

Greg Williams

From: Anne Barwick
Sent: Tuesday, 19 September 2006 12:10
To: Greg Williams
Subject: TRIM: RE: Jurisdiction question - Fr John Nestor and Wollongong diocese

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Thanks Greg

Anne

-----Original Message-----

From: Greg Williams
Sent: Tuesday, 19 September 2006 11:56
To: Anne Barwick
Subject: RE: Jurisdiction question - Fr John Nestor and Wollongong diocese

Anne

I have already started drafting. Your point about the fault for not notifying being CCER's and not the Bishop's is something I overlooked, even though it figured in our discussion. I shall make sure that it is referenced in the letter if needed.

Thanks
 Greg

-----Original Message-----

From: Anne Barwick
Sent: Tuesday, 19 September 2006 11:00
To: Greg Williams
Subject: RE: Jurisdiction question - Fr John Nestor and Wollongong diocese

Thanks Greg, will you now draft the letter for my signature. The failure to notify was a failure on the part of the CCEr as head of agency at the time. I suggst that we make that point in the letter as Fr Nestor will criticise the Bishop for waiting until now to notify.

Anne

-----Original Message-----

From: Greg Williams
Sent: Tuesday, 19 September 2006 10:19
To: Anne Barwick
Cc: Monique Adofaci
Subject: FW: Jurisdiction question - Fr John Nestor and Wollongong diocese

Anne

I refer to my previous advice to you and to a subsequent email discussion that I had with Monique, which is also below.

As is apparent, my view was that Fr Nestor's matter had been finalised by the Wollongong Diocese prior to the commencement of Part 3A on 7 May 1999.

The information that you provided to me directly and also through the subsequent material received from Sr Hanlen leads me to revise my earlier advice. The principle remains unchanged, namely that matters finalised by agencies before the commencement of Part 3A are not reportable to us. However, in this matter my assumption that it was finalised prior to 7 May 1999 was incorrect.

I interpreted the decree issued on 7/8/98 by Bishop Wilson restricting Fr Nestor from celebrating the liturgy publicly as being a final action. It is now apparent to me from your comments and the papers themselves that that step was analogous to suspension with pay, as Fr Nestor was not permanently prevented from undertaking his duties, but was only temporarily restrained, at the Bishop's discretion, from doing them. While I use the words 'Bishop's discretion', that discretion was open to review within the Church's canon law system by the Congregation of the Clergy and also a further appellate body, the Apostolic Signatura. Fr Nestor initiated the review process open to him in canon law and was successful at first instance before the Congregation of the Clergy, but the Diocese successfully appealed to the

Apostolic Signatura.

I note that the decision of the Apostolic Signatura was provided to the Diocese on 20 July 2006. That decision had the effect of reinstating what had been the case at 7 August 1998, namely that Fr Nestor was suspended with pay. This means that the Diocese, as Fr Nestor's employer, has not investigated, let alone made a finding, regarding the allegations against Fr Nestor. The allegations should have been notified to the Ombudsman within 30 days of the commencement of Part 3A on 7 May 1999. This omission on the part of the Diocese can be partly excused by the uncertainty regarding Fr Nestor's position and the Diocese's unfamiliarity with the requirements of Part 3A at the time. I also consider that the interaction between the canon law proceedings and the employer's obligations to notify and investigate would have added further complexities. Fr Nestor has recently taken the position that the employer's obligation to investigate should not be addressed until the canon law proceedings were completed. I note that Fr Nestor says in his letter to the Diocese of 6 July 2006 - 'Not directly concerned with the Ombudsman's Office, but of importance too, is that the Diocese is apparently proposing to start an inquiry on matters being presently judged by the Apostolic Signaturae, **and thus preempting that body as well as causing a complication in the connection between Church and Civil Law**' (my emphasis).

The Ombudsman generally advises employers to let legal processes take their course before commencing agency investigations, as long as suitable risk management measures have been taken. The Diocese managed the risk possibly posed by Fr Nestor effectively and consistently throughout this matter. The Diocese let criminal proceedings take their course and then adopted a similar approach with regard to proceedings under canon law. The only omission by the Diocese was the failure to notify this matter within thirty days of the commencement of Part 3A. Due to the unusual circumstances of this matter, that omission can be understood. In any event, it seems to have been in line with the views of Fr Nestor and thus cannot be regarded as having prejudiced his interests.

The Diocese should be informed that we require it to satisfy its obligations under Part 3A by notifying the allegations against Fr Nestor to us and by conducting an agency investigation pursuant to the provisions of part 3A.

Greg

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-----Original Message-----

From: Greg Williams
Sent: Friday, 4 August 2006 17:03
To: Monique Adofaci
Subject: RE: Jurisdiction question - Fr John Nestor and Wollongong diocese

Monique

That does not appear to be in contention. He was forbidden to exercise his priestly functions, so I don't regard him as being currently employed by the diocese. The current employee requirement means that an agency currently employing a person about whom an allegation is made (even though it may concern an incident before the person became employed by the agency) is still required to investigate the allegation.

Greg

-----Original Message-----

From: Monique Adofaci
Sent: Friday, 4 August 2006 16:58
To: Greg Williams
Subject: RE: Jurisdiction question - Fr John Nestor and Wollongong diocese

Thanks Greg

I note that that you refer to the two limitations on our ability to consider past incidents. You address one in detail in your advice. I am wondering if the other is also satisfied ? Is Fr Nestor a current employee ?

regards

Monique

-----Original Message-----

From: Greg Williams
Sent: Friday, 4 August 2006 16:50
To: Sue Phelan
Cc: Anne Barwick; Monique Adofaci
Subject: Jurisdiction question - Fr John Nestor and Wollongong diocese

Sue

I refer to the papers you passed to me on Wednesday. I have considered them and can confirm my tentative comments.

OMBUDSMAN JURISDICTION

I consider that we should not receive a notification from the diocese on this matter. The Ombudsman's power to deal with reportable allegations or convictions that arose before the commencement of Part 3A is found in s.25A(3) -

(3) A reference in this Part to a reportable allegation or a reportable conviction extends to any such allegation or conviction in respect of a matter occurring before the commencement of this Part.

We have interpreted the provision as enabling the Ombudsman to apply Part 3A to historic incidents, no matter how long in the past they occurred. There are two limitations on our ability to consider past incidents. Firstly, the allegation, when received by the agency within our jurisdiction, must be against a current employee. Secondly, we have adopted the practice of not requiring agencies to re-open matters that were dealt with and closed prior to the commencement of Part 3A.

Fr Nestor was an employee of the diocese when it received the allegations against him in April 1996. I note that the criminal charges were found proved in Wollongong Local Court on 12 December 1996, but that Fr Nestor was acquitted on appeal to the District Court on 22 October 1997. Action to address the risk that the diocese believed Fr Nestor posed to children was taken by the diocese and by the NSW Professional Standards Resource Group through 1997 and up to 29 June 1998, when the Professional Standards Resource Group issued its report and final advice to the Bishop following completion of the *Towards Healing* investigation. The Bishop issued a decree implementing final action against Fr Nestor on 7 August 1998. I note our discussion, in which you expressed the view that this matter had been finalised by the diocese at that point.

I agree with you. Although Fr Nestor has pursued avenues of appeal under canon law, the decision and protective action taken by the diocese remains in effect. I therefore consider that the matter was finalised prior to the commencement of Part 3A on 7 May 1999 and that, consistent with our previous practice and our interpretation of the wording of s.25(3), we should regard this matter as falling outside our jurisdiction.

CCYP JURISDICTION

In contrast, the ability of the CCYP to receive notifications of completed relevant employment proceedings is clearly limited by s.39(3) of the CCYP Act (extracted below). Part 7 of the CCYP Act, in which s.39 is placed, commenced on 3 July 2000. Adopting the same position as above and identifying 7 August 1998 as the date on which the relevant employment proceedings in respect of Fr Nestor were completed, entails that those proceedings were completed after the 'cut-off' of 3 July 1995 specified in s.39(3). In my view, the diocese should notify the CCYP of the relevant employment proceedings in respect to Fr Nestor.

39 Duties of employers with respect to relevant employment proceedings

(1) It is the duty of an employer to notify the Commission of the name and other identifying particulars of any employee against whom relevant employment proceedings have been completed by the employer (other than proceedings in which a finding is made that the alleged reportable conduct, or the alleged commission of an act of violence, did not occur).

(3) Notification under this section extends to disciplinary proceedings completed within the period of 5 years immediately before the commencement of this section.