

Address of Rev Professor Ian Waters

The Pumphouse Hotel, Melbourne, 29 October 2014

on

Kieran Tapsell's book:

Potiphar's Wife: The Vatican's Secret and Child Sexual Abuse

With a Response from the Author

Introduction

Rev Professor Ian Waters holds degrees of Master of Church Administration, a Licentiate in Canon Law, Doctor of Philosophy in Canon Law from the University of Ottawa and Doctor of Canon Law from St. Paul's University in Ottawa. He is the emeritus judicial vicar, the presiding judge of the Catholic Tribunal for Victoria and Tasmania. He has chaired the Melbourne Diocesan Historical Commission and is a diocesan censor of the Archdiocese of Melbourne. He is currently a director of Calvary Ministries. His academic interests are in research associated with the Canon Law Society of Australia and New Zealand, of Great Britain and Ireland, and of the United States of America, Corpus Christi Priests Association, Brisbane Catholic Historical Society, Australian Catholic Historical Society and Melbourne Catholic Historical Society. He has also published pieces such as The Fourth Plenary Council of Australia and New Zealand, and an article in the Australasian Catholic Record: *General Absolution, Where are we at?* And when he has some spare time, he is also the parish priest of St Roch, Glen Iris and St. Cecilia's in South Camberwell.

This is a transcript of the address given by Rev Professor Ian Waters:

http://www.youtube.com/watch?v=7_jaQKTe4VY&feature=youtu.be

Ian Waters: At the outset, I am Ian Waters, and I am here in the capacity as a private person. I have not been authorised to speak here by any Catholic Church authority. Specifically, I am not speaking with any mandate from the Archbishop of Melbourne or the bishops of the ecclesiastical province of Victoria and Tasmania or the Australian Catholic Bishops Conference or the Holy See.

I was ordained a Catholic priest in 1970, and commenced graduate studies in canon law in 1973, and have been a canonical practitioner since then. I hold the academic rank of Professor at the University of Divinity where I have lectured in canon law since 1991. In summary, I believe I am qualified to speak this evening, but I am not speaking on behalf of the Church. And I'll try not to go over the half hour. In fact, I am sure I won't.

Some time ago I was advised of Kieran's views and arguments he adduces in his book, *Potiphar's Wife: the Vatican Secret and Child Sexual Abuse* (which) is on public record and he was interested in

what I would regard as errors or flaws in his analysis as the basis of our discussion this evening. This evening's topic, as you know, is the role of Church law in the child abuse issue, help or hindrance?

Kieran Tapsell: I thank Ian for agreeing to come along to the Pumphouse Hotel meeting to discuss my book, *Potiphar's Wife: The Vatican's Secret and Child Sexual Abuse*, and to provide some feedback and criticism from a distinguished Australian canon lawyer. When researching and writing the book, I consulted with some canonists like Bishop Geoffrey Robinson and Fr Thomas Doyle. My conclusions do not necessarily reflect their views, other than where I have cited their own published work, and in some instances I have come to different conclusions. But this is the first time that there has been any critique of the published work by an experienced canon lawyer, and I very much appreciate Ian's contribution to the discussion.

Ian Waters: I take no issue with much of what Kieran has written in *Potiphar's Wife*. However, as a canonist, I cannot accept a number of assertions given as facts. These, as far as I am concerned, make much of what he concludes about the abuse crisis in Australia and about the actions of Catholic bishops and what he concludes about what popes decided and decreed personally, quite problematic.

I have here five headings. One is Australian Catholic canonical background. The second is canonical documents. The next is Latin. The next is secrecy, and the next is privilege of the clergy. There are some minor points at the end before I wind up.

The Australian Catholic Canonical Background

Australia was classified by the Holy See as a missionary territory until 1976. Consequently, Australia did not receive from the Holy See all the general correspondence and circulars that non-missionary countries received. I believe that this is the explanation of why no copy of *Crimen Sollicitationis* either the 1922 version or the 1962 reprint has ever been discovered in any archive in Australia. It simply was not sent here.

Kieran Tapsell: I understand that a search was made of the Australian diocesan archives for a copy of *Crimen Sollicitationis* after the calling of the Royal Commission. The fact that a copy was not found in the archives now does not mean that it was not sent or that bishops and canon lawyers in the past were unaware of it. A former Vice-Provincial of the Blessed Sacrament Fathers, Tony Lawless who was ordained in 1957 says he was first aware of it in 1962, at a time when he was on the staff of the Blessed Sacrament Society seminary at Templestowe.

"For what it's worth I have a clear memory of the moment I first heard of *Crimen Sollicitationis*. It was on a Friday morning in 1962. Every Friday the seminary director, Fr Walter Riendeau SSS, and I used to drive from Templestowe, Victoria, to the city for our weekly ministry at St Francis', Lonsdale St., Melbourne. That morning Walter was agitated because the day before, at a meeting of seminary professors of canon law, he had heard about this new instruction. The particular cause of Walter's distress was the unusually severe penalty of excommunication *latae sententiae* reserved to the sole person of the Supreme Pontiff that was attached to the obligation of secrecy. I got the impression that this was seen as heavy-handed and quite extraordinary...I don't know whether any of the diocesan canon law practitioners attended those meetings, or where news of the Instruction had come from. At the time I assumed it had come from the cathedral, but conceivably it could have come from overseas direct to one of those seminary professors. So I found Ian's description of the way Vatican

documents were distributed back then somewhat less than convincing. Certainly this decree was known and discussed in Australia in 1962. Whether it was ever used in practice by any tribunal is another matter.”¹

Fr Riendeau, mentioned above, had done his licentiate in canon law in Rome after ordination in the United States. He returned to the United States in 1964/65, and later had a term in Rome on the General Council of the Blessed Sacrament Society.

The description of *Crimen Sollicitationis* as “new” for the Blessed Sacrament Society in 1962 is correct, because the purpose of the reissue of the instruction was to extend its procedures to priests who were members of religious orders, and to give the local bishop jurisdiction over them as well.²

Later on in his talk, Ian seems to have accepted that *Crimen Sollicitationis* was repealed by the 1983 *Code of Canon Law*, a matter that is discussed in chapter 9 of *Potiphar’s Wife*. If it was repealed in 1983, the document could just as easily have been thrown out as being no longer useful. The more likely explanation of the lack of knowledge comes from Professor John P. Beal, one of the authors of the *New Commentary on the Code of Canon Law*:

“Although lay people, who were the most likely victims of these crimes, might not be aware of the details of canon law, confessors, who were supposed to be aware of these matters, were to alert them to the gravity of these matters and of their obligation to report these offenses, and, if need be, to threaten canonical sanctions and refusal of absolution if they failed to do so. In addition, the seriousness of these offences, their reservation to the Holy Office, and, at least in general, the procedure to follow when confronted with them were topics dealt with in the manuals of moral theology (117) and canon law (118) used in seminary formation and were broached at study days and other opportunities for continuing formation after ordination.(119). Thus, Yanguas could say with confidence in 1947, “knowledge of the crimen pessimum and of the shape of the process for [dealing with] it is considered to be divulged universally among clerics today.” (120)

One can be skeptical of Yanguas’ claim about how widespread knowledge of these matters actually was even among the clergy in his day, but he was correct that the information most people, both clergy and lay, needed to know should a complaint of solicitation or one of the permutations of the crimen pessimum arise was at least accessible.

Not long after the 1962 Instruction was disseminated, however, the Church underwent profound upheavals in the way in which the clergy were formed. The traditional manuals of moral theology were jettisoned; the study of canon law was relegated to a minor place in the seminary curriculum, and canon law itself was not widely viewed as an appropriate instrument for enforcing ecclesiastical discipline; as the study of Latin became at best marginal to priestly formation, fewer priests were able to read official documents in that language; junior clergy examinations which had pressured the newly ordained to remain abreast of developments in Church teaching and practice vanished;(121) and the focus on ongoing clergy formation shifted from casus conscientiae in confessional practice to more “pastoral” and “relevant” subjects.

As a result, the traditional channels by which the clergy (and, through them, the laity) were kept abreast of their responsibility when they became aware of the offenses treated in the instruction quickly eroded. Meanwhile, the 1962 Instruction gathered dust in the secret archives of diocesan curias until a reference to its existence in the Holy Father’s 2001 apostolic letter took most people, including most bishops, by surprise.

¹ <http://www.catholica.com.au/forum/index.php?id=164087> (Accessed 3 November 2014)

² Murphy Dublin Report Part 1 <http://www.justice.ie/en/JELR/DACOI%20Part%201.pdf/Files/DACOI%20Part%201.pdf> par 4.20 (Accessed 25 April 2013), John P. Beal: “The 1962 Instruction: *Crimen Sollicitationis*: Caught Red Handed or Handed a Red Herring?” 41 *Studia Canonica* 199 at 201.: <http://www.vatican.va/resources/Beal-article-studia-canonica41-2007-pp.199-236.pdf> (Accessed 16 July 2013). Clause 4 of *Crimen Sollicitationis* says that the local bishop is to be the judge for cases involving priests who are also members of religious orders, but that does not prevent the religious Superior to discipline them and to remove them from any ministry. Clause 74 provides that exempt religious can proceed either administratively or judicially, and Superiors of non-exempt religious can proceed only administratively. Where the decision is to expel the guilty party from religious life, the expulsion has no effect until approved by the Holy Office.

117 See, for example, Thomas IoRio, *Theologia moralis*, Naples, M. D'AuRJA Editori, 1954, vol. 2, pp. 158-159.

118 See, for example, WERNZ and VIDAL, *Ius Canonicum*, vol. 7, p. 584; Eduardo REGATILLO, *Institutiones iuris canonici*, Santander, Sal Terra!, 1951, vol. 2, pp. 571-572.

119 See, for example, Ulpianus Lopez, "Casus Conscienti:E- I," in *Per*, 27 (1938), pp. 32-35. YANGUAS, "De crimine pessimo," p. 438.

120 YANGUAS, "De crimine pessimo," p. 438. Emphasis in the original.

121 See 1917/CJC, c. 130, §1" ³

However, even assuming that what Ian says is correct, it does not alter the fact that in 1922 and again in 1962, the Holy See imposed the secret of the Holy Office on all information about child sexual abuse obtained through its canonical investigations. The fact that some or all of the Australian bishops did not know about it would only have affected how they behaved from 1922 to 1974 or at most 1983 if complaints came to their attention. Most of the complaints started in the late 1980s when the Special Issues Committee was formed by the Australian Catholic Bishops Conference. By that time *Secreta Continere* of 1974 had replaced the secret of the Holy Office with the pontifical secret. It was promulgated on the *Acta Apostolicae Sedis* ("AAS"), and imposed the pontifical secret on all allegations, investigations and proceedings about cases involving "faith and morals". There is no suggestion from Ian that *Secreta Continere* was unknown to bishops and canon lawyers.

Ian Waters: The bishops and other ordinaries in missionary territories do not deal directly with the individual departments, known by terms such as congregations at the Holy See. Instead, all business and dealings was channelled through the special department that deals with the missions. It was formerly known as the Congregation for the Propagation of the Faith, but in recent decades it has been known as the Congregation for the Evangelization of Peoples. At the Congregation for the Propagation of the Faith, the Cardinal Prefect often referred to as "the Red Pope" and other officials dealt with the vast majority of matters themselves. A minority were sent to other departments for advice or opinions, and then referred back to the Congregation for the Propagation of the Faith for resolution and return to the originating bishop.

Kieran Tapsell: All this means is that until 1986, the Australian Church dealt through the Congregation for the Propagation of the Faith. The footnotes to *Potiphar's Wife* reveal a significant amount of swapping of functions between various Congregations, not unlike what happens in the secular world with various ministries. For example, the laicisation of priests was handled for some time by the Congregation for the Doctrine of the Faith ("CDF") (when Cardinal Ratzinger was the Prefect) and then later by the Congregation of the Clergy (whose Prefect was Cardinal Castrillon), and later by the Congregation for Divine Worship and Discipline of the Sacraments. Likewise, disciplining of priests for sex abuse of children was dealt with by the Congregation for the Clergy until 2001 when it was handed over the CDF. Of more significance are the dispensations from canon law given to missionary countries, discussed by Ian below.

Ian Waters: Moreover the missionary territories were conceded special privileges and faculties that exempted them or dispensed them from the general canon law of the universal church. It would take me a long time to list them all. They were as varied as bishops having to report to the pope

³ Beal: "The 1962 Instruction: *Crimen Sollicitationis: Caught Red Handed or Handed a Red Herring?*" 41 *Studia Canonica* 199 at 230: http://www.vatican.va/resources/resources_introd-storica_en.html (Accessed 5 August 2013)

each ten years rather than each five years. Catholics having to observe only five instead of the ten Holy Days of Obligation; bishops being able to grant dispensations from certain obligations under canon law that were reserved to the pope, and cases in ecclesiastical tribunals being able to be judged by a sole judge instead of a bench of three. Even after 1976, these faculties were able to be used until 1986, as the Holy See, in removing Australia's missionary status, decreed that the missionary faculties could be used for a further decade to permit a non-traumatic transition for us having to function normally under the code of canon law.

Kieran Tapsell: Accepting that certain dispensations were given to “missionary countries”, Ian does not mention any such dispensation that is relevant to the sexual abuse issue other than using one judge instead of three in a canonical trial.⁴ That dispensation itself suggests that the full penal provisions of the *1917 Code* and the instruction, *Crimen Sollicitationis* otherwise applied. Ian does not suggest that there was any dispensation from the secret of the Holy Office or the pontifical secret as a result of Australia still being a missionary country.

Ian Waters: In summary until 1986, the Catholic Church in Australia did not function as it did in Europe and North America. Instead we functioned as it did, for example, in the African countries. Consequently writings of canonists from Europe and the United States may reflect accurately what happened or did not happen there, but do not reflect fully the Australian situation.

I first heard of *Crimen Sollicitationis* on 17 September 2002 during a paper delivered at the annual conference of the Canon Law Society of Australia and New Zealand, being held at that time in Christchurch, New Zealand. The paper was by the keynote speaker, an experienced canonist from the United States. I commenced canonical studies in 1973, and I have five canonical academic degrees. I formed the impression that this document was also news to the 101 other conference delegates. Whatever its transmission to other countries, it was obscure and unknown to us in Australia.

Kieran Tapsell: I am surprised, but accept entirely that Ian did not hear about *Crimen Sollicitationis* until 2002. He has lectured in Canon Law at Catholic Theological College since 1991, was the Judicial Vicar of the Catholic Tribunal for Victoria and Tasmania since 1979 and a Judge of the Catholic Tribunal of Appeal for Australia and New Zealand for more than thirty years.⁵ Archbishop Hart at the Victorian Parliamentary Inquiry said that he heard about *Crimen Sollicitationis* in 1996/1997 when he became Vicar General of the Melbourne diocese.⁶ Philip Wilson, the current Archbishop of Adelaide and a fellow canon lawyer, had been talking about it in 1996 after he had discussed it with the CDF.⁷ It seems that the then Bishop Wilson had even told an Irish bishop about it.⁸ The now Archbishop Wilson told the Royal Commission:

“The 1962 Instruction was not widely known of within the church. This was probably a result of a combination of factors including that it was a very old document, but also because at the time of its promulgation there was a

⁴ For further information about the effect of a country having the “missionary” status, see <http://www.newadvent.org/cathen/12456a.htm> (Accessed 13 November 2014)

⁵ <http://www.ctc.edu.au/Teaching-Staff/Senior-Fellows> (Accessed 3 November 2014)

⁶ http://www.parliament.vic.gov.au/images/stories/committees/fcdc/inquiries/57th/Child_Abuse_Inquiry/Transcripts/Catholic_Archdiocese_of_Melbourne_20-May-13.pdf p. 13 (Accessed 18 June 2013)

⁷ Potiphar's Wife p.108.

⁸ Murphy Commission, par 4.23, <http://www.justice.ie/en/JELR/DACOI%20Part%201.pdf/Files/DACOI%20Part%201.pdf> (Accessed 25 April 2013)

strong insistence on dealing with cases of sexual abuse cases in a highly confidential way, something which is made clear in canon law.”⁹

Crimen Sollicitationis was never discussed in my three years of canon law at St. Patrick’s College, Manly during the sixties. But this is not surprising because the document was meant to be kept in the secret archive (or, as Ian would prefer to call it, the confidential archive), and that it was not to be commented on by canon lawyers. Despite that it seems to have been discussed in some seminaries and clergy conferences in the United States, and in 1946, the Spanish canonist, Aurelio Yanguas SJ did not have any qualms about commenting on it in an article written in Latin in a Spanish canon law journal. I accept what Bishop Wilson has said that it was not “widely known” in Australia, but it seems from what Tony Lawless has said that some people in authority did know about it. I also accept – as I have in the book – that *Crimen Sollicitationis* was a reflection of the culture of secrecy that the Church adopted around the time of the *1917 Code of Canon Law*, rather than its cause. But it certainly made sure that this culture remained and was entrenched by those in authority who knew about it. Culture in a large organisation comes from the top down.¹⁰

Nothing significant turns on the time or extent of ignorance of *Crimen Sollicitationis* either in Australia or elsewhere because of its repeal in 1983, and because most complaints arrived in the late 1980s. The figures for complaints in Victoria that can be found in the appendices of *Facing the Truth* submission to the Parliamentary Inquiry. Most of the cover up (in the sense that the Victorian Church never reported any allegations to the police) occurred after 2001 when the pontifical secret had been imposed once again by *Sacramentorum Sanctitatis Tutela*. The first table in Appendix 3 is of upheld complaints under both *Towards Healing* and the *Melbourne Response* from 1996 to 2012 by decade of ‘incident’, that is, when the actual abuse took place. The second table in Appendix 4 sets out the date when the complaint was upheld.

Decades	Incidents		Complaints Upheld	
1940s	24		1997	81
1950s	83		1998	22
1960s	190		1999	32
1970s	224		2000	42
1980s	82		2001	22
1990s	12		2002	110
2000	2		2003	29
2010	nil		2004	46
			2005	37
			2006	47
			2007	34
			2008	29

⁹ Exh CTJH.500.37001.0015_M_R, par 76

¹⁰ I have dealt with the “trickle down” effect of culture within the Church at p.163ff of *Potiphar’s Wife*.

			2009	23
			2010	23
			2011	23
			2012	18
	617			618

Prior to 2001, there were 177 complaints dealt with under *Towards Healing* and the *Melbourne Response*. After 2001, and the specific imposition of the pontifical secret under *Secreta Continere* by *Sacramentorum Sanctitatis Tutela*, there were 441 complaints dealt with.

We don't know how many complaints were dealt with before 1997 because that is when the Church had national figures because of *Towards Healing* and the *Melbourne Response*. Nor does the table tell us when complaints were first received by the Church. We know that in fact many of these priests had a long history of complaints made to the Church over decades. Nevertheless it is safe to say that the vast majority of complaints that the Church received occurred after the 1983 *Code of Canon Law*. The Special Issues Committee was set up in 1988 that at least indicated some concern about the issue.¹¹ So knowledge or otherwise of *Crimen Sollicitationis* within the Australian Church is not really an issue. Between 1983 and 2001, such complaints were to be dealt with by the 1983 *Code of Canon Law* and *Secreta Continere* of 1974, which was promulgated in the AAS and which was widely known and applied. After 2001 such complaints were dealt with under the norms of *Sacramentorum Sanctitatis Tutela* which specifically applied the pontifical secret under *Secreta Continere*.

Comments on Canonical Documents

Ian Waters: It seems to me that *Potiphar's Wife* takes no notice of differences between the various canonical documents. There are real differences between apostolic constitutions, apostolic letters, motu proprios, decrees, instructions, notifications, directories, etc. The type of document chosen always indicates its author, relevance, purpose and whether it is legislative or not.

Kieran Tapsell: I was aware of the differences between the various canonical documents, but for reasons that I have explained below, there was no reason to draw a distinction between the instructions, *Crimen Sollicitationis* and *Secreta Continere*, and the *Motu Proprio Sacramentorum Sanctitatis Tutela* because they all equally obliged under canon law. In addition, I was not writing a canonical text book, but was trying to explain to people, most of whom would have had little knowledge of civil law let alone canon law, how the Church's law was a significant factor in the cover up of child sexual abuse. For the record, *Crimen Sollicitationis* is referred to in *Potiphar's Wife* as an "instruction" 34 times in the text and footnotes (which were mainly for canon lawyers and other academics) and 3 times in the text as a "decree". *Secreta Continere* is referred to as a "decree" 3 times and as an instruction 11 times. *Sacramentorum Sanctitatis Tutela* is referred to as a "motu proprio", 108 times and Pope Benedict XVI's revision of it is referred to as a "decree" 3 times. I am not alone in referring to the requirements of canon law as "decrees". Fr Thomas Doyle, a canon

¹¹ Facing the Truth, page 132

lawyer, in a paper written in 2010, used the word “decree” and “instruction” interchangeably to describe *Crimen Sollicitationis*.¹²

Ian Waters: Briefly, an instruction is not a law. It was defined by Pope Benedict XV in 1917 and is described in Canon 34 of the 1983 Code of Canon Law. *Crimen Sollicitationis* was a mere instruction on how the penal law process, canons 1925 to 1959 of the 1917 Code was to be applied to some, but not all penal cases, specifically those dealing with certain very grave crimes committed by clerics, not lay persons, namely, solicitation in a confessional, homosexuality, paedophilia and bestiality. In other words, *Crimen Sollicitationis*, was a series of norms or guidelines for the internal use of any tribunal that ever had to process such a case.

Kieran Tapsell: The concept of an “instruction” in canon law seems to be basically the same as a “regulation” in Australian civil law. Canon 34 §1 says:

“Instructions clarify the precepts of laws and elaborate on and determine the methods to be observed in fulfilling them. They are given for the use of those whose duty it is to see that laws are executed and oblige them in the execution of the laws. Those who possess executive power legitimately issue such instructions within the limits of their authority.”

The significant words here are: “oblige them”. While instructions can be categorised as “guidelines”, they must be followed. The *New Commentary on the Code of Canon Law* states:

“The guidelines for the application of the law found in an instruction, however, **are not merely suggestions; they oblige those who are responsible for the application of the law**. Instructions provide more detailed regulations in an attempt to ensure more uniform application of the law accommodated to current circumstances.”¹³ (my emphasis).

The distinction between a “law” and an “instruction” in canon law seems to be the same as the distinction that civil law makes between a “statute” and a “regulation”. Both of them are “laws” in the general sense that they oblige people to follow them, and sanctions may be imposed for failure to do so. In the case of *Crimen Sollicitationis*, automatic excommunication from the Church was imposed for breach of the secret of the Holy Office.

Ian Waters: Instructions are not normally published as they are not laws but merely regulations or guidelines to help those executing the law. In fact, no legislation can take effect until published according to the required canonical process, normally in the Vatican journal *Acta Apostolicae Sedis*, which is the Church equivalent of Hansard.

Kieran Tapsell: A more accurate comparison is the Government Gazettes of the Commonwealth and States rather than Hansard, which is a record of the proceedings of parliament. However, publication in the AAS is not mandatory under canon law. The *1983 Code of Canon Law* requires that the universal law of the Church is to be promulgated by publication:

“in the official commentary, *Acta Apostolicae Sedis*, unless another manner of promulgation has been prescribed in particular cases.”¹⁴

¹² http://www.awrsipe.com/Docs_and_Controversy/2010-03-04-solicitation.html (Accessed 31 October 2014)

¹³ Beal, Coriden and Green: *New Commentary on the Code of Canon Law* (Paulist Press, 2000) p,100

¹⁴ Can. 8 §1. This is identical with canon 9 of the 1917 Code: Bachofen *Commentary on the New Code of Canon Law*, p 81, (1918) St. Louis, Mo., B. Herder book co., 1918-1922.

The 2001 Motu Proprio of Pope John Paul II *Sacramentorum Sanctitatis Tutela* was a universal law of the Church that was not promulgated by publication in the AAS.¹⁵ It was sent out to all the bishops with an explanatory letter from the Congregation for the doctrine of the Faith.¹⁶ *Crimen Sollicitationis* was an instruction that was not published on the AAS, and its terms stated specifically that it was not to be published.¹⁷ On the other hand, *Secreta Continere* of 1974 was an instruction that was published on the AAS.¹⁸

Ian Waters: The signature on a document indicates its importance and nature, just as there is a difference between a document signed by the Governor General or Prime Minister on the one hand and a senior public servant on the other, there is a parallel between a document signed by the Pope and one signed by a Vatican official.

Kieran Tapsell: If that is a correct analogy, then in terms of obligations being imposed, there is no difference between canon and civil law. A person can be prosecuted under civil law for breach of a regulation as much as for breach of a statute, provided that the regulation is within the terms of the authority of the person signing it, and the regulation is consistent with the statute. Canon law has the same kind of provision in Canon 34§2.

“The ordinances of instructions do not derogate from laws. If these ordinances cannot be reconciled with the precepts of the laws, they lack all force.”

Ian Waters: The legislation regulating to penal law from 1917 until 1983 was the process contained in the 1917 Code of Canon Law, and Canons 1925 to 1959, and Pope Benedict XIV’s Constitution *Sacramentum Poenitentiae* dated 1 June 1741. The law since 1983 has been the process in Canons 1717 to 1731 in the *1983 Code of Canon Law*. The Instruction of 1922 and its reprint in 1962 contained norms to try to facilitate the implementation of the penal law in these specified crimes committed by clerics. The law must be followed for a valid process. In my opinion, and that of most reputable canonists, non-observance of articles of a mere instruction would not invalidate the legal canonical process. The *1917 Code of Canon Law* was issued and signed under the signature and letterhead of Pope Benedict XV. In contrast, *Crimen Sollicitationis* was issued in 1922 on the letterhead of the Congregation of the Holy Office and with the signature of Cardinal Rafael Merry del Val, Secretary of the Holy Office. The 1962 reprint was issued from the same office with the signature of Cardinal Alfredo Ottaviani. In this diocese, if I received a circular letter signed by the Archbishop, I know before I read it that it deals with a very important matter, and is meant to be taken much more seriously than a circular issued by a diocesan official such as the Vicar General or the Director of Catholic Education.

Kieran Tapsell: Whatever may be the general principle about non-observance of instructions not invalidating the canonical legal process, the Congregation of the Clergy viewed the issue of the pontifical secret differently in the letter dated 31 January 1997 in its letter to the Irish bishops through the Papal Nuncio, Archbishop Storero. The bishops had asked for a comment from the Congregation about their proposals for mandatory reporting. The Congregation said that mandatory

¹⁵ John P. Beal “*The 1962 Instruction: Crimen Sollicitationis: Caught Red Handed or Handed a Red Herring?*” 41 *Studia Canonica* 199 at 230: http://www.vatican.va/resources/resources_introd-storica_en.html (Accessed 5 August 2013).

¹⁶ Potiphar’s Wife p.112

¹⁷ *Ibid* p.98

¹⁸ *Ibid* p.128

reporting conflicted with canon law and the effect of that could be to invalidate any such canonical processes.¹⁹

There are two “instructions” that are relevant to the issues of secrecy and child sexual abuse: *Crimen Sollicitationis* and *Secreta Continere*.

Crimen Sollicitationis (1922 and 1962)

The argument that *Crimen Sollicitationis* was a “mere instruction” in the sense of a “guide” flies in the face of its own terms. A breach of the secret of the Holy Office provided for automatic excommunication from the Church, and that such excommunication could only be lifted by the pope personally. The instruction came not from Cardinal Ottaviani personally (albeit signed by him), but from Pope John XXIII in an audience granted to Cardinal Ottaviani. The 1962 document has the following notation at the bottom.

FROM AN AUDIENCE WITH THE HOLY FATHER, 16 MARCH 1962

His Holiness Pope John XXIII, in an audience granted to the Most Eminent Cardinal Secretary of the Holy Office on 16 March 1962, graciously approved and confirmed this Instruction, **ordering those responsible to observe it and to ensure that it is observed in every detail.**

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

L.+ S.A. Card. Ottaviani.²⁰ (my emphasis)

The *New Commentary on the Code of Canon Law* says,

“The form of the law or the document in which it is published has less juridical significance than the authority who makes the law. All universal laws, for example, have exactly the same juridical value or weight, regardless of the form in which they are published. However, there is hierarchy of legislative authorities that makes a real difference in the weight of the laws. The laws of the pope or ecumenical council are higher than all other ecclesiastical laws.”²¹

There seems little doubt from the note on the document itself that the “authority making the law” was Pope John XXIII himself, and not Cardinal Ottaviani.

Further, if there is any doubt as to whether or not this instruction was “law” in the canonical sense, it was removed by *Sacramentorum Sanctitatis Tutela*, the 2001 Motu Proprio of Pope John Paul II. The historical introduction to that document when speaking about *Crimen Sollicitationis* said:

“It is to be kept in mind **that an Instruction of this kind had the force of law** since the Supreme Pontiff, according to the norm of can. 247, § 1 of the Codex Iuris Canonici promulgated in 1917, presided over the Congregation of the Holy Office, and the Instruction proceeded from his own authority, with the Cardinal at the time only performing the function of Secretary.”²² (my emphasis)

¹⁹ Ibid, p262ff

²⁰ http://www.vatican.va/resources/resources_crimen-sollicitationis-1962_en.html (Accessed 4 August 2013)

²¹ p.58

²² <http://www.documentcloud.org/documents/243690-10-sacramentorum-sanctitatis-2001-with-2003.html> (Accessed 4 August 2013)

In his revised historical introduction to *Sacramentorum Sanctitatis Tutela*, Pope Benedict in 2010 said:

The norms issued in 1922 were an update, in light of the Code of Canon Law of 1917, of the Apostolic Constitution “*Sacramentorum Poenitentiae*” promulgated by Pope Benedict XIV in 1741.²³

The Pope is the supreme interpreter of canon law. Canon 16 provides:

- §1 The legislator authentically interprets law as does the one to whom the same legislator has entrusted the power of authentic interpretation.
- §2 An authentic interpretation put forth in the form of a law has the same force as the law itself and must be promulgated.

The *New Commentary on the Code of Canon Law* says:

“...an authentic interpretation by the legislator can officially resolve a doubt of law...an authentic interpretation given in the form of law (per modum legis) has the same force as the law itself.”²⁴

These statements from Pope John Paul II and Pope Benedict XVI indicate that there is very little room to argue that the secret of the Holy Office under *Crimen Sollicitationis* was not binding on those who were obliged to apply the law, namely the bishops and anyone else involved in the canonical investigation and trial.

In 2007, Professor John P Beal of the Catholic University of American in Washington, and one of the authors of the *New Commentary on the Code of Canon Law* wrote a 30 page article on *Crimen Sollicitationis*, which, somewhat unusually, has been published by the Vatican on its website.²⁵ Nowhere in that article does Beal raise the argument now raised by Ian, that *Crimen Sollicitationis* was not “law” and therefore was not binding.

Professor Gerardo Núñez from the University of Navarra has written:

“The secrecy requirement ended up being called ‘the secret of the Holy Office’, a secret that did not end with the finalization of the cases in the Congregation, as was the practice with the rest of the Roman Congregations. In effect **the obligation** to keep the secret over matters that it covered lasted forever. The persons who were bound by the secret were those that had anything to do with the Holy Office tribunal, and it applied equally to proceedings in the diocesan tribunal as the Roman one.”²⁶ (my emphasis)

Again, it is clear that the secret of the Holy Office was binding as “law”.

Ian Waters: I understand that Cardinal Joseph Ratzinger, when Prefect of the Congregation for the Doctrine of the Faith, that is, before he became Pope Benedict XVI, asserted that *Crimen Sollicitationis* was in effect until 2001, when replaced by the norms attached to Pope John Paul II’s

²³ http://www.vatican.va/resources/resources_introd-storica_en.html (Accessed 3 July 2013)

²⁴ P.71 and 72.

²⁵ John P. Beal “*The 1962 Instruction: Crimen Sollicitationis: Caught Red Handed or Handed a Red Herring?*” 41 *Studia Canonica* 199 at 230: http://www.vatican.va/resources/resources_introd-storica_en.html (Accessed 5 August 2013).

²⁶ *La Competencia penal de la Congregation para la Doctrina de La Fe, Comentario al m.p. Sacramentorum Sanctitatis Tutela*, *Ius Canonicum*, XLIII, N. 85, 2003, 351-390 at 387

legislation, *Sacramentorum Sanctitatis Tutela*. That was clearly his opinion, which in my opinion, was misguided. Ratzinger certainly had a doctorate in Dogmatic Theology, and he had what the Germans call an “habilitation” and the American’s call a “higher doctorate”, to qualify him to be a University Professor. But he had no qualifications in canon law, and should have been briefed by reputable canonists before making such an assertion. In my opinion he could only have given advice such as, “We have no instruction at present to elucidate the penal process in canons 1717 to canons 1731, and until it comes, it may be useful to you follow, *mutatis mutandis*, the norms of *Crimen Sollicitationis*, which was an instruction to elucidate the 1917 Code, not the 1983 Code.”

Kieran Tapsell: It seems from the above that Ian accepts the argument in *Potiphar’s Wife* that the 1983 Code of Canon Law abrogated *Crimen Sollicitationis*.²⁷ The Secretary of the Congregation for the Doctrine of the Faith from 1995 to 2002 was the then Archbishop Bertone at the time when Cardinal Ratzinger was the Prefect.²⁸ Bertone is a canon lawyer with a doctorate in canon law.²⁹ He was the one who told the American canon law society in 1996 that *Crimen* was still “in force”.³⁰ He also signed the letter of 18 May 2001, with Cardinal Ratzinger, saying that it was “in force until now”.³¹ Further, Archbishop Wilson at the Australian Royal Commission confirmed that he had written to the CDF on 28 January 1998 asking if *Crimen* was restricted to confession and received back a letter from Cardinal Bertone on 28 February 1998, effectively saying that it was not so confined, ie it was still in force for dealing with child sexual abuse matters outside of soliciting in the confessional.³² Cardinal Ratzinger did have the advice of an experienced canon lawyer, the secretary of his Congregation, the then Archbishop Bertone. Whether Bertone comes within Ian’s definition of “reputable” is a matter about which I am not qualified to comment. The serious confusion created by the statement in the letter of 18 May 2001 is described in *Potiphar’s Wife*, chapter 9. The real issue over the Congregation’s letter is whether *Crimen Sollicitationis* was “in force” between 1983 until 2001, rather than that it was not “in force” at all because it was only a “guide”.³³

***Secreta Continere* 1974**

Even stronger considerations arising from the form of the instruction apply to the *Secreta Continere*. It replaced the secret of the Holy Office, but it also applied not only to sexual abuse of children, but to all cases involving “faith and morals”, and to such matters as consultations as to the appointment of bishops and members of the Roman Curia and to the reports of papal legates.³⁴

²⁷ *Potiphar’s Wife*, ch. 9

²⁸ <http://www.catholic-hierarchy.org/bishop/bbertone.html> (Accessed 3 November 2014)

²⁹ Bertone’s doctoral dissertation was entitled *The Governance of the Church in the Thought of Pope Benedict XIV* (1740–1758). He was Professor of Canon Law at the Pontifical Salesian University from 1976 until 1991, and collaborated in the final phases in the drawing up of the 1983 Code of Canon Law. He was appointed consultor of the Congregation for the Doctrine of the Faith in 1984, whose Prefect was then Cardinal Ratzinger. In June 1995 Pope John Paul II appointed him secretary of that Congregation. <http://www.zenit.org/en/articles/cardinal-bertone-prefers-activity-to-study> (Accessed 3 November 2014)

³⁰ Thomas Doyle “*The 1922 Instruction and the 1962 Instruction “Crimen Sollicitationis” promulgated by the Vatican*”, http://www.bishop-accountability.org/news2010/03_04/2010_03_12_Doyle_VeryImportant.htm par 10 (Accessed 2 October 2013)

³¹ <http://www.bishop-accountability.org/resources/resource-files/churchdocs/EpistulaEnglish.htm> (Accessed 23 August 2013)

³² <http://www.childabuseroyalcommission.gov.au/exhibits/bb3eaadf-9283-41ef-9694-e560738d186a/case-study-14,-june-2014,-sydney> (Accessed 28 June 2014)

³³ See *Potiphar’s Wife*, ch 9.

³⁴ *Ibid* p. 98

The heading to this document is:

“Rescript from an Audience Instruction³⁵ Concerning Pontifical Confidentiality”.

At the bottom it says:

“In the audience to the undersigned on 4th day of the month of February in the year 1974, the Supreme Pontiff, Paul VI **approved this instruction and ordered that it be published with the stipulation that it go into force on the 14th day of the month of March of the same year, all things to the contrary notwithstanding.**”

Joannes Card. Villot, Secretary of State. (my emphasis)

The term, “all things to the contrary notwithstanding” is the term used in canon law to state that all previous laws dealing with that subject matter are repealed.³⁶ Once again, the terms of the document itself suggest that it was not a mere “guideline” but had binding force. But, more importantly, this instruction was promulgated by publication on the AAS, as seen below from the terms of Art 25 of the norms of *Sacramentorum Sanctitatis Tutela*.

Professor John P. Beal in his 2007 *Studia Canonica* article on *Crimen Sollicitationis* wrote:

"Although the revisions of the law governing the 'secret of the Holy Office' by authority of Paul VI abrogated the latae sententiae excommunication incurred by violation of this secret, it retained the obligation of what was now called 'the pontifical secret' for all who in their official capacity became aware of "extrajudicial denunciations of delicts against faith and against morals and regarding delicts perpetrated against the sacrament of penance. Likewise, the process and decision which pertain to the denunciations."³⁷

Professor Woestman in *Ecclesiastical Sanctions* say that *Secreta Continere* was still in force, despite the promulgation of the 1983 *Code of Canon Law*. Beal, in his *Studia Canonica* article states:

“The footnote to Normae, art. 25, §1, in WOESTMAN, p. 309, makes clear that the norms of *Secreta continere* remain the *ius vigen*s; it cites the 1999 Regolamento generale della Curia Romana, art. 36, §2, in A.A.S. 91 (1999), p. 646.”³⁸

“*Ius vigen*s” means “a law which is currently in force and therefore binding”.³⁹

From 1983 until 2001, canon law dealing with the sexual abuse of children was governed by the 1983 *Code* and *Secreta Continere*. But the most serious argument that *Secreta Continere* was in force as a “law” and not a mere guide is *Sacramentorum Sanctitatis Tutela* itself. That “law” specifically imposed the pontifical secret by Art 25.

“Cases of this kind are subject to the pontifical secret.” (fn 31)⁴⁰

Footnote 31 specifically incorporates Art 1(4) of *Secreta Continere*. It provides:

³⁵ Footnote 1 says, Secretariat of State Instruction, rescript from an audience, *Secreta Continere*, February 4, 1974 in ASS, 66 (1974), pp89-92; CLD Vol 8, pp205-210

³⁶ Beal Coriden and Green: *New Commentary on the Code of Canon Law*, p81.

³⁷ Beal: *The 1962 Instruction: Crimen Sollicitationis: Caught Red Handed or Handed a Red Herring?* (2007) 41 *Studia Canonica* 199, p.231 <http://www.vatican.va/resources/Beal-article-studia-canonica-41-2007-pp.199-236.pdf>,

³⁸ *Ibid*, p 232, fn 128

³⁹ James T. Bretzke: *Consecrated Phrases: A Latin Theological Dictionary: Latin Expressions*

⁴⁰ at <http://www.documentcloud.org/documents/243690-10-sacramentorum-sanctitatis-2001-with-2003.html> Art. 25 and footnote 31 specifically referring to *Secreta Continere*. (Accessed 4 August 2013).

“Secretariat of State, Rescript from an Audience of the Holy Father Il 4 febbraio, by which the Regolamento Generale della Curia Romana is made public, April 30, 1999, Regolamento Generale della Curia Romana, April 30, 1999, art. 36 § 2, in AAS 91 (1999) 646: “With particular care, the pontifical secret will be observed, according the norm of the Instruction *Secreta continere* of February 4, 1974.

The Secretariat of State or Papal Secretariat, Rescript from an Audience, the Instruction *Secreta continere*, Concerning the Pontifical Secret, February 4, 1974, in AAS 66 (1974) 89-92:

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

4. Extrajudicial denunciations received regarding delicts against faith and against morals, and regarding delicts perpetrated against the sacrament of Penance; likewise the trial and decision which pertain to those denunciations, with due regard for the right of the one who has been reported to the authorities to know of the denunciation, if such knowledge is necessary for his own defense. However, it will be permissible to make known the name of the denouncer only when it seems opportune to the authorities that the denounced person and the denouncer appear together in the trial; ...” (p. 90).

In 2010, Pope Benedict XVI revised the norms and the revised norms have this:

Art. 30 §1. Cases of this nature are subject to the pontifical secret.⁴¹

Footnote 41 is in the same terms, but published in the original Latin – the translation of the original 2001 footnote 31 was by the American Catholic Bishops Conference.⁴²

[41] *Secretaria Status, Rescriptum ex Audientia SS.mi Il 4 febbraio, quo Ordinatio generalis Romanae Curiae foras datur, 30 aprilis 1999, Regolamento generale della Curia Romana, 30 aprile 1999, art. 36 § 2, in AAS 91 (1999) 646: «Con particolare cura sarà osservato il segreto pontificio, a norma dell'Istruzione *Secreta continere* del 4 febbraio 1974».*

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

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

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

If it is conceded (as I did at the meeting) that *Sacramentorum Sanctitatis Tutela* is “law”, as distinct from a mere instruction or guide, the pontifical secret is imposed by that law. By the use of the footnote references to *Secreta Continere*, the Pope is indicating with greater detail exactly what the pontifical secret entails. It is difficult to accept that the pontifical secret was therefore some kind of “guide” that bishops could obey or ignore. It was imposed by a law signed by the Pope.

⁴¹ http://www.vatican.va/resources/resources_norme_en.html (Accessed 5 August 2013), Art 30, footnote 41

⁴² The translation of Art 1(4) of *Secreta Continere* in footnote 31 in the 2001 document was posted at http://www.opusbonosacerdotii.org/sacramentorum_sanctitatis_tutela_english1.htm with the notation that it was done “on behalf of the United States Catholic Bishops Gregory Ingels, revised by Joseph R. Punderson and Charles J. Scicluna.” Charles J. Scicluna, now an auxiliary bishop in Malta, was the Promoter of Justice for the Congregation for the Doctrine of the Faith under Cardinal Ratzinger. That site has since disappeared, but the translation can also be found at <http://www.bishop-accountability.org/resources/resource-files/churchdocs/SacramentorumAndNormaeEnglish.htm> (Accessed 13 November 2014)

Ian's argument is not supported by the documents themselves, the statements of eminent canonists, the statements by senior members of the Roman Curia and hierarchy from 1997 to 2002, and the statements of two popes, the supreme interpreters of canon law. Ironically, the only support that I have been able to find for Ian's argument that *Crimen Sollicitationis* and by inference *Secreta Continerere*, were only guides, with no canonical obligation to follow them, comes not from other canon lawyers but from the Vatican's civil lawyer in the United States, Jeffery Lena, who has stated that bishops had a discretion to comply with the pontifical secret.⁴³ In other words, it was no more than a "guide". Lena has no apparent qualifications in canon law.⁴⁴

Latin

Ian Waters: I'll say something about Latin. Official Church documents are always in the Latin language. And translations into the major modern languages are made from the Latin text. As regards the mention of secret archives, the Latin text has the words "archivum secretum," often translated as "secret archive". It should be noted that the Latin word "secretum" is translated in various dictionaries by other words in addition to "secret", including "separate", "apart", "remote", "solitary", "private", "hidden" and "sealed". In Latin, "secretus" is the past participle of word "secervo", which means "to put apart", "to sunder", "to sever", "to separate". I personally would consider that the "archivum secretum" is most accurately translated as "confidential archive", in the sense that it is separated from the normal archive to which many persons can gain access. I do not believe that the words can be translated to imply something secretive or a means for covers up. The Catholic Church is not the only entity in Australia with confidential archives, or classified material, or restricted access or in camera sessions. The reasons are not usually presumed to be cover up. Incidentally, the Latin word, "secretarius", translates to "secretary" who was the person overseeing business confidentially, not secretly, for a powerful person such as a king or a pope. The duties of a modern secretary often include the handling of confidential information. The literal meaning of secretary still holds true. But no one expects a secretary to be secretive.

Kieran Tapsell: *Potiphar's Wife* has never suggested that that there was anything wrong with confidentiality itself, provided there was an exception for reporting such crimes to the civil authorities. In the case of crimes, whether canonical or civil, confidentiality is required so as not to harm the reputations of those persons being investigated where the result of that investigation finds that they are innocent. Likewise, confidentiality is required so that the investigation can achieve its purpose in finding evidence to support any allegation. Many an investigation has been rendered useless by a "tip off".⁴⁵ But when police or courts (in the Continental legal system) are investigating a civil crime, the confidentiality that is imposed on them does not have the effect of withholding that information from the State, because **they are the State**.⁴⁶ Where independent bodies like Law Societies and Ombudsmen in Australia are obliged to investigate matters confidentially, the legislation provides for an exception to allow reporting to the police where a breach of the law is

⁴³ Potiphar's Wife, p100

⁴⁴ See Lena's profile at http://www.huffingtonpost.com/2010/04/18/jeffrey-lena-lawyer-for-pope_n_541835.html (Accessed 3 November 2014)

⁴⁵ Potiphar's Wife, p203ff

⁴⁶ Ibid p.138.

involved.⁴⁷ Canon law never had any such exception until 2010, and then it was limited to where the civil law required reporting.

The current state of canon law means that where there is no civil law requiring reporting, canon law prevents bishops from reporting these crimes to the police even if they wanted to. It is significant that in its 1999 report on proposals to abolish compulsory reporting of all crimes under S.316 of the New South Wales *Crimes Act 1900*, the NSW Law Reform Commission accepted a number of submissions in favour of abolition, but the most telling reason for abolition was because they disapproved of substituting a legal duty backed up by criminal sanction for a moral one, unless there were “overall substantial benefits to society”.⁴⁸ Most bishops in Australia would accept now that there is a moral duty to report even if the civil law does not require it.⁴⁹ Canon law in its current form prevents them from acting in accordance with the moral view that the Law Reform Commission identified as being so widespread in Australian society.

Secrecy

Ian Waters: Now on secrecy itself. The highest and only absolute form of secrecy in the Catholic Church is the secrecy of the confessional. Pontifical secrecy until 1974, called “the secret of the Holy Office” is regarded by canonists and a number of others to mean greater than normal confidentiality, with parallels outside the Church with concepts or conventions such as cabinet confidentiality, diplomatic confidentiality, order and confidentiality, in camera hearings, military secrecy and professional secrecy which is observed by professionals such as doctors and lawyers with their clients. Pontifical secrecy has never been regarded as absolute as confessional secrecy is. But there are penalties for infringing it without sufficient cause, as there is with the infringement of the other secrets listed here. Most canonists would see secrecy as attempting to protect the victim, the accused and the witnesses so that there can be a free finding of facts before a verdict is handed down.

Kieran Tapsell: There is nothing in *Potiphar’s Wife* to suggest that the pontifical secret is absolute like the secret of the confessional. Indeed it is stated specifically that the Holy See can dispense with it.⁵⁰ Sr Moya Hanlen told the Royal Commission that the pontifical secret as one “of the highest order”.⁵¹ At the time of the revision of the norms of *Sacramentorum Sanctitatis Tutela*, Fr Lombardi said that judicial trials for sex abuse by clergy were “dealt with in strict confidentiality”.⁵²

⁴⁷ Ibid p.203

⁴⁸ New South Wales Law Reform Commission

http://www.lawreform.lawlink.nsw.gov.au/agdbasev7wr/lrc/documents/pdf/report_93.pdf par 3.58(Accessed 16 July 2013)

⁴⁹ Indeed, they are the terms of the current *Towards Healing* protocol, but they conflict with canon law in respect of the allegations themselves and any information obtained through the canonical processes where there is no civil law requiring reporting.

⁵⁰ *Potiphar’s Wife*, p. 134

⁵¹ <http://www.childabuseroyalcommission.gov.au/case-study/bb3eaadf-9283-41ef-9694-e560738d186a/case-study-14,-june-2014,-sydney.aspx> 27 June 2014, 8143

⁵² 19 July 2010, <http://www.catholicnews.com/data/stories/cns/1002901.htm> (Accessed 6 March 2013)

http://en.radiovaticana.va/storico/2010/07/16/vatican%E2%80%99s_revised_rules_on_sexual_abuse_of_children/in2-408723 (Accessed 25 August 2013)

If the intention of the pontifical secret was as stated by Ian above, there is no need for it to be a “permanent silence”.⁵³ Further, witnesses can be protected by the use of pseudonyms as is constantly happening in the Australian Royal Commission. *Secreta Continere* had one exception to the pontifical secret: the accused priest could be told if it were necessary for his defence. There were no exceptions to allow reporting to the civil authorities until 2010 when a limited dispensation was given.

The Spanish canon lawyer, Aurelio Yanguas SJ, provided the real reason for the secrecy imposed by *Crimen Sollicitationis* in 1946. He said that only by taking “swift, decisive and secret action” before these crimes reach the civil courts could the Church be spared the humiliation of having priests in the public dock as sex offenders.⁵⁴ The “swift” and “decisive” action was never going to occur because of the requirement to try to reform the priest before imposing dismissal. But the secrecy remained to avoid such priests being in the dock.

Privilege of the Clergy

Ian Waters: Now, as to privilege of the clergy. I am not going to try to defend privileges that were accorded the clergy when Europe was synonymous with Christendom, other than to make the observation that what seems archaic at the very least now, often was based upon what was accepted as valid premises in the past. But leaving aside clerical attitudes and clericalism, that may still prevail, especially in Europe, clerical privileges have never existed in Australia for two reasons. The first is that there was no provision for it in the missionary canon law that governed Australia until 1986 as already explained. Secondly civil law in Australia inherited from the English common law, has never accorded to the Catholic Church juridical personality. That’s the legal reason why the Church as such in Australia cannot own property. Instead she has to arrange for a civil law entity such as a trust corporation to hold its assets, as was made clear to all at the *Ellis case* in Sydney. Some countries whose legal systems permit it have entered into legal arrangements with the Vatican, known as concordats. Some of these have accorded special privileges and exemptions to clerics. But it is simply absurd, in my opinion, to suggest that such arrangements have or can in any way affect how the Church is run, or has conducted itself in Australia.

Kieran Tapsell: There is no suggestion in *Potiphar’s Wife* that there is, or has ever been a de iure privilege of clergy in Australia similar to what might have existed in Franco’s Spain or currently which exist in Colombia and Italy. *Potiphar’s Wife* asserts that the use of silence through the pontifical secret has had exactly the same effect as a de iure privilege of clergy by protecting these priests from State prosecution. For that reason, the term used throughout *Potiphar’s Wife* is a “de facto privilege of clergy”.

⁵³ *Secreta Continere* Art III (1): “Whoever is bound by papal secrecy is always under a grave obligation to observe it.”: Translation in William Woestman: *Ecclesiastical Sanctions and the Penal Process* (St. Paul University 2003) Appendix VII, p.237

⁵⁴ “*De crimine pessimo et competentia S. Officia relate ad illud,*” *Revista Espanola de Derecho Canonico*. 1(1946): 427-439. John P. Beal: “*The 1962 Instruction: Crimen Sollicitationis: Caught Red Handed or Handed a Red Herring?*” 41 *Studia Canonica* 199 at 228ff. <http://www.vatican.va/resources/Beal-article-studia-canonica41-2007-pp.199-236.pdf> (Accessed 16 July 2013)

Some Other Points

Ian Waters: As regards the oath of fidelity to the Apostolic See as required of bishops before ordination, most commentators see this as ensuring the unity of the college of bishops rather than subservience to the person of the pope. In Australia, all police officers take an oath or make an affirmation that, “I will well and truly serve our sovereign lady the Queen, as a police officer. I will see and cause Her Majesty’s peace to be kept and preserved.” I suggest that that does not make police officers subservient to the person of the Queen. Nor does the oath or affirmation of allegiance taken by our members of Parliament: “I will be faithful and bear true allegiance to Her Majesty, Queen Elizabeth, her heirs and successors according to law.”

Kieran Tapsell: Bishop Geoffrey Robinson has a different view of the oath that bishops take.⁵⁵ However, quite apart from what might be termed the Church’s “oath of allegiance”, canon law requires all those taking on positions in the Church hierarchy, and those in religious orders to make a “profession of faith” according to an approved formula which also requires them to swear that they will obey all ecclesiastical laws and especially the *Code of Canon Law*.⁵⁶ When a policeman or judge swears an oath of allegiance, there is no question of his being required to obey a system of law that might conflict with the civil law. That is what canon law required.

Ian Waters: Another point. It is not accurate to describe automatic excommunication as the Church’s “worst form of punishment” following expulsion from the Church community. An excommunicated person is still a full member of the Church community, albeit subject to certain penalties, specifically, prohibition from liturgical ministry, from reception of the sacraments and from the exercise of any ecclesiastical offices, ministries, functions or acts of governance.

Conclusion

And so my conclusion. It is reasonable, in my opinion to conclude that the Church in general and certain bishops in particular have been most inept, naïve, and often unjust in dealing with the problem of the sexual abuse of minors. It is, in my opinion, also reasonable to conclude that many bishops and others in the Church have resorted, on their own initiative, to secrecy as an attempt to avoid embarrassment. But the canonical facts to which I have drawn your attention have to be considered before concluding to cover up. What has happened in Australia with sexual abuse and other types of abuse of minors by Catholic personnel, by both clerics and non-clerics is shameful. It is humiliating for the Church to have to face this mess. My personal position is that it had causes other than canon law, and canon law cannot be blamed for it, and that it is to be remedied by means other than canon law. Thank you.

⁵⁵ Potiphar’s Wife, p 7, footnote 12: ‘Before they are ordained, all bishops are required to take a special oath of loyalty to the pope (not to God, not to the church, but to the pope). This oath is a symptom of the constant and severe pressure on all bishops to protect all levels of papal authority at all costs and in all circumstances. A very high value is put on a bishop being “a pope’s man”. http://bishopgeoffrobinson.org/usa_lecture.htm (Accessed 23 August 2013). Similar comments have been made by Sipe, Benkert and Doyle: *Spirituality and the Culture of Narcissism*: <http://www.awrsipe.com/reports/2013/Spirituality%20and%20the%20Culture%20of%20Narcissism%20-%20Complete%20article%20-%20208-30-2013.pdf> at 6 (Accessed 30 September 2013)

⁵⁶ Canon 833: http://www.vatican.va/archive/ENG1104/_P2R.HTM (Accessed 3 March 2013), and http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_19880701_professio-fidei_en.html (Accessed 3 March 2013) ‘I shall follow and foster the common discipline of the entire Church and I shall maintain the observance of all ecclesiastical laws, especially those contained in the Code of Canon Law.’

Kieran Tapsell: It is not suggested in *Potiphar's Wife* that canon law was the only problem. There was also the culture of secrecy, and canon law in 1922 and thereafter was a reflection of that culture. But as Cardinal Francis George has correctly pointed out, once you have a law in place, the effect of the law is to reinforce, perpetuate, rationalize and deepen the culture that gave rise to it in the first place. He further states that a culture reflected in the law can only be overturned by changing the law. He was talking about discrimination in the United States, but the same principle applies equally to the Church and canon law and the culture of secrecy. That culture will never change without abandoning the pontifical secret in canon law for child sexual abuse.⁵⁷

The Church in Australia has accepted that there was a cover up of child sexual abuse.⁵⁸ The argument in *Potiphar's Wife* is that canon law prevented reporting to the police, and was virtually useless as a means of dismissing these priests. That meant that more children were abused than might otherwise have occurred.⁵⁹

Ian makes no mention of the numerous statements by senior Curia Officials and the Congregations between 1997 and 2002 that reporting paedophile priests to the police breached canon law in one way or another or was in some ways "immoral".

On the issue of the deficiencies in canon law for disciplining priests, Ian's assertion that "canon law cannot be blamed" is contradicted by evidence given by senior Australian clerics at the Victorian Parliamentary Inquiry, the Cunneen Special Commission and the Royal Commission. The chances of dismissing a priest through a canonical trial were variously described as "very difficult" (Cardinal Pell), "close to hopeless" (Bishop Malone) "very, very difficult" (Archbishop Hart) "extraordinarily difficult" (Archbishop Coleridge) and the whole procedure was "unworkable" (Fr Brian Lucas).⁶⁰

⁵⁷ *Potiphar's Wife*, p.155ff.

⁵⁸ Francis Sullivan: Truth, Justice and Healing Council blog 22 October 2014: "Blue Knot Day gives Catholics the perfect opportunity to send a very clear message that together we have an important role to play in ensuring the crimes and cover-ups of the past never happen again and that survivors are treated with justice and compassion."
<http://www.tjhcouncil.org.au/media/tjhc-blog.aspx> (Accessed 11 Nov 2014)

⁵⁹ Bishop Connors, the former bishop of Ballarat admitted to the Victorian Parliamentary Inquiry that the cover up of the sexual abuse by his predecessor, Bishop Mulkearns, of serial paedophile priests in his diocese "effectively facilitated" further abuse:

http://www.parliament.vic.gov.au/images/stories/committees/fcdc/inquiries/57th/Child_Abuse_Inquiry/Transcripts/Catholic_Diocese_of_Ballarat_29-April-13.pdf, 10, 14 (Accessed 20 May 2013) and see the finding in *Betrayal of Trust*, Report of the Victorian Parliamentary Committee to that effect, par 7.3.6, page 174 https://s3-ap-southeast-2.amazonaws.com/family-and-community-development-committee/Inquiry+into+Handling+of+Abuse_Volume+1_FINAL_web.pdf (Accessed 14 November 2013)

⁶⁰ Cardinal Pell: Victorian Parliamentary Inquiry

http://www.parliament.vic.gov.au/images/stories/committees/fcdc/inquiries/57th/Child_Abuse_Inquiry/Transcripts/Catholic_Archdiocese_of_Sydney_27-May-13.pdf page 21.8 (Accessed 3 July 2013),

Bishop Malone: Special Commission of Inquiry into Matters Relating to the Police Investigation of Certain Child Sexual Abuse Allegations in the Catholic Diocese of Maitland-Newcastle,

[http://www.lawlink.nsw.gov.au/lawlink/Special_Projects/ll_splprojects.nsf/vwFiles/Transcript_Day_8_-_TOR_2_-_11_July_2013.pdf/\\$file/Transcript_Day_8_-_TOR_2_-_11_July_2013.pdf](http://www.lawlink.nsw.gov.au/lawlink/Special_Projects/ll_splprojects.nsf/vwFiles/Transcript_Day_8_-_TOR_2_-_11_July_2013.pdf/$file/Transcript_Day_8_-_TOR_2_-_11_July_2013.pdf), 873.43ff (Accessed 14 July 2013); Archbishop

Hart, Victorian Parliamentary Inquiry

http://www.parliament.vic.gov.au/images/stories/committees/fcdc/inquiries/57th/Child_Abuse_Inquiry/Transcripts/Catholic_Archdiocese_of_Melbourne_20-May-13.pdf p. 9 (Accessed 18 June 2013); Archbishop Coleridge, Australian Royal

Commission: http://www.childabuseroyalcommission.gov.au/wp-content/uploads/2013/08/Transcript-RC_IRCSA_Day-026_11-Dec-2013_Public.pdf p.2733 (Accessed 12 December 2013)

There is nothing that Ian raised at the Pumphouse Hotel that leads me to change or modify what I have written in *Potiphar's Wife: The Vatican's Secret and Child Sexual Abuse*, other than perhaps the deletion of the words "expulsion from the Church community" from the description of "excommunication" on page 53 of the book. Whatever may be the technical meaning of that word, expulsion from the Church community is the way it is normally understood.