



Report of Dr Rodger Austin JCD STL
Canon Law

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Royal Commission into Institutional Responses to Child Sexual Abuse**

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THE STATE AND THE CHURCH

- 1 The Royal Commission into Institutional Responses to Child Sexual Abuse in Australia has investigated such responses within the Catholic Church in Australia and as such this involves the relationship between the State and the Church.
- 2 Within the historical and political context of the late nineteenth century, Pope Leo XIII [1878-1903] presented in his Encyclical Letter of 1 November 1885 the Church's teaching on the relationship between the State and the Church as two independent and sovereign societies, each was a perfect society – *societas perfecta*. A perfect society is one that is complete in itself, a self-sufficient community which has the necessary resources, especially an independent ruling authority, to achieve its overall goal or purpose.¹
- 3 Leo XIII explained that “the Church no less than the State itself is a perfect society in its own nature and in its own right”² and is “distinguished and differs from civil society” for it is “a supernatural and spiritual society” founded by Jesus Christ.³ The Church “has for her immediate and natural purpose” the salvation of all peoples and the fulness of eternal life in the Kingdom of Heaven.⁴ By contrast the purpose for which the State exists is “the well-being of its citizens in “this mortal life” safeguarding not only “the well-being of the community” but also “the interests of its individual members”.⁵
- 4 As a *societas perfecta* “Jesus Christ gave to His Apostles unrestrained authority in regard to things sacred, together with the genuine and most true power of making laws, as also with the twofold right of judging and of punishing, which flow from that power”.⁶ The Church's purpose is to lead all its members to their eternal salvation and the means for attaining that end include the scriptures, the sacraments and the authority Christ gave to the Church exercised by the Pope and the Bishops “who are not vicars of the Roman Pontiff because they exercise a power really their own”.⁷
- 5 Pope Pius X [1903-1914] said that, in accord with the Scriptures, the constitutional structure of the Church “is essentially an unequal society, that is, a society comprising two categories of persons, the pastors and the flock, those who occupy a rank in the different degrees of the hierarchy and the multitude of the faithful. So distinct are these categories that with the pastors rests the necessary right and authority for promoting the end of the society and directing all its members towards that end; the one duty of the multitude is to allow themselves to be led, and, like a docile flock, to follow the Pastors”.⁸

¹ Matthaeus Conte a Coronata, *Institutiones Iuris Canonici Ius Publicum Ecclesiasticum*, Editio Quarta (Romae: Marietti, 1959) 46-65.

² Pope Leo XIII, Encyclical Letter *On the Christian Constitution of States [Immortale Dei]*, 1 November 1885:35. All quotations from Papal documents are from the Vatican website:<http://w2.vatican.va/content/vatican/it.html>.

³ *Ibid.*, 10.

⁴ *Ibid.*, 1.

⁵ *Ibid.*, 6.

⁶ *Ibid.*, 11.

⁷ Pope Leo XIII, Encyclical Letter *On the Unity of the Church [Satis Cognitum]*, 29 June 1896: 14.

⁸ Pope Pius X, Encyclical Letter *On the French Law of Separation [Vehementer Nos]*, 11 February 1906: 8.

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- 6 Leo XIII taught that it was “a matter of justice and duty” incumbent on all members of the Church as citizens of the State to obey the civil law.⁹ It is the teaching of the Church that “citizens are bound in conscience to obey” the laws of the State.¹⁰ Notwithstanding, a “citizen is obliged in conscience not to follow the directives of civil authorities when they are contrary to the demands of the moral order, to the fundamental rights of persons or the teachings of the Gospel”.¹¹
- 7 “The Church should enjoy that full measure of freedom which her responsibility for the salvation of all requires. The freedom of the Church is the fundamental principle in what concerns the relations between the Church and governments and the whole civil order. The Church and the political community in their own fields are autonomous and independent from each other”.¹²

⁹ Pope Leo XIII, Encyclical Letter *On the Christian Constitution of States [Immortale Dei]*, 1 November 1885: 5.

¹⁰ Second Vatican Ecumenical Council 1962-1965 [hereafter Vatican II], *Pastoral Constitution on the Church in the Modern World*, 74. All quotations from Vatican Council documents are from the Vatican website: <http://w2.vatican.va/content/vatican/it.html>.

¹¹ Catechism of the Catholic Church, 2242; cf. Pope John XXIII, *On Establishing Peace on Earth [Pacem in Terris]*, 11 April 1963: 51. All quotations from the Catechism of the Catholic Church are from the Vatican website: <http://w2.vatican.va/content/vatican/it.html>.

¹² Vatican II, *Declaration on Religious Liberty*, 13.

CODIFICATION OF CANON LAW

FIRST VATICAN ECUMENICAL COUNCIL 1869-1870

- 8 Although the first Ecumenical Council held at the Vatican was brought to a premature conclusion following the occupation of the Papal States by the armies of the Kingdom of Italy on 29 September 1869, there had been discussion about canonical discipline and many bishops asked that the reform of canon law be undertaken.
- 9 Over the centuries the laws of the Church had been gathered together in collections. By the end of the nineteenth century there were at least twelve collections which constituted the sources from which a knowledge of the law was obtained. Some laws were mutually contradictory, others had fallen into disuse, the laws lacked arrangement and some matters were in need of legislation.¹³ In the development of ecclesiastical law, Roman law had a most significant influence. For example, Roman law influence on matrimonial law was considerable as well as in the law on procedures.¹⁴
- 10 Pius X in 1904 initiated this reform, the primary task of which was to arrange in a clear and orderly collection all the laws of the Church. Obsolete laws were to be abolished, other laws were to be adapted to the present needs and new laws were to be made as necessity or expediency required. In the process of reform it was decided to adopt a codified approach to canon law, a decision in large part influenced by the codification of civil legislation in Europe in the Eighteenth and Nineteenth Centuries.¹⁵
- 11 Accordingly the first Code of Canon Law was not new legislation “because for the most part it retained the discipline hitherto in force” although it did introduce “some opportune changes”.¹⁶
- 12 It was the understanding of the Church as a juridically complete society - *societas perfecta* - that provided the guiding image of the Church for the reform of canon law in 1904-1917.

FIRST CODE OF CANON LAW 1917

- 13 Pope Benedict XV promulgated the Code of Canon Law on 27 May 1917 and decreed that it come into force on 19 May 1918. The official text of the 1917 Code of Canon Law is in Latin.¹⁷ It was not permitted to reprint the Code of Canon Law or to translate it into another language without the permission of the Holy See.¹⁸
- 14 The 1917 Code comprised five sections, called ‘books’: General Norms; Persons; Things; Procedures; and Crimes and Punishment. This systematic order adapted the legal principle of Roman law in the Institutes of Gaius and also Justinian: All our law relates either to persons or to things or judicial procedure.¹⁹ The 1917 Code of Canon Law remained in force until 27 November 1983.

¹³ Amleto G. Cicognani, *Canon Law* Second Revised Edition Authorized English Version of *Ius Canonicum* (Maryland: Newman, 1934) 414.

¹⁴ Albert Gauthier, *Roman Law and its Contribution to the Development of Canon Law* (Ottawa: St Paul University, 1996) 3-15.

¹⁵ Cicognani, 417-418.

¹⁶ 1917 Code of Canon Law, canon 6; cf. Cicognani, 498-499.

¹⁷ *Codex Iuris Canonici Pii X Pontificis Maximi iussu digestus Benedicti Papae XV auctoritate promulgatus*.

¹⁸ Cicognani, 435.

¹⁹ *Omne ius quo utimur vel ad personas pertinent vel ad res vel ad actiones*. Cf. Gauthier, 12.

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SECOND VATICAN ECUMENICAL COUNCIL 1962-1965

- 15 On 25 January 1959 when Pope John XXIII [1958-1963] convened the Second Vatican Council he said it would be accompanied by the revision of the 1917 Code of Canon Law.²⁰
- 16 The Second Vatican Council, “following faithfully the teaching of previous Councils”, presented its teaching on the “nature and universal mission” of the Church.²¹ The Council, drawing on an ancient tradition, described the Church as the ‘People of God’ embracing all those who believe in Christ and accepting his call to holiness of life and eternal salvation.
- 17 The Council also brought to light the reality of the Church as a *communion* with its inseparable dimensions. *Communion* means the relationship of every Christian with God through Jesus Christ in the Holy Spirit. *Communion* also refers to the relationship between all the disciples themselves.²² By virtue of their baptism, all Christ’s followers are united in a spiritual bond with Jesus Christ and, in and through him, with one another.
- 18 *Communion*, a spiritual reality, takes on historical and tangible form through a community.
- 19 It is within the Church, in communion with all the baptized, that each person fulfils one’s Christian vocation nourished by the scriptures and the sacraments. The People of God are called to live by “the law of Christ”²³ which includes the ten commandments - the Decalogue. The law of Christ provides the indispensable foundation for each one to nurture a faith-relationship with God and with one’s sisters and brothers within the People of God. It is the same law of Christ that guides and directs Christians in their lives as members of their civil society.²⁴
- 20 According to the teaching of Vatican II: “the spiritual community and the visible assembly form one interlocked reality which comprises a divine and a human element. The Church is a visible community through which Christ communicates truth and grace to all peoples”.²⁵ The Council spoke of the Church in terms of a mystery which in the words of Pope Paul VI [1963-1978] means “a reality imbued with the hidden presence of God”.²⁶
- 21 The Second Vatican Council taught that the Church is a communion of Churches²⁷ and is to be understood with her double dimension and reality: the universal Church and the particular Church, that is, a diocese which includes an archdiocese. As Paul VI said the universal Church is not “the sum of or an anomalous federation of essentially different individual Churches”.²⁸

REVISED CODE OF CANON LAW 1983

- 22 Paul VI formally inaugurated the work of revision of the first Code of Canon Law on 20 November 1965.

²⁰ Pope John XXIII, Address, 25 January 1959.

²¹ Vatican II, *Dogmatic Constitution on the Church*, 2.

²² *Ibid.*, 1, 4, 6-7, 9.

²³ New Testament, Letter of Paul to the Galatians 6:2.

²⁴ Catechism of the Catholic Church, 2030.

²⁵ Vatican II, *Dogmatic Constitution on the Church*, 8.

²⁶ Pope Paul VI, Opening Address to the Second Session of Vatican II, 29 September 1963.

²⁷ Vatican II, *Dogmatic Constitution on the Church*, 13, 23.

²⁸ Pope Paul VI, Apostolic Exhortation *On Evangelisation in the Modern World [Evangelii Nuntiandi]*, 8 December 1975: 62; cf. Pope John Paul II, Post-Synodal Apostolic Exhortation *On the Vocation and Mission of the Lay Faithful in the Church and in the World [Christifideles Laici]*, 30 December 1988: 25.

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- 23 The systematic order of the revised Code of Canon Law was established on the teaching of Vatican II. Accordingly, the revised Code comprises seven books: General Norms; The People of God; The Teaching Office of the Church; The Sanctifying Office of the Church; The Temporal Goods of the Church; Sanctions in the Church; and Processes.
- 24 Pope John Paul II [1978-2005] promulgated the Code of Canon Law on 25 January 1983 and decreed that it come into effect on 27 November 1983.
- 25 In the Apostolic Constitution whereby he promulgated the revised Code of Canon Law, John Paul II said that the “new Code can be understood as a great effort to translate the teaching of Vatican II on the Church into canonical terms”.²⁹ In this regard the Pope mentioned specifically the Church as “the People of God, a *Communion* and the mutual relationships between the particular and the universal Church”.³⁰
- 26 It was the doctrinal teaching of Vatican II, not the legal concept of *societas perfecta*, that provided the guiding image of the Church for the revision of canon law.
- 27 The official text of the 1983 Code of Canon Law is in Latin.³¹ The English translation of the Codex Iuris Canonici approved by the Bishops Conference for use in Australia is *The Code of Canon Law New Revised English Translation* (London: Harper-Collins, 1997).³²

THE LATIN CHURCH AND THE EASTERN CHURCHES

- 28 The universal Church traditionally has been distinguished as ‘East’ and ‘West’, such geographical designation used with reference to the division of the Roman Empire at the end of the third century. It was in the Christian East where the Church was born and in the course of time, as the Second Vatican Council stated, the Churches of the East “safeguarding the unique divine structure of the universal Church have [developed] their own discipline, liturgy and theological and spiritual heritage”.³³ The universal Church embraces twenty-three Eastern Churches and the one Latin Church.
- 29 The Code of Canon Law which came into effect on 27 November 1983 concerns only the Latin Church. The Eastern Churches are governed by the Code of Canons of the Eastern Churches promulgated by Pope John Paul II on 18 October 1990 and which came in to effect on 1 October 1991.³⁴
- 30 In Australia the majority of Catholics belong to the Latin Church. However five Eastern Churches have established eparchies for the members of their Churches living in Australia: the Ukrainian Church; the Maronite Church; the Melkite Church; the Chaldean Church; and the Syro-Malabar Church. In the Latin Church a particular church is called a diocese and in the Eastern Churches an eparchy.³⁵

²⁹ Pope John Paul II, Apostolic Constitution *The Promulgation of the 1983 Code of Canon Law* [*Sacrae disciplinae leges*], 25 January 1983.

³⁰ Ibid.

³¹ Codex Iuris Canonici auctoritate Ioannis Pauli PP. II promulgatus.

³² Secretariat of State, *Norms for reprinting the Latin text of the Code of Canon Law and translating it into other languages*, 28 January 1983.

³³ Vatican II, *Dogmatic Constitution on the Church*, 23.

³⁴ Pope John Paul II, Apostolic Constitution *The Promulgation of the Code of Canons of the Eastern Churches* [*Sacri Canonices*], 18 October 1990.

³⁵ There is often a misconception when Catholics speak of their Eastern Churches as some people think they are referring to the Orthodox Churches.

CANON LAW

- 31 Canon law can be described as that system of laws promulgated by lawful ecclesiastical authority by which the constitution and governance of the Church is regulated and the actions of the members of the Church are directed towards its purpose.³⁶
- 32 The first words of the 1983 Apostolic Constitution, promulgating the Code of Canon Law, *Sacrae disciplinae leges - the laws of [the Church's] sacred discipline* - reflect a long tradition in which the laws of the Church were described as *ius sacrum - sacred law*. This title arose because the authority by which laws were promulgated was given to the Church by Jesus Christ, and the laws were concerned with people living out Christ's call to eternal life and concerned the sacraments in particular.
- 33 In this Apostolic Constitution John Paul II said that "the purpose of the Code of Canon Law is not in any way to replace faith, grace and charisms and above all charity in the life of the Church or Christ's faithful".³⁷
- 34 Nevertheless the very nature of the Church, the Pope said, requires law in order that: "its hierarchical and organic structure be visible; the exercise of the functions divinely entrusted to it, especially that of sacred power and of the administration of the sacraments, may be adequately organized; the mutual relations of the faithful may be regulated according to justice based upon charity, with the rights of individuals guaranteed and well-defined; and that common initiatives undertaken to live a Christian life ever more perfectly may be sustained, strengthened and fostered by canonical norms. Finally, canonical norms by their very nature demand observance".³⁸
- 35 In reference to the obligation upon all Catholics to obey canonical norms, John Paul II was repeating his predecessor Paul VI, who said that all members of the Church "have a duty in conscience to obey the law".³⁹
- 36 'Canon law – *ius canonicum*' is ordinarily or commonly used to refer to the law of the Church. From the earliest times the Church used for its laws the Greek word κανών – *canon*, meaning a rod or ruler that came to mean a rule of conduct. With the codification of law, the term 'canon law' applies to the Code of Canon Law, but it also embraces the legislation promulgated by those who possess legislative authority within the Church.⁴⁰
- 37 'Ecclesiastical law' is the term used in reference to the law emanating from the human legislators within the Church. Such a designation is necessary since canon law is based on, and in part contains, divine positive law and natural law.
- 38 'Disciplinary law' is the term which occurs in canon 6 of the 1983 Code of Canon Law. This term refers to all ecclesiastical laws, that is, laws emanating from human legislators in the Church,

³⁶ cf. Felix M. Cappello, *Summa Iuris Canonici* 3 Vols. Editio Sexta (Romae: Pontificia Universitas Gregoriana, 1961) I:8.

³⁷ Pope John Paul II, Apostolic Constitution *The Promulgation of the 1983 Code of Canon Law [Sacrae disciplinae leges]*, 25 January 1983.

³⁸ Ibid.

³⁹ Pope Paul VI, Encyclical Letter *On the Church [Ecclesiam suam]*, 6 June 1964: 114; Pope Paul VI, Address to the Members and Consultors of the Pontifical Commission for the Revision of the Code of Canon Law, 20 November 1965.

⁴⁰ The relevant legislative authorities for Australia are mentioned under the heading "The Church's Structures" see p.12 and following.

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- irrespective of whether the laws are within the Code of Canon Law. The phrase ‘ecclesiastical discipline’ that occurs on seven occasions in the 1983 Code of Canon Law is a general reference to disciplinary law but also includes liturgical law of the Latin Church.⁴¹
- 39 On the occasion of the promulgation of the 1983 Code of Canon Law John Paul II, reiterating the words of Paul VI, said canon law includes “the fundamental elements of the hierarchical and organic structure of the Church established by the Divine Founder”.⁴² “Divine law is that which is known either from Scripture, which may be understood as normative, even legislative, and therefore is called ‘positive’ divine law, or known from nature, which the Creator has endowed with a certain unchangeable order, and is the natural law”.⁴³
- 40 As the Church is inseparably a spiritual community and a visible assembly, John Paul II said “the social structure of the Church is at the service of the deeper reality of *communio*, and the law of the Church is unique in its means and its ends”.⁴⁴
- 41 Given the nature and purpose of the Church, canon law is imbued with a pastoral character. Law is an instrument at the service of the Church in accomplishing the mission entrusted to her by Jesus Christ. The juridical life of the Church, and therefore her judicial activity as well, is by its nature pastoral: “The juridical life is one of the pastoral helps the Church uses in leading us to salvation”.⁴⁵
- 42 In his 1990 Address to the Roman Rota that he devoted to the pastoral nature of canon law, John Paul II said “any opposition between what is pastoral and what is juridical is misleading. The juridical and the pastoral dimensions are united inseparably in the Church because they serve a common goal – the salvation of the people. It is not true that, to be more pastoral, the law becomes less juridical for the demands of justice must be respected and never denied”.⁴⁶
- 43 In keeping with this traditional teaching, Pope Francis in his Address to the Rota in 2014 said: “The juridical dimension and the pastoral dimension of the Church’s ministry do not stand in opposition, for they both contribute to realizing the Church’s purpose and unity of action. In fact the judicial work of the Church, which represents a service to truth in justice, has a deeply pastoral connotation, because it aims both to pursue the good of the faithful and to build up the Christian community”.⁴⁷
- 44 The law and all juridical activity is directed towards the ultimate purpose for which the Church was founded - the salvation of all peoples. Drawing on a Roman law axiom *salus populi suprema lex - the supreme law is the welfare of the people*, the principle established in the Church in the twelfth century was *salus animarum suprema lex - the supreme law is the salvation of souls*. Canon 1752, the final canon of the 1983 Code of Canon Law, reiterates this principle to serve as a reminder that the ultimate purpose of the law of the Church “must contribute to its supernatural purpose”.⁴⁸

⁴¹ 1983 Code of Canon Law [hereafter CIC], canons 326 §1, 342, 436 §1 1°, 445, 305 §1, 392 §2, 1317 Canon 2 states that liturgical law determines “the rites to be observed in the celebration of liturgical actions”.

⁴² Pope John Paul II, Apostolic Constitution *The Promulgation of the 1983 Code of Canon Law [Sacrae disciplinae leges]*, 25 January 1983.

⁴³ Joseph J. Koury, “*Ius Divinum* as a Canonical Problem: On the Interaction of Divine and Ecclesiastical Laws” *The Jurist* 53 (1993) 129.

⁴⁴ Pope John Paul II, Apostolic Constitution *The Promulgation of the 1983 Code of Canon Law [Sacrae disciplinae leges]*, 25 January 1983; cf. Pope Paul VI, Address to the Members and Consultors of the Pontifical Commission for the Revision of the Code of Canon Law, 20 November 1965.

⁴⁵ Pope Paul VI, Address to the Tribunal of the Roman Rota, 4 February 1977.

⁴⁶ Pope John Paul II, Address to the Tribunal of the Roman Rota, 18 January 1990.

⁴⁷ Pope Francis, Address to the Tribunal of the Roman Rota, 24 January 2014.

⁴⁸ Pope John Paul II, Address to the Tribunal of the Roman Rota, 18 January 1990.

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- 45 It is a misconception to think that “canon law exists and operates in a ‘purely juridical order’, and it is as autonomous there as civil law is independent in its own sphere. In truth, the nature of canon law is radically different from that of civil law because the nature of the Church is radically different from that of the State”.⁴⁹ “The correct conception of canon law places it into the order of salvation; it sees the whole legal system as part of the redeeming mission of the Church”.⁵⁰ There is a “dynamic relationship between theology and canon law”.⁵¹ Theology provides the law with meta-judicial data and as Pope John Paul II said canon law translates the teaching of the Church into canonical terms.⁵² Thus “theology and canon law are linked organically”.⁵³
- 46 “Since civil law is such a pervasive element of social life, it inevitably exercises a dominant influence on a person’s view of law itself. One is tempted to equate all law with one’s concept of law in civil society”.⁵⁴ This univocal approach to law can be misleading because it fails to take into account the specific nature and purpose of canon law. Looking at canon law through the lens of one’s civil law runs the risk of misunderstanding and misinterpreting canon law.

⁴⁹ Ladislaus Örsy, “Integrated Interpretation: or, The Role of Theology in the Interpretation of Canon Law” *Studia Canonica* 22 (1988) 257.

⁵⁰ *Ibid.*, 258.

⁵¹ *Ibid.*, 249.

⁵² Pope John Paul II, Apostolic Constitution *The Promulgation of the 1983 Code of Canon Law* [*Sacrae disciplinae leges*], 25 January 1983.

⁵³ Örsy, 251.

⁵⁴ John A. Alesandro, “General Introduction” in J. A. Coriden, T. J. Green, D. E. Heintschel (eds.) *The Code of Canon Law: A Text and Commentary* (New York, Mahwah: Paulist Press 1985) 11.

RELATIONSHIP BETWEEN CANON LAW AND THE CIVIL LAW

- 47 Since the twelfth century the term 'ius civile - civil law' has been used to refer to law enacted by civil authorities and thus distinguish it from 'ius canonicum - canon law'. Whilst the Code of Canon Law pertains to the Latin Church throughout the world, the relationship between canon law and the civil law will vary depending on what legal system is operative in respect of each place. The two dominant legal traditions are the common law and the civil law. The civil law tradition predominates in Europe and in Latin America in places colonised by Portugal and Spain.

1983 CODE OF CANON LAW AND THE CIVIL LAW

- 48 In the 1983 Code of Canon Law, canon 22 is a general principle of the Church's canonical system and states one aspect of the relationship between canon law and civil law:

When the law of the Church remits some issue to the civil law, the latter is to be observed with the same effects in canon law, in so far as it is not contrary to divine law, and provided it is not otherwise stipulated in canon law.

- 49 In canon 22 the phrase *civil law* is to be understood generically, referring to the laws that constitute the legal system of a particular state or nation or legislation enacted by civil authority. Canon 22 is the only canon in which the term *ius Ecclesiae - the law of the Church* - is used in the 1983 Code of Canon Law.⁵⁵ The term includes not only the canons of the 1983 Code of Canon Law but also any ecclesiastical laws promulgated by those who exercise legislative power.
- 50 In canon 22 the verb *remit* means that whilst the Church has the power to promulgate norms on a particular matter it chooses not to do so and determines that it will adopt the relevant civil law. It requires that the civil law is to be observed in a canonical matter with the same effects as in the civil law. The civil law operates in the Church in the same way as it does in the secular society.
- 51 The interpretation and application of the civil law must be congruent with "the rules and standards of the civil law",⁵⁶ "using the overall regulation of the institution as well as juridical and jurisprudential resources that it offers".⁵⁷
- 52 The process is referred to as the canonisation of civil law. Although the Church adopts the civil law it does not become an integral part of the canonical system. The civil law does not become *ius Ecclesiae*, because it is, and remains, civil law. The civil law is adopted by the Church "without losing its normative nature in the original system of law".⁵⁸ When the *ius Ecclesiae* remits a matter to the civil law, the matter remains a canonical matter regulated by the relevant civil law. There are five canons in the 1983 Code of Canon Law in which the civil law has been canonized or adopted.⁵⁹

⁵⁵ Xaverius Ochoa, *Index Verborum ac Locutionum Codex Iuris Canonici* Editio Secunda et Completa (Città del Vaticano: Libreria Editrice Lateranense, 1984) 157.

⁵⁶ John Huels, "Ecclesiastical Laws" in John P. Beal, James A. Coriden, Thomas J Green (eds.) *New Commentary on the Code of Canon Law* (Mahwah: Paulist Press, 2000) 85.

⁵⁷ Javier Otaduy, "Ecclesiastical Laws" in Ángel Marzoa, Jorge Miras, and Rafael Rodríguez-Ocaña (eds.), Ernest Caparros (Eng. ed.), *Exegetical Commentary on the Code of Canon Law* 5 Vols. (Montreal: Wilson & Lafleur, 2004) I:379.

⁵⁸ *Ibid.*, I:378-379.

⁵⁹ Rodger J Austin, "The Interface of the Code of Canon Law and the Civil law: Interpretations, Applications, Implications" *Canon Law Society of Australia and New Zealand Proceedings* 41 (2007) 37-68.

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- 53 The general principle enunciated in the first part of canon 22 is not absolute, and in its final component the canon imposes a two-fold limitation.
- 54 First, the civil law will apply “in so far as it is not contrary to divine law”. The teaching authority of the Church to which has been entrusted “the task of giving an authentic interpretation of the Word of God, whether in its written form or in the form of Tradition”⁶⁰ is the source from which it is determined if the civil law is contrary to the divine law. In the five canons in which the civil law has been canonised, there is no conflict with the relevant civil law.⁶¹
- 55 Second, the civil law will apply “provided it is not otherwise stipulated in canon law”. In one of the five canons in which civil law is canonised, canon law does make a specific different provision.⁶²

⁶⁰ Vatican II, *Dogmatic Constitution on Divine Revelation*, 9.

⁶¹ CIC canons 98 §2, 110, 197, 1290, 1500.

⁶² CIC canon 197 adopts the civil law relating to prescription. Canon 198 requires prescription to be based on good faith, even if good faith is not required by the civil law.

THE CHURCH'S STRUCTURES

- 56 The universal Church and the particular Churches [dioceses/archdioceses] are constituent elements of the hierarchical and organic structure of the Church. Other institutes exist in virtue of ecclesiastical law and those of relevance for Australia include Ecclesiastical Provinces and the Bishops Conference.

THE UNIVERSAL CHURCH

- 57 The universal Church, the People of God, is the entire Catholic community throughout the world. According to the Annual Statistics of the Church compiled by the Central Office of Church Statistics, as at 31 December 2014, the number of Catholics was 1.272 billion, 17.8 per cent of the world population, and the number of particular Churches was 2998.⁶³
- 58 The Pope is the Bishop of the Diocese of Rome and as the successor of St Peter and the Vicar of Christ he is the Pastor of the universal Church. By virtue of his office the Pope “has supreme, full, immediate and universal ordinary power in the Church”.⁶⁴ The Pope, the successor of Peter, and the bishops, the successors of the Apostles, constitute one college. This College of Bishops is also the subject of supreme and full power for the universal Church that it exercises in a solemn manner in an ecumenical council.⁶⁵
- 59 In the exercise of his pastoral ministry for the service of the universal Church, the Pope “usually conducts the business of the universal Church through the Roman Curia which acts in his name and with his authority for the good and for the service of the Churches”.⁶⁶ The Roman Curia, the origins of which are found in the Apostolic Constitution of Pope Sixtus V of 1588, is a complex of institutes among which are congregations, councils, secretariats, commissions and tribunals.

Legislative power of governance

- 60 The Pope, as well as the College of Bishops, exercise the legislative power of governance in respect of the universal Church. Laws come into existence when they are promulgated and the Code of Canon Law states explicitly the means by which universal laws are promulgated.⁶⁷
- 61 Pope John Paul II promulgated both the Code of Canon Law for the Latin Church and the Code of Canons of the Eastern Churches. However these are not the only sources of universal laws. The Pope also promulgates ecclesiastical laws by way of Apostolic Constitutions and Apostolic Letters issued *motu proprio*, that is, on the Pope’s own initiative. The former constitute the most significant and the latter the more common means whereby the Pope exercises legislative power of governance.

⁶³ *Annuario Statisticum Ecclesiae* 2014 published by Vatican Press May 2016; <https://press.vatican.va/content/salastampa/en/bollettino/pubblico/2016/03/05/160305b>.

⁶⁴ CIC canon 331. All quotations from canons of the 1983 Code of Canon Law are from the English translation approved by the Bishops Conference for use in Australia: *The Code of Canon Law New Revised English Translation* (London: Harper-Collins, 1997).

⁶⁵ Vatican II, *Dogmatic Constitution on the Church*, 22; CIC canons 336-337 §1.

⁶⁶ CIC canon 360.

⁶⁷ CIC canons 7-8.

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- 62 Paul VI promulgated in his 1967 Apostolic Constitution new ecclesiastical laws pertaining to the re-organization of the Roman Curia.⁶⁸ The respective competencies of the departments of the Roman Curia were further reformed in the 1988 Apostolic Constitution of John Paul II.⁶⁹ Pope Francis has embarked on a further reform of the Roman Curia and has already introduced some significant new ecclesiastical laws. However the legislation pertaining to the Roman Curia does not bring about any changes in the ecclesiastical laws in the Code of Canon Law.⁷⁰
- 63 The reform of the law is applicable also to the Code of Canon Law. Since the Code of Canon Law came into effect on 27 November 1983 amendments to the law have been introduced by Pope John Paul II, Pope Benedict XVI and Pope Francis.
- 64 John Paul II on 18 May 1998 amended several canons of the Code of Canon Law with a corresponding amendment in the Code of Canons of the Eastern Churches.⁷¹ On 30 April 2001 he introduced new laws constituting new canonical offences, and amended canon 1395 §2 by changing the age for sexual abuse of children from sixteen to eighteen.⁷²
- 65 Pope Benedict XVI [2005-2013] introduced changes on 27 October 2009. Three canons were slightly amended of which one was not a law but a statement of Church teaching. The other two canons were amended in identical fashion by a clause being withdrawn from the text of the law.⁷³ He also introduced on 21 May 2010 the new canonical offence in respect of child pornography.⁷⁴
- 66 Pope Francis promulgated on 15 August 2015 new legislation in respect of the processes concerning the declaration of the nullity of marriage that came into effect on 8 December 2015. In this instance four canons were partially amended and three were abrogated.⁷⁵ Pope Francis on 31 May 2016 introduced some amendments to eleven canons of the Code of Canon Law so as to ensure their conformity with the comparable canons in the Code of Canons of the Eastern Churches.⁷⁶ Whilst the new laws are promulgated in the manner required by law, they also become immediately available on the Vatican website, usually in a number of languages.
- 67 Furthermore, Pope Benedict XVI in 2008 spoke of the on-going reform of canon law.⁷⁷ Among other parts of the Code, Book VI *Sanctions in the Church* has been under review and a draft text proposing the reform of this section of the Code is the subject of consultation throughout the Latin

⁶⁸ Pope Paul VI, Apostolic Constitution *Reform of the Roman Curia* [*Regimini Ecclesiae Universae*], 15 August 1967.

⁶⁹ Pope John Paul II, Apostolic Constitution *Reform of the Roman Curia* [*Pastor Bonus*], 28 June 1988.

⁷⁰ CIC canon 360.

⁷¹ Pope John Paul II, Motu proprio *New Canons inserted into the Code of Canon Law* [*Ad Tuendam Fidem*], 18 May 1998.

⁷² Pope John Paul II, Motu proprio *Promulgation of norms on the more grave delicts reserved to the Congregation for the Doctrine of the Faith* [*Sacramentorum Sanctitatis Tutela*], 30 April 2001.

⁷³ Pope Benedict XVI, Motu proprio *On several amendments to the Code of Canon Law* [*Omnium in mentem*], 26 October 2009.

⁷⁴ Congregation for the Doctrine of the Faith, Revised Norms of the Motu Proprio *Sacramentorum Sanctitatis Tutela*, 21 May 2010: Art. 6 2°.

⁷⁵ Pope Francis, Motu proprio *Reform of canons pertaining to the nullity of marriage* [*Mitis Iudex Iesus Christus*], 15 August 2015.

⁷⁶ Pope Francis, Motu proprio *Amending certain norms to have concordance between the Code of Canon Law and the Code of Canons of the Eastern Churches* [*De Concordia inter Codices*], 31 May 2016.

⁷⁷ Pope Benedict XVI, Address to the Roman Rota, 25 January 2008.

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Church.⁷⁸ The definitive amendments to Book VI of the Code of Canon Law are yet to be promulgated.

THE PARTICULAR CHURCH – THE DIOCESE

- 68 Jesus Christ gave to the Church he established the mandate to proclaim the good news to all peoples. Consequently that portion of the People of God, constituting the particular Churches throughout the world, lives in a variety of cultural, social, human, political and legal realities. The Church takes on different external expressions and appearances in each part of the world.
- 69 A particular Church, in accord with the teaching of Vatican II, “is a portion of the People of God entrusted to a bishop to be shepherded by him with the cooperation of the priests”.⁷⁹ The bishop is not the delegate of the Pope but governs the particular Church as “the vicar and ambassador of Christ”.⁸⁰
- 70 The bishop governs his diocese by his “counsel, exhortations and example, but also by his authority and sacred power” that he exercises “personally in the name of Christ”.⁸¹ Each diocesan bishop is immediately subject to the authority of the Pope and to whom he is accountable for the pastoral governance of the diocese.
- 71 The bishop of each diocese “has all the ordinary, proper and immediate power required for the exercise of his pastoral office, except in those matters which the law or a decree of the Supreme Pontiff [the Pope] reserves to the supreme or to some other ecclesiastical authority”.⁸²

Legislative power of governance

- 72 The bishop exercises the legislative power of governance in respect of his particular Church. Legislative power of governance is exercised within the diocesan synod which is “an event of communion and an act of governance”.⁸³ “The Synod not only manifests and actualizes ecclesial communion in a diocese, it also builds up and fosters that same unity”.⁸⁴ Canon law provides that the bishop is the sole legislator in the diocesan synod, but he can also exercise legislative power of governance apart from the synod.⁸⁵

⁷⁸ Pontifical Council for Legislative Texts, Draft of the Revision of Book VI of the Code of Canon Law – Pontificium Consilium De Legum Textibus, *Schema Recognitionis Libri VI Codicis Iuris Canonici* (Città del Vaticano: Typis Vaticanis, 2011); cf. John Renken, “Penal Law in the Church Tomorrow: Reflections on a Revision of Book VI” *The Canonist* 6 (2015) 11-43; Thomas J. Green, “Initial Reflections on the Schema Recognitionis Libri VI Codicis Iuris Canonici” *Studia Canonica* 50 (2016) 5-29.

⁷⁹ Vatican II, *Decree on the Bishops’ Pastoral Office in the Church*, 11; CIC canon 369.

⁸⁰ Vatican II, *Dogmatic Constitution on the Church*, 27.

⁸¹ Vatican II, *Decree on the Bishops’ Pastoral Office in the Church*, 11;

⁸² CIC canons 381 §1, 391 §1.

⁸³ Congregation for Bishops, *Directory for the Pastoral Ministry of Bishops*, 166 (Città del Vaticano: Libreria Editrice Vaticana, 2004) 184.

⁸⁴ Congregation for Bishops and Congregation for the Evangelization of Peoples, *Instruction on Diocesan Synods* 1997: 1.3. All quotations from documents of the Roman Curia are from the Vatican website: <http://w2.vatican.va/content/vatican/it.html>.

⁸⁵ CIC canon 466.

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- 73 In accord with the principle established in canon law, the bishop cannot validly promulgate a law which is contrary to the universal law [namely the Code of Canon Law or other universal laws] or to the law of a Plenary or Provincial Council or Bishops Conference.⁸⁶
- 74 The Code of Canon Law, in accordance with the principle of subsidiarity, does not establish the method whereby each bishop is to promulgate laws for his diocese as that matter is to be determined by the bishop.

OTHER INSTITUTES WITHIN THE CHURCH IN AUSTRALIA

- 75 In his pastoral governance of the particular Church, the diocesan Bishop acts within “the reality of *communion* which is the basis of all intra-ecclesial relationships”.⁸⁷ These other institutes exist by virtue of ecclesiastical law. Therefore the Bishop is cognizant of those which exercise in particular the legislative power of governance, namely the Provincial and Plenary Councils and the Bishops Conference.

Provincial Council

- 76 An ecclesiastical province is a grouping of a number of neighbouring dioceses under the presidency of one of the dioceses, as determined when the province is established.⁸⁸ The diocese to which the presidency is ascribed is called an ‘archdiocese’ and the bishop an ‘archbishop’. The archbishop is called ‘the Metropolitan’ and the archdiocese is referred to as a ‘Metropolitan See’. The other dioceses which constitute the province are called ‘suffragan’ dioceses.
- 77 The purpose of an ecclesiastical province is “to promote, according to circumstances of time and place, a common pastoral action among the dioceses and foster more closely relations between the diocesan Bishops”.⁸⁹ In Australia there are five provinces – Adelaide, Brisbane, Melbourne, Perth and Sydney.
- 78 The Provincial Council has the “power of governance especially legislative power”.⁹⁰ Any laws drawn up by a Provincial Council are only promulgated after they have been reviewed by the Apostolic See.⁹¹ Each Provincial Council in accordance with the principle of subsidiarity establishes the method whereby it promulgates its laws.
- 79 In a province each diocese preserves its own autonomy, and the Metropolitan has no power of governance in respect of suffragan dioceses other than as provided for in the three matters stated in canon law.⁹²
- 80 The Metropolitan is competent: to see that faith and ecclesiastical discipline are carefully observed in the province and to notify the Pope if there are any abuses; to conduct a canonical visitation if the suffragan bishop has neglected it, provided that the Apostolic See has given its prior approval; and

⁸⁶ CIC canon 135 §2.

⁸⁷ Pope John Paul II, Post-Synodal Apostolic Exhortation *On the Bishop, Servant of the Gospel of Jesus Christ for the Hope of the World* [*Pastores Gregis*], 56.

⁸⁸ CIC canon 431 §1, §3.

⁸⁹ CIC canon 431 §1.

⁹⁰ CIC canon 445.

⁹¹ CIC canon 446.

⁹² CIC canon 436 §1.

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to appoint a diocesan administrator when a suffragan diocese becomes vacant, if the college of consultors has failed to do so as required by canon law.⁹³

- 81 Notwithstanding that a diocese which is designated a metropolitan see is called an archdiocese, other dioceses are for specific reasons also established as an archdiocese and the diocesan bishop an archbishop. In Australia there are two such archdioceses: the Archdiocese of Canberra-Goulburn and the Archdiocese of Hobart. As archdioceses these two particular Churches do not constitute part of an ecclesiastical province. Nevertheless, they are required by law to relate to a province.⁹⁴ The Archdiocese of Canberra-Goulburn relates to the Province of Sydney and the Archdiocese of Hobart relates to the Province of Melbourne.
- 82 The Military Ordinariate, was established in 1986 and comprises all those Catholics who are members of the Armed Forces and includes their spouses and children. The pastoral care of the members of the Ordinariate is entrusted to an Ordinary appointed by the Pope. The Ordinariate is not a particular Church although for the purposes of canon law it is equated with a diocese and the Ordinary with a diocesan bishop.⁹⁵

Bishops Conference

- 83 The Bishops Conference has legislative power of governance to promulgate laws, called “general decrees, only in cases where the universal law has so prescribed, or by special mandate of the Apostolic See, either on its own initiative or at the request of the Conference itself”.⁹⁶ Such general decrees are reviewed by the Apostolic See before they are promulgated. The Bishops Conference, in accordance with the principle of subsidiarity, determines the manner in which its general decrees are to be promulgated and when they come into effect.⁹⁷

Plenary Council

- 84 Canon Law makes provision for a Plenary Council to be held “for all the particular Churches of the same Episcopal Conference as often as the Bishops Conference, with the approval of the Apostolic See, considers it necessary or advantageous”.⁹⁸ The Australian Bishops Conference has announced that a Plenary Council is to be held in 2020.
- 85 The Plenary Council has the “power of governance especially legislative power”.⁹⁹ Any laws drawn up by a Plenary Council are only promulgated after they have been reviewed by the Apostolic See.¹⁰⁰ In accordance with the principle of subsidiarity, each Plenary Council is to promulgate its laws in the manner determined by the Council itself.

⁹³ CIC canon 421 §1.

⁹⁴ CIC canon 431 §2.

⁹⁵ Pope John Paul II, Apostolic Constitution *Spiritual Care of the Military* [*Spirituali militum curae*] 21 April 1986.

⁹⁶ CIC canon 455 §1.

⁹⁷ CIC canon 455 §§2-3.

⁹⁸ CIC canon 439 §1.

⁹⁹ CIC canon 445.

¹⁰⁰ CIC canon 446.

INTERPRETATION AND APPLICATION OF CANON LAW

*The application of canon law presupposes its correct interpretation.*¹⁰¹

INTERPRETATION

- 86 The Code of Canon Law addresses two types of interpretation of canon law.
- 87 First, there is “authentic interpretation which is presented by way of a law” and, as it “has the same force as the law itself, [it] must be promulgated”.¹⁰² The person who holds the office of legislator and the one to whom the legislator entrusts the responsibility has the authority to interpret the law authentically.¹⁰³
- 88 “In the Middle Ages, the principle *ad quem pertinent iuris constitutio, ad ipsum pertinent interpretatio* - the one who makes the law is the one who is competent to interpret it - was received in canon law from Roman law and is at the basis of the rules governing authentic interpretation”.¹⁰⁴ Accordingly, the Pontifical Council for Legislative Texts is competent to publish, having obtained the approval of the Pope, authentic interpretations of universal laws of the Church.¹⁰⁵
- 89 Second, there is authoritative or official interpretation which occurs “by way of a court judgment or of an administrative act in a particular case”; such interpretation “does not have the force of law and binds only those persons and affects only those matters for which it was given”.¹⁰⁶
- 90 Therefore judicial decisions given by an ecclesiastical tribunal or by way of the executive power of governance, for example by diocesan bishops or by departments within the Roman Curia, do not create binding precedents.
- 91 A court judgement is required by law to state the facts, the relevant law and the argument in which the law is applied to the facts.¹⁰⁷ In like manner when a decision is given by way of an administrative act “it must be issued in writing [and] express at least in summary form, the reasons for the decision”.¹⁰⁸ The person issuing such a document must provide an explanation of the reasons for the decision, “which embrace the basis in law, the facts of the case and the reasons that led to the adoption of the particular decision rather than a different one”.¹⁰⁹
- 92 Therefore a person who seeks a judgement from an ecclesiastical tribunal or a decision from an authority exercising executive power of governance receives the response in which the reasons for the decision are explained.

¹⁰¹ Pope John Paul II, Address to the Roman Rota, 23 January 1992.

¹⁰² CIC canon 16 §2.

¹⁰³ CIC canon 16 §1.

¹⁰⁴ Gauthier, 21.

¹⁰⁵ Pope John Paul II, Apostolic Constitution *Reform of the Roman Curia [Pastor Bonus]*, 20 November 1988: Art. 155.

¹⁰⁶ CIC canon 16 §3.

¹⁰⁷ CIC canon 1612.

¹⁰⁸ CIC canon 51.

¹⁰⁹ Jorge Miras, “Singular Decrees and Precepts” in Ángel Marzoa, Jorge Miras, and Rafael Rodríguez-Ocaña (eds.), Ernest Caparros (Eng. ed.), *Exegetical Commentary on the Code of Canon Law* 5 Vols. (Montreal: Wilson & Lafleur, 2004) I:534.

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- 93 In order to interpret the canons in the Code of Canon Law it is necessary to understand the nature of each one. Canons may include a statement of belief or the doctrinal teaching of the Church. Some canons are exhortations or recommendations and therefore not binding obligations. In respect of the canons that are laws, the sources and resources of law must be brought into play. The rules for interpreting canon law are established in canon law¹¹⁰ and for those who have the responsibility of applying the law, for example diocesan bishops, they have at their disposal the interpretation provided by canon lawyers.
- 94 The Annual Addresses of the Pope to the personnel of the Roman Rota at the beginning of the judicial year are part of the Church's official teaching. "The papal discourses to the Roman Rota are addressed to all engaged in the administration of justice in ecclesiastical tribunals".¹¹¹ Hence there is an obligation on the ministers of tribunals throughout the Church to study the teaching of the Popes as presented annually in these addresses.

INSTRUCTIONS

- 95 Other than the Pontifical Council for Legislative Texts, the departments of the Roman Curia do not have the authority to provide authentic interpretations of the law. However they do have executive power of governance to issue instructions "which set out the provisions of a law and develop the manner in which it is to be put into effect" and as such they "are given for the benefit of those whose duty it is to execute the law, and they bind them in executing the law".¹¹²
- 96 It has been noted by canon lawyers that there are issues of clarification that need to be addressed in relation to documents and pronouncements coming from the Apostolic See as well as other ecclesial authorities.¹¹³
- 97 Two Instructions issued by the Congregation for the Doctrine of the Faith are of relevance. The first was issued in 1922 and with slight amendment re-issued in 1962; it is known as *Crimen Sollicitationis*, as it dealt with the crime of solicitation.
- 98 Another Instruction to be noted was issued by the Secretariat of State in 1974 and is known as *Secreta continere*. It addressed the issue of maintaining the secrecy or confidentiality required in respect of the matters pertaining to the Roman Curia. It replaced a previous instruction of 24 June 1968.

JURISPRUDENCE

- 99 The Roman Rota is "the ordinary tribunal established by the Roman Pontiff to receive appeals" and thus judges "in second instance, cases which have been adjudicated by the ordinary tribunals of first instance and brought before the Holy See through legitimate appeal".¹¹⁴

¹¹⁰ CIC canon 17.

¹¹¹ Pope John Paul II, Address to the Roman Rota, 25 January 1989.

¹¹² CIC canon 34 §1.

¹¹³ Francis G. Morrissey, "Papal and Curial Pronouncements: Their Canonical Significance in Light of the 1983 Code of Canon Law" *The Jurist* 50 (1990) 124-125; also published by Faculty of Canon Law Saint Paul University Ottawa, Second Edition revised and updated by Michel Thériault, April 1992.

¹¹⁴ CIC canons 1443, 1444 §1 1°.

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- 100 Pope John Paul II in his 1983 Address to the Roman Rota said: “the jurisprudence of the Rota has acquired, in the history of the Church, a growing authority, not only moral but juridical”.¹¹⁵ Again, in his 1986 Address he said: “the jurisprudence of the Rota has always been and must continue to be a sure point of reference for regional and diocesan tribunals”.¹¹⁶
- 101 Acknowledging that the judicial decisions of the Roman Rota, as provided for in canon law¹¹⁷, are not binding on lower tribunals, John Paul II said “the application of canon law presupposes its correct interpretation” and in this context referred to “the principal function of the Roman Rota”.¹¹⁸ In his 1988 Apostolic Constitution on the reform of the Roman Curia, the Pope said that the Roman Rota “fosters the unity of jurisprudence, and, by virtue of its own decisions, provides assistance to lower tribunals”.¹¹⁹
- 102 In his 1992 Address to the Roman Rota John Paul II, in respect of cases dealing with the nullity of marriage, said: “It seems evident that, on the level of substantive law, i.e. in deciding the merit of the cases presented, jurisprudence must be understood exclusively as that which emanates from the Tribunal of the Roman Rota”.¹²⁰
- 103 The jurisprudence of the Roman Rota, as found in its judgements in respect of matrimonial cases, is a dynamic source in the interpretation of law and in particular the evolutionary interpretation of the law. It “was able to foresee and anticipate certain canonical regulations, e.g., in matrimonial law, which later were included in the present Code”.¹²¹
- 104 The judgements of the Roman Rota are published annually [*Sacrae Romanae Rotae Decisiones*] commencing with volume 1 in 1909, such that the volume number lags eight years behind the year. Decisions are also published in canon law journals, including publications in English such as *The Jurist* [Catholic University of America], *Studia Canonica* [St Paul University Ottawa] and *The Canonist* [Canon Law Society of Australia and New Zealand]. These are often translations of the original decisions and are always published with the requisite approval. Judges of the Roman Rota also in their own name publish articles in academic journals which provide access to their interpretation of the law.

APPLICATION

- 105 A characteristic of the Code of Canon Law is that its laws in many instances remain on the level of principle. This is necessarily so because this Code is the universal law for the Latin Church throughout the world. Accordingly this Code relies upon the discretion of those whose duty it is to apply the law, in particular bishops, vicars general, episcopal vicars and parish priests, to apply the law in the specific and concrete circumstances pertaining to the people concerned within the realities of the diocese or the parish.

¹¹⁵ Pope John Paul II, Address to the Roman Rota, 26 February 1983.

¹¹⁶ Pope John Paul II, Address to the Roman Rota, 30 January 1986.

¹¹⁷ CIC canon 16 §3.

¹¹⁸ Pope John Paul II, Address to the Roman Rota, 23 January 1992.

¹¹⁹ Pope John Paul II, Apostolic Constitution *Reform of the Roman Curia* [*Pastor Bonus*], 20 November 1988: Art. 126.

¹²⁰ Pope John Paul II, Address to the Roman Rota, 23 January 1992.

¹²¹ *Ibid.*

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- 106 A fundamental principle of the Church enshrined in canon 1752 is that “the law is to be applied always observing canonical equity”. In the words of Henry of Segusio, an Italian canonist of the thirteenth century, canonical equity is “justice tempered with the sweetness of mercy”.¹²²
- 107 Equity means applying the law “taking into account the situation of persons and the concrete circumstances of the case, bearing in mind the ultimate purpose of the law, which is to promote the common good” and the eternal salvation of each person.¹²³
- 108 In canon law equity is “an attitude of mind and spirit that tempers the rigor of the law. It seeks a higher form of justice with a spiritual goal in mind. It softens the rigor of the law, but sometimes it also increases certain penalties”.¹²⁴

¹²² Pope Paul VI, Address to the Roman Rota, 8 February 1973.

¹²³ John M. Huels, “Ecclesiastical Laws” in J. P. Beal, J. A. Coriden, T. J. Green (eds.) *New Commentary on the Code of Canon Law* (Mahwah: Paulist Press, 2000) 79.

¹²⁴ Pope Paul VI, Address to the Roman Rota, 8 February 1973.

THE PASTORAL GOVERNANCE OF A PARTICULAR CHURCH [DIOCESE]

- 109 Catholics by reason of their place of residence belong to a parish and a particular Church¹²⁵ and it is within these communities that their lives and the law of the Church meet.
- 110 The bishop governs the diocese by his “counsel, exhortations and example, but also by his authority and sacred power” that he exercises “personally in the name of Christ”.¹²⁶ Accordingly, he “has all the ordinary, proper and immediate power of governance required for the exercise of his pastoral office, except in those matters which the law or a decree of the Supreme Pontiff reserves to the supreme or to some other ecclesiastical authority”.¹²⁷
- 111 By contrast with civil society canon law does not contemplate a separation of powers. Although the power vested in the Pope and the bishops is one, canon law explicitly states the power of governance is distinguished in its exercise into legislative, executive and judicial.¹²⁸
- 112 When Pope John Paul II promulgated the revised Code of Canon Law in 1983 he said that one of the teachings of the Second Vatican Council that was of importance was the Church’s “hierarchical authority as service”.¹²⁹ In the Church, authority is “a participation in the mission of Christ”.¹³⁰ It comes from God, not the law. Authority pre-exists the law and the law is the servant of authority. The law provides the framework for the exercise of Christ’s authority. Ecclesiastical law establishes its parameters and regulates the conditions, circumstances and manner in which it is to be exercised. According to the Pontifical Commission for the Revision of the Code of Canon Law: “the arbitrary use of power in the Church is prohibited by natural law, divine positive law and ecclesiastical law”.¹³¹

EXECUTIVE POWER OF GOVERNANCE

- 113 Accordingly, canon law provides the essential personnel for the purposes of assisting the bishop in his ministry of governance. The bishop exercises his executive power of governance either personally or through his vicar(s) general and episcopal vicar(s).
- 114 Canon law describes an ‘ecclesiastical office’ as any position “which by divine or ecclesiastical disposition is established in a stable manner to further a spiritual purpose”.¹³² The power of governance attached to an ecclesiastical office is designated “ordinary power” and it is either “proper or vicarious”.¹³³

¹²⁵ CIC canon 102.

¹²⁶ Vatican II, *Dogmatic Constitution on the Church*, 27.

¹²⁷ CIC canon 381 §1.

¹²⁸ CIC canon 135 §1.

¹²⁹ Pope John Paul II, Apostolic Constitution *The Promulgation of the 1983 Code of Canon Law* [*Sacrae disciplinae leges*], 25 January 1983; cf. Vatican II, *Dogmatic Constitution on the Church*, 2.

¹³⁰ Pope John Paul II, Post-Synodal Apostolic Exhortation *On the Bishop, Servant of the Gospel of Jesus Christ for the Hope of the World* [*Pastores Gregis*], 43.

¹³¹ Pontificia Commission Codici Iuris Canonici Recognoscendo, *Communicationes* 2 (1969) 82.

¹³² CIC canon 145 §1.

¹³³ CIC canon 131.

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- 115 The power of governance of the bishop is proper ordinary power for it is exercised in his own name. The power of governance of the vicars is vicarious power because it derives from the power of the bishop and is exercised in the name of the bishop.
- 116 In contrast to proper power attached to an ecclesiastical office, the exercise of the executive power of governance can be delegated to a person. The relationship between the bishop delegating the exercise of executive power and the person so delegated is to be formalised in a mandate establishing the terms and conditions of the delegation.

Vicars General and Episcopal Vicars

- 117 A vicar general is a priest freely appointed by the diocesan bishop.¹³⁴ If a coadjutor bishop is appointed to a diocese, the bishop is required to appoint him as a vicar general; if an auxiliary bishop is appointed, he must be appointed at least as an episcopal vicar.¹³⁵ The role of a vicar general is “to assist the bishop in the governance of the whole diocese”.¹³⁶ A vicar general by virtue of his ecclesiastical office has the same executive power of governance throughout the whole diocese that belongs by law to the bishop, with the exception of those matters reserved to the bishop.¹³⁷
- 118 The bishop is obliged to appoint one vicar general unless pastoral circumstances suggest two or more.¹³⁸ However the law leaves to the bishop’s discretion the appointment of episcopal vicar(s) whenever “the good governance of the diocese requires it” and for a limited purpose such as “a determined part of the diocese, or a specific type of activity or certain groups of people”.¹³⁹
- 119 An episcopal vicar by virtue of his ecclesiastical office has the same executive power of governance for his specific responsibility that belongs by law to the diocesan bishop, with the exception of those matters reserved to the bishop.¹⁴⁰
- 120 The primary focus of the tasks of both a vicar general and an episcopal vicar is pastoral, as “the diocesan Bishop has the responsibility of coordinating the pastoral action of the Vicars general and episcopal Vicars”.¹⁴¹ Canon law views the vicar(s) general and the episcopal vicar(s) as having, and taking, responsibility for “important matters” relating to the pastoral governance of the diocese, and reporting to the bishop. This is more than simple communication since vicars must act in unity with the bishop and not “against (his) will and mind”.¹⁴²

Consultation

- 121 “Ecclesial communion in its organic structure calls for personal responsibility on the part of the Bishop, but it also presupposes the participation of every category of the faithful, inasmuch as they share responsibility for the good of the particular Church which they themselves form”.¹⁴³
Accordingly, canon law provides the essential consultative groups for the purposes of assisting the

¹³⁴ CIC canon 477 §1.

¹³⁵ CIC canon 406 §1.

¹³⁶ CIC canon 475 §1.

¹³⁷ CIC canons 479 §1, 131 §2.

¹³⁸ CIC canon 475 §1,

¹³⁹ CIC canon 476.

¹⁴⁰ CIC canons 479 §2, 131 §2.

¹⁴¹ CIC canon 473 §2.

¹⁴² CIC canon 480.

¹⁴³ Pope John Paul II, Post-Synodal Apostolic Exhortation *On the Bishop, Servant of the Gospel of Jesus Christ for the Hope of the World* [*Pastores Gregis*], 44.

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- bishop in the exercise of his executive power of governance. The essential consultative groups are the council of priests, the college of consultors, the financial council and the pastoral council.
- 122 These groups are not collegial decision-making entities, such as a Provincial or Plenary Council or Bishops Conference, of which the bishop is but one member who also acts as the chairperson. It is not comparable to a corporate governance structure such as a board of company directors. Rather they are a group of persons who come together to take counsel on particular matters and where one person makes the decision once the consultative process has reached a conclusion.
- 123 Consultation flows from the nature of the Church as a *communio* and is a process involving three stages: the provision of direct, real and opportune information which takes into account all relevant data that may impact upon an issue; the candid, honest and open discussion and free exchange of ideas by all those involved in the process so that agreement can be facilitated; and the formulation of a resolution that is proposed to the person whose responsibility it is to make the decision and see to its implementation.
- 124 Canon law requires that the bishop is to undertake a process of consultation, for example, with the council of priests, the college of consultors or the finance council in respect of certain matters specified in the law.¹⁴⁴ The legal construct of consultation is presented in terms of advice and consent, such that the council or the college is required by law to give its advice or its consent to a proposed juridical act of the bishop.
- 125 If consent is not sought or if the bishop acts against the consent, the act is invalid. If advice is to be obtained, the act is invalid if the advice is not sought. Although the bishop is not bound to follow the advice even if it is unanimous, “nevertheless without what is in his judgement an overriding reason he is not to act against it, especially if it is unanimous”.¹⁴⁵ It is evident that the responsibility for any decision made by the bishop after a process of consultation rests with him alone.
- 126 As consultation is an expression of the Church as *communio*, it cannot be limited only to those occasions when canon law specifically requires that the bishop obtain the consent or the advice of the above-mentioned structures of participation. Consultation is a fundamental characteristic of the pastoral governance of the diocese. Thus the norms of law apply also in those instances when a bishop at his own discretion consults any other structure established to assist him in the governance of the diocese.

JUDICIAL POWER OF GOVERNANCE

- 127 The bishop exercises his judicial power of governance personally and through a judicial vicar and judges. An ecclesiastical tribunal is the structure provided by canon law through which the judicial power of governance is exercised. As a rule, the tribunal of first instance is the diocesan tribunal but the law permits inter-diocesan tribunals to be established.¹⁴⁶
- 128 In Australia the five tribunals of first instance, established in 1953, are regional/provincial tribunals, that is, there is one tribunal for all the dioceses pertaining to each ecclesiastical province. Originally established only for cases of nullity of marriage, since 1975 the competency of these five tribunals of

¹⁴⁴ CIC canons 461 §1, 494 §1, 515 §2, 531, 536 §1, 1215 §2, 1222 §2, 1263, 1277, 1281 §2, 1292 §1, 1305, 1310 §2.

¹⁴⁵ CIC canon 127 §2 2°.

¹⁴⁶ CIC canon 1423.

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first instance is for “all cases, namely not only marriage cases, but also for cases of rights and for criminal cases”.¹⁴⁷

THE POWER OF GOVERNANCE IN THE INTERNAL FORUM

129 Canon 130 states:

Of itself, the power of governance is exercised for the external forum; sometimes, however, it is exercised for the internal forum only, but in such a way that the effects which its exercise is designed to have in the external forum are not acknowledged in that forum, except in so far as the law prescribes this for determinate cases.

- 130 The term ‘internal forum’ in the 1983 Code of Canon Law does not mean the conscience of an individual person which has been referred to in the Church’s tradition as the ‘forum of conscience’.¹⁴⁸
- 131 A person’s conscience, according to the teaching of the Church in the Second Vatican Council, “is the most intimate core and sanctuary of the human person, in which he or she is alone with God, whose voice echoes within their depths”.¹⁴⁹ This is the meaning of the word ‘conscience’ on the thirteen occasions it is used in the Code of Canon Law.¹⁵⁰
- 132 As canon 130 states without ambiguity the power of governance is to be exercised in the external forum, that is to say, the public life of the Church, the place or arena of observable, verifiable acts so as to provide for the necessary certainty of juridical acts.¹⁵¹
- 133 Although the external forum is the proper field for the exercise of the power of governance, canon 130 establishes that in some specific circumstances established by the law the power of governance is exercised in the internal forum alone. These are the only instances when the exercise of the power of governance can be used in the internal forum.
- 134 The exercise of the power of governance in the internal forum is justified by the ultimate purpose of the law of the Church - *salus animarum* - *the salvation of the people*. It is also founded upon the fundamental right, enshrined in canon 220, of the protection of the good name of every member of the People of God.¹⁵²
- 135 The internal forum can be described as the private realm of a person’s life where the actions are not publicly known. In such cases the act of the power of governance is not manifested publicly and its effects are not acknowledged in the external forum, unless the law prescribes this for specific cases.
- 136 The distinction between the two fora in which the power of governance can operate has relevance in penal law and matrimonial law. In very general terms the exercise of the power of governance in the internal forum can be explained as follows.

¹⁴⁷ Rodger J Austin, “The Address of Pope Francis and Tribunals in Australia and New Zealand” *The Canonist* 5 (2014) 5-16.

¹⁴⁸ Juan Ignacio Arrieta, “The Internal Forum: Notion and Juridical Regime” *Studia Canonica* 41 (2007) 27-35.

¹⁴⁹ Vatican II, *Pastoral Constitution on the Church in the Modern World*, 16.

¹⁵⁰ Ochoa, 102.

¹⁵¹ Brendan Daly, “Power of Governance in the Internal Forum and the External Forum” *The Canonist* 6 (2014) 44-64.

¹⁵² Arrieta, 29.

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- 137 The commission of a canonical offence and incurring a penalty for an offence are matters of the external forum, as is the remittance of a penalty. For some few canonical offences a penalty is incurred automatically. For example, abortion is a sin against the fifth commandment in accord with the teaching of the Church, and it is also constituted a canonical offence for which the penalty of excommunication is incurred automatically.¹⁵³ If a person has incurred this penalty and goes to the sacrament of penance to be reconciled with Jesus Christ and the Church, the law provides for the confessor to remit the penalty in the internal forum. The law in this instance refers to the “sacramental internal forum”.¹⁵⁴
- 138 The other use of the power of governance in the internal forum is in regard to the dispensation of impediments for marriage.¹⁵⁵ In canon law there are impediments to marriage that render it invalid unless a dispensation is granted. Impediments, as a rule, can be proven in the external forum, and the dispensation is granted by the bishop or vicar general by virtue of the executive power of governance.
- 139 However, it can occur that an impediment may not be known publicly and thus it is referred to as an occult impediment. Only in the specific circumstances stated in canon law, parish priests, other priests and deacons are empowered to grant a dispensation in the internal forum, should such an impediment be made known to them. Likewise, the law also empowers a confessor to grant such a dispensation. If he does so during the celebration of the sacrament of penance it is referred to as ‘the sacramental internal forum’.¹⁵⁶ If it occurs apart from the sacrament of penance it is referred to as ‘the non-sacramental internal forum’.

¹⁵³ CIC canon 1398: A person who actually procures an abortion incurs a *latae sententiae* excommunication.

¹⁵⁴ CIC canon 1357.

¹⁵⁵ CIC canons 1073, 1074, 1078.

¹⁵⁶ CIC canons 1079, 1080.

THE ARCHIVES OF THE DIOCESE

- 140 Canon law establishes the fundamental principle that all documents “concerning the spiritual and temporal affairs of the diocese are to be properly filed and carefully kept”.¹⁵⁷ Accordingly there is an obligation for the establishment of archives for each diocese. Canon law refers to the three categories of archive: general; secret and historical. In the historical archive “documents which have an historical value” are to be preserved and the diocesan Bishop is to establish norms for access to this archive.¹⁵⁸
- 141 There must be in each diocesan curia a general archive where documents “concerning the spiritual and temporal affairs of the diocese are to be properly filed and carefully kept under lock and key”.¹⁵⁹ The custody of the general archive is the responsibility of the bishop and the chancellor, from whom permission must be obtained to access the general archive.¹⁶⁰
- 142 Canon law establishes the obligation that each diocese must have a ‘secret archive’ which is to be separate from the general archive, or by way of exception it can be located in a specially secured portion of the general archive.¹⁶¹ The nature of the secret archive is determined by reason of the documents which are to be preserved in it, the custody of and the access to the secret archive.
- 143 The custody of the secret archive is the responsibility of the bishop and only he has the right to access the secret archive; his permission is required for any other person, including the chancellor, to access the secret archive.¹⁶² The documents which are to be preserved in the secret archive are usually highly confidential and may include matters of conscience. The law determines certain documents are to be kept in the secret archive.¹⁶³
- 144 Canon law explicitly states that all the documentation pertaining to the preliminary investigation, in accord with canon 1717, into any alleged canonical offence including the sexual abuse of minors must be kept in the secret archive. “The acts of the investigation, the decrees of the bishop by which the investigation was opened and closed, and all those matters which preceded the investigation, are to be kept in the secret curial archive unless they are necessary for the penal process”.¹⁶⁴
- 145 Therefore the documentation received by the bishop about the sexual abuse of a minor, that was considered, after the preliminary investigation, not to have provided sufficient information for the matter to progress further, must be retained permanently in the secret archive. Such documentation is not to be destroyed.
- 146 Moreover, the bishop has the authority to determine other documentation that is to be preserved in the secret archive.¹⁶⁵ Canon 269 2° provides for a bishop, who is to incardinate a cleric, to obtain from the cleric’s bishop or superior “under secrecy if need be, appropriate testimonials concerning

¹⁵⁷ CIC canon 486 §2.

¹⁵⁸ CIC canon 491 §2.

¹⁵⁹ CIC canon 486 §2.

¹⁶⁰ CIC canon 487.

¹⁶¹ CIC 489 §1.

¹⁶² CIC 490 §1.

¹⁶³ CIC canons, 413 §1, 1082, 1133, 1339 §3, and 1719 indicate documentation which is to be kept in the secret archive.

¹⁶⁴ CIC canon 1719 §3. This takes up the provision in the Instruction *Crimen Sollicitationis* Art. 42 b) that required information received “to be archived” so that it could “be brought up again should anything else happen in the future”.

¹⁶⁵ Cf. CIC canons 269 2°; 277 §3; 413 §1.

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the cleric's life, behavior and studies". *Towards Healing* requires a bishop receiving a cleric into his diocese "to ask for a written statement from the cleric indicating whether there have been any substantiated complaints of abuse against him, or whether there are known circumstances that could lead to a complaint of abuse. Such statements shall be held as confidential documents".¹⁶⁶

- 147 In both instances such documentation would be held in the secret archive so as to protect the cleric's right to privacy and/or his good name.¹⁶⁷ Any such information would be retained permanently.
- 148 Documents held in the secret archive does not mean that they cannot be accessed. On the contrary, it means that they can be accessed provided the permission of the bishop has been given. When a request is made, in accordance with the provisions of the civil law, in respect of documentation concerning child sexual abuse held in the secret archive, the bishop is obligated to comply with such a request.
- 149 Canon law regulates the retention of documents in the secret archive by way of identifying what, and when, certain documents are to be destroyed. The law provides that "each year documents of criminal cases concerning moral matters are to be destroyed whenever the guilty parties have died, or ten years have elapsed since the definitive judgement was issued and the trial concluded. A short summary of the facts is to be kept, together with the text of the definitive judgement".¹⁶⁸
- 150 The only documents in the secret archive to which this norm of law applies are those pertaining to an ecclesiastical criminal trial concerning a moral matter that reached a definitive judgement, and this includes trials with regard to an offence of sexual abuse of a minor. In these instances not all the information is destroyed because a short summary of the facts is to be kept, together with the text of the definitive judgement. The judgment must set out the facts of the particular case, the law that is applicable, and the arguments and reasons by which the tribunal reached its decision.

¹⁶⁶ *Towards Healing* 2010 Part Three, 45.6.

¹⁶⁷ CIC canon 220.

¹⁶⁸ CIC 489 §2.

THE SEXUAL ABUSE OF MINORS

- 151 For the Catholic Church the sexual abuse of minors is, in accordance with ‘the law of Christ’, a grave violation of the sixth commandment of the Decalogue. In addition, the Church has constituted such abuse as an offence [*delictum* in Latin] within its canonical system.
- 152 In the 1917 Code of Canon Law and in the 1983 Code of Canon Law, in keeping with canonical tradition, only clerics whether they be diocesan clergy who are incardinated in a diocese, or clerical religious who are members of a religious institute, commit the canonical offence of the sexual abuse of minors.
- 153 The relevant canon in the 1917 Code of Canon Law was canon 2359 §2 and in the 1983 Code of Canon Law it is canon 1395 §2 which states:
- A cleric who has offended in other ways against the sixth commandment of the Decalogue, if the offence was committed by force, or by threats, or in public, or with a minor under the age of eighteen years¹⁶⁹ is to be punished with just penalties, not excluding dismissal from the clerical state if the case so warrants.*
- 154 Notwithstanding that canon 1395 §2 does not apply to members of religious institutes who are not clerics, canon 695 §1 of the 1983 Code of Canon Law provides that if a religious sister or brother has sexually abused a minor s/he “must be dismissed unless the superior judges that dismissal is not absolutely necessary, and that sufficient provision has been made in some other way for the amendment of the member, the restoration of justice and the reparation of scandal”.
- 155 The procedure for the dismissal of a religious for the sexual abuse of a minor is established in canon 695 §2. This procedure is neither a penal process nor a judicial process.
- 156 The 1917 Code of Canon Law, in the context of the privilege of the forum, acknowledged explicitly that sexual abuse of minors was an offence in respect of which both the Church and the State had competency.
- 157 In regard to lay persons, the secular courts were competent to hear such matters and in the 1917 Code of Canon Law canon 2357 provided that a lay person, who had been legitimately declared guilty of sexual abuse of a minor in accordance with the civil law, was subject to a penalty to be declared by an ecclesiastical tribunal.

¹⁶⁹ The text as promulgated on 25 January 1983 stated “sixteen years” and this was amended to “eighteen years” by Pope John Paul II on 30 April 2001

 PRIVILEGE OF THE FORUM – 1917 CODE OF CANON LAW

- 158 From the eighth to the nineteenth century the Pope was not only the head of the Church but also a sovereign temporal ruler over the territories in the Italian Peninsula known as the Papal States. On 29 September 1870, during the first Vatican Council, the armies of the Kingdom of Italy occupied the Papal States. Ultimately, by reason of the Lateran Treaty ratified on 7 June 1929 the State of the Vatican City was created of which the Pope is the Head of State and holds legislative, executive and judicial power in respect thereof.
- 159 “The Catholic Church, through the Holy See understood as the organ of its government, is qualified as a subject enjoying sovereignty equal to that of the State” to enter into concordats, conventions or agreements. Such concordats are established “between two subjects of international law, each one sovereign in its own sphere: spiritual and political”.¹⁷⁰
- 160 In the 1917 Code of Canon Law one of the privileges of clerics was the privilege of the forum. Canon 120 §1 stated:
- All lawsuits against clerics, both civil and criminal, must be brought before an ecclesiastical court, unless for particular places provision is otherwise lawfully made.*
- 161 Canon 120 §2 did provide otherwise, whereby a priest could be brought before the secular courts if the bishop granted permission. The law said that such permission was not to be refused without a just and serious reason.
- 162 The Holy See between 1852 and 1887 by way of concordats with Costa Rica, Nicaragua, Guatemala, Honduras, El Salvador, Ecuador and Colombia, agreed that clerics would be tried before the secular courts, subject to certain conditions.¹⁷¹
- 163 For example, the Concordat with Colombia in 1887, and the subsequent Concordat in 1973, provided that with regard to clergy “civil and criminal cases are within the jurisdiction of the courts of the State, except for Bishops, whose criminal cases are judged by the Holy See [Art. XIX]. In criminal proceedings against clergy, exceptions to the common legal scheme are agreed: the trials will not be public and accused persons will not be detained in common prisons during the trial. However, if the final decision is that of guilty, the common penalty regime is applied [Art. XX]”.¹⁷²
- 164 The Concordat with Latvia in 1922 was the first to be executed after the promulgation of the 1917 Code of Canon Law. It provided that if clerics were accused before the secular courts of crimes under the Code of Latvia, the Archbishop or his delegate was to be notified and he or his delegate could attend the court hearings and be present at the trial. The clerics sentenced to imprisonment were to serve their time in a monastery. In the other cases, the guilty clerics receive their

¹⁷⁰ Professor Roland Minnerath, “The Position of the Catholic Church Regarding Concordats from a Doctrinal and Pragmatic Perspective” *Catholic University Law Review* Volume 47 Issue 2 Winter 1998: <http://scholarship.law.edu/lawreview/vol.47/iss2/9>.

¹⁷¹ Francisco X. Wernz – Petrus Vidal, *Ius Canonicum* (Romae: Pontificia Universitas Gregoriana, 1928) Vol. II: 69.

¹⁷² Professor Vicente Prieto, Religion and the Secular State in Colombia; <http://www.iclrs.org/content/blurb/files/Colombia>.

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- punishment like other convicted persons, after the Archbishop has deprived them of their ecclesiastical status.¹⁷³
- 165 In the 1927 Concordat with Lithuania clergy were to be tried before the secular courts for crimes committed under the penal laws of the Republic. It provided that “in the case of arrest or imprisonment the civil authorities shall proceed with due regard for their state and ecclesiastical rank”.¹⁷⁴
- 166 In the 1933 Concordat with Austria it was agreed that clerics would stand trial before the secular courts. In the case of arrest and retention in custody the cleric was to be treated with the consideration befitting his profession and his rank in the hierarchy. In the case of the criminal conviction of a cleric the State was immediately to inform the diocesan bishop and as soon as possible send the result of the preliminary hearing and, if applicable, the court’s final judgment in both the first instance and the court of appeal.¹⁷⁵
- 167 In some places the privilege of the forum did not apply by reason of a contrary custom. Such was the position in Germany¹⁷⁶ and in those places where English customs prevailed including the United States of America and Canada.¹⁷⁷
- 168 For the same reason, the privilege of the forum did not apply in Australia. Accordingly canon law has never prevented a person in Australia from taking her or his allegations that a cleric had committed sexual abuse of a minor directly to the civil authorities.
- 169 In Australia any charge of sexual abuse of a minor committed by a priest would be dealt with by the secular courts. In 1978 Michael Glennon a priest of the Archdiocese of Melbourne was found guilty of sexual abuse of a minor and jailed.
- 170 As a matter of law, the privilege of the forum was abolished on 27 November 1983 when the revised Code of Canon Law came into effect.

¹⁷³ Concordat between the Holy See and the Government of Latvia, Art. XVIII-XIX, 30 May 1922 *Acta Apostolicae Sedis* Vol. XIV Num. 16, 15 November 1922: 580.

¹⁷⁴ Cicognani, 472-474.

¹⁷⁵ Concordat between the Holy See and the Austrian Republic Art. XX, 5 June 1933, *Acta Apostolicae Sedis* Vol. XXVI Num. 7, 2 May 1934: 270.

¹⁷⁶ Secretariat of State, Concordat between the Holy See and German Reich, 20 July 1933: Art. 33; cf. Wernz–Vidal, 69.

¹⁷⁷ Chas. Augustine, *A Commentary on the New Code of Law* (St. Louis MO: Herder Book & Co., 1918) 64; cf. Matthaeus Conte a Coronata, *Institutiones Iuris Canonici* Volume I, Editio Tertia (Romae: Marietti, 1947) 209-211.

THE OBLIGATION OF CLERICS TO OBSERVE CHASTITY & CELIBACY

- 171 For the Latin Church, “the law of ecclesiastical celibacy, whose first written traces pre-suppose a still earlier unwritten practice, dates back to a canon of the Council of Elvira, at the beginning of the fourth century”.¹⁷⁸ It has been affirmed in the Church in the teaching of the Second Vatican Council and also of Pope Paul VI and Pope John Paul II.¹⁷⁹
- 172 Canon 132 of the 1917 Code of Canon Law spoke of the obligation incumbent upon clerics to observe chastity and celibacy. The Church has acknowledged from the earliest times that some clerics fail to observe this obligation. Moreover, some failures are of such a kind that they are also constituted canonical offences within the Church’s legal system. At the same time these offences may also be crimes in accordance with the civil law.
- 173 Canon 277 §1 of the 1983 Code of Canon Law sets out the theological foundation of the celibacy of clerics and the formulation of the law in precise juridical terms: “Clerics are obliged to observe perfect and perpetual continence for the sake of the Kingdom of heaven and are therefore bound to celibacy which is a special gift of God by which sacred ministers can more easily remain close to Christ with an undivided heart, and can dedicate themselves more freely to the service of God and their neighbour”.
- 174 In canon 277 §3 the law addresses the authority of the diocesan bishop to safeguard the observance of celibacy. It empowers the bishop “to establish more detailed rules” for the diocese as a means of assisting clerics living faithfully the celibacy they have freely undertaken. The law also empowers the bishop “to pass judgement on the observance of the obligation in particular cases”.
- 175 In accord with its predecessor, the 1983 Code of Canon Law identifies in canon 1394 and canon 1395 those failures to observe the obligation of clerical celibacy which also constitute canonical offences. Among the failures stated in canon 1395 §2 which constitute a canonical offence is the sexual abuse of a minor by a cleric.

¹⁷⁸ Pope Pius XI, Encyclical Letter *On the Catholic Priesthood* [*Ad Catholici Sacerdotii*], 20 December 1935, 43.

¹⁷⁹ Vatican II, *Decree on the Ministry and Life of Priests*, 16; Pope Paul VI Encyclical Letter *On Priestly Celibacy*, 24 June 1967, 14; Pope John Paul II, Post-Synodal Apostolic Exhortation *I will give You Shepherds* [*Pastores dabo vobis*], 25 March 1992, 29; Congregation for the Clergy, *Directory on the Ministry and Life of Priests*, 31 January 1994, 57-60.

RESPONDING TO SEXUAL ABUSE OF MINORS BY CLERICS

1917 CODE OF CANON LAW

- 176 Responding to the sexual abuse of minors by clerics can be addressed in the first instance in relation to the 1917 Code of Canon Law which was in force from 19 May 1918 until 27 November 1983.
- 177 The 1917 Code of Canon Law established the procedure to be followed should a bishop become aware that a cleric had or may have committed a canonical offence. The procedure was established in canons 1939-1959.

INSTRUCTION OF THE HOLY OFFICE 1922 AND 1962

- 178 Among the canonical offences in the 1917 Code of Canon Law was the offence or crime of solicitation. This offence occurs when a priest “who in confession, or on the occasion or under the pretext of confession, solicits a penitent to commit a sin against the sixth commandment of the Decalogue”.¹⁸⁰ In the 1917 Code of Canon Law there was an obligation upon the penitent who had been solicited to denounce, within one month to the bishop or the Holy See, the confessor who had committed the crime of solicitation.¹⁸¹
- 179 On 9 June 1922 the Supreme Sacred Congregation of the Holy Office, now known as the Congregation for the Doctrine of the Faith, issued with the approval of Pope Pius XI an Instruction entitled *On the Manner of Proceeding in Cases of Solicitation*. This instruction was replaced by a slightly amended one issued with the approval of Pope John XXIII on 16 March 1962. Accordingly the Instructions had the force of law and were to be observed. The 1962 Instruction is commonly referred to as *Crimen Sollicitationis*.¹⁸²
- 180 The norms issued in 1922 were an update, in light of the 1917 Code of Canon Law, of the Apostolic Constitution *Sacramentorum Poenitentiae* in respect of the crime of solicitation, promulgated by Pope Benedict XIV on 1 June 1741. This Apostolic Constitution was published with the 1917 Code of Canon Law as an appendix.
- 181 Although the 1917 Code of Canon Law in canons 1933-1959 established the procedure for criminal trials, the Instruction *Crimen Sollicitationis* provided for bishops and their tribunals special procedural norms that were to be observed in dealing with the crime of solicitation. Although this was its primary purpose, the Instruction also provided that these procedural norms were to be observed for other crimes relating to the sixth commandment of the Decalogue, including the sexual abuse of minors by clerics.¹⁸³
- 182 Bishops were required to keep the Instruction in the secret archive of the diocesan curia for internal use only. It was not to be published or augmented with commentaries. Furthermore, all those

¹⁸⁰ CIC canon 1387; cf. canons 904, 2368 §1, 1917 Code of Canon Law.

¹⁸¹ Canon 904 of the 1917 Code of Canon Law.

¹⁸² Supreme Congregation of the Holy Office, Instruction *On the manner of Proceeding in Cases involving the Crime of Solicitation*, approved by Pope John XXIII 16 March 1962.

http://www.vatican.va/resources/resources_crimen-sollicitationis-1962_en.html.

¹⁸³ *Ibid.*, 73.

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associated in any way with a judicial trial in these matters were bound to observe the strictest confidentiality, known as the 'secret of the Holy Office'. The person making the allegations against the cleric and any witnesses were required to take an oath to observe confidentiality. However these persons were "subject to no censure, unless they were expressly warned of this in the proceedings".¹⁸⁴ The obligation to observe confidentiality commenced only from the time the allegation was made known to the bishop. At any time before, during or after the allegation was brought before the bishop and a canonical process was conducted, a victim had the right to take the matter to the secular courts.

- 183 The Instruction indicates that the reasons for such confidentiality are related to protecting the reputation of any person involved in the process and this would have particular importance if it was found that the allegations were untrue. It also enables those involved to speak openly, honestly and freely. In addition it seeks to prevent undermining or destroying the faith of the Catholic community in regard to the sacrament of penance in which penitents seek the forgiveness of their sins and reconciliation with God through the ministry of the priest.¹⁸⁵
- 184 Father Thomas Doyle OP JCD states that "there is no basis to assume that the Holy See envisioned this process to be a substitute for any secular legal process, criminal or civil". Furthermore, he states that "it is incorrect to assume, as some have unfortunately done, that the 1922 and 1962 Instructions are proof of a conspiracy to hide sexually abusive priests or to prevent the disclosure of sexual crimes committed by clerics to civil authorities".¹⁸⁶ This is evident from the fact that, in all the places where the privilege of the forum was not operative, the sexual abuse of minors by a cleric was taken before and dealt with by the secular courts. Furthermore the matter of the pontifical secret was not of relevance if a matter was before the secular courts, as such confidentiality applied only to a matter being dealt with in accordance with the norms of canon law.
- 185 According to the Congregation for the Doctrine of the Faith "the 1922 Instruction was given as needed to bishops who had to deal with particular cases concerning solicitation ... [and] the sexual abuse of children. Copies of the 1962 re-print were meant to be given to the Bishops gathering for the Second Vatican Council. A few copies of this re-print were handed out to bishops who, in the meantime, needed to process cases but most of the copies were never distributed".¹⁸⁷
- 186 On the basis of this statement from the Congregation for the Doctrine of the Faith not every bishop obtained a copy of the 1962 Instruction and would have remained unaware of its existence. That situation is reflected in the information provided to this Royal Commission by Bishop Geoffrey Robinson who stated that he was not aware of the 1962 Instruction until about 2000.¹⁸⁸

¹⁸⁴ Ibid., 11, 13.

¹⁸⁵ The Roman Ritual, Rite of Penance, 6.

¹⁸⁶ Thomas Doyle, The 1922 Instruction and the 1962 Instruction *Crimen Sollicitationis* promulgated by the Vatican, 3 October 2008. See Brendan Daly, The Instruction *Crimen Sollicitationis* on the Crime of Solicitation: Confusion or Cover-up of Paedophilia? *The Canonist* 7 (2016) 10-30.

¹⁸⁷ Congregation for the Doctrine of the Faith, *Historical Introduction – Norms of the Motu Proprio Sacramentorum Sanctitatis Tutela* 2001.

¹⁸⁸ Transcript of G J Robinson, Case Study No 31, 24 August 2015, p.16054 L26-27.

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INSTRUCTION OF THE SECRETARIAT OF STATE 1974

- 187 The Secretariat of State issued on 4 February 1974, with the approval of Pope Paul VI, a document dealing with pontifical secrecy. This means the document has the force of law and is to be observed. The document is known as *Secreta continere*.¹⁸⁹
- 188 As Latin is the official language for canon law, the noun *secretum* - *secrecy* and the adjective *secretus* - *secret* are used in the law and they derive from the verb *secerno* which means “to put apart, to separate”.¹⁹⁰ The word ‘secrecy’ in Latin and its use in canon law means what, in other contexts, is described as ‘confidentiality’.¹⁹¹ The English text of the 1962 Instruction *Crimen Sollicitationis* available on the Vatican website also uses the word ‘confidentiality’.
- 189 The document *Secreta continere* states that general official secrecy applies to the matters dealt with by the Roman Curia and that there is a moral obligation to observe this confidentiality. On the other hand it is recognised that in some matters of more serious consequence a greater degree of confidentiality is applicable and this is called ‘pontifical secrecy’.
- 190 The purpose of the Instruction was to present to the Roman Curia the matters subject to pontifical secrecy and those persons who were obliged to observe such confidentiality. As the Instruction pertained to the entire Roman Curia, the term ‘the secret of the Holy Office’, hitherto used to refer to the confidentiality relevant to matters within the competency of the Congregation for the Doctrine of the Faith, ceased to be used.
- 191 *Secreta continere* did not alter any of the procedural norms established in the 1962 Instruction *Crimen Sollicitationis*.

RESPONDING TO AN ALLEGED CANONICAL OFFENCE

- 192 There was a procedure established in the 1917 Code of Canon Law for dealing with any alleged canonical offence. Canon 1939 required that when information about an alleged offence came to the attention of the bishop an investigation was to be undertaken, unless the matter was notorious or the facts were certain, to enable the bishop to determine whether or not there was sufficient evidence to proceed with a penal process.
- 193 However, the procedure established in the Instruction *Crimen Sollicitationis* was to be followed in respect of the sexual abuse of minors by clerics.
- 194 If a bishop in Australia was unaware of the 1962 Instruction and a complaint of the sexual abuse of a minor was brought to his attention, the norms of canon law could be followed and the complaint investigated with a view to determining the truth of what was being alleged to have occurred and then taking what he considered to be the appropriate action.
- 195 The bishop had to decide in the first instance whether or not a penal process was to be instigated.

¹⁸⁹ An English translation of the original Latin text is in *Canon Law Digest* Vol. VIII 1973-1977 (Mundelein, Illinois: Chicago Province S.J., 1978) 205-210.

¹⁹⁰ C. T. Lewis and C Short, *A Latin Dictionary* Founded on Andrews' Edition of Freund's Latin Dictionary 1850 (Oxford: Clarendon Press, 1966) 1652.

¹⁹¹ Ian Waters, The Law of Secrecy in the Latin Church *The Canonist* 7 (2016) 75-87.

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- 196 In the 1917 Code of Canon Law if clerics committed sexual abuse of a minor, canon 2359 §2 provided that a penalty could be imposed upon them taking into account the facts of the case, but “in the more serious cases they shall be deposed”. Deposition meant that the cleric was suspended from the office he held and disqualified in the future from holding any office or ministry or position. However he retained the rights and privileges as well as the obligations arising from ordination. Deposition did not include dismissal from the clerical state.
- 197 In order to impose a penalty upon a cleric for committing the canonical offence of sexual abuse of a minor, it was required that a judicial trial be held in the diocesan tribunal. It would be acknowledged that in Australia a lack of qualified and experienced personnel in the area of penal law could have made this very problematic. In 1975 when the interdiocesan tribunals became competent to hear criminal cases, the situation was not significantly improved.
- 198 Also, in respect of penalties canon 2214 of the 1917 Code of Canon Law re-iterated the admonition of the Ecumenical Council of Trent [1545-1563] that urged bishops to try to bring about the reform of the offender by means other than the imposition of a penalty which, however, should be done when the seriousness of the offence required it.
- 199 Speaking to the personnel of the Roman Rota in 1979 Pope John Paul II said:

in the vision of a Church which protects the rights of the individual faithful, but likewise promotes and protects the common good as an indispensable condition for the integral development of the human and Christian person, she also positively includes penal discipline. Even the penalty that is threatened by 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 behavior of the members of the People of God.¹⁹²

1983 CODE OF CANON LAW

- 200 The revised Code of Canon Law came into force on 27 November 1983. Notwithstanding the promulgation of the revised Code of Canon Law, the Instruction *Crimen Sollicitationis* remained in force until 30 April 2001.¹⁹³
- 201 In the 1983 Code of Canon Law, canon 1395 §2 provides that a cleric who commits the canonical offence of sexual abuse of a minor “is to be punished with just penalties not excluding dismissal from the clerical state”.
- 202 The penalty of dismissal could only be imposed by way of judicial trial but other penalties could be imposed by an extra-judicial decree, that is, without a formal trial. In Australia, such a trial would be heard by the competent inter-diocesan tribunal.

¹⁹² Pope John Paul II, Address to the Roman Rota, 17 February 1979.

¹⁹³ Congregation for the Doctrine of the Faith, *Historical Introduction – Norms of the Motu Proprio Sacramentorum Sanctitatis Tutela* 2001: “[The letter of Cardinal Ratzinger of 18 May 2010] informed the bishops of the new law and the new procedures which replaced the Instruction *Crimen Sollicitationis*”.

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- 203 If, after 27 November 1983 when the revised Code of Canon Law came into effect, the 1962 Instruction was not known to a bishop, he was in a position to follow the norms of law in the Code of Canon Law. The procedure for dealing with offences was addressed under the title *The Penal Process* comprising canons 1717-1731.
- 204 As a prior step to the penal process, a bishop who “receives information, which has at least the semblance of truth, about an offence he is to enquire carefully either personally or through some other suitable person, about the facts and circumstances and the imputability of the offence, unless this enquiry would appear to be entirely superfluous”.¹⁹⁴ “Imputability is that property by virtue of which an act is attributable to the author of the act, with regard not only to the mechanical or physical cause, but also to the human cause, meaning the act is freely perpetrated”.¹⁹⁵
- 205 Whilst the penalty of dismissal from the clerical state could only be imposed by means of a judicial trial, canon 1718 §1 3° did permit the bishop to impose certain penalties by way of extra-judicial decree.
- 206 For those clerics found guilty of the sexual abuse of a minor in the courts of the civil law, such a preliminary investigation would be superfluous. In such circumstances the bishop would have to determine, in accordance with the norms of canon law, whether a penalty should be imposed and if so what penalty.
- 207 In regard to the manner in which some bishops in Ireland had dealt with matters of sexual abuse by clerics Pope Benedict XVI in 2010 said:
- It cannot be denied that some of you and your predecessors failed, at times grievously, to apply the long-established norms of canon law to the crime of child abuse. Serious mistakes were made in responding to allegations. I recognize how difficult it was to grasp the extent and complexity of the problem, to obtain reliable information and to make the right decisions in the light of conflicting expert advice. Nevertheless, it must be admitted that grave errors of judgement were made and failures of leadership occurred. All this has seriously undermined your credibility and effectiveness. I appreciate the efforts you have made to remedy past mistakes and to guarantee that they do not happen again. Besides fully implementing the norms of canon law in addressing cases of child abuse, continue to cooperate with the civil authorities in their area of competence. Clearly, religious superiors should do likewise... It is imperative that the child safety norms of the Church in Ireland be continually revised and updated and that they be applied fully and impartially in conformity with canon law.*¹⁹⁶
- 208 Canon 193 provides for the removal from office of a diocesan Bishop “for grave reasons in accordance with the procedure defined by law”. On 4 June 2016 Pope Francis issued an Apostolic Letter *motu proprio* that came into effect on 5 September 2016 in which he promulgated a law that provided “among the grave reasons”, for which a bishop could be removed from office, is “the negligence of a Bishop in the exercise of his office, and in particular in relation to cases of sexual abuse inflicted on minors and vulnerable adults”.¹⁹⁷

¹⁹⁴ CIC canon 1717 §1.

¹⁹⁵ Ángel Marzoa, “Those who are liable to Penal Sanctions” in Ángel Marzoa, Jorge Miras, and Rafael Rodríguez-Ocaña (eds.), Ernest Caparros (Eng. ed.), *Exegetical Commentary on the Code of Canon Law*, 5 Vols. (Montreal: Wilson and Lafleur, 2004) IV/1:256.

¹⁹⁶ Pope Benedict XVI, Pastoral Letter to the Catholics of Ireland, 19 March 2010.

¹⁹⁷ Pope Francis, *Motu Proprio As a Loving Mother*, 31 May 2016.

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- 209 Given the above it can be said that the issue was not one of a crisis of canon law but “a crisis of living according to the law”¹⁹⁸ that is to say a failure in not applying the law.

TOWARDS HEALING

- 210 *Towards Healing Principles and Procedures in responding to complaints of abuse against personnel of the Catholic Church in Australia* [“Towards Healing”] was published jointly by the Australian Catholic Bishops Conference and Catholic Religious Australia, formerly the Australian Conference of Leaders of Religious Institutes.
- 211 Originally published in December 1996 and commencing on 31 March 1997, it was comprehensively revised in December 2000 and again in January 2010. In 1996 *Towards Healing* addressed only the issue of sexual abuse of children, adolescents and adults by clergy and religious. From 2000 *Towards Healing* addresses sexual, physical and emotional abuse¹⁹⁹ of children, adolescents and adults by clergy, religious and other church personnel.
- 212 The Bishops Conference has legislative power of governance to promulgate general decrees, “only in cases where the universal law has so prescribed, or by special mandate of the Apostolic See”.²⁰⁰ These laws²⁰¹ “do not oblige until they have been reviewed by the Apostolic See and lawfully promulgated.”²⁰²
- 213 The Code of Canon Law does not prescribe that Bishops Conferences are to issue general decrees in respect of the matters dealt with in *Towards Healing*, that is, the sexual, physical and emotional abuse of children, adolescents and adults by clergy, religious and other church personnel. Therefore, the only way in which the Bishops Conference could have issued *Towards Healing* as a general decree was to have obtained a special mandate from the Apostolic See.
- 214 The sexual abuse of minors by clerics and religious in Australia was an issue for both diocesan Bishops and Religious Leaders especially. In accord with the teaching of Vatican II, Conferences of Major Superiors are called upon to collaborate and cooperate with Bishops Conferences.²⁰³ Accordingly, the Bishops Conference and Catholic Religious Australia determined that they should commit themselves to common principles and procedures that would be applicable throughout Australia. As a consequence *Towards Healing* was published jointly by the two bodies.
- 215 In these circumstances, the Apostolic See could not issue a special mandate because only a Bishops Conference exercises legislative power²⁰⁴ and Catholic Religious Australia is an ecclesial structure which does not have the power of governance.²⁰⁵
- 216 The overall purpose of *Towards Healing* was “to strive for seven things in particular: truth, humility, healing for the victims, assistance to other persons affected, a just response to those who are accused, an effective response to those who are guilty of abuse, and prevention of abuse”.²⁰⁶

¹⁹⁸ Julián Herranz Casado, “Renewal and Effectiveness in Canon Law” *Studia Canonica* 28 (1994) 22.

¹⁹⁹ *Towards Healing* 2000 Part One: 1-4, 5; *Towards Healing* 2010 Part Two: 1-4, 5.

²⁰⁰ CIC canon 455 §1.

²⁰¹ CIC canon 29 states: “General decrees are true laws and are regulated by the provisions of canons on laws”.

²⁰² CIC canon 455 §2.

²⁰³ Congregation for Religious and Secular Institutes, and Congregation for Bishops, *Directives for the mutual relations between Bishops and Religious in the Church* 14 May 1978: 60-65; cf. CIC canon 708.

²⁰⁴ CIC canon 455 §1.

²⁰⁵ CIC canon 708.

²⁰⁶ *Towards Healing* 2010 Part Two: 12-32; cf. *Towards Healing* 1996 Part One: 10; *Towards Healing* 2000 Part One: 12-31.

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- Towards Healing* was significant for it sought to address issues that were not previously considered or addressed. It established procedures to ensure that compassionate and effective care was provided for the victims and their families in particular. Also it established procedures relating to preventative strategies.
- 217 *Towards Healing* was significant in that it extended the definition of abuse to include physical and emotional abuse, thereby taking it beyond the sexual abuse dealt with in the Code of Canon Law. Moreover it extended the persons who could be responsible for such abuse to include the laity, again a matter not dealt with in the law.
- 218 Accordingly, *Towards Healing* established procedures for both dioceses and religious institutes to respond to complaints of sexual, physical and emotional abuse by clergy, religious and laity.
- 219 The sexual abuse of minors by a cleric, and in certain circumstances of adults as provided for in canon 1395 §2, is a canonical offence and canon law provides the procedure to be followed. *Towards Healing* provided that the norms of canon law with regard to penal procedures for clerics are to be observed.²⁰⁷ Although the sexual abuse of minors by a religious sister or religious brother is not a canonical offence, canon law provides a procedure when a religious is found to have committed the sexual abuse of a minor.²⁰⁸ The sexual abuse of minors by a lay person is not a canonical offence and hence there is no specific procedure established in canon law.
- 220 A Bishops Conference does not have the authority to promulgate laws in respect of the internal governance of religious institutes, including dealing with allegations of abuse made against its members.²⁰⁹ Therefore, the Bishops Conference could not issue a general decree binding religious institutes to the procedures established in *Towards Healing*. Accordingly, the Apostolic See could not issue a special mandate.
- 221 Given the comprehensive nature of *Towards Healing*, there were matters addressed that would not be the subject of canonical legislation. For this reason the Apostolic See could not issue a special mandate.
- 222 From 22 November – 12 December 1998, a Special Assembly of the Synod of Bishops was held for which the theme was ‘the Church in Oceania’. In his Apostolic Exhortation after this Assembly of the Synod of Bishops Pope John Paul II said:

In certain parts of Oceania, sexual abuse by some clergy and religious has caused great suffering and spiritual harm to the victims. It 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. The Church in Oceania is seeking open and just procedures to respond to complaints in this area, and is unequivocally

²⁰⁷ *Towards Healing* 1966 Part Two: 1.4; 6; *Towards Healing* 2000 Part Two: 38.8.2, 39.3, 39.2.1; *Towards Healing* 2010 Part Two: 39.2.

²⁰⁸ CIC canon 695 §2.

²⁰⁹ CIC canons 586 §1, 593, 594.

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*committed to compassionate and effective care for the victims, their families, the whole community, and the offenders themselves.*²¹⁰

- 223 This statement of Pope John Paul II is one of support and encouragement for the efforts of the Bishops Conference and Catholic Religious Australia in establishing *Towards Healing*.
- 224 In 2011 the Congregation for the Doctrine of the Faith sent a letter to Bishops Conferences to assist them in developing guidelines for dealing with cases of the sexual abuse of minors by clerics.²¹¹ The letter, having recalled the applicable canonical legislation, states that the purpose of these guidelines is “to provide guidance” to bishops and religious superiors and this includes assistance to the victims as well as matters pertaining to the civil law. Given their specific purpose, it is evident that such guidelines do not constitute laws and therefore would not be issued as general decrees.
- 225 *Towards Healing* was not promulgated as law and therefore is not binding. Consequently the procedures of *Towards Healing* had to be authorised by each bishop for use in his diocese, and also by the superior for each religious institute.
- 226 The Archbishop of Melbourne, at the time Archbishop Pell, did not authorise the procedures established by *Towards Healing* for use in that Archdiocese. Instead he established procedures specifically for the Archdiocese of Melbourne. All other diocesan Bishops authorised the procedures established in *Towards Healing* for use in their respective dioceses.
- 227 The Provincial Superior of the Society of Jesus [the Jesuits] initially did not authorise the use of the procedures of *Towards Healing* but subsequently they were authorised for use in the Society.
- 228 It is the practice of the Church that ecclesiastical authorities, including the Apostolic See, issue documents which have a juridical character, in that they deal with matters that may be regulated by canon law, but the documents are drawn up and issued without any binding force.²¹² Although not juridically binding such documents have moral authority.
- 229 By virtue of the ecclesiastical office he holds, the diocesan bishop possesses the executive power of governance which is expressed in authoritative acts whereby he carries out his ministry of governance.
- 230 The bishop has the authority to issue or introduce for his diocese documents that have a juridical character, in that they deal with matters that may be regulated by law, but the documents are issued without any binding force, that is, they are not juridically binding. Such documents are lawful, have a formal and official existence within the diocesan Church and belong within the Church’s canonical system because they emanate from an authoritative act of governance by the bishop. *Towards Healing* is such a document.
- 231 The authorisation by the bishop for the procedures in *Towards Healing* to be used in the diocese constitutes an authoritative act of governance on his part. Although not juridically binding *Towards Healing* does have moral authority.

²¹⁰ Pope John Paul II, Post-Synodal Apostolic Exhortation *The Church in Oceania [Ecclesia in Oceania]*, 22 November 2001: 49.

²¹¹ Congregation for the Doctrine of the Faith, *Circular Letter to assist Episcopal Conferences in developing guidelines for dealing with cases of sexual abuses of minors perpetrated by clerics*, 3 May 2011.

²¹² John M. Huels, “A Theory of Juridical Documents Based on Canons 29-34” *Studia Canonica* 32 (1998) 337-370.

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- 232 The procedures of *Towards Healing* have particular relevance in respect of the responsibility of the bishop, in accord with canon 277 §3, “to pass judgement concerning the observance of the obligation [of clerical chastity] in particular cases” when the failure does not constitute a canonical offence.
- 233 *Towards Healing* was not issued as a general decree and therefore its procedures were not legally binding. Nevertheless, statements such as: *Towards Healing* is not canon law; *Towards Healing* lacks authority under canon law; *Towards Healing* has no canonical status; and *Towards Healing* is not part of canon law, are incorrect or misleading.

POPE JOHN PAUL II – 30 APRIL 2001

- 234 By virtue of his Apostolic Letter issued *motu proprio*, entitled *Sacramentorum Sanctitatis Tutela - Safeguarding of the Sanctity of the Sacraments*, Pope John Paul II promulgated new laws in regard to the more serious canonical offences reserved to the Congregation for the Doctrine of the Faith.
- 235 The competency of the Congregation for the Doctrine of the Faith is to promote and safeguard the doctrine on faith and morals and to examine offences against faith and more serious ones - *graviora delicta* - in regard to moral behavior or the celebration of the sacraments.²¹³
- 236 The norms were promulgated on 30 April 2001 and came into force on the same day. Consequently, the Instruction *Crimen Sollicitationis* was abrogated. The new law contained both substantive and procedural norms that the Prefect of the Congregation for the doctrine of the Faith [Cardinal Joseph Ratzinger] communicated, with a covering letter of 18 May 2001, to all bishops and superiors of clerical religious institutes.²¹⁴
- 237 Pope John Paul II in Article 4 §1 of the substantive norms extended the competency of the Congregation for the Doctrine of the Faith to include:
- the delict against the sixth commandment of the Decalogue committed by a cleric with a minor below the age of eighteen years; in this case, a person who habitually lacks the use of reason is to be considered equivalent to a minor.*
- 238 Also in Article 4 §2 of these norms Pope John Paul II provided that a cleric who commits such a canonical offence “is to be punished according to gravity of his crime, not excluding dismissal or deposition”. For the most serious penalty in such cases, the Code of Canon Law uses the term ‘dismissal’ and the Code of Canons of the Eastern Churches ‘deposition’.
- 239 In respect of sexual abuse of minors, Article 5 §§1-2 stated that prescription ran for ten years from the time the minor turned eighteen.
- 240 As provided for in Article 17 of the procedural norms “the more grave delicts reserved to the Congregation for the Doctrine of the Faith are to be tried in a judicial process”.

²¹³ Pope John Paul II, Apostolic Constitution *Reform of the Roman Curia* [*Pastor Bonus*], 20 November 1988: Art. 48, 52.

²¹⁴ Congregation for the Doctrine of the Faith, *Letter Explains New Norms for Church Handling of Certain Grave Offenses* and including the Substantive and Procedural Norms, 18 May 2001.

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- 241 The level of confidentiality that applies to these procedures is that of pontifical secrecy without prejudice to the matter being taken to the civil authorities and dealt with in the secular courts; and also without prejudice to an obligation imposed by the civil law that such matters are to be reported to the civil authorities.

POPE JOHN PAUL II – FURTHER AMENDMENTS

- 242 Pope John Paul II made two amendments to the 2001 norms.
- 243 First, in 2002 the faculty to derogate from the period of prescription of 10 years was granted to the Secretary of the Congregation for the Doctrine of the Faith “on a case by case basis after having considered the request of the Bishop and the reasons for such a request”.²¹⁵
- 244 Second, in 2003 the Congregation for the Doctrine of the Faith was granted the faculty to permit certain cases to be dealt with administratively, that is extra-judicially and thus not through the judicial process.²¹⁶ This was a significant step because it established that the more grave delicts reserved to the Congregation for the Doctrine of the Faith could be dealt with by way of an administrative process and not always through a judicial process. In particular, it meant that the penalty of dismissal from the clerical state could be imposed by way of an administrative decree, whereas the only means of imposing that penalty in the Code of Canon Law is by way of a judicial trial.²¹⁷

POPE BENEDICT XVI – 21 MAY 2010

- 245 Nine years after the original norms came into force, the Congregation for the Doctrine of the Faith conducted a review. As a consequence some amendments were proposed to Pope Benedict XVI and with his approval these norms were promulgated on 21 May 2010.
- 246 Included among the more serious offences reserved exclusively to the Congregation for the Doctrine of the Faith in accordance with Article 6 2° of the revised substantive norms is:

*the acquisition, possession, or distribution by a cleric of pornographic images of minors under the age of fourteen, for purposes of sexual gratification, by whatever means or using whatever technology.*²¹⁸

- 247 In accordance with Article 7 §1 of the revised norms:

*A criminal action for delicts reserved to the Congregation for the Doctrine of the Faith is extinguished by prescription after twenty years, with due regard to the right of the Congregation for the Doctrine of the Faith to derogate from prescription in individual cases.*²¹⁹

²¹⁵ Charles J. Scicluna, “The Procedure and Praxis of the Congregation for the Doctrine of the Faith concerning Graviora Delicta” *Canon Law Society of Australia and New Zealand Proceedings* 40 (2006) 6.

²¹⁶ *Ibid.*, 7.

²¹⁷ CIC canon 1342 §2.

²¹⁸ Congregation for the Doctrine of the Faith, Revised Norms of the Motu Proprio *Sacramentorum Sanctitatis Tutela*, 21 May 2010: Art. 6 2°.

²¹⁹ *Ibid.* Art. 7 §1.

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- 248 As in the original norms in regard to the offence committed with a minor below the age of eighteen years, prescription begins to run from the day on which a minor completes his or her eighteenth year of age.²²⁰ A victim under the age eighteen has until the age of thirty-eight to make a complaint or allegation about sexual abuse. However, in individual cases the Congregation for the Doctrine of the Faith has the right to derogate the time limit to make an allegation.
- 249 The reservation of the offence of sexual abuse of minors to the Congregation for the Doctrine of the Faith on 30 April 2001, means that the diocesan bishop or the superior of a clerical religious institute is no longer competent to deal with the matter.
- 250 The procedure a diocesan bishop must follow if he receives information, which has at least the semblance of truth about alleged sexual abuse of a minor by a cleric, is established in Article 16 of the procedural norms.²²¹
- 251 He is to conduct a preliminary investigation, in accordance with the norms of law in canon 1717, and when the preliminary investigation has been completed, he is to forward the matter to the Congregation for the Doctrine of the Faith.
- 252 Having examined the documentation, the Congregation for the Doctrine of the Faith determines what action is to be taken. There are four courses of action available.
- 253 First, the Congregation for the Doctrine of the Faith “may decide that the facts of the case do not require any further penal action and propose, or confirm, some non-penal administrative provisions for the sake of the common good of the Church, including the good of the denounced cleric”.²²²
- 254 Second, the Congregation for the Doctrine of the Faith “may decide to present the case directly to the Pope for a *dismissio ex officio - ex officio dismissal* of the accused cleric. This is reserved for particularly grave cases in which the guilt of the cleric is beyond doubt and well documented”.²²³ In these cases the cleric may be asked if he would prefer to present a petition requesting a dispensation from the obligations undertaken at his ordination.²²⁴
- 255 Third, the Bishop may be instructed to conduct a penal administrative process which is established in canon 1720. The process is conducted by the Bishop or his delegate. It must ensure that the cleric, having been notified of “the allegation and the proofs”, has the possibility of exercising his right of defence.²²⁵ The Bishop or his delegate, “together with two assessors”, must examine the proofs and the arguments, and then determine if “the offence is certainly proven” and impose a penalty.²²⁶ A decree is issued “stating at least in summary form the reasons in law and in fact” for the decision.²²⁷ The cleric has the right to propose administrative-hierarchical recourse to the Apostolic See against the decree.

²²⁰ Ibid. Art. 7 §2.

²²¹ Ibid. Art. 16.

²²² Scicluna, 7.

²²³ Ibid.

²²⁴ Ibid.

²²⁵ CIC canon 1720 1°.

²²⁶ CIC canon 1720 2°-3°.

²²⁷ CIC canon 1270 3°.

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- 256 Fourth, the Bishop may be instructed that the matter is to be dealt with through a penal judicial process.²²⁸ A judicial process means the truth of the allegation that the cleric has committed sexual abuse of a minor is determined by the judges following the full procedure for a penal trial established in canon law. The judges must issue a definitive judgment in which they also impose the penalty. The cleric has the right to lodge an appeal against the judgement before the competent tribunal of second instance or the Roman Rota.
- 257 In the exercise of judicial power of governance the judge in an ecclesiastical trial, in accordance with the norms of canon law, “must have in his mind moral certainty about the matter to be decided in the judgement”.²²⁹ This applies to all matters be they nullity of marriage, nullity of ordination, contentious cases such as defamation, or penal trials.
- 258 Therefore in order to impose a penalty an ecclesiastical judge must have moral certainty that the accused has committed a canonical offence. Accordingly this principle applies to the canonical offence of the sexual abuse of a minor committed by a cleric.
- 259 As canon law provides for penalties to be imposed on a cleric also by way of an extra-judicial decree, it is evident that in an administrative penal process the bishop must have moral certainty that the cleric has committed the canonical offence of sexual abuse of a minor.
- 260 According to the teaching of Pope Pius XII, “between the two extremes of absolute certainty and quasi-certainty or probability is moral certainty”. Absolute certainty is that “in which all possible doubt is entirely excluded”. Quasi-certainty or probability “does not exclude all reasonable doubt, but leaves a foundation for the fear of error”.²³⁰
- 261 Moral certainty, by contrast with probability, “is characterized by the exclusion of well-founded or reasonable doubt”. By contrast with absolute certainty “it does admit the absolute possibility of the contrary”.²³¹ Moral certainty “is understood to be objective, that is, based on objective motives; it is not a purely subjective certitude”.²³²

²²⁸ Scicluna, 7-8.

²²⁹ Canon 1689 1917 Code of Canon Law; CIC canon 1608 §1.

²³⁰ Pope Pius XII, Address to the Roman Rota, 1 October 1942. An English translation of the original Italian text is in *Canon Law Digest* Vol. III 1942-1953 (Milwaukee: Bruce Publishing Company, 1954) 605-607.

²³¹ *Ibid.*

²³² *Ibid.*, 608

REPAIRING THE HARM

262 Canon 128 of the 1983 Code of Canon Law states:

Whoever unlawfully causes harm [damnum] to another by a juridical act, or indeed by any other act which is malicious or culpable, is obliged to repair the damage [damnum] done.

263 The obligation to repair the harm unlawfully caused to a person is “a principle founded in the natural law”.²³³ Therefore, it is evident that the obligation to repair the harm caused “is not only a moral, but also a juridical obligation”.²³⁴

264 Canon 128 establishes the fundamental norm of ecclesiastical law on the “responsibility for harm and on compensation throughout the legal order of the Latin Church”.²³⁵

265 The term ‘*damnum* - harm’ in canon 128 means all kinds of harm as “the unanimous interpretation of canonists” attests, and therefore, “in addition to financial harm one might mention damage to the physical, intellectual, spiritual, ethical, social, and psychic integrity of the person”.²³⁶ Hence in respect of the nature of the reparation “moral and spiritual measures are also to be taken into consideration”.²³⁷ According to canon 128 the responsibility for repairing the harm rests with the person who actually caused the damage.

266 A minor who has been sexually abused by a cleric has a right to reparation for the harm she or he has suffered from the abuse. It is recognised that in such circumstances “to undo the damage normally is impossible as a matter of principle”.²³⁸

267 In respect of the harm arising from the commission of a canonical offence, canon law provides norms for taking an action for damages before an ecclesiastical tribunal.²³⁹ Judicial trials within the Church are by nature investigative not adversarial, they are an “inquiry for truth”.²⁴⁰

268 Canon law in keeping with the teaching, originating in the New Testament²⁴¹, and the canonical tradition of the Church reiterates the Christian obligation to avoid judicial disputes and to seek reconciliation by means other than a judicial sentence.

269 Accordingly, canon 1446 §1 states:

All Christ’s faithful, and especially Bishops, are to strive earnestly, with due regard for justice, to ensure that lawsuits among the people of God are as far as possible avoided, and are settled promptly and without rancour.

²³³ Jozef Krukowski, “Responsibility for Damage Resulting from Illegal Administrative Acts in the Code of Canon Law of 1983”, *Proceedings 5th International Congress of Canon Law 1984*: Vol. I. 235.; Luigi Chiappetta, // *Codice di Diritto Canonico commentario giuridico-pastorale* Second Edition 3 Vols. (Roma: Edizione Dehoniane, 1996) I:199.

²³⁴ Helmuth Pree, “On Juridic Acts and Liability in Canon Law” *The Jurist* 58 (1998) 510.

²³⁵ *Ibid.*, 495.

²³⁶ *Ibid.*, 509.

²³⁷ *Ibid.*, 511.

²³⁸ *Ibid.*, 510.

²³⁹ CIC canons 1729-1731.

²⁴⁰ Francis G. Morrissey, “Canon Law meets Civil Law” *Studia Canonica* 32 (1998) 202.

²⁴¹ The Gospel according to Matthew 5: 23-24; 18:15-17; First Letter of Paul to the Corinthians 1 Co 6:1-7.

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- 270 It is evident that the duty to strive to avoid litigation rests on all the baptised, but above all it is a duty incumbent upon bishops. The obligation “to strive earnestly” is an obligation to do everything one can to avoid litigation and bring about a resolution.²⁴²
- 271 In doing whatever can be done either to avoid disputes or to ensure they are resolved as quickly as possible and in a peaceful manner, canon 1446 §1 requires that the demands of justice are to be observed.

²⁴² Chiappetta, III, 52.

LOSS OF THE CLERICAL STATE

- 272 Vatican II in its teaching on the nature of the Church emphasised the essential equality among all Christ's faithful, that is, all those who are baptised and are constituted the People of God. By virtue of the sacrament of baptism all Christ's faithful are called to share in the life of Christ and participate in the mission he entrusted to his Church.²⁴³
- 273 From among Christ's faithful there are those who by virtue of the sacrament of orders are ordained to the diaconate, priesthood and episcopacy and are constituted 'sacred ministers'. In canon law, these sacred ministers are also called 'clerics' and those who are not ordained are called 'lay persons'.²⁴⁴ Accordingly canon law speaks of two canonical or juridical states, the lay state and the clerical state.
- 274 Just as one's baptism is permanent so also is a person's ordination permanent. However, canon 290 of the 1983 Code of Canon Law, as did its predecessor in the 1917 Code of Canon Law, provides for the three ways in which the juridical state of the cleric can be lost.
- 275 The first way in which a cleric can lose the clerical state is "by a judgement of a court or an administrative decree declaring the ordination invalid".²⁴⁵ This juridical activity be it judicial, by way of an ecclesiastical trial, or administrative "is directed towards proving that there did not exist a valid ordination because of some substantial defect in the administration or reception of the sacrament".²⁴⁶
- 276 In accordance with the reform in 1988 of the Roman Curia by Pope John Paul II, the Congregation for Divine Worship and the Discipline of the Sacraments "is competent to examine, in accordance with the law, cases concerning the nullity of sacred ordination".²⁴⁷ Canons 1708-1712 establish norms specifically for cases concerning the declaration of nullity of sacred ordination.
- 277 The second way in which a cleric can lose the clerical state is by the penalty of dismissal lawfully imposed as a result of the commission of a canonical offence, for which the penalty of dismissal is explicitly provided for in the universal law.²⁴⁸ The penal process has as its purpose the reformation of the cleric who has offended, the restoration of justice and the reparation of scandal.
- 278 The Congregation for the Doctrine of the Faith alone is competent to deal with two canonical offences committed by clerics. First, "the delict against the sixth commandment of the Decalogue committed with a minor below the age of eighteen years; in this case, a person who habitually lacks the use of reason is to be considered equivalent to a minor".²⁴⁹ Second, "the acquisition,

²⁴³ Cf. CIC canons 204, 208.

²⁴⁴ CIC canon 207 §1.

²⁴⁵ CIC canon 290 1°.

²⁴⁶ Jorge de Otaduy, "The Loss of the Clerical State" in Ángel Marzoa, Jorge Miras, and Rafael Rodríguez-Ocaña (eds.), Ernest Caparros (Eng. ed.), *Exegetical Commentary on the Code of Canon Law* 5 Vols. (Montreal: Wilson & Lafleur, 2004) II/1:400.

²⁴⁷ Pope John Paul II, Apostolic Constitution *Reform of the Roman Curia [Pastor Bonus]*, 20 November 1988: Art. 68.

²⁴⁸ CIC canon 290 2°.

²⁴⁹ Congregation for the Doctrine of the Faith, *Letter Explains New Norms for Church Handling of Certain Grave Offenses* and including the Substantive and Procedural Norms, 18 May 2001.

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- possession, or distribution of pornographic images of minors under the age of fourteen, for purposes of sexual gratification, by whatever means or using whatever technology".²⁵⁰
- 279 The third way in which the clerical state is lost is essentially different. It is by way of an administrative process whereby a dispensation from the obligations arising from ordination, including the obligation of celibacy, is granted to the cleric. Canon law states that such dispensations will be granted to "deacons for only grave reasons and to priests only for the gravest of reasons".²⁵¹
- 280 Pope Paul VI issued in 1967 an Encyclical Letter *On Priestly Celibacy* in which he addressed the issue of bishops dealing with priests who had violated their obligation of clerical celibacy. He emphasized the importance of taking the measures necessary to assist them to fulfil faithfully the obligation freely undertaken.
- 281 On 31 January 1971 the Congregation for the Doctrine of the Faith issued procedural norms for the documentation to be presented to the said Congregation by a priest spontaneously requesting a dispensation from the obligations connected with ordination.
- 282 This process involves the priest making a formal request for a dispensation. It requires that he provide all the information available so as to establish that there exists a justified reason for the dispensation to be granted. However, the 1971 norms required that before proposing a petition for a dispensation the bishop or the superior for a religious priest, "must attempt for an appropriate period of time and with every means available to help the petitioner to overcome the difficulties which he experiences (cf. Paul VI, Encyclical Letter *On Priestly Celibacy*, 87), for example, transferring him from the place in which he is exposed to the danger and, according to the nature of the case, giving him the help of brother priests, friends, relatives, doctors, or psychologists".²⁵²
- 283 Provision was made also for cases to be processed *ex officio*, namely cases in which the priest should be granted a dispensation "because of a perverse lifestyle, doctrinal errors, or another grave cause".²⁵³
- 284 On 14 October 1980, at the direction of Pope John Paul II, the Congregation for the Doctrine of the Faith issued new norms regarding the dispensation of priests from celibacy. In the letter in which bishops and superiors were informed of the norms it was stated: "With the exception of cases dealing with priests who have left the priestly life for a long period of time and who hope to remedy a state of affairs which they are not able to quit" the Congregation shall "accept for consideration the cases of those who should not have received priestly ordination because the necessary aspect of freedom of responsibility was lacking or because the competent superiors were not able within an appropriate time to judge in a prudent and sufficiently fitting way whether the candidate really was suited for continuously leading a life of celibacy".²⁵⁴

²⁵⁰ Congregation for the Doctrine of the Faith, Revised Norms of the Motu Proprio *Sacramentorum Sanctitatis Tutela*, 21 May 2010: Art. 6 2°.

²⁵¹ CIC canon 290 3°.

²⁵² Congregation for the Doctrine of the Faith, *Norms for preparing petitions for reducing priests to the lay state with a dispensation from all the obligations arising from Sacred Orders*, 31 January 1971: I: 1-2.

²⁵³ *Ibid.*, VII.

²⁵⁴ Congregation for the Doctrine of the Faith, *Letter to all local Ordinaries and General Moderators of clerical religious communities regarding the dispensation of priests from celibacy*, 14 October 1980.

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- 285 When the Congregation examines the documentation it decides “whether to present the petition to the Pope or to ask for a more thorough instruction of the case or to reject the petition as unfounded”.²⁵⁵
- 286 Following the reform in 1988 of the Roman Curia by Pope John Paul II, the competency for processing petitions for a dispensation from the obligations arising from ordination was transferred from the Congregation for the Doctrine of the Faith to the Congregation for Divine Worship and the Discipline of the Sacraments.²⁵⁶
- 287 Pope Benedict XVI on 1 August 2005 further reformed this matter by the transfer of competency to the Congregation for the Clergy. Therefore this Congregation now has competency for all matters relating to the loss of the clerical state other than by way of a declaration of nullity of ordination or by the penalty of dismissal for the offences reserved to the Congregation for the Doctrine of the Faith. On 30 January 2009 Pope Benedict XVI gave special faculties to the Congregation for the Clergy to resolve grave violations of clerical celibacy or situations where clerics have freely and illicitly abandoned ministry for an extended period.²⁵⁷

²⁵⁵ Congregation for the Doctrine of the Faith, *Procedural Norms regarding the dispensation of priests from celibacy*, 14 October 1980: Art. 8.

²⁵⁶ Letter of the Secretariat of State, 13 April 1989; cf. Michael O'Reilly “Recent Developments in the Laicization of Priests” *The Jurist* 52 (1992) 689.

²⁵⁷ Congregation for the Clergy, *Letter to the Eminent and Most Excellent Ordinaries at their Sees*, Prot. N. 2009 0556, 18 April 2009; English translation of the Letter of Cardinal Hummes see. <https://www.catholicculture.org/culture/library/view.cfm?recnum=9074>.

REPORTING SEXUAL ABUSE OF MINORS TO CIVIL AUTHORITIES

- 288 According to Pope Leo XIII in his teaching on the relationship between the State and the Church, it is a matter of justice and duty incumbent on all members of the Church to obey the civil law.²⁵⁸ As expressed in the teaching of the Church “citizens are bound in conscience to obey” the civil law²⁵⁹ unless the laws are “contrary to the demands of the moral order, to the fundamental rights of persons or the teachings of the Gospel”.²⁶⁰
- 289 As was acknowledged with the promulgation of the 1917 Code of Canon Law the sexual abuse of a minor was a matter both for the State and for the Church. Other than in those places where the privilege of the forum was recognized and operative, the secular courts were competent to hear cases of sexual abuse of minors by clerics. And as has been stated in this submission the privilege of the forum was not operative in many countries including Australia and was abolished in 1983.
- 290 It is evident that the competent civil authorities have the right and duty to enact legislation in respect of the crime of the sexual abuse of minors. Civil authorities also have the right to enact legislation requiring that an allegation of sexual abuse of a minor, or the fact that a minor has been sexually abused, be reported to the relevant civil authority.
- 291 It is evident that insofar as legislation obliges a bishop or religious superior to report such matters they are obliged, in accordance with the teaching of the Church, to comply with that legislation.
- 292 There is no norm of canon law which prohibits a bishop or religious superior from complying with the civil law if it requires that allegations or crimes of sexual abuse of minors be reported to civil authorities.
- 293 The 1962 Instruction *Crimen Sollicitationis* required the strictest confidentiality to be observed in the matters which it regulated, including the sexual abuse of minors. Likewise, the present law promulgated by Pope John Paul II on 30 April 2001 provides that cases of the sexual abuse of minors reserved to the Congregation for the Doctrine of the Faith are subject to the pontifical secret, in accordance with the Instruction *Secreta Continere*.²⁶¹
- 294 However, the 1962 Instruction *Crimen Sollicitationis* did not prohibit or prevent compliance with the civil law requiring that a crime of sexual abuse of minors, or any allegation of such a crime, be reported to the civil authorities.
- 295 Likewise, the present norms of law according to the 2001 Apostolic Letter of Pope John Paul II issued *motu proprio*, entitled *Sacramentorum Sanctitatis Tutela - Safeguarding of the Sanctity of the Sacraments*, do not prohibit or prevent compliance with the civil law requiring that a crime of sexual abuse of minors, or any allegation of such a crime, be reported to the civil authorities.
- 296 In 2011 the Congregation for the Doctrine of the Faith stated:

Sexual abuse of minors is not just a canonical delict but also a crime prosecuted by civil law. Although relations with civil authority will differ in various countries,

²⁵⁸ Pope Leo XIII, Encyclical Letter *On the Christian Constitution of States [Immortale Dei]*, 1 November 1885: 5.

²⁵⁹ Vatican II, *Pastoral Constitution on the Church in the Modern World*, 74.

²⁶⁰ Catechism of the Catholic Church, 2242.

²⁶¹ Congregation for the Doctrine of the Faith, *Letter Explains New Norms for Church Handling of Certain Grave Offenses* and including the Substantive and Procedural Norms, 18 May 2001.

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*nevertheless it is important to cooperate with such authority within their responsibilities. Specifically, without prejudice to the seal of the sacrament of penance, the prescriptions of civil law regarding the reporting of such crimes to the designated authority should always be followed. This collaboration, moreover, not only concerns cases of abuse committed by clerics, but also those cases which involve religious or lay persons who function in ecclesiastical structures.*²⁶²

- 297 Cardinal William Levada, the then Prefect of the Congregation for the Doctrine of the Faith, in 2012 said:

*Certainly no less important than any of the other elements, the cooperation of the Church with civil authorities in these cases recognizes the fundamental truth that the sexual abuse of minors is not only a crime in canon law, but is also a crime that violates criminal laws in most civil jurisdictions. Since civil laws vary from nation to nation, and the interaction between Church officials and civil authorities may be different from one nation to another, the manner in which this cooperation takes place will necessarily differ in various countries as well. The principle, however, must remain the same. The Church has an obligation to cooperate with the requirements of civil law regarding the reporting of such crimes to the appropriate authorities. Such cooperation naturally extends also to accusations of sexual abuse by religious or laity who work or volunteer in Church institutions and programs. In this regard, Church officials must avoid any compromise of the seal of the sacrament of penance, which must remain inviolable.*²⁶³

- 298 Cardinal Seán O'Malley, the President of the Pontifical Commission for the Protection of Minors, together with all the Commission Members, issued on 15 February 2016 the following statement on the obligation to report suspected sexual abuse to civil authorities:

*As Pope Francis has so clearly stated: 'The crimes and sins of the sexual abuse of children must not be kept secret for any longer. I pledge the zealous vigilance of the Church to protect children and the promise of accountability for all'. We, the President and the Members of the Commission, wish to affirm that our obligations under civil law must certainly be followed, but even beyond these civil requirements, we all have a moral and ethical responsibility to report suspected abuse to the civil authorities who are charged with protecting our society.*²⁶⁴

- 299 There is no doubt whatsoever that, whenever the civil law requires the reporting of allegations or crimes of the sexual abuse of minors to the civil authorities, the relevant Church officials, for example bishops or religious superiors, are obliged to comply with the requirements of the civil law. There is no law or other provision within the Church's canonical system that prohibits Church officials from complying with such requirements of the civil law.
- 300 Similarly there is no doubt whatsoever that, if the civil law does not require the reporting of allegations or crimes of the sexual abuse of minors to the civil authorities, bishops, religious superiors and other Church officials are not under any legal obligation to report.

²⁶² Congregation for the Doctrine of the Faith, *Circular Letter to assist Episcopal Conferences in developing guidelines for dealing with cases of sexual abuse of minors perpetrated by clerics*, 3 May 2011.

²⁶³ Cardinal William Levada, *The Sexual Abuse of Minors: A Multi-faceted Response to the Challenge*, 6 February 2012.

²⁶⁴ <http://en.radiovaticana.va/news/2016/02/15>.

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- 301 Notwithstanding, the Bishops have a responsibility to condemn the sexual abuse of minors and support the civil authorities in the exercise of their duties in regard to this most heinous of crimes.
- 302 In keeping with Papal teaching from Pope Leo XIII [1878-1903] to Pope John XXIII [1958-1963], the Second Vatican Council reiterated that an integral element of the mission of the Church is the promotion and defence of the dignity and fundamental rights of the human person.²⁶⁵ The recognition of these rights is essential to the pursuit of the common good which “embraces the sum of those conditions of the social life whereby human persons, families and associations more adequately and readily may attain their own perfection”.²⁶⁶
- 303 The sexual abuse of minors is the gravest violation of their rights and the gravest injustice, with consequent harm to them as well as their families and the community. In reference to child abuse in all its forms, Pope Francis said on 1 May 2016, “This is a tragedy! We must not tolerate the abuse of minors! We must protect minors and we must severely punish their abusers”.²⁶⁷
- 304 If the Church is to fulfil its responsibility to promote and defend the human dignity and rights of minors, she must give witness that such is the reality within her own community.²⁶⁸ Whilst acknowledging the failures within the Church, Bishops are called upon to collaborate, insofar as is possible, with the civil authorities within the specific circumstances prevailing in the local secular society.

²⁶⁵ Vatican II, *Pastoral Constitution on the Church in the Modern World*, 26; *Declaration on Religious Liberty*, 14.

²⁶⁶ Vatican II, *Pastoral Constitution on the Church in the Modern World*, 74.

²⁶⁷ Pope Francis, Address in St. Peter’s Square, Sunday 1 May 2016.

²⁶⁸ Cf. *Synod of Bishops*, II Ordinary General Assembly November 1971, Justice in the World.

SACRAMENT OF PENANCE

- 305 The canons in the 1983 Code of Canon Law in respect of the sacraments in general and each sacrament individually are founded upon the doctrinal teaching of the Church in accord with Scripture and Tradition. These sources are essential for understanding the meaning of the canons.
- 306 The sacraments are actions of Christ and of the Church.²⁶⁹ It is by baptism that people are brought into the People of God. In the sacrament of penance, also called the sacrament of reconciliation and confession, those who, after examining their conscience, confess the sins they have committed and express sorrow for those sins and have a purpose of amendment, receive forgiveness from God through the absolution given by the priest and are reconciled with the Church.

THE CELEBRATION OF THE SACRAMENT

- 307 The law of the Church provides the regulations as to where, by whom and the ritual in accord with which the sacrament of penance may be celebrated.
- 308 As the celebration of the sacraments is an act of worship the usual place for their celebration is a church. Within the church the place set apart for the sacrament of penance is the confessional. The Bishops Conference is empowered to issue norms in respect of confessionals, provided that they are so constructed that there is an open space and also a space with a fixed grill between the penitent and the confessor, either of whom may choose which option they wish to use.²⁷⁰
- 309 By reason of his ordination to the priesthood, a priest is empowered to absolve sinners of their sins, but he requires authorisation from the bishop, that is given the faculty, to act as the minister of the sacrament. Prior to granting a priest this faculty the bishop must determine that he is suitable to exercise this ministry of reconciliation.²⁷¹
- 310 The liturgical law of the Church establishes the ritual for the liturgy and the sacrament of penance is regulated by the Rite of Penance revised in accordance with the Second Vatican Council and published on 2 December 1973. The manner in which the confessor fulfils his ministry is a subject dealt with by the teaching of the Church. The Apostolic Exhortation *On Reconciliation and Penance in the mission of the Church* of Pope John Paul II, issued on 2 December 1984, is essential reading for understanding the four parts of the sacrament: contrition, confession, satisfaction and absolution.
- 311 "If the confessor is in no doubt about the penitent's disposition and the penitent asks for absolution, it is not to be denied or deferred".²⁷² These are issues dealt with in moral theology.

THE SACRAMENTAL SEAL

- 312 Canon 983 §1 states:

The sacramental seal is inviolable. Accordingly, it is absolutely wrong for a confessor in any way to betray a penitent, for any reason whatsoever, whether by word or in any other fashion.

²⁶⁹ CIC canon 840.

²⁷⁰ CIC canon 984 §2.

²⁷¹ CIC canon 966.

²⁷² CIC canon 980.

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- 313 “The legislator formulates and determines in this norm a very grave obligation *ex iure divino*: the absolute, permanent and inviolable secret - *sigillum* seal – that the confessor must keep forever regarding all the sins that the penitent confesses to him”.²⁷³ The foundation of the obligation arises from the divine law, as Pope John Paul II explains, when Jesus gave his power to forgive sins to the Apostles to be handed on to their successors.²⁷⁴ In addition, the obligation also finds a basis in the natural law since the right to privacy and the right to one’s good name are, as the Second Vatican Council stated, among the universal and inalienable rights of the human person.²⁷⁵
- 314 The seal of confession means that a confessor cannot reveal any sin of any kind that a penitent has confessed to him in the sacrament of penance. The sacramental seal relates to this information only. Nor can the confessor reveal that he deferred or denied the penitent absolution because the sins were confessed in the sacrament of penance.
- 315 The violation of the seal of the sacrament of penance is one of the more serious canonical offences reserved to the Congregation for the Doctrine of the Faith. A confessor who directly violates the sacramental seal automatically incurs the penalty of excommunication whose remittance is reserved to the Apostolic See.²⁷⁶
- 316 “The obligation of the priest to uphold the seal of confession is one of the strongest obligations that the priest has. The seal of confession is based on natural law, divine law and ecclesiastical law. The secrecy as a result of the seal of confession is necessary for Catholic faithful to be able to freely practise their religion. If the faithful have committed serious sins, they are required to go to confession at least once a year and to receive the sacrament of penance. Confessions are not just a special form of counselling but an act of worship in which the penitent receives God’s forgiveness. Catholic people require confidence in the requirement of canon law to keep their confessions secret. The penalty of automatic excommunication for breaking the seal of confession demonstrates the seriousness with which the Catholic Church and its members take the seal of confession. Catholics believe that the priest acts in the person of Christ as he grants forgiveness in the prayer of absolution. Without the secret of the seal of confession, the relationship of the penitent with the confessor is compromised and the freedom of Catholics to worship and perform ministry is removed”.²⁷⁷

²⁷³ Fernando Loza, “The Minister of the Sacrament of Penance” in Ángel Marzoa, Jorge Miras, and Rafael Rodríguez-Ocaña (eds.), Ernest Caparros (Eng. ed.), *Exegetical Commentary on the Code of Canon Law*, 5 Vols. (Montreal: Wilson and Lafleur, 2004) III/1:816.

²⁷⁴ Cf. Pope John Paul II, Apostolic Exhortation *On Reconciliation and Penance in the mission of the Church*, 2 December 1984: 29.

²⁷⁵ Vatican II, *Pastoral Constitution on the Church in the Modern World*, 26.

²⁷⁶ CIC canon 1388 §1.

²⁷⁷ Brendan Daly, *Canon Law in Action* (Sydney: St Pauls Publications, 2015) 263-264.