

SPECIAL COMMISSION OF INQUIRY
INTO MATTERS RELATING TO THE POLICE INVESTIGATION
OF CERTAIN CHILD SEXUAL ABUSE ALLEGATIONS
IN THE CATHOLIC DIOCESE OF MAITLAND-NEWCASTLE

REPORT

OF

DR RODGER JOSEPH AUSTIN JCD STL

CANON LAWYER

FOR THE ATTENTION OF

THE COMMISSIONER

MS MARGARET CUNNEEN SC

REPORT

OF

DR RODGER JOSEPH AUSTIN JCD STL

Author of this Report

I, the undersigned, Rodger Joseph Austin, am the author of this Report. I was born on ~~REDACTED~~. I am a canon lawyer. I obtained a degree in theology [STL] from the Ecclesiastical Theological Faculty of Sydney in 1967 and a doctorate in canon law [JCD] from the Pontifical Urban University, Rome in 1972.

I was a lecturer in canon law at the Catholic Theological Institutes in Sydney from 1972-1996. I was a judge of the Ecclesiastical Regional Tribunal of Sydney 1979-2004 and of the Tribunal of Appeal for Australia and New Zealand 1981-2004. I was ordained a priest in 1967 and Pope John Paul II dispensed me from all obligations arising from ordination in 2004. I held various ecclesiastical offices in the Diocese of Wollongong and the Archdiocese of Sydney between 1972 and 1989. I was Assistant Secretary to the Australian Catholic Bishops Conference in Canberra 1989-1991. I have contributed to theological and canonical journals in Australia and overseas.

I am self-employed as a Canon Law adviser and consultant to diocesan bishops, diocesan agencies, parishes, religious institutes and other Catholic Church organisations and individuals. I am an Advocate for the Ecclesiastical Regional Tribunal of Sydney of the Catholic Church.

My Curriculum Vitae is annexed to this Report as Annexure 'A'.

Agreement to Expert Witness Code of Conduct

I, Rodger Joseph Austin, acknowledge for the purpose of Rule 31.23 of the *Uniform Civil Procedure Rules 2005* that I have read the Expert Witness Code of Conduct in Schedule 7 to the Rules and agree to be bound by it.

I have been requested to provide an expert report with respect to the following matters.

Relationships between a Bishop and Priest of a Diocese

1. The relationship under Canon law between a Bishop and a Priest of a Diocese, including the extent to which the Bishop holds a position of authority in relation to the priest.

Interface between Canon Law and civil law

2. The interface between Canon law and civil law and, in particular (as relevant to the context of reporting allegations of child sexual abuse committed by a priest), whether or not Canon law may override or displace any applicable civil law obligations.
3. (a) In concise terms, with respect to allegations of child sexual abuse committed by a priest the Canon law requirements for a Bishop to undertake an investigation of such allegations and applicable procedures.

Please summarise the position as at (i) 1956; (ii) 1976; (iii) 1983-1987; (iv) 1993-1995; and (v) the present time.

- (b) What are the Canon law requirements for documenting investigative steps (whether by the Bishop or person appointed by the Bishop to undertake an investigation) and for retaining such documents?
4. Whether Canon law imposes any (a) obligations or (b) restrictions upon a Bishop or priest in terms of reporting to Police of allegations of child sexual abuse committed by a priests and, if so, the nature of such obligations or restrictions (including any change in the position from 1950 onwards as per above).
5. In summary terms, a description of the evolution of any Church protocols or procedure (whether or not mandated by Canon law) relating to the reporting of allegations of child sexual abuse. To the extent applicable, please include reference to any relevant directives or guidelines provided by the Congregation for the Doctrine of the Faith or the Vatican.

The "secret archive"

6. In concise terms, a description of the Canon law requirements for the establishment and maintenance of a "secret archive" (cf. Canon 489) including:
 - (a) What is the nature of a secret archive?;
 - (b) What type of documents should be stored in the secret archive, and why?;
 - (c) Should documents relating to allegations of child sexual abuse be stored in a secret archive?;
 - (d) Who has responsibility for and control of such secret archive and documents?;
 - (e) Which persons are permitted access to documents in such secret archive?;
 - (f) What are the requirements for (i) retention, and (ii) destruction of documents held in the secret archive?
7. Canon 489 §2 states that "*Each year documents of criminal cases concerning moral matters are to be destroyed whenever the guilty parties have died, or ten years have elapsed since a condemnatory sentence concluded the affair. A short summary of the facts is to be kept, together with the text of the definitive judgement.*"

In this respect:

- (a) Is a Bishop bound or expected to follow Canon 489 §2 and destroy documents as contemplated by that canon? What consequences follow, under Canon law, if he does not do so?
- (b) Does Canon 489 §2 have the effect that documents are required to be destroyed under Canon law 10 years after the perpetrator had died and which thus may not be later available to Police who later may be investigating allegations of concealment (by Church officials) of offences committed by the perpetrator?
- (c) How does the apparently mandatory language of Canon 489 §2 co-exist with any civil law obligations that may exist regarding the retention of documents?

Laicisation and impediments to exercise of Ministry

- 8. What is meant by the laicization of a priest (under Canon law) and whether or not it is the same as dismissal?;
- 9. What steps were required under Canon law to:
 - (a) remove a priest's faculties as at 1993?;
 - (b) laicise a priest as at 1995?
 - (c) if the process involved in either (a) or (b) above has since changed, please summarise the change and the basis thereof.
- 10. (a) To what extent did the letter dated 19 October 1995 from Bishop Leo Clarke to Fr Denis McAlinden (copy attached) correctly set out the applicable Canon law process as at that date?
 - (b) Did the reference (in the letter dated 19 October 1995 to "*your good name will be protected ...*") reflect an applicable Canon law requirement?

PRELIMINARY AND EXPLANATORY STATEMENT

1. In order to provide a response to the matters hereinbefore set out it is necessary to make a preliminary and explanatory statement with regard to the law of the Catholic Church.
2. From the earliest times the legislation promulgated by the Church was referred to as *ius canonicum* - canon law. Since the Twelfth Century, the Church has referred to the laws enacted by secular authorities as *the civil law*.

Canon law can be defined as that system of laws promulgated by lawful ecclesiastical authority by which the constitution and governance of the Church is regulated and the actions of the members of the Church are directed towards its purpose.¹

THE CODE OF CANON LAW

3. The development of the Church's legal system from New Testament times until the present is very complex.² For the purposes of this Report it is necessary to note the following.

Code of Canon Law 1917-1983

4. As requested by the First Vatican Council [1869-1870] Pope Pius X undertook, from 1904 to 1917, the reform of canon law. In the process of reform it was decided to adopt a codified approach to canon law, a decision in large part influenced by the codification of civil legislation in Europe in the Eighteenth and Nineteenth Centuries.³

Pope Benedict XV promulgated the Code of Canon Law on 27 May 1917 and decreed that it come into force on 17 May 1918.

The 1917 Code of Canon Law remained in force until 27 November 1983.

The official text of the 1917 Code of Canon Law is in Latin: *Codex Iuris Canonici* PII X Pontificis Maximi iussu digestus Benedicti Papae XV auctoritate promulgatus. The text of canons of the 1917 Code of Canon Law to which I refer in this Report are taken from Stanislaus Woywod - Callistus Smith, *A Practical Commentary on the Code of Canon Law* New and Revised Edition (New York: Joseph F. Wagner, Inc., 1957). The 1917 Code of Canon Law is identified as CIC17.

Code of Canon Law 1983

5. On 25 January 1959 when Pope John XXIII convened the Second Vatican Council [1962-1965] he said it would be accompanied and completed by the revision of the 1917 Code of Canon Law.⁴ On 25 November 1967 Pope Paul VI inaugurated the work of the Pontifical Commission for the Revision of the 1917 Code of Canon Law that was brought to completion on 22 April 1982.

¹ cf. Felix M. Cappello SJ *Summa Iuris Canonici* 3 Vols. Editio Sexta (Rome: Pontificia Universitas Gregoriana, 1961)I:8.

² cf. Amleto G. Cicognani *Canon Law* Second Revised Edition Authorized English Version of *Ius Canonicum* (Maryland: Newman, 1934); Alphonsus M. Stickler *Historia Iuris Canonici* 6 Vols. (Rome: Pontificia Studiorum Universitas Salesiana, 1950); James A. Coriden *An Introduction to Canon Law* (London: Chapman, 1991).

³ Cicognani, 417-418.

⁴ Pope John XXIII Allocutio 25 January 1959.

On 25 January 1983 Pope John Paul II promulgated the revised Code of Canon Law and decreed that it come into force on 27 November 1983.

The official text of the 1983 Code of Canon Law is in Latin: *Codex Iuris Canonici auctoritate Ioannis Pauli PP. II promulgatus.*

The English translation of the Codex Iuris Canonici approved for use in Australia is *The Code of Canon Law New Revised English Translation* Prepared by the Canon Law Society of Great Britain and Ireland in association with the Canon Law Society of Australia and New Zealand and the Canadian Canon Law Society (London: Harper-Collins, 1997). The text of canons quoted in this Report is taken from this translation.

The 1983 Code of Canon Law is identified as CIC83.

After the 1983 Code of Canon Law came into force further legislation has been promulgated by the Roman Pontiffs, John Paul II and Benedict XVI.

6. In the Catholic Church there is an essential relationship between the teaching of the Church and its legislation, such that it is necessary to consider the legislation with reference to its theological sources and the teaching of the Church that pertains to it.

In respect of the 1983 Code of Canon Law it is the teaching of the Second Vatican Council that is of particular importance.

RELATIONSHIPS BETWEEN A BISHOP AND PRIEST OF A DIOCESE

1. *The relationship under Canon law between a Bishop and a Priest of a Diocese, including the extent to which the Bishop holds a position of authority in relation to the priest.*
7. The teaching of the Church is that the Catholic Church is not one single monolithic structure but a communion of individual or particular Churches which are also called dioceses.⁵

The teaching of the Church is that a diocese is a portion of the People of God entrusted to a bishop to be shepherded by him with the cooperation of the priests.⁶ The diocesan Bishop is not the delegate of the Roman Pontiff but governs the particular Church assigned to him as the vicar and ambassador of Christ.⁷ He governs his diocese by his "counsels, exhortations and example, but over and above that also by the authority and sacred power exercised in the name of Christ".⁸

In the Diocese entrusted to his pastoral care the diocesan Bishop, as of right, possesses all the ordinary, proper and immediate power required for the exercise of his pastoral office, without prejudice to the supreme authority of the Roman Pontiff.⁹ The diocesan bishop's power is legislative, judicial and executive.¹⁰

8. It is the teaching of the Church that the relationship between a priest and his Bishop has its foundation in the spiritual reality, namely that priests share and exercise with the Bishop the one priesthood and ministry of Christ through their reception of the Sacrament of Holy Orders.¹¹

All members of the Church are referred to generically as "Christ's faithful". Those who are ordained, that is sacred ministers, "in law are also called clerics" and consequently the law refers to the "clerical state".¹²

As a member of the Catholic Church a priest already possesses the obligations and rights common to all Catholics.¹³

Ordination as a priest brings with it the obligations and rights pertaining to the status of 'a cleric' in the Church.¹⁴

9. No man who is a member of the Catholic Church can be ordained a priest unless, as stated in CIC83 canon 265, he is incardinated into a diocese.

Incardination is ordinarily established by ordination as a deacon. Incardination is the permanent attachment of an ordained minister to the diocese to whose service he has committed himself. Incardination can only be lost in accordance with the procedures established in the Code of Canon Law.

⁵ Vatican II Dogmatic Constitution on the Church n.23.

⁶ Vatican II Decree on the Bishops' Pastoral Office in the Church n.11; cf. CIC83 canon 369.

⁷ Vatican II Dogmatic Constitution on the Church n.27.

⁸ Ibid.

⁹ Vatican II Decree on the Bishops' Pastoral Office in the Church 8(a); cf. CIC83 canon 381 §1.

¹⁰ Cf. CIC17 canons 335 §1, 1519; CIC83 canon 391 §1.

¹¹ Cf. Vatican II Dogmatic Constitution on the Church n.28.

¹² CIC83 canon 207 §1.

¹³ CIC83 canons 208-223.

¹⁴ CIC83 canons 273-289.

A priest, whilst remaining incardinated in his own diocese, may be permitted to exercise his priestly ministry in another diocese only in accordance with the norms of canon law.

Incardination constitutes a spiritual bond as well as an authentic legal bond. CIC83 canon 275 §1 provides that "since all clerics are working for the same purpose, namely the building up the body of Christ, they are to be united with one another in the bond of brotherhood and prayer. They are to seek to cooperate with one another, in accordance with the provisions of particular law".

Incardination into a diocese establishes obligations and rights incumbent upon the priest and the diocese. A priest is "bound by a special obligation to show reverence and obedience to his diocesan Bishop" for he shares with the Bishop in the responsibility for the diocese. [CIC83 canon 273] He is obliged to accept and faithfully fulfil the ministry to which he is appointed by the diocesan Bishop. [CIC83 canon 274 §2] He is bound to reside in the diocese unless his absence is authorised [CIC83 canon 283]. A diocese is obligated to provide "remuneration [for the priest who is] dedicated to the ecclesiastical ministry" and "such social welfare he may need in infirmity, sickness or old age". [CIC83 canon 281]

10. It is the teaching of the Church that a priest is dependent upon the diocesan Bishop in the exercise of his priestly ministry.¹⁵ Subsequent to his ordination a priest requires "faculties" in order to exercise his priestly ministry in the diocese in which he is incardinated.

A faculty is an empowerment to act. Faculties are important in the pastoral ministry within a diocese. Some faculties are given by the law. For his ministry within the diocese, the priest is granted faculties by the diocesan Bishop. They provide the priest with the authorisation to perform certain functions and with the delegation to perform services usually reserved to a higher authority. A priest is not entitled to these faculties as they are freely granted by the diocesan Bishop.

The fact that a priest is incardinated into a diocese does not give him the right to be appointed to a specific ministry, such as a parish priest.

11. The Church requires the diocesan Bishop to "relate to his priests not merely as a ruler towards his subjects, but rather as a father and friend".¹⁶ Drawing on the teaching of the Church, CIC83 canon 384 specifies three aspects in which the diocesan Bishop must care for his priests: "defend their rights ... ensure they fulfil the obligations proper to their state ... and see they have the means needed for the development of their spiritual and intellectual life".

"Clerics are obliged", as stated in CIC83 canon 277 §1, "to observe perfect and perpetual continence for the sake of the Kingdom of heaven, and are therefore bound to celibacy". CIC83 canon 277 §2 warns clerics "to behave with due prudence towards persons whose company can endanger their obligation to observe continence or give rise to scandal among the faithful". In CIC83 canon 277 §2, the Church legislates for the diocesan Bishop "to establish more specific norms concerning this matter and to pass judgement in particular cases concerning the observance of this obligation". It is well within the competence of the diocesan Bishop to make a judgement about a priest's inappropriate behavior.

¹⁵ Vatican II Dogmatic Constitution on the Church n.23.

¹⁶ Congregation for Bishops *Directory for the Pastoral Ministry of Bishops* (2004):76.

INTERFACE BETWEEN CANON LAW AND CIVIL LAW

2. *The interface between Canon law and civil law and, in particular (as relevant to the context of reporting allegations of child sexual abuse committed by a priest), whether or not Canon law may override or displace any applicable civil law obligations.*

12. The interface of canon law and the civil law is expressed in different ways in the 1983 Code of Canon Law.

First, CIC 83 canon 22 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, in so far as it is not contrary to divine law, and provided it is not otherwise stipulated in canon law.

The remittance to the civil law is referred to as the canonization of the civil law. It involves the reception of the civil law into the juridical order of the Church, whereby the Church adopts the civil law in place of its own legislation in respect of a specific issue.

By way of example, CIC83 canon 1290 provides that "whatever the local civil law decrees about contracts, both generally and specifically, and about the voiding of contracts, is to be observe regarding matters which are subject to the governance of the Church, and with the same effect, provided that the civil law is not contrary to divine law, and that canon law does not provide otherwise".

Second, there are a number of canons in the 1983 Code of Canon Law that require the provisions of the civil law be observed. For example, in the matter of contracts of employment CIC83 canon 1286 1^o requires that "the civil laws relating to labour and social life" be observed.

13. In respect of the issue of reporting allegations of child sexual abuse, it is necessary to consider in the first instance the 1917 Code of Canon Law.

CIC17 canon 2198 provided that an offense which violates the law of both Church and State may be punished by both. Among such, in accordance with CIC17 canon 2359 §2, was a crime committed against the sixth commandment with a minor under the age of sixteen years.

The 1917 Code of Canon Law provided in canon 120 §1 that "all law suits against clerics, both civil and criminal, must be brought into the ecclesiastical court, unless other provisions have been legitimately made for some countries". This was referred to as the *privilegium fori*, but it did not mean that a priest could not be taken to the civil courts in the matter of sexual abuse of a minor.

On the contrary, CIC17 canon 120 §2 stated that a priest could be sued in the civil court provided the diocesan Bishop gave permission. The law further stated that the Bishop "should not refuse such permission without a just and serious reason, especially when the plaintiff was a lay person".

The 1917 Code of Canon Law did not prohibit any person from going to the secular courts in respect of the issue of child sexual abuse committed by a priest.

14. The *privilegium fori* was abolished with the promulgation of the revised Code of Canon Law which came into effect on 27 November 1983. Consequently any person who seeks to make a claim of sexual abuse against a priest can go immediately and directly to the civil law.

In respect of the issue of reporting allegations of child sexual abuse, there are no norms in the 1983 Code of Canon Law that override or replace any applicable civil law obligations.

On 3 May 2011 the Congregation for the Doctrine of the Faith issued a *Circular Letter to assist Episcopal Conferences in developing guidelines for dealing with cases of sexual abuse of minors perpetrated by clerics*.

The General Considerations articulated at the beginning of this Letter included the following statement regarding Cooperation with Civil Authority:

Sexual abuse of minors is not just a canonical delict but also a crime prosecuted by civil law. Although relations with civil authority will differ in various countries, nevertheless it is important to cooperate with such authority within their responsibilities. Specifically, without prejudice to the sacramental internal forum, the prescriptions of civil law regarding the reporting of such crimes to the designated authority should always be followed. This collaboration, moreover, not only concerns cases of abuse committed by clerics, but also those cases which involve religious or lay persons who function in ecclesiastical structures.

On 6 February 2012 the then Prefect of the Congregation for the Doctrine of the Faith, reiterating the statement of the Circular Letter, said:

Certainly no less important than any of the other elements, the cooperation of the Church with civil authorities in these cases recognizes the fundamental truth that the sexual abuse of minors is not only a crime in canon law, but is also a crime that violates criminal laws in most civil jurisdictions. Since civil laws vary from nation to nation, and the interaction between Church officials and civil authorities may be different from one nation to another, the manner in which this cooperation takes place will necessarily differ in various countries as well. The principle, however, must remain the same. The Church has an obligation to cooperate with the requirements of civil law regarding the reporting of such crimes to the appropriate authorities. Such cooperation naturally extends also to accusations of sexual abuse by religious or laity who work or volunteer in Church institutions and programs. In this regard, Church officials must avoid any compromise of the sacramental internal forum, which must remain inviolable.

3. (a) *In concise terms, with respect to allegations of child sexual abuse committed by a priest the Canon law requirements for a Bishop to undertake an investigation of such allegations and applicable procedures. Please summarise the position as at (i) 1956; (ii) 1976; (iii) 1983-1987; (iv) 1993-1995; and (v) the present time.*

(i) 1956

15. The 1917 Code of Canon Law provided in canons 1939-1946 the procedure for investigating information received by the Bishop in respect of a canonical offence.

However, on 9 June 1922 the Congregation for the Doctrine of the Faith [then called Congregation of the Holy Office] issued an Instruction on the manner of proceeding in the investigation and prosecution of certain canonical crimes, including that of sexual abuse of minors. This document was issued in strict secrecy and it was never published in the official publication of the Holy See, *Acta Apostolicae Sedis*.

There are diverse views as to whether every diocesan Bishop received this document. According to the Congregation for the Doctrine of the Faith, the 1922 Instruction was given as needed to bishops who had to deal with particular cases such as sexual abuse of children.

According to this Instruction, if the Bishop received information about an alleged sexual abuse of a minor by a priest and he judged that it indicated a crime may have been committed, he was obliged to proceed immediately with an investigation, "so that it may be determined whether the accusation has any basis and what that may be". He could conduct the investigation personally or appoint another priest to do it. The person making the allegation is to be interviewed under oath. The archives are to be accessed to see if any other accusations have been made against the priest. The investigation involved taking evidence from the accuser under oath, testing the credibility of the allegations by examining witnesses who know both the accuser and the accused, and interviewing witnesses who may be able to offer testimony about the alleged crime.

With the closure of the investigation the Bishop, having consulted the Promoter of Justice, has four options:

- 1) if the allegation is completely unfounded, he is to order this fact to be declared in the acts, and the documents of accusation are to be destroyed;
- 2) if the evidence of a crime is vague and indeterminate, or uncertain, he is to order the acts to be kept in the secret archive, to be brought up again should anything else happen in the future;
- 3) if, however, the evidence of a crime is considered grave enough, but not yet sufficient to file a formal complaint he is to order that the accused be admonished according to the norm of CIC17 canon 2307, adding, if necessary, the *explicit threat of a trial* should some other new accusation be brought against him. The acts are to be kept in the secret archive, and vigilance is to be exercised for a period with regard to the conduct of the accused [CIC17 canon 1946 §2 2°];
- 4) if certain or at least probable arguments exist for bringing the accused to trial, he should order the priest to be cited and formally charged.

The Bishop upon receiving an allegation of sexual abuse of a minor by a priest had to immediately inform the Apostolic See and also as to the outcome of the case if it proceeded to an ecclesiastical trial.

16. If it were to be argued that the Bishop was either ignorant of the Instruction or did not possess the Instruction, then he would still be obliged to act in accordance with the norms of canon law - CIC17 canons 1939-1946.

The allegation had to be investigated either by the Bishop or a priest appointed by the Bishop. [CIC17 canons 1940, 1944] The investigation was to be secret and conducted with the greatest caution, lest the good reputation of any person be endangered. [CIC17 canon 1943] The Bishop had to decide when there were sufficient reasons to institute the judicial investigation. [CIC17 canon 1942]

When the investigation was completed, the acts of the investigation with the investigator's own opinion were presented to the Bishop. Three outcomes were possible:

- if there were certain or at least probable and sufficient reasons for instituting a criminal trial, the priest was to be summoned to appear and the trial conducted in accordance with the law;
- if the allegation seemed to lack a solid foundation a decree was to be issued to that effect and all the acts of the investigation preserved in the secret archives;
- if there were indications of an offense but not sufficient proofs to institute a trial, the acts were to be preserved in the secret archives and the conduct of the suspected person watched; if the Bishop judged it advisable the suspect was to be interviewed and if there was a reason for doing so the Bishop was to give him an admonition. [CIC17 canon 1946]

(ii) 1976

17. In 1976 the 1917 Code of Canon Law was still in force.

However, on 16 March 1962 the Congregation of the Holy Office issued the Instruction - *Crimen sollicitationis* - to replace the 1922 Instruction. The 1922 and 1962 Instructions are identical in content although the 1962 Instruction contained an Appendix with formulas to be used during the process. The Instruction was addressed to Bishops and other Local Ordinaries and stated that it was "to be kept carefully in the secret archive for internal use" and that it was "not to be published or augmented with commentaries".

Whether this Instruction reached every diocesan bishop is questioned. According to the Congregation for the Doctrine of the Faith "copies of the 1962 re-print were meant to be given to the Bishops gathering for the Second Vatican Council (1962-1965). A few copies of this re-print were handed out to bishops who, in the meantime, needed to process cases reserved to the Holy Office but, most of the copies were never distributed".

The situation in 1976 is the same as has been outlined in nn.15-16 above for the year 1956.

(iii) 1983-1987

18. The revised Code of Canon Law came into effect on 27 November 1983, and in accordance with the norm of law in CIC83 canon 6 §1 3°, the 1962 Instruction would cease to have legal effect.

However, the then Cardinal Ratzinger, Prefect of the Congregation for the Doctrine of the Faith, on 18 May 2001 stated that the "Instruction *Crimen Sollicitationis*, issued by the Supreme Sacred Congregation of the Holy Office on March 16, 1962, [remained] in force until now".

Consequently in 1983-1987 the Bishop was to deal with allegations of sexual abuse in accordance with the procedure established in the 1962 Instruction.

The Instruction required a proper investigation into allegations of sexual abuse by a priest.

Even if a Bishop was not aware of his obligation to follow the procedure of the 1962 Instruction, the norms of CIC83 canon 1717-1719 required that he enquire, either personally or through another suitable person, about the facts and circumstances, and about the imputability of the offence, unless such an inquiry seems entirely superfluous.

(iv) 1993-1995

19. The position as at 1993-1995 is the same as for the period 1983-1987.

(v) the present time

20. On 30 April 2001 Pope John Paul II issued an Apostolic Letter whereby he promulgated *Norms concerning the more grave delicts reserved to the Congregation for the Doctrine of the Faith*. The norms were published on 18 May 2001.

These norms were subject to amendment and a review was undertaken. Subsequently Pope Benedict XVI approved and ordered the promulgation of revised norms on 21 May 2010.

In accordance with these norms the following crimes are reserved to the Congregation for the Doctrine of the Faith:

- 1° the delict against the sixth commandment of the Decalogue committed by a cleric with a minor below the age of eighteen years; in this case, a person who habitually lacks the use of reason is to be considered equivalent to a minor.
- 2° the acquisition, possession, or distribution by a cleric of pornographic images of minors under the age of fourteen, for purposes of sexual gratification, by whatever means or using whatever technology.

A cleric who commits the delicts mentioned above in §1 is to be punished according to the gravity of his crime, not excluding dismissal.

As a consequence of these norms CIC83 canon 1395 §2 was amended such that the age limit of sixteen years was increased to eighteen years.

As of 30 April 2001, if the Bishop receives a report of sexual abuse by a priest, which has at least the semblance of truth, the preliminary investigation must be completed and the Bishop is to forward the matter to the Congregation for the Doctrine of the Faith which, unless it calls the case to itself due to particular circumstances, will direct the Bishop how to proceed further.

21. The Bishop is obliged to undertake a preliminary investigation in accordance with CIC83 canons 1717 and 1719 and then refer the matter to the Congregation for the Doctrine of the Faith and await its direction.

If the Bishop "receives information, which has at least the semblance of truth, about [this] offence, he is to enquire carefully, either personally or through another suitable person, about the facts and circumstances, and about the imputability of the offence, unless such an inquiry seems entirely superfluous". [CIC83 canon 1717 §1] "Care is to be taken that this investigation does not call into question anyone's good name". [CIC83 canon 1717 §2]

If the Bishop determines that the information lacks any semblance of truth, then he is to commit the reasons for his decision in writing and the documentation is to be preserved in the secret archive.

If the Bishop determines the information is credible he is obliged to conduct an investigation, the purpose of which is to ascertain whether there are solid grounds for determining that the cleric has violated canon 1395 §2.

22. The person conducting the investigation has "the same powers and obligations as an auditor in a process (trial)". [CIC83 canon 1717 §3] CIC83 canon 1428 §1 empowers the investigator to decide what "proofs are to be collected and the manner of their collection". The relevant canons in the 1983 Code of Canon Law that govern the collection of proofs are canons 1526-1587.

The information assembled by the investigator may include:

Declarations [canons 1530-1538]

- the statement of the person against whom the alleged crime was committed;
- the statement of the person bringing forward the allegation, if not the victim;
- the statement of the priest accused of the alleged crime;
- all such declarations must be in writing.

Documentary Proof [canons 1539-1546]

- public ecclesiastical documentation cf. canon 1540 §1;
- public civil documentation cf. canon 1540 §2;
- other documentation which is designated as private cf. canon 1540 §1.

Testimony of Witnesses [canons 1547-1573]

- the investigator can decide which persons are to be interviewed;
- all testimony obtained from witnesses is to be in writing; and if recorded initially must be transcribed into writing - canon 1567 §2.
- witnesses must be given the opportunity to add or omit or vary the written record before signing it.

Experts [canons 1547-1573]

- Included in the acts of the investigation could be reports from professional persons given in their capacity as a professional, such as doctors, counselors, psychologists and psychiatrists.

Access and Inspection [canon 1582-1583]

- The investigator may "visit some place or inspect some thing" as part of the investigative process [canon 1582]. Such access or inspection is to be recorded in a written document [canon 1583].

23. When it has been completed the investigator presents all the documentation assembled during the investigation, together with a written report, to the Bishop. The Bishop is required to transmit the documentation relating to the preliminary investigation to the Congregation for the Doctrine of the Faith.

3. (b) What are the Canon law requirements for documenting investigative steps (whether by the Bishop or person appointed by the Bishop to undertake an investigation) and for retaining such documents?

24. As stated in CIC83 canon 1719 the documentation of the investigation comprises:

- the acts of the investigation;
- the decree of the Bishop by which the investigation is opened;
- the decree of the Bishop by which the investigation is closed; and
- all those matters which preceded the investigation.

Having received information which he judges has a semblance of truth that a priest has violated CIC83 canon 1295 §2, the Bishop must issue a decree establishing the investigation. This Decree is required irrespective of who conducts the investigation. If a suitable person is appointed to undertake the investigation then that person must be named in the Decree. The Decree must also contain any specific directions given by the Bishop for the conduct of the investigation.

When the investigation has been completed, the Bishop is to issue a decree whereby the investigation is closed. This Decree is issued only after the investigator has presented all the acts of the investigation to the Bishop.

Matters which preceded the investigation would include: the initial information about the alleged crime received by the Bishop; the record of interview with the person making the allegation; and the documentation, if any, of proceedings already held in the courts.

The acts of the investigation comprise all the documentation assembled by the investigator in carrying out the investigation.

CIC83 canon 1719 requires that all the documentation of the investigation is "to be kept in the secret curial archives, if they are not necessary for the penal process".

4. Whether Canon law imposes any (a) obligations or (b) restrictions upon a Bishop or priest in terms of reporting to Police of allegations of child sexual abuse committed by a priests and, if so, the nature of such obligations or restrictions (including any change in the position from 1950 onwards as per above).
25. The Code of Canon Law makes no reference to the obligations of a Bishop or a priest reporting to Police of allegations of child sexual abuse committed by a priest. The reason for this is that such is a matter of the civil law.

However the two statements, quoted in this Report in n.14 above, are without ambiguity in stating that the prescriptions of civil law regarding the reporting of such crimes to the designated authority should always be followed by "Church officials" and that includes bishops and priests.

The only restriction upon a bishop or priest in reporting such allegations is referred to in the two statements: "In this regard, Church officials must avoid any compromise of the sacramental internal forum, which must remain inviolable". [cf. CIC83 canon 983 §1]

Therefore the only restriction on a bishop or a priest in reporting allegations of sexual abuse is if his knowledge of the abuse committed by a priest was obtained in the course of sacramental confession.

5. In summary terms, a description of the evolution of any Church protocols or procedure (whether or not mandated by Canon law) relating to the reporting of allegations of child sexual abuse. To the extent applicable, please include reference to any relevant directives or guidelines provided by the Congregation for the Doctrine of the Faith or the Vatican.

26. In April 1992 the Australian Bishops Conference approved a *Protocol for dealing with Allegations of Criminal Behaviour*.

The Protocol was not promulgated as ecclesiastical law and did not in any way affect the obligations of the Bishop in canon law. Nevertheless, the Protocol was to be observed by a diocesan Bishop if an accusation was made against a priest in his Diocese.

If the Bishop "received information of alleged criminal behavior" the Protocol [6.1] required him to refer the matter "immediately to the Special Issues Resource Group", which was to ensure a preliminary investigation was undertaken [7.1-7.5] and then report to the Bishop [7.6].

If the report considered "there is substance to the complaint and the matter requires further investigation" the Bishop was "forthwith (within hours)" to require the priest "to attend for an interview" [8.1]. If the matter was to be investigated further the priest was to stand down [administrative leave] from his "public duties" [9.1].

As the Protocol did not in any way affect the obligations of the Bishop in canon law, the Bishop was obliged to act in accordance with the norms of canon law. Therefore, if it was established that the priest had, as stated in CIC83 canon 1395 §2, "offended in other ways against the sixth commandment of the Dialogue with a minor under the age of sixteen years" the Bishop was to proceed according to the 1962 Instruction.

27. In December 1996 the Australian Catholic Bishops Conference and the Australian Conference of Leaders of Religious Institutes adopted *Towards Healing Principles and procedures in responding to complaints of sexual abuse against Personnel of the Catholic Church in Australia*. This document was comprehensively revised in 2000 and again in January 2010.

The 2010 *Towards Healing* provides principles and procedures in responding to complaints of abuse against personnel of the Catholic Church in Australia.

As with the 1992 Protocol, *Towards Healing* is not ecclesiastical law and does not in any way affect the obligations a Bishop has in canon law in respect of allegations of sexual abuse committed by a priest.

28. The legislation promulgated 30 April 2001 and 21 May 2012 by the Apostolic See in respect of the delict of sexual abuse of minors, the competency of the Congregation for the Doctrine of the Faith with regard to that crime and procedure for dealing with such an offence have been addressed in n.20 of this Report.

THE "SECRET ARCHIVE"

6. In concise terms, a description of the Canon law requirements for the establishment and maintenance of a "secret archive" (cf. Canon 489) including:

- (a) What is the nature of a secret archive?;
- (b) What type of documents should be stored in the secret archive, and why?;
- (c) Should documents relating to allegations of child sexual abuse be stored in a secret archive?;
- (d) Who has responsibility for and control of such secret archive and documents?;
- (e) Which persons are permitted access to documents in such secret archive?;
- (f) What are the requirements for (i) retention, and (ii) destruction of documents held in the secret archive?

29. CIC83 canons 486-491 regulate ecclesiastical archives in respect of a diocese. The law refers to three types of archives: general; secret; and historical.

Each diocesan curia [diocesan/chancery office] must have a general archive where documents are to be properly filed and kept under lock and key. The custody of the general archive is the responsibility of the Bishop and the Chancellor, from whom permission must be obtained to access the general archive. It is not permitted to remove documents from the general archive except for a short time and only with the permission of the Bishop or the Chancellor. [cf. CIC83 canons 486 §2, 487, 488]

CIC83 canon 489 §2 establishes the obligation that each diocesan curia must have "a secret archive" which is separate from the general archive or by way of exception it can be located in a specially secured portion of the general archive, provided that it cannot be removed.

(a) What is the nature of a secret archive?

30. The nature of the secret archive is determined by reason of the documents which are to be kept in it, the custody of the archive, the access to the archive and the prohibition against removal of documents from the archive.

(b) What type of documents should be stored in the secret archive, and why?

31. The law determines certain documents which are to be kept in the secret archive. In the 1983 Code of Canon Law canons 269 2°, 377 §2, 413 §2, 489 §2, 1082, 1133, 1339 §2, and 1717 §3 indicate documentation is to be kept in the secret archive.

The Bishop has the authority to determine other documentation which is to be kept in the secret archive.

The documentation to be kept in the secret archive is usually highly confidential or personal and may include matters of conscience.

(c) Should documents relating to allegations of child sexual abuse be stored in a secret archive?

32. Canon 1719 §3 explicitly states that the documentation pertaining to the preliminary investigation in accordance with canon 1717 must be kept in the secret archive.

Also, if the documentation received by the Bishop about sexual abuse of a minor was judged not to have a semblance of truth, this should be kept in the secret archive.

(d) Who has responsibility for and control of such secret archive and documents?

33. In accordance with the norm of law in CIC83 canon 490 §1 "only the Bishop is to have the key of the secret archive" and in canon 490 §3 "documents are not to be removed from the secret archive".

(e) Which persons are permitted access to documents in such secret archive?

34. Only the Bishop has the right to access the secret archive and the permission of the Bishop is required for any other person, including the Chancellor, to access the secret archive.

(f) What are the requirements for (i) retention, and (ii) destruction of documents held in the secret archive?

35. CIC83 canon 489 §2 regulates the retention of documents in the secret archive by way of identifying what, and when, certain documents are to be destroyed.

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

The only documents in the secret archive to which this norm applies are those pertaining to an ecclesiastical criminal trial which reached a definitive judgement in respect of moral matters. This includes trials with regard to an offence of sexual abuse against a minor.

There are two situations provided for CIC83 canon 489 §2. First, the priest who was found guilty of the crime of sexual abuse of a minor has died; and second, the priest who was found guilty in an ecclesiastical trial which concluded ten years ago and still lives.

In these instances not all the information is destroyed because the law requires "a short summary of the facts is to be kept, together with the text of the definitive judgement". The judgment must set out the facts of the particular case, the law that is applicable, and the arguments and reasons by which the tribunal reached the decision.

7. Canon 489 §2 states that *"Each year documents of criminal cases concerning moral matters are to be destroyed whenever the guilty parties have died, or ten years have elapsed since a condemnatory sentence concluded the affair. A short summary of the facts is to be kept, together with the text of the definitive judgement."*

In this respect:

- (a) Is a Bishop bound or expected to follow Canon 489 §2 and destroy documents as contemplated by that canon? What consequences follow, under Canon law, if he does not do so?
36. A Bishop is obliged to observe the laws of the Church, indeed CIC83 canon 392 §1 states that he is to promote "the observance of all ecclesiastical laws".

The failure of a Bishop to observe the norm of law in CIC83 canon 489 §2 does not constitute a crime in canon law and hence no penal action can be taken against a Bishop who does so.

- (b) Does Canon 489 §2 have the effect that documents are required to be destroyed under Canon law 10 years after the perpetrator had died and which thus may not be later available to Police who later may be investigating allegations of concealment (by Church officials) of offences committed by the perpetrator?
37. If a Bishop does destroy the documents of an ecclesiastical trial relating to a priest found guilty of sexual abuse of a minor in accordance with CIC83 canon 489 §2, not all the information is destroyed.

The law requires "a short summary of the facts is to be kept, together with the text of the definitive judgement". This documentation remains perpetually in the secret archive.

- (c) How does the apparently mandatory language of Canon 489 §2 co-exist with any civil law obligations that may exist regarding the retention of documents?
38. The two statements quoted in n.14 of this Report in reference to co-operation with civil authorities were concerned with the reporting of allegations of sexual abuse.

The statement of the Apostolic See that "sexual abuse of minors is not just a canonical delict but also a crime prosecuted by civil law" is the foundation for the co-operation in these matters but it is also the acknowledgment that the provisions of the civil law is to be observed. In my opinion this must extend to the retention of records relating to sexual abuse of minors under the age of eighteen years.

Until some other provision is made by the Apostolic See, it is my opinion that a diocesan bishop can dispense from the obligation to destroy the documentation required by CIC83 canon 489 §2.

LAICISATION AND IMPEDIMENTS TO EXERCISE OF MINISTRY

8. What is meant by the laicization of a priest (under Canon law) and whether or not it is the same as dismissal?
39. By virtue of his ordination a priest acquires the juridical status of a cleric. This juridical status can be lost only through death or the procedures established in canon law. Two ways in which the cleric can lose the clerical state are: dismissal and dispensation.

CIC83 canon 290 2° states that "a cleric loses the clerical state by a penalty of dismissal legitimately imposed". Dismissal is the punishment of a cleric who has committed a crime for which the penalty includes dismissal from the clerical state. The penalty must be imposed in accordance with the norms of canon law.

CIC83 canon 290 3° states: "a cleric loses the clerical state by rescript of the Apostolic See". The Apostolic See, that is, the Congregation for Clergy, issues a document [rescript] whereby the cleric is dispensed from the obligations he undertook by virtue of his ordination. This process is referred to as "laicisation" because a cleric who loses the clerical state is in law a lay person.

9. What steps were required under Canon law to:
- (a) remove a priest's faculties as at 1993?
40. As stated in n.10 of this Report the Bishop freely grants faculties to a priest, they are not something to which he is entitled. To withdraw faculties is an administrative act by the Bishop and is subject the provisions of canon law for executing such acts.

In accordance with CIC83 canon 50 the Bishop, before issuing a decree to withdraw faculties from a priest, must "seek out the necessary information and proofs and, insofar as possible, to consult (the priest) whose rights could be harmed".

In accordance with CIC83 canon 51 the Bishop's decree "must be issued in writing" and must "express, at least in summary form, the reasons for the decision".

- (b) laicise a priest as at 1995?
41. The procedure is established by the Apostolic See and the current norms were promulgated on 14 October 1980. The documentation required is to be assembled by the Bishop or, as is usual, a priest delegated by him. All such documentation is then forwarded to the Apostolic See.

The primary and essential requirement is that the priest must present a petition to the Roman Pontiff in which he must state the reasons for which he is seeking the dispensation and why his decision to do so is irrevocable. The petition must include his personal history including family background and upbringing, seminary formation and priestly ministry. The Bishop must add his opinion including the pastoral efforts made to assist the priest remain in ministry.

- (a) if the process involved in either (a) or (b) above has since changed, please summarise the change and the basis thereof.
42. There have been no changes to the procedure in respect of either matter.

10. (a) To what extent did the letter dated 19 October 1995 from Bishop Leo Clarke to Fr Denis McAlinden (copy attached) correctly set out the applicable Canon law process as at that date?
43. In light of the content of the letter I would understand Bishop Clarke had formed the view that: first, Fr McAlinden should no longer be regarded as a cleric or belong to the clerical state with its obligations and rights; and second, Fr McAlinden was not suitable to exercise the priestly ministry.

In respect of the first Fr McAlinden was requested "to petition the Holy See for a Rescript of Laicization". As the petition is to be made freely by the priest such a request by the Bishop could be regarded as a breach of the procedure.

In respect of the second matter, the Bishop proposed to act in accordance with CIC83 canon 1044 §2 which states that a priest is impeded from the exercise of his priestly ministry if he "suffers from insanity or some psychological infirmity ... until such time as the [Bishop], having consulted an expert, has allowed" him to exercise his ministry.

The process as described in the letter includes matters already stated in the law, such as the right to propose recourse against the decree [cf. CIC83 canon 221 §1]. It appears that the procedural issues stated in the final paragraph on page one of the letter have been adapted from the canons regulating the process of the removal of a priest from the office of parish priest. In my view this did not correctly set out the applicable Canon law process.

To issue a decree in respect of CIC83 canon 1044 §2 is an administrative act, and therefore the Bishop was obliged to observe the norms of law in CIC83 canons 50 and 51.

It is to be noted that one of the principles adopted for the revision of the Code of Canon Law was: "The use of power in the Church must not become arbitrary, because natural law prohibits such arbitrary use of power, as do also divine positive law and the law of the Church".¹⁷ Power can be used arbitrarily both by commission and omission.

First, the Bishop was obliged "to seek out the necessary information and proofs and, insofar as possible, to consult (the priest) whose rights could be harmed". The diocesan Bishop must have the evidence, having consulted experts, that the priest does suffer from some psychological infirmity such that the priest is to be prohibited [impeded] from exercising his priestly ministry.

In reaching his decision the diocesan Bishop is obliged to consider all the relevant evidence available to him. Such evidence would include any previous behavioural issues in respect of the priest that are relevant to the issue of the psychological infirmity. The Bishop is then obliged to consult with the priest, if possible. How that consultation process takes place is to be determined by the Bishop.

Second, in accordance with CIC83 canon 51 the Bishop must issue a written decree in which he must express "at least in summary form, the reasons for the decision". These reasons must relate to the law and the facts.

¹⁷ Pontifical Commission for the Revision of the Code of Canon Law, *Communicationes* 1 (1969) 82.

(b) Did the reference (in the letter dated 19 October 1995 to "*your good name will be protected ...*" reflect an applicable Canon law requirement?

44. It is my opinion that this statement has been taken from CIC83 canon 1717 §2 pertaining to the preliminary investigation into an alleged crime.

The procedure to be followed by the Bishop in the matter of the existence of a psychological infirmity is of its nature confidential, but it is not an investigation into a crime.

Moreover, if it was established that Fr McAlinden was impeded from the exercise of orders, the decree which must be issued in writing by the Bishop is a document of the external forum and the fact that Fr McAlinden was impeded from the exercise of his priestly ministry would be publicly known.

As a rule a priest is regarded to be in good standing if he is able to exercise his ministry. A decree that a priest because of a psychological infirmity is unable to exercise his ministry does not mean he is not in good standing. Such a situation ought not be detrimental to a priest's good name.

Signed

Rodger J Austin

3 July 2013

ANNEXURE 'A'

CURRICULUM VITAE

DR RODGER J AUSTIN JCD STL

Summary

I was born in Sydney on ~~REDACTED~~. I am a canon lawyer. I obtained a degree in theology in Sydney in 1967 and a doctorate in canon law in Rome in 1972. I was a lecturer in canon law at the Catholic Theological Institutes in Sydney from 1972-1996. I was a judge of the Ecclesiastical Regional Tribunal of Sydney 1979-2004 and of the Tribunal of Appeal for Australia and New Zealand 1981-2004. I was ordained a priest in 1967 and obtained a dispensation from all obligations arising from ordination in 2004. I held various ecclesiastical offices in the Diocese of Wollongong and the Archdiocese of Sydney between 1972 and 1989. I was Assistant Secretary to the Australian Catholic Bishops Conference in Canberra 1989-1991. I have served as a Director of a number of not-for-profit Church organisations. I have contributed to theological and canonical journals in Australia and overseas.

I am self-employed as a Canon Law adviser and consultant to diocesan bishops, diocesan agencies, parishes, religious institutes and other Catholic Church organizations and individuals. I am an Advocate for the Ecclesiastical Regional Tribunal of Sydney of the Catholic Church.

Qualifications	STL	Licentiate in Theology Ecclesiastical Faculty of Sydney, Manly, 1967
	JCD	Doctorate in Canon Law Pontifical Urban University, Rome, 1972

Professional Appointments

1972-1975 Lecturer in Canon Law
Theological Faculty of Sydney, Manly

1972-1975 Lecturer in Canon Law
Marist Fathers Seminary, Sydney

1975-1989 Lecturer in Canon Law
Catholic Theological Union, Hunter's Hill

1982-1989 Lecturer in Canon Law
St Paul's National Seminary, Kensington

1984-1989 Lecturer in Canon Law
Catholic Institute of Sydney, Manly

1991-1996 Lecturer in Canon Law
St Paul's National Seminary, Kensington

1979-2004 Judge Ecclesiastical Regional Tribunal of
Sydney

1981-2004 Judge Ecclesiastical Tribunal of Appeal for
Australia and New Zealand

2005 Advocate for the Ecclesiastical Regional Tribunal of Sydney and Ecclesiastical Tribunal of Appeal for Australia and New Zealand

**Ministerial
Appointments**

1972-1983 In the Catholic Diocese of Wollongong: Chancellor; Diocesan Consultor; Bishop's Secretary; Director of Centacare; Member of Council of Priests, Diocesan Welfare and Liturgical Commissions.

1984-1989 In the Catholic Archdiocese of Sydney: Episcopal Vicar for Religious

1989-1991 Assistant Secretary Australian Catholic Bishops' Conference Canberra

1991-2004 Independent Canon Law Consultant

*2004 dispensed from obligations undertaken in ordination to priesthood in 1967; returned to the status of a lay person in the Church.

Present

2004 - Canon Law Advisor and Consultant

Board commitments

Chairman of the Board of Directors of Our Lay of Consolation Aged Care Services Limited

Director of the Canon Law Society of Australia and New Zealand

**Professional
Activities**

Member of the Canon Law Society of Australia and New Zealand

Member of the Canon Law Society of Great Britain and Ireland

Member of the Canon Law Society of America

Member of the City of Sydney Law Society