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Fr Brian Jones,
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April 5th 2001

Dear Brian,

Re Father Nestor

I understand that you have received a letter from the Commissioner for Children and Young People and that you would like my advice on this matter because you have had conflicting advice from lawyers on the issue. As you know, I am not a practising solicitor so you need to rely on others' advice, but I am happy to assist with an opinion.

The first issue is whether you have a duty to report a disciplinary proceeding in this matter in the circumstances which have led to the present controversy. As I understand the position from our discussions, there has been the completion of a criminal process but no other disciplinary proceedings have been taken. Father Nestor has been forbidden from publicly celebrating the sacraments until he submits to an assessment. Such an assessment, even if it is a psychological assessment, could be considered part of a disciplinary response to the allegations of sexual abuse since the purpose of the assessment, I presume, is to determine whether Father Nestor's appointment might pose an unacceptable risk to children and young people.

What has to be reported under the Act is the outcome of a completed disciplinary process. My understanding is that no investigation of the allegations has occurred separately from the police investigation which led to criminal charges. The issue on which appeals have been made to Rome concerns the refusal of the previous bishop to return Father Nestor to parish ministry until the condition of submitting to an assessment has been fulfilled. Even once the Vatican appeal is resolved one way or another, there will not be a completed disciplinary process because, as I understand it, neither the diocese nor the Vatican has conducted an inquiry leading to a determination of the fitness of Father Nestor to be re-appointed to pastoral ministry. My understanding is that the Vatican case turns on the powers of bishops in Canon Law and does not involve a review of the evidence which led to the criminal charges. It is not a disciplinary proceeding concerning an allegation of child abuse but a case about the application of Canon Law to this situation.

On the basis of what you have told me then, Father Nestor has been asked to co-operate in a process of assessment but because of his refusal to do so, no disciplinary process has yet been begun nor a disciplinary decision taken. Father Nestor has been suspended from the celebration of the sacraments pending such an assessment, and there has been an impasse.

No doubt your legal advisers have considered an inquiry under the revised version of *Towards Healing* which came into effect from March 1st this year. Specifically, it provides that the investigation may proceed whether or not the accused co-operates, and requires the assessors to endeavour to reach a conclusion on the facts of the matter. While its conclusions would have no standing in Canon Law, its findings would be reportable to the Commission and would be taken into account in the Commission's determination whether the priest concerned poses an unacceptable risk to children if returned to parish ministry. Such advice, one way or another, might be of some assistance to the Church.

The second issue arises if you decide to appoint Father Nestor to a parish. In my view, if Father Nestor is offered any appointment to a new pastoral position involving unsupervised work with children then he ought to be screened through the employment screening system. Two arguments might be advanced for why screening is not legally mandated.

First, one could argue technically that he is not a "preferred applicant" in the sense that Catholic priests do not compete for advertised appointments to parishes. However, priests may be applicants in that they express an interest in a particular pastoral position (you would not usually order someone to take on a parish against their will, I presume). Furthermore, the priest is 'preferred' by you in the sense that you have made a choice to appoint this priest to the particular position as opposed to other potential appointees. The matter is not beyond doubt, but the Act specifically refers to ministers of religion so one must conclude that Catholic priests are within the contemplation of the Act. Parliament can be assumed to have been aware of the manner in which they are appointed to pastoral positions.

Secondly, it could be argued that he is not being appointed to a new position as he is already a priest and is on a stipend. In my view, it is the position which matters, and this would be new for him. The fact that he is already a priest is beside the point. He might have been in a priestly office which does not involve work with children. In any event, he is not currently employed in a position where he is working with children.

I trust this assists. One way of responding to the Commissioner's letter is to reply giving your understanding of the legal position and inviting the Commissioner to offer a different interpretation of the law's requirements if her view differs from those of your legal advisers. You will, I am sure, find the Commissioner very helpful. I have no objection to you showing her a copy of this letter.

Kind regards



Patrick Parkinson
Professor of Law