOYLE: The only honest answer I could give to that is irresponsibility and, in many instances, an inability or an unwillingness to face the grave situation and the grave reality of what we're dealing with.

COMMISSIONER FITZGERALD: The next question is what should be done about that?

DR DOYLE: What should be done? My feeling is that what should be done is that there should be, since we are a hierarchical, monarchical system, something from the top giving orders to the religious institutes with some uniformity dealing with this issue. But there has not been anything that effective. It's very difficult unless you have, on the part of the superiors, a very serious sense of responsibility about this particular issue.

COMMISSIONER MURRAY: Or a law?

DR DOYLE: Or a law. A law would be very nice, and I'm not saying that facetiously. It would be certainly helpful, in the institutional overall picture of the Catholic Church, to have some form of legislation with teeth in it, for example, to the bishops, "If you do not conform to this, you will be removed and you will not have the ability to fall back on a bureaucratic maze that you can use as an excuse for sticking around and waiting for the final decision on your case to come down at the end of time." But unfortunately the situation in the Catholic Church, with its legal system, is that, as Ms Furness said, it is not consistent; it is not consistently applied; it is not consistently understood.
MR FREE: Mr Tapsell, can I just return to the question of limitations, which you have mentioned.

MR TAPSELL: Yes.

MR FREE: You have described the position under the 1983 Code, which was a five-year limitation period from the date of the incident. Now, that was extended to 10 years in 2001; is that right?

MR TAPSELL: Yes.

MR FREE: Up until 2002, there was no discretion on the part of anybody to extend that period; is that right?

MR TAPSELL: That's right. In the United States, the United States bishops negotiated an extension. It took them six years, from 1988 until 1994. So in the United States, it was different. But in Australia, no, it was 2010, and then - sorry, 2001. In 2010, it was extended again to 20 years.

MR FREE: So it is now 20 years from the victim's 18th's birthday; is that right?

MR TAPSELL: That's right, so if they are over 38, bearing in mind the average age of reporting that has been referred to here - but I accept that, now, the CDF has an authority to waive that or to extend it indefinitely, basically.

MR FREE: You may have all heard that the data that was referred to in the opening address of Senior Counsel Assisting indicates that on the data available to the Royal Commission, the average time between an incident and a complaint is some 33 years, so it seems as if the average complainant will be out of time and will depend upon the discretion of the CDF. Do any of you have a view about whether that presents a problem still?

SISTER HANLEN: The CDF has the power to disregard that in all cases. It has been granted that power by John Paul II.

MR FREE: But in terms of the exercise of that power, do you have any concerns about whether --

SISTER HANLEN: Oh, no, I do not believe that there should
be a limitation period attached at all, and I believe that also of the state.

MR FREE: Dr Austin?

DR AUSTIN: Yes. If it's one of the findings of the Royal Commission, from the evidence that has been given to it, that the average age when victims are able to come forward is beyond 30 years of age, then it would seem to me that the statement from the Royal Commission that says, "That's what we have found" should be followed up by saying, therefore, in regard to child sexual abuse, leaving aside any other sorts of crimes - in regard to that, a positive statement should be made by the Church that rather than talk about, "Well, there is a time limit we can waive", the statement which I'm sure would speak more loudly or more authentically to the victims will be to say, "There is no time limit."

THE CHAIR: We have said that already in the civil space, and a number of states have legislated to that effect.

SISTER HANLEN: That's important.

DR AUSTIN: Yes. So what we need to do is to say that in terms of the regulation of statute of limitations, as far as the Church is concerned, for victims of child sexual abuse, there should be none, and that should go from the Royal Commission very clearly to Church authorities.

MR FREE: I notice the time, your Honour, if that is convenient?

THE CHAIR: We will take the morning adjournment.

SHORT ADJOURNMENT

MR FREE: I want to get the panel's views on the proposition that canon law required bishops to adopt a pastoral approach in responding to allegations of child sexual abuse before taking any more serious action against a priest. I will invite you to give your views in a moment, but I want to refer you to two particular rules of canon law that have been referred to in your various reports.

Canon 1341 in the 1983 Code talks about ordinaries...
commencing a judicial or administrative canon law procedure for the imposition of penalties only when the ordinary 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.

Dr Austin, you have also referred to a norm that was issued in 1971 requiring that:

Before proposing any petition for dispensation, the bishop or the superior must attempt, for an appropriate period of time and with every means available, to help the petitioner to overcome the difficulties which he experiences, for example, transferring him from the place in which he is exposed to the danger and, according to the nature of the case, giving him the help of brother priests, friends, relatives, doctors or psychologists.

You will appreciate that the Commission has heard evidence in various case studies of steps of all of those informal kinds being taken in response to quite serious allegations. I would just like to get your response to the proposition that canon law required bishops and superiors to adopt that approach.

Dr Austin, perhaps if I could start with you?

DR AUSTIN: Canon 1341 is in the context of penal law. The origin of the Church taking the position that punishment or penal penalty should be the last resort actually finds its origin in the teaching of the Council of Trent in the 16th century. The 1917 Code picked up that, and the 1983 Code, in Canon 1341, reflects it. We need to make sure that we're talking about the context of a crime being committed.

So if after a preliminary inquiry - which is not a penal process; it's an administrative process leading into a penal process - it becomes clear that the information given in that process then leads the bishop to decide they have to take it further, if that information is of such a kind that it is very clear that this man simply cannot continue in ministry, and if we take into account
the evidence from experts on the nature of this psychosexual matter, then quite clearly it may be that - 1341 says that it is when a bishop ascertains that trying to resolve it in that line is simply no good, it simply will not be appropriate.

So bearing in mind that every time a priest commits sexual abuse of a child, that action is not a personal action just of the priest. That is an action that affects the whole Church. Very often, people look at it - it is the individual. There is a broader perspective on it than just an individual priest offending. So we need to take into account that if in fact those actions - of course, I'm not talking about the victims and the family here, but in the general community - something needs to be done to rectify that. Well, if it is very clear from the horrendous information that has been presented that that is never going to work, then you don't - it is not a question of trying it first and then seeing if that works and then going to something else. The law says that if you have ascertained that that is not appropriate, then you go immediately to a penal process.

The other document that you referred to, Mr Free, was not about a penal process. That was a document about if a priest comes to a point where he wants to apply for a dispensation from obligation - and that was following an encyclical by Pope Paul VI on celibacy - he's saying, whatever the reasons are, we tried to assist that man to live out as best he can faithfully the commitment that he undertook. But in some cases, those dispensations had nothing to do with celibacy at all. There were other factors. But you can't sort of say, well, apply what was said there into this 1341. There are two different approaches. So this one is saying, in terms of the penal process, if it is clear that adopting an approach to try to resolve the problem without a penalty is simply not appropriate, then you go immediately to a penal thing.

If I could just add that if the case goes before the civil courts, then it is entirely appropriate that canonical processes wait for the outcome of that. If the outcome of that is so clear as to what has happened, as we know has happened, then the penal investigation - as the Code says, you don’t do it if it is superfluous. If all that information clearly establishes what has happened, then a bishop is confronted with an issue: how do I look
at this issue in terms of not only this gentleman himself but the broader church and say, well, does 1341 suggest to me or say you have got to try to fix it up? We're not trying to cure people. We're trying to address the entire issue, which is not about the individual; it is of the community. And if that is clearly not an option, then there has to be a penalty.

MR FREE: Do any other members of the panel have a different view about whether either of those rules might have impacted on the response? Dr Doyle?

DR DOYLE: I have seen that canon, what's called the pastoral approach, consistently misapplied and used as an excuse to justify lack of action.

I would follow on from what Dr Austin said and basically agree with what he is saying. I would handle it a slight bit differently. Given the reality of what the crime is, the focus seems to have been consistently on the priest - either getting him off the hook, taking care of him or punishing him in some way.

Dr Austin mentioned the community - extremely important. Take it to another level, which is the victim - most important. This business of a pastoral approach to deal with a man who has been accused of committing sexual violation of a child is nuts. There is no such thing. It is beyond your competence as a bishop to try to talk him out of doing this again. He has already committed a crime, if the evidence shows that. If the evidence is good enough to proceed with a penal process, that's what you do, because you are not talking about stealing from the collection or stealing a bicycle or something of that nature.

COMMISSIONER MURRAY: Dr Doyle, can I explore that a little further with you on a principles basis. I want you to think of the principle which lies behind the pastoral care canon that we're discussing.

DR DOYLE: Yes, sir.

COMMISSIONER MURRAY: The point you make is a very good one. The International Convention on the Rights of the Child essentially comes to the conclusion that any institution that deals with children should act in the best
interests of the child. Once that principle is established, it completely changes the institutional direction, because if your direction, your principle, is to act in the best interests of the child, then much else follows and a different direction results for the institution.

In the same way, a pastoral care provision which said, "At all times, you should act in the best interests not just of the congregation or the community but of the victim", it would totally alter the approach, wouldn't it? And does such a canon law or such a principle exist at present?

DR DOYLE: Not that I know of, and I totally agree with what you are saying, that the best interests of the victim should be the overriding concern in applying the law. The best interests of the victim is not necessarily finding any way to exonerate the priest or any way to remove oneself from accepting the obligation of acting decisively in the face of an accusation.

I don't know of any explicit canon that says that the interests of the victim have to take precedence or have to be sincerely considered. I think if there was one, a lot of our discussion would have been changed somewhat significantly. But the fact is that there hasn't been. As I said, I believe the focus has been on the perpetrator, on the priest.

If you apply this pastoral solution in the way I've seen it attempted to have been applied, it has been to avoid responsibility and to avoid accountability in the civil arena and in the ecclesial arena as well.

The crime we're dealing with, as I said, dictates to a certain extent, and to a significant extent, how the rest of the canons are to be applied. The crime we're dealing with is the violation of a child, which is also a civil crime. So the concept of convincing a priest to promise, "I will not do this again" is only one part of it. The question of justice and scandal are significant. We've seen enough of the results of priests who are allowed to get off the hook, so to speak. That's where the scandal is. It's the lack of decisive action, not the fact that he has done something evil, but that this has been enabled by ecclesiastical procedures.
As I said, the nature of the offence I think dictates to a significant extent how the rules of law are applied in this instance, if they are applied. Did I answer your question clearly, sir?

COMMISSIONER MURRAY: That was helpful, thank you.

DR DOYLE: Good, thank you.

MR FREE: Dr Doyle, you would be aware from certainly your experience overseas in various jurisdictions, and you may be aware of case studies in Australia as well, that quite a number of bishops across the world do seem to have responded in the way that I think you have just described as "nuts", that is, they were presented with conduct that was plainly extremely serious and criminal and very harmful to children yet dealt with it in a pastoral way. I think you have suggested that to deal with it in a pastoral way was a misunderstanding of canon law, but do you think that the content of canon law is partly to blame for their misunderstanding?

DR DOYLE: I think the canon itself is a good one and it has a real role in the life of the Church if it is applied within the context where it would be intended. For example, I think an application of that would be if the priest is engaged in a relationship, let's say, with a woman and he's living with her part time, so the bishop gets him in and tries to work something out in that regard. That's not necessarily a civil crime or a major canonical crime, but violating a child is.

I believe that the canon, whether it has been rightly or wrongly understood by the bishops - a couple of bishops that I was involved in questioning were not able to articulate the meaning of the canon. All they used was the term "pastoral approach" because it was, in a sense, a buzzword that can be used as an excuse for going around something that is much more difficult, which is following the rules or demanding accountability.

MR FREE: Mr Tapsell - or perhaps, sister, would you express your response to that?

SISTER HANLEN: Thank you. I agree with the opinions that have been submitted, but I am overwhelmingly of the opinion
that where we are dealing with the sexual abuse of children, we deal with the civil processes first, before we bring any canonical processes into play.

MR FREE: Thank you. Mr Tapsell?

MR TAPSELL: Yes, look, I accept - Tom has been at the coalface for a long, long time, but the evidence all over the world, including in the United States - Nicholas Cafardi, a canon lawyer there, said that there was almost unanimous - and I think the "almost" was probably because of Tom - almost unanimous opinion that that's what the bishops had to do. The same thing happened in Ireland. They had to try to fix up the priest because of Canon 1341.

Now, I agree with all my colleagues here that you could interpret that - it's flexible enough to interpret it to say, for example, this is so serious that you could never repair the scandal, for example, you could never restore justice, in the case of child sexual abuse. That is definitely open, but that is not the way it was interpreted.

Our problem now is - and this is a structural problem of canon law - how do we know that it is being interpreted differently? Because if you go through the documents produced by the CDF, for example, in the Milwaukee cases, which Tom has had a lot to do with, the CDF has been saying, "Try the pastoral approach."

They even did it with Lawrence Murphy, and this was in 1998. Lawrence Murphy abused 200 deaf-mute children. In that particular case, the deaf people, after a long time, as happens, were outraged that he was still operating as a priest in the diocese next door.

The Archbishop of Milwaukee looked at whether he could be dismissed and found the limitation period. They were all before the limitation period. But one child told him that there had been solicitation of sex in the confessional. No limitation period for solicitation of sex in the confessional. So he then sought permission from the CDF to start a trial.

They then start a trial, and Lawrence Murphy writes to Cardinal Ratzinger or Bertone, and says, "I'm old and I have had a stroke" - but he wasn't completely
incapacitated - "and I haven't offended since then." What do they do? They send back a letter saying, "You have to try the pastoral approach." So they go over to Rome and sit down with Bertone, and the minutes of the meeting are quite clear: "If you proceed to dismiss this priest, we are going to overturn it." So he had no alternative but to stop it.

It wasn't just the bishops. It was the Congregation for the Doctrine of the Faith who insisted on that, and that's why it was applied all over the world.

Now you get down to: what are we going to do now with this canon? There are two ways, in any coherent legal system, where you can get over this. One is you can have an authentic interpretation from the council for authentic interpretation where they can say, "Look, child sexual abuse is so bad that we think that in no case can you restore justice, and therefore it doesn't apply. You shouldn't try to reform these people." That's fine. And that's what we do here. That's what we do in the civil law. The High Court tells us something like that, or the Court of Appeal.

The other way of doing it is to simply change it. Simply change it. But there has been no indication from the Vatican that they have any intention to change that. There is a proposal to change the penal thing. If you look at it now, there is no real substantial change to it. If you look at the proposals which have come out, which I think you have in your documents, it means the same. There is no suggestion of victims, no suggestion of looking after the child.

DR DOYLE: All three of my learned colleagues have touched on an issue that is of crucial importance when you are dealing with the Church's canonical system, and that is the issue of connection or cooperation, or lack thereof, from the Holy See. That has been a major, major stumbling block for a number of bishops trying to do anything. In most instances in the past, their primary and almost sole concern was the priest and the mythology that if we take his priesthood away, we're taking his identity away, which dictated whether or not any kind of severe or serious penalties were applied.

Sister Moya referred to a case sitting for five years...
waiting for an appellate decision. The reason it sat for
five years, I am certain, if there is an analogy with other
similar cases, is because nobody wanted to deal with it,
and so it just sat there under the theory that if we let it
sit long enough, it will disappear on its own.

So the question of cooperation of the Holy See - the
most blatant example is the one that Mr Tapsell mentioned,
that I know of, which was the 200 deaf-mute children in
Milwaukee. Not only was that man allowed to live out his
priesthood, there was a rule or a command issued that he
was not to be buried publicly as a priest, and they
violated that. It was a major slap in the face of at least
200 men and their families and the community. But that's
the reality that we have to deal with in trying to figure
out why canon law doesn't work coherently. It's because
the pilot in the cockpit is sleeping.

MR FREE: Mr Tapsell, can I ask you to address a related
but slightly different topic, which is rules relating to
the secrecy of these processes. Could I ask you, please,
to summarise the concerns you have expressed in a number of
different places about how those rules operate, and can
I ask you to address Crimen Sollicitationis and also the
pontifical secret?

MR TAPSELL: Yes. I think I should just correct something
which appeared in the opening address, maybe because
I didn't write it very well. I think, as I heard it, it
said that my view was that if the witnesses were sworn to
silence, they couldn't report what happened to them to the
police. That's certainly not what I meant, if that's the
way it came out.

The oath of secrecy related to what was said in the
tribunal, not to what happened to them. What happened to
them they know about, because it happened to them.

John P Beal, who wrote an important article, which you
can find on the website, criticised this because he said,
look, if you have ordinary people who are sworn to secrecy,
they're not going to take the casuistic distinction between
what happened to them and what they said or anyone else
said in a tribunal. So it didn't stop them going to the
police.

The same thing with Secreta Continere. Secreta
Continere was from 1974 onwards, a difference between the pontifical secret and the secret of the Holy Office. The real difference between them - there are two things. One is that there was not an automatic excommunication under Secreta Continere. It was punishment that fits the crime. They were both permanent silences.

But the huge difference between them is that, as Tom Doyle has written before, under Crimen you could go to the police before some sort of a canonical inquiry started. And I agree with that completely. But that ended in 1974, because under Secreta Continere, the secrecy applied to the extrajudicial denunciation, that is, a complaint by someone to the superior that they had been abused.

Now, it didn't apply to all information. For example, if a bishop walked into a priest's bedroom and found him sexually abusing a minor, the pontifical secret didn't apply to that. You could go straight down to the police station.

Secondly, he's playing golf with a priest, and the priest says, "Oh, by the way, bishop, I've been sexually abusing children." That's not an extrajudicial denunciation. The bishop can go straight down to the police.

But if it comes from a complaint from someone or the parents of some child, it's an extrajudicial denunciation and that cannot be reported to the police, and it's the reason why Sister Elizabeth Delaney, in her thesis, said that it wouldn't be wise for that complaint to go to the bishop.

So what they did in New South Wales - and Father Usher mentioned this - they would refer it to Centacare, and Centacare would then arrange counselling. Now, when the victim went to the counsellor and said, "I've been abused by a priest", that's not an extrajudicial denunciation. That's, as I understand it, the basis on which it was reported.

Okay, go to Victoria, where there was no equivalent of 316 of the Crimes Act - 611 complaints, no obligation to go to the police, and none of them reported by the Church. None of them. That is not disputed by anyone, in the Victorian inquiry or anywhere.
So you had a situation where people were obeying canon law. You know, I agree with Tom, there is a cultural thing in this, too, a cultural thing about secrecy. We can also talk later on about the connection, the very tight connection, between law and culture.

If I might just address Dr Austin's submission - he can correct me if I am wrong, but the way I understand him, he is saying there is nothing in canon law which says you can't go to the police. Now, in those terms, it doesn't say, "Don't go to the police", but what it does say is that the strictest confidentiality applies to the extrajudicial denunciation and any information that comes out of that process and the decision, the strictest confidentiality.

Now, you don't need to say, "Don't go to the police."
Five days ago, I got this from the Commission. The Commission gave me some documents, and there was a non-publication order on that document. It just said "Not to be published" and it set out four exceptions, to the Commission and a few other things. That's the way a coherent legal system works.

If you are going to have confidentiality, you actually put an exception in the law, not in the catechism, not in some encyclical, not in some vague Church teaching, not in some moral, principle. It has to be in the law. And that's what has happened here. If you go to the law in relation to Secreta Continere - one exception. And even that exception you might have said might be implied. The accused can be told. The only exception.

Now, I'm not a canon lawyer, but I do understand how legal systems work. It's quite possible that in some other part of the law, there is an exception. One of the concerns I had when I was researching this, and even more so when I was writing the book: have I missed that exception? Where is it? I couldn't find it. I published the book. I put submissions in to the Commission, which repeated all of that. The Truth, Justice and Healing Council has had it for over 12 months. I was waiting for a response that said, "Oh, look, sorry, here it is."

They haven't done it. They have not pointed to any law, other than the one exception to Secreta Continere, which says that you can go to the police. I'm talking
about prior to 2010 - I will get on to that. But prior to 2010, they say, "Oh, it's in the catechism, it's in St Paul's gospel, it's in St Paul's epistle." You are talking about moral things. They are not legal documents. They are teachings of the Church.

Could I just use a simple example. There is a moral obligation on the state to look after disabled people. If there is a sign which says "No parking", that means everyone, including disabled people. If they want to create an exception for disabled people, you write it in the law, you put pictures of wheelchairs down in the parking spot, or you put it somewhere else. The same with police and ambulance. That's the way coherent legal systems work.

Canon law is a coherent legal system, or at least it claims to be. There are a lot of problems with it, and I've outlined them, but the one thing that it has never suggested - and I have never seen until about a month ago anyone suggest that it is not a legal system and you can create an exception not in the law but by something in the catechism or something in the gospels or something like that.

MR FREE: Mr Tapsell, can I just draw out a couple of elements of what you have said to clarify a couple of points. Firstly, in relation to Crimen Sollicitationis, that applied what was called the secret of the Holy Office, and there is a question, I'm sure you are aware, about how widely known Crimen Sollicitationis itself was, because it itself was secret.

MR TAPSELL: Yes.

MR FREE: You have also described the pontifical secret, which was pronounced in 1974?

MR TAPSELL: 1974, yes.

MR FREE: That was itself not secret; is that right?

MR TAPSELL: No, it was promulgated on the Acta Apostolicae Sedis. It was used in everyday life of the Church. Tom mentioned, I think - or someone mentioned - that it applies to the appointment of bishops. So bishops or other people who are consulted would have "pontifical
secret" stamped all over it.

MR FREE: What pontifical secrecy requires is a matter of common knowledge; is that right?

MR TAPSELL: Absolutely.

MR FREE: Your evidence is that the effect of the pontifical secret is to require secrecy on the part of everyone who is made aware of an allegation or of an incident only by way of the extrajudicial denunciation?

MR TAPSELL: That's right.

MR FREE: And then any subsequent step in the canon process?

MR TAPSELL: And the procedures relating to it. So it applies to the people of a tribunal. It applies to bishops. Secreta Continere says quite specifically bishops, cardinals, people of high rank, people of low rank - anyone who is dealing with the subject matter of the secret. But it also applies to people who accidentally come across the information. So if it fell off the back of a truck and you were a good Catholic or a priest or something, you were obliged not to reveal it, to the police or anyone else.

MR FREE: If we turn to the question of what impact canon law has on the capacity of people to report allegations of abuse to civil authorities, is it your position that pontifical secrecy precluded that prior to 2010, even if the civil law required it?


MR FREE: Can you just explain what happened in 2010 to change that?

MR TAPSELL: In 2010, there was an announcement by the Vatican that bishops should obey any civil laws relating to reporting. I can go back to 2002, because in 2002 the American bishops put a proposal up from what they called the Dallas conference for mandatory reporting of everything, whether there are reporting laws or not.
They get a letter back from Cardinal Rai and he says, "Your proposals don't seem to fit in with the universal Church." They have a delegation which goes to Rome and a compromise is reached. If there are civil reporting laws, report. They actually struck out the clause which says "all", and they substituted the other, "only if there are civil laws requiring reporting".

Now, that clause originally in the Dallas charter - you can still find it there, and if you look on the American Bishops Conference website, you will actually find an explanation of the difference. The explanation of the difference says that the norms which were approved by the Vatican in 2002, that's law. What we've got, I think it is in clause 11 or 4 - I can't remember exactly now - what is in clause 11 is what we want in the future.

So I don't think there is any doubt that if there were no civil laws requiring reporting, then the pontifical secret still applies. In Western Australia and Queensland, for example, just to take two, bishops are under an obligation not to report, under canon law, to the police. It doesn't matter what Towards Healing says. Under canon law. Towards Healing is not canon law. Now, I would take my hat off to them if they breached it. So they should. But it is still the law.

THE CHAIR: Mr Tapsell, we exist by reason of the civil authority of the Commonwealth and the state. Do you think it's within the proper exercise of our authority to be recommending a reporting obligation in canon law that goes beyond the law of the state or states in this country?

MR TAPSELL: Look, I think there is a good argument. Can I just backtrack a little bit. This problem in canon law - well, subject to what I'm about to say - can largely be overcome by universal reporting laws because then there will be a useful reporting law.

THE CHAIR: That's the point, I think. That's the flip side of what I'm raising with you.

MR TAPSELL: Well, I can understand an argument where the Catholic Church says that we should be treated equally and unless there is mandatory reporting for everyone, then we shouldn't be obliged as well. Of course, a lot of Catholics would disagree with that and say you should have
a higher standard. But anyway, leaving that aside, I think as an institution, it is entitled to be treated equally.

Now, to make a recommendation which doesn't apply to other people - within their own internal laws, I mean; I'm not talking about changing state laws - may very well create an objection, "Why should we be treated differently to anyone else?"

THE CHAIR: It's more than that. The question is whether it is a proper exercise of our power to make a recommendation that the Church do something which the state doesn't do. It may be, of course, a very good thing for the Church to do. Indeed, it may be the right thing for the Church to do, having regard to the Church's foundations and principles. The question is whether it's proper for us to step into that space.

MR TAPSELL: Your Honour, you raised this question before, or a number of people have raised it in the last few days, and that is whether or not the welfare of children means that this recommendation should be made. This covers right across everything - canon law, structures, everything. As I understand what was coming from the Bench, if the welfare of children is involved, then my answer will be the same as what I thought was sort of indicated for the last few days: yes.

THE CHAIR: Of course the problem would disappear if we were to recommend that every state enact legislation, would it not?

MR TAPSELL: And provided they did, of course.

THE CHAIR: Well, we can't control that. We can only make recommendations. But that would remove the problem in Australia.

MR TAPSELL: It would remove the problem, subject to this qualification about reporting which arose in 2010. In 2010, Father Lombardi announced that now you must obey civil laws on reporting. But he said the reporting has to be done in good time and not during or subsequent to a canonical trial.

Now, when I read that, I thought, well, this is just a spokesman. Is it a condition? Is it just a piece of
advice as to when to do it? But I have tended to change my
mind about that now, for the simple reason that in the case
of Father Inzoli, a serial paedophile in Italy, he was
dismissed by Pope Benedict XVI, he was reinstated by
Pope Francis, and, in the meantime, the Italian magistrates
got interested in it and they approached the Congregation
for the Doctrine of the Faith to see the documents relating
to the canonical trial. They were told, "These are
canonical documents and, as such, they are not there to be
interchanged with the civil authorities or the
investigating magistrates".

Now, there was a letter that was mentioned in the
first opening address - I haven't seen that letter - where
this Commission has asked for documents, and it sounded
like - but I haven't seen it - this Commission got the same
answer: "These are canonical documents."

Now, if that's the case, it would seem to me that
Father Lombardi's qualification is in fact a limitation,
and that means that if you have a priest who is accused of
one case of child sexual abuse, and in the course of the
investigation another 20 turn up, that can't be reported to
the police.

Now, one might say, oh, well, how often would that
happen? Well, it happened in Nestor, it happened with
Gannon in Victoria.

A canonical process, whether it is a trial or whether
it is a preliminary investigation, is an investigative
procedure, like here, or like an inquest. It's highly
likely to happen.

Now, it may be this has to be clarified in some way,
but it seems to me that those - and I assume the one coming
to the Commission supports that, but I don't know. If that
is the case, then there is a serious problem still, even if
there are civil laws requiring reporting.

COMMISSIONER MURRAY: There is a further string to the
judge's question. The Royal Commission will indeed make
recommendations to the Commonwealth and the states of
Australia to change laws, and we will be specific about
that. We will also make recommendations on principles to
be adopted in law by institutions, in administration. So
one question is whether it is proper for the
Royal Commission to recommend, against our remit, consideration of legal changes to the Church; the other side is whether it is proper, in your view, for us to recommend principles.

We discussed yesterday principles of governance. Today we would discuss a principle such as acting in the best interests of the child or acting in the best interests of victims. What is your response to that line of approach from the Royal Commission?

MR TAPSELL: Well, if there is an inhibition on reporting to the police - now, bearing in mind, reporting to the police is something that is so important to protect children, because it gets these people - it may even get them off the street, maybe for quite a long time, but it stops them being in a situation of being able to repeat the offence. And if that's the case, I think the same principle comes in which you talked about with governance: if, in fact, it's in the interests of children or the protection of children, then it is quite appropriate, I would have thought, that the Royal Commission make changes to canon law. And that would include this problem that Father Lombardi mentioned: is there a prohibition or isn't there? I mean, assuming that there is a problem with it, I would have thought it was appropriate for the Royal Commission to make that recommendation - change canon law.

COMMISSIONER MURRAY: Are the further remarks from the other members of the panel with respect to the judge's question and my question?

DR AUSTIN: I would simply endorse it, Commissioner. I disagree with what Mr Tapsell said about the secrecy and reporting, but leaving that to one side for the moment, if, in fact, there is a commonality amongst the legislature in Australia about reporting, it will become very clear not only that the Catholic Church but any organisation has to report. If that was clearly stated, that would be a great service to the children who have been abused because that would make it very clear that under the civil law, then these matters must be reported. But while that commonality isn't there, then it clearly makes it a difficult issue. But I would endorse that completely, that that should be done.
SISTER HANLEN: I would also, your Honour.

DR DOYLE: I certainly would, and I would like to call to the attention of those who may not be aware of it, in July, I believe, of 2009 the Honourable Enda Kenny, Taoiseach of Ireland, gave an address to the Dail, to the parliament, in which he took to task the Holy See for attempting to interfere with the laws of a sovereign nation, namely Ireland. His point was, the Holy See had told the Irish bishops in 1997 not to report cases of sexual abuse of children to the civil authorities. They had it written into their protocol. The Holy See responded in 1997 with a secret letter, that eventually was disclosed, that this was improper and it was contrary to canon law.

Then you see, I see, a very serious collision between canon law and civil law, and the most important principle is what everyone has articulated so well, and it is the welfare of children, which I think overrides just about every other consideration and also eliminates the possibility of putting the institutional Church in a position where it would be on a collision course with the civil law of the Commonwealth of Australia.

MR FREE: Could I just turn to a slightly different scenario. What you have been discussing is the interaction between canon law and civil law in circumstances where the civil law positively requires reporting. The effect, as I understand it you all agree, of what happened in 2002 for America, but then 2010 generally, with the exception of the possible Lombardi qualification, is that canon law now allows you to report if the civil law requires you to report - do you agree with that?

DR AUSTIN: There has always been an obligation on Church authorities to report if the laws of the state require it.

MR FREE: So are you suggesting that the dispensation that was given in 2002 in America and 2010 generally was not required?

DR AUSTIN: That is correct.

MR FREE: Is that because the pontifical secret did not in fact apply?

DR AUSTIN: The document that we have called Crimen
Sollicitationis spoke about confidentiality under the title "Secret of the Holy Office". Bearing in mind that official documents of the Church are in Latin and the Latin word is "secretum", that's translated as "secrecy". I don't believe there is a Latin word for what we call "confidentiality", but that's what it means.

The victims and the witnesses who may have been involved in a criminal matter under Crimen Sollicitationis were not bound by the secrecy of the Holy Office. They were not bound by that obligation. They were bound by the ordinary obligation in the 1917 Code of Canon Law that says you have to keep confidentiality while the matter is under consideration.

There was provision for the judges in an ecclesiastical court, under the 1917 Code, to say, "Because of the particular circumstances of this matter we can impose upon you an obligation of confidentiality in a permanent manner."

The document of 1974, Secreta Continere - the purpose of that document was after the Second Vatican Council. In 1965 the council finished. Immediately, Pope Paul VI changed the name of the Congregation of the Holy Office to Doctrine of the Faith.

In 1968 they produced an instruction regulating the matters of confidentiality for the staff of the Roman Curia, all the departments of it. That was sort of updated, if you like, and a new document came out, which is called Secreta Continere, in 1972. It came into force in March that year.

That document is what is required of people working in the Roman Curia in terms of ordinary confidentiality, if we could put it that way, and also the special matters that then require a greater degree of confidentiality, called the pontifical secret from that time on.

As Father Tom explained to us the other day, some of the matters that the Roman Curia deal with also touch other people, eg, here is a letter asking you what you think about some person as a suitable candidate for being a bishop, and that is put under that secrecy.

In regard to crimes, the 1972 document said that what
was covered, if you like, by the secret, was what they
called extrajudicial denunciations that had been accepted
by the authority about crimes relating to faith and morals
and the Sacrament of Penance, and the process and the
decision pertaining thereto. They were subject to
pontifical secrecy.

Who were the people bound by it? Mr Tapsell has
referred to cardinals, bishops, et cetera. That's in that
document.

That's talking about cardinals, bishops and everybody
else who are personnel of the Roman Curia. It also says in
the last bit that - it doesn't exactly say, you know, if it
fell off the back of the bus. It does say that if people
who are not entitled to that information happened to come
across it, they were also caught up in it.

MR FREE: Could I ask you, then, Dr Austin, what about the
position of the local bishop, who receives the complaint.

DR AUSTIN: Yes, because the local bishop receives the
complaint - the term "extrajudicial denunciation" doesn't
appear in the 1983 Code. We're talking about complaints,
allegations. That's what it means.

If a bishop is presented with an allegation in terms
of child sexual abuse and that matter proceeds, then he and
anybody who is either delegated by him or caught up in that
work is bound by it. I myself have done a preliminary
investigation in that context. I'm bound by the pontifical
secrecy of what I learnt in that. I've had nothing more to
do with it after that, but that's my obligation.

The Secreta Continere did not refer to all crimes
committed by clerics, religious, and laypeople, as
Mr Tapsell writes. It only applied to the crimes that were
subject to the Congregation for the Doctrine of the Faith,
one of which was child sexual abuse.

So, clearly, my presentation to the Royal Commission
was that I'm not in confrontation or denial or confirming
the issue. It is quite clear that the law of the Church
said if you are part of this process, wherever you fit into
it, then you are bound by the pontifical secret. That law
never said to the victim, "You cannot go to the civil
courts." That was a right they had in the civil law and no
law that binds people to confidentiality, for good
reasons - the Church cannot say to someone, "You cannot go
and exercise your rights before the civil courts."

Father Lombardi's remark, as a press officer of the
Holy See, is saying it has to be done in good time and
afterwards - there is nothing in the statement of 2014 and
there is nothing in the Code of Canon Law or in the
document Secreta Continere that says a victim cannot go to
the courts at any time they like.

MR FREE: Can I ask, Dr Austin, would you just assume that
Father Lombardi's statement didn't amount to
a qualification and the 2010 dispensation applied more
generally.

DR AUSTIN: Yes.

MR FREE: Can I ask you to focus on the situation not of
the victim, but of the bishop or the vicar general who
receives the complaint of abuse, and they are in a state or
a jurisdiction which doesn't have a legal requirement at
civil law to report, but they consider, "I think this would
be a good idea, to go to the police and tell them of this
serious criminal allegation". Is the effect of what you
have said that the pontifical secret does preclude them
from doing that?

DR AUSTIN: No, that's not my conclusion at all.

MR FREE: Why not?

DR AUSTIN: Pope Leo XIII, at the end of the century
before last, said we have an obligation in conscience to
observe the civil law. That was repeated in the teaching
of the Second Vatican Council.

Mr Tapsell has said that's a moral obligation and that
it can't bind anyone unless that obligation is then framed
in terms of a law and promulgated as a legal obligation
and, therefore, his argument in response to my proposition
is that, well, you can't say that they had a moral
obligation to report because, in fact, there was a law of
secrecy that said they couldn't.

In actual fact, in the 1917 Code of Canon Law and in
the 1983 Code of Canon Law, there is a canon that says

Transcript produced by DTI
Catholics are bound by the teaching of the Church. Now, if the teaching of the Church says you observe the civil laws, then that applies to this case.

MR FREE: But, Dr Austin, if you are referring to either that or to Pope Leo XIII's statement that says "observe the civil law", that has no application, does it, if the civil law doesn't actually require a report and we're considering the situation of a voluntary report?

DR AUSTIN: Well, in the first place we have to ask ourselves what does it mean? Clearly, if the civil law says report, then it's bound under that obligation.

If my analysis is not correct, then, basically, we have a sort of smorgasbord Catholic approach where you just take bits and pieces of Church things and say, "That doesn't apply". That's clearly not the case.

What I'm saying is that Mr Tapsell's fundamental legal principle is that a moral obligation must be articulated in law for it to be legally binding. My response to him is, in canon law there is a law that says you must follow the teaching, therefore, a bishop or whoever must report.

If the civil law does not have a law that says you report, we are then in the bind where Mr Tapsell's fundamental legal principle that it should be articulated in a law - it is not articulated.

So the point we're talking about - if the various jurisdictions in Australia don't have reporting laws, his argument is, well, if they put it into law, then we would be bound; but if they haven't got it into law, it's a moral obligation; but a moral obligation doesn't apply in the civil law because it is not set out in the law.

MR FREE: Dr Austin, if the moral obligation according to the teachings of the Church was, "You should report", and the moral obligations and the teachings of the Church are to be understood as part of canon law --

DR AUSTIN: Yes.

MR FREE: -- how do you then explain the Vatican's response to what the Americans requested in 2002, where they effectively asked for a protocol in exactly those
terms and they were told, "No, but you can report if you are legally required to"?

DR AUSTIN: If they used the argument that it is the law of confidentiality or of secrecy that is what directs or governs all of that, then we have to face the situation that a law of the Church, an ecclesiastical law, which is made to regulate confidentiality, has a higher priority than the protection of children and the right of the children to go to the court and of our obligation to do something about it.

Now, I don't see how we can argue on the one hand we have this moral obligation, if you like, bolstered by the canonical requirement to follow civil law, and then say, "But, by the way, another law says keep silent over these matters." As I say, it can be for justified reasons; we can have justified reasons for not disclosing things. But how can you say that a law like that, which regulates business matters between the Roman Curia and Catholic bishops and other people in their process, is of greater value and is more important than the protection of children?

In actual fact, we have to abide by civil law, provided it doesn't conflict with the moral order. Not to comply with the civil law when it says so is in fact violating the moral order of the rights of a child, and I don't understand, in all the erudite discussions, even with the Australian bishops putting that forward - I accept that Towards Healing is quite different from the States. Towards Healing was a significant step forward in how we dealt with things; clearly it is not the end. But why didn't someone not say - the Church doesn't exist simply by the laws relating to penal law; it exists more than that. So why did not someone say, "There is an issue here that should be on the table, that should be thoroughly addressed in trying to solve this problem"? I don't know why that was not done, because it has been sitting there at least since the time of Leo XIII and it was very clear. I have said nothing in my submission to the Royal Commission that has not already been in the teaching and the law of the Church at least since 1917. I do not understand that. The only reason that I think might be there is that it was simply not going to solve their problem of not facing up to it.
COMMISSIONER FITZGERALD: Can I ask a question. Putting aside reporting to the police and putting aside reporting to child protection agencies where there is a child or children at risk, one of the things the Commission is looking at and is likely to recommend are reportable conduct regimes similar to that which exist in New South Wales, and we have put out papers on that.

Is there anything in canon law that in fact inhibits the information that can be provided in that arrangement - that is, where you report the incident and then you must report on the conduct of the investigation and its outcomes? So the civil authority, the ombudsman in New South Wales or the Children's Commission in Victoria, where they are enacting similar laws, will require details of the investigation itself.

So where there has been a canonical process, putting aside criminal, is there anything in the canon law that will in fact restrict the ability of the Catholic authorities to disclose fully all of the aspects of that investigation, from notification right through to the end, irrespective of criminal or child protection legislation?

DR AUSTIN: Commissioner, if a view is taken that the current legislation of confidentiality precludes that from happening, the clear message from the facts before the Commission is that must change.

COMMISSIONER FITZGERALD: My question is - and you are the experts - is there anything in canon law that would prohibit the Church fully disclosing all aspects of the investigation, if the Catholic Church is in fact covered by that legislation, because parts of the religious institutions are not covered currently in various jurisdictions.

DR AUSTIN: If it's required, then it's required. All I'm saying is that if people argue that we have a law of confidentiality that prohibits it, well then that law has to be changed so it is very clear that we must comply.

THE CHAIR: That might be so, but the question is: is there such a law at the moment?

DR AUSTIN: That we must comply?
THE CHAIR: That you must not comply - that would have the
effect of saying you must not comply?

COMMISSIONER FITZGERALD: Or, being more specific, even if
you were to report the incident to the ombudsman, would it
be possible for a bishop or an authority leader to say
"Well, we will tell you about the investigation, we will
tell you about the conclusion, but you are not entitled to
access to any information about what the process was and
what was conducted in the investigation", which is the very
purpose of reportable conduct?

DR DOYLE: Are we to understand, your Honour, that what
you are referring to is the information that has been
gathered, let's say in the investigation?

THE CHAIR: Really, the essence of it is that the
ombudsman, in some places, has a capacity to review the
investigation itself, to determine whether it was an
appropriate investigation. So it would really be, if you
like, giving a pass mark to the process of the Church.

Now, the question is whether there is currently in
canon law anything that would prohibit the Church leader
from providing to the ombudsman materials sufficient to
enable the ombudsman to determine whether or not the
investigation was appropriate.

DR DOYLE: That's what I was trying to get - make
a comparison between our own system, where documents such
as that are subpoenaed in the civil courts --

THE CHAIR: It is different to that. This is an
obligation to report.

DR DOYLE: I don't think there is anything that would
prohibit the reviewing the documentation, the facts and the
details of the investigation.

THE CHAIR: It would be a significant intrusion, in
practice, and I could imagine some Church people might not
like it.

DR DOYLE: I'm sure they wouldn't like it.

THE CHAIR: But you don't think there is a prohibition in
the current law that would conflict with a state law that
required that level of reporting?

DR AUSTIN: I don't believe there is anything in canon law
that stops that, and, on the other hand, I would say that
with what this Royal Commission has unearthed about our way
of proceeding, then it is high time that there is an
independent referee to make sure that the procedures that
we have in place and the way they are handled are in fact
in accordance with the demands of justice and the
protection of children. We know that we can never repair
the harm that has been done, but this is a matter that
needs both church and state to collaborate together in the
interests of the children and everything that goes with
that.

So we have to sort of stand by and say it is not your
job, it is not our job, it is "our" job, and we have to
find a way together, respecting the individuality, if you
like, of both the wider community and the Church community
and other organisations as to how we find a way through the
horrendous facts that have been unearthed. I think if
people say, "This law says that", we are making the law
more important than the children and I think that has been
the problem all along.

COMMISSIONER FITZGERALD: Before going to Father Doyle,
can I just be clear, does your answer apply even when
a canonical process is in place? Because in many cases -
I think Sister said the civil should always follow, but in
terms of investigations, distinct from the criminal
process, often canonical processes, as well as the secular
investigation of complaints will take place
contemporaneously. Is there anything, once a canonical
process starts, that would inhibit a Church leader from
disclosing any of that information to the civil authority,
notwithstanding your moral principles?

DR AUSTIN: I think they would probably say, Commissioner,
that because this process is under way, and there is
another process under way, then is what is said in here or
what is said in there affecting the two different
processes? But I firmly agree with Sister Moya that if the
matter does go to the civil court, that process should be
done first, and then there will not be this tension
between, well, we can't tell you what we're doing because
we are still doing it, and anything that goes there might
affect this.
COMMISSIONER MURRAY: There is an assumption behind your answer that the documentation attached to the canonical process will remain in Australia. We know from our own experience that documents that we would wish to have access to are not available to us because the instruction has been to send them to Rome. So will that not be an impediment, if Rome says to a bishop "Send us those documents"?

DR AUSTIN: Could I answer, Commissioner, by saying that in the current situation, if a bishop has an allegation presented to him about child sexual abuse, if we follow what canon law says, it is to be investigated, and if you get to the end of that preliminary investigation and there is a point that there is a verifiable allegation, it has to proceed.

The current law, which is different to the previous law, is now that when that part of the process comes to a conclusion, that preliminary one - the penal process has not yet begun - it must be sent to the Congregation for the Doctrine of the Faith and they will then proceed, et cetera.

The difficulty, obviously, is that I'm sure they will say, "Well, in that, the matter is now under our jurisdiction and, therefore, we keep it or we do it, and we don't want to give documents that relate to a canonical process into another process."

THE CHAIR: What that means is - which is our experience - documents generated in Rome in relation to a perpetrating priest won't be available to civil authorities in the state where the priest lives. That's what it amounts to.

DR AUSTIN: And I'm sorry, I don't know, your Honour, with these things - I don't think there is any simple answer to how we do it.

THE CHAIR: There is no simple answer, let me assure you.

DR AUSTIN: I can thoroughly agree with you. But if the Commission states clearly, "These are the problems and they have to be addressed in the interests of children", that will be a very significant step forward.

COMMISSIONER FITZGERALD: Father Doyle I think has had his
finger up for a while.

DR DOYLE: All I would like to add is - let me get clear in my brain what you are asking. You are asking can the documentation that has been generated as part of this investigation, before the investigation is done, before the process is totally finished, let's say - can that be submitted to civil authorities if they ask for it, let's say, in a criminal trial --

THE CHAIR: Either before finished or any time.

DR DOYLE: Any time. First, I think there is nothing prohibiting that. Second, if there is a conflict, and that has been certainly articulated in instances from my experience, "It is privileged information and cannot be disgorged", it is not privileged information analogous to privilege as it is understood in civil or canon law. It is not.

Second, that it is secret and therefore would be a violation of the pontifical secret to disclose this information, the process is going on, the information is there, if there is a perceived conflict between the demands of the civil authorities - the court - and the ecclesiastical authorities, what I have seen happen is that conflict is resolved in favour of the civil authorities. When the subpoena has not worked to obtain documentation, what has happened has been the issuing of warrants, and that is going on right now, and the documentation is then produced.

THE CHAIR: That assumes it is amenable to the jurisdiction of the warrant.

DR DOYLE: Yes, sir, that's the issue. But that documentation that has been disclosed not only includes the information that is oftentimes contained in a canonical criminal investigation, but also the documentation that is available concerning a laicisation process, and sometimes that's considered even more confidential. But that documentation has been disclosed as well to the civil authorities.

THE CHAIR: But that's at the demand of the civil authorities through a subpoena process, I assume.
DR DOYLE: That's correct.

THE CHAIR: So you are saying there is the power, the question is, is there anything in canon law that would say you can't do it? You are saying no?

DR DOYLE: I don't think so.

DR AUSTIN: I agree.

SISTER HANLEN: I agree also. Obviously, your Honour, I did work with the ombudsman's office, and I recall saying here, during Case Study 14, that it would be really very helpful to extend the jurisdiction of the ombudsman's office into other areas that relate to the Church, and also across the states, that they would be similar. They were incredibly helpful in the whole process.

But I didn't actually say, Commissioner, that you do the canonical process first. I actually said the reverse.

COMMISSIONER FITZGERALD: Yes, sorry.

SISTER HANLEN: Could I also just say, I'm shamed, deeply shamed, to read and hear various Church leaders coming out and saying, "Only report if you have to". I believe that to be incredibly wrong. But I note, too, that both Father Doyle and Mr Tapsell are on record as saying that it is not pontifical secret or Crimen that were the problem; the secrecy existed before that, and it is the culture of the secrecy, I believe, which is the protection of the clergy, that is the problem. I genuinely believe that if you follow the law as it stands you will get the desired result.

It is well recognised that in Australia, certainly, Crimen was hardly known to have existed. There is debate around that in regard to Secreta. It is the culture that "we must protect" - that is where it is wrong.

DR DOYLE: Yes. Totally correct.

MR TAPSELL: Could I just say, with great respect, that what Dr Austin has said is inconsistent with what he told the Cunneen Commission. If I might read from the transcript. He was asked about secrecy applying, whether there was secrecy applying:
Q. Say, 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 if it was a matter where the law clearly stated that - I'm thinking, for example, in tribunal work where confidentiality is involved, if what was said, that what you learned in that process had been given under civil law, my view would be that one would seek to be dispensed from the obligation of that particular case.

If you need a dispensation, there must be an obligation not to reveal to a civil court.

THE CHAIR: There's a challenge, Dr Austin?

DR AUSTIN: Your Honour, in the Cunneen Inquiry, the issue had come up, and the question I was asked was about priests in general. It was not about anything to do with a sexual abuse case being processed. It was a general conversation about confidentiality. The exact question was, did priests have a general obligation. I answered "Yes". In order to explain to the inquiry, I did use the example that people working in a tribunal - we are under an obligation of confidentiality because we say to the people, and I was thinking particularly, say, of cases where the nullity of marriage is being challenged - we give the people a guarantee that what they have said is under confidentiality until everything is finished.

I used that example because at that time there were people working in the Church saying that tribunal people had to go around and get all the documents, et cetera, to look to see what was in them, and they had to hand them all over to the archdiocese or diocese, whatever it was.

My view was that if a tribunal in Australia was handling, say, a matrimonial case, and they somehow or another something had come up elsewhere where they thought there was information available in that process, I simply
said because the people working in the tribunal - and this
was under the example where a process was on - they should
get a dispensation.

Mr Tapsell said, "Well, that's a dispensation from
procedural law; it has to go to Rome." That's not correct,
because the obligation to observe confidentiality is not
a procedural law of the Church. Procedural law is about
protection of the rights. So I think we have to agree to
disagree.

THE CHAIR: We understand the limits of the dispute. Now,
we are well over time.

MR FREE: Yes, your Honour. There are a couple of short
matters I will need to deal with before I have finished
with this session, your Honour. Can I suggest we take the
luncheon adjournment.

THE CHAIR: How long is it going to take?

MR FREE: I probably only need another 10 minutes or so,
and I think my learned friend Mr Gray has some questions.

THE CHAIR: I think we should take lunch. I think we have
been here long enough now. We will come back at 10 past 2.

LUNCHEON ADJOURNMENT

MR FREE: If I could get the panel to return for a moment
to a proposition that came from the Bench shortly before
lunch, and that was if there was a scenario in which the
civil law required what in New South Wales is called
a reportable conduct scheme, so the civil law required that
the Church report to the civil authorities on not only
a complaint but the way it was managing a complaint, would
that be consistent with canon law or is there anything in
canon law, to put it another way, which would prohibit
that?

I gave each of you the homework over lunch of thinking
in particular about the 2010 dispensation, which had the
effect that the pontifical secret didn't apply where civil
law required reporting, whether that would be broad enough
to cover the scenario we're talking about.

Has anyone formed a view on that?
DR AUSTIN: That would be correct, that it does cover it.

MR FREE: Does anyone disagree about whether the 2010 dispensation would have that effect?

MR TAPSELL: I only have the problem with the Lombardi qualification, that's all.

MR FREE: All right, but apart from that, you would see it as being broad enough?

MR TAPSELL: Mmm.

DR DOYLE: I would concur with Kieran. Lombardi is not a canon lawyer and he doesn't have the authority to interpret anything except the news, so to take his word - but I think your proposition is correct, again from the viewpoint of what we're talking about, which is the violation of children.

MR FREE: Finally, on a different topic, the canon law contains requirements about how documents are kept in Church archives and one of those requirements is that dioceses maintain a secret archive to hold certain documents, and I think one or more of you has indicated that documents relating to the response to allegations of child sexual abuse would be required to be kept in a secret archive.

Sister Hanlen, can I ask you from a practical perspective whether the maintenance of a secret archive had any practical impact for you in the way you dealt with allegations in the Diocese of Wollongong?

SISTER HANLEN: Mr Free, it had absolutely no impact. I was given access to the secret archive as I needed it, and I made those documents available under civil law requirements as it was needed.

I think, perhaps, the word "secret" is a little bit misleading. I'm sure in this building there are professional archives that are severely restricted to some people, and I think that's how we need to interpret it. They are particularly sensitive archives, so people generally don't have access to them.
There's the historical archives, which we would understand; there's also the archives that are actually for the day-to-day running of the diocese and the parish. But there are archives that contain very sensitive information and there's limited access.

That does not mean that, if requested by civil authorities, they cannot be made available. That is my understanding and it has been my practice.

MR FREE: What was the reason why you were given access to the archives, that part of the archives, in Wollongong?

SISTER HANLEN: Because, in actual fact, I was the bishop's delegate for child protection and therefore was doing this work. The bishop gave me access because I was the chancellor for the diocese and therefore there would be times I would need it. This isn't the only kind of material that would be in the secret archives.

MR FREE: Can I ask the other panel members if anyone has a different view about the significance of that canon?

DR DOYLE: The only thing I would add - and I'm not sure if this is applicable over here - is the point I think I made earlier, that the archives, secret or otherwise, are not privileged information in the sense that they cannot be disclosed, as analogous to privilege, I think, in the civil law that you may have here. They're not privileged, so they can be requested and disclosed by those who need to know.

MR TAPSELL: I can only go on what other canon lawyers have said. In Ireland, Monsignor Stenson carried out all of these inquiries. He was approached by the Irish Garda to produce them, and he said, "I can't, because of canon law."

MR FREE: Do you have any understanding of whether that stems from the form of the archives, or is that a reflection of the pontifical secret?

MR TAPSELL: Oh, no, it's the pontifical secret, because what's in some of the archives may not be covered by the pontifical secret; it might be all sorts of things. But if they relate to extrajudicial denunciations about child sexual abuse and any process in relation to it, then they
are prohibited under the pontifical secret.

THE CHAIR: Was that said in response to a subpoena from a court?

MR TAPSELL: Well, obviously he can't resist if there's a subpoena from the court. My point is that if the police don't know about it - I mean, obviously in that particular case, they did what they did to Bishop Heather. They would have issued a warrant and just got them. But if you're talking about whether or not, under canon law, people can hand them over voluntarily - also Cardinal Connell, at the Murphy inquiry, did hand over 17 files to the Garda, to the Irish police, and he told the Murphy inquiry that he was very concerned about the secrecy provisions, and, further than that, he thought he was breaching his consecration oath by handing them over.

THE CHAIR: One can look at a variety of circumstances in the civil law, in relation perhaps to a corporation, where an officer of the corporation might consider himself unable voluntarily to hand over documents or information. That's not an uncommon circumstance in the civil law.

MR TAPSELL: People know about it and they issue subpoenas.

THE CHAIR: That's right. That's the way the civil law operates.

MR TAPSELL: That's right, yes.

THE CHAIR: Are you suggesting there should be a greater obligation?

MR TAPSELL: I'm not suggesting there should be a greater obligation, but the only problem is, as my colleagues on my right keep saying, if you have an issue of child sexual abuse, they should be handed over. My problem with that is, under canon law, it's prohibited.

MR FREE: Thank you, your Honour. Nothing further from me.

THE CHAIR: Commissioner Atkinson has a question.

COMMISSIONER ATKINSON: Thank you. Sister Hanlen, I just
want to, if I could, take you back to something you told us about earlier about the retired priest who had dementia. In private sessions, people have said to us that if a person in any occupation or profession sexually abuses a child, then part of what they see as justice that flows from that is that that person should be permanently disqualified from holding that occupation or profession.

I just want to ask you whether this was possible - if, in that scenario that you described to us in wanting to support the family, and the priest having dementia, whether or not it would be possible that he could still be laicised but, at the same time, as can happen with elderly people with dementia or approaching dementia, the person responsible within the Church for monitoring him obtain a power of attorney through a process where that person then would have control, and also a responsibility, but the priest could still be laicised? Would that be possible?

SISTER HANLEN: In the case to which I referred, Commissioner, the cleric concerned had a degree of dementia. I do not believe that if the diocese had applied for a power of attorney that it would have been granted, because it would have been seen as a violation of his rights at that time. Whether that would be worth considering - that's a definite thing.

The concern was that it was an unjust situation, but the priest had to be penalised, he had to pay the price, and that is actually what happened.

COMMISSIONER ATKINSON: In that his powers were taken from him?

SISTER HANLEN: His powers were taken from him; any semblance of clerical dress was taken from him. He has died. He's had a private funeral. He paid the price.

COMMISSIONER ATKINSON: I understand all that. It's just that what victims are saying to us is that whether the person is a sports coach, a schoolteacher or a priest, they should be permanently and absolutely disqualified from holding that role, and it's important to them. That's what they've conveyed to us. So I just wanted to ask you whether that was a possibility, and you don't seem to be excluding it entirely as a possibility?
SISTER HANLEN: No. I believe it is worth thinking about.

JUSTICE COATE: Could I ask a question of perhaps Father Doyle or Sister Hanlen that follows on from something raised by Commissioner Murray this morning with respect to principles about the rights of the child being enshrined in canon law. Do you know whether or not the sovereign state of the Holy See is a signatory to the United Nations Convention on the Rights of the Child?

DR DOYLE: Yes, they are. They've also been challenged for not following the provisions of the Convention on the Rights of the Child.

JUSTICE COATE: And, doctor, do you know when Holy See adopted the convention?

DR DOYLE: I could find out, but I'm not sure. I don't know exactly. I know that when the hearings took place, I think it was about two or three years ago, they had signed then, and the issue was their non-conformity to the conventions.

THE CHAIR: Mr Gray?

<EXAMINATION BY MR GRAY:

MR GRAY: Thank you, your Honour.

Members of the panel, I'm largely going to ask some questions to get the response of panel members to some of what has been said in writing, principally by Mr Tapsell, and I'm conscious of the time. Therefore, I am going to try to do it as briefly as I may. By and large, I don't expect to have any questions for Mr Tapsell, but, of course, where Mr Tapsell wants to say something in response to what someone else says, then of course he is free to do so.

The first topic I just want to raise with you, Dr Doyle, is the relative importance of canon law as opposed to culture of the Church generally in relation to the poor response by Church leaders, at least until relatively recently, to claims of child sexual abuse. I want to take you to a couple of the things that you have said in your written submission to the Commission in this hearing.
Firstly, in your first submission, the one for panel 2, actually, the one the other day, you said that apropos Crimen Sollicitationis, the document had very little impact on the actual response to reports of sexual abuse. I take it that's still your view?

DR DOYLE: Yes, it is.

MR GRAY: You gave, in summary, a reason, which was that - and I'm paraphrasing - bishops, by and large, didn't follow the processes; they in fact either - and I'm speaking very loosely - did nothing or did something unacceptable. In other words, adherence to a process prescribed by Crimen Sollicitationis was not the problem.

DR DOYLE: I'll try to answer that. First, I concur with those who have said that many of the bishops - it's hard to tell how many - were not aware of Crimen. I have, however, seen authentic documentation of those who have been. I would stand with what I said, that the lack of adherence to processes or the way that specific cases were actually handled may have appeared to have been contrary to the norms of Crimen and contrary to the Code of Canon Law, and in some instances that may be excusable by lack of information, but I think for the most part it was an intentional decision to pursue a course of action that was contrary to the law or outside the law.

MR GRAY: But not as a result of anything found in Crimen, for the most part?

DR DOYLE: I think - no, sir, I don't think it was as a result, consciously as a result, of anything found in Crimen or anywhere else. The issue was, keep this under control, under wraps, and don't let it become known.

MR GRAY: As a matter of culture or general approach?

DR DOYLE: It was the culture. When Crimen first became publicly known in 2003, several attorneys at home felt that this was a smoking gun and evidence of a conspiracy on the part of the Holy See to keep sexual abuse of children secret and under wraps. When I was questioned about that, my response was, no, it is not a conspiracy; it's a part of the ecclesiastical law, but the secrecy is more a part of the culture, that Crimen responded in many ways or
supported an overall culture of secrecy.

MR GRAY: I understand. Without taking you to it, you've said something broadly similar in your second written submission specifically in respect of this panel on canon law at pages 34 to 35, but the Commissioners have that.

DR DOYLE: I've got it here somewhere.

THE CHAIR: Mr Gray, as you just said, and we appreciate, we have the written document.

MR GRAY: I just saw that the witness was looking it up.

DR DOYLE: Basically what I just articulated is pretty much what I have said here.

MR GRAY: Exactly.

Now, let me address something to you, Sister Hanlen. You spoke this morning about your practice, yourself, being always to, first of all, refer a matter of this kind to the civil authorities, to the police, for example, and to wait until the civil process is over before engaging any canonical process; is that right?

SISTER HANLEN: That's correct.

MR GRAY: Pausing there, is it your evidence that you did not regard any requirement of secrecy, wherever sourced, as preventing you from doing that?

SISTER HANLEN: I was dealing with a crime against children. Nothing can prevent me from dealing with that.

MR GRAY: And, of course, Towards Healing, to the extent that that has been used or is still used, is not a canonical process; is that right?

SISTER HANLEN: No, it's not. And in terms myself of using Towards Healing, I didn't use it in relation to sexual abuse of children. I might have - I did use it, for example, if there was a complaint that came through that a teacher had hit a child in the classroom, perhaps what was seen as unfairly, and I dealt with those things through that protocol.
MR GRAY: Similarly, the Melbourne Response and its --

SISTER HANLEN: I don't know the Melbourne Response, Dr Gray.

MR GRAY: Do you know whether it's a canonical process, though? Or you don't know?

SISTER HANLEN: I really don't know.

MR GRAY: Dr Austin, do you know whether the Melbourne Response amounts to a canonical process?

DR AUSTIN: It doesn't.

SISTER HANLEN: Oh, no, no.

THE CHAIR: We know it doesn't.

SISTER HANLEN: No, it doesn't, sorry. I thought you were going to ask me a question about it. No, it's not.

MR GRAY: One other discrete matter, Dr Hanlen. You mentioned the offender who, in your own experience, was not laicised but finished up in a care facility that, as you put it, wasn't very nice. Had that man already served a gaol sentence?

SISTER HANLEN: He had, Mr Gray, yes. He actually went from the gaol to there.

MR GRAY: To the care facility?

SISTER HANLEN: Yes, and he has since died.

MR GRAY: So the latter was not in any sense in lieu of a gaol sentence?

SISTER HANLEN: Oh, no. No, no.

MR GRAY: Thirdly, for you again, Dr Hanlen, in relation to this notion of permanent silence that is sometimes said to apply, as the CDF is said to decree, in your experience either during or at the conclusion of any canonical process that you were involved in, has the CDF ever said anything to you to the effect that thereafter there was any
continuing obligation of secrecy?

SISTER HANLEN: No. What it has said, just to directly quote from one - "To the bishop", it was addressed:

The ordinary is to see to it that, insofar as possible, the new situation of the dismissed priest does not cause scandal to the faithful. If, however, there is danger of abuse to minors, the ordinary must make public both the fact and the canonical basis of the dismissal.

I note, too, that there has been a response from the Pontifical Council for Legislative Texts. The document is redacted, but from reading the document, I would take that a Bishops Conference has asked the question, under Canon 220, whether in actual fact it can put on its website the names of priests who have sexually abused minors, and they were told that it would have to be looked at on a case-by-case basis, but if there was any risk to further abuse of minors, that was not an issue.

MR GRAY: Thank you. I want to pass to you, Dr Austin. The topic is the relationship between canon law and civil law, and I don't want to trespass on what has already been said this morning, but the Commission has been looking at, among other things, two instructions - Crimen Sollicitationis of 1922 and then later 1962 and also Secreta Continere of 1974.

You have dealt with the topic of what an instruction is in your written submission, but is this a fair, if brief, summary of what you say there, that such instructions do not constitute canon law themselves but are nevertheless binding as to how to execute the law contained in the canons?

DR AUSTIN: That is correct.

MR GRAY: Does anyone disagree with that?

DR DOYLE: I think it's just a question of semantics. If it's an instruction that's telling you how to obey the law, you're supposed to use that instruction. So, in a sense, it's part of canon law. It may not be in the Code, but if it's not in the Code, that doesn't mean it's not law.
MR GRAY: Exactly. Mr Tapsell?

MR TAPSELL: I think it depends on the instruction. If the instruction is in forma specifica directed by the Pope, then it becomes law, and I think that has been quite obvious both in relation to Secreta Continere and Crimen Sollicitationis. They are both in forma specifica directed by particular popes.

MR GRAY: So your point I think is that they are themselves legally binding?

MR TAPSELL: Absolutely.

MR GRAY: But I was simply asking - it may well just be a matter of semantics - are they correctly described as being themselves canon law?

MR TAPSELL: Yes.

MR GRAY: You would say yes; Dr Doyle would say yes.

DR AUSTIN: They're all part of canonical law, whether they are in the Code or not.

SISTER HANLEN: They are part of - yes.

DR DOYLE: The misunderstanding oftentimes is that if something is not contained as a particular canon in the Code itself, that it is not canon law. Canon law actually, I believe, encompasses all ecclesiastical law - that not found in the Code but perhaps found elsewhere or in the form of an apostolic constitution, instruction, some other document that is authentic and authentically approved or promulgated in some way by the Holy See.

As Kieran mentioned, "in forma specifica" means - it says right in the document, "This was approved at an audience before His Holiness" so-and-so.

MR GRAY: I'll touch upon that again shortly when I get to another topic, Dr Austin, but, meanwhile, as to Canon 22, Mr Tapsell - and I'm summarising his argument - says as a proposition that where canon law and civil law conflict, canon law prevails, and, as I say, I'm summarising this, but, in sum, he says that the basis for that is Canon 22.
You have seen that.

Now, Dr Austin, is this a fair summary again of your response: first of all, you would say Canon 22 is not about what to do in the case of a theoretical possible conflict between the two systems of law?

DR AUSTIN: That is true.

MR GRAY: And you would say that nowhere else in the Code - that is, canon law does not itself actually prescribe anywhere what would happen where canon law and civil law were in conflict. Is that your position?

DR AUSTIN: That is also my position.

MR GRAY: Thirdly, quite apart from Canon 22 and whatever it may mean, is this your view, that the only situation where canon law would or might ever, as it were, prevail, in that sense, over civil law, is where the relevant canon law derives from the divine law?

DR AUSTIN: That is correct.

MR GRAY: And the civil law was inconsistent with the divine law; is that right?

DR AUSTIN: That is correct.

MR GRAY: A possible example of that was mentioned this morning, namely, to do with divorce and remarriage, and so on. If the civil law were to be changed so as to abolish the seal of the confessional, hypothetically, is this your view, that canon law would there prevail because the origin of canon law in that context is divine law?

DR AUSTIN: That would be my view, yes.

MR GRAY: Whereas, by contrast, there's nothing in the divine law that says anything to the effect that child sexual abuse is not to be reported to authorities?

DR AUSTIN: Nothing at all.

MR GRAY: Is that right?

DR AUSTIN: That is correct.
MR GRAY: Dr Hanlen, does that, however briefly, also reflect your view?

SISTER HANLEN: It does, Mr Gray.

MR GRAY: And Dr Doyle?

DR DOYLE: It does. I have one question. When we use the words "divine law", it's a very broad term and I've always wondered who has the authority to interpret and determine what is divine law? At one point in history in my country it was considered God's law, divine law, that blacks and whites be separate and not necessarily equal. Now, that today would be looked upon as ridiculous, but it was considered to be God's will. I have sometimes a question: how do you interpret, who says what is divine law?

MR TAPSELL: Could I just make a comment on that? That narrow view, which is what Dr Austin has mentioned, effectively means that you have two obligations - one under canon law and one under civil law - and he says Canon 22 doesn't resolve that.

My problem with that is in terms of the practical situation of the Church. Bishops swear an oath of loyalty to the Pope. Officials swear oaths to obey all ecclesiastical laws. They take no oaths to obey civil laws.

Again I come back to Cardinal Connell. Cardinal Connell gave evidence at the Murphy Commission. He was a member of the Congregation for the Doctrine of the Faith. The Commissioners asked him what went on at a particular meeting, and he said, "I can't tell you. I've taken an oath to be secret." He said, "I have taken an oath to tell the truth and I've taken an oath to keep this secret, and I intend to keep the oath of secrecy."

In other words, I can't imagine a bishop not taking his oath seriously. And you have a situation of neutrality, where there's a conflict, that you have an oath which says you're going to follow canon law. So even if Dr Austin is correct, there's a problem.

MR GRAY: Dr Austin, would you like to respond to that?
DR AUSTIN: The bishop, for example, has to take an oath of professional faith and an oath of fidelity to his office. Before he agrees to follow canon law, he has to agree to follow the teaching of the Church. That's under the same oath. I would have thought that that has more than equal standing with following ecclesiastical laws that are made for particular purposes. I don't see how we can just pick one and leave the other bit out, because there's a holistic approach to it that has to be counted.

DR DOYLE: Following upon what Mr Tapsell said, cardinals take a separate oath, in which they vow to the Pope that they will not reveal anything that might in any way be harmful or detrimental to the Church. And of course then they can interpret what they think would be harmful or detrimental to the Church.

I don't know about Cardinal Connell, what he appealed to in that particular instance. He did turn some files over to the Commission, but his successor, Archbishop Diarmuid Martin, also turned the rest of them over voluntarily.

There was a conflict between the two. There were more files that Connell had that they wanted to get before the Commission, and it ended up in a civil court contest between Cardinal Connell and his successor, the archbishop, which was rather unique and unusual, and the files ended up with the Commission.

MR GRAY: Dr Hanlen, did you want to comment on that topic?

SISTER HANLEN: I don't have any difficulty in handing over what is required. We are dealing with a serious crime. The protection of children is the utmost.

MR GRAY: Now I just want to come, as briefly as I can, to the two particular instructions that have been the subject of most of the discussion - Crimen and Secreta. The Commissioners are aware, as to Crimen, of the evidence, including that of Dr Doyle in this hearing and of Bishop Robinson earlier, which, again summarising, indicates that Crimen was, at least in this country, in Australia, unknown to and seemingly not used by the Australian bishops up to at least 2000, or a bit later.
I just want to ask a couple of things about what it actually said, nonetheless, what Crimen said. This is addressed to you, Dr Austin. Is it your view that by article 11 of Crimen, the secrecy obligations concerned the process, being a process to be carried out by officials of the Roman Curia? Is that your view?

DR AUSTIN: No, it is wider than that, because under Crimen the allegation was made before, let's say, the diocesan bishop. The procedure required him to deal with that process and how it was to be carried out. He was acting under delegation, as the document says, from the Congregation for the Doctrine of the Faith, and he was accountable to them; he was doing their work.

So clearly whatever information came, when the person came and said, "This is what happened" and that began with an inquiry and then moved to a formal process, all of that would have been encapsulated under the pontifical secret.

MR GRAY: Quite, but accepting that, what the obligation of secrecy applied to was that entire process?

DR AUSTIN: The information that was gathered in the course of that entire process.

MR GRAY: Yes. Secreta, of course, came 12 years later than the 1962 version of Crimen. Pausing there, Dr Austin, Crimen was, of course, still in force in 1974?

DR AUSTIN: It was, yes.

MR GRAY: While I've paused - your view is that Crimen was not abolished or repealed by the 1983 Code; is that right?

DR AUSTIN: That is my view.

MR GRAY: And I think, Dr Doyle, that's also your view?

DR DOYLE: To be honest with you, I'm not really sure, because there are so many nuances to that whole issue. It could have been abolished under 1983, and then there are arguments that would say it was not in force in 2010 - or 2001, and others on the other side, so I'm, quite frankly, not sure.

I would tend to say since SST, the document that
refers to it having been in force until then, was signed
off on by the Pope, who is the legislator, that unless he
didn't know what he was doing at the time or unless it was
included in there unintentionally or by mistake, it
probably did end up neutralising Crimen at that time. This
was May 18, 2002.

MR GRAY: 2002, yes, but not before, seemingly?

DR DOYLE: Not before.

MR GRAY: All right. Dr Austin, back to you. Given that
Crimen was still in force, what is your understanding of
why there was any need for Secreta?

DR AUSTIN: There is the need for that because, leaving
aside the change of name in the Holy Office going out, the
1968 precursor to the 1974 document provided the
regulations to be observed by all personnel working in the
Roman Curia about matters that were dealt with by the Roman
Curia. So Mr Tapsell this morning said it spoke about
bishops. They were the bishops working in the Roman Curia.
They weren't all the bishops of the world.

But if it was a matter of the sexual abuse of a child
that had been reported to a bishop out here, he was under
that because the report had been made; he had to prepare
the documents, et cetera.

MR GRAY: Following on from that, in your view, was the
range of people who were bound by the secret, the
pontifical secret, expanded by Secreta from what had been
the case under Crimen?

DR AUSTIN: No, there was no change at all. Neither the
crimes that were under the Congregation for the Doctrine of
the Faith, nor the people - it applied the same. There was
no expansion either of the matters that were embraced by
Crimen or the people involved.

If I could just make a comment on Tom Doyle, Mr Gray.
There was this dispute as to whether it was in or whether
it was out. If we accept the argument that Crimen
Sollicitationis went out with the 1983 Code, that meant
that the crimes that it spoke about reserved to the
Holy See also went out, because they weren't anywhere else.
And that was part of the reason for having to say we make

Transcript produced by DTI
it very clear that it didn't go out in 1983 but it stayed until 2001, as far as we're concerned, for this process.

MR GRAY: Dr Doyle, I think you're nodding generally to that?

DR DOYLE: Yes, I am. Without getting into the weeds any deeper than we already are, there are other arguments concerning whether it went out in 1983 or in 2001, but the fact that the Holy Father did approve of the apostolic - I think it's - is it a constitution, the SST? It's an instruction.

DR AUSTIN: Motu proprio.

THE CHAIR: You realise, all of you, that to outsiders, the fact that you all sit here and discuss whether or not something exists or doesn't exist, when it's part of Church law, is an extraordinary proposition. Has anyone ever thought about codifying all of this?

DR AUSTIN: Your Honour, we have a codified system, and that's part of the problem, in the sense that - Father Doyle said laws exist outside. I think in this regard you need to put it into the context that there is a 1917 Code that codified for the first time the existing law, so it wasn't all brand new law.

After the Second Vatican Council, that 1917 Code was revised, and in that transition period there were issues that had to be clarified. In the first Code, there were numerous authentic interpretations saying, well, before, we used to do this; what do we do now? And there has been since this. But I think part of the ongoing - and bear in mind that the law is being looked at in terms of renewal - these are some of the issues. I mean, I think Father Doyle and Sister Moya and I would clearly say the wording in some of the canons should never have been there, because it would be far better if they wrote it in a better way, but that is an inherent problem that needs to be worked out.

Perhaps it's only cases like this that come to the fore and point up the difficulties we're facing in regard to that, and in that sense this is a service that's being done by these conversations.

MR TAPSELL: Can I just make a comment about that?
I disagree with Dr Austin that this only applied to Holy
Office people. It didn't. It applied to the reports of
papal legates all over the world. So it couldn't just have
applied to them.

Secondly, in paragraph 274 of my submission I've set
out the preamble. The preamble makes it absolutely clear
that it's not confined to the Holy Office.

MR GRAY: I'm not meaning to ignore you, Mr Tapsell. It's
just that most of this is in response to your very full
written submission, which, to some extent, has not been
responded to yet.

Dr Doyle, do you agree so far with what Dr Austin has
said? Apropos what Dr Austin has just said, to the effect,
and I'll summarise it, that neither the nature or the
content of the secret, nor the identification of those
bound by the secret was expanded by Secreta over Crimen, do
you agree with that?

DR DOYLE: Yes, I would. I would have no cause to
disagree with it.

MR GRAY: Sister Hanlen, I think you would agree as well?

SISTER HANLEN: I would agree.

MR GRAY: I won't linger on this, but because it's given
a lot of attention in Mr Tapsell's written document, can
I refer you, Dr Austin, to the presence in Secreta of
Article I(4), which talks about extrajudicial denunciation;
you'll know the subsection that I'm talking about?

DR AUSTIN: I do, yes.

MR GRAY: Is it your view that Article I(4), at least in
the Latin, being all one sentence, is conjunctive rather
than disjunctive, so that what is caught by the secret is
only complaints or denunciations which give rise to
a canonical process?

DR AUSTIN: That is correct.

MR GRAY: So a complaint which does not, for whatever
reason, lead to a canonical process is not governed by the
1974 document?
DR AUSTIN: I would interpret it that way, and it has to be seen that people who are the victims of whatever the crime happened to be still have the right to go to the secular courts, and if we bear in mind what was said earlier, that if the processes of the civil law take place first, all that information, in that sense, is public. So if the civil law processes are complete and that matter is on the public record, so to speak, and the process in the Church starts, you cannot say, "Oh, by the way, we say the same things here, they're under secrecy", when, in fact, they're out in the public arena already under civil law.

MR GRAY: And so - and this may be another way of saying the same thing - no secrecy restraint under Secreta would apply to a complaint which had not led to a canonical process?

DR AUSTIN: That is correct.

MR GRAY: I think, Dr Doyle, again summarising, that reflects your view?

DR DOYLE: Yes.

MR GRAY: And Dr Hanlen as well?

SISTER HANLEN: Yes.

MR GRAY: That then leads me to ask you, Dr Austin, in particular, for a direct response simply to what Mr Tapsell's conclusion, in effect, is on this part of the debate. I don't need to have you look it up unless you want to, but it's in paragraphs 73 and 76 of his executive summary. The thrust of it is that in his view - and he has said this today - the pontifical secret is still imposed by canon law over allegations and information about child sexual abuse by clergy, and that otherwise than in New South Wales and Victoria in this country, it prevents bishops and religious superiors from reporting historical allegations, even if they wanted to.

Again I'm summarising that slightly, but you're familiar with Mr Tapsell's view on that?

DR AUSTIN: Yes.
MR GRAY: Do you agree or disagree with that?

DR AUSTIN: My position is that the law on secrecy or confidentiality does not prohibit the reporting of crimes such as we're talking about, and if it's required by the civil law, then that comes under another obligation that we spoke about earlier in terms of complying with the teaching of the Church.

MR GRAY: And so - and I'll ask the others in a second - to the extent that various senior figures in the Church outside Australia - and Mr Tapsell has referred to a number of them in writing and some of them orally - have made statements which either are or seem to be to the contrary, what do you say about those?

DR AUSTIN: My position is not in confrontation with those. My position is in all this whole debate, there is another area that should have been looked at, about the responsibility to comply with the civil laws, and that, to my knowledge, has not been raised in any discussions across the whole issue.

MR GRAY: I'm not sure I follow that.

DR AUSTIN: What I'm saying is that my position is that clearly the law is in existence about confidentiality. That is not the issue for me.

MR GRAY: Namely, Secreta?

DR AUSTIN: Yes, yes. My issue is that there is an obligation to observe that law because that's there. There is, however, because of the nature of the Church, another responsibility that emerges, and that is, by virtue of canon law, my obligation to comply with the civil law, and if it says report, it does, and it has always been in the teaching of the Church that a person must follow their conscience, and if conscience dictates that you must do something, even if that is not in conformity with a law of the Church regarding confidentiality, in conscience you have an obligation to do it.

MR GRAY: Dr Hanlen, your view?

SISTER HANLEN: I would stand with that, yes. I believe it's a matter of integrity.
MR GRAY: Dr Doyle?

DR DOYLE: I would say, first off - I think we've heard this many, many times: the legal system of the Catholic Church is unique and it's different from the legal systems of the secular countries. Because of the fact of what the nature of the Church is, there are times when that legal system does not provide for what must be done.

I still recall one of my now deceased professors saying that the canons and the law can only go so far, and yet something must be done in a particular situation to apply the good of souls, and that's I think what Dr Austin is referring to.

For example, practically speaking, if I were asked as a canon lawyer, "It's clear that to report this or that case is a violation of the secret of the Holy Office; what should I do?", my response would be: "Disobey; go ahead, report it", because there's a greater good, and that's the violation of a child that's at stake.

MR GRAY: And that greater good - is this right, accepting everything you've said - is provided for by the Church's teaching on moral questions, among others?

DR DOYLE: Yes. It is. And the problem with that, the difficulty with that whole concept that Dr Austin has articulately put forth is the fact that it's somewhat alien to the nature of a civil law system. That's part of the difficulty with canon law. There's a grey area that is built into it and that must be taken into consideration, and that gives the option of either strictly observing the law when it's going to benefit the individual who is handling it, or not strictly observing it when it's going to benefit or be assisting, in this case, the violated children.

MR GRAY: Dr Hanlen?

SISTER HANLEN: Yes, I would accept that, yes, no problem.

MR TAPSELL: I agree that canon law has an overlying thing, and it's set out in the very last canon of the Code, that the supreme law of the Church is the salvation of souls. The problem is - I mean, I accept what my friends
say, they would regard reporting as being for the salvation of souls, if you like, that these children should be protected.

The problem was historically the salvation of souls meant covering it up, because "scandal" has a technical meaning in the Church, and it means that people will lose their faith because they see how priests are behaving, and that's all the way through it. You go in the Victorian inquiry - that's what Archbishop Hart admitted; it was done to stop scandal. And you can say that under that overlying thing, that required the cover-up.

MR GRAY: I want to come to one last topic, which is one that I'll introduce by referring to the statement by Cardinal O'Malley in February last year, February 2016, where he said - and I'm reading out only the gist of it:

| Our obligations under civil law must certainly be followed, but even beyond these civil requirements we all have a moral and ethical responsibility to report suspected abuse to the civil authorities who are charged with protecting our society. |

You're all familiar with that statement that he made.

The point that I want to ask about, with that statement in our minds, is Mr Tapsell's argument, mainly found in the reply submission of a seek or so ago, to the effect - and again I'm paraphrasing - that moral obligations can only be binding if they're enacted as part of canon law or a coherent legal system.

Correlatively with that, Mr Tapsell would also say, and has said, that canon law does not in fact provide anywhere a general obligation to obey the civil law. You're familiar with his views on that.

Now, Dr Austin, first of all, do you say that canon law does provide a general obligation to obey the civil law?

DR AUSTIN: I do, yes.

MR GRAY: Where is that to be found?
DR AUSTIN: That's in canon 754.

MR GRAY: Which says - and either quote it or refer to it?

DR AUSTIN: That all members of the Church have an obligation to observe the teaching of the Church, particularly teaching that may come from the Vatican Council or from papal teaching through a variety of documents, and also it includes teaching at a diocesan level.

MR GRAY: And in your submission you point to one particular example of Church teaching in this area, namely, what Pope Leo XIII had to say 100 or so years ago?

DR AUSTIN: In 1885, yes, I do, Mr Gray.

THE CHAIR: Why wouldn't it be better just to have the law say that you should all comply with the civil law? Why go through a circuitous route to get to the answer?

DR AUSTIN: I don't think it is a circuitous route if you accept that not all our obligations are tied up in one Code of law, one book of law, as Dr Doyle said.

THE CHAIR: Why couldn't there be a law somewhere that says: you must comply with the civil law?

DR AUSTIN: Well, it may well be necessary to do that in the light of what the Royal Commission has discovered, but there's a basic principle that Catholics are supposed to observe the authentic teaching of the Church as it comes, and that covers everything. We've had a lot of teaching in recent years about the social teaching of the Church. Catholics are supposed to pick that up.

But there's no law that comes out and says: you must observe this or that particular teaching. It is a blanket obligation, if you like. But that's the difference in the Church in terms of - there's a role of teaching that we must observe; there's also the role of governance in which we're caught up. But everything is not condensed into the Code of Canon Law.

If it is such that there is debate over this matter in terms of reporting, where the civil law requires it, yes,
that's quite clear.

THE CHAIR: Why not a general obligation to obey the civil law, full stop?

DR AUSTIN: But it's already there. It's in Canon 754 that says we obey the teaching of the Church. If the Church says obey the civil law --

THE CHAIR: Maybe I'm just an ordinary common lawyer, but we normally say things in simple words.

DR DOYLE: Not in canon law.

DR AUSTIN: Does that mean, then, we need a list of every single thing, in the teaching of the Church - where civil law makes an obligation, we list all those?

THE CHAIR: No, no. Just say: obey civil law.

DR AUSTIN: Sorry, it's already there. I know it's circuitous but it's already there.

DR DOYLE: Can I make a response to that, your Honour? Several times the question has been brought up, exactly why there isn't a general obligation to obey civil laws, and it's always - of late, it has been in the context of reporting this sort of issue to civil authorities - law enforcement authorities, child protection authorities.

One of the excuses that has been offered, put forward, by the different people in the Holy See - now, this doesn't mean it's an official word, but it's, "Rome says this" or "Rome says that", is that not all police and law enforcement agencies are honest, and many of them are corrupt, and as far as legal systems are concerned, not all legal systems are honest and may be corrupt.

That, to me, is trying to legislate for an exception. You have to presume that a legal system does have integrity. So your proposition makes eminent sense for any organisation or country or culture or legal system.

However, you mentioned a circuitous route, which is built in, almost culturally, to canon law: if you can get somewhere directly or indirectly, take the indirect route; if you can take something that is ordinarily simple and you
have the option of creating something that's compound and complex, do the latter.

I'm not saying that facetiously. That's from my experience, having been on the inside, and that is exactly what happens all too often.

MR TAPSELL: Could I just make a comment? Canon law has always drawn a distinction between a juridical document and a magisterial document, the latter being the teaching thing of the Church. I've set this out in here and I've also set out the authorities on which I rely, the canonical authorities which say it.

One of the interesting things about Dr Austin's thing about if that encyclical of 1885 was a juridical document, it was repealed by the 1917 Code of Canon Law. But it's not a juridical document. It's a magisterial document.

MR GRAY: I had better let Dr Austin respond to that proposition.

DR AUSTIN: It wasn't a juridical document, it was a teaching document. It's a doctrinal statement. It abides over time and its teaching is repeated in the Second Vatican Council.

But canon law does say we have an obligation. It's a statement of principle that we must observe the civil law, because that is the teaching of the Church.

I accept his Honour's statement that it might be easier if it was all spelled out in clear language, but what I am saying is that Mr Tapsell's statement that it's not a juridical document, therefore it doesn't bind, is incorrect, because the Code of Canon Law, both 1917 and 1983, said you follow the teaching of the Church. My argument or presentation to the Commission is that bishops have the obligation to report, if that was there, because of that, and to use various arguments about secrecy and that, in my view, does not stand up to the fundamental issue of the rights of a child who has been abused and the responsibility, both on the person who did it in the first instance and the Church, to say, "We stand by a child who has been abused", not by a law that says we don't have to say anything.
MR GRAY: Dr Doyle?

DR DOYLE: I would just like to mention, because now we're really in the weeds, Gaudium et spes, which Sister Moya mentioned this morning, was an apostolic constitution from Vatican II. Encyclicals, all these documents, are not law, they are not canon law, but they are documents or instruments from the Holy See that assist in the proper application of the law.

Canon law does not have stare decisis where you have previous cases to depend on. The application of the law depends on the opinions of the legal scholars, the commentators. Authentic application is given only by the Holy See, an authentic interpretation. So to apply the law, you can't call the Holy See every time you have a conundrum or something, so you look to the scholars, you look to official Church documents such as we're referring to that assist you in applying the law in this particular situation.

MR GRAY: So in this particular instance - and I don't want to take up any more time if I can personally avoid it - do you agree with Dr Austin that there is, under 754, an obligation to obey a teaching such as that promulgated by Pope Leo XIII and found later in the Second Vatican Council, and so on?

DR DOYLE: Yes, there are no exceptions in that canon. They don't say, "Obey every teaching except these", so I would.

MR GRAY: Dr Hanlen?

SISTER HANLEN: I do. I do, Mr Gray.

MR GRAY: Those are my questions, your Honour.

MR FREE: Thank you.

THE CHAIR: Do we need any of these good people again?

MR FREE: No, I don't think so. I think they can all be excused.

THE CHAIR: You can all be excused. You will be pleased to know that. Can I thank you again. It has been a long
session, longer than we had first anticipated. Thank you very much.

THE WITNESSES WITHDREW

MR FREE: Your Honour, can I call, please, the witnesses who are part of the next session on the Sacrament of Reconciliation to come forward. We have six witnesses, so we will be spilling down to the lower level. They are Dr Frank O'Loughlin, Professor Ian Waters, Father Joseph Grayland, Father Frank Brennan, Father Laurence McNamara and Bishop Terence Curtin.

TERENCE ROBERT CURTIN, sworn: [3.11pm]
FRANK TENISON BRENNAN, sworn: [3.11pm]
JOSEPH PAUL GRAYLAND, sworn: [3.11pm]
FRANCIS THOMAS O'LOUGHLIN, sworn: [3.11pm]
LAURENCE JAMES MCNAMARA, sworn: [3.11pm]
IAN BENJAMIN WATERS, sworn: [3.11pm]

EXAMINATION BY MR FREE:

MR FREE: Firstly, if I could seek to introduce you each briefly, starting with Father Frank O'Loughlin. Father, you are the parish priest of Sandringham; is that right?

DR O'LOUGHLIN: That's right.

MR FREE: You were ordained back in 1968?

DR O'LOUGHLIN: 1969.

MR FREE: You are a sacramental theologian and liturgician; is that right?

DR O'LOUGHLIN: That's right.

MR FREE: You have a Doctorate in Theology?

DR O'LOUGHLIN: Yes.

MR FREE: Professor Waters, you are a Professor of
Divinity, is that right?

PROFESSOR WATERS: Canon law.

MR FREE: You were ordained back in 1970; is that right?


MR FREE: Father Grayland - I'm sorry, I should also ask you, please, to state your full name, Father O'Loughlin?

DR O'LOUGHLIN: Francis Thomas O'Loughlin.

MR FREE: Professor Waters?

PROFESSOR WATERS: Ian Benjamin Waters.

MR FREE: Father Grayland?

DR GRAYLAND: Joseph Paul Grayland.

MR FREE: You have a Doctorate in Theology; is that right?

DR GRAYLAND: Correct.

MR FREE: You are a serving priest in Palmerston North in New Zealand?

DR GRAYLAND: Yes, in the Diocese of Palmerston North.

MR FREE: Father Brennan, can you state your full name?

FATHER BRENNAN: Frank Tenison Brennan.

MR FREE: What's your current position?

FATHER BRENNAN: As of Monday, I am the CEO of Catholic Social Services Australia.

MR FREE: In the past, you've been a law professor, a human rights advocate?

FATHER BRENNAN: Yes.

MR FREE: You're also a Jesuit priest; is that right?

FATHER BRENNAN: Yes.
MR FREE: Father McNamara, could you please state your full name?

FATHER McNAMARA: Laurence James McNamara.

MR FREE: You were also ordained in 1970?

FATHER McNAMARA: Correct.

MR FREE: You lecture in moral theology and ethics?

FATHER McNAMARA: Correct.

MR FREE: Finally, Bishop Curtin, can I ask you to state your full name?

BISHOP CURTIN: Terence Robert Curtin.

MR FREE: Bishop, you are the Chair of the Australian Catholic Bishops Conference Commission for Doctrine and Morals?

BISHOP CURTIN: I am.

MR FREE: Can you explain what that involves?

BISHOP CURTIN: The conference has a number of commissions which I guess in other language would be referred to as committees, and they are deputised to carry out various needs of the conference. In relation to doctrine and morals, there are four of us, and we act as a kind of body where people - the bishops themselves - can refer various things to us to look over a document. It may be there are some issues, the use of an authorised translation of the Bible or not, that again is referred to us to follow up what might be involved in that.

MR FREE: The practice of applying the sacraments, is that something you would give advice on?

BISHOP CURTIN: Only if that question is raised to us. It would be more in the light of - there's a Commission for Church Life, they might have some statement they wish to make, and they would have us look over it before it goes out.
MR FREE: Bishop, by way of introduction, can I ask you to explain, as you have done in writing, but for the benefit of assisting the discussion today, what you have described as the four essential parts of the Sacrament of Reconciliation?

BISHOP CURTIN: Certainly. For the sacrament to be properly celebrated, the requirement is, first of all, that there be contrition, genuine sorrow for one's sins, which is essential for forgiveness; that there be confession, so contrition, confession, the telling of one's sins in order to be reconciled with God and the Church. The Second Vatican Council made clear that reconciliation wasn't just between the penitent and God but it also involved being reconciled with the Church. And then that requires then that whatever has separated the penitent, in their awareness of their life where they, through sin, have turned away from God and Church, then that must be confessed as part of seeking that forgiveness. And one would look for an integral confession in that way.

Then there's what is called satisfaction, which is the act of penance, which is where the inner conversion of heart then extends out to the community harmed by sin, and traditionally it takes three forms: prayer; it can also be self-denial; and also service of neighbour. And that is determined in discussion with the priest confessor to whom the person is confessing their sins.

Then finally, on the basis of that, absolution is given, the forgiveness of one's sins, where God meets the penitent's confession which has been brought to the Church, which is represented by the priest confessor, and now then that forgiveness is effected, God's forgiveness is effected through the sacramental sign.

The language that the priest uses reflects the understanding that it is God who forgives and the priest then acts as the instrument for that forgiveness. The priest does not say to the penitent, "I forgive you"; the priest says, "I now absolve you from your sins."

MR FREE: Thank you. I'll ask some questions of the panel generally a little later about some of the interesting suggestions that have been made about conditions that a confessor can effectively impose on absolution.
Can I ask, just at a general level - and this is again to you, Bishop Curtin - is it inherent in the sacrament that all of those four steps occur at the one time, in the one conversation?

BISHOP CURTIN: Not necessarily. So if you have the situation, as we've already seen in papers that have been submitted to us, where someone, in relation to abuse - that therefore the priest confessor would then require of that person that there must be some sign of what is headed under "satisfaction" but, indeed, to seek some way in which to make real what that remedy might be, which would be that the priest confessor would say to the person, "I cannot give you absolution until you come back to me and show me that you have actually reported yourself to the police and have indeed" - and you could also suggest counselling, but reporting to the police could be a condition placed on the giving of absolution. That recourse expects that the person making the confession is genuine about what they're on about.

I was thinking of the case of Father Phil O'Donnell, as he then was, being faced with Father Gannon trying to shut him up by coming, when he became aware that Phil had been told of what he had been doing and therefore appeared to him the next day and confessed what he had done and then as he walked out turned around and laughed at him, and I think Phil's reaction to that was that the man was trying to use the form of the sacrament to shut him up.

If I became aware of that situation, I would have no hesitation in reporting it, because, to me, that's not the sacrament at all. That person has not been there for the purpose of forgiveness of sins; they are trying to use it for something else.

THE CHAIR: Does the confessor have the capacity to refrain giving absolution until they are satisfied that a report has been made?

BISHOP CURTIN: Yes, yes, you could set that condition there.

THE CHAIR: You could?

BISHOP CURTIN: Yes. That's the judgment of the confessor then to do that.
THE CHAIR: Yes, and the consequence would be if the condition was not met, the confessional process has miscarried?

BISHOP CURTIN: Well, it just means it's not complete. The person has not fulfilled what was there and, therefore, does not receive absolution and the forgiveness of their sins. The assumption in all this, of course, is that the person is really and genuinely seeking forgiveness for their sins.

MR FREE: Bishop Curtin, I might come back to that example you gave of the evidence that Phil O'Donnell gave, and the concept that you have just introduced of essentially an invalid attempt to invoke the sacrament.

BISHOP CURTIN: I could parallel it with a wedding where the person professes fidelity, "I love you and honour you all the days of my life", but in fact is already conducting an affair somewhere else. The form that is celebrated at the time is indeed of a marriage, but in the eyes of the Church that's not a sacramental marriage because, indeed, the consent that is required for that sacrament is not there, because that consent involves also the commitment to fidelity and what has been professed in the words used.

MR FREE: So in the context of marriage, is that something that's dealt with through annulment?

BISHOP CURTIN: Yes, it is.

MR FREE: I'll come to the seal in a moment that applies to the Sacrament of Reconciliation, but is there a concept of annulment, either formally or informally, with other sacraments?

BISHOP CURTIN: No.

MR FREE: It's unique to marriage?

BISHOP CURTIN: The annulment is a statement that that marriage, that sacramental marriage, never came into existence because something was lacking in the consent given between the two parties.

MR FREE: Thank you. Just to introduce the concept of the
sacramental seal, which is dealt with in Canon 983,
Father Brennan, could I ask you please to explain how the
seal operates and what is forbidden by the canon?

FATHER BRENNAN: Sure, but Father Waters is here, who's
a canon lawyer, so he might correct me if I err.

Basically, as I understand it, it's that if you have
someone who confesses a sin, then you cannot disclose that
sin. And, also, if the penitent provides you with
information, you are not to use that information to the
detriment of the penitent. That often occurs in situations
where the one who might have heard the confession may be in
some position of authority within the Church community or
whatever. They're not allowed to rely upon detrimental
information that they receive only in the confession.

So I think probably for the public, and particularly
for those who are not Catholic and for whom this seems
something of a parallel universe, it's important to point
out that, at least as I understand it, the seal of the
confession is talking about whether or not something which
is confessed by a penitent can be revealed.

My understanding of it as a priest is that I cannot
reveal that which is confessed by a penitent.

Maybe to give an example in the present context, if,
for example, a child in confession said that they had been
violated, then of course the child is not confessing a sin;
the child is providing information, which I would view as
being able to be used in exactly the same way if it were
being said outside of confession.

So I think, Mr Free, some of the public talk about the
seal of the confessional has been overblown by those who
don't appreciate that distinction.

MR FREE: Can I just ask, on that example of the child, if
it is a child indicating in the course of - assume for this
purpose - what is otherwise in the Sacrament of
Reconciliation, so the child is confessing other sins, but
makes reference to being the victim of abuse, if I'm
understanding you correctly, Father Brennan, you say that
the seal does not operate to require confidentiality over
that information which the child has conveyed?
FATHER BRENNAN: Yes, but could I just say what one would do with that information I think would then be critical in pastoral terms and psychology in terms of dealing with the child. Now, there are others much more expert on that than me. But I would think - like, for example, if it were in a school context, then I think if I were a priest and a child had confessed this, or said something about this, then immediately I would consult with the school principal or something like that.

MR FREE: But in terms of the operation of the seal, you have no doubt that that information is --

FATHER BRENNAN: No, I would not see disclosing that information as an interference with the seal.

MR FREE: Bishop Curtin, if I'm reading what you have said in writing correctly, you might take a slightly different view of that; is that right?

BISHOP CURTIN: No. Perhaps for those present, what I wrote was that if a child confessed - or, no, spoke of this in the context of the sacrament, that given the seal - this is what I wrote at the time - I was of the opinion, which I've changed, that therefore I could only encourage the child and say, "Look, who do you find it easy to talk to?", and then urge the child to go and speak to someone afterwards.

Why I spoke in that way was I was thinking back to when I first began as a priest - and it's some 45 years ago - early in the piece, having a youth group, and we had celebrated the sacrament, and I can remember coming out afterwards and talking to them and that, they were young people, and I made a comment to one following up on a comment they had made about the weather, and that immediately got a reaction from this young man, who said, "But I thought anything said there could not be said elsewhere." That made me become more cautious or just think, oh, whatever's said there, I have to keep in.

But if I think of my own theology, the confession of sin is what we're talking about in terms of forgiveness. The child is not talking of any sin that they have committed. In fact, if one was discussing such a thing with a child, we would have to perhaps try to work through that with the child if in any way they felt that they were
guilty of something, because sometimes in that sort of situation - well, I think we've seen it - the priest can make the person almost feel complicit.

Therefore, as Frank was saying, in the same way, I would think that what is not within the bounds of the person telling their sins and seeking forgiveness, well, then, that stands outside and could be properly treated elsewhere.

FATHER BRENNAN: Could I add to that. I don't think there's any problem in saying that you have a strict reading of the seal, but then you have a usual rule of thumb that you won't reveal anything you've heard in confession. But there may then be an extraordinary case where a child reveals something like this.

MR FREE: Can I ask the other members of the panel whether, focusing on the question of the seal strictly rather than good practice of maintaining confidentiality, anyone has a different view about how the seal would operate in that kind of situation?

FATHER McNAMARA: I think I'd make a distinction between - and I agree with what has already been said so far, but my concern is the overlap between the theoretical distinctions which have been made so clearly already and the culture in the Catholic community, which sees a very clear delineation of what goes on within the confession as sacrosanct and therefore not to be revealed. So there's the issue of the pastoral knock-on effect of some of these distinctions in practice.

So I'm a bit uncomfortable - while I accept the intellectual distinctions, I'm not that comfortable in terms of how it's perceived within the community, which sees the inviolability of the seal as being sacrosanct.

THE CHAIR: Do you mean to say that laypeople confessing would see the seal as being a tighter bond than perhaps all of you, experienced in the matter, would see it?

FATHER McNAMARA: I think that's the culture that has developed. Of course, we have to realise that the pre-eminence of personal confession originates with the new disciplines from the Council of Trent in the 16th century, and then the cumulative practice of that, particularly when
we grew up, of monthly confessions and all of the sort of
cultural practices over those times, have reinforced this
perception, which of course is somewhat different,
I suggest, to the distinctions that have been made thus
far.

COMMISSIONER MURRAY: Father McNamara, is that
understanding of yours affected by what may be a level of
ignorance - and I don't mean that unkindly - on both the
confessor and the child? For instance, we in the Royal
Commission have heard from many thousands of victims of
these crimes and we have a concept of both impact and of
current danger, and it may be that the confessor would not
understand impact - the disclosure might be indirect or
limited - or they might just not understand impact at all,
and the child may also not understand the impact that's
likely to occur if these activities continue. And of
course there's then the issue of current danger to other
children.

So from the perspective that you've just outlined,
which is very understandable, do you think greater
education of these matters for confessors would be of
assistance in making judgments in those circumstances?

FATHER McNAMARA: There's an assumption in this that the
practice of coming to the Sacrament of Reconciliation is so
general that these cases would appear. I've been a priest
now nearly 47 years and have not had one case, and I think
Frank mentions that in his article.

I think the assumption - and I have some difficulty
with this. This is not an issue in terms of the normal
practice, I think, and one can only judge that from the
anecdotal evidence of other priests and talking with them.
So the issue of impact and all of that I think stands
outside the confessional practice.

COMMISSIONER MURRAY: If I could just continue quickly.
Father, I asked you the question with evidence in mind. We
have been told in public hearings by very experienced
members of the cloth that they didn't understand or realise
what was being said to them, so they actually had no
realisation of the indirect communication that they were
receiving or that sort of thing. So it's quite possible,
in your own lifetime, or that of Father Brennan, you might
have heard something from a child and not completely
understood it, which is why the issue of education is important, in my mind.

FATHER McNAMARA: And I think you raise an issue that we had commented earlier on in the day privately, that where the areas particularly of sexual behaviour are involved, there's a sort of set of code words about behaviour that could have either superficial or deeper meaning in terms of the moral act, and in that sense it could be missed by the confessor, so your point is well made.

I think there's also a way in which the degree of maturity of the person who confesses - whether their words convey the reality of what has occurred, and there's a set of words, sometimes, that people use that could range from something extremely serious to something quite superficial. So that could be missed, using your point of view.

MR FREE: Father Brennan, just on that point, you have written publicly, in the article that was published in The Australian some time ago, that the notion of the maintenance of the seal over the Sacrament of Reconciliation is a furphy or a red herring when it comes to the story of child sexual abuse and the Church's failings in that regard. Is that based on the same empirical notion, that it is so infrequently disclosed in the confessional as to be negligible?

FATHER BRENNAN: Maybe I might address it in this way - I mean, we've all been confronted with these horrific statistics about the Catholic Church. You as a Royal Commission put the spotlight on the Church, quite rightly. You ask, well, why are things out of kilter in the Catholic Church? You look at those things which are distinctively Catholic, particularly those which might look a bit weird to those who aren't Catholic, so you draw up a list of those things, including confession.

Now, it seems to me that where we're all on the same page is, right, we want to get this right in terms of the future protection of children. Now, with the seal of the confessional, yes, when I was rung by The Australian editor and asked to write an article about this, I reflected, as I suppose we all do, on our own limited personal experience.

One experience I had was that, yes, no-one had ever
confessed paedophilia to me. But, as I said to you at the morning break, Mr Free, your Honour Justice Coate, I gather, held a private session with a woman who wrote to me overnight, just last night and this morning, pointing out that she came from a family where her father was a serial abuser and that she had a very useful session with you talking about what had happened, and you've asked me not to disclose the names, although the woman was quite happy to have the names disclosed. The father is now in gaol, and it's understood that, indeed, he was a serial abuser.

Now, the issue this woman raised with me, which I had never considered before, is that he was one who regarded himself as Catholic and went to confession regularly and went to priests who very readily forgave him, with what we might call very cheap grace, and that he somehow felt vindicated in that and then went on to further abuse children in that family.

To me, that is an absolutely shocking and appalling thing. What I'm saying is, all right, given there would be cases like that - which, as I say, I was completely unaware of until last night and this morning - the question is how can we improve the Sacrament of Confession so as to avoid those sorts of problems?

One of the questions has been about the seal of the confessional, and this is where, with respect, I've said that I think it's a red herring.

To my mind, the question has been trying to imagine who is the sort of person who will present in confession and confess paedophilia, where they wouldn't admit it anywhere else?

Now, it seems to me that if the law takes away the seal of the confessional, then that paedophile knows that when he walks into the box, he's in the same situation as if he talks to anyone else in the street and says, "I am a paedophile" - that there will be a duty to report.

What I was saying was that in 31 years as a priest where there is the seal of the confessional, no-one has come and confessed paedophilia, and looking at the wellbeing of children, I ask myself, if you take away the seal of the confessional, is it any more likely that anyone
will come to confession and confess paedophilia?

THE CHAIR: There might be another component to that, though, father, because the confessional - and I'm not a Catholic, but, as I understand it - provides for absolution, reconciliation, by the penitent. So as an outsider, although what you say may have some force, nevertheless the assumption must be that the person making the confession believes that they will be in some way benefiting from the reconciliation that follows, and it's that offer made by the Church which I think you might find the general public might have some problem with. Do you understand the point?

FATHER BRENNAN: I do, and, with respect, your Honour, that's the very point that I think the woman raised with me in relation to the private case with Justice Coate. All I'm saying on that is, all right, let's say we agree, let's legislate to take away the seal of the confessional. What will be the result of that? The result of that will be that that person will not present for confession.

Now, I'd readily concede that in this particular case, from what this woman said to me about her father, that would be something which would be of benefit for that family. But in most other cases that I could imagine, all that would be achieved by taking away the seal would be ensuring that most, if not everybody, would not present for confession.

THE CHAIR: Father, what you might then have is a benefit for the abuser but absolutely nothing for the child; do you understand?

FATHER BRENNAN: Well, against that, your Honour, I would put - and here once again we're in the theoretical and speculative - there may be the occasional paedophile who does display all the contrition and all the rest that Bishop Terry talked about, who, coming and presenting, sees it as the first opportunity in life to completely unburden, and then go and report and then be brought to justice, and then if the seal is not there available, the opportunity for convincing that person is taken away.

THE CHAIR: It may be that we need to explore the prospect of the priest not offering absolution until the priest is satisfied that report has been made. Now, I take it at the
moment that wouldn't be the case, necessarily, but that
might go part of the way to dealing with the issue that's
in the public's mind.

FATHER BRENNAN: It might, and as I say, from my own
experience, I'd never had a case, so when I was asked to
think about it, when asked by The Australian to write an
article, I thought to myself, well, I think I would
probably give absolution conditional on reporting being
made.

THE CHAIR: What I'm suggesting is that you don't give
absolution at all until.

FATHER BRENNAN: Sure, and I think that, your Honour, may
well be very good pastoral and theological practice.

THE CHAIR: Of course, the Irish have a different
experience and legislated in this space, and apart from the
experience you've had, we have had other experience of
priests in Australia confessing to other priests and then
moving on to continue abusive activity. Your experience of
the last 24 hours is not unique.

FATHER BRENNAN: Sure.

MR FREE: I'll come to the question of conditional
absolution and other responses aside from legislating to
take away the seal, if that assists.

You may be familiar with the research of
Dr Marie Keenan, which was referred to in the opening of
this hearing a few days ago. Dr Keenan has carried out
research involving perpetrators of sexual abuse, and in her
own case study, eight of the nine perpetrators had in fact
made confession at different points.

So assuming that it at least occurs, and putting to
one side for the moment how frequently it occurs, I want to
ask you all some questions about the appropriate response
of a confessor to a penitent who turns up and confesses the
carrying out of abuse.

Father Grayland, can I ask you, please, to summarise
what you've said in writing about the characterisation of
private sin and public sin and how that might assist the
approach in this area?
DR GRAYLAND: Yes, sure. Tena koutou. I'm very happy to do that. Very briefly, the general understanding within Catholic theology is that sin is individual and private, so if you and I were to do something together and plan murdering someone, we would still individually have sinned. We can't sin together.

So there is a huge emphasis that comes through, I think, in the way in which the Sacrament of Reconciliation is practised and understood, with an excessive individualism.

So when it comes, then, to the concept of public sin, I think it's reasonable to say that the Church's understanding is evolving, slowly, but it is evolving, into the sense that there is something greater than an individual's action; there is actually the sin of the community.

An Australian example could be the historical treatment of the indigenous first nation of Australia. We've dealt with this as part of the reconciliation within New Zealand and the indigenous Maori people. As you go through that, then you begin to understand that the sins of the settlers are actually then enshrined in laws and practices and attitudes and opinions, and even this morning, I believe, in the news, Reconciliation Australia has brought out information as to the racism within the country and how it's perceived.

So when you begin to look at all of that and begin to interrogate it theologically, then you have to understand, I think, how sin is constructed, what it means, what it means vis-à-vis law, moral law, et cetera, and then to understand how it may be enshrined or concretised in the structures of government, et cetera. I hope that's brief enough.

MR FREE: Thank you. What is your own view, Professor Grayland, about the appropriate response in the confessional to a penitent who presents with a confession of perpetrating sexual abuse?

DR GRAYLAND: Just a point of clarity, I'm not a professor.
MR FREE: I'm sorry.

DR GRAYLAND: I've always wanted to be one.

I think it's very simple - and perhaps I'm lucky because I have the ability to make this comment in the light of everything that has happened in Australia and in New Zealand and around the world. If somebody were to come in and to say very clearly, "I have sexually abused a person", legally and morally, et cetera, then the answer for me would be very simple, "Go and show yourself to the police, and once you've done that, come back and we can talk about reconciliation." And, if necessary, I'd go with them.

MR FREE: Have you had any personal experience with, not necessarily child sexual abuse but confession of sins that are, in effect, crimes and having that kind of response?

DR GRAYLAND: No. Luckily, no.

MR FREE: Could I ask any other members of the panel whether they've had personal experience with applying that kind of condition?

(Members of the panel indicated no.)

THE CHAIR: Is your experience that people may come and confess criminal activity which may not be sexual abuse - do people do that?

DR GRAYLAND: My experience is not criminal activity but of serious matters that involve relationships and fidelity in relationships that should not be broken.

THE CHAIR: I can understand that, but no-one comes and says, "I stole some money" or --

FATHER McNAMARA: Yes, I was going to mention that, that people have embezzled, and then the issues of restitution become significant.

THE CHAIR: So you deal with that through the reconciliation process?

FATHER McNAMARA: Yes.
THE CHAIR: They'll come in and say, "I've taken some money that I shouldn't have"?

FATHER McNAMARA: Yes.

THE CHAIR: Have you all had that sort of experience?

FATHER BRENNAN: Yes.

DR GRAYLAND: Yes.

COMMISSIONER MURRAY: I want to ask you specifically about people who come to confess, particularly children, who assume they have sinned but have not, and I ask you deliberately in the context of the large numbers of reports to us of children, now adults, who tell us that what they felt was shame, guilt and embarrassment but that they took the blame for what happened to them upon themselves. In the religious context, it is often because a man of God - not always just Catholic, I might say - represented themselves as carrying the mission of God and put the blame, the fault, on the child, and the child assumed that fault.

We're then told in private sessions that that child went to confession believing they had sinned and told the priest, confessed to a sin which wasn't their sin, and in some cases discovered afterwards that that confessor had blurted out to the predators what they had been told, and they were punished for speaking up.

This is not uncommon in the information that has reached us, but I would suggest - well, I would ask you whether it's reasonably common, in your experience - for instance, a person might have sexual thoughts, which is not a sin, but might come and say to you, "I'm worried that I'm having these thoughts." Have any of you come across situations such as I've described, where a child has been molested and has taken unto themselves the blame and has come to you and confessed?

BISHOP CURTIN: I've never had that experience.

FATHER BRENNAN: Never.

THE CHAIR: I suspect that where that may have happened - and none of you may have had the experience - is
particularly in children's or boys homes, where there was a ritual confessional process and, as you probably now realise from what we have revealed, there were sometimes horrific levels of abuse, both physical and sexual.

MR FREE: Professor Waters, could I ask you to comment --

FATHER BRENNAN: Could I make one further observation, and there are others here with more pastoral experience than myself, but as I wrote in that article, I mean, I help out in quite a big parish in Canberra on weekends, but when doing confessions on a Saturday evening I can count on the fingers of two hands, and usually one, the number of people who come to confession, and they ain't children.

So what we're talking about in terms of contemporary practice in Australia in 2017 I think is probably very different from what went on in the 1960s, 1970s, or whatever, where you had the kids being lined up in droves. I mean, I remember when I was a kid, I was one of seven kids and we were taken out to confession every couple of weeks or so. Now, it just doesn't happen nowadays.

MR FREE: What about as between priests, Father Brennan? Is it still usual for priests to confess regularly?

FATHER BRENNAN: Well, I'm sure for some priests it is. I mean, I'll just be personal, anecdotal. I would confess probably only a couple of times a year, and the most significant time for me of confession would be at what I would call a general confession during my annual eight-day retreat. Yes, I find it spiritually a very significant part of that retreat, if you like, in putting my life back together and working on in the year ahead.

Now, I readily concede to those who aren't Catholic, or whatever, they say, well, we can live perfectly well without that sort of thing. All I can say is I'd be a much more egregious person if I didn't have that sort of sacramental life, minimal though it be in terms of degree of repetition.

MR FREE: Can I ask the rest of the panel whether any of you have views about whether priests themselves still regularly confess or whether the practice has changed significantly in that regard?
DR O'LOUGHLIN: I think the whole practice has changed in the last 40 to 50 years. Penance has a very differing history in different periods, and we're entering into another period of change now, which is parallel to other cultural periods in the history of the Church when it has changed.

The personal confession, for instance, arose at a period in western history when there was much greater emphasis on the individual as individual. So, in a way, that one-to-one confession fits that cultural situation in a way that was different in earlier forms, but I think that whole thing is changing again.

As Joseph was saying a while ago, there is a different concept of sin abroad and a different image of God. I think all of these things are in fact changing, and that applies not only to the people but to the priests. I would agree more or less with Frank when he says it would be during my retreat each year and perhaps at Easter, or something like that, but it would be twice a year at most.

THE CHAIR: Gentlemen, could I cut to the chase, perhaps, and, Father Brennan, I'm conscious of this discussion which you've aired in the newspapers, and you may have gathered you didn't need to remind me of it.

FATHER BRENNAN: I gather that's why I'm here, your Honour. I'll be very careful about requests from the Murdoch press in future.

THE CHAIR: No, go ahead. There are two issues that come to mind now in this context. We, as you know, are charged by the governments of the Commonwealth and all of the states with making recommendations to do what we can possibly achieve to make it safe for children going forward. We have not made up our minds about any of these issues, but can I explore them from the question of what you would accept is within our authority to make recommendations about.

If we were to recommend that through the appropriate process, all confessors were to be instructed that they were not to give absolution to someone who confessed a sexual crime against a child until they were satisfied that that person had reported to the police, would that be something that you would see as within our authority?
FATHER BRENNAN: I myself would see it as a fundamental interference with the usual separation of church and state. But subject to section 116 of our constitution, yes, these things can be done, particularly by state parliaments, should they be minded.

THE CHAIR: Yes, it could be done. Does that carry with it, though, an assumption that we would have the authority to make such a recommendation?

FATHER BRENNAN: I think you would have the authority to do it. Whether it would be prudent to do it in terms of maximising the prospects both of the acceptance of your recommendations and of your recommendations being seen to be universally applicable to all, regardless of religious affiliation, I think that could become politically problematic.

THE CHAIR: We'll have to gauge that.

FATHER BRENNAN: Sure.

THE CHAIR: Does anyone else want to comment on that question?

DR GRAYLAND: If I may. I think, your Honour, what you would have to do before you do that is go and investigate theologically the liturgical structure of the Sacrament of Reconciliation. What I would say as a liturgical theologian is that this morning we listened to a way of understanding the Church which is a juridical way, whereas I would say that it's the wrong path because canon law is not theology. It can use a theological basis, but in order to understand the sacrament, you need to delve into it theologically at the level of its ritual and the understanding of its liturgical purpose.

So if you were to go in and then to legislate that the seal was now consequential on certain things, or the holding of it, you would still again be approaching the problem from a juridic point of view rather than actually approaching the Church from a theological point of view because I would submit that to understand the Church, you need actually to engage with her/it/us theologically, because it's at the level of our theology that we have fallen down, and our juridic structure around that has also
consequently fallen down. But we're coming to what is 
essentially a very small aspect, if you like.

If you look at it liturgically, theologically, the 
seal could be understood to begin as soon as the liturgical 
greeting has been given by the priest and received by the 
penitent, and so anything under that seal could be given.

When you're looking, then, to say, okay, what is 
inviolate under that seal, is it all of the conversation 
that takes place? Is it only those things that are the 
sins of the penitent there, therefore excluding the 
information they bring in about somebody else? So I would 
say that the difficulty with asking the question is that 
the starting point is legal, not theological, and therefore 
may be wrong.

THE CHAIR: Except, as Father Brennan says, you only have 
to contemplate, subject to what the High Court might say, 
the intervention of the civil legislature by making a civil 
law and imposing that law on everyone. You can do that 
without understanding, indeed even appreciating, the 
theological foundation.

DR GRAYLAND: Except I would question that, to the extent 
that the Royal Commission is probably engaged much more in 
a theological task here than maybe even it realises or that 
the Commonwealth gives it permission to have, because 
you're in the process of changing the mindset of the Roman 
Catholic Church and, in that, you're changing the 
theological basis and you are in the process of that 
evolution.

THE CHAIR: Can I just expand the discussion to make it 
even more fraught. If we were to recommend that the 
obligation to report includes an obligation on a priest to 
report when a person confesses to a sexual crime against 
a child in the confessional, first of all, would it be 
beyond our remit, do you say, to make a recommendation in 
those terms?

DR GRAYLAND: I'm not an Australian, so I can't answer 
that.

THE CHAIR: Father Brennan would probably have a view 
about it.
FATHER BRENNAN: I do. I don't think it would be beyond your remit, and if parliaments were minded to pass such a law, could I maybe just outline what I think then would be the options for Australian citizens like myself or a Catholic priest?

The option would be to say, "I will no longer hear confessions", and that may cause concern with the local bishop, or whatever, or, "It is to be understood that when I hear confession, I will breach the seal of the confessional, despite what canon law says, in particular instances", in which case the bishop would be entitled to strip away my faculties as a priest. Or I could say, "In good faith I, as a citizen, make it clear that according to the philosophical principles of conscientious refusal, I will refuse to comply with that law, in the sense that I will continue to hear confessions where I will honour the seal of the confessional where I have confidence that, by doing that, there may be the prospect that, once in a blue moon, a paedophile will present who otherwise wouldn't."

As I have said, I am troubled by the instance that I heard overnight, but I would, if I may say, pride myself, unlike those priests who were in that case, there is no way that I would discharge the cheap grace which was discharged on those occasions, and definitely by the time such an individual presented the second time, there would be no way that any absolution would be offered.

So that, in good conscience, is as far as I have been able to take it in terms of trying to see how we can prudently amend not only the law but the practice of confession by priests so as to maximise the prospects of protecting children in the future.

As well, if I might add just one other element where I do think that for some Catholics there is a benefit of living in a society where they can confess, knowing that the seal of the confessional is kept intact, that it is something of the common good of the pluralistic, democratic society, and if that is a good that can be maintained without jeopardising children, then I say it should be.

THE CHAIR: That is the point, of course, of the debate, isn't it?

FATHER BRENNAN: It is.
THE CHAIR: Can you grant reconciliation to someone who has abused and still perform an effective or proper role in society?

COMMISSIONER FITZGERALD: Perhaps Professor Waters or Father McNamara might want to comment on that. In fact, Father McNamara started by talking about the expectations or the understandings of the Catholic population, and that's a very interesting position because even in this conversation, most Catholics would have absolutely no understanding of when and where the seal of confession starts and finishes, let alone the fact that there could be conditional absolution or any of those notions at all. Primitive Catholic like I am, I wouldn't have thought very much about that, either, nor have ever been taught that any of those things are possible. So I just was wondering --

PROFESSOR WATERS: I'll just make a few points. First of all, the canon - and I think it's Canon 980 - speaks about that at every confession the confessor must judge the dispositions of the penitent and then decide whether to grant absolution, refuse absolution or defer absolution. There's that possibility every time: grant, refuse or defer. Defer means postpone. The confessor says to the penitent, "Do this." If it's an anonymous confessional, because the canon law says the penitent has the choice to be anonymous if he or she wants to, and that means go behind a screen - if the person was anonymous, I think you would have said, "I shall be here at this time on this day in three weeks' time. It's now 11 o'clock on Saturday. You come at 11 o'clock in three weeks' time and tell me that you have done what I have asked."

Now, that may be to report to the police if the civil jurisdiction requires that. It may be to bring back a letter from a psychiatrist or a psychologist that proves that you have an appointment, are undergoing counselling or whatever other requirement that you have set. In other words, you're not refusing absolution; you're testing the person's disposition as to whether he or she is genuinely remorseful, sorrowful and prepared to amend his or her life. If he didn't come back in three weeks' time or two weeks' time, whatever date you set, that's an indication he is not prepared to do that.

I read Dr Marie Keenan's thing, and I would say I was
appalled by what I read there. I've never heard of
anything like that. But there was only one time, according
to the account, that the confessors challenged the person.
That's full stop.

New paragraph under the same point. The new paragraph
is talking about Catholic culture. I think penitents have
grown up thinking the priest is going to be compassionate,
like Jesus, and, no matter what is said, he will understand
and be forgiving. Now, perhaps that needs to be
challenged. Why has that happened?

In 1825, Pope Leo XII put out an encyclical letter making that point, that every time
a confessor hears confessions, and this is 1825, not 1925,
those possibilities of defer, refuse or grant absolution
were spelt out and there was an obligation on the penitent
to take notice of that. That was repeated by the
Australian bishops in the legislation of their plenary
council in 1885, again in 1895 and again in 1905. It was
then deleted from their next plenary council in 1937.

Now, we can guess - we could be here till midnight and
I could tell you a few things that have happened
historically, but it may mean that there was a change in
Catholic mindset and culture of being kind rather than, for
want of a better word, ruthlessly just, that the priests
were supposed to be welcoming rather than - so he wasn't
told not to deny or refuse. It was simply not mentioned.

Therefore, I think a lot of people would be slightly
shocked or set back if they went to the Sacrament of
Penance and found out that the priest was going to refuse.
Now, perhaps that needs to be looked at, addressed.
Perhaps that's a recommendation.

The second point I would make is that the seal applies
only to the sins of the penitent as regards the penitent.
So if a child came and told a story that he or she was
being interfered with by the scoutmaster or the teacher or
the priest or the aunty or the uncle, or whatever else,
that's not a sin of the child. Now, I have no problem
myself going and bringing that to the public authorities.

I know that some here perhaps may say that's against
the Catholic culture. A lot of people would be shocked
because they've grown up in the mindset that, "Whatever
I tell the priest will never be revealed." That's really child's language which is never translated into adult terms. There's nothing in canon law that has ever said that will never be revealed. It's the sin of the penitent that may not be revealed by the confessor.

The third thing I would say - and I'll be getting a bit controversial now to some members of the Church - would be that I think over the last 100 years, we have been hearing confessions of children, whereas up until about 1908 children never received that sacrament until they were aged about 12. Now it has been lowered down to six or seven. I think that a child of six or seven is really - I have great problems, and whilst I lecture in a university, I've never been a primary schoolteacher, but I wonder whether children of six or seven can cope with these adult concepts.

THE CHAIR: The civil law rather suggests not.

JUSTICE COATE: I'm sorry, I'm not sure where that point goes.

PROFESSOR WATERS: I think if we trained children to the concept of confessing their sins and acknowledging sinfulness, we would have more chance with an 11-year-old or a 12-year-old than we would have a 6-year-old or a 7-year-old. Now, that's a matter of pedagogy. It's not a matter of theology. I just feel that and I wonder about that, and I wonder why the Church, this last century or since the early 1900s, has set the policy that children start confessing so young.

The fourth thing I would say is that there's a canon that says that a priest is not to be appointed a confessor by his bishop until he has been assessed as capable of being a confessor.

In my diocese - my home diocese is Melbourne - up until about 1968 or 1969, to be appointed a confessor in the Melbourne Diocese, the priest had to go for three consecutive years before the board of examiners of the diocese and be questioned on points of moral theology, canon law and so on. After the first year, he was authorised to hear confessions for a year. That happened after the second year, and then if he did well in the third year, he got the thing for life.
Since 1969, that has been one examination and it's never repeated. So there's no in-service, for want of a better word. And also I think the loops - and Bishop Curtin will be able to tell me what goes on. I'm not quite sure. I wonder whether priests coming from outside Victoria are ever put through any form of assessment before they are given the faculty to hear confessions by the archbishop.

BISHOP CURTIN: That I don't know.

PROFESSOR WATERS: But if that's not so, it could well be a recommendation that we expect in-service of our clergy in all sorts of other areas. And I wonder about whether these matters of moral theology, canon law and some of the things we're discussing here - how the average priest regards the seal, whether the average priest automatically thinks he must pronounce the absolution, how many priests would know how to postpone absolution or require that this happens before they give the absolution.

COMMISSIONER FITZGERALD: Could I specifically ask, in relation to that, what do you think would be the answer to that question if you were to ask seminarians coming out at the moment from the various seminaries around Australia? Would they have that same understanding that you have articulated? Would they have an appreciation that they can in fact reveal the abuse that has occurred to a child? Would they have the sophistication to understand when - and I must say, I still don't know - the seal of confession actually commences? In other words, would our young and not-so-young seminarians coming through have the understanding to which you've just spoken?

PROFESSOR WATERS: I've been in charge of that course since about the year 2000 in Melbourne, so for seminarians in Melbourne, that's a prerequisite to being ordained. That means any seminarian in Victoria or Tasmania who is educated in Melbourne - not the ones who happen to be educated overseas, but who happen to be educated in Melbourne - have to do that, and they would have heard that.

Now, like in any university, people can go to sleep, people can have their own preconceived ideas, people can skip class, and so on, but they would have heard anything
I have said today, and that includes seminarians from the houses of religious institutes, congregations and orders where the seminary is based in Melbourne. Not all are based in Melbourne.

I also lecture canon law sessionally in the seminary in Brisbane, so priests being ordained for the dioceses in Queensland since 2010 would have certainly heard me say those things. Do they take it on board? The young, modern, conservative Caucasian may not take it on board as easily as the Asian and the African.

COMMISSIONER FITZGERALD: That's a topic for exploration probably separate to that, and I think it will come up later on, but could I ask this question. Taking what Justice McClellan indicated about what the Commission might recommend, putting aside whether or not we would recommend that the seal of confession could in fact be broken - put that aside - it's very clear to most of us that there is now a lack of confidence in the Catholic Church, and part of that lack of confidence is a genuine misunderstanding of confession.

Notwithstanding that most of you, in fact all of you, have indicated that you have not had personal experience of this, to the world at large, confession is one of those dark parts of the Catholic Church which they neither fully understand but, may I say, the Church doesn't fully articulate to anybody, including its own people.

So if the public policy is that we want to have a Church, an institution, that is safe for children, people are going to want something from the Church, irrespective of whether it's legislated or otherwise, that actually says this is not a problem, not simply because we haven't personally experienced it but because we have articulated clearly a particular style of confession that is child safe, that does promote the best interests of the child, and, in this case, if the confession is not complete because the penitent refuses or fails to adhere to those conditions, then in fact that confession ceases, is invalid, and the question I then have is whether or not you can report in that circumstance.

So the question for all of you is how do you build confidence in the community, including in the Catholic community, that this particular aspect of Church has in
fact been reflected upon, is in fact child safe and advances the wellbeing of people that have been abused within our society, irrespective of whether or not ultimately we came to a view about a legislative intervention?

FATHER BRENNAN: Could I respectfully offer a suggestion that I think in your recommendations you should separate out what you might recommend in terms of legislative change, but then, regardless of what you might recommend about legislative change, recommendations directly to the Catholic Church as to how to proceed to correct certain evils and abuses that you have become aware of in the historic practice of confession.

To put it very bluntly, though most of you are not members of the Catholic Church, nor pride yourselves as theologians, you have been the de facto confessors of the nation on this particular issue now for four years. You have far more experience pastorally on these things than even all these learned professors and bishops I am surrounded by will ever have.

So what we need to hear is, all right, what are the genuine issues that have arisen in these private sessions insofar as maintaining the respect for the dignity of those who have made those private remarks? What publicly can be said in terms of patterns in confession where there have been problems and where the Church is put on notice that, "Pastorally and theologically, you have to come to terms with this"?

COMMISSIONER MURRAY: Father Brennan, you have put your finger on an option which is open to the Royal Commission and we are conscious of. We can, of course, make specific recommendations to any institution, not just to governments. The earlier panel put it quite succinctly. In summary, they said to us that Christian and Catholic teaching is congruent with the welfare of children, and the welfare of children requires reporting for the greater good, because of the tremendous damage done to children from incidents of child sexual abuse, and they were unequivocally in favour of reporting.

So the question, then, is what kind of reporting should arise from instances of a confessional? You have indicated already one area where reporting is perfectly
valid, namely, information reaches you which is not the
penitent, but it's the child, and you transfer that to the
child protection authorities or whoever.

We are looking at different kinds of reporting, those
which can be imposed, but of course it's open to the
Catholic Church to impose reporting as well.

FATHER BRENnan: Sure, but --

COMMISSIONER MURRAY: One of the things we would like to
be guided with, if we were to go the route you have put
your finger on, which is making recommendations to the
Church, is what kinds of reporting you think should be
obliged of priests in the confessional.

FATHER BRENnan: Well, you heard from me earlier. I've
defferred to your superior experience in what you have heard
in private sessions, but I continue to state what I said at
the outset, that my fear, in terms of looking at the
wellbeing of children, is that if you simply scrap the seal
of the confessional, then the prospect of a paedophile ever
confessing, I think, evaporates.

JUSTICE COATE: That's a personally held opinion of yours?

FATHER BRENnan: It is, yes, and I may well be wrong.

JUSTICE COATE: You now understand, at least from one
person, that there is evidence --

FATHER BRENnan: I do, yes.

JUSTICE COATE: -- to the contrary in terms of your
personal experience?

FATHER BRENnan: No. Well, no, what I understand from
that person, your Honour, with respect, is that the holding
of confession for that particular paedophile, where
forgiveness was given cheaply and regularly, resulted in
ongoing abuse.

What I don't know is whether even with that
paedophile - and I'm aware that you heard from the family
directly and I didn't, except with what I heard overnight
from the eldest daughter. What I don't know is whether, having taken away the seal of the confessional, that
paedophile would ever have presented to a priest.

THE CHAIR: I understand the spiritual dimension of this, Father Brennan, but in terms of the rest of human experience, you don't make any assumption - or do you - that reconciliation will in fact divert the offending paedophile from their conduct of the past, or do you?

FATHER BRENNAN: No, I do not presume that it would.

THE CHAIR: Well, then, where does it all go? If your concern is that they won't come and confess at all, why does that matter?

FATHER BRENNAN: Sure. All I'm saying is prescinding from anything to do with theology or pastoral care of that individual, there may be a small window of opportunity, which I've said I have never experienced, where someone, a paedophile, maybe later in their life wanting to be repentant, does come forward and there is the prospect for the first time in his life - and it's always a "him" - there's the prospect that through a spiritual conversation with the confessor, he will come to presenting himself to the authorities.

But if the seal has been taken away, there is absolutely no prospect of that. Or, to put it more accurately, the prospect of his doing that is exactly the same as his presenting himself to anyone else in the community. Now, that's the prudential decision for you to make.

BISHOP CURTIN: It seems to me also there's another dimension to it. I'm just thinking of that situation that Marie Keenan spoke of with the person coming back again and again. I would think on the part of the confessor, particularly since the Second Vatican Council, there would be concern not to turn the confessional into judge and jury, which is often a very frightening experience, and the penance was seen as a punishment and, "Kids, would you come outside. How many Hail Marys did you get?" In fact, your status went up if you got more than the others.

But if the priest doesn't want to go that way now, then it could well be with the person who is giving, for want of another word, a soft sell of their sins in their confession, there would be also a reticence on the part of
the priest to be prying into what exactly that means. That
might mean the thing then sails on without that person ever
being confronted with what it is that they're actually
doing. Of course, then, the question is for the priest,
his readiness in hearing the confession of the person who
has confessed to abuse, his willingness to engage, to say,
"Well, what exactly are you saying to me?", and then to be
able to name it for what it is and get the person to name
it for what it is. There would be that hesitance at times
to enter into that.

DR O'LOUGHLIN: Could I put something which is a bit
offside. Not all my confreres agree with this. There is
a tradition called the reserved sin; that is, some sins
can't be confessed to any priest. But to have that sin
forgiven, you have to go to the person nominated. Now, it
usually arose in a situation where some sin was seen as
particularly heinous, which this one is. It means that the
Church is being very serious about it and it means that you
can't get this cheap forgiveness.

I think that bears thinking about as a way in which we
might just go around this question in a manageable sort of
way, and it would certainly need more thought than I've
given it. In our initial discussion on the link-up
telephone line last September, we talked a little about
this, but it seems to me something worth thinking about.
It wouldn't be a bishop. It would need to be somebody who
is appointed to that position and who is trustworthy and
who could be particularly formed for that situation.

FATHER BRENNAN: As Father O'Loughlin knows, I strongly
object to this proposal, in that I think in the present
atmosphere in Australia, no matter what the goodwill of it,
there's us as Catholic priests talking about these things
and the perception would be: there go the Catholics again
trying to design something where it all depends on the
secrecy of a few clerics. I just don't think it can fly.
That's my two bobs worth.

DR GRAYLAND: May I just make a comment? I think the
other thing that's important is that there are a lot of
other people in the Catholic Church who aren't paedophiles
and that the seal of the confessional is important to them
for a variety of reasons. So I would fear that if the
Commission were to recommend and if the states and the
Commonwealth of Australia were to legislate that, in that
particular instance, mandatory reporting is in place, much the same as for teachers in New Zealand, then again you would have another problem within the culture of the Catholic Church more generally.

There would be a lot of people who would say, "I can't go to reconciliation penance any more, because the priest, if he is asked by the court, is going to tell them that I had an impure thought", or something, and that will be the whole beginning of a slide down into --

THE CHAIR: It would be legislated in a very confined space, though.

DR GRAYLAND: No, but it's the perception, sir.

COMMISSIONER FITZGERALD: Father McNamara, could I just raise that: what do you think the perception of the Catholic laity is as to these sorts of issues? Do you have a view as to what the Catholic laity thinks about confession, as it currently is, in relation to this? We know that the numbers have dropped hugely, and there's no indication that that's about to be reversed, but generally what do you think the Catholic population thinks about confession and these issues?

FATHER McNAMARA: I spent a couple of years going around the country doing parish missions. We would put seven or eight hours a day into listening and celebrating the sacrament. My sense is that the community's perceptions, up until recently, were basically the things that they learnt when they were children, and I think that has already been mentioned.

When we get to the area of sin, responsibility and confession, there is hopefully growth in moral maturity. What's a suitable age and all of those sorts of things have vindicated that question. But it seems to me that on the whole, many in the Catholic community have a relatively primitive position about the sacrament and it's just simply practised, if they're still doing it. It's not something that they give a lot of thought to.

So that's why, when it comes to the seal, I personally have a very cautious position that whilst I accept the distinctions being made in the course of this discussion, I have the problem that how it's perceived in the Catholic
community is that somehow we are now opening this seal up for other purposes, and I don't think that the community has come far enough along in thinking about it in that regard.

THE CHAIR: Even in the space of the sexual abuse of children?

FATHER McNAMARA: I think the community as a whole is appalled by that. I don't know that they make a connection that people who do these things go to confession.

THE CHAIR: No.

FATHER McNAMARA: That's an assumption. Certainly the evidence is that - well, there seems to be the suggestion that people who are truly abusing others don't see any necessity.

THE CHAIR: No, but it would be right to think, wouldn't it, that everyone, Catholics and everyone in the community, would hold the view, at least now, that we as a community should come together to do whatever we can to stop it happening in the future?

FATHER McNAMARA: No doubt about that, but they would see it mainly as the structures of the Church being marshalled to address the question. I don't know whether the whole issue of confession - this may not be the agreed position, but since the third form of the Sacrament of Confession was removed from the general practice of the Church, the use of the sacrament has plummeted. I might get one or two a week. So we're not dealing with it now as it would have been when we were in third class, in the 1950s or the 1960s. I think that's the issue. So I don't think that confession and the seal is something that's the issue. But certainly the issue - because we talk about it in the community, speak about it in the community, this is the stuff we have to take on the chin. This is where the community has failed.

MR FREE: I think Bishop Curtin has his hand up?

BISHOP CURTIN: We could be having this picture of the decline of the sacrament, but having gone on World Youth Day last year to Krakow, where you had two million young people arrive from all around the world, the sacrament was
very much celebrated during the pilgrimage that took
various groups there. It was carefully explained and
celebrated in the sense of a celebration, not only
a confession of your sins but also the confession of God's
love, and the young people really held to it, that there
was a whole teaching that surrounded that, it was
celebrated with music, et cetera, and it spoke to them and
they responded. It wasn't the austere sort of trot along
on Saturday morning to a deserted church.

COMMISSIONER MURRAY: Which lends force to
Father Brennan's point that any recommendation to the
Church of course doesn't just affect Australia and would
have wider applicability. Since this particular issue is
worldwide, there is some importance to that observation.

COMMISSIONER FITZGERALD: I know that Mr Free wants to get
on with it, and I don't want to disrupt it --

THE CHAIR: I think we all need to get on with it.

COMMISSIONER FITZGERALD: One issue is this notion in the
broader community's view, which is the false notion, but
I think it's very strong, that confession in some sense is
the end of the game and the notion of forgiveness rather
than forgiveness and consequences.

Could I just refer to a public hearing in relation to
the Salvation Army where a young lieutenant spoke about
grace. In the Salvation Army church, "grace" is a term
they use for forgiveness. Nevertheless, she said that what
the Salvation Army had failed to understand was that
forgiveness is fine - forgiveness by God, by Church, by
others - but there is a consequence for your action. One
of the issues that they struggled with in the Salvation
Army is that, in practice, many actually stopped at the
forgiveness and not the consequence.

Is it a possibility that in the Catholic Church, to
the wider community that same thing appears, that in fact
confession is about forgiveness, but what the community
doesn't see is that it's also associated with consequence?
Is that a problem in the way in which the world sees the
Sacrament of Confession in the Catholic Church, or am
I misunderstanding that?

FATHER BRENNAN: Well, I think consequence and what in the
old days you will remember used to be called firm purpose of amendment.

DR GRAYLAND: I would say that people don't see the consequence. When the reconciliation that somebody has engaged in is a pro forma reconciliation, "Go through the stages and then you're out", then the whole thing of the consequence is actually missed. The need for restitution and the need to engage in behaviours that change what led to that sin are not always there.

They can be there in a much more substantial form of the sacrament where time is taken and the liturgical rite is used not as a ritual but as a way of investigating the salvation needed by that person or the experience of grace that they need. So I would say there are different levels, and that depends very much on where you are and who you're with. I don't think you can legislate for it.

I think what you have to do is both educate the Catholic populace for that and, probably equally importantly, educate the seminarians for it as well.

THE CHAIR: Mr Free, have we covered all your issues?

MR FREE: Almost, your Honour. I notice the time. I'm very close to the end of the issues I wish to deal with. I probably only need another five or ten minutes. I'm conscious that we're keeping everyone beyond the normal time.

THE CHAIR: Mr Gray wants to have a go, too, I think.

MR GRAY: So far, not.

MR FREE: I think we're quite close to the end, your Honour, if I could indulge --

THE CHAIR: Then let's go to the end.

MR FREE: Bishop Curtin, could I ask you, please, as a matter of practice, if the Church identified, whether in response to a recommendation by the Commission or just through a process of reflection, that it was good practice for confessors to respond to any confession of sexual abuse by a perpetrator in the way that I think Father Grayland has outlined and that you might have seen in the Truth,
Justice and Healing Council's submission, details might differ, but essentially that absolution is to be withheld until the person demonstrates true contrition and satisfaction by reporting themselves to the police - if that was identified within the Church as good practice, is that something that could be directed as such to the priesthood and in a way that the public would understand?

BISHOP CURTIN: I think one would want to learn the lessons that are coming out of the work of the Commission and what has had to be acknowledged, which for many people wasn't before, and now seeing the extent of what was happening, there have to be things that the Church takes on very seriously, and part of that would have to be how are we approaching the sacrament and how do we celebrate it, and in what way, then, can we be sure that the sacrament does not contribute to enabling people to continue what they're doing or, indeed, put young people into an experience of a feeling of guilt, when that should not be there at all.

MR FREE: Would that be achieved through the Bishops Conference?

BISHOP CURTIN: I would think there could be directives from the Bishops Conference that would then come forward to be taken on by the dioceses, because obviously the bishops can have a joint agreement, but also each bishop in his own diocese can make particular provision for how that's to be done. One would hope that in the kind of course that is done, say, with Professor Waters, those matters are handled there as well. It cannot be the old way.

MR FREE: On a related point, you understand that one of the issues that we've asked you to address and that has been addressed in your various submissions is dealing with the more practical question of how is the sacrament administered to children in a way which is safe and avoids any risk of what can otherwise be a quite intimate environment.

The response indicates that practices seem to vary quite widely. There are varying degrees of attention to, for instance, maintaining open line of sight or doing this in an open part of the Church. In some places, it seems it's done behind doors but doors with a glass panel. If there were thought to be a need for a uniform standard in
that regard, what would be the way of achieving it?

BISHOP CURTIN: The way of achieving it would be, and would have to be, I imagine - one would want some discussion by the Bishops Conference. "Okay, we've heard the Commission. Here are the results. Here are the recommendations. What now are we going to do?" And then something has to be done. It can't just sink below the waves as though nothing has happened. That would be the worst possible thing ever.

MR FREE: Thank you. Professor Waters, just to return to something we touched on right at the start, and this was a suggestion, I think, that emerged from something the bishop had said: if someone presents for what has the appearance of a confession but does so with no honest intention or contrition to seek a sincere confession and reconciliation, is it accepted generally as a matter of canon law and theology that the priest is entitled to form a judgment that that's not a true sacrament and therefore the seal doesn't apply?

PROFESSOR WATERS: I believe he would. You may have seen the film Calvary a few years ago, set in Ireland. It started with a Hollywood-style hearing of a confession, where a man came in and made threats to the priest about what he was going to do, and the next scene showed that confessor discussing this with his bishop.

Now, a number of my parishioners, in discussing this with me, said he was breaking the seal of the confession. There's this naive, childish thing that anything said within the confessional room is bound by the seal. The Church has never taught that, but that's the naive, inaccurate perception of many. It needs to be made quite clear that it's only the administration of the sacrament where the seal applies, and it applies only to the sins of the penitent.

Now, some people could go into a confessional using it as a safe counselling room. For example, if a child came in to me without making any attempt to make a confession but had been told by an adult, "If you go and see the priest there, he will never reveal anything", I think my job is to counsel him to go and tell a responsible adult or even offer, myself, to take him to the responsible adult and tell him also that this is nothing to do with the seal
because you haven't come to me to confess your sins; you've
come to me to tell me about someone else's sins, and that
has never been under the seal.

That's a widely held misconception, and unfortunately
these days the only image we ever get of confession is what
we see in Hollywood films or not even films - what do you
call them? Serials and so on. Neighbours or something
like that.

THE CHAIR: Not television documentaries.

PROFESSOR WATERS: Not serious documentaries, no.

MR FREE: Your Honour, I have no further questions, but
I'm conscious that I may have overlooked anyone who might
have had any outstanding points. Do any of you have any
further contributions you wish to make?

DR GRAYLAND: If I may, really quickly. I think one of
the problems or the issues that you are facing is how do
you go about reconciling all of this that has happened in
Australia to both the Catholic people in the parishes who
have been victimised by it, to the victims themselves, and
then wider to the people of Australia? What restorative
justice processes are you putting in place and considering?

So I did bring one, which is a Samoan one, and I won't
bore you with it. It's called Ifoga. So there are
examples around the Pacific, and there may even be for the
indigenous first nations of Australia, of some process that
you can use whereby the Church is taken, by the Commission
or by the people of Australia, through this process of
contrition, confession, satisfaction and absolution.
I think those are important.

JUSTICE COATE: Some might call that a Royal Commission.

DR GRAYLAND: Yes, exactly. I think you are acting, as
Father Brennan previously said, as confessor to the
Catholic Church and you are in the process of influencing
the theological perception that the Church has of itself
and its weaknesses around the way that it has dealt with
its own theology, with its own gospel.

The other thing I would say is that from a liturgical
point of view, to protect children, it is possible and it's
not unreasonable to require of the Catholic Church in
New Zealand that the preparation of the Sacrament of
Reconciliation is moved until a period after the children
have received baptism, confirmation or chrismation and
eucharist, whenever that may be, so that could be
a requirement of the teenage years. I'll leave it there.

THE CHAIR: Father, it's important for us all to
constantly bear in mind that we are a Royal Commission into
many organisations, not just the Catholic Church.

DR GRAYLAND: Yes, I understand and appreciate that, but
I do see what you're doing. Thank you.

JUSTICE COATE: Could I just clarify one thing with you,
Father Brennan. It goes back to the issue of the child or
young person inside the confessional, to use the generic
language. As I understand it, what you say is that the
child who is making a disclosure rather than a confession
is not a penitent in the model inside your Church --

FATHER BRENNAN: Yes.

JUSTICE COATE: -- and therefore not covered by the seal
of the confessional. What I'm just not clear about is
therefore what you would do, and not only you, but your
expectations of what the confessor would do, in the
circumstances where such a disclosure is made?

FATHER BRENNAN: So eight-year-old Sally presents and
says, "I stole jelly beans, and daddy did something naughty
to me." I am not at liberty to disclose to anyone that
Sally stole the jelly beans. But in terms of what she has
said about what daddy did, I regard myself as being in
exactly the same position as if she was outside the
confessional.

Now, what I would do - as I say, given the work I do
and my travel habits, I don't imagine I will have
a relationship with Sally, but Sally may be in a local
school or a local parish, and so I would see it as my
obligation to make contact with the authorities in that
area to ensure that something is done to investigate what
was meant by Sally saying, "Daddy did something naughty."

JUSTICE COATE: So effectively you would feel yourself
obliged to make a notification to the appropriate child
FATHER BRENNAN: Yes, I'm saying it subject to this: in terms of the appropriate child protection authority, it may be that if Sally has come in and only presented at confession and I've never met Sally before and never likely to again, I think what I would find more appropriate is to go to the school principal or the parish priest or to contact someone in the diocesan office to say, "We now have to action this to the child protection authority."

JUSTICE COATE: So does it then follow from what you've said that you would not have a theological or doctrinal objection to the confessor being mandated --

FATHER BRENNAN: No, no.

JUSTICE COATE: -- in those circumstances with respect to a disclosure by a child or young person in the seal of the confessional?

FATHER BRENNAN: That's right, in the - I'm saying that it's not matter which is relevant to the seal of confessional in the first place. What might be mandated to me, as an adult person receiving that information, I say can be applied indiscriminately whether I'm sitting in a confessional box or in Pitt Street.

COMMISSIONER FITZGERALD: Can I ask this question just on that seal: is there uniformity of view as to when the seal applies? I don't want the answer what it is, but is there now a uniform position in the Catholic Church in Australia as to what the seal of confession actually covers? Is that not contentious? In other words, in the submissions you have made to us, are we as the Royal Commission able to fully understand and appreciate the clear position of what the seal of confession covers for our consideration?

FATHER BRENNAN: Could I suggest the appropriate course would be to have Bishop Terry's committee of the Bishops Conference put in a particular submission to you articulating what is the received theological view of the Catholic Church in Australia on the seal of the confessional?

BISHOP CURTIN: Yes.
THE CHAIR: Will we get one view?

BISHOP CURTIN: Yes, you would.

FATHER BRENnan: That's the advantage of a hierarchy, your Honour.

COMMISSIONER ATKINSON: Just so I'm clear - and thank you for being patient with me in this regard, because it might be self-evident - in that scenario that you just explained to Justice Coate, say that Sally does not come to you at all, but Sally's father comes to you and confesses that Sally has been sexually abused by him and that abuse is occurring every weekend when he has access to that child. My understanding particularly of what Father Waters said is that a likely scenario there is that you may say to Sally's father, "Before you can receive absolution, you have to confess to the authorities." But if, using Father Waters' hypothetical, you say, "Come back and see me in two weeks' time, and if you have confessed to the authorities, I'll consider absolution", and if Sally's father doesn't come back, then you will not report to the authorities; is that correct?

FATHER BRENnan: That's correct, and if the --

COMMISSIONER ATKINSON: Then the abuse of Sally will continue, most likely?

FATHER BRENnan: Yes, yes. In much the same way, with deep regret, as with legal professional privilege, for example.

COMMISSIONER ATKINSON: Well, that's another area of debate, isn't it? That has been opened up now for schoolteachers and doctors. The comment was made earlier, I think, that people might be reluctant to go to confession, but there are professionals today who are required to report. Okay, thank you.

THE CHAIR: Mr Gray, have we excited any thoughts in you?

MR GRAY: I have no questions, your Honour.

THE CHAIR: No questions. Does anyone else wish to say anything before I thank you?
Very well. Then can I thank all of you. I don't think we want any of you again. Is that right?

MR FREE: They can all be excused, your Honour.

THE CHAIR: You are formally excused. I very much appreciate the time that you have given us today. Father Brennan, can I say to you I look forward to your next article in The Australian.

FATHER BRENNAN: Indeed, your Honour.

THE WITNESSES WITHDREW

THE CHAIR: 10 o'clock tomorrow morning?

MR FREE: Yes, your Honour.

THE CHAIR: We'll adjourn.

AT 4.50PM THE COMMISSION WAS ADJOURNED TO FRIDAY, 10 FEBRUARY 2017 AT 10AM
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