

MAKINSON & d'APICE

SOLICITORS AND NOTARIES



16 January 2001

Partner: Richard d'Apice

Copy Bishop G. Robinson
18.01.01
Copy J Davoren 19.01.01

Private & Confidential

Fr Peter A Comensoli
Chancellor
Diocese of Wollongong
PO Box 1239
WOLLONGONG SCMC NSW 2521

Dear Fr Comensoli

FATHER JOHN NESTOR

I acknowledge your letter of 4 January 2001 to Mr Bill d'Apice who is presently on leave.

This advice is provided on the assumption that a Decree will, in due course, be received from the Congregation for Clergy which will have the effect of declaring invalid the two Decrees in respect of Father John Nestor which were issued by His Grace as Bishop of Wollongong on 7 August 1998. This advice is further given upon the basis that the effect of the Decree issued by the Congregation for Clergy would be to render the Decrees issued by His Grace void and of no effect but that His Grace has a right of appeal which, if exercised, would suspend the effect of the Decree issued by the Congregation for Clergy pending determination of that appeal.

I assume that the effect of the invalidation of His Grace's Decrees would be that Father Nestor would no longer be restricted from celebrating the liturgy publicly and would no longer be subject to a decree requiring him to undergo a full appraisal by Encompass Australasia as a pre-requisite for any further ecclesiastical appointment.

The Child Protection (Prohibited Employment) Act 1998 was assented to in December 1998 and provides in Section 7(1) as follows:

"An employer must not commence employing any other person in child related employment without first requiring that other person to disclose whether or not that other person is a prohibited person."

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Pursuant to Section 5(1) of the Act:

“For the purposes of this Act, a prohibited person means a person convicted of a serious sex offence, whether before or after the commencement of this sub-section”.

The expression “*serious sex offence*” is defined in Section 5(3) of the Act.

Pursuant to Section 8(1) of the Act:

“An employer must not commence employing, or continue to employ, in child related employment a person that the employer knows is a prohibited person”.

I am uncertain of the exact level of actual knowledge which the Diocese has concerning Father Nestor’s present position. However as I understand the position the Diocese knows that Father Nestor was convicted of a serious sex offence and know that he has been acquitted on appeal.

Clearly the Diocese must exercise considerable care to ensure that it is not, even unwittingly, guilty of a criminal offence under the Act.

Clearly the Diocese also has a civil duty of care of a high standard to ensure that children are not placed at risk by contact with prohibited persons or others who may be a risk to them.

Pursuant to the provisions of Section 37(2) of the Commission for Children and Young People Act 1998:

“It is the duty of an employer to carry out all the relevant procedures of employment screening of the preferred applicant before employing the preferred applicant in ... child-related employment”.

Section 37(1) provides, in effect, that the duty imposed under Section 37(2) relates to a decision to employ a person in primary child related employment being a person not already employed by the employer in child related employment of that kind.

It is the writer’s understanding that Father Nestor is not presently employed by the Diocese in child related employment so that any employment of him in “*primary child-related employment*” must be preceded by carrying out all the relevant procedures of employment screening. The employer could engage the Commission for Children and Young People to carry out the screening and I would suggest that this would be the preferred course of action.

“*Primary child-related employment*” means, relevantly, child-related employment to which the Child Protection (Prohibited Employment) Act 1998 applies by a Minister of Religion or other member of a religious organisation and also means child related employment of any kind prescribed by the regulations made under the Act.

Fr Peter A Comensoli

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A child-related employment to which the Child Protection (Prohibited Employment) Act 1998 relates is extensively defined in Section 3 of that Act, a copy of which is **attached**.

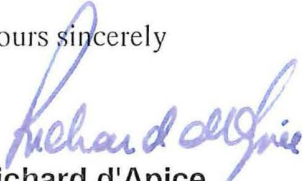
It seems to me that public ministry by Father Nestor would fall within paragraphs (a)(viii) and (xv) and may fall within other parts of the definition.

In the circumstances I believe that any form of public ministry by Father John Nestor would be "*primary child-related employment*" within the meaning of Section 37(6) of the Commission for Children and Young People Act 1998 giving rise to a duty under Section 37(2) to carry out all of the relevant procedures of employment screening before employing Father John Nestor and that the Diocese would be entitled to engage the Commission for Children and Young People for the purpose of carrying out that screening.

Please do not hesitate to contact me if I can be of any further assistance.

Kind regards

Yours sincerely



Richard d'Apice

Encl.