

CONFERENCE PROGRAM

The opening presentation at our Conference was to be given by Dr Rocio Figueroa, who is a lecturer in systematic theology at Catholic Theological College Auckland. Regrettably, Dr Figueroa has been struck down with an infection and is unable travel or to give her presentation even by zoom. We wish her a speedy recovery. Monsignor Brendan Daly had accepted the invitation of the Executive Committee to conduct a workshop. However, Brendan has agreed at short notice to give the opening presentation of our Conference on the topic: The Preliminary Investigation Canon 1717 *CIC*.

The Preliminary Investigation Canon 1717 *CIC*

Brendan Daly

When information is received about the possible commission of a delict or offence, it is very important that the Ordinary ascertain whether it is “knowledge, which at least seems true”.¹

The Dicastery for the Doctrine of the Faith explained that “A *notitia de delicto* (cf. canon 1717 § 1 *CIC*; canon 1468 § 1 *CCEO*; art. 10 *SST*; art. 3 *VELM*), occasionally called a *notitia criminis*, consists of any information about a possible delict that in any way comes to the attention of the Ordinary or Hierarch. It need not be a formal complaint”² It could come from the media, the police, or an anonymous source. The *Vademecum* states:

When a *notitia de delicto* (information) is received, a preliminary investigation ought to ensue, provided that the report is “*saltem verisimilis*”. If that plausibility proves unfounded, there is no need to pursue the *notitia de delicto*, although care should be taken to keep the documentation, together with a written explanation regarding the reasons for the decision.³

The preliminary investigation is outlined in canons 1717 ff. of the 1983 Code (*CIC*) or canons 1468 ff. of the Code of Canon Law for the Eastern Churches (*CCEO*):

Canon 1717 §1. Whenever an ordinary has knowledge, which at least seems true, of a delict, he is carefully to inquire personally or through another suitable person about the facts, circumstances, and imputability, unless such an inquiry seems entirely superfluous.

If a cleric admits his guilt, or has been found guilty in a secular court, a preliminary investigation is not necessary.⁴

Competence

When a complaint is received, the primary responsibility and right to carry out the

¹ C. 1717 §1. Translations of the *CIC* 1983 from the translation of the Canon Law Society of America 2001.

² Dicastery for the Doctrine of the Faith, *Vademecum: On Certain Points of Procedure in Treating Cases of Sexual Abuse of Minors Committed by Clerics*. 5 June 2022. Ver. 2 *Vademecum* on certain points of procedure in treating cases of sexual abuse of minors committed by clerics - Ver. 2.0 (5 June 2022) (vatican.va) (=Vademecum) 9.

³ *Vademecum* 16.

⁴ *Vademecum* 37.

preliminary investigation is the Ordinary of the place where the alleged delict took place according to *Vos estis lux mundi*:

Art. §3. Except as provided for by art. 3 §3, the Ordinary who received the report shall transmit it without delay to the Ordinary of the place where the events are said to have occurred, as well as to the Ordinary of the person reported. Unless otherwise agreed upon by the two Ordinaries, it is the responsibility of the Ordinary of the place where the events are said to have occurred to proceed according to the law provided for the specific case.⁵

It is possible for the Local Ordinary of the alleged events to agree that another Ordinary investigates. Previous law was not clear who had the right to investigate.⁶ There must be good communication and transparency between all the Ordinaries involved in a case including Religious Ordinaries.

Decree Opening the Preliminary Investigation

First, the Ordinary or Hierarch decrees the opening of the preliminary investigation.

Then the Ordinary usually appoints a “suitable person”⁷ to conduct the investigation.⁸ The decree should also state that the person carrying out the investigation has the powers of an auditor:

Canon 1717 §3. The person who conducts the investigation has the same powers and obligations as an auditor in the process; the same person cannot act as a judge in the matter if a judicial process is initiated later.

The investigation involves collecting proofs and sometimes this may also involve deciding what proofs are to be collected and the manner of collecting them.⁹ There may be affidavits, interviews etc. The person conducting the investigation cannot take part later as judge in a trial. Giorgio Giovanelli explains the wisdom of the Ordinary appointing another suitable person to carry out this investigation:

⁵ Pope Francis, *Motu proprio, Vos estis Lux Mundi*, March 25, 2023, https://www.vatican.va/content/francesco/en/motu_proprio/documents/20230325-motu-proprio-vos-estis-lux-mundi-aggiornato.html (=VELM).

⁶ *Vademecum* 22, 31; VELM 2019 art. 2 §3.

⁷ C. 1428 §3; VELM 14; *Vademecum* 38.

⁸ *Vademecum* 40; c. 1719, CCEO c. 1470.

⁹ Canon 1428 §3. It is for the auditor, according to the mandate of the judge, only to collect the proofs and hand those collected over to the judge. Unless the mandate of the judge prevents it, however, the auditor can in the meantime decide what proofs are to be collected and in what manner if a question may arise about this while the auditor exercises his or her function.

the preliminary investigation can be carried out personally by the Ordinary or by a person delegated by him; although he has all the power to conduct such an investigation it is preferable that it be delegated; in this case the Office of Delegate can be taken on by a man or a woman, lay or clerical provided that the general requisites of suitability established by law for the assumption of ecclesiastical offices are present; special treatment is given to the *delicta reservata*.¹⁰

The local Ordinary, usually the diocesan bishop, has the responsibility to care for all the faithful, including victims and complainants,¹¹ as well as accused clergy¹² and religious. There are obvious conflicts of interests for someone with these responsibilities, who attempted to investigate information, and then had to make decisions about the adequacy of the evidence and any ensuing penal process.

The Ordinary also appoints a notary who should be a priest in cases where the person under investigation is a priest.¹³ The *Vademecum* advises:

41. Although not expressly provided for by law, it is advisable that a priest notary be appointed (cf. canon 483 § 2 CIC and canon 253 § 2 CCEO, where other criteria are indicated for the choice), who assists the person conducting the preliminary investigation, for the purpose of ensuring the authenticity of the acts which have been drawn up (cf. canons 1437 § 2 CIC and 1101 § 2 CCEO).¹⁴

Qualifications of the Person carrying out the Investigation

The person must have the appropriate knowledge to carry out the investigation. It is vital when the victim is a child that the person has the required training and experience. It is also critical that the person be competent in canon law concerning the sacrament of Penance and the seal of confession when a possible crime concerning the sacrament of Penance is being investigated. The person carrying out the Investigation can be a “cleric or lay person outstanding for their good character, prudence, and doctrine”.¹⁵ Usually the people carrying out the Investigation are lay persons and this is encouraged in most western countries.¹⁶ It is most important that the investigation

¹⁰ Giorgio Giovanelli, “The Investigatio Praevia and the Role of the Ordinary”, Pontificia Universitas Lateranensis – Academia.edu.

¹¹ C. 383.

¹² C. 384.

¹³ CIC c. 483 §2; CCEO c. 253 §2.

¹⁴ *Vademecum* 41.

¹⁵ C. 1428 §2.

¹⁶ Cf. USCCB, “Directives for the Implementation of the Provisions of Vos estis lux mundi Concerning Bishops and their Equivalents”, <https://www.usccb.org/sites/default/files/about/leadership/usccb-general-assembly/2019-june-meeting/upload/usccb-modified-amended-directives-2019-06.pdf>

be seen to be credible, professional, and independent.¹⁷

The person conducting the investigation must be careful to respect the right to privacy of the alleged victim and their desires. Also, the good name of the accused must be protected: "Care must be taken so that the good name of anyone is not endangered from this investigation".¹⁸ Information placed on the internet about the cleric's withdrawal from ministry sometimes cannot be completely removed.

The *Vademecum* of the Congregation of the Faith explained the preliminary investigation of an alleged delict or crime looks to establish "33...whether there is a sufficient basis both in law and in fact so as to consider the accusation as having the semblance of truth".¹⁹ The allegation may be indisputable or notorious because of information available to the public, or it may be impossible to have taken place for some reason. Then the preliminary investigation would be superfluous. However, the *Vademecum* states:

18. Given the sensitive nature of the matter (for example, the fact that sins against the sixth commandment of the Decalogue rarely occur in the presence of witnesses), a determination that the *notitia* lacks the semblance of truth (which can lead to omitting the preliminary investigation) will be made only in the case of the manifest impossibility of the commission of a delict according to the norms of canon law.²⁰

The preliminary investigation should be "a true procedure, albeit brief and administrative in nature",²¹ so "the Ordinary can draw the conclusion knowledge of a delict has been received which seems to be true".²²

The purpose of having a preliminary foundation is to establish whether there is a solid basis for conducting a penal process. A libellus can only be rejected if the petition lacks any basis and it does not seem possible that a basis will result from carrying out a process.²³

In secular justice systems police might conduct a criminal investigation²⁴ for the

¹⁷ *Vademecum* 38-39.

¹⁸ CIC c. 1717 §2; CCEO 23; *Vademecum* 44.

¹⁹ *Vademecum* 12, 13, 16, 18, 19, 37.

²⁰ *Vademecum* 18.

²¹ Frederick. Easton. *A Practical Commentary to the Code of Canons of the Eastern Churches* (Montreal: Wilson & Lafleur. 2019) vol. 2. 2616. (=EASTON, *A Practical Commentary*)

²² Easton, *A Practical Commentary*, 2616.

²³ C. 1505 §2. A libellus can be rejected only: 4/ if it is certainly clear from the libellus itself that the petition lacks any basis and that there is no possibility that any such basis will appear through a process.

²⁴ The crime | New Zealand Ministry of Justice <https://www.justice.govt.nz/about/learn-about->

prosecutor to see if there is enough evidence to proceed, or what charges could be laid. In American courts there is often a preliminary hearing

by a judge to determine whether a person charged with a crime should be held for trial. A hearing held in felony cases prior to indictment during which the state is required to produce sufficient evidence to establish that there is probable cause to believe that a crime has been committed and that the defendant committed it.²⁵

Most legal systems have preliminary procedures prior to a trial. In New Zealand they are outlined in a Justice Department flowchart.²⁶

Sufficient evidence

The person carrying out the Investigation inquires carefully about "the facts, circumstances, and imputability" of the accused.²⁷ The Ordinary then decides "when it seems that sufficient evidence has been collected"²⁸.

1. whether a process to inflict or declare a penalty can be initiated.
2. whether, attentive to can. 1341, this is expedient.
3. whether a judicial process must be used or, unless the law forbids it, whether the matter must proceed by way of extrajudicial decree.²⁹

However, if the Ordinary decrees there is insufficient evidence to proceed with a penal process, this may be changed by a new decree according to "canon 1718 §2. The ordinary is to revoke or change the decree mentioned in §1 whenever new evidence indicates to him that another decision is necessary." The Ordinary in "issuing the decrees mentioned in §§1 and 2, is to hear two judges or other experts of the law if he considers it prudent".³⁰

The preliminary investigation should establish the following:

- The facts on which the investigation is based;
- The number of criminal acts;
- When they took place;
- The circumstances in which they took place;

²⁵ [the-justice-system/explore-the-criminal-justice-system/the-crime/](https://www.justice.govt.nz/assets/Documents/Publications/MOJ0100.3C-At-a-glance-factsheet-AUG19-WEB.pdf)

Henry C. Black, *Black's Law Dictionary*, St. Paul, Minn. 1983. 614.

²⁶ <https://www.justice.govt.nz/assets/Documents/Publications/MOJ0100.3C-At-a-glance-factsheet-AUG19-WEB.pdf>

²⁷ C. 1717 §1.

²⁸ C. 1718 §1.

²⁹ C. 1718 §1.

³⁰ C. 1718 §3.

- The general details of the alleged victims; and
- A preliminary evaluation of the physical, psychological, spiritual, and moral harm inflicted.³¹

The person carrying out the preliminary investigation needs to verify the external acts that occurred which would constitute a delict. The investigation is not supposed to be trying to prove the allegation with moral certainty. Sometimes preliminary investigations include hundreds of pages of evidence. This should not happen because it means that a preliminary investigation is more like an administrative penal process. The procedures of a trial or penal process safeguarding rights are non-existent.

A preliminary investigation only needs to establish that the “knowledge of the delict” (“*notitia de delicto*”) seems to be true. It is most important that the accuser or a witness gives their testimony under oath, sign at the end of a typed-up transcript, and initial each page of the transcript. This may prevent the person being required to be reinterviewed again.³² Often the complainant will refuse to be interviewed again. Therefore, it is very important that the first interview is comprehensive and obtains as much relevant information as possible.

Sacrament of Penance

When an accusation or a case involves the sacrament of Penance, it is vital that the confidentiality of the seal of the sacrament is upheld. The CDF *Vademecum* states:

Care should also be taken care to determine any possible relation to the sacramental internal forum (in this regard, however, account must be taken of the prescriptions of art. 4 § 2 SST. At this point, any other delicts attributed to the accused (cf. art. 9 § 2 SST can be added, as well as any indication of problematic facts emerging from his biographical profile.³³

The person carrying out the investigation must not reveal the identity of the alleged victim to the accused priest. *Sacramentorum Sanctitatis tutela* is explicit about this protection for the sacrament of Penance and the accuser.³⁴

Scope of the Investigation

The person carrying out the investigation should focus on the specific allegation against the accused. E.g., if the bishop is accused of not dealing with the allegation of abuse against a priest, the person carrying out the investigation should focus on that

³¹ C. 1717 §1; *Vademecum* 34.

³² *Vademecum* 34, 51.

³³ *Vademecum* 34.

³⁴ *Vademecum* 102; SST art. 4 §2.

priest and not trawl through all the files of the priests in the diocese. The person carrying out the investigation should only look at the file of another priest if a particular failure to act is revealed. This will also help to avoid delays in dealing with a particular allegation.³⁵

The person carrying out the investigation is not carrying out a general inquiry into how the accused performed his ministry, but if other unlawful or criminal behaviour is revealed, this should be investigated. The person carrying out the investigation may need to request the Ordinary to amend the opening decree of the preliminary investigation if other delicts or misconduct come to light.

Prohibition to exercise Sacred Ministry

The Ordinary or Hierarch has the right to impose precautionary measures³⁶ from the beginning of the investigation.³⁷ He will usually prohibit the accused from the exercise of sacred ministry if a more grave crime is alleged or if the allegation is about a recent incident:

Canon 1722. To prevent scandals, to protect the freedom of witnesses, and to guard the course of justice, the ordinary, after having heard the promoter of justice and cited the accused, at any stage of the process can exclude the accused from the sacred ministry or from some office and ecclesiastical function, can impose or forbid residence in some place or territory, or even can prohibit public participation in the Most Holy Eucharist. Once the cause ceases, all these measures must be revoked; they also end by the law itself when the penal process ceases.

The accused cannot normally exercise any ministry or function including public concelebration of the Eucharist until the investigation and any process has concluded. Usually, the accused must reside at a specified residence and is forbidden to have any contact with the accuser, or their relatives and friends. The *Vademecum* explains:

64. The precautionary measures referred to in no. 58 are imposed by a singular precept, legitimately made known (cf. canons 49ff. and 1319 CIC and 1406 and 1510ff. CCEO).

65. It should be noted that whenever a decision is made to modify or revoke precautionary measures, this must be done by a corresponding decree, legitimately made known. This will not be necessary, however, at the conclusion of the possible process, since at that moment those measures cease to have legal

³⁵ *Vademecum* 34, 35, 66.

³⁶ *Vademecum* 58-65.

³⁷ SST, art. 19.

effect.³⁸

Imputability

There is the maxim “the accused is innocent until proven guilty” in “The Declaration of Rights” from the time of the French Revolution.³⁹ On the other hand, according to canon 1321, if it is proven the accused committed the action, the presumption of the law is that the accused is culpable for the offence.

The person carrying out the investigation is to assess the imputability of the accused.⁴⁰ “Imputability is a person’s moral responsibility for an act they have performed”.⁴¹ This depends on how freely, deliberately, and intentionally the person violated the law, without compulsion or limits on their freedom of action.

The imputability of a person is presumed when it is shown the person performed the action.⁴² However, some factors such as reoffending may increase imputability,⁴³ while other factors such as ignorance may decrease imputability.⁴⁴

Protecting the Good Reputation

When someone is convicted of a crime, they lose their good reputation. This has happened legitimately because of a legal process and their own action. However, canon 220 states “No one is permitted to harm illegitimately the good reputation which a person possesses nor to injure the right of any person to protect his or her own privacy.” “Illegitimately” includes careless use of information, lack of concern for privacy or libel. If it is proven with moral certainty in a penal process that a person has committed an offence, that person will lose his good reputation, but this has come about legitimately.

Any investigation must take care that the reputation of anyone involved is not endangered. This includes the accused, the accuser, and witnesses. All these people have a right to privacy and protection against, prejudice, retaliation, or discrimination.⁴⁵

³⁸ Vademecum 64-65.

³⁹ CC. 220; 1321 §3; 1728 §2; cf. Kenneth Pennington, “Innocent until Proven Guilty: The Origins of a Legal Maxim” *The Jurist* 63(2003) 106-124.

⁴⁰ C. 1717 §1.

⁴¹ P. Dugan and P. Gargaro. *A Simple Dictionary of Canon Law* (Philadelphia: Canon Law Books, 2012) 29.

⁴² C. 1321 §3 When there has been an external violation, imputability is presumed, unless it appears otherwise.

⁴³ C. 1326.

⁴⁴ C. 1323-1325.

⁴⁵ C. 1717 §2; C. 220; Vademecum 44-46.

Protection of Whistle-Blowers

Significant measures in recent law provide for accusers and whistle-blowers to be protected from retribution.⁴⁶ *Vos Estis Lux Mundi* provides protection for them in article 4:

Article 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.⁴⁷

The person making the report is protected from prejudice, retaliation, or discrimination because of submission of the report. This brings the Church legislation into line with most civil jurisdictions.

Obviously, persons making a report could easily be members of a religious institute or diocesan clergy. Paragraph 3 makes it clear that no obligation to silence or secrecy can be imposed on a person about their report or its contents. This eliminates non-disclosure agreements, as well as making it clear that the person making the report is free to report to any police or civil authority concerning the abuse.

Rights of the Accused

The accused does not have any procedural rights during the preliminary investigation apart from their rights in natural justice. At some stage of the process, the accused would normally be informed unless it might compromise the integrity of the investigation or the evidence. When the accused is informed, he should be encouraged to get civil and canonical advice and invited to respond to the accusation against him.⁴⁸

⁴⁶ <https://www.nytimes.com/2019/05/09/world/europe/pope-francis-abuse-catholic-church.html>.

⁴⁷ VELM 4.

⁴⁸ Vademecum 52. During the investigative process, a particularly sensitive task falling to the Ordinary of Hierarch is to decide if and when to inform the person being accused.

Vademecum 53. In this regard, there is no uniform criterion or explicit provision in law. An assessment must be made of all the goods at stake: in addition to the protection of the good name of the persons involved, consideration must also be given, for example, to the risk of compromising the preliminary investigation or giving scandal to the faithful, and the advantage of collecting beforehand all evidence that could prove useful or necessary.

Vademecum 54. Should a decision be made to question the accused person, since this is a

At any stage of the process, a cleric may admit his guilt and his unsuitability to be a minister. Then he can apply to be dispensed from the obligations of celibacy, but he can never present himself again as a minister of the Church.⁴⁹

Pastoral Care of Those Involved

The complainant, the one(s) harmed, the one under investigation and the community involved may need pastoral care including spiritual, medical, and psychological help.⁵⁰ The diocesan bishop would be the first person responsible for this offer.⁵¹

The accused should not be driving him/herself to the meeting with the Ordinary/bishop to ensure the safety of all involved.

Conclusion of the Investigation

Investigations vary in length. Some investigations may only involve several photos or some text messages. The person carrying out the investigation and the Ordinary need to continually evaluate whether "it seems that sufficient evidence has been collected".⁵² At a certain point a decision can be made that it is unlikely evidence will be found that significantly contradicts what seems to be the truth of the case and whether it seems to be true an ecclesiastical delict was committed.

The person carrying out the investigation should make a report and give it and the evidence collected to the Ordinary. The report should assess what has been found in the evidence and suggest anything else that could be done concerning the collection of further evidence.

Decree Closing the Preliminary Investigation

The Ordinary or Hierarch must then decree the conclusion of the preliminary investigation.⁵³

preliminary phase prior to a possible process, it is not obligatory to name an official advocate for him. If he considers it helpful, however, he can be assisted by a patron of his choice. An oath cannot be imposed on the accused person (cf. ex analogia, canons 1728 §2 CIC and 1471 §2 CCEO).

⁴⁹ Vademecum 157.

⁵⁰ VELM 5; Vademecum 55.

⁵¹ C. 383 §1. In exercising the function of a pastor, a diocesan bishop is to show himself concerned for all the Christian faithful entrusted to his care, of whatever age, condition, or nationality they are, whether living in the territory or staying there temporarily; he is also to extend an apostolic spirit to those who are not able to make sufficient use of ordinary pastoral care because of the condition of their life and to those who no longer practice their religion.

⁵² C. 1718 §1.

⁵³ Vademecum 68; CIC canon 1719 and CCEO 1470.

The Ordinary must then decide whether the allegation has a sufficient basis in law and in fact to have a semblance of truth.⁵⁴

A decision must be made whether prescription has precluded a penal process.

A decision needs to be made whether it concerns a delict reserved to the Holy See. If the investigation concerns a *graviora delicta*, the Ordinary or Hierarch must according to the *Vademecum*:

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.⁵⁵

Even if the Ordinary concludes the accusation is unfounded or unproven, the CDF *Vademecum* states he must forward the acts of the case with his *voluntatem* to the Dicastery for the Doctrine of the Faith:

71. Whenever the Ordinary who carried out the preliminary investigation is not the Ordinary of the place where the alleged delict was committed, he is to communicate to the latter the results of the investigation.

72. The acts are to be sent in a single copy; it is helpful if they are authenticated by a notary who is a member of the curia, unless a specific notary had been appointed for the preliminary investigation.

73. Canons 1719 CIC and 1470 CCEO state that the original of all the acts is to be kept in the secret archive of the curia.

74. Again, according to art. 16 SST, once the acts of the preliminary investigation have been sent to the CDF, the Ordinary or Hierarch is to await communications or instructions in this regard from the CDF.

75. Clearly, if other elements related to the preliminary investigation or new accusations should emerge in the meantime, these are to be forwarded to the CDF as quickly as possible, in order to be added to what is already in its possession. If it appears useful to reopen the preliminary investigation on the basis of those elements, the CDF is to be informed immediately.

The revised Book VI of the Code (2021) includes the crime of neglecting to report an offence whether it be to an Ordinary or the Apostolic See.

Canon 1371 §6. A person who neglects to report an offence, when required to do

⁵⁴ C. 1718.

⁵⁵ Vademecum 69.

so by a canonical law, is to be punished according to the provision of can. 1336 §§ 2-4, with the addition of other penalties according to the gravity of the offence.

Informing Civil Authorities

The Ordinary or Hierarch is to inform the civil authorities of the receipt of the allegation according to the following principles:

Two principles apply: a/ respect for the laws of the state (cf. art. 19 VELM); and b/ respect for the desire of the alleged victim, provided that this is not contrary to civil legislation. Alleged victims should be encouraged – as will be stated below (no. 56) – to exercise their duties and rights vis-à-vis the state authorities, taking care to document that this encouragement took place and to avoid any form of dissuasion with regard to the alleged victim (*Vademecum* 48).

If the law requires the Ordinary or Hierarch to report, they must do so.⁵⁶ When civil authorities issue subpoenas, the Ordinary or Hierarch must obey them (*Vademecum* 50).

Role of the Complaints Advisory Committee/Review Board

These committees are created by particular law. They advise about the credibility of the report and what to recommend to the Ordinary and the Holy See. A committee cannot carry out an investigation. There must be an individual person carrying out the investigation.⁵⁷

Non-Reserved Delict

Many sexual abuse allegations against clergy and religious concern crimes of abuse of authority.⁵⁸ The Ordinary must discern and decide about initiating a penal process. Canon 1718 §1 states that: “when it seems that sufficient evidence has been collected, the Ordinary is to decide:

- 1° whether a process to inflict or declare a penalty can be initiated; or
- 2° whether, attentive to canon 1341, this is expedient.

It must be remembered that the penal process has the objects of repairing scandal, restoring justice and reforming the offender.⁵⁹ Canon 1345 notes that the offender “must be punished if there is no other way to provide for the restoration of justice and

⁵⁶ *Vademecum* 49.

⁵⁷ C. 1717 ff.

⁵⁸ C. 1378 formerly c.1389.

⁵⁹ C. 1341. An ordinary is to take care to initiate a judicial or administrative process to impose or declare penalties only after he has ascertained that fraternal correction or rebuke or other means of pastoral solicitude cannot sufficiently repair the scandal, restore justice, reform the offender.

the repair of any scandal that may have been caused.”

If a penal process is to be used, he must decide which process:

Canon 1718 §1 3° whether a judicial process must be used or, unless the law forbids it, whether the matter must proceed by way of extrajudicial decree.

Sometimes other complaints or information comes in many years later. If new evidence comes to light, canon 1718 §2 states that “the Ordinary is to revoke or change the decree mentioned in §1 whenever new evidence indicates to him that another decision is necessary”.

The Ordinary is required in accordance with canon 1718 §3 “in issuing the decrees mentioned in Canon 1718 §§1 and 2 to consult two judges or other experts of the law if he considers it prudent”.

The Ordinary might resolve the matter between the parties if it involves libel:

Canon 1718 §4. Before he makes a decision according to the norm of §1 and in order to avoid useless trials, the ordinary is to examine carefully whether it is expedient for him or the delegate, with the consent of the parties, to resolve equitably the question of damages.

Anonymous Complaints

The *Vademecum* states anonymous complaints must be accepted, although they are harder to verify.

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, especially when it is accompanied by documentation that attests to the likelihood of a delict. Nonetheless, for easily understandable reasons, great caution should be exercised in considering this type of *notitia*, and anonymous reports certainly should not be encouraged.

The anonymous complaint may give clear knowledge of a delict especially if it alleges the exact time, date and place of the delict. Of course, when someone makes an anonymous complaint, the person’s motive and hiding of their identity may be suspect. However, the anonymity of the complainant may be understandable if there is a danger of retribution in their culture or political situation.

Credibility

The accuser is presumed to be telling the truth until the contrary is demonstrated.

However, the person carrying out the investigation should validate the plausibility of the complaint. This is particularly important if the case involves the sacrament of penance because the accused priest cannot reveal any conversation within the sacrament, but can only admit or deny the offence.

Evidence from other processes such as for a declaration of marriage nullity may be included in the file by the person carrying out the investigation:

It can be useful to assemble testimonies and documents, of any kind or provenance (including the results of investigations or trials carried out by civil authorities), which may in fact prove helpful for substantiating and validating the plausibility of the accusation. It is likewise possible at this point to indicate eventual exempting, mitigating or aggravating factors, as provided for by law. It could also prove helpful to collect at this time testimonials of credibility with regard to the complainants and the alleged victims. An Appendix to the present *Vademecum* contains a schematic outline of useful data that those carrying out the preliminary investigation will want to compile and have at hand (cf. no. 69).⁶⁰

Other useful data could include evidence from any civil investigation. Although there may be no witnesses, the credibility of the persons involved, the consistency of the facts and the accounts of what happened, other accusations against the accused, previous patterns of offending, documents etc all help to establish the truth of the accusations.

Conclusion

Kevin McKenna wrote an article about due process and referred to an American survey that showed 82% of priests fear being falsely accused.⁶¹ The preliminary investigation is a crucial part of the procedures before a penal process. If the investigation is performed correctly, it goes a long way to ensure a just outcome for all those involved.

⁶⁰ Vademecum 34.

⁶¹ Kevin McKenna. "We can have both: Due process for accused priests and justice for sex abuse survivors" *America*. 2 June 2023. <https://www.americamagazine.org/faith/2023/06/02/due-process-clergy-sexual-abuse-accusation-245117>.

Forms used in New Zealand

TABULAR SUMMARY FOR CASES OF *DELICTA RESERVATA*

Diocese/Institute Of Incardination	
Ordinary	
Church Sui Iuris	
Ddf Prot. No	
Cleric's Full Surname(s)	
Cleric's Full First Name(s)	
Cleric's Father's Surname	
Official I.D.	

DATE OF BIRTH AND OTHER SIGNIFICANT DATES

Date of Birth		Diaconal Ordination	
Perpetual Vows		Priestly Ordination	Years in Ministry
Place Of Incardination			
Ministry In/Transfer to Other Dioceses			
Cleric's Current Address			
Advocate/Procurator (&Signed Copy of Mandate)			
Advocate/Procurator's Address			

MINISTRY

Year	Parish/ Organisation	Place	Appt/Responsibility
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ACCUSATION(S) OF *DELICTA RESERVATA* AGAINST THE CLERIC

Date of Alleged Accusation	Name, Surname of Alleged Victim	Date of Birth	Place, Duration of Alleged Delicts	Identity of Person Bringing Allegation(s)/Date of Denunciation to Ecclesiastical
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Brendan Daly

CANON LAW SOCIETY OF AUSTRALIA AND NEW ZEALAND

PROCEEDINGS

2023

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