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**CANONICAL IMPLICATIONS OF THE RESPONSE
OF THE CATHOLIC CHURCH IN AUSTRALIA
TO CHILD SEXUAL ABUSE**

by
Elizabeth M. DELANEY, sgs

A dissertation submitted to the Faculty of Canon Law
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ABSTRACT

Canonical Implications of the Response of the Catholic Church in Australia to Child Sexual Abuse

Since the early 1980s the Church and society have been shocked and scandalised by incidents of child sexual abuse perpetrated by clerics and religious. During the past twenty years knowledge of sexual abuse has grown. With increased knowledge has come increased understanding of factors that affect offenders, that impact on the healing of victims. Church leaders in the church have not always responded well, to victims, to offenders and to communities. The Church has grown in understanding of how to respond to all who are affected by sexual abuse of children. Church and society continue to learn.

In 1996, the Australian Catholic Bishops' Conference and the Australian Conference of Leaders of Religious Institutes published *Towards Healing, Principles and Procedures in Responding to Complaints of Sexual Abuse against Personnel of the Catholic Church in Australia*. The following year, they published *Integrity in Ministry: A Document of Ethical Standards for Catholic Clergy and Religious in Australia*. The former document presents the principles and procedures for responding to complaints of misconduct and sexual abuse. The latter document presents standards for life and ministry for clergy and religious.

The Catholic Church in Australia responded to sexual abuse within the context of the Australian society, as did the church in each country. In presenting an overview of the response to child sexual abuse of both society and church in several countries besides Australia, the possibility exists not only for identifying similarities and differences, but also for understanding the reasons behind them.

In the 1980s knowledge of the complexities of sexual abuse and its impact on victims was very limited. Likewise familiarity with the church's penal law and related procedures was limited because it had not been used to any great extent. Increased and new usage of both penal law and procedural law identified areas that caused problems.

At the heart of the church's response to sexual abuse is the goal of responding to the dignity of the human person. Hopefully, identifying differences and problem areas will result in increased understanding and the upholding of the dignity of all people affected by sexual abuse.

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In omnibus glorificetur Deus

ABBREVIATIONS

AAS	<i>Acta Apostolicae Sedis</i>
ABC	Australian Broadcasting Corporation
ACBC	Australian Catholic Bishops' Conference
ACBCSIC	Australian Catholic Bishops' Conference Special Issues Committee Relating to Priests and Religious
ACLRI	Australian Conference of Leaders of Religious Institutes
ASS	<i>Acta Sanctae Sedis</i>
BBC	British Broadcasting Corporation
BCEW	Bishops' Conference of England and Wales
c., cc.	canon, canons
CCCB	Canadian Conference of Catholic Bishops
CCEO	<i>Codex canonum Ecclesiarum orientalium</i>
CDF	Congregation for the Doctrine of the Faith
CDWDS	Congregation for Divine Worship and the Discipline of the Sacraments
CIC/1917	<i>Codex iuris canonici</i> , 1917
CIC	<i>Codex iuris canonici</i> , 1983
CLD	Canon Law Digest

CLSA	Canon Law Society of America
CLSANZ	Canon Law Society of Australia and New Zealand
CLSGBI	Canon Law Society of Great Britain and Ireland
col., cols.	column, columns.
CoRI	Conference of Religious of Ireland
ed., eds.	editor, editors
ICBC	Irish Catholic Bishops' Conference
ITC	International Theological Commission
n., nn.	number, numbers
NCCB	National Conference of Catholic Bishops (USA)
NZCBC	New Zealand Catholic Bishops' Conference
USCCB	Unites States Conference of Catholic Bishops
vol., vols.	volume, volumes

INTRODUCTION

Our knowledge is evolutionary. In coming to an understanding of an object, be it an ordinary earthly thing or a divine mystery revealed to us, we catch it according to our capacity at that very moment. We do not come to an exhaustive knowledge of it; rather, after the initial perception, we penetrate its secret gradually. Our spirit, embedded in the flesh as it is, has a limited capacity. We cannot grasp the whole reality all at once. Our knowledge evolves in the best sense of that word.

Our knowledge is also historically conditioned. Every Christian generation inherits the accumulated knowledge of the ones which preceded it, and then enriches it through its own industry and ingenuity. But each generation has its own categories, horizon, and standpoint which influence its capacity to know. Each receives the old tradition. Each adds something to it. Each makes a contribution. None says the final word.¹

Whether in the context of society or Church, these words of Ladislav Örsy apply to our knowledge of sexual abuse – in all its aspects.

Sexual misconduct and sexual abuse have been problems in the Church in Australia as in other countries. Certain members of both the diocesan clergy and religious institutes² have acted in ways that have caused scandal to Christ's faithful. Many people have given this as a reason for their turning away from the Church.

At first, bishops and leaders of religious institutes appeared reluctant to act. This lack of action also caused scandal. In particular, people considered that Church

¹ L. ÖRSY, "The Fundamental Rights of Christians and the Exercise of the 'Munus sanctificandi'," in *Les droits fondamentaux du Chrétien dans l'Église et dans la société. Actes du IVe Congrès international de Droit canonique*, Fribourg, Editions Universitaires Fribourg Suisse, 1981, p. 207.

² What is said of religious institutes applies also to secular institutes and societies of apostolic life, but to simplify the reading of the text, the terms "religious institutes" or "institutes" will be used.

authorities were unwilling to act when the person who perpetrated sexual abuse was a leader in the Church. The perception developed that the Church was protecting its own. This also caused scandal.

In Australia, media articles concerning sexual abuse of children were broadcast or printed only from 1985 onwards. Awareness of sexual abuse of children was slow to percolate through the society. Initially, people thought in terms of incest, then as media articles increased, the awareness of this problem grew. The realization developed that the problem was not small, that sexual abuse was perpetrated by people of a range of temperaments from all walks of life, including clerics and religious. At the same time, there came an increased comprehension of the frequently long-lasting effects of sexual abuse on children. An understanding of the complexities of sexual abuse continues to grow.

In December 1996, the Australian Catholic Bishops' Conference and the Australian Conference of Leaders of Religious Institutes published *Towards Healing, Principles and Procedures in Responding to Complaints of Sexual Abuse against Personnel of the Catholic Church in Australia*. The following year, they published the draft of *Integrity in Ministry: A Document of Ethical Standards for Catholic Clergy and Religious in Australia*. In 1999, following a consultative process, a revised *Integrity in Ministry: A Document of Principles and Standards for Catholic Clergy and Religious in Australia* was published. Following further consultation, a revised *Towards Healing* was published in December 2000. Further amendments were made in 2003. As well, two handbooks were developed, one contained guidelines for bishops and leaders of religious institutes and one was directed to people involved in the process. These documents form two

elements of a nine-point plan that was formulated in response to sexual abuse within the Church in Australia by the Australian bishops and leaders of religious institutes in 1996 and expanded to a twelve-point plan in 2000. Recognizing that these documents form only part of the Church's response, we acknowledge that, having the nature of public documents, they are a visible form of the Church's response. Consequently, these documents, especially *Towards Healing*, constitute the particular focus of this study.

Guided by *Towards Healing*, bishops and leaders of religious institutes in Australia addressed issues and formed decisions concerning particular offences. In some situations their decisions were reversed when a person took recourse to the Holy See.³ While recognizing the right of an individual to take recourse, adherence to carefully formulated principles and procedures should minimize the need for such action. While subsequent revisions may have reduced the possibility of recurrences of the overturning of decisions in the future, still, potential bases for misinterpretation or misunderstanding need to be identified. Furthermore, these documents aim to give assurance of the Church's determination to respond with justice and equity.

The bishops and congregational leaders in Australia responded to child sexual abuse by members of the Catholic Church in the context of the time. That context was broader than Australia. Although Australia is isolated geographically, communications technology and international media have diminished that isolation. Accordingly, the context in which the leaders of the Catholic Church in Australia responded was an

³ See CONGREGATIO PRO CLERICIS, 21 December 2000, Prot. No. 2000/1201; CONGREGATIO PRO CLERICIS, 23 August 2001, Prot. No. 2001/1099; CONGREGATIO PRO CLERICIS, 23 August 2001, Prot. No. 2001/0081. These decisions are cited by A. MENDONÇA, "The Bishop as the Mirror of Justice and Equity in the Particular Church: Some Practical

ecclesial one with a universal scope and indeed, one that took into account movements of society. Consequently, after identifying aspects of sexual abuse of children in general, the first chapter presents the situation in a number of countries: United States, Canada, United Kingdom and Ireland, and New Zealand. Looking firstly at society, we find inquiries and reports, changing legislation and the establishment of councils and commissions to protect the rights of children in particular but also of the defenceless. We then study the response to sexual abuse of the Catholic Church in these countries. At times, it is possible to identify interactions between the church and society – not only in terms of the chronology, but also in relation to the particular emphases that characterize the responses. These overviews are necessarily limited by the space that can be allocated, but also by the fact that they are being viewed from outside the country.

The second chapter focuses on Australia. As with the other countries, we examine firstly society's response. Events in Western Australia, New South Wales and Queensland impacted most significantly on our awareness and understanding of sexual abuse. However, while action was centred in a given state, each influenced the actions of governments in other states. As in other countries, we find revelations, inquiries and legislative changes forming a backdrop to the Church's response. Then, in considering the response of the Catholic Church in Australia, we identify a number of features of this response that make it unique.

With this background, in the third chapter we identify the values and rights that the Church strives to uphold. We examine the concretization of these rights in Church law and consider their application to procedures and practices adopted in response to

allegations of sexual abuse of minors. Where appropriate, we identify specific problems and attempt to propose an alternative that, as well as being canonically sound, is underpinned by appropriate theological values.

Finally, in the fourth chapter, we identify and consider a number of canonical issues arising from the Australian policy, procedures and practice. In developing procedures for their dioceses, the United States Catholic Conference of Bishops chose to develop a process for the whole territory of the Conference of Bishops and seek *recognitio* from the Holy See. The Australian Catholic Bishops' Conference chose an alternative approach, as did the Church leaders in other countries. The implications of this decision are worthy of consideration, as are other aspects of the approach of the Church in various countries. As well as differences in approach, differences between countries in substantive issues point to possible problem areas. We discuss these also in Chapter Four.

This thesis was commenced in 2001. During the past three years, governments and non-governmental bodies have continued to respond to the sexual abuse of children. Inquiries continue, legislation is enacted, the functions of various commissions and consultative bodies concerned with the rights of children change. During this period, also, the Church has made legislative changes at the universal level. The Church in Australia, like the Church in each of the countries considered, has continued to review and refine its policies and procedures. Developments will continue to occur. Given the evolutionary nature of the Church's understanding of the nature of the problem, and its commitment to reviewing its procedures, this study presents a view that may be true for only a brief period in time.

Several notes are required. The first concerns the use of non-inclusive language. Throughout this thesis, to facilitate reading, the masculine gender is used for all personal pronouns. This is judged to be appropriate in many cases when referring to clergy. However, we recognize that victims of sexual offences are both male and female. In the context of offences committed by clerics, offenders and their superiors are male; in the broader context of abuse, offenders and their superiors may be male or female.

We recognize that while the Latin and Eastern Churches have their own laws, in the context of sexual abuse of children, both universal law, in particular the norms of *Sacramentorum sanctitatis tutela*, and the policies and procedures of *Towards Healing* apply to both the Latin and Eastern Catholic Churches. When referring to members of one of the Eastern Catholic Churches, these documents must be interpreted and applied in the context of the *Code of Canons of the Eastern Churches* and the particular legislation of each *sui iuris* Church. Nevertheless, references are made to specific canons in the *Code of Canons of the Eastern Churches* only when a significant difference exists between the parallel canons of the Eastern and Latin Codes.

CHAPTER I

THE CONTEXT OUTSIDE AUSTRALIA

INTRODUCTION

To appreciate and understand the response of the Catholic Church in Australia to child sexual abuse, we will commence by identifying societal factors that have brought this issue to public attention in many parts of the world. Then we will examine situations in several countries in which the sexual abuse of children has been a matter of grave concern. Taking a chronological approach, we present an overview of inquiries and legislative changes. Finally, with this background, we will examine the response of the Catholic Church in selected countries. This approach aims to contextualize the Church's response in each country and provide a basis for comparisons between them.

1 – A GROWING AWARENESS OF THE INCIDENCE OF SEXUAL ABUSE

Over the past twenty years or so, the sexual abuse of minors within the Catholic Church has caused grave scandal in many countries, including Australia. And yet, it would be difficult, if not impossible, to state that sexual misconduct by clerics and religious has not occurred in the Church in other times as well. One factor that has changed is that previously the misconduct was either not widely known, or it was simply

regarded as personal moral failure.¹ Since the early 1980s, however, society has become increasingly aware both of the extent of sexual abuse and of its harmful effects. Accordingly, both society and Church have striven to prevent further occurrences of it, especially where children are concerned.

Several sociological factors, such as the women's movement, a growing public awareness of the rights of children, the recognition by society of the harmful effects of child sexual abuse, as well as an increasingly litigious society, have brought the issue of sexual abuse to the public forum. In 1972, the General Assembly of the United Nations proclaimed 1975 to be International Women's Year² and the years 1976 to 1985 as the United Nations Decade for Women.³ This focus on women led to increased attention being given to the issues of domestic violence⁴ and even to the extent of child sexual abuse.

During the Decade for Women, the United Nations Organization proclaimed 1979 as the International Year of the Child.⁵ Changes in civil legislation in many countries and

¹ See H. GOODE, H. McGEE and C. O'BOYLE, *Time to Listen: Confronting Child Sexual Abuse by Catholic Clergy in Ireland*, Dublin, The Liffey Press, 2003, p. 122. See also ROYAL COMMISSION INTO THE NEW SOUTH WALES POLICE SERVICE, *Final Report, Vol. V: The Paedophile Inquiry*, Sydney, 1997, p. 996.

² See United Nations General Assembly Resolution 3010 (XXVII), 18 December 1972. All resolutions of the General Assembly of the United Nations are found at «<http://www.un.org/documents/resga.htm>» (18 February 2002).

³ See United Nations General Assembly Resolution 3520, 15 December 1975. The *United Nations Decade for Women: Equality, Development and Peace* concluded with the adoption of the *Nairobi Forward Looking Strategies for the Advancement of Women*, Nairobi, Kenya, 15-26 July 1985.

⁴ Eventually this led to the General Assembly's proclamation of the *Declaration on the Elimination of Violence against Women* at its 85th Plenary meeting. United Nations General Assembly Resolution 48/104, 20 December 1993.

⁵ See United Nations General Assembly Resolution 31/169, 31 December 1976. The Assembly articulated the goals of that year: "to provide a framework for advocacy on behalf of

the establishment of commissions and councils as advocates for children testified to the success of that year's programs. Similarly, a general increased consciousness of the needs of children and of the harm that can be caused to them by emotional and physical abuse bore witness to the success of the Year of the Child. Ten years later, on 20 November 1989, the United Nations Convention on the Rights of the Child was opened for signature and ratification.⁶ Accordingly, since the early 1980s we have witnessed the beginning of a new level of awareness of the extent and repercussions of child sexual abuse.

The mass media have also played a significant role in raising public awareness of the nature and incidence of sexual misconduct.⁷ While much of the media's attention has concentrated on disclosures of the conduct of individuals, it has also highlighted

children and thus promote a greater awareness of the special needs of children; to make people realize that programs for children ought to be seen as an integral part of economic and social development planning."

6 Article 19 is particularly relevant:

"1. States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.

2. Such protective measures should, as appropriate, include effective procedures for the establishment of social programmes to provide necessary support for the child and for those who have the care of the child, as well as for other forms of prevention and for identification, reporting, referral, investigation, treatment and follow-up of instances of child maltreatment described heretofore, and, as appropriate, for judicial involvement."

As of 2 November 2003, 192 member nations had signed the convention. Although not referring to the Year of the Child, many reports and documents refer to this *Convention on the Rights of the Child* and acknowledge its guidance. The Holy See acceded to this convention on 20 April 1990.

⁷ See S.H.S. HUGHES, *Royal Commission of Inquiry into the Response of the Newfoundland Criminal Justice System to Complaints*, (=Hughes Report), Vol. 1, p. 490, and R.G. ROGERS, *Reaching for Solutions: The Report of the Special Advisor to the Minister of National Health and Welfare on Child Sexual Abuse in Canada*, Ottawa, Minister of Supply and Services, 1990, p. 9. See also *South Australian Government Task Force on Child Sexual Abuse: Final Report*, which urged the use of media in providing to adults and children information on child sexual abuse. SOUTH AUSTRALIAN HEALTH COMMISSION, *South Australian Government Task Force on Child*

government action or lack of action, including the conduct of inquiries, the provision of funding and the enactment of legislation. The media have also focussed on the handling of complaints or the ignoring of complaints of abuse by officials, especially church officials. Thus, it has assisted in forming public attitudes. In many countries, this pressure has resulted in governments, non-government agencies and churches increasing their efforts in child protection.

1.1 – DEFINITIONS OF CHILD SEXUAL ABUSE

An examination of responses to sexual abuse produces a range of definitions. The federal *Child Abuse Prevention and Treatment Act* in the United States defines child abuse or neglect as:

any recent act or failure to act:

- resulting in imminent risk of serious harm, death, serious physical or emotional harm, sexual abuse, or exploitation
- of a child (usually a person under the age of 18, but a younger age may be specified in cases not involving sexual abuse)
- by a parent or caretaker who is responsible for the child's welfare.

In turn, sexual abuse of children is defined as:

- the employment, use, persuasion, inducement, enticement, or coercion of any child to engage in, or assist any other person to engage in, any sexually explicit conduct or any simulation of such conduct for the purpose of producing any visual depiction of such conduct; or
- the rape, and in cases of caretaker or inter-familial relationships, statutory rape, molestation, prostitution, or other form of sexual exploitation of children, or incest with children.⁸

Sexual Abuse: Final Report (=SA Task Force), Adelaide, Government Publishing Service, 1986, p. 265.

⁸ *Child Abuse Prevention and Treatment Act*, s. 111.4, «<http://www.acf.hhs.gov/programs/lcb/laws/capta/>» (15 August 2003). Originally passed in the United States Congress in 1974, the *Child Abuse Prevention and Treatment Act* was amended most recently by the *Keeping Children and Families Safe Act* of 2003.

In contrast, the Western Australia Law Reform Commission, in defining child sexual abuse in terms of a greater number of activities in fact, may have employed a less inclusive definition:

- i. intentional touching of the body of a child for the purpose of the sexual arousal or sexual gratification of the child or the person;
- ii. intentional masturbation in the presence of a child;
- iii. intentional exposure of the sexual organs of a person or any other sexual act intentionally performed in the presence of a child for the purpose of sexual arousal or gratification of the older person or as an expression of aggression, threat or intimidation towards the child; and
- iv. sexual exploitation, which includes permitting, encouraging or requiring a child to solicit for or to engage in prostitution or other sexual acts as referred to above with the accused or any other person, persons, animal or thing engaging in the recording (on video-tape, film, audio-tape or other temporary or permanent material), posing, modelling or performing of any act involving the exhibition of a child's body for the purpose of sexual gratification of an audience for the purpose of any other sexual act referred to in subparagraphs (i) and (iii) above.⁹

Some definitions consider the question of cooperation or choice. For instance, a widely used definition of child sexual abuse as “the involvement of dependent, developmentally immature children and adolescents in sexual activities with any person older or bigger, which they do not fully comprehend, and to which they are unable to give an informed consent”¹⁰ raises questions as to whether or not a child is ever able to comprehend and give informed consent.¹¹

⁹ The Irish Catholic Bishops' Advisory Committee on Child Sexual Abuse adopted this definition. See IRISH CATHOLIC BISHOPS' ADVISORY COMMITTEE ON CHILD SEXUAL ABUSE, *Child Sexual Abuse: Framework for a Church Response*, Dublin, Veritas, 1996, p. 20. This definition was recommended by the Law Reform Commission of Ireland. THE LAW REFORM COMMISSION, *Report on Child Sexual Abuse*, Part I, 1.10, «www.lawreform.ie/publications/data/volume7/lrc_5.7.html» (28 October 2003).

¹⁰ P. PARKINSON, *Child Sexual Abuse and the Churches*, London, Hodder & Stoughton, 1997, p. 9. This definition is based on that of Schechter and Roberge, who add the phrase, “and that violate the social taboos of family roles.” Cf. M.D. SCHECHTER and L. ROBERGE, “Sexual

The definition used by the Canadian Conference of Catholic Bishops and taken from the *Winter Report* adopts a different approach:

Contacts or interactions between a child and an adult when the child is being used as an object of sexual gratification for the adult. A child is abused whether or not this activity involves explicit force, whether or not it involves genital or physical contact, whether or not it is initiated by the child, and whether or not there is discernible harmful outcome.¹²

While this definition focuses on the action of the adult, that of the bishops of England and Wales focuses on the child. They define an abused child as a boy or girl under the age of eighteen

who has suffered from physical injury, physical neglect, failure to thrive, emotional or sexual abuse, which the person who has had custody, charge or care of the child either caused or knowingly failed to prevent. Having custody, charge or care includes any person, in whatever setting, who, at the time is responsible for that child.¹³

Exploitation," in R.E. HELFER and C.H. KEMPE (eds.), *Child Abuse and Neglect: The Family and the Community*, Cambridge, MA, Ballinger, 1976, pp. 127-142.

¹¹ P. Parkinson determines that children are not able to give an informed consent and that they do not fully understand what is happening. Given that two conditions are necessary for consent, namely knowledge of what one is consenting to and freedom to consent, Bagley and King support this view in asserting that "children cannot give informed consent to sex with adults because they lack the information about the full social and biological meanings of sexuality." C. BAGLEY and K. KING, *Child Sexual Abuse: The Search for Healing*, London and New York, Tavistock/Routledge, 1990, p. 53.

¹² CANADIAN CONFERENCE OF CATHOLIC BISHOPS, *From Pain to Hope: Report from the CCCB ad hoc Committee on Child Sexual Abuse*, Ottawa, Canadian Conference of Catholic Bishops (=CCCB), 1992, p. 20. See G. WINTER, *The Report of the Archdiocesan Commission of Enquiry into the Sexual Abuse of Children by Members of the Clergy* (=Winter Report), St. John's, NF, Archdiocese of St. John's, 1990, Vol. II, p. A-20. This definition was based on working definition developed by the British Standing Committee on Sexual Abuse of Children. See *Winter Report*, vol. I, p. 30.

¹³ LANCASHIRE AREA CHILD PROTECTION COMMITTEE, *Procedures and Guidelines*, Lancaster, Lancashire County Council, 1990, n. 1.1.

These definitions provide for the possibility of an action being considered sexual abuse according to one definition, but not according to another.¹⁴ They also point to the difficulties inherent in formulating a definition that is both comprehensive and usable.

1.2 – UNDERSTANDING THE EFFECTS OF CHILD SEXUAL ABUSE

Many researchers and writers have acknowledged that both the Church and society have grown in their understanding of the effects of child sexual abuse over the past twenty years. They concur that the effects of child sexual abuse vary from individual to individual.¹⁵ Likewise, it is generally accepted that a number of factors affect both the short, medium and long-term effects of the abuse. While research findings about the most significant factors may vary, there is general agreement about the factors that affect the degree of trauma experienced.¹⁶ The person's age and stage of development at the onset of the activity, as well as the meaning of the abuse to the child impact very significantly on the severity of the effects, as does the relationship of the child to the offender.¹⁷ Abuse involving penetration (vaginal, anal or oral) is considered the most traumatic, along with the use of violence or threats of violence. Obviously, the frequency and intensity of the

¹⁴ According to some definitions, voyeurism or exhibitionism may not be included as child sexual abuse. See GOODE, McGEE and O'BOYLE, *Time to Listen: Confronting Child Sexual Abuse by Catholic Clergy in Ireland*, pp. 18-20.

¹⁵ See BAGLEY and KING, *Child Sexual Abuse: The Search for Healing*, pp. 116-131, ROGERS, *Reaching for Solutions*, pp. 19-20.

¹⁶ See A. BROWNE and D. FINKELHOR, "Initial and Long-Term Effects: A Review of the Research," in D. FINKELHOR, *A Sourcebook on Child Sexual Abuse*, Beverley Hills, CA, Sage Publications, 1986, pp. 143-179. The Irish Compensation Advisory Committee provided a summary of the effects of child sexual abuse in its 2002 report. See THE COMPENSATION ADVISORY COMMITTEE, *Towards Redress and Recovery: Report to the Minister for Education and Science*, January 2002, pp. 23-27, «<http://www.rirb.ie/ryanreport.asp>» (30 September 2003).

¹⁷ See R.K. OATES, "The Effects of Child Sexual Abuse," in *The Australian Law Journal*, 66 (1992), p. 190. The South Australian Task Force proposed that greater trauma is experienced

activity as well as its duration impact on the consequences. For instance, children subjected to ritualistic abuse have been found to experience more numerous effects than those subject to non-ritualistic abuse.¹⁸ Strangely enough, the offender's making the victim assume responsibility for the action is not widely identified as exacerbating the effects.¹⁹ However the degree of participation of the child does impact on the trauma.²⁰ Two post-abuse factors that clearly affect the child are the degree of support received at the time of disclosure and subsequent therapeutic intervention. Likewise, investigations and court proceedings generally impact negatively on the child.²¹

While noticeable short-term effects of child sexual abuse may alert parents and teachers to the problem, other effects, initially less visible, may endure long after the offences have ceased. As early as 1981, D.A. Mrazek and P.B. Mrazek²² provided an overview of long-term effects that included problems in three general areas: sexual adjustment, interpersonal problems and other psychological symptoms. Among problems

when the child is old enough to be aware of the cultural taboos that have been violated. See *SA Task Force*, p. 29.

¹⁸ See OATES, "The Effects of Child Sexual Abuse," p. 190.

¹⁹ See S. HARTER, P.C. ALEXANDER, and R.A. NEIMEYER, "Long Term Effects of Incestuous Child Abuse in College Women: Social Adjustment, Social Cognition, and Family Characteristics," in *Journal of Consulting and Clinical Psychology*, 56 (1988), pp. 5-8.

²⁰ *S.A. Task Force*, p. 29.

²¹ See OATES, "The Effects of Child Sexual Abuse," p. 190. See also C.C. HAASE, R.S. KEMPE and C.A. GROSZ, "Non-Familial Sexual Abuse: Working with Children and Their Families," in R.K. OATES (ed.), *Understanding and Managing Child Sexual Abuse*, Sydney, Australia, Harcourt Brace Jovanovich Publishers, 1990, p. 179. D. Finkelhor and A. Browne proposed a model incorporating four factors affecting the trauma experienced by victims: 1. traumatic sexualization, 2. betrayal, 3. powerlessness and 4. stigmatization. See D. FINKELHOR and A. BROWNE, "The Traumatic Impact of Child Sexual Abuse: A Conceptualization," in *American Journal of Orthopsychiatry*, 55 (1985), pp. 530-541, cited by BAGLEY and KING, *Child Sexual Abuse: The Search for Healing*, p. 127.

²² D.A. MRAZEK, and P.B. MRAZEK, "Psychosexual Development within the Family," quoted in BAGLEY and KING, *Child Sexual Abuse: The Search for Healing*, pp. 130-132.

in sexual adjustment, these writers listed promiscuity, confusion about sexual orientation,²³ sexual dysfunction, prostitution, impulses to assault a child brutally and sexually, sexual molestation of a child, as well as aversion to sexual activity. Clinicians have suggested that the victim may identify with the aggressor and so may become an aggressor in order to assimilate the traumatic experience.²⁴ Accordingly, the person may repeat the experience over and over in order to master it. Interpersonal problems may be evidenced in conflicts with partners and parents, and may cause social isolation and difficulty in establishing close human relationships. Researchers have identified numerous long-term psychological problems including poor self-esteem,²⁵ chronic depression, distrust of those in authority, anxiety, substance abuse, schizophrenia, suicidal tendencies, inter-personal violence and eating and body image disorders.²⁶ Bagley and King identify dissociation, borderline psychosis and multiple personality as the more extreme survival symptoms.²⁷ Sexual abuse perpetrated by clergy or other

²³ In a study controlled for family variables, D. Finkelhor found a connection between childhood sexual abuse of males and adult homosexual activity. See D. FINKELHOR, "Long-term Effects of Childhood Sexual Abuse: Some New Data," in D. FINKELHOR (ed.), *Childhood Sexual Abuse: New Theory and Research*, New York, The Free Press, 1984, pp. 190-191.

²⁴ See OATES, "The Effects of Child Sexual Abuse," p. 192. Although they may not have expressed the finding in the same terms, other researchers have found that adult perpetrators were frequently abused as children when they were the same age as their victims.

²⁵ Because it affects all relationships, R. De Blassie and D. Meier believe that the damage to self-esteem is the primary effect of childhood sexual abuse. See R.R. DE BLASSIE and D. MEIER, "Sexual Abuse of Children," in *Human Development*, 9,3 (Fall 1988), pp. 38-39.

²⁶ See L. TONG and R.K. OATES, "Long Term Effects of Child Sexual Abuse" in OATES, *Understanding and Managing Child Sexual Abuse*, pp. 354-369. These authors tabulate the results of both clinical and non-clinical studies on the long-term effects of child sexual abuse. See also, R.P. VAUGHAN, "Adult Effects of Childhood Sexual Abuse," in *Human Development*, 18,2 (Summer 1997), pp. 38-42.

²⁷ See BAGLEY and KING, *Child Sexual Abuse: The Search for Healing*, p. 127.

church personnel may result in the victim's alienation from God, the Church and religious practice.²⁸

In summary, the long-term effects of childhood sexual abuse can impact severely on the person and, indirectly, on others. At the same time, even if there are no long-term effects, the seriousness of child sexual abuse needs to be recognized, as Browne and Finkelhor have asserted:

Effects seem to be considered less serious if the impact is transient and disappears in the course of development. However this tendency to assess everything in terms of its long-term effects betrays an 'adultocentric' bias. Adult traumas such as rape are not assessed ultimately in terms of whether or not they will have an impact on old age: they are acknowledged to be painful and alarming events whether their impact lasts for one year or ten. Similarly, childhood traumas should not be dismissed because no long-term effects can be demonstrated. Childhood sexual abuse needs to be recognized as a serious problem of childhood, if only for the immediate pain, confusion, and upset that can ensue.²⁹

1.3 – WIDENING THE PARAMETERS OF SEXUAL ABUSE OF CHILDREN

In addressing sexual abuse of children, governments and churches have found themselves moving beyond sexual abuse of children to abuse of children in general. Moreover, recognizing wider aspects of the problems, some have sought to respond to the issue, not only of the abuse of children, but also of the abuse of adults, particularly vulnerable ones. Four facts provide reasons for these variations in approach.

Firstly, the abuse of children was recognized initially as physical abuse. The battered child syndrome, identified by H. Kempe in the 1960s, served as the first warning sign of danger to children in what would normally have been considered a safe

²⁸ See GOODE, McGEE and O'BOYLE, *Time to Listen: Confronting Child Sexual Abuse by Catholic Clergy in Ireland*, pp. 72-74, 101-107.

environment.³⁰ Secondly, sexual abuse of children was often accompanied by other forms of abuse. As will be seen later, a great deal of sexual abuse occurred in residential institutions.³¹ Claims of sexual abuse in these institutions have often been associated with allegations of physical and emotional abuse and neglect.³² Therefore, governments and others have attempted to respond to the needs of all who were abused, whether sexually, physically or emotionally.³³ Thirdly, numerous people have come forward with allegations of sexual abuse many years after the event. They have often suffered long-term effects, including psychological and emotional problems. In responding to them, the authority has generally tried to consider their needs at the time of seeking redress.³⁴ Fourthly, as was stated earlier, the renewed awareness of women's issues led society to

²⁹ BROWNE and FINKELHOR, "Initial and Long-term Effects" p. 178.

³⁰ In 1961 Dr. Kempe conducted a symposium at the American Academy of Paediatrics on the problem of child abuse. In 1969 his book, *The Battered Child*, was published in Chicago and London with a later edition being published in 1974, and revised editions following in 1980, 1987 and 1997. See M.E. HELFER and R.S. KEMPE and R.D. KRUGMAN(eds.), *The Battered Child*, 5th ed., Chicago IL, University of Chicago Press, 1997 (R.E. Helfer, and C.H. Kempe edited the first three editions). This identification of children who had been seriously injured by their parents came fourteen years after the first published article on inexplicable injuries to children by J. Caffey. See J. CAFFEY, "Multiple Fractures in Long Bones of Infants Suffering from Chronic Sub-dural Hematoma," in *American Journal of Roentgenology and Radium Therapy*, 56 (1946), pp. 163-173.

³¹ See below, p. 18 (Canada), p. 23 (England), p. 24 (Wales), p. 25 (Northern Ireland).

³² In Canada, pupils of residential schools have also claimed spiritual, racial and cultural abuse. See LAW COMMISSION OF CANADA, *Restoring Dignity, Responding to Child Abuse in Canadian Institutions*, Ottawa, Minister of Public Works and Government Services, 2000, p. 41. See also THE COMPENSATION ADVISORY COMMITTEE, *Towards Redress and Recovery: Report to the Minister for Education and Science by the Compensation Advisory Committee*, Dublin, 2002, pp. 16-36, <http://www.rirb.ie/documents/cac_report2002.pdf> (13 October 2003).

³³ Generally, the number of those claiming to have been sexually abused is significantly smaller than those claiming physical or emotional abuse.

³⁴ In Ireland, the *Residential Institutions Redress Act 2002* was passed on 10 April 2002 "to provide for the making of financial awards to assist in the recovery of certain persons who as children were resident in certain institutions in the state and who have or have had injuries that are consistent with abuse received while so resident." <<http://www.gov.ie/bills28/acts/>

become more conscious of domestic violence, and then, widening its understanding, of the impact of sexual abuse on children. Accordingly, in some contexts sexual abuse issues can be addressed only in conjunction with family matters.³⁵

A further parameter that distinguishes the responses of the Catholic Church in various countries is that of the perpetrator of the abuse. Some have chosen to address abuse by clergy only, others by clergy and religious only; others have adopted a broader perspective and have included abuse by any person acting on behalf of the Church.

1.4 – DEVELOPMENT OF CODES OF ETHICS

From the early 1960s, professional groups began developing codes of conduct or codes of ethics. Numerous organizations, including church institutions and agencies have developed such documents for their members and employees in response to concerns of sexual harassment or sexual abuse. While many bodies have recognized the value of such a statement in itself, some have identified a need because of the poor perception of the particular group of professionals.³⁶ A code of ethics, if properly formulated and adhered to, is meant to restore trust and confidence. K. Joseph makes the point that while a good code of ethics will provide a set of normative guidelines, these guidelines cannot be exhaustive.³⁷ Accordingly, they still require the person to exercise discretion and judgement. A. Brien suggests that a code of conduct “can provide the foundation for the

2002/a1302.pdf» (23 August 2002). Because it provides for payments to either the spouse or children of certain victims who have died, the Act recognizes the impact of the abuse on others.

³⁵ See ROGERS, *Reaching for Solutions*, p. 46.

³⁶ A. Brien premised his discussion on the need for a code of ethics for Australian parliamentarians on the basis that public trust in parliamentarians was at an all-time low. See A. BRIEN, *A Code of Conduct for Parliamentarians?* Research Paper 2, 1998-99, «<http://www.aph.gov.au/library/pubs/rp/1998-99/99rp02.htm>» (13 December 2001).

development of responsible and honourable action, a basis for developing the skills and patterns of behaviour necessary for honourable public life.”³⁸

A number of groups have both a code of ethics and a code of conduct. Whereas the code of ethics contains principles or statements of values, the code of conduct or practice will generally deal with specific ways of acting. Codes of conduct are more specific than codes of ethics, in terms of the actions prescribed and proscribed. However many groups have one document that includes both types of statements.

Generally, the code, of whichever type, serves the purpose of providing guidance to the individual, as well as to the public for whom the professionals work. It also guides a professional body that may make decisions concerning the action of a member of the profession. For this reason, the code must be known and understood by the individual and should be available to the public.

The question of whether or not a code of ethics should contain a mechanism for its own enforcement remains open. If the code does not contain such a mechanism, then frequently a co-existing structure will exercise such a role. Certainly the existence of such a mechanism provides greater certainty to the public that infractions will be punished. Writing in 1995, K. Joseph concluded:

In the end the best code of ethics in the world will not ensure good or ethical behaviour, - that is reliant on the ethos of the organisation, the prevailing culture, and the character of the individual professional. However, a code of ethics finds its true role in the influence it has on all of these. ... The challenge for an organisation or profession is to set up a code of ethics which not only gives guidelines for the ethical benefit of individual

³⁷ See K. JOSEPH, “Codes of Ethics,” in *Bioethics Outlook*, 6, 4 (December 1995), p. 11.

³⁸ BRIEN, *A Code of Conduct for Parliamentarians?* p. 17.

practitioners but also contributes to the formation of an ethos in which ethical behaviour is the practiced norm.³⁹

2 – RESPONSE OF SOCIETY

In examining the Church's response to child sexual abuse it is necessary to situate it within the context of society's awareness of the issue and response to it. As noted above, society has become increasingly aware of the issue of sexual abuse, especially of children, since the early 1980s.⁴⁰ However, this growing awareness occurred neither universally nor simultaneously in the countries considered in this work.⁴¹ For these reasons, we will examine the situation in several countries in order that patterns in responses of civil and Church authorities may be identified. Events in both the United States and Canada had a significant effect on those in Australia. News of such events served as a warning to Australia. Events in the United Kingdom and Ireland, especially in respect of children in residential care and child migrants, also interacted with events in Australia. In turn, the Australian situation influenced New Zealand's response. While some have opined that the issue of child sexual abuse is a problem unique to English-speaking countries, the situations in France, Belgium, Austria, Germany, Italy and many other countries show otherwise.⁴² Of these, we refer briefly only to the response of the Church in France.

³⁹ JOSEPH, "Codes of Ethics," p. 11.

⁴⁰ In speaking of society, we are referring, at least, to those countries that we are about to consider. It is recognized that the awareness of child sexual abuse is not uniform throughout the world.

⁴¹ In the United Kingdom this awareness developed from the late 1980s.

⁴² See, for example, PARLIAMENTARY ASSEMBLY OF THE COUNCIL OF EUROPE, Report of the Social, Health and Family Affairs Committee, *Sexual Exploitation of Children: Zero Tolerance*, 5 September 2002, <<http://assembly.coe.int/Documents/WorkingDocs/doc02/EDOC9535.htm>> (24 September 2003) and R. WAZIR and N. van OUDENHOVEN (eds.), *Child Sexual*

2.1 – UNITED STATES

Just over forty years ago, Dr. Henry Kempe identified the ‘battered child syndrome’. Battered children were generally seen to be children who had sustained non-accidental physical injuries. Thirteen years later, in 1974, Congress passed the *Child Abuse Prevention and Treatment Act*⁴³ directed towards coordinating and facilitating the states to enable communities to carry out family protection plans. In 1974, as a result of this Act, the National Centre on Child Abuse and Neglect (NCCAN) was established.⁴⁴ Also in 1974, the first state laws requiring professionals to report suspected cases of child abuse were passed to enable the states to qualify for funding under this federal legislation.

Congress also passed the *Children’s Justice and Assistance Act*, providing state grants to improve the investigation, prosecution and judicial handling of child abuse cases, particularly cases involving child sexual abuse. Funding under this act was

Abuse : What Can Governments Do? A Comparative Investigation into Policy Instruments Used in Belgium, Britain, Germany, the Netherlands and Norway, Boston, Kluwer Law International, c1998. In reference to another English-speaking country, see SOUTH AFRICAN HUMAN RIGHTS COMMISSION, *Report on Sexual Offences against Children: Does The Criminal Justice System Protect Children?* April 2002, «www.sahrc.org.za/mai-frameset.htm» (10 May 2002).

⁴³ Originally enacted in 1974, a number of amendments have been passed, including *Child Abuse Prevention, Adoption and Family Services Act* of 1988; *Child Abuse Prevention Challenge Grants Reauthorization Act* of 1989; *Drug Free School Amendments* of 1989; *Stewart B. McKinney Homeless Assistance Act Amendments* of 1990; *Child Abuse, Domestic Violence, Adoption, and Family Services Act* of 1992; *Juvenile Justice and Delinquency Prevention Act Amendments* of 1992; *Older American Act Technical Amendments* of 1993; *Human Services Amendments* of 1994; *Child Abuse Prevention and Treatment Act Amendments* of 1996; *Keeping Children and Families Safe Act* of 2003.

⁴⁴ Following the 1996 amendments to the Act, the Office on Child Abuse and Neglect (OCAN) replaced the National Centre on Child Abuse and Neglect.

conditional on the establishment and maintenance of a state multi-disciplinary task force on children's justice.⁴⁵

Federal legislation has directed state action and state legislation. As a result, action has focussed on child abuse and neglect, not just on child sexual abuse. Also, there have been few major scandals and thus little media attention given to child sexual abuse or institutional abuse in federal or state-run institutions, no government inquiries, nor allegations of mishandling of such incidents in society. Members of churches, on the other hand, have attracted media attention both for the extent of the abuse and the handling of allegations of sexual abuse. During the early 1980s, accounts of sexual abuse of children and sexual misconduct by clergy first appeared in the press. The 7 June 1985 issue of the *National Catholic Reporter* carried several articles on child abuse by clergy. An editorial introduction to the articles, stated:

In a decision following considerable internal discussion, the National Catholic Reporter decided to publish the names of the priests involved though not those of the boys and their families. In each case, these priests have already been named in open court or in legal depositions, and they have been the subjects of national wire service or national magazine coverage.⁴⁶

The articles referred to or focussed on sexual abuse by ten diocesan priests and one religious priest.⁴⁷ In addition, the articles raised a number of issues concerning the Church's response to such behaviour and the accusations that followed. Among the issues raised were:

⁴⁵ The level of funding was increased when President William Clinton signed the *Child Abuse Prevention and Enforcement Act* on 10 March 2000, «<http://www.cfda.gov/public/viewprog.asp?progid=1304>» (15 August 2003).

⁴⁶ *National Catholic Reporter*, 7 June 1985, p. 1.

- the responsibility for failing to report suspected sexual abuse;
- the privacy of diocesan personnel records;
- the applicability or otherwise of the statutes of limitations;
- the responsibility of Church leaders in failing to protect other children after a complaint had been received;
- the failure to respond to requests for assistance for counselling on the basis that it might imply responsibility;
- the inappropriate responses from Church leaders to victims, including placing blame on them and suggesting that their actions were sinful.

Consequently, from 1985 onwards, the issue of sexual abuse by clergy and religious was in the mind of many Americans Catholics. It became even more so in 2002.

Chronologically, events in the United States generally preceded similar events in other countries. Hence, they served to warn others of the possibility of similar happenings. Likewise other countries looked to the United States for guidance in determining the nature and extent of their responses.

2.2 – CANADA

Canada's history of awareness and response to child abuse was very different from that of the United States. In Canada, the issue of sexual abuse (as distinct from child abuse) has been addressed directly. Between 1977 and 1980, significant increases occurred in the number of incidents of child sexual abuse reported to provincial child services.⁴⁷ In 1980, the Minister of Justice and the Minister of National Health and

⁴⁷ Criminal or civil suits involving eight of these people had either been judged in the previous twenty-four months or were pending at the time of the publication of the articles. Naming these priests was aimed at alerting readers to the extent of the problem.

⁴⁸ COMMITTEE ON SEXUAL OFFENCES AGAINST CHILDREN AND YOUTHS, *Sexual Offences Against Children: Report of the Committee on Sexual Offences Against Children and Youths*, (=Badgley Report), vol. I, Ottawa, Department of Supply and Services, 1984, p. 127. See also

Welfare established a Committee on Sexual Offences against Children and Youth “to enquire into the incidence and prevalence in Canada of sexual offences against children and youths and to recommend improvements in laws for the protection of young persons from sexual abuse and exploitation.”⁴⁹ Chaired by Robin F. Badgley, the committee submitted its report in 1984.⁵⁰

In 1990, Rix Rogers, Special Adviser on Child Sexual Abuse to the Minister of National Health and Welfare completed a significant national report, *Reaching for Solutions*. Later, in 1997, the Minister of Justice asked the Law Commission of Canada to study the ways in which the government should respond to what had become known as institutional child abuse.⁵¹ The Law Commission released its report, *Restoring Dignity, Responding to Child Abuse in Canadian Institutions*, in March 2000.

About the time of the first two reports, major and startling revelations of child sexual abuse occurred in two distinct situations. In 1989-1990, four diocesan priests in St John's, Newfoundland, pleaded guilty to sexual offences against adolescents. Also in 1990, the disclosure of physical and sexual abuses by the Christian Brothers at their

ROGERS, *Reaching for Solutions*, p. 19, where Rogers noted significant increases in the number of incidents during later periods.

⁴⁹ *Badgley Report*, vol. 1, p. 3. The specific Terms of Reference were assigned on 16 February 1981.

⁵⁰ Christopher Bagley and Kathleen King, writing in 1990, evaluate the report: “in terms of its strong research base, its thoroughness, the lucidity and breadth of its proposals, and above all in its wholly child-centred approach, [it] is a unique document and the most important government report on the problem of child sexual abuse to appear in any country.” BAGLEY and KING, *Child Sexual Abuse: The Search for Healing*, p. 98.

⁵¹ More specifically, the Minister asked the Commission to advise on how the government might address the harm caused by physical and sexual abuse of children in institutions operated, funded or sponsored by the government. The Law Commission of Canada was careful to note that ‘institutional child abuse’ “means abuse inflicted on a child residing in an institution, as distinguished from abuse occurring at home, or ‘domestic child abuse’”. The term does not imply

Mount Cashel Orphanage finally became public after having been reported to the Department of Social Services and to the Royal Newfoundland Constabulary fourteen years previously.⁵² Following these disclosures in the media, further allegations of abuse, including physical and sexual abuse were made concerning incidents in other residential situations.⁵³

The recommendations of these reports encompassed issues of awareness and prevention, the justice system, healing and treatment, education and research. The crucial elements of communication and coordination of activities at all levels were achieved primarily through the designation of Health and Welfare Canada as the lead ministry in the area of addressing child sexual abuse, thus ensuring consistency and coordination of initiatives.

that child abuse is an integral feature of all institutions for children, or that it has become 'institutionalised'." *Restoring Dignity*, p. 15.

⁵² These disclosures led to a Royal Commission being established to look into the events at Mount Cashel Orphanage. On 1 June 1991, the Honourable S.H.S. Hughes presented to the Lieutenant Governor his two volume report, *Royal Commission of Inquiry into the Response of the Newfoundland Criminal Justice System to Complaints*, containing thirty-five recommendations.

⁵³ The first claim made by a former pupil in a residential school was received in 1988. By 1996, 200 claims had been made.

Up to 130 residential schools for First Nations children were operated, in all provinces except Newfoundland, New Brunswick and Prince Edward Island, as joint ventures of the Government of Canada and either the Roman Catholic Church, the Anglican Church of Canada, the United Church of Canada or the Presbyterian Church of Canada. On 1 April 1969, the Government of Canada assumed total responsibility for the schools, most of which closed during the mid 1970s.

Students from St. John's Training School for Boys, Uxbridge ON, and St Joseph's Training School for Boys, Alfred, ON, disclosed incidents of abuse about this time. In 1991, the Ontario Provincial Police laid 200 charges against 30 Christian Brothers and staff. An agreement was reached between the Brothers of the Christian Schools of Ottawa, the Government of Ontario, the Roman Catholic Archdiocese of Ottawa and the Roman Catholic Archdiocese of Toronto in 1992 and a second agreement was made in 1994 that included the Christian Brothers of Toronto. As part of the agreement, an official apology was made and a moment of silence was observed in the Legislative Assembly of Ontario on 25 June 1996.

Among their recommendations, the *Badgley Report* and *Reaching for Solutions* proposed several legislative changes. Consequently, national legislation created new child abuse offences,⁵⁴ introduced principles of sentencing⁵⁵ and revised rules and procedures for hearing evidence⁵⁶ as well as providing for restrictions on offenders.⁵⁷ In addition to changes in federal legislation, developments occurred in provincial legislation in three areas: court procedures,⁵⁸ reporting of abuse and the establishment and maintenance of child abuse registers. All provinces and territories have legislated for the

⁵⁴ In November 1999, the Department of Justice launched the *Children as Victims in the Criminal Justice System* project by releasing a consultation paper, *Child Victims and the Criminal Justice System*, which raised the issue of the need of recognizing the distinct offence of causing severe emotional or psychological harm. DEPARTMENT OF JUSTICE, *Child Victims and the Criminal Justice System*, [«canada.justice.gc.ca/en/cons/cjild/index.html»](http://canada.justice.gc.ca/en/cons/cjild/index.html) (26 July 2001). The consultation was completed in Summer 2001. Subsequently, discussions were being held with Federal, Provincial, and Territorial Ministers Responsible for Justice concerning improving the protection of children from re-offenders and the creation of further child specific offences.

⁵⁵ These principles include denunciation, deterrence, rehabilitation, reparation for harm done and the promotion of a sense of responsibility in offenders and acknowledgment of harm done to victims and the community. See GOVERNMENT OF CANADA, *Safeguarding the Future and Healing the Past, The Government of Canada's Response to the Law Commission of Canada's Report Restoring Dignity: Responding to Child Abuse in Canadian Institutions*, June 2001. pp. 13-14. Cf. *Criminal Code*, s. 718, [«http://laws.justice.gc.ca/en/C-46/38474.html»](http://laws.justice.gc.ca/en/C-46/38474.html) (7 December 2001). Earlier, in 1995, the breach of a position of trust or authority was made an aggravating factor for sentencing purposes.

⁵⁶ *Canada Evidence Act*, Bill C-15, effective on 1 January 1988, eliminated the rules for corroboration and simplified the process for allowing young children to provide testimony.

⁵⁷ In 1994, the National Screening System provided for criminal record checks by the Canadian Police Information Centre. Having received Royal Assent on 30 March 2000, Bill C-7 amended the *Criminal Records Act 2000* so that the criminal records of pardoned sex offenders who are seeking positions of trust, either as employees or volunteers, are available for screening purposes [«http://canlii.org/ca/as/2000/c1/»](http://canlii.org/ca/as/2000/c1/) (8 December 2002). The *Sex Offender Information Registration Act* (Bill C-16) was passed by the Thirty-Seventh Parliament and received royal assent on 1 April 2004 [«http://www.parl.gc.ca/LEGISINFO/index.asp?Lang=E&Chamber=C&StartList=2&EndList=200&Session=12&Type=0&Scope=I&query=4110&List=toc-1»](http://www.parl.gc.ca/LEGISINFO/index.asp?Lang=E&Chamber=C&StartList=2&EndList=200&Session=12&Type=0&Scope=I&query=4110&List=toc-1) (22 April 2004).

⁵⁸ See Saskatchewan's *The Child and Family Services Act*, S.S. 1988, s. 30. See also Nova Scotia's *Children's Services Act*, s. 76A, as amended by Bill 81, 1988, 54th Assembly, 4th Session.

mandatory reporting of child abuse.⁵⁹ A number of provinces have established child abuse registers, although their purposes differ.⁶⁰

A theme of all reports has been the recognition of the need for further research. Rogers identified particular groups that deserve to be the subject of further research as well as the issues of long-term effects of sexual abuse and the characteristics and incidence of unproven and false allegations.⁶¹ Hand in hand with the recognition of the need for research has been the recognition of the need for reviews of procedures and strategies.⁶²

The Rogers report also contained a recommendation concerning churches:

That churches develop policies and procedures for responding appropriately to the problem of child sexual abuse. This includes the articulation of guidelines

⁵⁹ Alberta, *Child Welfare Act*, 1996, s. 3; British Columbia, *Child, Family and Community Services Act*, 1996, s. 7; Manitoba, *Child and Family Services Act*, 1987, s. 18; New Brunswick, *Family Services Act*, 1980, s. 30; Newfoundland, *Child Welfare Act*, 1990, s. 49: 1-3; North West Territories, *Child Welfare Act*, 1988, s. 38; Nova Scotia, *Children and Family Services Act*, 1990, ss. 23, 24, 25; Nunavut, *Child and Family Services Act*, 1997, s. 8(1); Ontario, *Child and Family Services Act*, 1984, s. 68, 81; Prince Edward Island, *Family and Child Services Act*, 1988, s. 14; Quebec, *Loi de la protection de la jeunesse*, 1977, s. 39, 43, 134; Saskatchewan, *Child and Family Services Act*, 1989-1990, s. 12; Yukon, *Children's Act*, s. 117.

⁶⁰ Nova Scotia's *Children's Services Act*, (s. 43 (2)), as amended by S.N.S. 1988, c. 46, s.9.) permits the use of the register for job screening as also does Manitoba's register, established by the *Child and Family Services Act*, R.S.M. 1987 c. 80, s. 19.1-19.5. On 23 April 2002, the *Sex Offender Registry 2000 Act*, known also as Christopher's Law, received royal assent, establishing the Ontario Sex Offender Registry.

⁶¹ He identified as being in need of research: problems and issues concerning sexual abuse in rural and remote areas, among Aboriginal peoples (in both rural and urban settings), in immigrant families, involving disabled and mentally handicapped children and children living in institutions.

⁶² See *Restoring Dignity*, pp. 111, 403. This challenge has been accepted by the Department of Justice. Its project, *Children as Victims in the Criminal Justice System*, aims to explore the need for new measures to safeguard children and to reflect better children's particular needs and vulnerabilities in four general areas: a) preventing convicted sexual offenders from re-offending against children, b) creating further child-specific offences and modifying general offences to refer to the harms suffered by child victims, c) making it easier for child victims and witnesses to testify in court and d) reviewing issues relating to age, including minimum age of consent to sexual activity.

for church leaders to follow in the event of disclosures, training for appropriate pastoral counselling, procedures to follow in the event that church personnel are accused of sexual abuse, and comprehensive screening procedures for clergy and other personnel who work with children and youth.⁶³

This recommendation endorsed recommendations proposed by the CCCB to diocesan bishops.⁶⁴

The significance of much of what has happened in Canada in terms of the responses of provincial and federal governments, lies in several areas: the national approach to the issues, the scope of issues addressed, the resources provided and the breadth of the inquiries. Most importantly, because of the timing of events, for many of these issues, Canada served as a model for other countries.

2.3 – UNITED KINGDOM

In examining the situation in the United Kingdom we find a labyrinth of revelations, inquiries with their subsequent reports and laws concerning the welfare of children.⁶⁵ The legislative systems in the United Kingdom add to the complexity of the situation. While Scotland is part of the United Kingdom, it also has its own legal system. Laws passed in Westminster specify whether they apply to England, Scotland, Wales,

⁶³ ROGERS, *Reaching for Solutions*, pp. 53-54.

⁶⁴ In 1987 the Canadian Conference of Catholic Bishops distributed to all the diocesan bishops a document, *Proposed Procedure to Be Applied in Case of Child Sexual Abuse by a Cleric*. The intention of the executive of the conference of bishops was that each diocesan bishop would use the document as a basis for preparing a policy and procedure for his own diocese. CCCB, *Proposed Procedure to Be Applied in Case of Child Sexual Abuse by a Cleric*, 1987, in *Winter Report*, vol. 1, pp. 192-195.

⁶⁵ With regard to inquiries, in 1982 a report was published that examined the reports of eighteen inquiries that had been conducted over the previous nine years, seventeen of which concerned the deaths of children. See DEPARTMENT OF HEALTH AND SOCIAL SECURITY, *Child Abuse: A Study of Inquiry Reports 1973-1981*, London, HMSO, 1982. The report notes, "The general picture of practice emerging from the reports is not of gross error or failures by

Northern Ireland or to some or all of these countries. Despite this complexity, the inquiries and legislative changes serve as a backdrop for the Church's response to child sexual abuse.

In 1988, the Cleveland Inquiry,⁶⁶ conducted by Lord Chief Justice Elizabeth Butler-Sloss, was the first of a series of inquiries into issues of child sexual abuse in England. Following this report, numerous reports were commissioned into issues concerning children in care in each country. The "Pindown" report, focussing on child care institutions in Staffordshire, followed in 1991.⁶⁷ Consequently, the Secretary of State for Health appointed Sir William Utting to examine "the broader context to the management and control of children's homes."⁶⁸ Also in 1991, the Secretary of State established a Committee of Inquiry, chaired by Sir Norman Warner, to examine, among other issues, the selection and recruitment methods for staff working in children's homes.⁶⁹ Then in 1996, "as a result of continuing revelations of widespread sexual, physical and emotional

individuals on single occasions but of a confluence or succession of errors, together with the adverse effects of circumstantial factors beyond the control of those involved" (par 2.2).

⁶⁶ The Cleveland Inquiry investigated the abnormally large number of children who were referred to hospitals in the Cleveland area of England in 1987 with suspected sexual abuse. Elizabeth BUTLER-SLOSS, *The Report of the Inquiry into Child Abuse in Cleveland 1987*, London, HMSO, Cmnd 412, 1988.

⁶⁷ This report resulted from an inquiry into allegations of abuse in child care institutions in Staffordshire. See A. LEVY and B. KAHAN, *The Pindown Experience and the Protection of Children: The Report of the Staffordshire Child Care Inquiry 1990*, Staffordshire County Council, 1991.

⁶⁸ Sir William UTTING, *Children in the Public Care: A Review of Residential Child Care*, London, HMSO, 1991.

⁶⁹ See N. WARNER, *Choosing With Care: The Report of the Committee of Inquiry into the Selection, Development and Management of Staff in Children's Homes*, London, HMSO, 1992, «www.parliament.the-stationery-office.co.uk/pa/cm199798/cmselect/cmhealth/319/31904.htm» (12 October 2001).

abuse of children in children's homes over the preceding 20 years,"⁷⁰ Sir William Utting was again asked to conduct a review of safeguards for children living away from home and to make further recommendations.⁷¹

In Wales, similar investigations were made into child care institutions. In June 1996, the Secretary of State for Wales established a commission to inquire into the care of children in two county councils.⁷² The resulting report, *Lost in Care: Report of the Inquiry into the Abuse of Children in Care in the Former County Council Areas of Gwynedd and Clwyd since 1974*, revealed extensive sexual and physical abuse in residential institutions.⁷³

Meanwhile, in Scotland, a public inquiry was held concerning procedures used to remove children from their home on the basis of a suspicion of their being subject to

⁷⁰ The House of Commons Select Committee on Health refers to inquiries into abuse at the Kincora boys' hostel in East Belfast (1989), the 'Pindown' regime in Staffordshire children's homes (1991), Castle Hill School (1991), Ty Mawr former approved school in Gwent (1992), Feltham Young Offenders' Institution (1993) and Leicestershire children's homes (1993).

⁷¹ Sir William UTTING et al., *People Like Us: The Report of the Review of the Safeguards for Children Living Away From Home*, Norwich, The Department of Health, The Welsh Office, HMSO, 1997. In his report Sir William expressed concern that education and health needs were not being met for many children in care.

⁷² It is worth noting that this commission followed two police investigations (1986-1987 and 1992-1993) and an internal investigation conducted by an independent panel. On the advice of the council's insurance company this panel's report, the Jillings Report, was never published.

⁷³ Sir Ronald WATERHOUSE, *Lost in Care: The Report of the Tribunal of Inquiry into the Abuse of Children in Care in the Former County Council Areas of Gwynedd and Clwyd since 1974*, London, The Stationery Office, 1999, <<http://www.doh.gov.uk/lostincare.2001021.htm>> (15 October 2003). In June 2000, the Secretary of State for Health presented the government's response to this report to the Welsh Assembly: *Learning the Lessons, The Government's Response to Lost in Care: The Report of the Tribunal of Inquiry into the Abuse of Children in Care in the Former County Council Areas of Gwynedd and Clwyd since 1974*, London, The Stationery Office, 2000, <<http://www.doh.gov.uk/lostincare/response.htm>> (12 November 2003).

sexual abuse, possibly in an organized or ritualistic manner.⁷⁴ This inquiry resulted in the reform of the Scottish child protection system and the passing of the *Children (Scotland) Act 1995*.⁷⁵

In Northern Ireland, the Social Services Inspectorate conducted a review of residential care services, with the report, *Children Matter*, being published in October 1998.⁷⁶ The Committee for Health, Social Services and Public Safety conducted an inquiry into residential and secure accommodation for children and presented its two volume report to the Northern Ireland Assembly in November 2000.⁷⁷

While each of these inquiries was directed to a particular issue or a particular geographical area, their findings coincide. The formulation and implementation of standards for the selection and recruitment of staff and care-givers, the need to develop expertise and provide resources, the education of parents, and regular inspection of facilities were recommended as means of preventing future child abuse. In addition,

⁷⁴ *The Report of the Inquiry into the Removal of Children from Orkney in February 1991* (=Clyde Report), London, HMSO, 1992. Chaired by Lord Clyde, the Inquiry was directed to examine the application of the law and procedures. Its brief did not instruct it to determine whether or not the children had actually been abused.

⁷⁵ Concerning the *Clyde Report*, E. Sutherland, professor of law at Glasgow University, concluded, "What emerged was a picture of a lack of communication between individuals within various agencies, a lack of trust between certain individuals and agencies, an absence of any clear procedure, and a lack of clarity about the roles of individual agency members. Most tragic of all was the apparent failure to see the nine children involved as individual human beings." E. SUTHERLAND, "Lessons from Orkney: Child Protection in Scotland," Atelier/Workshop 309, «http://www.osde.ca/Congres/4e_Congres/s53.pdf» (9 October 2001).

⁷⁶ SOCIAL SERVICES INSPECTORATE, *Children Matter: A Review of Residential Child Care Services in Northern Ireland*, Belfast, Social Services Inspectorate, 1998.

⁷⁷ NORTHERN IRELAND ASSEMBLY, COMMITTEE FOR HEALTH, SOCIAL SERVICES AND PUBLIC SAFETY, *Inquiry into Residential and Secure Accommodation for Children in Northern Ireland*, Belfast, The Stationery Office, 2000. «<http://www.ni-assembly.gov.uk/health/reports/report1-00.htm>» and «<http://www.ni-assembly.gov.uk/health/reports/report1-00vol2.htm>» (12 November 2002).

increased inter-agency cooperation and the establishment of procedures for reporting concerns were recommended in order that incidents could be handled better.

The findings of these inquiries impacted significantly on legislation. Because of the multiplicity of legislation that had developed since the passing of the *Children Act 1948*, a Parliamentary Select Committee was established in 1983 to examine this legislation. The *Children Act 1989*,⁷⁸ incorporating the findings of this committee and those of the Cleveland report, forms the basis for child care policy and practice; it focuses on children in care, whether in community homes, registered children's homes, homes of voluntary organizations, or in foster-care.⁷⁹ The paramountcy principle, namely that the child's welfare shall be the court's primary concern, underlies all clauses of the Act, which is effective throughout the United Kingdom. Also passed by the United Kingdom Parliament, the *Care Standards Act 2000*, as its name implies, is concerned with establishing and maintaining standards in providing for children and vulnerable adults.⁸⁰

⁷⁸ *Children Act 1989 c. 41*, «http://www.uk-legislation.hmsso.gov.uk/acts/acts1989/Ukpga_19890041_en_1.htm» (6 April 2003).

⁷⁹ As a consequence and to promote and guide inter-agency cooperation, the Home Office, the Department of Health and the Welsh Office, in 1991, jointly issued *Working Together Under the Children Act 1989: A Guide to Arrangements for Inter-Agency Cooperation for the Protection of Children from Abuse*, London, HMSO, 1991. Based on lessons learned from experience and research, this document was replaced in 1999. DEPARTMENT OF HEALTH, HOME OFFICE, DEPARTMENT FOR EDUCATION AND EMPLOYMENT, *Working Together to Safeguard Children*, London, The Stationery Office, 1999.

⁸⁰ *Care Standards Act 2000 c. 14*, «<http://www.hmsso.gov.uk/acts/acts2000/20000014.htm>» (14 October 2001). It provides for the registration and inspection of care providers: children's homes, care homes, independent hospitals, boarding schools and colleges, child minding and day care centres. It fosters standards among social workers, by legislating for their registration and addresses issues of training and their code of conduct.

The Scottish Parliament passed the *Children (Scotland) Act 1995*.⁸¹ It addresses three general areas: (i) the care of children by parents and local authorities, (ii) children's hearings and (iii) parental responsibilities. Although not addressing abuse in particular, the Act impacts on children who have been abused. Having a slightly different focus, the *Regulation of Care (Scotland) Act 2001*, established the Scottish Commission for the Regulation of Care and the Scottish Social Services Council.⁸²

More specifically for our purpose, a number of the laws apply to sexual offences and sex offenders. Among these are the *Sexual Offences (Conspiracy & Incitement) Act 1996*,⁸³ and the *Sex Offenders Act 1997*.⁸⁴ The latter, effective in England, Wales and Northern Ireland, requires persons who have previously committed certain sexual offences to provide to the police information concerning contact details. The period for which the offender is required to notify the police depends on the length of the sentence. The *Sexual Offences (Amendment) Act 2000* deals specifically with people in a position of trust.⁸⁵

⁸¹ *Children (Scotland) Act 1995* c. 36, <http://www.uk-legislation.hmso.gov.uk/acts/acts1995/Ukpga_19950036_en_1.htm> (14 October 2001).

⁸² *Regulation of Care (Scotland) Act 2001* asp 8, <<http://www.scotland-legislation.hmso.gov.uk/legislation/scotland/acts2001/10008.htm>> (14 October 2001). The former body is concerned with providing advice and hearing complaints about care services and the registration of care service providers. The latter body has "the general duty of promoting high standards (i) of conduct and practice among social service workers; and (ii) in their education and training."

⁸³ *Sexual Offences (Conspiracy & Incitement) Act 1996* c. 29, <<http://www.uk-legislation.hmso.gov.uk/acts/acts1996/1996029.htm>> (12 October 2001). This Act is applicable only in England, Wales and Northern Ireland.

⁸⁴ *Sex Offenders Act 1997* c. 51, <<http://www.uk-legislation.hmso.gov.uk/acts/acts1997/1997051.htm>> (12 October 2001).

⁸⁵ In addition, this act reduced the age of consent for homosexual acts from eighteen to sixteen years. See *Sexual Offences (Amendment) Act 2000* c. 44, <<http://www.hmso.gov.uk/acts/acts2000/2000044.htm#7>> (12 October 2001).

Several Acts relate to employment. The British Parliament passed the *Public Interest Disclosure Act 1998* that amended the *Employment Rights Act 1996* to ensure that an employee who makes a disclosure in good faith would not be the subject of detriment.⁸⁶ The *Protection of Children Act 1999* provides for the checking of an adult's suitability for working with children.⁸⁷ Accordingly, the Criminal Records Bureau may disclose information for a specified range of positions about people included on lists maintained either by the Department of Health or the Department of Education. The act requires childcare organisations to carry out a check on prospective employees. The *Criminal Justice and Courts Services Act 2000* determined that the period of twelve months is the minimum period adopted by statute for the compulsory disqualification of adult offenders from working with children.⁸⁸

In summary, we note that in the United Kingdom, issues surrounding child abuse were aired in the late 1980s but disclosures have continued through the 1990s and beyond. A number of these disclosures concern events that occurred twenty years previously. In addition, the inquiries have shown that abuse occurred particularly in residential care situations. Furthermore, later inquiries judged that disclosures of incidents of abuse were not always handled appropriately. While the majority of the legislation has focussed on standards of facilities, or on procedures, due emphasis has also been given to prevention through the placing of restrictions on offenders.

⁸⁶ See *Public Interest Disclosure Act 1998* c. 23, «<http://www.uk-legislation.hmso.gov.uk/acts/acts1998/19980023.htm>» (12 October 2001).

⁸⁷ See *Protection of Children Act 1999* c. 14, «<http://www.uk-legislation.hmso.gov.uk/acts/acts1999/190014.htm>» (14 October 2001).

⁸⁸ See *Criminal Justice and Courts Services Act 2000* c. 43, «<http://www.uk-legislation.hmso.gov.uk/acts/acts2000/20000043.htm>» (6 April 2003).

2.4 – IRELAND

The 1980s saw the emergence of a national awareness of child sexual abuse in Ireland. However, it was not until the 1990s that this awareness was translated into legislation that would make a difference in preventing abuse or in assisting people who had been abused.

In 1983, two events led social workers in Ireland to focus on child abuse. The Irish Association of Social Workers held a conference on incest, and the Department of Health published *Non-Accidental Injury Guidelines* which was a forerunner to the 1987 *Guidelines on Procedures for the Identification, Investigation and Management of Child Abuse*.⁸⁹ These documents and the conference testified to the awareness of the issues among professionals. In 1999, the Department of Health published *Children First – National Guidelines for the Protection and Welfare of Children*.⁹⁰ Concerned about the neglect, emotional, physical and sexual abuse of children, the department sought to achieve three objectives: a) to improve the identification, reporting, assessment, treatment and management of child abuse, b) to clarify the responsibilities of various professionals and individuals within organizations and c) to enhance the communication and coordination of information between disciplines and organizations. The document recognized that children with disabilities and children who are separated from parents or family are especially vulnerable to abuse. Among its guidelines, *Children First* recommends that every organization providing services to children should have agreed

⁸⁹ A revised version of this document was published by the Departments of Health, Education and Justice in 1995.

procedures for dealing with allegations and that confidentiality must never be promised to a child making a disclosure. It enunciates the principle that “a proper balance must be struck between protecting children and respecting the rights and needs of parents/carers and families; but where there is conflict, the child’s welfare must come first.”⁹¹

Besides the guidelines, developments in legislation witness to the concern for people who had been abused. Covering a wide range of issues, the *Child Care Act 1991*, while not referring specifically to child abuse, serves as the principal act dealing with the welfare of children and forms the basis for more recent acts.⁹² Concerned primarily with guardianship, custody and maintenance of children, the *Children Act 1997* touches only incidentally on issues connected with child abuse.⁹³ The *Child Trafficking and Pornography Act 1998* prohibits trafficking in, or using, or allowing the use of children for the purposes of their sexual exploitation and the production, dissemination, handling or possession of child pornography.⁹⁴ The *Protection for Persons Reporting Child Abuse*

⁹⁰ DEPARTMENT OF HEALTH AND CHILDREN, *Children First: National Guidelines for the Protection and Welfare of Children*, Dublin, Stationery Office, 1999, <http://www.doh.ie/pdfdocs/children_first.pdf> (4 December 2001).

⁹¹ *Ibid.*, p. 5.

⁹² The *Child Care Act 1991* encompasses the care of homeless children, court orders, adoption services, court procedures, the registration of residential care services and the supervision of pre-school services. The paramountcy principle that underlies policies and guidelines is enunciated in Section 24. <<http://www.gov.ie/bills>> (16 October 2001).

⁹³ See <<http://www.gov.ie/oireachtas/frame.htm>> (16 October 2001). Part III of the Act provides for children giving evidence in civil proceedings via television links or intermediaries.

⁹⁴ See <<http://www.gov.ie/oireachtas/frame.htm>> (16 October 2001). In developing this legislation, the National Parliament considered both Article 34 of the *United Nations Convention on the Rights of the Child* and the *European Union Joint Action against Trafficking in Human Beings and the Sexual Exploitation of Children*.

Act 1998 was also enacted in the same year.⁹⁵ This Act grants immunity from civil liability and from unfair dismissal from employment to any person who in good faith reports a child to be a victim of abuse. In contrast, false reports become an offence under this law.

Public awareness of child sexual abuse by clergy in Ireland focussed on individual cases in 1994 and 1995. During the following years, the focus moved to abuse in residential institutions conducted by the Catholic Church. Then in 2002, several documentaries were broadcast that directed public attention to the mishandling by the Church of complaints of child sexual abuse.⁹⁶

A Commission to Inquire into Child Abuse was established on 23 May 2000 by the *Commission to Inquire into Child Abuse Act 2000*.⁹⁷ Otherwise known as the Laffoy Commission, its principal functions were to:

- listen to persons who have suffered abuse in childhood in institutions telling of the abuse and making submissions;
- conduct an inquiry into abuse of children in institutions since 1940 or earlier and, where satisfied that abuse occurred, find out why it occurred and who was responsible for it; and

⁹⁵ The Bill was introduced in the *Dáil*, the lower house of Parliament, on 29 January 1998 as *Children (Reporting of Alleged Abuse) Bill*, «<http://www.gov.ie/oireachtas/frame.htm>» (16 October 2001).

⁹⁶ BBC 2 screened *Suing the Pope* on 19 March 2002. The documentary was televised in April 2002 by Irish television (RTÉ). RTÉ also broadcast the documentary, *Cardinal Secrets*, in November 2002.

⁹⁷ The Bill was introduced in the *Dáil* on 2 February 2000 and was signed on 26 April 2000. This short passage through all stages suggests a high measure of agreement within the Parliament. See «<http://www.gov.ie/oireachtas/frame.htm>» (16 October 2001).

- report directly to the public on the results of the inquiry and make recommendations, including recommendations on the steps which should be taken now to deal with the continuing effects of abuse and to protect children in institutions, as defined in the Act, from abuse now and in the future.⁹⁸

The Commission had sought and obtained an extension of three years, until May 2005, because of the very large number of requests that it had received,⁹⁹ as well as the difficulties experienced.¹⁰⁰ The Commission also sought to conduct research into the long-term effects of institutional child abuse.

Other legislation related to the issue of child abuse was enacted. Prior to the *Statute of Limitations (Amendment) Act 2000*,¹⁰¹ a plaintiff could take legal action only within three years of reaching the age of 18. The amending Act provides an extended but limited period in which those who were sexually abused as minors (under 21) and who are suffering from a psychological injury as a result can make a claim. Similarly, the *Residential Institutions Redress Act 2002*¹⁰² provides an opportunity for people who were harmed by abuse in residential institutions to seek some form of compensation.

⁹⁸ *Commission to Inquire into Child Abuse Act 2000* s. 4.1.

⁹⁹ As of April 2001, the Commission had received one thousand, two hundred and thirty-eight (1,238) requests that had proceeded to a hearing or were being processed. See [«http://www.childabusecommission.ie»](http://www.childabusecommission.ie) (16 October 2001).

¹⁰⁰ See [«http://www.childabusecommission.ie»](http://www.childabusecommission.ie) (4 December 2001). On 8 September 2003, Justice M. Laffoy offered her resignation as chairperson of the Commission. It is to take effect when the interim report is completed.

¹⁰¹ [«http://www.gov.ie/oireachtas/frame.htm»](http://www.gov.ie/oireachtas/frame.htm) (16 October 2001).

¹⁰² [«http://www.gov.ie/bills28/acts/2002/9/302.pdf»](http://www.gov.ie/bills28/acts/2002/9/302.pdf) (6 May 2003). *Residential Institutions Redress Act 2002*, No. 13 of 2002 was enacted on 10 April 2002.

Having first been presented in the Dáil on 10 January 2000, the *Sex Offenders Act 2001* was enacted on 30 June 2001.¹⁰³ The Act requires that a person convicted of certain sex offences be required to notify the police of his or her address for a specified period after release or from the time of sentencing in the case of a suspended or a non-custodial sentence. In addition, the Act requires that persons who have committed sexual offences inform their employers of such offences when they apply for, or accept, employment or voluntary work that involves necessary unsupervised access to or contact with children or people with a mental impairment. Furthermore, the Act allows a court, if it considers it necessary for the protection of the public, to make an order (sex offender order) prohibiting certain activities. Finally, the Act enables the court to impose post-release supervision.

The passing of this legislation suggests that concern about child abuse became a matter of grave public concern only in the second half of the 1990s. Furthermore, the range of legislation reflects both the complexity of the issues, and the multi-faceted approach adopted to prevent future abuse.¹⁰⁴ The national guidelines illustrate the need for the cooperation of all in detecting and preventing abuse. Nevertheless, contained in the above details are suggestions that the need continues for further legislation.

¹⁰³ «<http://www.gov.ie/oireachtas/frame.htm>» (16 October 2001). In 1998 the *Sex Offenders Registration Bill* was introduced as a Private Member's Bill. However, it was defeated at second stage.

¹⁰⁴ Despite the issue having been considered for over ten years, mandatory reporting of child abuse has not been introduced in Ireland. In 1989 the Law Reform Commission concluded that mandatory reporting might not serve a positive purpose. In 1996 a forum focussed on "The Reporting of Child Abuse – The Contribution of Mandatory Reporting" reached a consensus that other areas of child protection needed changing before the introduction of mandatory reporting. See *Irish Times*, 17 September 1996.

In November 2002, the President, Mary McAleese, launched the report of the first national prevalence study of lifetime sexual abuse and violence.¹⁰⁵ Commissioned by the Dublin Rape Crisis Centre, this report addressed not only the incidence of sexual abuse but also factors affecting disclosure.

2.5 – AOTEAROA NEW ZEALAND

The growing awareness of child sexual abuse in Aotearoa New Zealand differed from the situations in the countries considered previously. The small number of allegations reflects the relatively small population of New Zealand.¹⁰⁶

Like Australia, New Zealand received child migrants from the United Kingdom during the period from 1948 to 1953. Through the New Zealand Government Child Migration Scheme, 530 children were brought to New Zealand where they were placed in foster homes by the Child Welfare Department. While some children were sexually abused, each incident was unrelated to others. Hence, media attention surrounding child migrants focused primarily on issues of identity.¹⁰⁷

¹⁰⁵ H. MCGEE, et al., *The SAVI Report: Sexual Abuse and Violence in Ireland*, Dublin, The Liffey Press, 2002.

¹⁰⁶ Based on the 2001 census, Statistics New Zealand-Te Tari Tatau estimated that the population of New Zealand reached 4 million in April 2003. Of this number, 14% are Maori. «[http://www.stats.govt.nz /domino/external/web/prod_serv.nsf/htmldocs/Pop+Clock](http://www.stats.govt.nz/domino/external/web/prod_serv.nsf/htmldocs/Pop+Clock)» (10 June 2003).

¹⁰⁷ Information of the New Zealand Government Child Migration Scheme was found through the United Kingdom Parliament, House of Commons Select Committee on Health. «<http://www.parliament.the-stationery-office.co.uk/pa/cm199798/cmselect/cmhealth/755/75506.htm>» (6 May 2002). Prior to the post-war scheme, the Parkhurst boys scheme operated during 1842 and 1843 and Empire Settlement schemes were run by the Salvation Army, the Church of England and the Sheepowners Fund between 1908 and 1928. The television mini-series, *Leaving of Liverpool*, was broadcast in New Zealand in 1993.

Claims of sexual abuse committed during the 1970s were made against staff at Lake Alice Hospital Child and Adolescent Unit and were outlined in a report of Sir Rodney Gallen, a retired High Court judge.¹⁰⁸ Similar complaints were made against staff at Porirua hospital. Thus, in both these contexts the problem of sexual abuse was linked with, but, to an extent, overshadowed by other issues.

A number of incidents of sexual abuse have concerned Christian churches. In June 2002, newspapers reported that Catholic bishops revealed that thirty-eight cases of sexual abuse committed by clergy or religious had been confirmed.¹⁰⁹ Some of these dated back to the 1950s and yet they did not receive public notice until the mid 1990s or even later. Throughout 2002, publicity surrounded sexual abuse committed by the St. John of God Brothers at Marylands, a school for boys with intellectual and learning disabilities in Christchurch, prior to 1984. The Society of Mary, being the largest clerical religious institute in New Zealand, also received complaints of abuse at this time. Other accusations were made against individual members of religious institutes.

In 1986, the New Zealand Government established an advisory committee to review the situation in New Zealand concerning the investigation, detection and

¹⁰⁸ The primary concern at this government-run hospital concerned the use of electroconvulsive therapy and treatment with the drug paraldehyde, causing severe pain and the use of inappropriate disciplinary measures. The New Zealand Government reached a settlement with 95 patients on 7 October 2001.

¹⁰⁹ In apologizing to victims and their families, the President of the Bishops' Conference, Bishop Peter Cullinane, admitted that some of the cases were multiple crimes committed by one or two individuals. In a pastoral letter read in all parishes in June 2002, the bishops apologized and acknowledged past mistakes in handling complaints. See *New Zealand Catholic*, 14 July 2002, p. 5.

prosecution of cases of child sexual abuse. Its report was published in 1988.¹¹⁰ A number of its findings concerned the reliability of witness of child victims.

The mid 1980s saw the commencement of community counselling for sex offenders in New Zealand. Commencing with two social workers, the SAFE network was established in 1990. Initially providing programmes for adult offenders, the network commenced an adolescent programme in 1994 and at the time of writing is looking to establish a treatment programme for female offenders.

The New Zealand Law Commission addressed the matter of limitation of civil actions in 2000.¹¹¹ In so doing, the commission specifically considered sexual abuse. Recognizing that no limitation exists for criminal action, the commission noted reasons for delay in introducing civil actions.¹¹² The commission concluded that limitation should be based on accrual, but that a "reasonable discovery" be introduced, serving as an exception to the normal rule of accrual. The commission also recommended a long-stop of ten years be implemented.¹¹³

¹¹⁰ NATIONAL ADVISORY COMMITTEE ON THE INVESTIGATION, DETECTION AND PROSECUTION OF OFFENCES AGAINST CHILDREN, *A Private or Public Nightmare?* Dunedin, Royal New Zealand Plunket Society Research and Education Unit, 1988.

¹¹¹ The Law Commission produced a discussion paper in February 2000. LAW COMMISSION, Preliminary Paper 39, *Limitations of Civil Actions: A Discussion Paper*, Wellington, NZ, 2000.

¹¹² The commission reasoned that the person may have a psychological inability to bring an action, may suffer from post-traumatic stress disorder, or may be unable to recognize a link between the effects and the cause of suffering.

¹¹³ The matter of discoverability in sexual abuse cases was the critical element in a judgement in the Court of Appeal and in one in the High Court of New Zealand. See *W v Attorney-General*, 1999, Thomas J. and *G v S*, High Court, Auckland, CP 576/93, 22 June 1994, Blanchard J. Both decisions were cited in the Law Commission discussion paper and have relevance to a review of prescription in canon law.

As in other countries, the need for preventative education programs was recognized. The New Zealand Police Department and the Department of Education developed *Keeping Ourselves Safe* specifically for New Zealand children.¹¹⁴

2.6 – COMMON ELEMENTS

In surveying the situations concerning child sexual abuse in the United States of America, Canada, the United Kingdom, Ireland and New Zealand we find a number of common elements. For instance, in relation to the public awareness of child sexual abuse, we find that it commenced with an awareness of incest and abuse within families and then moved to a growing realization of sexual abuse by others. In institutional settings, authorities focussed on the incidence of physical abuse and neglect prior to sexual abuse. This increased awareness was followed by a growing understanding of the seriousness of abuse and of a heightened commitment to its prevention.

In several countries, we find that an allegation by one person has led to a number of people coming forth with similar allegations. These have come about either in response to public inquiries or to publication in the media. Another common element is that while offences have occurred over several decades, generally, it is only in the past twenty years or less, that people have come forward to competent authorities. In each of the countries

¹¹⁴ C.C.M. Woolley and T.C.M. Gabriels, of the School of Psychology, Massey University, conducted an evaluation of *Keeping Ourselves Safe*, using a sample of ninety-six students. Their conclusion that although the children were unlikely to misinterpret appropriate touching, nevertheless the program needed refinement to facilitate the child's ability to conceptualize abuse and so to reduce incidence of offences, points to the difficulties inherent in developing and implementing effective preventative programs. See C.C.M. WOOLLEY and T.C.M. GABRIELS, "Children's Conceptualisation of Some Child Sexual Abuse Prevention Concepts as Taught by 'Keeping Ourselves Safe', a New Zealand Prevention Programme," in *The Australasian Journal of Disaster and Trauma Studies*, (1999-1), Electronic Journal, no pagination, <<http://www.massey.ac.nz/~trauma/issues/1999-1/woolley.htm>> (16 January 2002).

where residential institutions provided care for children, physical, sexual and emotional abuse occurred. Leaders in the past did not always handle the accusations appropriately.

Besides investigating allegations, governments have responded with new or revised criminal and civil legislation that aimed at deterring offenders and providing a safer environment for children by placing restrictions on offenders. In addition, in each of the countries considered, the government has encouraged a coordinated, inter-agency approach to address the protection of children and the investigations of suspicions and allegations. The responses of governments have been multi-faceted and continuing.

Two elements that indirectly concern child sexual abuse concern privacy and limitations. Recently, privacy legislation in some countries, for example the United Kingdom and New Zealand, has affected the holding and use of personal data. Possible changes to the statute of limitations have been investigated in both Ireland and New Zealand.

The impact of the media has been significant in each country, particularly in the early stages of awareness. Media has served an educative purpose, not only in the broadcast of advertising or educative programs, but also in the telling of the experience of individuals.

3 – RESPONSES OF THE CATHOLIC CHURCH

From about 1987 to the present, Catholic hierarchies in a number of countries, realizing the extent of the problem, began to develop policies and procedures that would serve as guidelines for dioceses and religious institutes in dealing with incidents of child sexual abuse. In doing so, they aimed to make clear and public the stance of the Catholic

Church concerning child sexual abuse, and their determination to respond to sexual abuse and to do all that they could to prevent future incidents.

In examining the response of the Church, we look at those same countries in which we considered the public awareness and the response of the state. In addition, we will look briefly at the response of the bishops in France. This is not to suggest that sexual abuse of children did not occur in other countries, but the Conference of Bishops in each of these countries has made public its response. In addition, to a greater or lesser extent, these countries have either influenced or been influenced by the response of the Australian bishops.

3.1 – UNITED STATES OF AMERICA

The Catholic Church in the United States of America responded to the issue of child sexual abuse in three phases, the first phase commenced in the early 1980s and continued to 1988; the second phase spanned the period from 1988 to 2000; and the third phase commenced in early 2001. The Church responded at several levels; namely, that of diocesan bishops, provincial conferences and nationally. Individual religious superiors and bodies of religious superiors cooperated in a number of these responses. Four different types of actions resulted from the increasing incidents of abuse: assistance and advice in particular situations, study and formation, formulation of statements of policy and procedures, and the passing of legislation.

The initial involvement of the National Conference of Catholic Bishops (NCCB) took the form of providing advice to diocesan bishops. In 1982, two dioceses in the United States sought advice on child molestation cases. During the next two years other

diocesan bishops sought advice. Then in 1984, the situation of multiple child abuse came to public attention.¹¹⁵ Further claims followed swiftly. Several dioceses began formulating policies on responding to sexual abuse. In the following year, the NCCB met to discuss sexual abuse by clergy in a closed meeting. A resource paper, "The Problem of Sexual Molestation by Roman Catholic Clergy: Meeting the Problem in a Comprehensive Manner" was provided to the bishops.¹¹⁶ By mid 1985, as the result of learning from experience, the NCCB provided the following advice to dioceses:

Remove the alleged offender from assignment, refer the alleged offender for professional medical evaluation, deal promptly with the young victim and his or her family to offer the solace and support of the church, make efforts to protect the confidential nature of the claim, and comply with the obligations of the civil law and make appropriate notifications.¹¹⁷

In the following two years, the NCCB continued to give advice as more dioceses developed personnel policies.

On 9 February 1988, the United States Catholic Conference's¹¹⁸ General Counsel, Mark Chopko, published a statement concerning child abuse.¹¹⁹ In this statement, Chopko

¹¹⁵ Reports of the misconduct of Father Gilbert Gauthé of Lafayette, Louisiana were widely published. Several years later, his inappropriate behaviour was to constitute a significant focus of J. BERRY, *Lead Us Not into Temptation: Catholic Priests and the Sexual Abuse of Children*, New York, Doubleday, 1992.

¹¹⁶ The paper was authored by Reverend Michael Peterson, President of St Luke Institute, Thomas Doyle O.P., canon lawyer working at the Apostolic Nunciature, and F. Ray Mouton, attorney, who acted for Gilbert Gauthé.

¹¹⁷ *Origins*, 23 (1993-1994), p. 667.

¹¹⁸ From 1966, the Conference of Bishops in the United States operated through the National Conference of Catholic Bishops (NCCB) and the United States Catholic Conference (USCC). The bishops themselves formed the committees of the NCCB; laity, religious and clergy, as well as bishops, formed the committees of the USCC that dealt with matters that concern the Church as part of society. On July 2001, the United States Conference of Catholic Bishops (USCCB) replaced both bodies.

acknowledged the lasting impact of child sexual abuse, and the need for all organizations involved in the care and education of children to respond to this most grave problem. Recognizing that society had grown in its ability to deal with pedophilia, the bishops committed themselves to “addressing such incidents positively, to making strong efforts to prevent child abuse, to repairing whatever damage has been done and to bringing the healing ministry of the church to bear wherever possible.”¹²⁰ Accordingly, the conference of bishops was committed to breaking the cycle of abuse, and to education in all aspects of the problem. A significant part of the statement focussed on explaining the independence of each diocese and the role of the conference of bishops in providing advice and guidance. Consequently, the development of policies and guidelines for responding to allegations of incidents of abuse took place at the diocesan level.¹²¹

During the period from 1989 to 1994, more and more allegations were made of sexual abuse that had occurred 10 or more years previously. Although the period of prescription had elapsed, the NCCB advised dioceses to consider the pastoral needs of the victims.¹²² Because of the time lapse between the alleged incidents and the claims, canon law did not provide for a penal process for priests who, in the view of the bishops, should not return to ministry.

¹¹⁹ *Origins*, 17 (1987-1988), p. 624. Towards the end of 1987, the General Secretary of the USCC had decided that the general counsel would become the spokesperson for the Catholic Conference. See *Origins*, 23 (1993-1994), p. 668.

¹²⁰ *Origins*, 17 (1987-1988), p. 624.

¹²¹ A further statement was issued by the NCCB Administrative Committee on 5 November 1989, reaffirming the earlier statement. See *Origins*, 19 (1989-1990), pp. 394-395. According to the editorial comment, this second statement resulted from allegations that a bishop had sexually abused a youth.

¹²² Prescription affects only the right to introduce a penal action. It does not affect a natural law right to seek repair of harm.

In this same period, a number of priests who had undergone treatment returned to their diocese with the hope or expectation of being reassigned to ministry. The NCCB Committee on Priestly Life and Ministry considered the complex question of reassignment. Following this, ordinaries considered what action should be taken in the case of priests who could not be assigned to ministry and who did not voluntarily seek laicization. In May 1992, the Canonical Affairs Committee of the NCCB issued the document, "Draft of Special Norms for Administrative Removal of a Cleric from the Clerical State."¹²³ These norms were never adopted.

In June 1992, the NCCB issued a statement of five principles:

1. Respond promptly to all allegations of abuse where there is reasonable belief that abuse has occurred.
2. If such allegation is supported by sufficient evidence, relieve the alleged offender promptly of his ministerial duties and refer him for appropriate medical evaluation and intervention.
3. Comply with the obligations of civil law as regards reporting of the incident and cooperating with the investigation.
4. Reach out to the victims and their families and communicate sincere commitment to their spiritual and emotional well-being.
5. Within the confines of respect for privacy of the individuals involved, deal as openly as possible with the members of the community.¹²⁴

This statement represented a re-affirmation of the guidance offered in 1985. At the same time, it encouraged caution in ensuring that an allegation is supported by sufficient evidence. It also represented a tempering of concern for confidentiality.

¹²³ Although this process was intended to be used for clerics who had committed offences in canon law, it was not considered a penal process. Accordingly, there was no statute of limitations. J. Alesandro observed that the proposed process was not well received. See J. ALESANDRO, "A Study of Canon Law: Dismissal from the Clerical State in Cases of Sexual Misconduct," in *The Catholic Lawyer*, 36 (1996), p. 264.

¹²⁴ The principles make no reference to canon law. These principles were reaffirmed by the USCCB on 19 November 1992. See *Origins*, 22 (1992-1993), p. 418.

Five months later, the Priestly Life and Ministry Committee of the NCCB announced the formation of a subcommittee on sexual abuse. In February 1993, this subcommittee, chaired by Canice Connors, OFM Conv, held a two-day "think-tank" on sexual abuse by clergy. The resulting recommendations were grouped under three headings: care of the victims, prevention and reassignment to ministry. While strongly affirming the need to respond to victims and the need to ensure prevention of further incidents, the Priestly Life and Ministry Committee also supported the view that would bar priest offenders from certain types of ministry.¹²⁵

In June 1993, in response to the "Think Tank," the NCCB established an Ad Hoc Committee on Sexual Abuse, with Bishop John Kinney of Bismark, North Dakota, as chairman. What the bishops then identified as the key issues can be gauged from Bishop Kinney's address to them:

What can the National Conference of Catholic Bishops do at this moment, pastorally to stand beside the victims and their families, how to aid bishops in working with priests who have been abusers; how to strengthen screening of candidates for the priesthood and the ministries; how to assess the risks/possibilities of any future assignments for priest-perpetrators; what about other church employees and church volunteers and this issue; what can the church share from its experience with our society about this horrendous

¹²⁵ The following recommendations concerned reassignment to ministry:

11. Priests or other ministers who have offended against children should never return to any ministry that includes minors.
12. Priests in recovery should be supervised as long as they remain the responsibility of church authorities.
13. Support for priests in recovery should be considered essential to prevent relapse.
14. The NCCB should support research on defining risk factors for re-offending after treatment and recommend guidelines for the reassignment of priests in recovery.
15. The church should foster, through, its teaching office, an understanding of recovery as a dimension of the redemptive mystery and see in the priest in recovery a witness to this redemption. See *Origins*, 23 (1993-1994), pp. 110-111.

and terrifying problem; and finally, what can be done to lift up the drooping morale of priests – even of some of our bishops?¹²⁶

This committee presented to the bishops at their meeting in November 1994, *Restoring Trust* Volume I, a binder of resource materials, including recommendations concerning prevention and education, administrative guidelines, victims, accused and media.¹²⁷ The committee suggested that all diocesan policies be public documents and be pastoral in tone. It proposed that dioceses consider having a policy apply to “clergy, religious and employees in the context of sexual abuse, misconduct, exploitation and harassment.”¹²⁸ It also encouraged the use of experts to study all aspects of the issue and stressed the need for individuals carrying out investigations to have special skills. The Committee also suggested “that the diocese seek ways to involve the people in general in the whole process of healing the often serious and long-lasting after-effects of child sexual abuse.”¹²⁹

On 18 November 1993, the NCCB approved for a period of three years, “Proposed Guidelines on the Assessment of Clergy and Religious for Assignment.”¹³⁰ These guidelines were developed in collaboration with the Leadership Conference of Women

¹²⁶ *Origins*, 23 (1993-1994), p. 104.

¹²⁷ *Restoring Trust*, Volume I, contained a review of diocesan policies, description of treatment centres and information on various topics: paedophilia, expectations of treatments, responding to victims. *Restoring Trust* Volume II was provided to diocesan bishops in November 1995 and a third volume was issued in November 1996.

¹²⁸ *Origins*, 24 (1994-1995), p. 443.

¹²⁹ *Ibid.*, p. 444.

¹³⁰ NATIONAL CONFERENCE OF CATHOLIC BISHOPS, “Proposed Guidelines on the Assessment of Clergy and Religious for Assignment,” in *The Jurist*, 54 (1994), pp. 623-628. Although the guidelines were to be reviewed in 1996, this does not seem to have happened.

Religious, the Conference of Major Superiors of Women, the Conference of Major Superiors of Men and the NCCB. Acknowledging the responsibility of bishops and major superiors for the common good, the guidelines sought to ensure that no harm or scandal would befall either an individual or the church community through the ministry of the person. In presenting the guidelines, the NCCB sought to prevent the confusion of relations between individual bishops and major superiors. The church leaders recognized that seriously improper behaviour may include not only child abuse, but also “untreated addictions to alcohol and other substances, abusive behavior or misconduct (especially that of a sexual nature), and financial improprieties.”¹³¹ The guidelines are comprehensive, not only in terms of the types of conduct that are covered, but also in that they are recommended to all bishops and religious superiors to be used for the appointment or transfer of both priests and religious, including retired personnel. Furthermore, they apply not only at the time prior to the making of an appointment, but also after an appointment had been made.

In presenting the procedures, the ecclesiastical leaders committed themselves to fundamental principles: full disclosure within the limits of confidentiality, shared responsibility for the works of the Church, protection of the community, respect for the individual and the observance of canon law. Accordingly, the procedures include careful inquiry, communicating the findings to the person, the possibility of a review and further communication of relevant information after an appointment has been made. The proposed guidelines state unequivocally: “No cleric or religious will be given an assignment where there is any reasonable probability that he or she may bring harm to the

¹³¹ *Ibid.*, p. 625.

Church or to individual persons, particularly minors.”¹³² In developing the guidelines, the major superiors and bishops aimed to provide assistance for church leaders in developing personnel policies for their own dioceses and institutes.

The document, “Walk in the Light: A Pastoral Response to Child Sexual Abuse”, was issued by the Bishops’ Committee on Women in Society and in the Church and their Committee on Marriage and Family in October 1995.¹³³ Addressed to all Catholics, the document served to raise the awareness of the issues and encouraged parishes to respond to them. In particular, the document encourages people who have been abused to come forward and seek support in their parishes.

During the period from 1985 to 2000, most dioceses had developed policies, and most had revised them based on their own experience and that of others. Generally, the dioceses based their policy and procedures for responding to sexual abuse on one of several models, and these, in turn, were influenced by the recommendations of the Ad Hoc Committee on Child Sexual Abuse. Some dioceses also formulated policies in relation to personnel, for example, policies on sexual harassment or policies for ministry to minors. In November 1997, the Ad Hoc Committee on Child Sexual Abuse was re-commissioned for a further three-year period, with the mandate to concentrate on three major issues; the healing of victims, education, and future options for priest offenders.

January 2002 marked a turning point in the Church’s response to sexual abuse by clergy and religious. Commencing at this time, media reports focused on the mishandling of allegations of abuse by diocesan bishops. Of particular concern were the accusations

¹³² *Ibid.*, p. 624.

that several bishops, most noticeably Cardinal Bernard Law, Archbishop of Boston, had appointed priests to parishes or had recommended them for appointments in dioceses other than their own, even after 1995, despite their having been accused of previous acts of sexual abuse. As a result of the publicity covering such events and following the semi-annual meeting of the leadership of the USCCB with Vatican officials in Rome,¹³⁴ Pope John Paul II called the cardinals of the United States to the Vatican to meet with members of the Roman Curia.¹³⁵ Following this, the USCCB assembled for their General Meeting in June. The conference of bishops approved the document, *Charter for the Protection of Children and Young People*,¹³⁶ prepared by the Ad Hoc Committee on Sexual Abuse of the USCCB. Aiming at achieving a new level of transparency, the document expresses the commitment of the bishops to address the issues of sexual abuse of minors and young people. In fulfillment of Article 9 of the Charter, the Conference of Bishops established a National Review Board whose functions are to:

- Provide advice and guidance to the U.S. Conference of Catholic Bishops
- Approve the report on the implementation of the Charter in each diocese and eparchy
- Formulate recommendations that emerge from this report
- Commission a descriptive study on the "Nature and Scope" of the problem of sexual abuse of children and young people in the Catholic Church

¹³³ *Origins*, 25 (1995-1996), pp. 337-343.

¹³⁴ Bishops Wilton Gregory and William Skylstad and Msgr. William Fay met with curial officials on April 13, 2002. See *Origins*, 31 (2001-2002), pp. 741-743.

¹³⁵ This meeting was held on 22-23 April 2002. See POPE JOHN PAUL II, "Address to Summit of Vatican U.S. Church Leaders," in *Origins*, 31 (2001-2002), pp. 757,759; also in the same publication, CARDINAL ANGELO SODANO, "The Task of the Vatican Summit," pp. 759-760; "Final Communique of Vatican-U.S. Summit," pp. 771-772; "Letter to Priests," p. 772. These texts were also published in *L'Osservatore Romano*, weekly edition, No. 17 (24 April 2002) and No. 18 (1 May 2002).

¹³⁶ UNITED STATES CONFERENCE OF CATHOLIC BISHOPS, "Charter for the Protection of Children and Young People," in *Origins*, 31 (2001-2002), pp. 102-106.

- Commission a study on the "causes and context" of the crisis of sexual abuse of children and young people in the Catholic Church
- monitor the work of the Office of Child and Youth Protection.¹³⁷

At the same meeting, the conference developed the first draft of "Essential Norms for Diocesan/Eparchial Policies dealing with Allegations of Sexual Abuse of Minors by Priests, Deacons and Other Church Personnel."¹³⁸ The document was revised and approved at the national meeting in November and was forwarded subsequently for the *recognitio* of the Holy See. The Congregation for Bishops granted the required *recognitio* on 8 December 2002 and on 12 December 2002, the USCCB promulgated the norms by means of a general decree.¹³⁹

3.2 – CANADA

In investigating the response of the Catholic Church in Canada to child sexual abuse, it is appropriate to examine the response of a single diocese, St. John's, Newfoundland, as well as the response of the CCCB. The Archdiocese of St. John's had to face the issue of abuse on a scale unparalleled by any other diocese, at that time. In turn, its unique response has impacted on the action of other dioceses and of the CCCB.

¹³⁷ The first of the studies on the "Nature and Scope" of the problem, conducted by John Jay College of Criminal Justice, was complemented by a report by the Board, "A Report on the Crisis in the Catholic Church in the United States." This report was presented to the USCCB on 27 February 2004. The second study, on the "causes and context" will be commissioned in 2004 so that it may be guided by the findings of the "Nature and Scope" study and the "Report on the Crisis in the Catholic Church in the U.S."

¹³⁸ See *Origins*, 31 (2001-2002), pp. 107-108.

¹³⁹ The need for recognition is stated in c. 455 §2. The norms became particular law, effective 1 March 2003, for all dioceses and eparchies of the United States.

In September 1988, a priest of the Archdiocese of St John's¹⁴⁰ pleaded guilty to 20 sexual offences against children over a period of seventeen years. Within the next two years, further disclosures of clergy sexual misconduct with children became public knowledge. In May 1989, several weeks after the media publicity concerning the allegations of sexual abuse at Mount Cashel, the Archbishop of St. John's, Alphonsus Penney, appointed a Special Archdiocesan Commission of Enquiry under the Chairmanship of the Honourable Gordon A. Winter, a former Lieutenant Governor.¹⁴¹

The mandate of this commission was:

1. To enquire into factors which might have contributed to the sexual abuse of children by some members of the clergy: which factors may include family background, education, lifestyles, mutual support systems, or any other pertinent circumstance.
2. To enquire how such behaviour could have gone undetected and unreported for such a long period of time.
3. To make recommendations to provide for the spiritual, psychological and social healing of the victims and their families.
4. To make recommendations that will ensure that the Church has effective procedures for becoming aware of, reporting and dealing with incidents of deviant behaviour that might occur.

¹⁴⁰ In 1988 the diocese consisted of forty-four parishes and had approximately sixty priests, including active and retired.

¹⁴¹ The work of this commission was significant for several reasons. Firstly, the commission produced a comprehensive three volume report (Volume One presents the Report; Volume Two contains Background Studies and Briefs and Volume Three contains Conclusions and Recommendations). Secondly, the commission was impartial. While the commission was established by Archbishop A. Penney, and as such, was a church committee, the chairman of the committee was an Anglican. The number of criticisms of the church's handling of incidents of sexual abuse and sexual misconduct by clergy contained in the report witnessed to the impartiality of the commission. Accordingly, the report described in detail the response of the church to allegations of sexual misconduct. Thirdly, the working of the commission and its reports were unique in North America. Consequently the report has served the CCCB and others in developing policies and procedures.

5. To make recommendations respecting the selection of candidates for the priesthood, the promotion of wholistic growth of the clergy, the fostering of healthy relationships between clergy and laity and the provision of support for the clergy to help them cope with deep psychosocial problems.¹⁴²

In response to the first term, the commission concluded that a number of factors were responsible for the incidence of sexual abuse:

Some of these were direct, such as the regressed sexuality of the offenders, their access to children, and the powerful status accorded to priests within the patriarchal church community. Others were indirect, and worked in less obvious ways, some to protect the offenders and inhibit public acknowledgement of the offences. They included a variety of sociocultural factors, a general lack of an appropriate understanding of sexuality, the social isolation of priests, inadequate support systems, ineffective and inappropriate management by the Archdiocesan administration, and a recurring pattern of denial throughout the Archdiocese generally.¹⁴³

The commission reproached the administration for allowing the need to avoid scandal to dominate the Church's response to the allegations of abuse. Furthermore, it held the Church responsible for accepting the denials of abuse by the offenders rather than reporting the allegations to civil authorities and in so doing discounting the disclosures of victims.¹⁴⁴

The Winter Commission observed that allegations of child sexual abuse had been reported to the Archdiocese as early as 1975. It noted the minimal response of the Archdiocese, while also acknowledging that Archbishop Penney took certain measures to meet the problems. The commission concluded that "[t]hese measures, including the Ministry to Priests Program, the provision of a number of professional, psychological and spiritual facilities, the establishment of a number of innovative and creative Archdiocesan

¹⁴² *Winter Report*, Vol. 1, p. v.

¹⁴³ *Ibid.*, p. 91.

pastoral bodies and other similar initiatives, simply did not prove effective to provide for public safety.”¹⁴⁵ Obviously, these measures addressed few of the causes of sexual abuse as identified by the commission.

Consistent with its mandate, the commission made fifty-five recommendations. The first ten were directed to addressing the needs of the victims and others affected by abuse. The next fourteen focused on education and formation, with six of these concentrating on issues in schools. The next group of seven recommendations applied to the response of the Church to allegations and accusations while the next five attended to the needs of priest offenders. In responding to the fifth clause in its mandate, the commission addressed not only the needs of priests, but also those of the laity: communication, education, structures and lay leadership. The underlying theme of these recommendations was that the Church must respond primarily to the victims and others affected by abuse and by situations that allowed the offences to occur. Moreover, the commission acknowledged the need for further education about sexuality and sexual abuse.¹⁴⁶ In addition, it registered the need to repair the situation caused by the lack of structures for communication. In other words, the Winter Report endorsed a multi-faceted approach to the prevention of child sexual abuse.

On 1 December 1987,¹⁴⁷ the CCCB distributed to all Canadian bishops, *Policies and Procedures Regarding Complaints of Sexual Abuse*, prepared by Francis G.

¹⁴⁴ *Winter Report*, vol. 1, p. 140.

¹⁴⁵ *Ibid.*, p. 24.

¹⁴⁶ Recommendations 10, 13, 22, 24, 53, and 54 addressed this need.

¹⁴⁷ It was in 1987 that Rix Rogers was appointed Special Adviser on Child Sexual Abuse.

Morrisey.¹⁴⁸ Directed to the bishops, the document proposed a structure that would serve as a basis for each diocese to develop its own policy and process for responding to specific allegations. Underlying the proposed procedure was a commitment to following the prescriptions of the *Code of Canon Law* and a recognition of the need for a team approach to address the many aspects of each situation. A range of responses resulted from this document:

- many dioceses had discovered for the first time the implications of a problem of which they had not been aware;
- some dioceses had drafted a protocol or action strategy on this issue;
- in at least one instance, a major pastoral region encompassing some twenty dioceses had drafted a common protocol on the issue of child sexual abuse.¹⁴⁹

On 12 July 1989, the President of the CCCB, Archbishop James Hayes, wrote an Open Letter to Canadian Catholics in which he expressed the anguish and anger of the Church community as well as the anguish of the victims. In the carefully worded letter, he acknowledged the betrayal of trust involved in the crimes, while calling for a solution that helps all the members of the Church community. In terms of process, he warned that charges “must be carefully investigated in such a way as to avoid creating more suffering” and that they “should be proven before the accused is condemned in the court of public information.”¹⁵⁰

At their Plenary Meeting in October 1989, the CCCB created the Ad Hoc Committee on Child Sexual Abuse. The seven-member committee worked closely with

¹⁴⁸ F.G. MORRISEY, “Proposed Procedures to be Applied in Case of Child Sexual Assault by a Cleric,” in *Winter Report*, vol. 1, Appendix A, pp. 192-195.

¹⁴⁹ *From Pain to Hope*, p. 22.

four groups¹⁵¹ over a two year period from April 1990 to April 1992. The document, *From Pain to Hope, Report from the CCCB Ad Hoc Committee on Child Sexual Abuse*, containing fifty recommendations, was published in June 1992. These recommendations were presented in five groups: the first five recommendations were directed to all Catholics of Canada; eighteen were made to the Canadian Catholic Bishops; ten to those responsible for priestly formation; ten to those responsible for priests in a diocese and seven to the CCCB itself. The recommendations addressed responses to victims and offenders, procedures, learning and formation as well as prevention.

The underlying themes are the need to break the silence,¹⁵² on-going pastoral care of the victim and others affected by the abuse,¹⁵³ concern for all the priests of the diocese,¹⁵⁴ respect for the requirements of canon law¹⁵⁵ and of civil law,¹⁵⁶ as well as the need for pre-defined structures and roles.¹⁵⁷ Furthermore, many of the recommendations embody, either implicitly or explicitly, the conviction that knowledge surrounding the issues of sexual abuse has continued to grow and accordingly, involves many disciplines.

¹⁵⁰ Most Rev. James Hayes, "An Open Letter to Canadian Catholics," in *Origins*, 19 (1989-1990), pp. 216-217.

¹⁵¹ Group I revised the 1987 guidelines; Group II developed guidelines for the pastoral care of victims and their families; Group III addressed guidelines and policies for the long-time care of priest abusers; Group IV addressed issues of formation of candidates for the priesthood and religious life.

¹⁵² Recommendations 1, 13.

¹⁵³ Recommendations 2, 10, 11, 12, 19.

¹⁵⁴ Recommendations 5, 11, 19.

¹⁵⁵ Recommendations 6, 14, 15.

¹⁵⁶ Recommendations 4, 16.

¹⁵⁷ Recommendations 6, 7, 8, 9, 13, 17.

While the committee was set up to address the issue of child sexual abuse by priests, it noted that the recommendations may be applied to similar acts by others in the Church, or with appropriate adaptations, to adult sexual abuse. However, to reduce the work of the committee to these fifty recommendations is to do them a disservice and this for two reasons. Firstly, *Part VI Perspectives on the Mandate*, contextualized the recommendations, while the Appendices expanded on them. Secondly, the committee developed a group discussion document, *Breach of Trust / Breach of Faith*.¹⁵⁸ The success of the work of the CCCB may be measured by the acceptance and implementation of the totality of the recommendations.

3.3 – ENGLAND & WALES

Following the passing of *The Children Act 1989* and the public inquiries of 1991, the Committee for Social Welfare of the Bishops' Conference of England and Wales commissioned a paper entitled "The Sexual Abuse of Children" that was approved in November 1992.¹⁵⁹ This discussion paper urged communities to consider the effect of sexual abuse on the child as well as the response of the whole of society to the

¹⁵⁸ *Breach of Trust / Breach of Faith: Child Sexual Abuse in the Church and Society: Material for Discussion Groups*, Ottawa, Canadian Conference of Catholic Bishops, 1992. This document is also available in French, under the title, *Comme une brisure... Les agressions sexuelles contre les enfants dans l'Église et la société*. These documents contain material for five study sessions aimed at increasing awareness of the nature of abuse and promoting actions to prevent further abuse.

¹⁵⁹ COMMITTEE FOR SOCIAL WELFARE OF THE BISHOPS' CONFERENCE OF ENGLAND AND WALES, "The Sexual Abuse of Children," in *Briefing*, 23, 1 (14 January 1993), pp. 2-6.

The name of the Episcopal Conference appears on publications either as "Bishops' Conference of England and Wales" (BCEW), "Catholic Bishops' Conference of England and Wales," or "Roman Catholic Bishops' Conference of England and Wales." The first name is used throughout this thesis.

problem.¹⁶⁰ The document proposed nine steps that the Church might take to address the issues of sexual abuse:

- i. Dioceses to develop a policy in relation to personal/social education, which looks at the whole question of sex education, abuse, Aids, etc.
- ii. Diocesan schools commissions to look at a policy for governors in relation to sexual abuse in schools taking particular care over the documenting of disciplinary procedures.
- iii. The directors of in-service training for clergy to arrange study days on sexuality and the sexual abuse of children.
- iv. The subject of the sexual abuse of children to be on the agenda of both deanery conferences and the council of priests.
- v. The same subject to be on the agenda of local parish councils and diocesan pastoral councils.
- vi. Local communities to explore how to care for those who have been abused and those who have been abusers.
- vii. Diocesan child welfare agencies to review their child protection procedures.
- viii. Priests and local communities to look at the whole question of 'forgiveness and reconciliation'
- ix. Bishops to look towards policies in relation to clergy or other diocesan employees who may abuse children or others.¹⁶¹

The paper endorsed a multi-faceted approach to both the prevention of child abuse and the healing of those victimised by it that included formation and education, policy development as well as pastoral care. Having pastoral concerns as priorities and recognizing the responsibilities of the Catholic Church, it endorsed existing action and challenged local communities and dioceses to respond to needs. While the paper primarily addressed issues related to victims, it noted, "we must appreciate that any

¹⁶⁰ The members of the Working Party were Fr J. O'Keefe, Director of Catholic Care North East, Newcastle, Dr C. De San Lazaro, consultant paediatrician and senior lecturer in forensic medicine, Dr P. McArdle, consultant senior lecturer in child and adolescent psychology and Mr J. Cullen, Deputy Director of Lancaster Catholic Caring Services, Preston. This membership indicates the pastoral care emphasis of the document.

¹⁶¹ "The Sexual Abuse of Children," p. 6.

abuser is suffering from a disease.”¹⁶² Although the bishops acknowledged, “child sexual abuse is as prevalent in Roman Catholic communities as any others in the country”,¹⁶³ they did not address specifically the concern of abuse perpetrated by church personnel. Hence the wording of the last recommendation did not embody overtones of urgency nor gravity.

Addressing another aspect of the issue, the BCEW published, in June 1994, a report that provided guidelines for dealing with allegations of sexual abuse involving priests, religious and other Church workers.¹⁶⁴ Relying heavily on the two documents, *Working Together Under the Children Act 1989: A Guide to Arrangements for Inter-Agency Cooperation for the Protection of Children from Abuse*, and *Procedures and Guidelines*,¹⁶⁵ the Bishops’ document, *Child Abuse: Pastoral and Procedural Guidelines*, comprised the first stage of the Church’s response to child abuse. In accordance with the task given it, the working party developed a document that focused, in part one, on definitions and principles and, in part two, on structures and procedures.¹⁶⁶

The Paramountcy Principle, the first principle enunciated, affirmed that “the welfare of the child is the paramount consideration in proceedings concerning

¹⁶² *Ibid.* Obviously this statement might not appear in a similar document ten years later.

¹⁶³ *Ibid.*

¹⁶⁴ BISHOPS’ CONFERENCE OF ENGLAND AND WALES, *Child Abuse: Pastoral and Procedural Guidelines*, 1994. The working party included people from a range of backgrounds, including canonists, the police, health and welfare workers, as well as two bishops. In the preface to the document, Bishop Christopher Budd, the Chairman of the Working Party, acknowledging inadequate responses in the past, apologised to the survivors of abuse, to their families and communities.

¹⁶⁵ This document is a regional application of *Working Together Under the Children Act 1989*.

children.”¹⁶⁷ The scope of the procedures includes all forms of abuse: neglect, physical injury, sexual abuse and emotional abuse, even though the primary concern remained sexual abuse. Evidenced in its frequent citation of *Working Together*, the document pledges the Church’s full cooperation with statutory authorities. Finally, recognizing both the effects of child abuse and the betrayal of trust and misuse of power when the adult concerned is perceived as acting in the name of the Church, the document states emphatically that “the Church will unequivocally condemn the behaviour which is both immoral and criminal.”¹⁶⁸

In the nature of guidelines, the document presents a series of recommendations, while, at the same time, acknowledging that no one course of actions covers the range of situations that occur. The immediate response to all allegations made to the Church, according to the guidelines, must take the form of a prompt and circumspect preliminary investigation which generally will not include challenging the accused person, followed by consultation with statutory agencies.¹⁶⁹ Should the preliminary investigation and the consultation reveal cause for suspicion, the guidelines recommend that the alleged abuser be placed on administrative leave. These guidelines contained an implicit assumption that any thorough investigation will be conducted by a statutory authority in accordance with

¹⁶⁶ The objective of the working party, appointed by the BCEW, was to establish guidelines for Church authorities for dealing with cases of child abuse by those exercising responsibility in the Church, clerics, religious and laity.

¹⁶⁷ This is taken from *Working Together under the Children Act 1989*, Appendix, IX. The Paramountcy Principle applies to issues of confidentiality, training of personnel, the requirement for administrative leave as well as the determination of Church authorities to investigate the truth of allegations.

¹⁶⁸ *Child Abuse: Pastoral and Procedural Guidelines*, p. 8.

¹⁶⁹ The recommendation that the accused person not be informed of the allegation or suspicion is a controversial issue and will be considered later.

Working Together. The guidelines concern themselves with the pastoral support of victims and survivors. Less apparent is the concern for the pastoral care of the accused.

The second stage of the Church's response was set in motion by the resolution of the BCEW dated 18 November 1993:

Without prejudice to the report already being prepared on "Child Abuse: Pastoral and Procedural Guidelines", it is proposed that a working party be established by the Social Welfare Committee to investigate how the Church can best offer care and support to victims/survivors of abuse, together with families and other social groups affected, including colleagues of abusers.

The subsequent report, *Healing the Wound of Child Abuse: A Church Response*, was completed in 1996.¹⁷⁰ The chairman of the working party, Bishop Terence Brain, clarified the rationale of the document. It was developed in response to child sexual abuse and not limited to that committed by ministers of the Church. He affirmed that the main purpose of the document is to be "educative and help [...] to develop a deeper understanding of the pain involved, to hear the prophetic voice of the victims and promote dialogue."¹⁷¹ For this reason the working party did not formulate recommendations, but simply encouraged readers to draw their own conclusions.

While acknowledging the difficulties experienced by many in responding to allegations and incidents, the document focuses on the "wound" of child abuse. It recognizes that abuse impacts on the child and may have effects that continue into adulthood, on the families and the local community, including the parish, and that the effects on communities as well as individuals can include traumatic sexualization,

¹⁷⁰ BISHOPS' CONFERENCE OF ENGLAND AND WALES, *Healing the Wound of Child Sexual Abuse: A Church Response* (= *Healing the Wound*), London, The Catholic Bishops' Conference of England & Wales Committee for Social Welfare, 1996.

powerlessness, betrayal and stigmatisation. The document then moves to preparing to heal the wound. Finally, it addresses issues concerned with the healing of abuse. The suggestions cover a range of aspects: pastoral care, communication and liturgy. Throughout the document, certain themes perdure: the blamelessness of the victim, the priority of the victim's needs, the need for continuing learning about all the issues related to abuse and the need for the whole community to respond in whatever way is possible.

In September 2000, Archbishop (later Cardinal) Cormac Murphy-O'Connor, on behalf of the BCEW, established an Independent Review Committee "to examine and review arrangements for child protection and the prevention of abuse within the Catholic Church in England and Wales, and to make recommendations."¹⁷² The review did not focus on past action, or on how the Church has responded to abuse, but looked to the future. Moreover, it addressed all forms of abuse, not only child abuse, and not only sexual abuse. The committee, under the chairmanship of Lord Nolan provided its first report to the President of the BCEW, Cardinal Cormac Murphy-O'Connor in April 2001.¹⁷³ The report, containing fifty recommendations, was accepted unanimously by the BCEW.

The review committee recommended that priority be given to preventive policies and practices. For this reason although building on the 1994 Guidelines, it proposes alternative approaches. The scope of the guidelines should be changed, they suggest, to embrace lay workers as well as clergy. Consequently, the approach focuses first on

¹⁷¹ *Ibid.*, p. 5.

¹⁷² *Briefing*, 30, 10 (11 October 2000), p. 3.

¹⁷³ *Review on Child Protection in the Catholic Church in England and Wales, First Report*, was published as a supplement to *Briefing* 31, 5 (16 May 2001).

workers, either employees or volunteers, and then on clergy. While recognizing the responsibility of individual diocesan bishops and superiors of religious institutes, the committee recommends that the whole Church in England and Wales and the individual bishops and superiors commit themselves to a single set of policies and practices in addition to supporting a national infrastructure that will support dioceses and institutes. They assert, “[d]iversity of policy and practice, insufficiency of resources and a lack of national support and co-ordination will, in our view, lead to a weakened, inconsistent and inadequate response.”¹⁷⁴ Affirming the excellence of the Home Office document, *Safe from Harm*, the review committee recommended the adoption of its principles that encompassed organization, management and staff (and volunteer) selection, training and management.

A second and final report of the Nolan Review was presented to the BCEW in August 2001.¹⁷⁵ *A Programme for Action* recommended that the Church “should make it clear [...] that members of the Church who bring forward concerns are acting in the interests of the Church (and should be so regarded by all other members of the Church, not just the authorities).”¹⁷⁶ A consequence of this stance is embodied in a further recommendation that “the person who raised the concern should be kept informed subsequently of any steps that have been taken, subject to legal constraints and appropriate confidentiality.”¹⁷⁷ This is a further development of the review’s earlier

¹⁷⁴ *Ibid.*, p. 24.

¹⁷⁵ BISHOPS’ CONFERENCE OF ENGLAND AND WALES, *A Programme for Action: Final Report of the Independent Review on Child Protection in the Catholic Church in England and Wales*, September 2001, published with *Briefing* 31, 9 (17 September 2001).

¹⁷⁶ *A Programme for Action*, p. 12.

¹⁷⁷ *A Programme for Action*, p. 13.

recommendation that the person should be informed of how the matter would be dealt with and advised of the expected timing.

In considering the future of priests who have been found guilty of offences, the Nolan Review recommends that the procedure for laicization be initiated if the cleric is sentenced to a term of imprisonment of 12 months or more.¹⁷⁸ The review suggests that suspension or declaring a priest impeded may also be appropriate action.¹⁷⁹ Significantly, the review notes that even if a cleric is laicised “the Church may nonetheless be able to assist with the rehabilitation and pastoral needs of the individual.”¹⁸⁰ Concerning people who have been cautioned or convicted of an offence against children, the review recommends that they “should not be allowed to hold any position that could possibly put children at risk again. The bishop or religious superior should justify any exceptions to this approach publicly.”¹⁸¹

The Church has acknowledged that although its leaders have not always responded appropriately in the past, they wish to do so from this time forward. The review further suggests that mistakes be acknowledged, publicly if necessary,¹⁸² and that bishops and religious leaders should review historic cases that were known but not acted upon satisfactorily.¹⁸³ The fact that both Church and society continue to learn about issues of child abuse, and sexual abuse, in particular, determines that policies and procedures

¹⁷⁸ See *A Programme for Action*, Recommendation 78, p. 40.

¹⁷⁹ See *A Programme for Action*, Recommendation 79, p. 40.

¹⁸⁰ *Ibid.*

¹⁸¹ *A Programme for Action*, Recommendation 77, p. 39.

¹⁸² See *A Programme for Action*, Recommendation 80, p. 40.

¹⁸³ See *A Programme for Action*, Recommendation 70, p. 37.

remain in need of review and that there is need for ongoing education on related issues. Consequently, the Nolan Review recommends a further review after five years.¹⁸⁴

The procedure and the policies of the Catholic Church in England and Wales are characterized by a remarkable degree of openness: in their cooperation with statutory agencies, in their admission of past mistakes, in their dealing with lay employees and volunteers and clerics according to the same procedures, in their commitment to investigate suspicions as well as disclosures, in their maintaining of careful records for a lengthy period. Such practices, if they are adopted by the Church will make a powerful statement of the commitment of the Church concerning child abuse.

3.4 – SCOTLAND

In February 1995 the Bishops' Conference of Scotland commissioned a working party to "develop advice to the Bishops on appropriate ways of dealing with cases involving sexual abuse of children by Priests, Religious and other Church Workers." In 1996, the working party produced a report, *Child Sexual Abuse*.¹⁸⁵ The report contains forty-nine recommendations covering a range of issues, including the appointment of a National Child Protection Advisor.¹⁸⁶ In addition, the working party recommended that religious institutes develop guidelines consistent with the recommendations, and that they refer all cases of child abuse to the Child Protection Advisor. In September 1996, the Bishops of Scotland published a brief response, accepting the guiding principles of the

¹⁸⁴ *A Programme for Action*, Recommendation 83, p. 41.

¹⁸⁵ This document was not published.

¹⁸⁶ This position was advertised for the first time in April 2003.

working party's report. They declared emphatically that all investigations of criminal complaints should be carried out by statutory authorities.

In December 1996, on the recommendation of the working party, diocesan bishops appointed Diocesan Child Protection Advisors. These advisors developed guidelines, *Keeping Children Safe*, for the Catholic Church for use in every diocese, parish and church organization. *Keeping Children Safe* essentially recommends the adoption of the thirteen guidelines, contained in the Home Office publication, *Safe From Harm*.¹⁸⁷ The document does not exhibit any obvious efforts to contextualize the guidelines in a church setting.

3.5 – IRELAND

In March 1994, the Irish Catholic Bishops' Conference¹⁸⁸ convened an Advisory Committee under the chairmanship of Bishop Laurence Forristal, Bishop of Ossory. The terms of reference of the committee were:

to consider and advise on an appropriate response by the Catholic Church in Ireland where there is an accusation, suspicion or knowledge of a priest or religious having sexually abused a child;

to identify guidelines for Church policy in this area and suggest a set of procedures to be followed in these circumstances.¹⁸⁹

¹⁸⁷ Interestingly, *Safe from Harm* was developed for use in England and Wales. Apart from the use of the phrase 'children and young people', rather than 'children' and changes of two words, the guidelines are taken verbatim from *Safe from Harm*.

¹⁸⁸ The Irish Catholic Bishops' Conference (ICBC) includes the bishops of the Republic of Ireland and those of Northern Ireland. This is significant in that, if one considers Ireland only, the bishops' response, in large measure, precedes that of the state. This is not the case when one situates the bishops' response in the context of Northern Ireland, part of the United Kingdom.

¹⁸⁹ *Child Sexual Abuse: Framework for a Church Response*, p. 9. Although this committee was convened by ICBC, the committee comprised representatives of both ICBC and the Conference of Religious of Ireland (CoRI).

Comprising priests, religious and laity, professionals in the fields of social welfare, psychology, mass media, canon law, and civil law, the Advisory Committee met during 1994 and 1995.

The document, *Child Sexual Abuse: Framework for a Church Response*, was presented by the Irish Bishops' Conference and the Conference of Religious of Ireland who recommended it to individual dioceses and institutes that they might use it as a framework for addressing the issue of child sexual abuse by priests and religious. As the title states, the document provides a framework, albeit a detailed framework, for dioceses and religious institutes to establish their own policies and procedures. The document addresses child sexual abuse by clergy and religious only.

These procedures established by ICBC and CoRI were placed in a setting of personal and communal rights. At the outset, they assert the rights of the child: the right to bodily integrity and physical and emotional privacy, the right to enjoy physical and mental health and the right to grow and develop in an environment which recognises their inherent dignity and worth and which is conducive to the realisation of their full potential. Flowing from the assertion of these rights, the document recognises the harmful and, sometimes lasting, effects of sexual abuse on victims, and also on their families.

The procedures strongly protect the rights of the accused, the right to one's reputation, and the right to protect one's privacy.¹⁹⁰ Having the details of the complaint provided to the accused as well as being informed of developments in the investigation serves to protect the right of defence. Consistent with canon law, the Irish procedures do not recommend leave of absence when an accusation is first being investigated. Rather,

when the bishop or religious superior is satisfied that child sexual abuse has occurred he is to ensure that the accused does not remain in a ministry that provides access to children.¹⁹¹

The procedures also affirm the pastoral role of the diocesan bishop and the religious superior.¹⁹² In general terms, the superior is to consider “the needs of those who may have suffered abuse and their families, of the accused priest or religious and his or her family, of the parish or other place of ministry in which the accused person has served, and of the wider Church community.”¹⁹³ Although the superior’s delegate receives a complaint, he informs the superior immediately. It is the superior who then informs the accused that a complaint has been received, explains the role of the Adviser and assures the accused person of his availability to himself and to members of his family.¹⁹⁴ The superior should be available to meet with those who have suffered abuse and their families. In order to support the parish where an accused priest has worked, the bishop should appoint a priest to replace him, and brief him appropriately. The bishop should inform priests in the neighbouring parishes of the situation.¹⁹⁵ Further, the bishop should make a pastoral visit to the parish or parishes affected, during which he should listen to and address, in so far as he may, the needs and concerns of the parishioners. Following

¹⁹⁰ *Ibid.*, 3.5.

¹⁹¹ *Ibid.*, 4.6.6.

¹⁹² The Irish document consistently refers to the bishop or religious superior and to the accused as either priest or religious (male or female). For consistency with the rest of the chapter, masculine terms will include the female term except where the context provides otherwise. The term “superior” implies bishop or religious superior.

¹⁹³ *Child Sexual Abuse: Framework for a Church Response*, 3.7.

¹⁹⁴ See *Child Sexual Abuse: Framework for a Church Response*, 4.5.8 - 4.5.10.

¹⁹⁵ See *Child Sexual Abuse: Framework for a Church Response*, 6.1 - 6.2.

this he should, together with the local priests and pastoral council, prepare a programme of pastoral support and spiritual renewal for the parish.¹⁹⁶

Towards the end of 2000, the Bishops' Committee on Child Abuse commissioned the Health Services Research Centre of the Department of Psychology at the Royal College of Surgeons to examine the issue of clerical sexual abuse and to develop recommendations. The study was completed in 2003 and published as *Time to Listen: Confronting Child Sexual Abuse by Catholic Clergy in Ireland*, referred to above.¹⁹⁷

3.6 – AOTEAROA NEW ZEALAND

In 1993, the Bishops of Aotearoa New Zealand adopted a provisional protocol for dealing with sexual abuse.¹⁹⁸ During the following five years work progressed, particularly through world-wide consultation, on a document of principles and procedures. In March 1998, at their annual meeting, the Bishops and Congregational Leaders of New Zealand approved for a period of three years the document, *Te Houhanga Rongo A Path to Healing: Principles and Procedures in Responding to Complaints of Sexual Abuse by Clergy and Religious of the Catholic Church in New Zealand*.¹⁹⁹ When the document was reviewed, three years later, with the six dioceses and the religious institutes which were signatories to the document being invited to

¹⁹⁶ See *Child Sexual Abuse: Framework for a Church Response*, 6.6 - 6.7.

¹⁹⁷ See above, Chapter One, note 1.

¹⁹⁸ NEW ZEALAND CATHOLIC BISHOPS' CONFERENCE, *Protocol*, typescript, 1994.

¹⁹⁹ NEW ZEALAND CATHOLIC BISHOPS CONFERENCE AND THE CONGREGATIONAL LEADERS CONFERENCE OF AOTEAROA-NEW ZEALAND, *Te Houhanga Rongo A Path to Healing: Principles and Procedures in Responding to Complaints of Sexual Abuse by Clergy and Religious of the Catholic Church in New Zealand*, 2001. The unpublished document, distributed by Catholic Communications New Zealand, consists of two parts together with a Handbook

participate, they found that only minor changes were required. Consequently, the bishops and congregational leaders accepted the document for a further five year period.

In developing *Te Houhanga Rongo A Path to Healing*, the leaders of the Catholic Church drew on the experience and the documents already in existence in Australia, Canada, England and Wales, Ireland and Scotland. Consequently the New Zealand document contains many similarities to those of these countries. Nevertheless the document, in its totality, is unique.

The document applies to clergy and religious and diocesan seminarians. The text contains a number of definitions, including “sexual abuse” and “sexual misconduct”, the latter being “any misconduct of a sexual nature that is inconsistent with our witness to chastity, but which does not necessarily involve an abuse of power or status – for example, misconduct with a freely consenting adult where there is not or has not been a professional or pastoral relationship.” The document further distinguishes between “criminal abuse” and “non criminal abuse”. Accordingly, the procedures apply in the case of allegations of sexual abuse.

Having been developed specifically for use in New Zealand, the procedures respect the nation’s law. Consequently they are particularly sensitive to issues of privacy, including the fact that the diocesan Abuse Protocol Committees do not have statutory authority to investigate allegations. New Zealand has no mandatory reporting requirements at this point in time and therefore the Procedures do not specify any commitment to reporting to civil authorities. The members of the Abuse Protocol

containing more detailed guidelines. <<http://www.catholic.org.nz/documents/healing.html>>(24 November 2001).

Committees are warned to be “careful lest they are seen to be acting contrary to the intent of the [Accident Compensation Act].”²⁰⁰

Having been written in 1998 and revised in 2001 *Te Houhanga Rongo A Path to Healing* bears the marks of benefiting from the documents of other countries. More importantly, it embodies fine-tuning and inculturation of points incorporated in these documents, and in particular with respect to the requirements of canon law.

In 1999 the New Zealand Catholic Bishops’ Conference (NZCBC) requested permission of the National Professional Standards Committee in Australia, to adapt and use the document, *Integrity in Ministry*. At its Conference in May 2000 the NZCBC adopted *Integrity in Ministry* as an official statement of NZCBC guidelines in professional standards for clergy and institutes of consecrated life in all six dioceses. Having received permission to adapt it to the New Zealand context, the bishops made only one change: they deleted an appendix specifying procedures to be followed in cases of serious violations of the principles and standards contained in the document. Accordingly, while the New Zealand document presents standards of behaviour for clergy and religious, it does not suggest a way of dealing with violations.

3.7 – FRANCE

In November 2000, the Conference of Bishops of France, during their Plenary Assembly, adopted a statement, *Déclaration des Évêques sur la Pédophilie*. In this single page statement, the bishops condemn pedophilic activity and recognize the double betrayal that occurs when the offender is a priest. The bishops committed themselves to

²⁰⁰ *Te Houhanga Rongo A Path to Healing*, Handbook 4.5.

research on pedophilia, on ways of supporting victims and their families, on prevention, on the formation of priests, and on the procedures for the intervention of bishops. Concerning priests who have offended, they state, "It is necessary that they atone for the wrong that they have done and bear the weight of the punishment imposed by the Church and by society. Nevertheless as a human being, a priest who has committed these acts remains a person who has a right to our support and to our prayer."²⁰¹

In his opening address to the Conference of Bishops at their Plenary Assembly in November 2001, Cardinal Louis-Marie Billé spoke of the trial of Mgr Pierre Pican, Bishop of Bayeux and Lisieux.²⁰² On 4 September 2001, Bishop Pican was given a nine-month suspended prison sentence for not having warned the justice system of the pedophilic acts of a priest. Cardinal Billé spoke of his concern for what he saw as an infringement by secular authorities on the norms of professional secrecy.

Mgr Jean-Pierre Ricard, who was elected president of the Conference during this session, presented the closing address. He noted that a consultative committee on sexual abuse had been formed. "It will respond to the questions of bishops and of major superiors. Clearly, it will take up suggestions, formulate recommendations and draw our attention to questions which merit our consideration." The consultative committee will

²⁰¹ "Il est nécessaire qu'ils réparent le mal qu'ils ont fait et portent le poids de la peine infligée par l'Eglise et par la société. Comme tout être humain pourtant, le prêtre qui a commis ces actes demeure une personne qui a droit à notre accompagnement, à notre prière." CONFERENCE OF BISHOPS OF FRANCE, *Déclaration des Évêques sur la Pédophilie*, in *La Documentation catholique*, 97 (2000), p. 1031.

²⁰² See O. ÉCHAPPE, «Le secret en question», in *L'année canonique*, 43 (2001), pp. 285-300.

develop a brochure aimed directly at Christian educators.²⁰³ These statements suggest that in France the need to address the issue of child sexual abuse arose as much as fifteen years later than it did in the United States, Canada or Australia.

4 – THE RESPONSE OF THE HOLY SEE

During the period considered so far, diocesan bishops and religious superiors have responded in various ways to allegations of sexual abuse. As well as the experience of their confreres, they were guided by the *Code of Canon Law* and a document, *Crimen sollicitationis*, to be applied in the case of solicitation by a priest in the context of confession as well as certain sexual offences committed by clerics.²⁰⁴ A number of decisions of bishops in relation to particular priests were overruled by the Congregation for the Clergy, usually for procedural reasons. In the situations where the initial decision was made using procedures that had been developed either at a national or diocesan level, a contrary decision by the Congregation for the Clergy implied that the procedures were inadequate or in error or were not followed correctly. However, some in the Church, not knowing all the details of the situation, interpreted such decisions as support for the priest rather than for the victim.

²⁰³ Mgr Ricard did not indicate that the committee would develop guidelines for diocesan bishops, nor a common set of protocols for every diocese in France. See *La Documentation catholique*, 98 (2001), p. 1050 for a list of members of this committee.

²⁰⁴ SACRED CONGREGATION OF THE HOLY OFFICE, Instruction, *Crimen sollicitationis*, 16 March 1962, Rome, The Vatican Press, 1962. This document was distributed to diocesan ordinaries with the direction that it be stored in the secret archives as strictly confidential. In the first instance, the document addressed the procedure to be applied in the event of an allegation of solicitation in the context of confession. However, the last title directed that the same procedures be applied when allegations were received of “the worst crime” (homosexual acts) or of sexual offences perpetrated or attempted with youths or animals (nn. 71-73). This document replaced an almost identical document that had been distributed with the same direction in 1922. Cf. SUPREMAE S. CONGREGATIONIS S. OFFICII, *Instructio, De modo procedendi in causis sollicitationis*, Romae, Typis Polyglottis Vaticanis, 1922.

4.1 – DEROGATIONS GRANTED TO THE UNITED STATES CATHOLIC CONFERENCE

As early as 1989 discussions were held between officers and key staff of the NCCB and members of the Roman curia. Of particular concern were the matters of prescription and culpability or imputability. The possibility of having an administrative procedure for the removal of a priest from the clerical state was considered.²⁰⁵

During their 1993 *ad limina* visit, at their meeting with members of the Congregation of the Clergy, the bishops raised the question of clergy sexual misconduct, seeking a simpler process for the laicization of clergy who have sexually abused minors.²⁰⁶ On 11 June 1993, Pope John Paul wrote to the bishops of the United States informing them of a “joint committee of experts from the Holy See and the bishops’ conference [that] has just been established to study how the universal canonical norms can best be applied to the particular situation of the United States.”²⁰⁷ The commission produced a report which the Canonical Affairs Committee of the NCCB studied. This led to the development of a proposal of derogations which was adopted by the conference of bishops in November 1993. In response to a petition, dated 30 November 1993, by Cardinal William Keeler, President of the NCCB, Pope John Paul II granted on 25 April 1994, the following derogations for a five year period:

With regard to can. 1395.2:

this norm is to be applied to delicts committed with any minor as defined in can. 97.1, and not only with a minor under sixteen years of age.

With regard to can. 1362. 1,2:

²⁰⁵ See above, p. 42.

²⁰⁶ Reported in *Origins*, 22 (1992-1993), p. 720.

²⁰⁷ *Origins*, 23 (1993-1994), p. 103. This ad hoc joint commission met in Rome, 14-15 June 1993.

in those matters which pertain to the above-mentioned delict, this norm is so to be applied that criminal action is not extinguished unless the following conditions have been fulfilled:

the one who has suffered the delict has completed the twenty-eighth year of age; and

at least one year has passed from the denunciation regarding the same delict, as long as the denunciation was made before the one who suffered the injury had completed the twenty-eighth year of age.²⁰⁸

In addition, the Holy Father issued a transitory norm: "with respect to delicts already committed, criminal action is not to be deemed extinguished until the minor who has suffered the injury had completed the twenty-third year of age." The derogation was renewed in 1998.²⁰⁹

4.2 – POPE JOHN PAUL II

On numerous occasions, Pope John Paul II has spoken about sexual abuse.²¹⁰ However, as early as 1993, he spoke at length on the issue to the bishops of the United States, during their *ad limina* visit, acknowledging the scandal that results from clerical misconduct and affirming the need "to discern scrupulously the charism of celibacy among candidates for the priesthood."²¹¹ Following the Synod of Oceania, the Pope declared:

²⁰⁸ Rescript of the Secretariate of State, 25 April 1994, Prot. N. 346.053.

²⁰⁹ Letter of the Secretariate of State, 4 December 1998, Prot. N. 445.119/G.N. While this derogation provides for the use of canon law in a greater number of cases, there would still be many cases for which a penal process could not be applied because the action had been extinguished by prescription (c. 1362).

²¹⁰ See POPE JOHN PAUL II, Letter to U.S. Bishops, 11 June 1993, in *Origins*, 23 (1993-1994), pp. 102-103; Address in Denver, U.S.A., 14 August 1993, in *Origins*, 23 (1993-1994), p. 195; Address to the Roman Curia, December 1993; Address to Youth in St. Louis, U.S.A., 26 January 1999, in *Origins*, 28 (1998-1999), p. 598; Letter to Priests of the World, Holy Thursday, 21 March 2002, in *Origins*, 31 (2001-2002), pp. 693-699.

²¹¹ POPE JOHN PAUL II, *Ad limina* Address to the Bishops of New Mexico, Utah, Arizona, Colorado, Wyoming, 8 June 1993, in *Origins*, 23 (1993-1994), p. 78.

In certain parts of Oceania, sexual abuse by some clergy and religious has caused great suffering and spiritual harm to the victims. It has been very damaging in the life of the Church and has become an obstacle to the proclamation of the Gospel. The Synod Fathers condemned all sexual abuse and all forms of abuse of power, both within the Church and in society as a whole. Sexual abuse within the Church is a profound contradiction of the teaching and witness of Jesus Christ. The Synod Fathers wished to apologize unreservedly to the victims for the pain and disillusionment caused to them.²¹²

On 23 April 2002, Pope John Paul II made an even stronger statement, when he addressed the Cardinals of the United States, "People need to know that there is no place in the priesthood and religious life for those who would harm the young." His statements are reflected in the statements of both conferences of bishops and individual bishops.²¹³

4.3 – CONGREGATION FOR THE DOCTRINE OF THE FAITH

In 1997, the Congregation for the Clergy commenced a study of diocesan protocols. In November 2000, the Congregation for the Doctrine of the Faith held a meeting to which members of episcopal conferences of a number of countries were invited. The purpose was to consider the response of the Catholic Church to sexual abuse of minors by clergy. Accordingly, conferences of bishops and major superiors knew that it was expected that the Congregation for the Doctrine of the Faith would provide specific directions for managing future allegations.

On 30 April 2001, Pope John Paul II issued an apostolic letter *motu proprio*, by which he promulgated *Normae de gravioribus delictis Congregationi pro Doctrina Fidei*

²¹² POPE JOHN PAUL II, Post-Synodal Apostolic Exhortation, *Ecclesia in Oceania*, 22 November 2001, Australian edition, Sydney, St. Pauls Publications, 2001, n. 49.

²¹³ See, for example, Statements of Bishop W. Gregory, Archbishop (later Cardinal) J. Rigali, Bishop D. Wuerl in *Origins*, 31 (2001-2002), pp. 613-615, 677-679.

reservatis.²¹⁴ Subsequently, the CDF sent to all the bishops the circular letter, *De delictis gravioribus*, dated 18 May 2001.²¹⁵ In the following months Pope John Paul II granted several faculties to the CDF in relation to these norms.²¹⁶ Henceforth, certain delicts were reserved to the CDF. These included a delict committed by a cleric against the sixth commandment of the Decalogue with a minor below the age of eighteen years and solicitation by a confessor in the act, on the occasion, or under the pretext of confession, to sin against the sixth commandment of the Decalogue, if it is directed to sinning with the confessor himself.²¹⁷

As often as the Ordinary or Hierarch receives a report of a reserved delict which has at least a semblance of truth, once the preliminary investigation has been undertaken, he is to forward to the CDF the acts of the investigation. If he has probable knowledge of such an offence he may proceed with a penal trial or an administrative process only at the direction of the CDF and according to the norms which the Congregation may transmit to

²¹⁴ JOHN PAUL II, Apostolic letter issued *motu proprio*, *Sacramentorum sanctitatis tutela*, 30 April 2001, in *Acta Apostolicae Sedis*, 93 (2001), pp. 737-739, English translation in W.H. WOESTMAN, *Ecclesiastical Sanctions and the Penal Process: A Commentary on the Code of Canon Law*, 2nd edition, Ottawa, Faculty of Canon Law, Saint Paul University, 2003, pp. 300-302 and *Normae de gravioribus delictis*, 23 April 2001, not published in the AAS, available with English translation in WOESTMAN, *Ecclesiastical Sanctions and the Penal Process*, pp. 303-309.

²¹⁵ CONGREGATIO PRO DOCTRINA FIDEI, Epistula, *Ad exsequendam ecclesiasticam legem*, 18 May 2001, in AAS, 93 (2001), pp. 785-788, English translation in WOESTMAN, *Ecclesiastical Sanctions and the Penal Process*, pp. 310-313.

²¹⁶ The English translation of these faculties is found in WOESTMAN, *Ecclesiastical Sanctions and the Penal Process*, pp. 314-316. Accordingly, the norms and associated documents consist of four elements: the *motu proprio* of Pope John Paul II, the substantive and procedural norms, the letter from the Congregation for the Doctrine of the Faith, and the subsequent decisions following the promulgation of the norms. For the sake of consistency, the norms will be referred to as the Norms of *Sacramentorum sanctitatis tutela*.

²¹⁷ The norms also apply in the situation of certain more grave delicts related to the celebration of the Eucharist and the sacrament of Penance. Significantly, among the delicts specified in these norms, only the delict of a sexual offence committed with a minor is a criminal offence in secular law.

the Ordinary for the individual case (Art. 13). In such tribunal processes, unless a dispensation is granted by the CDF, the functions of judge, promoter of justice, notary and legal representative can validly be performed only by a priest (Art. 12). In addition, cases are subject to the pontifical secret (Art. 25).

The norms are significant for a number of reasons. Firstly, they changed the universal law with respect to the age of a minor for the delict "against the sixth commandment of the Decalogue" to eighteen. Secondly, they changed the period of prescription for the delicts reserved to the CDF to 10 years.²¹⁸ Thirdly, in many dioceses, previously bishops had found that it was not necessary to proceed with a formal canonical process. However, the new norms require that the bishop always in such cases initiate a preliminary investigation, unless it would be entirely superfluous, and then the decision of the CDF will determine the subsequent procedure to be observed. As well, the matter must always be pursued in a judicial process, although Pope John Paul II later changed this to allow for administrative processes in certain more serious instances. Fourthly, it requires of those participating in these processes that they observe pontifical secrecy. Fifthly, while the new procedure does not remove the diocesan bishop's judicial role in accordance with c. 391, it does regulate his exercising it.

²¹⁸ According to c. 1362 §1 2°, such offences had a period of prescription of five years, commencing at the time of the offence. With the new norms, prescription commences when the minor completes the eighteenth years of age and runs for a period of ten years. This prescription of ten years applies to all of the delicts reserved to the CDF (Article 5). For offences of this nature committed prior to 25 November 1983, CIC/1917 c. 1703 also specified a period of prescription of five years.

When similar provisions were made for the church in the United States, Pope John Paul II issued a transitory norm so that the provisions applied for delicts already committed. (See p. 72.) Since no similar provision was made in these procedures, the principle of non-retroactivity would normally apply.

Following the promulgation of the norms, Pope John Paul II made several decisions concerning them. On 7 November 2002, he granted the faculty to the CDF to derogate from prescription on a case by case basis after having considered the request of the Bishop and the reasons for such request. Then, on 7 February 2003, he granted to the Congregation the faculty to dispense from the requirement of priesthood and the requirement of a doctorate in canon law for judges, the promoter of justice, notaries and chancellors, advocates and procurators.²¹⁹ On the same day, he also granted to the CDF the faculty “in cases legitimately brought to the Congregation of the Doctrine of the Faith, to sanate acts, if procedural laws have been violated by inferior tribunals acting on the mandate of the same Congregation or under art. 13 of the *Motu Proprio Sacramentorum sanctitatis tutela*.”²²⁰ As well, the Holy Father granted to the CDF the faculty to dispense from the requirement of a judicial process in grave and clear cases.

The Letter from the CDF concludes, “Through this letter ... it is hoped [...] that more grave delicts will be entirely avoided.” Bishops and leaders of institutes have shared the hope that the establishment of procedures and protocols would have had the same effect. Unfortunately, such has not been the case.

CONCLUSION

This survey of the situations in a number of countries provides two frameworks for comparison. We find that a great number of similarities exist both between the various

²¹⁹ A dispensation from the doctorate in canon law may be granted only to persons who hold a licentiate in canon law and who have worked in ecclesiastical tribunals for a reasonable time. In fact, notaries and chancellors are not required to have a doctorate in canon law. The dispensation from priesthood for judges is granted in accordance with c. 1421.

²²⁰ WOESTMAN, *Ecclesiastical Sanctions and the Penal Process*, p. 316.

civil situations and between civil and ecclesial contexts. Child sexual abuse is a widespread phenomenon. It has taken years for authorities, whether civil or ecclesial, to understand the nature of such abuse, the nature of the perpetrators, the harm caused by such offences, how to handle allegations of offences and how to care for victims. Many particular churches and some civil authorities have acknowledged mistakes in the response to past allegations.

In every country considered above the civil situation has impacted on the response of the Church. The civil situation contextualizes and provides the rationale for a number of the differences in procedures between one country and another. Cooperation and trust between civil and church authorities underlies and is essential for many of the procedures. This fundamental cooperation points to the need for ecclesial procedures to remain at the level of the conference of bishops rather than having universal rules. This cooperation with civil authorities raises questions also about differences between the Church's law and secular law, for example, as regards prescription or the statute of limitations.

Whether or not the conference of bishops in a particular country has responded with a national policy may relate to the civil structure. This begs the question of whether or not that response is appropriate. Increasing uniformity in provincial/state legislation, with regard to criminal law, age of consent, mandatory reporting, may lead church leaders to re-examine the values inherent in national or provincial or even diocesan policies and determine that an alternative approach will be appropriate in the future. For example, increased uniformity in secular law presents a rationale for increased uniformity in Church procedures.

While some government reports have made comments or recommendations directed at the churches, these need to be examined critically. A number contain insights that present challenges for diocesan bishops and religious institutes. On the other hand, some recommendations need to be examined critically in the light of the present canon law.

Some civil jurisdictions have praised the procedures developed and circulated by the bishops. However, the use of unpublished procedures is unlikely to help people believe in what the Church is trying to achieve. In addition, the need for adherence to published procedures is evidenced by the popular response to the failure to do so and the perception that adherence to procedures and policies should be the subject of external audits.

This points to the fact also that there is much to learn yet. Particular studies could focus on the nature and effect of trauma that is experienced when the abuse is perpetrated by someone acting in the name of the Church. The long-term impact of trauma on people who may become complainants deserves further study. Given that abuse has occurred in the past in a context of secrecy, research might also examine the impact of disclosure and publicity on an individual's offending. The effectiveness of alternative treatment programs for offenders invites research.

All jurisdictions acknowledge the need for continuing attentiveness, study and pastoral concern. A high level of exchange has occurred on all aspects of child sexual abuse. No one has yet claimed to have developed the definitive set of procedures. Readiness to adapt procedures in the light of study and experience could well lead to the revision of policies and procedures every few years. Accordingly, the policies and

procedures of different countries will be characterized by many common elements. Nevertheless, the particular social situation of each country should demand differences not only in pastoral practice but also in the application of law.

Because of the culture of the time and acknowledged mistakes in the past, trust in the Church has diminished. The Church is often perceived to act solely from an institutional model of Church. Steps taken to avoid scandal aimed to protect the perfect society of the Church. Subsequently, conferences of bishops, diocesan bishops and religious superiors continue to face the challenge of grounding policies and procedures in both canon law and sound theology.

Having studied the situations in the United States, Canada, United Kingdom, Ireland and New Zealand, we now look to the situation in Australia. While finding similarities between the Australian situation and the countries considered, we will identify unique elements. Likewise, we will contextualize the response of the Church in within the Australian society.

CHAPTER II

THE AUSTRALIAN CONTEXT AND RESPONSE

INTRODUCTION

Despite Australia's geographic isolation, communications between it and other countries is immediate and frequent and impacts on the thinking and actions of Australians. For many, awareness of sexual abuse of children came about through media reports of such offences in other countries. During the late 1980s and the 1990s, consequently, Australians came to understand that the problem of sexual abuse of children is also part of Australian society – as it is part of society in so many countries.

Having considered the situations with regard to child sexual abuse in certain other countries, we now investigate the situation in Australia. Following the pattern of the previous chapter, initially, we will look at a growing general awareness concerning its incidence and then examine how governments have responded. When doing this, we focus primarily on New South Wales, the state with the largest population. We will also consider to a lesser degree government responses in Queensland and South Australia; this will take the form of an overview or snapshots, rather than a thorough examination of all the issues since they are similar. Finally, we will examine the response of the Catholic Church.

Australia is a federation comprised of six states, New South Wales, Victoria, Queensland, South Australia, Western Australia and Tasmania, and two territories, Australian Capital Territory and Northern Territory.¹ There are five ecclesiastical provinces: Sydney, Melbourne, Adelaide, Perth and Brisbane.² As well, Australia has one military ordinariate.³ In addition, three Churches *sui iuris* have their eparchies: the Eparchy of Saint Michael Archangel of Sydney for Melkite Greek Catholics of Australia, the Eparchy of Saints Peter and Paul of Melbourne for the Ukrainian Rite in Australia and New Zealand, and the Maronite Eparchy of St. Maroun of Sydney.⁴

1 – AWARENESS OF THE INCIDENCE OF CHILD SEXUAL ABUSE

The women's movement, society's recognition of the rights of the child, and the reporting of occurrences of sexual abuse incidents in Australia and in other countries (principally in the United States of America and Canada) constituted the major factors that led Australians to become aware of issues surrounding sexual misconduct, sexual

¹ The powers of the Commonwealth are defined in the Australian Constitution. The states, having competence for all other matters, bear responsibility for matters that relate to child sexual abuse: health and welfare, education, police and criminal law. Consequently, for the greater part, in this chapter, we direct our attention to responses at the state level.

² The Province of Sydney is made up of the eleven dioceses of New South Wales and the Australian Capital Territory. The Province of Melbourne comprises the Archdiocese of Melbourne, the three suffragan dioceses, Sale, Sandhurst and Ballarat and the Archdiocese of Hobart. The Province of Adelaide consists of the Archdiocese of Adelaide and two suffragan dioceses, Darwin and Port Pirie. The provinces of Perth and Brisbane are each made up of the dioceses that are included in the state boundaries. Thus, the Archdiocese of Perth and the dioceses of Broome, Bunbury and Geraldton form the Province of Perth and the Archdiocese of Brisbane and the dioceses of Cairns, Rockhampton, Toowoomba and Townsville constitute the Province of Brisbane. See Appendix 3 for a map of the diocesan and state boundaries.

³ The military ordinariate was established as an ordinariate in 1986.

⁴ The Melkite Mission was established in 1891 and was established as a diocese in 1987. The Ukrainian Rite Exarchate was established in 1958 and was elevated to an Eparchy in 1982. The Maronite Mission was established in 1898 and became an Eparchy in 1973.

abuse and, in particular, child sexual abuse. In this regard, two events were of prime importance: the media focus on child migration and the Wood Royal Commission.

1.1 – GOVERNMENT ACTION IN THE 1980s

Prior to these events, committees and statutory bodies were established in several states to advise on child sexual assault. The activities of these bodies were not well publicized, especially beyond state borders. However, they indicate an awareness, at least among professionals working in the field of child welfare, and among politicians and members of the legal profession, of the incidence and effects of child sexual abuse. They also illustrate early attempts to respond to the problem. The situations in New South Wales and South Australia serve to illustrate approaches of governments.

1.1.1 – NEW SOUTH WALES

On 25 June 1984 Neville Wran, the Premier of New South Wales, established a special task force to advise on strategies for dealing with the crime of child sexual assault. The report, presented nine months later, recommended the introduction of a co-ordinated, comprehensive child sexual assault program encompassing law reform, health, welfare, police, education, legal services, training and community education.⁵ As a

⁵ In all, the task force made sixty-five recommendations, after having consulted aboriginal, church, community, ethnic, legal, and welfare bodies in New South Wales and having received submissions from more than three hundred individuals and groups. Despite this number, little general awareness of its functioning existed.

The task force recommended compulsory training for personnel from a range of fields, including ministers of religion and religious instructors (Recommendation 33). They proposed that this training should address as a minimum:

- The person's own values and attitudes to children and child sexual assault
- Societal attitudes to children and child sexual assault
- The indicators of child sexual assault in the behaviours of victims
- Legal and child welfare procedures and obligations

consequence, the government established the NSW Child Protection Council.⁶ This Council was the lead player in developments in child protection in New South Wales.

Recognizing the need for communication and education, the Child Protection Council adopted a multi-faceted approach. In 1986, it established Area Child Protection Committees that were to form a state-wide network to facilitate the flow of information. In order to combat widespread ignorance of the incidence and effects of child sexual abuse, the Council ran media campaigns between 1986 and 1990 and organised numerous seminars.⁷ Perceiving interagency coordination and cooperation to be essential for effective intervention, it developed interagency guidelines to achieve a standardised and systematic response to allegations of child sexual assault.⁸

Also, in 1991, the Council established a multi-disciplinary committee to inquire into "systems abuse". The resulting report, *Systems Abuse: Problems and Solutions*,

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- Medical procedures
 - Support services for children and their families

In addition the task force recommended that the training address the specific needs of Aboriginal children, migrant children, developmentally and physically disabled children (Recommendation 34). CHILD SEXUAL ASSAULT TASK FORCE (NSW), *Report of the New South Wales Child Sexual Assault Task Force*, Sydney, Government Printer, 1985, p. 79.

⁶ Information on the NSW Child Protection Council is drawn from NSW CHILD PROTECTION COUNCIL and COMMISSION FOR CHILDREN AND YOUNG PEOPLE, *The NSW Child Protection Council 1985-1999, A History of Change and Innovation*, (=NSW Child Protection Council History), Sydney, Commission for Children and Young People, 2000.

⁷ Its first campaign, "Child Sexual Assault: It's Often Closer to Home Than You Think" commenced in 1986; the second campaign, "Child Sexual Assault. No Excuses. Never, Ever" commenced in May 1987. A third child sexual assault campaign ran in 1988. Yet another campaign was broadcast on the radio and at cinemas for a three-month period in 1990. In addition, the Council undertook a publishing program.

⁸ Having introduced the guidelines in 1991, the Council, in the mid 1990s, undertook a review which led to its developing revised guidelines that were finalised and distributed in 1997. Following the passing of the *Children and Young Persons (Care and Protection) Act 1998*, the *Commission for Children and Young People Act 1998* and amendments to the *Ombudsman Act*

published in 1994, saw it occurring in three situations: when children's needs were not considered; when effective services were not available or were not properly organised or co-ordinated; and when children were abused in institutional care.⁹ The Council identified features of institutions that facilitate systems abuse that arise from political and administrative decisions:

- i. Lack of resources
- ii. Gap between policy and practice
- iii. Lack of coordination and consistency
- iv. Inadequate guidelines
- v. Lack of specialised skills
- vi. Lack of support for staff
- vii. Lack of information
- viii. Lack of a voice for children.¹⁰

The Council proposed three ways of counteracting such abuse:

- strengthening the child orientation of services and institutions [...];
- introducing quality assurance mechanisms which set standards and which include monitoring, reviewing and complaints mechanisms to allow instances of systems abuse to be identified and rectified;
- appointing a Children's Commissioner to advocate for children and to monitor and review the activities of both government and non-government organisations and agencies to make sure that children's special needs are recognised and met.¹¹

At the same time, recognizing that the management of sex offenders served to protect children, the Council both initiated and contributed to policy development on the

1974, the Guidelines were again reviewed. *New South Wales Interagency Guidelines for Child Protection Intervention*, 2000 edition, Sydney, NSW Government Printer, 2000.

⁹ NSW CHILD PROTECTION COUNCIL, *Systems Abuse: Problems and Solutions: A Report of the NSW Child Protection Council*, Sydney, NSW Child Protection Council, 1994.

¹⁰ *Ibid.*, p. 36. While these features refer specifically to institutions, their applicability to the Church or any other entity in relation to sexual abuse is obvious.

¹¹ *NSW Child Protection Council History*, p. 29.

matter. Basing their work on a recommendation of the Child Sexual Assault Task Force, the Council developed the model that was adopted subsequently for the Pre-Trial Diversion of Offenders program. The Council also developed a proposal for a program for juvenile sex offenders. Keeping the same focus, in 1994, it published *Principles of Working with Sex Offenders*.¹² The Council recommended that treatment programs be:

- accessible only through a court-mandated order
- properly piloted and evaluated before being considered for wider adoption
- provided only by appropriately skilled and experienced personnel [...]
- linked to long-term monitoring and research into outcomes.¹³

After the Minister for Community Services established an inter-departmental working group to implement the recommendations, the NSW Health Department introduced a treatment program for young offenders (aged between 10 and 17).

The Child Protection Council also addressed issues of legislation and legal procedures. In 1991, following the issuing of a discussion paper, *Out-of-Court Videotaping of the Statements of Children Who are the Alleged Victims of Sexual Assault in NSW*, the Council concluded “that the effectiveness of videotaping in reducing a child’s ordeal depends less on the technology itself and more on the skills and training of the users, plus the level of interagency coordination and cooperation exercised.”¹⁴ In 1995, the Council was a significant participant in the review of the government’s *Child (Care and Protection) Act 1987*. The *Children and Young Persons (Care and Protection) Act*, the new legislation that resulted from this review, was passed in December 1998.

¹² This was followed by *Working with Sex Offenders: A Child Protection Perspective*.

¹³ *NSW Child Protection Council History*, p. 32.

¹⁴ *NSW Child Protection Council History*, p. 33.

The work of the NSW Child Protection Council began in 1985 and continued until the Council was replaced by the Commission for Children and Young People in 1999. Consequently the Council's existence and influence preceded the Wood Royal Commission and the media publicity surrounding child migration. On the other hand, continuing beyond them, the Council's work was itself influenced by these events. Encompassing prevention programmes, interagency coordination and cooperation, treatment of sex offenders, systems abuse and legislation and legal procedures, the work of the Child Protection Council was influential both in raising awareness and in preventing further child sexual abuse.

1.1.2 – SOUTH AUSTRALIA

In October 1984, the South Australian Minister for Health established a Task Force on Child Sexual Abuse.¹⁵ Its role was to identify problems associated with existing law and methods of service delivery and to make recommendations on strategies to prevent or alleviate the incidence of child sexual abuse. Its report, presented to the government in 1986, contained over one hundred recommendations, the principal one being that the government establish a state council of child protection.¹⁶ As well, it recommended, *inter*

¹⁵ The role of the task force in raising awareness of sexual abuse was recognized in an editorial in *The Advertiser*, on 10 May 1986:

The Task Force established by the South Australian Government in 1984 to examine the law and methods of dealing with sexually-abused children and their families has gone some way towards exposing one of society's most distasteful crimes. Following an initial, and understandable, reluctance by many people to come forward with first-hand information, there is now little doubt that the problem of child abuse is more prevalent than the general community had realised.

¹⁶ Cabinet directed the task force to form three committees, Education, Health and Welfare, and Legal. This last committee subsequently subdivided into two groups: the Child Protection Legislation and Procedures Group and the Criminal Prosecution, Law and Procedures Group. As

alia, the continuation of the mandatory reporting of suspected cases of child sexual abuse and the expansion of the class of people identified as mandated notifiers; special training in recognising abuse and neglect; training in child protection laws for those mandated to report and the establishment of a hospital based Child Protection Service for the assessment of suspected child sexual abuse. The task force recommended that Catholic schools systems be involved in all training and curriculum development and that employees in the non-government sector be included in personnel training.

In 1986, the Minister of Community Welfare undertook a review of the sections of the *Children's Protection and Young Offenders Act 1979* dealing with procedures to protect children in need of care. The review, conducted by Ian Bidmeade, recommended that the interest of the child be the paramount consideration in any "in need of care" matters.¹⁷ He also proposed that the Children's Interest Bureau become a Commissioner for Children. Then, in November of the same year, the Cabinet approved the

a result, the South Australian task force, including its committees, had a membership of forty-eight people. This fact, together with the planned time period of eighteen months, enabled the resulting report to be both more comprehensive and detailed in comparison with the report of the New South Wales body. SOUTH AUSTRALIAN GOVERNMENT TASK FORCE ON CHILD SEXUAL ABUSE: *Final Report*, Adelaide, Government Publishing Service, 1986.

¹⁷ The *Children's Protection and Young Offenders Act, 1979* identifies children in need of care when "a guardian of the child has maltreated or neglected the child to the extent that the child has suffered, or is likely to suffer, physical or mental injury, or to the extent that his physical, mental or emotional development is in jeopardy" or the guardians are unable or unwilling to exercise adequate supervision and control over the child or maintain the child. The 1979 Act did not refer to sexual abuse of children in particular, nor did this 1986 review of the legislation, other than to note that in a particular sample, 47.7% of children had suffered or were at risk of suffering physical abuse, while 12.4% had suffered or were at risk of suffering sexual abuse. I. BIDMEADE, *Review of Procedures for Children in Need of Care*, South Australian Government, 1986, p. 15.

establishment of the South Australian Child Protection Council with an independent chairperson.¹⁸ The objects of the Council were:

to ensure the coordination and evaluation of child protection, encourage cooperation between various State and Commonwealth agencies, encourage research, ensure coordination of community education and training and encourage the development of programs within Government and non-Government agencies.¹⁹

Like its counterpart in New South Wales, the South Australian Child Protection Council developed interagency guidelines which provided a basis for government agencies to develop their own policies and procedures. It also made a number of recommendations concerning proposed legislation. The Child Protection Council was disbanded in March 1995, with many of its roles being taken up by the Children's Protection Advisory Panel which was a legislative requirement of the *Children's Protection Act 1993*.²⁰

In both New South Wales and South Australia the delineation between awareness-raising and response to child sexual abuse is not clear. The work of the New South Wales Child Sexual Assault Task Force and the New South Wales Child Protection Council, like that of the South Australian Government Task Force on Child Sexual Abuse and the South Child Protection Council, forms a continuum that still evolves.

¹⁸ The first chair was Dame Roma Mitchell, who in 1981 was the founding chair of the Australian Human Rights Commission and in 1991 was appointed the Governor of South Australia.

¹⁹ R. LAYTON, *Our Best Investment, A State Plan to Protect and Advance the Interests of Children*, Adelaide, The Government of South Australia, 2003, p. 4.8.

²⁰ *Children's Protection Act, 1993*, s. 55.

1.2 – CHILD MIGRATION

The publication through the mass media of information related to child migration schemes alerted many Australians to the incidence of child abuse.²¹ Child migrants are “children from the United Kingdom and Malta who were sent to [Australia] between 1913 and 1968 unaccompanied by parents and under the guardianship of the Federal Minister for Immigration (in 1946) and the relevant State department (after 1947), where a British, Commonwealth and State government subsidy was paid.”²²

Following the success of child migration to other countries,²³ migration of children to Australia commenced in 1913 when Kingsley Fairbridge initiated a farm school at Pinjarra, south of Perth in Western Australia. Child migration from the British Isles was suspended during World War I but was resumed in 1920. Not surprisingly, all migration to Australia terminated during the depression, but resumed in 1937. While the outbreak

²¹ The Senate Report on Child Migration notes that this term “has often been applied to a range of significantly different child, youth and family migration schemes, operating, at times concurrently, from the post war period to the early 1980s.” Distinctions are made between child migrants, on the one hand, and youth migrants, “typically young men aged 15-19 years of age, who had left school and had made their own decision to migrate or had made a decision to precede the rest of the family.” SENATE COMMUNITY AFFAIRS REFERENCES COMMITTEE, *Lost Innocents: Righting the Record, Report on Child Migration* (= *Lost Innocents: Righting the Record*) August 2001, Canberra, The Senate, Parliament House, Canberra, p. 12. Some schemes were voluntary in nature; others were involuntary.

²² *Lost Innocents: Righting the Record*, p. 13. While voluntary agencies were involved, child migration was legislated for by the British Parliament, and was regulated and overseen by government agencies, both State and Commonwealth in Australia.

²³ Child migration from the United Kingdom commenced as far back as 1618, when 100 children were shipped from London to Virginia, America and the practice continued for over three hundred years. In 1850 Britain’s *Poor Law Act* provided for the emigration of children of the poor who were under 16 years of age. Child migration to America ended with the American War of Independence. The economic situation in Britain after 1870 increased child migration to Canada so that by 1914 approximately 80,000 children had been transferred there. Since the eighteenth century, children had also been transferred to New Zealand, where, generally, they were placed in foster-care situations. See *Lost Innocents: Righting the Record*, pp. 13-19; A.

of World War II resulted in a cessation, post-war policies proposed a significant increase in child migration.²⁴

Up to 1937 the Catholic Church had not been a participant in the child migration scheme.²⁵ The situation changed in 1937-38 when the Christian Brothers brought 114 boys to Tardun, south of Geraldton. During the decade commencing in 1950, 280 Maltese children, all boys, were brought to Western Australia and placed in Christian Brothers' orphanages.²⁶ Up until 1968, when child migration to Australia was terminated, 1,355 child migrants were placed in Catholic institutions in Australia.²⁷ Apart from thirty-one

GILL, *Orphans of the Empire: The Shocking Story of Child Migration to Australia*, Random House, Sydney, 1998, pp. 41-42.

²⁴ Although the goal was never attained, the Labor government planned to bring to Australia during the three years following the war, 50,000 orphans from Britain and other countries devastated by war. See *Lost Innocents: Righting the Record*, p. 25.

Historians have offered various interacting reasons for child migration. Clearly, some schemes were inspired by philanthropic or religious purposes while others were aimed at increasing the white population in British dominions and providing a source of labour for the colonies. Child migration also provided an economic benefit to Britain. In addition, in both Canada and Australia child migration served as a means of increasing denominational populations. For these various reasons, see *Lost Innocents: Righting the Record*, pp. 15-17; B.M.COLDREY, *Child Migration to Catholic Institutions in Australia*, Melbourne, Tamanaraik Publishing, 1995, pp. 1-2; GILL, *Orphans of the Empire*, p. 529.

²⁵ Barry Coldrey noted that in the early 1920s there were seven non-Catholic organisations bringing children to Australia, but no Catholic agencies. B. COLDREY, *The Scheme: The Christian Brothers and Childcare in Western Australia*, O'Connor, WA, Argyle-Pacific Publishing, 1993, p. 126.

²⁶ An agreement between the Maltese Government and the Catholic hierarchy in Australia was signed with Australian government approval concerning child emigration from Malta in 1950. See *Lost Innocents: Righting the Record*, pp. 42-43.

²⁷ This figure represents an estimate by the Catholic Church's Joint Liaison Group. Of this number 1,045 came from Britain and 310 from Malta. While these figures differ from those of the Catholic Child Welfare Council in the United Kingdom, they serve as a basis for other statistics used in the Senate Committee's report. The liaison group also estimated that Catholic child migration comprised eighteen per cent of the total child migration to Australia. See *Lost Innocents: Righting the Record*, p. 68.

children who went to the Murray Dwyer home owned by the Diocese of Maitland, the rest of these children went to institutions conducted by religious institutes.²⁸

Until the late 1980s knowledge of child migration was not widespread in Australia. In 1987, *The Western Mail* presented a three-page exposé of child migration and abuse in residential institutions in Western Australia.²⁹ Focussing on St. Joseph's Farm and Trade School, Bindoon, Fairbridge Farm School, Pinjarra and Nazareth House, Geraldton, the newspaper alleged practices involving physical, emotional and sexual abuse, excessive cruelty and hard physical labour. Two years later, in 1989, the release of the book, *Lost Children of the Empire*,³⁰ followed by the screening of a television documentary based on the book, again brought the issue of residential care to the attention of the public. Both presented case studies that reinforced the allegations of physical and sexual abuse within the institutions. Four more books on the theme of child migration were published in 1990-1991.³¹ The repetition and consistency of allegations of abuse suggested that the abuse was real and widespread.

In 1992, two more television programs increased the level of awareness of issues of child abuse. On 15 March the ABC *Compass* program screened "The Ultimate Betrayal".

²⁸ The Christian Brothers received 871 boys (six having transferred from the Fairbridge school); the various congregations of Sisters of Mercy received 260 children; the Poor Sisters of Nazareth received 147 girls; the Salesian Fathers received 39 boys and the Sisters of St Joseph received 7 children. See *Lost Innocents, Righting the Record*, Appendix 4.

²⁹ See A. MALAN, "The Lost Children Britain Sent Away to Australia," in *The Western Mail*, 15-16 August 1987.

³⁰ A. BEAN, *Lost Children of the Empire*, London, Unwin Hyman Limited, 1989.

³¹ See L.P. WELSH, *Geordie, Orphan of the Empire*, Perth, P & B Press, 1990; L.P. WELSH, *The Bindoon File*, Perth, P & B Press, 1991; J. LANE, *Fairbridge Kid*, South Freemantle, Freemantle Arts Centre Press, 1990; A. MOORE, *Growing up with Barnardo's*, Sydney, Hale & Iremonger, 1990. See also G. SHERRINGTON, *Fairbridge, Empire and Child Migration*, Perth, University of Western Australia Press, 1998.

In July, this was followed by the screening of the ABC and BBC TV mini-series, *The Leaving of Liverpool*. Public response to these programs was significant.³² Speaking of the former program, Peter Horsfield proposed:

what occurred in 1992 should be seen, not as a moral panic, but as a breaking of a political silence, resulting in the coherence of a previously suppressed common social experience and the stimulation of significant and legitimate social resistance and moral action.³³

Reflecting on the totality of these events, Barry Coldrey, a Christian Brother and an historian, notes that

there are two strands in the controversy which has continued unabated since 1987:

- the child migration process itself: the rightness or evil in sending children away from their surviving family and associations, without their informed consent, half way around the world for their education and training before placement in employment;
- the quality of care the children received in the Australian orphanages and the evidence or otherwise of widespread physical, emotional and sexual abuses which occurred there.

It is understandable that in popular media presentations the two strands of the controversy are blurred.³⁴

Besides linking child migration and child abuse, this development showed that, at least in a residential situation, sexual abuse was accompanied often by other forms of abuse. Consequently, in responding to a victim of sexual abuse, it is necessary to consider other forms of abuse as well.

³² The Wood Royal Commission considered the screening of these documentaries as marking the public disclosure of physical and sexual abuse in Australia. ROYAL COMMISSION INTO THE NEW SOUTH WALES POLICE SERVICE, *Final Report, Vol V: The Paedophile Inquiry*, p. 993.

³³ P. HORSFIELD, "An Analysis of the Media Debate following the ABC *Compass* Program, 'The Ultimate Betrayal'," in *Australian Journalism Review*, 15,1 (1993), p. 2.

³⁴ B.M. COLDREY, "The Child Migration Controversy: A Survey and Analysis of the Debate over Child Migration and Residential Care in Australia, 1987-2000," in *The Australasian Catholic Record*, 78 (2001), p. 66.

1.3 – ROYAL COMMISSION INTO THE NEW SOUTH WALES POLICE SERVICE

In May 1994, the New South Wales government appointed James Wood as Commissioner to inquire into the operations of the New South Wales Police Service. The terms of reference required that he inquire into six areas, including the nature and extent of corruption, promotions and the internal informers policy.³⁵ According to the fourth clause in the terms of reference, he was mandated also to inquire into “the impartiality of the Police Service and other agencies in investigating and/or pursuing prosecutions including, but not limited to, paedophile activity.” This clause was further expanded in December 1994:

- (d1) Whether any members of the Police Service have by act or omission protected paedophiles or pederasts from criminal investigation or prosecution and, in particular, the adequacy of any investigations undertaken by the Police Service in relation to paedophiles or pederasts since 1983; however you may investigate any matters you deem necessary and relevant which may have occurred prior to 1983.
- (d2) Whether the procedures of, or the relationships between the Police Service and other public authorities adversely affected police investigations and the prosecution, or attempted or failed prosecution, of paedophiles or pederasts.
- (d3) The conduct of public officials related to the matters referred to in paragraphs (d1) and (d2).³⁶

Accordingly, greater attention was to be given to the procedures and conduct of investigations and prosecutions. Almost two years later, in October 1996, the terms of reference were expanded yet again:

- (g) Whether the existing law prohibiting crimes involving paedophilia and pederasty are appropriate and sufficient to effectively prosecute persons

³⁵ See Letters Patent issued by the Governor (Rear Admiral Peter Sinclair) on 13 May 1994, in ROYAL COMMISSION INTO THE NEW SOUTH WALES POLICE SERVICE, *Final Report, Volume III: Appendices*, 1997, p. A38.

³⁶ Letters Patent issued by the Governor on 21 December 1994.

accused and punish persons convicted of those crimes or other related crimes of sexual abuse.

- (h) Whether penalties currently prescribed for crimes involving paedophilia and pederasty are appropriate and a sufficient deterrent to the commission of those crimes.
- (i) Whether Government departments and agencies have sufficiently effective monitoring and screening processes to protect children in the care of or under the supervision of Government departments and agencies from sexual abuse; if not, what measures should be put in place to provide effective protection in this respect.³⁷

With these terms the commission was able to consider not only the response to crimes involving paedophilia but also preventative measures that would attempt to ensure the protection of children.

While it was required to focus on government departments and agencies, the Commission also found it necessary to consider churches and religious associations.

Justice Wood based the decision on four findings:

- there had been a substantial incidence of sexual abuse involving clergy, members of religious orders, ministers of religion, acolytes, and others involved on a paid or unpaid basis in and around Churches or institutions associated with or conducted by Churches or religious bodies...
- in very many cases, investigations or prosecutions of these incidences had been suppressed, discontinued, or failed in circumstances suggestive of either protection or failure on the part of the official agencies involved to exercise their powers impartially;
- there was a serious absence of protocols, guidelines, accepted practices or established lines of communication with the Police Service, concerning the way that allegations of this kind should be managed; and that
- there had been a history of ignorance or misunderstanding of the existence of the problem, as well as a pattern of denial and repression of any allegations which happened to be raised.³⁸

³⁷ Letters Patent, 23 October 1996.

³⁸ ROYAL COMMISSION, *Final Report, Volume V: The Paedophile Inquiry*, p. 991.

While recognizing that problems existed, the Commission, during the course of its investigation, also acknowledged a number of positive developments that had occurred in the recent past.

The original Letters Patent required that a report be completed by 30 June 1996. The date for the final report was deferred on two occasions, so that the final report was required by 30 June 1997.³⁹ This resulted in the media presenting frequent reports on this issue over the period from 1994 to 1997.

The Final Report of the Royal Commission comprised five volumes, the fifth of which was devoted to the paedophile segment. Of this fifth volume, one chapter focussed solely on "The Churches".⁴⁰ Observing that the response of the churches had been defensive in the past, the Commission noted that they now recognized sexual abuse of children as a major problem.⁴¹ The Commission identified several reasons for the lack of appropriate and timely response by the churches:

- ignorance of matters of sexuality, and lack of any ability, particularly by older members of the clergy, to comprehend or accept the fact of sexual indiscretion by their brethren;
- ignorance of the fact that paedophile activity is strongly compulsive and recidivist in nature, and that it is impossible to dismiss an apparent indiscretion as a one-off event;
- confusion over loyalty to the Church and its community;

³⁹ On 16 May 1995, the Governor issued further Letters Patent to permit the Royal Commissioner to issue interim Reports and to defer the date for the final Report to 31 December 1996. On 21 February 1996, the Lieutenant-Governor deferred the date for the final Report to 31 March 1997. On 30 October 1996, the date for the final Report was again deferred to 30 June 1997.

⁴⁰ The Royal Commission stated clearly that it did not attempt to consider churches individually on a denominational basis.

⁴¹ "The process of confrontation and acknowledgment of the problem was hastened by the evidence led in the Royal Commission hearings, and by media pressure, as much as it was by the mounting number of complaints." *Final Report, Volume V: The Paedophile Inquiry*, p. 993.

- confusion between forgiveness and trust towards offenders, and the duties of protection owed to the wider community, and ignorance concerning the limits of counselling;
- concern to avoid or limit legal liability, in order to protect the Church as a viable institution, which has led to an adversarial approach [...] rather than a response based on pastoral concern;
- confusion in relation to the limits of confidentiality concerning matters disclosed, or learned outside the confessional; and
- uncertainty as to the appropriate response where the complainant does not wish the matter to proceed to police action.⁴²

In further examining the churches' response to allegations, the Commission considered issues that will be addressed later, including confidentiality, the pastoral relationship and sexual abuse as sin or moral failure. The Commission also examined protocols developed by each of the churches. In addition, it considered treatment programs for offenders, praising the model to be implemented by the Australian Conference of Catholic Bishops and the Australian Conference of Leaders of Religious Institutes as "comprehensive, impressive and innovative."⁴³ While not making specific recommendations, the Commission affirmed that clergy, youth workers and those associated with church schools, homes and other religious institutions who have offended should be subject to the same safeguards and restrictions as other members of the community having care of children. To sum up, the Royal Commission both criticized the short-comings of the churches and praised their achievements.

While the Wood Royal Commission was initiated by the New South Wales Government to investigate the operations of the state's police service, it directed significant attention to child sexual abuse. In so doing, to it heightened public awareness of the issue. Importantly, while this Commission was conducted in New South Wales and

⁴² *Ibid.*, p. 994.

⁴³ *Ibid.*, p. 1031.

the terms of reference encompassed only activity in that state, its impact reached beyond the state borders.⁴⁴

2 – RESPONSE OF SOCIETY

In Australia, governments responded to the growing realization of sexual offences against children, in three principal ways: a) the establishment of children's commissions; b) the conduct of public inquiries into aspects of child abuse, and c) legislative changes. While learning from the experiences of other states, each state responded independently, in its own way and in its own time. Understandably, common elements emerged. In view of this, since New South Wales and Queensland, at different times and in different ways, have been at the forefront in responding to sexual abuse, the situations in these two states only will be considered, with an occasional reference to other states.

2.1 – COMMISSIONS FOR CHILDREN

In November 1996, the Queensland Government established a Children's Commission to monitor, review and investigate complaints about the provision and delivery of children's services and to investigate complaints about allegations of offences against children.⁴⁵ In addition, the Commission carried out research, communications and policy functions. Likewise, the Commission was responsible for the Official Visitor

⁴⁴ The proceedings of the Wood Royal Commission were a motivating factor in the establishment of the Queensland Crime Commission. See QUEENSLAND CRIME COMMISSION and QUEENSLAND POLICE SERVICE, *Project Axis, Child Sexual Abuse in Queensland: The Nature and Extent*, Brisbane, Queensland Crime Commission and Queensland Police Service, 2000, p. 1.

⁴⁵ *The Children's Commission and Children's Services Appeals Tribunal Act 1996* was assented to on 20 November 1996. The Commission was asked to report on paedophilia in Queensland within twelve months of its establishment. The subsequent report, *Paedophilia in Queensland*, was tabled in the Legislative Assembly on 19 August 1997. CHILDREN'S COMMISSION OF QUEENSLAND, *Paedophilia in Queensland*, Government of Queensland, 1997.

Program as a means of monitoring residential facilities for children. It was responsible to the Minister for Families, Youth and Community Care, Queensland. In 2000, new legislation established the Commission for Children and Young People to replace the existing one.⁴⁶

In the meantime, the New South Wales Government, in response to the Wood Royal Commission, replaced the NSW Child Protection Council with the Commission for Children and Young People.⁴⁷ Among the Commission's principal functions are the following:

- to promote and monitor the overall safety, welfare and well-being of children in the community and to monitor the trends in complaints made by or on behalf of children,

- to make recommendations to government and non-government agencies on legislation, policies, practices and services affecting children,

- to participate in and monitor screening for child-related employment,

- to develop and administer a voluntary accreditation scheme for persons working with persons who have committed sexual offences against children.⁴⁸

In addition, the Commission conducts, promotes and monitors training, public awareness activities and research on or into issues affecting children.

A review of child protection services in South Australia was completed by Robyn Layton in April 2003.⁴⁹ She proposed that the South Australian Government establish an Office of Commissioner for Children and Young Persons whose functions include

⁴⁶ See *Commission for Children and Young People Act 2000*, Act 60, 2000, assented to on 24 November 2000. As a response to a number of recommendations of the Forde Inquiry, the legislation established the commission as an independent statutory body, responsible to the Premier.

⁴⁷ *Commission for Children and Young People Act 1998*, Act 146, 1998, assented to on 8 December 1998.

⁴⁸ *Commission for Children and Young People Act 1998* s 11.

advocacy, promotion, public information, research, the development of screening processes for people working with children and young people. Within this recommendation she proposed that the position of Deputy Commissioner of Young Persons be occupied by an indigenous person.⁵⁰

2.2 – INQUIRIES

Several inquiries were conducted and reports were commissioned into issues related to child abuse. The inquiries generally had one of two focal points, either police or departmental corruption or children in residential care.⁵¹ The most significant in the former group was that of the Wood Royal Commission conducted in New South Wales. In the latter group, the Forde Inquiry in Queensland was noteworthy. In addition, a number of inquiries were conducted into sexual offences legislation in several states.⁵²

⁴⁹ LAYTON, *Our Best Investment*. See Chapter 2, note 19.

⁵⁰ R. Layton also recommended that an Office of Children and Young Persons' Guardian be established to ensure that children and young people who are in care are cared for in accordance with guidelines set out in a charter of Rights of Children in Care.

⁵¹ These inquiries resulted in the following reports: DEPARTMENT OF COMMUNITY WELFARE WA, *Children in Limbo: an Investigation into the Circumstances and Needs of Children in Long Term Care in Western Australia* 1981; LEGISLATIVE SELECT COMMITTEE, *Report on Child and Youth Deprivation*, Tasmania, 1984; *Family and Children's Council, Review of the Redevelopment of Protective Services for Children in Victoria*, 1990; *Report to the Minister for Health and Community Services on Substitute Care*, NSW, 1992; *Breach of Duty: A New Paradigm for the Abuse of Children and Adolescents in Care*, Position Paper from the Department of Family and Community Services, SA, 1995.

⁵² In Victoria, the Rape Law Reform Evaluation Project was conducted between 1992 and 1995 and the Victorian Parliamentary Crime Prevention Committee (known as the Parliamentary Drugs and Crime Prevention Committee) inquired into the levels of rape and sexual assault cited in the 1992/1993 Victoria Police Annual Report. The Committee's first report, *Combating Child Sexual Assault – An Integrated Model*, was released in June 1995. The Tasmanian Government established a task force to review the response to sexual assault and rape in 1995. See *Report of the Task Force on Sexual Assault and Rape in Tasmania*, 1998, <www.women.tas.gov.au/resources/reports/sexassault.pdf> (12 December 2002).

2.2.1 – INQUIRIES INTO POLICE OR DEPARTMENTAL CORRUPTION

The progress and the findings of the Commission of Inquiry into the New South Wales Police Force (Wood Royal Commission) impacted on Queensland police and gained significant media attention. Allegations of corruption were raised in the media in Queensland in 1996 and 1997. As well, the Children's Commission's report, *Paedophilia in Queensland*, raised allegations that police had acted improperly in their investigations of paedophilia in Queensland. Consequently, the Criminal Justice Commission and the Queensland Police Service established Project Triton, a joint task force to examine these allegations.⁵³ Finding that none of the allegations had substance in fact, the ensuing report was tabled in Parliament in August 1998. While there was no corroboration of allegations of police cover-up of paedophilia, the issues of both police corruption and sexual abuse of children remained constant elements in media coverage over the period from at least 1996 to 1998.⁵⁴

2.2.2 – FORDE INQUIRY

On 13 August 1998, in response to pressure exerted over the previous ten years, the Labor Premier of Queensland, Peter Beattie, established a commission, chaired by Justice

⁵³ Project Triton, also known as Operation Triton, was not concerned so much with allegations of paedophilia, as with allegations of police cover-up in their investigations of child sexual abuse. See CRIMINAL JUSTICE COMMISSION, *Inquiry into Allegations of Misconduct in the Investigation of Paedophilia in Queensland (Kimmins Report)*, Toowong, Q, Criminal Justice Commission, pp. 1-2, «<http://www.cmc.qld.gov.au/library/CMCWEBSITE/kimmins.pdf>» (1 November 2001). R. Mulholland QC, who had been appointed to conduct the hearings, resigned five days after his appointment. Subsequently, the Criminal Justice Commission appointed J.P. Kimmins to conduct the inquiry.

⁵⁴ Against this background, the Queensland government passed the *Crime Commission Act 1997* establishing the Queensland Crime Commission for the investigation of criminal paedophilia, which is defined by the Act to mean “activities involving offences of a sexual nature

Leneen Forde, a former State Governor, to inquire into government and non-government institutions and detention centres. The commission was to determine whether “any unsafe, improper or unlawful care or treatment of children had occurred in these facilities.”⁵⁵ In addition, the commission was required to make recommendations in relation to:

- (i) any systemic factors which contribute to any child abuse or neglect in institutions or detention centres;
- (ii) any failure to detect or prevent any child abuse or neglect in institutions or detention centres; and
- (iii) necessary changes to current policies, legislation and practices.⁵⁶

Furthermore, as the Chairperson deemed appropriate, the Commission was to

refer to the appropriate authorities any instances where there appears to be sufficient evidence to prosecute for a criminal offence, take disciplinary proceedings, or pursue a charge of official misconduct against any person under any Act in respect of such lack of safety, impropriety or unlawful care or treatment of children.⁵⁷

Thus, the Commission was mandated to identify the problems and make recommendations in relation to the causes, detection and prevention of child abuse. The Report was to be presented to the Minister for Families, Youth and Community Care and Minister for Disability Services by 1 March 1999. Recognizing legislative deficiencies, the Forde Report made numerous recommendations concerning legislation that should be enacted to mandate the reporting of all abusive situations in residential care facilities and juvenile detention centres, and to require the licensing and regular inspection of these

committed in relation to children, or offences relating to obscene material depicting children. This definition encompasses all child sex offences.”

⁵⁵ *Commission of Inquiry Order (No 1) 1998*, s. 3 A. Other commissioners were Dr. Jane Thomason and Mr. Hans Heilpern.

⁵⁶ *Ibid.* s. 3 D.

⁵⁷ *Ibid.* s. 3 C.

facilities. As well, the Report recommended that advocacy services be provided for young people in residential care facilities and juvenile detention services.⁵⁸ The Report declared:

One of the outcomes of the Inquiry has been to establish the historical record and to place before the government, religious organisations and society at large the evidence that, over decades, considerable numbers of children were subjected to inexcusable physical, emotional and sexual abuse in institutions that were established to care for them. [...]

Reparation will require the government and responsible religious organisations to enter into a restorative process with survivors to redress the harm done. Accountability for the harm done cannot be characterised as a legal issue only; the government and religious organisations must also accept moral and political accountability.⁵⁹

Consequently Leneen Forde recommended that governmental and responsible religious authorities provide both compensation as a means of restitution for damages and a range of services to meet current needs.⁶⁰

2.2.3 – INQUIRY INTO CHILD MIGRATION

On 20 June 2000, eight years after the media publicity surrounding child migration, the Australian Senate referred the matter of child migration to the Senate Community Affairs Reference Committee for inquiry and report. The committee was to inquire into child migration under approved schemes:

⁵⁸ See L. FORDE, *Commission of Inquiry into the Abuse of Children in Queensland Institutions*, (=Forde Report), «www.qld.gov.au/html/fordeinquiry/inquiryreport.html» (1 November 2001), p. 258.

⁵⁹ Forde Report, pp. 287-288.

⁶⁰ In August 1999 the Queensland Government released its response to the *Forde Report*. Accepting 41 of the 42 recommendations, the government undertook to establish an independent committee to monitor the implementation of the recommendations. The Forde Implementation Monitoring Committee, consisted of representatives of the community sector, former residents, churches, consumer and advocacy groups and academics, presented its final report in August 2001.

- (a) in relation to government and non-government institutions responsible for the care of child migrants:
 - (i) whether any unsafe, improper, or unlawful care or treatment of children occurred in such institutions, and
 - (ii) whether any serious breach of any relevant statutory obligation occurred during the course of the care of former child migrants [...]
- (d) the need for a formal acknowledgment and apology by Australian governments for the human suffering arising from the child migrations schemes;
- (e) measures of reparation including, but not limited to, compensation and rehabilitation by the perpetrators; and
- (f) whether statutory or administrative limitations or barriers adversely affect those former child migrants who wish to pursue claims against individual perpetrators of abuse previously involved in their care.⁶¹

Thus, this inquiry differed significantly from others, in that its goal was to address the effects of previous government policy and consequent actions by churches and other agencies.

Published in 2001, the report contained thirty-three recommendations. Of these, all but the four were directed to the needs of former child migrants. The Senate committee urged governments to address the needs of migrants relating to identity and family records and reunions, accommodation, education, counselling and aged care needs. The committee encouraged governments to make statements acknowledging that the scheme was wrong and “that the statement express deep sorrow and regret for the psychological, social and economic harm caused to the children, and the hurt and distress suffered by the children, at the hands of those who were in charge of them, particularly the children who were victims of abuse and assault.”⁶² As well, the Committee recommended that the

⁶¹ *Lost Innocents: Righting the Record*, p. 1.

⁶² *Lost Innocents: Righting the Record*, Recommendation 30, p. 239.

Commonwealth Government urge the Western Australian government to review its existing limitations law.⁶³ In addition, the Senate Committee recommended that all State and Territory Governments undertake inquiries similar to the Forde Inquiry in Queensland into children in institutional care.⁶⁴

The Committee considered that duty of care was lacking in the implementation of the schemes and “not just that horrendous levels of physical, sexual and emotional abuse and assault was allowed to occur, allegedly undetected, while the migrant children were in care, but also that such abuse was able to continue unchecked over so many years.”⁶⁵ In regard to the Christian Brothers in particular, the Committee stated, “Evidence is available to warrant further criminal investigation and action.”⁶⁶ Accordingly, the Senate Community Affairs Reference Committee affirmed many of the accusations made in the books and television programs of the early 1990s.

2.3 – LEGISLATION

During the 1980s and 1990s and up to the present, legislatures at national and state levels have passed legislation aimed at preventing future occurrences of child abuse and, in particular, child sexual abuse. This legislation can be grouped into five areas: criminal

⁶³ *Lost Innocents: Righting the Record*, Recommendation 29, p. 223.

⁶⁴ *Lost Innocents: Righting the Record*, Recommendation 1, p. 9. On 4 March 2003, the Australian Senate passed to the Senate Community Affairs Reference Committee a reference to inquire into children in institutional care. The committee was to focus on children who were not covered by *Lost Innocents: Righting the Record* and *Bringing Them Home*, an inquiry into the care of Aboriginal children. The report of the inquiry was to be completed by 3 December 2003. Because the state governments, rather than the federal Parliament, have primary responsibility for child protection, in addressing this issue, the committee could only make recommendations that were not binding on other jurisdictions. The committee would not make recommendations with respect to any particular person.

⁶⁵ *Lost Innocents: Righting the Record*, p. 121.

law, child protection, judicial proceedings, mandatory reporting of suspected cases of child abuse, and legislation concerning restrictions on people who have committed sexual offences. Some examples of these legislative changes will be examined.⁶⁷

2.3.1 – CRIMINAL LAW

Prior to 1981, the New South Wales *Crimes Act 1900* had been amended only rarely in relation to the very small number of sexual offences against children.⁶⁸ In 1981, the *Crimes (Sexual Assault) Amendment Act 1981* brought about changes that encouraged the reporting of sexual assault, educated the community about changing attitudes to sexual assault, and facilitated the administration of justice and the conviction of guilty offenders. The *Crimes Amendment Act 1984* classified as offences a number of acts against males under 18 that had not previously been regarded as such. Then, in 1985 the New South Wales Government enacted the *Crimes (Child Assault) Act 1985* thereby amending the *Crimes Act 1900* by extending the definition of child sexual abuse and removing all but one of the gender distinctions for children under the age of sixteen, while at the same time, providing for more severe penalties where the child was under the care, supervision or authority of the offender at the time of the offence.

Following the recommendations of the Child Sexual Assault Task Force Report 1985 and the Violence Against Women and Children Law Reform Task Force Report 1987, the New South Wales Government passed further legislation relating to child

⁶⁶ *Ibid.*, p. 78-79.

⁶⁷ Information concerning New South Wales legislation was drawn from P. GALLAGHER, J. HICKEY and D. ASH, *Child Sexual Assault, An Analysis of Matters Determined in the District Court of New South Wales During 1994*, Monograph Series 15, Sydney, Judicial Commission of New South Wales, 2000.

protection. *The Crimes (Personal and Family Violence) Amendment Act 1987* provided for protection of victims of personal and family violence as did the *Bail (Personal and Family Violence) Amendment Act 1987*. Further changes were introduced to the *Crimes Act* in 1989.⁶⁹ Aggravating factors were extended, including whether violence or the threat of violence was used and whether the victim had serious physical or intellectual disability. The *Criminal Legislation (Amendment) Act 1992* amended the definition of sexual intercourse, so that it was not limited to penetration of the vagina. With the passing of the *Crimes Amendment (Child Pornography) Act 1997*, publishing child pornography became a new indictable offence in New South Wales.

In 2003, the Queensland Government passed the *Sexual Offences (Protection of Children) Amendment Act 2003*.⁷⁰ In so doing, the government criminalised sexual offences relating to the internet and the maintaining of an unlawful sexual relationship with a child. The latter is a relationship that involves more than one unlawful sexual act over any period. This new offence appears to have less stringent requirements for a jury to reach a guilty verdict:

However, in relation to the unlawful sexual acts involved in an unlawful sexual relationship—

- (a) the prosecution is not required to allege the particulars of any unlawful sexual act that would be necessary if the act were charged as a separate offence; and

⁶⁸ In 1910, 1924, 1951 and 1974.

⁶⁹ In the Second Reading speech, the Attorney General recommended the *Crimes (Amendment) Act 1989* on the basis that, in existing legislation, the penalty was too low for the criminality involved and the existing scheme was too complex.

⁷⁰ *Sexual Offences (Protection of Children) Amendment Act 2003*, Act No. 3 of 2003, «[http://www.legislation.qld.gov.au/Bills/50PDF/2002/SxIOfns_PC_AB02 .pdf](http://www.legislation.qld.gov.au/Bills/50PDF/2002/SxIOfns_PC_AB02.pdf)» (11 June 2003).

- (b) the jury is not required to be satisfied of the particulars of any unlawful sexual act that it would have to be satisfied of if the act were charged as a separate offence; and
- (c) all the members of the jury are not required to be satisfied about the same unlawful sexual acts.⁷¹

Furthermore, the fact that the offence carries a maximum sentence of life imprisonment indicates the gravity of the offence.

2.3.2 – JUDICIAL PROCEEDINGS

In New South Wales, the *Crimes (Child Assault) Amendment Act 1985* provided for a support person to be present in court in the interest of children and prohibited the publication of information that could identify child victims. The *Evidence (Children) Amendment Act 1985* amended the *Evidence Act 1898* so that a judge was no longer required to warn the jury that it was unsafe to convict a person on the uncorroborated evidence of a child. At the same time, the *Pre-trial Diversion of Offenders Act 1985* provided for child sexual assault offenders to be assessed concerning their suitability for participation in a treatment program rather than proceeding with a criminal process. Directed specifically to the protection of children, the *Children (Care and Protection) Act 1987* and the *Children's Court Act 1987* enabled proceedings to be initiated in the Children's Court on behalf of children who had been abused.

In addition to actual changes in legislation, the law reform commissions in several states have addressed certain relevant issues, especially within the past ten years. Thus,

⁷¹ *Ibid.* s. 18

children's evidence,⁷² the limitation of actions,⁷³ and the right to silence⁷⁴ have all been the focus of review.

2.3.3 – CHILD PROTECTION

In 1994, the Legislative Review Unit of the New South Wales Department of Community Services commenced a review of the *Children (Care and Protection) Act 1987* under the chairmanship of Patrick Parkinson. Following the release of the three-part report, *Review of the Children (Care and Protection) Act 1987*, legislative changes were introduced. In 1998, as well as the *Commission for Children and Young People Act 1998* that has been considered already, the *Children and Young Persons (Care and Protection) Act 1998* was enacted.⁷⁵ This latter piece of legislation covers a wide range of issues pertaining to children and young people at risk of physical or psychological harm because of physical or sexual abuse or domestic violence, lack of medical treatment or other ill-treatment.

Queensland's *Child Protection Act*, enacted in 1999, also covers a wide range of issues concerning children. It deals with issues of custody and guardianship, court

⁷² LAW REFORM COMMISSION OF WESTERN AUSTRALIA, *Evidence of Children and Other Vulnerable Witnesses*, Project No. 87, April 1991, «www.lrc.justice.was.gov.au» (16 May 2003). See also AUSTRALIAN LAW REFORM COMMISSION, *Seen and Heard: Priority for Children in the Legal Process*, (Australian Law Reform Commission No. 84), 1997, «<http://www.alrc.gov.au/publications/finalreps.htm>» (16 May 2003).

⁷³ QUEENSLAND LAW REFORM COMMISSION, *A Review of the Limitations of Actions Act 1974*, September 1998. «www.qlrc.qld.gov.au/publications/r53.pdf» (16 May 2003). This report focuses one chapter on survivors of child sexual abuse.

⁷⁴ Concerning the right to silence, see chapter 24 of LAW REFORM COMMISSION OF WESTERN AUSTRALIA, *Review of the Criminal and Civil Justice System: Final Report*, Perth, State Law Publisher, 1999 and also QUEENSLAND LAW REFORM COMMISSION, *The Abrogation of the Privilege against Self-Incrimination, Discussion Paper WP No. 57*, Brisbane, Queensland Law Reform Commission.

proceedings, the enforcement of legal proceedings, the interstate transfers of children's orders or proceedings and the licensing of care services and approval of foster carers. More significantly, the Act contains principles for the protection of children as well as a *Charter of Rights for a Child in Care*.

As early as 1979 the South Australian Government passed the *Children's Protection and Young Offenders Act 1979*. In 1992, a Select Committee Inquiry recommended the separation of the justice and the welfare sections of the act. As a result, Parliament passed the *Young Offenders Act 1993* and the *Children's Protection Act 1993*. This latter legislation provided for the establishment of the Children's Protection Advisory Panel.

2.3.4 – MANDATORY REPORTING

All states and territories, except Western Australia and Northern Territory, have legislation that mandates some professionals to report child abuse.⁷⁶ South Australia introduced mandatory reporting in 1969, with New South Wales following in 1977. States differ in the type of abuse that must be reported and in the particular professionals who are required to report. Most provide for the protection of the identity of those who report. Some legislation states that this reporting does not breach any professional code of ethics and cannot result in a civil suit for defamation if the notification is made in good faith. New South Wales and Western Australia include the provision that any person who

⁷⁵ *Children and Young Persons (Care and Protection) Act 1998 No. 157*.

⁷⁶ See *Children and Young Persons (Care and Protection) Act 1998*, Section 27 (NSW); *Children and Young Persons Amendment Act 1993* (Victoria); *Health Act 1937* and *Child Protection Act 1999* (Queensland); *Children's Protection Act 1993* (South Australia); *Children,*

has reasonable grounds to suspect that a child is at risk may make a report. People who make voluntary notifications are also covered by the protections provided in the law.

Research continues to be carried out on the effectiveness or otherwise of mandatory reporting in preventing child abuse.⁷⁷ Such research has raised questions about the impact of mandatory reporting on specific cultures, particularly the indigenous cultures. Obviously cost-benefit analyses and the impact of increased work loads on government departments constitute critical elements in these reports.

2.3.5 – RESTRICTIONS ON OFFENDERS

The first of two pieces of legislation in New South Wales to impose restrictions on offenders was passed in 1998. The *Child Protection (Prohibited Employment) Act 1998* prohibited the employment of persons found guilty of committing certain serious sex offences in child-related positions.⁷⁸ A prohibited person may apply to the Industrial Relations Commission or the Administrative Decisions Tribunal for an order declaring that this Act does not apply to him or her in relation to specific offences. In 2000, the New South Wales Government passed the *Child Protection (Offenders Registration) Act*

Young Persons and their Families Act 1997 (Tasmania) and *Children's Services Act 1986* (A.C.T.). A summary of the legislation is presented in Appendix 4.

⁷⁷ In 2002 the Western Australian Minister for Community Development commissioned an analysis of existing evidence concerning mandatory reporting. The report did not make a specific recommendation either in favour of, or in opposition to the introduction of mandatory reporting. DISCIPLINE OF SOCIAL WORK AND SOCIAL POLICY UNIVERSITY OF WESTERN AUSTRALIA, *Mandatory Reporting of Child Abuse: Evidence and Options*, Report for the Western Australian Child Protection Council, July 2002, <http://fcs.wa.gov.au/content/miscellaneous/mandatory_reporting.pdf> (19 January 2003).

⁷⁸ A serious sex offence is one involving sexual activity or an act of indecency that was punishable (or would have been if committed in New South Wales) by penal servitude or imprisonment for 12 months or more. Cf. *Child Protection (Prohibited Employment) Act 1998* No 147 s. 4, Part 1. 5 (3).

2000.⁷⁹ This Act requires that persons who have been found guilty of certain offences involving children report relevant personal information to the Commissioner of Police for a specified period. Offences include committing or attempting, or conspiring or inciting to murder a child or an offence that involves sexual intercourse with a child (these being considered Class 1 offences) or an offence of committing or attempting, or conspiring or inciting to commit an offence that involves an act of indecency against a child. The period for reporting may be as short as eight years or as long as 15 years, or even life.⁸⁰

Particularly in New South Wales, but also in the other states, the number of legislative changes that have occurred in relation to sexual assault and the protection of children testify to the concern of the governments to address the issue of child abuse.

2.4 – RESPONSE AT A NATIONAL LEVEL

The response to child sexual abuse in Australia has occurred mainly at a state level. However, concern for the prevention of offences against children and the careful handling of those affected by offences already committed, prompted efforts at the national level on two fronts: education and law reform.

2.4.1 – EDUCATION

In 1997 at the sixth meeting of the Ministerial Council on Education, Employment, Training and Youth Affairs (MCEETYA), a national strategy was formulated to prevent paedophilia and other forms of child abuse in schooling. Key elements of the strategy included:

⁷⁹ This Act was assented to on 27 June 2000 and was amended in 2001.

⁸⁰ *Child Protection (Offenders Registration) Act 2000.*

- The implementation of effective child protection education ... within the context of whole school approaches to student welfare;
- A commitment to interagency collaboration in child protection facilitated by common goals;
- The maintenance of information by employing authorities regarding certain agreed categories of employees, past employees, or applicants refused employment, and the sharing of information about their category status with other education authorities, using confidential processes and common and agreed procedures;
- Police record checks for applicants for employment in school-based positions;
- Mandatory notification, either by legislation or by employer direction, for all school-based staff, of suspected sexual, physical and emotional abuse and neglect.⁸¹

While most states had implemented these strategies well before 1997, the adoption of this strategy at a national level binds all schools to its implementation and requires reporting of its implementation on an annual basis at the systems level. To promote the effective screening of employees and volunteers, the Commonwealth, State and Territory Ministers of Education and Training, at the MCEETYA meeting in July 2003, unanimously

- i. requested the preparation of model uniform legislation to be considered by all States and Territories, that provides for nationally consistent procedures and processes for the conduct of criminal record checks of persons seeking to work in educational settings with children;
- ii. agreed to advise the Standing Committee of Attorneys-General of its intention to consider model uniform legislation that would affect the operation of spent conviction legislation throughout Australia; and
- iii. endorsed the decision of Australian Education Systems Officials Committee (AESOC) that Queensland have lead responsibility for progressing this issue, in collaboration with other jurisdictions.⁸²

⁸¹ «<http://www.curriculum.edu.au/mceetya/meetings/meet6.htm>» (6 May 2002). In furtherance of this framework, in February 2003, MCEETYA published a National Safe Schools Framework: «<http://www.curriculum.edu.au/mctyapdf/natsafeschools.pdf>» (9 June 2003).

⁸² «<http://www.curriculum.edu.au/mceetya/meetings/meet15.htm>» (11 November 2003). Being a proposal, this resolution expresses the common will to action; the passing of this resolution in July 2003 illustrates the continuing and current efforts to address the issues; it also reflects the difficulties and frustrations experienced to this point in preventing the occurrence of abuse.

Implementation of this proposal will ensure that children and young people enjoy a greater level of safety in schools.

2.4.2 – LAW REFORM

The reform of sexual assault law has been on the national agenda since the early 1990s. In June 1990, the Standing Committee of Attorneys-General placed the concept of a national model criminal code for all Australian jurisdictions on its agenda. In November 1994 the Commonwealth Government and the State and Territory Premiers' Leaders Forum endorsed the project as being nationally significant. In November 1996 the Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General released a discussion paper on sexual offences against the person and, in May 1999, released its report.⁸³

In November 2002, state and territory ministers at the Australasian Police Ministers' Council meeting agreed to establish a national child sex offender register based on the existing database in New South Wales. This database gives police in all states and territories access to information about child sex offenders. The work continues both with respect to reform of sexual assault legislation and the national sex offenders' register.

2.5 – CONTINUING REVIEWS

The overview of the response of the Australian society to child sexual abuse is not static. Reviews continue to be conducted. In 1999 and 2000, the National Child

⁸³ See *Model Criminal Code Chapter 5 Sexual Offences against the Person, Report*, [«http://www.ag.gov.au/www/rwpattach.nsf/viewasattachmentPersonal/5E5E1BD0F92F63AECA](http://www.ag.gov.au/www/rwpattach.nsf/viewasattachmentPersonal/5E5E1BD0F92F63AECA)

Protection Clearinghouse carried out an audit of programs introduced to prevent child abuse.⁸⁴ They aimed to develop a comprehensive picture of the range of child abuse prevention programs currently operating across Australia, in order “to identify trends and any gaps in service provision, to identify programs from which service providers can learn, and thus avoid ‘reinventing the wheel’ with regard to program development, and to generate discussion of future directions in child abuse prevention.” Among the 1814 individual programs included in the audit, the researchers found a trend towards promoting the well-being of families and programs for children and families at risk.⁸⁵

In 2001, the Victorian Attorney-General gave the Victorian Law Reform Commission a reference:

- i. to review current legislative provisions relating to sexual offences to determine whether legislative, administrative or procedural changes are necessary to ensure the criminal justice system is responsive to the needs of complainants in sexual offences cases ...
- ii. To develop and/or coordinate the delivery of educational programs which may be necessary to ensure the effectiveness of existing and proposed legislative, administrative and procedural reforms.⁸⁶

Using the Model Criminal Code as a basis, the review is considering both substantive and procedural laws and will recommend changes to Victorian law.

On 25 March 2002, the South Australian Government approved the Review of Child Protection in South Australia, an independent review chaired by Robyn Layton.⁸⁷

256BB30003AAC9/\$file/modelcode_ch5_sexual_offences_report.pdf» (11th June 2002). *Sexual Offences against the Person* forms part of chapter 5 of both the discussion paper and the report.

⁸⁴ A. TOMISON and L. POOLE, *Preventing Child Abuse and Neglect, Findings from an Australian Audit of Prevention Programs*, National Child Protection Clearinghouse, Melbourne, Australian Institute of Family Studies, 2000.

⁸⁵ While the programs addressed all forms of child abuse and neglect, sixty-seven percent were directed to preventing sexual abuse.

The terms of reference required, *inter alia*, a review of Department of Human Services policy, practice and procedures, the effectiveness of child protection legislation and practice and an examination of the adequacy of criminal law and police procedures. The review was completed in 2003.

In October 2003, the Northern Territory Government commenced a review of the *Community Welfare Act 1983* with the release of a discussion paper.⁸⁸ While the context is broader than sexual abuse, the mandatory reporting of abuse and the screening of people who work with children and young people are two topics that are considered.

2.6 – IMPACT

From the mid 1980s to the present, many situations have come to light that point clearly to child abuse. In response, inquiries have been conducted, reports promulgated and legislation enacted. With few exceptions, taken individually, the impact of each was not significant. Taken collectively, however, either at a state level, or across the country as a whole, they provide evidence of genuine efforts to address, from every possible angle, the issues of child sexual abuse. They show, also, a cyclical approach involving addressing a need, implementation, evaluation, and readdressing the need based on new knowledge and experience. Reviews of policies, procedures and legislation are marked by concern for indigenous children as well as families of different ethnic groups. Reviews

⁸⁶ VICTORIAN LAW REFORM COMMISSION, *Sexual Offences: Law and Procedure: Discussion Paper*, Melbourne, Victorian Law Reform Commission, p. vii.

⁸⁷ *Child Protection Review (Powers and Immunities) Act 2002*, No. 6 of 2002. (Assented to 1 August 2002). Reference was earlier made to this review in the context of Commissions for Children, p. 97.

have involved wide-ranging consultation and have aimed to achieve coordinated and integrated responses to the protection of children. The totality of these events forms the context in which the Catholic Church in Australia responded to child sexual abuse.

3 – RESPONSE OF THE CATHOLIC CHURCH

The passing of the *Children (Care and Protection) Act 1987* in New South Wales, together with reports of events in the United States of America and Canada, prompted the bishops in Australia to act. In November 1988, the Australian Catholic Bishops Conference established the Australian Catholic Bishops' Special Issues Committee Relating to Priests and Religious (ACBCSIC). Among its functions, the committee was to establish a protocol to be observed by bishops and major superiors if an accusation is made against a priest or religious alleging criminal behaviour, and to advise on its implementation.⁸⁹ During the following years the committee developed and refined a protocol to be followed by diocesan bishops and leaders of religious institutes. The protocol, limited to allegations of criminal behaviour made against a cleric or religious in accordance with the terms of reference, was disseminated to diocesan bishops and religious leaders in April 1992.

Following this, the Australian bishops recognized the need for a protocol to be used when accusations were levelled against church employees. For some time it was thought that it was more appropriate to have one set of protocols for clergy and religious and a

⁸⁸ This Act provides the legal framework for the protection of children and families in the Northern Territory. <http://www.nt.gov.au/health/comm._sys/facs/community_welfare_act_review/pdf/CWARReviewDiscussion.pdf> (15 November 2003).

⁸⁹ By 1996, ACBCSIC was to become known as the Bishops' Committee for Professional Standards.

separate set of protocols for lay employees. Reasons for a separate protocol focussed on the fact that clerics and religious generally did not have the status of employees. A single protocol could be interpreted as acknowledging that clerics, religious and lay employees should be treated in the same way in other areas, that is, as employees. Because many church employees are not members of the Catholic Church, some expounded a second reason for separate protocols, namely, that the relationship of the diocesan bishop to non-Catholic employees is based on an industrial contract and is not one of ecclesial governance. A third reason argued that neither diocesan bishops nor superiors in religious institutes, were employers of some of the lay employees in the Church. Consequently, beginning in mid 1992, the ACBCSIC worked on the development of a set of protocols for lay employees.

In July 1993, the ACBC released a media statement, *Sexual Offences and the Church*. Acknowledging that procedures had been developed, the Conference of Bishops stated the objectives of the procedures:

To ensure a speedy, decisive and sensitive response to those who make a complaint.

To ensure that those who have been accused are dealt with justly.

To ensure that ongoing care is available to those who have been harmed.

To ensure that procedures are in place to minimise any risk to children.⁹⁰

In their statement the bishops affirmed that the procedures would continue to be revised. They declared that "the aim is to ensure that the Church's procedures are as effective as the complexities of this problem will allow."⁹¹ Accordingly, the ACBC authorised the

⁹⁰ AUSTRALIAN CATHOLIC BISHOPS CONFERENCE, media release, "Sexual Offences and the Church," Canberra, 23 July 1993.

⁹¹ *Ibid.*

ACBCSIC to conduct a consultation with interested persons with the goal of drafting a new protocol.

In the meanwhile, using the ACBCSIC procedures as a basis, a number of dioceses and religious congregations developed their own protocols. Subsequently, the Queensland Catholic Bishops Conference together with the Conference of Leaders of Religious Institutes, Queensland, developed a protocol for use in Queensland.⁹² Likewise, the Archdiocese of Melbourne and the Diocese of Ballarat both developed procedures to be used in their respective dioceses.⁹³

In April 1996, the ACBC and the Australian Conference of Leaders of Religious Institutes (ACLRI) wrote a pastoral letter to the Catholic people of Australia. They outlined a nine-point plan of action:

- The Bishops and Leaders of Religious Institutes set up in 1988 a Professional Standards Committee composed of appropriately qualified professionals. The Committee will continue to review and update, in the light of the discussion that has taken place at the Conference, the principles and procedures according to which the Bishops operate.
- The Professional Standards Committee will take advantage of the opportunity presented by the New South Wales Police Royal Commission to make a submission and will take account of any recommendations made by the Royal Commission.
- Dioceses and Religious Institutes will be asked to engage professional and independent persons to make suitable case studies of how incidents of sexual abuse have been handled and how well or badly the needs of victims have been met and what might be done to assist victims.

⁹² QUEENSLAND CATHOLIC BISHOPS' CONFERENCE AND CONFERENCE OF LEADERS OF RELIGIOUS INSTITUTES, *Protocol: Pastoral Action in Response to Allegations of Sexual Abuse by People who Work on Behalf of the Church in Queensland*, Brisbane, 1994.

⁹³ *Interim Procedures to be Followed when a Priest is Accused of Sexual Abuse*, typescript, [Melbourne] 1994; SPECIAL ISSUES COMMITTEE DIOCESE OF BALLARAT, *Draft Protocol for Dealing with Allegations of Criminal Behaviour Involving Clergy*, typescript, 1993.

- Likewise Dioceses and Religious Institutes will be asked to make a study of how an incident of sexual abuse has been handled in relation to the community in which it occurred, what lessons might be learned, what effects both the abuse and the Church body's response have had on the community, and what the Church body might now do to assist the community.
- Meetings will be arranged through counselling services of the Church in which Bishops and Religious Leaders might meet with persons who have suffered sexual abuse at the hands of a priest or religious and hear directly their stories, hurts, concerns and needs. The counselling services of the Church are to be empowered to arrange such meetings whenever they believe that this would be helpful to both victims and church leaders.
- A widely representative Committee is to be established to prepare codes of conduct for priests and religious. It will consult widely, and seek the advice of victims of sexual abuse.
- The Australian Catholic Social Welfare Commission and Centacare Sydney will be asked to co-coordinate a study of any factors peculiar to the Catholic Church which might lead to sexual abuse by priests, religious or other church workers. This study will include a review of the relevant literature, interviews with experts and with other relevant Catholic bodies, and with those offenders who are willing to assist.
- In collaboration with the leaders of Religious Institutes it is proposed to establish a program to treat those clergy and religious who suffer from psycho-sexual disorders. This program will contain a suitable spiritual input.
- The Professional Standards Committee will employ a full-time Executive Officer to co-ordinate the above projects and to assist it in carrying out this mandate.⁹⁴

This plan reflects the learning that had occurred and the recognition of the need for further learning in relation to sexual abuse. Implicit in these proposals is an acknowledgement of previous mistakes.

⁹⁴ AUSTRALIAN CATHOLIC BISHOPS CONFERENCE, *Pastoral Letter to the Catholic People of Australia*, Canberra, 26 April 1996. In May 2002, the mandate of the National Committee for Professional Standards was expanded. The commitment to learning about all aspects of the issue and to responding to victims underpins the fifteen elements.

3.1 – TOWARDS HEALING

Six months after the release of the nine-point plan, a pastoral statement from the ACBC and the ACLRI, “Responding to Sexual Abuse – A Progress Report,” announced the publication of *Towards Healing*.⁹⁵ This document, comprising a revision of the principles and procedures for responding to sexual abuse, was to come into force on 31 March 1997. *TH 1996* was one step in the evolutionary process. Developing from the earlier statements of principles and procedures, it was an interim document, which invited comment from all interested people. Consequently, in mid 1999, Patrick Parkinson⁹⁶ was appointed to conduct a revision of the document. The revision process, that continued until early 2000 and resulted in a new *Towards Healing*,⁹⁷ involved broad consultation with complainants, accused people, church authorities and the various persons who had a role in responding to complaints.

The major changes introduced in the revised document are the extension of the definition of abuse to include physical and emotional abuse and the widening of the scope to include other church personnel besides clergy and religious. The document recognizes the place of several different procedures. Other modifications included a greater emphasis

⁹⁵ AUSTRALIAN CATHOLIC BISHOPS’ CONFERENCE and the AUSTRALIAN CONFERENCE OF LEADERS OF RELIGIOUS INSTITUTES, *Towards Healing, Principles and Procedures in Responding to Complaints of Sexual Abuse against Personnel of the Catholic Church in Australia* (=TH 1996), [Canberra], 1996.

⁹⁶ At the time of this appointment Parkinson was Pro-Dean of the Faculty of Law at the University of Sydney and had written *Child Sexual Abuse and the Churches*, published in 1997. He was a member of the NSW Child Protection Council (1992-1995) and was Chairperson of the Review of the *Children (Care and Protection) Act 1987* in New South Wales.

⁹⁷ AUSTRALIAN CATHOLIC BISHOPS’ CONFERENCE and the AUSTRALIAN CONFERENCE OF LEADERS OF RELIGIOUS INSTITUTES, *Towards Healing, Principles and Procedures in Responding to Complaints of Abuse against Personnel of the Catholic Church of Australia* (=TH 2000) [Canberra], 2000. The principles and procedures of this document are reproduced in Appendix 1.

on some points already contained in the earlier document, for example, co-operation with secular authorities, and the use of different procedures depending on the subject of the complaint. Throughout the revised document more frequent and explicit reference is made to the *Code of Canon Law*.

Bishop Geoffrey Robinson, the chairman of the National Committee for Professional Standards,⁹⁸ asserted two underlying principles of the document, as he had with the earlier edition: firstly, the need to follow the principles and procedures of the document or risk failure according to the criteria established; secondly the recognition that the document is not perfect and will continue to be revised.⁹⁹

In 2001 the National Committee for Professional Standards produced a booklet, *Towards Healing, Guidelines for Bishops and Leaders of Religious Institutes 2001*.¹⁰⁰ Unlike *TH 2000* and consistent with its nature, *THG 2001* is a private document, providing clarifications to church leaders with respect to both the nature, purpose and procedures of *TH 2000*. Based on the Church's experience of responding to complaints, the document has a strong pastoral focus. In addition, a second booklet was produced, *Implementation of Towards Healing: Notes for People Involved in the Process for 2003 to 2005*.¹⁰¹ Also a private document, it provides guidelines for the Director of

⁹⁸ The Australian Catholic Bishops Special Issues Committee was replaced by the National Professional Standards Committee in 1996.

⁹⁹ In confirmation of this, the title page of the document invites dialogue or comments about the principles and procedures contained in the document.

¹⁰⁰ NATIONAL COMMITTEE FOR PROFESSIONAL STANDARDS, *Towards Healing, Guidelines for Bishops and Leaders of Religious Institutes 2001* (=THG 2001), [Canberra] 2001.

¹⁰¹ NATIONAL COMMITTEE FOR PROFESSIONAL STANDARDS, *Implementation of Towards Healing: Notes for People Involved in the Process for 2003 to 2005* (=ITH), [Sydney], 2003.

Professional Standards, the contact person, the support person for the accused, the assessors and facilitators.

Following the semi-annual meeting of the ACBC in 2003, further changes were made to *TH 2000*. These changes concerned three matters. They required each diocesan bishop and religious leader to establish a consultative panel to advise him in every stage of the process. Further, the amendments specified situations in which the bishop or leader was required to consult the panel as well as circumstances in which consultation may be advisable. The amendments express the Church's strong preference for a complainant to present to a secular authority allegations of a criminal act. If the complainant is unwilling to do so, then the amendments require that the complainant sign a statement to this effect. The third set of amendments concern complaints made against a bishop or leader of a religious institute. In this final amendment the bishops and religious leaders affirm their willingness to be subject to the same processes as other clerics and religious.

Then in November 2003, a further amendment was made to *Towards Healing*.¹⁰² This revision provided for the appointment by the ACBC and ACLRI of a National Review Panel. This panel will decide whether or not to accept a request for review of process and will appoint a Reviewer from a list of available persons. It will receive the report of the Reviewer and will make any necessary recommendations to the Church authority.¹⁰³ The aim of this latest revision is to provide a greater degree of objectivity for decisions related to and the conduct of the review.

¹⁰² Neither set of amendments passed in 2003 resulted in a revised edition of *Towards Healing*. For the sake of clarity, however, reference will be made to these amendments as *TH 2003*.

¹⁰³ *TH 2003* 35.8, 43.3, 43.7, 43.8.

3.2 – INTEGRITY IN MINISTRY

The sixth element in the plan of action concerned the development of a code of conduct for priests and religious. An advisory committee was established to carry out the task of developing the code. The purpose of the Code of Conduct is to

give added protection to children and adults from sexual abuse by some priests and religious; enhance the public credibility of clergy and religious; and provide clergy and religious with protective behaviours in order to live either their diaconate, priestly or religious life more fully and with the greatest freedom possible from false accusations and from behaviour being misinterpreted as sexual harassment or sexual abuse. It is also designed to give a clear message to clergy and religious who have abused or may sexually abuse children or adults that such behaviour has no place in ministry and will not be tolerated.¹⁰⁴

The Advisory Committee developed a Code of Conduct survey that was sent to all dioceses, all religious institutes, a number of victims, several lay organisations in the Church and all Catholic Education Offices.¹⁰⁵ Using the 6000 responses as a basis, the advisory committee developed the document, *Integrity in Ministry: A Document of Ethical Standards for Catholic Clergy & Religious in Australia*, which was published in December 1997.¹⁰⁶ The objectives of the document were:

- To promote justice and integrity in all aspects of the practice of pastoral ministry;

¹⁰⁴ Letter from the National Committee for Professional Standards to all Clergy and Religious in Australia, dated 15 February 1997.

¹⁰⁵ The Code of Conduct Survey for Clerics and Religious comprised twenty-eight discussion questions under headings of Contact with Minors; the Sacrament of Reconciliation; Counselling; Physical Contact; Boundaries between Living a Personal Life and Pastoral Ministry; Record Keeping; Finance and Administration; Pastoral Support of Religious and Clergy; and Protective Behaviours. 6000 responses were received by August 1997.

¹⁰⁶ Clearly marked "draft," the document contained questions that might be used for discussion leading to either group or individual responses that were to be submitted by June 1998. *Integrity in Ministry: A Document of Ethical Standards for Catholic Clergy & Religious in Australia*, [Canberra], 1997 (=IM 1997). This draft document is available at <<http://www.catholic.org.au/IIM/contents.htm>>

- To protect children and adults from abuses of power, especially sexual abuse and harassment;
- To facilitate self-care among clergy and religious;
- To ensure clergy and religious are more visibly accountable;
- To reinforce to clergy and religious who have abused or who may sexually abuse children or adults that such behaviour has no place in ministry and will not be tolerated;
- To offer religious and clergy a pastoral framework to protect them from false accusations of unethical behaviour as much as possible; and
- To enhance the public credibility of religious and clergy.¹⁰⁷

The document was based on the premise that “clergy and religious enter into a covenant relationship with the People of God ... modelled on God’s steadfast love and faithfulness.”¹⁰⁸ It was structured around eight themes, within the context of which prescriptive ethical standards were stated, followed by relevant behaviours, which were either mandatory or indicative.¹⁰⁹ Throughout the document references were made to the Scriptures, the *Code of Canon Law*, the writings of John Paul II, the documents of Vatican II, and other Vatican documents.

Following the responses to the draft document, a new text, *Integrity in Ministry: A Document of Principles and Standards for Catholic Clergy & Religious in Australia*,¹¹⁰ was published in June 1999. This document differed significantly from *IM 1997*. Bishops and religious leaders were urged to “take the document to his/her diocese or institute and seek the support of clergy and religious in putting it into effect *ad experimentum* for a

¹⁰⁷ *IM 1997*, p. xiii-xiv.

¹⁰⁸ *IM 1997*, p. xiv.

¹⁰⁹ The eight themes of *IM 1997* were: Proclaiming the Reign of God; Commitment to Vocation and Calling; Respect for the Dignity of All Persons; Commitment to Service; Commitment to Justice; Developing and Maintaining Competence; Stewardship; and Self Care.

¹¹⁰ NATIONAL COMMITTEE FOR PROFESSIONAL STANDARDS, *Integrity in Ministry: A Document of Principles and Standards for Catholic Clergy & Religious in Australia* (=IM 1999),

period of two years.” While *IM 1997* was structured around eight theological themes, *IM 1999* centres its principles and practices on an understanding of the Church as communion. In recommending the document, the co-chairs of the National Committee for Professional Standards wrote:

Seeing the Church as communion means recognising the central importance of relationships. It recognises firstly the privileged relationship we all have in sharing the life of God in the communion of Father, Son and Holy Spirit, and secondly it means recognising the reflection of God’s life in our relationships with one another. The image of the Church as communion emphasizes the gifts that are present in all God’s people and the richness of collaborative ministry between them.¹¹¹

Flowing from this, the aim of the document is expressed: “to support Australian religious and clergy in their effort to live dedicated and committed lives. It seeks to offer them an ecclesial context for measuring their behaviours as witnesses and ministers of the Church’s mission.”¹¹² Therefore each section contains an expression of ecclesial vision, followed by a number of principles derived from this vision. A non-taxative list of behavioural standards follows each principle. For the greater part, these behavioural standards are illustrative. However, a number of them are considered necessary “to safeguard integrity and clarity around issues of sexual and professional boundaries ... These call for a high degree of compliance.”¹¹³ During 2002 the National Committee for Professional Standards conducted a consultation on *Integrity in Ministry*. The responses

[Canberra], 1999. This document is available at «http://www.catholic.org.au/media/integrity_in_ministry/iim_index.htm».

¹¹¹ *IM 1999*, p. ii.

¹¹² *IM 1999*, p. iii.

¹¹³ *IM 1999*, p. iv.

indicate a high level of acceptance by the clergy and religious who participated in the survey.¹¹⁴ At the time of writing no further revisions were introduced.

Integrity in Ministry 1999 contains three appendices: Appendix One contains procedures to be followed in cases of serious violations of the standards; Appendix Two presents a canonical rationale for the document; and Appendix Three offers an outline of a theology of communion.

3.3 – ANALYSIS

We will now analyse a number of the elements of *Towards Healing* and *Integrity in Ministry*. The interdependence of the written procedures and policies of various countries has been acknowledged.¹¹⁵ Accordingly, in analysing these documents, appropriate comparisons are made with the documents of the countries considered in chapter one.¹¹⁶ In carrying out this analysis we look at some general issues, rather than analysing specific canonical concepts and implications.

As has been noted, *TH 2000*, like its predecessor, was developed by the Australian Catholic Bishops' Conference and the Australian Conference of Leaders of Religious Institutes. Theoretically, this ensures a reasonable level of acceptance by diocesan priests and members of religious institutes of the policies and procedures that have been

¹¹⁴ As of 31 December 2003, no changes had been made to *IM 1999* as a result of the consultation.

¹¹⁵ *TH 1996* contained an acknowledgement of having drawn on documents published in Australia, Canada and the United States. In turn, the New Zealand document, *Te Houhanga Rongo A Path to Healing*, drew strongly on *Towards Healing*.

¹¹⁶ In making comparisons, we recognize that these documents are at different stages in their life-cycles. As well, some are among the first generation of documents, while others belong to a second generation.

established.¹¹⁷ The Church in New Zealand adopted a similar approach. In Ireland, the bishops and leaders of religious institutes developed joint guidelines for individual bishops and religious leaders to develop their own policies and procedures.¹¹⁸ This latter approach recognizes the autonomy of the diocesan bishop and religious leaders. The approach of the Church in Australia recognizes the unity of the Church as perceived by its own members and by society in general. It also recognizes that the Church leaders do not lose autonomy in choosing to accept policy and procedures developed for the Church in Australia.

Each of the documents is different in nature and intended readership. *TH 2000* is a public document, establishing “public criteria according to which the community may judge the resolve of Church leaders to address issues of abuse within the Church.”¹¹⁹ Like the New Zealand document, *TH 2000* establishes principles and procedures for the Church’s response. Ireland’s document also sets out procedures. The documents of each of the other countries considered above, apart from the USA, are reports of committees to their respective conferences of bishops in which the current situations are reviewed and numerous recommendations are formulated.

TH 1996 addressed the issue of sexual abuse of children, adolescents and adults. *TH 2000* sets out procedures and principles for responding to abuse (including sexual,

¹¹⁷ The procedures of *TH 2000* apply neither to the Archdiocese of Melbourne nor the Society of Jesus. The Archdiocese of Melbourne developed its own procedures prior to the publication of *TH 1996* and continued to maintain a separate process after the publication of *TH 2000*.

¹¹⁸ The committee that developed the Irish document was established in 1994; its document, *Child Sexual Abuse: Framework for a Church Response*, was published in 1996. The New Zealand document was accepted by the bishops and congregational leaders in 1998.

¹¹⁹ *TH 2000*, Introduction.

physical and emotional abuse). Furthermore, whereas *TH 1996* was concerned with offences committed by priests and religious, *TH 2000* recognized that “other people who are employed by an official agency of the Catholic Church or appointed to voluntary positions may also be in a pastoral role” and so its principles and procedures apply to abuse by clergy, religious or other Church personnel.¹²⁰ In adopting the broad approach, *TH 2000* addressed issues beyond the delicts specified in c. 1395 §2 of the 1983 *Code of Canon Law*. At the same time, the document recognizes that the delicts specified in this canon extend beyond the sexual abuse of minors.

The principles and the procedures developed in Australia and New Zealand apply to the whole country. The Episcopal conferences of the United States, Canada, Scotland, England and Wales and Ireland all propose that each diocese develop a protocol.¹²¹ Accordingly, they propose that each diocese and/or religious institute establish a structure and appoint personnel to deal with complaints. Australia has both national and state structures and personnel. The ACBC and ACLRI jointly established the National Committee for Professional Standards and appointed a National Review Panel. In each state the bishops and leaders of religious institutes have established a Professional

¹²⁰ The United States Bishops, in their 2002 document, *Essential Norms*, address child sexual abuse by clerics; in Canada addresses child sexual abuse by clerics and male religious, but notes that the procedures can be adapted appropriately to suit other situations (Cf. *From Pain to Hope*, p. 43); Ireland addresses child sexual abuse by clergy and religious; New Zealand addresses sexual abuse by clergy and religious and seminarians; Scotland, like Australia, addresses child abuse by clergy, religious and other church personnel; England and Wales, in the Nolan report, address physical, emotional and sexual abuse of children and vulnerable adults, with the Report recommending that the arrangements apply to lay workers as fully as to clergy.

¹²¹ Canada considered having a national protocol, but on the basis of differences in civil law, the conference of bishops chose to develop guidelines to assist individual dioceses to develop their own protocols. See *From Pain to Hope*, p. 43. The Nolan Report recommended that all bishops and religious superiors in England and Wales commit themselves to a single set of policies, principles and practices. See *A Programme for Action*, Recommendation 3.

Standards Resource Group (PSRG). The bishops and leaders of religious institutes appoint the members and nominate a Director of Professional Standards in each state; they may also nominate a Deputy Director. In turn, the Director appoints personnel to fulfill the roles of contact persons and support persons for the accused. In addition, each diocese and each religious institute is to have a consultative panel of at least five people with expertise, experience and impartiality.¹²²

The canonical standing of the policies and procedures of *TH 2000* is an interesting question, particularly in light of the action of the United States Conference of Catholic Bishops in 2002.¹²³ The Australian Conference of Bishops did not choose to follow this path. The consequences of this action are twofold: either the individual bishops and the religious superiors make the procedures particular law for each diocese and institute¹²⁴ or there is an informal agreement that each diocese and institute will adopt them. This second approach would not preclude any particular diocese or institute making the protocol particular law. While there does not exist a legal obligation to observe the policy and procedures, the church leaders, bishops and leaders of institutes accept a moral obligation to observe them.

The procedures contained in *Towards Healing* are founded on a number of canonical principles. Importantly, the pastoral nature of the Church's activity is of prime

¹²² See *TH 2003*, 35.8

¹²³ As was noted in Chapter One, the USCCB presented the *Essential Norms* to the Holy See for *recognitio*. This was granted on 8 December 2002. Immediately, the USCCB promulgated the document, announcing that it would become particular law for all dioceses and eparchies in the United States on 1 March 2003. As far as is known, no other conference of bishops has adopted this approach to date.

concern. Accordingly, the Church leaders state that “[a]ny attempt to sexualise a pastoral relationship is a breach of trust, an abuse of authority and professional misconduct.”¹²⁵ The goals of the procedures are “truth, humility, healing for the victims, assistance to other persons affected, an effective response to those who are accused, an effective response to those who are guilty of abuse and prevention of abuse.”¹²⁶ The principles and procedures are directed primarily towards furthering the Church’s pastoral role.

TH 2000, like its forerunner, asserts the presumption of innocence until guilt is determined by due process or admitted. Not only does it affirm the principle, but it discourages language or action that might suggest otherwise.¹²⁷ The document recognizes that accused persons “*are asked to step aside from the office they hold while the matter is pending*” (italics added).¹²⁸ The document also advises that clergy and religious will receive their normal remuneration and other entitlements and may be given suitable activity, excluding public ministry. When a process, conducted either by the police or the Church, finds that the accused has not committed the offence, then the Church authority is to take whatever steps are necessary to restore the reputation of the accused. The document does not specify what those steps should be nor does it address the issue of a different result emanating from a police inquiry and a Church investigation.

¹²⁴ The bishops and religious leaders of New Zealand seem to have chosen this approach, with a list of bishops and congregations who accept the protocol being included in the document. See *Te Houhanga Rongo, A Path to Healing*, pp. 23-24.

¹²⁵ *TH 2000*, 1.

¹²⁶ *TH 2000*, 12.

¹²⁷ *TH 2000*, 26. Appropriate terminology is used not only for the person accused (“accused”) but also the person making the accusation (“complainant”). Alternative terminology (“offender” and “victim”) is used only when guilt is established.

¹²⁸ *TH 2000*, 26, and 38.8.2.

The procedures of *TH 2000* recognize a range of offences and, accordingly, a number of procedures are available. Thus, criminal offences, non-criminal action, canonical delicts, serious violations of *Integrity in Ministry*, professional misconduct on the part of employees and behaviour that warrants an informal correction are all treated differently.

In terms of the procedure, if the matter is a criminal matter, for example, any sexual offence with a minor, *TH 2000* favours a secular law process. The reasons for this approach are clear: the limited power of a Church process to compel witnesses, subpoena documents or insist on a cross-examination of witnesses, as well as the limited penalties that can be imposed. The clear statement of the distinction between processes of secular law and church law should dispel on the part of the complainant any expectations of the outcomes of a Church process.¹²⁹ In giving first place to a secular law process the Church is also ensuring that an ecclesiastical process will not interfere with it.¹³⁰ Furthermore, the offence may at times be prosecuted in secular law, but may not be actionable in canon law, unless the Ordinary chooses to seek a dispensation from prescription.

Prior to the Norms of *Sacramentorum sanctitatis tutela*, the age of a minor with respect to sexual abuse was the same in most secular jurisdictions in Australia and in canon law. Therefore, a canonical delict of child sexual abuse was also a criminal offence. With the redefinition of the age of a minor for sexual offences, a canonical delict

¹²⁹ *TH 2003*, 37.1. The statement of the Church's preference for a secular process discourages any misunderstanding that the response of the Church authority is either reluctant or exceptional.

¹³⁰ The interaction of secular law and a canonical process will be considered in Chapter Four. While theoretically, secular crimes other than sexual assault of a minor may be the subject of a complaint, in practice this has not been the case.

may or may not be a crime. This distinction applies to offences committed after April 2001 only. If the offence is committed by a cleric then it is reserved to the CDF; if committed by a religious, then it is not so. As a result of these norms, certain acts that are canonical delicts when committed by clerics are not delicts when committed by non-clerical religious.¹³¹

If the matter is not a crime in secular law and not a canonical delict reserved to the CDF, but nevertheless, is a canonical delict, the Church authority must decide whether or not a penal process should be commenced.¹³² If a penal process, either judicial or administrative, is not considered to be necessary, *TH 2000* provides an alternative procedure.¹³³ As well, the Church leaders recognize that other complaints relating to less serious behaviour may require a response, not only from the bishop or leader of the religious institute, but from the offender also. In such situations, *IM 1999* provides a procedure.¹³⁴ A further option, applicable when the complaint involves non-criminal behaviour by an employee, involves the state or territory Catholic employment relations body.

In all situations, the gravity of the offence committed will determine the response. Therefore, *TH 2000* identifies five factors that must be considered: 1) the precepts of

¹³¹ A further clarification is necessary. Article 4 of the Norms of *Sacramentorum sanctitatis tutela* states: “§1. Reservatio Congregationi pro Doctrina Fidei extenditur quoque ad delictum contra sextum Decalogi praeceptum cum minore infra aetatem duodevigniti annorum a cleric commissum.” While the delict defined in c. 1395 §2 is changed by this norm, c. 1395 §2 itself remains unchanged.

¹³² *TH 2000* recognizes that the Church’s response does not end with the conclusion of the penal process. The Director of Professional Standards liaises with the Church authority concerning the response to the victim when the complaint is validated. *TH 2000*, 39.2.

¹³³ See *TH 2000*, 40.

¹³⁴ See *IM 1999*, Appendix 1.

canon law, 2) the requirements of civil law, 3) the seriousness of the breach of professional responsibility, 4) the harm caused, and 5) the likelihood of repetition of such behaviour. These factors echo principles found in the *Code of Canon Law*. *TH 2000* does not provide for determinate outcomes, however, it asserts the principle that “[s]erious offenders will not be given back the power they have abused.”¹³⁵

Throughout *TH 2000*, priority is given to the observance of canon law. And so, the Church authority will inform an accused person of an accusation and seek a response from him;¹³⁶ the Church authority will commence a penal process if appropriate;¹³⁷ he will comply with c. 1722 concerning prohibiting the accused from the exercise of ministry or functions;¹³⁸ the response to guilt must be in accordance with canon law.¹³⁹

As has been noted, *TH 2000* concerns actions that are not defined canonical delicts as well as those that are. While a canonical penal process may be commenced for a canonical delict, the Church recognizes that such a process focuses on the accused. At the same time, *TH 2000* recognizes the need for a pastoral response to the complainant. Hence, the Director of Professional Standards ensures that this pastoral role is carried out when the penal process is completed.¹⁴⁰ The need for a pastoral response may well be the reason that no mention is made of prescription in the document. Since the principles and

¹³⁵ *TH 2000*, 27.

¹³⁶ See *TH 2000*, 38.5 and 38.6.

¹³⁷ See *TH 2000*, 39.2.

¹³⁸ See *TH 2000*, 38.8.

¹³⁹ See *TH 2000*, 27 and 42.4.

¹⁴⁰ See *TH 2000*, 39.2

procedures are aimed at bringing healing to victims, the procedures are concerned less with penalties than with addressing the needs of victims.

The procedures for investigating complaints of behaviours by clergy or religious that do not constitute crimes or canonical delicts, may be either a *Towards Healing* assessment or an *Integrity in Ministry* process. While these procedures are not canonical processes, they embody principles found in penal law. The *Towards Healing* process involves assessment by two independent assessors; if possible the same persons interview both complainant and the accused. The assessment progresses whether or not the complainant participates, whether the accused cooperates or not. In the case of non-cooperation by the complainant, however, the Director of Professional Standards may close the case. The accused person is considered innocent until proven guilty, and is not bound to admit guilt, nor may an oath be administered. The accused person is entitled to legal advice, both civil and canonical. Written or taped records are made of all interviews. The assessors must provide reasons for their decision concerning the truth of the complaint. The process is to be conducted and concluded as quickly as possible. Records of interviews and other materials are kept confidentially for no longer than five years. A review of process can be requested by an independent reviewer.

An ecclesiology of communion underlies the enunciation of the principles and the development and implementation of the procedures of *TH 2000* as well as the development of *IM 1999*. Both principles and procedures recognize the impact of offences on the victim, on the victim's family, on others affected by the abuse, and on offenders. *TH 2000* recognizes that incidents of abuse by church personnel can impact on the religious faith of the community. In establishing the structures and procedures, the

Church leaders affirm the role of the community in responding to the needs of the victim, in the first instance, but also to all who have been affected. The transparency of the procedures and as well as the public nature of *Integrity in Ministry* acknowledge an accountability to the community. This communion model balances the institutional nature of the Church which, necessarily, is also evidenced in *TH 2000*.

The rights of all members of the Church are upheld throughout the process. The procedures of *Towards Healing* and *Integrity in Ministry* uphold the rights of the complainant firstly by having transparent procedures in place that provide for the complaint to be heard, for a procedure appropriate to the complaint being used, and by having an opportunity for the procedure to be reviewed by independent reviewers. As well, to the extent possible, the complainant's privacy is respected and the person is kept informed of the development of the process. If the complaint warrants it, and the person requires help in taking an accusation to the police, then that help is provided.

The rights of the accused person are also respected. The person is given sufficient information to respond to an accusation. The person may be asked to stand down from an office or position while an investigation is being carried out, in which case the person will be provided with accommodation and, if possible, some professional activity. The person is assured that no admission of guilt is implied. The person is encouraged to obtain legal advice and the Church authority is encouraged to exercise discretion in providing financial assistance to ensure that this can happen. The accused person will have a support person available to him. The accused person is to be informed of the outcome of the process. Whereas in a penal procedure the accused or his advocate has the

right to speak last, *TH 2000* does not make it clear that this happens in the assessment. This principle should apply.

The independence of any Church process where people have been hurt is critical. At the same time, being a Church process, the diocesan bishop or the leader of the religious institute accepts responsibility for carrying out an inquiry. Accordingly, a balance between the bishop or Church leader having control and the process remaining independent is essential. The Church leaders, firstly, established the National Committee and have approved the principles and procedures contained in the documents. They also appoint the Director of Professional Standards (the Director), and the members of the Professional Standards Resource Group (PSRG) in each state. Throughout *Towards Healing*, it is clear that the Church authority bears responsibility for the process. When an individual complaint is received, the Church authority is informed of the complaint, of any report to the police or of a recommendation to seek an alternative way forward. The Director, the PSRG and his own consultative body provide advice to the Church leader so that he may make the necessary decisions. Other personnel, facilitators, contact persons, and support persons may assist his communication with both victims and accused persons.

Independence is assured through the Director of Professional Standards who ensures that the correct process is followed, arranges for a contact person to support the complainant, and if necessary, makes contact with the police. Hence, one with established procedures and personnel appointed, both the church authority and the complainant may be confident that an objective process will be followed. The complainant or the accused may seek a review of the procedures being used. A review of outcomes is possible only if

the National Review Panel considers that it is appropriate.¹⁴¹ As *THG* affirms, “the bishop or leader is free to act pastorally towards all concerned by leaving to others the responsibility of investigating the complaint and managing the process by which the complaint will be addressed.”¹⁴²

Having studied *Towards Healing 2000*, we now look to *Integrity in Ministry 1999*. By its very nature, as a public document of principles and standards for clerics and religious in the Church in Australia, the Church is making a strong statement of its expectations of religious and clergy. At the same time, the developmental process witnessed to the fact that these are standards that clergy and religious set for themselves. Inherent in the document is an understanding that may be new. As was expressed in *TH 2000*, the circulation of a public document of standards, principles and procedures implies and requires that the clergy and religious be held accountable. Thus, its very formulation is an expression of communion, of the need for the support of others that may take the form of judgement.

The issue of compliance was considered from the beginning of the development of the document. *IM 1997* recognized the need for a procedure to review and investigate an allegation of non-compliance, for the expeditious and fair determination of any allegations and for the imposition of sanctions as well as for principles to ensure that sanctions are applied consistently and fairly.¹⁴³ Accordingly, *IM 2000* was not imposed on clergy and religious. Some church leaders asked their members, either clergy or

¹⁴¹ See *TH 2000*, 43.5. Prior to the November 2003 amendments, it was the Church authority who decided whether a review of outcomes would take place.

¹⁴² *THG*, p. 5.

¹⁴³ See *IM 1997*, pp. 18-19.

religious, to commit themselves to live by them. Hence, the procedures to be followed in cases of serious violation depend on the commitment both of the religious leaders in implementing them and on the individual members in cooperating with the established process.

The bishops and religious leaders have the same obligation as any clergy or religious in living by the principles and standards of behaviour. They state this explicitly.¹⁴⁴ *IM 2000* also contains some principles and standards that apply specifically to the pastoral care of clerics and religious.¹⁴⁵

Naturally, *Towards Healing* presents principles and procedures with the expectation of co-operation and compliance. For example, an accused person will be asked to stand down. Yet if a cleric should refuse to stand down on the basis of an accusation, then the Ordinary cannot force him to do so, unless a judicial process has been initiated. Likewise, a guilty person will not be given back the power they have abused. While the document presents some alternative courses of action, it is possible that the procedures of the *Code of Canon Law* do not always provide.

The procedures of *TH 2000* contain specifically canonical elements and other elements that are grounded in canon law. Likewise, *IM 1999* is based on canonical principles.¹⁴⁶ These will be considered in the following chapters.

¹⁴⁴ See *IM 2000*, 8.2.

¹⁴⁵ See *IM 2000*, 2.2, 7.4, 8.4.

¹⁴⁶ This fact is stated very clearly in *Appendix 2, Integrity and Ministry and the Code of Canon Law*. See *IM 2000*, p. 24.

CONCLUSION

Despite the differences in nature, purpose and timing of the documents of the Church in various countries, they contain both common elements and distinctive features. The commitment to condemn sexual abuse of children, to respond appropriately to victims of abuse (including those indirectly affected) and to those accused, as well as to those found guilty of abuse and to those who have been falsely accused, and to prevent further abuse are common elements in all countries. The need for clear procedures for dealing with complaints is accepted by all, as is the need for a continuing review of these procedures and structures.

The joint approach of the ACBC and the ACLRI in developing documents has been widely accepted on the whole. Whether or not it would have been possible for the development of a protocol acceptable to both clergy and religious without this joint approach is questionable. However, more important than the practical consequences of such an approach, is the fact that an alternative one would have been unthinkable given the actual situation, our understanding of Church, and the place of religious in the Church in Australia. This situation inevitably leads to questions about the distinctions between clerics and religious in the *Code of Canon Law*.

The increase in the number of laity employed by the Church and its adoption of human resource practices, as well as the large number of volunteers in pastoral roles in the Church have impacted on the approach adopted in Australia in responding to sexual abuse. More importantly, our understanding of the Church, as the people of God, requires that lay personnel be included in the scope of the Church's response. Consequently, the

situation of the laity in the Church's penal law deserves further attention. Furthermore, the participation of the laity in procedures should be honoured.

The recognition of any form of sexualization of pastoral relationships as sexual abuse appears to address issues extending beyond c. 1395 §2. Civil society recognizes continuing links between sexual offences against adults and those against children. While Australian society has condemned most strongly sexual offences against children, it has also condemned other non-consensual sexual acts, particularly involving the use of violence. Recognising that the Church exists within society, it was necessary for it to take this broad approach. While, during the past twenty years, the discussion of c. 1395 §2 has focussed primarily on offences against minors, we must note that this paragraph also refers to offences against adults, committed by force, or by threats, or in public. Marriage jurisprudence may be able to inform future jurisprudence on the use of force and threats in the context of pastoral relationships.

The credibility of the Church in Australia, as in other countries, has been affected by sexual abuse. Links in the consciousness of many Australians between child abuse and residential situations and between the Church's mishandling of earlier complaints and police and political cover-ups have led to excessive mistrust of the Church's leaders. Arising from abuse of trust in pastoral situations, this can result in mistrust of the Church's teaching or of its sacramental and liturgical celebrations. Recognizing this, the continuing response of the Church leaders to complaints of abuse may serve to rebuild trust in the Church.

From the widespread media attention in Australia given to events relating to child sexual abuse, we could conclude that almost every Australian is aware of it and of abuse

committed by people who had a pastoral role in the Church. However, it cannot be concluded that people have an understanding of the many aspects of abuse, for example, its likely effects, the different patterns of offenders. Accordingly, if the whole Church is called to respond to victims and those who have offended, then further education and formation are needed.

The fact that *TH 2000* is a public document serves, as the document states, to give the people of God criteria on which to judge the leaders of the Church. At the same time, questions arise because it is not addressed to a specific group. For example, the matter of prescription is not mentioned in the document. In all Australian jurisdictions, there is no statute of limitations on criminal offences. The concept of having a finite period of prescription on sexual offences against children is contrary to criminal law in Australia and so is foreign to the thinking of the ordinary person. The need for education of the people of God on issues such as this continues. This education of the Church's practices must be aimed at developing an understanding of the underlying values and theology.

In the history of the Catholic Church in Australia and the Australian people, there are periods and policies that cause shame. The acknowledgement of this shame and the apologies to those harmed by sexual abuse by clergy and religious has been found to have some healing effect, not only on those harmed but also on the people as a whole. Apologies to victims of sexual abuse result not only in their healing, but also in healing for the Church.

Each of the Australian states has addressed the issue of child sexual abuse, not only in regard to procedural law but also in relation to substantive law. In reviewing this law, law reform commissions have engaged in consultation processes to assess the suitability

of proposals. In some jurisdictions, the criminal code relating to sexual offences had remained unchanged for fifty years. While the penal and procedural law of the church had been changed as recently as 1983, the understanding of c. 1395 was not changed substantially. A re-examination of this canon, involving a consultation process that includes some of the people involved in the consultations of *Towards Healing* and *Integrity in Ministry* would serve the People of God well.

The interrelationship of the policies of *TH 2000*, canon law and civil law raise questions. For example, if secular law prevents an offender from being employed in the Church, what possibilities exist for an Ordinary or religious superior to provide him with a ministry? How does a pastor include an offender in the pastoral life of the diocese or parish?

Whereas *Integrity in Ministry* is a document of principles and standards for clergy and religious, it could also be considered as a statement of their rights and responsibilities. Being a public document, it speaks to people of the reality of the human journey, of the interdependence of the People of God, of the continuing striving and the need for reconciliation and communion. Similarly, the development process of both documents, especially of *Towards Healing*, speaks of the real struggle in responding as Church to the weakness, the pain and the suffering of the People of God. These documents witness to the Church as true disciple only if they are utilised and their procedures followed.

Communication lies at the foundation and centre of the Church's procedures in dealing with sexual abuse of minors. Communication and the sharing of information concerning the past handling of allegations, as well as communication with people in

other countries, particularly the United States and Canada, have made the development of the policy and procedures possible. In Australia, communication between the Director of Professional Standards, the Professional Standards Resource Group in each state and the National Committee on Professional Standards, between the assessors and the church authorities instil confidence in the procedures. Communication during the application of the procedures serves to protect the rights of individuals.

Pope John Paul II mentioned: "In order to foster authentic communion, [...] it is absolutely necessary to encourage a correct sense of justice and of its reasonable demands. Precisely for this reason, the legislator and those who administer the law will be concerned, respectively, to create and apply norms based on the truth of what is necessary in social and personal relations."¹⁴⁷ This chapter has presented the social situation and has shown how the bishops and the leaders of religious institutes have strived to apply the norms of canon law in the Australian reality.

Having now studied the concrete and particular situations of the church in the social context, we now broaden the parameters to encompass the universal law of the Church. There we intend to shed light on the particular concerns and issues considered in these first two chapters.

¹⁴⁷ JOHN PAUL II, Allocation to the Roman Rota, 28 January 1994, in AAS, 86 (1994), p. 952, English translation in WOESTMAN, *Papal Allocutions*, p. 230.

CHAPTER III

CANONICAL ISSUES AND VALUES

INTRODUCTION

The Church's response to sexual abuse within the historical and cultural settings it faced constituted the subject matter of the two previous chapters. In this chapter we turn directly to the Church's law. We examine aspects of the legislation through the lens of the rights of the faithful. In adopting this approach we acknowledge and honour the theological principle that directed the revision of the *Code of Canon Law*. As E. Corecco confirms, the 1983 *Code of Canon Law* identifies the member of the faith community as the primary subject of the life of the Church.¹ Accordingly, based on the grounding of canon law in theology we begin with an overview of the Church's understanding of human rights before analysing the law that guides its response to sexual abuse.

¹ See E. CORECCO, "Theological Justifications of the Codification of the Latin Canon Law," in M. THÉRIAULT and J. THORN (eds.), *The New Code of Canon Law, Proceedings of the 5th International Congress of Canon Law*, Ottawa, Faculty of Canon Law, Saint Paul University, 1986, vol. I, p. 85.

1 – RIGHTS WITHIN THE CHURCH

Many human rights can be identified in Roman law and their development traced through the *Corpus Iuris Canonici* to the present *Code of Canon Law*.² However, the 1983 *Code of Canon Law* affirms the rights of the faithful in a new way.

1.1 – A DEVELOPMENT IN UNDERSTANDING

Within the Catholic Church prior to the 1950s the recognition of human rights was associated with social justice issues. The dignity of the worker constituted the focus of oft-quoted texts of Leo XIII and Pius XI.³ Throughout a number of his writings, Pope Pius XII also referred frequently to the dignity of the human person.⁴ Pope John XXIII addressed the question of human rights and the dignity of the human person more comprehensively.⁵ Subsequently, Pope Paul VI and the bishops in their synods of 1971,

² See for example, in the *Decretum* of Gratian, the right to a good name is upheld by means of the punishment of those who slander. See C. 5 q. 1 c. 1 and see also C.5. q. 6 c. 2 and c. 7 for indirect references to this right. The right to defend one's rights is found in the *Decretals* of Gregory IX. See X. 5.36.9. While this right was not stated explicitly in CIC/1917, it was upheld in jurisprudence because it was recognized as being of natural law.

³ See LEO XIII, Encyclical, *Rerum novarum*, 15 May 1891, nn. 6, 12, 20, in ASS, 23, pp. 641-670, English translation in C. CARLEN (ed.), *The Papal Encyclicals 1878-1903*, pp. 242, 244, 246, and PIUS XI, Encyclical, *Quadragesimo anno*, 15 May 1931, nn. 23, 28, 44, in AAS, 23 (1931), pp. 177-228, English translation in C. CARLEN (ed.), *The Papal Encyclicals 1903-1939*, pp. 415-443.

⁴ See PIUS XII, Address to the International Union of Archaeological Institutes, *C'est bien volontiers*, 9 March 1956, in *L'Osservatore Romano*, 10 March 1956, English translation in *The Pope Speaks*, 3 (1956), p. 162; Address to the Seventy-seventh National German Catholic Congress at Cologne, *Ehrwürdige Brüder*, 2 September 1956, Reported in *L'Osservatore Romano*, 7 September 1956, p. 1, English translation in *The Pope Speaks*, 3 (1956), p. 235; Address, *Dilette figlie*, 14 October 1956, in AAS, 48 (1956), p. 783, English translation in *The Pope Speaks*, 3 (1956), p. 371.

⁵ See JOHN XXIII, Encyclical, *Mater et magistra*, 15 May 1961, nn. 19, 22, 43, 44, in AAS, 53 (1961), pp. 401-464, English translation in C. CARLEN (ed.), *The Papal Encyclicals 1958-1981*, pp. 59-90; Encyclical, *Pacem in terris*, 11 April 1963, *passim*, in AAS, 55 (1963), pp. 257-304, English translation in C. CARLEN (ed.), *The Papal Encyclicals 1958-1981*, pp. 107-129. For a synopsis and evaluation of John XXIII's contribution to the Church's understanding of human

1974 and 1983 further advocated the advancement of human rights.⁶ In their various texts we find not only a promotion of the causes of particular oppressed groups, but the advancement of universal human dignity.

1.2 – BASIS FOR HUMAN RIGHTS

The dignity of the human person may be argued from several perspectives. The human person with reason and free will, who can therefore exercise a relative autonomy, serves to ground human dignity in natural law.⁷ On the other hand, from a theological perspective, we can distinguish four sources of dignity. The person finds his dignity as a creature of God, called to union with God. A Christological approach asserts human dignity because of union with Christ through His incarnation and redemptive work. A pneumatological understanding of dignity derives from the fact that the Spirit gives salvation and freedom to all the children of God. Eschatologically-speaking, the human person finds his dignity in the destiny that awaits him. Whatever one's stance, we recognize that the dignity of the human person is universal. Consequently, the rights deriving from this dignity are also universal.⁸ On the basis of these theological arguments

rights, see P. HEBBLETHWAITE, "Human Rights in the Church," in P.F. FRANSEN (ed.), *Authority in the Church*, Annua Nuntia Lovaniensia XXVI, Leuven, University Press, 1983, pp. 194-195.

⁶ SYNOD OF BISHOPS, *Convenientes ex universo*, 30 November 1971, in AAS, 63 (1971), pp. 923-942, English translation in A. FLANNERY (gen. ed.), *Vatican Council II, More Post Conciliar Documents* (=FLANNERY II), Collegeville MN, The Liturgical Press, 1982, pp. 695-710; (All English translations of Vatican documents will be taken from either of the volumes by Flannery, unless otherwise specified.) See also *Human Rights and Reconciliation*, Statement of the 1974 Synod of Bishops, English translation in *Origins*, 4 (1974-1975), pp. 318-319.

⁷ In *Pacem in Terris*, n. 8, Pope John XXIII asserts the universality, inviolability and inalienability of rights and duties based on human personhood.

⁸ The essential link between human dignity and human rights is found in several documents of Vatican II. See *Gaudium et spes*, nn. 27, 41, in AAS, 58 (1966), pp. 1048, 1059, in A. FLANNERY (Gen. ed.), *Vatican Council II: The Conciliar and Post Conciliar Documents*, New

for the dignity of the human person, fundamental rights are defined and sanctioned in law.⁹

1.3 – CHURCH’S RESPONSIBILITY TO PROTECT HUMAN RIGHTS

Having recognized the dignity of the human person and the rights of the faithful, the Church has a responsibility to protect these rights. J. Provost provided four reasons why this should be so.¹⁰ Firstly, as sacrament of Christ’s saving action, the Church makes present the meaning of the Gospel. This it does through all dimensions of its being, including the legal dimension.¹¹ Secondly, being a social institution, what the Church teaches and judges concerning other social institutions applies also to itself.¹² Thirdly, the Church can witness to justice only if it, itself, acts justly. Consistency in word and action

revised edition, (=FLANNERY I), Northport, NY, Costello Publishing Company, 1992, pp. 928, 941; *Gravissimum educationis*, Preface, in FLANNERY I, p. 725.

⁹ The International Theological Commission presents arguments for the dignity of the human person based on creation and Christology; W. Kasper presents arguments for all foundations. See INTERNATIONAL THEOLOGICAL COMMISSION, *Propositions on the Dignity and Rights of the Human Person*, in INTERNATIONAL THEOLOGICAL COMMISSION, *Texts and Documents 1969-1985*, M. SHARKEY (ed.), San Francisco, Ignatius Press, 1989, pp. 251-266. See also W. KASPER, “The Theological Foundations of Human Rights,” in *The Jurist*, 50 (1990), pp. 148-166.

¹⁰ See J. PROVOST, “Rights in Canon Law: Real, Ideal or Fluff?,” in *CLSA Proceedings*, 61 (1999), pp. 324-326.

¹¹ See P. HUIZING, “The Sacramental Structure of Church Order and Its Implications,” in *The Jurist*, 32 (1972), pp. 479-493 for a clear elucidation of the link between the Church as sacrament and canon law. This was an underlying theme of Pope Paul VI’s allocution to the Roman Rota in 1973. See PAUL VI, Allocution to the Roman Rota, 8 February 1973, in *AAS*, 65 (1973), pp. 96-98, English translation in W.H. WOESTMAN (ed.), *Papal Allocutions to the Roman Rota 1939-2002*, (=WOESTMAN, *Papal Allocutions*), Ottawa, Faculty of Canon Law, Saint Paul University, 2nd ed., 2002, pp. 116-118.

¹² In c. 747 §2, the Church asserts its right to proclaim moral principles and to make judgements, “etiam de ordine sociali” *Codex iuris canonici, auctoritate Ioannis Pauli PP. II promulgatus*, Città del Vaticano, Libreria editrice Vaticana, English translation: *The Code of Canon Law*, New revised English Translation, Prepared by The Canon Law Society of Great Britain and Ireland in association with The Canon Law Society of Australia and New Zealand and The Canadian Canon Law Society, London, HarperCollinsLiturgical, 1997. This translation will be used throughout this work, unless otherwise specified.

underpins the truthfulness of the Church not only with respect to issues of justice, but also with respect to its total witness.¹³ Fourthly, as a communion of faith, the Church has the responsibility to nourish the faith of believers both by word and by witness. Accordingly, the community of the Church deserves this witness to justice.

1.4 – RIGHTS AND OBLIGATIONS

The 1983 *Code of Canon Law* presents the rights of the faithful in the context of obligations and rights. While some see rights and duties in a complementary relationship within a person, others view them rather as the right of one person or community resulting in a reciprocal obligation on the part of another. However, Pope John XXIII affirmed not only the rights and the correlative duties for each person, but also the reciprocity of rights and duties among peoples.¹⁴ Throughout this chapter we will consider how the Church accepts the obligation flowing from certain rights of the faithful. The rights that we consider in this chapter relate to the issue of child sexual abuse: the rights of those who claim to be the victim of abuse, the rights of those who are accused of abuse, and the rights of the community.

1.5 – COMMUNION AND THE COMMON GOOD

Prompted by theologians such as Yves Congar, Henri de Lubac and Charles Journet, the second Vatican Council formulated, albeit inchoately, an ecclesiology of

¹³ The International Theological Commission's statement was prompted in part by this fact. Cf. ITC, *Propositions on the Dignity and Rights of the Human Person*, p. 251. See JOHN PAUL II, Allocation to the Roman Rota, 17 February 1979, in AAS, 71 (1979), p. 423, English translation in WOESTMAN, *Papal Allocutions*, p. 154.

¹⁴ JOHN XXIII, *Pacem in terris*, nn. 29, 30. See also R. TORFS, "Rights in Canon Law: Real, Ideal or Fluff?" in *CLSA Proceedings*, 61 (1999), pp. 350-351. Torfs distinguishes between

communion.¹⁵ In his 1977 allocution to the Roman Rota, Pope Paul VI spoke of the role of canon law in the context of *communio*. The goal of communion, the Pope taught, is that all achieve peace with God and peace with one another. This same understanding is expressed:

Seeing the Church as communion means recognising the central importance of relationships. It recognises firstly the privileged relationship we all have in sharing the life of God in the communion of Father, Son and Holy Spirit, and secondly it means recognising the reflection of God's life in our relationships with one another.¹⁶

Pope Paul taught that this peace can be achieved by means of justice that is embodied in the juridical life of the Church. In other words, this juridical life serves the life of communion. In particular, the honouring of human rights, as well as the restriction of their exercise in particular circumstances, preserve and build communion.¹⁷ For this reason, every exercise of rights within the church ought to contribute to the common good and may be tempered by it.

rights and duties, not only in the form in which they are concretized, but also in the extent of the field of application.

¹⁵ See H. de LUBAC, *Surnaturel*, Paris, Aubier 1946; rev ed., Paris, Desclée de Brouwer, 1985; see Y. CONGAR, *I Believe in the Holy Spirit*, New York, Seabury, 1983. For an assessment of their contributions, see D. DOYLE, "Journet, Congar, and the Roots of Communion Ecclesiology," in *Theological Studies*, 58 (1997), pp. 461-479 and D. DOYLE, "Henri de Lubac and the Roots of Communion Ecclesiology," in *Theological Studies*, 60 (1999), pp. 209-227. For the concept of *communio* in the documents of Vatican II, see CONGREGATION FOR THE DOCTRINE OF THE FAITH, Letter to the Bishops of the Catholic Church, *On Some Aspects of the Church Understood as Communion*, 28 May 1992, in AAS, 85 (1993), pp. 838-850.

¹⁶ AUSTRALIAN CATHOLIC BISHOPS CONFERENCE and AUSTRALIAN CONFERENCE OF LEADER OF RELIGIOUS INSTITUTES, *Integrity in Ministry*, [Canberra], 1999, Foreword by Bishop Geoffrey Robinson and Sr. Margaret Cassidy, p. ii.

¹⁷ Having presented the role of law and rights in the context of communion, Pope Paul VI then gave examples of particular instances in which the exercise of certain rights may be curtailed for the sake of communion. PAUL VI, Allocution to the Roman Rota, 4 February 1977, in AAS, 69 (1977), pp. 149, 152, English translation in WOESTMAN, *Papal Allocutions*, pp. 139, 142-143.

2 – RIGHTS OF CHRIST'S FAITHFUL

The 1983 *Code of Canon Law* delineates many rights. Fundamental as they are to the life of the faithful, most are listed in cc. 208-223. In addition, their application is concretized throughout the Code. In examining these rights we recognize that some of them are so fundamental as to be principles which can be grouped into three categories: human rights, rights at law, and rights due to members of an ecclesial community. In this section, we will first consider these three categories of rights as they are embodied in the *Code of Canon Law*. Then we test the application of these principles in the context of the Church's response to sexual abuse. While we recognize that those affected by abuse also have rights that must be safeguarded, the rights of a person accused of an offence are the primary focus of this study.

2.1 – PERSONAL RIGHTS

Members of Christ's faithful have certain rights not because of membership in the Church, nor because of any office held, but simply on the basis of personhood. As members of the Church they exercise these rights within the Church. Consequently, while each person has a responsibility to protect his rights, so also other members of the people of God have the responsibility to promote them. The right to one's good name, the right to privacy and the right to choose one's state in life are pertinent to the issue under consideration.

2.1.1 – RIGHT TO ONE’S GOOD REPUTATION (CANON 220)

According to natural law, every person enjoys the right to good reputation.¹⁸ While c. 220 affirms the right, other canons ensure that the Church protects this right in particular instances. Thus, in a judicial process, careful attention is paid to a person’s reputation. For instance, judges and tribunal assistants are bound to observe secrecy (particularly in a penal trial), and the judge may oblige witnesses, experts, and advocates to take an oath to observe secrecy if, besides other reasons, the disclosure of information related to the case might put at risk the reputation of others.¹⁹ Furthermore, a witness need not answer a question put to him in a judicial procedure if, in answering the question, he might harm his own reputation or that of a member of his family.²⁰ Both the person who accuses (usually, in the context of this thesis, the victim of the alleged abuse) and the person accused have the right to their good name. For this reason the investigations of accusations have been subject to pontifical secrecy and witnesses can be

¹⁸ Canon 220. “Nemini licet bonam famam, qua quis gaudet, illegitime laedere, nec ius cuiusque personae ad propriam intimitatem tuendam violare.” One’s good reputation is necessary for certain offices and functions, for example, admission to orders postulates the candidate’s enjoying a good reputation (c. 1029); procurators and advocates must enjoy a good reputation (c. 1483). On the other hand, the loss of one’s good name results in certain restrictions; for example, this is one of the reasons for which a parish priest may be removed (c. 1741).

Normally when a canon of the 1983 *Code of Canon Law* is cited, it is simply designated as c. or canon. However, when a comparison is made between the 1983 Code and either the 1917 *Code of Canon Law* or the *Code of Canons of the Eastern Churches*, the acronyms CIC/1983 and CIC/1917 or CCEO will be used.

¹⁹ See c. 1455 §§1-3. According to c. 1553 the judge may limit the number of witnesses. Reasons for this are not provided within the canon, although, based on c. 1527, expediency may be deduced as the reason. However, in the case of a penal trial, one could argue that the reasons given in c. 1455 §3, particularly threats to the reputation of others, might apply. According to R. Barrett, the principle that the accuser bears the burden of proof is an embodiment of the law’s protection of the right to a good name. See R. BARRETT, “Two Recent Cases from the Signatura Affecting the Right to Privacy,” in *Newsletter of the Canon Law Society of Great Britain and Ireland*, 122 (September 2000), p. 13.

²⁰ Canon 1548 §2 2°.

required to take an oath of secrecy.²¹ The law aims also to protect the good name of a person who has incurred a penalty. Accordingly, c. 1352 §2 suspends the obligation of observing a non-declared *latae sententiae* penalty if it is not notorious, if observing it would endanger the person's good name. Likewise, the remission of a penalty and the petition requesting it are not made public unless it serves the purpose of either protecting the good name of the offender or repairing scandal.²²

Because a person's good name is held to be sacred, anyone who violates someone's reputation is bound, both morally and in law, to make amends and may be subject to punishment.²³ A person who falsely accuses a priest of the delict of solicitation in the context of the sacrament of confession is subject to a *latae sententiae* interdict.²⁴

²¹ JOHN PAUL II, Norms of *Sacramentorum sanctitatis tutela*, Article 25 §1, in W.H. WOESTMAN, *Ecclesiastical Sanctions and the Penal Process: A Commentary on the Code of Canon Law*, 2nd edition, Ottawa, Faculty of Canon Law, Saint Paul University, 2003, p. 308. Consistent with c. 1457, Art. 25 §2 provides for an appropriate penalty for those who violate this secrecy. The reason for the maintenance of pontifical secrecy is implied in the second paragraph of the same article, namely, to prevent harm to the accused or to witnesses. See also SUPREMAE SACRAE CONGREGATIONIS SANCTI OFFICII, Instructio, *Crimen sollicitationis*, 16 March 1962, Typis Polyglottis Vaticanis, 1962, n 11. Knowledge of the existence of the latter document appears not to have been widespread prior to the letter of the CDF, *Ad exsequendam ecclesiasticam*, 18 May 2001, in AAS, 93 (2001), pp. 785-788, English translation in WOESTMAN, *Ecclesiastical Sanctions and the Penal Process*, pp. 310-311. The letter noted that the instruction, *Crimen sollicitationis*, "*hucusque vicens*, was to be reviewed when the new canonical codes were promulgated."

A direction, "*servanda diligenter in archivo secreto Curiae pro norma interna, non publicanda nec ullis commentariis augenda*" follows the title of both the 1922 and the 1962 documents. (See Chapter 1 footnote 204, p. 70) Such a direction was more meaningful in the context of 1922 than in the present day. Attempting to balance this direction with the fact that an English translation of the document became public on the internet during 2003, I have chosen to make reference to specific sections of the document, without quoting from it directly.

²² Canon 1361 §3.

²³ CIC/1983 c. 1390 §§ 2 and 3 replace CIC/1917 c. 2355. The matter is contained in two canons of the CCEO: cc. 1452 and 1454. For a recent study of defamation, see R.E. JENKINS, "Defamation of Character in Canonical Doctrine and Jurisprudence," in *Studia canonica*, 36 (2002), pp. 419-462.

2.1.1.1 – PRELIMINARY INVESTIGATION

A person's reputation is at risk of being harmed after an Ordinary initiates a preliminary investigation.²⁵ Canon 1717 §2 presents a warning to this effect.²⁶ For this reason we study the preliminary investigation in the context of the right to a good name. Several questions arise in relation to this investigation: is it necessary to inform an accused person that it is being carried out? Can the prohibitions and restrictions of c. 1722 be imposed during this time frame? Should all necessary evidence be collected during a preliminary investigation?

We recognize that the Norms of *Sacramentorum sanctitatis tutela* as well as *Towards Healing* apply to both Latin and Eastern Churches. Although a comparative study of the Latin and Eastern Codes is not being undertaken, reference is made to the Eastern Code at times when it is considered that this Code, having been formulated more recently, presents a clearer insight.

²⁴ Canon 1390 §1. Canon 982 requires that a person who has made a false accusation of this nature, is to withdraw the denunciation and be prepared to repair the harm done before he or she may receive absolution.

²⁵ Canon 1717 §1. "Quoties Ordinarius notitiam saltem veri similem habet de delicto, caute inquirat per se vel per aliam idoneam personam circa facta et circumstantias et circa imputabilitatem, nisi haec investigatio omnino superflua videtur."

See also CCEO c. 1468 §1, which has essentially the same wording as c. 1717, except that it omits the phrase, *et circa imputabilitatem*. *Codex canonum Ecclesiarum orientalium auctoritate Ioannis Pauli PP. II promulgatus*, Typis Polyglottis Vaticanis, 1990, English translation: *Code of Canons of the Eastern Churches: Latin-English Edition*, translation prepared under the auspices of the Canon Law Society of America, Washington, DC, Canon Law Society of America, 1992.

The Pio-Benedictine Code contained more canons than the present Latin or Eastern codes concerning the preliminary investigation (CIC/17 cc. 1939, 1941, 1943-1946). Significantly, the need for secrecy was specified in three canons: c. 1941 §2 required the investigator to take an oath of secrecy; c. 1943 required that the investigation be secret, and c. 1944 §1 required that those whom the investigator interrogates, provide their testimony after taking an oath of preserving secrecy. *Codex iuris canonici Pii X Pontificis maximi iussu digestus Benedicti Papae XV auctoritate promulgatus*, Romae, Typis polyglottis Vaticanis, 1917, English translation: E.N. PETERS (curator), *The 1917 Pio-Benedictine Code of Canon Law in English Translation with Extensive Scholarly Apparatus*, San Francisco, Ignatius Press, 2001.

²⁶ Canon 1717 §2 "Cavendum est ne ex hac investigatione bonum cuiusquam nomen in discrimen vocetur."

While numerous canonists agree that it is not necessary to inform the accused person that allegations have been received, one could argue that if others are to hear of the accusation, then the accused person himself should be aware of its substance. According to *Towards Healing 2000*, “as soon as possible after receiving notice of the complaint, the Church authority or its representative shall inform the accused of the nature of the complaint if it is possible to do so.”²⁷ The conditional clause indicates that it is not always possible to do so. The authority’s fear that the accused person may do something harmful to himself or another might prevent him from informing the person of the accusation.²⁸

The internal consistency of the canons suggests that it is not essential to inform the accused. After the preliminary investigation, the Ordinary²⁹ decides whether he will proceed judicially or extra-judicially, or whether there will be no further action. If he chooses to proceed by way of an extra-judicial decree, then he is to inform the accused “of the allegation and the evidence.”³⁰ The absence of any qualifying clause in c. 1722,

²⁷ *TH 2000*, p. 13, par. 38.5.

²⁸ It is for this reason that when he is informed of the accusation, the accused person is offered a support person. See *TH 2000*, 38.5. See also IRISH CATHOLIC BISHOPS’ ADVISORY COMMITTEE ON CHILD SEXUAL ABUSE, *Child Sexual Abuse: Framework for a Church Response: Report of the Irish Catholic Bishops’ Advisory Committee on Child Sexual Abuse by Priests and Religious*, Dublin, Veritas, 1996, 45.11, which specifically mentions the isolation and vulnerability experienced by an accused person.

²⁹ CCEO places the decision of the hierarchy (c. 1469) within Art. 1, The Prior Investigation. Canon 1469 §3 requires that the hierarchy hear the accused, before he decides anything on the matter. Thus, before the conclusion of the preliminary investigation, the hierarchy is to hear the accused.

While this argument is based on the canons of CIC/1983, it is important to note that as a consequence of the promulgation of the norms of *Sacramentorum sanctitatis tutela*, when he has “*notitiam saltem verisimilem [...] de delicto reservato*” the Ordinary is to forward the documents of the preliminary investigation to the CDF.

³⁰ c. 1720 1°.

for example, “unless he has already done so” indicates an expectation that he will not have already informed the accused of the allegation.³¹ Nevertheless, if possible, the person should be informed as soon as possible of accusations made against him.³²

2.1.1.2 – PROHIBITIONS AND IMPOSITIONS

Canon 1722 enables the Ordinary, at any stage of the process, to “prohibit the accused from the exercise of the sacred ministry or of some ecclesiastical office and position, or impose or forbid residence in a certain place or territory, or even prohibit public participation in the blessed Eucharist.”³³ The term commonly used, for such a prohibitions, even though it is not a term used in the *Code of Canon Law*, is

³¹ *Crimen sollicitationis*, in setting out the three stages of the process (denunciation, inquisition and accusation), did not require the offender to be notified until after the close of the inquisition. See *Crimen sollicitationis*, n. 42.

³² The Irish bishops and religious superiors are advised to meet with an accused person without delay (that is, as soon as possible after hearing the complaint), to inform him of the complaint and to request him to meet the Delegate. See IRISH CATHOLIC BISHOPS’ ADVISORY COMMITTEE ON CHILD SEXUAL ABUSE BY PRIESTS AND RELIGIOUS, *Child Sexual Abuse: Framework for a Church Response*, 4.5.8, p. 33.

³³ Canon 1722. “Ad scandala praevenienda, ad testium libertatem protegendam et ad iustitiae cursum tutandum, potest Ordinarius, audito promotore iustitiae et citato ipso accusato, in quolibet processus stadio accusatum a sacro ministerio vel ab aliquo officio et munere ecclesiastico arcere, ei imponere vel interdicere commorationem in aliquo loco vel territorio, vel etiam publicam sanctissimae Eucharistiae participationem prohibere; quae omni, causa cessante, sunt revocanda, eaque ipso iure finem habent, cessante processu poenali.”

Canon 1722 is based on CIC/1917 cc. 1956-1958. Canon 1956 determined that it is the Ordinary who may impose the prohibition, while c. 1957 enabled a judge to restrict the accused person’s place of residence. Canon 1958 required that the defendant be summoned before the appropriate decree was issued. E. Peters considers briefly the development of c. 1722 in *Penal Procedural Law in the 1983 Code of Canon Law*, Canon Law Studies, No. 537, Washington DC, Catholic University of America, Ann Arbor, MI, UMI, 1991, pp. 204-205.

According to the norms promulgated by *Sacramentorum sanctitatis tutela*, the presiding judge can impose these restrictions and impositions under the conditions stated in the canon. Art. 15.

“administrative leave.”³⁴ Because of the potential for damage to one’s reputation, questions raised concerning this canon are studied in the context of this right.

The first words of the canon, “at any stage of the process”, have been interpreted in different ways. Does “the process” include the preliminary investigation, or does it refer specifically to the judicial dimension? In other words, can “administrative leave” be imposed as soon as the Ordinary receives an accusation or only when he is satisfied that the accusation has substance? Several lines of reasoning necessitate the second reading.

The first argument relies on the internal consistency of the canons of the penal process. Already we have seen that it is possible for the Ordinary to carry out a preliminary investigation without informing the accused. However, the Ordinary cannot place restrictions on the accused, on the basis of c. 1722, without first consulting the promoter of justice and summoning the accused to appear. Accordingly, it would seem that the restrictions can be applied only after the preliminary investigation.

The general norms on singular administrative acts provide the basis for a second argument. In accordance with c. 1722, the Ordinary can restrict an accused person’s exercise of ministry or office or place of residence. However, before the Ordinary issues a decree in writing, which he is required to do, he must “seek the necessary information and proof, and, as far as possible, he is to consult those whose rights could be harmed.”³⁵ Furthermore, he is to provide reasons for his decision. So, not only must the Ordinary

³⁴ An alternative term, “leave of absence” is used by the Conference of Bishops in Ireland. See *Child Sexual Abuse: Framework for a Church Response*, 4.6.4, p. 36

³⁵ Canons 50 and 51 specify these details as do CCEO cc. 1517 §1 and 1519 §2. The Eastern Code provides an alternative approach if there is danger of harm resulting from the reasons being included in the decree. Importantly, the provision does not in any way prevent the recipient of the decree from taking recourse.

have reasons for imposing “administrative leave” on an accused priest, he must also make known these reasons to the accused. The Ordinary would obtain his proof from the preliminary investigation unless the facts provided to him were such that “this enquiry would appear to be entirely superfluous.”³⁶ Accordingly, normally the Ordinary ought not to impose ‘administrative leave’ until after a preliminary investigation. However, when an Ordinary decides that a preliminary investigation is not required, he would make this judgement on the basis of his having sufficient evidence to reach his decision about the course of action, and therefore he would have sufficient information to motivate an administrative decree.

A third reasoning relates to the position of c. 1722 in Part IV of Book VII. The penal process is set out in several chapters. Chapter I deals solely and completely with the preliminary investigation. Chapter II concerns the use of an extra-judicial decree and then the judicial process. Canon 1722 follows the first canon on the judicial process. Consequently, “the process” referred to in c. 1722 should be interpreted as the judicial process.

Canon 1722 itself offers a fourth argument. This canon presents not only the goals and the preconditions for these impositions and restrictions but also the reasons for their cessation. By virtue of the law they cease when the penal process ceases. In other words, the last sentence of the canon describes the process as a penal process.

Fifthly, a comparison with the parallel canon in CCEO presents a further argument that these restrictions can be applied only after the introduction of a judicial process.

³⁶ Canon 1717 §1 “... nisi haec inquisitio omnino superflua videatur.”

CCEO c. 1473 is substantially the same as c. 1722. However, in allowing the restrictions to be applied “at any stage and grade of the trial,” it leaves no room for doubt.³⁷

As well as the timing of these impositions, their purpose requires consideration. Canon 1722 states very clearly three reasons for prohibitions and restrictions: the prevention of scandal, the protection of the freedom of witnesses and the safeguarding the course of justice. These, theoretically, do not constitute automatic corollaries of an accusation. However, in the context of Australia and the countries already considered, the prevention of scandal will almost certainly require certain restrictions. Alternatively, these same goals could be achieved by the use of penal precepts, penal remedies or warnings.³⁸ The canon further asserts that when the reasons cease, the restrictions are to be revoked, in which case the Ordinary is required to issue a decree of revocation (c. 58 §1). Hence, if there is no longer a need either to prevent scandal, to protect witnesses, or to safeguard the course of justice, then the restrictions cannot be imposed, or if already imposed, they must be lifted.³⁹

However, counter arguments exist for the use of “administrative leave” even during the phase of the preliminary investigation. Firstly, in the present culture, at least of the countries considered in the earlier chapters, the imposition of administrative leave is considered to be essential. The church leaders in each of the countries considered have

³⁷ CCEO c. 1473 : “... in quolibet statu et gradu iudicii poenalis...”

³⁸ Cf. T.J. GREEN “The Penal Process,” in J.P. BEAL, J.A. CORIDEN and T.J. GREEN, (eds.), *New Commentary on the Code of Canon Law*, New York, Paulist Press, 2000, pp. 1812-1813.

³⁹ For those who assert that these restrictions cannot be imposed until the commencement of a judicial process, see J. ALESANDRO, “Dismissal from the Clerical State in Cases of Sexual Misconduct: Recent Derogations,” in *CLSA Proceedings*, 56 (1994), p. 54; J. BEAL, “Doing What One Can: Canon Law and Clerical Sexual Misconduct,” in *The Jurist*, 52 (1992), p. 662; D.

committed to responding to accusations. The imposition of administrative leave publicly signifies that commitment. Secondly, given that, in the matter of responding to child sexual abuse, the Church continues to learn from the secular society as well as from its own experience, it ought to consider how secular society acts in this regard. In an employment situation, it is customary for an accused person to stand down, to be assigned alternative duties, or to go on leave while an investigation is being conducted.⁴⁰ The culture of the organization that has policies in place ensures that no stigma is attached to the person being stood down when standard practice is implemented. Thirdly, and most importantly, the three reasons found in c. 1722 for imposing restrictions during a judicial trial may exist during a preliminary investigation. Thus, even during a preliminary investigation, it may be necessary to take steps to prevent scandal, protect the freedom of witnesses and safeguard the course of justice. Ideally, the accused person would comply with a request. If he chose not to do so, an Ordinary cannot issue a precept until he has the reasons for doing so. Fourthly, the fact that an increasing number of conferences of bishops and individual dioceses have considered it necessary to impose these restrictions even during the preliminary investigation, suggests that this practice should be supported in law.⁴¹

PRICE, "Clerical Sexual Misconduct," in *CLSGBI Newsletter*, 2001 p. 48; and G. READ, "Clerical Sexual Misconduct: Comment on Mgr Price's Article," in *CLSGBI Newsletter*, 2001, p. 57.

⁴⁰ Employment policies concerning the conduct of investigations typically contain clauses that ensure that the employee is informed of the accusation made against him or her and is given the opportunity to respond; no decision is made concerning the outcome of the investigation until the employee has responded; the investigation is carried out as promptly as possible, and the employee is told of the likely time-frame for the investigation; the employee receives full entitlements during the course of the investigation; he or she may not attend the place of employment nor communicate with other employees about the matter, except with a person specified by the employer.

⁴¹ See *From Pain to Hope*, p. 32; *Te Houhanga Rongo A Path to Healing*, Procedures 4.9; *A Programme for Action*, Recommendation 66; *Child Sexual Abuse*, 2.48.

The critical issue in relation to the prohibitions and restrictions of c. 1722 is that they do not constitute a penalty. Canon 36 distinguishes between administrative acts that “pertain to threatening or inflicting penalties” and those that “restrict the rights of a person.” Consequently, every effort should be made by the Ordinary to ensure that the restrictions do not resemble a penalty. Unnecessary or severe restrictions should not be imposed. In fact, only those prohibitions and restrictions can be imposed that are necessary for the stated goals: “to prevent scandals, to protect the freedom of witnesses, and to guard the course of justice.” Indeed, since c. 18 requires a strict interpretation of the law that restricts rights, the only restrictions that can be imposed relate to the exercise of sacred ministry or the exercise of an ecclesiastical office or position, or the place of residence or public participation in Eucharist. Other impositions, for example reduction in remuneration or standard of living, are not provided for by c. 1722 and may constitute a penalty.⁴² A further clarification is necessary. Canon 36 requires a strict interpretation of the administrative act that restricts rights. For this reason, it is incumbent upon the Ordinary to state explicitly in a precept what is required of the accused person.

2.1.1.3 – COLLECTION OF TESTIMONY

The 1983 Code devotes only three canons to the preliminary investigation, of which only one concerns the actual conduct of the investigation.⁴³ No specific direction is provided concerning the collection of information. Prior to the promulgation of the

⁴² Other measures that are punitive in nature include permitting contact only with immediate family and lawyers, not allowing the accused person to function as part of a community, and prohibiting unaccompanied trips.

⁴³ Canons 1717-1718. The 1917 Code provided more details concerning the investigator’s conduct of the preliminary investigation, than does the 1983 Code. Prior to 1983, for example, the

Norms of *Sacramentorum sanctitatis tutela*, if the bishop decided that a judicial process was to be undertaken, the promoter of justice used the acts of the investigation to draw up a petition of accusation.⁴⁴ Since 30 April 2001, following the preliminary investigation the bishop is to forward the acts to the Congregation for the Doctrine of the Faith (CDF) to whom such cases are now reserved.⁴⁵ Hence, it is necessary that the acts of the investigation contain sufficient information to enable both the promoter of justice and the CDF to fulfil the role required of them. This should not, however, prevent further evidence being gathered, particularly if the CDF, in accordance with Article 13 of the norms, requires the diocesan bishop to proceed with a penal procedure.

The *Code of Canon Law* does not specify that any evidence gathered during the preliminary investigation is to be taken under oath of secrecy.⁴⁶ In a trial, the judge can oblige witnesses, experts and others to swear an oath to observe secrecy.⁴⁷ Given that the investigation is preliminary to a trial, no judge is appointed. Therefore, the decision as to

law specifically stated that he could interrogate other persons and consult with the promoter of justice.

⁴⁴ Cf. c 1721 §1. Canon 1502 specifies that the petition contain, “at least in general terms, the facts and evidence to be submitted in support of the allegations made.”

⁴⁵ Norms of *Sacramentorum sanctitatis tutela*, Art. 13. “Whenever the Ordinary or Hierarch receives a report of a reserved delict which has at least a semblance of truth [notitiam saltem verisimilem] once the preliminary investigation has been completed, he is to communicate the matter to the Congregation for the Doctrine of the Faith which, unless it calls the case to itself due to particular circumstances, will direct the Ordinary or Hierarch [how] to proceed further, with due regard, however, for the right to appeal against a sentence of the first instance only to the Supreme Tribunal of the same Congregation.”

The phraseology of Article 13 and c. 1717 is identical: “Quoties Ordinarius [vel Hierarcha] notitiam, saltem veri similem, habet de delicto [reservato]...” The clear implication is that if the Ordinary has sufficient reason to conduct a preliminary investigation, then he is to forward the acts of the investigation together with his votum to the CDF.

⁴⁶ *Crimen sollicitationis*, n. 23, directs that, prior to making the denunciation, the person doing so take an oath to tell the truth. After making the denunciation, the person was obliged to take an oath to observe secrecy.

whether or not those participating in the preliminary investigation should take an oath of secrecy should lie with the bishop, unless he gives this decision to his delegated investigator.

2.1.1.4 – GOOD NAME OF THE COMPLAINANT

A person, who makes a complaint against a priest, religious or other Church personnel, also has a right to his good name. While the character of any complainant will be critical in determining the credibility of his statements, the person's good name should be valued in Church processes. Three issues are pertinent.

In Chapter One, we looked briefly at possible long term effects of sexual abuse. These included low self-esteem, inter-personal problems, psychological problems, substance abuse and problems with sexuality resulting in promiscuity.⁴⁸ Should any complainant suffer from these effects, then the person's reliability as a witness may be questioned. Recognition of the possible impact of any abuse should be factored into any assessment of the person's reliability as a credible witness.

Even if an accusation is proven to be false, a complainant may have acted in good faith. It is possible that the person had suffered abuse at the hands of someone other than the accused. Whether the person's coping mechanisms or some other cause have prevented him from correctly identifying the actual offender, the person should be presumed to be acting in good faith.

⁴⁷ Canon 1455 §3. Since, c. 1200 affirms that an oath is that must be taken freely, if a witness is unwilling to do so, then he cannot be forced in any way.

⁴⁸ See Chapter One, *Understanding the Effects of Sexual Abuse*, p. 7.

Also in Chapter One, when surveying a range of definitions of child sexual abuse,⁴⁹ it was noted that a child cannot give consent to sexual activity. Besides the inability to give consent, the perception of such consent should be considered irrelevant to the offence. *Crimen sollicitationis* directed forcefully that the person not be asked whether or not he consented and, in fact, he should be advised that he is not bound to manifest his conscience regarding such consent.⁵⁰ Certainly, a person should not be judged on the basis of a perceived giving of consent.

2.1.1.5 – RESTORATION OF GOOD NAME

When knowledge of a person's having offended against a minor becomes public, that person usually becomes the object of contempt; he loses the good reputation previously enjoyed. However, as R. Jenkins asserts, the person still maintains the right to a good reputation. Therefore, "the possibility of recovering the good name remains an essential aspect of the possession of the right to it."⁵¹ The task of restoring one's good name for a person who has admitted to, or has been found guilty of, having sexually abused minors will not be insignificant. However, the possibility must exist in practice. Conditions under which his reputation could be restored would normally include: the absence of further offences, undergoing evaluation and treatment, and undertaking expiatory penalties or penances. The process may also include acknowledging one's past actions to a number of people and subjecting oneself to ongoing supervision or

⁴⁹ See Chapter One, *Definitions of Child Sexual Abuse*, p. 4.

⁵⁰ See *Crimen sollicitationis*, n. 23. In the situations considered in *Crimen sollicitationis*, both adults and minors may be included.

⁵¹ R. JENKINS, "Defamation of Character in Canonical Doctrine and Jurisprudence," p. 425.

monitoring as well as participation in support groups. Likewise, the possibility of restoring his good name must exist for a person who has made a false accusation.

2.1.2 – RIGHT TO PRIVACY (CANON 220)

Among the human rights mentioned in *Gaudium et spes*, we find the right to privacy.⁵² Despite its being a natural right, the 1917 *Code of Canon Law* did not distinguish between a right to privacy and a right to one's good name. Accordingly, the safeguarding of the two rights is treated similarly, usually by way of observing secrecy.

In 1974, the Secretariate of State issued *Secreta continere*, an instruction on papal secrecy.⁵³ This instruction introduced norms on papal secrecy by both recognising the difficulty of maintaining silence and affirming that its maintenance conforms with human nature. *Secreta continere* provides the rationale for maintaining secrecy: the building up of the Church, the public good, and the safeguarding the inviolable rights of individuals and communities. Consequently, "those who are bound by such secrecy should not think of themselves as obligated by a law existing apart from themselves, but rather by an imperative of proper human dignity: in other words, they should think it an honor for

⁵² *Gaudium et spes*, n. 26., in AAS, 58 (1966), p. 1046, in FLANNERY I, p. 927.

⁵³ SECRETARIATE OF STATE, Instruction, *Secreta continere*, 4 February 1974, in AAS, 66 (1974), pp. 89-92, English translation in T.L. BOUSCAREN and J.I. O'CONNOR, *Canon Law Digest*, Volume 8, Mundelein, IL, St. Mary of the Lake Seminary, pp. 205-210.

them to observe secrecy due to the public good.”⁵⁴ The inviolable rights referred to include the person’s right to a good name and his right to privacy.⁵⁵

Having recognized the principle of secrecy and the person’s right to privacy, we look to applications of this principle in the law of the Church. This right lies at the very heart of the Church’s position in relation to a number of issues that are related to the Church’s response to sexual abuse of minors: the confidentiality of procedures, privileged information, the keeping of records, the exchange of information and the disclosure of previous conduct and the use of psychological assessments

2.1.2.1 – CONFIDENTIALITY OF PROCESSES

In the first place, CIC/1983 specifies that certain people are bound to secrecy. Canon 471 2° requires everyone who holds office in the diocesan curia to observe secrecy.⁵⁶ Likewise, as we have noted already, in a penal trial, judges and tribunal assistants must observe secrecy and can incur a penalty if they fail to do so.⁵⁷

⁵⁴ *Secreta continere*, p. 206. Because of the need to preserve the common good, *Secreta continere* affirms that the responsibility for determining when this secrecy should be imposed lies not with the individual but with the one who has care of the community.

⁵⁵ R. Barrett judges the right to privacy to be a means of preserving a person’s good reputation. See BARRETT “Two Recent Cases from the Signatura Affecting the Right to Privacy,” p. 13.

⁵⁶ Whereas CIC/1917 c. 363 §2 specified particular officeholders were bound to secrecy, CIC/1983 c. 469 requires that those who assist the Bishop in governing the entire diocese observe secrecy, especially in directing pastoral action, in providing for the administration of the diocese and in exercising judicial power. M Breitenbeck notes that CIC no longer mandates taking an oath in the hands of the bishop, but that the obligation of secrecy is attached to the acceptance of the office. In fact the oath required of CIC 1917 and the promise required by CIC/1983 c. 471 1° both refer to fulfilling one’s office. See M. BREITENBECK, “The Canonical Tradition of Confidentiality Pertaining to Oral Communications,” in D.K. IOPPOLO *et al.*, *Confidentiality in the United States, A Legal and Canonical Study*, Washington, DC, CLSA, 1988, p. 107.

⁵⁷ See p. 151 above. CIC/1983 cc. 1455 and 1457 are substantially identical to CCEO cc. 1113 and 1115. CIC/1917 cc. 1623 and 1625 are very similar. However, c. 1625 §§2, 3 provided for the possibility of a monetary fine for the violation of the law of secrecy. During the process of

Furthermore, c. 127 §3 establishes that those required to give advice, are required to maintain secrecy if the seriousness of the matter requires it.⁵⁸ While the canon provides that the Superior can insist on the obligation, in fact, the gravity of the matter determines the obligation itself.

2.1.2.2 – PRIVILEGE

The seal of the sacrament of Penance is guarded most strenuously in Church law, honouring the confessor-penitent relationship and preventing any disclosure of information received.⁵⁹ In addition, the Church recognizes what in secular law is termed “privilege.” Black’s Law Dictionary provides a definition: “A special legal right, exemption or immunity granted to a person or class of persons; an exception to a duty.” Among various privileges, the dictionary specifies “testimonial privilege” as “a right not to testify based on a claim of privilege: a privilege that overrides a witness’s duty to disclose matters within the witness’s knowledge, whether at trial or by deposition.”⁶⁰ Secular law commonly recognizes, *inter alia*, doctor-patient privilege, psychotherapist-client, lawyer-client privilege and priest-penitent privilege. As well as “clerics regarding what has been made known to them by reason of sacred ministry” the *Code of Canon Law* exempts from giving testimony in a trial those “bound by professional secrecy even

the revision of the *Code of Canon Law* consideration was given to moving to the canons on sanctions, the canon that articulated the penalty for violation of secrecy. See *Communicationes*, 10 (1978), p. 255. Brietenbeck suggested that the present placement denoted the seriousness of such violation. *Ibid.*, p. 119.

⁵⁸ Such occasions would include the situations foreseen in cc. 1041 1°, 1044 §2 2°, 1574, 1718 and 1720.

⁵⁹ Canon 983 states the obligation; c. 1388 specifies the penalty that specifies the penalty that is incurred by those who violate the sacramental seal. The Norms of *Sacramentorum sanctitatis tutela* reserve this delict, when committed by the confessor, to the CDF (Article 3 3°).

by reason of having given advice, regarding those matters subject to this secrecy.”⁶¹

Hence it can be seen that a privilege that is recognized in an ecclesiastical trial might not be so in a secular one. A person who may be delegated by a bishop to advise an accused cleric could not be asked to affirm or deny any admission of guilt in a canonical penal process. However, it is foreseeable that such a person could be required to give evidence in some secular jurisdictions. Accordingly, an accused person ought be warned of this distinction as also anyone who receives information concerning an accusation.

2.1.2.3 – RECORD KEEPING

Practices and policies concerning record-keeping may safeguard or endanger a person's right to privacy and good name. The maintenance of diocesan archives has been addressed by numerous canonists in recent years, often due to increased litigation.⁶² Likewise, the keeping of records in religious institutes has been the subject of several

⁶⁰ B.A. GARNER (editor in chief), *Black's Law Dictionary*, 7th edition, St Paul, MN, West Group, 1999, p. 1215.

⁶¹ Canon 1548 §2, which is substantially unchanged from CIC/1917 c. 1755 §2, also exempts relatives from giving testimony in certain circumstances.

Canon 1548 §2 “Salvo praescripto can. 1550 §2, n. 2, ab obligatione respondendi eximuntur: 1° clerici, quod attinet ad ea quae ipsis manifesta sunt ratione sacri ministerii, civitatum magistratus, medici, obstetrices, advocati, notarii alique qui ad secretum officii etiam ratione praestiti consilii tenentur, quod attinet ad negotia huic secreto obnoxia; 2° qui ex testificatione sua sibi aut coniugi aut proximis consanguineis vel affinibus infamiam, periculosas vexationes, aliave mala gravia obventura timent.”

⁶² See K.E. MCKENNA, “Confidential Clergy Matters and the Secret Archives,” in *Studia canonica*, 26 (1992), pp. 191-207; B. LUCAS, “Are our Archives Safe? An Ecclesial View of Search Warrants,” in CLSANZ, *Proceedings of the Thirtieth Annual Conference*, 1996, pp. 49-74; P.T. SHEA, “Clergy Records, Part I – Civil Law Considerations,” in *CLSA Proceedings*, 58 (1996), pp. 326-345 and R. WIATROWSKI, “Clergy Records, Part II – Canon Law Considerations,” in *CLSA Proceedings*, 58 (1996), pp. 346-353. See also E.A. RINERE, “Confidentiality of Written Documents in Canon Law,” in D.K. IOPPOLO *et al.*, *Confidentiality in the United States*, pp. 125-144 for a more general approach to written records. For an historical overview, see C.A. KEKUMANO, *The Secret Archives of the Diocesan Curia*, Canon Law Studies No. 350, Washington, DC, Catholic University of America, 1954, pp. 1-28.

articles.⁶³ While record keeping should protect the rights of all, issues surrounding complaints of sexual misconduct deserve particular attention.

R. Wiatrowski's observation that "chancery files constitute the 'corporate memory' of the diocese"⁶⁴ leads to the question of what needs to be remembered and for what reason.⁶⁵ Given the confidential nature of complaints, accusations and procedures following accusations, the secret archives ought to be the location for such records. Although the 1917 Code provided more specific directives than does the 1983 Code, nevertheless, cc. 489 and 490 require a high level of security for the secret archives. Since the Bishop alone is to have the key, he alone has the right of access unless he provides otherwise.⁶⁶

While CIC/1983 does not specify all the documents that are to be secured in the secret archives, c. 489 makes specific reference to documents of criminal cases concerning moral matters. In addition, c. 1719 specifies that the acts of the preliminary investigation are to be kept in the secret archive, and c. 1339 §3 requires that a written record of a warning or a correction be kept similarly.⁶⁷ Accordingly, any accusation or complaint concerning a delict, together with a notation of the procedure for follow-up

⁶³ See A. MALONE, "Privacy – Reputation – Archives, A Canonical Overview," in *CLSANZ Newsletter*, Autumn 1994, pp. 10-34; F.G. MORRISEY, "Confidentiality Issues Regarding a Religious Institute and its Relationships with a Diocese," in *Canon Law Society of Great Britain and Ireland Newsletter*, 89 (March 1992), pp. 56-65; D.J. WARD, "Privacy/Confidentiality Issues in Religious Institutes," in *CLSA Proceedings*, 61 (1999), pp. 305-315.

⁶⁴ WIATROWSKI, "Clergy Record, Part II – Canon Law Considerations," p. 346.

⁶⁵ The instruction, *Crimen sollicitationis*, directed the Ordinary, when he received an accusation, to search the secret archives in case a previous accusation had been made.

⁶⁶ In the event of the see being vacant, the diocesan administrator personally and only in case of real emergency is to open the secret archives. CIC/1983 cc. 489 and 490 derive from CIC/1917 cc. 379 and 382.

action should be retained. P. Shea warns that only clear notes of specific facts, rather than conclusions, should be kept.⁶⁸

The concern of the 1917 Code for the rights of the defendants as well as for the prevention of any miscarriage of justice,⁶⁹ continues in CIC/1983. Hence, c. 489 §2 directs that documents of criminal cases be destroyed on the death of the guilty party or when ten years have elapsed since the condemnatory sentence.⁷⁰ At the same time, it requires that a summary of the facts and the text of the definitive judgement be kept. A similar policy should be pursued for matters leading to a preliminary investigation.

The retention and destruction of records, whether in the secret archives or the general archives, as well as the accessibility by civil authority, has been a matter of concern for some dioceses. Bearing in mind the common good that ought to be served by canon law as well as the rights of the individual, diocesan policy should be formulated to cover the creation, maintenance, access and destruction of records. *Towards Healing 2000*, while stating that church authorities will cooperate with reasonable requests for access to documents, also affirms that they “are not required to disclose documents concerning which it has an obligation of confidentiality to the accused or to any other person.”⁷¹ Importantly, the destruction of files and documents must then be carried out

⁶⁷ Other documents that, by law, are to be kept in the secret archives are records of secret marriages and dispensations from certain impediments to marriage (cc. 1133 and 1082).

⁶⁸ See SHEA, “Clergy Records,” p. 329.

⁶⁹ See KEKUMANO, *Secret Archives*, p. 49.

⁷⁰ The Nolan Report’s recommendation that documentation be kept for a long period, one hundred years as a minimum, needs to be considered carefully in the light of this canon. It may provide an indication of the degree of detail that should be retained. *A Programme for Action*, Recommendation 47.

⁷¹ *TH 2000*, 40.8

according to policy. Any perception of intentional destruction to avoid litigation can be avoided by strict adherence to such policy.

2.1.2.4 – EXCHANGE AND DISCLOSURE OF INFORMATION

The transfer between dioceses and provinces of priests and religious who have committed offences has resulted in great harm. This harm may be due to the offender's not making restitution, to the possibility of the person's re-offending, and to the offence remaining secret. It seems that people were transferred without information being given to the superior *ad quem* about prior complaints of misconduct. *Crimen sollicitationis* specified certain requirements concerning the exchange of information. Although it is no longer *ius vigen*s, its directions indicate wise practice. Apart from informing the Holy Office at various stages of the proceedings, the Ordinary of the place where the denunciation was made, was directed to advise the Ordinary of the territory where the accused was later residing, when he received a denunciation.⁷² He was also to advise him when the priest was admonished or condemned for the delict.⁷³ The Ordinary was directed to communicate this information under the secret of the Holy Office. In other words, this high level of secrecy did not preclude the passing on of necessary information. Furthermore, the Ordinary was reminded of the serious obligation to communicate this information because of the common good of the Church.⁷⁴ This combination of the obligation to communicate the relevant information to the Ordinary

⁷² *Crimen sollicitationis*, n. 66.

⁷³ *Ibid.*, n. 68.

⁷⁴ *Ibid.*, n. 70.

and the applicability of the secret of the Holy Office serve both the common good and the person who has offended.

When religious are transferred from a house of their institute in one diocese to a house in another diocese, the practice has developed of requesting them to complete a statement "indicating whether there have been any substantiated complaints of abuse against him or her or whether there are known circumstances that could lead to a complaint of abuse."⁷⁵ In addition, the religious superior provides a similar statement. It has been argued that this could constitute a breach of a person's right to privacy. Several issues are pertinent. Firstly, when the information requested is of a general nature and is sufficient only to provide the bishop or the superior with enough information, either to ensure the appropriate safeguards are in place both for the person and for the community or to prevent the person's residence within the diocese, then there ought to be no breach of the right to privacy. Secondly, the process for collecting and receiving this information should ensure strict confidentiality. This requires that a confidential process be in place

⁷⁵ For an overview of the situation in Australia, see R. MCGUCKIN, "Declarations Necessary with Transfer of Clergy and/or Religious across Diocesan Borders – The Australian Scene" in CANON LAW SOCIETY OF AUSTRALIA AND NEW ZEALAND, *Proceedings of the Thirty Fifth Annual Conference*, 2001, pp. 73-76. The Nolan Report contained a similar recommendation, *A Programme for Action*, Recommendation 42. Article 12 of the USCCB's Essential Norms present a very strong statement:

"No priest or deacon who has committed an act of sexual abuse of a minor may be transferred for ministerial assignment to another diocese/eparchy or religious province. Before a priest or deacon can be transferred for residence to another diocese/eparchy or religious province, his bishop/eparch or religious ordinary shall forward in a confidential manner to the local bishop/eparch and religious ordinary (if applicable) of the proposed place of residence any and all information concerning any act of sexual abuse of a minor and any other information indicating that he has been or may be a danger to children or young people. This shall apply even if the priest or deacon will reside in the local community of an institute of consecrated life or society of apostolic life (or, in the Eastern Churches, as a monk or other religious, in a society of common life according to the manner of religious, in a secular institute, or in another form of consecrated life or society of apostolic life). Every bishop/eparch or religious ordinary who receives a priest

whether or not the person has something to acknowledge. Thirdly, in some jurisdictions, a person who has committed certain criminal offences in the past is not eligible for employment, or even for volunteering in certain occupations or positions.⁷⁶ As church organizations can be included, the Ordinary has a responsibility to know of any past activity that would render the person unable to work in a particular role. For these reasons such disclosures cannot be perceived as infringing a person's right to privacy. However, *Towards Healing 2000* directs, "Where there has been a substantiated complaint, the Church authority shall furnish all information necessary to evaluate the seriousness of the offence, and shall report on all treatment undertaken, and other measures employed to ensure that further offences do not occur."⁷⁷ In such a situation, it is important that the Church authority provide information with the informed consent of the cleric or religious. Without that consent the authority must determine the extent of the disclosure.

2.1.2.5 – PSYCHOLOGICAL ASSESSMENT

Over the past thirty-five years, various Vatican documents have encouraged the use of screening for those who wish to be admitted to orders or to religious profession.⁷⁸

or deacon from outside his jurisdiction will obtain the necessary information regarding any past act of sexual abuse of a minor by the priest or deacon in question."

⁷⁶ The NSW *Child Protection (Prohibited Employment) Act 1998* prohibits the employment of a person who has been convicted of a serious sex offence (an offence involving sexual activity or acts of indecency which could be punishable by imprisonment for twelve months or more) in child-related employment. The definition of employment under this act includes performance of work as a minister of religion or other member of a religious organisation; child-related employment includes employment in any religious organisation. Under this act, all people working or volunteering in the Church are required to complete the *Prohibited Employment Declaration*.

⁷⁷ *TH 2000*, 44.7

⁷⁸ VATICAN COUNCIL II, Decree, *Optatam totius*, 28 October 1965, n. 6, in AAS, 58 (1966), p. 717, in FLANNERY I, p. 712; POPE PAUL VI, Encyclical, *Sacerdotalis caelibatus*, 24 June 1967, n. 63, in AAS, 59 (1967), p. 682-683, in FLANNERY II, p. 303.

However, the careful screening of candidates for orders was encouraged as early as Pope St. Gregory VII. Pope Pius X and Pope Pius XII both affirmed the need for careful selection of candidates for orders.⁷⁹ From the time of Pope Pius XII, the appropriate use of psychological testing as part of a screening process has been recommended.⁸⁰ Accordingly, numerous canonists and others have written on the issue of psychological assessment in the past decade. Of these, most wrote in the context of pre-admission screening or screening during formation.⁸¹ Writings on psychological assessment following religious profession or ordination have appeared more recently.⁸² Furthermore, the use of psychological assessment has formed the subject of recent jurisprudence, especially in relation to clerical sexual abuse.

During the 1950s, Pope Pius XII developed two principles for the use of psychological testing. Firstly, "psychology as a science can assert its demands only to the extent that the scale of values and the higher norms ... which include law, justice, equity, respect for the human person, and charity ordered toward self and others ... are

⁷⁹ For a presentation of the history of screening of candidates for orders, see J. HARGADEN, *The Screening of Candidates for the Priesthood, Some Canonical, Historical and Psychological Considerations*, JCL thesis, Ottawa, Saint Paul University, 1996, pp. 17-46.

⁸⁰ SACRED CONGREGATION FOR THE SACRAMENTS, Private circular letter, *Magna equidem*, 27 December 1955; SACRED CONGREGATION FOR RELIGIOUS, *General Statutes on the Religious, Clerical and Apostolic Training to Be Imparted to Clerics in the States of Perfection to Be Acquired*, 7 July 1956, annexed to the Apostolic Constitution of Pius XII, *Sedes Sapientiae*, English translation in *CLD*, vol. 5, p. 335; SACRED CONGREGATION FOR RELIGIOUS AND SECULAR INSTITUTES, Instruction, *Renovationis causam*, 6 January 1969, n. 11, in *AAS*, 51 (1969), pp. 103-120, in *FLANNERY I*, p. 645.

⁸¹ See M. DIPIETRO, "Legal Considerations in the Use of Pre-Admission Psychological Testing," in *CLSA Proceedings*, 51 (1989), pp. 173-184; L. SAFFIOTTI, "Crucial Issues in Psychological Assessment," in *Human Development*, 18, 4 (Winter 1997), pp. 5-10.

⁸² G. INGELS, "Protecting the Right to Privacy when Examining the Issues Affecting the Life and Ministry of Clerics and Religious," in *Studia canonica*, 34 (2000), pp. 439-466.

respected.”⁸³ Secondly, the person who consents to the test must not exceed the limits of his power in giving consent, and must give it freely for “[i]f the consent is unjustly extorted, any action of the psychologist will be illicit; if the consent is vitiated by a lack of freedom (due to ignorance, error, or deceit), every attempt to penetrate into the depths of the soul will be immoral.”⁸⁴ In other words, a person must freely assent to psychological testing. Furthermore, the type of testing to which he assents must not transgress moral limits.⁸⁵

Based on the above writings and noting their applicability to situations beyond those specifically mentioned, G. Ingels proposes three working principles for psychological assessment and therapy of clergy and religious:

- (1) When circumstances suggest the need for a priest or religious to undergo a psychological evaluation or when an assessment recommends ongoing therapy, the individual should be invited to take part in the evaluation or therapy.
- (2) A priest or religious who freely consents to an evaluation or ongoing therapy should be invited to release the results of the evaluation or the therapy to his or her superior or Ordinary....
- (3) Under no circumstances can a priest or religious be required to undergo invasive testing which elicits information over which the individual has no freedom or personal control. Due to the questionable morality associated with the use of these techniques even if an individual should freely submit to such testing, any information gathered from such procedures cannot be used in the external forum.⁸⁶

⁸³ Pope Pius XII, Address to a Congress of the International Association of Applied Psychology, *Venus du monde*, 10 April 1958, in *L'Osservatore Romano* (French version) 18 April 1958, pp. 4-5, English translation in *The Pope Speaks*, 5 (1958-1959), p. 14.

⁸⁴ *Ibid.*, p. 15.

⁸⁵ Although Pope Pius XII addressed this issue in 1958, the opinion has been upheld as recently as 1998. Cf. CONGREGATION FOR THE CLERGY, 8 October 1998, Private response. Cited by WARD, “Privacy/Confidentiality Issues in Religious Institutes,” pp. 311-312.

⁸⁶ INGELS, “Protecting the Right to Privacy,” p. 450.

The second of these principles demands further clarification. If a person gives consent so that the Ordinary may receive his report, the latter is not free to provide the information to others, directly or indirectly, without the specific, informed consent of the person.

M. DiPietro provides more guidelines in relation to the sharing of such reports.

Concerning each disclosure she recommends that:

- a) each disclosure is explicitly identified;
- b) the [person] understands the implications of the use of the data; and
- c) the procedure for the use and maintenance of the records is identified. This includes identifying the method of release of information and identification of the kinds of responses, written report, or oral communication that may be shared.⁸⁷

The use of such reports constitutes yet another critical issue. Their use in a penal trial is at least inappropriate and may impinge on an accused person's rights in several ways. Firstly, while a psychological and medical assessment might provide insights into the health of a person, and may indicate the presence or otherwise of a paraphilia, and hence, indicate certain inclinations, such information does not confirm that a person followed an inclination to the completion of an act. Secondly, the use of such results could violate confidentiality and the doctor-patient privilege. Thirdly, the use of a report of a psychological assessment could be seen as inducing the accused to incriminate himself, contrary to c. 1728 §2. Fourthly, since psychological assessments are aimed at the healing and welfare of the person, they should not be used in a process that is directed to imposing a penalty. Fifthly, while the results of the assessment may lead to the conclusion that a delict is not imputable to the accused, the responsibility for proving

⁸⁷ DIPIETRO, "Legal Considerations in the Use of Pre-Admission Psychological Testing," p. 182. DiPietro provides further recommendations specifically in relation to pre-admission psychological testing. However, the principles that she enunciates are applicable to psychological assessment of clerics or professed religious.

diminished imputability lies with the accused and his defence. The presumption of imputability, expressed in c. 1321 §3 assures the promoter of justice that imputability need not be proven.⁸⁸ These five reasons point to the inappropriateness of results of psychological tests being used in a penal process. Accordingly, Ingels derives a further working principle: "only the accused himself or herself should request that the results of psychological testing be placed in the acts of a penal process in providing for the right of defence."⁸⁹

2.1.2.6 – IRREGULARITIES AND IMPEDIMENTS TO THE EXERCISE OF MINISTRY

Closely related to the issue of psychological testing is the question of the irregularity for the reception and exercise of orders and the impediment to the exercise of ministry, as specified in cc. 1041 and 1044. One who suffers from any psychological infirmity, because of which he is, after experts have been consulted, judged incapable of fulfilling the ministry, is irregular for the reception of orders; similarly, a cleric is

⁸⁸ CIC/1917 c. 2200 §2, the antecedent of CIC/1983 c. 1321 §3, expresses the presumption of *dolus*: "Positing an external violation of the law, *dolus*, the deliberate will to violate a law, in the external forum is presumed until the contrary is proven." Since CIC/1983 contains the presumption of imputability, the legislator recognizes imputability arising from lack of due diligence, culpable ignorance of violating a law, or lack of understanding of the situation. For discussions of this paragraph, see E. McDONOUGH, "A Gloss on Canon 1321," in *Studia canonica*, 21 (1987), pp. 381-390 and M. HUGHES, "The Presumption of Imputability in Canon 1321, §3," in *Studia canonica*, 21 (1987), pp. 19-36.

⁸⁹ INGELS, "Protecting the Right to Privacy," p. 458.

impeded from the exercise of orders.⁹⁰ In both situations, that is, both prior to the reception of orders and after ordination, the advice of experts is required.⁹¹

The use of psychological testing and the declaration of an impediment for the exercise of orders raise questions. Because of the reference to c. 1041 1°, an Ordinary could not determine that a cleric is impeded without first consulting experts. Likewise, after the person is impeded for this reason, the Ordinary cannot give him permission to exercise the order until after he has again consulted an expert. In this situation a person might refuse to undergo psychological assessment. Since an Ordinary could not require him to do so, return to the exercise of orders cannot be dependent on a psychological assessment. Canon 1044 §2 does not require that the expert conduct an assessment of the person; it simply requires that the Ordinary consult the expert. Hence, in a situation where the cleric refuses assessment, the expert can offer advice based on any objective information provided by the bishop.⁹² Before the bishop issues a decree declaring the

⁹⁰ A cleric who received orders while suffering from a psychological infirmity at the time would not be irregular for the exercise of orders unless, prior to receiving orders, he had been judged incapable of fulfilling the ministry.

⁹¹ A person may choose not to undergo psychological screening required by a bishop or major superior prior to the reception of orders. The bishop may choose not to ordain him, if he has any cause to believe that a problem may exist. However, the bishop ought not to refuse ordination to a person on the sole basis of his having refused to undergo psychological assessment. If ordination were conditional on such evaluation, then the candidate's consent to undergo assessment could be compromised.

⁹² For a detailed discussion of the issue of privacy and the use of psychological assessment in the context of an impediment to the exercise of ministry, see G. INGELS, "Protecting the Right to Privacy," pp. 452-454. The appendix to this article contains a study prepared by the Congregation for the Clergy, dated 9 June 1998. The study strongly asserts that any procedure for the declaration of an impediment to the exercise of ministry must not be associated with a penal process.

cleric impeded, in accordance with c. 50, the cleric should be given an opportunity to respond to the concerns of the bishop and the advice of the expert.⁹³

2.1.3 – RIGHT TO CHOOSE ONE’S STATE OF LIFE (CANON 219)

The right to choose one’s state in life is considered to be a basic right in most cultures. The Church certainly honours this right in the context of marriage, religious profession⁹⁴ and ordination.⁹⁵ The right to choose one’s state of life continues beyond one’s initial commitment. However a person may forego the exercise of this right if a penalty of dismissal from the clerical state or religious institute is imposed lawfully. Such penalties are imposed only as a last resort and only after due process.⁹⁶

The Church encourages the avoidance of trials. However, there is a risk that in the sincere desire to avoid trials, a person’s freedom can be harmed. A priest or a religious could be encouraged by his hierarchical superior to seek either laicization or dispensation from vows because of past actions or inclinations. The choice to seek laicization or dispensation from vows represents more than a choice of an action; it constitutes a choice of a state of life, and concerns his status in the Church. The judge, in a penal trial, on the other hand, decides on the imputability and gravity of an action and the surrounding circumstances. Hence, it is appropriate that the superior present options to the person, but

⁹³ Should the cleric take recourse against such a decree, the recourse has no suspensive effect.

⁹⁴ Canons 656, 657 and 658 require that both temporary and perpetual religious profession be made without force or fear after the person has freely asked to be admitted.

⁹⁵ Canon 1036 requires candidates for diaconate and orders to present a declaration “written in his own hand and signed by him, in which he attests that he will spontaneously and freely receive the sacred order.” Accordingly, on at least two occasions prior to his receiving ordination to the priesthood, a priest attests to his freedom.

care must be taken to ensure that the person's freedom is safeguarded. His decision should involve full knowledge and a free act of the will.⁹⁷ It could well be that the person requires a reasonable time to arrive at a free decision and so the hierarchical superior should allow this.⁹⁸ If a person cannot arrive at a decision in a reasonable time period, the superior may need to make other provisions for him.

2.2 – RIGHTS BEFORE LAW

Canon 221 safeguards three natural rights: the right to defend one's rights in a judicial forum; the right to be tried in accordance with the provisions of law; the right not to have a penalty imposed except in accordance with the law. These three rights express a fundamental belief in the capacity of the Church's judicial system to achieve a just resolution to an issue or a conflict. In addition, the right of defence implies a right not to incriminate oneself.

2.2.1 – RIGHT TO DEFEND ONE'S RIGHTS (CANON 221 §1)

The right to defend one's rights is founded in natural law. Accordingly, the right is concretized in church law, and so the desire to protect this right should be uppermost in the minds of those who conduct a process in the Church. In the context of accusations of

⁹⁶ Automatic dismissal from an institute of consecrated life can be incurred in accordance with c. 694. However, this dismissal must be established juridically.

⁹⁷ Jurisprudence based on c. 1103 might inform a superior's approach when presenting the available options to a person; these may even include a penal process.

⁹⁸ The procedure for the removal of a parish priest, directs the Bishop to give the priest fifteen days in which to respond to his request to resign (c. 1742 §1). If the priest does not do so, then if the Bishop intends to proceed with his intention, he renews the invitation and extends the time in which the priest may respond (c. 1744§1). While the length of the extension is not specified, one would expect that it be more than three days. So, if a parish priest has at least eighteen days in which to decide to resign from his parish, then it would be inappropriate for a

abuse, this canon safeguards the rights both of the person who claims to be the victim of such an offence and the one who has been accused of an offence.

A person against whom an offence has been committed can accuse a person and can seek restitution for the harm done to him or her. Such an action may take place either in conjunction with a penal case⁹⁹ or distinct from it. While in terms of penal law, an offence may no longer be actionable because of prescription, a person could, nevertheless, initiate a contentious action for the reparation of harm.

The rights of both a falsely accused person and a person against whom an offence has been committed are further supported by the responsibility to repair damage done by any act which is deceitful or culpable, this responsibility being enshrined in c. 128.¹⁰⁰ On the one hand, as M. Poll notes, there is no obligation to enforce this right, so that it may not be possible to defend one's rights other than in an ecclesiastical process. On the other hand, being a natural right, its exercise in an ecclesiastical forum is inviolable. If this were not so, then the only forum available would be a civil forum.

The right of defence in a judicial process was affirmed and elaborated by Pope John Paul II in his 1989 allocution to the Roman Rota.¹⁰¹ In particular the pontiff affirmed that

cleric to have less than thirty days in which to come to a decision about seeking laicization. Of course, much more time may be necessary.

⁹⁹ Canon 1729 provides for a person to bring a contentious action for the reparation of harm in a penal case. Such an action must be initiated in the first instance of a penal trial (c. 1729 §2).

¹⁰⁰ See M. POLL, *The Reparation of Harm: A Canonical Analysis of Canon 128 with Reference to its Common Law Parallels*, J.C.D. dissertation, Ottawa, Saint Paul University, 2002, p. 63.

¹⁰¹ See JOHN PAUL II, Allocution to the Roman Rota, 26 January 1989, in AAS, 81 (1989), pp. 922-927, English translation in WOESTMAN, *Papal Allocutions*, pp. 204-208. F. Daneels used this allocution to reflect on the right of defence at the Annual Conference of the Canon Law Society of Great Britain and Ireland in 1992. See F. DANEELS, "The Right of Defence," in *Studia canonica*, 27 (1993), pp. 77-95.

whereas, in a contentious trial, the accused person may renounce the exercise of the right of defence, in a penal trial, this may not happen. While the accused may choose not to exercise the right personally and directly, he exercises that right through an advocate. If, for the common good and to avoid very serious danger, the judge decides not to make available a particular act to the accused person, then that act either cannot constitute the basis for the sentence, or else, if it is critical to the sentence, then it must be shown to the advocate of the accused.

Apart from a judicial penal trial, an accused person must be given the opportunity to exercise his right of defence as is stated in c. 1720 1°. As has been noted above, before an Ordinary issues a decree, he is to consult those whose rights could be harmed.¹⁰² In order to exercise this right of defence, a person should not be required to respond immediately on hearing an accusation. The time limits proposed in the procedure for the removal of parish priests¹⁰³ suggest that time is needed for serious decisions. As well, the accused person should be advised that he may have present canonical counsel, civil counsel and personal support. In other words, the accused person should be provided the opportunity to exercise his right of defence as freely and consciously as he is able.

2.2.2 – RIGHT NOT TO INCRIMINATE ONESELF (CANON 1728 §2)

While consent can be presumed from silence, this is not the case in a penal trial. The principle of the *regulae iuris*, he who is silent does not confess, nor does he appear to deny,¹⁰⁴ is affirmed in c. 1728 §2, which ensures that an accused person is not bound to

¹⁰² Canon 50.

¹⁰³ Canons 1742 §1 and 1744 §1.

¹⁰⁴ “Is, qui tacet, non fatetur, sed nec utique negare videtur.” Reg. XLIV (D. 50, 17, 142).

admit to an offence in a penal trial. For this reason, the oath is not administered to an accused person. The person should be advised of this right at the time of being presented with the accusation. On the other hand, admission of an offence, and acknowledgement of the harm done to the other person, especially for sexual offences, is an important part of a process of healing and reform. Indeed, c. 1526 §2 specifies that proof is not required for a fact alleged by one litigant and admitted by another, unless the law or the judge determines otherwise. An admission of a sexual offence against a minor needs to be used carefully as the tendency for offenders to deny previous admission, in whole or in part, has been documented.¹⁰⁵

2.2.3 – RIGHT TO BE JUDGED ACCORDING TO THE LAW (CANON 221 §2)

The natural right of a person who is accused of committing a delict to be judged according to the law is affirmed in c. 221 §2. This right concerns both the substantive and procedural elements of law. The former requires that the offence be a delict in law and that the passing of time not have extinguished the action; the latter requires that all the procedures of law be followed. Two general norms impact on this right. Firstly, penal law must be interpreted strictly. Secondly, a diocesan bishop cannot dispense from procedural laws or from penal laws.¹⁰⁶

2.2.3.1 – RIGHT TO A FAIR TRIAL

In 1990, Pope John Paul II affirmed the right of the faithful to a fair trial:

¹⁰⁵ See T. FURNISS, "Dealing with Denial" in R. K. OATES (ed.), *Understanding and Managing Child Sexual Abuse*, Sydney Australia, Harcourt Brace Jovanovich, 1970, pp. 253-254.

¹⁰⁶ See Canon 87.

The institutionalization of that instrument of justice called the trial represents a gradual victory for civilization and for respect of human dignity. The Church herself has contributed to this in no small way through the canonical trial. In so doing, the Church has not denied her mission of love and peace; rather she has merely set up an adequate means for ascertaining the truth which is an indispensable condition for justice enlivened by love, and thus also for true peace. It is true that, if possible, trials are to be avoided. ... A fair trial is a right of the faithful, and at the same time it is required for the public good of the Church. Canonical procedural norms are thus to be observed by all involved in a trial as means of justice leading to substantive justice.¹⁰⁷

Pope John Paul II simultaneously encourages the avoidance of trials and affirms the right of the faithful to a fair trial. Underlying this right is the right to a resolution of disputes in a reasonable time.¹⁰⁸

A number of situations may lead an Ordinary to delay in responding to an accusation. Firstly, insufficient information may be made available to him; for example, an anonymous complaint may be received.¹⁰⁹ On other occasions, the Ordinary may delay because of imminent proceedings in either civil or criminal law. The two reasons for delay, however, are essentially different and require different actions. Based on the presumption of innocence, the lack of sufficient information must result in no further action being taken against the accused. Therefore, if a hierarchical superior has requested a cleric or religious to stand down from an office, he must restore his office. A delay due

¹⁰⁷ POPE JOHN PAUL II, Allocution to the Roman Rota, 18 January 1990, in AAS, 82 (1990), p. 877, English translation in WOESTMAN, *Papal Allocutions*, p. 212. Previously, in his 1979 allocution, the Pontiff had affirmed the following of procedural law as a means of respecting the rights of the person. See POPE JOHN PAUL II, Allocution to the Roman Rota, 17 February 1979 in AAS, 71 (1979), pp. 423, English translation in WOESTMAN, *Papal Allocutions*, p. 154.

¹⁰⁸ See Canon 1446. This right is supported by time limits set by the law itself (c. 1453) or by the judge (cc. 1465, 1466) or by the law directing that the issue be addressed "with maximum expedition" (c. 1451).

¹⁰⁹ Whereas some policies propose that the Church will not respond to anonymous complaints, others advise that the Church will respond in a way that is different from when a complainant identifies himself.

to imminent or actual proceedings in secular law is a separate matter. If the period of prescription has elapsed and the right to initiate a penal procedure is extinguished, then further delay is justified only if the Ordinary is requesting a dispensation from prescription from the CDF. Should this be the intention of the Ordinary, then he should so advise the priest.¹¹⁰

Following the promulgation of *Sacramentorum sanctitatis tutela* on 30 April 2001, the CDF has sole competence to impose a penalty if a cleric is found guilty of certain delicts, including sexual offences with a minor. When the norms were first promulgated, they provided for the imposition of a penalty for the more grave delicts reserved to the CDF only by means of a judicial process. However, on 7 February 2003, Pope John Paul II granted to the CDF the faculty to dispense from this provision:

in those grave and clear cases which, according to the Particular Congress of the CDF:

- a) may be referred directly to the Holy Father for an ex officio dismissal from the clerical state, or
- b) may be treated under the summary process of can. 1720 by the Ordinary who, in case he is of the opinion that the accused should be dismissed from the clerical state, will ask the CDF to impose the dismissal by decree.¹¹¹

Hence a non-judicial process is possible. That is, an administrative process may be used to impose a penalty. However, the role of the Ordinary in such cases is simply to request

¹¹⁰ At this point, the purposes and timing of c. 1722 need to be respected.

¹¹¹ "... nei casi gravi e chiari che a giudizio del Congresso Particolare della CDF:

- a) possono essere portati direttamente al Santo Padre per la dimissione ex officio; ovvero
- b) possono essere trattati con il rito abbreviato di cui al can. 1720 dall Ordinario che, nel caso sia del parere di procedere alla dimissione del reo, dovrà chiedere alla CDF la comminazione di detta pena per decreto." Faculty granted by Pope John Paul II, 7 February 2003. English translation in WOESTMAN, *Ecclesiastical Sanctions and the Penal Process*, p. 315.

a dispensation from a judicial process. Apart from the pope, it is only the CDF who can impose a penalty non-judicially for these offences.

2.2.3.2 – ADMINISTRATIVE DISMISSAL

For some years alternative processes had been used for the administrative dismissal from the clerical state. In 1998, in a private reply, the Congregation for Divine Worship and the Discipline of the Sacraments, (CDWDS) stated four conditions that were necessary before the process *ex officio et in poenam* could be utilised:

- There must be sound reasons for the Ordinary not to use an ordinary penal process.
- The priest must be unwilling to request voluntary laicization.
- The priest should have the opportunity to defend himself.
- There should be a conviction in criminal or civil law.¹¹²

In 2002, another response from the CDWDS confirmed that this procedure is to be used only *ad hoc*, in the most exceptional cases.¹¹³ This document refers to the various offences described in c. 1395 §1-2. Of these, that of sexual abuse with a minor is reserved to the CDF; therefore the procedure referred to by the CDWDS does not include this offence. However, given the exceptional nature of a dispensation, one can judge that the same conditions would apply.

This process, which is an exception to the law, has been used, according to G. Ingels, when prescription extinguished an action. Given that the outcome of the process was the imposition of the penalty of dismissal from the clerical state, it is difficult

¹¹² See CONGREGATION FOR DIVINE WORSHIP AND THE DISCIPLINE OF THE SACRAMENTS, Private response, Prot. N. 2169/98, 11 November 1998.

¹¹³ See CONGREGATION FOR DIVINE WORSHIP AND THE DISCIPLINE OF THE SACRAMENTS, Private response, Prot. No. 1890/02/S, 21 October 2002.

to see how this process was not subject to prescription. Still, dispensation from prescription may have constituted an element of the process.¹¹⁴

2.2.3.3 – MORAL CERTITUDE

In any judicial process, the judge must arrive at moral certainty about the matter to be decided based on the acts and the proofs.¹¹⁵ In 1942, Pope Pius XII distinguished between absolute certainty, “in which all possible doubt as to the truth of the fact and the existence of the contrary is entirely excluded [and , which is]” “characterized on the positive side by the exclusion of well-founded or reasonable doubt, [and] on the negative side it does admit the absolute possibility of the contrary.”¹¹⁶ The pontiff proceeded to make three further points. Firstly, he asserted that moral certainty may result from an accumulation of indications none of which individually would lead to moral certainty. He stated “ it is ... to recognize that the simultaneous presence of all these separate indications and proofs can have a sufficient basis only in the existence of a common origin or foundation from which they spring, that is, in objective truth and reality.”¹¹⁷ Secondly, Pius XII emphasized the need for objectivity in coming to moral certitude. He explained:

¹¹⁴ The faculty granted by Pope John Paul II to the CDF to dispense from prescription, applies to the offence of sexual abuse of a minor. It does not apply to other delicts described in c. 1395 §§1-2, that is, it does not apply to the offences not reserved to the CDF.

¹¹⁵ Canon 1608 §1.

¹¹⁶ POPE PIUS XII, Allocation to the Roman Rota, 1 October 1942, in AAS, 34 (1942), pp. 339-340, English translation in WOESTMAN, *Papal Allocutions*, p. 18. Pope John Paul II reaffirmed this teaching of Pope Pius XII in his 1980 allocation to the Roman Rota. See JOHN PAUL II, Allocation to the Roman Rota, 4 February 1980 in AAS, 72 (1980), pp. 176, English translation in WOESTMAN, *Papal Allocutions*, p. 162.

¹¹⁷ *Ibid.*, p. 19.

This moral certainty with an objective foundation does not exist if there are on the other side, that is, in favour of the reality of the contrary, motives which a sound, serious, and competent judgement pronounces to be at least in some way worthy of the attention, and which consequently make it necessary to admit the contrary as not only absolutely possible, but also in a certain sense probable.¹¹⁸

Thirdly, he recognized that different degrees of moral certainty may exist. Furthermore, the degree of moral certainty required in a particular case is determined by the requirement of the law and the importance of the case. E.A. McCarthy elaborated on this point:

The same degree of probability in one case can be equivalent to moral certitude, but not at all in another. This relative condition depends principally 1) on the nature of the thing to be proved and its capacity to be proved; 2) on the comparison between the damage especially to the public good, which would follow from an erroneous sentence, on the one hand, and that which would follow from an erroneous sentence on the other (and so the gravity of the matter at hand must be understood as a criterion for the required certainty).¹¹⁹

In the context of a penal trial, the damage caused to the common good by an erroneous judgment is great, whether the accused is judged innocent or guilty of an offence against c. 1395 §2.

Although Pope John Paul II was speaking of marriage cases, his advice to judges seems equally applicable to penal cases, "The judge must act impartially, free from all prejudice: from the will to use the verdict in order to correct abuses and from the will to

¹¹⁸ *Ibid.*

¹¹⁹ "Etenim idem gradus probabilitatis in uno casu potest aequivalere certitudini morali, in alio vero minime. Haec relativitas dependet principaliter: 1) ex natura rei probandae eiusque aptitudinis ut probari possit, 2) ex comparatione inter damnum boni praesertim publici, quod sequeretur ex sententia erronea, in unam partem, et illud quod sequeretur ex sententia erronea in alteram comparatam (sic intelligi debet «gravitas negotii» ut criterium certitudinis requisitae)." E. A. MCCARTHY, *De certitudine morali quae in iudiciis animo ad sententiae pronuntiationem requiritur*, Rome, 1948, Officium Libri

prescind from the divine or ecclesiastical law and the truth in order only to meet the demands of an ill-understood pastorate.”¹²⁰ Two applications of this principle are relevant. Firstly, while the obligation of the judge to reach moral certainty is clear, the Ordinary has that same obligation before he imposes any penalty at all. It is not possible for him to impose a lesser penalty based on his having less than moral certainty. Secondly, the impartiality required to reach a judgment based on moral certainty may well require the Ordinary to appoint judges from outside the diocese or even from outside the province.

2.2.3.4 – REVISED LAW

The revision of penal law, unlike ecclesiastical law in general, results in a more favourable outcome for the offender.¹²¹ In terms of substantive law, there have been several changes between 1917 and 1983. CIC/1917 c. 2359 §2 stated:

§2 If they engage in a delict against the sixth precept of the Decalogue with a minor below the age of sixteen, or engage in adultery, debauchery, bestiality, sodomy, pandering, incest with blood-relatives or affines in the first degree, they are suspended, declared infamous, and are deprived of any office, benefice, dignity, responsibility, if they have such, whatsoever, and in more serious cases, they are to be deposed.

§3 If they offend in other ways against the sixth commandment of the Decalogue they are to be punished with appropriate penalties according to the

Catholici, p. 111. Translation adapted from D.J. BURNS, “Moral Certitude,” in *CLSA Proceedings*, 37 (1970), p. 47.

¹²⁰ JOHN PAUL II, Allocution to the Roman Rota, 26 January 1984, in *AAS*, 76 (1984), p. 649, English translation in WOESTMAN, *Papal Allocutions*, pp. 185-186.

¹²¹ Canons 9 and 20 apply in matters other than penal law. Canon 1313 §1 requires that in the case of a law being changed after the commission of a delict, the law more favourable to the offender is to be applied. This canon replaces CIC/1917 c. 2226 without amendment. Canon 1313 §1 “Si post delictum commissum lex mutetur, applicanda est lex reo favorabilior.”

gravity of the case not excluding privation of offices or benefices especially if they are responsible for the care of souls.¹²²

Canon 1395 §2 reads:

A cleric who in another way has committed an offense against the sixth commandment of the Decalogue, if the delict was committed by force or threats or publicly or with a minor below the age of sixteen years, is to be punished with just penalties, not excluding dismissal from the clerical state if the case so warrants.¹²³

While the earlier code contained determined penalties, the later canon contains only undetermined ones. Both documents provide for, but do not mandate, the dismissal or deposition from the clerical state.

The Norms of *Sacramentorum sanctitatis tutela* introduced two significant substantive changes for the universal Church: first, the age of a minor for this delict was raised from sixteen to eighteen years; second, the period of prescription was extended from five years to ten years. Furthermore, "in the delict perpetrated with a minor by a cleric, the prescription begins to run from the day on which the minor completes the eighteenth year of age."¹²⁴ Since it is clear that the earlier law was more lenient to the offender than is the revised one, for offences committed before 30 April 2001 (except in the United States), the law as promulgated in the 1983 *Code of Canon Law* applies.

¹²² Canon 2359 §2 "Si delictum admiserint contra sextum decalogi praeceptum cum minoribus infra aetatem sexdecim annorum, vel adulterium, stuprum, bestialitatem, sodomiam, lenocinium, incestum cum consanguineis aut affinibus in primo gradu exercuerint, suspendantur, infames declarentur, quolibet officio, beneficio, dignitate munere, si quod habeant, priventur, et in casibus gravioribus deponantur."

§3 "Si aliter contra sextum decalogi praeceptum deliquerint, congruis poenis secundum casus gravitatem coerceantur, non excepta officii vel beneficii privatione, maxime si curam animarum gerant."

¹²³ Canon 1395 §2. "Clericus qui aliter contra sextum Decalogi praeceptum deliquerit, si quidem delictum vi vel minis vel publice vel cum minore infra aetatem sedecim annorum patratum sit, iustis poenis puniatur, non exclusa, si casus ferat, dimissione e statu clericali."

Therefore, for offences prior to 30 April 2001, the minor is defined as being under sixteen years of age. For offences committed on or after 30 April 2001, any external, grave, sexual act committed with a person under eighteen years of age is a canonical delict.

Further, the delict of sexual offences committed with minors under the age of eighteen is now reserved to the Holy See. Accordingly, after the Ordinary has conducted the preliminary investigation, he is to forward the acts of the investigation to the CDF. The procedures of *Sacramentorum sanctitatis tutela* apply to all cases involving this particular delict, whether they were committed before or after the norms were promulgated.¹²⁵ That is, once the preliminary investigation has been concluded, the Ordinary is to forward the acts of the investigation to the CDF if it is a reserved case.

2.2.3.5 – PRESCRIPTION

Prescription is a critical issue in matters concerning the sexual offences against minors and deserves further attention. Black's Law Dictionary defines "statutes of limitation" as "statutes of the federal government and various states setting the maximum periods during which certain actions can be brought or rights enforced."¹²⁶ Hence, after the time period established by the applicable statute of limitations, no legal action can be

¹²⁴ Norms of *Sacramentorum sanctitatis tutela*, Article, 5 §2. WOESTMAN, *Ecclesiastical Sanctions and the Penal Process*, p. 305.

¹²⁵ While the letter was dated 30 April 2001, it was only in November 2001 that it was published in AAS, 93 (2001), pp. 737-739. Contrary to common practice, the pontiff, excluding any *vacatio legis*, stated, "These Norms exert the force of law on the very day when they are promulgated."

¹²⁶ *Black's Law Dictionary*, pp. 1422-1423.

brought regardless of whether any cause or action ever existed. Prescription, the canonical parallel of the statute of limitations, has the same effect.

Prior to 30 April 2001, according to c. 1362, prescription extinguished any action for offences against c. 1395 §2 after five years. However, with the reservation of cases of sexual offences against a minor being reserved to the CDF, prescription was extended to ten years.¹²⁷ Since Pope John Paul II granted to the CDF the faculty to dispense from prescription on a case by case basis, prescription may not prevent some cases from being judged.¹²⁸

Whereas acquisitive prescription has its basis in Roman law, extinctive prescription with regard to penal actions was found in ecclesiastical law only from 1898.¹²⁹ The underlying value of prescription deserves serious study both from an historical perspective and from the experience of the Church today. Is prescription an objective value that benefits the individual against whom an action might otherwise be brought, or does it have a communitarian value?¹³⁰ The possibility of the granting of a dispensation

¹²⁷ Canon 1362 §2 specifies that prescription runs from the day an offence is committed, or for enduring offences, from the day the offence stopped.

¹²⁸ Writing in 1994, J. Alesandro asserted that prescription is a matter of procedural law. In the 2001 CDF norms, the article on prescription is the last article in Part One, Substantive Norms, suggesting that the CDF viewed prescription as substantive rather than procedural law. See J.A. ALESANDRO, "Dismissal from the Clerical State in Cases of Sexual Misconduct: Recent Derogations," p. 37.

¹²⁹ P. TORQUEBAU, "Extinction des actions," in *Dictionnaire de Droit canonique*, Vol 5, col. 719. It is interesting to note that the instruction, *Crimen sollicitationis*, does not mention prescription. This may be understood in the light of the very strongly stated obligation to report the offences referred to in the document, and to do so within a relatively short time frame. This obligation was present in CIC/1917 c. 904 which, in turn, restated an obligation expressed by Pope Benedict XIV in 1741. Logically, if this obligation were fulfilled, then there would be no need to consider prescription.

¹³⁰ The range of approaches to the statute of limitations in secular jurisdictions suggests that no uniform agreement about the underlying values exists.

from prescription presupposes that the exercise of the individual's rights embodied in prescription is subject to the common good.

2.2.4 – RIGHT NOT TO BE PUNISHED WITH CANONICAL PENALTIES EXCEPT ACCORDING TO LAW (CANON 221 §3)

Canon 221 §3 asserts a natural law value, the right not to be punished except according to law. This value is enshrined in common law and Church law. Since the second paragraph of this canon affirms the right to be judged according to the law, in terms of the offence and the procedure, the third paragraph of this canon relates to the penalty itself.

2.2.4.1 – PENALTY OF DISMISSAL FROM THE CLERICAL STATE

In 2002, the United States Catholic Conference approved the *Essential Norms for Diocesan/Eparchial Policies dealing with Allegations of Sexual Abuse of Minors by Priest or Deacons*. On 12 December 2002, having received the required *recognitio*, the Norms were promulgated as a general decree of the USCC, becoming effective on 1 March 2003. One implication inherent in the approval of these norms by the Apostolic See is an expectation of dismissal from the clerical state for offences of this nature. This understanding demands examination.

Canon 1395 §2 provides for the penalty of dismissal from the clerical state “if the case so warrants.”¹³¹ In fact, in the 1983 Code there are seven delicts for which the penalty of dismissal from the clerical state is a possible penalty.¹³² The specific penalty of

¹³¹ The Latin phrase is *si casus ferat*.

¹³² See cc. 1364 (apostasy, heresy and schism), 1367 (desecration of the sacred species), 1370 (use of physical force against the Roman Pontiff), 1387 (solicitation in confession), 1394 §1

dismissal is not mandatory in any of these instances. Several canons evidence the Church's concern that the penalty of dismissal from the clerical state be used sparingly and in extreme cases. For example, while particular law may provide for a specific penalty when an indeterminate penalty is provided or may add penalties to those established by universal law, particular law cannot legislate for dismissal from the clerical state.¹³³ Accordingly, neither a diocesan bishop nor a conference of bishops can legislate for dismissal from the clerical state. Likewise, c. 1342 requires that perpetual penalties not be imposed or declared by a decree, that is, by an extra-judicial process. In fact, an offence that may result in this penalty requires a judicial process involving a collegiate tribunal of at least three judges.¹³⁴ The norms of *Sacramentorum sanctitatis tutela* now provide for a possible exception to this for reserved delicts. Nevertheless, the principle remains. According to the present universal law, therefore, it cannot be a requirement of diocesan policy that a cleric will be dismissed from the clerical state for any act of sexual abuse with a minor.

2.2.4.2 – IMPUTABILITY

The imputability of an offence must be considered when any delict is being examined. CIC/1983 c. 1321 §3 affirms that imputability is presumed where there has

(attempted marriage), 1395 §1 (living in concubinage and other scandalous offences against the sixth precept), 1395 §2 (other offences against the sixth precept, involving force, threats, or in public or with a minor). In addition to these seven offences, the norms of SST provide for the possibility of dismissal from the clerical state for the delict of “[consecrating] for a sacrilegious purpose of one matter without the other in a Eucharistic celebration, or of both outside of the Eucharistic celebration.”

¹³³ Canon 1317.

¹³⁴ Nor may a judge impose dismissal from the clerical state for an offence in which the penalty is indeterminate.

been an external violation of the law, unless it appears otherwise.¹³⁵ Accordingly, ordinarily, it is the responsibility of the accused person or his advocate to prove that an act is not imputable to him. However, if it is apparent that the act may not be imputable, then it is the responsibility of the promoter of justice to prove otherwise.

The question of pedophilic clerics raises questions.¹³⁶ Reviewing the situation in the United States in 1996, J. Alesandro reflected that the prevalent opinion in 1992 was that "the psychopathology suffered by such priests almost automatically exempted them from the penalty insofar as the imposition of dismissal requires 'full' imputability, not merely 'grave' imputability."¹³⁷ For offences against minors, the judge must consider mitigating circumstances of CIC/1983 c. 1324, such as, whether the person acted in the heat of passion, or lacked the use of reason because of culpable drunkenness, or otherwise acted without full imputability. Moreover, he must consider possible aggravating circumstances of c. 1326, such as, whether the cleric foresaw the possibility of the offence and did nothing to prevent it, or whether he abused his authority or office to commit the offence. It could be argued that the warnings inherent in secular and canon law, as well as diocesan policies, serve as significant warnings that place greater

¹³⁵ In terms of the liability for a penalty, there is a difference between the Eastern and Latin Codes. According to CIC/1983, c. 1321 §2, if the violation of a law is due to the omission of due diligence, then the person is not punished, unless the law provides otherwise. According to CCEO c. 1414 §1, a person can be punished for a seriously culpable lack of due diligence or seriously culpable ignorance of a law or precept. Moreover, in the Latin Code, imputability is presumed, while in the Eastern Code, "it is presumed that it is a deliberate act."

¹³⁶ Obviously, the situation demands that a person not be considered a pedophile or an ephebophile unless diagnosed as such by a professional. See *Diagnostic and Statistical Manual of Mental Disorders*, Fourth Edition Text Revision, Washington, DC, American Psychiatric Association, 2000, p. 571.

¹³⁷ J.A. ALESANDRO, "A Study of Canon Law: Dismissal from the Clerical State in Cases of Sexual Misconduct," in *The Catholic Lawyer*, 36 (1996), p. 262. See Decision c. Colagiovanni,

emphasis on these aggravating factors. Similarly, it could be argued that a person's attraction to minors serves as an additional warning to him.

2.3 – RIGHTS SPECIFIC TO CLERICS

Chapter III of Book II of the *Code of Canon Law* concerns the obligations and rights of clerics. Among the rights that are enumerated, we find the right of association (c. 278), the right to remuneration and to social welfare (c. 281), and the right to a holiday (c. 283 §2). The corresponding right is recognized in the obligation for clerics to cooperate with one another (c. 275), to seek holiness (c. 276 §2), to continue their studies and to attend pastoral courses (c. 279). In addition, like all Christ's faithful, they enjoy the rights enunciated in cc. 208-223. As with any right, the exercise of these rights can be regulated in view of the common good (c. 223).

2.3.1 – RELATIONSHIP WITH THE DIOCESAN BISHOP

The diocesan priest has a right to the support of his bishop. Vatican II's Dogmatic Constitution of the Church, *Lumen gentium*, teaches, "The bishop ... should treat the priests, his helpers, as his sons and friends, just as Christ calls his disciples no longer servants but friends."¹³⁸ The Council's Decree, *Christus Dominus*, on the pastoral office of bishops, urges that the "bishop should be solicitous for the welfare- spiritual, intellectual, and material - of his priests, so that they may live holy and pious lives, and exercise a faithful and fruitful ministry." In addition, the "bishop should be compassionate and helpful to those priests who are in any kind of danger or who have

14 June 1994, in *Monitor ecclesiasticus*, 122 (1992), pp. 90-95. Colagiovanni argued that the intense sexual urges associated with pedophilia diminish freedom and lessen responsibility.

failed in some respect.”¹³⁹ The decree, *Presbyterorum ordinis*, also urges bishops to “regard their priests as brothers and friends and [...] to take the greatest interest they are capable of in their welfare both temporal and spiritual.”¹⁴⁰

This conciliar teaching is translated into legislation in c. 384, and the concern is given concrete form:

He is to have a special concern for the priests, to whom he is to listen as his helpers and counsellors. He is to defend their rights and ensure that they fulfill the obligations proper to their state. He is to see that they have the means and the institutions needed for the development of their spiritual and intellectual life.¹⁴¹

While this concern for his priests may be exercised readily and with ease when there are no particular problems, the situation of a priest accused of a sexual offence may cause particular angst. At such times, the responsibility of the bishop to defend the rights of an accused priest in light of the common good can be most needed and most challenged. Either of two extreme approaches must be avoided. On the one hand, in aiming to respond to a critical situation, the bishop must take care to avoid denying the priest his rights. On the other hand, he must ensure that, while trying to protect the priest's rights, he takes appropriate action. Sound diocesan policy should ensure that either extreme is avoided.

¹³⁸ Vatican II, Dogmatic Constitution, *Lumen gentium*, 21 November 1964, n. 28, in AAS, 57(1965), p. 35, in FLANNERY I, p. 386.

¹³⁹ VATICAN II, Decree, *Christus Dominus*, 28 October 1965, n. 16, in AAS, 58 (1966), in FLANNERY I, p. 573.

¹⁴⁰ VATICAN II, Decree, *Presbyterorum ordinis*, 7 December 1965, n. 7, in AAS, 58 (1966), p. 1002, in FLANNERY I, p. 876.

¹⁴¹ CCEO c. 192 §4 parallels CIC/1983 c. 384.

2.3.2 – RIGHT TO THE SUPPORT OF BROTHER PRIESTS

Just as he is entitled to the support of his bishop, so the diocesan priest has a right to the support of his confreres. Several of the documents of Vatican II encouraged this mutual support. *Lumen gentium*, for example, reads:

In virtue of their sacred ordination and of their common mission all priests are united together by bonds of intimate brotherhood, which manifests itself in a spontaneously and gladly given mutual help, whether spiritual or temporal, whether pastoral or personal, through the medium of reunions and community life, work and fraternal charity.¹⁴²

Not surprisingly, *Presbyterorum ordinis* urges this support and provides particular suggestions.¹⁴³ Three times, *Presbyterorum ordinis* urges support for those in need: “They should be particularly concerned about those who are sick, about the afflicted, the overworked, the lonely, the exiled, the persecuted.” The document continues, “in order to enable priests to find mutual help in cultivating the intellectual and spiritual life, ... to safeguard them from possible dangers arising from loneliness, it is necessary to foster some kind of community life or social relations with them.” The decree then enforces the message of support, in yet stronger language:

Finally, because of the same brotherly bond of priesthood, priests ought to realize that they have an obligation towards those labouring under difficulties. They should offer timely help to them, even by discreetly warning them where necessary. They ought always to treat with fraternal charity and compassion those who have failed in certain ways. They should

¹⁴² *Lumen Gentium*, n. 28, in AAS 57 (1965), p. 35, in FLANNERY I, p. 386. *Christus Dominus* urges this cooperation for the sake of the ministry to the people of God. See *Christus Dominus* nn. 28, 30, in AAS 58 (1966), pp. 687, 688, in FLANNERY I, pp. 580, 581.

¹⁴³ *Presbyterorum ordinis* grounds this responsibility to their brother priests on the intimate sacramental brotherhood, the one priestly service of the people of God in the diocese, the special ties of apostolic charity of the ministry and brotherhood and the signs of unity with which Christ willed his own to be united. This unity is signified liturgically by the imposition of hands at ordination and by concelebration of the Eucharist. *Presbyterorum Ordinis* n. 8, in AAS, 58 (1966), p. 1004, in FLANNERY I, p. 878-879.

pray earnestly to God for them and never cease to show themselves genuine brothers and friends to them.¹⁴⁴

The canons based on this understanding, (cc. 275 and 280) demand a careful reading of these documents in order to appreciate their meaning. Against the background of these Vatican documents, the formulation of these canons presents a minimalist position.

2.3.3 – RIGHT TO SUPPORT (CANON 281)

The Vatican Council affirms the right of the clergy to financial support. *Presbyterorum ordinis* n. 20 affirms that because priests are committed to the service of God in the office entrusted to them, they deserve a just remuneration. This remuneration should be in keeping with their status, and should be the same for all in the same region holding a similar office. The level of the remuneration should be such that they are able to provide for their own needs and pay the salaries of those they employ. In addition they should be able to contribute to the needs of the poor. Given that the priest has a right to continuing education and spiritual formation, his remuneration should provide for these items also.¹⁴⁵

The faithful have the obligation to ensure this support; when it is not forthcoming, the bishop has an obligation to warn them of their responsibility.¹⁴⁶ The bishop is to make provision for the support of those priests who retire Canon 281 expresses this conciliar teaching.¹⁴⁷ While the first paragraph expresses the general provisions, the second

¹⁴⁴ *Presbyterorum Ordinis*, n. 8, in AAS, 58 (1966), p. 1005, in FLANNERY I, p. 879-880.

¹⁴⁵ See *Presbyterorum Ordinis*, n. 19, in AAS, 58 (1966), p. 1020, in FLANNERY I, p. 898.

¹⁴⁶ See *Presbyterorum Ordinis*, n. 20, in AAS, 58 (1966), p. 1021, in FLANNERY I, p. 899.

¹⁴⁷ See *Christus Dominus*, n. 31, in AAS, 58 (1966), p. 689, in FLANNERY I, p. 583.

paragraph specifies that the needs of clerics must be met in times of infirmity, sickness or old age. Canon 1274 directs that a special fund be established to provide support for clergy "who serve the diocese." Support for those who are unable to serve the diocese must be considered.

The wording of c. 281 §2 does not suggest that this is a taxative list. Likewise, in most dioceses, the wording of c. 1274 has been interpreted as those who are currently serving the diocese and those who have served the diocese but are no longer able to do so. Accordingly, the diocese ought to provide for the needs of a priest who is not able to minister because of a delict. On the other hand, for a person who is not able to exercise ministry because of a sexual delict against a minor, one could argue that any debt that he has incurred because of the offence, he has incurred through his own actions and therefore, he alone is liable. Hence the diocese should not support him financially. However, the Code provides a balance. Referring specifically to the imposition of penalties, c. 1350 specifies "except in the case of dismissal from the clerical state, care must always be taken that he does not lack what is necessary for his worthy support." Further, the Ordinary is to provide in the best way possible for a person who is "truly in need because he has been dismissed from the clerical state."¹⁴⁸

A related question concerns an accused person receiving financial assistance from the diocese to obtain the advice of both secular and canon lawyers. Two values underlie this situation. Firstly, a cleric has a right to defend his name. To do this, he needs the advice of secular and canon lawyers. Secondly, the presumption of innocence requires that all presume his innocence until he either admits to the offence, or guilt is established

by a judicial procedure. On the basis of these two values, it seems appropriate for the diocese to provide assistance, if necessary, in the form of a loan. In the past, some dioceses avoided offering assistance to a cleric for legal advice on the basis that such action could be perceived either as the diocese's acknowledging responsibility for the person's misdeeds or as its protecting the accused from the law. Because of the complexities of the matter, it seems appropriate that the provision of legal advice should be the subject of diocesan policy that has sufficient leeway to provide for the range of situations of clerics. In the case of religious being accused, it is essential that superiors provide for legal advice as religious have no personal funds.

2.3.4 – RIGHT TO MINISTRY

The question of whether or not a cleric has a right to ministry is not completely clear. The Vatican documents presume a commitment to the service of the particular church,¹⁴⁹ yet, at times, it seems that the right to minister derives from both ordination and the mission received from the bishop,¹⁵⁰ while in other places, ministry and ordination seem to be intrinsically linked.¹⁵¹

CCEO c. 371 §1 clarifies: "Having fulfilled the requirements of law, clerics have the right to obtain from their eparchial bishop an office, ministry, or function to be exercised in the service of the Church." While no expression of this right to ministry is found in CIC/1983, the corresponding obligation to fulfill the ministry entrusted to them

¹⁴⁸ Canon 1350 §2. Cf. CCEO c. 1410.

¹⁴⁹ *Christus Dominus*, n. 28, in AAS, 58 (1966), p. 687, in FLANNERY I, p. 580, *Presbyterorum Ordinis* n. 6, in AAS, 58 (1966), p. 1000, in FLANNERY I, p. 874.

¹⁵⁰ See *Presbyterorum Ordinis*, n. 1, in AAS, 58 (1966), p. 991, in FLANNERY I, p. 863.

¹⁵¹ See *Presbyterorum Ordinis*, n. 7, in AAS, 58 (1966), p. 1005, in FLANNERY I, p. 876.

is found in both the Latin and the Eastern codes. However, the meaning of CCEO c. 371 §1 is embodied throughout CIC/1983. For example, a priest cannot be removed from the office of pastor without a just reason, nor can he be transferred. Even when he reaches the age of seventy-five he may offer his resignation, but need not do so.¹⁵²

CCEO c. 381 §2 may be interpreted as providing further clarification. Clerics are bound to provide for the spiritual needs of the faithful unless they are constrained by a just impediment.¹⁵³ This canon suggests that there are three situations only when a cleric cannot exercise ministry: he is constrained by a just penalty; he is impeded according to law, or restrictions have been imposed after a penal trial has commenced. In other words, a priest has a right to ministry, however, this right, as all rights, must be exercised in the context of the common good.

CONCLUSION

In this chapter we have considered the rights of the People of God, in particular, the rights of those accused of sexual offences and ways in which these rights ought to be protected. In the context of sexual offences committed against minors, the rights of the person offended, the rights of the offender and the rights of the community all need to be considered. The goals of penal law, the repair of harm that has been done, the reform of the offender and the repair of scandal, are a reminder of all who are involved.

¹⁵² CIC/1983 c. 538 §3.

¹⁵³ While the Eastern Code does not use the term “irregularity”, the impediments of CCEO are substantially the same as the irregularities and impediments of CIC/1983.

In the first instance, the Church attempts to repair scandal by clearly and emphatically condemning the offence. The Church also must avoid further scandal by acting with justice towards the persons offended against and the offenders.

As well as repairing scandal, the Church aims to reform the offender. Reform of the offender is not only a goal of the penal law of the Church, but is also fundamental to the Church's understanding of the Redemption, the Christian life, the sacrament of penance. Furthermore, the reform of the offender achieves two ends, namely conversion and the prevention of future offences. Consequently, the Church must persevere with this goal whether or not the offender remains in priesthood or religious life.

To ensure a just response to accusers and accused, the Church in Australia, Canada, United Kingdom, Ireland, New Zealand and the United States has established policies and procedures that complement universal law. Most take the form of public documents, whose procedures or recommendations embody the defence of rights. Should Church authorities in any of these countries choose not to abide by their policies, then their own public documents condemn them. Commitment to the procedures signifies a desire to achieve the stated goals and to avoid further scandal.

While policies and procedures of episcopal conferences and dioceses present refinements of universal law, nevertheless, questions remain about appropriate procedures and outcomes in particular situations. The complexity of cases is evidenced by the derogations granted by John Paul II during the period following the publication of *Sacramentorum sanctitatis tutela*. Obviously, these derogations illustrate that while certain practices and laws should be maintained, they can be dispensed with in a particular situation. Therefore, the values inherent in the law must be interpreted in the

context of the particular situation, not only in terms of seeking dispensations, but also in terms of the imposition of a penalty. While both c. 1395 §2 and Art. 4 of the Norms provide for dismissal from the clerical state, neither require that this penalty be imposed. The question ought to be clearly addressed as to whether or not it is the appropriate penalty in every situation.

Apart from a person's own repentance, the Church has always used penances as a means to reform and a sign of it. The imposition of a penalty by a Church authority is a sign of condemnation of the action and of a commitment to the reform of the offender. On his part, the acceptance of a penance by an offender constitutes a sign of willingness to reform and to repair harm. Hence, their purpose has always been both expiatory and medicinal. Pope John Paul II recognized their value in fostering communion.

Even the penalty that is threatened by an ecclesiastical authority – although in reality it is simply a recognition of a situation in which the subject has put himself or herself – is seen as a means of fostering communion, that is, as a means of repairing those deficiencies in the individual good and the common good that have come to light in the anti-ecclesial, criminal and scandalous behaviour of the members of the People of God.¹⁵⁴

While penalties have been avoided in the past, it may be that the present circumstances will provide the opportunity for a review of their use in certain circumstances as a sign of repentance.

Issues raised in this chapter provide the impetus for the formation of the laity. Although most members of the faithful have little knowledge of the Church's penal law, yet they have an understanding of the right to be judged according to law. Therefore, information could be given to the faithful so that they can appreciate some of the

differences between secular law and ecclesiastical law. Further, education on the goals of the Church's penal law may promote an appreciation of the difficulties faced by Church authorities, but also of the need for a multi-faceted and on-going response to the persons involved.

Following the third revision principle, the laws are to be marked by "a spirit of charity, temperance, humaneness, and moderation." The application of the law in circumstances of accusations of sexual offences against minors should witness to the pastoral role of the Church's law and, in particular, of CIC/83. This witness assumes greater significance in the context of media attention. The tensions between balancing the rights of a victim, the rights of the accused and the rights of the community demand input from a range of people, as well as input and understanding of many people. This understanding will be promoted through formation and communication of the issues involved in the Church's procedures and through education in the complex issue of sexual abuse.

The requirements of canon law as well as documents, such as *Towards Healing*, provide opportunities for the development of policies for dioceses and religious institutes. Such policies might relate to the imposition of the restrictions and prohibitions of c. 1722: what can an accused person expect in relation to remuneration, and financial support during the period of administrative leave? What can the person expect in terms of announcements made to a parish or to other members of a community or to the institute? What assurances can an accused person have about the information that will be given to

¹⁵⁴ POPE JOHN PAUL II, Allocution to the Roman Rota, 17 February 1979, in AAS, 71 (1979), p. 426, English translation in WOESTMAN, *Papal Allocutions*, p. 156.

his brother priests? What can an accused person expect in terms of personal support from his confreres and from the bishop or superior? Can a priest incardinated in a diocese be assured of canonical counsel and secular law counsel even though he may not have the personal funds to obtain these? The development of policies, particularly when the members have input, prior to the application of any decisions to a particular accused person, can lead to a greater level of acceptance on the part of the religious or presbyterate.

In the light of all that has been said, the question of how the Church appears to be just in a society that has come to recognize the gravity of child sexual abuse is not completely resolved. Pope John Paul II affirmed the Church's responsibility:

[T]he task of the Church and her historical merit, which is to proclaim and defend in every place and in every age the fundamental human rights, does not except her, but, on the contrary, obliges her to be herself a mirror of justice for the world. In this regard, the Church has her own proper and specific responsibility.¹⁵⁵

Sixteen years later, while again asserting human rights, he acknowledged particular need for the recognition of human dignity, when he spoke of "an ever greater esteem for humans' sublime nobility, their inviolable rights, the respect owed to them even when their actions and behaviour become the object of judicial investigation on the part of legitimate authority in general or of ecclesial authority in particular."¹⁵⁶ The Church continues to face this challenge.

¹⁵⁵ POPE JOHN PAUL II, Allocution to the Roman Rota, 17 February 1979, in AAS, 71 (1979), p. 423, English translation in WOESTMAN, *Papal Allocutions*, p. 154.

¹⁵⁶ POPE JOHN PAUL II, Allocution to the Roman Rota, 10 February 1995, in AAS, 87 (1979), p. 1014, English translation in WOESTMAN, *Papal Allocutions*, p. 232.

We have now looked at the efforts of the Church in various countries to deal with the issue of the sexual abuse of minors; we have seen the efforts of the Holy See to provide an appropriate procedure for certain cases. The practice of the past twenty years has resulted in some problems. While growth in understanding of sexual offences, refinement of procedures, increasing commitment to the protection of rights, seeks to minimise the problems, nevertheless some still happen. A number of these will be studied in the next chapter.

CHAPTER IV

UNRESOLVED CANONICAL ISSUES

INTRODUCTION

The universal law of the Church appears to be clear and adequate in addressing the legal issues surrounding the sexual abuse of minors. Likewise, *Towards Healing* and *Integrity in Ministry*, developed by the bishops and the leaders of religious institutes in Australia, provide clear guidance for just and pastoral responses to those who have been affected by incidents of abuse and for the prevention of abuse by clergy and religious. Nevertheless, certain unresolved issues remain. In this chapter we identify a number of them that could eventually give rise to difficulties.

1 – ISSUES ARISING FROM *TOWARDS HEALING AND INTEGRITY IN MINISTRY*

We commence by examining issues that arise from *Towards Healing* and *Integrity in Ministry*. Some of these are also found in one or more of the documents of the United States, Canada, Ireland, England and Wales, Scotland and New Zealand.¹ We commence

¹ UNITED STATES CATHOLIC CONFERENCE OF BISHOPS, *Essential Norms for Diocesan/Eparchial Policies Dealing with Allegations of Sexual Abuse of Minors by Priests or Deacons* (=Essential Norms), 2002, in *Origins*, 32 (2002-2003), 415-418 and *Charter for the Protection of Children and Young People*, Revised Edition, 2002 in *Origins*, 32 (2002-2003), 409, 411-415. CANADIAN CONFERENCE OF CATHOLIC BISHOPS, *From Pain to Hope: Report from the Ad Hoc Committee on Child Sexual Abuse*, Ottawa, Canadian Conference of Catholic Bishops, 1992. IRISH CATHOLIC BISHOPS' ADVISORY COMMITTEE ON CHILD SEXUAL ABUSE, *Child Sexual Abuse: Framework for a Church Response: Report of the Irish Catholic Bishops'*

by considering the approach adopted by the Church, followed by an examination of certain procedural issues. We shall then look at matters related to the outcome of the processes.

1.1 – APPROACH

The response of the Catholic Church in various countries exhibits three distinct focuses. The first relates to the nature of the abuse itself: whether the response is limited to sexual abuse or encompasses all forms of abuse; the second concerns the victim of the abuse: the documents are either limited to children or apply to both children and adults; the third concerns the perpetrator of the abuse, where again we find that several possible approaches have been adopted: the documents apply only to clergy, or apply to clergy and religious, or to all Church personnel. The basis for these different approaches deserves consideration.

1.1.1 – ABUSE IN GENERAL OR AN EXCLUSIVE FOCUS ON SEXUAL ABUSE

As was seen in both Chapters One and Two, sexual abuse of children was not infrequently perpetrated on children in residential care.² Given the culture of the time, sexual offences were sometimes associated with other forms of abuse, e.g. physical or emotional abuse. In some countries, publicized offences occurred mostly in residential

Advisory Committee on Child Sexual Abuse by Priests and Religious, Dublin, Veritas, 1996. CATHOLIC BISHOPS CONFERENCE OF ENGLAND AND WALES, *A Programme for Action: Final Report of the Independent Review on Child Protection in the Catholic Church in England and Wales*, September 2001. BISHOPS' CONFERENCE OF SCOTLAND, *Child Sexual Abuse: Report Commissioned by the Bishops' Conference of Scotland*, 1996. NEW ZEALAND CATHOLIC BISHOPS CONFERENCE AND THE CONGREGATIONAL LEADERS CONFERENCE OF AOTEAROA-NEW ZEALAND, *Te Houhanga Rongo A Path to Healing: Principles and Procedures in Responding to Complaints of Sexual Abuse by Clergy and Religious of the Catholic Church in New Zealand*, 2001, unpublished, distributed by New Zealand Catholic Bishops Conference.

institutions conducted by the state through the instrumentality of religious institutes. Situations such as this demanded that the Church respond to any form of abuse of children by clergy or religious.³ In other countries, the majority of instances that were publicized were of sexual abuse of children. Consequently, in these places the Church's response focussed primarily on, but was not limited to, the sexual abuse of minors.

The Church condemns all forms of abuse against children. However, Church law recognizes that some more acute forms of abuse also constitute a canonical delict; for example, c. 1395 §2 which refers to specific forms of sexual abuse and c. 1397 which treats of grave physical wounding of a person.⁴ On the other hand, the infliction of emotional wounds is not a canonical delict. Consequently, an allegation of physical abuse, that consists of less than grave wounding, or an allegation of emotional abuse, cannot result in a canonical penal procedure.

Nevertheless, an approach that condemns abusive behaviour, even if it does not constitute a defined canonical delict, affirms the dignity of the person and gives witness to the Church's consistent teaching on the value of human life. Of necessity, this implies that different procedures are required in responding to complaints. Whereas an allegation of sexual abuse may well require a penal procedure, an allegation of misconduct or of emotional or physical abuse calls for an approach that encourages the offender to review

² See Chapter One, pp. 19 (Canada), 23 (England), 25 (Northern Ireland), 24 (Wales), and 91 (Australia).

³ Ireland and Canada exemplify this approach. In these situations, the state also addressed all forms of abuse against children.

⁴ To date, in the countries considered, such grave wounding has either not occurred, or has not been made public.

his or her actions, to apologise to the offended person, and even to make restitution for harm done.

1.1.2 – SEXUAL ABUSE IN GENERAL OR SEXUAL ABUSE OF CHILDREN

The question of whether or not the Church's policy and procedures should address allegations of sexual abuse with adults or even sexual misconduct needs to be considered. As we noted in the first chapter, an increased awareness of women's issues led to a new consciousness of domestic violence and then to an inchoate understanding of child sexual abuse.⁵ So, while sexual offences against adults and children have been considered in terms of society's awareness and response, nevertheless, for numerous reasons, sexual abuse of minors has been the primary focus of attention.⁶

The definition of a minor differs from one secular jurisdiction to another. Even within the same jurisdiction, sexual offences may differ depending on the age of the victim. In Church law differences are also found. Whereas c. 97 §1 defines a minor as a person who has not completed the eighteenth year of age, c. 1395 §2 as first promulgated limited the delict of sexual abuse of a minor to those acts committed with a person under the age of sixteen.⁷ However, in 2001 the Norms of *Sacramentorum sanctitatis tutela*

⁵ See Chapter One, p. 1.

⁶ Some reasons include: awareness of the possible long-term effects of childhood sexual abuse, the change in culture that now encourages victims to come forward as opposed to a previous culture that discouraged disclosure; the recognition of paedophilia as a paraphilia; the recidivist nature of the problem; the recognition of mishandling by government and church authorities; society's will to address the previous inadequacy of laws to prosecute offenders and to prevent further incidents. However, the recognition of the fact that children, unlike adults, are incapable of giving consent to any sexual activity with an adult, almost certainly constitutes one of the most significant reasons.

⁷ The reason for this age limitation is not clear from the discussions during the revision process. Two reasons suggest themselves. Firstly, based as it is on CIC/1917 c. 2359 §2, c. 1395 §2 repeats the same age limit contained in the earlier canon. The question of the age of a minor

raised the age to eighteen years.⁸ Previously, the derogation applicable for the United States, effective 25 April 1994 (and extended for a further ten years on 26 April 1999) provided "With regard to canon 1395, §2, 2°: this norm is to be applied to delicts committed with any minor as defined in canon 97, §1, and not only with a minor under sixteen years of age." Both this derogation and the new norms indicate that the age restriction found in the previous law was not adequate to the situation.

While c. 1395 §2 encompasses not only sexual offences against minors but also offences against adults, as well as those committed with force, threats or in public, these different offences require different procedures.⁹ Following the promulgation of the 1983 *Code of Canon Law* and prior to the Norms of *Sacramentorum sanctitatis tutela*, the same procedures could be used whether or not an offence was committed with a minor under the age of sixteen or with an adult, provided that it was a canonical delict.¹⁰ The

was not discussed during the revision process. See *Communicationes*, 9 (1977), p. 316. Secondly, c. 1323 1° and c. 1324 §1 4° distinguish between a minor under the age of sixteen years and one aged over sixteen but not yet eighteen. The former is not liable to any penalty in the Church while the latter is liable for a diminished penalty. This distinction implies a recognition of the developing maturity of a sixteen year old.

⁸ Norms of *Sacramentorum sanctitatis tutela*, Article 4 §1, in WOESTMAN, *Ecclesiastical Sanctions and the Penal Process*, pp. 304-305.

⁹ Previously, CIC/1917 c. 2359 encompassed a range of sexual offences. *Crimen sollicitationis* established a procedure for dealing with a subset of these. Hence, homosexual acts and sexual offences with a child, *impubis*, and bestiality were dealt with according to *Crimen sollicitationis*, while other offences of c. 2359 were dealt with according to ordinary penal procedures. Implicit in this grouping and the terminology used, "the worst crime" is a perception of these offences as being contrary to nature. Thus the distinction in the procedure was based not so much on age as on the nature of the offence. See SACRED CONGREGATION OF THE HOLY OFFICE, Instruction, *Crimen sollicitationis*, 16 March 1962, Rome, The Vatican Press, 1962, nn. 71-73, and SUPREMAE S. CONGREGATIONIS S. OFFICII, *Instructio, De modo procedendi in causis sollicitationis*, Romae, Typis Polyglottis Vaticanis, 1922, nn. 71-73.

¹⁰ Whether or not *Crimen sollicitationis* was *ius vigens* in the period between the promulgation of the 1983 *Code of Canon Law* and the Norms of *Sacramentorum sanctitatis tutela* is not completely clear. The practice of diocesan bishops in referring cases to the Congregation for the Clergy, rather than to the CDF, suggests that the situation was unclear. However,

previous specification of prescription contained in c. 1362 §1 applied not only to offences against children, but also to the other delicts of c. 1395 §2. One can thus conclude that the Church condemns sexual offences against all persons. Therefore, an approach that condemns all offences yet ensures that different procedures are utilised according to circumstances, is entirely consistent with universal law and sound pastoral practice.

1.1.3 – CLERGY, RELIGIOUS, CHURCH PERSONNEL

In *Towards Healing 1996*, the Church leaders in Australia were concerned with sexual abuse committed by clergy and religious. In *Towards Healing 2000*, they broadened the scope to include abuse committed by Church personnel. Scotland took the same approach.¹¹ The bishops in the United States developed their *Essential Norms* for offences committed by clerics and other Church personnel.¹² Ireland's document considers offences committed by clergy and religious, as does New Zealand's *Te Houhanga Rongo A Path to Healing*.¹³ Given these varying approaches, a question naturally arises, as to the relative value of each.

according to c. 6, all penal law enacted by the Holy See was abrogated when the CIC/1983 came into force. This was not the case for procedural law. Confusion may have resulted from both the nature of *Crimen sollicitationis* as procedural law or penal law, and the secrecy surrounding the document.

¹¹ *Child Sexual Abuse*, 1.1.

¹² *Essential Norms*, Norm 2.

¹³ *Framework for a Church Response*, 3.3. New Zealand's document contains notes to the effect that, for the purposes of the document, seminarians are considered as clerics and those who have been admitted to a religious institute's formation program are considered religious. *Te Houhanga Rongo A Path to Healing*. Procedures, 2.12, 2.17. A clear distinction must be made in that the c. 1395 does not apply to seminarians nor to a person admitted to a religious formation programme. Therefore, the procedures that apply to either of these groups of people exclude penal processes.

Several arguments can be presented for a “clerics only” approach. Firstly, c. 1395, like its counterpart CIC/1917 c. 2359, refers to offences committed by clerics.¹⁴ Secondly, *Crimen sollicitationis* reserved to the Holy Office certain sexual offences committed by clerics, whether secular or religious.¹⁵ Thirdly, prior to the progress in understanding of the consequences of sexual offences over the past twenty or thirty years, it was generally considered that sexual offences against minors were perpetrated only by men. Finally, the Norms of *Sacramentorum sanctitatis tutela* apply specifically to sexual offences committed by clerics. Article 4 states:

§1. Reservation to the Congregation for the Doctrine of the Faith is also extended to the delict against the sixth commandment of the Decalogue committed by a cleric with a minor below the age of eighteen years.¹⁶

This norm clearly indicates that the CDF distinguishes, for the time being, between an offence committed by cleric and one committed by a religious.

However, a “clerics only” approach results in several inconsistencies. If the offence is considered primarily as one against the obligation of celibacy, then the matter should be treated similarly whether it was committed by a cleric or a religious. This would necessitate an interpretation of c. 1395 taken together with c. 695 or else a clarification of c. 1395 so that it would include both clerics and religious, as do cc. 1392 and 1394. If it is not an offence against celibacy, then is it an offence against the clerical state? Alternatively, if it is an abuse of authority, then as the leaders of the Church in Australia recognize, others, besides clerics, also exercise authority in the Church.

¹⁴ In turn, this canon related to cc. 2176-2180, under Title XXXI, *De modo procedendi contra clericos concubinos*.

¹⁵ *Crimen sollicitationis*, n. 4

An approach that includes clergy and religious can be argued more readily. Firstly, while c. 1395 limits the offence to clerics, c. 695 applies the same norm to religious. As a consequence, religious may be dismissed from their institutes for these offences. Secondly, in the rite of ordination, clerics promise to observe celibacy and in the rite of religious profession, religious vow chastity, and so must live celibately.¹⁷ Thirdly, in these public ceremonies, both clerics and religious commit themselves to serve the Church.¹⁸ So, whether the offence is an offence against celibacy, or against the commitment to serve the Church, the positions for both clerics and religious are not dissimilar. Accordingly, an approach encompassing offences by clergy and religious would not be based on a perception of hierarchy, but on the nature and substance of their commitment to the Church.

So to a third approach, looking at the matter from the perspective of current ecclesiastical law, and not in theory, an argument that encompasses all Church personnel is difficult to sustain. CIC/1983 does not refer to delicts of a sexual nature committed by lay persons. Interestingly enough, CIC/1917 contained two canons related to offences against the sixth precept, one concerning laity and the second, c. 2358, concerning clerics in minor orders. Canon 2357 of the Pio-Benedictine Code stated:

§1 Laity legitimately convicted of a delict against the sixth [commandment of the Decalogue] with a minor below the age of sixteen, or

¹⁶ Norms of *Sacramentorum sanctitatis tutela*, Article 4, in WOESTMAN, *Ecclesiastical Sanctions and the Penal Process*, pp. 304-305.

¹⁷ Canon 1037 prescribes that a candidate to the permanent diaconate or to priesthood is not to be admitted to diaconate unless he has undertaken, publicly and according to the prescribed rite, the obligation of celibacy.

¹⁸ See *Ordo professionis religiosae, Ex decreto Sacrosancti Oecumenici Concilii Vaticani II instauratus auctoritate Pauli PP. VI promulgatus*, Romae, Typis Polyglottis Vaticanis, 1975, Praenotanda, n. 2.

of debauchery, sodomy, incest, or pandering, are by that fact infamous, besides other penalties that the Ordinary decides should be inflicted.

§2 Whoever publicly commits the delict of adultery, or publicly lives in concubinage, or who has been legitimately convicted of another delict against the sixth precept of the Decalogue is excluded from legitimate ecclesiastical acts until he gives a sign of returning to his senses.¹⁹

A parallel to this canon is not found in CIC/1983. Apart from the general principle of diminishing penalties in the new Code, the reasons against the inclusion of some form of this canon are not clear. An argument that there should not be a penalty for offences of a sexual nature committed by a lay person because of the difficulty of inflicting a penalty on such a person is inconsistent with the approach of other canons on delicts. Canon 1395 aside, apart from those delicts that can be committed only by a cleric,²⁰ all the delicts mentioned in Book VI of the Code are not delicts because of the person who commits them, but because of the will of the legislator.²¹ However, the Code recognizes that some

¹⁹ Canon 2357 “§1 Laici legitime damnati ob delicta contra sextum cum minoribus infra aetatem sexdecim annorum commissa, vel ob stuprum, sodomiam, incestum, lenocinium, ipso facto infames sunt, praeter alias poenas quas Ordinarius infligendes iudicaverit.

§2 Qui publicum adulterii delictum commiserint, vel in concubinato publice vivant, vel ob alia delicta contra sextum decalogi praeceptum legitime fuerint damnati, excludantur ab actibus legitimis ecclesiasticis, donec signa verae respicientiae dederint.”

This canon is different from the parallel canon for clergy in that its focus is the exclusion from ecclesiastical acts of persons either found guilty in a secular court or having committed adultery publicly or living in concubinage, rather than the imposition of a penalty.

²⁰ Delicts that are limited to clerics are specified in cc. 1378 (absolution of a partner in a sin against the sixth commandment), 1382 (episcopal consecration without a mandate), 1383 (ordination without dimissorial letters), 1387 (solicitation in confession), and 927 (consecration of one Eucharistic element without the other for a sacrilegious purpose or of both outside a Eucharistic celebration); those that can be committed by clerics or religious only are found in c. 1392 (engaging in illicit trade), 1394 (attempted marriage), and 1396 (obligation of residence).

²¹ The commission of these delicts may result in the offender's incurring a greater penalty if he is a cleric. For example, cc. 1364 (apostasy, heresy, schism), 1367 (throwing away the consecrated species), and 1370 §§ 1, 2 (use of physical force against the Pontiff, or a bishop).

offences are more serious when committed by a cleric and so, in these instances, provides for the imposition of more severe penalties.

Accordingly, although an approach that considers in the same fashion offences committed by clergy and religious will be more consistent with the present *Code of Canon Law*, one that encompasses offences committed by all Church personnel would be more consistent with an ecclesiology of communion. It would also be more consistent with the present reality in which the number of lay persons who are engaged in the Church's pastoral care, including health and education, far outweighs the number of clerics or religious.

1.1.4 – COLLABORATIVE DEVELOPMENT OF THE AUSTRALIAN DOCUMENTS

The conference of major superiors, ACLRI, actively cooperated in the development of *Towards Healing and Integrity in Ministry*. This approach is consistent with the three purposes of such a conference, as stated in c. 708: "by combined effort they may work to achieve more fully the purpose of each institute .. [to] deal with the affairs that are common to all and ... to establish suitable coordination and cooperation with the Bishops' Conferences and with individual Bishops."²² These three purposes were

22 Canon 708. "... collatis viribus, allaborent sive ad finem singulorum institutorum plenius assequendum ... sive ad communia negotia pertractanda, sive ad congruam coordinationem et cooperationem cum Episcoporum conferentiis et etiam cum singulis Episcopis instaurandam."

The *raison d'être* for the conference of major superiors, a structure that was not present in CIC/1917, is found in several documents of Vatican II. See *Christus Dominus* n. 35, in AAS 58 (1966), *Perfectae caritatis* n. 23 and *Ad gentes*, n. 33. See also PAUL VI, *Ecclesiae Sanctae* II, 6 August 1966, n. 43, in FLANNERY I, p. 633, and SACRED CONGREGATION FOR RELIGIOUS AND SECULAR INSTITUTES and SACRED CONGREGATION FOR BISHOPS, *Mutuae relationes*, 23 April 1978, n. 63, in AAS, 70 (1978), p. 504, in FLANNERY II, p. 242.

advanced in this particular instance. As well, this approach embodies the purposes and values of c. 1316, which seeks uniformity of legislation in a region.

The practical advantages of such an approach include the sharing of wisdom and experience, the establishment of a single set of structures for responding to allegations, increased cooperation in preventative and educational measures. In addition, the Church is perceived, by its members, to be speaking with a single voice. Furthermore, it is perceived by those outside the Church to be united in responding to the abuse of minors.²³ As well, this approach has encouraged cooperation between bishops and major superiors in providing for clerics who have admitted to or have been found guilty of such an offence.

However, in spite of its numerous advantages, the adoption of a cooperative approach between the conference of major superiors and the conference of bishops raises issues relating to particular law. And so this matter is considered next.

1.1.5 – POLICY OR LAW

As we have seen in the second half of Chapter One, the Church in the various countries studied has taken different approaches. Thus the USCCB developed *Essential Norms* for which it received the *recognitio* of the Apostolic See. Having the nature of particular law, these norms serve as mandatory positions, providing the basis for each

²³ While condemning previous inadequacies, the Wood Royal Commission praised the response of the Catholic Church to issues raised in the commission, Royal Commission into the New South Wales Police Service, *Final Report, Vol V: The Paedophile Inquiry*, p. 992. In the United Kingdom, the Nolan Review acknowledged “that the most desirable outcome would be a single set of policies adopted throughout the Church in England and Wales (including religious orders). So, while we recognise that bishops and religious superiors are each fully responsible for their own policies and arrangements, we recommend that they work together through the National

diocesan bishop to develop diocesan policy and procedures. In contrast, the documents of Canada, Scotland, England and Wales, simply provide recommendations to the diocesan bishops and others. Hence, in these countries, while the bishops may have adopted the recommendations, nevertheless, the freedom not to do so remains. Ireland's document also presents guidelines for bishops and religious institutes to develop their own policies and procedures. However, these are more specific and concrete than those of the other countries. On the other hand, Australia and New Zealand are distinct in that the policy and procedures have been developed on a national level and simply require the individual dioceses and religious institutes to commit to them.

Is it necessary or advisable to make such procedures particular law? Although concerned directly with the revision of the *Code of Canon Law*, the third principle of revision helps provide an answer to this issue:

To foster the pastoral care of souls as much as possible, the new law, besides the virtue of justice, is to take cognizance of charity, temperance, humaneness and moderation, whereby equity is to be pursued not only in the application of the laws by pastors of souls but also in the legislation itself. Hence unduly rigid norms are to be set aside and rather recourse is to be taken to exhortations and persuasions where there is no need of a strict observance of the law on account of the public good and general ecclesiastical discipline.²⁴

This principle reflects the teaching of Pope John XXIII in *Pacem in terris*:

In [man's] association with his fellows ... there is every reason why his recognition of rights, observance of duties, and many-sided collaboration with other men, should be primarily a matter of his own personal decision. Each man should act on his own initiative, conviction and sense of responsibility, not under the constant pressure of external coercion or enticement. There is

Child Protection Unit ... to develop and implement such a single set of arrangements." *A Programme for Action*, 2.5.1.

²⁴ *Code of Canon Law: Latin-English Edition*, New English translation, Prepared under the auspices of the Canon Law Society of America, Washington DC, Canon Law Society of America, 1998, Preface, p. xxxvi.

nothing human about a society that is welded together by force. Far from encouraging, as it should, the attainment of man's progress and perfection, it is merely an obstacle to freedom.²⁵

The development and use of policy, rather than law, reflects the values expressed in these statements.

In each document we find an articulation of the intention to abide by canon law. Being consistent with the universal law of the Church, the procedures may not require the status of particular law. However, in some instances, the policies and procedures may go beyond current universal law either in relation to the delict or as regards the processes. For example, in the case of the actual delict specified in c. 1395, the use of a mandatory penalty of dismissal from the clerical state extends the requirement of the canon. In terms of processes, the imposition of administrative leave during a preliminary investigation, while its use may be wise, does not have the support of universal law. Likewise, if, on the basis of particular law, the Ordinary was required to request a dispensation from prescription in every case, even if he did not wish to proceed, then this too would go beyond universal law.²⁶

Nevertheless, neither the approach adopted in Australia and New Zealand, nor that taken in Canada, Ireland, England and Wales, and Scotland, prevents any diocesan bishop from promulgating particular law for his diocese. If he chooses to do so, he must make clear his intention to promulgate law and specify the *vacatio legis*. Likewise, a religious

²⁵ JOHN XXIII, *Pacem in terris*, n. 34, in AAS, 55 (1963), p. 265. English translation in C. CARLEN (ed.), *The Papal Encyclicals 1958-1981*, pp. 110.

²⁶ Article 8A of *Essential Norms* directs the bishop: "If the case would otherwise be barred by prescription, because sexual abuse of a minor is a grave offense, the bishop/eparch shall apply to the Congregation for the Doctrine of the Faith for a derogation from the prescription, while indicating appropriate pastoral reasons."

institute or society of apostolic life may pass proper law. Generally, in the case of religious institutes and societies of apostolic life, responsibility for the formulation of proper law of this nature would lie with the general chapter,²⁷ and this law would be included in statutes or similar documents, rather than in the constitutions.²⁸

In each case, care must be taken to ensure that particular law is not contrary to universal law. While a legislator may impose additional penalties for a specific offence mentioned in universal law, he may also specify penalties for an offence against divine law. In other words, a legislator could apply specific penalties, excluding dismissal from the clerical state, in relation to particular forms of abuse. However, care must be taken to ensure that any law enacted is not contrary to universal law. As well, care should be taken, based on the principles of cc. 1315 §3 and 1318, to enact penal legislation, only in cases of grave necessity. In terms of procedural law, a diocesan bishop cannot legislate a procedure contrary to universal law for the imposition of penalties. Furthermore, particular law must be promulgated and it comes into effect only one month after this promulgation, unless an alternative period is specified in the law itself.²⁹ Particular law, like universal law, applies only to matters of the future, except some instances relating to penal law.³⁰

A matter that is not covered by law, either universal or particular, is open to challenge. So the passing of particular law discourages contrary action. However, if the

²⁷ Canon 631 §1.

²⁸ Canon 587 §4.

²⁹ Canon 8 §2.

³⁰ Canons 9, 1313. When a law is changed, after an offence has been committed, the law more favourable to the offender applies.

procedures are reasonable and accepted by the members, policy should suffice. To promote acceptance by its members, a diocese or institute may ask each person to sign a statement that they agree to accept the policies and procedures. While probably not binding in law, such written agreement provides a basis for action and decision-making.

The role and status of documents, such as *Integrity in Ministry*, and policies for clergy and religious are related. Canon 277 §3 provides that a diocesan bishop “has authority to establish more detailed rules concerning [the observance of perfect and perpetual continence], and to pass judgement on the observance of the obligation in particular cases.”³¹ Therefore, *Integrity in Ministry* fulfills this responsibility of bishops. Throughout the *Code of Canon Law* there are numerous references to the norms of the diocesan bishop. The status of these norms, more often than not, implies policy rather than law. Indeed, the very status of *Integrity in Ministry*, as policy rather than law, is appropriate. Furthermore, c. 277 §3 particularly provides that the bishop should act in particular cases of non-observance. Superiors in religious institutes and societies of apostolic life bear similar responsibility for the discipline of the members in accordance with c. 596 §1 and their own constitutions.³²

³¹ Canon 277 “§3 Competit Episcopo diocesano ut hac de re normas statuatur magis determinatas utque de huius obligationis observantia in casibus particularibus iudicium ferat.” CIC/1917 c. 133 §3, the precursor of this canon, was more limited.

³² Canon 738 §1 applies to societies of apostolic life. While the responsibility lies with the Superior in a particular way, all members have responsibility for the Institute and its way of life. See also c. 578.

1.2 – PROCEDURES

Having considered alternative approaches to the development and scope of policies and procedures, our focus turns now to aspects of the process to be used in responding to allegations of sexual abuse of minors.

1.2.1 – SECULAR LAW

Various popes have asserted that authority in society has its foundation in God.³³ In his encyclical, *Pacem in terris*, Pope John XXIII affirmed that the role of secular law provided it conforms to principles of justice and right,³⁴ is founded on the moral order,³⁵ has particular concern for the disadvantaged in society,³⁶ creates a climate conducive to the protection of essential rights and the exercise of duties³⁷ and is enacted by legislators acting within their competence.³⁸ He also urged secular governments to be concerned to adapt to new situations in society and to seek solutions to new problems.³⁹ Pope Paul VI echoed this teaching.⁴⁰ Accordingly, respect for secular law, unless it be contrary to divine law, is an essential aspect of Christian morality.

³³ PIUS XII, Broadcast message, Christmas 1944, in AAS, 37 (1945), p. 15; John XXIII, *Pacem in terris*, n. 46.

³⁴ JOHN XXIII, *Pacem in terris*, n. 70,

³⁵ *Pacem in terris*, n. 85.

³⁶ *Pacem in terris*, n. 56.

³⁷ *Pacem in terris*, nn. 63, 65.

³⁸ *Pacem in terris*, n. 69.

³⁹ *Pacem in terris*, n. 72.

⁴⁰ See Paul VI, Allocution, “Il nous est très agréable,” 4 October 1969, in AAS, 61 (1969), p. 710, English translation in *The Pope Speaks*, 14 (1969), p. 372.

Most civil jurisdictions in Australia have legislated for the mandatory reporting of sexual abuse of minors.⁴¹ *TH 2000* respects this legislation. According to its procedures, a person who comes with a complaint of a criminal offence is to be encouraged to go to the police. *TH 2003* affirms this approach even more strongly than the earlier document. The document now states: “the Church has a strong preference that the allegation be referred to the police and, if desired, the complainant will be assisted to do this.”⁴² If the matter is a reportable offence, then Church personnel must comply with the legal requirements.⁴³ In jurisdictions that do not have mandatory reporting, for example, Western Australia and New Zealand, the complainant’s right to refer the complaint to secular authorities is respected.⁴⁴

The intention of the Church to cooperate with police or other secular authorities is embodied in *TH 2000* which affirms that “no Church assessment shall be undertaken in such a manner as to interfere in any way with the proper processes of criminal or civil law, whether they are in progress or contemplated for the future.”⁴⁵ According to New

⁴¹ See Appendix 4 for the legislation concerning mandatory reporting in each state and territory of Australia.

⁴² *TH 2003* 37.1. A complainant who chooses not to take the complaint to the police is asked to sign a statement to this effect before the Church will take any action. See *TH 2003* 37.2

⁴³ See *TH 2000* 37.3. The Irish document recommends that diocesan procedures direct the person receiving the complaint and also the delegate of the Church authority, to make known to the complainant the policy on reporting to civil authorities. *Child Sexual Abuse: Framework for a Church Response*, 4.2.1, 4.4.4.

⁴⁴ See *Te Houhanga Rongo A Path to Healing*, Procedure 4.5

⁴⁵ *TH 2000* 5.2. The Irish guidelines echo this. See *Child Sexual Abuse: Framework for a Church Response*, 4.4.4. In effect, the policy of both Australia and Ireland may result in the suspension or cessation of an ecclesiastical process.

Zealand's principles, "if the offence is a crime in civil law and the complainant places the matter in the hands of the police, the Church authority will cease the investigation."⁴⁶

Canon 1717 §1 requires that "whenever the Ordinary receives information, which has at least the semblance of truth, about an offence, he is to enquire carefully ... unless this enquiry would appear to be entirely superfluous."⁴⁷ Likewise, the norms, *De gravioribus delictis*, require that the Ordinary conduct a preliminary investigation.⁴⁸ Accordingly, the necessity of conducting it at the same time as a process in secular law may be unavoidable. For this reason, in Australia, the Director of Professional Standards is to "endeavour to establish a protocol with the police in each relevant State or Territory to ensure that Church assessments do not compromise any police action."⁴⁹ Despite the attempts at cooperation and non-interference, it could happen that, in order to ensure that there be no conflict, a canonical preliminary investigation may be interrupted or postponed until the completion of the secular process. In other words, an on-going secular process might delay or even impede a preliminary investigation, or a penal trial.

On the other hand, a serious secular process may remove the need for a canonical preliminary investigation. If a person is found guilty of a sexual offence against a minor and the offence occurred within the period of canonical prescription, then the Ordinary may dispense with the preliminary investigation, on the basis that "this enquiry would appear to be entirely superfluous." However, the bishop must have sufficient information

⁴⁶ *Te Houhanga Rongo A Path to Healing*, Principle 16.

⁴⁷ Canon 1717 "§1 Quoties Ordinarius notitiam, saltem veri similem, habet de delicto, caute inquirat ... nisi haec inquisitio omnino superflua videatur."

⁴⁸ See Norms of *Sacramentorum sanctitatis tutela*, Article 13, in WOESTMAN, *Ecclesiastical Sanctions and the Penal Process*, p. 306.

to believe that the canonical delict is imputable to the cleric. He cannot presume that the secular proceedings will replace the preliminary investigation. In such a situation, the case should be referred to the CDF, with the necessary information and the recommendation of the Ordinary.

If a cleric is found guilty in criminal court of one or more serious offences against a minor, it may not be necessary to conduct a judicial process. For, although the Norms of *Sacramentorum sanctitatis tutela* require that a judicial process be conducted when the offence of a sexual abuse of a minor is being considered,⁵⁰ on 7 February 2003, Pope John Paul II granted the faculty to dispense from this requirement as considered in Chapter Three. Thus, the Particular Congress of the CDF may decide to refer the case directly to the Holy Father. If this approach is not adopted, then the Ordinary, after having conducted a summary process in accordance with c. 1720, may request the CDF to impose the penalty of dismissal from the clerical state. If the Ordinary does not make this request, then whether the CDF or the Ordinary conducts a penal trial is the decision of the CDF. Certainly, the Ordinary is not free on his own to handle a credible complaint of sexual abuse of a minor, which is not extinguished by prescription, through an administrative procedure.

If the accused is found not guilty in a secular court, or if a secular process is terminated for lack of proof, the situation may be more complex. In either instance, if the Ordinary has information concerning a delict, he must initiate a preliminary investigation. It could well be that additional witnesses may be willing to give testimony provided that

⁴⁹ TH 2000 37.5.

their identities will not be made public, or some other information could be made known to an Ordinary or to an ecclesiastical judge that was not made known in the secular process, or did not meet the requirements of the secular law.

While the documents of each country affirm the principle of the Church's not interfering with the secular process, the Australian Church leaders provide additional reasons for their preference for a secular process. As the 2003 amendments to *Towards Healing* specify, the secular authorities have certain powers that the Church does not enjoy that make more possible the attainment of truth. Three significant differences between secular law and ecclesiastical law can be noted for those countries where no concordat or similar agreement is in effect.

Firstly, secular law has the power to subpoena documents and witnesses.⁵¹ In the past, this power has been a source of concern for Church authorities. While secular authority usually respects the confessional secrecy, it does not extend this privilege to communications between bishop and priests or between superiors and members of institutes. In addition, documents contained in the secret archives could be subpoenaed. This obviously requires that the secret archives be kept carefully and that the Church authority have an understanding of the secular legislation in regard to subpoenas and search warrants.⁵²

⁵⁰ Norms of *Sacramentorum sanctitatis tutela*, Article 17, in WOESTMAN, *and the Penal Process*, p. 307.

⁵¹ *TH 2003 Amendments* 37.1

⁵² See B. LUCAS, "Are our Archives Safe? An Ecclesial View of Search Warrants," in CLSANZ, *Proceedings of the Thirtieth Annual Conference*, 1996, pp. 55-74.

On the other hand, an ecclesiastical judge cannot force a witness to participate in a penal process. While a judge may encourage a person to provide testimony on the basis of his or her moral responsibility, nevertheless, he cannot coerce a potential witness to appear. As well, c. 1548 precludes certain persons from responding to questions in a canonical trial, including “civil officials, doctors, [...] others who are bound by the secret of their office, even on the ground of having offered advice, in respect of matters subject to this secret.”⁵³ Importantly, it also includes “clerics, in those matters revealed to them by reason of their sacred ministry.” Likewise, the Church authority cannot force anyone to provide documents as testimony in an ecclesiastical penal procedure. This difference between the power of the Church and society can lead to different conclusions with respect to the same facts.

Secondly, secular law has the power to impose certain penalties and restrictions that the Church cannot impose. In Australian jurisdictions, the usual penalty for sexual crimes against minors is imprisonment. As part of this imprisonment, the person can be required to undergo treatment. As well, the length of the sentence may result automatically in the person’s not being able to be involved in child-related employment in the future. An ecclesiastical judge may impose dismissal from the clerical state, or less severe penalties, including deprivations and prohibitions from exercising powers, functions and offices. But if a person is dismissed from the clerical state or seeks laicization, then the bishop

⁵³ Canon 1548 “§2 Salvo praescripto can. 1550, §2, n. 2, ab obligatione respondendi eximuntur:

1° clerici, quod attinet ad ea quae ipsis manifestata sunt ratione sacri ministerii; civitatum magistratus, medici, obstetrices, advocati, notarii aliique qui ad secretum officii etiam ratione praestiti consilii tenentur, quod attinet ad negotia huic secreto obnoxia;

cannot prevent his involvement in child-related activities unless they are Church-related, for example, working with children in Catholic schools within the diocese. Moreover, if the matter is subject to pontifical secrecy, then this restriction would need to be observed.

Thirdly, in many countries, the statute of limitations does not extinguish criminal actions. Therefore, whereas a canonical delict may be extinguished by prescription in ecclesiastical law, the offence may still be subject to a criminal action in secular law. As a result, a secular process may be introduced where a canonical process may not. Prescription and confidentiality will now be considered in more detail.

1.2.2 – PRESCRIPTION

Surprisingly, *Towards Healing 2000* makes no mention of the concept of prescription. Yet, this issue has impacted on the response of Church authorities to allegations of abuse. The fact that in 1994, the USCCB sought and obtained a derogation from prescription, and the Norms of *Sacramentorum sanctitatis tutela* extended the period of prescription for the particular delict of sexual offences with minors for the universal Church, signifies that the limits of prescription prior to these events were not adequate to address current needs.⁵⁴

Canon 1313 §1 declares an important principle which can be applied when prescription is considered: “If a law is changed after an offence has been committed, the law more favourable to the offender is to be applied.” Therefore, outside the United States of America, the change in the law concerning the period of prescription is

2° qui ex testificatione sua sibi aut coniugi aut proximis consanguinis vel affinibus infamiam, periculosas vexationes, aliave mala gravia obventura timent.”

applicable only to offences perpetrated after 30 April 2001. Hence, normally, for offences that occurred before this date, the period of prescription is five years.

On 7 November 2002, Pope John Paul II granted to the CDF the faculty to derogate from the prescription on a case by case basis after having considered the request of the Bishop and the reasons for such request. As with all dispensations, this constitutes an exception and may not be given without a just and reasonable cause.⁵⁵ The experience of the past twenty years points to possible just and reasonable causes.

For instance, if, within the appropriate time-frame, a person approached a Church authority with an accusation concerning a priest or religious and the Ordinary decided to take no further action, can the person return with the very same complaint at a later time, even though the time limit of ten years beyond the person's eighteenth birthday is past? In this situation, c. 199 affirms the person's right to seek redress because the harm done is not extinguished. Prescription applies only to the introducing of a penal action by the promoter of justice and to the imposition of a penalty. So, while a person can introduce a contentious process, an Ordinary is no longer able to initiate a penal one without first seeking a dispensation from the Congregation for the Doctrine of the Faith. In such a situation, an Ordinary may seek a dispensation on the basis of his previous inaction due to a lack of knowledge of the seriousness of the offence.

Similarly, if an Ordinary was informed of an offence, spoke with the accused about it, and then imposed a penance or a warning and considered the matter closed, can the Ordinary reconsider the same offence at a later date beyond the period of prescription? If

⁵⁴ Norms of *Sacramentorum sanctitatis tutela*, Article 5, in WOESTMAN, *and the Penal Process*, p. 305.

the Ordinary received further information about the nature, number and duration of the offences could it then be considered as a new offence? However, if no further information is provided, then it must be considered the same offence. In this situation it is difficult to argue that an Ordinary could seek a dispensation. This would be particularly so if, in the interim period, the Ordinary appointed the accused to positions of responsibility, as such appointments would indicate that he considered that scandal and harm had been repaired and that the offender had reformed.⁵⁶

How is prescription affected by a Church authority's wise delay in order to allow a secular procedure to progress without interruption? Further, if a priest or religious is sentenced to a prison sentence as a result of a secular trial, may an Ordinary then delay introducing a penal trial until after the person has completed the prison sentence? An offender's incarceration would surely constitute a sound reason for the Ordinary's requesting from the CDF a dispensation from prescription.

The number of offences or the number of victims and the seriousness of offences would also constitute reasons for seeking a dispensation from prescription. Likewise, the fact that a complainant came forward only recently might constitute such a cause. Perhaps it is even possible that a cleric may admit to an offence after many years. On the other hand, does the fact that a cleric has not informed the Ordinary of an offence provide

⁵⁵ Canon 90. Canon 92 requires that such a dispensation be interpreted strictly.

⁵⁶ This would not prevent a person who has committed offences in the past from choosing to resign voluntarily from any offices held, in accordance with cc. 187 and 189, and not continuing in ministry because of the present situation. The present scandal would certainly constitute a just cause for doing so.

the Ordinary with a basis for seeking a dispensation?⁵⁷ Each of these relates intrinsically to the offender and his offences.

Extrinsic factors that determine the degree of scandal may provide the Ordinary with sound reasons for seeking a dispensation from prescription. These factors might include: the number of offences committed, the influence of the media, a public perception of previous inaction by the Ordinary, or even by a previous Ordinary. The practice of the CDF in the coming years will provide information on what constitutes “a just and reasonable cause” for the granting of a dispensation from prescription.

1.2.3 – SECRECY / CONFIDENTIALITY / PRIVACY

As we have noted previously, the Norms of *Sacramentorum sanctitatis tutela* require that cases of sexual abuse of minors be subject to pontifical secrecy.⁵⁸ This is both consistent with and an extension of the 1974 Instruction of the Secretariate of State, *Secreta continere*, which stated that:

Included under pontifical secrecy are:...

4. Extrajudicial denunciations received regarding delicts against faith and against morals, and regarding delicts perpetrated against the sacrament of Penance. Likewise the process and decision which pertain to those denunciations, always safeguarding the right of one who has been reported to authorities to know of the denunciation if such knowledge is necessary for his own defense.⁵⁹

⁵⁷ This situation would be pertinent in those dioceses and religious institutes where the hierarchical superior has requested the clerics or members to complete a statement to the effect that they have not committed an offence or that they are not aware of grounds for an action being brought against them.

⁵⁸ Norms of *Sacramentorum sanctitatis tutela*, Article 25, in WOESTMAN, *Ecclesiastical Sanctions and the Penal Process*, p. 308.

⁵⁹ THE PAPAL SECRETARIATE OF STATE, Rescript from an Audience, Instruction *Secreta continere*, 4 February 1974, in AAS, 66 (1974), 89-92, English translation in CLD, vol. 8, p. 207.

Accordingly, not only the acts of the process, including the judgement, but also the denunciation itself are subject to pontifical secrecy. This article follows the requirement of *Crimen sollicitationis* that all who participate in cases to which it applies should observe the strictest secrecy, the secrecy of the Holy Office.⁶⁰ Several factors make the observance of such secrecy difficult: the requirements of mandatory reporting, the nature of some forms of sexual abuse of minors, and the need for healing for the victim.

According to *Towards Healing 2000*, the complainant is encouraged to take the matter to the secular authority. If the person chooses not to do so, the one who receives the complaint bears the obligation according to provisions of the secular legislation.⁶¹ Where such legislation does not exist, it could be argued that the person receiving the complaint might have a moral obligation to provide information to the police or civil authority. This approach is somewhat consistent with *Crimen sollicitationis* which stresses the moral obligation of the person solicited or of any person having certain knowledge to make a denunciation on account of the possible public harm.⁶² The reporting to a secular authority, therefore, generally would not be in conflict with the requirement of the norms, since the report would be made at the time of receiving an allegation, that is, prior to any canonical process subject to pontifical secrecy.

⁶⁰ See *Crimen sollicitationis*, n. 11.

⁶¹ For this reason, it is appropriate that the person who receives such complaints not be the Ordinary or hierarchical superior.

⁶² *Crimen sollicitationis*, nn. 10, 11. This document also requires the Ordinary, in the event of a condemned priest transferring to another diocese, to inform the Ordinary of this diocese about the facts. *Ibid.* nn. 68-70. As well, CIC/1917 c. 1935 §2 asserted the natural law obligation to denounce a delict when there is danger to faith or to religion or some other public evil.

If the person who commits a sexual offence with a minor is a pedophile or an ephebophile,⁶³ then it may be important that a number of people know of this person's tendency to cultivate potential victims and to repeat similar offences. It has been recognized that the secrecy surrounding such offences acts as a disinhibitor.⁶⁴ Conversely, the lack of secrecy serves as an inhibitor preventing further acts. In other words, the lack of secrecy serves the offender by preventing him from re-offending and therefore prevents further victimisation.

The experience of the Church in Australia concerning confidentiality clauses in agreements following sexual abuse of minors is pertinent to the observance of secrecy. Such clauses serve to protect not only the reputation of the offender, but also the privacy of the victim. However, they have also served to prevent the victim from introducing a claim under secular law. The policy of encouraging persons to take their cases to secular courts should prevent such situations. Unfortunately, the inclusion of confidentiality clauses in agreements has resulted, for some individuals, in a negative impact on the healing of trauma. Since healing of harm is a stated goal of penal law, the inclusion of anything that hinders this process creates a contradiction in practice. For this reason *TH 2000* contained a clause not found in *TH 1996*: "No complainant shall be required to give an undertaking which imposes upon them an obligation of silence concerning the

⁶³ A clear distinction must be made between those offenders who are ephebophiles or pedophiles and those who have acted impulsively on an occasion. Further distinctions also should be made, by professionals, between fixated and regressed pedophiles/ephebophiles. In this study, the terms "pedophile" and "ephebophile" are not used to refer to an offender, except, if necessary, when quoting a document.

⁶⁴ For example, see D. FINKELHOR, "New Ideas for Child Sexual Abuse Prevention" in R.K. OATES, *Understanding and Managing Child Sexual Abuse*, Sydney, Harcourt Brace Jovanovich, 1990, pp. 391-393.

circumstances which led them to make a complaint, as a condition of an agreement with the Church authority.”⁶⁵

1.2.4 – THE PRELIMINARY INVESTIGATION

Since c. 1717 specifies that a diocesan bishop may delegate some suitable person to carry out the preliminary investigation, the bishop may delegate the Director of Professional Standards or a person proposed by him for this purpose. While the canon does not specify that the person must be a cleric if the offence is alleged to have been committed by a cleric, the principle of c. 483 §2 could be adopted.⁶⁶ However, the fact that the CDF can now dispense from the requirement of priesthood for officials in a trial concerning clerics, suggests that this is not necessarily so. The argument could be made that the best person for this role is a person who has training and experience, whether or not he be a cleric. In any case, the diocesan Bishop should appoint the person, provide direction about the scope and conduct of the preliminary investigation and open and close it by means of decrees.⁶⁷ In addition, all the acts of the preliminary investigation must be in writing, must be numbered, and bear a seal as specified by c. 1472. In addition, they are to be signed by a notary in accordance with c. 1437.

1.2.5 – ROLE OF ORDINARY

While *Christus Dominus* and *Lumen gentium* stress the three-fold ministry of the bishop, in teaching, sanctifying and governing the People of God entrusted to his care,

⁶⁵ TH 2000 41.4.

⁶⁶ See *Te Houhanga Rongo A Path to Healing*, Handbook 6.3, which directs that the delegate conducting the preliminary investigation involving an accused cleric be a cleric.

⁶⁷ Canons 1718 §1, 1719.

Mutuae relationes emphasizes the unity of this ministry: "Since Christ, in the New law has united in Himself the three functions of Teacher, Priest and Pastor, there is only one ministry, unique in its origin. That is why the episcopal ministry in its various functions has to be exercised in an indivisible way."⁶⁸ The role of the Ordinary in the response to allegations of sexual abuse of a minor by a cleric illustrates this teaching. While valuing this unity, we look, in turn, at aspects of his role as pastor: the judicial aspect and the pastoral one.

In his diocese, the diocesan bishop has the primary responsibility as judge; cases reserved to the CDF are exceptions. While he can exercise his power through others, in penal cases certain decisions generally remain with him. For instance, the decision to initiate a preliminary investigation and to determine whether or not the complaint is credible, whether the matter is a criminal delict and whether or not the offence is actionable is often reserved to the bishop.⁶⁹ During the preliminary investigation, if the person is to be asked to stand aside from ministry, then this decision also usually rests with him. At the conclusion of the preliminary investigation, the Ordinary is to send the acts to the CDF together with his *votum*. If the CDF entrusts the judicial trial to him, then the decision to impose the prohibitions and restrictions of c. 1722 may be his or the presiding judge's.⁷⁰ The Ordinary must also decide whether it is appropriate to seek a

⁶⁸ *Mutuae relationes*, n. 7, in FLANNERY II, pp. 214. See also *Lumen gentium*, nn. 25-27, in FLANNERY I, pp. 379-384; *Christus Dominus*, nn. 12-20, in FLANNERY I, pp. 569-576.

⁶⁹ Concerning c. 1717, T. Green notes that although the term "Ordinary" usually includes the vicar general and Episcopal vicars, in c. 1717, "it probably means" bishops and major superiors of pontifical clerical religious institutes and societies of apostolic life. T.J. GREEN, "The Penal Process" in *CLSA Commentary*, 2000, p. 1807.

⁷⁰ While c. 1722 assigns this decision to the Ordinary, the Norms of *Sacramentorum sanctitatis tutela* enable the presiding judge of the *turnus* to decide this on the insistence of the

dispensation from prescription, or whether the case is so clear and grave that he should immediately request a dispensation from the requirement of having a judicial procedure. In the event of the judicial trial being held in the diocese, the Ordinary would have the responsibility for appointing the judges and other officials; he would not have responsibility, though, for deciding the penalty. In the event of a penalty other than dismissal from the clerical state, the Ordinary must then decide whether the person can be reappointed to ministry, and if so, in what capacity. In some of these decisions, he is required by universal law to consult with others; in other decisions he is required by the procedures of *TH 2003* to consult.⁷¹ Having received the advice, the Ordinary must make the decision.

At the same time, the bishop exercises his pastoral role. In these situations he has concern for the accused, for the victim(s) and for those others who are affected by the complaint. It is in this regard that differences in policies are readily observable. The Irish document recommends that the bishop meet with the accused to inform him of the accusation and request that he meet with his delegate who will conduct the preliminary investigation. *TH 2000* recommends that the Church authority or his delegate seek a

promoter of justice. Norms of *Sacramentorum sanctitatis tutela*, Article 15, in WOESTMAN, *Ecclesiastical Sanctions and the Penal Process*, p. 307. In the United States, *Essential Norms*, Article 8A determines that the bishop shall implement c. 1722.

⁷¹ All procedures require the diocesan bishop to establish a consultative body. Previously *TH 2000* provided only for state and national consultative bodies. *TH 2003* directs each diocesan bishop and religious leader to establish a consultative panel of at least five members. The church authority must consult in six situations: 1. if the Director of Professional Standards recommends that the accused be asked to stand aside from any or all offices pending investigation; 2. when the Director of Professional Standards provides a report to the authority, following the assessment of a complaint of a non-criminal offence; 3. in responding to a victim when the truth of a complaint is accepted; 4. in responding to the accused, whether guilty or not of the complaint; 5. when an alleged crime is prosecuted before a criminal court and 6. when a decision must be made concerning whether a person is an "unacceptable risk" to vulnerable persons. See *TH 2003*, n. 35.8.

response from the accused. A bishop could find himself in a difficult situation if he does this personally. For instance, if the alleged offence is a criminal matter, then he could be in a position of having to give evidence against the priest in a secular court. If the matter is not a criminal matter in secular law, but is a canonical delict, then he could not give evidence in a canonical trial on the basis of c. 1548 §2, 1°. On the other hand, given the relationship between the diocesan bishop and his priests and the specific concern for those in need, it is entirely appropriate for the bishop to communicate with the priest in this situation.⁷² Furthermore, if he requests the cleric to stand aside or if at the conclusion of the preliminary investigation he imposes the restrictions of c. 1722, then he must consult the accused himself not only in relation to the accusation, but also concerning appropriate plans for his residence and occupation.⁷³

The Church authority must also respond to the victim. According to the procedures of *TH 2003* the Church authority or delegate with power to make binding decisions may meet with a victim in a facilitated meeting.⁷⁴ The facilitator identifies issues and proposes means of dealing with the issues. A victim who remains dissatisfied with the process is to be informed of the possibility of a review. So, since the actual process may be subject to review, and could lead to dissatisfaction on the part of the victim, the Church authority may choose to delegate this and then meet with the victim in a setting that has no formal purpose.

⁷² *Christus Dominus*, n. 16, in AAS, 58 (1966) p. 681, in FLANNERY I, p. 573.

⁷³ The phrase, "*et citato ipso accusato*," of c. 1722, provides for the situation when the cleric does not respond. It does not require that the communication be face to face. However, in a time of stress such as this, the Ordinary must decide if face-to-face communication expresses greater care for the accused.

⁷⁴ See *TH 2000*, 41.3.

As well, the bishop must decide what information is to be given to those who may be affected by the complaint. He needs to consider the rights of the accused and the complainant to privacy, but he also will be aware of the effect of silence or misinformation.

1.2.6 – DIOCESAN BISHOP OR MAJOR SUPERIOR AS OFFENDER

During the past decade, the Church has received several complaints of abuse by bishops and major superiors. Canon 1404 asserts the right of the Roman Pontiff alone to judge bishops in penal cases, and the right of the Roman Rota to judge supreme moderators of a religious institute of pontifical right; c. 1406 § 2 thus declares the absolute non-competence of all other judges. As a consequence, any judgements of another judge would be irremediably null.

The 2003 revisions of *TH 2000* incorporate provisions respecting the role of the Director of Professional Standards, who receives the complaint from the initial contact person, so that, on the one hand, the honoured position of these people is respected and, on the other, they recognize that they too are subject to the policies and procedures. As the person with experience, the director determines the nature of the complaint, whether it be a criminal matter, a matter for mediation, or a matter requiring apology and correction. For bishops and major superiors, this role is carried out jointly by the Co-Chairpersons of the National Committee for Professional Standards. The Church authority to whom they report is a specified bishop, in the case of a bishop,⁷⁵ and an

⁷⁵ See *TH 2003*, Appendix 1- 38.4.1

authority as recognized for major superiors.⁷⁶ The revisions note the principle that “the supreme moderator of any ecclesiastical group is subject to the authority of an appropriate ecclesiastical superior, although the latter may delegate that authority to another person.”⁷⁷ This revision clarifies the previous uncertainty.

1.2.7 – NON-RETROACTIVITY OF LAW

The principle of non-retroactivity of canon law stated in c. 9 is overturned by c. 1313 §1, which echoes the principle found in the *Regulae iuris* of Boniface VIII: “If a law is changed after an offence has been committed, the law more favourable to the offender is to be applied.”⁷⁸ For the most part, particular law will be more severe than universal law because the diocesan bishop may specify a determined penalty when universal law prescribes a facultative one; he may also add additional penalties to those prescribed by universal law for an offence; and he may reinforce a divine law or an ecclesiastical law with a penalty. These indicate the more severe nature of particular law when compared with universal law. However, the diocesan bishop can specify aggravating, extenuating or excusing circumstances which may increase a penalty, or which must reduce one. So while normally the universal law will be less severe than particular law, there may be occasions when this is not so.

⁷⁶ “If a complaint of abuse is made against a leader of a religious institute the Church authority is determined to be:

- a) The diocesan bishop of the principal house (cf. canon 595) for a major superior of an institute of diocesan right; or
- b) The supreme moderator for a major superior of an institute of pontifical right; or
- c) The prefect of the Congregation for Institutes of Consecrated Life and Societies of Apostolic Life (CICLSAL) for the supreme moderator of an institute of pontifical right.” *TH 2003*, Appendix 2 - 38.4.1

⁷⁷ *Ibid.*

1.2.8 – TRANSPARENCY OF PROCESS

The documents of various countries have embodied in their procedures as great a transparency as possible. In the first place the procedures themselves are available as public documents. Secondly, complainants are kept informed of the progress and the accused is given details of the complaint. Then the accused and the complainant are able to request a review of the process. Communication with both persons is to be honest and open throughout the process.⁷⁹ This is not the case, however, for the procedures envisaged in the Norms of *Sacramentorum sanctitatis tutela*. It is necessary, therefore, to identify the values underpinning the two opposing approaches. Whereas the observance of secrecy may be appropriate for some of the offences, for example, when they concern the celebration of the sacraments, is it necessary for offences that are criminal offences in secular law and subject to media scrutiny? Attempts by the Church to be open in its processes are generally welcomed, especially given attempts to keep matters secret in the years preceding the mid 1990s.

Closely linked to transparency of processes is the acknowledgement that the Church continues to learn. Thus it is recognized that all protocols and policies are subject to review. Two sets of revisions have been incorporated into *Towards Healing*. While some changes may result from the development of and subsequent changes to the Norms of *Sacramentorum sanctitatis tutela*, others may be needed following changes in secular legislation. The need for other changes could result from the use of the procedures and

⁷⁸ “In poenis benignior est interpretatio facienda.” *Regula iuris*, n. 49.

⁷⁹ See *Framework for a Church Response*, 4.2.1, 4.5.3, 4.5.16, *From Pain to Hope*, Recommendations 13, 19, 21, 43.

the development of jurisprudence. The question remains as to how to interpret and balance the values underlying two very different approaches.

1.3 – OUTCOMES

The Church leaders in Australia commit themselves to ensuring that those guilty of serious abuse, considered in the light of the person's professional responsibility, the harm caused and the likelihood of the behaviour being repeated, "will not be given back the power they have abused." While this statement may be open to a range of interpretations, the following sentence clarifies the intended meaning: "Those who have made the best response to treatment recognise this themselves and no longer claim a right to return to ministry."⁸⁰

For a cleric, not returning to ministry may take the form of: being dismissed from the clerical state, being deprived of office or functions or being prohibited from their exercise, voluntarily seeking laicization, voluntarily retiring from all ministry, or being declared impeded from the exercise of orders. Alternatively, a diocesan bishop may remove a parish priest in accordance with the procedures outlined in cc. 1740-1747.

1.3.1 – DISMISSAL FROM THE CLERICAL STATE

Universal Church law does not mandate dismissal from the clerical state for the sexual abuse of a minor.⁸¹ However, several facts point to this penalty now being

⁸⁰ *TH 2000*, 27.

⁸¹ Dismissal from the clerical state is never an obligatory penalty. Canons 1364, 1367, 1370, 1387, 1394 and 1395 allow for, but do not mandate, dismissal from the clerical state in more serious cases. Even if it were an obligatory penalty, c. 1344 allows for the superior or judge to mitigate the punishment.

imposed more frequently than in the past. While allowing for alternative actions, the USCCB's *Essential Norms* state clearly:

When even a single act of sexual abuse by a priest or deacon is admitted or is established after an appropriate process in accord with canon law, the offending priest or deacon will be removed permanently from ecclesiastical ministry, not excluding dismissal from the clerical state, if the case so warrants.⁸²

Given that this does not state expressly that dismissal will be imposed, the document later specifies: "If the penalty of dismissal from the clerical state has not been applied (e.g. for reasons of advanced age or infirmity), the offender ought to lead a life of prayer and penance,"⁸³ thus implying for all practical purposes the inevitability of the imposition of dismissal in most instances.

While making substantial and procedural changes in relation to the law governing the sexual abuse of minors, the Norms of *Sacramentorum sanctitatis tutela* repeat the provision of c. 1395 §2: "one who commits the delict [specified] is to be punished according to the gravity of the offence, not excluding dismissal or deposition."⁸⁴ In other words, the CDF does not require that absolutely anyone who offends with a minor against c.1395 §2 incur the penalty of dismissal. Nevertheless, the restatement that dismissal is a possible outcome serves as a strong reminder of the possibility. This was particularly provided for by the special faculty granted to the CDF to dispense, in grave and clear cases, from the requirement that the delicts reserved to the CDF be tried in a judicial process.⁸⁵ As well, other faculties granted to the CDF during 2002 facilitate the

⁸² *Essential Norms*, n. 8.

⁸³ *Essential Norms* n. 8 B.

⁸⁴ Norms of *Sacramentorum sanctitatis tutela*, Art. 4. §2.

⁸⁵ See Chapter Three, footnote 111, p. 184.

introduction of a judicial process, which makes dismissal possible. The faculties granted to the CDF to dispense from prescription,⁸⁶ or to dispense from the requirement that judges and notaries be clerics with a doctorate in canon law, make the conduct of a judicial procedure within a diocese or ecclesiastical province easier. In addition, the faculty to sanate acts of inferior tribunals⁸⁷ ensures that the process is not delayed or disrupted by procedural errors.

The difficulty with this at present, lies in the law as stated in c. 1395 §2 and the Norms of *Sacramentorum sanctitatis tutela*, Article 5, both of which imply that some offences are more serious than others. While some, without question, may be considered “more serious cases”, it may be more difficult to judge an offence as less serious. The canons provide some guidance for developing criteria.⁸⁸ Canon 1395 §2 refers to the use of force, or threats. Apart from threats of violence either to the person or someone close to him, any threat made using the name of God or the use of statements that imply that the minor has sinned add to the seriousness of the offence because of their impact on the person’s relationship with God. Other issues that impact on the seriousness of the effects

⁸⁶ “Il Santo Padre nella audienza concessa alla Ecc.mo Segretario della CDF, SER Mons. Tarcisio Bertone, il 7 novembre 2002, ha concesso la facoltà alla CDF di derogare ai termini della prescrizione, caso per caso, su motivata domanda dei singoli Vescovi.”

⁸⁷ “Facultas, in causis ad Congregationem pro Doctrina Fidei legitime deductis, actus sanandi, si leges processuales violatae fuerint a Tribunalibus inferioribus ex mandato eiusdem Congregationis vel iuxta art. 13 MP *Sacramentorum sanctitatis tutela* agentibus.”

Faculty granted by the Holy Father on occasion of the Audience of 7 February 2003.

⁸⁸ It is interesting to note that c. 1324 specifies situations in which a lighter penalty must be imposed, whereas c. 1326 leaves the option of imposing a more serious penalty to the judge. Also of note is the fact that although alcohol or other stimulant may have been used to induce a state that made possible the commission of the offence, the Code does not see such usage as an aggravating factor that ought to result in the imposition of a more serious penalty. Although the lists of cc. 1313, 1324 and 1326 have not been defined as taxative, the strict interpretation required for penal law would seem to require that they be seen as such.

of sexual abuse of a minor should also be considered as impacting on the seriousness of the offence itself: the frequency, and intensity of the abuse, whether or not the abuse involved penetration or physical contact. Likewise, the vulnerability of the minor should be taken into account.⁸⁹ It is difficult to conclude that the age of the victim should be considered in every case, as offenders may be frequently attracted to a specific age range. The multiplicity of victims almost certainly impacts on the seriousness of the offence. The time since the commission of the offence may not impact on the seriousness of the offence itself, but it may be a factor that affects the penalty to be imposed.

Canon 1326 §1 2° recognizes that a person who abuses a position of authority or an office in order to commit a crime may incur a more serious punishment. Hence, if the offender is known to be a cleric or a religious, *TH 2000* recognizes that the person abuses power. Likewise, this canon recognizes that a person who does not exercise appropriate due diligence in taking precautions to avoid committing an offence may incur a more serious punishment. One could argue that any person who commits this offence, because of its condemnation by both Church and secular authorities in the countries considered, may well be considered as not exercising due diligence.⁹⁰

The question of the use of a guilty verdict in a secular court in determining the seriousness of an offence must also be considered. As has been mentioned, in some states

⁸⁹ The New South Wales *Crimes Amendment (Sexual Offence) Act 2003* amended the *Crimes Act 1900* to include certain conditions that would classify an offence as an aggravated offence. These include: the victim is under the authority of the offender; the offender threatens the victim or another person; the offender is in the presence of another person; the victim has a serious physical or intellectual disability; the offender takes advantage of the victim being influenced by alcohol or drugs to commit the offence. See *Crimes Act 1900* s. 66C, <http://www.austlii.edu.au/au/legis/nsw/consol_act/ca190082/> (15 January 2004).

of Australia a person who has received a two year sentence for a sexual offence with a minor may not work in the Church, either as an employee or as a volunteer. Therefore the person cannot continue in ministry in these jurisdictions. However, the clear distinction between the state's preventing the person from exercising ministry and the Church's prohibiting this exercise must remain and be articulated by Church authorities.

The impact of statements to the effect that any person who has been found guilty of a sexual offence will not be allowed to return to ministry must be considered. What is critical is that judges be free to impose a penalty consistent with the law. While the penalty for crimes covered by c. 1395 §2 remains indeterminate, judges must maintain the freedom to impose or not impose a penalty of dismissal from the clerical state.

1.3.2 – DEPRIVATIONS AND PROHIBITIONS

Any person may incur an expiatory penalty that results in the deprivation of or a prohibition on the exercise of power, office, function, right, privilege, faculty, favour, title or insignia. These deprivations or prohibitions are expiatory penalties.⁹¹ In addition, clerics may incur a suspension which prohibits all or some of the acts of the power of order, or governance or prohibits the exercise of some of the rights or functions attached to an office.⁹² Consequently, it is possible for a cleric to be prohibited from exercising an

⁹⁰ The implication of this canon for an argument of reduced imputability based on the existence of a paraphilia deserves further study by both experts in the treatment of sexual disorders and canonists.

⁹¹ See Canon 1336 §1.

⁹² Canon 1333. According to c. 1349, a judge cannot impose a perpetual penalty, either a censure or an expiatory penalty unless the law determines the penalty to be imposed. Also, c. 1347 §1 prevents him from imposing a censure of any kind, unless the offender has already been given a warning and has been allowed sufficient time to make amends.

office or function either as a censure or medicinal penalty or as an expiatory penalty.⁹³

While the immediate effects may be the same, the process for cessation may be different. An expiatory penalty may be imposed perpetually or for an indeterminate or a determinate time. Hence in the last case, when the specified period has elapsed, the penalty is remitted. An indeterminate penalty may be remitted either by the person who initiated the judicial proceedings to impose it, or the Ordinary of the place where the person now resides provided that he consults the former Ordinary.⁹⁴ This remission is granted at the will of the Ordinary. The remission of a censure is different in that it requires that the contempt be purged before it is granted. However, if the contempt has been purged, then the remission must be granted.⁹⁵ The difficulty concerning offences that may involve paraphilias lies in the lack of certainty concerning the offender's repentance.

For this reason, if a prohibition is to be imposed, the following elements should be stated in the precept: the exact details of the prohibition in terms of the nature of the acts or the powers that are affected, whether the prohibition is perpetual, for a determinate or indeterminate time and whether it is medicinal or expiatory as well as whether or not another may remit the penalty.

⁹³ Non-clerical religious and lay persons can incur the censures of excommunication and interdict as defined by cc. 1331 and 1332; they may incur similar prohibitions as expiatory penalties as set out in c. 1336 §1.

⁹⁴ Canon 1355 §1.

⁹⁵ Canon 1358. According to c. 1347 §2, a person shows that he has purged his contempt by having truly repented and having made, or at least having promised to make, appropriate reparation for the damage and scandal.

1.3.3 – RETURN TO MINISTRY

The question of whether a person who has been found guilty, either in a secular process or a canonical process, of a sexual offence with a minor may return to ministry is one that confronts bishops and religious leaders. As we have seen, bishops in the United States have made a very strong statement. The Church in the United Kingdom, Ireland, Canada, New Zealand and Australia takes a more nuanced approach. These various positions require that the issue be addressed.

From the outset, the goals of penal law should ground any considerations. The reform of the offender, the repair of harm and the removal of scandal determine procedures to be followed and the penalties to be imposed. Embodied in these goals and in all the considerations and statements of conferences of bishops and of major superiors is the primary goal of preventing further harm. While complete assurance about the achievements of these goals is not possible, certain objective realities point to the probability of their having been achieved and should impact on a superior's decision to allow a cleric or religious to return to ministry.

The response of the offender to accusations should impact on the decision. Whether or not the person admitted to the offence, and whether or not he maintained that position is critical.⁹⁶ Whether or not he recognizes the harm done to the victim, and even the harm done to the Church would serve as an indication of his remorse. His readiness to undergo

⁹⁶ T. Furniss addresses the reasons why offenders sometimes regress into secondary denial after having previously admitted to an offence. He also identifies six areas of denial that an offender may use to disclaim responsibility for abuse: primary denial of the abuse, denial of the severity of the facts, denial of the knowledge of the abuse, denial of the abusive nature of the abuse, denial of the harmful effects of the abuse and denial of responsibility. See T. FURNISS,

treatment and therapy on a continuing basis indicates his admission of the impact of his action. The extent of his cooperation with the Ordinary or superior in the process of investigation also points to his remorse and reform.

Apart from these matters that relate specifically to the offence, other issues serve as indicators of whether or not a return to ministry is possible. The first of these relates to authority. *Towards Healing* recognizes these offences as abuse of trust and authority. The offender's style in ministry shows whether or not he considers his own authority as power or service. As well, his attitude to authority in general, particularly his attitude to the authority of his Ordinary or superior, will indicate his degree of cooperation with safeguards that are set in place. A person who does not respect authority in general is unlikely to respect an authority that sets limitations on his own actions.

The second of these relate to the offender's lifestyle. Lifestyle issues certainly would have been addressed in treatment, and would contribute to the recommendation of therapists about his possible return to ministry.

In addition, the character of the diocese or the institute needs to be considered. In particular, the relationship of the presbyterate with the diocesan bishop and the relationships among members of the presbyterate are critical factors to be considered in decisions about reassignment. Aimed as they are at advancing the mission of the Church, they play a critical role in supporting clerics in need.⁹⁷ If other clerics are willing to commit to support their brother priest for the sake of the mission, then reassignment may

"Dealing with Denial," in R.K. OATES, (ed.), *Understanding and Managing Child Sexual Abuse*, Sydney, Harcourt Brace Jovanovich, 1990, pp. 244-245.

be possible. If such support is not possible because of already existing demands placed on priests, then perhaps, reassignment might not be possible.⁹⁸

A further support for clerics or religious returning to ministry comes from the people of God to whom they minister. Depending on the nature of the limited ministry, the people to whom a cleric ministers have a role in offering support. While all members of the Church bear responsibility for supporting the religious or clerical minister, they can provide specific support in the situation of a person who has already offended against a minor. However, they are able to do so only if they are aware of the need.

Bishop Geoffrey Robinson asserted as a general principle, that “no question of a new pastoral assignment for a priest should ever be based on minimising the seriousness of the offence.”⁹⁹ Another principle could be formulated concerning the purpose of return to ministry. A person’s return to ministry should be seen, in the first place, in terms of service of the people of God.¹⁰⁰ In other words, the needs of the People of God should be considered before the needs of the priest. Consequently, the principle that the priest’s ministry must have the potential and expectation of serving the common good and of building communion should inform the decision.

⁹⁷See “The Priest-to-Bishop Relationship, An Interview with Reverend Roger A. Statnick,” in *Human Development*, 20,2 (Summer 1999), pp. 36-41 for insights from both theological and human perspectives.

⁹⁸*Te Houhanga Rongo A Path to Healing*, Procedure 6.3 recommends that the opinion of the bishop’s council of priests and the other priests of the diocese be sought, as also the informed opinion of representative lay persons, such as the diocesan pastoral council or the parish council.

⁹⁹G. ROBINSON, “The Possibility of a New Assignment to Ministry for a Priest Guilty of a Sexual Offence,” in *CLSANZ Newsletter*, 2002, No. 1, p. 36.

¹⁰⁰Canon 1740, providing for the removal of a parish priest whenever his ministry becomes harmful or at least ineffective, implicitly recognizes this principle that ministry should be of value.

The diocese or institute must be able to put in place certain safeguards. The Irish committee sees as essential conditions:

- completion of a comprehensive assessment and treatment programme with a favourable opinion on the person's suitability for the proposed assignment;
- a positive recommendation from the Advisory panel in regard to the proposed assignment;
- the elapse of a period of time after treatment during which his or her behaviour has been observed;
- the priest or religious permits disclosure of his or her past abusing to those who will be in authority in the proposed assignment and such others as they consider need to know;
- the priest or religious will avoid unsupervised contact with children, and the assignment does not afford such contact;
- a system of individual monitoring has been put in place which ensures supervision and accountability;
- An after-care programme involving individual and group therapy has been arranged to provide continuing support and guidance.¹⁰¹

Generally, the following conditions are considered as pre-requisites for return to ministry:

- The offender must have acknowledged the offence and the existence of his problem.
- The offender must have participated in evaluation and a treatment program.
- The treatment should have concluded with a positive recommendation for return to ministry.
- The ministry would be restricted to ensure that the offender was not in any unsupervised contact with potential victims.
- An effective monitoring system must be in place.
- The offender must be willing to continue with therapy and support-group as recommended by professional therapists.

¹⁰¹ *Child Sexual Abuse: Framework for a Church Response*, 7.3.8. See also *From Pain to Hope*, Recommendation 20.

- The offender must have given permission to his bishop/superior to provide essential information to others, on a need to know basis.
- The offender must be willing to accept other restrictions, as determined by the bishop/superior on the recommendation of the offender's therapists, e.g. restrictions in use of alcohol, or use of internet.
- The arrangements and the progress of the offender should be subject to annual review.

Other restrictions might apply to the person's use of leisure time and travel. These restrictions should be specified in a precept, which, in addition, would state the place of residence, and the terms of the assignment. Furthermore, the precept would state that a violation of any of the conditions could constitute cause for removal from the assignment.

1.3.4 – RETIREMENT

The *Essential Norms* of the USCCB recognize that for some clerics who have committed sexual offences against minors, it may be inappropriate to conduct a judicial trial because of ill-health or advanced years. Likewise, other documents recognize that laicization, either sought voluntarily or brought about through a penal or administrative process, may not be necessary. Or, in some cases, prescription prevents the introduction of an action and the Ordinary may decide not to seek a derogation from it. This could result in a number of clerics and religious remaining in the priesthood, but not exercising ministry.

As in the case of return to ministry, the cleric in this situation may be subject to certain restrictions and agreements. Whereas a person who returns to ministry has this as an incentive, one who is not able to do so, may find himself with more restrictions and

fewer reasons for adhering to them. In 1969 Pope Paul VI recognized the need “to guarantee the rights of the guilty just as much as those of the innocent.”¹⁰² Nevertheless, before a person chooses to remain in religious life or in priesthood, he should be given a very clear picture of the restrictions that will be placed on him.

Restrictions on freedom of movement point to the need for further work on the prevention of offences. David Finkelhor has proposed a multi-faceted approach. While his may be one of several theories, it serves to direct hierarchical superiors and others involved in supervision of offenders to seek alternative approaches to prevention.¹⁰³

1.3.5 – DECLARATION OF IMPEDIMENT

A possible result of a person’s committing offences against children may be the declaration of an impediment to the exercise of orders, in accordance with c. 1044 §2 2°. The basis for such a declaration, the process by which the impediment is declared and the consequences of this action need to be considered.

¹⁰² PAUL VI, “Il nous est très agréable,” p. 373.

¹⁰³ Prevention of sexual abuse requires an understanding of what causes abusers to abuse. In appraising theories of child sexual abuse, David Finkelhor has identified four factors that the theories seek to explain. He explains emotional congruence: “relating sexually to a child is an activity that fulfils special emotional needs in molesters.” Because the second factor, relating sexually to a child, is simply unusually arousing for at least some groups of child molesters, if not most child molesters, sexual arousal becomes the key element in explaining many theories of sexual abuse. Some theorists explain the third factor: “the proposition that sexual abusers have some chronic or episodic difficulty in getting their sexual and emotional needs met in socially appropriate ways.” Recognizing that these three factors prove insufficient to explain sexual abuse, Finkelhor identifies a fourth factor, disinhibition, which explains why abusers are able to overcome the legal and moral prohibitions on sexual contact with children. In identifying these factors, Finkelhor stresses the complexity of the issue. Simultaneously, he proposes that the approach to prevention lies in developing strategies that address each of the four factors rather than in responding to each and every theory of child sexual abuse. See D. FINKELHOR, “New Ideas for Child Sexual Abuse Prevention,” in R.K. OATES (ed.), *Understanding and Managing Child Sexual Abuse*, pp. 386-387.

Firstly, a question that must be addressed concerns whether or not a person who has sexually abused a minor may be considered impeded from the exercise of orders. To appreciate this question we consider also whether or not a person in the same circumstance could be considered irregular for the reception of orders. According to c. 1041, a person is irregular for the reception of orders if he suffers from certain impairments or if he has committed certain delicts. The delicts specified in c. 1395 §2 are not listed in c. 1041. Accordingly, consistent with c. 1040, specifying that this list of delicts is taxative, a person who commits the delict in question does not incur an irregularity.¹⁰⁴ However, it could be determined that the candidate suffers from a psychological infirmity which would render him irregular. In coming to this determination experts are to be consulted. According to a strict interpretation of this canon, a candidate may or may not be irregular for the reception of orders depending on

¹⁰⁴ In relation to the sixth commandment, a marriage attempted while prevented from doing so makes one irregular for the reception of orders, but not concubinage nor an offence with a minor. The offences specified in Book VI in relation to delicts against human life all render a person irregular for the reception of orders.

According to CIC/1917 c. 2357 §1, a lay person who was convicted of certain sexual offences, including one with a minor, was by that fact infamous, and a cleric who committed the sexual offences of c. 2359 §2, including an offence with a minor was declared infamous. In turn, CIC/1917 c. 984 5°, specified that those who were marked by infamy of law were irregular. Consequently, a person found guilty of having committed a sexual offence with a minor was irregular for the reception and exercise of orders.

The logic of these canons is interesting when one considers that other delicts resulted in irregularities. This logic of the delict resulting in infamy which in turn results in an irregularity provides an explanation for the exclusion of this particular delict as a cause of an irregularity or a delict in CIC/1983.

See J.J. HICKEY, *Irregularities and Simple Impediments in the New Code of Canon Law*, Washington DC, Catholic University of America Press, 1920, pp. 36-40; F.J. RODIMER, *The Canonical Effects of Infamy of Fact, A Historical Synopsis and Commentary*, Washington DC, Catholic University of America Press, 1954, p. 37. While the former recognizes the delicts of c. 2357, but not c. 2359 §2 as resulting in infamy of law, the latter recognizes the delicts of both canons. P.R. Lagges follows Hickey in this matter. See P.R. LAGGES, "The Use of Canon 1044, §2, 2° in the Removal of Parish Priests," in *Studia canonica*, 30 (1996), p. 36.

whether or not he is judged, on the basis of this psychological infirmity as being incapable of properly fulfilling the ministry.¹⁰⁵ The judgement is an essential condition for the declaration of the irregularity; the existence of the psychological infirmity in itself does not render one irregular. A broader or more extensive interpretation of the canon, invoking c. 1045,¹⁰⁶ provides that the existence of the psychological infirmity in itself, whether or not it was known by the bishop, renders the candidate irregular for the reception of orders.

The question of an irregularity or an impediment for the exercise of orders already received is a related question. Based on the two interpretations of c. 1041 1°, c. 1044 provides two approaches. According to the first paragraph, “one who, while bound by an irregularity for the reception of orders, unlawfully received orders” is irregular for the exercise of orders.¹⁰⁷ Thus, if the broader interpretation of c. 1041 1° is accepted, the Ordinary may declare the cleric irregular for the exercise of orders, and so the person cannot hope to return to ministry at a later time. However, if the stricter interpretation of c. 1041 1° is correct, then the Ordinary may declare the cleric impeded from the exercise of orders.

With respect to this canon, R. Geisinger notes that “the canon does not state whether the psychic problem need inhibit the person merely in liturgical ministry (e.g. presiding at mass or hearing confession), or rather in a broader pastoral sense as well (e.g.

¹⁰⁵ If experts were to advise that the person did not have a psychological infirmity, the bishop would use cc. 1029 and 1025 §2 to refuse ordination.

¹⁰⁶ Canon 1045 “Ignorantia irregularitatum atque impedimentorum ab eisdem non eximit.”

¹⁰⁷ Can. 1044 “§1 Ad exercendos ordines receptos sunt irregulares:

1° qui irregularitate ad ordines recipiendos dum afficiebatur, illegitime ordines recepit...”

preaching, teaching, visiting, or parish administration).”¹⁰⁸ W. Woestman maintains that “since these canons concern an irregularity for the ‘reception of orders’ and an impediment ‘from exercising orders,’ it is a question of carrying out ordained ministry in the strict sense, i.e. *ministerium sacrum*, and not ministries shared with non-ordained members of Christ’s faithful.”¹⁰⁹ Basing his argument on the meaning of the word, *rite*, Woestman proposes that, in order to constitute an impediment the psychic defect must prevent the cleric from celebrating according to the rites.¹¹⁰ However, an alternative stance is argued in a 1996 judgement of the Apostolic Signatura, c. Davino.¹¹¹ This judgement recognizes that ministry involves the functions of teaching and ruling as well as the celebration of the sacraments. Woestman also argues that the canon speaks of an incapacity or inability – not just a difficulty – to exercise sacred ministry. On this basis, he asserts that an Ordinary may not validly declare a cleric impeded from exercising ministry on the basis of his being a pedophile. Others, including G. Ingels and J. Beal, believe that a person suffering from the psychological disorder of pedophilia, may be impeded from the exercise of priestly ministry in virtue of c. 1044 §2, 2°. ¹¹² Clearly, not

¹⁰⁸ R. GEISINGER, “Orders,” in *New Commentary on the Code of Canon Law*, p. 1215

¹⁰⁹ W. WOESTMAN, “Canons 1041, 1° and 1044, §2, 2° Some Forms of Insanity or Other Psychic Infirmary” in *Roman Replies and CLSA Advisory Opinions 1995*, K.W. VANN and J.I. DONLON (eds.), Washington, DC, Canon Law Society of America, p. 81. See also W. WOESTMAN, “Too Good to Be True: An Interpretation of Canons 1041, 1° and 1044, §2, 2°,” in *Monitor ecclesiasticus*, 120 (1995), pp. 619-629.

¹¹⁰ However, Woestman notes that the word *rite* is used fifty times in the 1983 *Code of Canon Law*. Of these times, in c. 1041 1° alone, the word is used as described above. On the other forty-nine occasions *rite* means correctly, rightly or duly. Usage of a word in the corresponding canon of the previous code does not necessarily constitute persuasive support for his argument.

¹¹¹ SUPREME TRIBUNAL OF THE APOSTOLIC SIGNATURA, Prot. N. 23737/92CA, 4 May 1996, c. Davino, translated by S. Cordileone, in *Forum*, 7 (1996), pp. 379-383.

¹¹² See G. INGELS, “Concealed Irregularity and Effect on Ordination,” in *Roman Replies and CLSA Advisory Opinion 1998*, F.S. PEDONE and J.I. DONLON (eds.), Washington, DC, Canon

every person who commits a sexual offence suffers from pedophilia or ephebophilia. This latter position is also supported by Davino:

Clerics who sin against the sixth commandment of the Decalogue with minors, we repeat, in certain circumstances [only] – and therefore not always – be considered incapable for sacred ministry, ... it is due to the fact that their behaviour can be a sign of the existence of some mental disorder or of a grave mental disturbance. Nor does a diagnosis of some infirmity, such as the so called “ephebophilia” or sexual impulse towards adolescents, suffice; one has to consider the gravity of the infirmity, its effect on the priest and on his ministry, the outcome of the therapy, the means used to limit the effects of the illness, and so on.

The assessment of an expert is necessary, as required by c. 1044 §2 2°. However, as Davino asserts, “making a judgment in this matter does not pertain to experts, but only to the Bishop who, after consulting the experts and seriously considering all of the other circumstances (cfr. c. 1579 §1), can then reach a legitimate conclusion.”

Given that the *Code of Canon Law* does not specify a process for the declaration of an impediment or an irregularity, C. Cox proposes six basic principles on which a procedure should be based.¹¹³ Firstly, the process should be a formal one. However, the process for establishing the existence of an impediment due to a psychological infirmity should not, in any way, be related to a penal trial.¹¹⁴ Secondly, the process should

Law Society of America, p. 75 and J.P. BEAL, “Compelling a Cleric to Seek a Psychological Evaluation Under Canonical Obedience,” in *Roman Replies and CLSA Advisory Opinions 1996*, K.W. VANN and J.I. DONLON (eds.), Washington, DC, Canon Law Society of America, p. 66. See also J.P. BEAL, “Too Good to be True? A Response,” in *Monitor ecclesiasticus*, 121 (1996), pp. 431-463.

¹¹³ C. COX, “Processes Involving Irregularities and Impediments to the Exercise of Orders,” in *Clergy Procedural Handbook*, R. CALVO and N. KLINGER, (ed.), Washington, DC, Canon Law Society of America, 1992, pp. 184-185. Cox also proposes that either a judicial or an administrative process be employed.

¹¹⁴ The necessity of separating the two processes was affirmed by the Congregation for the Clergy, in a study reproduced in F. S. PEDONE and J.I. DONLON (eds.), *Roman Replies and CLSA Advisory Opinions 1999*, pp. 32-40.

commence with a presumption that an impediment or irregularity does not exist. Hence, the Ordinary bears the responsibility to prove the existence of the condition, rather than the cleric having the burden of proving that he does not suffer from such an infirmity.¹¹⁵ Thirdly, the cleric must have the opportunity to defend his rights to a good name, to privacy and to exercise ministry. As well, he should have the assurance that the process will respect these rights. Therefore the process should be transparent. In addition, the cleric should have access to a canonical advocate. Fourthly, the Ordinary should have reached moral certitude before declaring the existence of an impediment or irregularity. In an area where there remain many uncertainties about sexual offenders, moral certainty would require the opinions of several experts. Fifthly, Cox asserts that the cleric should be given the opportunity to remedy the situation.¹¹⁶ He suggests that the cleric be given the opportunity to request a dispensation. Other means of addressing the cause of the impediment may be participation in treatment programs.¹¹⁷ Sixthly, an impeded or irregular cleric retains his right to support. Whereas financial support is essential, he also retains the right to the pastoral support of the Ordinary.

Cox proposes that a judicial process be used. P. Lagges offers a contrary position. P.R. LAGGES, "The Use of Canon 1044, §2, 2° in the Removal of Parish Priests," pp. 31-69.

¹¹⁵ In his comprehensive response to W. Woestman's argument, J. Beal draws seven conclusions, most of which are very similar to those of C. Cox. He does make the point however, that experts in the field of psychology and psychiatry are responsible for establishing the existence of a psychic infirmity. It is then the responsibility of the diocesan bishop to judge whether this disorder renders the cleric "inhabiles ad ministerium rite implendum." See J. BEAL "Too Good to be True? A Response, p. 463"

¹¹⁶ This principle would apply only to an impediment. If the broader interpretation was upheld, then the cleric could not remedy a situation that existed at the time of ordination.

¹¹⁷ Successful participation in a treatment program would not affect an initial declaration of an impediment. It may affect the timing of the Ordinary's giving permission to exercise ministry once again.

1.4 – RELATED ISSUES

Some issues refer not to the procedures in themselves, but to related matters. Communication between clergy and religious, and the care of laicized clerics or religious who have been dismissed, or left ministry are two such issues.

1.4.1 – RELIGIOUS AND THE DIOCESAN BISHOP

A number of matters concern religious and the diocesan bishop. In Australia, the joint development of *Towards Healing* witnesses to a high level of cooperation between the bishops and the leaders of institutes. However, cooperation is needed when an allegation of sexual abuse of a minor is made concerning a religious working or living in the diocese. Religious engaged in an apostolate that concerns “the care of souls, the public exercise of divine worship and other works of the apostolate” are responsible to the diocesan bishop and also to their superior. Therefore if the person is alleged to have abused his power, and in particular, has committed a sexual offence against a minor, then the superior should inform the bishop or the bishop should inform the superior of the accusation. This communication recognizes the responsibility of both, on the part of the members of the institute and on the part of the bishop for the pastoral care of all members of the particular church.

If the religious is a cleric, then whether or not he belongs to a clerical institute and whether the institute is of pontifical or diocesan right is critical. Since the majority of religious clerics in Australia belong to clerical institutes of pontifical right, the church authority is the major superior. In the event of a cleric belonging to a non-clerical religious institute, the diocesan bishop is the church authority.

1.4.2 – CARE OF LAICIZED CLERICS AND RELIGIOUS

While some clerics may seek voluntary laicization and religious seek dispensation from their vows, others may be dismissed. As a result, neither the diocesan bishop nor the religious leader has responsibility for them in the same way as previously. However, two issues remain. As members of a particular church, a bishop has pastoral care for them. At the same time, given that they have offended previously, safeguards must be put in place to ensure that children are protected.

Because they are lay persons and there is no canonical delict recognized for sexual offences against a minor committed by a lay person, the bishop cannot issue a precept that imposes restrictions on them. Therefore, there must be pastoral supports to prevent re-offending.

2 – CANON 1395 §2

A sexual offence against a minor by a cleric is determined to be an offence in canon law by c. 1395 §2 under Title V, Offences against Special Obligations. There are several problems with the wording of this canon and with its placement. The bases of these problems are three-fold: the formulations of penal law prior to 1983; the 1983 revision of the Code; and the heightened awareness of the nature and impact of sexual abuse.

2.1 – THE OFFENDER

The 1917 Code contained several canons relating to sexual misconduct. Of these, c. 2357 concerned lay persons committing these offences, c. 2358 referred to clerics in minor orders and c. 2359 focused on clerics in major orders. In terms of the offences

specified in each of these three canons, the lists are essentially the same.¹¹⁸ Consequently, similar actions were considered offences whether committed by lay persons or by clerics. However after 1983, these offences are considered as canonical delicts only if they are committed by clerics.

Canon 695 directs that a member of a religious institute must be dismissed for the offences specified in cc. 1397, 1398 and 1395. While c. 695 points to the seriousness of the offences mentioned in these last three canons, the necessary strict interpretation of penal law causes ambiguity. Whereas cc. 1397 and 1398 focus on the action, rather than on the perpetrator of the action, c. 1395 specifies a cleric as the perpetrator of the delict. While religious institutes have condemned sexual abuse of a minor by any member, man or woman, the universal law of the Church does not speak clearly on this.

Canon 695 §1 specifies possible penalties to be imposed on religious for the offences of cc. 1397, 1398 and 1395. In the first two instances, the situation is quite clear. Both canons focus on the offence. The subject of c. 1395 in both its paragraphs is “a cleric.” Consequently, c. 695 §1 is unclear. Does it refer only to members who are clerics who offend against the sixth commandment? Or does it refer to any religious who offends against the sixth commandment. Given that c. 1392 uses the phrase “clerics or religious” and c. 1394 refers to clerics in the first paragraph and religious in the second paragraph, the former reading is more likely. Should not c. 1395 refer to priests and religious? Such would be consistent with c. 1395 coming under the title “Offences against Special Obligations.” What may well be more appropriate would be the inclusion of these as

¹¹⁸ Canon 2359 listed both sodomy and bestiality, while c. 2357 specified only sodomy. However, bestiality was usually considered a subset of sodomy.

canonical delicts when committed by any person, cleric or lay, when the person is perceived to be acting in the name of the Church.

2.2 – OFFENCES AGAINST SPECIAL OBLIGATIONS

Apart from the wording of the canon, its position in Book VI, raises questions. The canon comes under the heading “*Offences against Special Obligations*.” The placement of the canon, particularly with respect to the previous canons of the title, suggests that the offence lies primarily in not observing celibacy. The 1917 Code places the several canons relating to offences relating to chastity in Title XIV, “On delicts against life, liberty, good reputation, and good morals.”¹¹⁹ During the period of the formulation of these canons little was known about sexual abuse of minors. However, as more and more is understood, particularly about the harmful and oftentimes very lasting impact on people, the placement of the canon under the title, “*Offences against Human Life and Liberty*” would direct the focus to the harm that is caused to a victim of sexual misconduct.

On a related issue, in the 1917 Code, these canons fall under Title XIV, with cc. 2357-2359 coming at the end of the title. In the revised code, c. 1395, as we have stated, is an “*offence against special obligations*.” Such a placement is problematic for several reasons. The first is that the offences mentioned are contrary to one’s commitment and responsibility whether one has committed oneself in marriage or by religious profession, or even if a person is single. The second reason concerns the focus of the canon.

¹¹⁹ Titulus XIV “De delictis contra vitam, libertatem, proprietatem, bonam famam ac bonos mores.”

Offences against Special Obligations directs one to consider the obligations that a person chooses to accept, in this case, obligations arising from the promise of celibacy or the vow of chastity. Experience has proven this to be an incorrect focus. Firstly, the recognition and diagnosis of psycho-sexual disorders with recognized rates of recidivism, point to the uselessness, in some cases, of warning offenders not to re-offend. Secondly, the question needs to be asked, "Do offenders consider that in abusing children, they have offended against their vow of chastity?" Anecdotal evidence suggests that they do not. Most certainly, further research must be done.

2.3 – THE HARMFUL EFFECTS OF CHILD SEXUAL ABUSE

Thirdly and most significantly, the greatest learning that Church authorities and others have gained, relates to the impact of sexual abuse on the person offended. The effects of the abuse can be more harmful and lasting than physical injury. Since c. 1397 includes the crime of mutilating or gravely wounding a person, would it not be appropriate for the crime of sexual offence against a minor to be included under the title, *Offences against Human Life and Liberty*? In this way, the universal Church would recognize the harm done by such offences. This approach would be supported by the teaching of *Gaudium et spes*:

The varieties of crime are numerous: all offences against life itself, such as murder, genocide, abortion, euthanasia and wilful suicide; all violations of the integrity of the human person, such as mutilation, physical and mental torture, undue psychological pressures; all offences against human dignity, such as subhuman living conditions, arbitrary imprisonment, deportation, slavery, prostitution, the selling of women and children, degrading working conditions where men are treated as mere tools for profit rather than free and responsible persons: all these and the life are criminal: they poison

civilization; and they debase the perpetrators more than the victims and militate against the honour of the creator.¹²⁰

2.4 – CONSEQUENCES OF FORMULATION

As a result of this formulation, mixed messages are present in the universal law. The delict of a sexual offence with a minor committed by a cleric is reserved to the CDF. Of the offences so reserved, the sexual abuse of a minor is the only delict that is against morals; the others are delicts against the sacraments. For religious, a sexual offence against a minor does not result in automatic dismissal, even though the offences of cc. 1397 and 1398 (all offences against life), do result in dismissal.

CONCLUSION

The precision of language is critical when responding to allegations of sexual offences. The misuse of terms can cause grave misunderstanding. Suspension, a censure or medicinal penalty, can be imposed only as a result of a penal process, either a judicial or administrative one. While it takes the form of a prohibition from all or some of the acts of the power of order or of governance or the exercise of rights or functions attached to an office, it is distinct from the prohibitions of c. 1722, which do not as such constitute a penalty. Similarly, the distinction between the prohibitions incurred by a suspension, a medicinal penalty, on the one hand, and the prohibitions of an expiatory penalty need to be clear. Likewise, the distinction between an irregularity, which is perpetual, and an impediment, which may come to an end, must be maintained.

A serious need exists for the publication of jurisprudence concerning cases reserved to the Congregation of the Doctrine of the Faith. Greater guidance is needed in terms of

¹²⁰ *Gaudium et spes*, n. 27, in AAS, 58 (1964), p. 1047, in FLANNERY I, p. 928.

the amount of testimony to be collected during a preliminary investigation, the basis on which an offence is judged to be more or less serious, the severity of penalty for different offences. As some patterns emerge, guidance could also be given concerning the basis on which dispensations are granted for the use of non-clerical qualified personnel. The development and formation in matters such as this will lead not only to a greater awareness of the pastoral role of penal law, but also to a greater awareness of the Church's explicitly upholding the rights of people. Besides jurisprudence needing to be available, more guidance is needed on matters such as the procedures for declaring impediments.

The relation of secular law and church law is a question that deserves further study. While the various procedures have taken a stance with regard to secular law that is entirely appropriate, the universal law does not seem to provide support for such positions. The Norms of *Sacramentorum sanctitatis tutela*, even though they deal at times with a delict that is also a criminal offence in secular law, do not explicitly recognize the role of secular law in this context.

In responding to complaints of sexual abuse of minors as well as to complaints against behaviour encompassed by policies and codes of conduct, Church authorities have numerous opportunities for consultation and cooperation with members of the faithful. Church authorities are able to draw on the expertise of others before making decisions. They are able to invite others to cooperate in pastoral ministry, by supporting victims and their families or by supporting offenders who have returned to ministry as well as those who have lost the clerical state or who have left religious life. A cooperative

approach is an expression of communion that underpins the procedures used in responding to sexual offences and affirms human dignity.

While the Church authorities in each of the countries have made public the policies and procedures or guidelines, yet the opportunity could still exist for further education in promoting the understanding of Church law. If people were given an opportunity to understand the values underlying the procedures, they might come to recognize that besides being identified with the institutional dimension of the Church, canon law is primarily pastoral, serving the Church's ministry of justice and the building of communion. An enhanced understanding of the nature of penal law is likely to lead to an enhanced understanding of other ecclesial laws.

Confusion has occurred when values appear to be in conflict. Hence, the value of protecting the Church from scandal was in conflict with the value of making one's needs known and the value of protecting individuals. New situations in society require that the Church address them and consider the appropriateness of existing laws to meet these needs. In doing so it is essential that the underlying values in the law be considered.

GENERAL CONCLUSION

The joy and hope, the grief and anguish of the men of our time, especially of those who are poor or afflicted in any way are the joy and hope, the grief and anguish of the followers of Christ as well. Nothing that is genuinely human fails to find an echo in their hearts. For theirs is a community composed of men, of men who, united in Christ and guided by the holy Spirit, press onwards towards the kingdom of the Father and are bearers of a message of salvation intended for all men. That is why Christians cherish a feeling of deep solidarity with the human race and its history.¹

Child sexual abuse has caused grief and anguish to many individuals: victims and their families, offenders and those who love them, the members of the particular churches where these offences have occurred, people in society who understand the harm that results from such offences.

The experience of the Church in Australia, as elsewhere, affirms the message of Ladislav Örsy quoted in the introduction,² that we are continuing to learn about sexual abuse, the impact on victims, how to help offenders, how to engage the community in healing, how to ensure that procedures respect the rights of all concerned while at the same time, being concerned for the common good.

We can now draw the following general conclusions.

¹ VATICAN II, *Pastoral Constitution on the Church in the Modern World, Gaudium et Spes*, 7 December 1965, English translation in Flannery, Vol. 1

² L. ÖRSY, "The Fundamental Rights of Christians and the Exercise of the 'Munus sanctificandi'," in *Les droits fondamentaux du Chrétien dans l'Église et dans la société. Actes du IVe Congrès international de Droit canonique, Fribourg, 1980*, p. 207.

1. The Church has learned from society. Lawmakers, investigators and others have given an example of readiness to learn, of the need to work cooperatively with other agencies to secure prevention and to respond to complaints. They have given an example of recognizing the need for a multi-faceted approach to addressing the issues. We continue to find in churches and non-governmental agencies efforts made to address the needs of victims as well as offenders. The Church continues to learn these lessons.

During the past twenty years, the Church has assumed the role of learner with respect to understanding the complexity of sexual abuse. While this role will continue, our situation calls for Church leaders to share what they have learnt. Although all members of the Church are called to respond, leadership and direction is needed. The Church community needs to learn how to care for people who have been harmed by sexual abuse, both directly and indirectly. They need to learn how to care for those who minister to them, including those who have offended. The Church community needs to understand the meaning of sanctions within the Church and the role of penance in the life of the Church. The Church community needs to continue to learn how to be a Church of compassion, justice and reconciliation.

2. Pope John Paul II promulgated the *Code of Canon Law* on 25 January 1983. As, has been shown in this work, it was around this time that awareness of the incidence of sexual abuse and understanding of the issues surrounding it were just beginning to become more widespread. Accordingly, the 1983 *Code of Canon Law*, and the formulation of c. 1395 §2 represents an understanding of the offence of sexual abuse of children that is no longer adequate.

Twenty years later, much more is known about the harmful effects of sexual abuse on those abused as well as the psychology and behaviours of offenders. Particularly in the forty years since the Second Vatican Council, the Church has grown in her understanding of the dignity of the human person and of the Church as communion. While penal law and procedural law are generally seen as part of the institutional nature of the Church, it is necessary for the understanding of these two types of law to be interpreted in the light of our renewed understanding of the human person in communion. Fundamentally, this may mean ensuring that each application of the Church's law promotes the dignity of the human person and builds communion. If it does not do this, then the question needs to be asked about the appropriateness of the law, or at least the method of applying it to a particular situation.

3. The increased recognition of the dignity of the human person points to problems with the placement and formulation of c. 1395 §2. Whereas the 1917 Code presented the delict of the sexual abuse of a minor, c. 2359, under the title, "On delicts against life, liberty, property, good reputation and good morals,"³ the 1983 Code has placed the corresponding canon, c. 1395 §2, under the title "Offences against Special Obligations."⁴ The church's concern for young people has more recently directed its focus, primarily, to the person offended. Likewise, the formulation of the delict and its placement should focus on the harm done. For this reason this delict ought to be considered under the title, "Offences against Human Life and Liberty."⁵

³ Titulus XIV. "De delictis contra vitam, libertatem, proprietatem, bonam famam ac bonos mores."

⁴ Titulus V. "De delictis contra speciales obligationes."

⁵ Titulus XV. "De delictis contra hominis vitam et libertatem."

4. Throughout the 1983 *Code of Canon Law*, the only precept of the Decalogue that is referred to is the sixth commandment. The lack of clarity can present difficulties for canonists and bishops. It can be read as reflecting the Church's lack of comfort with matters of human sexuality. Given the advances of the past twenty years, it is appropriate that more clarity be embodied in the formulation of the canon.

The canon concerns all external sins against the sixth commandment. Whether or not one's partner is male or female is not specified, although in the earlier documents, homosexual offences were considered very grave delicts. The canon includes offences with adults or minors. In other words, the 1983 universal code condemns all sexual offences. Nevertheless, the Norms of *Sacramentorum sanctitatis tutela* reserve only the sexual abuse of minors to the CDF. This reservation suggests that the concern of Pope John Paul II is for the children against whom offences have been committed. Should the canon be reformulated so that there are two separate paragraphs: one concerning all adult sexual relationships, and one concerning sexual offences against minors?

If the mind of the pontiff is that no priest should continue in ministry, who commits the offence specified in Article 4 of the Norms of *Sacramentorum sanctitatis tutela*, then perhaps at some time, a new basis might be introduced for an irregularity for the exercise of orders: the delict of Article 4, a sexual offence with a minor. Without this change in law, and without a greater knowledge of paedophilia, it is not possible to use c. 1044 §1 1° to declare a cleric irregular for the exercise of orders.

5. Canon 1395 requires reformulation from another perspective. The words, “not excluding dismissal from the clerical state if the case so warrants”⁶ indicate that the law recognizes that there are more serious offences, and consequently, less serious ones. Likewise, the secular law in many jurisdictions recognizes a range of seriousness of sexual offences committed against children and against adults. At the same time, the Norms of *Sacramentorum sanctitatis tutela* identify all sexual abuse of minors as more grave delicts. Consequently, there is a danger that all cases could be considered more grave and so be judged to warrant dismissal from the clerical state. Given the requirement that penal law is to be interpreted strictly,⁷ greater clarity is needed in the formulation.

6. While the Church in a number of countries has been addressing the issuing of child sexual abuse for more than twenty years, in some places the Church’s response has continued for less than ten years. In other countries, the Church is yet to address the issue in terms of developing procedures and policies. The evolutionary nature of the responses of the Church in Australia and elsewhere testifies to the growing understanding of the complexities of the situation. This points to the fact that even in countries such as Australia, many will not know about aspects of the sexual abuse of minors. It cannot be assumed that judges, promoters of justice, or even Church leaders will have a comprehensive knowledge of the issues which they need to address. The need for jurisprudence is great. Despite secrecy surrounding cases, information on the canonical issues involved needs to be disseminated.

⁶ Canon 1395 §2 “... non exclusa, si casus ferat, dimissione e statu clericali.”

⁷ Canon 18.

7. The goals of penal law are three-fold: the repair of harm, the reform of the offender and the repair of scandal. The repair of harm is being addressed by responding to the needs of the primary and secondary victims of sexual abuse. While immediate needs are addressed, each parish now finds itself in a situation where there is a probability that in any gathering someone may have been affected by sexual abuse. Given its possible long-term effects, this may need to be considered in general pastoral practice. Previously, the reform of the offender was considered something that the individual needed to work at; it required both grace and discipline. The increased understanding of sex offenders has taught that, while the offender retains responsibility for his or her actions, the community plays a significant role in supporting the person. Again, this may continue for many years. The achievement of each of these goals requires the working together of the local Church.

8. Addressing the scandal caused by sexual abuse of minors is more complex. Most importantly, the Church must be a mirror of justice. The question of how the Church can best assure Christ's faithful that it is acting justly in dealing with people who have offended against minors remains a critical issue. Firstly, justice demands that Church leaders fully use the procedures that have been established. Secondly, where the procedures are lacking, continued effort should be directed to ensuring that they be refined so that they can help those who use them to come to the truth of a situation. Thirdly, the procedures will have greater credibility if all the dioceses and all religious institutes commit to the one set of procedures. To the extent that any diocese or institute does not agree to use them, because they are found to be inappropriate or lacking, then the confidence of the faithful will be tested. On the other hand, a religious institute that

has communities in a number of countries may choose to commit to one set of procedures throughout the institute. Although this approach seems not to respect sufficiently the role of the particular Church, and, in particular, the Australian situation, the reasons for such decisions should be made known.

9. What aspects of the Church's judicial ministry will make her a mirror of justice?

The following suggest themselves:

- the law respects the rights of individuals, especially the right to be heard, the right to be informed and the right of defence;
- the procedures respect the complainant and the accused;
- the procedures and policies are available as public documents, that is, the procedures are transparent;
- roles and responsibilities of officials are clearly defined;
- the process ensures that officials are skilled in ensuring the protection of justice, and the rights of the individuals;
- the independence of officials is ensured;
- the process is open to review by independent reviewers, and the parties are informed of their right to seek a review;
- the participants are informed of the progress;
- the procedures are such that they allow for the participation of and respect the culture of people with special needs, people of different ethnic groups, native people, people with intellectual disabilities;
- the presumption of innocence is ensured;
- guidelines are in place for the imposition of penalties where such are necessary;

- policies are in place to guide decision-making in particular instances;
- the procedures and policies are reviewed;
- the procedure is carried out as quickly as reasonable; the legal time frame for marriage nullity cases may serve as a guideline.

More importantly, the Church will be a mirror of justice if its response does not end with the conclusion of the trial or the imposition of a penalty, but continues to address the pastoral needs of those affected.

10. While the Church has learned much over the past twenty years, whether one considers the nature of the offender, possible treatment options, the effects of abuse on the victim, or the development and use of procedures, still there is much to learn. As in any of the sciences or in theology or canon law, each new understanding leads one to ask new questions. The need for ongoing research in the every aspect of sexual abuse is great and pressing.

Part of this learning involves looking backwards as well as looking forwards. It involves looking to the values inherent in the law and identifying new ways of applying them to the new situations. For example, the revision principles, the teaching of Pope Paul VI, can be reapplied in relation to the church's response. While the conferences of bishops have honoured the fifth revision principle, the principle of subsidiarity, it remains to be seen how it might be honoured more concretely. The second revision principle, concerning the separation of the internal and external fora, may inform practices. The sixth and seventh principles, concerning the value of human rights and their defence, may also inform practice in new ways. As well as commencing with the principle, it is also appropriate that the values underlying practices be studied further. For example, the

values underlying prescription, maintaining the pontifical secret (as distinct from observing confidentiality), having clerical officials for cases concerning clerics, may lead either to a reaffirmation of practice or to change. Likewise, the values underlying secular principles and practices that have been adopted by the Church, for example accountability and transparency, need to be studied so that, if appropriate the principles might be adopted more widely.

This thesis concludes by repeating the words of *Towards Healing*:

Abuse of both children and adults by Church personnel has done great harm to individuals and to the whole Church. Despite this, it can become an opportunity to create a better Church, but only if the response given by the leaders and all members of the Church is humble, honest and thoroughly Christian.⁸

⁸ *Toward Healing*, n. 45.3

APPENDIX 1

TOWARDS HEALING

Principles and procedures in responding to complaints of abuse
against personnel of the Catholic Church of Australia.¹

Part One

Principles for Dealing with Complaints of Abuse

SEXUAL ABUSE

1. Clergy and religious are in a special position of trust and authority in relation to those who are in their pastoral care, e.g. those in their parish, people seeking advice, students at a Catholic school. Any attempt to sexualise a pastoral relationship is a breach of trust, an abuse of authority and professional misconduct. Such sexualisation may take the form not only of sexual relations, but also harassment, molestation, and any other conduct of a sexual nature which is inconsistent with the integrity of a pastoral relationship. Compliance by the other person does not necessarily imply meaningful consent. Even when the other person concerned is the one who seeks to sexualise the relationship, it is the professional responsibility of clergy or religious to guard the boundary against sexual contact.
2. Other people who are employed by an official agency of the Catholic Church or appointed to voluntary positions may also be in a pastoral role. This includes, for example, pastoral workers in parishes, teachers in Catholic Schools, counsellors in Catholic welfare organisations, health care professionals, youth workers, staff in child care centres, and volunteers conducting religious education classes in schools or parishes.

¹ The National Committee for Professional Standards of the Australian Catholic Bishops' Conference and the Australian Conference of Leaders of Religious Institutes holds the copyright of *Towards Healing*. The principles and procedures contained of this document are reproduced here for the purpose of this research. This reproduction includes amendments approved in November 2003.

3. Any form of sexual behaviour with a minor, whether child or adolescent, is always sexual abuse. It is both immoral and criminal.
4. Sexual abuse by clergy, religious, or other Church personnel of adults in their pastoral care may be subject to provisions of civil or criminal law. Even when there are no grounds for legal action, we recognise that serious harm can be caused.

PHYSICAL AND EMOTIONAL ABUSE

5. Physical and emotional cruelty also constitute an abuse of power. Where a priest, religious or another person appointed to a position of pastoral care by an agency of the Church has acted towards a child or young person in a way which causes serious physical pain or mental anguish without any legitimate disciplinary purpose as judged by the standards of the time when the incidents occurred, then this constitutes abuse.

THE VICTIMS

6. Victims of abuse can experience fear, shame, confusion and the violation of their person. They can feel guilty, blame themselves and take responsibility for what has happened. Children and adolescents can suffer distortions in the process of determining their identity as persons. They may find it difficult to trust those in positions of authority or pastoral care or to believe in or trust in God. Victims can go through a long period of silence, denial and repression. Other people can refuse to believe them, reinforcing their sense of guilt and shame.
7. The intensity of the effects of abuse on victims will vary. Some of the factors involved are the age and personality of the victim, the relationship with the offender, the duration and frequency of the abuse, the particular form of the abuse, the degree of force used, the threats used to compel secrecy, the degree of violation of trust and abuse of power involved and the reaction of those in whom the victim confides.
8. We recognise that responses to victims by the many Church authorities vary greatly. We express regret and sorrow for the hurt caused whenever the response denies or minimises the pain that victims have experienced. Through this document we commit ourselves to principles and procedures that apply to all Church authorities.

THE OFFENDERS

9. In most cases of abuse free choices are made and many serious and sacred obligations are violated. These very facts argue to a clear awareness by the offender of the wrong that is being done.
10. Offenders frequently present as respectable, good and caring people. They can be quite exemplary in their public life, and they can actually use this as an excuse for a private life that contradicts their public image.

11. At the same time, a number of offenders are disturbed persons and some have serious psychological problems. A significant number were themselves victims of abuse in their earlier years.

THE RESPONSE OF THE CHURCH

12. The Church makes a firm commitment to strive for seven things in particular: truth, humility, healing for the victims, assistance to other persons affected, an effective response to those who are accused, an effective response to those who are guilty of abuse and prevention of abuse.

TRUTH

13. The Church makes a commitment to seek to know the full extent of the problem of abuse and the causes of such behaviour within a community that professes the values of Jesus Christ.
14. Concealing the truth is unjust to victims, a disservice to offenders and damaging to the whole Church community.

HUMILITY

15. It is very humbling for a Christian Church to have to acknowledge that some of its clergy, religious and other Church personnel have committed abuse. We must recognise that humility is essential if we are to care for victims and prevent abuse in the future.

HEALING FOR THE VICTIMS

16. Whenever the offender is a clergyman, religious or another person appointed to a position of pastoral care by an agency of the Church, Church authorities accept that they have a responsibility to seek to bring healing to those who have been victims of abuse.
17. A compassionate response to the complainant must be the first priority in all cases of abuse.
18. This attitude must be present even at a time when it is not yet certain that the allegations are accurate. At the first interview complainants should be assured that, if the facts are truly as stated, abuse must be named for what it is and victims assisted to move the blame from themselves to the offender. They should be asked what needs to be done to ensure that they feel safe from further abuse. They should be offered whatever assistance is appropriate. These responses do not pass judgment on or

prejudice the rights of the person accused, but they are part of the Christian response to the very possibility that the person present is a victim of abuse.

19. Whenever it is established, either by admission or by proof, that abuse did in fact take place, the Church authority shall listen to victims concerning their needs and ensure they are given such assistance as is demanded by justice and compassion. Details concerning the procedures to be followed are contained in the second half of this document.

ASSISTANCE TO OTHER PERSONS AFFECTED

20. We shall also strive to assist in the psychological and spiritual healing of those persons who, as well as the victims, have been seriously affected by incidents of abuse.
21. The effect on the family of the victim can be profound. Sometimes the disclosure is so terrible that the family would rather reject the victim than face the reality. Parents can feel guilty that they did not protect their child more effectively.
22. The parish, school or other community in which the abuse occurred may be deeply affected. The more popular and respected the perpetrator, the greater will be the shock.
23. The family and close friends of the offender may also be deeply hurt. They can find it difficult to know how to respond and how to act towards the offender.
24. When clergy or religious are found to have committed child abuse, then other clergy and religious are affected, and the thought that other people might be looking at them as potential child abusers can be a cause of personal stress. Clergy and religious have had to make changes in their manner of relating to all young people and some good things have been lost in these changes.
25. The whole Church community has been affected by incidents of abuse, for all Catholic people have been dismayed by the stories they have heard. The reputation of the whole Church has been affected and the religious faith of many has been disturbed.

A RESPONSE TO THOSE ACCUSED

26. All persons are presumed innocent unless and until guilt is either admitted or determined by due process. If Church personnel accused of abuse are asked to step aside from the office they hold while the matter is pending, it is to be clearly understood that they are on leave and that no admissions or guilt are implied by this fact. Unless and until guilt has been admitted or proved, those accused should not be referred to as offenders or in any way treated as offenders.

A RESPONSE TO THOSE GUILTY OF ABUSE

27. If guilt has been admitted or proved, the response must be appropriate to the gravity of what has happened, while being consistent with the precepts of Canon Law or civil law which govern that person's position. Account will be taken of how serious was the breach of professional responsibility, the degree of harm caused, and whether there is a likelihood that such behaviour could be repeated. Serious offenders will not be given back the power they have abused. Those who have made the best response to treatment recognise this themselves and no longer claim a right to return to ministry.
28. We accept that the community expects of us a serious and ongoing role in seeking to ensure that offenders are held accountable for what they have done, come to a true appreciation of the enduring harm they have caused, seek professional help in overcoming their problems, and do whatever is in their power to make amends.
29. In order to carry out this responsibility, Church authorities need to have some contact with offenders and some form of influence over their conduct. In order to achieve change, they need to hold out to them something more than the prospect of unending condemnation. They need to be able to tell them that there can be forgiveness, by human beings as well as by God, and that change is possible.

PREVENTION

30. We commit ourselves to making every effort to reduce the risk of abuse by Church personnel. Special care shall be taken in relation to all work with children and young people. No person shall be permitted to work in a position if the Church authority believes, on the basis of all the information available, that there is an unacceptable risk that children or young people may be abused.
31. We continue to review the selection of candidates for priesthood and religious life and their ongoing formation. We commit ourselves to a process of community education and awareness in recognising and responding to abuse.

COMMITMENT

32. We commit ourselves to the principles presented in this document. We invite the whole Church to assist us in offering whatever healing is possible to victims of abuse and in preventing abuse in the future.

Part Two

PROCEDURES FOR DEALING WITH COMPLAINTS OF ABUSE**33. NOTES**

- 33.1. This section of the document deals with the procedures to be applied where victims (or other complainants on their behalf) seek a response from the Church as a result of abuse. It is to be implemented in the context of the previous sections on principles.
- 33.2. These procedures are a revised version of the document published by the Australian Catholic Bishops' Conference and the Australian Conference of Leaders of Religious Institutes in 1996.
- 33.3. These procedures are intended to apply to all complaints of abuse by Church personnel, whether they be clerics, religious personnel, lay employees or volunteers. In the case of current lay employees, the response of the Church authority will be made in conjunction with the relevant body for employment relations in each state or territory.
- 33.4. A complaint of abuse may raise medical, psychological, spiritual, legal and practical questions. An appropriate response may, therefore, need to be based on a team approach.

34. DEFINITIONS

'Abuse' means:

Sexual assault, sexual harassment or any other conduct of a sexual nature that is inconsistent with the integrity of the relationship between Church personnel and those who are in their pastoral care.

Behaviour by a person with responsibility for a child or young person which causes serious physical pain or mental anguish without any legitimate disciplinary purpose as judged by the standards of the time when the behaviour occurred.

'Accused' means the person against whom a complaint of abuse is made.

'Children and young people' refers to those persons under the age of 18.

'Church authority' includes a bishop, a leader of a religious institute and the senior administrative authority of an autonomous lay organisation, and their authorised representatives, responsible for the Church body to which the accused person is or was connected.

‘Church body’ includes a diocese, religious institute and any other juridical person, body corporate, organisation or association, including autonomous lay organisations, that exercise pastoral ministry within, or on behalf of, the Catholic Church.

‘Church personnel’ includes any cleric, member of a religious institute or other persons who are employed by a Church body, or appointed by a Church body to voluntary positions in which they work with children or young people, or engage in other forms of pastoral care.

‘Church procedure’ means a penal process under canon law, or a disciplinary process in relation to a person who is employed by a Church body, or an assessment process under Clause 40 of these procedures.

‘Civil authorities’ include members of the police service as well as officials of the government departments responsible for child protection, for the administration of laws relating to complaints of sexual harassment, for the discipline of professions and for industrial relations.

‘Complainant’ means the person who has alleged abuse against Church personnel. In most but not all cases the complainant will also be the person against whom it is alleged that the abuse was directed, and this is to be understood in this document unless the context suggests otherwise.

‘Offender’ means a person who has admitted abuse or whose responsibility for abuse has been determined by a court of law or by due process in accordance with canon law, or a disciplinary process in relation to a person who is employed by a Church body, or an assessment process under Clause 40 of these procedures.

‘Pastoral care’ means the work involved or the situation which exists when one person has responsibility for the wellbeing of another. This includes the provision of spiritual advice and support, education, counselling, medical care, and assistance in times of need. All work involving the supervision or education of children and young people is a work of pastoral care.

‘Victim’ means the person against whom the abuse was directed.

35. STRUCTURES AND PERSONNEL

- 35.1. The Australian Catholic Bishops’ Conference and the Australian Conference of Leaders of Religious Institutes have jointly established a National Committee for Professional Standards (National Committee) to oversee the development of policy, principles and procedures in responding to complaints of abuse against Church personnel.
- 35.2. The bishops and leaders of religious institutes of the Catholic Church in Australia have established and shall maintain a Professional Standards Resource Group (Resource Group) in each State and the Northern Territory.

- 35.2.1. The Resource Group shall consist of at least one priest and one religious and a suitable number of other persons (no more than ten), both men and women, of diverse backgrounds, skilled in areas such as child protection, the social sciences, civil and Church law and industrial relations. Members of the Resource Group shall be appointed by the bishops and leaders of religious institutes.
- 35.2.2. The Resource Group shall act as adviser to all Church bodies in the State in matters concerning professional standards.
- 35.2.3. In addition to responding to requests for assistance, the Resource Group shall also act in a proactive manner. It shall be free to offer advice within its mandate to any Church body in the State as it sees fit.
- 35.3. The bishops and leaders of religious institutes for each State shall jointly be responsible for appointing a Director of Professional Standards in each State.
 - 35.3.1. The Director shall manage the process in relation to specific complaints, appoint assessors, facilitators and reviewers when required, convene and chair meetings of the Professional Standards Resource Group as required; liaise with the National Committee, other Resource Groups, and individual Church bodies and their professional advisers; have an overview of all matters dealt with under these procedures within their State; and be responsible for the safe-keeping of all documentation connected with these procedures.
 - 35.3.2. The bishops and leaders of religious institutes for each State may nominate a Deputy Director who may exercise any of the responsibilities which are delegated to him or her by the Director.
- 35.4. Each Resource Group shall appoint suitable persons from among its own members or otherwise, to be available to fulfil the following roles:

CONTACT PERSONS, who shall be the usual persons to receive complaints of abuse and pass them on to the Director of Professional Standards. Contact persons shall be skilled listeners, sensitive to the needs of complainants. After the initial complaint has been received, they may act as a support person for the complainant and may assist, where appropriate, with communication between the complainant, assessors and the Church authority. The contact person is not a counsellor to the complainant and shall not be the complainant's therapist.

ACCUSED'S SUPPORT PERSONS, who shall represent the needs of the accused to the Church authority and assist, where appropriate, with the care of the accused and with communication between the accused, assessors and the Church authority. The accused's support person shall not be the accused's therapist.

- 35.5. Each Resource Group shall maintain a list of suitable persons, not from its own members, to fulfil the following roles:

ASSESSORS, who shall be responsible for investigating the complaint.

FACILITATORS, who shall facilitate processes by which agreements may be reached between a victim and the Church authority about what the Church body can and should do to assist the victim.

REVIEWERS, who shall, where appropriate, conduct a review of process. Reviewers must be independent and impartial. They should not have close associations either with the complainant or with the Church authority responsible for dealing with the complaint.

- 35.6. All members of the Resource Group shall abide by the highest possible standards of professional conduct in all aspects of their work, including the maintenance of confidentiality.
- 35.7. The Group shall act in an advisory capacity to the Director of Professional Standards concerning any aspect of his or her work.
- 35.8. In addition to the above national and state structures, each diocesan bishop and religious leader of Australia shall have a consultative panel to advise and assist him or her at all stages of the process.
 - 35.8.1. The panel shall consist of at least five members who collectively provide the expertise, experience and impartiality that are necessary in this field.
 - 35.8.2. The bishop/leader must consult with this panel concerning the issues contained in nos. 38.8, 40.12, 41 and 42 of this process, and may well experience the need to consult concerning the issues raised in nos. 38.5, 39.2, 40.8 and 43.
 - 35.8.3. The panel must be consulted when an alleged crime is prosecuted before a criminal court.
 - 35.8.4. The panel must be consulted in any decision concerning whether a person constitutes an "unacceptable risk" to vulnerable persons.
- 35.9. The Australian Catholic Bishops Conference and the Australian Conference of Leaders of Religious Institutes shall jointly be responsible for appointing a National Review Panel to decide upon requests concerning a review of process and to fulfil such other functions as are assigned to it by the National Committee for Professional Standards.
 - 35.9.1. The National Review Panel shall consist of three members, with a quorum of two members.
 - 35.9.2. The National Review Panel may deliberate in person, by exchange of letters, electronic mail or telephone, or by any other means.

36. RECEIVING A COMPLAINT

- 36.1. If a complaint of abuse comes to the notice of any Church personnel and the person who has made this complaint wishes to invoke the procedures outlined in this document, the Church personnel shall refer the matter to a Contact Person as soon as possible.
- 36.2. Information shall be widely circulated to the public, and especially among Church counselling agencies, parishes and schools, to make people aware that these procedures exist. The information shall set out as simply as possible the manner for making a complaint about abuse.
- 36.3. Anonymous complaints are to be treated prudently. An anonymous complaint cannot have the full force of one made by an identified person, but anxiety and fear may persuade some complainants not to reveal their identity immediately. The Church authority may be unable to act on the complaint under these procedures unless at some point the name of the complainant becomes known.
- 36.4. The Contact Person shall listen fully, honestly and compassionately to the person laying the complaint, both concerning the facts of the situation and its emotional, psychological and spiritual effects. The Contact Person shall explain the procedures for addressing the complaint and ensure that the complainant gives his or her consent to proceeding on the basis laid down in this document.
- 36.5. The Contact Person shall either receive a written and signed complaint, or provide written notes of the details of the complaint and these notes are to be confirmed by the signature of the complainant. The complaint should have sufficient information about the nature of the complaint for the accused person to know what has been alleged against him or her.

37. CRIMINAL OFFENCES AND THE REPORTING OF CHILD ABUSE

- 37.1. When the complaint concerns an alleged crime, the Contact Person shall explain to the complainant that any process the Church establishes cannot compel witnesses, subpoena documents or insist on a cross-examination of witnesses. It cannot impose the same penalties as a criminal court. Because of these serious limitations, the Church has a strong preference that the allegation be referred to the police and, if desired, the complainant will be assisted to do this. Where it applies, the Contact Person shall also explain the requirements of the law of mandatory reporting.
- 37.2. In all cases other than those in which reporting is mandatory, if the complainant indicates an intention not to take the matter to the police, this shall be recorded by the Contact Person and confirmed by the signature of the complainant. Unless and until the complainant signs this document, the Church process cannot proceed beyond no. 38.4.

Appendix - 37.2

When a complainant does not wish to go to the police or other appropriate authority and asks the Church to investigate an alleged crime the complainant is required to sign the following statement before the Church takes any action:

“The Catholic Church has strongly urged me to take my complaint to the police or other civil authority. It has been carefully explained to me that any process the Church establishes cannot compel witnesses, subpoena documents or insist on a cross-examination of witnesses. It cannot impose the same penalties as a criminal court. Aware of these limitations, I still state that I do not wish to take my complaint to the police or other civil authority at this time and I ask that a Church process be established.”

37.1 - Appendix 37.2 Amendments May/June 2003

- 37.3. All Church personnel shall comply with the requirements for mandatory reporting of child abuse that exist in some States/Territories, and State or Territory law regarding the reporting of knowledge of a criminal offense must be observed. The appropriate Church authority shall also be notified of any such report.
- 37.4. No Church investigation shall be undertaken in such a manner as to interfere in any way with the proper processes of criminal or civil law, whether they are in progress or contemplated for the foreseeable future. However, where the complainant has chosen not to report the matter to the police or other civil authority, or the civil authorities have decided not to take further action under the criminal law or child protection legislation, the Church authority must act on the complaint.
- 37.5. The Director of Professional Standards shall endeavour to establish a protocol with the police in each relevant State or Territory to ensure that church assessments do not compromise any police action.

38. RESPONDING TO A COMPLAINT

- 38.1. The following procedures apply only where the complaint does not concern a criminal matter, or where a complainant has chosen not to report the matter to the police or other civil authority, or the civil authorities have decided not to take further action under the criminal law or child protection legislation.
- 38.2. The Contact Person shall forward the report promptly to the Director of Professional Standards.
- 38.3. The Director of Professional Standards shall determine whether the complaint concerns conduct which could reasonably be considered to fall within the definition of abuse in this document. If the complaint does not concern a matter which is to be dealt with by this procedure, or the behaviour complained of does not represent a serious breach of pastoral ethics and can properly be dealt with by correction and

apology, he or she shall advise the complainant of other means of addressing the issue. This may include voluntary mediation or a complaint under Integrity in Ministry. The Director may assist in making the referral. The Director should advise the Church authority of the action taken.

- 38.4. Apart from matters dealt with under 38.3, on receiving the complaint of abuse, the Director shall forward it to the appropriate Church authority and may make a recommendation concerning any immediate action that needs to be taken in relation to the protection of vulnerable children and adults. The Director may also make recommendations concerning the funding of counselling or other such assistance for the complainant pending the outcome of the investigation.

- 38.4.1. In the event that a complaint of abuse is made against a bishop or leader of a religious institute, the “Director of Professional Standards” for the case shall be the Co-Chairpersons of the National Committee for Professional Standards acting together. The “Church authority” for the case shall be the person designated in accordance with Appendices 1 & 2.

Appendix 1- 38.4.1

If a complaint of abuse is made against a bishop, the Church authority for a suffragan, auxiliary or retired bishop shall be the Metropolitan; for the Metropolitan himself it shall be the suffragan bishop senior by promotion. For the purpose of these cases the Archbishop of Canberra and Goulburn, the Maronite bishop, the Melkite Eparch and the Military Ordinary shall be deemed to be suffragans of the Province of Sydney, and the Archbishop of Hobart shall be deemed to be a suffragan of the Province of Melbourne.

Appendix 2 - 38.4.1

If a complaint of abuse is made against a leader of a religious institute the Church authority is determined to be:

- a) The diocesan bishop of the principal house (cf canon 595) for a major superior of an Institute of diocesan right; or
- b) The supreme moderator for a major superior of an institute of pontifical right; or
- c) The Prefect of the Congregation for Institutes of Consecrated Life and Societies of Apostolic Life (CICLSAL) for the supreme moderator of an institute of pontifical right.

The general principle applies in all cases that the “supreme moderator” of any ecclesiastical group is subject to the authority of an appropriate ecclesiastical superior, although the latter may delegate that authority to another person

- 38.5. As soon as possible after receiving notice of the complaint, the Church authority or its representative shall inform the accused of the nature of the complaint if it is possible to do so. The accused needs to be given enough detail about the complaint, and the complainant, to be able to offer a response. The Director of Professional Standards may be involved in such a process. The accused shall be entitled to information about his or her rights and about the process for dealing with the complaint. The accused shall be offered a support person.
- 38.6. The Church authority (or his or her delegate) shall seek a response from the accused in order to determine whether the facts of the case are significantly disputed. If they are not, then the Church authority shall proceed in accordance with Clause 42 of these procedures.
- 38.7. Where there is a significant dispute about the facts, or the accused is unavailable to give a response, the matter shall be investigated in accordance with the procedures set out in this document.
- 38.8. At any time, the Director of Professional Standards may recommend to the Church authority that the accused be asked to stand aside from a particular office or from all offices held in the Church, pending investigation. The Church authority may seek the opinion of others involved in the matter before making a decision, and shall give the accused the opportunity to be heard on the matter. Where the accused is a priest or religious, the Church authority shall comply with canon 1722.²
- 38.8.1. If there is seen to be any significant risk of abuse of other persons, this advice must be given and acted upon by the Church authority at the earliest possible moment.
- 38.8.2. If accused persons are asked to stand aside from any office they hold while the matter is pending, it is to be clearly understood that they are on leave and that no admissions of any kind are implied by this fact. Accused persons who are clergy or religious shall, therefore, receive their normal remuneration and other entitlements while the matter is pending and they are standing aside. They shall be provided with an appropriate place to live. Where possible, they should be given some suitable activity. They shall not engage in any public ministry during this time.

39. SELECTING THE APPROPRIATE PROCESS

- 39.1. If the allegations concern a current employee of a Church body, other than a priest or religious, then the Director should refer the complaint to the relevant body for employment relations to investigate in accordance with the applicable procedures of

² This canon requires that the Ordinary shall consult with the promotor of justice and shall summon the accused to appear, before prohibiting the accused from exercising some ecclesiastical office or position.

employment law (and any other relevant laws) in that State or Territory. The Director of Professional Standards should liaise with the relevant body when the investigation has been completed, concerning how to respond to the victim if the complaint is validated. The response to the victim should follow the principles and procedures outlined in this document.

39.1.1. The documents or other material arising from the investigation are to be kept in accordance with the practices of the employing authority and any relevant laws.

39.2. If the allegations concern a priest or religious, the Church authority shall consider whether a penal process should be commenced in accordance with Canon Law.³ If a penal process is commenced, the Director of Professional Standards should liaise with the Church authority when the penal process has been completed, concerning how to respond to the victim if the complaint is validated. The response to the victim should follow the principles and procedures outlined in this document.

39.2.1. Where the accused is a priest or religious, the documents associated with the penal process shall be preserved in accordance with canon 1719 and canons 489-490 of the Code of Canon Law.⁴

39.3. In all other cases where the facts of a case are in dispute, the Director of Professional Standards shall act in accordance with Clause 40 of these procedures.

39.4. If in the course of a Church procedure, allegations emerge for the first time which indicate that a criminal offense may have been committed, the Church procedure shall cease immediately and the matter will be dealt with in accordance with 37.1-37.3. If the complainant indicates an intention not to take the matter to the police, this should be recorded and confirmed by the signature of the complainant before the Church procedure resumes.

40. ASSESSMENT

40.1. In all cases to which this Clause applies, the Director of Professional Standards shall appoint assessors. Two assessors shall be appointed unless the Director considers that in the circumstances one professional assessor is sufficient. A list of assessors shall be maintained by the Resource Group. The appointment of the assessors shall occur as soon as practicable.

³ This may involve an administrative or a judicial procedure as laid down in cc. 1720-1728. Canon 1341 provides that administrative or judicial procedures should be invoked only when pastoral approaches have failed.

⁴ Canon 1719 requires that all documents which form part of the investigation process or which preceded the investigation, should be retained in the secret curial archive. Canons 489-490 govern the maintenance of this archive and issues about access to it.

- 40.1.1. The assessors chosen must be, and be seen to be, independent of the Church authority, the complainant and the accused.
- 40.2. The purpose of an assessment is to investigate the facts of the case where there is a significant dispute as to the facts, or where there is a need for further information concerning the complaint.
- 40.3. The assessor or assessors shall arrange an interview with the complainant. Where there is more than one assessor, both should interview the complainant and the accused.
 - 40.3.1. Where the complainant is not the victim, then the assessors shall not seek to interview the victim without first discussing the matter with the complainant and the Director of Professional Standards. If the facts are disputed, and it is not possible to interview the person who it is said has been victimised, then it may not be possible to proceed any further in dealing with the complaint unless other relevant information, such as a police record of interview, is available.
 - 40.3.2. The complainant shall be invited to have another person present at the interview.
 - 40.3.3. Under no circumstances shall there be any attempt to intimidate a complainant or to dissuade a complainant from proceeding with a complaint.
 - 40.3.4. No interview with a child will take place if there is a risk that this will interfere with the proper process of civil or criminal law. No interview, either by a Contact Person or an assessor, shall be conducted with a child without the express written authority and in the presence of the parent or guardian. An interview with a child shall only be conducted by personnel who are professionally recognised as skilled practitioners in interviewing children.
 - 40.3.5. Special care shall also be taken in interviewing persons with an intellectual or psychiatric disability, and any such interview shall be conducted only by an appropriately qualified and experienced person.
 - 40.3.6. The Director of Professional Standards has a discretion to close a matter if the complainant decides not to co-operate with an assessment process.
- 40.4. The assessor or assessors shall arrange an interview with the accused, if he or she is available and willing to speak to them. If the accused does not wish to co-operate with the assessment, the assessment shall still proceed and the assessors shall endeavour to reach a conclusion concerning the truth of the matter so that the Church authority can make an appropriate response to the complainant.

- 40.4.1. Where an interview with the accused takes place, the assessor or assessors shall inform the accused that in both civil and Church law a person is presumed innocent until proven guilty.
- 40.4.2. An accused person may be invited to admit to an offense but is not bound to do so, nor may an oath be administered.⁵
- 40.5. The accused has the right to obtain independent legal advice.
 - 40.5.1. This advice shall be at the accused's expense, although the Church authority may exercise a discretion to make loans or to reimburse an accused for reasonable legal expenses if he or she is unable to afford legal assistance.
- 40.6. The accused is entitled to have other persons present during any interviews (e.g. accused's support person or legal representative).
- 40.7. The assessors shall interview any other persons who could be of assistance. Decisions about who should be interviewed should be made after taking account of any wishes expressed by the complainant and the accused, and following consultation with the Director of Professional Standards. They may also need to put to the complainant the accused's version of events.
- 40.8. Church authorities shall comply with all reasonable requests made by assessors for access to documents which may assist them in their work. Church authorities are not required to disclose documents concerning which it has an obligation of confidentiality to the accused or to any other person.
- 40.9. A written or taped record shall be made of all interviews.
- 40.10. The contact person and the accused's support person shall have ready access to the assessors and shall have the responsibility of keeping the complainant and accused, respectively, informed of the progress of the assessment.
- 40.11. After the assessment is completed, the assessors shall provide a written report to the Church authority and the Director of Professional Standards. The assessors shall review the evidence for the complaint, examine the areas of dispute and may advise the Church authority whether they consider the complaint to be true.
 - 40.11.1. The assessors must provide reasons for their conclusions. If they are unable to reach a determination of the truth of the matter with a sufficient degree of certainty, they may nonetheless make recommendations to the Church authority concerning its response to the complainant.

⁵ Canon 1728, §2.

- 40.11.2. Where the behaviour about which complaint has been made was not a criminal offense, the assessors may also comment on how serious was the abuse of the pastoral role.
- 40.11.3. The complainant is entitled to know the findings of the assessment promptly. The accused is also entitled to know the findings of the assessment if he or she has participated in the assessment or otherwise could be subjected to disciplinary action as a consequence of it by the Church authority. The Director of Professional Standards is responsible for communicating the relevant findings.
- 40.12. The Church authority shall discuss the findings and recommendations of the report with the Director of Professional Standards as quickly as possible. If the assessors consider the complaint to be true, then the Church authority must consider what action needs to be taken under Clauses 41 and 42 of these procedures. The Director of Professional Standards may be called upon by the Church authority for advice on these matters. If the Church authority decides to reject the complaint, then it must provide reasons for its decision to the complainant.
- 40.13. Mindful that the assessment process is a difficult and trying time for all concerned, particularly the complainant and the accused, the process of the assessment shall be undertaken and concluded as quickly as possible and the process shall be as transparent as possible to all concerned. The Director of Professional Standards shall seek to ensure that all parties adhere to this principle.
- 40.14. During the assessment, and therefore, at a time when guilt has been neither admitted nor proven, the issue of guilt, liability or the particular course of action that may follow assessment cannot be commented upon. Any comment regarding these issues must always be referred to the Church authority and its professional advisers.
- 40.15. The records of interview and all other documents or material associated with the assessment are to be treated as confidential. The Director of Professional Standards shall maintain a confidential record of all findings and any documents relevant to the suitability of the person for future ministry. The Director shall not retain any other documents or material for longer than five years following the completion of the assessment unless required to do so by law.

41. OUTCOMES RELATING TO THE VICTIM

- 41.1. In the event that the Church authority is satisfied of the truth of the complaint, whether through admission of the offender, a finding of a court, a canon law process or a Church assessment, the Church authority shall respond to the needs of the victim in such ways as are demanded by justice and compassion. Responses may include the provision of an apology on behalf of the Church, the provision of counselling services or the payment of counselling costs. Financial assistance or reparation may also be paid to victims of a criminal offense or civil wrong, even though the Church is not legally liable.

- 41.2. The Church authority may seek such further information as it considers necessary to understand the needs of the victim.
- 41.3. Facilitation shall be the normal means of addressing the needs of the victim. The Church authority and the victim shall mutually agree on a Facilitator from the approved panel.
 - 41.3.1. The Facilitator shall arrange and moderate a process for communication between the victim and Church authority (or delegate with power to make binding decisions). This may involve a meeting, under the direction of the Facilitator, in which apologies can be offered and unresolved problems addressed.
 - 41.3.2. The victim may have a support person or adviser present at the meeting. The Church authority or delegate may also have an adviser if required. The presence of any other persons accompanying either the victim or the Church authority shall be subject to the agreement of the Facilitator. The Director of Professional Standards should not participate in the facilitation process.
 - 41.3.3. The Facilitator shall seek to know the ongoing needs of the victim and the response of the Church authority to these needs.
 - 41.3.4. The Facilitator shall also seek to know the needs of the victim's family and of the community in whose midst the abuse occurred.
 - 41.3.5. The Facilitator shall seek to identify any outstanding issues where the victim is not satisfied with the response received and shall explore with both parties the best means of dealing with such issues.
 - 41.3.6. Issues concerning reparation may either be dealt with in a facilitation, addressed through a compensation panel or dealt with through some other such process in order to reach a resolution on this aspect of the matter.
 - 41.3.7. The Facilitator shall ensure that there is a record of any agreement reached and of any outstanding areas of disagreement.
 - 41.3.8. The Director of Professional Standards shall be informed of the outcome, and whether the Facilitator considers that any other processes or actions would assist further in bringing the matter to a conclusion.
 - 41.3.9. The Church authority shall bear all ordinary and reasonable expenses of the process of facilitation.
- 41.4. No complainant shall be required to give an undertaking which imposes upon them an obligation of silence concerning the circumstances which led them to make a complaint, as a condition of an agreement with the Church authority.

- 41.5. If the victim remains of the view that the response of the Church authority is unsatisfactory, the victim shall be informed about access to a review of process.

42. OUTCOMES RELATING TO THE ACCUSED

- 42.1. If either a police investigation or a Church process makes it clear that the accused did not commit the alleged wrong, the Church authority shall take whatever steps are necessary to restore the good reputation of the accused.
- 42.2. If abuse is admitted, or a Church process reaches the conclusion that on the basis of the findings of the assessment there are concerns about the person's suitability to be in a position of pastoral care, the Church authority in consultation with the Director of Professional Standards shall consider what action needs to be taken concerning the future ministry of the person. It may commission such other reports or inquiries as are necessary to determine what action should be taken.
- 42.3. Where the offender is a current employee of the Church other than a priest or religious, the offender's future must be determined in accordance with the applicable procedures of employment law.
- 42.4. The process of determining the future ministry of a priest or religious shall be consistent with the requirements of the Code of Canon Law.⁶ If a cleric or religious has admitted to or been found guilty of abuse, the Church authority shall, in person or through a nominated representative, meet with the offender to discuss honestly and openly the offender's future options. The offender may be accompanied by a support person and/or legal representative. The discussion shall take into account the seriousness of the offense and all relevant circumstances. It is unfair to hold out to a serious offender any hope of a return to ministry when it is clear that this will not be possible.
- 42.5. In making decisions on the future of a person found guilty of abuse, Church authorities shall take such action as the situation and the seriousness of the offense demand. In relation to child abuse, Church authorities shall be guided by the principle that no-one should be permitted to exercise a public ministry if doing so presents an unacceptable risk of abuse to children and young people.
- 42.6. As far as it is within its power to do so, the Church authority shall require the offender to address the issue of restitution to the victim and to the Church community.

⁶ Canon law provides a number of principles and procedures which may be relevant to determining the future of a priest or religious in cases of alleged abuse. In addition to an administrative or judicial procedure as laid down in canons 1720-1728, there is the procedure for the removal of a parish priest under canons 1740-1747. Reliance may also be placed upon Canons 1041 and 1044 if it is considered that the priest or religious is incapable of fulfilling ministry due to psychological infirmity. In some cases it will be appropriate to commence a formal penal process even where

- 42.7. The Church authority shall promptly communicate the outcomes in relation to an offender to the Director of Professional Standards.

43. REVIEW OF PROCESS

- 43.1. A review of process of the procedures contained in Parts 40 and 41 is available for complainants who are not satisfied with the response of the relevant Church authority. A review of process of the procedures contained in Parts 40 and 42 is also available for accused persons if they co-operated with the assessment process.
- 43.2. A complainant or an accused person who is entitled to a review of process may request in writing to the Director of Professional Standards a review of process within 3 calendar months of the completion of the process. The process is complete in relation to the complainant when either the Church authority gives its response to the complaint or if the Church authority fails to offer a response within three calendar months of the time when an assessment has been completed or the facts otherwise established. The process is complete in relation to the accused when the Church authority has made its decision concerning the future ministry of the accused in response to the complaint of abuse.
- 43.3. The Director of Professional Standards shall refer the request to the National Review Panel.
- 43.4. If the request is accepted, the Review Panel shall appoint a Reviewer on the list of reviewers kept by the Professional Standards Resource Groups.
- 43.4.1. If any party objects to the Reviewer named, the matter shall be considered further by the National Review Panel which shall decide whether to appoint a different Reviewer.
- 43.4.2. The National Review Panel shall inform the Director of Professional Standards of the appointment of a Reviewer.
- 43.4.3. The Director shall inform the Church authority that a review of process has been requested and approved. He or she shall also ensure that the complainant or accused person as the case may be, is informed that a review has been requested and approved. This only applies to accused persons who have co-operated with the process.
- 43.5. The review of process is an independent evaluation, not only of whether the procedures set out in this document have been properly observed, but also of whether the principles established in the first part of the document have been adhered to. A review of process is not a review of outcomes unless the National Review Panel requests the reviewer to consider the appropriateness of the Church authority's response to the complaint.
- 43.6. The Reviewer shall determine the procedures for the conduct of the review.

- 43.6.1. The Reviewer shall have authority to interview all Church personnel concerned and will have access to all relevant documentation.
- 43.6.2. The Reviewer shall conduct the review expeditiously and certainly within three calendar months, unless the National Review Panel provides for a further extension of time.
- 43.7. At the end of the review, the Reviewer shall provide a written report with recommendations to the National Review Panel. If the Reviewer considers that there has been a failure to observe the required processes, he or she shall indicate whether the decided outcomes ought to be called into question.
- 43.8. The National Review Panel shall consider the Reviewer's report and make such recommendations as it sees fit to the Church authority in relation to the complaint. A copy of the report and the Panel's recommendations shall also be given to each party, the Director of Professional Standards in the relevant State or Territory, the Professional Standards Resource Group and the National Committee for Professional Standards.
- 43.9. The Church authority shall bear all ordinary and reasonable expenses of the review of process.

44. PREVENTIVE STRATEGIES

- 44.1. Each Church authority shall ensure that all Church personnel are made aware of the seriousness of abuse. They should be warned of behaviour that is inappropriate or which might be misunderstood as involving improper behaviour.
- 44.2. Each Church authority shall ensure that those working with children and young people are made aware of the issue of child abuse and are given information concerning processes for reporting disclosures of abuse. They should also be given information on how to conduct children's and youth ministry in such a manner as to reduce the risk of child abuse occurring.
- 44.3. Church bodies, especially those involved in providing care for children, shall have in place procedures, consistent with good child protection and industrial relations practice, for verifying the suitability of persons for employment or for participation as volunteers. They shall obey all applicable laws concerning employment screening and the prohibition of certain convicted persons from employment involving children.
- 44.4. Whenever a Church authority is concerned about the behaviour of any person connected with that Church body which might lead to a complaint of abuse, this fact should be brought to the attention of that person and appropriate steps taken to determine whether the behaviour is the symptom of a deeper problem requiring attention.

- 44.5. Church personnel who feel that they might be in danger of committing abuse shall be offered opportunities to seek both spiritual and psychological assistance before the problem becomes unmanageable and they offend. Names of suitable therapists and treatment programs should be made available.
- 44.6. Whenever a cleric or religious is to transfer from one diocese or institute to another, or is to carry out a ministry or apostolate in another diocese or institute, the Church authority to which the person is to be transferred shall ask for a written statement from the priest or religious indicating whether there have been any substantiated complaints of abuse against him or her or whether there are known circumstances that could lead to a complaint of abuse. Such statements shall be held as confidential documents by the Church authority.
- 44.7. In these same circumstances the Church authority in the diocese or institute where the cleric or religious previously lived and worked, shall provide a statement in writing to the new diocese or institute indicating whether such authority knows of any complaints of abuse which have been substantiated or is aware of circumstances that could lead to a complaint of abuse. Where there has been a substantiated complaint, the Church authority shall furnish all information necessary to evaluate the seriousness of the offense, and shall report on all treatment undertaken, and other measures employed to ensure that further offences do not occur. Such statements shall be held as confidential documents by the Church authorities.
- 44.8. Each Church authority shall have in place procedures for verifying the suitability of candidates for seminaries or religious institutes. In particular, candidates must be asked to state in writing whether they have a criminal record, or any complaints of abuse have been made against them, or whether there are any known circumstances that could lead to a complaint of abuse against them.
- 44.9. While due process must be observed, any proven incident of sexual assault or other serious abuse must lead to the dismissal of a seminarian from a seminary or a candidate from an institute's program of formation.
- 44.10. Church authorities shall be honest and frank in references and shall not act in a way which would allow an offender to obtain employment in circumstances where others might be at risk.

45. CONCLUDING STATEMENTS

- 45.1. All Church authorities shall take the necessary steps to conduct such in-service programs for Church personnel as may be necessary to inform them of the principles and procedures set down in this document.
- 45.2. While the distribution of this document is unrestricted, the publication of the document, its implementation, and all matters of interpretation are reserved to the National Committee for Professional Standards.

- 45.3. Abuse of both children and adults by Church personnel has done great harm to individuals and to the whole Church. Despite this, it can become an opportunity to create a better Church, but only if the response given by the leaders and all the members of the Church is humble, honest and thoroughly Christian.
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APPENDIX 2

INTEGRITY IN MINISTRY

Appendix 1¹

The Procedures to be Followed in Cases of Serious Violation of the Principles and Standards of the Document *Integrity in Ministry*

1. 1.1 For matters concerning diocesan clergy, the members of the council of priests of the diocese shall elect at least four priests and two independent civil lawyers to a stably established group.
 - 1.2 For matters concerning religious, the council of each religious institute shall elect at least four members of the institute and two independent civil lawyers to a stably established group.
 - 1.3 For matters concerning bishops, the members of the Australian Catholic Bishops Conference shall elect at least four members of the conference and two independent civil lawyers to a stably established group.
 - 1.4 For matters concerning leaders of religious institutes, the members of the Australian Conference of Leaders of Religious Institutes shall elect at least four members of the conference and two independent civil lawyers to a stably established group.
2. A complaint of a serious violation of the principles and standards of the document *Integrity in Ministry* is to be lodged in writing with:
 - the diocesan bishop in the case of a diocesan priest or deacon;
 - the provincial leader of the religious institute in the case of a religious;

¹ The copyright of *Integrity in Ministry: A Document of Principles and Standard for Catholic Clergy & Religious in Australia* is held by the National Committee for Professional Standards, a committee of the Australian Catholic Bishops Conference and the Australian Conference of Leaders of Religious Institutes. Appendix 1 of this document is reproduced solely for the purpose of research. The document is available at <http://www.catholic.org.au/media/integrity_in_ministry/iim_index.htm>. (15 July 2003).

- the president of the Australian Catholic Bishops Conference in the case of a bishop, and this president shall be the Church authority for the purposes of nn. 3 and 6 of these procedures;
 - the president of the Australian Conference of Leaders of Religious Institutes in the case of a leader of a religious institute, and this president shall be the Church authority for the purposes of nn. 3 and 6 of these procedures.
3. If the complaint concerns a matter that constitutes a crime in civil law the Church authority shall inform the complainant that the matter must be referred to the police. If the complaint is not of a criminal nature, within ten days of receipt of the written complaint, the Church authority mentioned in no. 2 shall select two peers and a civil lawyer from the group elected and appoint them as a panel to hear the complaint.
4. The senior peer shall act as the convenor of the panel and shall call the panel together within ten days of being notified of the names of those selected.
5. The panel shall first determine whether it is the proper forum and, if so, in what capacity it acts:
- 5.1.1 If the complaint concerns a matter that constitutes a crime in civil law and the complainant has not already been informed that the matter must be referred to the police, the panel shall do so now.
 - 5.1.2 If the complaint is an accusation of sexual abuse that does not constitute a crime in civil law, the complainant shall be referred to the appropriate personnel under the provisions of the document Towards Healing.
 - 5.1.3 If the panel believes that the matter would be more appropriately handled under some other procedure of law (e.g. the process for the transfer or removal of a parish priest), it shall advise the Church authority accordingly.
 - 5.1.4 If the panel is convinced that the complaint, even if proven, would not constitute a serious violation of the principles and standards of the document Integrity in Ministry, warranting at the very least the advice and counselling mentioned in 8.1 of that document, it shall forward its written reasons for this decision to the complainant.
 - 5.1.5 If the panel believes that the complaint, if proven, could lead to advice and counselling or a request to undertake special training or seek specialised assistance, it shall proceed as in no. 6 below.
 - 5.1.6 If the panel believes that the complaint, if proven, could lead to more serious penalties under the code of canon law, it shall proceed as in no. 7 below.

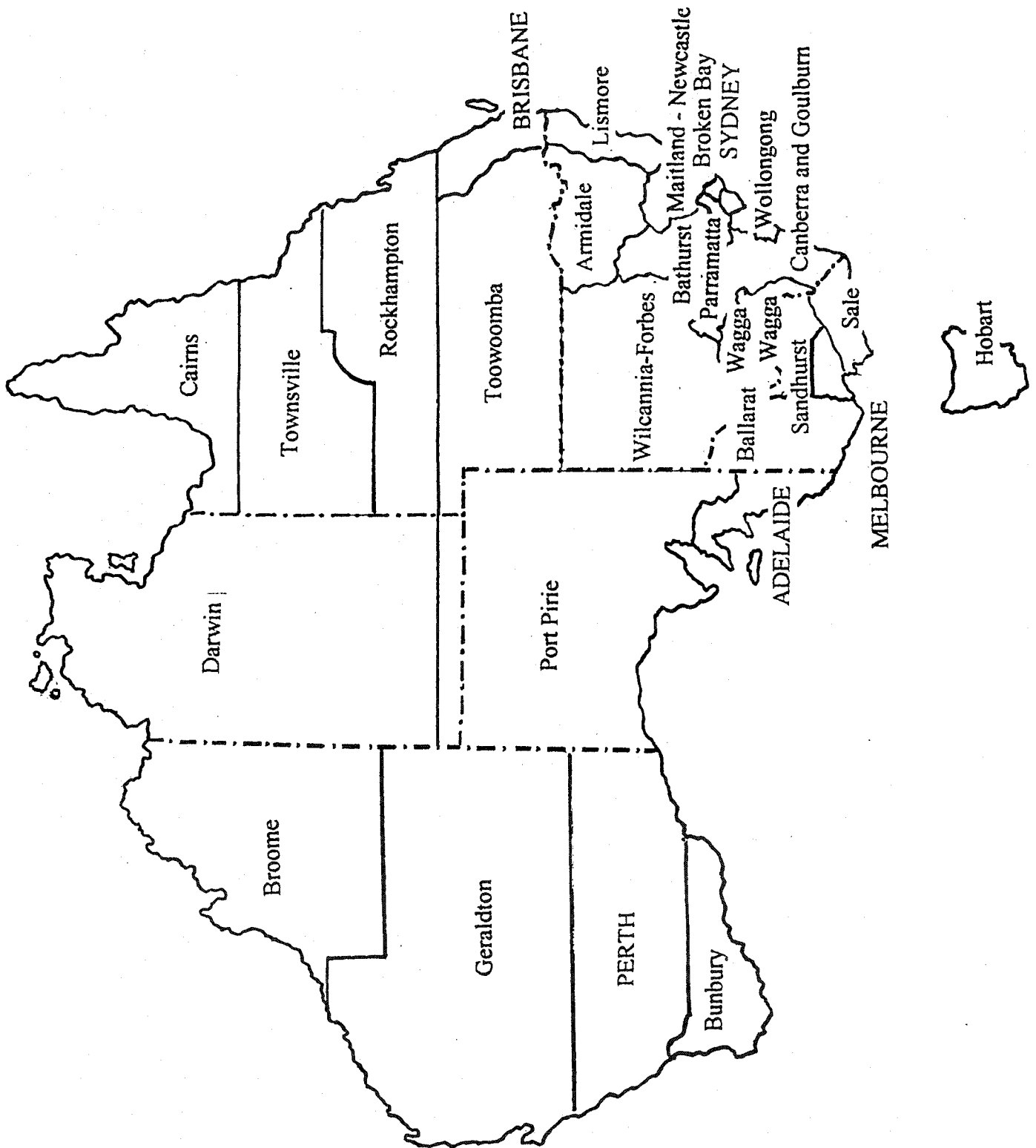
6. 6.1 If the panel believes that the complaint, if proven, could lead to advice and counselling or a request to undertake special training or seek specialised assistance, it shall determine the procedure to be followed.
 - 6.1.1 In accordance with the general rules of law, both the procedure to be adopted and the degree of certainty required may vary according to the seriousness of the matter and the penalty that might be incurred.
 - 6.1.2 In all cases the basic principles of natural justice shall be respected.
 - 6.1.3 As a minimum requirement, the following provisions, adapted from canons 1740-1752, shall be observed.
 - 6.1.4 The person who is the subject of the complaint shall be given the opportunity to answer the complaint and to produce contrary proofs.
 - 6.1.5 The panel may also question any other person it judges might have relevant information, whether nominated by the complainant or by the person defending the action or by the panel itself.
 - 6.1.6 The panel shall then debate all the material presented to it and inform the Church authority of its findings and its recommendations.
- 6.2 If the panel finds the complaint not proven, the Church authority shall inform both the complainant and the person who is the subject of the complaint of this finding and of the reasons for it.
- 6.3 If, on the advice of the panel, the Church authority decides that advice and counselling, or a request that the person undertake special training or seek specialised assistance is appropriate, he or she may proceed to this.
7. 7.1 If the panel believes that the complaint, if proven, could lead to more serious penalties under the code of canon law, it shall request from the proper canonical authority nomination as the 'suitable person' mentioned in canon 1717 in carrying out a preliminary investigation into a canonical offence in accordance with canons 1717-1719.
- 7.2 If this preliminary investigation indicates the likelihood of an offence, the panel shall offer advice to the Church authority in relation to the options listed under canon 1718, always bearing in mind canon 1341

APPENDIX 3

AUSTRALIA

STATE / TERRITORY	POPULATION
	AS AT 31 MARCH 2003
New South Wales	6 691 800
Victoria	4 929 800
Queensland	3 774 300
South Australia	1 528 200
Western Australia	1 951 300
Tasmania	476 200
Northern Territory	197 100
Australian Capital Territory	323 800
AUSTRALIA	19 875 000

Roman Catholic population, (Latin and Eastern Churches) is 26% of the total population.



APPENDIX 4

AUSTRALIAN MANDATORY REPORTING REQUIREMENTS

The following information was correct at 31 May 2003.

New South Wales

Children and Young Persons (Care and Protection) Act 1998, s. 27

Persons who provide health care, welfare, education, children's services, residential services or law enforcement or who hold management positions in an organization providing such services, must as soon as practicable, report to the Director-General of the Department of Community Services, when they have reasonable grounds, arising during the course of their work, to suspect that a child is at risk of harm.

A person who makes a report in good faith does not breach a code of professional ethic or depart from accepted standards of professional conduct nor is the person liable for defamation incurred because of the report.

The disclosure of the identity of the notifier is subject to restrictions.

Queensland

Health Act 1937, s. 76K

A medical practitioner who suspects on reasonable grounds the maltreatment or neglect of a child [under 17 years] in such a manner as to subject or be likely to subject the child to unnecessary injury, suffering or danger shall, within 24 hours after first so suspecting, notify by the most expeditious means available to the medical practitioner a person authorised under a regulation to be so notified.

Child Protection Act 1999, s. 22, 180

A person who, acting honestly and suspecting that a child has been or is likely to be harmed, gives a police officer or an officer of the department information about the alleged harm to the child is protected from liability. The person cannot be held to have breached any code of professional ethics.

The person who receives the notification may not disclose the identity of the notifier, subject to some exceptions.

Department of Education

Department of Education guidelines require teachers to advise their principal of suspected cases of child abuse.

Children's Protection Act 1993, ss. 11-13

Certain persons who, in the course of their work or official duties, suspect on reasonable grounds that a child has been or is being abused or neglected, must notify the Department of that suspicion as soon as practicable. (Penalty \$2500.)

The persons who must notify are medical practitioners, registered and enrolled nurses, dentists, psychologists, members of the police force, community corrections officers, social workers, teachers, approved family day care providers, people employed in government (including local government) departments that provide health, welfare, education, child care or residential services for children. Also included are people in management positions in organisations providing these services.

A person who notifies the department of a suspicion of abuse or neglect, cannot be held to have breached any professional code of conduct and, if the person has acted in good faith, cannot incur civil or criminal liability in respect of the notification. Restrictions apply to the disclosing of the identity of the notifier.

South Australia*Children's Protection Act 1993 ss. 11-14*

Medical practitioners, dentists, registered and enrolled nurses, psychologists, pharmacists, teachers, teacher aides, preschool workers, members of the police force, community corrections officers, family day care providers, employees of agencies providing health and welfare services, employees or managers of organizations who provide child care or residential services to children, and social workers in health services who, in the course of their work or carrying out official duties, suspect on reasonable grounds that a child has been or is being abused or neglected must notify the Department as soon as practicable. Failure to do so carried a maximum penalty of \$2500.

A person who, whether voluntarily or as required by this legislation, makes such a notification, cannot be held to have breached any code of ethics or to have not acted contrary to professional conduct. Such a person, acting in good faith, does not incur civil or criminal liability in respect of the notification.

Restrictions are placed on the disclosure of the identity of the notifier.

Tasmania*Child Protection Act 1974 as amended in 1986, 1987 and 1991*

The following professionals must report suspected cases of child abuse to the Child Protection Board: medical practitioners, registered nurses, probation officers, child welfare officers, school principals, kindergarten teachers, welfare officers appointed under the *Alcohol and Drug Dependency Act 1968*, guidance officers and psychologists.

Victoria

Children and Young Persons Act 1989 s. 64 (Including amendments as at 19 June 2002).

Any person who believes on reasonable grounds that a child is in need of protection may notify a protective intervener of that belief and of the reasonable grounds for it.

Certain persons who, in the course of practising their profession or employment, form the belief on reasonable grounds that a child is in need of protection must notify the Secretary of that belief and of the reasonable grounds for it as soon as practicable after forming the belief; and after each occasion on which they become aware of any further reasonable grounds for the belief.

These persons include registered medical practitioners, psychologists, nurses, teachers, the head teacher or principal of a State school or a registered school, youth and child welfare workers, other workers in related community and welfare services fields, members of the police force, probation officers, and youth parole officers.

Such notifications do not constitute unprofessional conduct or a breach of professional ethics on the part of the person by whom it is made; and if made in good faith, does not make the person by whom it is made subject to any liability in respect of it.

The identity of person making the notification is protected in court proceedings.

Western Australia

There is no mandatory reporting legislation.

Referrals about possible harm to children are facilitated by a series of reciprocal protocols that have been negotiated with key government and non-government agencies. Community awareness programs and education of professional groups also contribute to identification of possible maltreatment, and action to prevent further harm from occurring.

Australian Capital Territory

Children and Young People Act 1999, ss. 158-164.

Any person may report.

Certain persons who suspect that a child or young person is in need of care and protection must report, in good faith, the circumstances to the chief executive. Those persons are: doctors, registered dentists, enrolled or registered nurses, teachers, persons providing counsel at school, police officers, persons providing care at a child-care centre or coordinating or monitoring home-based care or family day care, community advocates, the official visitor, public servants who provide services relating to the health and well-being of children, young people or families.

A person, in making either a voluntary or a mandatory report does not breach confidence, ethics or a rule of professional conduct and no civil or criminal liability is incurred by reason of making the report.

Northern Territory*Community Welfare Act 1983 s. 14*

Any person who is not a member of the police force, who believes on reasonable grounds, that a child is being or has been maltreated, must report to the Minister or to a member of the police force.

If the person is acting in good faith in making the notification, the report does not constitute a breach of confidence or professional conduct or ethics. No civil or criminal liability is incurred in making the report.

APPENDIX 5

CHRONOLOGY

YEAR	COUNTRY	SOCIETY	CATHOLIC CHURCH
1961	USA	"Battered child syndrome" identified by Dr. H. Kempe.	
1974	USA	<i>Child Abuse Prevention and Treatment Act</i> State Mandatory reporting legislation	
1975		International Women's Year	
1979		International Year of the Child	
1980	Canada	Committee on Sexual Offences against Children and Youth established.	
1981	Australia WA	Department of Community Welfare published <i>Children in Limbo</i>	
1983	Ireland	Irish Association of Social Workers Conference on Incest. Department of Health published <i>Non-Accidental Injury Guidelines</i> .	
1984	Canada	<i>Report of the Committee on Sexual Offences Against Children and Youths</i> (Badgley Report).	
1984	USA		NCCB Resource, "The Problem of Sexual Molestation by Roman Catholic Clergy: Meeting the Problem in a Comprehensive Manner"

YEAR	COUNTRY	SOCIETY	CATHOLIC CHURCH
1984	Australia SA	South Australian Task Force on Child Sexual Abuse established.	
1984	Australia NSW	NSW Child Sexual Assault Task Force established.	
1985	USA		<i>National Catholic Reporter</i> published articles on clergy who had been accused of child sexual abuse.
1985	USA		NCCB meeting on clergy sexual abuse
1985	Australia NSW	NSW Child Protection Council established	
1985	Australia Q	Sturgess Report published	
1986	Australia NSW	Media campaign, <i>Child Sexual Assault: It's Often Closer to Home Than You Think</i>	
1986	Australia SA	<i>South Australian Government Task Force Report on Child Sexual Abuse</i> published South Australian Child Protection Council established.	
1987	UK	Cleveland Inquiry	
1987	Ireland	Department of Health published <i>Procedures for the Identification, Investigation and Management of Child Abuse.</i>	
1987	Canada		<i>CCCB Policies and Procedures Regarding Complaints of Sexual Abuse</i>
1987	Australia NSW	<i>Child (Care and Protection) Act 1987</i>	
1987	Australia WA	Exposé of child migration and child abuse	

YEAR	COUNTRY	SOCIETY	CATHOLIC CHURCH
1988	England	<i>Report of the Inquiry into Child Abuse in Cleveland 1987</i>	
1988	USA		Statement on child abuse by spokesperson for United States Catholic Conference.
1988	New Zealand	National Advisory Committee on the Investigation, Detection and Prosecution of Offences against Children, <i>A Private or Public Nightmare?</i>	
1989	UK	<i>The Children Act 1989</i>	
1989	Australia	Screening of <i>Lost Children of the Empire</i>	
1989	Canada		CCCB Ad hoc Committee on Child Sexual Abuse
1989	United Nations	<i>Convention on the Rights of the Child</i> opened for signature and ratification	
1990	Canada	<i>Reaching for Solutions: The Report of the Special Advisor to the Minister of National Health and Welfare on Child Sexual Abuse in Canada</i> (Rogers Report)	
1990	Canada	Media coverage concerning abuse at Mount Cashel orphanage, in Newfoundland.	
1990	Canada		<i>The Report of the Archdiocesan Commission of Enquiry into the Sexual Abuse of Children by Members of the Clergy</i> (Winter Report), St. Archdiocese of St. John's, Newfoundland
1990	Australia Victoria	Family and Children's Council	

YEAR	COUNTRY	SOCIETY	CATHOLIC CHURCH
1991	UK	<p><i>The Pindown Experience and the Protection of Children: The Report of the Staffordshire Child Care Inquiry</i></p> <p><i>Children in the Public Care: A Review of Residential Child Care</i> (Sir William Utting)</p> <p>Inter-agency Guidelines: <i>Working Together Under the Children Act 1989.</i></p>	
1991	Canada	<i>Royal Commission on of Inquiry into the Response of the Newfoundland Criminal Justice System to Complaints</i> (Hughes Inquiry)	
1991	Australia NSW	<i>Interagency Guidelines for Child Protection Intervention</i>	
1992	UK	<i>Choosing With Care: The Report of the Committee of Inquiry into the Selection, Development and management of Staff in Children's Homes</i> (Warner Report)	BCEW, "The Sexual Abuse of Children"
1992	Canada		<p><i>From Pain to Hope, Report from the CCCB Ad Hoc Committee on Child Sexual Abuse</i></p> <p><i>Breach of Trust/ Breach of Faith: Child Sexual Abuse in the Church and Society: Material for Discussion Groups</i></p>
1992	USA		<p>NCCB, "Draft of Special Norms for Administrative Removal of a Cleric from the Clerical State"</p> <p>NCCB, Statement of principles for dealing with sexual abuse by clergy.</p>

YEAR	COUNTRY	SOCIETY	CATHOLIC CHURCH
1992	Australia	Screening of <i>The Leaving of Liverpool</i>	
1993	USA		NCCB Ad Hoc Committee on Sexual Abuse established. NCCB, "Proposed Guidelines on the Assessment of Clergy and Religious for Assignment."
1993	Holy See-USA		Joint committee of experts to study situation in U.S.A.
1993	UK England & Wales	<i>Sexual Offences Act</i>	<i>The Sexual Abuse of Children</i> , Discussion Paper of the BCEW.
1993	New Zealand		Bishops of Aotearoa -NZ Provisional protocol.
1994	Australia NSW	NSW Child Protection Council, <i>Systems Abuse: Problems and Solutions</i> Commission of Inquiry into the New South Wales Police Service (Wood Royal Commission) established	
1994	England & Wales		<i>Child Abuse: Pastoral and Procedural Guidelines</i> published by the BCEW.
1994	Ireland		ICBC established an advisory committee.
1994	USA		NCCB, <i>Restoring Trust</i> Vol. I
1995	Australia SA	<i>Breach of Duty: A New Paradigm for the Abuse of Children and Adolescents in Care.</i>	
1995	UK Scotland	<i>Children (Scotland) Act</i>	

YEAR	COUNTRY	SOCIETY	CATHOLIC CHURCH
1996	UK Scotland		Bishops' Conference of Scotland established a working party to advise the bishops. <i>Report, Child Sexual Abuse</i>
1996	Australia Q	Children's Commission established.	
1996	Australia WA	<i>Legislative Assembly Select Committee into Child Migration, Interim Report</i>	
1996	Australia		<i>Towards Healing: Principles and Procedures in Responding to the Complaints of Sexual Abuse against Personnel of the Catholic Church in Australia.</i>
1996	UK Wales	<i>Lost in Care: Report of the Inquiry into the Abuse of Children in Care in the Former County Council Areas of Gwynne and Clwyd.</i>	
1996	Ireland		Irish Catholic Bishops' Advisory Committee on Child Sexual Abuse, <i>Child Sexual Abuse: Framework for a Church Response</i>
1996	UK	<i>Sexual Offences (Conspiracy & Incitement) Act 1996.</i>	
1996	England & Wales		Bishops' Conference of England and Wales, <i>Healing the Wound of Child Sexual Abuse, A Church Response.</i>
1997	Australia NSW	Final Report of the Wood Royal Commission	
1997	Australia Q	<i>Paedophilia in Queensland, Report of the Children's Commission.</i>	
1997	Australia		<i>Integrity in Ministry, A Document of Ethical Standards for Catholic Clergy and Religious in Australia</i>

YEAR	COUNTRY	SOCIETY	CATHOLIC CHURCH
1997	UK	<i>People Like Us: The Report of the Review of the Safeguards for Children Living Away From Home.</i>	
1997	UK	<i>Sex Offenders Act 1997.</i>	
1998	New Zealand		<i>Houhanga Rongo A Path to Healing: Principles and Procedures in Responding to Complaints of Sexual Abuse by Clergy and Religious of the Catholic Church in New Zealand.</i>
1998	UK N.Ireland	<i>Children Matter: a Review of Residential Child Care Services in Northern Ireland</i>	
1998	Ireland	<i>Protection for Persons Reporting Child Abuse Act 1998</i> <i>Child Trafficking and Pornography Act 1998</i>	
1998	UK	<i>Public Interest Disclosure Act 1998.</i>	
1998	Australia Q	<i>Report of Inquiry into Allegations of Misconduct in the Investigation of Paedophilia in Queensland (Kimmins Report)</i>	
1998	Australia NSW	<i>Commission for Children and Young People 1998</i> <i>Child Protection (Prohibited Employment) Act 1998</i> <i>Children and Young Persons (Care and Protection) Act 1998</i>	
1999	Australia NSW	Commission for Children and Young people replaced the Child Protection Council	
1999	Australia Q	Forde Report presented.	

YEAR	COUNTRY	SOCIETY	CATHOLIC CHURCH
1999	UK Wales	<i>Lost in Care: The Report of the Tribunal of Inquiry into the Abuse of Children in Care in the Former County Council Areas of Gwynedd and Clwyd since 1974</i>	
1999	UK	<i>Protection of Children Act, 1999</i> <i>Working Together to Safeguard Children</i>	
1999	Ireland	Department of Health published <i>Children First – National Guidelines for the Protection and Welfare of Children</i>	
2000	Canada	<i>Restoring Dignity, Responding to Child Abuse in Canadian Institutions</i> , Report of the Law Commission of Canada	
2000	New Zealand		<i>Integrity in Ministry</i> adopted.
2000	Australia Q	Commission for Children and Young People replaced the Children's Commission	
2000	UK	<i>Sexual Offences (Amendment) Act 2000</i> <i>The Criminal Justice and Courts Services Ac, 2000.</i>	
2000	UK Scotland	<i>Care Standards Ac, 2000</i>	
2000	UK England & Wales		BCEW established Independent Review Committee (Nolan Committee)
2000	Holy See		Meeting of members of Conferences of Bishops in Vatican.

YEAR	COUNTRY	SOCIETY	CATHOLIC CHURCH
2000	UK N.Ireland	<i>Inquiry into Residential and Secure Accommodation for Children in Northern Ireland</i>	
2000	Ireland	<i>Commission to Inquire into Child Abuse Act 2000 (Laffoy Commission)</i> <i>Statute of Limitations (Amendment) Act 2000.</i>	
2001	Ireland	<i>Sex Offenders Act 2001</i>	
2001	UK Scotland	<i>Regulation of Care (Scotland) Act 2001</i>	
2001	England & Wales		<i>BCEW, A Programme for Action, Final Report of the Independent Review on Child Protection in the Catholic Church in England and Wales</i>
2001	Holy See		Pope John Paul II, <i>Sacramentorum sanctitatis tutela</i>
2001	New Zealand		<i>Te Houhanga Rongo A Path to Healing</i> revised.
2001	Australia	<i>Senate Report, Lost Innocents: Righting the Record, Report on Child Migration</i>	
2002	Ireland	<i>Residential Institutions Redress Act 2002</i> <i>Sexual Abuse and Violence in Ireland, Report</i>	
2002	USA		Meeting of Pope with US Cardinals "Charter for the Protection of Children and Young People," "Essential Norms for Diocesan/Eparchial Policies dealing with Allegations of Sexual Abuse of Minors by Priests, Deacons and Other Church Personnel"

YEAR	COUNTRY	SOCIETY	CATHOLIC CHURCH
2003	Vatican		Pope John Paul II granted faculties to CDF with respect to Norms of <i>Sacramentorum sanctitatis tutela</i>
2003	Ireland		<i>Time to Listen: Confronting Child Sexual Abuse by Catholic Clergy in Ireland</i>

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BIOGRAPHICAL NOTE

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After completing her Licence in Canon Law at Saint Paul University in 1997, she was appointed Chancellor in the Diocese of Wollongong. She commenced studies for a doctorate in canon law at Saint Paul University in 2000. During this period she completed a Master of Arts in Theology at University of Notre Dame, South Bend, Indiana.