

NATIONAL COMMITTEE FOR PROFESSIONAL STANDARDS

**"TOWARDS HEALING" AND
THE CDF DOCUMENT OF 18TH MAY 2001**

In July 2001 a document called an *Epistula* and dated 18th May 2001 was sent to every bishop by the Congregation for the Doctrine of the Faith. It concerns how the "greater crimes" (*graviora delicta*) are to be handled. Among the "greater crimes" it lists a sexual offence by a cleric against a person under the age of 18 years.

Can the requirements of this document be reconciled with a) the criminal and civil law of each jurisdiction in Australia and b) our own document *Towards Healing*? What adaptations need to be made and what conflicts remain?

TOWARDS HEALING

The revision of *Towards Healing* completed in December 2000 foresaw some of the canonical problems that could arise and attempted to accommodate them.

Those things that will remain the same include the following:

- When the complaint concerns an alleged crime or reportable child abuse, every effort will be made to refer the matter to the police (no. 37 and 39.4);
- No Church investigation shall be undertaken in such a manner as to interfere in any way with the proper processes of criminal or civil law (no.37.4);
- Allegations that concern a current employee of a Church body, other than a priest or religious, shall be referred to the relevant body for employment relations (no.39.1);
- Since the CDF document concerns only clerics, all complaints against non-clerical religious will continue to be dealt with under *Towards Healing* (unless and until some further direction comes from Rome on how these cases are to be handled);
- Since the CDF document concerns only offences against persons under the age of 18 years, all offences by clerics against persons of either sex over the age of 18 years will continue to be dealt with under *Towards Healing*.

Where the complaint concerns a cleric and a victim who was a minor at the time of the offence, no.39.2 of *Towards Healing* says that "the Church authority shall consider whether a penal process should be commenced in accordance with Canon Law." This would now have to be amended to read "... in accordance with the procedures of the Congregation for the Doctrine of the Faith."

A PENAL PROCESS

In considering whether to initiate a penal process, the following considerations are relevant.

1. If the bishop or clerical religious leader believes that, in the particular case, the only way to ensure the good of all persons is to apply some kind of permanent penalty, including dismissing the cleric from the clerical state, the penal process is the only way to achieve this end. It has been made clear that appeals to the Pope to dismiss a cleric from the clerical state against his will create significant difficulties for the Pope and cannot be seen as an ordinary means of resolving problems.
2. However, the CDF document contains a "prescription" (in English commonly called a "statute of limitations") of ten years, beginning when the victim reaches the age of 18. This means that the victim must notify the complaint to the Church authority before his or her 28th birthday. (In Australian law there is no statute of limitations for criminal cases of sexual abuse).
3. Furthermore, since this is new law, it is most probable that it cannot be retroactive. This means that, for any offence that occurred before 18th May 2001, the statute of limitations is that of the Code, that is, five years from the time of the last offence. If the victim was eight at the time of the last offence, the statute of limitations expired when he/she was thirteen.
4. The CDF document is also new law in establishing 18 as the relevant age rather than 16 as in can.1395 #2. This means that if, before 18th May 2001, the victim was 16 at the time of the offence, permanent penalties, especially dismissal from the clerical state, could not be applied for this offence alone.
5. While it is not a legal consideration, a bishop or clerical religious leader would also have to consider whether a victim would be able and willing to confront the full rigour of a Church judicial process before clerical judges.
6. On the other hand, if the case is still within the statute of limitations, the bishop or leader must make a decision before the time limits expire. There is no point in allowing those limits to expire and then deciding that a judicial case to dismiss the offender from the clerical state should be put into effect.
7. If the bishop or leader decides to initiate a penal process, the process of *Towards Healing* can become "The Preliminary Investigation" of can.1717-1719. In this case it would be essential that the bishop or leader appoint, by a formal, written act, the Director of Professional Standards as the "suitable person.... to enquire carefully about the facts and circumstances, and about the imputability of the offence" (can.1717)

OTHER LEGAL REMEDIES

Where a penal process according to the norms of the CDF is not possible or not advisable, there are two other possible legal remedies.

Removal From Office

Can.193 says that no one may be removed from an office which is conferred for an indeterminate time, or before the expiry of a determinate time, except for grave reason and in accordance with the procedure defined by law. When an office is conferred "at the prudent discretion of the competent authority", the person may be removed for "a just reason".

Except in the case of parish priests, the universal law does not determine any procedure to be followed for removal from an office. Particular law (e.g. the internal law of a religious institute) may have determined a procedure. However, in ALL cases involving sexual, physical or psychological abuse, a bishop or religious leader would be strongly advised to follow both the procedure and the criteria set out in cann.1740-1747 for the removal of a parish priest.

The code also contains a procedure for the transfer of a parish priest (cann.1748-1752), but it is presumed here that the bishop or leader wishes to remove the offender from all office and not appoint to any other, so it is cann.1740-1747 that are relevant.

Can.1740 defines the "grave reason" of can.193 as "when the ministry of any parish priest has for some reason become harmful or at least ineffective". The following canon spells this out further and two of the five criteria listed are particularly relevant:

1. a manner of acting which causes grave harm or disturbance to ecclesiastical communion;
3. the loss of the parish priest's good name among upright and serious-minded parishioners, or aversion to him, when it can be foreseen that these factors will not quickly come to an end.

Cann.1742-1747 and 193 #4 then detail the procedure to be followed.

Advantages of this process:

- It is an administrative rather than a judicial procedure and so easier to carry out;
- There would be no statute of limitations for such a case. All that matters is the loss of good name or aversion in the present, not when the offence that caused this occurred;
- The age of the victim would also be irrelevant;
- Can.1740 speaks of ministry being harmful or at least ineffective, "even though this occurs without any serious fault on his part". Thus, e.g. if a cleric had been found guilty by a civil court, the bishop or leader could remove him without having to prove his guilt in a separate Church process;
- It is even possible that, if the "aversion" of the people demanded it, the cleric could be removed from his office without moral certainty of his guilt.

Disadvantages of this process:

- It enables only removal from office and does not enable any other penalty to be applied. Thus it can be quite insufficient to prevent the cleric from offending again.
- The cleric can appeal to Rome against the decree of removal (can.1747 #3). At least in the case of a parish priest, "while recourse against a decree of removal is

pending, the Bishop cannot appoint a new parish priest, but is to make provision in the meantime by way of a parochial administrator." This situation can last for years.

Psychological Infirmary

By putting together canons 1041, 1o and 1044 #2, 2o, we obtain the following law:

"The following are impeded from the exercise of orders:

One who suffers from any form of insanity, or from any other psychological infirmity, because of which he is, after experts have been consulted, judged incapable of properly fulfilling the ministry."

The argument has been presented that a cleric guilty of sexual abuse might be suffering from a psychological infirmity, and so could be not merely removed from an office, but also excluded from all exercise of orders.

Several comments made by Archbishop (now Cardinal) Pompedda at the Rome meeting in April 2000 are relevant. (He spoke only in terms of bishops, but what he said would apply equally to a clerical religious leader).

1. The phrase "properly fulfilling the ministry" does not refer only to the proper administration of the sacraments, but to all aspects of priestly ministry; (Comment: One of the aspects of ministry that could be included would be that of ministry to minors. If a psychological infirmity causes a priest to be incapable of a proper ministry to minors, the bishop may invoke this canon.)
2. If it is legitimate for a bishop to forbid all exercise of orders in this regard, it is also licit merely to limit the exercise of orders for difficulties which are not so severe. (Comment: It is a strong principle of canon law that all penalties are to be interpreted strictly, so this is a most interesting statement. It means that for a lesser grade of psychological infirmity, the bishop can limit the exercise of particular aspects or areas of ministry, e.g. not to go near a school.)
3. The declaration of the presence of "psychological infirmity" is not in any way to be considered a penalty, even if the cleric himself considers it to be so. (Comment: Since it is not a penalty, it does not require a judicial process. There is no reason why the bishop could not use the procedures of *Towards Healing*.)
4. On the other hand, such a declaration can never be based simply on the fact of an offence committed. A sexual offence against a minor can be an indication that a serious condition exists, but is not a sufficient proof in itself that a cleric suffers from a "psychological infirmity" that renders him incapable of properly exercising his ministry. (Comment: The mere fact of an offence is not enough and can.1041 says "after experts have been consulted". The bishop would have to consult at least one expert. Should he fail to do so, his decision would be invalid (Can.127 #2 2o). Canon 50 says that the bishop should, as far as is possible, consult the alleged offender. In most cases he would invite him to undergo an assessment. Before this assessment could be used, the priest would have to agree twice: he would have to agree to undergo the assessment and then, after the assessment had taken place, he would have to give a new agreement to the

making known of the results of the assessment to the bishop. If the priest refuses either of these agreements, the bishop is still bound to seek the opinion of an expert. In this case he would tell the priest that, of necessity, the expert could base an opinion solely on the reports of the priest's behaviour that have been gathered. The same canon 50 would probably demand that the bishop then make known to the priest the results of this opinion and the priest would then have to decide whether he should undergo an assessment in the interests of his own defence.)

5. While the bishop is to consult experts before making such a decision, the decision itself pertains to the bishop, not the experts.

Advantages of this process:

- It is an administrative rather than a judicial process;
- It enables, not only removal from office, but, as required, exclusion from certain ministries or all ministries;
- There are cases in which it would be a reasonably simple matter to declare the presence of an obvious psychological infirmity.

Disadvantages of this process:

- There are cases in which it is not at all obvious that a psychological infirmity is present;
- The procedure seems to have overtones of the former Soviet Union's habit of declaring dissidents insane and putting them in hospitals. This does not mean that this procedure could not be used in an obvious case, but it would have to be used sparingly;
- While it enables more than removal from an office, it still does not meet the bishop's or leader's needs in a case where there is a fear of further offences, for the cleric can still wear clerical clothes and still introduce himself as "Father" or "Reverend".

(Archbishop Pompedda also spoke of ways of getting around some of the difficulties of the full judicial process, e.g. having the victim interviewed by one layperson rather than a panel of priests. However, it is far from certain that this will be possible under the CDF procedures. In any case, one must ask why we should need to get around a law, why we can't have a law that doesn't need getting around.)

THE DILEMMA

Where none of these procedures is opportune, all that is left is to return to *Towards Healing* and follow what is set out in no.40:1-15. It must be clearly understood that in these cases the procedure has no "teeth" and cannot be enforced. The bishop or leader would proceed solely in the hope that, if the offence is confirmed, he will be able to reach an agreement with the offender based on the good of the whole Church. In many cases this is possible, but it is usually the cases in which it is most required that it is not possible. In these cases the CDF document will, in most instances, block any enforceable solution.

THE CDF DOCUMENT OF 18TH MAY 2001

There are a number of issues arising from the CDF document of 18th May 2001 that concern the whole Roman Curia and/or raise questions of possible conflict between Church and State. As such they appear to be matters for the Secretariat of State.

PAPAL DISPENSATIONS

In the past, in some cases of very serious abuse, various bishops made a request to the Pope to dispense a priest from all the obligations of priesthood and return him to the lay state. The dispensation was given, even against the will of the priest concerned. At the meeting in Rome in April 2000 it was said that these requests put the Pope in a difficult situation and were not to continue.

However, the cases that gave rise to these dispensations still occur, and it will not be possible to handle many of them according to the CDF procedure, mainly because of the statute of limitations. So will the Pope continue to dispense in the future? If not, how are these cases to be handled?

TITLE AND INSIGNIA

There are other cases in which it is not necessary and probably not advisable to return the offender to the lay state, but it is essential that he be denied any privileged access to minors. In practice this means that he be denied the use of clerical clothes and collar (insignia) and be forbidden to call himself "Father" (title). Once again many of these cases cannot follow the procedure of the CDF document. So will the Pope dispense in these cases? If not, how are they to be handled?

UNACCEPTABLE RISK

Cases can arise where a cleric cannot be given a position that confers privileged access to minors because there is an unacceptable risk, based on past events or allegations, that the person will commit sexual abuse against those minors.

For example, four girls aged between six and eight years complained to their respective parents that the same priest had performed identical improper actions on them. On two separate occasions the police charged the priest with one of these offences, but on each occasion it came down to his word against that of a small girl and he was acquitted. However, if the four cases are put together, it is obvious that there is a serious, and therefore unacceptable, risk of an offence against another small girl.

Bishops and religious leaders would be subject to penalties, including imprisonment, if they ignored these risks. There would also be massive negative public reaction if a bishop or leader were found to be negligent in this matter.

The problem is that this concept does not exist in canon law. The procedures of the CDF are seen as the sole means by which permanent penalties may be imposed on a cleric. A cleric could appeal to the appropriate Congregation against an action of a bishop or leader based on the concept of unacceptable risk and the Congregation would probably uphold his appeal and order that the cleric be restored to ministry. This creates the potential for a serious conflict between Church and State.

CONSCIENCE

There are circumstances in which a bishop or religious leader can find that he must say, "Irrespective of either civil or canon law, in conscience before God alone I must remove this man from his office and cannot give him a new appointment." In another case he might even have to say, "I cannot in conscience before God alone allow this person to continue to wear a clerical collar or call himself 'Father'".

There are cases in which this can occur and yet no judicial case is possible, e.g. because of the statute of limitations. A bishop or leader must be free to follow his conscience.

STANDING ASIDE FROM AN OFFICE

It is the custom in most countries that follow the Common Law tradition that a person accused of a serious offence stands aside from his office while the matter is being investigated. He remains the holder of that office, but does not reside at the place of the office or carry out any act of jurisdiction or administration. An administrator is appointed until the matter is resolved. In canon law his legal status is equivalent to that of a bishop *sede impedita*.

If the Church does not follow this practice, there can be serious criticism from the whole community, including good Catholic people. For example, if a priest is arrested by the police and charged with sexual abuse of a minor, there can be serious scandal if the Church allows him to continue to administer his office while the matter is being heard.

Canon 1740 allows that a priest can be removed from his office when his ministry "has for some reason become harmful or at least ineffective, even though this occurs without any serious fault on his part." If a priest can be permanently removed from his office for these reasons, then surely he can be asked to stand aside from the office temporarily in similar circumstances. And yet canon law does not make allowance for this.

THE PASTORAL VERSUS THE LEGAL

The CDF document forces bishops and leaders to think in terms of crime and punishment from the beginning and this is not the way in which cases have been approached until now. To most bishops and leaders abuse is a cause of harm to victims, a scandal and a pastoral problem. Their reaction has included a response to the needs of the victim, an appropriate response to the situation of the offender and an attempt to address the pastoral problems created for the whole community of the Church.

In relation to the offender, most have tended to leave punishment to the State and to see their own role in terms of treatment and prevention of future offences. When the fact of abuse has been admitted or confirmed, they have tended to rely on an agreement with the cleric about limitations on his future activities and, where appropriate, on an agreement by the cleric to request a return to the lay state. They have tended to turn to penalties only when there has been no other way of resolving the situation. To have to concentrate on crime and punishment from the beginning, with everything else following on behind, is seen as inappropriate and inadequate.

In a particular way, returning an offender to the lay state is not always an appropriate response. There are situations where it is important that the bishop or leader retain some control over where the priest lives, the clinical treatment he is given, the continuing support he receives and the safeguards that are put in place to ensure that he does not offend again. This can involve lengthy and delicate negotiations. In some places it can lead to a contract being signed between the cleric and his bishop or religious leader. The CDF requirement to think in terms of crime and punishment from the beginning is a very poor means of conducting these delicate negotiations.

The CDF document does not address the whole issue of abuse. It does not even mention victims. A response to the whole pastoral problem is essential. This seems to be a matter for the Secretariat of State, for the whole issue involves Church-State relations in a most sensitive field where the Church is being placed under great pressure by the State.

THE "GRAVER CRIMES"

In the CDF document cases of sexual abuse are subjected to the needs of the other crimes listed there, e.g. concelebrating with a non-Catholic minister, celebrating with bread but not wine.

There may well be arguments for having a tribunal consisting of three priests judges, a priest notary, a priest promotor of justice and a priest advocate in the cases just mentioned. There may well be advantages in having a statute of limitations of ten years for these cases. And there may well be arguments for subjecting such cases to pontifical secret. But this is not true of cases of sexual abuse and it is not good to subject the needs of abuse cases to the needs of the other cases. There is a serious need for a process designed solely for cases of abuse.

THE STATISTICS

It is likely that only a relatively small number of cases will be referred to the CDF. The main reasons for this are:

- The fact that criminal cases brought by the police will take precedence;
- The statute of limitations;
- The unwillingness of victims to submit themselves to the CDF process;
- The desire of bishops and leaders to respond to the whole pastoral situation and, in this context, to reach agreements with offenders before turning to penalties.

It would be a pity if, because of these factors, the CDF were to conclude that cases of paedophilia by priests are very rare and can safely be ignored in the bigger picture of the life of the Church and even of the lifestyle of priests.

Should there be an agreement between our Conferences that we will keep Rome informed of the size and complexity of the problem? If so, could we agree on

- what statistics we should forward to Rome
- which Congregation we should forward them to
- what types and particular difficulties of cases we should draw to their attention?

QUESTIONS WITHIN THE CDF DOCUMENT

The CDF document is very brief and it leaves a number of questions unanswered. Among these questions are the following:

1. If a priest is found guilty of abuse of a minor by a civil court, must the Church hear the case all over again before an ecclesiastical tribunal, with a new interrogation of the victim, before it could impose a perpetual penalty on him? Under what conditions may the Church use a) the evidence and b) the judgement of the civil trial in deciding whether perpetual penalties may be imposed?
(If a civil court finds a priest guilty and a church court then finds him not guilty, the local Church will face most serious problems)
2. If a number of accusations are made against the same priest, must there be a separate trial for each of them or can they be considered together? That is, can there be cumulative proof of guilt?