

## **RESPONSE OF THE HOLY SEE TO THE AUSTRALIAN ROYAL COMMISSION *FINAL REPORT***

BRENDAN PETER DALY

**SUMMARY** — The final report of the Australian Royal Commission into Institutional Responses to Child Sexual Abuse in 2017 commented on the lack of responsibility, transparency, and accountability within the Catholic Church’s practices and law. The Commissioners made twenty-one recommendations; the Australian Catholic Bishops Conference accepted all of them, except one concerning the seal of confession. The recommendations concerning universal law were forwarded to the Holy See, which responded on 26 February 2020. The author explains the origins of the recommendations and comments on the responses of the Holy See to each recommendation.

**RÉSUMÉ** — Le rapport final de la Australian Royal Commission into Institutional Responses to Child Sexual Abuse en 2017 a commenté le manque de responsabilité, de transparence et d’obligation de rendre des comptes au sein des pratiques et du droit de l’Église catholique. Les commissaires ont formulé vingt et une recommandations ; la Australian Conference of Catholic Bishops les a toutes acceptées, sauf une concernant le sceau de la confession. Les recommandations concernant le droit universel ont été transmises au Saint-Siège, qui a répondu le 26 février 2020. L’auteur explique les origines des recommandations et commente les réponses du Saint-Siège à chaque recommandation.

### ***Introduction***

The Royal Commission into Institutional Responses to Child Sexual Abuse in Australia (= the “Royal Commission”) made a thorough study of sexual abuse within the Australian Catholic Church. The Royal Commission’s 2017 final report, in sixteen volumes, details the extent of this abuse within the Catholic Church and the catastrophic failure of bishops and religious superiors to deal with the perpetrators, to protect victims and

potential victims, and to prevent abuse.<sup>1</sup> These revelations have had a huge impact on the Catholic Church and its reputation. It is obvious that the Church in Australia cannot continue to operate as it has in the past. The gravity of the abuse revelations resulted in extensive recommendations by the Commission on 15 December 2017. The Australian Catholic Bishops Conference accepted all the recommendations, except one concerning the seal of confession. On accepting the recommendations, the Australian Catholic Bishops Conference forwarded the recommendations involving universal canon law to the Holy See. The Holy See responded on 26 February 2020.<sup>2</sup>

This study is divided into three parts according to the tenor of the Holy See's responses as being (1) predominantly acceptable recommendations, (2) predominantly unacceptable recommendations, and (3) other recommendations. The issues considered in the responses are treated by first giving the recommendation of the Royal Commission, then the response to it of the Holy See, followed by a commentary on the response.

## **1 — *Predominantly Acceptable Recommendations***

The Vatican responses in this first category show that the Holy See is generally supportive of the recommendations in substance. These responses for the most part indicate that the Holy See has already addressed the issue satisfactorily, is still studying the matter, and/or intends to make further progress.

### **1.1 — Selection of Bishops**

The Royal Commission made recommendations concerning the selection of bishops, due to catastrophic failures of episcopal leadership.

#### **1.1.1 — *Royal Commission Recommendation 16.8***

*In the interests of child safety and improved institutional responses to child sexual abuse, the Australian Catholic Bishops Conference should request the Holy See to: (a) publish criteria for the selection of bishops, including*

<sup>1</sup> THE ROYAL COMMISSION INTO INSTITUTIONAL RESPONSES TO CHILD SEXUAL ABUSE, *Final Report*, 2017, [https://www.childabuseroyalcommission.gov.au/sites/default/files/final\\_report\\_-\\_volume\\_16\\_religious\\_institutions\\_book\\_1.pdf](https://www.childabuseroyalcommission.gov.au/sites/default/files/final_report_-_volume_16_religious_institutions_book_1.pdf) (= RCIRCSA, *Final Report*).

<sup>2</sup> HOLY SEE, "Observations of the Holy See," Prot. No. 484.110, in "Responses to Australia's Royal Commission on Child Sexual Abuse," in *Origins*, vol. 50, no. 17 (2020), 271-276 (= HOLY SEE, *Observations of the Holy See*).

*relating to the promotion of child safety; (b) establish a transparent process for appointing bishops which includes the direct participation of lay people.*

### **1.1.2 — Response of the Holy See**

The Holy See, in various published sources, has set forth the process followed in the selection and appointment of candidates for the episcopal office. In particular, canons 377 and 378 of the Code of Canon Law (CIC) offer a summary of the nomination process and of the qualities required of candidates. The Apostolic Letter *motu proprio* of Pope St. Paul VI, *Sollicitudo omnium ecclesiarum* (1969) and the Decree *Episcoporum delectum*, with its accompanying norms (1972), which are still in force, outline in some detail the informative process undertaken by Pontifical Representatives in relation to the nomination of bishops. As a normal part of that process, lay men and women, together with clerics, are regularly consulted. Moreover, the questionnaires used in collecting information about potential candidates have included, for the past several years, questions specific to the safeguarding of minors.

At the same time, it should be noted that the procedure for nominating bishops is carried out with a certain discretion out of respect for the candidates, who, after all, do not put themselves forward, and in order to allow the persons consulted to answer with the greatest possible candour and freedom.

Finally, the Holy See acknowledges that, as with all procedures, improvements can always be made, especially in the light of experience. In that context, the Holy See shares the concern of the Royal Commission that the question of child safety be given due consideration in the process for identifying candidates and naming bishops.

### **1.1.3 — Commentary**

Massive failures in episcopal leadership have been exposed around the world.<sup>3</sup> This raises the question whether a different process for their selection would be a preventative measure. Normatively, “the supreme pontiff freely appoints bishops or confirms those legitimately elected” (c. 377 § 1). However, there are exceptions in some places (e.g., Vietnam, China, and Chur in Switzerland). It has been suggested by some canonists that there could be much more involvement by the faithful in this process. This could take the

<sup>3</sup> T. PAPROCKI, “Confronting the Myths and Realities of Clerical Sexual Abuse of Minors in the Catholic Church,” *StC*, 53 (2019), 606 (= PAPROCKI, “Confronting the Myths and Realities of Clerical Sexual Abuse of Minors in the Catholic Church”).

form of proposing a list of candidates from which the pope makes the final choice. Alternatively, local Church representatives could have a right of veto.<sup>4</sup>

Canon 378 enumerates the required qualities in candidates for the episcopacy. However, Torfs has pointed out that the job description of a bishop has changed, and this needs to be reflected in the qualities required of episcopal candidates. Bishops need to be people with moral courage, who can make the right decisions in difficult situations.<sup>5</sup> A respectable but lenient churchman, intent primarily on maintaining the reputation of the Church, could be a liability when dealing with a clerical abuser.

The Royal Commission recommended a governance review of the Church in Australia. Subsequently, the Australian Catholic Bishops Conference and Catholic Religious Australia appointed a group to conduct it. The appointment process for bishops was also addressed by the governance report on the Catholic Church in Australia in *The Light of the Southern Cross*.<sup>6</sup> This latter report notes how confidence and trust in Church governance and episcopal leadership had been undermined. It suggests that the processes leading to the appointment of bishops by the pope be explained on the Australian Bishops Conference website. The report recommends that the consultative process for episcopal appointments be more transparent and effective.<sup>7</sup> The governance review also recommends wider consultation with laity during the appointment process, as well as ensuring that candidates for the episcopacy have proven competence in dealing with sexual abuse cases.

## 1.2 — Pontifical Secret

The Royal Commission received many complaints concerning pontifical secrecy. The use of the word “secret” causes confusion for victims and others.

<sup>4</sup> R. TORFS, “Canon Law and the Recommendations of the Royal Commission,” in S. CRITENDEN (ed.), *Health and Integrity in Church and Ministry*, Melbourne, 2019, 88 (= TORFS, “Canon Law and the Recommendations of the Royal Commission”).

<sup>5</sup> *Ibid.*, 89.

<sup>6</sup> IMPLEMENTATION ADVISORY GROUP AND THE GOVERNANCE REVIEW PROJECT TEAM, *The Light of the Southern Cross*, <https://static1.squarespace.com/static/5acea6725417fc059ddcc33f/t/5f3f79e41aac2871be0fba5c/1597995610389/The+Light+from+the+Southern+Cross+FINAL+%2815+August+2020%29.pdf> (= IMPLEMENTATION ADVISORY GROUP AND THE GOVERNANCE REVIEW PROJECT TEAM, *The Light of the Southern Cross*).

<sup>7</sup> *Ibid.*

### 1.2.1 — *Royal Commission Recommendation 16.10*

*The Australian Catholic Bishops Conference should request the Holy See to amend canon law so that the pontifical secret does not apply to any aspect of allegations or canonical disciplinary processes relating to child sexual abuse.*

### 1.2.2 — *Response of the Holy See*

The Holy See also welcomes this recommendation. During the meeting on “The Protection of Minors in the Church” held in the Vatican from 21 to 24 February 2019, with the participation of the Presidents of all the national Episcopal Conferences and representatives of a number of Major Superiors of the Institutes of Consecrated Life and Societies of Apostolic Life, considerable attention was given to the question of the confidentiality of canonical processes. During the meeting it was acknowledged that, although the scope of the Pontifical Secret has always been to protect the parties involved and to avoid unnecessary and harmful publicity around delicate cases, under the current circumstances it has frequently become a source of misunderstanding.

Consequently, with the Instruction “On the Confidentiality of Legal Proceedings” of 6 December 2019, the Holy Father removed from the ambit of the Pontifical Secret accusations, canonical processes and decisions in cases concerning the sexual abuse of minors and vulnerable persons, and the possession of pornographic material involving minors.

It should be noted that all those charged with conducting canonical penal processes will continue to observe an appropriate level of confidentiality related to the discharge of their office. However, such official confidentiality does not constitute an obstacle to the fulfilment of any reporting obligations under civil laws nor to the execution of enforceable requests of civil judicial authorities.

### 1.2.3 — *Commentary*

Pope Francis dealt with this recommendation of the Royal Commission on 6 December 2019 by promulgating a rescript and an instruction on the confidentiality of cases.<sup>8</sup> This enables jurisprudence of the Congregation for the Doctrine of the Faith to be published.

<sup>8</sup> FRANCIS, Rescriptum ex audientia SS.mi, 6 December 2019, [http://www.vatican.va/roman\\_curia/secretariat\\_state/2019/documents/rc-seg-st-20191206\\_rescriptum\\_en.html](http://www.vatican.va/roman_curia/secretariat_state/2019/documents/rc-seg-st-20191206_rescriptum_en.html): “3. In the cases referred to in no. 1, the information is to be treated in such a way as to ensure its security, integrity and confidentiality in accordance with the prescriptions of

### 1.3 — Penal Law Reform

The Royal Commission exposed serious gaps in canonical legislation concerning sexual abuse of minors and called for a reform of penal law.

#### 1.3.1 — *Royal Commission Recommendation 16.9*

*The Australian Catholic Bishops Conference should request the Holy See to amend the 1983 Code of Canon Law to create a new canon or series of canons specifically relating to child sexual abuse, as follows: (a) All delicts relating to child sexual abuse should be articulated as canonical crimes against the child, not as moral failings or as breaches of the ‘special obligation’ of clerics and religious to observe celibacy. (b) All delicts relating to child sexual abuse should apply to any person holding a ‘dignity, office or responsibility in the Church’ regardless of whether they are ordained or not ordained. (c) In relation to the acquisition, possession, or distribution of pornographic images, the delict (currently contained in Article 6 §2 1° of the revised 2010 norms attached to the motu proprio Sacramentorum sanctitatis tutela) should be amended to refer to minors under the age of 18, not minors under the age of 14.*

#### 1.3.2 — *Response of the Holy See*

The Holy See welcomes this recommendation, which has been taken into account in the current process of review of the canonical penal legislation, both general (Book VI of the Code of Canon Law) and specific (Norms of the Congregation for the Doctrine of the Faith). Indeed, a number of recent decisions have already addressed, at least in part, the issues raised in the recommendation.

The Apostolic Letter *motu proprio* of Pope Francis, *Vos estis lux mundi*, of 7 May 2019, requires Dioceses and Eparchies to establish permanent mechanisms for receiving reports of sexual abuse against minors and vulnerable adults, when committed not only by clerics but by non-clerical members of Institutes of Consecrated Life and Societies of Apostolic Life, who may also be subject to penalties. Moreover article 1, §1 of *Vos estis lux*

canons 471, 2° CIC and 244 §2, 2° CCEO, for the sake of protecting the good name, image and privacy of all persons involved.

4. Office confidentiality shall not prevent the fulfilment of the obligations laid down in all places by civil laws, including any reporting obligations, and the execution of enforceable requests of civil judicial authorities.

5. The person who files the report, the person who alleges to have been harmed and the witnesses shall not be bound by any obligation of silence with regard to matters involving the case.”

*mundi* describes these crimes as offenses against minors and vulnerable persons, rather than as breaches of the special obligations of clerics.

Regarding offenses related to child pornography, the same Letter, *Vos estis lux mundi*, defines a minor as one under the age of 18 (Article 1, §2). In addition, the *Rescriptum ex Audientia SS.mi*, dated 3 December 2019, which updated some of the Norms accompanying *Sacramentorum sanctitatis tutela* (SST), modified the offenses relative to child pornography contained in Article 6 §1, 2°, to make punishable under Canon Law “the acquisition, possession or distribution of pornographic images of minors under the age of eighteen.” This decision entered into force on January 1<sup>st</sup>, 2020.

### 1.3.3 – Commentary

Many civil jurisdictions around the world have precise legislation for the protection of children. Any person who violates any of these prescriptions cannot work with children. Unfortunately, canon law currently does not adequately protect children. This is both because of the seriousness of the sexual act that must be committed before it becomes a canonical crime, as well as the fact that one must be a cleric for the act to be considered a delict. In marked contrast, the 1917 Code excluded laymen from exercising any responsibility in the Church who were guilty of the rape of girls,<sup>9</sup> while canon 2357 made laity guilty of sexual abuse of a minor liable for other penalties.<sup>10</sup> As an increasing number of lay people are employed by the Church, people reasonably expect that they will be subject to ecclesiastical penalties for sexual abuse of a minor. The Final Report notes the finding that, within the Catholic Church, perpetrators of sexual abuse were thirty-seven percent non-ordained religious (thirty-two percent religious brothers and five percent religious sisters); thirty percent were priests; and twenty-nine percent were lay people.<sup>11</sup> Consequences could be legislated for lay employees who have abused a minor, including immediate termination of employment,

<sup>9</sup> *CIC/17*, c. 2354 § 1. A layman who was legitimately convicted of the delict of homicide, rape of a youth of the opposite sex ... is by the law itself considered as excluded from legitimate ecclesiastical acts and from any responsibility, if he had any in the Church, with the obligation of repairing the damage that remains. Translation by E. PETERS, *The 1917 Pio-Benedictine Code of Canon Law*, San Francisco, Ignatius Press, 2001. All translations of the 1917 Code hereinafter are from this source.

<sup>10</sup> *CIC/17*, c. 2357 § 1. Laity legitimately convicted of a delict against the sixth [commandment of the Decalogue] with a minor below the age of sixteen, or of debauchery, sodomy, incest, or pandering, are by that fact infamous, besides other penalties that the Ordinary decides should be inflicted.

<sup>11</sup> RCIRCSA, *Final Report*.

a perpetual ban against being employed by a Catholic organisation or institution, an irregularity for ordination, or automatic excommunication.

One way that the Church ensures the dignity of sacred orders is by establishing irregularities for ordination. Cappello defines “an irregularity as a perpetual impediment, established by ecclesiastical law out of reverence of the divine ministry, prohibiting primarily the reception of orders, and secondarily the exercise of orders received.”<sup>12</sup> Even if the ordinand is unaware that he has an irregularity, he is bound by the irregularity when he learns it has been incurred. This is different from a crime, in that a person ignorant of the law without negligence is not subject to a penalty (c. 1323, 2°). Sexual abuse of minors needs to be made an irregularity to prevent someone who has committed sexual abuse from being ordained or exercising ministry. A dispensation from an irregularity can only be granted by the Holy See, so a diocesan bishop or religious ordinary cannot address the matter alone.

Pope Francis has now addressed the recommendation by promulgating a new canon 1398 covering the delict of sexual abuse of minors in the section of the Book VI entitled *Offences against Human Life, Dignity and Liberty*.<sup>13</sup> The delict applies to all clergy, religious brothers and sisters and lay people holding offices in the Church. The delict in relation to pornography refers to minors under the age of eighteen years.

## 1.4 — Publication of Penal Sentences

It was obvious to the Royal Commission that bishops, religious superiors, and canon lawyers in Australia were unsure of jurisprudence in regard to sexual abuse cases. The Commission saw the great need for decisions to be published.

### 1.4.1 — Royal Commission Recommendation 16.16

*The Australian Catholic Bishops Conference should request the Holy See to introduce measures to ensure that Vatican Congregations and canonical appeal courts always publish decisions in disciplinary matters relating to*

<sup>12</sup> F.M. CAPPELLO, *Tractatus canonico-moralis de Sacramentis*, vol. 2, Rome, 1935, 416: “Irregularitas est impedimentum perpetuum, iure ecclesiastico propter reverentiam divini ministerii constitutum, prohibens primario suceptionem ordinis et secundario exercitium ordinum susceptorum.”

<sup>13</sup> FRANCIS, constitutio apostolica qua Liber VI Codicis iuris canonici reformatur *Pascite gregem Dei*, 23 May 2021, [https://www.vatican.va/content/francesco/la/apost\\_constitutions/documents/papa-francesco\\_costituzione-ap\\_20210523\\_pascite-gregem-dei.html](https://www.vatican.va/content/francesco/la/apost_constitutions/documents/papa-francesco_costituzione-ap_20210523_pascite-gregem-dei.html) (= FRANCIS, *CIC*, 2021).

*child sexual abuse, and provide written reasons for their decisions. Publication should occur in a timely manner. In some cases, it may be appropriate to suppress information that might lead to the identification of a victim.*

#### **1.4.2 — Response of the Holy See**

The present Recommendation is related to the question of the Pontifical Secret already mentioned in Recommendation 16.10. As noted there, the Instruction of December 6<sup>th</sup>, 2019 has amended the dispositions concerning the Pontifical Secret, which now does not apply to accusations, processes and decisions involving cases related to child sexual abuse. However, as the Recommendation itself recognises, the publication of decisions in individual cases needs to be evaluated in light of the duty to protect the good name, image and privacy of all persons involved including, in particular, that of the victims. In the future, such evaluations will be made in light of the abovementioned Instruction.

#### **1.4.3 — Commentary**

The response of the Holy See is cautious. No commitment is made about publishing decisions and making jurisprudence available. However, following publication of the Final Report of the Royal Commission, the Congregation for the Doctrine of the Faith issued the *Vademecum: on Certain Points of Procedure in Treating Cases of Sexual Abuse of Minors Committed by Clerics*.<sup>14</sup> This gives practical advice for the handling of these cases.

## **2 — Predominantly Unacceptable Recommendations**

In these predominately unacceptable recommendations, the Holy See does not reject the recommendations outright. Instead, the response is a polite affirmation of whatever good may be salvaged in the recommendation while not accepting it. These responses implicitly express a basic disagreement with the recommendations.

<sup>14</sup> CONGREGATION OF THE DOCTRINE OF THE FAITH (CDF), *Vademecum: on Certain Points of Procedure in Treating Cases of Sexual Abuse of Minors Committed by Clerics*, [http://www.vatican.va/roman\\_curia/congregations/cfaith/documents/rc\\_con\\_cfaith\\_doc\\_20200716\\_vademecum-casi-abuso\\_en.html](http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_20200716_vademecum-casi-abuso_en.html); hereinafter all quotes from the *Vademecum* are taken from this source.

## 2.1 — Abolition of Prescription for the Crime of Sexual Abuse

The data about the complainants of the Catholic Church show that the length of time between the first incident of abuse and a victim reporting it was, on average, thirty-three years.<sup>15</sup> This delay has complicated bringing the perpetrators to justice; yet, according to the Royal Commission's final report, a priority of victims is to prevent others from being abused.<sup>16</sup> Prescription in canon law is similar to the statute of limitations in the civil law (common law). The two are often confused with one another but, as Austin explains, they can be clearly distinguished.<sup>17</sup> A criminal cause for action no longer exists when prescription applies. With a statute of limitations, the criminal cause for action still exists, but the offender can no longer be prosecuted because of the passage of time. Prescription, he says, is in fact a matter of substantive law because, with the passage of time, often there is a weakening of the proofs and a loss of witnesses.<sup>18</sup>

### 2.1.1 — Royal Commission Recommendation 16.12

*The Australian Catholic Bishops Conference should request the Holy See to amend canon law to remove the time limit (prescription) for commencement of canonical actions relating to child sexual abuse. This amendment should apply retrospectively.*

### 2.1.2 — Response of the Holy See

The recommendation deals with a question that has been the subject of considerable review in recent years. Already in 2001, changes were made to the legislation contained in the Code of Canon Law when *Sacramentorum sanctitatis tutela* (SST) extended the period of prescription for the crimes in

<sup>15</sup> RCIRCSA, *Final Report*.

<sup>16</sup> “We were told that many survivors disclosed because they wanted the abuse to stop or wanted to prevent it happening to others. Other survivors disclosed because they could no longer carry the burden of the secrecy of sexual abuse. Disclosing early can immediately commence the important process of ensuring safety and protection for victims, taking steps to ensure the abuse is stopped and reducing risk to other potential victims. Disclosure is important for victims as well as the institutions involved, other children and the broader community. Disclosure is rarely a one-off event, and is a process. Victims will disclose in different ways to different people throughout their lives. Disclosures may be verbal or non-verbal, accidental or intentional, partial or complete.” RCIRCSA, *Final Report*.

<sup>17</sup> B.T. AUSTIN, “Due Process of Law and the USCCB Essential Norms,” in *StC*, 51 (2017), 70-71 (= AUSTIN, “Due Process of Law and the USCCB Essential Norms”).

<sup>18</sup> *Ibid.*, 66.

question to 10 years. In the 2010 revision of SST, the period of prescription was increased to 20 years, which runs from the victim's 18th birthday. In addition, the Congregation for the Doctrine of the Faith was granted the faculty to derogate from prescription on a case-by-case basis, a faculty that the Congregation continues to use whenever appropriate.

It should be kept in mind, nonetheless, that the institution of prescription is of ancient origin, in both canonical and civil systems. Its outright abolition could, in fact, result in difficulties for the proper administration of justice since the fallibility of memory with the passage of time and the lack of proofs concerning events from the distant past make it difficult to reach the level of certainty required in criminal proceedings.

### 2.1.3 — *Commentary*

In 2001, Pope John Paul II promulgated the motu proprio *Sacramentorum sanctitatis tutela* (SST).<sup>19</sup> This universal law lists the sexual abuse of a minor under eighteen years of age committed by a cleric as one of the *delicta graviora* reserved to the Congregation for the Doctrine of the Faith.<sup>20</sup> Prescription for this delict was fixed at ten years, beginning at the completion of the eighteenth year of the victim.<sup>21</sup> Now, prescription does not apply for sexual abuse of a minor until twenty years after the victim has reached the age of eighteen (SST, art. 7).

The Royal Commission recommended that the law be changed to eliminate prescription in cases of the sexual abuse of minors, and that this change apply retroactively. However, as Austin points out, *ex post facto* laws are contrary to the natural law.<sup>22</sup> The 1948 *Universal Declaration of Human Rights* states: "No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed."<sup>23</sup>

<sup>19</sup> JOHN PAUL II, Apostolic Letter m.p. *Sacramentorum sanctitatis tutela*, 30 April 2001, in AAS, 93 (2001), 737-739.

<sup>20</sup> CDF, Circular Letter, 3 May 2011, in AAS, 103 (2011), 406-412.

<sup>21</sup> Msgr. Charles Scicluna asserted that it would be preferable to have no prescription for crimes of sexual abuse of minors. C. SCICLUNA, "The Procedure and Praxis of the Congregation for the Doctrine of the Faith regarding *Graviora Delicta*," [http://www.vatican.va/resources/resources\\_mons-scicluna-graviora-delicta\\_en.html](http://www.vatican.va/resources/resources_mons-scicluna-graviora-delicta_en.html) (= SCICLUNA, "The Procedure and Praxis of the CDF").

<sup>22</sup> AUSTIN, "Due Process of Law and the USCCB Essential Norms", 73.

<sup>23</sup> THE UNITED NATIONS, *Universal Declaration of Human Rights*, Article 11, [https://www.ohchr.org/EN/UDHR/Documents/UDHR\\_Translations/eng.pdf](https://www.ohchr.org/EN/UDHR/Documents/UDHR_Translations/eng.pdf).

There have been inconsistencies in how canonical penalties and prescription have applied to clergy and lay religious brothers and sisters.<sup>24</sup> There is an administrative process for members of religious institutes for the dismissal of a member from the religious institute.<sup>25</sup> Pope Francis has clarified the law on prescription in canon 1362 of the revised penal law, but prescription is retained for sexual abuse crimes according to the special norms for offences reserved to the Congregation for the Doctrine of the Faith.<sup>26</sup> While a dispensation from prescription is not possible, one can receive a derogation. A dispensation relaxes the law, while a derogation means that the law does not apply in a particular case.<sup>27</sup> Only the Congregation for the Doctrine of the Faith has the faculty to derogate from prescription.

## 2.2 — The “Balance of Probabilities” and the “Canonization” of Criminal Convictions

All legal systems have standards of proof that a judge or jury must arrive at in order to decide an accused is guilty of a crime. The Royal Commission recommended a lower standard of proof for sexual abuse crimes. It also recommended obligatory dismissal from the clerical state or from a religious institute for convicted offenders.

### 2.2.1 — *Royal Commission Recommendation 16.14*

*The Australian Catholic Bishops Conference should request the Holy See to amend canon law to give effect to Recommendations 16.55 and 16.56.*

*Recommendation 16.55. Any person in religious ministry who is the subject of a complaint of child sexual abuse which is substantiated on the balance of probabilities, having regard to the principles in *Briginshaw v Briginshaw*, or who is convicted of an offence relating to child sexual abuse, should*

<sup>24</sup> Canon 1362 § 1. Prescription extinguishes a criminal action after three years unless it concerns: 1) delicts reserved to the Congregation for the Doctrine of the Faith; 2) an action arising from the delicts mentioned in canons 1394, 1395, 1397, and 1398, which have a prescription of five years; 3) delicts which are not punished in the common law if particular law has established another period for prescription.

<sup>25</sup> Canon 695 § 1. A member must be dismissed for the delicts mentioned in canons 1397, 1398, and 1395, unless in the delicts mentioned in can. 1395 § 2, the superior decides that dismissal is not completely necessary and that correction of the member, restitution of justice, and reparation of scandal can be resolved sufficiently in another way.

<sup>26</sup> FRANCIS, *CIC*, 2021.

<sup>27</sup> See C.G. RENATI, “Prescription and Derogation from Prescription in Sexual Abuse of Minors Cases,” in *Jur*, 67 (2007), 503 (= RENATI, “Prescription and Derogation”); and P. BROWN, “Prescription and Statutes of Limitation,” in *CLSAP*, 70 (2008), 384.

*be permanently removed from ministry. Religious institutions should also take all necessary steps to effectively prohibit the person from in any way holding himself or herself out as being a person with religious authority.*

*Recommendation 16.56. Any person in religious ministry who is convicted of an offence relating to child sexual abuse should: a. in the case of Catholic priests and religious, be dismissed from the priesthood and/or dispensed from his or her vows as a religious.*

### **2.2.2 — Response of the Holy See**

The Holy See has long insisted that “there is no place in the priesthood and religious life for those who would harm the young” (St John Paul II, Address to the Cardinals of the United States, 23 April 2002). At the same time, such a position does not exclude the right to a fair and impartial trial, nor to the presumption of innocence, nor does it dispense from the principles of legality and proportionality between the crime and the penalty. It is worth recalling that the sexual abuse of minors is a crime in both civil and canon law.

The civil and criminal responsibility of individuals who perpetrate that crime is a matter for the laws of the State where the crime is committed. Focusing on the ecclesial aspect of the crime, Canon Law seeks to punish the wrongdoer for the grievous harm he has caused and to protect the faithful from further damage. At the same time, it cannot be indifferent to the sinner’s conversion, since it has as a fundamental goal the salvation of souls.

Regarding the standard for conviction in a judicial process, the long tradition of canonical reflection on vital jurisprudential principles, as embodied in the Codes of Canon Law, requires of the judge “moral certainty” in coming to a decision. Such moral certainty is derived from the acts and the proofs of the case (CIC, can. 1608; CCEO can. 1291). The principle of moral certainty gives expression to the need to respect both the presumption of innocence and the ancient legal maxim *in dubio pro reo*.

As for those who are dismissed from the clerical state or from their religious institute, they are explicitly forbidden to present themselves as clerics or to act in any ministerial role.

### **2.2.3 — Commentary**

The “balance of probabilities” is the standard of proof necessary to prove civil cases in common law countries. “Absolute certainty” excludes any possibility of doubt, while at the other extreme a “semblance of truth” means that the accusation seems to be true. The jurisprudence of the common law legal system requires a judge or jury to be convinced of the defendant’s guilt *beyond reasonable doubt* to convict. If a reasonable doubt exists, the accused must be acquitted. Henry Chambers explains: “If trial evidence affords any reasonable possibility of the defendant’s innocence that cannot be explained

away by additional evidence or inferences from additional evidence, a juror cannot be sufficiently certain of the defendant's guilt to convict under the reasonable doubt standard.<sup>28</sup> Sometimes decisions must be made concerning compensation for victims when the accused is deceased. In these circumstances, it is reasonable to make decisions based on a "balance of probabilities."

The concept of moral certainty arose because Christians have been conscious of the injunction in Matthew 7:1 "Do not judge, so that you may not be judged." Being involved in convicting an innocent person was considered a mortal sin. Therefore, from the 1780s, the level of certitude required to convict was moral certainty, so that the accused was acquitted if there were reasonable doubts.<sup>29</sup> Secular jurisprudence used the non-theological language of "beyond reasonable doubt," rather than the theological language of moral certainty.

Moral certainty is the standard of proof in the Catholic Church for all procedures, including criminal cases. The *motu proprio Mitis Iudex Dominus Iesus* explains: "To achieve the moral certainty required by law, a preponderance of proofs and indications is not sufficient, but it is required that any prudent doubt of making an error, in law or fact, is excluded, even if the mere possibility of the contrary is not removed."<sup>30</sup>

In a canonical case of an Australian priest, an archbishop stated in his decree that the criteria of proof to be applied were the "balance of probabilities" and "unacceptable risk." Not surprisingly, the Congregation for Clergy found that these criteria were foreign to canon law and its processes, from which no dispensation is possible.<sup>31</sup> The standard of proof in ecclesiastical cases is moral certainty (canon 1608 § 1). The judge is to be morally certain in his mind that the defendant is guilty in order to convict him of the crime. There is the maxim "the accused is innocent until proven guilty" in "The Declaration of Rights" from the time of the French Revolution.<sup>32</sup> On the other hand, according to canon 1321, if it is proven that

<sup>28</sup> H. CHAMBERS, "Reasonable Certainty and Reasonable Doubt," in *Marquette Law Review*, 81 (1998), 655, 671.

<sup>29</sup> J. WHITMAN, *The Origins of Reasonable Doubt*, New Haven/London, Yale University Press, 2008, 2-3.

<sup>30</sup> FRANCIS, Apostolic Letter m.p. *Mitis Iudex Dominus Iesus*, 15 August 2015, in *AAS*, 107 (2015), 958-970, art. 12; *RR 2016*, 39.

<sup>31</sup> CONGREGATION FOR THE CLERGY, 21 December 2000, Prot. No. 2000/1201. See <http://web-mail.aol.com/msgview.adp?folder=UkVBRA==&uid=3084679>.

<sup>32</sup> Canons 220; 1321 § 3; 1728 § 2; cf. K. PENNINGTON, "Innocent until Proven Guilty: The Origins of a Legal Maxim," in *Jur*, 63 (2003), 106-124.

the accused committed the action, the presumption of the law is that the accused is culpable.

Judith Hahn believes that the notions of “moral certainty” and “beyond reasonable doubt” can be understood as equivalents.<sup>33</sup> The judge overcomes reasonable doubt when he reaches moral certainty. This moral certitude excludes all other reasonable possibilities. Pope Pius XII taught in a 1942 Rotal Allocution: “Sometimes moral certainty does not result except from a number of clues and proofs, which, taken individually, are not valid to found a true certainty, and only together do they no longer allow any reasonable doubt to arise for a man of sound judgment.”<sup>34</sup> The Holy See has rightly upheld the standard of proof of moral certainty for proof of accusations against priests. Priests have the right to justice like every other citizen. In the past some priests were not convicted of crimes as they should have been, but that does not now justify lower standards of proof in cases involving priests. The Cardinal Pell case and the quashing of his conviction in Australia illustrate the importance of standards of proof and presumptions of innocence.

Rik Torfs and John Beal question whether all clerical offenders should be dismissed from the clerical state.<sup>35</sup> The reality is that bishops and religious superiors often have little capacity to really supervise and control convicted offenders when they come out of prison. The Church does not have the systems and technology to control their internet use, where they go, or who they see. Dioceses and religious institutes need to utilise all the help that the civil justice system provides. There needs to be very detailed precepts given to offenders released from prison, and these precepts need to be enforced with clear consequences concerning accommodation and any financial support. Pope Francis has changed canon 1350 so that the Ordinary is not to confer “an office, ministry or function” on someone dismissed from the clerical state, and lay employees and ministers can now be punished for any sexual abuse crime.<sup>36</sup>

<sup>33</sup> J. HAHN, “Moral Certitude: Merits and Demerits of the Standard of Proof Applied in Roman Catholic Jurisprudence,” in *Oxford Journal of Law and Religion*, vol. 8, no. 2 (June 2019), 300-325.

<sup>34</sup> PIUS XII, 1 October 1942, Address to the Rota, [https://www.vatican.va/content/pius-xii/it/speeches/1942/documents/hf\\_p-xii\\_spe\\_19421001\\_roman-rot.html](https://www.vatican.va/content/pius-xii/it/speeches/1942/documents/hf_p-xii_spe_19421001_roman-rot.html).

<sup>35</sup> J. BEAL, “At the Crossroads of Two Laws. Some Reflections on the Influence of Secular Law on the Church’s Response to Clergy Sexual Abuse in the United States,” in R. TORFS (ed.), *Canon Law and Realism, Monsignor W. Onclin Chair 2000*, Leuven, Peeters, 2000, 51-74; TORFS, “Canon Law and the Recommendations of the Royal Commission,” 83.

<sup>36</sup> FRANCIS, *CIC*, 2021.

In the revised penal law, grooming is now a delict according to canon 1398 §2. This is a big step forward, although the meaning of “grooming” will have to be clarified in jurisprudence or another canonical document.<sup>37</sup> A repeat offence of grooming should result in dismissal from the clerical state and/or from the religious institute.

### **2.3 — Retention of Criminal Conviction Case Files**

The Royal Commission encountered the destruction of documents many times during its investigations. Sometimes attempts were made to justify this for canonical reasons.

#### **2.3.1 — Royal Commission Recommendation 16.17**

*The Australian Catholic Bishops Conference should request the Holy See to amend canon law to remove the requirement to destroy documents relating to canonical criminal cases in matters of morals, where the accused cleric has died or ten years have elapsed from the condemnatory sentence. In order to allow for delayed disclosure of abuse by victims and to take account of the limitation periods for civil actions for child sexual abuse, the minimum requirement for retention of records in the secret archives should be at least 45 years.*

#### **2.3.2 — Response of the Holy See**

The Holy See notes that this recommendation needs to be considered in light of the requirements set forth by the civil law in various jurisdictions regarding both the preservation of archives and the right to privacy of the various persons concerned. Since such requirements are frequently divergent and at times even contradictory across different jurisdictions, the approach proposed by the Royal Commission might not be practicable in all cases.

Moreover, it should be noted that the scope of the current legislation applies to all “criminal cases in matters of morals” and not simply to cases involving clerics (CIC, can. 489; CCEO, can. 259). The provision concerning the destruction of documents applies only in cases “where the guilty parties have died or ten years have elapsed from the condemnatory sentence,” that is, only in those cases that have already been concluded with the sentence of a tribunal or that are extinguished by death. It should also be noted that even when documentation is destroyed, “a brief summary of what

<sup>37</sup> Ibid.

occurred along with the text of the definitive sentence is to be retained” (CIC, can. 489, §2; CCEO, can. 259, §2).

### 2.3.3 — *Commentary*

The retention of documents and the contents of the secret diocesan archives are matters addressed in canon law, notably canon 489 concerning the secret archives of the diocese. This canon replaced canon 379 of the 1917 Code.<sup>38</sup> In 1941 the Code Commission was asked to clarify canon 379 § 1 as to whether a brief summary of the facts needed to be retained when the accused died. “Whether the words of canon 379 § 1 *retento facti brevi sumario cum textu sententiae definitivae* (retaining only a brief summary of the facts, with the text of the definitive sentence), are to be applied only to cases which have been closed by a condemnatory sentence for ten years, or also to cases in which the accused have departed this life. Reply. In the affirmative to the first part, in the negative to the second.”<sup>39</sup> The Reply of the Code Commission clarified that a brief summary of the facts of a case was not kept when the accused died.

The secret archive and the retention of documents are both addressed in canon 489 of the 1983 Code.

Canon 489 § 1. In the diocesan curia there is also to be a secret archive, or at least in the ordinary archive there is to be a safe or cabinet, which is securely closed and bolted and which cannot be removed. In this archive documents which are to be kept under secrecy are to be most carefully guarded.

§2. Each year documents of criminal cases concerning moral matters are to be destroyed whenever the guilty parties have died, or ten years have elapsed since a condemnatory sentence concluded the affair. A short summary of the facts is to be kept, together with the text of the definitive judgement.

The text of canon 489 is less detailed than canon 379 of the 1917 Code. Each diocese is obliged to have an archive (or safe) for confidential documents. In this archive are documents concerning secretly celebrated

<sup>38</sup> *CIC/17*, c. 379 § 1. Bishops shall also have another secret archive or at least a safe or box, entirely closed and covered, in the common archive, from which place it cannot be moved. In it secret writings are to be most cautiously preserved; but promptly once a year, documents in criminal cases are to be burned in morals cases, [or] in which the defendant has died or ten years have passed from the condemnatory sentence, retaining only a brief summary of the facts, with the text of the definitive sentence.

<sup>39</sup> PONTIFICAL COMMISSION FOR THE INTERPRETATION OF THE CODE OF CANON LAW, reply, 5 August 1941, in *AAS*, 33 (1941), 378; *CLD*, vol. 2, 132.

marriages (c. 1133), criminal prosecutions, dispensations from occult marriage impediments, and penal remedies. Francesco Coccopalmerio thinks the archive should also hold other sensitive documents, such as the names of candidates for bishop and testimonials about a priest seeking to be incarcerated.<sup>40</sup>

The Holy See's response is significant because it points out that the destruction of documents is not to happen until either the accused has died, or ten years have elapsed since the sentence judging the accused. In those circumstances, "a short summary of the facts and the text of the definitive judgment are to be kept."<sup>41</sup> Gordon Read thinks that the retention of a summary of the facts only applies where there has been a definitive sentence, not when the accused has died.<sup>42</sup> However, Barbara Cusack argues for the retention of a summary of the facts when the accused has died, because of its value for historical purposes and the delay in reporting accusations of sexual abuse.<sup>43</sup>

There is a concern that documents in the secret archive might be destroyed during the time the see is vacant, but this is addressed in canon 490.

Canon 490 § 1. Only the Bishop is to have the key of the secret archive.

§ 2. When the see is vacant, the secret archive or safe is not to be opened except in a case of real necessity, and then by the diocesan Administrator personally.

§ 3. Documents are not to be removed from the secret archive or safe.

During the process of drafting this canon, custody of the key was provided to the diocesan bishop, the chancellor, and a priest designated by the bishop.<sup>44</sup> The final text only allowed the bishop to have the key,<sup>45</sup> because he is the only person with the right to access the documents in the secret archive. When the see is vacant, the diocesan administrator can access the secret archives only in case of necessity. To ensure the safe retention of documents, canon 491 provides for two copies of inventories or catalogues.<sup>46</sup>

<sup>40</sup> F. COCCOPALMERIO, in *Exegetical Comm*, vol. 2/1, 1160.

<sup>41</sup> *Ibid.*

<sup>42</sup> G. READ, in *CLSGBI Comm*, 272.

<sup>43</sup> B. CUSACK, in *CLSA Comm2*, 643.

<sup>44</sup> *Comm*, 24 (1992), 52, 61, 64, 86, 119, 128.

<sup>45</sup> *Comm*, 13 (1981), 124.

<sup>46</sup> Canon 491 § 1. The diocesan bishop is to ensure that the acts and documents of the archives of cathedral, collegiate, parochial and other churches in his territory are carefully kept and that two copies are made of inventories or catalogues. One of these copies is to remain in its own archive, the other is to be kept in the diocesan archive.

## 2.4 — Optional Celibacy

The Royal Commission observed that many clergy and religious did not observe celibacy, while others were poorly formed and lived unhappy lives. The Final Report states: “While not a direct cause of child sexual abuse, we are satisfied that compulsory celibacy (for clergy) and vowed chastity (for members of religious institutes) have contributed to the occurrence of child sexual abuse, especially when combined with other risk factors. We acknowledge that only a minority of Catholic clergy and religious have sexually abused children. However, based on research we conclude that there is an elevated risk of child sexual abuse where compulsorily celibate male clergy or religious have privileged access to children in certain types of Catholic institutions, including schools, residential institutions and parishes.”<sup>47</sup> This led to a recommendation about optional celibacy.

### 2.4.1 — *Royal Commission Recommendation 16.18*

*The Australian Catholic Bishops Conference should request the Holy See to consider introducing voluntary celibacy for diocesan clergy.*

### 2.4.2 — *Response of the Holy See*

While the Holy See accepts the good will of the Royal Commission in making the present recommendation, it wishes to emphasize the great value of celibacy and to caution against its reduction to a merely practical consideration. Indeed, it must be recalled that the practice of clerical celibacy is of very ancient origin, that it developed in imitation of the style of life chosen by Jesus Christ himself and that it cannot be understood outside the logic of faith and of the choice of a life dedicated to God. It is a question that touches also upon the right to religious freedom, that is to say, the freedom of the Church to organise her internal life in a manner coherent with the principles of the faith and the freedom of individuals to choose this form of life. With regard to any assertion of a link between celibacy and sexual abuse, a great deal of evidence demonstrates that no direct cause and effect exists. Sadly, the spectre of abuse appears across all sectors and types of society, and is found too in cultures where celibacy is hardly known or practiced, as Pope Francis observed at the conclusion of the meeting on the protection of minors in the Church held in the Vatican from February 21-24, 2019. And, as the Holy Father recalled on that occasion: “Here again I would state clearly: if in the Church there should emerge even a single

<sup>47</sup> RCIRCSA, *Final Report*, 46.

case of abuse—which already in itself represents an atrocity—that case will be faced with the utmost seriousness.”

### 2.4.3 — *Commentary*

In 2007, the *New York Times* reported a comparison between celibate clergy and non-celibate clergy relative to alleged sexual abuse of minors. In the United States, two hundred claims were made to American insurance companies by Protestant churches.<sup>48</sup> These claims were more than the total allegations against Catholic Church clergy in the same period. In Southern Baptist Churches, four hundred Church leaders abused nearly seven hundred victims, and many of these leaders continued in their roles.<sup>49</sup> Rik Torfs has also noted that compulsory celibacy is often viewed as a main cause of sexual crimes by clerics. However, he holds that clericalism and inadequate Church governance are also significant contributors.<sup>50</sup> A study by Douglas Pryor in the United States found that seventy percent of perpetrators of sexual abuse were married.<sup>51</sup>

Celibacy is a disciplinary law and is not essential to the priesthood. In 1971, Paul VI considered lifting compulsory celibacy, as reported by Bernhard Cardinal Alfrink Edward Schillebeeckx.<sup>52</sup> He refrained from doing so because he did not want to be the pope ending a long tradition. However, Pope Francis has suggested that, maybe one day, the Church could ordain *virī probati*, including married men, to the priesthood.<sup>53</sup>

Rather than celibacy being the problem, perhaps a more pressing matter has been the quality of seminarians and their preparation. As the number of applicants for seminaries declined in the 1970s and 1980s, it was tempting to lower admission standards. The governance review of the Catholic Church in Aus-

<sup>48</sup> THE ASSOCIATED PRESS, “Data Shed Light on Child Sexual Abuse by Protestant Clergy,” in *The New York Times*, 16 June 2007, <https://www.nytimes.com/2007/06/16/us/16protestant.html>.

<sup>49</sup> I. LOVETT, “Southern Baptists Approve Steps to Address Sexual Abuse,” in *The Wall Street Journal*, 11 June 2019, <https://www.wsj.com/articles/southern-baptists-approve-steps-to-address-sexual-abuse-11560303422>.

<sup>50</sup> TORFS, “Canon Law and the Recommendations of the Royal Commission,” 90.

<sup>51</sup> D. PRYOR, *Unspeakable Acts: Why Men Sexually Abuse Children*, New York, University Press, 1996, 297.

<sup>52</sup> E. SCHILLEBEECKX, *Theologisch testament: Notarieel nog niet verleden*, Nelissen, Baarn, 1994, 200.

<sup>53</sup> FRANCIS, interview with the German weekly, *Die Zeit*, 8 March 2017; “Pope Francis Signals Openness to Ordaining Married Men in Some Cases,” in *The New York Times*, 12 March 2017, <https://www.nytimes.com/2017/03/10/world/europe/pope-francis-married-priests.html>.

tralia recommends a national protocol on seminarian selection, training, and ongoing formation; that each diocesan bishop (or dioceses in combination if appropriate) establish a panel involving women and lay men for the selection process for entry of candidates into the seminary and discernment prior to ordination; that lay people take a critical role in the formation of seminarians and evaluations of suitability for ordination; and that there be a requirement for each diocesan bishop to consult the panel before accepting a foreign priest.<sup>54</sup>

Another issue is the acceptance by bishops of foreign seminarians and priests. In 1980, the Congregation for the Clergy issued Directive Norms on the distribution of clergy.<sup>55</sup> These norms point out that a better distribution of clergy is necessary to implement the mandate of Jesus Christ at his Ascension to preach the Gospel to everyone. The norms emphasise the importance of agreements between diocesan bishops concerning clergy working outside their own diocese. The norms require bishops, when accepting foreign clergy, to have an agreement with the Ordinary of the cleric. In practice, however, this requirement was often neglected, so it can be difficult to determine whether some bishops even made minimal consultations on the background and character of the clerics they were welcoming.

### 3 — *Other Recommendations*

The third part of the study takes up the remaining recommendations. The Holy See's first two responses (sections 3.1 and 3.2) may suggest a misunderstanding of canon law on the part of the Royal Commission, and the third a possible misunderstanding of a recommendation on the part of the Holy See (3.3). The final recommendation (3.4) is unique, in that it is not a specific change in canon law that is requested but consultation and information on the applicability of the seal of confession.

#### 3.1 — The “Pastoral Approach” Pre-empting a Canonical Trial

Many bishops and religious superiors failed to implement canon law or ignored canonical procedures but claimed to be dealing with offenders

<sup>54</sup> IMPLEMENTATION ADVISORY GROUP AND THE GOVERNANCE REVIEW PROJECT TEAM, *The Light of the Southern Cross*.

<sup>55</sup> SACRED CONGREGATION FOR THE CLERGY, Directive Norms for Cooperation among Local Churches and for a Better Distribution of the Clergy *Postquam apostoli*, 25 March 1980, in AAS, 72 (1980), 343; *CLD*, vol. 9, 760-787.

pastorally. This has been one of the biggest contributors to the sexual abuse crisis facing the Church, and it has led to the next recommendation.

### 3.1.1 — *Royal Commission Recommendation 16.11*

*The Australian Catholic Bishops Conference should request the Holy See to amend canon law to ensure that the ‘pastoral approach’ is not an essential precondition to the commencement of canonical action relating to child sexual abuse.*

### 3.1.2 — *Response of the Holy See*

The Holy See takes careful note of the concerns expressed by the Royal Commission regarding recourse, in certain cases in the past, to what was sometimes erroneously termed a “pastoral approach.”

In this regard, it must be stressed that both the Code of Canon Law and the particular norms of the Congregation for the Doctrine of the Faith explicitly require that the Ordinary undertakes a preliminary investigation when informed of a suspected delict. To reinforce this principle, the recent *Motu proprio, Vos Estis Lux Mundi*, sets forth sanctions for ecclesiastical superiors who, either by “actions or omissions, interfere with or avoid civil or canonical investigations, whether administrative or penal” in connection with these grave delicts.

With regard to the initiation of an investigation or a penal process, some have claimed, inaccurately, that certain principles in the Code of Canon Law permit alternatives to the canonical process for the delicts of sexual abuse, citing, for example, the sections “Ways of avoiding trials” and “The application of penalties.”

This claim overlooks the clearly-stated principle that such alternatives “cannot validly be employed in matters which pertain to the public good” (CIC, can. 1715 §1). Since the serious crimes under consideration do indeed impact the public good, for they offend grievously against justice and greatly injure the community of the faithful, they must be the subject of a canonical penal process (judicial or administrative), precisely in order to restore justice, reform the offender and protect the faithful from further harm.

### 3.1.3 — *Commentary*

The response of the Holy See to this recommendation reiterates that diocesan bishops and religious ordinaries must implement penal law. In his Pastoral Letter to the Catholics of Ireland, Pope Benedict XVI states:

To my brother bishops: It cannot be denied that some of you and your predecessors failed, at times grievously, to apply the long-established norms of

canon law to the crime of child abuse. Serious mistakes were made in responding to allegations. I recognize how difficult it was to grasp the extent and complexity of the problem, to obtain reliable information and to make the right decisions in the light of conflicting expert advice. Nevertheless, it must be admitted that grave errors of judgement were made and failures of leadership occurred. All this has seriously undermined your credibility and effectiveness.<sup>56</sup>

The response of the Holy See is a reminder that canon 1715 § 1 excludes from settlement, and from compromise through arbitration, those matters that pertain to the public good of the Church and also everything that is outside the free disposition of the parties.<sup>57</sup> Penal cases (c. 1728) are of a public nature, like marriage cases (cc. 1691, 1696), so they cannot be the object of settlement or compromise. According to canon 1728 § 1: “Without prejudice to the canons of this title, and unless the nature of the case requires otherwise, in a penal trial the judge is to observe the canons concerning judicial procedures in general, those concerning the ordinary contentious process, and the special norms about cases which concern the public good.” A penal process is the best way to achieve justice and to observe the requirements of the law.<sup>58</sup> Canonical procedures are the best instruments to ensure justice for the victim and to safeguard the rights of the accused and the community of the faithful.<sup>59</sup> The diocesan bishop is bound to observe these procedures, nor does he have the power to dispense from procedural laws or penal laws (c. 87 § 1).<sup>60</sup> When a bishop receives information concerning an offence that seems to be true, he must begin a preliminary investigation (c. 1717 § 1) and then discern whether to begin a penal process (c. 1718 § 1).

<sup>56</sup> BENEDICT XVI, Pastoral Letter to the Catholics of Ireland, 19 March 2010, [http://www.vatican.va/content/benedict-xvi/en/letters/2010/documents/hf\\_ben-xvi\\_let\\_20100319\\_church-ireland.html](http://www.vatican.va/content/benedict-xvi/en/letters/2010/documents/hf_ben-xvi_let_20100319_church-ireland.html).

<sup>57</sup> See RODRIGUES-OCANA, in *Exegetical Comm*, vol. 6/2, 1977.

<sup>58</sup> R. BACCARI, *Elementi di diritto canonico*, Bari, 1984, 103, cited in R. COPPOLA, *Exegetical Comm*, vol. 1, 2034.

<sup>59</sup> COPPOLA, *Exegetical Comm*, vol. 1, 2034.

<sup>60</sup> This principle was expounded in *Christus Dominus* 8b, and procedural and penal laws were excluded from the power of bishops to dispense in the motu proprio *De Episcoporum muneribus*. See PAUL VI, Apostolic Letter m.p. *De Episcoporum muneribus*, 15 June 1966, in *AAS*, 58 (1966), 467; *CLD*, vol. 6, 396-397. “IV. According to the norm of can. 80, by dispensation is meant the *dissolution of the law for a special case*. The faculty to dispense can be exercised with respect to the *precipitating or prohibiting laws*, but not to the *constitutive ones*. The notion of dispensation does not include the granting of license, faculty, pardon and acquittal. The procedural laws, since they are established in defense of rights, also taking into account that their dispensation does not concern the spiritual good of the faithful, are not the subject of the faculty referred to in the Decree *Christus Dominus*, n. 8 b.” Cf. J. LOBELL, “Centralizzazione normativa processuale e modifica dei titoli di competenza nelle cause di nullità matrimoniale,” in *IE*, 3 (1991), 431-477.

## 3.2 — Diagnosis of a Psychological Disorder and Imputability

Some perpetrators of sexual abuse were not dismissed from the clerical state or a religious institute because they were diagnosed with paedophilia. This fact gave rise to the next recommendation.

### 3.2.1 — *Royal Commission Recommendation 16.13*

*The Australian Catholic Bishops Conference should request the Holy See to amend the ‘imputability’ test in canon law so that a diagnosis of paedophilia is not relevant to the prosecution of or penalty for a canonical offence relating to child sexual abuse.*

### 3.2.2 — *Response of the Holy See*

In relation to the question of imputability and its relevance as a factor in canonical processes, it should be stressed that both the Code of Canon Law and the Code of Canons of the Eastern Churches (CCEO) articulate the fundamental principle that imputability is presumed in any external infraction of the law (CIC c. 1321, §3; CCEO c. 1414). The canonical prosecution of an offense is not precluded by a medical or psychological diagnosis. As in many other criminal law systems, however, Canon Law permits claims regarding diminished imputability to be properly examined in the course of the proceedings (CIC cc. 1322-1324).

### 3.2.3 — *Commentary*

Imputability means “the state or condition rendering one chargeable for an act.”<sup>61</sup> It is different from guilt. The presumption of imputability for an external action is addressed in canon 1321.

Canon 1321 § 1. No one can be punished for the commission of an external violation of a law or precept unless it is gravely imputable by reason of malice or of culpability.

§ 2. A person who deliberately violated a law or precept is bound by the penalty prescribed in the law or precept. If, however, the violation was due to the omission of due diligence, the person is not punished unless the law or precept provides otherwise.

§ 3. When there has been an external violation, imputability is presumed, unless it appears otherwise.

<sup>61</sup> H. BLACK (ed.), *Black’s Law Dictionary*, Minneapolis/St. Paul, 1983, 386.

The President of the Pontifical Council for Legislative Texts, Cardinal Francesco Coccopalmerio, states in the introduction to the draft schema of a revised Book VI of the Code, sent out to Bishops' Conferences for consultation in July 2011, that experience had demonstrated that the provisions of penal law needed strengthening because many bishops had seen implementing penal law as contrary to charity.<sup>62</sup> However, the revised canon 1343 states that the judge "is to determine the matter according to his own conscience and prudence and in accordance with what the restoration of justice, the reform of the offender and the repair of scandal require."<sup>63</sup> In promulgating the revised penal law on 23 May 2021, Pope Francis stated: "Charity thus demands that the Church's pastors resort to the penal system whenever it is required, keeping in mind the three aims that make it necessary in the ecclesial community: the restoration of the demands of justice, the correction of the guilty party and the repair of scandals."<sup>64</sup>

### 3.3 — National Tribunal for Criminal Cases

The Royal Commission notes the lack of expertise in many dioceses and comments on the divisions between bishops and canonists over the seal of confession and other canonical issues. These divisions highlight a lack of competent personnel, leading to the following recommendation about combining expertise.

#### 3.2.1 — *Royal Commission Recommendation 16.15*

*The Australian Catholic Bishops Conference and Catholic Religious Australia, in consultation with the Holy See, should consider establishing an Australian tribunal for trying canonical disciplinary cases against clergy, whose decisions could be appealed to the Apostolic Signatura in the usual way.*

#### 3.2.2 — *Response of the Holy See*

The proposal to create local penal tribunals is under examination. In the current practice of the Congregation for the Doctrine of the Faith, which has exclusive competence for all cases involving clerics, local tribunals already play a significant role, since they are frequently asked to instruct individual cases. However, a number of questions around the present proposal need to

<sup>62</sup> PONTIFICAL COUNCIL FOR LEGISLATIVE TEXTS, *Schema recognitionis Libri VI Codicis Iuris Canonici*, Typis Vaticanis, 2011; unofficial translation by G. READ.

<sup>63</sup> FRANCIS, *CIC*, 2021.

<sup>64</sup> *Ibid.*

be carefully considered. For example, given the extension of the Church throughout the world and the very different conditions that exist from country to country, the availability of resources for the establishment of penal tribunals and the presence of adequately prepared personnel to staff such tribunals would have to be assessed.

### **3.2.3 — Commentary**

The Holy See seems to have misunderstood the recommendation. At present, the regional tribunals in Australia are competent for all canonical cases, including penal cases. Local tribunals usually only deal with declarations of marriage nullity. The Royal Commission believes that the pooling of expertise in a national tribunal would be more effective in handling penal cases in which the penalty could be dismissal from the clerical state. The Bishops' Conference of France has recognised the wisdom of having a national tribunal for penal cases in France.<sup>65</sup>

## **3.4 — The Seal of Confession**

On the question of the seal of confession, the Royal Commission made the following recommendation.

### **3.4.1 — Royal Commission Recommendation 16.26**

*The Australian Catholic Bishops Conference should consult with the Holy See, and make public any advice received, in order to clarify whether:*

- (a) information received from a child during the sacrament of reconciliation that they have been sexually abused is covered by the seal of confession;*
- (b) if a person confesses during the sacrament of reconciliation to perpetrating child sexual abuse, absolution can and should be withheld until they report themselves to civil authorities.*

### **3.4.2 — Response of the Holy See**

With its Note on the importance of the internal forum and the inviolability of the sacramental seal, published on 29 June 2019, the Apostolic Penitentiary has furnished useful indications for arriving at a considered response to the questions raised in the present recommendation. It will be

<sup>65</sup> C. HENNING, "French Bishops to Create a National Canonical Criminal Court," in *National Catholic Reporter*, 16 April 2021, <https://www.nconline.org/news/accountability/french-bishops-create-national-canonical-criminal-court>.

recognised at once that the question of the confessional seal is one of great delicacy and that it is related intimately with a most sacred treasure of the Church's life, that is to say, with the sacraments.

The aforementioned Note repeats the constant tradition of the Church with regard to the seal of confession, recalling that: "The confessor is never allowed, for any reason whatsoever, 'to betray in any way a penitent in words or in any manner' (can. 983, §1), just as 'a confessor is prohibited completely from using knowledge acquired from confession to the detriment of the penitent even when any danger of revelation is excluded' (can. 984, §1)." The Note helpfully clarifies the extent of the seal, which includes: "all the sins of both the penitent and others known from the penitent's confession, both mortal and venial, both occult and public, as manifested with regard to absolution and therefore known to the confessor by virtue of sacramental knowledge." The Note gives expression to the long-standing and constant teaching of the Church on the inviolability of the sacramental seal, as something demanded by the nature of the sacrament itself and thus as deriving from Divine Law. See for example: Fourth Lateran Ecumenical Council (1215), Cost. 21; Pope Clement VIII, Decr. *Ad omnes superiores regulares* (1593); Decr. *S. Officii* (1682); Pope Benedict XIV, *Breve Suprema omnium ecclesiarum* (1745).

However, even if the priest is bound to scrupulously uphold the seal of the confessional, he certainly may, and indeed in certain cases should, encourage a victim to seek help outside the confessional or, when appropriate, to report an instance of abuse to the authorities.

Concerning absolution, the confessor must determine that the faithful who confess their sins are truly sorry for them and that they have a purpose of amendment (cfr. CIC, can. 959). Since repentance is, in fact, at the heart of this sacrament, absolution can be withheld only if the confessor concludes that the penitent lacks the necessary contrition (cfr. CIC, can. 980). Absolution then, cannot be made conditional on future actions in the external forum.

It should be recalled also that the confessional provides an opportunity—perhaps the only one—for those who have committed sexual abuse to admit to the fact. In that moment the possibility is created for the confessor to counsel and indeed to admonish the penitent, urging him to contrition, amendment of life and the restoration of justice. Were it to become the practice, however, for confessors to denounce those who confessed to child sexual abuse, no such penitent would ever approach the sacrament and a precious opportunity for repentance and reform would be lost.

Finally, it is of paramount importance that formation programmes for confessors include a detailed analysis of Church law, including the "Note" of the Apostolic Penitentiary, together with practical examples to instruct priests concerning difficult questions and situations that may arise. These may include, for example, principles for the kind of dialogue a confessor should have with a young person who has been abused or appears vulnerable to abuse, as well as with anyone who confesses to having abused a minor.

### 3.4.3 — *Commentary*

Experience demonstrates that offenders often repeat their sexual abuse. Michael McArdle, a convicted paedophile, said he received absolution fifteen hundred times for sins of sexual abuse in his thirty years as a priest.<sup>66</sup> Many believe he was exaggerating. Archbishop Mark Coleridge, in his submission to the Queensland Parliament’s Legal Affairs and Community Safety Committee on the Criminal Code (Child Sexual Offences Reform) and Other Legislation Amendment Bill 2019, said: “Perhaps former priests who have been found guilty of child abuse should not be so readily believed by media when they claim to have confessed their abuse when much of their life has been a lie.”<sup>67</sup> Nevertheless, if McArdle had received absolution numerous times for the sin of sexual abuse of a minor, his behaviour is despicable, and his confessors may have been gravely negligent. In France, there have been similar cases.<sup>68</sup> The Apostolic Penitentiary needs to provide more detailed advice on dealing with sexual abusers, both clerical and lay, in the confessional. Bishops and priests need to be clear how to deal with abusers who are penitents to ensure that they have a true purpose of amendment and get effective help to stop their abuse.

Priests can delay or even deny absolution to a person confessing sexual abuse of minors. Pope Blessed Innocent XI condemned the proposition that a priest could grant absolution to a penitent when there appeared no hope of amendment.<sup>69</sup> Penitents, who are judged by the confessor to have no real intention of reforming and avoiding the occasions of sin, can have absolution deferred or refused until the confessor judges their intention of amendment to be sincere (cc. 978 § 1, 980). However, a confessor can never require a

<sup>66</sup> K. AGIUS, *Australian Broadcasting Company News*, 17 January 2020, <https://www.abc.net.au/news/2020-01-18/catholic-church-mandatory-reporting-child-abuse/11876130>.

<sup>67</sup> M. COLERIDGE, “Submission to the Queensland Parliament’s Legal Affairs and Community Safety Committee on the Criminal Code (Child Sexual Offences Reform) and Other Legislation Amendment Bill 2019,” 3 January 2020, <https://www.parliament.qld.gov.au/documents/committees/LACSC/2019/CriminalCodeChild2019/submissions/010.pdf>.

<sup>68</sup> “Aside from church superiors, Preynat said he also systematically spoke about his behaviour in the confessional. ‘I always confessed my faults,’ he said. ‘Every time the confessor gave me absolution and urged me not to start again. A month later, I’d start again’.” N. VAUX-MONTAGNY, “Church Covered for Predator Priest,” *Crux*, 20 January 2020, <https://cruxnow.com/church-in-europe/2020/01/french-trial-exposes-how-church-covered-for-predator-priest/>.

<sup>69</sup> HOLY OFFICE, Decree, 2 March 1679 (Denzinger, no. 2164), quoted in I. WATERS, “The Seal of Confession,” *The Australasian Catholic Record*, 340. Proposition number 60 stated: “The penitent who has the habit of sinning against the law of God, of nature, or of the Church, even if there appears no hope of amendment, is not to be denied absolution or to be put off, provided he professes orally that he is sorry and proposes amendment.”

penitent to hand himself over to civil authorities, as the Apostolic Penitentiary points out. In the presence of sins that involve criminal offenses, it is never permissible, as a condition for absolution, to place on the penitent the obligation to turn himself in to civil justice, by virtue of the natural principle, incorporated in every system, according to which *nemo tenetur se detegere*.<sup>70</sup> The confessor can encourage a penitent to hand himself in to civil authorities, but he cannot make the granting of absolution conditional on this.<sup>71</sup> A priest is not bound by the seal of confession, however, concerning matters he learns outside the context of sacramental confession.

Not everyone understands that the Catholic faithful are free to go to confession anonymously, confessing behind a screen or grill. The priest usually has no idea who is confessing, and he is not permitted to ask the identity of any person with whom the penitent may have sinned (c. 979). The essential element of a sacramental confession is the penitent's contrition and intention of receiving absolution. If the penitent is a paedophile confessing his personal sin of sexual abuse of a minor, the seal of confession applies to the priest/confessor. Upholding the seal of confession is a serious obligation for priests. The seal is not just to protect the privacy of the penitent. It is founded on the necessity to protect the dignity of the sacrament. Montini explains that the sacramental seal cannot be removed from the confessor at the discretion of the penitent, as he is not the guardian of the seal and may be subject to various pressures.<sup>72</sup>

Priests can and must help child victims as much as they can while upholding the seal of confession. If someone later states what had earlier been stated in confession, obviously the knowledge is now in the external forum—but care must be taken not to confuse what is under the seal and what is not. In any event, what is said in confession remains always sealed. Because of the complexity of such situations, bishops, major superiors of clerical religious institutes, and members of sexual abuse protocol committees should not hear the confessions of priests, to avoid any potential conflict of interest.

<sup>70</sup> APOSTOLIC PENITENTIARY, Note of the Apostolic Penitentiary on the importance of the internal forum and the inviolability of the sacramental seal, 1 July 2019. In the presence of sins that indicate offenses, it is never permissible to place the penitent, as a condition for absolution, the obligation to establish himself for civil justice, by virtue of the natural principle, incorporated in every order, according to which “*nemo tenetur se detegere*”. <http://press.vatican.va/content/salastampa/it/bollettino/pubblico/2019/07/01/0565/01171.html>.

<sup>71</sup> *Ibid.* A parallel example is a confessor cannot require an unfaithful husband to tell his wife of the affair.

<sup>72</sup> G.P. MONTINI, *La tutela penale*, 226-227.

### *Conclusion*

The Royal Commission blamed clericalism as a key cause of failures to deal with the sexual abuse of minors within the Catholic Church. This is part of the systemic failure that led to neglecting the input of laity.<sup>73</sup> The authority of bishops and how it has been exercised was a constant issue for the Royal Commission. Torfs notes that the diocesan bishop has very wide powers in his diocese with few limitations and checks;<sup>74</sup> he believes some structural changes in canon law are necessary. A true separation of powers and more allowance for laity in Church governance are needed.<sup>75</sup> Pope Francis has promoted synodality, meaning the active participation of all members of the Church in its processes of discernment, consultation, and cooperation at every level. Pope Francis believes that this renewal of the Church cannot be deferred: “the path of synodality is the path that God expects from the Church of the third millennium.”<sup>76</sup> Synodality will result in better decisions in all areas of the Church’s life.<sup>77</sup>

The response of the Holy See to the Recommendations of the Royal Commission reminds the Australian Church and all Church leaders that there needs to be a proper appreciation of the value of canon law in ecclesial practice. The sexual abuse crisis was exacerbated by an arbitrary, antinomian approach to canonical procedures and penalties. If canon law had been implemented, the commission of many crimes could have been prevented and both victims and the Church at large could have been spared considerable pain.

<sup>73</sup> Luis Navarro recognises the fundamental character of the principle of equality. “The principle of radical equality constitutes a true constitutional principle which, as such, must inform canon law in its entirety.” Cf. NAVARRO, “Il principio costituzionale di uguaglianza nell’ ordinamento canonico,” 158.

<sup>74</sup> Canon 381 § 1. In the diocese entrusted to his care, the diocesan Bishop has all the ordinary, proper and immediate power required for the exercise of his pastoral office, except in those matters which the law or a decree of the Supreme Pontiff reserves to the supreme Pontiff or to some other ecclesiastical authority.

<sup>75</sup> TORFS, “Canon Law and the Recommendations of the Royal Commission,” 92.

<sup>76</sup> FRANCIS, speech at the commemoration of the 50<sup>th</sup> anniversary of the institution of the Synod of Bishops, <http://www.synod.va/content/synod/en/news/synodality-in-the-life-and-mission-of-the-church-by-the-interna.html>.

<sup>77</sup> *The Light of the Southern Cross* acknowledges that the current canon law “allows laypersons to cooperate in the exercise of jurisdiction, but should also be interpreted and implemented in light of legal provisions that have occurred since the promulgation of the 1983 Code.” IMPLEMENTATION ADVISORY GROUP AND THE GOVERNANCE REVIEW PROJECT TEAM, *The Light of the Southern Cross*.