ROYAL COMMISSION INTO INSTITUTIONAL RESPONSES
TO CHILD SEXUAL ABUSE
AT SYDNEY

COMMONWEALTH OF AUSTRALIA

Royal Commissions Act 1902

PUBLIC INQUIRY INTO

The response of the Catholic Diocese of Wollongong to allegations of child sexual abuse against John Gerard Nestor

SUBMISSIONS OF COUNSEL ASSISTING THE ROYAL COMMISSION

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Part A: THE NESTOR MATTER

1. INTRODUCTION

1. The 14th public hearing by the Royal Commission was held from 24 to 27 June 2014. The case study concerns the response of the Catholic Diocese of Wollongong (the Diocese) to allegations of child sexual abuse made against one of its priests, John Gerard Nestor (Nestor).

2. Nestor was convicted in the Wollongong Local Court of aggravated indecent assault and an aggravated act of indecency on a person under the age of 16 years in December 1996. He was acquitted on appeal to the District Court in October 1997. During and following the criminal proceedings, the Diocese became aware of other complaints against Nestor.

3. Over the ensuing 11 years the questions of whether Nestor should be allowed to function publicly as a priest and whether he should be dismissed from the priesthood were considered by an assessment under Towards Healing, recourse to the Congregation for the Clergy and an appeal to the Supreme Tribunal of the Apostolic Signatura in the Vatican, an independent investigation under the Ombudsman Act 1974 (NSW), a preliminary investigation under canon law, and a submission to the Congregation for the Doctrine of the Faith in the Vatican.


5. These submissions are separated into 3 parts. Part A includes 9 sections (aside from the introduction), as detailed. Section 2 provides an overview of the Church’s legal structures which were in place at the time. Section 3 explains what happened before Nestor was convicted in 1996. This includes consideration of the rumours and complaints against Nestor about his inappropriate conduct with young boys and how the Church dealt with them.

6. Section 4 covers the period when Nestor was convicted and before he was acquitted on appeal in 1997, and the further complaints against Nestor that came to light during this period. Section 5 covers the period following the acquittal, including the decree that was issued by the bishop that Nestor cease functioning publicly as a priest, and the assessment process under Towards Healing.

7. Section 6 concerns Nestor’s recourse to the Congregation for the Clergy (CFC) against this decree, the CFC’s subsequent decree finding that Nestor was to be restored ‘immediately’ to
the full exercise of his priestly ministry in the Diocese. Section 6 also considers the consequences this decree had for the Diocese. Section 7 explores the Diocese’s protracted appeal against this decree to the Supreme Tribunal of the Apostolic Signatura (Signatura), and the Signatura’s decision. During this period Nestor lived overseas, and so Section 7 also considers Nestor’s attempts to practice publicly as a priest outside Australia.

8. Section 8 considers the investigation under the Ombudsman Act that ensued following the Signatura’s decision, and Section 9 considers how Nestor was dismissed from the clerical state following the conclusion of that investigation.

9. Part B summarises the available findings.

10. Part C identifies the systemic issues that are illustrated by this case study.

2. OVERVIEW OF APPLICABLE CHURCH LAW

Code of Canon Law

11. The body of internal rules governing the Church is referred to as canon law. The Church refers to the laws enacted by secular (that is, state) authorities as civil law.

12. Canon law is the term used to describe the ‘laws’ of the Church. The primary sources of canon law are the Code of Canon Law promulgated in 1983 and the Code of Canons of the Eastern Churches promulgated in 1990. Canon law is not law in the sense understood in civil law; it is enforceable only as a private agreement as between members of the Church.

13. Canon law was first codified in 1917 and that code remained in force until 1983 when the 1983 Code of Canon Law was introduced (CIC83). CIC83 was promulgated on 25 January 1983 by Pope John Paul II and came into force on 27 November 1983.

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4 Ibid.
The Penal Process

14. Book VII, Part IV of CIC83 governs the penal process under canon law. Chapter 1 of Book VII, Part IV governs the preliminary investigation, being an investigation which is a precursor to either a penal or an administrative process. A penal process under canon law, in particular a penal trial, takes place according to CIC83 provisions and it involves canonical court proceedings. As explored below, these are unlike domestic criminal proceedings as, relevantly, they do not include oral testimony.

15. It is generally only through this penal process that a penalty such as dismissal from the clerical state can be imposed. An administrative process – whereby there is gathering and evaluation of evidence by the ordinary, that is, the bishop – can result in decisions being made which are quite serious for those affected, but it cannot result in the dismissal of a cleric from the clerical state.

16. CIC83 c 1717 governs how a preliminary investigation into a delict, which is a crime under canon law, is to be carried out and by whom. CIC83 c 1718 governs what is to be done once sufficient evidence, from this preliminary investigation, has been collected. As these provisions are particularly relevant to this case study it is useful to set them out:

CIC83 c 1717

§1. Whenever an ordinary has knowledge, which at least seems true, of a delict, he is carefully to inquire personally or through another suitable person about the facts, circumstances, and imputability, unless such an inquiry seems entirely superfluous.

5 CIC83 cc 1717-1719: Ex 14-3 Tab 17 VATC.0002.001.0014.
6 CIC83 cc 1728 §1, 1404-1416; Ex 14-3 Tab 17 VATC.0002.001.0017; Wilson T7882: 37-46.
8 Wilson T7882: 34-T7883: 11.
9 Delict, according to the Vatican's Glossary of Terms, refers to ‘a crime in canon law, an external violation of a law or precept gravely imputable by reason of malice or negligence’: The Vatican, Glossary of Terms, http://www.vatican.va/resources/resources_glossary-terms_en.html (viewed 14 July 2014); Wilson T7880: 30-31; Hanlen T8161: 18-25.
10 CIC83 c 1718: Ex 14-3 Tab 17 VATC.0002.001.0014.
11 CIC83 c 1717: Ex 14-3 Tab 17 VATC.0002.001.0014.
§2. Care must be taken so that the good name of anyone is not endangered from this investigation.

§3. The person who conducts the investigation has the same powers and obligations as an auditor in the process; the same person cannot act as a judge in the matter if a judicial process is initiated later.

CIC83 c 1718

§1. When it seems that sufficient evidence has been collected, the ordinary is to decide:

1/ whether a process to inflict or declare a penalty can be initiated;

2/ whether, attentive to can. 1341, this is expedient;

3/ whether a judicial process must be used or, unless the law forbids it, whether the matter must proceed by way of extrajudicial decree.

§2. The ordinary is to revoke or change the decree mentioned in §1 whenever new evidence indicates to him that another decision is necessary.

§3. In issuing the decrees mentioned in §§1 and 2, the ordinary is to hear two judges or other experts of the law if he considers it prudent.

§4. Before he makes a decision according to the norm of §1 and in order to avoid useless trials, the ordinary is to examine carefully whether it is expedient for him or the investigator, with the consent of the parties, to resolve equitably the question of damages.
17. The reference to CIC83 c 1341\(^\text{12}\) in c 1718 makes it clear that the bishop should consider whether pastoral options have been exhausted before processes are initiated to impose or declare a penalty.\(^\text{13}\)

**Other relevant sources of canon law**

18. During the period from when complaints about Nestor first came to light in the early 1990s to when Nestor was dismissed from priesthood in 2008 other canon law instruments were applicable, in particular:

   a. *1962 Instructio de modo procedendi in causis sollicitationis*: the 1962 Instruction on the Manner of Proceeding in Causes involving the Crime of Solicitation (1962 Instruction); also known as *Crimen Sollicitationis*\(^\text{14}\)

   b. *2001 Motu Proprio Sacramentorum Sanctitatis Tutela*: Norms of More Grave Delicts Reserved to the Congregation for the Doctrine of the Faith (2001 *Sacramentorum Sanctitatis Tutela*).\(^\text{15}\)

19. The 1962 Instruction applied from 1962 until 2001, when the 2001 *Sacramentorum Sanctitatis Tutela* commenced. The 1962 Instruction is primarily directed at establishing a protocol to be observed by bishops if an accusation is made against a cleric or religious alleging criminal behaviour in relation to the sacrament of confession. However, Title Five extends the protocol to sexual assault perpetrated or attempted against pre-adolescent children.\(^\text{16}\) The 1962 Instruction reserved jurisdiction to the Sacred Congregation of the Holy Office (now the Congregation of the Doctrine of the Faith) over, relevantly, Title Five conduct. Archbishop Wilson gave evidence that the 1962 Instruction was not widely available and that in his

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\(^{12}\) CIC83 c 1341 provides that:

> 'An ordinary is to take care to initiate a judicial or administrative process to impose or declare penalties only after he has ascertained that fraternal correction or rebuke or other means of pastoral solicitude cannot sufficiently repair the scandal, restore justice, reform the offender.'

\(^{13}\) See Wilson T883: 42-T7884: 5.

\(^{14}\) Ex 14-3 Tab 1 VATC.0001.001.0006.

\(^{15}\) Ex 14-3 Tab 20 IND.0043.001.0068, VATC.0001.001.0085.

\(^{16}\) 1962 Instruction, Title Five: Ex 14-3 Tab 1 VATC.0001.001.0006 at VATC.0001.001.0017.
experience nobody knew about it across the Church.\textsuperscript{17} This might be explained in part because the 1962 Instruction was not, until recently, a public document—it was to be kept ‘carefully in the secret archive of the curia for internal use’; it was only disclosed to bishops and superior ministers.\textsuperscript{18}

20. The 1962 Instruction was a re-issue of the 1922 \textit{Instructio de modo procedendi in causis sollicitationis} with minor additions which are not presently relevant.

21. The 2001 \textit{Sacramentorum Sanctitatis Tutela} was promulgated on 30 April 2001. It governs the jurisdiction of the Congregation for the Doctrine of the Faith (CDF) over grave delicts. Relevantly, this includes the sexual assault by a cleric of a minor below the age of 18 years.\textsuperscript{19}

\textbf{Australian protocols not part of canon law}

22. Similarly, during the same period, from the early 1990s to 2008, there were also Australian protocols in place that did not form part of canon law but which were applicable, in particular:

\begin{enumerate}
\item The 1992 Special Issues Sub-Committee of the Australian Catholic Bishops Conference Protocol for Dealing with Allegations of Criminal Behaviour (1992 Protocol)\textsuperscript{20}
\item \textit{Towards Healing}: Principles and procedures in responding to complaints of sexual abuse against personnel of the Catholic Church in Australia (\textit{Towards Healing})\textsuperscript{21}
\end{enumerate}

23. The 1992 Protocol applied from 1992 until March 1997, when \textit{Towards Healing} commenced.\textsuperscript{22} The 1992 Protocol was a protocol to be observed by bishops if an accusation was made against a cleric or religious alleging criminal behaviour. It operated alongside CIC83, that is, it did not affect the rights and obligations in CIC83.\textsuperscript{23}

\begin{flushright}
\footnotesize
\textsuperscript{17} Wilson T7890: 18-39; Ex 14-6 Wilson [76]-[77].
\textsuperscript{18} Ex 14-3 Tab 1 VATC.0001.001.0006 at VATC.0001.001.0006.
\textsuperscript{19} 2001 \textit{Sacramentorum Sanctitatis Tutela}, art 4 §1: Ex 14-3 Tab 20 IND.0043.001.0068 at IND.0043.001.0069.
\textsuperscript{20} Ex 14-3 Tab 23 CTJH.0001.001.0295.
\textsuperscript{21} Ex 14-3 Tab 21 CTJH.0001.001.0104; Ex 14-3 Tab 22 CTJH.0001.001.0073.
\textsuperscript{22} Lucas T7801: 18-32.
\textsuperscript{23} Preamble to the 1992 Protocol: Ex 14-2 Tab 23 CTJH.0001.001.0295 at CTJH.0001.001.0296.
\end{flushright}
24. *Towards Healing* is a set of principles and procedures established by the Australian Catholic Bishops Conference (ACBC) and the Australian Conference of Leaders of Religious Institutes for a person who wishes to complain of having been, relevantly, sexually abused by a priest, religious or other Catholic Church personnel. *Towards Healing* identifies the principles that must form the basis of the Church’s response to a complaint of sexual abuse, as well as the procedures to be followed in particular cases.24 *Towards Healing* commenced in March 1997 and was amended in December 2000.25 There have been further subsequent amendments but they are not relevant to this case study.

3. EARLY CONCERNS

*Rumours and complaints about Nestor*

25. From about the late 1980s26 Nestor organised camps for children in the Diocese.27 The camps were run several times a year28 and newsletters or flyers which were circulated in local parishes helped to advertise the camps.29 Some camps were run for altar boys and ex-altar boys, others were open to all children in the local parishes.30 The camps for boys and girls were run separately.31

26. From the early 1990s rumours spread in relation to Nestor’s conduct with boys.32
27. In the early 1990s, Father Schmitzer, the then Chancellor and Private Secretary to then Bishop of Wollongong, Bishop Murray, was told of rumours that at the camps boys were skinny dipping and showering in the open, and that Nestor had conversations with boys about the size of genitalia. About this time Father Schmitzer also knew that some priests in other parishes, having also heard rumours about Nestor’s conduct at these camps, decided not to advertise the camps in their parishes. Father Schmitzer told Bishop Murray about these rumours and the decisions made by other priests.

28. Meanwhile, other complaints had been made against Nestor, including:

a. in 1991, a school principal reported his concern about the camps to the Director of Schools for the Diocese

b. in 1993, the same principal reported his concerns to the Catholic Education Office in Wollongong and Bishop Murray

c. in 1993, the Secondary Religious Education Consultant for the Catholic Education Office reported to the Director of Schools about concerns he had following a conversation with some boys about a camp organised by Nestor

d. also in 1993, an assistant on the camps and a parent (ABQ) separately reported their concerns about the camps to Centacare Wollongong. Centacare is the Catholic Church’s community services agency. The Director of Centacare Wollongong apparently passed the complaints on to Bishop Murray and to the Department of Community Services

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33 Ex 14-1 Schmitzer [9]; Schmitzer T7784: 04.
34 Ex 14-1 Schmitzer [9].
35 Ex 14-1 Schmitzer [9].
36 Ex 14-1 Schmitzer [9].
37 Ex 14-2 Tab 322 CTJH.001.03006.0102_R.
38 Ex 14-2 Tab 322 CTJH.001.03006.0102_R at [1].
39 Ex 14-2 Tab 322 CTJH.001.03006.0102_R at [2].
40 Ex 14-2 Tab 322 CTJH.001.03006.0102_R at CTJH.001.03006.0103_R-0104_R at [7].
DOCS interviewed ABQ’s son, ABP, and four brothers who had also been on the camps (ABR, ABS, ABT and ABU). DOCS closed each file following the interview.41

29. On 25 May 1994, Bishop Murray refused Nestor permission to organise a further camp.42 Specifically, Bishop Murray told Nestor:

‘In view of the present “witch hunting” mentality of our local media, I think it would be advisable to forego this proposal for this occasion.’ 43

30. This decision was made shortly after Father Schmitzer submitted, on 17 May 1994, a special issues incident form to the Diocese’s insurer, Catholic Church Insurances Limited, in relation to Nestor’s conduct at the camps.44 Relevantly, this form stated that:

‘For some years Fr Nestor, Assistant Priest at Dapto, has organised Youth and Altar Servers Camps during school holidays. Some time ago “The Illawarra Mercury” contacted Miss Kath McCormack, Director of Wollongong CENTACARE, regarding allegations the Mercury had received concerning misconduct by Fr Nestor on these camps. This Chancery Office knows nothing of details regarding victims or dates. The Bishop feels that nothing of a criminal nature happened ...’

**Nestor’s Study overseas**

31. In 1994, Nestor went to the United States to undertake studies in theology.45 Father Schmitzer gave evidence that he would not have been surprised if Bishop Murray wanted Nestor to go overseas to get him out of the way or to let the dust settle,46 although Father Schmitzer accepted that he had not seen correspondence between Nestor and Bishop Murray about Nestor studying overseas.47 There is some evidence that Bishop Murray had initially refused Nestor’s request to study overseas, but that following correspondence from Nestor about why

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41 Ex 14-2 Tab 322 CTJH.001.03006.0102_R at CTJH.001.03006.0104_R at [8].
42 Ex 14-1 Schmitzer [9]; Ex 14-2 Tab 3 CTJH.001.03006.0191_R.
43 Schmitzer T7788: 12-15.
44 Schmitzer T7786: 5-29; Ex 14-2 Tab 2 CCI.0500.00006.0037.
45 Ex 14-1 Schmitzer [10] and Schmitzer T7789: 2-8; Ex 14-2 Tab 321 CTJH.001.03006.0098_R at 0099 at [3.4].
46 Schmitzer T7789:2-8.
Bishop Murray should reconsider this decision, Bishop Murray acceded to Nestor's request and granted him permission to attend a two-year course at the John Paul II Institute for Studies on Marriage and the Family. 48

**Nestor's return to Australia**

32. Nestor returned to Australia in 1996 and was appointed assistant priest in the parish of Kiama. Shortly thereafter, on or around 19 April 1996, he moved to the parish of Fairy Meadow of his own accord. 49

33. Bishop Murray had retired on 12 April 1996. Father Ryan was then appointed Administrator of the Diocese until Monsignor Wilson was ordained and installed as Bishop on 10 July 1996. 50 When Nestor was working at Fairy Meadow, in about April 1996, the then Director of Education in the Diocese, Terry White, told Father Ryan that he did not want Nestor to have any dealings with children at St John Vianney's School at Fairy Meadow because of rumours he had heard about Nestor's conduct with boys. 51 In response to this, Father Ryan directed that Nestor not have any involvement or contact with this school. 52

**Father Lucas' interview with Nestor**

34. Father Lucas gave evidence that he was asked by Bishop Murray to interview Nestor in about 1993, 53 in his capacity as a member of the Special Issues Resource Group under the 1992 Protocol. 54 Whilst at this time the 1992 Protocol was in place, 55 the interview was not conducted in accordance with the Protocol. Father Lucas gave evidence that the interview was informal, effectively preliminary to any formal investigation under the 1992 Protocol. 56

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48 Ex 14-2 Tab 321 CTJH.001.03006.0098_R at CTJH.001.03006.0099_R [3.4].
49 Ex 14-1 Schmitzer [10] and [11]; Ex 14-4 Ryan [12] and [13].
50 Ex 14-4 Ryan [7].
51 Ex 14-4 Ryan [15]-[16].
52 Ex 14-4 Ryan [16].
53 Lucas T7809: 33-47.
54 Lucas 7810: 1-17.
55 Lucas T7801: 13-32.
35. In the interview in 1993 Father Lucas put to Nestor the substance of the rumours about Nestor’s conduct at the camps he had organised, to see if he could get any agreement or explanation from Nestor about the conduct and the inappropriateness of it. Nestor denied the allegations but said something to the effect that he was ‘helping [the children at the camps] in the formation of their conscience’. Before interviewing Nestor, Father Lucas was not provided with written or detailed notes about the allegations made against Nestor, nor did he make his own note of the allegations he was to put to Nestor.

36. The details of what Nestor told Father Lucas were not communicated to Bishop Murray: only the end result – the denial of the allegations – was communicated, as well as Father Lucas’ general discomfort about Nestor’s denial. In accordance with his general practice, Father Lucas did not record the interview or take any notes. This approach was said by him to have been adopted in order to preserve confidentiality and entice the cleric being interviewed into feeling comfortable about talking openly about his conduct. Once the cleric was advised that the details of what he said would be confidential, and that no records of the interview would be made, Father Lucas also felt that to then subsequently record or disclose that information would undermine the cleric’s right to silence.

37. Father Lucas accepted that the consequences of his practice of not taking notes of his interviews with clergy or religious against whom allegations of child sexual abuse were made – such as his interview with Nestor – was that there would be no written record of any admissions of criminal conduct, which would protect the priest or religious concerned and the Church. Father Lucas denied, however, that this was his intention.

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60 Lucas T7821: 24-32; T7811: 37-43.
61 Ex 14-5 Lucas [18].
62 Lucas T7828: 8-10; 7840: 46-7841: 4-12.
63 Ex 14-5 Lucas [18].
64 Lucas T7813: 30-43; T7822: 4-10; T7823: 3-6; 7829: 36-7831: 25.
Available Findings

1. Had the Church acted to prioritise the safety of children, it should have contemporaneously recorded the details of what was said in interviews with clergy or religious conducted by the Church in relation to allegations of child sexual abuse by a cleric or religious.

2. Failing to make and keep such a record serves to:

   (1) Facilitate the interviewer and the cleric or religious being unable to recall what was said in the interview and what conclusions were arrived at if subsequently called upon to do so;

   (2) Provides an additional barrier to the proof of allegations of child sexual abuse by the cleric; and

   (3) Support a culture of secrecy about child sexual abuse in the Church.

ABA’s complaint about Nestor

38. In late April 1996, shortly after Father Ryan directed Nestor not to have any involvement or conduct with St John Vianney’s School, Father Schmitzer was told about a complaint against Nestor by ABA.68 Father Schmitzer spoke to ABA and his father in person the next day and ABA told Father Schmitzer that he had been sexually abused by Nestor.69 This occurred in 1991 when he was 15 years old.70 ABA point was hesitant about going to the police, and so Father Schmitzer arranged for him to meet the following day with the director of Centacare in Wollongong, Ms Kath McCormack.71 Following this meeting ABA agreed to report to the police and Father Schmitzer facilitated this.72

68 Ex 14-1 Schmitzer [14]; Schmitzer T7789: 10-26.
69 Ex 14-1 Schmitzer [13]-[15]; T7789:16-36.
70 Ex 14-2 Tab 322 CTJH.001.03006.0102_R at CTJH.001.03006.0106_R.
71 Schmitzer T7789: 38-47.
72 Schmitzer T7790: 1-8; Ex 14-1 Schmitzer [16].
39. On 29 April 1996, Father Schmitzer told Father Ryan about ABA’s complaint.\(^{73}\) Father Ryan immediately sought advice as to what he should do from Father Lucas and Bishop-Elect Wilson, who both advised Father Ryan to stand Nestor down from public ministry pending the resolution of the complaints made against him.\(^{74}\) The next day, after receiving this advice, Father Ryan instructed Nestor personally and in writing to stand aside from the exercise of any public ministry.\(^{75}\)

40. Shortly after this, Nestor was arrested and charged.\(^{76}\) Nestor remained on administrative leave during the police investigation and criminal proceedings that followed on from ABA’s complaint.

**Available Finding**

3. Father Ryan’s placing of Nestor on administrative leave, and Bishop Wilson’s confirmation of that, was a justified and timeous act to protect children from possible sexual abuse by Nestor.

**Secular employment**

41. On 10 June 1996, before Nestor was convicted of the charges against him, Nestor requested permission from Father Ryan to undertake employment outside the Church, in particular, with the University of Western Sydney.\(^{77}\) On 13 June 1996, Father Ryan refused this request on the basis that he considered himself, as the Administrator of the Diocese until Bishop-Elect Wilson commenced, not competent to grant the permission.\(^{78}\) On 30 July 1996, Bishop Wilson refused Nestor’s request to undertake secular employment because he considered that this would be inconsistent with him being on administrative leave.\(^{79}\)

\(^{73}\) Ex 14-1 Schmitzer [19]; Ex 14-4 Ryan [18].

\(^{74}\) Ex 14-4 Ryan [19]-[20].

\(^{75}\) Ex 14-4 Ryan [21]; Ex 14-2 Tab 4, CTJH.001.12001.1381_R.

\(^{76}\) Ex 14-1 Schmitzer [18]; Schmitzer T7790: 7-8.

\(^{77}\) Ex 14-2 Tab 7 CTJH.001.03002.0087_R.

\(^{78}\) Ex 14-4 Ryan [37]; Ex 14-2 Tab 8 CTJH.001.12001.1313_R.

\(^{79}\) Ex 14-6 Wilson [25]-[26]; Ex 14-2 Tab 10 CTJH.001.12001.0089 and Tab 11 CTJH.001.12001.0090.
4. NESTOR’S CONVICTION

42. On 20 December 1996, Magistrate Johnson of the Wollongong Local Court found Nestor guilty of aggravated indecent assault and an aggravated act of indecency on a person under the age of 16 years, namely ABA.80 Before the assault, Nestor and ABA’s family had a ‘fairly close friendship’,81 and the day of the assault, ABA and his brother, ABB, were staying overnight at Nestor’s home.82 ABA alleged, however, that during the night he was woken up by Nestor touching him. Nestor proceeded to thrust his penis at ABA’s bottom and then tried to pull his pyjamas down. Nestor took hold of ABA’s hand and put it on Nestor’s penis; ABA pulled his hand away, whereupon Nestor put his hand inside ABA’s pyjama pants and played with ABA’s penis.83 These allegations were found to be established, having particular regard to evidence that Nestor’s friendship with the family ceased after the night in question, with no explanation given by Nestor as to why he did not have any further contact with the family or find out why the family ‘had shunned him’.84

43. Nestor was sentenced to terms of 12 months and 4 months to be served consecutively.85

44. It was not in issue in the criminal trial that the brothers and Nestor watched a video from mattresses on the floor, before going to sleep on the mattresses. Relevantly, Magistrate Johnson observed that Nestor:

‘did not deny that the boys had stayed overnight at his home on a number of occasions, that they had slept in the way that the boys have said on mattresses on a bedroom floor, watching a video, particularly on this night, the night in question.’86

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80 Ex 14-2 Tab 14 CTJH.001.12001.1322_R.
81 Ex 14-2 Tab 14 CTJH.001.12001.1322_R at CTJH.001.12001.1323_R-1324_R.
82 Ex 14-2 Tab 14 CTJH.001.12001.1322_R at CTJH.001.12001.1324_R.
83 Ex 14-2 Tab 14 CTJH.001.12001.1322_R at CTJH.001.12001.1325_R-1326_R.
84 Ex 14-2 Tab 14 CTJH.001.12001.1322_R at CTJH.001.12001.1325_R-1337_R-1338_R.
85 Department of Public Prosecution v John Gerard Nestor (Unreported, Wollongong Local Court, Magistrate Johnson, 18 February 1997): NSW.0002.01006.0215.
86 Ex 14-2 Tab 14 CTJH.001.12001.1322_R at CTJH.001.12001.1333_R.
45. Bishop Wilson considered that Nestor’s guilt or otherwise of the crimes was a matter for the law, but Nestor’s admission regarding the sleeping arrangements was a matter of concern for him. Bishop Wilson considered that these sleeping arrangements with teenage children were highly inappropriate. This conduct was such that it raised questions about Nestor’s suitability for ministry of any kind.

46. Nestor appealed this decision to the District Court. In the period of the appeal, Father Ryan’s instruction for Nestor to stand down from public ministry still applied. In that period and shortly thereafter Bishop Wilson was informed of four further complaints against Nestor. These are detailed in the next section.

Further complaints about Nestor

47. First, on 24 July 1997 Bishop Wilson received a letter from John Davoren of the Professional Standards Office (PSO) about a complaint made by ABE regarding the alleged misconduct of Nestor and another priest towards her son, ABD. The PSO oversees the development of policy, principles and procedures in responding to Church related abuse complaints pursuant to the protocols of Towards Healing. ABE alleged that Nestor had told a joke about ‘priests and Christmas trees having balls’, and about ‘personal development’, as well as seeing Nestor’s penis when Nestor, ABE and another boy were seeing ‘who could do the biggest wee.’

48. Secondly, in September 1997 Bishop Wilson was informed about a complaint by ABJ, about an allegation in relation to her son, ABI, against Nestor. ABJ alleged that at camps organised by Nestor, Nestor had insisted on communal, naked showering and bathing and had showered naked with the boys; further, that Nestor had insisted that ABI’s brother, ABK, shower naked, although ABK did not want to. Bishop Wilson referred ABJ to the PSO and an assessment was

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87 Ex 14-6 Wilson [33].
88 Ex 14-6 Wilson [32]-[33]; Wilson T7866:1-2.
89 Ex 14-6 Wilson [32]-[33]; Wilson T7866:4-9.
90 Wilson T7861:9-11.
91 Ex 14-6 Wilson [36]; Wilson T7866:37-45; Ex 14-2 Tab 16 CTJH.001.12001.1262 and Tab 17 CTJH.001.12001.1263.
92 Ex 14-6 Wilson [36].
93 Ex 14-6 Wilson [38]; Wilson T7866:47-T7867:5.
94 Ex 14-6 Wilson [42]; ex 14-2 Tab 18 CTJH.402.05001.0569_R.
conducted by Mr Hynd, an assessor appointed by the PSO. Mr Hynd did not find evidence of physical interference with either ABI or ABK, but considered it would not be appropriate for Nestor to be employed in any situation which might permit him access to young children.

49. Thirdly, also in September 1997, Bishop Wilson was informed of a complaint made by ABN against Nestor. ABN alleged that at camps organised by Nestor, Nestor had insisted on communal, naked showering and bathing and had conducted ‘soap inspections’ after the boys had washed; further, that ABN had seen Nestor touch his brother ABO ‘on the penis and the bum’ during one of the camps. This complaint was referred to the PSO.

50. Fourthly, on or about 31 October 1997 Margaret Chittick of Centacare informed Bishop Wilson of a complaint made by ABM against Nestor. The complaint concerned a competition initiated by Nestor to find the ‘hairiest arse’ and the ‘biggest dick’ amongst the boys at a camp organised by Nestor. This competition followed nude swimming with the boys and Nestor. On 18 December 1997, Bishop Wilson visited ABM and her son ABL to discuss the complaint. The matter was referred to Towards Healing assessors.

Available Finding

4. The further complaints about Nestor that were received by Bishop Wilson in the period after Nestor was charged to shortly after Nestor’s appeal against his conviction justified serious reservations and concern about the danger that Nestor posed to children and his suitability for ministry.

95 Ex 14-6 Wilson [41], [44], [45]; Ex 14-2 Tab 18 CTJH.402.05001.0569_R; Tab 19 CTJH.402.05001.0594_R.
96 Ex 14-6 Wilson [45], [46]; Ex 14-2 Tab 18 CTJH.402.05001.0569_R.
98 Ex 14-6 Wilson [39].
99 Ex 14-6 Wilson [63]; Ex 14-2 Tab 30 CTJH.001.12001.1215_R.
100 Ex 14-6 Wilson [52]; Ex 14-2 Tab 21 CTJH.001.12003.0214_R.
101 Ex 14-2 Tab 322 CTJH.001.03006.0102_R at CTJH.001.03006.0111_R.
102 Ex 14-2 Tab 322 CTJH.001.03006.0102_R at CTJH.001.03006.0111_R.
103 Ex 14-6 Wilson [64]; Ex 14-2 Tab 31 CTJH.001.03003.0093_R.
104 Ex 14-2 Tab 57 CTJH.402.05001.0289_R.
5. NESTOR ACQUITTED OF CRIMINAL CHARGES

51. On 22 October 1997, Phelan DCJ acquitted Nestor of the charges against him after conducting a fresh trial. Phelan DCJ was not persuaded that the Crown had established ABA’s allegations beyond a reasonable doubt. His Honour found a number of problems with the reliability of ABA’s evidence, including as to the timing of events, inconsistencies in evidence, as well as evidence that ABA had seen ghosts. In this regard, Phelan DCJ considered that whilst he did not wish to belittle ABA, ‘it does seem to remain a possibility that reality and imagination in his mind, may at times merge.’

52. However, Phelan J commented that:

‘There were two other aspects of the evidence that deserve comment – they relate to the appellant sleeping on the same mattresses as the two boys. This, the Crown submits, was imprudent. There is merit in this submission. But inappropriate conduct does not prove that a criminal offence took place. The dictates of prudence should have been clear to the appellant in his priestly position…’ (emphasis added)

53. Following this judgment Bishop Wilson considered that Phelan DCJ’s comments (above), as well as Nestor’s admission that he had slept on the same mattresses as ABA and his brother, confirmed Bishop Wilson’s view that Nestor’s conduct was unacceptable. Bishop Wilson considered that there was a real question about whether he could as a matter of conscience allow Nestor to return to ministry, although he had been acquitted. The complaints about Nestor that had been made following Nestor’s conviction, evidencing behaviour consistent with or of a similar character to the admission, supported this view.

105 Ex 14-2 Tab 20 CTJH.001.12001.0999_R.
106 Ex 14-2 Tab 20 CTJH.001.12001.0999_R at CTJH.001.12001.1010_R.
107 Ex 14-2 Tab 20 CTJH.001.12001.0999_R at CTJH.001.12001.1005_R.
108 Ex 14-2 Tab 20 CTJH.001.12001.0999_R at CTJH.001.12001.1008_R to .1009_R.
109 Ex 14-6 Wilson [51]; Wilson T7977: 18-25.
110 Ex 14-6 Wilson [51]; Wilson T7868: 19-24; T7977: 18-25.
111 Ex 14-6 Wilson [51]; Wilson T7868: 19-24.
considered that a formal assessment process under *Towards Healing* should commence to
determine Nestor’s suitability for future appointment.\(^{112}\)

54. Both Bishop Wilson’s letter to Nestor informing him of the assessment process\(^{113}\) and his
appointment letters to the assessors\(^{114}\) state that the assessment procedure would fulfil, in
part, the function of a ‘preliminary investigation’ under CIC83 c 1717.\(^ {115}\) It was thus
contemplated that the *Towards Healing* and canon law processes would run together.\(^ {116}\)

55. Bishop Wilson considered the results of the *Towards Healing* assessment could be used to show
that there was ‘sufficient evidence’ of a case against Nestor, a prerequisite requirement under
canon law to commencing any penal proceedings to dismiss Nestor from the Church.\(^ {117}\)
Archbishop Wilson gave evidence that in his view, evidence obtained from an investigation
conducted using the civil standard of proof (as the assessment process was) satisfied the
requirement in CIC83 c 1718 of ‘sufficient evidence’.\(^ {118}\)

56. On 7 November 1997, Bishop Wilson issued a media statement advising that an assessment
process would soon begin and Nestor was to remain on administrative leave until that process
was complete.\(^ {119}\) On 8 January 1998, Bishop Wilson appointed Elizabeth Hannan (Hannan) and
Howard Murray (Murray) as assessors to be responsible for the assessment process, as
required under *Towards Healing*.\(^ {120}\) Archbishop Wilson gave evidence that Hannan and
Murray were recommended by the PSO.\(^ {121}\) Archbishop Wilson could not recall why there was
a delay in appointing the assessors.\(^ {122}\)

\(^{112}\) Ex 14-2 Tab 22 CTJH.001.12001.1247 and Wilson T7868: 37-7869: 20.

\(^{113}\) Ex 14-2 Tab 32 CTJH.001.12001.1014_R, Tab 52 CTJH.001.12001.1075_R; Wilson T7878: 22-38.

\(^{114}\) Ex 14-2 Tab 32 CTJH.001.12001.1017_R, Tab 34 CTJH.001.12001.1018_R.

\(^{115}\) Ex -6 Wilson [66]; Wilson T7878: 22-47; Ex 14-3 Tab 17 VATC.0002.001.0014.


\(^{117}\) Wilson T7879: 27-37; Wilson T7905: 34-47.

\(^{118}\) Wilson T7905: 34-47.

\(^{119}\) Ex 14-6 Wilson [53]; Ex 14-2 Tab 22 CTJH.001.12001.1247 Tab 23 CTJH.001.12003.0230.

\(^{120}\) Ex 14-6 Wilson [69]; Ex-2 Tab 33 CTJH.001.12001.1017 and Tab 34 CTJH.001.12001.1018. Protocol 6.1 of
Towards Healing: Ex 14-3 Tab 21 CTJH.0001.001.0104.

\(^{121}\) Wilson T7885: 31-36.

\(^{122}\) Wilson T7878: 16-20.
57. On 15 November 1997, following Nestor’s acquittal, Bishop Wilson personally requested that Nestor stand aside ‘voluntarily’, without issuing a formal canonical order or decree, which Nestor initially agreed to. When a priest is ordained he promises obedience to his bishop. Bishop Wilson considered that based on this canonical requirement of obedience he had authority to request that Nestor stand down, and that in any event, under canon law, issuing orders and decrees were a last resort.

58. Also on 15 November 1997, Nestor requested an *exeat* from the Diocese of Wollongong so that he could work as a priest in another diocese. As Nestor was incardinated into the Diocese, he was ‘hinged’, in effect, to that diocese. He needed permission from Bishop Wilson before he could move to another diocese. Bishop Wilson refused this request. Archbishop Wilson explained that if he allowed Nestor to change diocese, then management or otherwise of the Nestor matter would become someone else’s problem, and that could be, for some, a ‘big temptation’.

59. On 22 January 1998, Bishop Wilson discovered that Nestor had breached his personal request on 18 January 1998 when he celebrated mass and preached the homily at St Thomas More.

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123 Ex 14-6 Wilson [56], [71]; Wilson T7875: 19-29; T7873: 5-23; Ex 14-2 Tab 25 CTJH.001.12001.1013_R.
124 Wilson T7875: 19-39; Ex 14-3 Tab 4 VATC.0002.001.0026, CIC83, which c 273 states: ‘Clerics are bound by a special obligation to show reverence and obedience to the Supreme Pontiff and their own ordinary.’
125 Ex-6 Wilson [71]; Wilson T7879: 19-39.
126 Ex 14-6 Wilson [56]; Wilson T7869: 45-T7870: 8.
127 Wilson T7870: 10-25; CIC83 c 265.
128 See Ex-3 Tab 4 VATC.0002.001.0026, CIC83 c 283 §1, which states that: ‘Even if clerics do not have a residential office, they nevertheless are not to be absent from their diocese for a notable period of time, to be determined by particular law, without at least the presumed permission of their proper ordinary.’ See also CIC83 c 27; see Wilson T7870: 10-25.
129 Ex 14-6 Wilson [56]; Ex 14-2 Tab 32 CTJH.001.12001.1014_R.
130 Wilson T7874: 8-20.
Church, Ruse. Bishop Wilson then issued to Nestor a formal decree under CIC83 c 273 that:

‘[Nestor was] to cease functioning publicly as a priest in any place until I give you permission to do so. ... any disregard for the instructions of this decree will cause me to initiate the process to suspend you formally from the sacred ministry.’

60. Nestor considered this decree to be void, and on 27 January 1998 Bishop Wilson was informed that Nestor had again celebrated mass at St Thomas More Church. Bishop Wilson responded by writing to Nestor requesting that he comply with his decree of 22 January 1998. On 22 January 1998, Bishop Wilson also wrote to Father Vaughan, the parish priest at St Thomas More Church, requesting that Father Vaughan not allow Nestor to celebrate mass publicly at his parish again.

61. Father Vaughan, however, did not read this letter until after Nestor had again celebrated mass at his parish on 25 January 1998. After reading the letter, Father Vaughan did not invite Nestor to celebrate mass publicly at his parish again.

62. Father Vaughan gave evidence that, upon reflection, and a better understanding of child sexual abuse, even though Nestor had been acquitted of criminal charges, it may be necessary for the Church to conduct its own investigations into allegations of child sexual abuse to determine whether a person poses a risk to children. Further, by inviting Nestor to celebrate mass at his parish, he did not adequately consider the feelings of ABA and his family. Father Vaughan
indicated that in light of this, in retrospect, he thinks he would not have invited Nestor to say mass without the permission of Bishop Wilson.\textsuperscript{141}

63. On 29 March 1998, Father Vaughan contacted Bishop Wilson to let him know of his intention to invite Nestor to concelebrate mass on Holy Thursday in his parish.\textsuperscript{142} Bishop Wilson responded by urging Father Vaughan not to do this.\textsuperscript{143} Father Vaughan complied with this request.\textsuperscript{144}

\textit{Advice sought}

64. Whilst Bishop Wilson had decided that Nestor should be assessed under \textit{Towards Healing} following his acquittal and before being allowed to undertake public ministry, he wanted comfort that this approach was correct.\textsuperscript{145} Archbishop Wilson gave evidence that at the time there was confusion as to what processes applied in the circumstances.\textsuperscript{146}

65. Accordingly, Bishop Wilson sought advice from several sources as follows:

a. On 27 January 1998, he contacted Dr James Provost, Head of Canon Law at the Catholic University of America, for advice on the approach that should be taken under canon law.\textsuperscript{147} Dr Provost replied stating, amongst other things, that Bishop Wilson’s procedure (including issuing the 22 January 1998 decree, and commencing an assessment process under \textit{Towards Healing}) was correct and in keeping with canon law and good pastoral practice.\textsuperscript{148}

b. On 28 January 1998, Bishop Wilson wrote to Cardinal Ratzinger, then the Prefect of the CDF, to ask what procedures applied under canon law to the Nestor matter, particularly,
whether the procedures in the 1962 Instruction applied. Bishop Wilson sought this advice because at the time there was confusion in the Church about whether the procedure set out in the 1962 Instruction applied in cases of alleged sexual assault against a minor. There was also some confusion as to whether the 1962 Instruction applied to sexual misconduct outside the context of the sacrament of confession. The CDF responded on 28 February 1998 confirming that the 1962 Instruction applied to the Nestor matter.

c. On 10 March 1998, Bishop Wilson wrote to Cardinal Castrillon Hoyos, then the Prefect of the CFC, requesting guidance in dealing with the Nestor case, and followed this upon 23 June 1998, having not yet heard back from the CFC. Bishop Wilson sought this advice in part because of the lack of certainty at the time as to which congregation had jurisdiction over cases of alleged sexual assault against a minor and to confirm what procedures under canon law applied. On 15 July 1998, the CFC eventually replied by referring Bishop Wilson to the provisions of CIC83 and warning that refuge could not be sought in ‘particular norms’ in conflict with the code, which Wilson understood to be a reference to Towards Healing. Bishop Wilson also understood this reply as the CFC asserting their jurisdiction in the area of sexual assault against minors.

d. On 25 June 1998, Father Bob McGuckin, the then Vicar General of Parramatta, advised Bishop Wilson that recourse from an administrative decree does not suspend the decree,

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149 Ex 14-6 Wilson [75]; Ex 14-2 Tab 39 CTJH.001.12001.0384.
150 Ex 14-6 Wilson [76]-[77]; Wilson T7888: 25-34; T7889: 10-24.
151 Wilson T7897: 7-12.
152 Ex 14-6 Wilson [81]; Ex 14-2 Tab 42 CTJH.001.12003.0178.
153 Ex 14-6 Wilson [84]; Ex 14-2 Tab 45 CTJH.001.12001.1026.
154 Ex 14-6 at [107]; Ex 14-2 Tab 61 CTJH.001.12001.1043
157 Wilson T7898: 36-42.
like it would if the decree were penal in nature.\textsuperscript{158} This was relevant for Bishop Wilson to know in case Nestor sought recourse against Bishop Wilson’s decree, as Nestor later did.

\textit{Further complaints and updates from assessors}

66. During the period when Bishop Wilson’s decree dated 22 January 1998 was in force, three further complaints against Nestor were made.

67. First, on 10 February 1998, \textit{Towards Healing} assessor, Murray, told Bishop Wilson that there was a further complaint made about Nestor, although it later became clear that the complainant did not want to participate in the assessment process.\textsuperscript{159} This complaint also concerned Nestor’s conduct at camps, including asking young boys to ‘clean their penises’ and watching them do so.\textsuperscript{160} Then, on 12 April 1998, Bishop Wilson was informed by Murray of the second and third complaints, namely, from ABH about inappropriate comments and touching of a sexual nature,\textsuperscript{161} and Janet Morrisey, a former teacher at a school where Nestor had taught, about inappropriate comments to boys whilst teaching.\textsuperscript{162}

68. Throughout the assessment period, Murray and Hannan kept Bishop Wilson up to date with the assessment process and how it was going.\textsuperscript{163}

\textit{Towards Healing assessment report}

69. On 16 May 1998, Hannan and Murray provided their assessment report to Bishop Wilson.\textsuperscript{164}

70. In the methodology to the report, they advised that they adopted the civil standard of proof for the assessment, that is, on a balance of probabilities.\textsuperscript{165} The report made findings as to

\textsuperscript{158} Ex 14-6 Wilson [108]; Ex 14-2 Tab 63 CTJH.001.12003.0155.

\textsuperscript{159} Ex 14-6 Wilson [79]; Ex 14-2 Tab 322 CTJH.001.03006.0102_R at CTJH.001.03006.0104_R.

\textsuperscript{160} Ex 14-2 Tab 322 CTJH.001.03006.0102_R at CTJH.001.03006.0104_R.

\textsuperscript{161} Ex 14-2 Tab 322 CTJH.001.03006.0102_R at CTJH.001.03006.0106_R.

\textsuperscript{162} Ex 14-6 Wilson [89]; Ex 14-2 Tab 48, CTJH.001.12001.1030_R; Ex 14-2 Tab 322 CTJH.001.03006.0102_R at CTJH.001.03006.0105_R.

\textsuperscript{163} Ex 14-2 Tab 44 and 48; Wilson T7902: 25-28.

\textsuperscript{164} Ex 14-6 Wilson [102]; Ex 14-2 Tab 57 CTJH.402.05001.0289_R.

\textsuperscript{165} Ex 14-6 Wilson [102]; Ex 14-2 Tab 57 CTJH.402.05001.0289_R at CTJH.402.05001.0290_R.
which complaints against Nestor were, in their view, sustained, and then made recommendations, including, relevantly, that:

‘Before Fr Nestor be allowed to engage in any public ministry, he be subjected to an appraisal as to his fitness to do so such as that offered through the Church’s Encompass program.’

71. The Encompass Australasia program was the Church’s sexual counselling program. Many of the programs were run by trained psychologists and psychiatrists.

72. Hannan and Murray did not interview Nestor before the completion of their report. They stated in their report that Nestor was afforded the opportunity to be interviewed, but that after consultation with his legal advisor, he did not take this up. Hannan and Murray considered that it was agreed between them and Nestor’s legal advisor that an interview would be of little utility given that Nestor had denied all the allegations made against him.

73. After receipt of the report, Bishop Wilson sought advice on it from the NSW Professional Standards Resource Group (PSRG), an advisory body in relation to the administration of Towards Healing. The PSRG advised Bishop Wilson:

a. in the light of the available evidence of Nestor’s continuing and seriously imprudent and ambiguous behaviour, significantly at variance with any reasonable understanding of the obligations of his role, there were serious grounds for concern about his suitability for pastoral ministry

b. the Bishop would require reassurance that Nestor was a fit and proper person suitable to be reappointed so that he could be confident that in making such a reappointment

166 See conclusions as to findings at Ex 14-2 Tab 57 CTJH.402.05001.0289_R at CTJH.402.05001.0298_R.

167 Ex 14-2 Tab 57 CTJH.402.05001.0289_R at CTJH.402.05001.0299_R.

168 See generally Wilson T7907: 35-T7908: 16 and particularly T7908: 8-16.

169 Ex 14-2 Tab 57 CTJH.402.05001.0289_R at CTJH.402.05001.0296_R.

170 Ex 14-6 Wilson [104]; See Ex 14-3 Tab 21 CTJH.0001.001.0104 at CT JH.0001.001.0116, where protocol 3.2.2 states that:

‘The Resource Group shall act as adviser to all Church bodies in the province in matters concerning professional standards, both in general and in relation to specific cases.’

171 Ex 14-6 Wilson [109]-[110]; Ex 14-2 Tab 66 CTJH.001.12001.1046.
was not thereby placing at risk any member of the community that he wished Nestor to serve.

74. The PSRG therefore recommended that Nestor should be requested as a precondition to any further appointment to undergo a full appraisal by Encompass Australasia as the means of providing that reassurance.\textsuperscript{172}

\textbf{7 August 1998 decrees}

75. Following receipt of the PSRG’s advice, Bishop Wilson issued two decrees to Nestor on 7 August 1998 stating, relevantly, that Nestor was:

a. required to undergo a full appraisal by Encompass Australasia as a prerequisite to any further ecclesiastical appointment (first 7 August 1998 decree)\textsuperscript{173}

b. restricted from celebrating the liturgy publicly and that this restriction applied to all places within and without the Diocese and would continue until it was abrogated by a decree of the diocesan bishop of Wollongong (second 7 August 1998 decree).\textsuperscript{174}

76. Liturgy is the worship life of the Church.\textsuperscript{175} As such, the reference in the second 7 August 1998 decree to ‘celebrating the liturgy publicly’ can be understood as referring to all the public rites, ceremonies, prayers and sacraments of the Church.\textsuperscript{176}

\textsuperscript{172} Ex 14-2 Tab 66 CTJH.001.12001.1046 at CTJH.001.12001.1048.

\textsuperscript{173} Tab 72 CTJH.001.12001.1054_R.

\textsuperscript{174} Tab 73 CTJH.001.12001.1058.

\textsuperscript{175} Wilson T7912:2-10.

\textsuperscript{176} Wilson T7912:12-14.
77. Archbishop Wilson gave evidence that he had authority under CIC83 c 381 §1\textsuperscript{177} to issue the 7 August 1998 decrees because he had immediate and proper power for the administration of the Diocese, particularly in relation to the life of the clergy.\textsuperscript{178}

78. Further, Archbishop Wilson gave evidence that he considered that the second 7 August 1998 decree was required to make sure that priests in the Diocese would not let Nestor exercise public ministry.\textsuperscript{179} When issuing these decrees, Bishop Wilson considered they were administrative in nature, not penal.\textsuperscript{180}

79. Nestor refused to submit to an assessment by Encompass Australasia.\textsuperscript{181}

**Enforcing the second 7 August 1998 decree**

80. In September 1998 Nestor breached the second 7 August 1998 decree by practising public ministry in the parish of Unanderra.\textsuperscript{182} When this was brought to Bishop Wilson’s attention, he wrote to both Father Mark O’Keefe, the parish priest of Unanderra, and Nestor advising them that this was in breach of Bishop Wilson’s decree and that it should not happen again.\textsuperscript{183} Bishop Wilson also requested that Father O’Keefe read, at the upcoming weekend masses, a pastoral letter explaining that Nestor was not allowed to practice public ministry, and that his celebration of mass in the parish of Unanderra was against Bishop Wilson’s instructions.\textsuperscript{184} Bishop Wilson followed up this request on 7 October 1998.\textsuperscript{185}

\textsuperscript{177} Ex-4 Tab 7 VATC.0002.001.0033. CIC83 c 381 §1 states:

‘A diocesan bishop in the diocese entrusted to him has all ordinary, proper, and immediate power which is required for the exercise of his pastoral function except for cases which the law or a decree of the Supreme Pontiff reserves to the supreme authority or to another ecclesiastical authority.’

\textsuperscript{178} Wilson T7910: 34-45 and T7913: 4-22; and see Tab 73 CTJH.001.12001.1058 reference to power under CIC83 c 835 §1.

\textsuperscript{179} Wilson T7911: 20-31.

\textsuperscript{180} Wilson T7919: 32-34.

\textsuperscript{181} Ex 14-6 Wilson [185].

\textsuperscript{182} Ex 14-6 Wilson [119]; Ex 14-2 Tab 76 CTJH.001.12001.1198.

\textsuperscript{183} Ex 14-6 Wilson [119]; Ex 14-2 Tab 76 CTJH.001.12001.1198, Tab 78 CTJH.001.12003.0137_R, Tab 79 CTJH.001.12001.1086_R.

\textsuperscript{184} Ex 14-2 Tab 76 CTJH.001.12001.1198 and enclosed letter at Ex 14-2 Tab 75 CTJH.001.03005.0071.

\textsuperscript{185} Ex 14-2 Tab 81 CTJH.001.03005.0072.
81. Father O'Keefe gave evidence that in September 1998 he was not aware of the second 7 August 1998 decree. The 7 August 1998 decrees were issued to Nestor. It is uncertain what steps were taken by Bishop Wilson to notify parish priests within the Diocese about the second 7 August 1998 decree. In any event, however, Father O'Keefe was aware of Bishop Wilson's media statement dated 7 November 1997 advising that Nestor would remain on administrative leave until an assessment under *Towards Healing* was complete. Father O'Keefe accepted that nothing had changed since that media release which had lead him to believe that Nestor could now celebrate mass.

82. Further, Father O'Keefe did not read the pastoral letter out at the weekend masses as requested, although he did bring the letter to the attention of those present. In accordance with Bishop Wilson's instructions, Father O'Keefe did not permit Nestor to celebrate mass at his parish again.

83. Prior to Father O'Keefe giving consent for Nestor to celebrate mass publicly at his parish, and after Nestor had been acquitted of criminal charges, Father O'Keefe had written a letter to Bishop Wilson in support of Nestor. Father O'Keefe, amongst other things, commented that:

> 'While I would understand your hesitation to restore John to a parish appointment, at least for the present, I must admit to being greatly surprised that you have not, as yet, restored John's faculties to celebrate or concelebrate public Masses. While I can understand a need for a period of assessment in terms of John's parish ministry, I must admit to bewilderment that he has to continue in this unfortunate state of ministerial limbo. After the painfully slow process of demonstrating his innocence, John now awaits the justice of being welcomed back by the clergy and people of the diocese.'

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186 O'Keefe T8031: 38-8032:5. See also Ex 14-12 O'Keefe [28].
187 Cf Wilson T7965:12-23.
188 Ex 14-12 O'Keefe [22].
189 O'Keefe T8029: 35-T8031:5.
190 O'Keefe T8034: 30-T8035:5.
191 O'Keefe T8035: 16-37.
192 Ex 14-2 Tab 24 CTJH.001.12001.1219.
84. Father O'Keefe accepted that his support for Nestor in this letter was motivated by a belief that in part Bishop Wilson's treatment of Nestor had been unjust, since, following the acquittal, there was still no resolution. Father O'Keefe also placed weight on the acquittal being a positive thing for the Church and for Nestor. Subsequently, in around February 2001, Father O'Keefe wrote a letter to the Illawarra Mercury, which together with a sermon he had given earlier, expressed support for Nestor and criticism of Bishop Wilson. Father O'Keefe gave evidence that he did these things because he felt at the time that Nestor's recourse to the CFC had decided the issue and humiliated Bishop Wilson.

85. Father O'Keefe gave evidence that he now understands that despite no criminal conviction, a person may still not be appropriate to practice public ministry, having regard to the risk of child sexual abuse. Further, Father O'Keefe gave evidence that he was not aware of all relevant information Bishop Wilson had in regard to Nestor, for example, the further complaints made about Nestor following his acquittal. He explained that had he known this information he would probably not have written the letters and given the homilies that he did about the Nestor matter, nor would he have arranged for Nestor to say mass at his parish. Father O'Keefe conceded that Bishop Wilson had a right to appeal to the Signatura.

Available Findings

5. Bishop Wilson's request to Nestor to remain on administrative leave following his acquittal was a justified act to protect children from possible sexual abuse by Nestor as a cleric.

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193 O'Keefe T8035: 39-8036: 44.
194 O'Keefe T8026: 18-26; T8027: 2-22; T8028: 10-33.
196 O'Keefe T8038: 14-45.
197 See O'Keefe T8026:44-8027:2; T8041: 20-36; T8042: 42-8043:41.
198 O'Keefe T8043: 12-27; O'Keefe T8036: 1-5.
199 O'Keefe T8036: 1-5; and see Ex 14-12 O'Keefe [25].
200 O'Keefe T8038: 47-T8039: 5.
6. Father Vaughan and Father O’Keefe’s invitations to Nestor to celebrate mass publicly were undermining of Bishop Wilson’s efforts to protect children from possible sexual abuse by Nestor as a cleric.

7. Bishop Wilson’s 7 August 1998 decrees were justified acts by Bishop Wilson to protect children from possible sexual abuse by Nestor as a cleric.

6. RECURSE TO THE CONGREGATION FOR THE CLERGY

Nestor’s application to the CFC

86. On 4 October 1998, Nestor applied to the CFC to have at least Bishop Wilson’s first decree dated 7 August 1998 set aside.\(^{201}\) It was not clear whether Nestor intended a challenge to the second decree in his recourse to the CFC because he did not specifically mention it.\(^{202}\) However, as will be seen, the CFC’s decision in effect abrogated the second decree.\(^{203}\) For present purposes Nestor’s recourse to the CFC can therefore be taken to include a challenge to both decrees.

87. Nestor informed Bishop Wilson of his recourse to the CFC,\(^{204}\) but neither Nestor nor the CFC provided Bishop Wilson with information identifying in detail the case against Bishop Wilson.\(^{205}\) On 12 December 1998, the CFC requested that Bishop Wilson send it ‘any input’ that Bishop Wilson had about the matter,\(^{206}\) which he sent on 31 March 1999.\(^{207}\) His input was a brief summary of the Nestor case, including the processes that he had undertaken. Bishop Wilson advised that he had sought, by his 7 August 1998 decrees, to engage in an administrative and not a penal process, but he did not mention that he had been advised by the CDF that the 1962 Instruction applied and that the CDF had exclusive jurisdiction in relation

\(^{201}\) Ex 14-8 EXH.014.008.0001_R.

\(^{202}\) Ex 14-8 EXH.014.008.0001_R at EXH.014.008.0004_R.

\(^{203}\) Ex 14-2 Tab 130 CTJH.001.12001.0388 at CTJH.001.12001.0390.

\(^{204}\) Ex 14-6 Wilson [130] and [132]; Wilson T7918: 47-T7919: 5.

\(^{205}\) Ex 14-6 Wilson [130]; Wilson T7917: 20-24.

\(^{206}\) Ex 14-6 Wilson [132]; Ex 14-2 Tab 84 CTJH.001.12001.1090.

\(^{207}\) Ex 14-6 Wilson [134]; Ex 14-2 Tab 86 CTJH.402.05001.0323; acta provided same day Ex 14-2 Tab 85 CTJH.001.12001.0993.
to the matter. Archbishop Wilson gave evidence, however, that he mentioned to the Secretary of the CFC, Archbishop Scaba Ternyak, that the CDF had jurisdiction.

88. Archbishop Wilson gave evidence that he understood that the CFC had a tendency to be supportive of priests, as the CFC is responsible for the care of the clergy. He explained that there was a trend at the time that when bishops, especially in the United States, were trying to deal with cases involving sexual abuse the CFC would make ‘things difficult for them’; the CFC would tend to support the priests, giving instructions to the bishops that the priests be allowed back into ministry. Bishop Wilson was therefore not surprised to learn, informally, from the Secretary of the CFC, Archbishop Scaba Ternyak, that the CFC decision was likely to be made in Nestor’s favour.

Negotiation processes

89. During the CFC process, the CFC ‘strongly urged’ Bishop Wilson to seek a pastoral resolution of the matter with Nestor. This was attempted unsuccessfully by Bishop Wilson; he gave evidence that Nestor made it a precondition to any discussions with Bishop Wilson that the decrees be withdrawn. There was ultimately a short meeting between Bishop Wilson and Nestor in which they agreed that they could not reach a pastoral resolution and that the CFC should be so informed.

90. The approach of the CFC can be explained by the preference in canon law for pastoral solutions over formal decrees or penalties.

208 Ex 14-2 Tab 86 CTJH.402.05001.0323.
210 Wilson T7917: 26-47; Ex 14-6 Wilson [30].
211 Wilson T7931: 35-7932: 36; Ex 14-6 Wilson [147], [157].
212 Ex 14-2 Tab 87 CTJH.001.12001.0778; Wilson T7920: 1-23.
213 Wilson T7920: 25-7921: 6; Ex 14-2 Tab 101 CTJH.001.12001.0759_R, Tab 102 CTJH.001.12001.0757_R, Tab 103 CTJH.001.12001.0756.
214 Wilson T7920: 1-23; see also CIC83 cc 50, 273, 274 §2, 275 §1 and 1341, which refer to pastoral solutions and cooperation; Wilson T7883:44-7884:5.
91. On 30 November 2000, Bishop Wilson was appointed Coadjutor Archbishop of Adelaide. Upon this appointment he acted as the administrator of the Diocese of Wollongong until he began ministry in Adelaide in February 2001.

The CFC Decree

92. On 21 December 2000, more than two years after the date of Nestor’s application for recourse, the CFC decreed that Nestor’s recourse against the 7 August 1998 decrees was upheld. The CFC decreed, relevantly, that, under CIC83 c 128:

‘Nestor is to be restored immediately to the full exercise of his priestly ministry in the Diocese of Woolongong (sic)’. (the CFC decree)

93. The CFC held that the Towards Healing assessment and Bishop Wilson’s subsequent decree had failed to comply with the proper canon law processes. The CFC decree hinged on the CFC’s finding that Bishop Wilson’s decree was penal in nature. Penal decrees can only be enacted after a ‘preliminary investigation’ in accordance with CIC83 cc 1717 – 1719 and after starting a penal process under CIC83 c 1720. The CFC ruled that the Towards Healing assessment process had not complied with the procedural requirements for a preliminary investigation under canon law, because, amongst other things:

a. Bishop Wilson did not appoint a single delegate to act on his behalf, as envisaged by CIC83 c 1717§1

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216 Ex 14-6 Wilson [12].
217 Ex 14-2 Tab 129 CTJH.001.12001.0387; Tab 130 CTJH.001.12001.0388.
218 CIC83 c 128 states:

‘Whoever illegitimately inflicts damage upon someone by a juridical act or by any other act placed with malice or negligence is obliged to repair the damage inflicted.’

219 Ex 14-2 Tab 130 CTJH.001.12001.0388; see also CIC83 c 221 §3, which states that:

‘The Christian faithful have the right not to be punished with canonical penalties except according to the norm of law’, quoted in the CFC’s decision.

221 Wilson T7926: 45- 7928: 31; Ex 14-2 Tab 130 CTJH.001.12001.0388.
b. there was no indication that the purposes of a ‘preliminary investigation’ outlined in CIC83 c 1718 were clearly arrived at

c. the Acts of the case did not include a decree of the closure of the ‘preliminary investigation’ as envisaged by CIC83 c 1719

d. there was no evidence that the investigative materials were kept in the secret archive of the Diocese, as required under CIC83 cc 1719 and 489§1

e. there was no written, sworn testimony from the complainants and the complaints were not verified by recognisable legal means

f. Nestor requested, and was not afforded, the opportunity of a canonical process to prove his innocence.

94. Further, the CFC considered that the standard of proof adopted by the Towards Healing assessors was not consistent with a preliminary investigation under CIC83 c 1717, in particular, that the standards of ‘balance of probabilities’ and ‘unacceptable risk’ were criteria foreign to canon law.

**Consequences of the CFC decree**

95. The CFC decree effectively placed Bishop Wilson, and his successors, Father Jones and Bishop Ingham, in a difficult position because it required Nestor to be restored immediately to the full exercise of his priestly ministry, yet the substantial doubts as to Nestor’s suitability for ministry remained.

96. Archbishop Wilson and Bishop Ingham gave evidence that despite the CFC decree, they felt bound by conscience not to permit Nestor to engage in public ministry.

97. In anticipation that it would be against him, prior to the CFC decision on Nestor’s recourse to it, Bishop Wilson had sought advice about what he might do if the decision from the CFC was

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222 Ex 14-2 Tab 130 CTJH.001.12001.0388 at .0389 to .0390; Wilson T7929: 3-34.
223 See Wilson T7928: 1-10 and 7929: 3-34.
224 Ex 14-6 Wilson [158]; Wilson T7932: 17-36; Ingham T8071: 3-23. See Ex 14-22 Jones at [47].
against him. Bishop Wilson sought this advice from Father Brundage, Bishop Geoffrey Robinson and law firm Makinson d’Apice.225 On 4 January 2001, Father Comensoli (the Chancellor of the Diocese) also sought advice on the Diocese’s obligations under the Commission for Children and Young People Act 1998 (NSW) (CCYP Act), in particular, whether the CCYP Act required the Diocese to ask Nestor to consent to a ‘Working With Children Check’ under Part 7 of that Act.226

98. The CCYP Act was an Act to establish, and provide for the functions of, a Commission (the Commission for Children and Young People (CCYP)) to improve the safety, welfare and wellbeing of all children and young people in NSW. The legislation came into force on 3 July 2000 with the Children Protection (Prohibited Employment) Act 1998 (NSW). The CCYP Act created obligations requiring all employees working with children to undergo a Working with Children Check and prohibited certain people from working with children.

99. Law firm Mackinson d’Apice subsequently advised that the CCYP Act applied and that the Diocese had a duty to carry out relevant screening procedures under the CCYP Act before employing Nestor to undertake any form of public ministry.227 On 3 April 2001, Father Jones, Administrator of the Diocese of Wollongong following the departure of Bishop Wilson to Adelaide in February 2001, sought advice from Professor Parkinson as to whether the Diocese had reporting obligations under the CCYP Act in relation to Nestor.228 He was told that as no disciplinary processes or action had been undertaken notification to the CCYP about Nestor was not required.229 Contrary advice at the time was received from the Commissioner of the CCYP. On 15 March 2001, the Commissioner wrote to Father Jones saying that based on the information in the media it appeared that the Church’s actions against Nestor would constitute

225 See Ex 14-6 Wilson [148], Ex 14-2 Tab 119 CTJH.001.12003.0529, Tab 120 CTJH.001.12003.0536; Wilson T7933: 2-7934: 20; Ex 14-2 Tab 132 CTJH.001.12003.0514; Ex 14-6 Wilson [149], Ex 14-2 Tab 125 CTJH.001.12003.0003.

226 Ex 14-15 Comensoli [34]; Ex 14-2 Tab 136 CTJH.001.12003.0454; Comensoli T8111:24-8112: 32; Ex 14-6 Wilson [161].

227 Ex 14-6 Wilson [170]; Ex 14-2 Tab 146 CTJH.001.12003.0442; Comensoli T8114:10-47.

228 Ex 14-22 Jones [38]; see also Ex 14-15 Comensoli [54].

229 Ex 14-22 Jones [40]; Ex 14-2 Tab 161 CTJH.001.12003.0642.
a relevant completed disciplinary proceeding and accordingly the Diocese would be required to notify the CCYP.  

100. Bishop Wilson also sent the CFC decree to Cardinal Clancy, the Archbishop of Sydney and Archbishop Carroll, the Archbishop of Canberra and Goulburn and the Chair of the ACBC. The ACBC is the permanent national assembly of bishops in Australia. On 15 January 2001, the ACBC sent Bishop Wilson a letter recognising that the CFC decree has implications for dioceses across Australia and that:

‘Clearly it is not easy to offer any advice as it is difficult to know how to proceed. If conscience and perhaps civil law are in conflict with the decree, you deserve the support of your brother bishops.’

Petitioning the CFC to reconsider and revoke its decree

101. Bishop Wilson considered that it was necessary to appeal the CFC decree. The appeal application needed to be made to the Supreme Tribunal of the Apostolic Signatura, which is the highest judicial authority in the Church, other than the Pope. However, before Bishop Wilson could do this, he was required under canon law to request the CFC to review their decree. On 12 January 2001, Bishop Wilson sent a letter petitioning the CFC to revoke or amend the decree on ‘procedural and pastoral grounds’. The grounds were that Nestor’s...
appeal was outside the allowable time limits and that the decree could cause further scandal in the Diocese. The CFC rejected Bishop Wilson’s petition on 19 May 2001.

7. APPEAL TO THE APOSTOLIC SIGNATURA

102. Once the 30 day period for the CFC to reconsider its decree had expired, on 22 February 2001 Father Jones commenced an appeal from the decision of the CFC to the Signatura. Grounds identified in support of the appeal were that:

a. recourse by Nestor to the CFC was made outside the relevant time limits

b. the allegations against Nestor came within the scope of the exclusive jurisdiction of the CDF as reserved to it by the 1962 Instruction and that the CFC accordingly lacked jurisdiction to decide Nestor’s recourse to it

c. Bishop Wilson was never given a copy of the Nestor’s application to the CFC or a summary of the facts of the case.

103. Father Jones released a media statement advising about this appeal on 23 February 2001.

104. The ACBC supported the appeal to the Signatura. Archbishop Carroll as Chair at the ACBC sent a letter to Cardinal Pompedda, the Prefect of the Signatura, stating, amongst other things, that in matters affecting the safety and wellbeing of minors, the Bishop of Wollongong must not be

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237 Scandal refers not just to the effect that conduct has on a particular person, but also to the way in which the community in general (the faithful) can be affected by the conduct: Wilson T7884:7-20.1962.

238 Ex 14-6 Wilson [167]; Ex 14-2 Tab 143 CTJH.001.12001.0391.

239 Ex 14-2 Tab 165 CTJH.001.12001.0671; Jones T8177:22-37.

240 CIC83 c 1735: Ex 14-3 Tab 18 VATC.0002.001.0019. CIC83 c 1735 provides that:

‘If within thirty days after receiving the petition mentioned in can. 1734 the author of the decree communicates a new decree by which he either emends the earlier one or decides that the petition must be rejected, the time limits for making recourse run from the notification of the new decree. If the author makes no decision within the thirty days, however, the time limits run from the thirty-tieth day’.

241 Ex 14-2 Tab 151 CTJH.001.12001.0690, Tab 149 CTJH.001.12001.0689.

242 Ex 14-22 Jones [22], [23]; Ex 14-2 Tab 151 CTJH.001.12001.0690.

243 Ex 14-22 Jones [27]; Ex 14-2 Tab 154 CTJH.001.03006.0277.
placed in a situation where the state is ordering him to do one thing while the Church is ordering him to do the opposite”. The ACBC sent this letter following a request from Father Jones to Archbishop Carroll for his advice. The letter referred to truths that the Australian Bishops had learnt ‘through bitter experience’, in particular, that:

‘the offence [of sexual abuse of minors] cannot be reduced to a sexual sin for which the sacrament of confession is an adequate remedy’

105. This constituted an acknowledgement by the ACBC of a viewpoint obviously still held by some within the Church, and reflected the ACBC’s acceptance that this was no longer a permissible approach to child sexual abuse.

106. Further, the letter stated that the ACBC was ‘perturbed by the statement in the decree of the [CFC] that that criterion of “unacceptable risk” is foreign to canon law and cannot be taken into consideration.’ The ACBC commented further that:

‘Australian law has the concept of “unacceptable risk”, meaning that a person cannot be appointed to an office if this appointment carries with it an unacceptable risk of abuse of minors. ... If the idea of unacceptable risk is “foreign to canon law”, then should the idea be rejected or should the law be changed?’

107. In turn, the ACBC considered that the CFC decree has created ‘a dilemma in law, in conscience and in Church-State relations.’

**Suspension of CFC decree**

108. When Father Jones appealed to the Signatura, he was unsure what effect this appeal had on the status of the CFC decree, in particular, whether it was still in force. To clarify this position, Father Jones asked Cardinal Pompedda whether the appeal to the Signatura would suspend

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244 Ex 14-2 Tab 156 CTJH.301.05001.0003.
245 Jones T8184: 6-16.
246 Ex 14-2 Tab 156 CTJH.301.05001.0003 at CTJH.301.05001.0004.
247 Ex 14-2 Tab 156 CTJH.301.05001.0003 at CTJH.301.05001.0003.
248 Ex 14-2 Tab 156 CTJH.301.05001.0003 at CTJH.301.05001.0004.
249 Ex 14-2 Tab 156 CTJH.301.05001.0003 at CTJH.301.05001.0004.
the decree of the CFC. In a letter dated 28 June 2001, the Signatura replied, effectively advising that the appeal to the Signatura did not suspend the CFC’s decree, but that an application could be made to the Signatura for a suspension.

109. Accordingly, Father Jones made such an application on 24 July 2001, which was opposed by both Nestor and the CFC. The application was granted in part by the Signatura on 22 April 2002. The Signatura suspended that part of the CFC decree which required that Nestor be restored immediately to the full exercise of his priestly ministry in the Diocese of Wollongong, but it did not suspend that part of the decree which required that Nestor be remunerated in accordance with the diocesan norms.

110. Until the suspension was issued by the Signatura, there had been no formal restriction on Nestor’s ability to minister since the CFC decree dated 21 December 2000.

111. On 25 July 2001, Bishop Peter Ingham was installed as the Bishop of Wollongong. Bishop Ingham continued the process of appeal to the Apostolic Signatura with the assistance of his Chancellor, Father Comensoli.

Materials supporting application to Signatura

112. On 26 July 2001, Bishop Ingham appointed Martha Wegan (Wegan), a canon lawyer in Rome, to act as his Procurator-Advocate in the appeal to the Signatura. In this role Wegan

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250 Ex 14-22 Jones [25]; Ex 14-2 Tab 152 CTJH.001.12003.0425.
251 Ex 14-22 Jones [47]; Ex 14-2 Tab 167 CTJH.001.12001.0397; Jones T8176:3-18.
252 Ex 14-22 Jones [51]; Ex 14-2 Tab 173 CTJH.001.12001.0661; Jones T8177:12-20.
253 Tab 179 CTJH.001.03006.0235_T.
254 Ex 14-22 Jones [53]; Ex 14-2 Tab 179 CTJH.001.03006.0235_T (translated from the original in Latin); Ingham T8051:19.
255 Ex 14-2 Tab 179 CTJH.001.03006.0235_T at CTJH.001.03006.0236_T.
256 Ingham T8049:11-20.
257 Ex 14-22 Jones [52]; Ex 14-13 Ingham [9].
258 Ex 14-22 Jones [50]; Ex 14-13 Ingham [23]; Ex 14-2 Tab 174 CTJH.001.12001.0653; Ingham T8056:30-37-43; and see Ex 14-15 Comensoli [66].
submitted a formal Memoriale on behalf of the Diocese to the Signatura on 27 March 2002 and on 24 May 2004.\textsuperscript{259} Grounds for the appeal in the Memoriale included that the CFC:\textsuperscript{260}

a. erred in characterising the decree as a penal measure\textsuperscript{261}

b. erred in concluding that standards of proof less than beyond reasonable doubt (including `unacceptable risk`) were alien to canon law\textsuperscript{262}

c. was not competent to make its decree as, in accordance with 1962 Instruction, jurisdiction over matters concerning sexual assault of a minor is reserved to the CDF.\textsuperscript{263}

113. On 5 November 2003, the Signatura notified Bishop Ingham that the CFC had submitted its Memoriale and that the case was now with the Promoter of Justice\textsuperscript{264} to make submissions.\textsuperscript{265} The Promoter of Justice is meant to make sure that procedurally everything is done correctly; he or she is able to make judgements about the proper nature of everything that has taken place.\textsuperscript{266} On 20 January 2004, the Promoter of Justice provided his submissions to the Signatura.\textsuperscript{267} Father Comensoli was advised by Wegan on 10 November 2005 that these submissions were in the Diocese’s favour.\textsuperscript{268}

\begin{itemize}
\item \textsuperscript{259} Ex 14-13 Ingham [26]; Ex 14-2 Tab 178 CTJH.001.02001.0170_T_R; Ingham T8057:15-19; Ex 14-2 Tab 225 CTJH.001.12001.0450_T_R; Ingham T8062:31-40.
\item \textsuperscript{260} Ingham T8057: 21-8058:40.
\item \textsuperscript{261} Ex 14-2 Tab 178 CTJH.001.02001.0170_T_R at CTJH.001.02001.0180_T_R.
\item \textsuperscript{262} Ex 14-2 Tab 178 CTJH.001.02001.0170_T_R at CTJH.001.02001.0181_T_R.
\item \textsuperscript{263} Ex 14-2 Tab 178 CTJH.001.02001.0170_T_R at CTJH.001.02001.0182_T_R.
\item \textsuperscript{264} CIC83 c 1430 states that:
\begin{quote}
`A promoter of justice is to be appointed in a diocese for contentious cases which can endanger the public good and for penal cases; the promoter of justice is bound by office to provide for the public good.'
\end{quote}
\item \textsuperscript{265} Ex 14-13 Ingham [40]; Ex 14-2 Tab 199 CTJH.001.12003.0455; Ingham T8059: 39-47.
\item \textsuperscript{266} Wilson T7949: 4-11.
\item \textsuperscript{267} Ex 14-2 Tab 201 CTJH.001.12003.0475_R; Wilson T7950: 26-38; Ingham T8060: 11-29; Ex 14-13 Ingham [44]; Ex 14-15 Comensoli [90].
\item \textsuperscript{268} Ex 14-13 Ingham [60]; Ex 14-2 Tab 242 CTJH.001.12003.0637_R.
\end{itemize}
114. On 18 March 2004, the Signatura decreed that the Nestor matter be admitted, that is, the matter would be dealt with by the Signatura.  

**Delay**

115. The appeal to the Signatura took nearly five and a half years.

116. The appeal was made on 22 February 2001; the Signatura decision was not issued until 19 May 2006, as explained below. During this period Bishop Ingham sent three letters to the Signatura asking when judgment might be expected or inquiring about the reasons for the delay in receiving judgment. In the last letter, sent on 17 May 2005, Bishop Ingham noted that the lengthy delay was having an *adverse impact on our diocese and the priest involved.*

**The Signatura decision**

117. On 18 March 2006, the Signatura upheld the Diocese’s appeal. This was communicated by letter dated 30 March 2006 which was received in the Diocese on 10 April 2006. On 20 July 2006, the Signatura issued its reasons in its Definitive Sentence (the Signatura decision). The Signatura found amongst other things that the CFC, first, was not competent to hear the matter and, second, had erred in holding that Bishop Wilson’s decree was penal in nature.

118. As to the first finding, the Signatura referred in support to relevant provisions of the Apostolic Constitution and the General Ordering of the Roman Curia, and noted that the CDF’s ‘exclusive competence’ in the matter has since the CFC decree been confirmed by the 2001 *Sacramentorum Sanctitatis Tutela.* This finding clarified any confusion that had previously

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269 Ex 14-13 Ingham [52]; Ex 14-2 Tab 216 at CTJH.001.12001.0473_T; T8062: 12-29.

270 Ex 14-15 Comensoli [79]; Ex 14-2 Tab 188 CTJH.001.12003.0462; Ingham T8059:2-22; Ex 14-15 Comensoli [83]; Ex 14-2 Tab 198 CTJH.001.12003.0459; Ingham T8059: 24; Ex 14-13 Ingham [58]; Ex 14-2 Tab 239 CTJH.001.12001.0424, Ingham T8064: 9-36; Ex 14-2 Tab 199 CTJH.001.12003.0455.

271 Ex 14-2 Tab 239 CTJH.001.12001.0424.

272 Ex 14-2 Tab 243 CTJH.001.03006.0007_T; Ingham T8065: 24-44.

273 Ex 14-2 Tab 248 CTJH.001.12001.0360; Ex 14-15 Comensoli [113]; Ex 14-13 Ingham [61].

274 Ex 14-2 Tab 256 CTJH.001.12001.0350 (translated from the original in Latin).

275 Ex 14-2 Tab 256 CTJH.001.12001.0350 at CTJH.001.12001.0353.

276 In particular articles 112 §2 and 121 §2 and 137 §1 of the General Ordering of the Roman Curia of 1992 (cf articles 128 §2 and 137 §1 or the Ordering of 1999): Ex 14-2 Tab 256 CTJH.001.12001.0350 at CTJH.001.12001.0352.
existed about whether the CDF was the competent congregation for these cases – that is, cases involving alleged sexual assault against minors.\textsuperscript{277}

119. As to the second finding, the Signatura held that Bishop Wilson’s decree was in no way a penalty but rather was a ‘non-penal disciplinary decision’, which the Bishop was entitled to make on the basis of a ‘positive and probable doubt’ about Nestor’s suitability for ministry. The Signatura noted that:

‘However, the decision by which, eg, the conferring of an ecclesiastical office by a competent authority is impugned because of the lack of suitability of the candidate or the faculty either to preach or to hear confessions is revoked, respectively with canons 764\textsuperscript{278} and 974§1,\textsuperscript{279} is in no way the inflicting of a penalty, for which is required moral certainty concerning a gravely imputable crime committed, but a non-penal disciplinary decision, which may be imposed because of a positive and probable doubt concerning the suitability of the cleric in the matter concerned.’\textsuperscript{280}

120. This finding is significant as it clarifies, first, that a decree restricting a priest’s use of his faculties is not necessarily penal, and secondly, that the penal standard of proof will not apply to this decision – rather, the standard is whether there is a positive and probable doubt concerning the suitability of the cleric in the matter concerned.

121. However the Signatura stated that it would not decide on the conformity of the Towards Healing assessment procedure with ‘universal law’ (understood to be a reference to canon

\textsuperscript{277} Ex 14-3 Tab 20 IND.0043.001.0068 at IND.0043.001.0069: 2001 Sacramentorum Sanctorum Sanitatis Tutela art 4.1 states that:

‘Reservation to the [CDF] is also extended to a delict against the sixth commandment of the Decalogue committed by a cleric with a minor below the age of eighteen years.’

\textsuperscript{278} CIC83 c 764 states that:

‘Without prejudice to the provisions of Canon 765, priests and deacons, with the at least presumed consent of the rector of a church, have the faculty to preach everywhere, unless this faculty has been restricted or removed by the competent Ordinary, or unless particular law requires express permission.’

\textsuperscript{279} CIC83 c 974 §1 states:

‘The local ordinary and the competent superior are not to revoke the faculty to hear confessions habitually except for a grave cause.’

\textsuperscript{280} Ex 14-2 Tab 256 CTJH.001.12001.0350 at CTJH.001.12001.0352-3; See Wilson T7952: 41-T7953: 19, T7954: 44-T7955: 42.
law), and that if this was warranted, that would be a matter for the Pontifical Council for Legislative Texts. The Signatura also suggested that the procedure adopted by Father Wilson under *Towards Healing* was not a ‘preliminary investigation’ to a penal procedure that was in accordance with CIC 83 c 1717 when they stated:

> ‘even though he had spoken of having set up a preliminary investigation to a penal procedure in accordance with canon 1717, in fact he had used another form of procedure ...’

**Employment outside the Diocese of Wollongong**


123. In the meantime, Nestor on several occasions sought permission to exercise his priestly faculties in dioceses in the United States of America and in various countries in Africa. One occasion that the bishop of the relevant diocese or Nestor wrote to Father Jones or Bishop Ingham to ask whether Nestor had or could have his leave to do so, Father Jones and Bishop Ingham refused. They adopted the view that until Nestor’s position in the diocese in which he was incardinated had been resolved it was not appropriate to allow him to minister publicly elsewhere.

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281 Ex 14-2 Tab 256 CTJH.001.12001.0350 at CTJH.001.12001.0353.
282 Ex 14-2 Tab 256 CTJH.001.12001.0350 at CTJH.001.12001.0352.
283 Ex 14-2 Tab 299 CTJH.001.12001.0258_R; Ex 14-2 Tab 323 CTJH.001.03006.0116_R; Jones T8181: 17-30; cf Ex 14-2 Tab 183 CTJH.001.12001.0594_R.
284 Ex 14-2 Tab 258: OMB.0004.001.0718; see also Ex 14-2 Tab 299 CTJH.001.12001.0258_R; Tab 319 CTJH.001.03006.0031_R; Tab 320 CTJH.001.03006.0034_R.
285 Ex 14-2 Tab 244 CTJH.001.12001.0127_R; Tab 342 CTJH.001.12001.0007_R.
286 See Wilson T8074: 7-8078: 44; Ex 14-2 Tab 160 CTJH.001.12001.0673, Tab 166 CTJH.001.12001.0596, Tab 169 CTJH.001.12001.0665, Tab 182 CTJH.001.12001.0609, Tab 186 CTJH.001.12001.0591, Tab 189 CTJH.001.12001.0588, Tab 190 CTJH.001.12001.0575, Tab 191 CTJH.001.12001.0576, Tab 192 CTJH.001.12001.0573_R, Tab 197 CTJH.001.12001.0551, Tab 200 CTJH.001.12001.0549, Tab 202 CTJH.001.12001.0519, Tab 209 CTJH.001.12001.0564_R, Tab 211 CTJH.001.12001.0509_R, Tab 213 CTJH.001.12001.0502_R, Tab 231 CTJH.001.12001.0444_R, Tab 238 CTJH.001.12001.0435_R, Tab 240 CTJH.001.12001.0412, Tab 241 CTJH.001.12001.0377.
287 Ibid.
124. As explained above, a cleric is incardinated to a particular diocese – he cannot simply change diocese.\(^{288}\) If a cleric wants to move diocese he needs the permission of his bishop.\(^{289}\) A cleric may be granted permission to move to another diocese for a specified period, and this permission can be renewed several times.\(^{290}\) If the cleric is granted permission to permanently change diocese the rights and duties of the cleric are determined by written agreement with the diocesan bishop of the place to which he wishes to move.\(^{291}\) Similarly, a diocesan bishop cannot incardinate a cleric unless he knows by a lawful document that excardination has been granted, and has also obtained from the excardinating bishop, under secrecy if need be, appropriate testimonials concerning the cleric’s life, behaviour and studies.\(^{292}\)

125. These obligations under canon law explain why Nestor sought permission to exercise his faculties in other dioceses, and the bishops in foreign dioceses asked Father Jones or Bishop Ingham whether Nestor had or could have leave to use his faculties in another diocese.

126. Nevertheless, it appears that Nestor may have undertaken public ministry on some occasions whilst he was overseas. Bishop Ingham gave evidence that he recalled in 2002 he was aware that Nestor may have been exercising his priesthood as part of a university chaplaincy,\(^{293}\) and he wrote to Nestor enquiring whether this was the case on 21 May 2002.\(^{294}\) Nestor replied on 24 June 2002 stating that Father Myers, Bishop of Peoria, United States, had given him ‘faculties for his diocese’ and had asked him to live at the University of Illinois.\(^{295}\) However Father Jones had previously written to Bishop Myers on 21 June 2001 stating that Nestor was not able to undertake public ministry,\(^{296}\) and on 6 July 2001 Bishop Myers replied noting, with reference to Towards Healing, that he would not want to do anything adverse to the pastoral

\(^{288}\) Wilson T7870: 10-25; CIC83 c 265.

\(^{289}\) Wilson T7870: 10-25; CIC83 c 283; Ex 14-3 Tab 4 VATC.0002.001.0026.

\(^{290}\) CIC83 c 271 §2.

\(^{291}\) CIC83 c 271 §1.

\(^{292}\) CIC83 c 269 §2.

\(^{293}\) Ingham T8050: 2-34.

\(^{294}\) Ex 14-2 Tab 181 CTJH.001.12001.0618_R.

\(^{295}\) Ex 14-2 Tab 183 CTJH.001.12001.0594_R.

\(^{296}\) Ex 14-2 Tab 166 CTJH.001.12001.0596.
intentions of the bishops. This suggests that Bishop Myers may not have given Nestor ‘faculties’ as Nestor claimed; he was perhaps given some lesser role within the diocese of Peoria.

127. There is also some evidence that Nestor had celebrated public mass at an aged care facility in the parish of Clemton Park upon his return to Australia in 2006. However, similarly, the parish priest was subsequently informed that Nestor was not able to undertake public ministry.

128. There is a suggestion that Nestor may have undertaken secular work as possibly a bus driver, but the evidence is inconclusive in this regard.

Available Findings

8. The Signatura decision leaves some uncertainty as to the status of Towards Healing with regard to whether it (in whole or part) operates in conformity with canon law.

9. The Signatura decision establishes that an investigation under Towards Healing can be a domestic process as a precursor to any canonical processes (for example under CIC83 c 1717).

10. The Signatura decision clarifies that:

(1) a decree restricting a priest’s use of his faculties pending some further process or appraisal is not necessarily penal, and

(2) the penal standard of proof will not apply to a decision to issue such a decree, rather, the standard is whether there is a positive and probable doubt concerning the suitability of the cleric in the matter concerned.

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297 Ex 14-2 Tab 169 CTJH.001.12001.0665.

298 14-13 Ingham [72]; Ex 14-2 Tabs 270 CTJH.001.02001.0299, 274 CTJH.001.12001.0308, 276 CTJH.001.12001.0309, 277 CTJH.001.12001.0312_R, 278 CTJH.001.12001.0314_R; Ingham T8081: 33-8082: 12.

299 Ex 14-2 Tab 71 CTJH.001.12001.1053; Ex 14-9 CTJH.001.12001.1079_R; Ex 14-9 CTJH.001.12001.1085_R; Ex 14-8 DFAT.VATC.007.0209_R; Ex 14-2 Tab 130 CTJH.001.12001.0388; Ex 14-7 DFAT.VATC.007.0191_R; Ex 14-2 Tab 341 CTJH.001.12001.0007_R.
11. The length of time that the appeal to the Signatura took, which was from February 2001 to May 2006:

(1) Had an adverse impact in the Diocese and contributed to uncertainty with regard to Nestor’s status

(2) Resulted in Nestor being abroad for many years where he undertook some public ministry and was a potential risk to children.

12. The refusal by Father Jones and Bishop Ingham to give permission to Nestor to serve other bishops when such permission was requested of them was justified to protect children from possible abuse by Nestor as a cleric.

8. INVESTIGATION UNDER THE OMBUDSMAN ACT

129. From May 1999 the Diocese was required by Part 3A of the Ombudsman Act 1974 (NSW) (the Ombudsman Act) to report allegations or convictions of child sexual abuse to the Ombudsman’s office. There was also an obligation on employers to inform the Commission for Children and Young People of completed disciplinary actions taken against employees.  

130. As stated above, Nestor lived overseas during the period from early 2001 to early 2006. On 18 March 2004, during this period, the Diocese received advice from the Catholic Commission for Employment Relations (CCER) that whilst Nestor was overseas, the Diocese had no obligations under the Ombudsman Act. The CCER advised that these obligations were only enlivened on Nestor’s return to Australia. The CCER is a body that gives advice and, in some matters, has authority to act in employment matters associated with those employed within the life of the Church.

300 Ombudsman Amendment (Child Protection and Community Services) Act 1998 (NSW) s 3 and Schedule 1.

301 Commission for Children and Young People Act 1998 (NSW) s 39.

302 Ex 14-15 Comensoli [89]; Ex 14-2 Tab 217 CTJH.305.01001.0030_R; Comensoli T8118: 6-45; see also Ex 14-15 Comensoli [97]; Ex 14-2 Tab 227 CTJH.001.12003.0644_R; Comensoli T8119: 17-25; Ex 14-15 Comensoli [102]; Ex 14-2 Tab 234 CTJH.001.12001.0438, Tab 235 CTJH.305.01001.0014; Comensoli T8119: 40.

303 Comensoli T8117: 36-45.
131. The Executive Director of the CCER was the ‘head of agency’ for the purposes of the Ombudsman Act from 2000;\textsuperscript{304} the bishop became the head of agency from 1 July 2005.\textsuperscript{305}

132. Nestor’s return to Australia in about March 2006 prompted the then Diocesan Chancellor to write to the Principal Investigator at the NSW Ombudsman Office, on 25 July 2006, seeking clarification and direction as to what steps were to be taken by the Diocese in relation to the allegations against Nestor.\textsuperscript{306} This was followed up by Sister Hanlen when she replaced Father Comensoli as Chancellor in July 2006. On 15 September 2006, Sister Hanlen wrote to the Ombudsman Office, referring to Father Comensoli’s letter dated 25 July 2006 and a conversation between herself and the Ombudsman Office on 31 August 2006, enquiring as to jurisdiction and procedural steps to be taken under the Ombudsman Act.\textsuperscript{307}

133. In September 2006, the Ombudsman decided the allegations against Nestor were reportable and that these allegations should be investigated in accordance with the investigation provisions in the Ombudsman Act;\textsuperscript{308} further, the Ombudsman opted to monitor the Diocese’s investigation under section 25E of the Ombudsman Act.\textsuperscript{309} Sister Hanlen confirmed in writing to the Ombudsman’s office on 22 September 2006 that the Diocese would comply with its obligations under Part 3A of the Ombudsman Act.\textsuperscript{310}

134. In January 2007, the Diocese formally appointed external investigators, Kamira Stacey Consulting, to conduct the investigation under the Ombudsman Act.\textsuperscript{311} Sister Hanlen coordinated and assisted this investigation.\textsuperscript{312} The investigation included contacting and interviewing complainants, putting the allegations which they had investigated to Nestor and giving him the opportunity in writing and in a recorded interview to respond in detail.\textsuperscript{313}

\textsuperscript{304} Ombudsman Amendment (Designated Agencies) Regulation 2000 (NSW) cl 7.
\textsuperscript{305} Ombudsman Regulation 2005 (NSW) cl 6.
\textsuperscript{306} Ex 14-15 Comensoli [123]; Ex 14-16 Hanlen [36]; Ex 14-2 Tab 257 OMB.0004.001.0717.
\textsuperscript{307} Ex 14-16 Hanlen [37]-[38]; Ex 14-2 Tab 262 CTJH.001.12001.0132, Tab 263 CTJH.001.12001.0131; Hanlen T8131:34 -T8132:30.
\textsuperscript{308} Ex 14-16 Hanlen [39]; Ex 14-2 Tab 264 CTJH.002.02003.0025; Hanlen T8132: 38-T8133:38.
\textsuperscript{309} Ex 14-2 Tab 272 CTJH.001.12001.0141; Hanlen T8135:37-47; Ex 14-16 Hanlen [43], [47].
\textsuperscript{310} Ex 14-2 Tab 265A CTJH.001.02001.0808; Hanlen T8135: 31-47.
\textsuperscript{311} Ex 14-2 Tab 280 CTJH.001.02001.0342_R.
\textsuperscript{312} Ex 14-16 Hanlen [40]; Hanlen T8133: 40-T8134:1-21.
\textsuperscript{313} Hanlen T8134: 1-T81835:29.
135. Sister Hanlen and Ms Chittick, who was then the child protection officer at the Catholic Education Office, contacted potential witnesses in the investigation to explain the situation and ask whether they would be willing to assist Kamira Stacey with their investigation.  

Potential witnesses included those who attended the camps organised by Nestor, and their parents, as well as friends of Nestor, and others who assisted Nestor organise and run the camps. Kamira Stacey then arranged to interview participating witnesses. Sister Hanlen and Ms Chittick also assisted Kamira Stacey obtain relevant documentation, including from the NSW Police Force and the Department of Community Services.  

136. Nestor was informed that an investigation, conducted by Kamira Stacey, had commenced under the Ombudsman Act and that Kamira Stacey would put to him the allegations against him for his comment. Kamira Stacey did this by letter on 11 October 2007 to which Nestor responded on 4 November 2007. Nestor was subsequently interviewed by Kamira Stacey on 27 November 2007.  

137. Kamira Stacey presented their final report in May 2008. Ultimately, Kamira Stacey investigated four allegations which were documented in the final report. Three of these allegations concerned complaints made by purported victims of indecent or sexual assault by Nestor. On the balance of probabilities, Kamira Stacey concluded that one of these allegations was not sustained and the other two were, in particular, that:  

- Nestor had sexually molested ABA in the same incident that had been the subject of the criminal trial.

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314 Ex 14-16 Hanlen [53]; Hanlen T8134: 10-37.  
315 Ex 14-16 Hanlen [57]; Hanlen T8134: 10-37; 46-8135: 29.  
316 Ex 14-16 Hanlen [57]; see Hanlen T8134: 10-21; 39-44  
317 Ex 14-2 Tab 269 CTJH.001.12001.0305_R, 281 CTJH.001.02001.0813_R, 288 CTJH.001.12001.0239_R.  
318 Ex 14-2 Tab 289 CTJH.001.02001.0459_R.  
319 Ex 14-2 Tab 290 CTJH.001.03008.0028_R.  
320 Ex 14-13 Ingham [86]; Ex 14-16 Hanlen [65].  
321 Ex 14-2 Tab 298 CTJH.001.03005.0002_R; Ingham T8087: 22-41.  
322 Ex 14-2 Tab 298 CTJH.001.03005.0002_R; Ingham T8088: 5-8089: 5.  
323 Ex 14-2 Tab 298 CTJH.001.03005.0002_R at CTJH.001.03005.0009_R.-0010_R.
b. Nestor had sexually molested ABO, then aged 9, at an alter server’s camp in 1993, by
fondling ABO’s penis with his hand and putting his hand down ABO’s tracksuit pants and
rubbing him on the ‘bottom’.  

138. The fourth allegation concerned Nestor engaging in a pattern of sexual misconduct during
about 1989 to 1993. This allegation was sustained.  

139. Bishop Ingham then put the Kamira Stacey Report to Nestor as reflecting his preliminary view,
and gave Nestor the opportunity to respond to him, which Nestor did by way of a letter on 12
June 2008.  

140. On 4 June 2008, Sister Hanlen on behalf of Bishop Ingham provided the Kamira Stacey Report
to the Ombudsman. The Ombudsman had previously advised that the Diocese was required
under the Ombudsman Act to, amongst other things, form its own view as to whether it
accepted the recommendations of the Kamira Stacey Report and to notify Nestor and the
Ombudsman of this. On 19 August 2008, after considering the information supplied by
Nestor on 12 June 2008, Bishop Ingham notified Nestor that he had reached the same findings
as those that he had notified Nestor of as being preliminary.  

141. Then, on 21 October 2008, the Ombudsman advised that they were satisfied that the Diocese
had handled the matter appropriately, and that they would now close the file.  

142. On the basis of the Diocese’s findings, the Diocese then reported Nestor to the Commission
for Children and Young People, pursuant to section 39 of the CCYP Act. This meant that
potential employers would be notified if Nestor was required to undertake a ‘working with
children’ check in the future.  

324 Ex 14-2 Tab 298 CTJH.001.03005.0002_R at CTJH.001.03005.0010_R.  
325 Ex 14-2 Tab 298 CTJH.001.03005.0002_R at CTJH.001.03005.0010_R.  
326 Ex 14-2 Tab 300 CTJH.001.12001.0267_R, Tab 301 CTJH.001.12001.0273_R, Tab 303
CTJH.001.12001.0279_R; Ingham T8089: 35–8090: 27.  
327 Ex 14-2 Tab 297 CTJH.001.12001.0257_R; Tab 298 CTJH.001.03005.0002_R; Hanlen T8137:34.  
328 Ex 14-2 Tab 295 CTJH.001.12001.0246; Hanlen T8136:26.  
329 Ex 14-2 Tab 303 CTJH.001.12001.0279_R; Tab 304 CTJH.001.12001.0281.  
330 Ex 14-2 Tab 332 CTJH.001.12001.0300; Ex 14-16 Hanlen [82].  
331 Ex 14-2 Tab 305 CTJH.001.03003.0168_R; Tab 306 CTJH.001.12001.0282_R.  
332 Commission for Children and Young People Act 1998 (NSW) ss 34(a) and 37.
On 26 August 2008, Bishop Ingham informed Nestor that he had been reported to the Commission for Children and Young People.\textsuperscript{333}

\section*{9. CANONICAL PENAL PROCESSES AND DISMISSAL FROM CLERICAL STATE}

Following the conclusion of the Ombudsman investigation, on 27 August 2008 Bishop Ingham commenced a process under CIC83 c 1717 on the basis that he had received information that appeared to indicate that serious offences against Church law may have been committed by Nestor.\textsuperscript{334} Bishop Ingham issued two decrees, which:

\begin{itemize}
\item[a.] opened the preliminary investigation of a penal process under c 1717 to investigate the allegations against Nestor; admitted the Kamira Stacey report into the Acts of the case (meaning that it formed part of the formal record of the investigation); and appointed Father Greg Homeming to serve as auditor\textsuperscript{335}

\item[b.] appointed Father Homeming as auditor for the preliminary investigation and directed him to conduct an appropriate investigation on behalf of Bishop Ingham.\textsuperscript{336}
\end{itemize}

On 29 August 2008, Father Homeming accepted this appointment.\textsuperscript{337}

Nestor was notified of these decrees on 29 August 2008.\textsuperscript{338}

The investigation involved principally relying on the Kamira Stacey report and obtaining sworn confirmations from witnesses of their previous statements.\textsuperscript{339} This was to accord with a requirement in canon law that there be sworn testimony in such an investigation.\textsuperscript{340}

\begin{footnotes}
\item[333] Ex 14-2 Tab 307 CTJH.001.12001.0283_R; Ex 14-16 Hanlen [78].
\item[334] Ex 14-13 Ingham [98]; Ingham T8091: 12-T8092: 2.
\item[335] Ex 14-2 Tab 310 CTJH.001.03006.0127; Ingham T8091: 3-T8092: 8.
\item[336] Ex 14-2 Tab 311 CTJH.001.03006.0128; Ingham T8092: 23-42.
\item[337] Ex 14-2 Tab 313 CTJH.001.03006.0130; Ingham T8092: 44-47.
\item[338] Ex 14-2 Tab 314 CTJH.001.03006.0131_R.
\item[339] Ingham T8091: 12-22; Ex 14-16 Hanlen [86].
\item[340] The 1962 Instruction [23]; Ex 14-3 Tab 1 VATC.0001.001.0006.
\end{footnotes}
was provided by Bishop Ingham to Father Homeming as to the processes to follow when obtaining sworn testimony. 341

148. Father Homeming completed his report on 1 September 2008.342 On 10 September 2008, Bishop Ingham decreed the preliminary investigation closed343 and submitted344 the documentation of the investigation to Cardinal William Levada, the Prefect of the CDF, for his guidance under Article 13345 of the 2001 Sacramentorum Sanctitatis Tutela and CIC83 c 1717.346 The documentation included five volumes of materials, including the formal ‘votum’ setting out in detail the history of the Nestor matter, a summary of the case and the evidence against Nestor, and the documentation from Kamira Stacey relating to their investigation.347 Article 13 provided that the bishop was to refer the matter to the CDF once a preliminary investigation under CIC83 c 1717 was completed, and providing there was at least a semblance of truth in the report.348

149. Sister Hanlen gave evidence that guidance from the CDF was sought because that is what the relevant canon law process required.349

341 Ex 14-2 Tab 312 CTJH.001.03006.0043_R; Ingham T8092: 27-42.
342 Ex 14-2 Tab 315 CTJH.001.03006.0044_R; Ex 14-16 Hanlen [88]; Ex 14-13 Ingham [101]; Ingham T8098: 32.
343 Ex 14-2 Tab 325 CTJH.001.03006.0132; Ex 14-13 Ingham [102].
344 Ex 14-2 Tab 317 CTJH.001.03006.0028; Ingham T8090: 39-43.
345 Art 13 2001 Sacramentorum Sanctitatis Tutela: Ex 14-3 Tab 20 IND.0043.001.0068.
347 Ex 14-2 Tab 320 CTJH.001.03006.0034_R, Tab 321 CTJH.001.03006.0098_R, Tab 322 CTJH.001.03006.0102_R Tab 323, CTJH.001.03006.0116_R, Tab 324 CTJH.001.03006.0124.
348 2001 Sacramentorum Sanctitatis Tutela, art 13 provides that:

‘Whenever the Ordinary or Hierarch receives a report of a reserved delict which has at least a semblance of truth [notitiam saltem verisimilem], once the preliminary investigation has been completed, he is to communicate the matter to the Congregation for the Doctrine of the Faith which, unless it calls the case to itself due to particular circumstances, will direct the Ordinary or Hierarch [how] to proceed further, with due regard, however, for the right to appeal against a sentence of the first instance only to the Supreme Tribunal of the same Congregation.’ : Ex 14-3 Tab 20 IND.0043.001.0068.
349 Hanlen T8139: 33-47.
150. The 2001 *Sacramentorum Sanctorum Tutela* provided that the CDF had jurisdiction over cases involving a delict committed by a cleric with a minor below the age of 18 years and it set out how the CDF was to judge the case.\(^{350}\)

151. On 26 September 2008, the CDF decided to dispense with the requirement for a penal judicial process and to request the Pope to dismiss Nestor from the clerical state ‘ex officio et in poenam’.\(^{351}\) This means, in effect, to free Nestor from his status and obligations as a clergy.\(^{352}\) The CDF was able to do this under 2001 *Sacramentorum Sanctorum Sanctorum* article 17, which provides that whilst the more grave delicts reserved to the CDF may only be tried in a judicial process, the CDF has a faculty to dispense with this where the CDF considers the case should be referred directly to the Holy Father for an *ex officio* dismissal.\(^{353}\)

152. Pope Benedict XVI issued the decree of dismissal on 17 October 2008.\(^{354}\) It deprived Nestor of the rights, and released him from the obligations, of a priest including celibacy, excluded him from the exercise of ministry (except to hear the confessions of and absolve those imminent danger of death), and placed restrictions on his ability to work in seminaries and theological colleges, or to teach theology or religion in universities or schools.\(^{355}\)

153. The Pope’s decree stated that the Bishop was to see to it, in so far as possible, that the decree does not cause scandal to the faithful, but could make public the fact of the dismissal and its canonical basis if children would otherwise be at risk.\(^{356}\)

154. Under the 2001 *Sacramentorum Sanctorum Sanctorum*, the Nestor case was subject to the pontifical secret, being a particular secrecy which must be observed as a grave obligation.\(^{357}\) Those who are bound by the pontifical secret are placed under a solemn obligation to preserve

\(^{350}\) See eg 2001 *Sacramentorum Sanctorum Sanctorum* arts 4, 6, 7 and 13: Ex 14-3 Tab 20 IND.0043.001.0068.

\(^{351}\) Ex 14-2 Tab 333 CTJH.001.03006.0006; CIC83 c 1336 §1(5): Ex 14-3 Tab 12 VATC.0002.001.0043; CIC83 cc 332 §1, 333 §1 and 333 §3: Ex 14-3 Tab 6 VATC.0002.001.0031.

\(^{352}\) Wilson T7958: 15-34.

\(^{353}\) Ex 14-3 Tab 20 IND.0043.001.0068; Hanlen T8143: 10-29.

\(^{354}\) Ex 14-2 Tab 331 CTJH.001.12001.0060.

\(^{355}\) Ex 14-2 Tab 331 CTJH.001.12001.0060.

\(^{356}\) Ex 14-2 Tab 331 CTJH.001.12001.0060.

it forever. Accordingly, the decree effectively relieved Bishop Ingham of this obligation if children would otherwise be at risk.

155. Bishop Ingham notified Nestor and the people involved with the Nestor case, including the complainants, of the decree and the outcome of the CDF process. However, Bishop Ingham did not generally publicise Nestor’s dismissal from the clerical state.

156. Bishop Ingham gave evidence that he agreed it would have been a safer option, insofar as the protection of children was concerned, to have made it known to the faithful of Wollongong that Father Nestor had been dismissed from the clerical state by some form of pastoral letter or public announcement. Bishop Ingham explained that he did not make the dismissal public because of Nestor’s threatening attitude and he considered that those who were affected were informed directly. He also explained that by then the matter had been ‘off the radar’ for quite some time.

157. On 4 March 2009, Nestor wrote to the CDF complaining of the way in which he had been treated and inviting the CDF to ‘correct itself’, but on 30 March 2009 the CDF wrote that there was no possibility of any recourse against the Pope’s decree.

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359 Hanlen T8144: 8-23.

360 Ex 14-13 Ingham [109]-[110], [112]; Ex 14-2 Tab 336 CTJH.001.12001.0029, Tab 337 CTJH.001.03006.0020_R, Tab 344 CTJH.001.03006.0010.

361 Ex 14-13 Ingham [108], [111]; Ex 14-2 Tab 336 CTJH.001.12001.0029, Tab 337 CTJH.001.03006.0020_R; Ingham T8103: 28-42.

362 Ingham T8103: 28-42.

363 Ingham T8103: 28-42.

364 Ingham T8103: 28-42.

365 Ingham T8103: 44.

366 Ex 14-2 Tab 342 CTJH.001.12001.0007_R.

367 Ex 14-2 Tab 345 CTJH.001.03006.0009.
Available Findings

13. The Congregation for the Doctrine of the Faith and the Pope acted timeously to have Nestor dismissed from the clerical state.

14. The dismissal of Nestor from the clerical state was justified to protect children from possible further abuse by Nestor as a cleric.

15. It would have better protected children from possible further abuse by Nestor if Bishop Ingham had made it known publicly that Nestor had been dismissed from the clerical state because of the findings of child sexual abuse and other inappropriate conduct made against him.

16. The case study demonstrates that with the requisite will and application it is possible within the existing canon law and structures of the Catholic Church to have a priest dismissed from the clerical state because of his unsuitability for ministry on grounds of the risk of sexual abuse that he poses to children even in the absence of a conviction on a relevant charge in a civil or canonical penal process.

Angus Stewart

Counsel Assisting the Royal Commission

DATE: 18 July 2014
Part B: SUMMARY OF AVAILABLE FINDINGS

1. Had the Church acted to prioritise the safety of children, it should have contemporaneously recorded the details of what was said in interviews with clergy or religious conducted by the Church in relation to allegations of child sexual abuse by a cleric or religious.

2. Failing to make and keep such a record serves to:
   
   (1) Facilitate the interviewer and the cleric or religious being unable to recall what was said in the interview and what conclusions were arrived at if subsequently called upon to do so;
   
   (2) Provides an additional barrier to the proof of allegations of child sexual abuse by the cleric; and
   
   (3) Support a culture of secrecy about child sexual abuse in the Church.

3. Father Ryan’s placing of Nestor on administrative leave, and Bishop Wilson’s confirmation of that, was a justified and timeous act to protect children from possible sexual abuse by Nestor.

4. The further complaints about Nestor that were received by Bishop Wilson in the period after Nestor was charged to shortly after Nestor’s appeal against his conviction justified serious reservations and concern about the danger that Nestor posed to children and his suitability for ministry.

5. Bishop Wilson’s request to Nestor to remain on administrative leave following his acquittal was a justified act to protect children from possible sexual abuse by Nestor as a cleric.

6. Father Vaughan and Father O’Keefe’s invitations to Nestor to celebrate mass publicly were undermining of Bishop Wilson’s efforts to protect children from possible sexual abuse by Nestor as a cleric.

7. Bishop Wilson’s 7 August 1998 decrees were justified acts by Bishop Wilson to protect children from possible sexual abuse by Nestor as a cleric.

8. The Signatura decision leaves some uncertainty as to the status of Towards Healing with regard to whether it (in whole or part) operates in conformity with canon law.
9. The Signatura decision establishes that an investigation under *Towards Healing* can be a domestic process as a precursor to any canonical processes (for example under CIC83 c 1717).

10. The Signatura decision clarifies that:
   
   (1) a decree restricting a priest’s use of his faculties pending some further process or appraisal is not necessarily penal; and

   (2) the penal standard of proof will not apply to a decision to issue such a decree, rather, the standard is whether there is a positive and probable doubt concerning the suitability of the cleric in the matter concerned.

11. The length of time that the appeal to the Signatura took, which was from February 2001 to May 2006:

   (1) Had an adverse impact in the Diocese and contributed to uncertainty with regard to Nestor’s status; and

   (2) Resulted in Nestor being abroad for many years where he undertook some public ministry and was a potential risk to children.

12. The refusal by Father Jones and Bishop Ingham to give permission to Nestor to serve other bishops when such permission was requested of them was justified to protect children from possible abuse by Nestor as a cleric.

13. The Congregation for the Doctrine of the Faith and the Pope acted timeously to have Nestor dismissed from the clerical state.

14. The dismissal of Nestor from the clerical state was justified to protect children from possible further abuse by Nestor as a cleric.

15. It would have better protected children from possible further abuse by Nestor if Bishop Ingham had made it known publicly that Nestor had been dismissed from the clerical state because of the findings of child sexual abuse and other inappropriate conduct made against him.

16. The case study demonstrates that with the requisite will and application it is possible within the existing canon law and structures of the Catholic Church to have a priest dismissed from the clerical state because of his unsuitability for ministry on grounds of the risk of sexual abuse.
that he poses to children even in the absence of a conviction on a relevant charge in a civil or canonical penal process.

**Part C: SUMMARY OF SYSTEMIC ISSUES**

Systemic issues illustrated by this case study are:

a. Supervision of and disciplinary processes in respect of clerics working with children.

a. Arrangements, including canonical and procedural, within the institution to respond to those accused of child sexual abuse, including in relation to disciplinary and penal processes.

b. Arrangements within the institution to report incidents to external agencies.

c. Arrangements within the institution to respond to victims and their families, and the relevant community.

d. Arrangements within the institution to respond to those accused of child sexual abuse.