

OBSERVATIONS OF THE HOLY SEE

With reference to the *Response* of the Australian Catholic Bishops' Conference and Catholic Religious Australia to the Final Report of the Royal Commission on Institutional Responses to Child Sexual Abuse, published in August 2018, the Holy See affirms once more its resolute determination to confront and eradicate the abuse of minors and vulnerable persons, wherever it may occur in the Church. The Pope has sought to promote reform and vigilance at all levels within the Church and to encourage the efforts of local Churches in the same direction. That commitment has led to the adoption, both by the Holy See and by Dioceses, Episcopal Conferences and Religious Institutes of a wide range of measures, designed to ensure a proper response to such cases, including at the canonical level, as well as encouraging cooperation with civil authorities, both domestic and international.

In that spirit, the Holy See wishes to offer the following observations on a number of recommendations of the above-mentioned Final Report. For ease of reference, each of the recommendations in question is reproduced below, followed by the relevant observations, which have been kept as concise as possible.

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

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 & 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.

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.

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 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 1st, 2020.

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.

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 the 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 "office 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.

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.

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 undertake 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.

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.

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 santitatis tutela* (SST) extended the period of prescription for the crimes in 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.

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.

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 can. 1321, §3; CCEO can. 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 cann. 1322 - 1324).

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 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.

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.

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.

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 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.

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 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.

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 6th, 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.

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.

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

Recommendation 16.18

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

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 case of abuse - which already in itself represents an atrocity - that case will be faced with the utmost seriousness.*"

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.*

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 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.