

Best Practices in Penal Processes

Monsignor Brendan Daly

1. Knowledge of Canon Law

It is fundamental that everyone involved in any canonical processes is trained in canon law. We know there is a disappointing ignorance about Church teaching today, but there is even more ignorance concerning canon law. *Vos estis Lux Mundi* states concerning sexual abuse:

Art. 1 Scope of application

§1. These norms apply to reports regarding clerics or members of Institutes of Consecrated Life or Societies of Apostolic Life and concerning:

- a) delicts against the sixth commandment of the Decalogue consisting of:
 - i. forcing someone, by violence or threat or through abuse of authority, to perform or submit to sexual acts;
 - ii. performing sexual acts with a minor or a vulnerable person;
 - iii. the production, exhibition, possession or distribution, including by electronic means, of child pornography, as well as by the recruitment of or inducement of a minor or a vulnerable person to participate in pornographic exhibitions;
- b) conduct carried out by the subjects referred to in article 6, consisting of actions or omissions intended to interfere with or avoid civil investigations or canonical investigations, whether administrative or penal, against a cleric or a religious regarding the delicts referred to in letter a) of this paragraph.

Article 6 refers to bishops and major superiors of religious institutes. The more grave (*graviora delicta*) crimes, besides sexual abuse of minors, encompass crimes such as those involving the sacrament of Penance.

Sometimes Church leaders, especially major superiors, do not appear to recognise that abuse of authority as a priest or a religious is a crime. Many cases of so called “consenting adults” are in fact crimes as they are not fully consensual by both parties.

When a complaint is made that “has at least the semblance of truth”,¹ there is to be a preliminary investigation. (c. 1717, SST at. 10 §1) Frequently however, there is no preliminary investigation as required by *Vos Estis Lux Mundi*, Art 2. §3.

The Doctrine of the Faith *Vademecum* 21 points out that the omission of a preliminary investigation could constitute a delict. There needs to be a decree opening

¹ c. 1717 §1.

the preliminary investigation, and then after consultation with the promotor of justice the accused can be prohibited from the exercise of sacred ministry. (c. 1722)

The ignorance of canon law extends from bishops to safeguarding offices, clergy, parish, and diocesan employees. Often former police officers are used to investigate complaints but have no in-depth understanding of canonical crimes. No-one should be investigating canonical crimes without knowing exactly what they are. Before commencing an interview with a complainant/victim or the accused, investigators should know what is likely to happen in any ensuing penal process.

We know from experience that a lot of people only want to be interviewed once in declaration of marriage nullity cases. The reality in penal processes is that frequently the complainant/victim will only be interviewed once.

When the complaint concerns a canonical crime involving the sacrament of Penance it is paramount that the appropriate questions are asked about solicitation, indirect violation of the seal or the absolution of an accomplice in a sin against the sixth commandment. It must be remembered it is a more grave crime even if the absolution is only pretended.

2. Training of Investigators and Other Officials

I think the Canon Law Society and Judicial Vicars must keep pushing bishops and conferences of bishops to ensure that more judges and personnel are properly trained with at least licentiates in canon law. Safeguarding and Professional Standards staff in offices around Australia and New Zealand need to be trained with appropriate qualifications. Lay people can do online training from St Paul University and other universities.

Investigators and other Church staff involved with dealing with complaints need to be trained so that they have a good knowledge of the law concerning the crimes and allegations of misconduct they are dealing with. Also, they need to be trained in accompanying people suffering from trauma and understand victim's rights.

It is fundamental that all people involved with cases in any role are familiar with the *Vademecum* of the Doctrine of the Faith, *Vos Estis Lux Mundi*, the revised Book 6, and the forthcoming procedural handbook from the Dicastery of the Doctrine of the Faith.

3. Complaint Processes

Around Australia and New Zealand most tribunal staff conscientiously keep a clear record of contact with petitioners and respondents in marriage cases. This is promoted at the tribunal practice course.

One should be able to look inside a case folder and immediately see the interactions with the respondent. If the respondent is reported as phoning many times or has had an angry exchange with a case instructor, the judicial vicar and the judges know they must be extra careful in dealing with the person.

A bishop in a New Zealand diocese once received 74 letters of complaint about a priest in one week. The bishop had to accept there was a serious problem. However, people usually do not write letters. They often ring the diocesan office to complain about priests' behaviour including anything from bad manners to accusations of abuse. There needs to be a file note for each phone call.

With phone call complaints to diocesan offices, it is extremely important that there be a proper system for recording these interactions, so that it can be easily established who is complained about, how often and what the complaints concern. The complaints need to be properly investigated and recorded in the personnel file of the priest, so they are easily accessible. If all the information is available to the Ordinary who is usually the diocesan bishop, then any pattern of behaviour is clearly established.

Under the New Zealand privacy act,² any person has a right to see all the emails, notes, meeting minutes, and reports about them. Former seminarians, priests and Church employees have all exercised this right in recent times. Respondents in marriage cases can do the same. As we know from experience, it is very important to include these emails or documents in tribunal files. After a judgment, the respondent may ask for them, so the judges need to be fully informed about the case they are judging.

This right of access to information about themselves also applies to abuse complainants of course. The files concerning complaints need to include all the email and text exchanges as well as any reports.

Royal Commissions in Australia and New Zealand have exposed the lack of accountability and transparency in complaint processes. Decisions have been made without genuine consultation with others in their area of competence. Sometimes canon lawyers have been consulted but their advice has not then been acted upon.

4. Report Form

The tribunal in New Zealand has a report form for any complaints of abuse received by a case instructor or auditor. There is also a link on the tribunal website to the professional standards office where abuse complaints can be made.

Filling in a form like this is very important to establish an accurate historical record of what was revealed, how, to whom and what advice was given about reporting

² It is just a matter of time until the Australian privacy act is changed.

to the police etc. I have seen a complaint received about a deceased, respected Church official and what was allegedly said. He is not around to defend himself and it is difficult to defend him without a file note or record.

Judges in marriage cases know how important it is for case instructors to write a report about the instruction of the case before the case is sent to the defender of the bond. Then the defender of the bond and the judges know about any special circumstances and why only these witnesses were interviewed etc.

DISCLOSURE OF SEXUAL ABUSE TO TRIBUNAL AUDITOR/JUDGE

PERSONAL INFORMATION COLLECTION STATEMENT UNDER THE NEW ZEALAND PRIVACY ACT

The personal data and other relevant documents and information in connection with the abuse disclosure will be used by the Catholic Church to ascertain with moral certainty whether a canonical crime or sexual misconduct took place.

Provision of the personal data and relevant documents and information by tribunal personnel is obligatory.

The disclosure form and all other relevant data, documents and information will be kept at the tribunal office of the place of disclosure, the Judicial Vicar and in the National Office of Professional Standards.

If necessary, the disclosure document and all other relevant data, documents and information collected and retained by the tribunal may be disclosed and transferred to Catholic Church authorities within and outside New Zealand in response to official Catholic Church inquiries about the disclosure.

The parties, either jointly or separately, have the right of access to the disclosure documents and to require correction(s) of any personal data and information kept by the tribunal, on condition that their request complies with civil and canon law. Such a request should be addressed in writing to the Judicial Vicar.

Case Name _____

Case Number _____

Date of Disclosure _____

Time of Disclosure _____

How was the information received (Interview, phone, letter, email, in person)

Details of Person Making Disclosure:

Name _____

Telephone _____

Email _____

Address _____

Details of Alleged Victim:

Name _____

Age _____

Telephone _____

Email _____

Address _____

Signature and Name of Person Receiving Allegation:

Name _____

Signature _____

Details of Alleged Perpetrator

Name _____

Diocese/Religious Institute? _____

Details of Allegation _____

Date of Notification to the Ordinary/Diocesan Bishop and National office for Professional Standards _____

Date of Notification to Judicial Vicar _____

Was the person making the disclosure advised to go to the police? YES / NO

Details of Person Receiving the Information:

Name _____

Telephone	_____
Email	_____
Address	_____
Signature	_____
Date	_____

It is very important for a diocese to have a good system of receiving and handling complaints. Bishop Dowd of Sault Saint Marie Diocese in Sudbury gave a very interesting presentation at Saint Paul University on 26 January 2022 on Archives.

Associated with him was a judge Pepita Capriole who had investigated the diocesan and other files in Montreal associated with a dismissed cleric Brian Boucher. Her investigation was centered on questions such as “**Who Knew What, When?**”

The archives in Montreal consisted of General, Secret and Historic archives. In practice there were General Archives with restricted access, Duplicate files, and the working files of curial personnel such as those working with foreign priests over immigration and visa applications. There were no policies or directives on what was to go where, especially where emails were to be filed.

The custodian of General and Historic files in Montreal was the Chancellor. In Australian and New Zealand dioceses, the person would more likely be called the archivist.

The archdiocese of Montreal had all the information needed to establish that there was a serious problem with Brian Boucher. The problem was that the archbishop had some information, but other information was held independently by other diocesan offices and officials. If the complaint information and the report information had all been centralized, then very different decisions would likely have been made about this priest continuing in ministry.

The Australian and New Zealand Royal Commissions have demonstrated that this kind of thing is a problem in both countries. Clergy and religious offend in other dioceses. Offenders can be in a national or provincial position such as at a seminary or a religious education office. Religious institutes often do not share complaint information with local Ordinaries as required by *Vos Estis Lux Mundi* in 2019³.

³ In 2019, Pope Francis in *Vos Estis Lux Mundi*³ introduced mandatory reporting of sexual abuse by clerics and religious within the Church. Article 3 stated:
 §1. Except as provided for by canons 1548 §2 CIC and 1229 §2 CCEO, whenever a cleric or a member of an Institute of Consecrated Life or of a Society of Apostolic Life has notice of, or

Vos Estis Lux Mundi Article 3 states concerning the requirement to report:

§1. Except as provided for by canons 1548 §2 CIC and 1229 §2 CCEO, whenever a cleric or a member of an Institute of Consecrated Life or of a Society of Apostolic Life has notice of, or well-founded motives to believe that, one of the facts referred to in article 1 has been committed, that person is obliged to report promptly the fact to the local Ordinary.⁴

The local Ordinary means the diocesan bishop, apostolic or diocesan administrator, as appropriate.⁵

While the obligation to uphold the seal of confession is not stated explicitly, the seal is included by mentioning canon 1548 which cites canon 1550 and the inability to report:

well-founded motives to believe that, one of the facts referred to in article 1 has been committed, that person is obliged to report promptly the fact to the local Ordinary where the events are said to have occurred or to another Ordinary among those referred to in canons 134 CIC and 984 CCEO, except for what is established by §3 of the present article.

§2. Any person can submit a report concerning the conduct referred to in article 1, using the methods referred to in the preceding article, or by any other appropriate means.

§3. When the report concerns one of the persons indicated in article 6, it is to be addressed to the Authority identified based upon articles 8 and 9. The report can always be sent to the Holy See directly or through the Pontifical Representative.

§4. The report shall include as many particulars as possible, such as indications of time and place of the facts, of the persons involved or informed, as well as any other circumstance that may be useful in order to ensure an accurate assessment of the facts.

§5. Information can also be acquired *ex officio*.³

Most importantly the person submitting the report was guaranteed protection:

Art. 4 – Protection of the person submitting the report

§1. Making a report pursuant to article 3 shall not constitute a violation of office confidentiality.

§2. Except as provided for by canons 1390 CIC and 1452 and 1454 CCEO, prejudice, retaliation or discrimination as a consequence of having submitted a report is prohibited and may constitute the conduct referred to in article 1 §1, letter b).

§3. An obligation to keep silent may not be imposed on any person with regard to the contents of his or her report.³

⁴ *VELM*, ART. 3.

⁵ Canon 134 §1 In law the term Ordinary means, apart from the Roman Pontiff, diocesan Bishops and all who, even for a time only, are set over a particular Church or a community equivalent to it in accordance with Can. 368, and those who in these have general ordinary executive power, that is, Vicars general and episcopal Vicars; likewise, for their own members, it means the major Superiors of clerical religious institutes of pontifical right and of clerical societies of apostolic life of pontifical right, who have at least ordinary executive power.

§2 The term local Ordinary means all those enumerated in §1, except Superiors of religious institutes and of societies of apostolic life.

§3 Whatever in the canons, in the context of executive power, is attributed to the diocesan Bishop, is understood to belong only to the diocesan Bishop and to those others in Canon 381 §2 who are equivalent to him, to the exclusion of the Vicar general and the episcopal Vicar except by special mandate.

Canon 1550 §2. Priests regarding all matters which they have come to know from sacramental confession even if the penitent seeks their disclosure; moreover, matters heard by anyone and in any way on the occasion of confession cannot be accepted even as an indication of the truth.⁶

A priest cannot report sexual abuse that is confessed to him by a perpetrator in confession. However, the priest could help a victim to report or complain about the abuse when the victim comes to him in confession seeking help.

Failure to cooperate with a canonical investigation is a delict or canonical crime. This mandatory reporting is reinforced by the changes in Book 6. All clergy and member of religious institutes must report sexual abuse by clergy to the Ordinary. They must report even suspicions that abuse is happening. This includes a cleric or religious abusing their authority by having sexual contact with anyone. This requirement is now reinforced by canon 1371 §6 in the revised penal law which provides penalties for clergy and religious who fail to report an offence as required by canon law:

Canon 1376 § 6. A person who neglects to report an offence, when required to do so by a canonical law, is to be punished according to the provision of canon 1336 §§ 2-4, with the addition of other penalties according to the gravity of the offence.

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Reports might be anonymous or only suspicions that sexual abuse is taking place. The Congregation for the Doctrine of the Faith explained all reports must be taken seriously:

11. At times, a *notitia de delicto* can derive from an anonymous source, namely, from unidentified or unidentifiable persons. The anonymity of the source should not automatically lead to considering the report as false. Nonetheless, for easily understandable reasons, great caution should be exercised in considering this type of *notitia*, and anonymous reports certainly should not be encouraged.

⁶ http://www.vatican.va/archive/ENG1104/___P60.HTM

⁷ VELM.

12. Likewise, when a *notitia de delicto* comes from sources whose credibility might appear at first doubtful, it is not advisable to dismiss the matter *a priori*.⁸

Experience teaches us that anonymous complaints often have a basis in fact, especially when the complaint specifies an exact time and place when the alleged offence occurred. Investigations of these anonymous complaints must also be reported to the Congregation for the Doctrine of the Faith including those that the Ordinary decides lack a semblance of truth.⁹

Destruction of files is another serious issue. Every diocese should have a documents retention policy¹⁰ such as the one for Christchurch diocese¹¹ which could be copied and slightly modified as appropriate for other dioceses.

5. Secret Archives

The Code makes provision for secret archives:

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

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

Secret archives could contain some confidential dispensations related to marriages and clergy, special marriage registers, and penal cases.

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

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

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

Access to files is critically important.

Canon 486 §1. All documents concerning the diocese or parishes must be kept with the greatest of care.

⁸ *VADEMECUM*, 11-12.

⁹ *VADEMECUM*, “19. Even in these cases, however, it is advisable that the Ordinary or Hierarch communicate to the CDF the *notitia de delicto* and the decision made to forego the preliminary investigation due to the manifest lack of the semblance of truth.

¹⁰ Christchurch diocese retention policy in appendix.

¹¹ Triona Doocey, CDC-Parish-Records-Disposal-Schedule_FINAL-V2.pdf (chchcatholic.nz)

§2 In each curia there is to be established in a safe place a diocesan archive where documents and writings concerning both the spiritual and the temporal affairs of the diocese are to be properly filed and carefully kept under lock and key.

§3 An inventory or catalogue is to be made of documents kept in the archive, with a short synopsis of each document.¹² and

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Canon 489 §1 covers potential access and security. There must be security arrangements that people are comfortable with, otherwise there will be resistance to consolidation of files and information. There are significant privacy issues concerning access to information about who has been accused of abuse, the type of abuse and when it is alleged to have occurred.

Canon 489 §2 speaks of documents in criminal cases being destroyed if ten years have elapsed since a condemnatory sentence concluded the affair. The Holy See in its response to the recommendations of the Australian Royal Commission pointed out that documents concerning complaints of sexual abuse could not be destroyed if there had not been a sentence concluding the affair.¹³

The diocesan bishop by law is to be the only person who has access to the secret archives. When a diocesan bishop has died it has been known for priests to access their files and to destroy documents complaining against them. Because of this all abuse files must be held securely.

In New Zealand several bishops have died in recent years. Sometimes these bishops seem to have never recorded confidential information about abuse or misconduct. An Anglican bishop in New Zealand shredded all his confidential files

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¹³ Brendan Daly, "Response of the Holy See to the Australian Royal Commission *Final Report*" *Studia Canonica* 55, 2021, 260.

just before retirement so that his successor would begin with a “fresh start”.

Some bishops had the secret archives or confidential files at their house, but nothing was specified in their will, and the result was that the executors of their wills shredded them, and all the confidential files were lost including abuse complaints.

Access to these files needs to be covered in bishops’ wills and power of attorney documents. I noticed when I last renewed my gun licence there was a question about my will and what was happening to my guns when I died. The New Zealand police wanted to know where they might end up. What is in confidential files can be explosive, but it can be critically important for victims and the defence of the accused. Wills and powers of attorney need to encompass them as well as the authorization to deal electronic media personal accounts.

6. Complaints

What seems initially to be professional misconduct may as a result of the investigation be shown to be in fact a crime or a more grave crime (*graviora delicta*). E.g., if an investigation later reveals the priest absolved his accomplice or abused his authority or there is another vulnerable victim.

Investigators need to make maximum use of phone records, and texts. The phones of both the complainant and the accused can demonstrate within 20 metres where they were at the time of the alleged events.

In the United States, according to the *Essential Norms for Diocesan/Eparchial Policies for Dealing with Allegations of Sexual Abuse of Minors by Priests or Deacons* and *A Statement of Episcopal Commitment* (often referred to as “The American Procedural Norms”),¹⁴ the promotor of justice attends review board meetings, although he is not a member and does not vote. This ensures that there is a real connection between preliminary investigations and later penal processes. This does not happen in Australasia, but this would be helpful so that a canon lawyer can point out canonical issues relevant to the investigation.

7. Preliminary Investigation

Whenever a complaint is received, the Ordinary must conduct a preliminary investigation:

Canon 1717 §1 Whenever the Ordinary receives information, which has at least the semblance of truth, about an offence, he is to enquire carefully, either personally or through some suitable person, about the facts and circumstances, and about the imputability of the offence, unless this enquiry would appear to be

¹⁴ USCCB, Charter for the Protection of Children and Young People (2018 Revised)
<https://www.usccb.org/resources/charter-protection-children-and-young-people-2018-revised>

entirely superfluous.

Sacramentorum Sanctitatis Tutela Article 16 stated:

Whenever the Ordinary or Hierarch receives a report of a more grave delict, which has at least the semblance of truth, once the preliminary investigation has been completed, he is to communicate the matter to the Congregation for the Doctrine of the Faith.¹⁵

This requirement to report more grave crimes to the Congregation for the Doctrine of the Faith is reinforced by its *Vademecum* in 2020:

69. In accordance with art. 16 SST, once the preliminary investigation has concluded, whatever its outcome, the Ordinary or Hierarch is obliged to send, without delay, an authentic copy of the relative acts to the CDF. Together with the copy of the acts and the duly completed form found at the end of this handbook, he is to provide his own evaluation of the results of the investigation (*votum*) and to offer any suggestions he may have on how to proceed (if, for example, he considers it appropriate to initiate a penal procedure and of what kind; if he considers sufficient the penalty imposed by the civil authorities; if the application of administrative measures by the Ordinary or Hierarch is preferable; if the prescription of the delict should be declared or its derogation granted).¹⁶

Sacramentorum Sanctitatis Tutela required accountability and transparency from bishops and religious superiors. The Congregation for the Doctrine of the Faith points out in its *Vademecum* that failure to hold a preliminary investigation may be a crime:

21. According to canon 1717 CIC and canon 1468 CCEO, responsibility for the preliminary investigation belongs to the Ordinary or Hierarch who received the *notitia de delicto*, or to a suitable person selected by him. The eventual omission of this duty could constitute a delict subject to a canonical procedure in conformity with the Code of Canon Law and the Motu Proprio *Come una madre amorevole*, as well as art. 1 § 1, b VELM.

8. Privacy

Privacy and security of complaint information concerning the victim and the accused is very important. In 2022 there was publicity about “Word on Fire” leaked complaints from a complainant in the United States.¹⁷ In 2021 a New Zealand a bishop’s emails concerning a complaint were hacked.

¹⁵ http://www.vatican.va/resources/resources_norme_en.html

¹⁶ Congregation for the Doctrine of the Faith, *Vademecum: On Certain Points of Procedure in Treating Cases of Sexual Abuse of Minors Committed by Clerics*; 16 July 2020. https://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_20200716_vademecum-casi-abuso_en.html, 12, 13, 16, 18, 19, 37. (=VADEMECUM)

¹⁷ <https://www.ncronline.org/news/accountability/multiple-resignations-bishop-barrons-word-fire-after-allegations-staffers>

9. Investigator protection

It is very important to tape record interviews from the beginning to the end. Sometimes false claims are made about matters such as being asked to take an oath.¹⁸ False claims are very important evidence in establishing the credibility of the accusations or the defence when many cases are largely “he said she said” cases unless there are several accusers, useful texts and photos, or special circumstantial evidence.¹⁹

The investigator should never be alone. One of the worst outcomes is having the investigator accused of misconduct.

Sometimes a friend or family member of the accused or complainant, or even an advocate, interferes in the process or with the gathering of evidence. This must be guarded against at all costs. Significantly, the *Vademecum* advises in 23. “Should an Ordinary or Hierarch encounter difficulties in initiating or carrying out the preliminary investigation, he should immediately contact the CDF for advice or help in resolving any eventual questions.”

10. Case Files

It is basic procedure:

- 1) To put every document in the Acts of the Case in chronological order
- 2) To index in detail all documentation in chronological order. If there are related files not included there should be a statement in the file indicating where they may be located if they are requested by CDF, a Judge, or an Advocate
- 3) That a canonical penal procedure such as a preliminary investigation should begin but be on hold until any civil court proceedings are concluded. The civil courts can provide useful information that a Church tribunal would not have access to such as the personal bank accounts of the accused.
- 4) Every complainant should be offered counselling for a limited time. Even if there are inaccuracies in the accusation, such as accusing the wrong cleric, the person making an allegation probably needs counselling.

¹⁸ Canon 1390 §2. A person who calumniously denounces some other offence to an ecclesiastical Superior, or otherwise unlawfully injures the good name of another, is to be punished according to the provision of can. 1336 §§ 2-4, to which moreover a censure may be added.

¹⁹ §3. The calumniator must also be compelled to make appropriate amends.
Catechism of the Catholic Church 2477. *Respect for the reputation* of persons forbids every attitude and word likely to cause them unjust injury. He becomes guilty:
 - of *rash judgment* who, even tacitly, assumes as true, without sufficient foundation, the moral fault of a neighbour;
 - of *detraction* who, without objectively valid reason, discloses another's faults and failings to persons who did not know them;
 - of *calumny* who, by remarks contrary to the truth, harms the reputation of others and gives occasion for false judgments concerning them.

5) To avoid conflict of interest. Ideally Judges and the Promoter of Justice do not belong to the same presbyterate as the accused cleric. It has to be remembered, no one likes the person investigating them or the person who imposes a penalty on them.

6) A local priest is better as a notary because he has easier access to diocesan files.

11. Three Possible Decisions

Decisions made in civil criminal trials are made according to the standard of beyond reasonable doubt. Decisions by protocol and professional standards committees are often made on the standard of probability. However, decisions in canon law and Church penal processes²⁰ must be made with the standard of moral certainty.²¹

There are three possible decisions at the end of a penal process: guilty, not guilty and innocent. We must distinguish carefully between a *sententia dismissoria* (delict not proven) and a *sententia absolutoria* (reus proven innocent). The *Vademecum* of the Congregation for the Doctrine of the Faith states:

84. The decision that concludes the penal process, whether judicial or extrajudicial, can be of three types:

- *conviction* (“*constat*”), if with moral certainty the guilt of the accused is established with regard to the delict ascribed to him. In this case, the decision must indicate specifically the type of canonical sanction imposed or declared.
- *acquittal* (“*constat de non*”), if with moral certainty the innocence of the accused is established, inasmuch as no offence was committed, the accused did not commit the offence, the offence is not deemed a delict by the law or was committed by a person who is not imputable.
- *dismissal* (“*non constat*”), whenever it has not been possible to attain moral certainty with regard to the guilt of the accused, due to lack of evidence or to insufficient or conflicting evidence that the offence was in fact committed, that the accused committed the offence, or that the delict was committed by a person who is not imputable.

²⁰ Judith Hahn, “What does it mean to be “morally certain”? How secular standards of proof help to understand canonical decision making”, *The Canonist*. Vol 11. No. 2. 242 and Judith Hahn, ‘Moral Certitude: Merits and Demerits of the Standard of Proof Applied in Roman Catholic Jurisprudence’, 8(2019), *Oxford Journal of Law and Religion*, 324.

²¹ Canon 1608 §1. To give any judgement, the judge must have in his mind moral certainty about the matter to be decided in the judgement.

§2 The judge must derive this certainty from the acts and from the proofs.

§3 The judge must weigh the proofs in accordance with his conscience, with due regard for the provisions of law about the efficacy of certain proofs.

§4 A judge who cannot arrive at such certainty is to pronounce that the right of the plaintiff is not established and is to find for the respondent, except in a case which enjoys the favour of law, when he is to pronounce in its favour.

It is possible to provide for the public good or for the welfare of the person accused through appropriate warnings, penal remedies, and other means of pastoral solicitude (cf. canon 1348 CIC).

The decision (issued by sentence or by decree) must refer to one of these three types, so that it is clear whether “*constat*”, “*constat de non*” or “*non constat*”.²²

The three types of decisions have been expertly analysed by Judith Hahn.²³ Judges need to fully understand these possibilities. Also, they need to remember other related canons including canons 220, 221 §1, 1390 §3, 1717 §2, and 1723.

12. Procedural requirements prior to imposing Medicinal Penalties

Pope Francis revised book 6 of the Code including adding more developed procedures to canon 1339.

Canon 1339 §4. If on one or more occasions warnings or corrections have been made to someone to no effect, or if it is not possible to expect them to have any effect, the Ordinary is to issue a penal precept in which he sets out exactly what is to be done or avoided.

§5. If the gravity of the case so requires, and especially in a case where someone is in danger of relapsing into an offence, the Ordinary is also to subject the offender, over and above the penalties imposed according to the provision of the law or declared by sentence or decree, to a measure of vigilance determined by means of a singular decree.

The offender must be given at least one warning, and then a detailed precept must be given in writing to the offender setting out exactly what is to be done or avoided. Canon 1339 §3 states “The fact that there has been a warning or a correction must always be proven, at least from some document to be kept in the secret archive of the curia.”

13. Standards of behaviour

Both Australia and New Zealand have documents concerning *Integrity in Ministry*, but in both countries the documents concerning professional misconduct lack teeth. It is important to have particular law concerning grooming, vulnerable people

²² CDF, *Vademecum*, 16 July 2020, https://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_20200716_vademecum-casi-abuso_en.html

²³ Judith Hahn. Guilt, “Innocence, and Remaining Doubts: Some Considerations on the Congregation for the Doctrine of the Faith’s Three-Verdict System of Deciding Cases of Sexual Abuse”, *Oxford Journal of Law and Religion*, 2021, 00, 1–25doi: 10.1093/ojlr/rwab001

etc.

Around the world there have been examples of police forces not bothering with minor crimes such as graffiti and vandalism. However, there is a stronger recognition of the importance of Crime prevention as illustrated by this article by police chiefs:

In today's policing environment, it is smart to focus on crime prevention as a foundational strategy.²⁴ FBI's 2016 *Crime in the United States* report revealed that violent crime is on the increase—2016 had the highest single-year spike in violent crime in 25 years—yet burglary and property crime figures are continuing to trend down.

Police chiefs can see that if minor crimes are investigated and prosecuted a culture of non-tolerance for crime is established. We have the saying “look after the pennies and the pounds will look after themselves in English.” This saying is applicable to clergy misconduct. There needs to be much more attention and effort put into the professional development of clergy and religious.

14. Victim Advocates

The accused clerics have a right to canonical advice. The revised *Vademecum* states:

98. With the new *Norms* promulgated in 2021 (cf. art. 20 § 7 SST), it is explicitly stipulated by the law for the case of an extrajudicial process in matters reserved to the DDF that the accused, in accordance with the prescriptions of canons 1723 and 1481 §§ 1-2 CIC, be assisted by an advocate and/or procurator, either of his own choice or, otherwise, appointed *ex officio*. The Ordinary (or his delegate) must be informed of the appointment of the advocate and/or procurator by means of a suitable and authentic procuratorial mandate in accordance with canon 1484 § 1 CIC, prior to the session in which the accusations and proofs are made known, in order to verify that the requirements of canon 1483 CIC have been met.²⁵

In 2022 I was asked if bishops would pay for canonical advocates for victims. Most bishops in Australia and New Zealand do not provide canonical advocates for victims.

It is obvious that there is no equality in Church processes if the accused has the

²⁴ R. Arrington et al., “Crime Prevention in the 21st Century”, *Police Chief Magazine*, <https://www.policechiefmagazine.org/crime-prevention-in-the-21st-century>

²⁵ Dicastery for the Doctrine of the Faith, *Vademecum on certain points of procedure in treating cases of sexual abuse of minors committed by clerics 2.0*, 5 June 2022, https://www.vatican.va/roman_curia/congregations/cfaith/ddf/rc_ddf_doc_20220605_vademecum-casi-abuso-2.0_en.html

advantage of canonical advocacy while the complainant/victim does not.²⁶ Victims need to have the canonical processes explained to them. Victims also need to be helped if awards of damages are being decided at the end of the preliminary process.²⁷ If there is a separate canonical process to compensate for harm following canons 1729-1731, the victim needs to have a canonical representative.²⁸

Both civil and Church processes in Australia and New Zealand do not give sufficient protection to victim's rights and involvement in processes. The European legislation on Victim rights and the new EU Directive on minimum standards for victims will ensure that, in all 27 EU countries:

- victims are treated with respect and police, prosecutors and judges are trained to properly deal with them;
- victims get information on their rights and their case in a way they understand;
- victim support exists in every Member State;
- victims can participate in proceedings if they want and are helped to attend the trial;
- vulnerable victims are identified – such as children, victims of rape, or those with disabilities – and are properly protected;
- victims are protected while police investigate the crime and during court proceedings.²⁹

It is a challenge for the Church in both Australia and New Zealand to work for more accountability and transparency in Church penal processes. The Church needs to ensure that justice is done and seen to be done; that victim's rights are respected and victims are enabled to participate fully in penal processes and the award of damages. The Church will lack credibility until this happens.

²⁶ Dicastery for the Doctrine of the Faith, *Vademecum*, 5 June 2022, https://www.vatican.va/roman_curia/congregations/cfaith/ddf/rc_ddf_doc_20220605_vademecum-casi-abuso-2.0_en.html

²⁷ Canon 1718 §4. Before making a decree in accordance with §1, the Ordinary is to consider whether, 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 damages.

²⁸ Canon 1729 §1. In accordance with Can. 1596, a party who has suffered harm from an offence can bring a contentious action for damages in the actual penal case itself.

§2. The intervention of the harmed party mentioned in §1 is no longer admitted if the intervention was not made in the first instance of the penal trial.

²⁹ https://ec.europa.eu/commission/presscorner/detail/en/IP_12_1066

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FIFTY-FIFTH ANNUAL CONFERENCE

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