

**Introduction**

- 4.1 This Commission is established under the law of Ireland and it is therefore arguable that this is the only law relevant to its work. However, an understanding of aspects of canon law and internal Church procedural rules is essential to understanding how allegations and suspicions of clerical child sexual abuse were handled by Church authorities. The fact is that Catholic Church authorities, in dealing with complaints against its clerics, gave primacy to its own laws. Therefore, since no matter what penalties are imposed on a clerical abuser by the State, only a canon law process can affect his status as a cleric or a priest, an understanding of the role of canon law is necessary in order to fully understand the response of the Church authorities to complaints of child sexual abuse.
- 4.2 It is very clear from the accounts given by victims and from the reports of psychologists and psychiatrists that offending priests used their status as clerics and their privileged access in order to groom and abuse children. It is notable that a major concern of virtually all victims, when they first made a complaint to Church authorities about an alleged priest abuser, was that he be removed from ministry so that he could no longer use his status to gain access to children. Parents frequently made the point to the Archdiocesan authorities that this was their major concern. It was the failure to deal with that concern that distressed many of those parents. It is clear that the suffering and the stress of victims was often related to the fact that their abuser was still functioning as a cleric and might therefore be a threat to other children. This is specifically acknowledged in the evidence of Monsignor John Dolan, the current chancellor of the Dublin Archdiocese, and was mentioned by many others who gave evidence to the Commission.
- 4.3 Canon law provides the Church authorities with a means not only of dealing with offending clergy, but also with a means of doing justice to victims, including paying compensation to them. In practice, it appears to the Commission that, for a significant part of the period covered by the Commission, canon law was used selectively when dealing with offending clergy, to the benefit of the cleric and the consequent disadvantage of his

victims. The Commission has not encountered a case where canon law was invoked as a means of doing justice to victims.

### **What is canon law?**

4.4 The body of canon law in question in this report is the law of the Latin Church – in effect, the Roman Catholic Church. The canonical system is said to consist of three bodies of law: divine law, ecclesiastical law and civil law.<sup>13</sup> Divine law consists of certain truths of the faith both dogmatic and moral which cannot be changed by human beings. Ecclesiastical law, on the other hand, is human in origin and can be created, reformed and abolished by competent legislative authorities of the Church. It concerns the internal regulation of the Church and binds only those who have been baptised in the Catholic Church or received into it.<sup>14</sup> The requirement of clerical celibacy is an example of this type of law.

4.5 Canon law can defer or yield to civil laws.<sup>15</sup> Canon 22 of the 1983 code states: “*When the law of the Church remits some issue to the civil law, the latter is to be observed with the same effects in canon law, insofar as it is not contrary to divine Law, and provided it is not otherwise stipulated in canon law*”.

4.6 It is not easy to provide a coherent description of the relevant parts of canon law because, since the 1960s, canon law itself has been in a state of flux and considerable confusion, making it difficult even for experts to know what the law is or where it is to be found. This is the case, not only with local canonists, but also, it appears, even with spokesmen for the Holy See itself. A Vatican spokesman believed the 1962 instruction, *Crimen Solicitationis*, had been superceded by the 1983 *Code of Canon Law* when its existence in the late 1990s was being referred to by others.

4.7 An eminent English canon lawyer, Monsignor Gordon Read, chancellor of the diocese of Brentwood, whom the Commission heard as an independent expert, explained to the Commission that canon law was not

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<sup>13</sup> Huels, “Introduction” in J Beal et al (eds) *New Commentary on the Code of Canon Law* (New York: Paulist Press, 2000).

<sup>14</sup> Canon 11.

<sup>15</sup> It should be noted that “civil law” in this context refers to the entire law of the State and is not used to refer to civil law as distinct from criminal law.

codified until the beginning of the twentieth century. Previously it was found in a complex series of books, volumes of decrees of councils and letters of popes. At times it was very hard even for a canonist to determine the actual content of the law or the authoritative source of law on a particular matter.

4.8 At the end of the nineteenth century, the Church decided to produce a code of canon law along the lines of the (Napoleonic) continental civil codes. The intention was that the law would be found in one book with numbered canons that could be cross referenced. If these were changed, any new edition would contain the changed text. It took rather a long time to produce but the code of canon law was eventually published in 1917. While amendments were made, the code as a whole was not updated until the 1980s.

4.9 By the 1950s, a mass of legislation had accumulated outside the published code and few Church members knew where to find it. Pope John XXIII decided to revise the canon law. In the meantime, the same Pope convened the second Vatican Council in 1961. The revision of the 1917 code was deferred as it was thought that it might be appropriate to incorporate some of the decisions of Vatican II into the legal system of the Church.

4.10 Pope Paul VI, who became Pope in 1963, set up a Commission for the Revision of the 1917 code of canon law during the Vatican Council (1961 – 1965). This revision work took almost two decades to complete, decades during which the older system it was replacing was either discredited or unused. The new code of canon law was eventually finalised in 1983 and took effect on the first Sunday of Advent in that year. So, during the time relevant to the Commission's terms of reference, there were successive codes of canon law in effect, the 1917 code and the 1983 code.

4.11 It is clear to the Commission that canon law was, for many centuries, the prime instrument of governance in the Church. Priests were governed by it. There was, up to the time when the new code was promulgated in 1983, an extensive penal and criminal content in canon law; priests and others under its jurisdiction could be accused of offences and subjected to an extensive range of penalties on conviction. However, it is also clear that this system suffered an enormous loss of confidence in the 1960s and seems to

have fallen into disuse. The Commission heard evidence from canon law experts that the status of canon law as an instrument of Church governance declined hugely during Vatican II and in the decades immediately after it. The Church courts, according to Monsignor Dolan, became little more than marriage tribunals; the penal (criminal) law of the Church fell into disuse; and the modern generation of canonists lacked any experience of it. This was an obvious problem in an era when a large number of clerics were being accused of criminal offences.

4.12 In the words of Monsignor Dolan, canon law *“had been judged by many, rightly or wrongly to have had a significantly negative impact on the mission of the Church, this attitude could perhaps best be summed up by the following: that many placed more faith in the code than in the Gospel”*.

4.13 The second Vatican Council brought about a reassessment of the place of canon law in the Church. Accordingly, by the time the new code was published in 1983 canon law’s influence in and on the Church had significantly diminished particularly in relation to disciplinary actions.

4.14 Monsignor Dolan, in his evidence, analysed the reasons for this state of affairs as he saw it. The Commission is satisfied that this analysis was offered in an effort to be helpful and in total good faith. The view was taken that *“It remains true that law and authority had a role in the church that was often overstated which could tend to stifle other values which could be harmful to individuals”*.

4.15 This development is perhaps not unrelated to broader developments in western society, featuring an increased emphasis on the rights of individuals and an attitude of suspicion of ‘heavy’ regulation or control. Monsignor Dolan freely stated that pre-Vatican II, the tendency in the Church had been to subordinate the individual to the institution. It may be that there was so strong a reaction against this that it left the institution in a condition of near powerlessness when faced by the numerous and gross misdeeds of individual priests. However, it should be noted that this attitude extended only to priests; it did not extend to lay people and particularly, it did not extend to lay complainants of child sexual abuse.

4.16 When the new system came into being in 1983, it was not clear by any means, even to canonists, what its effect was on older decrees or sources of law. These included the procedural rules on dealing with child sexual abuse issued in 1922 and 1962.

#### **Procedural rules regarding child sexual abuse**

4.17 As well as the codes of canon law, there are procedural laws or instructions issued by the Vatican which are relevant to the Commission's work. These are documents dealing with the manner in which allegations either of "*crimen sollicitationis*" (solicitation within the confessional) or of sexual abuse of minors by clergy were to be handled.

4.18 The first relevant set of instructions was promulgated in 1922 and was entitled *Crimen Sollicitationis*. It sets out procedures for dealing with solicitation in the confessional (*crimen sollicitationis*) and it also dealt with what it described as the "*worst crime*". This term includes any obscene external gravely sinful act committed in any way by a cleric with young people of either sex – in other words, child sexual abuse by priests.

4.19 This document was issued in Latin and no definitive English text was or is available. A new version of this instruction was issued in 1962; it, too, is in Latin. The Commission is grateful to Fr Aidan McGrath, the judicial vicar of the Archdiocese of Dublin and Monsignor Read of the diocese of Brentwood (England) for providing it with translations of the 1962 document.

4.20 The instructions contained in the two documents appear to be identical. The main difference between the 1922 and the 1962 documents is that the latter extended the instructions contained in the 1922 document to members of religious orders.

4.21 The main problem with these procedural rules was that virtually no one appears to have known anything about them – including the people who were supposed to implement them. It appears that both documents were circulated only to bishops and under terms of secrecy. Each document stated that it was to be kept in the secret archive to which only the bishop had access. The Commission has evidence that the 1922 document was known to senior figures in the Archdiocese of Dublin, especially during the time of

Archbishop John Charles McQuaid and that, in the words of one witness, it was a “*well thumbbed*” document. The Commission could find no evidence that the 1962 document was ever received by the Archdiocese of Dublin and it certainly was unknown to the officials of the Archdiocese until sometime in the late 1990s. The 1922 document was used by Archbishop McQuaid in the case of Fr Edmondus\* (see Chapter 13). It is not clear if it was ever used by Archbishop Dermot Ryan or Archbishop Kevin McNamara. Cardinal Connell told the Commission that he did not become aware of the 1922 instruction immediately on becoming Archbishop of Dublin (in 1988), but at some later stage he did become aware of it. He said he “*could not recall ever being acquainted with it ...the technical details of what a particular document had to say on the matter was something I wasn’t involved in. This was a matter for the chancellery to deal with and to present recommendations to me*”. He told the Commission that he had never read, and he had never seen, the 1962 document nor had he met anyone who had seen it. He told the Commission that he relied on his canonists to advise him on canon law – his principal canonical advisors were Monsignor Gerard Sheehy (then the judicial vicar of the Archdiocese and a former chancellor), Monsignor Alex Stenson (then the chancellor of the Archdiocese) and Monsignor Dolan.

4.22 Monsignor Stenson worked at the chancellery from 1967-1997; he was chancellor from 1981 to 1997. He lectured in canon law in Clonliffe College from 1972 until 1997. He gave evidence that he never saw the 1922 document until the end of his time as chancellor.

4.23 Monsignor Dolan told the Commission that he only became aware of the 1922 document after he became chancellor in 1997. He thought that it only dealt with the crime of solicitation in the confessional: “*I didn’t know that lurking in the very end at the very back was a little paragraph on the worst crime [child sexual abuse by clerics]*”. He too was unaware of the 1962 document until an Australian bishop discovered towards the end of the 1990s that it was still valid. Monsignor Dolan told the Commission that this bishop wrote to Rome to ask if the law in this document was still valid. He was told that it was. Monsignor Dolan’s evidence was that for the first time they had an acknowledgment that “*we have some guidelines*”. Bishops wanted procedures that they could be certain of; they felt extremely vulnerable because in 1996 (the year the *Framework Document*, which set out

guidelines for dealing with allegations of abuse, was published) “*they did not feel Rome was supporting them in dealing with this issue [of child sexual abuse]...they were meeting an onslaught of complaints and Rome was pulling any particular solid ground that they had from under them*”.

4.24 So, an unusual situation had existed whereby a document setting out the procedure for dealing with clerical child sexual abuse was in existence but virtually no one knew about it or used it.

#### **The 1922/1962 procedural requirements**

4.25 The 1922 and 1962 instructions covered how the investigation into an allegation of solicitation or “*the worst crime*”, including child sexual abuse, was to be conducted; they also covered what was to happen after the investigation process had closed. The entire process was permeated by a requirement of secrecy. For example, the accuser was required to take an oath of secrecy. The penalty for breach of that oath could extend to excommunication.

4.26 The instructions stated that the bishop was to proceed as follows:

- (a) If it was proved that the accusation was without any foundation whatsoever, he was to order that this be declared and the documents of the accusation be destroyed.
- (b) If there were vague and undetermined or uncertain indications of the crime he was to order that the documents be placed in the archive to be taken up again if anything should occur at a later date.
- (c) If there were indications in relation to the crime that were quite serious but not yet sufficient to warrant establishing an accusatory process, the bishop had to order that the accused be warned in a fatherly manner or most gravely adding, if necessary “*an explicit threat of a process if a new accusation is made*”. This material was to be kept in the archives, and the behaviour of the accused monitored.
- (d) If there were arguments to hand that there were certain, or at least probable, reasons for the setting up of an

accusatory process he was to order that the accused should be cited.

4.27 The element of secrecy in this process was very prominent. The warning mentioned at c) above was always to be made in secret. It was to be done either by or through an intermediate person. No matter how it was done, there was to be proof kept in the secret archives that it was done and that the accused had received it.

4.28 The document then went on to deal with bringing the accused to trial, the sentence and the appeal process. The document contained instructions as to what was to happen if a priest who was found guilty of the alleged crime, or had even received a warning, was transferred to another territory. The bishop of the place to which he was being transferred was to be warned as soon as possible about the priest's history and juridical status.

#### **The 2001 procedural rules**

4.29 A further instruction came from the Vatican in May 2001 entitled *Sacramentorum Sanctitatis Tutela*. Unlike the 1922 and 1962 documents, this document was made widely available. This initiative represented a major change in Vatican policy. It provided that all allegations of child sexual abuse, which have reached the threshold of “a semblance of truth” should be referred directly to the Congregation for the Doctrine of the Faith (CDF) in Rome. That body would either elect to deal with the matter itself or would advise the bishop on the appropriate action to take in canon law. The Commission has been informed that this policy was adopted in order to ensure a co-ordinated and uniform response to allegations of child sexual abuse against clergy throughout the Roman Catholic world. The chancellor, Monsignor Dolan, gave evidence that the policy was subsequently modified as Rome was unable to deal with the vast numbers of referrals. The position now, he said, is that all cases brought to the attention of the Archdiocese before April 2001 and which were outside prescription (see below) were not going to be dealt with by the CDF. It was up to the bishop to apply disciplinary measures to the management of those priests. Monsignor Dolan told the Commission that, up until 2007, 19 cases had been referred by the Archdiocese of Dublin to the CDF. These did not include most of the very serious cases such as those of Fr Bill Carney (Chapter 28), , Fr Ivan Payne (Chapter



24), Fr \_\_\_\_\_ or others that had already been dealt with by the Archdiocese.

### **Canon law on investigating complaints**

4.30 Both the 1917 and the 1983 codes of canon law included rules for dealing with clerics who are accused of child sexual abuse. The vast majority of the complaints of child sexual abuse dealt with by the Commission were made after 1983 so we concentrate on that code here. Monsignor Stenson has told the Commission that, for the bulk of the period during which he was dealing with clerical child sexual abuse, he relied on the 1983 code. He had encountered two cases prior to 1983 but the investigation of these cases was dealt with by others.

4.31 The Commission has used the text of the 1983 code as set out in *The Canon Law: Letter & Spirit* prepared by the Canon Law Society of Great Britain and Ireland in association with the Canadian Canon Law Society.<sup>16</sup> The translation into English of the text of the code of canon law in this publication is approved by the Bishops' Conferences of Australia, Canada, England and Wales, India, Ireland, New Zealand, Scotland and Southern Africa. The editorial board for this text included Fr Aidan McGrath, the current judicial vicar of the Archdiocese of Dublin, his predecessor and former chancellor Monsignor Sheehy and one other canonist, Fr Donal Kelly, associated with the Archdiocese of Dublin. It should be noted that the American Canon Law Association translation of the code is slightly different from that used in the publication being quoted.

4.32 Canon 1395:2 of the 1983 code states "*A cleric who has offended ... against the sixth commandment of the Decalogue,<sup>17</sup> if the crime was committed... with a minor under the age of sixteen years, is to be punished with just penalties, not excluding dismissal from the clerical state if the case so warrants.*" The age limit was raised to 18 in 1996.

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<sup>16</sup> Canon Law Society of Great Britain and Ireland *Canon Law: Letter & Spirit: A Practical Guide to the Code of Canon Law* (London: Geoffrey Chapman, 1995).

<sup>17</sup> The Decalogue is the Ten Commandments. Section one of canon 1395 deals with clerics living in concubinage whereas section two deals with child sexual abuse.

4.33 The procedure for handling such accusations is set out. It is very clear that the responsibility for dealing with complaints rests with the bishop (or the head of the order in the case of religious orders). While aspects of the investigation may be delegated to others, it is the bishop who is required to make the decisions.

4.34 Canon 1717:1 states that whenever an ordinary (bishop) receives information which has at least *“the semblance of truth”* about an offence, he is to inquire carefully, either personally or through some suitable person about the facts and circumstances and about the imputability (guilt) of the offender unless such an inquiry would appear to be entirely superfluous.

4.35 The issue arises as to whether an anonymous complaint should be investigated. In practice, complaints are made by victims, by parents, or a third party who may or may not be an anonymous complainant. Speaking to the episcopal conference in 1994, Monsignor Stenson stated that it would be inadvisable to ignore an anonymous complaint. He told the conference that

*“A person may have a genuine complaint and be anxious to communicate it to the Church authorities if only to alert them and prevent further abuse while not wishing to be involved. There may sometimes be a genuine concern that the priest gets help. It would seem wise to at least record such complaints, inform the alleged perpetrator of the fact of the complaint and note his response. To do nothing on the basis that its source was unknown would seem to be a precarious practise nowadays”.*

4.36 It is clear that Archbishop Ryan certainly did not agree with this as he refused to deal with anonymous complaints (see Chapter 16 in relation to Fr Maguire). Monsignor Sheehy also considered that such complaints should not be entertained (see Chapter 24 in relation to Fr Payne). The Commission accepts that it could be difficult to investigate a complaint without the co-operation of the victim.

4.37 According to Monsignor Stenson, all complaints were to be recorded and investigated since they arose from various sources and the information often differed greatly both in quality and detail. He considered that the matter

should be investigated in a discreet manner, as soon as possible, certainly within 48 hours.

#### *Initial inquiry*

- 4.38 The purpose of the initial inquiry is to decide whether the accusation has a “*semblance of truth*” – in effect, is it a genuine complaint that could not be ignored.

#### *Preliminary Investigation*

- 4.39 Once the allegation has been found to have at least “*a semblance of truth*”, the bishop, either personally or through some suitable person, is obliged to start a formal investigation known as the preliminary investigation. This, as outlined in Canon 1717:1, requires the bishop to inquire about the facts and circumstances and about the imputability (guilt) of the offender.

#### *Delegate*

- 4.40 The preliminary investigation is to be conducted by a person known as the delegate. The delegate was usually a priest but is now a lay person in the Archdiocese of Dublin. This person is appointed by decree and must be a suitable person. A person appointed a delegate cannot subsequently act as a judge in the case if it is decided to establish a penal process.

- 4.41 For the bulk of the time within the Commission’s remit, the delegate was either Monsignor Stenson or Monsignor Dolan. Fr Paddy Gleeson and Fr Cyril Mangan were delegates for some of the time.

- 4.42 A delegate has the same powers and obligations as an auditor. An auditor in canon law may be either a cleric or a lay person endowed with good morals, prudence and doctrine, but it was thought for clerical sexual abuse cases that they were better investigated by a priest. It is up to the delegate to decide what evidence is to be collected and how. His responsibilities include not only evaluating the complaint but assessing the credibility of the complainant and any other witnesses who might have information. He also has responsibility for compiling a report for the bishop.

- 4.43 Canon 1717:2 requires that “*care is to be taken that this investigation does not call into question anyone’s good name*”. This seems to be the

reason why the processes set out in the procedural rules require such a degree of secrecy.

4.44 Anyone accused of a crime at canon law (or in civil law) has a right to an impartial investigation. The complainant and his/her family also have a right to an impartial investigation. The accused cleric is to be informed about his right to obtain legal advice and, if necessary, to be accompanied by a lawyer if being interviewed during the process of the preliminary investigation. There is no requirement on the priest to respond to the allegation; he is entitled to remain silent and is not required to take an oath or explain his situation. No adverse inference can be drawn by the delegate if the accused exercises his right to silence.

#### **Status of an accused person during the preliminary investigation**

4.45 Administrative leave is a well accepted and standard procedure for lay people accused of child sexual abuse. Such leave involves the temporary removal of individuals from their duties, with pay, during the course of an investigation of their behaviour. There is no presumption of guilt involved. The procedure is designed to:

- protect the individual from further accusations pending the outcome of an investigation;
- protect the public from the possibility of further wrong doing;
- ensure the integrity of the investigative or judicial process is not compromised.

4.46 This procedure is followed in many workplaces and institutions where workers have been accused of child sexual abuse.

4.47 Monsignor Stenson was of the view that during the course of much of his tenure as chancellor, there was no such equivalent to administrative leave within the canon law process unless a process to impose a penalty was directed by the bishop. It was his view that a bishop would have to ask a priest to step aside voluntarily and temporarily while the preliminary investigation was going on. If the priest failed to do so then a real dilemma was created.

4.48 Other canonists hold a different view. Fr Thomas Doyle,<sup>18</sup> an American expert, is of the view that Canon 1722 enabled the bishop to compel an accused to cease public ministry or refrain from the administration of the sacraments. The bishop could compel him to change his residence or even refrain from celebrating the Eucharist. Fr Doyle fairly acknowledged that there were two schools of thought concerning the applicability of Canon 1722. Monsignor Stenson's view, while shared with many canonists, would accord with the more narrow interpretation, that this canon could only be invoked during the more formal judicial process and not during the preliminary investigation. A contrary view is that administrative leave could be imposed as soon as the bishop had reason to believe that it was needed. That view stems from the fact that formal judicial proceedings were rare and canon 1722 would be useless to bishops if the narrow interpretation were followed.

4.49 It should be noted that, under canon 552, the bishop or diocesan administrator may move an assistant priest for "*just reason*". On the other hand a parish priest can be removed only for a "*grave reason*".

4.50 In giving evidence to the Ferns Inquiry, Bishop Eamonn Walsh said that the criterion for removing a parish priest (a grave cause) or a curate (a just cause) would be met by a credible allegation or a reasonable suspicion of child sexual abuse. He told that inquiry that the same standards applied to all priests in the diocese of Ferns. Most of the priests in the Archdiocese of Dublin who were confronted with the allegation of child sexual abuse agreed to take administrative leave on request. They did this without admission of guilt and they were entitled to be provided with a residence and a "*proper income*" until the matter could be fully investigated.

#### **Removal of faculties**

4.51 In certain circumstances, a priest may be subject to various forms of censure. One such is removal of faculties which can prevent the priest from carrying out some or all of his priestly functions. The bishop issues a precept; this is effectively a ruling about what the priest is allowed to do. So, for example, he may be forbidden to say mass in public and/or to wear clerical dress and/or to be seen in the company of any young person less than 18

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<sup>18</sup> Author of "The Canonical Rights of Priests Accused of Sexual Abuse" (1990) 24 (2) *Studia Canonica* 335 – 336.

years of age. Many such precepts are described in the chapters on individual priests. Such precepts cannot be perpetual and must be renewed if they are to remain in place.

### **The Application of penalties**

4.52 When the preliminary investigation is complete, canon 1718:1 requires that the bishop must decide:

- whether a process to impose a penalty can be initiated;
- whether this would be expedient, bearing in mind canon 1341;
- whether a judicial process is to be used or whether the matter is to proceed by means of an extra judicial decree.

4.53 Canon 1341 states that the bishop is to “*start a judicial or administrative procedure for the imposition or the declaration of penalties only when he perceives that neither by fraternal correction or reproof, nor by any methods of pastoral care, can the scandal be sufficiently repaired, justice restored and the offender reformed*”.

4.54 This canon was interpreted to mean that bishops are required to attempt to reform the abusers in the first instance. In the Archdiocese of Dublin, significant efforts were made to reform abusers. They were sent to therapeutic facilities, very often at considerable expense. In a number of the earlier cases in particular, the Archdiocese seems to have been reluctant to go beyond the reform process even when it was abundantly clear that the reform process had failed. In fact, when a penal process was finally initiated in the case of Fr Carney (Chapter 28), the judges in that process were severely critical of the delay in starting it.

4.55 The Commission could find very little evidence, particularly in the early decades of the Commission’s remit, of any attempt by Church authorities to restore justice to the victims. The main emphasis was on the reform of the priest and the repair of scandal. Under canon 1718:4, it is open to the bishop to decide if in order “*to avoid useless trials, it would be expedient, with the parties’ consent, for himself or the investigator to make a decision, according to what is good and equitable, about the question of harm*”. This does not ever seem to have been considered by the Archdiocese.

## **Imputability**

4.56 Canon 1395 allows for just penalties, not excluding dismissal from the clerical state, to be imposed if a cleric is found to have committed child sexual abuse. The concept of imputability (guilt) is of fundamental importance in canon law when considering the offence of child sexual abuse. Before imposing any penalty for such offence, the ecclesiastical authority must be morally certain that there has been an offence which is gravely imputable in the sense explained at canon 1321.

4.57 Canon 1321 states that no one can be punished for an offence unless it is *“gravely imputable by reason of malice or of culpability”*.

4.58 It goes on to state *“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. When there has been an external violation, imputability is presumed, unless it appears otherwise”*.

4.59 The Canon Law Society of Great Britain and Ireland’s commentary on canon 1395 states that:

*“Among the factors which may seriously diminish their imputability in such cases is paedophilia. This is described as ‘the act or fantasy or engaging in sexual activity with pre-pubertal children as a repeatedly preferred or exclusive method of achieving sexual excitement.’ Those who have studied this matter in detail have concluded that proven paedophiles are often subject to urges and impulses which are in effect beyond their control.*

*When the facts of a particular case are examined carefully it may well emerge that the cleric did indeed commit a sexual offence or a number of them with a minor; as such he may be subject to punishment by the criminal law of the state; nevertheless because of the influence of paedophilia he may not be liable by reason of at least diminished imputability to any canonical penalty or perhaps to only a mild penalty, to a formal warning or reproof, or to a penal remedy. Dealing with such cases the ecclesiastical authority must tread very carefully, balancing the harm*

*done to the victims, the rights of the cleric in Canon law and the overall good of the Church in its striving for justice for all.*<sup>19</sup>

This is a major point of difference between the Church and the State law. In the former, it appears that paedophilia may be an actual defence to a claim of child sexual abuse just as insanity would be in the law of the State.

4.60 It must be noted that two of the three priests in the representative sample (see Chapters 16 and 19) who were dismissed from the priesthood following canonical trials appealed their dismissals to Rome and had their sentences varied by Rome. They were both child sexual abusers and both were diagnosed as paedophiles.

4.61 This Commission finds it a matter of grave concern that, under canon law, a serial child sexual abuser might receive more favourable treatment from the Archdiocese or from Rome by reason of the fact that he was diagnosed as a paedophile.

#### **Periods of prescription/Limitation periods**

4.62 Many of the complaints investigated by the Commission could be classified as historical complaints. Here the canon law and the civil law differ considerably. In Ireland there is no general statute of limitations with regard to serious criminal offences. In canon law, criminal actions, even of the most serious kind, were time barred after a certain period. Under canon law, this period was five years for most of the time with which the Commission is concerned (1975-2004). This is known as the period of prescription. This meant that, in canon law, many of the complaints made to the Church were time barred and could not be properly investigated.

4.63 In 2001, Rome extended the time for making a complaint to ten years. In the case of a minor, this ran, not from the last offence, but from the victim's 18<sup>th</sup> birthday. The preliminary Church investigation, therefore, now has first to establish the dates of the alleged offences and especially the last occasion, and also the age of the victim both at the time the offences were committed and at the time of the investigation.

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<sup>19</sup> Canon Law Society of Great Britain and Ireland, *supra* note 16, p 805.



4.64 A further concession was made by the Pope in 2002 when he granted to the Congregation of the Doctrine of the Faith (CDF) the faculty to derogate from the period of prescription on a case-by-case basis. This meant that a complaint dating back a period of ten years or more could be investigated on a discretionary basis.

### **The canonical penal process**

4.65 Archbishop Connell was one of the first bishops in the world to initiate canonical trials in the modern era. He did so in relation to Fr Bill Carney in 1990 (Chapter 28). A canonical trial was also held in the case of Fr Patrick Maguire (Chapter 16); this was initiated by his religious society in 1999. The canonical penal process is governed by canons 1717 – 1728.

#### *Decision to start a penal process*

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*Conduct of canonical trials*

4.69 The trials which were conducted in the Archdiocese of Dublin were presided over by a canonical tribunal. All three judges were priests and all had qualifications in canon law. Until February 2003, the officers of the court had to be priests. From that date the Pope authorised the Congregation for the Doctrine of the Faith to dispense (in individual cases) with the requirement of priesthood and with the requirement of a doctorate in canon law.

4.70 Each case was presented by a priest who was designated to be the Promoter of Justice for the trial – this is the equivalent of the prosecutor in a criminal trial. The defendant priest was represented by a person known as the Advocate for the defendant. The canonical judges heard the evidence of the witnesses put forward by the Promoter of Justice. Evidence from the preliminary inquiry was permitted as was all data collected by the chancellery. It appears to the Commission that proceedings were more akin to a European model of law, in other words an inquisitorial rather than an adversarial model.

4.71 A number of the witnesses who attended the trials in Dublin told the Commission they had only a vague idea why their evidence was needed. The process and their role in it were not explained to them.

4.72 Once the judges heard the evidence, they then issued their determination. The decision can be appealed.

, Fr Carney,

who did not attend the trial, accepted the determination that he be dismissed from the clerical state. Overall, it seems to the Commission that these trials were conducted carefully and

diligently.

*Damages*

4.73 Under canon 1729, a party who has suffered harm can bring a “*contentious action*” for damages in the course of the penal case. The victims who gave evidence to the Dublin canonical trials were not told of this option for reasons which have never been explained.

*The appeal to Rome*

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4.78 Two further canonical trials were held in respect of priests in the representative sample and both priest defendants appealed the outcomes to Rome. One of the trials was initiated at the behest of the Society of St Columban in 1999. The trial and appeal of the other priest was post 2004 and has not been disposed of at the time of this report.

4.79 In the case of the Columban priest, Fr Patrick Maguire (see Chapter 16), once again Rome directed that the decision of the diocesan tribunal to dismiss Fr Maguire should be changed to a “*penalty of the censure of suspension from all public acts of the exercise of the powers of orders and jurisdiction for nine years and an expiatory penalty of residing in a designated house of the Institute of St. Columban under the direction and vigilance of the superior for an indefinite time*”.<sup>20</sup>

4.80 In the case of Fr Maguire, because he was a Columban priest, it clearly was easier for the order to facilitate the decree from Rome as they could accept him into one of their houses where they could monitor him and supervise him.

#### **Penalties for ecclesiastical authorities who fail to apply the canon law**

4.81 Canon 1389 provides for a penalty, including deprivation of office, for an official who abuses ecclesiastical power or who omits through “*culpable negligence*” to perform an act of ecclesiastical governance. A bishop who fails to impose the provisions available to him in canon law in a case of sexual abuse of a child is liable to penal sanctions imposed by Rome. The Commission is not aware of any bishop who was subjected to such penalty in the period covered by its remit.

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<sup>20</sup> This translation from the Latin of the Roman order was provided by the Missionary Society of St Columban.

## **Confidentiality**

- 4.82 There is no doubt that the code of canon law places a very high value on the secrecy of the canonical process. This obligation of secrecy was described as a “*secret of the Holy Office*” in the 1922/1962 documents, the penalty for breach of which was excommunication and which breach was a sin which could only be absolved by a bishop. In hearings before the Commission, it was notable that Church officials preferred to refer to it now as a duty of confidentiality. Whichever it be, it is in stark contrast to the civil law which requires the public administration of justice. Moreover, an obligation to secrecy/confidentiality on the part of participants in a canonical process could undoubtedly constitute an inhibition on reporting child sexual abuse to the civil authorities or others.
- 4.83 It is not clear from the evidence or the documents available to the Commission whether the obligation of confidentiality relates only to what takes place during the canonical process or whether it extends to the underlying details of complaint.
- 4.84 A number of complainants, however, spoke of being urged, when making a complaint outside the canonical process, to keep it confidential. According to the evidence of Monsignor Dolan, which the Commission regards as truthful and helpful, a number of complainants wished to make complaints to the church authorities only because, ironically, they did not trust the confidentiality of the civil authorities.
- 4.85 Another aspect of the emphasis on the secrecy of the canonical process is that it was very definitely a process in which the complainant (like the accused) was subjected to questioning but no information was given to the complainant. This is illustrated graphically in a handwritten note made by Fr Dolan (before he became chancellor) while attending a lecture by another canon lawyer entitled “Preliminary Investigation, Canonical responses and Processes in Cases of sexual misconduct by Church personnel with minors”. Fr Dolan’s handwritten note records in relation to the examination of the witness: “*gain his knowledge/tell him nothing*”. It is important to emphasise that this statement may not be as sinister as it might be made to appear but it does indicate that the mode of procedure was to extract from the complainant

what he knew without in any way informing him as to the process, the other evidence available, the standing of the accused or other matters.

4.86 While, strictly speaking, these notes related to the examination of a witness for canonical purposes it seems likely that this attitude informed the examination of witnesses generally and the receipt of complaints, even outside the canonical process or investigation.

### **Conclusion**

4.87 The Commission finds the lack of precision and the difficulties of finding the exact content of canon law very difficult to understand. The Archdiocese of Dublin was, in the period relevant to the Commission's inquiry, apparently ignorant of many of the laws relating to the Church's self governance and sought to justify its actions and inactions by reference to canon 1341 which, as we have seen, provides for fraternal rebuke and reform rather than legal process. Even the best attempts of competent people to discover the norms which, according to canon law, should be applied to cases of sexual abuse were in vain. The Commission is quite satisfied that the evidence of the present chancellor of the Dublin Archdiocese, Monsignor Dolan, as to the general canon law background is truthful and accurate. More than that, this witness made every attempt to render what he had to say comprehensible insofar as he could and did not shrink from painting a picture on occasion of chaos and confusion within the Archdiocese and between the Archdiocese and Rome.

4.88 There seems to have been a total absence of any straightforward, easily verifiable system for ascertaining which decrees or statements had the force of canon law and which had not, and what the effects of new canonical instruments, such as the code of 1983, or the 2001 procedural rules, had on previous instruments which had been treated as having the force of law. The Commission was surprised to discover that the 1962 instrument referred to above and its predecessor in 1922 were circulated under terms of secrecy, were kept in a secret archive and, in the case of the latter, apparently never translated from the original Latin. Even more astonishing, Monsignor Stenson, a former chancellor and long term advisor to successive Archbishops did not see the 1922 document until the end of his time in Archbishop's House. There was no evidence that Archbishops Ryan or

McNamara ever applied that document or even read it and the most recent former Archbishop, Cardinal Connell, told the Commission that he did not become aware of the 1922 instruction for some time after becoming Archbishop and that he had never read or seen the 1962 document or met anyone who had seen it.

4.89 It is a basic feature of every coherent legal system that there is a firm, simple and unmistakable procedure for the promulgation of a law. The absence of any such procedure within Church law, in the Commission's view, makes that law difficult to access, and very difficult to implement and to monitor compliance.

4.90 The Commission considers that clear and precise rules are required to ensure that priests suspected of abusing children are not allowed to use their status to give them privileged access to children. This requires that they be removed from ministry. The Commission does not consider that an order to stay away from children, or to minister only to adults, or to meet children only when accompanied by another adult, is adequate. It is virtually impossible for such orders to be enforced. The power to remove priests from ministry is available only from canon law. The penal process of canon law was for a period of years set aside in favour of a purely 'pastoral' approach which was, in the Commission's view, wholly ineffective as a means of controlling clerical child sexual abuse. The abuse of children in Dublin was a scandal. The failure of the Archdiocesan authorities to penalise the perpetrators is also a scandal.

4.91 The Commission is, therefore, very concerned about the lack of precision in canon law about the power of bishops to exercise control over offending priests.

4.92 In particular, the Commission is concerned that canon law is not clear on the power of a bishop to require a priest to stand aside from ministry. At the present time, it appears that standing aside is done on a voluntary basis due to a lack of confidence in the canonical powers available to enforce it. It must also be acknowledged that this 'standing aside' raises considerable questions from the point of view of the rights of the accused. It is clear to the Commission that this aspect of the present procedure is greatly resented by

many priests. However, the Commission is strongly of the view that there needs to be clear, unequivocal power available to bishops to require priests to stand aside.

4.93 The Commission is also concerned about the uncertainty which exists as to whether a person who has been diagnosed as a paedophile could ever be guilty of a canonical offence. If it is to be the case that, because of their psychiatric or psychological condition, paedophiles cannot be guilty of offences, then canon law needs to provide for alternative means of dealing with paedophile priests.

4.94 As the Roman Catholic Church is a private organisation, it appears to the Commission that the status of priests within that organization is a matter over which the State has no power. Accordingly, if these particular concerns are to be addressed, it is for the Church rather than the State to address them.