



Katholieke Universiteit Leuven
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Libertas Ecclesiae in the State of Victoria

Recent developments in light of
insights from English legal history

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May the holy saints Anselm and Thomas of Canterbury intercede for the Church in Victoria and her pastors. May a cooperative relationship thrive between the Church and the temporal powers, and may the Church “*enjoy that full measure of freedom which her care for the salvation of men requires*” (*Dignitatis Humanae*, art. 13).

Regi autem sæculorum immortalī, invisibili, soli Deo honor et gloria in sæcula sæculorum. Amen. (1 Tim 1:17)

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Abstract (English/Dutch)

This paper analyses from a canonical perspective the extent to which the Church's ability to select and organise her own ministers has been legitimately or illegitimately interfered with by the civil authorities in the state of Victoria, Australia. It considers two recent civil law developments in Victoria, namely civil legislation requiring ministers of religion to be vetted by the civil authorities before ministering, and attempts to pressure the nature of the relationship between a bishop and his clergy through imposing civil liability on a bishop for the acts of his clergy. Chapter 1 considers the magisterium of Vatican II on the *libertas Ecclesiae*, and the translation of this teaching into canonical norms in the Code. It examines the canons which make provision for the selection of the Church's ministers and their related rights and faculties, as well as those which describe the relationship between a diocesan bishop and his clergy. It then considers the interaction between these canonical norms and the civil law. Chapter 2 examines four instances of interaction between the Church and State in pre-Reformation England which further illustrate the doctrine of the *libertas Ecclesiae* and efforts to uphold it. Lessons are drawn in relation to Church-State cooperation, the essential role of the Apostolic See in ecclesiastical discipline, and the important role of local bishops. Finally, Chapter 3 examines the development of the magisterium concerning the *libertas Ecclesiae* subsequent to the Reformation. In particular, the doctrines of the Church as a perfect society and her independence from the civil power are analysed. In light of this magisterial analysis, the legitimacy of the two Victorian civil law developments is considered, as well as possible responses by the universal and local ecclesiastical authorities.

Deze paper analyseert vanuit een canoniek perspectief in hoeverre de burgerlijke autoriteiten van de Australische deelstaat Victoria op legitieme of illegitieme wijze tussengekomen zijn in de wijze waarop de Kerk haar geestelijken selecteert voor benoeming en deze organiseert. Hiertoe wordt gekeken naar twee recente ontwikkelingen in het burgerlijk recht van Victoria, meer bepaald de verplichte screening door de burgerlijke autoriteiten waaraan bedienaars van godsdiensten onderworpen worden in aanloop van hun apostolaat, en de ondernomen pogingen om druk te zetten op de relatie tussen een bisschop en zijn geestelijken door deze burgerlijk aansprakelijk te stellen voor de daden van zijn clerus. Hoofdstuk 1 bespreekt het magisterium van Vaticaan II aangaande de *libertas Ecclesiae*, en de vertaling van deze leer naar het Canoniek Wetboek door middel van een beschouwing van de canons die de selectie van kerkbedienaars en hun relatieve rechten en faculteiten bepalen, evenals deze die de relatie beschrijven tussen een diocesane bisschop en zijn ondergeschikte geestelijken. Daarna wordt dieper ingegaan op de interactie tussen deze canonieke wetten en burgerlijk recht. Hoofdstuk 2 onderzoekt vier

instanties van interactie tussen Kerk en Staat in pre-Reformatie Engeland die verder de doctrine van de *libertas Ecclesiae* illustreren evenals de inspanningen om deze *libertas Ecclesiae* te behouden. Op het einde van het hoofdstuk worden beschouwingen gemaakt op het vlak van samenwerking tussen Kerk en Staat, de essentiële rol van de Heilige Stoel op gebied van ecclesiastische discipline, en de belangrijke rol die weggelegd is voor lokale bisschoppen. Hoofdstuk 3 tenslotte behandelt de ontwikkeling van het Magisterium in de periode na de Reformatie wat betreft de *libertas Ecclesiae*, waarbij in het bijzonder een analyse gemaakt wordt van de doctrines van de Kerk als volmaakte maatschappij en haar onafhankelijkheid van de burgerlijke macht. In het licht van deze magisteriale analyse wordt een beschouwing gemaakt van de legitimiteit van de twee ontwikkelingen in burgerlijk recht van Victoria, net als van de mogelijke reacties hierop door universele en lokale ecclesiastische autoriteiten.

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List of Abbreviations

AAS – Acta Apostolicae Sedis.

ACBC – Australian Catholic Bishops Conference.

ACSL – Australian Catholic Safeguarding Ltd.

art. – article.

arts. – articles.

ASS – Acta Sanctae Sedis.

c. – canon.

cc. – canons.

Code – *Code of Canon Law* (1983).

NCSS – National Catholic Safeguarding Standards.

NSW – New South Wales.

PCLT – Pontifical Council for Legislative Texts.

s. – section.

ss. – sections.

WSA – Worker Screening Act 2020 (Vic).

I. Introduction

Since the onset of the clerical sexual abuse crisis globally in the past several decades, much pressure has been brought to bear on ecclesiastical institutions by civil authorities. This paper will analyse from a canonical perspective the extent to which the Church's ability to select and organise her own ministers has been legitimately or illegitimately interfered with by the civil authorities in the state of Victoria, Australia in response to the abuse crisis. Specifically, it will examine two recent civil law developments in Victoria which concern the *libertas Ecclesiae* (liberty of the Church). First, civil legislation has been implemented requiring ministers of religion to be subjected to vetting by the civil authorities before being allowed to minister. Second, pressure has been building to fundamentally alter the relationship between a diocesan bishop and his clergy through attempts to impose civil liability on a bishop for the acts of his clergy. Importantly, although both the civil and ecclesiastical authorities have pursued the praiseworthy goal of protecting children and vulnerable persons from harm, the means which they have used may be impermissible from a canonical perspective. Saint John Paul II, the promulgator of the present *Code of Canon Law* (1983) ("**Code**"),¹ taught that a Catholic may not justify an act which is intrinsically immoral by reference to a good end, no matter how laudable.² Hence, it is important to examine the intersection of the canon and civil law to determine whether any interference by the latter impermissibly conflicts with the *libertas Ecclesiae* as understood by the Church. As there is no concordat between Australia and the Holy See,³ the situation in Victoria will provide an excellent basis to analyse the Code's articulation of the *libertas Ecclesiae*, unmodified by a concordat as may be the case in other jurisdictions.⁴

Chapter 1 will examine the Second Vatican Council's teaching on the liberty of the Church in general, and the canons of the Code which translate the conciliar vision into law. Next, the specific canons which make provision for the Church's selection of her ministers will be analysed, especially those concerning the selection, rights and faculties of cardinals, papal

¹ English quotations of the Code are from: *Code of Canon Law*, Latin-English Edition, Translation under the auspices of the Canon Law Society of America, Washington, Canon Law Society of America, 1999, xliii + 751 p, which is available on the Vatican website (<https://www.vatican.va/archive/cod-iuris-canonici/cic_index_en.html>). However, for canons 1311–1399 (Book VI), English quotations are from: FRANCIS, "New Book VI of the Code of Canon Law", 1 June 2021, in *Bollettino*, 210601b(2021).

² JOHN PAUL II, "Encyclical Veritatis Splendor", 6 August 1993, nn. 79–83, in *AAS*, 85(1993), 1197–1200.

³ See s. n., "Australia-The Holy See relationship", *Australian Embassy Holy See*, <<https://holysee.embassy.gov.au/hyse/relations.html>>, last accessed on 28-04-2025.

⁴ See Code, c. 3.

legates, bishops and priests. This will be followed by a consideration of the Victorian civil legislative regime imposing obligations on ministers of religion to be vetted before ministering, and an analysis of the Victorian bishops' implementation of these obligations. Finally, the theological and canonical nature of the relationship between a bishop and his priests will be described, followed by an analysis of the attempt by Victorian courts to affect this relationship through the extension of the civil legal doctrine of "vicarious liability".

As the Australian legal system developed out of the English legal system, Chapter 2 will seek helpful insights through examining four episodes in the history of the *libertas Ecclesiae* in England between the Norman conquest of 1066 and the Reformation. First, the reforms of King William the Conqueror in strengthening the independence of the ecclesiastical jurisdiction and promoting Church reform will furnish an example of healthy cooperation between Church and State. Next, the investiture controversy in England in the early 12th century will illustrate the Church's response to civil interference in her rights regarding the appointment of her ministers. Later in the same century, the battle between King Henry II and the Archbishop of Canterbury regarding the privilege of the forum for clerics and other ecclesiastical liberties will be examined. Finally, the Holy See's response to the English Reformation will be considered.

In Chapter 3, the development of the Church's magisterium subsequent to the Reformation will be examined to determine the proper relationship between the Church and the civil powers from the Catholic perspective.⁵ This will allow a judgment of whether the Victorian civil authorities have acted legitimately or illegitimately in influencing the selection and organisation of the Church's ministers. In particular, doctrinal developments regarding the independence of the Church from civil power, and the related concept of a "perfect society", will be considered. Papal documents treating the freedom of bishops and other clerics in their ministry in the context of several historical persecutions of the Church will also be examined. Finally, many Popes have also encouraged cooperation between the Church and the civil powers. To address the problem of abuse which both the ecclesiastical and civil authorities seek to combat, several possible reforms to canon law will then be considered which could be effected cooperatively through a concordat or through unilateral action by Church authorities.

⁵ Although most primary and secondary sources for this paper were consulted in English, ecclesiastical primary sources were consulted in their original language (either Latin or Italian), except where the use of a translation is noted in the relevant footnote.

Australia consists of several states and territories united together in a federal commonwealth, one of which is Victoria.⁶ Victoria is covered by four territorial dioceses: the Archdiocese of Melbourne, and its suffragan dioceses of Sale, Sandhurst and Ballarat.⁷ Several Eastern Catholic eparchies and two ordinariates, including the Military Ordinariate of Australia, also operate within Victoria.⁸ In 2021, approximately 1.5% of Catholics in Australia were members of Eastern Catholic Churches.⁹ In view of the overwhelming majority of Victorian Catholics being of the Latin Church, this paper will confine itself to the Latin Church's canon law and will not analyse the situation of the Catholic eparchies. Further, in view of their broad diversity of governance according to their proper constitutions and other norms,¹⁰ the situation of institutes of consecrated life and societies of apostolic life will not be specifically analysed.

⁶ *Commonwealth of Australia Constitution*, ss. 3, 122.

⁷ AUSTRALIAN CATHOLIC BISHOPS CONFERENCE, "Dioceses", *Catholic Australia*, <<https://www.catholic.au/s/all-dioceses>>, last accessed on 15-02-2025.

⁸ *Ibid.*

⁹ NATIONAL CENTRE FOR PASTORAL RESEARCH, *Social Profile of the Catholic Community in Australia*, Canberra, Australian Catholic Bishops Conference, 2023, 9.

¹⁰ See Code, cc. 586–587, 591, 617, 732, 734.

II. Chapter 1 – The *Libertas Ecclesiae* in Victoria

1. Introduction

This chapter will analyse the current rights of the Church as asserted in the *ius vigens*, and instances where these rights *prima facie* conflict with the Victorian civil law. The magisterium of the Second Vatican Council will be examined, as well as the canons of the Code regarding the *libertas Ecclesiae* generally and the selection of the Church's ministers specifically. The interaction of these norms with the Victorian vetting requirements for ecclesiastical ministry will then be considered. Finally, the canonical nature of the bishop-priest relationship will be examined, including the effects of Victorian attempts to impose civil liability on bishops for the acts of their priests.

2. The *Libertas Ecclesiae* in the *ius vigens*

A. The magisterium of Vatican II

In interpreting the Code, it is essential to have recourse to the documents of Vatican II. As Pope John Paul II explained in his Apostolic Constitution promulgating the Code, “*the Code, not only because of its content but also because of its very origin, manifests the spirit of this Council*”.¹¹ Importantly, the “*conciliar image of the Church*” is the Code’s “*essential point of reference*”.¹²

The Council’s declaration on religious freedom, *Dignitatis Humanae*, distinguishes between religious freedom and the duties of States to the Catholic Church, explaining that: “[*r*]eligious freedom ... which men demand as necessary to fulfil their duty to worship God, has to do with immunity from coercion in civil society. Therefore it leaves untouched traditional Catholic doctrine on the moral duty of men and societies toward the true religion and toward the one Church of Christ.”¹³ Therefore, while religious freedom concerns coercion of the individual, the doctrine of the liberty of the Church, which concerns the relationship between the Church and the State, remains unaltered by the Council’s discussion of religious freedom. During the

¹¹ JOHN PAUL II, “Apostolic Constitution *Sacrae Disciplinae Leges*”, 25 January 1983, in *AAS*, 75/II(1983), ix, English translation at <https://www.vatican.va/content/john-paul-ii/en/apost_constitutions/documents/hf_jp-ii_apc_25011983_sacrae-disciplinae-leges.html>, last accessed on 07-05-2025.

¹² *Ibid.*

¹³ VATICAN II, “Declaration *Dignitatis Humanae*”, 7 December 1965, art. 1, in *AAS*, 58(1966), 930, English translation at <https://www.vatican.va/archive/hist_councils/ii_vatican_council/documents/vat-ii_decl_19651207_dignitatis-humanae_en.html>, last accessed on 04-05-2025.

Council, the *relator* for the schema on religious liberty, Emiel de Smedt (Bishop of Bruges, Belgium), confirmed this distinction to the Council Fathers. He stated that, while *Dignitatis Humanae* recalled more clearly (“*clarius recoli*”) the doctrine regarding the duties of public power towards the true religion, its proper object was to elaborate the doctrine of religious freedom grounded in the dignity of the human person.¹⁴ Hence, there is continuity in the Church’s doctrine on the *libertas Ecclesiae*, and pre-Conciliar expressions of this doctrine, which will be considered further in Chapters 2 and 3, remain essential to the interpretation of the *ius vigen*s. Additionally, as a declaration, *Dignitatis Humanae* has a lesser authority than other types of conciliar documents such as dogmatic constitutions.¹⁵ This further emphasises the importance of considering *Dignitatis Humanae* in the context of other more authoritative documents, both of Vatican II and of the ecclesiastical magisterium more generally.

Dignitatis Humanae calls the liberty of the Church a “*sacred freedom*”, purchased by the blood of the Lord Jesus Christ, which necessitates “*that the Church should enjoy that full measure of freedom which her care for the salvation of men requires.*”¹⁶ It asserts that “[t]he freedom of the Church is the fundamental principle in what concerns the relations between the Church and governments and the whole civil order.”¹⁷ The term “*fundamental*” emphasises the importance of the *libertas Ecclesiae*.¹⁸ In strong terms which directly confront the civil power, the Council Fathers state that:

“*In human society and in the face of government the Church claims freedom for herself in her character as a spiritual authority, established by Christ the Lord, upon which there rests, by divine mandate, the duty of going out into the whole world and preaching the Gospel to every creature. The Church also claims freedom for herself in her character as a society of men who have the right to live in society in accordance with the precepts of the Christian faith.*”¹⁹

Dignitatis Humanae also affirms a more limited freedom of all other religions, subject to the “*just demands of public order*”, especially as regards “*freedom in order that they may govern*

¹⁴ VATICAN II, *Acta Synodalia Sacrosancti Concilii Oecumenici Vaticani II. Volumen IV Periodus Quarta. Pars VI*, Roma, Typis Polyglottis Vaticanis, 1978, 719; HARRISON, B., “Pius IX, Vatican II and Religious Liberty”, part I, in *Living Tradition*, 9(1987), <<http://www.rtforum.org/lt/lt9.html#II>>, last accessed on 24-03-2025.

¹⁵ LAMONT, J., “Catholic Teaching on Religion and the State”, in *New Blackfriars*, 96/1066(2015), 691–692.

¹⁶ *Dignitatis Humanae*, art. 13.

¹⁷ *Ibid.*

¹⁸ COURTNEY MURRAY, J., “The Issue of Church and State at Vatican Council II”, in *Theological Studies*, 27/4(1966), 588–589.

¹⁹ *Dignitatis Humanae*, art. 13 (citation omitted).

*themselves according to their own norms”, and “the right not to be hindered ... in the selection, training, appointment, and transferral of their own ministers”.*²⁰

The pastoral constitution *Gaudium et Spes* also comments on the *libertas Ecclesiae*. The Council Fathers state that “*at all times and in all places, the Church should have true freedom to preach the faith, to teach her social doctrine, to exercise her role freely among men, and also to pass moral judgment in those matters which regard public order when the fundamental rights of a person or the salvation of souls require it.*”²¹ *Gaudium et Spes* asserts the autonomy and independence of the Church and the political community in their own fields, but explains that fostering sounder cooperation between the two can render their service more effective for the good of all.²² John Courtney Murray S.J. has observed that the Council did not precisely define the nature of this cooperation, rather it recognised that “*the contingent relativities of history, and not any logical deductions from abstract principle, must determine the institutional forms of Church-state cooperation.*”²³ Chapters 2 and 3 will examine several historical examples of this cooperation. The conciliar emphasis on the benefits of cooperation is important to bear in mind when considering any rights which the Church may assert for herself.

Many of these freedoms which the Church claims for herself, namely the freedoms to preach, to teach, to govern herself, to pass moral judgment, and to care for the salvation of souls, are freedoms which are principally associated with the ecclesiastical hierarchy. As the dogmatic constitution *Lumen Gentium* explains, the Lord Jesus appointed twelve apostles “*whom He would send to preach the Kingdom of God ... He sent them first to the children of Israel and then to all nations, so that as sharers in His power they might make all peoples His disciples, and sanctify and govern them.*”²⁴ The bishops are the successors of the apostles, “*who together with the successor of Peter ... govern the house of the living God.*”²⁵ Through episcopal ordination, “*bishops in an eminent and visible way sustain the roles of Christ Himself as Teacher, Shepherd and High Priest.*”²⁶ Similarly, the Council’s decree *Christus Dominus* states

²⁰ *Ibid*, art. 4.

²¹ VATICAN II, “Pastoral Constitution *Gaudium et Spes*”, 7 December 1965, art. 76, in *AAS*, 58(1966), 1100, English translation at <https://www.vatican.va/archive/hist_councils/ii_vatican_council/documents/vat-ii_const_19651207_gaudium-et-spes_en.html>, last accessed on 04-05-2025.

²² *Ibid*.

²³ COURTNEY MURRAY, J., *The Issue ...*, 603.

²⁴ VATICAN II, “Dogmatic Constitution *Lumen Gentium*”, 21 November 1964, art. 19, in *AAS*, 57(1965), 22, English translation at <https://www.vatican.va/archive/hist_councils/ii_vatican_council/documents/vat-ii_const_19641121_lumen-gentium_en.html>, last accessed on 04-05-2025.

²⁵ *Ibid*, art. 18.

²⁶ *Ibid*, art. 21.

that the diocesan bishops are the “*principal dispensers of the mysteries of God*”.²⁷ For this reason, the liberty of the Church as a community and institution must be considered in close connection with the liberty of her individual ministers to perform their ecclesial mission. Since the “*chief place*” among the Church’s ministries “*belongs to the office of those who, appointed to the episcopate, by a succession running from the beginning, are passers-on of the apostolic seed*”,²⁸ many of the canons and ecclesiastical documents which will be analysed in this paper relate specifically to bishops, rather than priests and deacons. For example, *Christus Dominus* asserts that:

“*In discharging their apostolic office, which concerns the salvation of souls, [diocesan] bishops per se enjoy full and perfect freedom and independence from any civil authority. Hence, the exercise of their ecclesiastical office may not be hindered, directly or indirectly, nor may they be forbidden to communicate freely with the Apostolic See, or ecclesiastical authorities, or their subjects.*”²⁹

However, the Church’s sacred ministers also include priests, who “*are the prudent fellow workers of the episcopal order and are themselves consecrated as true priests of the New Testament*”, and deacons, who “*are ordained for the ministry and serve the people of God in communion with the bishop and his presbytery*”.³⁰ Therefore, the canon law relating to priests and deacons will also be examined, and it will be seen that they also participate in the liberty of the Church in various ways.

B. The Libertas Ecclesiae in the Code

The teaching on the liberty of the Church finds partial expression in various canons of the Code. Most clearly, canon 747§1 provides that: “[t]he Church ... has the duty and innate right, independent of any human power whatsoever, to preach the gospel to all peoples, also using the means of social communication proper to it.” This implies the absolute freedom of the Church from secular interference in internally organising herself and selecting her ministers for the purpose of preaching the gospel. Similarly, the Code asserts the Church’s “*proper and*

²⁷ VATICAN II, “Decree *Christus Dominus*”, 28 October 1965, art. 15, in *AAS*, 58(1966), 679, English translation at <https://www.vatican.va/archive/hist_councils/ii_vatican_council/documents/vat-ii_decree_19651028_christus-dominus_en.html>, last accessed on 04-05-2025.

²⁸ *Lumen Gentium*, art. 20 (citations omitted).

²⁹ *Christus Dominus*, art. 19. See also COURTNEY MURRAY, J., *The Issue ...*, 589–590.

³⁰ *Christus Dominus*, art. 15.

exclusive right” to form sacred ministers.³¹ Beyond the scope of this paper, the Church also claims independence from the civil power in adjudicating spiritual matters or matters of ecclesiastical discipline,³² and in the sphere of temporal goods.³³ However, even where the Church claims a proper and exclusive right, sometimes canon law seeks to cooperate with the civil law. For example, in Pope Francis’ *Motu Proprio Vos Estis Lux Mundi*, the procedural norms regarding the reporting of certain sexual delicts by clerics are expressly stated to be subject to any relevant civil law provisions.³⁴

In defence of the Church’s liberty, which is closely related to and practically lived out in the liberty of her individual ministers, canon 1372 requires the punishment of “*those who hinder the freedom of the ministry or the exercise of ecclesiastical power, or the lawful use of sacred things or ecclesiastical goods, or who intimidate one who has exercised ecclesiastical power or ministry*”.³⁵ The Church’s penal law in the Code only binds persons who were baptised into the Catholic Church or received into it,³⁶ and who are Catholics of the Latin Church.³⁷ Latin Catholic government officials who infringe the liberty of the Church may therefore be punished. Diocesan bishops and other clergy who are accomplices to such a delict, for example by helping the State to enforce a law which hinders the freedom of ministry or the exercise of ecclesiastical power, may also be punished.³⁸ A violation of canon 1372 1° may be punished by any of the expiatory penalties listed in canon 1336§§2–4, namely an order (including a fine), a prohibition, or a deprivation.³⁹ However, if a judge foresees “*that greater evils may arise from a too hasty punishment of the offender*”, as may be the case in a direct confrontation with the civil authorities, the judge may defer the imposition of a penalty to a more opportune time except if there is an urgent need to repair scandal.⁴⁰

³¹ Code, c. 232.

³² *Ibid*, c. 1401.

³³ *Ibid*, c. 1254§1. See also BEAL J., CORIDEN, J. and GREEN, T. (ed.), *New Commentary on the Code of Canon Law*, New York/Mahwah, Paulist Press, 2000, 1454.

³⁴ FRANCIS, “Apostolic Letter *Vos Estis Lux Mundi*”, 25 March 2023, art. 20, in *AAS*, 115/4(2023), 403, English translation at <https://www.vatican.va/content/francesco/en/motu_proprio/documents/20230325-motu-proprio-vos-estis-lux-mundi-aggiornato.html>, last accessed on 21-04-2025.

³⁵ Code, c. 1372 1°.

³⁶ *Ibid*, c. 11.

³⁷ *Ibid*, c. 1.

³⁸ *Ibid*, c. 1329§1.

³⁹ Some of these penalties can only be applied to clerics or religious.

⁴⁰ Code, c. 1344 1°.

3. The selection of the Church's ministers

Having considered the current articulation of the *libertas Ecclesiae* in the *ius vigens*, we will now examine how the Church concretely exercises her right to select her own ministers under the Code. The Victorian civil law vetting regime will then be considered. For the purposes of this analysis, when a cleric enters a diocese other than that in which he is incardinated, the diocese will be referred to as the “receiving diocese”.

A. The provisions of the Code

Certain appointments may be made by the Roman Pontiff pursuant to the Code, and the Code itself may make provision for particular ministers through the grant of faculties or other means. Monsignor Brendan Daly defines a faculty as “*an authorisation by an ecclesiastical authority ... enabling a priest to participate in the ecclesiastical power of teaching, sanctifying or governing for the good of the faithful.*”⁴¹ Giving a slightly different definition, Professor John Huels defines a faculty as “*an ecclesiastical power or authorization necessary for performing lawfully an act of ministry or administration in the name of the Church.*”⁴² Both of these definitions emphasise that a faculty is an *authorisation* to perform an act of *ecclesiastical power* (i.e. not a merely private act). While the Code does not give priests a right to an ecclesiastical office, it does presume that, by virtue of their ordination, priests should be able to minister publicly and possess the necessary faculties to do so.⁴³ Indeed, the Code provides that a candidate is not to be ordained to the priesthood unless his bishop or competent major superior considers him “*useful for the ministry of the Church*”.⁴⁴ Therefore, the Code’s grant of a faculty conveys a corresponding expectation of the right to exercise that faculty.

Where universal legislation grants a right or faculty, it cannot validly be restricted by an inferior legislator or executive authority such as a diocesan bishop, except where the law itself permits this.⁴⁵ Therefore, where a civil authority intrudes into the selection of the Church’s ministers, even with the consent or cooperation of the diocesan bishop, it may constitute an illegitimate interference in the Church’s liberty. A bishop’s ability to legitimately consent to such an intrusion depends on whether the law itself authorises it.

⁴¹ DALY, B., “Removal of the Faculties of a Priest by a Diocesan Bishop”, in *The Canonist*, 8/1(2017), 94.

⁴² HUELS, J., “Permissions, Authorizations and Faculties in Canon Law”, in *Studia Canonica*, 36(2002), 29.

⁴³ DALY, B., *Removal ...*, 109.

⁴⁴ *Ibid*, 95–96; Code, c. 1025§2.

⁴⁵ Code, cc. 135§2, 33§1, 38.

Cardinals and Papal Legates

Cardinals enjoy a strong position in canon law. They are freely selected by the Roman Pontiff,⁴⁶ and “[i]n those matters which pertain to their own person, cardinals living outside of Rome and outside their own diocese are exempt from the power of governance of the bishop of the diocese in which they are residing.”⁴⁷ By virtue of the law itself, “cardinals have the faculty of hearing the confessions of the Christian faithful everywhere in the world”.⁴⁸ Unlike the corresponding faculty conferred on all bishops,⁴⁹ this faculty is not expressed to be subject to denial by the diocesan bishop, and it can therefore be exercised contrary to his will.

Pontifical legates also enjoy strong protections in canon law. Canon 362 states that “[t]he Roman Pontiff has the innate and independent right to appoint, send, transfer, and recall his own legates either to particular churches in various nations or regions or to states and public authorities.” The Code gives a pontifical legate a general authorisation to perform liturgical celebrations in all churches of his legation.⁵⁰ He is not required to obtain permission from the local ordinary, but must notify the ordinary in advance insofar as possible.⁵¹ Hence, a legate may celebrate without such notification where it is impossible, or even in opposition to the local ordinary’s will. Although a pontifical legate to the nation of Australia possesses immunity from criminal liability under Australian and international law,⁵² a legate to a particular church in Victoria would not *ex officio* enjoy such immunity. Such a legate may be coerced or prosecuted by the civil authorities in relation to any civil law restrictions on ecclesiastical ministry. Although there are currently no pontifical legates to particular churches in Victoria, the Pope may choose to send one in the future.

⁴⁶ *Ibid*, c. 351§1.

⁴⁷ *Ibid*, c. 357§2.

⁴⁸ *Ibid*, c. 967§1.

⁴⁹ *Ibid*.

⁵⁰ *Ibid*, c. 366.

⁵¹ *Ibid*.

⁵² AUSTRALIAN GOVERNMENT, “Protocol Guidelines: 5. Privileges and immunities”, *Department of Foreign Affairs and Trade*, <<https://www.dfat.gov.au/about-us/publications/corporate/protocol-guidelines/5-privileges-and-immunities>>, last accessed on 15-02-2025.

Bishops

Bishops are freely appointed by the Pope, or confirmed by him in the case of a legitimate election.⁵³ The Pope's unique authority is confirmed by canon 1387, which provides that it is a delict for a bishop to be consecrated without a pontifical mandate. The Code provides various faculties to bishops, and distinguishes between circumstances where a bishop may act licitly, or validly but illicitly. It also distinguishes between bishops who are diocesan bishops within their own territory, and those who are not.

The Code provides that a diocesan bishop within his diocese “*has all ordinary, proper, and immediate power which is required for the exercise of his pastoral function except for cases which the law or a decree of the Supreme Pontiff reserves to the supreme authority or to another ecclesiastical authority.*”⁵⁴ By the law itself, a diocesan bishop within his diocese can perform pontifical functions and licitly confer the sacraments of baptism, confirmation and reconciliation and assist at marriages.⁵⁵ He can also ordain priests and deacons for his diocese.⁵⁶

The Code is more restrictive regarding bishops who are not diocesan bishops, or who are diocesan bishops outside their own dioceses. For these bishops, some rights conferred by the Code are exercisable unless they have been denied by the local bishop *in a particular case*, namely the faculties to preach and to hear confessions licitly.⁵⁷ Some rights conferred by the Code may be exercised if a bishop has at least the reasonably presumed permission of the local bishop (or his express permission), namely the right to licitly confer confirmation on persons who are not his subjects,⁵⁸ or to perform pontifical functions in the case of a diocesan bishop outside his territory.⁵⁹ Finally, some episcopal rights require positive permission before they may be exercised, namely the rights of a bishop to licitly ordain priests or deacons outside his own jurisdiction,⁶⁰ to confer the sacrament of baptism outside a case of necessity,⁶¹ or to assist

⁵³ Code, c. 377§1. See also *Christus Dominus*, art. 20: “[T]he right of nominating and appointing bishops belongs properly, peculiarly, and per se exclusively to the competent ecclesiastical authority”.

⁵⁴ Code, c. 381§1.

⁵⁵ *Ibid*, cc. 390, 861§1, 863, 883 1°, 967§1, 1109.

⁵⁶ *Ibid*, cc. 1015§1, 1016.

⁵⁷ *Ibid*, cc. 967§1, 763.

⁵⁸ *Ibid*, c. 886§2.

⁵⁹ *Ibid*, c. 390.

⁶⁰ *Ibid*, c. 1017.

⁶¹ *Ibid*, c. 862.

at a marriage.⁶² For completeness, a metropolitan archbishop is empowered by law in suffragan dioceses to “*perform sacred functions ... as if he were a bishop in his own diocese in all churches*”.⁶³

Ministers in cases of necessity

The Code also grants certain faculties to administer sacraments in cases of necessity or emergency. Since the salvation of souls is the supreme law of the Church,⁶⁴ these faculties cannot be restricted by a diocesan bishop. In a case of necessity, any priest is obliged to bring the Viaticum to the sick,⁶⁵ and any person with a right intention may confer the sacrament of baptism.⁶⁶ In a case of the danger of death, any priest can administer the sacrament of confirmation licitly,⁶⁷ and any priest is obliged to hear a sacramental confession and grant absolution from any censures and sins.⁶⁸ Canon 1003§2 provides that any priest can administer the anointing of the sick for a reasonable cause with at least the presumed consent of the priest having the care of the soul in question. This consent could reasonably be presumed in a case of the danger of death. However, in other cases, an ordinary could reserve the granting of this consent to himself.⁶⁹

Priests in general

In view of their role within the ecclesiastical hierarchy, priests are subject to greater oversight by their superiors. Nevertheless, they have some rights and faculties conferred by the law itself. Canon 1003§2 provides that any priest “*to whom the care of souls has been entrusted [has] the duty and right of administering the anointing of the sick*” to his faithful. Similarly, a “*pastor, parochial vicars [and] chaplains ... have the duty and right of bringing the Most Holy Eucharist as Viaticum to the sick.*”⁷⁰ Additionally, either within the context of the mass or elsewhere, all priests and deacons possess the faculty of preaching by the law itself, “*unless the competent ordinary has restricted or taken away the faculty or particular law requires express*

⁶² *Ibid*, c. 1108§1.

⁶³ *Ibid*, c. 436§3.

⁶⁴ *Ibid*, c. 1752.

⁶⁵ *Ibid*, c. 911§2.

⁶⁶ *Ibid*, c. 861§2.

⁶⁷ *Ibid*, c. 883 3°.

⁶⁸ *Ibid*, cc. 976, 986§2.

⁶⁹ SUPREMUM TRIBUNAL SIGNATURAE APOSTOLICAE, prot. nr. 37937/05 CA, 10b, 28-04-2007, in *Ius Ecclesiae*, 19/3(2007), 615.

⁷⁰ Code, c. 911§1.

permission”.⁷¹ The faculty to preach must “*be exercised with at least the presumed consent of the rector of the church*”,⁷² and may not be exercised in the churches or oratories of religious without the permission of the competent superior.⁷³

The Code also confers rights relating to the sacrament of confession. For a priest to validly impart sacramental absolution, he must have received the faculty to do so for the relevant faithful,⁷⁴ granted either by the law itself or by the competent authority.⁷⁵ *Inter alia*, the law itself grants the faculty to hear confessions in virtue of office to “*a local ordinary, canon penitentiary, a pastor, and those who take the place of a pastor ... each within his jurisdiction*”.⁷⁶ Otherwise, excluding the case of penitents living day and night in the house of certain religious institutes or societies of apostolic life,⁷⁷ the authority competent to grant a faculty is the local ordinary.⁷⁸ However, once a priest has received the faculty to hear confessions habitually “*whether by virtue of office or by virtue of the grant of an ordinary of the place of incardination or of the place in which [he has] a domicile [he] can exercise that faculty everywhere unless the local ordinary has denied it in a particular case*”.⁷⁹ Hence, a priest who possesses the habitual faculty to hear confessions in his diocese of incardination also possesses that faculty when he travels into another diocese, without any need to seek a new faculty from the local ordinary of the receiving diocese. This extended faculty can be denied by the local ordinary of a receiving diocese *in a particular case*,⁸⁰ or revoked by him within his territory for a grave cause (without needing any canonical delict or penal process).⁸¹ However, the presumption of canon 967§2 favours the right of the minister to exercise the faculty everywhere, and a local ordinary cannot refuse all priests from other dioceses generally the ability to exercise such a faculty.⁸² The local ordinary may only deny the use of such a faculty with cause and to an individual priest or on an individual occasion.⁸³ Similarly, the faculty

⁷¹ *Ibid*, c. 764.

⁷² *Ibid*.

⁷³ *Ibid*, c. 765.

⁷⁴ *Ibid*, c. 966§1.

⁷⁵ *Ibid*, c. 966§2.

⁷⁶ *Ibid*, c. 968§1.

⁷⁷ For these cases, see *ibid*, cc. 967§3, 968§2 and 969§2.

⁷⁸ *Ibid*, c. 969§1.

⁷⁹ *Ibid*, c. 967§2.

⁸⁰ *Ibid*, c. 967§2.

⁸¹ *Ibid*, cc. 974§§1–2; SUPREMUM TRIBUNAL SIGNATURAE APOSTOLICAE, *prot. nr. 37937/05 CA*, 10a.

⁸² BEAL J., CORIDEN, J. and GREEN, T. (ed.), *New Commentary ...*, 1154.

⁸³ *Ibid*.

which a priest enjoys under canon 764 to preach everywhere may be restricted or taken away by the local ordinary for any just and proportionate reason, without needing any penal process or canonical delict.⁸⁴

Priests also have extensive rights under the Code to offer mass. Canon 904 expresses the *mens legislatoris* regarding the Eucharistic sacrifice: “*priests are to celebrate frequently; indeed, daily celebration is recommended earnestly since, even if the faithful cannot be present, it is the act of Christ and the Church in which priests fulfill their principal function.*”⁸⁵ Canon 900§2 provides that “[a] priest not impeded by canon law celebrates the Eucharist licitly”, drawing no distinction between a mass with or without the presence of the faithful. The right in canon 900§2 is limited by the canons which follow it, however the only relevant limitation is that in canon 903, which states that “[a] priest is to be permitted to celebrate even if the rector of the church does not know him, provided that either he presents a letter of introduction from his ordinary or superior, issued at least within the year, or it can be judged prudently that he is not impeded from celebrating.”⁸⁶ Practically, this means that a priest who is unknown to the rector may be prevented from celebrating mass unless he has a letter of introduction (“celebret”).⁸⁷ Conversely, a priest who possesses a celebret has a right under canon 903 to celebrate mass, even if no other information is known about him. Apart from this limitation, the Code allows a priest to say mass without requiring any special permission or faculty.⁸⁸ An ordinary may, however, impede a priest from celebrating the Eucharist through a non-penal administrative act. For example, an ordinary may limit a priest’s ability to celebrate or concelebrate the Eucharist in a public place or before the people.⁸⁹ In order to make such a non-penal administrative decree, an ordinary must have a just and proportionate reason.⁹⁰ A

⁸⁴ SUPREMUM TRIBUNAL SIGNATURAE APOSTOLICAE, *prot. nr. 37937/05 CA*, 10a: “*ob quamlibet iustam et proportionatam causam*”.

⁸⁵ See also Code, c. 276§2 2°.

⁸⁶ “*Rector*” includes anyone having the care of a church or oratory: BEAL J., CORIDEN, J. and GREEN, T. (ed.), *New Commentary* ..., 1099. The other canons only limit the exercise of the right in canon 900§2 in very narrow circumstances, e.g.: concelebration (c. 902), bination (c. 905), concelebration with non-Catholic ministers (c. 908).

⁸⁷ See also Code, c. 561.

⁸⁸ OBEL, A., *The Agreement for Temporary Service of a Diocesan Priest outside His Diocese of Incardination according to Canon 271 of the Code of Canon Law*, Ottawa, Saint Paul University, 2017, 230–231.

⁸⁹ SUPREMUM TRIBUNAL SIGNATURAE APOSTOLICAE, *prot. nr. 37937/05 CA*, 10d, 13.

⁹⁰ *Ibid*, 15; SUPREMUM TRIBUNAL SIGNATURAE APOSTOLICAE, *prot. nr. 22785/91 CA*, 8, 11-06-1993, in *Ius Ecclesiae*, 32/1(2020), 191.

complex assessment of factors may be necessary in each case to determine whether such a restriction in truth has a penal character and is therefore subject to additional requirements.⁹¹

Restriction of faculties through a penal process

In addition to a non-penal restriction of rights or faculties, a local ordinary may also restrict a cleric's faculties through a penal process. A cleric may be deprived of a faculty of hearing confessions or of preaching,⁹² or of "*all or some offices, duties, ministries or functions, or only of certain functions attaching to offices or duties*", through an expiatory penalty imposed according to Book VI of the Code for certain delicts.⁹³ Similarly, a cleric may be subjected to a prohibition against performing certain acts of the powers of order or governance,⁹⁴ or "*against exercising, everywhere or inside or outside a specified place or territory, all or some offices, duties, ministries or functions, or only certain tasks attaching to offices or duties*".⁹⁵ This could include a prohibition of offering mass in public. These expiatory penalties cannot, however, affect powers, offices, functions, rights or faculties which are outside the control of the ordinary imposing the penalty.⁹⁶ Additionally, the Christian faithful (including clerics) "*have the right not to be punished with canonical penalties except according to the norm of law*",⁹⁷ and these expiatory penalties can only be imposed through a penal process (whether judicial or extra-judicial).⁹⁸ A penal process is regulated by several canons in the Code which must be observed by the relevant ordinary.⁹⁹ Finally, a diocesan bishop is not competent to judge another bishop in a penal case, nor a cardinal or legate of the Apostolic See,¹⁰⁰ so he could not impose expiatory penalties on them through such a process.

⁹¹ SUPREMUM TRIBUNAL SIGNATURAE APOSTOLICAE, *prot. nr. 37937/05 CA*, 10d–13.

⁹² Code, c. 1336§4 2°.

⁹³ *Ibid*, c. 1336§4 1°.

⁹⁴ *Ibid*, c. 1336§3 3°–4°.

⁹⁵ *Ibid*, c. 1336§3 2°.

⁹⁶ *Ibid*, c. 1338§1.

⁹⁷ *Ibid*, c. 221§3. See also DALY, B., "Canon 1336. What Processes Must the Diocesan Bishop Follow to Remove the Faculties of a Priest?", in EUART, S., ALESANDRO, J., and GREEN, T. (ed.), *2017 Roman Replies & CLSA Advisory Opinions*, Washington, Canon Law Society of America, 2017, 89.

⁹⁸ Code, c. 1342.

⁹⁹ See especially: *ibid*, cc. 1717–1728; DALY, B., *Canon 1336 ...*, 89–91, 95.

¹⁰⁰ Code cc. 1405§1 2°–3°.

B. The civil law obligation for clerics to be vetted

The Worker Screening Act 2020 (Vic)

The *Worker Screening Act 2020* (Vic) (“*WSA*”) is legislation passed by the Victorian Parliament in 2020. It replaced the *Working with Children Act 2005* (Vic), which was the first Victorian statewide legislative regime for vetting anyone working with children, either as a volunteer or in paid employment.¹⁰¹ Its purpose includes “to assist in protecting children from sexual and physical harm by providing for screening of persons who work with, or care for, children”.¹⁰² Broadly, the *WSA* makes it a crime to engage in “child-related work” if a person does not have a current WWC clearance.¹⁰³ The term WWC clearance derives from “working with children check”, which was used in the earlier legislation. It is also an offence to engage another person in child-related work if the engager knows the worker lacks a WWC clearance or is reckless as to the same.¹⁰⁴

The *WSA* generally defines “child-related work” as work of certain specified types “that usually involves direct contact with a child”.¹⁰⁵ This includes any work by a minister of religion “unless any direct contact with children during the work engaged in as a minister of religion is only occasional direct contact that is incidental to that work”.¹⁰⁶ Further, “if a minister of religion is the appointed leader of a local religious congregation in an organised religious institution and the congregation contains any children, work engaged in as a minister of religion is child-related work”.¹⁰⁷ For the purposes of the *WSA*, all Catholic clergy are “ministers of religion”, and their ministry is defined as “work”.¹⁰⁸ In practice, nearly all pastoral assignments would involve some regular direct contact with children, other than some ministries such as a chaplaincy to an adult prison or an aged-care home. Hence, the vast majority of Catholic clergy, including all diocesan bishops, pastors and parochial vicars, would be defined *de jure* to be undertaking child-related work. However, a small number of clergy could be excluded from this definition, such as a priest with merely administrative or judicial responsibilities (e.g. a

¹⁰¹ Australia (Victoria), Legislative Assembly, Parliamentary Debates, *Hansard*, 21 July 2005, 1997 (ROB HULLS, Attorney-General).

¹⁰² *Worker Screening Act 2020* (Vic), s 1(b).

¹⁰³ *Ibid*, s 121.

¹⁰⁴ *Ibid*, s 123.

¹⁰⁵ *Ibid*, s 7(1).

¹⁰⁶ *Ibid*, s 121(4).

¹⁰⁷ *Ibid*, s 121(5).

¹⁰⁸ *Ibid*, s 3(1).

judicial vicar) with no pastoral assignment, or a priest-hermit who has no ministry outside his strict enclosure.

In order to undertake child-related work, a Catholic cleric must possess a current WWC clearance, or have an application pending.¹⁰⁹ Whether to grant a WWC clearance is decided by a government official (the “Secretary”),¹¹⁰ whose paramount consideration must be “*the protection of children from sexual or physical harm*”.¹¹¹ The legislative regime is intended to be protective of children, not punitive of offenders.¹¹² In considering an application, a check of the applicant’s police record must be undertaken, and the Secretary may also seek information concerning the application from “*any person or source that the Secretary thinks fit*”.¹¹³

The Secretary must grant a WWC clearance, subject to the following considerations.¹¹⁴ Broadly, the Secretary must refuse a WWC clearance if the applicant is subject to certain reporting obligations as a registered sex offender, or if the applicant is charged with or has been convicted of various serious crimes including murder, rape, and certain sexual offences perpetrated while the offender was an adult against a child or involving child abuse material.¹¹⁵ In the case of certain other crimes, the Secretary must refuse to grant a WWC clearance “*unless satisfied that doing so would not pose an unjustifiable risk to the safety of children*”.¹¹⁶ Crimes in this category include certain sexual offences perpetrated while the offender was a child against a child or involving child abuse material, as well as other offences including certain crimes relating to violence, drugs and indecent behaviour.¹¹⁷ Finally, where an applicant has been charged with or convicted of an offence other than those already covered, or has been subject to certain disciplinary or regulatory findings, the Secretary must grant a WWC clearance unless the Secretary is “*satisfied that giving the WWC clearance would pose an unjustifiable*

¹⁰⁹ *Ibid*, ss 121(1), (2)(a).

¹¹⁰ *Ibid*, s 68.

¹¹¹ *Ibid*, s 11.

¹¹² STORMONT, N., “Not Child-Related: Unnecessary Working with Children Checks as Irrelevant Criminal Records Discrimination”, in *Monash University Law Review*, 48/2(2022), 174.

¹¹³ *Worker Screening Act 2020* (Vic), ss 58(1), 58(2)(b).

¹¹⁴ *Ibid*, s 68.

¹¹⁵ *Ibid*, ss 60–61.

¹¹⁶ *Ibid*, s 63.

¹¹⁷ *Ibid*, s 62.

risk to the safety of children".¹¹⁸ An administrative tribunal has jurisdiction to review the Secretary's decision.¹¹⁹

The *WSA* exempts some individuals, such as registered teachers, from the obligation to have a WWC clearance.¹²⁰ Most relevantly, a person who is not ordinarily resident in Victoria is exempt from the obligation to have a WWC clearance if he or she engages in child-related work in Victoria for less than 30 days per calendar year.¹²¹ This would cover visiting clergy ministering in Victoria for a short period. Otherwise, in general, the Church's clergy are obliged to have a WWC clearance before ministering in Victoria.

The case of Bishop Max Davis

One relevant example of worker screening legislation similar to that of Victoria concerns the former bishop of the Australian Military Ordinariate, Max Davis. In February 2016, Bishop Davis was tried and acquitted by a jury in the District Court of Western Australia for several alleged instances of historic sexual abuse.¹²² Bishop Davis had been accused of six counts of indecent dealings with children over the period of 1969 to 1972, while he was working as the dormitory master at a school in the state of Western Australia.¹²³ The children claimed that Bishop Davis abused them when he was a Benedictine brother, even describing the Benedictine habit.¹²⁴ However, Mr Davis was a layman at the time and was never a member of the Benedictine Order, and he left the school in the late 1960s.¹²⁵ Additionally, one of Bishop

¹¹⁸ *Ibid*, ss 64–65.

¹¹⁹ *Ibid*, part 4.3.

¹²⁰ *Ibid*, part 5.1.

¹²¹ *Ibid*, s 116.

¹²² CATHOLIC DIOCESE OF THE AUSTRALIAN DEFENCE FORCE, "Media Statement | 16 February 2016", *Truth Justice Healing Council*, <<https://www.tjhcouncil.org.au/media/113986/160216-MEDIA-RELEASE-Catholic-Diocese-of-the-Australian-Defence-Force-Bishop-Davis-found-not-guilty.html>>, last accessed on 21-02-2025.

¹²³ TRIGGER, R., "Catholic Bishop of Australian Defence Force Max Davis cleared of abusing boys at New Norcia", *ABC News*, <<https://www.abc.net.au/news/2016-02-16/adf-catholic-bishop-max-davis-not-guilty-abusing-boys-new-norcia/7170184>>, last accessed on 14-04-2025.

¹²⁴ SHANAHAN, A., "Pell convicted over lack of empathy", *The Australian*, <<https://www.theaustralian.com.au/inquirer/cardinal-george-pell-convicted-for-a-lacklustre-display-of-empathy/news-story/4597d38fec70dd0b28f2cd63117b0d7e>>, last accessed on 06-03-2025.

¹²⁵ *Ibid*.

Davis' accusers was not enrolled at the school while he was working there.¹²⁶ Bishop Davis argued in court that the children had been abused by someone else.¹²⁷

Following his trial and acquittal, Bishop Davis sought to return to active ministry as bishop of the Australian Military Ordinariate. However, despite being acquitted in February 2016, he could not return to active ministry until around December 2017.¹²⁸ In the Ordinariate's newsletter, the Vicar General explained that, despite Bishop Davis having stepped down for over three years from active ministry, "*a decision as to his resumption of duty as Bishop is ongoing due to civil requirements in regards to the re-establishment of his 'Working with Children check' in [the State of New South Wales].*"¹²⁹ Similar to Victoria, New South Wales ("NSW") required individuals not to engage in child-related work without possessing a working with children check clearance.¹³⁰ The NSW legislation required the relevant government authority to grant a clearance to Bishop Davis, as someone who had been the subject of relevant criminal proceedings (even though acquitted), unless the government authority was satisfied that Bishop Davis "*[posed] a risk to the safety of children*".¹³¹ In eventually granting his clearance, the NSW government official therefore concluded that Bishop Davis did not pose a risk to the safety of children. Nevertheless, this is a case where the civil authorities impeded a legitimately appointed bishop from discharging his office after the conclusion of the relevant criminal proceedings, and for a lengthy period of time. The legitimacy of this action by the civil authorities in light of the canonical rights of an ordinary will be further considered in Chapter 3.

C. The application of the civil law by the Victorian bishops

In response to the civil legislative obligations in Victoria, the Victorian bishops have taken various measures. Indeed, a diocesan bishop has a broad authority to select his diocesan clergy and confer offices on them,¹³² and he may choose to cooperate with the civil authorities in

¹²⁶ *Ibid.*

¹²⁷ TRIGGER, R., *Catholic Bishop ...*

¹²⁸ HODGES, A. (ed.), "I'll be home for Christmas", in *Serving Faithfully*, 28(2017), 2.

¹²⁹ O'KEEFE, P. "From the Vicar General Monsignor Peter O'Keefe AM VG EV", in *Serving Faithfully*, 27(2017), 1.

¹³⁰ *Child Protection (Working with Children) Act 2012* (NSW), s 8.

¹³¹ *Ibid.*, ss 14, 18(2), schedule 1 clause 1(5).

¹³² See e.g.: Code, c. 157: "*[I]t is for the diocesan bishop to provide for ecclesiastical offices in his own particular church by free conferral*". See also *Christus Dominus*, art. 28: "*the bishop should possess a necessary freedom in bestowing offices and benefices*". The bishop also makes a prudent judgment about those to be promoted to orders: Code, c. 1029.

vetting candidates for ordination or appointment. However, the relationship between a diocesan bishop and visiting clergy, or his own clergy once ordained, appointed, or granted faculties, is partially governed by the Code which limits the bishop's ability to consent to the involvement of the civil authorities in regulating the clergy within his jurisdiction. Only the situation in the Archdiocese of Melbourne will be considered in detail, as the other Victorian dioceses of Ballarat,¹³³ Sandhurst and Sale,¹³⁴ as well as the Catholic Military Ordinariate,¹³⁵ have similar (although not identical) regimes in place.

The Archdiocese of Melbourne has implemented rules regarding visiting clergy which do not differentiate between different types of clergy. The same rules apply *prima facie* to visiting deacons, priests, bishops, cardinals and pontifical legates. The Archdiocese's website states that:

*“All clergy, deacons and vowed religious from outside the Catholic Archdiocese of Melbourne who wish to provide ministry or religious services within the Archdiocese are required to complete an Application for Faculties – Short Term Ministry and receive permission to minister before providing any ministry or religious service in the Archdiocese.”*¹³⁶

The Archdiocese distinguishes between Australian clergy and clergy from overseas. Overseas clergy must submit an application to the Archdiocese at least three weeks prior to arriving in Melbourne, consisting of a Safeguarding Declaration Form and, if they are staying for more than 14 days, an International Police Check.¹³⁷ Importantly, the Archdiocese states that “[y]ou will only be granted your faculties letter once we have received your International Police Check.”¹³⁸ The Safeguarding Declaration Form requires the visiting cleric to state that “there

¹³³ CATHOLIC DIOCESE OF BALLARAT, “Application for Faculties & Short-Term Ministry in the Diocese of Ballarat”, *Catholic Diocese of Ballarat*, <<https://www.ballarat.catholic.org.au/wp-content/uploads/2021/06/Request-for-Permission-to-Minister-Form-fillable-template-FB.pdf>>, last accessed on 04-05-2025.

¹³⁴ CATHOLIC DIOCESE OF SALE, “Professional Standards. Screening (Clearance) and Sign In for Church Personnel and Others”, *Safeguarding Resources*, <https://www.cdsale.org.au/application/third_party/ckfinder/userfiles/files/31_%20Diocesan%20Policy%20on%20Screening%20%20Sign%20in.pdf>, last accessed on 13-05-2025; CATHOLIC DIOCESE OF SANDHURST, “Safeguarding Policy for Children and Young People”, *Catholic Diocese of Sandhurst*, <<https://www.sandhurst.catholic.org.au/diocese-of-sandhurst-publications/1898-safeguarding-children-and-young-people/file>>, last accessed on 11-03-2025.

¹³⁵ CATHOLIC MILITARY ORDINARIATE OF AUSTRALIA, “Professional Standards Requirements. For all Visiting Clergy and Religious”, *Catholic Military Ordinariate of Australia*, <<https://military.catholic.org.au/safeguarding/professional-standards-requirements>>, last accessed on 11-03-2025.

¹³⁶ CATHOLIC ARCHDIOCESE OF MELBOURNE, “Visiting clergy”, *Catholic Archdiocese of Melbourne*, <<https://melbournecatholic.org/how-do-i/visiting-clergy>>, last accessed on 04-05-2025.

¹³⁷ *Ibid.*

¹³⁸ *Ibid.*

are not currently any complaints of abuse against me”, that he “is not subject to any past substantiated complaint of abuse”, that “there are no circumstances that could lead to a complaint of abuse against me”, and that “there are no other circumstances that may lead to a conclusion that I pose a risk to children, young people or adults at risk”.¹³⁹ Additionally, the visiting cleric’s diocesan bishop or similar authority must sign the Safeguarding Declaration Form and attest to substantially the same statements regarding the visiting cleric.¹⁴⁰ If the visiting cleric or his bishop cannot make the necessary affirmations unconditionally, disclosure of the reason must be made via the Safeguarding Declaration and Disclosure Form.¹⁴¹ This states that the visiting cleric must assist with further enquiries and assessments “prior to a grant of short term faculties being made”.¹⁴²

Australian clergy are required to have a current WWC clearance, and the Archdiocese specifically references the Victorian civil law obligation.¹⁴³ The Archdiocese does not distinguish between clergy who are obliged under the *WSA* to have a WWC clearance and those who are not.¹⁴⁴ Australian clergy must also submit a Safeguarding Declaration Form (or Safeguarding Declaration and Disclosure Form), unless they are registered in the Australian Catholic Ministry Register.¹⁴⁵ This register allows clergy to provide safeguarding statements similar to the Safeguarding Declaration Form in a centralised database, rather than submitting individual forms in multiple dioceses.¹⁴⁶

¹³⁹ CATHOLIC ARCHDIOCESE OF MELBOURNE, “Safeguarding Declaration Form”, *Catholic Archdiocese of Melbourne*, <<https://cam-parishwebfiles-public.s3.ap-southeast-2.amazonaws.com/CAM/VisitingClergy/Safeguarding+Declaration+Form.pdf>>, last accessed on 11-03-2025.

¹⁴⁰ *Ibid*; AUSTRALIAN CATHOLIC SAFEGUARDING LTD (“ACSL”), *National Catholic Safeguarding Standards*, Melbourne, ACSL, 2022, 41.

¹⁴¹ CATHOLIC ARCHDIOCESE OF MELBOURNE, “Individual Safeguarding Declaration and Disclosure”, *Catholic Archdiocese of Melbourne*, <<https://cam-parishwebfiles-public.s3.ap-southeast-2.amazonaws.com/CAM/VisitingClergy/Safeguarding+Declaration+and+Disclosure+Form.pdf>>, last accessed on 11-03-2025.

¹⁴² *Ibid*.

¹⁴³ CATHOLIC ARCHDIOCESE OF MELBOURNE, *Visiting clergy*.

¹⁴⁴ An employer may require a worker to apply for a WWC clearance even if the legislation does not oblige the worker to do so: STORMONT, N., *Not Child-Related ...*, 172–173.

¹⁴⁵ CATHOLIC ARCHDIOCESE OF MELBOURNE, *Visiting clergy*.

¹⁴⁶ ACSL, “Australian Catholic Ministry Register FAQs”, *ACSL*, <<https://www.acsltd.org.au/wp-content/uploads/2022/11/ACMR-Frequently-Asked-Questions-21.11.22.pdf>>, last accessed on 11-03-2025, n 1; ACSL, “Australian Catholic Ministry Register. Individual Safeguarding Declaration”, *ACSL*, <<https://www.acsltd.org.au/wp-content/uploads/2023/07/Individual-Safeguarding-Declaration-form-25.7.23.pdf>>, last accessed on 11-03-2025.

Both the Safeguarding Declaration Form and the Australian Catholic Ministry Register were implemented in response to the *National Catholic Safeguarding Standards* (“*NCSS*”),¹⁴⁷ which were produced by a civil law company (“*ACSL*”) partially owned by the Australian Catholic Bishops Conference (“*ACBC*”).¹⁴⁸ Although none of *ACSL*’s directors (which oversee its governance) are clerics,¹⁴⁹ the *NCSS* was developed in collaboration with, and endorsed by, the *ACBC*.¹⁵⁰ However, each diocese, ordinariate or competent authority of a religious institute remains responsible for implementing the *NCSS*, which is not obligatory.¹⁵¹ The *NCSS* is not strictly a law (*lex*), since its observance is voluntary, and therefore it was not issued as a “*common [prescript] for a community capable of receiving law*” by a competent legislator.¹⁵² Importantly, the *NCSS* was not approved by the Apostolic See, and does not have the status of a special law which derogates from the Code’s norms.¹⁵³

In light of the preceding analysis of the Code, it is at best misleading to claim that a visiting cleric must apply to receive faculties from a receiving diocese before ministering there. The Code grants certain faculties to cardinals, papal legates and metropolitan archbishops, as well as clerics in the case of necessity, which cannot be restricted by a diocesan bishop. Further, the law itself provides some faculties to a travelling cleric which are not subject to the prior confirmation of the receiving diocese. Some faculties, however, are amenable to restriction by a receiving ordinary, through either a penal process or a non-penal administrative act.

Of those faculties and rights which are particularly relevant to travelling bishops, only the faculties of a visiting bishop to ordain, baptise (excluding a case of necessity) or assist at a marriage are stated by law to require the prior consent of the local ordinary. Further, the reasonably presumed permission of the diocesan bishop is necessary for a visiting bishop to licitly confer confirmation (unless it concerns his own subjects) or perform pontifical functions.

¹⁴⁷ *ACSL*, *National Catholic Safeguarding Standards*; CATHOLIC ARCHDIOCESE OF MELBOURNE, *Safeguarding Declaration Form*; *ACSL*, *Australian Catholic Ministry Register FAQs*, n 2.

¹⁴⁸ *ACSL*, “About Us. Governance”, *ACSL*, <<https://www.acsltd.org.au/about-us/governance/#content-anchor>>, last accessed on 11-03-2025.

¹⁴⁹ *Ibid.*

¹⁵⁰ *ACSL*, “National Catholic Safeguarding Standards Edition 2 Published”, *ACSL*, <<https://www.acsltd.org.au/national-catholic-safeguarding-standards-edition-2-published/>>, last accessed on 11-03-2025.

¹⁵¹ *NCSS*, 5; *ACBC*, “Australian Catholic Safeguarding Limited | FAQs”, *Catholic Australia*, <<https://s3.ap-southeast-2.amazonaws.com/acbcwebsite/Articles/Documents/ACBC/FAQs%20Australian%20Catholic%20Safeguarding%20Limited.pdf>>, last accessed on 26-04-2025, n 8.

¹⁵² Code, c. 29. Further, the *ACBC* could only enact the *NCSS* as a *lex* if it possessed a special mandate from the Apostolic See: Code, c. 455.

¹⁵³ C.f. Code, c. 20.

A diocesan bishop could therefore limit these faculties in general by publicly stating that his permission is denied unless expressly granted in a particular case.

We saw that a local ordinary may restrict a visiting priest's faculties under canons 764 (to preach) and 967§2 (to hear confessions pursuant to a habitual faculty granted by his competent authority) through a non-penal administrative act *in a particular case*. However, an “*administrative act issued by a competent executive authority in which a decision is given or a provision is made for a particular case according to the norms of law*” is a singular decree.¹⁵⁴ A singular decree should be in writing, “*with the reasons at least summarily expressed if it is a decision*”.¹⁵⁵ Before a singular decree is issued, its author “*is to seek out the necessary information and proofs and, insofar as possible, to hear those whose rights can be injured*”.¹⁵⁶ Therefore, where rights or faculties can be denied or withdrawn in a particular case through a singular decree, the law requires that this not be done pre-emptively and in a general manner before the circumstances of the particular case are considered. Hence, these rights and faculties cannot be automatically withdrawn from visiting clergy until they submit the necessary WWC clearance and safeguarding information. However, in view of the grave importance of protecting children and vulnerable persons from abuse, it is likely that failing to provide details of a WWC clearance and safeguarding information to a receiving diocese *when asked* constitutes a just cause allowing *subsequent* restriction of a faculty by singular decree, even in the case of a priest who is innocent and in good standing.

We also saw that an ordinary may impede a priest's right under canon 900§2 to say mass through a non-penal administrative act, although he must have a just and proportionate reason to do so. Although the non-provision of safeguarding information may constitute a just reason, a blanket prohibition on celebrating mass in the receiving diocese (especially mass without any participation of the faithful) may be disproportionate in the particular circumstances in light of the strong exhortation to celebrate mass frequently, even daily, contained in canon 904. Additionally, at a mass without any faithful, the protection of children and vulnerable persons is not threatened. The validity of such a prohibition may be very fact-specific and ultimately subject to the adjudication of the Apostolic Signatura.¹⁵⁷

¹⁵⁴ *Ibid*, c. 48.

¹⁵⁵ *Ibid*, c. 51. See also DALY, B., *Removal ...*, 102.

¹⁵⁶ Code, c. 50.

¹⁵⁷ See *ibid*, cc. 1445§2, 1732–1739.

A local ordinary may also restrict a visiting cleric's existing habitual faculties through an expiatory penalty via a penal process, however such a penalty would be limited to the local ordinary's jurisdiction.¹⁵⁸ A penal process is subject to specific canonical requirements, and canon 1717§1 of the Code explains that an ordinary should commence a penal investigation “[w]henever [he] has knowledge, which at least seems true, of a delict ... unless such an inquiry seems entirely superfluous.” However, failing to respond to a request by a receiving diocese for details of a WWC clearance and a declaration of good standing cannot reasonably be considered to give rise to “knowledge, which at least seems true, of a delict”. In particular, failing to respond to a request for information does not constitute, or give knowledge of, the delict of abuse as articulated in canon 1398. There are reasons why a cleric could innocently fail to submit the requested information, including that he was unaware of the obligation to do so before ministering, which seems understandable since, *prima facie*, it conflicts with the faculties which he already enjoys under universal law. It is also possible that a receiving ordinary could seek to commence a penal process against a visiting cleric for “not obey[ing] the lawful command ... of ... the Ordinary ... and, after being warned, [persisting] in disobedience”.¹⁵⁹ This delict would allow for the imposition of the relevant expiatory penalties, however it can only take place if the receiving ordinary: (1) lawfully commands (not merely requests) the visiting cleric to provide the relevant WWC clearance details and safeguarding information; and (2) the visiting cleric persists in disobedience after being warned. If a penal process were commenced in the receiving diocese, canon 1722 provides that the ordinary could temporarily “exclude the accused from the sacred ministry or from some office and ecclesiastical function ... [or] prohibit public participation in the Most Holy Eucharist” during the penal process, subject to other conditions expressed in the canon.

In light of a diocesan bishop's canonical obligation to “promote the common discipline of the whole Church and therefore to urge the observance of all ecclesiastical laws”,¹⁶⁰ the Victorian diocesan policies should be updated to accord with the universal law of the Church expressed in the Code. In particular, the dioceses should clearly distinguish between their expectations of visiting cardinals, papal legates, bishops and priests. Further, they should not suggest that all of a visiting cleric's faculties are suspended pending submission of safeguarding information to the diocese and confirmation by the diocese. The Victorian dioceses can, however, request

¹⁵⁸ *Ibid*, c. 1338§1.

¹⁵⁹ *Ibid*, c. 1371§1.

¹⁶⁰ *Ibid*, c. 392§1.

information, and indicate that administrative actions may be taken to restrict faculties for non-compliance, or, in rare cases, penal actions.

4. The Church's internal organisation: the bishop–priest relationship

Having reviewed the canon and civil law pertaining to the Church's selection of her ministers, the exercise of the Church's right to determine the nature of the relationship between a diocesan bishop and his clergy will now be examined.

A. The magisterium and the Code

The nature of the relationship between a diocesan bishop and his clergy is not simply one of employment. *Lumen Gentium* describes it as follows:

*“Priests, prudent cooperators with the Episcopal order, its aid and instrument ... constitute one priesthood with their bishop although bound by a diversity of duties. Associated with their bishop in a spirit of trust and generosity, they make him present in a certain sense in the individual local congregations, and take upon themselves, as far as they are able, his duties and the burden of his care ... On account of this sharing in their priesthood and mission, let priests sincerely look upon the bishop as their father and reverently obey him. And let the bishop regard his priests as his co-workers and as sons and friends, just as Christ called His disciples now not servants but friends.”*¹⁶¹

Further, priests “are dependent on the bishops in the exercise of their power”, however they exercise “within the limits of their authority the function of Christ as Shepherd and Head”.¹⁶² Vatican II variously refers to priests as the bishop's “helpers”,¹⁶³ “counsellors”,¹⁶⁴ and “sons and friends”.¹⁶⁵ Further, *Christus Dominus* states that “[t]he relationships between the bishop and the diocesan priests should rest most especially upon the bonds of supernatural charity so that the harmony of the will of the priests with that of their bishop will render their pastoral

¹⁶¹ *Lumen Gentium*, art. 28.

¹⁶² *Ibid.* See also VATICAN II, “Decree Presbyterorum Ordinis”, 7 December 1965, art. 2, in *AAS*, 58(1966), 991–993, English translation at <https://www.vatican.va/archive/hist_councils/ii_vatican_council/documents/vat-ii_decree_19651207_presbyterorum-ordinis_en.html>, last accessed on 04-05-2025.

¹⁶³ *Lumen Gentium*, art. 20; *Presbyterorum Ordinis*, art. 7.

¹⁶⁴ *Presbyterorum Ordinis*, art. 7.

¹⁶⁵ *Christus Dominus*, art 16.

activity more fruitful. Wherefore ... let the bishop call the priests into dialogue, especially about pastoral matters.”¹⁶⁶

This theology of the presbyteral-episcopal relationship is translated into legal norms in several canons of the Code. Canon 369 provides that “[a] diocese ... is entrusted to a bishop for him to shepherd with the cooperation of the presbyterium”. In particular, parish priests exercise an ordinary power of governance over their parishes which is proper, not vicarious.¹⁶⁷ The Code prescribes that a bishop is “to attend to presbyters and listen to them as assistants and counsellors ... [and] to protect their rights and take care that they correctly fulfill the obligations proper to their state”.¹⁶⁸ This suggests a degree of independence and initiative on the part of the presbyters. In turn, canon 273 provides that “[c]lerics are bound by a special obligation to show reverence and obedience to the Supreme Pontiff and their own ordinary”. Further, clerics must “undertake and fulfill faithfully a function which their ordinary has entrusted to them”, unless excused by a legitimate impediment.¹⁶⁹ This special obligation of obedience is limited to matters prescribed by canon law, including the appointment to a parish or other office.¹⁷⁰ It is therefore not an absolute servile obedience. Further, it does not extend to the cleric’s private life, unlike the vow of obedience of a religious.¹⁷¹ Hence, priests are not mere servants of their bishop, but rather his cooperators, assistants and counsellors who have a certain autonomy despite their special obligation of obedience.

In an Explanatory Note in 2004, the Pontifical Council for Legislative Texts (“PCLT”) further clarified the canonical responsibility of a diocesan bishop as regards his clergy.¹⁷² Importantly, the Explanatory Note is not expressed to be an authentic interpretation of the Code, which would itself have the force of law.¹⁷³ The PCLT affirmed that the relationship between a bishop and his priests is not merely one of hierarchical subordination or employment.¹⁷⁴ Further, the

¹⁶⁶ *Ibid*, art 28.

¹⁶⁷ Code, cc. 515§1, 131§2.

¹⁶⁸ *Ibid*, c. 384.

¹⁶⁹ *Ibid*, c. 274§2.

¹⁷⁰ DALY, B., “The Promise of Obedience of Diocesan Priests: what does it mean?”, in *The Australasian Catholic Record*, 90/3(2013), 338–339, 343.

¹⁷¹ *Ibid*, 338.

¹⁷² PONTIFICIUM CONSILIUM DE LEGUM TEXTIBUS, “Nota Esplicativa Elementi per configurare l’ambito di responsabilità canonica del Vescovo diocesano nei riguardi dei presbiteri incardinati nella propria diocesi e che esercitano nella medesima il loro ministero”, 12 February 2004, in *Communicationes*, 36(2004), 33–38.

¹⁷³ Code, cc. 16§1–2.

¹⁷⁴ PONTIFICIUM CONSILIUM DE LEGUM TEXTIBUS, *Nota Esplicativa ...*, I.

diocesan priest is not a mere passive executor of the bishop's orders; rather, he enjoys a legitimate initiative and a just autonomy.¹⁷⁵ The canonical subordination of a priest to his bishop is limited in scope to the exercise of ecclesiastical ministry and directly connected acts, in addition to the general duties of the clerical state.¹⁷⁶ Finally, the PCLT expressly assigns juridical responsibility for a priest's faithful and correct discharge of his duties to the priest himself, not to his bishop.¹⁷⁷

B. Civil law pressure on the bishop–priest relationship

Victorian courts have recently sought to intrude into the relationship between a bishop and his clergy through the imposition of “vicarious liability”. In the 2021 case of *DP (a pseudonym) v Bird*, the Victorian diocese of Ballarat was held civilly liable in the Supreme Court of Victoria for two instances of sexual abuse of a minor by a parochial vicar of the diocese in 1971.¹⁷⁸ The diocese, which had been sued through the person of its current bishop Paul Bird, was ordered to pay the plaintiff \$230,000.¹⁷⁹ On appeal in 2023, three judges of the Court of Appeal upheld the decision.¹⁸⁰ However, in November 2024 on further appeal, the High Court of Australia overturned the lower decisions.¹⁸¹

The case concerned the doctrine of “vicarious liability”, which the majority of the High Court explained “*involves cases of secondary liability based on attribution of liability, not attribution of the acts, of a wrongdoer to a defendant*”.¹⁸² The defendant may be absolutely free from personal fault, but is nevertheless held responsible for another person's wrongs.¹⁸³ The High Court explained that, prior to the present case, Australian common law had demanded that a relationship of employment exist before the doctrine of vicarious liability could be applied.¹⁸⁴ Despite finding that the offending priest was not a diocesan employee, the trial judge had extended the doctrine of vicarious liability to cover the bishop–priest relationship in light of a number of factors including the substantial degree of control exercised by a bishop over a priest

¹⁷⁵ *Ibid*, II.

¹⁷⁶ *Ibid*, III.

¹⁷⁷ *Ibid*, IVa.

¹⁷⁸ *DP (a pseudonym) v Bird* [2021] VSC 850.

¹⁷⁹ *Ibid*, [5].

¹⁸⁰ *Bird v DP (a pseudonym)* [2023] VSCA 66.

¹⁸¹ *Bird v DP (a pseudonym)* [2024] HCA 41.

¹⁸² *Ibid*, [44].

¹⁸³ *Ibid*, [29], [44].

¹⁸⁴ *Ibid*, [45], [48].

through canon law.¹⁸⁵ The Court of Appeal upheld the trial judge’s decision, acknowledging that “[t]he relationship between a diocese and a priest or assistant priest is, necessarily, *sui generis*. It does not exist in the context of a commercial relationship ... nor in the context of a purely social relationship.”¹⁸⁶ Until the High Court issued its ruling, the Court of Appeal’s judgment was authoritative in Victoria.

The High Court had never before considered whether a diocese or bishop could be held vicariously liable for the actions of a priest in the absence of an employment relationship.¹⁸⁷ However, the majority of the Court confirmed that vicarious liability in Australia is confined to relationships of employment, excluding relationships merely “*akin to employment*”.¹⁸⁸ They acknowledged that the Australian law was narrower than in other common law jurisdictions including Canada and the United Kingdom.¹⁸⁹ Despite acknowledging that restricting vicarious liability in a case like the present may seem “*harsh*”, the majority of the Court said that extending this well-established legal doctrine to non-employment relationships should only be done by the legislature not a court.¹⁹⁰ Importantly, the High Court did not argue against imposing liability on a bishop *per se*, but rather against altering settled legal precedent. Coupled with the preparedness of the two Victorian courts to impose liability even in the absence of legislative action, the High Court’s judgment presages potential legislative change in this area. Indeed, proposed legislation to extend vicarious liability to situations akin to employment has been introduced into the Victorian Parliament for consideration,¹⁹¹ however the Victorian government is still developing its position on the issue.¹⁹²

If a bishop and diocese could generally be held vicariously liable for the actions of diocesan clergy, it would fundamentally change the nature of the relationship between a bishop and his clergy. To avoid being liable for their civil wrongs, a bishop would need to micromanage his clergy in a way which infringed their legitimate initiative and just autonomy as elaborated by the PCLT. The diocesan clergy’s role as the bishop’s cooperators and counsellors could be

¹⁸⁵ *Ibid*, [3], [12].

¹⁸⁶ *Bird v DP (a pseudonym)* [2023] VSCA 66, [120]. See also paragraphs [121]–[130].

¹⁸⁷ *Bird v DP (a pseudonym)* [2024] HCA 41, [5].

¹⁸⁸ *Ibid*.

¹⁸⁹ *Ibid*, [50]–[63].

¹⁹⁰ *Ibid*, [64], [67].

¹⁹¹ *Wrongs Amendment (Vicarious Liability) Bill 2025* (Vic).

¹⁹² WILLINGHAM, R., “Victorian sisters abused by paedophile priest say High Court decision has halted quest for compensation”, *ABC News*, <<https://www.abc.net.au/news/2025-05-14/victoria-sisters-catholic-church-abuse-bryan-coffey/105286662>>, last accessed on 14-05-2025.

diminished, tending more in the direction of his servants.¹⁹³ A parish priest's proper power could be especially infringed.¹⁹⁴ The legitimacy or otherwise of such a change forced on the relationship between a bishop and his clergy by the civil authorities will be considered in Chapter 3 in light of the historical and magisterial analysis undertaken in the remainder of this paper.

5. Conclusion

In this chapter, we have reviewed the existing state of play in Victoria regarding two major civil law developments affecting the *libertas Ecclesiae*. The rights and faculties of clergy under the Code were seen to conflict with the regulations imposed by the *WSA*, and with the Victorian bishops' response to the *WSA*. The nature of the relationship between a diocesan bishop and his clergy was also seen to be under pressure by court jurisprudence and potential legislative change. With the intersection of canon law and civil law in Victoria clearly defined, the next two chapters will seek to answer the question of the legitimacy or otherwise of these encroachments by the State, as well as provide helpful insights for the governance of the Church in Victoria.

¹⁹³ C.f. *Lumen Gentium*, art. 28; *Presbyterorum Ordinis*, art. 7.

¹⁹⁴ See Code, c. 515§1.

III. Chapter 2 – Lessons from Catholic England

1. Introduction

This chapter will examine several episodes in pre-Reformation Catholic England which touch upon the *libertas Ecclesiae* and especially the Church's selection and organisation of her ministers. Since the Australian legal system developed out of the English legal system,¹⁹⁵ useful lessons for present-day Victoria will be drawn from this patrimony. There are substantial differences between pre-Reformation England and modern-day Victoria, not least because of over four centuries of separation. Importantly, Australia is a pluralistic society which does not have an official religion.¹⁹⁶ Nevertheless, the contests between the pre-Reformation kings and prelates have helped to more clearly delineate the boundaries of their proper spheres. Pre-Reformation England will also furnish examples of that positive cooperation between Church and State which *Gaudium et Spes* asserts will lead to the more effective exercise of their service “for the good of all”.¹⁹⁷

2. Church–State cooperation: the reforms of William the Conqueror

Ecclesiastical reform in England was not the principal motivation of Duke William of Normandy in undertaking his invasion of England in 1066, however it was nevertheless invoked as a justification.¹⁹⁸ Prior to the Norman invasion, the English Church's condition was problematic, including widespread simony, neglect of celibacy, and subordination of the Church to secular influences.¹⁹⁹ The civil and ecclesiastical jurisdictions were barely distinguished, and the king appointed bishops.²⁰⁰ In particular, assemblies of the whole realm called *Gemóts* had exercised judicial and legislative power regarding both ecclesiastical and

¹⁹⁵ See GARVEY, T., *The Presumption of Innocence in Canon 1321§1: A canonical and historical analysis in dialogue with the Australian criminal law*, Leuven, KU Leuven, 2023, 21–22.

¹⁹⁶ PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA JOINT STANDING COMMITTEE ON FOREIGN AFFAIRS, DEFENCE AND TRADE, *Conviction with Compassion: A Report into Freedom of Religion and Belief*, Canberra, Commonwealth of Australia, 2000, 6. See also *Commonwealth of Australia Constitution*, s 116.

¹⁹⁷ *Gaudium et Spes*, art. 76.

¹⁹⁸ FREEMAN, E., *The History of the Norman Conquest of England. Its Causes and Its Results. Volume 3: The Reign of Harold and the Interregnum*, Cambridge, Cambridge University Press, 2011, 259 – 265, 271–286; THURSTON, H., “England. Before the Reformation”, in HERBERMANN, C., PACE, E., PALLAN, C., SHAHAN, T., and WYNNE, J. (ed.), *The Catholic Encyclopedia. Volume V Diocese–Fathers*, New York, The Encyclopedia Press, Inc., 1913, 431.

¹⁹⁹ THURSTON, H., *England ...*, 431.

²⁰⁰ *Ibid*; FREEMAN, E., *The History ... Volume 3 ...*, 284–285.

temporal matters.²⁰¹ When the Normans invaded, they did so having obtained a bull of authorisation from Pope Alexander II.²⁰² In granting his approval, Alexander was heavily influenced by the arguments of the archdeacon Hildebrand, later to become Pope Gregory VII.²⁰³

Having completed his conquest, King William set about his work of reform in cooperation with the ecclesiastical authorities. At an Easter *Gemót* in 1070 at which both the king and three papal legates were present, several bishops and abbots were deprived of their offices, including the Archbishop of Canterbury.²⁰⁴ At a *Gemót* at Pentecost of the same year, the king appointed bishops to the sees of York and Winchester.²⁰⁵ On the following day, the one remaining papal legate held a synod in which several abbots and a bishop were deposed.²⁰⁶ Further, the king and the assembly decreed that Lanfranc, the abbot of Saint Stephen's abbey in Normandy, should be appointed Archbishop of Canterbury.²⁰⁷ The distinction between the Pentecost *Gemót* and the legate's synod of the following day is an example of the development of a clearer distinction between ecclesiastical councils and civil assemblies which emerged during William's reign.²⁰⁸ However, the king's confirmation remained necessary to give force to the decrees of national synods.²⁰⁹ Nevertheless, William sought to improve ecclesiastical discipline. For example, at a synod in 1076 and in parallel with reforms by Pope Gregory VII, legislation was enacted under the guidance of Archbishop Lanfranc to promote clerical celibacy.²¹⁰ Lanfranc also promoted the study and development of canon law in England.²¹¹

²⁰¹ FREEMAN, E., *The History of the Norman Conquest of England. Its Causes and Its Results. Volume 4: The Reign of William the Conqueror*, Cambridge, Cambridge University Press, 2011, 360, 392.

²⁰² THURSTON, H., *England ...*, 431; HITCHCOCK, M., "The Papal Bulls for the Invasions of England and Ireland", in *The Churchman*, 47/4(1933), 279–280.

²⁰³ FREEMAN, E., *The History ... Volume 3 ...*, 317–321.

²⁰⁴ FREEMAN, E., *The History ... Volume 4 ...*, 329–338, 360; THURSTON, H., *England ...*, 431.

²⁰⁵ FREEMAN, E., *The History ... Volume 4 ...* 340–343.

²⁰⁶ *Ibid*, 343–344.

²⁰⁷ *Ibid*, 345–347.

²⁰⁸ *Ibid*, 360, 393–394.

²⁰⁹ *Ibid*, 438–439.

²¹⁰ *Ibid*, 422–425; THURSTON, H., *England ...*, 431.

²¹¹ ÁLVAREZ DE LAS ASTURIAS, N., "Lanfranc of Bec's Version of Decretals in a Canonistic Context", in *The Catholic Historical Review*, 98/4(2012), 649–651.

William also ordered the separation of civil and ecclesiastical courts, prohibiting the bishops from bringing any causes involving canon law or regarding the care of souls before local civil courts called courts of the shire and the hundred.²¹²

*“Wherefore I command, and by royal authority decree, that no bishop or archdeacon shall any longer hold, in the hundred court, pleas pertaining to the episcopal laws, nor shall they bring before the judgment of secular men any case which pertains to the rule of souls.”*²¹³

Bishops were to hold their own courts to judge ecclesiastical matters, to which anyone was obliged to appear when cited.²¹⁴ William’s ordinance only applied to local civil courts, not to the highest court of the king himself.²¹⁵ However, this division of the ecclesiastical courts from the temporal courts served to increase the independence of the clergy from the civil power.²¹⁶

William’s reforms, undertaken in cooperation with the ecclesiastical authorities, demonstrate the value of a positive relationship between Church and State. Both sought to correct abuses within the Church, including through deposing certain bishops. However, William only acted with the approval and cooperation of the competent ecclesiastical authorities: he deposed bishops only in a council containing papal legates, and he used ecclesiastical synods to implement reforms while strengthening the independence of canon law courts. William, therefore, is an excellent example of that positive cooperation between Church and State which is sought by *Gaudium et Spes*. Unlike William, however, the Victorian Parliament unilaterally imposed its response to clerical abuse via the *WSA* without the consent of the Apostolic See, which is the ecclesiastical authority competent to modify the relevant norms of universal canon law. Rather than unilaterally obliging the Church, the history of William the Conqueror’s reforms suggests that cooperation on the basis of mutual consent can be very conducive to attaining the shared goals of Church and State.

²¹² FREEMAN, E., *The History ... Volume 4 ...*, 392; THURSTON, H., *England ...*, 431; RICHARDSON, H., and SAYLES, G., *The Governance of Mediaeval England from the Conquest to Magna Carta*, Edinburgh, Edinburgh University Press, 1963, 173.

²¹³ England, WILLIAM I, *Ordinance of William I, separating the Spiritual and Temporal Courts*, in HENDERSON, E. (ed.), *Select Historical Documents of the Middle Ages*, London, George Bell and Sons, 1903, 9.

²¹⁴ *Ibid*; FREEMAN, E., *The History ... Volume 4 ...*, 392–393.

²¹⁵ RICHARDSON, H., and SAYLES, G., *The Governance ...*, 285.

²¹⁶ HENDERSON, E. (ed.), *Select ...*, 1.

3. Choosing prelates: the investiture controversy in England

From the seventh century onwards in Central Europe, it had become increasingly common for episcopal sees to be regarded as within the power of the local temporal sovereign to confer on whomever he pleased.²¹⁷ According to this understanding, the lands from which a prelate derived his revenues were not directly associated with his spiritual office, but rather owned by the sovereign and granted to the prelate along with the obligation to accept episcopal consecration.²¹⁸ To express the idea that the temporal lord thus “made” the bishop, the lord would “invest” his new vassal with the episcopal ring and crosier and receive homage, with the episcopal consecration being a subordinate matter.²¹⁹ By the tenth century, this lay investiture had caused great harm to the Church in Western Europe.²²⁰ Bishops were often worldly-minded, having obtained their promotion by simony.²²¹ This in turn affected the lower clergy, since bishops were responsible for clerical discipline and education, and the acceptance of candidates for ordination.²²² Ignorance and unchastity were common, and the Church had to fight against the abuse of ecclesiastical benefices becoming hereditary, descending from a priest to his children.²²³ In the second half of the eleventh century, Pope Gregory VII identified that discipline and morality could not be restored among priests while unworthy men were appointed as their bishops by temporal sovereigns.²²⁴ In *Dictatus Papae*, a document included in the register of Gregory VII’s letters, it is asserted that the Pope “*alone can depose or reinstate bishops*”, that “*he may depose and reinstate bishops without assembling a synod*”, and that “*in a council, his legate ... can pass sentence of deposition against [all bishops]*”.²²⁵ Particularly directed against King Henry IV of Germany, Pope Gregory forbade the investiture of bishoprics, abbeys and churches by lay persons in decrees of 1078 and 1080.²²⁶

Despite the investiture controversy raging in continental Europe at the time, both William the Conqueror and his episcopal appointments were well regarded by Gregory VII, and the Pope

²¹⁷ THURSTON, H., *England ...*, 432.

²¹⁸ *Ibid.*

²¹⁹ *Ibid.*

²²⁰ *Ibid.*

²²¹ *Ibid.*, 433.

²²² *Ibid.*, 432–3.

²²³ *Ibid.*, 433.

²²⁴ *Ibid.*

²²⁵ GREGORY VII, “The Dictate of the Pope”, 1075, in HENDERSON, E. (ed.), *Select ...*, 366–367 (English translation); HENDERSON, E. (ed.), *Select ...*, 351–352.

²²⁶ HENDERSON, E. (ed.), *Select ...*, 352–356, 365–366.

did not seek to restrict his right to confer episcopal regalia.²²⁷ However, after Archbishop Lanfranc's death in 1089, William II (the Conqueror's son) began to wield his power of investiture harmfully.²²⁸ The Crown confiscated the revenues of vacant bishoprics and abbeys, and kept them vacant for extended periods until receiving additional payments.²²⁹ After Lanfranc's death, the metropolitan see of Canterbury was vacant for four years, and Saint Anselm was only appointed and invested as Lanfranc's successor when William was seriously ill and near death.²³⁰ Despite having promised to Anselm to undertake reforms in the administration of the Church, William returned to health and persisted in his view that Anselm's investiture had made him the king's liege man and vassal.²³¹ After various disputes with William, Anselm went into exile until William's death in 1100, when he was succeeded by Henry I.²³²

Henry I recalled Anselm to England, and implicitly promised to end the disputes between Anselm and the Crown.²³³ Henry renounced any payment for the appointment of prelates, and promised not to seize ecclesiastical revenues during vacancies.²³⁴ He viewed Anselm's support as essential for the stability of his rule which was under threat from a rival claimant.²³⁵ However, when Anselm returned to England, Henry asked him to do homage and receive the archbishopric from him according to custom, which Anselm refused in accordance with the decrees of the recent Council of Rome (1099) against lay investiture.²³⁶ As a compromise, Anselm and Henry agreed to send legates to the Pope to settle the issue.²³⁷ Additionally, in return for Anselm's support against Henry's rival who was threatening invasion, Henry promised to obey the Apostolic See's commands and leave the administration of the English Church to Anselm.²³⁸ However, once the threat of invasion had passed, Henry resiled from his

²²⁷ FREEMAN, E., *The History ... Volume 4 ...*, 430–432; THURSTON, H., *England ...*, 433.

²²⁸ THURSTON, H., *England ...*, 433.

²²⁹ *Ibid.*

²³⁰ *Ibid.*

²³¹ *Ibid.*; POOLE, A., *The Oxford History of England. From Domesday Book to Magna Carta 1087–1216*, 2nd ed, Oxford, Oxford University Press, 1955, 173–176.

²³² THURSTON, H., *England ...*, 433–434; VAUGHN, S., “St Anselm and the English Investiture Controversy Reconsidered”, in *Journal of Medieval History*, 6/1(1980), 63.

²³³ VAUGHN, S., *St Anselm ...*, 63.

²³⁴ THURSTON, H., *England ...*, 434.

²³⁵ VAUGHN, S., *St Anselm ...*, 63, 67.

²³⁶ *Ibid.*, 67; THURSTON, H., *England ...*, 434; POOLE, A., *The Oxford ...*, 177.

²³⁷ VAUGHN, S., *St Anselm ...*, 68.

²³⁸ *Ibid.*

undertaking, and reasserted his customary rights of investiture and homage.²³⁹ Both Henry and Anselm continued to send envoys and messages to the Pope.²⁴⁰ Supporting the king, Anselm repeatedly sought papal dispensations in favour of the king's right of investiture.²⁴¹ In 1103, both Anselm and a royal envoy visited the Pope in person, despite Anselm being nearly 70 years old.²⁴² Nevertheless, Pope Paschal II declined to grant the dispensations sought, and Henry forced Anselm into exile as a result.²⁴³

After negotiations between Anselm and Henry in 1105 while the king was undertaking an invasion of Normandy and wanted to avoid being excommunicated by Anselm, Henry agreed to yield on his right of investiture if the Pope granted a dispensation to allow him to receive homage.²⁴⁴ Despite this agreement, Anselm awaited final papal approval before returning to England and recognising the bishops which Henry had invested.²⁴⁵ In March 1106, Pope Paschal confirmed the settlement and granted a dispensation allowing the king to receive homage from prelates for the temporal possessions of their sees until such time as the king could be convinced to abandon even that right.²⁴⁶ Prelates who had been invested by Henry were absolved of their excommunications and confirmed in their offices.²⁴⁷ The terms of the settlement were announced at a great council of clergy and nobles in London in August 1107, and Henry confirmed that no investiture of a bishopric or abbey would ever again take place at the hands of a layman.²⁴⁸

The *Magna Carta* law of 1215 also confirmed the liberty of the Church in selecting bishops and abbots,²⁴⁹ especially concerning clerical electors.²⁵⁰ Subsequent to its adoption, the *Magna Carta* was confirmed by many English kings and enjoyed clerical support well beyond the thirteenth century.²⁵¹ In its first article, King John promised that “*the English church shall be*

²³⁹ *Ibid*, 69.

²⁴⁰ *Ibid*.

²⁴¹ *Ibid*, 69–71.

²⁴² *Ibid*, 71; POOLE, A., *The Oxford ...*, 178.

²⁴³ VAUGHN, S., *St Anselm ...*, 71–72.

²⁴⁴ *Ibid*, 73–76.

²⁴⁵ POOLE, A., *The Oxford ...*, 179.

²⁴⁶ VAUGHN, S., *St Anselm ...*, 79; THURSTON, H., *England ...*, 434.

²⁴⁷ VAUGHN, S., *St Anselm ...*, 79.

²⁴⁸ *Ibid*, 82.

²⁴⁹ England, JOHN, *Magna Carta*, 15 June 1215, art. 1, in HENDERSON, E. (ed.), *Select ...*, 136.

²⁵⁰ HELMHOLZ, R., “The Church and Magna Carta”, in *William & Mary Bill of Rights Journal*, 25/2(2016), 426–427.

²⁵¹ *Ibid*, 425–426; THURSTON, H., *England ...*, 438.

free and shall have its rights intact and its liberties uninfringed upon”, drawing special attention to “*freedom of elections, which is considered most important and most necessary to the church of England*”.²⁵² Despite its broad language, however, this article failed to guarantee much beyond free elections due to its vagueness.²⁵³ The *Magna Carta*’s final article repeated that “*we will and firmly decree that the English church shall be free*”.²⁵⁴ These guarantees of the Church’s liberty were on occasion used to ground the jurisdiction of ecclesiastical courts in matters such as seeking redress from one who had used secular courts to restrict the exercise of canonical jurisdiction, dealing with a man who cut down some trees on an ecclesiastical property, and disciplining a man who slandered clerics.²⁵⁵ However, the *Magna Carta* was not used in a general way to deal with actions against the Church’s interests (such as heresy or sacrilege), nor was it routinely invoked in cases of interference with or contempt of ecclesiastical jurisdiction.²⁵⁶ Despite its limited scope, the *Magna Carta* confirms the continued importance through the thirteenth century and beyond of the selection of ecclesiastical ministers as a core element of the Church’s liberty.

The resolution of the English investiture controversy clearly manifests the Church’s assertion of her sole right to select her prelates. The *Magna Carta*’s guarantee of the freedom of clerical elections, which are a specific means by which the Church exercised her right of selecting prelates, reinforces the general principle of the Church’s liberty in selecting her ministers. However, the investiture controversy also provides several lessons relevant to present-day Victoria. First, since the issue of investiture was governed by universal ecclesiastical law, the ecclesiastical authority competent to grant any permission in favour of the temporal authorities was the Pope, not the local bishop. Even though Anselm sought papal approval of the king’s right of investiture, Anselm never took it upon himself to grant the king permission contrary to papal law. By analogy, even though both the Victorian bishops and the civil authorities seek the same laudable goal of protecting children and vulnerable persons from abuse, local bishops should not arrogate to themselves authority which is not properly theirs to overrule universal canon law. Rather, the local bishops, like Saint Anselm, can play an important role in negotiations with the Pope in support of any modifications to canon law sought by the temporal authorities. Finally, this episode shows that negotiations with Rome need not be a zero-sum

²⁵² JOHN, *Magna Carta*, art 1.

²⁵³ HELMHOLZ, R., *The Church ...*, 427.

²⁵⁴ JOHN, *Magna Carta*, art 63.

²⁵⁵ HELMHOLZ, R., *The Church ...*, 433–434.

²⁵⁶ *Ibid*, 434–435.

game where one side totally vanquishes the other. Eventually Pope Paschal yielded the right of homage in exchange for the abandonment of lay investiture. Similarly, negotiations regarding the selection and vetting of clergy between Rome and the civil authorities need not result in a rejection of all the concessions sought by the civil authorities, especially where both Church and State pursue a similar end in fighting abuse.

4. Delineating ecclesiastical jurisdiction: the Constitutions of Clarendon

William the Conqueror separated the local civil courts from the ecclesiastical courts, while leaving intact the *status quo* concerning the jurisdiction of his own royal court. Despite this growing independence of the ecclesiastical jurisdiction, until the mid-twelfth century there was no general principle that clerics should not be tried for crimes in the civil courts.²⁵⁷ In 1088, having been charged with treason through complicity in a rebellion against the king, the Bishop of Durham, William of St. Calais, claimed to be exempt from the jurisdiction of the king's court and that he should be tried according to canon law.²⁵⁸ In the king's court, Lanfranc observed that Bishop William was being tried not as a bishop but as the feudatory lord of a fief.²⁵⁹ William did not receive much support from his fellow prelates, who viewed his argument as a mere attempt to evade justice.²⁶⁰ He declared his intention to appeal to Rome, and the king granted him safe passage out of the kingdom, although he ultimately did not pursue the appeal.²⁶¹ Even though Lanfranc and the Court had distinguished between ecclesiastical and secular jurisdiction through stating that William was tried as a lord not as a bishop, the precise limits of the jurisdiction of the king's court remained unclear.²⁶² However, when Henry II ascended the English throne in 1154,²⁶³ he made various concessions to Archbishop Theobald of Canterbury, including surrendering to him clerics accused of crimes.²⁶⁴ The general practice in England of remitting clerics accused of crimes to ecclesiastical courts for trial and punishment dated from around this time.²⁶⁵

²⁵⁷ RICHARDSON, H., and SAYLES, G., *The Governance* ..., 286, 306.

²⁵⁸ *Ibid*, 285; POOLE, A., *The Oxford* ..., 102–103; OFFLER, H., “The Tractate De Iniusta Vexacione Willelmi Episcopi Primi”, in *The English Historical Review*, 66/260(1951), 321, 328.

²⁵⁹ POOLE, A., *The Oxford* ..., 103; OFFLER, H., *The Tractate* ..., 333.

²⁶⁰ RICHARDSON, H., and SAYLES, G., *The Governance* ..., 286.

²⁶¹ POOLE, A., *The Oxford* ..., 103.

²⁶² RICHARDSON, H., and SAYLES, G., *The Governance* ..., 285–286.

²⁶³ THURSTON, H., *England* ..., 436.

²⁶⁴ RICHARDSON, H., and SAYLES, G., *The Governance* ..., 295, 304.

²⁶⁵ *Ibid*, 306.

After Theobald's death, Thomas Becket was elected Archbishop of Canterbury at the urging of King Henry.²⁶⁶ They had been close friends, and, as Chancellor, Thomas had well supported the king and widely asserted the royal prerogative.²⁶⁷ Upon becoming the Archbishop, however, Thomas renounced the chancellorship and became rigorously ascetic, adopting a much more confrontational position against the king in questions of the Church's jurisdiction.²⁶⁸ Thomas and the king quickly came into conflict over the seemingly inadequate punishment by ecclesiastical courts of criminal clerics, and it was alleged that clerics had committed one hundred homicides within ten years.²⁶⁹ At council at Westminster in October 1163, the king claimed the right to punish clerics who had committed crimes, although the bishops, persuaded by Thomas, refused their consent.²⁷⁰ Henry also demanded that the bishops swear obedience to the ancient customs of the kingdom, without specifying what those customs were.²⁷¹ After the council, many of the bishops sided with the king.²⁷² Indeed, the existing canon law on criminal clerics was not clear, with the contemporary canonists Rufinus and Stephen of Tournai writing that a cleric could be degraded and then given to a secular court for further punishment.²⁷³ Thomas sought support from Pope Alexander III, who encouraged him to compromise.²⁷⁴ Thomas eventually promised to observe the kingdom's customs in December 1163.²⁷⁵

Seeking to codify those customs, Henry took further action by issuing the *Constitutions of Clarendon* in January 1164.²⁷⁶ The *Constitutions* described themselves as a memorandum "of some part of the customs and liberties and dignities of [King Henry II's] predecessors ... which ought to be observed and kept in the kingdom."²⁷⁷ However, whether the *Constitutions* only

²⁶⁶ THURSTON, H., *England ...*, 436.

²⁶⁷ *Ibid*; RICHARDSON, H., and SAYLES, G., *The Governance ...*, 303; POOLE, A., *The Oxford ...*, 200.

²⁶⁸ RICHARDSON, H., and SAYLES, G., *The Governance ...*, 303; THURSTON, H., *England ...*, 436.

²⁶⁹ THURSTON, H., *England ...*, 436; POOLE, A., *The Oxford ...*, 201.

²⁷⁰ POOLE, A., *The Oxford ...*, 203.

²⁷¹ *Ibid*; THURSTON, H., *England ...*, 436.

²⁷² POOLE, A., *The Oxford ...*, 203.

²⁷³ *Ibid*, 206. For further discussion, see DUGGAN, A., "Clerical Exemption in Canon Law from Gratian to the Decretals", in *Medieval Worlds*, 6(2017), 78–88.

²⁷⁴ POOLE, A., *The Oxford ...*, 204.

²⁷⁵ *Ibid*, 204–205.

²⁷⁶ *Ibid*, 205; England, HENRY II, *Constitutions of Clarendon*, 30 January 1164, in HENDERSON, E. (ed.), *Select ...*, 11–16.

²⁷⁷ HENRY II, *Constitutions of Clarendon*, preamble.

restated existing customs, rather than introducing new ones, is questionable.²⁷⁸ Among other customs, the *Constitutions* asserted that clerics could be tried in the king's courts:

*“Clerks charged and accused of anything, being summoned by the Justice of the king, shall come into his court, about to respond there for what it seems to the king's court that he should respond there; and in the ecclesiastical court for what it seems he should respond there ; so that the Justice of the king shall send to the court of the holy church to see in what manner the affair will there be carried on. And if the clerk shall be convicted, or shall confess, the church ought not to protect him further.”*²⁷⁹

This did not require that all clerics be tried in the king's courts.²⁸⁰ Rather, the king's court was first to take cognizance of the case, and if the accused was found to be a cleric, the case was to be sent to an ecclesiastical court.²⁸¹ If the accused was found guilty in the ecclesiastical court, an officer of the king's court was to conduct the convict back to the king's court after degradation, where he would be punished as an ordinary criminal.²⁸² While Henry argued that the ecclesiastical punishments of fines, flogging, excommunication and degradation were insufficient, Thomas invoked the clerical privilege and opposed double punishment in two courts for the same offence.²⁸³ Other customs in the *Constitutions* included that certain of the king's officers and great vassals could not be excommunicated without the prior involvement of the king's court,²⁸⁴ that certain types of appeals from an archbishop should be finally resolved by the king not the Pope,²⁸⁵ and that archbishops and bishops should not leave the kingdom without the king's consent.²⁸⁶

Initially the bishops were united in opposing the *Constitutions*, however Thomas suddenly changed his mind and the other bishops followed suit.²⁸⁷ Again changing his mind, Thomas repented of his support for the *Constitutions*, undertaking large penances and seeking

²⁷⁸ RICHARDSON, H., and SAYLES, G., *The Governance ...*, 303–304.

²⁷⁹ HENRY II, *Constitutions of Clarendon*, §3.

²⁸⁰ THURSTON, H., *England ...*, 436.

²⁸¹ *Ibid.*

²⁸² *Ibid.*; POOLE, A., *The Oxford ...*, 206.

²⁸³ THURSTON, H., *England ...*, 436.

²⁸⁴ HENRY II, *Constitutions of Clarendon*, §7; THURSTON, H., *England ...*, 436.

²⁸⁵ HENRY II, *Constitutions of Clarendon*, §8; RICHARDSON, H., and SAYLES, G., *The Governance ...*, 306–307.

²⁸⁶ HENRY II, *Constitutions of Clarendon*, §4.

²⁸⁷ POOLE, A., *The Oxford ...*, 207.

absolution from Pope Alexander for his weakness.²⁸⁸ When the *Constitutions* were sent to Alexander for ratification, he could not accept them, and his support for Thomas' resistance against Henry strengthened.²⁸⁹ However, the other English bishops were not of much help to Thomas.²⁹⁰ He was subsequently exiled from England for six years, however a temporary peace was made between him and Henry in 1170.²⁹¹ Thomas returned to Canterbury, however within a few weeks he had again enraged the king, who spoke rash words which lead to Thomas' martyrdom.²⁹² In response to the king's outburst, four of his knights went to Canterbury, and on 29 December 1170, Thomas was martyred inside his own cathedral.²⁹³ An outcry at his death arose throughout Europe, and he was canonised in 1173, with Henry performing penance at his tomb in 1174.²⁹⁴ In the later contexts of the French Revolution in the eighteenth century and Austrian secularisation in the nineteenth century, Saint Thomas' resistance to the *Constitutions* has been held up by Popes as an example to be followed by bishops in times of persecution.²⁹⁵ These papal documents will be considered in Chapter 3.2.A.

In a final settlement with the papal legate in 1178, Henry agreed that clerics could not be tried for offences in secular courts, excepting certain limited offences such as trespass of a royal forest.²⁹⁶ The involvement of a papal legate again highlights the importance of the Apostolic See being involved in any negotiations regarding the interaction between universal ecclesiastical discipline and the Victorian civil law. The actions of Saint Thomas may provide inspiration to today's Victorian bishops both in encouraging recourse to the Apostolic See and in defending the Church's rights. Further, Saint Thomas' persistence without the support of his episcopal colleagues is a cautionary tale against automatically following a majority opinion, even among bishops. In this respect, the canonical problems highlighted in Chapter 1 regarding the Victorian bishops' response to the *WSA* should not be overlooked merely because all the Victorian bishops have implemented similar policies.

²⁸⁸ *Ibid.*

²⁸⁹ *Ibid.*

²⁹⁰ *Ibid.*, 208; THURSTON, H., *England ...*, 436.

²⁹¹ THURSTON, H., *England ...*, 436.

²⁹² *Ibid.*; POOLE, A., *The Oxford ...*, 214, 216.

²⁹³ THURSTON, H., *England ...*, 436; POOLE, A., *The Oxford ...*, 214, 216.

²⁹⁴ THURSTON, H., *England ...*, 436; POOLE, A., *The Oxford ...*, 214–215.

²⁹⁵ PIUS VI, "Brief Quod Aliquantum", 10 March 1791, translated by MARWIN, E., "Pius VI: Quod Aliquantum", *The Josias*, <<https://thejosias.com/2024/08/14/pius-vi-quod-aliquantum/>>, last accessed on 19-04-2025; PIUS IX, "Encyclical Vix Dum a Nobis", 7 March 1874, in *ASS*, 7(1872–1873), 570–572.

²⁹⁶ RICHARDSON, H., and SAYLES, G., *The Governance ...*, 310; DUGGAN, A., *Clerical Exemption ...*, 89.

Despite Henry's settlement being restricted to England, the *Constitutions of Clarendon* and Saint Thomas' martyrdom likely had a wider effect on canon law.²⁹⁷ Around the year 1177, Pope Alexander III wrote the letter *At si clerici* which would subsequently be included in the *Corpus Iuris Canonici*.²⁹⁸ Alexander stated that a secular judge was not qualified to convict a cleric, and that such a sentence would not be binding.²⁹⁹ Further, a cleric who was degraded in an ecclesiastical court should not be handed to a secular judge to be punished a second time.³⁰⁰ These legal principles were somewhat relaxed by Popes in the following decades.³⁰¹ Nevertheless, the forum privilege was still asserted in canon 1553§1 3° of the *Codex Iuris Canonici* of 1917,³⁰² however it is deliberately omitted in the present Code.³⁰³ Since this amounts to an implicit waiver by the Church of any corresponding secular privilege,³⁰⁴ the current canonical situation is not directly analogous to the struggle between Henry and Thomas. Nevertheless, the changing status of the clerical forum privilege emphasises the need to distinguish between merely disciplinary laws which may be changed and laws which reflect an immutable aspect of the Deposit of Faith. Making such a distinction would help to focus any negotiations between the Church and civil powers and identify areas where ecclesiastical authorities may be able to compromise. The analysis of the ecclesiastical magisterium which will be undertaken in Chapter 3 will assist in understanding the fundamental content of the *libertas Ecclesiae* which should be reflected in any settlement between the Church and State.

5. The end of Catholic England

When Henry VIII became king in 1509, the English episcopate was loyal to the Holy See, there was no general societal decay of morals, and no major danger threatened the Catholic faith in England.³⁰⁵ Instead, the English Reformation was due principally to the actions of Henry.³⁰⁶

²⁹⁷ RICHARDSON, H., and SAYLES, G., *The Governance* ..., 311; POOLE, A., *The Oxford* ..., 206.

²⁹⁸ ALEXANDER III, "Decretal At si clerici", 1177, in FRIEDBERG, A., *Corpus Iuris Canonici. Pars Secunda Decretalium Collectiones*, 2nd ed, Lipsiae, Tauchnitz, 1881, 240 (X. 2.1.4); RICHARDSON, H., and SAYLES, G., *The Governance* ..., 311–312.

²⁹⁹ ALEXANDER III, *At si clerici*; see also: RICHARDSON, H., and SAYLES, G., *The Governance* ..., 311.

³⁰⁰ ALEXANDER III, *At si clerici*; see also: RICHARDSON, H., and SAYLES, G., *The Governance* ..., 311.

³⁰¹ DUGGAN, A., *Clerical Exemption* ..., 90–94.

³⁰² BENEDICT XV, "Codex Iuris Canonici", 27 May 1917, in *AAS*, 9/2(1917), 301.

³⁰³ MARZOA, Á., MIRAS, J., RODRÍGUEZ-OCAÑA, R., and CAPARROS, E. (ed.), *Exegetical Commentary on the Code of Canon Law. Volume IV/1*, Montreal/Chicago, Wilson & Lafleur/Midwest Theological Forum, 591–593.

³⁰⁴ *Ibid*, 593.

³⁰⁵ THURSTON, H., *England* ..., 442; LILLY, W., "England. Since the Reformation", in HERBERMANN, C., PACE, E., PALLAN, C., SHAHAN, T., and WYNNE, J. (ed.), *The Catholic Encyclopedia* ..., 445.

³⁰⁶ THURSTON, H., *England* ..., 442–443.

Henry was an amateur theologian, who had himself defended Catholic doctrine regarding the sacraments against Luther, earning him the title of “Defender of the Faith” from Pope Leo X.³⁰⁷ Henry and his first wife Catherine could not produce a son who lived long after birth, and Henry sought a declaration of nullity of his marriage to allow him to enter another marriage, on the ground that Catherine had been married to Henry’s elder brother before his death.³⁰⁸ However, a papal dispensation for Henry’s marriage had been granted at the time, and in 1534 the Pope upheld the validity of Henry’s marriage to Catherine.³⁰⁹ In the meantime, Henry had caused the English Parliament to pass legislation restricting papal authority in England in an attempt to intimidate the Pope into acquiescence.³¹⁰ In response to the Pope’s judgment, in 1534 the English Parliament passed legislation asserting that the king was “*the only supreme head in earth of the Church of England*”,³¹¹ transferring to Henry the authority over the Church formerly exercised by the Pope, consummating the schism.³¹² Henry determined religious doctrine, and expropriated large amounts of ecclesiastical property.³¹³

Although Catholicism was briefly restored in England under Queen Mary (1553–1558), an official Protestant Church of England was re-established in 1559 under Elizabeth I.³¹⁴ Legislation was passed mandating the attendance of the laity at Protestant services on Sundays and holidays.³¹⁵ In 1560, Pope Pius IV wrote courteously to Elizabeth urging her to return to the Catholic religion.³¹⁶ He also invited her to send delegates to the Council of Trent, which she refused to do.³¹⁷ With the accession of Pope Pius V in 1566, papal policy towards Elizabeth grew less conciliatory.³¹⁸ In late 1569 in the context of a political crisis in England, several

³⁰⁷ *Ibid*, 442.

³⁰⁸ LILLY, W., *England ...*, 445.

³⁰⁹ *Ibid*, 445–446.

³¹⁰ *Ibid*, 446.

³¹¹ England, PARLIAMENT OF ENGLAND, Legislation, 26 Henry VIII c. 1, *The Supremacy Act*, 1534, in GEE, H. and HARDY, W. (ed.), *Documents Illustrative of English Church History*, London, Macmillan and Co, 1914, 243–244.

³¹² LILLY, W., *England ...*, 445–446.

³¹³ *Ibid*, 447.

³¹⁴ SHIRES, H., “The Conflict between Queen Elizabeth and Roman Catholicism”, in *Church History*, 16/4(1947), 221; MULLER, A., *The Excommunication of Elizabeth I. Faith, Politics, and Resistance in Post-Reformation England, 1570–1603*, Leiden and Boston, Brill, 2020, 1, 4; THURSTON, H., *England ...*, 444.

³¹⁵ England, PARLIAMENT OF ENGLAND, Legislation, 1 Elizabeth I c. 2, *Act of Uniformity*, 1559, in GEE, H. and HARDY, W. (ed.), *Documents ...*, 458–467; LILLY, W., *England ...*, 448.

³¹⁶ SHIRES, H., *The Conflict ...*, 224.

³¹⁷ *Ibid*, 224–225.

³¹⁸ *Ibid*, 225–226.

English earls wrote to Pius expressing their intention to rebel against Elizabeth and seeking Papal assistance.³¹⁹ On receiving their letter in February 1570, the Pope promised financial and religious assistance.³²⁰ In the days prior, Elizabeth had also been put on trial and found guilty in the Papal Court for crimes against the Catholic Church.³²¹ Several days after receiving the earls' letter, in his bull *Regnans in Excelsis*, Saint Pius deposed Elizabeth and recounted various violations of the Church's liberty perpetrated by her, including that she prohibited the practice of the Catholic faith.³²² The Queen had “outrageously usurped for herself the place of Supreme Head of the Church in all England and its chief authority and jurisdiction”, and Pius specifically decried that she had “dared to eject bishops, rectors of churches and other Catholic priests from their churches and to bestow these and other ecclesiastical things upon heretics and [had] presumed to decide legal cases within the Church.”³²³ Further, she had “forbidden the prelates, clergy and people ... to obey [the Roman Church's] orders and its canonical sanctions ... [and had] forced most of them ... to abjure the authority and obedience of the Roman Pontiff.”³²⁴ She “imposed pains and penalties on those who would not obey her commands” and cast various Catholic bishops and priests into prison.³²⁵ Pius declared Elizabeth excommunicated and deprived of her kingdom, absolving the lords and peoples of England of their allegiance to her.³²⁶

Saint Pius's condemnation of Elizabeth is an application of *Dictatus Papae*, which had asserted that “it may be permitted to [the Pope] to depose emperors”, and that the Pope “may absolve subjects from their fealty to wicked men.”³²⁷ One would not expect language similar to that of Saint Pius to issue from the Apostolic See in modern times. However, *Regnans in Excelsis* restates the clear principle that the civil power may not remove bishops or clerics from their offices, nor presume to bestow those offices on other persons. Similarly, the civil power may not forbid anyone from obeying the law of the Church, including as it relates to rights and

³¹⁹ MULLER, A., *The Excommunication ...*, 23–24.

³²⁰ *Ibid*, 23.

³²¹ *Ibid*, 25–26.

³²² PIUS V, “Bull *Regnans in Excelsis*”, 25 February 1570, in CROSIGNANI, G., MCCOOG, T., and QUESTIER, M. (ed.), *Recusancy and Conformity in Early Modern England. Manuscript and Printed Sources in Translation (Studies and Texts 170)*, Toronto, Pontifical Institute of Mediaeval Studies, 2010, 86–89 (Latin/English).

³²³ *Ibid*, 88.

³²⁴ *Ibid*, 88–89.

³²⁵ *Ibid*, 89.

³²⁶ *Ibid*.

³²⁷ *The Dictate of the Pope*.

faculties granted by that law or to the nature of the hierarchical relationship between a bishop and his clergy. The imposition of criminal sanctions on those who disobey these unjust civil laws is also expressly condemned. These principles remain relevant to the present day.

6. Conclusion

In this chapter, we have considered several examples of episcopal responses to unjust interference by the State with the Church's rights. The resolution of the English investiture controversy illustrated the Church's claim to select her own prelates, and the eventual acceptance of this by the civil power. Saint Pius V's response to the English Reformation also showed the Church's clear assertion of her *libertas* in the face of a hostile civil power intent on replacing the Church's legitimately appointed clergy with individuals agreeable to the Protestant authorities. However, we also saw the effectiveness of cooperation between the civil and ecclesiastical powers in pursuing common goals during the reign of William the Conqueror. The investiture controversy showed the important role which can be played by local bishops in negotiating resolutions to disputes with the civil power, while emphasising the importance of the Apostolic See in determining universal ecclesiastical discipline. In Chapter 3, these historical insights will be combined with an analysis of the Church's recent magisterium to determine the legitimacy of the legal developments in Victoria considered in Chapter 1 and possible responses.

IV. Chapter 3 – The magisterium subsequent to the Reformation

1. Introduction

In Chapter 1, we saw that *Dignitatis Humanae* deliberately left untouched the “*traditional Catholic doctrine on the moral duty of men and societies toward the true religion and toward the one Church of Christ*”.³²⁸ This chapter will analyse the nature of that traditional Catholic doctrine and determine, in light of authoritative sources of the Catholic magisterium, the legitimacy or illegitimacy of interference by civil authorities in the selection and organisation of the Church’s ministers. Answering this theoretical question, together with a consideration of the concrete historical situations analysed in Chapter 2, will allow an evaluation of the current situation in Victoria. Possible future actions by the ecclesiastical authorities will also be considered.

2. The Church as a perfect society and independent of civil power

A. Prior to Vatican II

In *Dignitatis Humanae*, the Church claims “*that full measure of freedom which her care for the salvation of men requires*”.³²⁹ *Dignitatis Humanae* refers to the encyclical *Officio Sanctissimo* of Pope Leo XIII, in which Leo commented on the same phrase and explained that the Church is “*a perfect and divine institution*”, and that she “*is a society eminently independent, and above all others, because of the excellence of the heavenly and immortal blessings towards which [she] tends*”.³³⁰ He explained that the Church needs, “*as proper and necessary means, the power of ... regulating and ruling all ecclesiastical discipline*”, and that God “*has given the Church full freedom to judge and decide as to the things that may best suit Her ends. Wherefore it is unjustly that the civil powers take offence at the freedom of the Church*”.³³¹ In his subsequent encyclical *Satis Cognitum*, Leo further explained that, as a perfect and independent society, the Church possesses “*all principles which necessarily tend to make organized human*

³²⁸ *Dignitatis Humanae*, art. 1.

³²⁹ *Ibid*, art. 13.

³³⁰ *Ibid*; Leo XIII, “Encyclical *Officio Sanctissimo*”, 22 December 1887, art. 13, in *ASS*, 20(1887), 269–270, English translation at <https://www.vatican.va/content/leo-xiii/en/encyclicals/documents/hf_l-xiii_enc_22121887_officio-sanctissimo.html>, last accessed on 19-04-2025.

³³¹ *Officio Sanctissimo*, art. 13.

societies, and through which they attain the perfection proper to each”,³³² such as a complete legislative, executive, and judicial competence.³³³

The doctrine that the Church is independent, and that she possesses a complete power of regulating ecclesiastical rights and discipline, was taught by numerous Popes prior to Vatican II. In 1832, Pope Gregory XVI condemned the proposition that the sacred discipline fixed by the Church for the hierarchical regulation of her ministers and the prescription of her laws was dependent on the civil authority.³³⁴ Similarly, in his Apostolic Letter *Quanta Cura* of 1864, Pope Pius IX rejected the propositions that the Church should be subjected to the civil power, that the Church has no rights concerning matters of the external order, and that the Church’s authority relates only to dogmas of faith and morals and not to ecclesiastical rights and discipline.³³⁵ It has been argued by some, including Saint John Henry Newman, that the teaching of *Quanta Cura* meets the conditions for papal infallibility.³³⁶ In his *Syllabus* of the same year, Pius IX expressly condemned the proposition that the Church is not a true and perfect society and completely free and that the civil power can define the rights of the Church and the limits of those rights.³³⁷ He also condemned the propositions that ecclesiastical authority should not be exercised without the permission of the civil government,³³⁸ and that civil law prevails over canon law in the event of a conflict between them.³³⁹

In his encyclical *Immortale Dei* of 1885, Pope Leo XIII taught that “*it is to be understood that the Church ... is a society perfect in its own nature and its own right, and that those who exercise sovereignty ought not so to act as to compel the Church to become subservient or*

³³² LEO XIII, “Encyclical Satis Cognitum”, 29 June 1896, art. 10, in *ASS*, 28(1895–1896), 724, English translation at <https://www.vatican.va/content/leo-xiii/en/encyclicals/documents/hf_l-xiii_enc_29061896_satis-cognitum.html>, last accessed on 04-05-2025.

³³³ See also GRANFIELD, P., “The Church as Societas Perfecta in the Schemata of Vatican I”, in *Church History*, 48/4(1979), 436–437, 441, 444; PAPPIN, G., “The Return of the Church’s Repressed Boundary Problem”, in *Church Life Journal*, 27 May 2020, <<https://churchlifejournal.nd.edu/articles/the-return-of-the-churchs-repressed-boundary-problem/>>, last accessed on 16-04-2025.

³³⁴ GREGORY XVI, “Encyclical Mirari Vos”, 15 August 1832, in *La Santa Sede*, <<https://www.vatican.va/content/gregorius-xvi/it/documents/encyclica-mirari-vos-15-augusti-1832.html>>, last accessed on 13-05-2025 (Italian translation).

³³⁵ PIUS IX, “Apostolic Letter Quanta Cura”, 8 December 1864, in *ASS*, 3(1867), 164–165.

³³⁶ LAMONT, J., *Catholic Teaching ...*, 686–687.

³³⁷ PIUS IX, “Syllabus Complectens Praecipuos Nostrae Aetatis Errores Qui Notantur in Encyclicis Aliisque Apostolicis Litteris Sanctissimi Domini Nostri Pii Papae IX”, 8 December 1864, XIX, in *ASS*, 3(1867), 170.

³³⁸ *Ibid*, XX.

³³⁹ *Ibid*, XLII.

subject to them, or to hamper her liberty in the management of her own affairs".³⁴⁰ Similarly, in his encyclical *Quas Primas* of 1925 instituting the feast of Christ the King, Pope Pius XI affirmed that "*the Church, founded by Christ as a perfect society, has a natural and inalienable right to perfect freedom and immunity from the power of the state; and that in fulfilling the task committed to her by God of teaching, ruling, and guiding to eternal bliss those who belong to the kingdom of Christ, she cannot be subject to any external power.*"³⁴¹ In the bull *Providentissima Mater* which promulgated the *Codex Iuris Canonici* of 1917, Pope Benedict XV also used the term *societas perfecta* to describe the Church,³⁴² although the *Codex* itself did not contain the term.³⁴³ More generally, Pope Pius XII stated in 1953 that no human authority or State could mandate or authorise doing something which is contrary to religious truth or moral good,³⁴⁴ which would include the religious truth regarding the *libertas Ecclesiae*.

The freedom of the Church has also been asserted by Popes in the face of specific persecutions. In March 1791 in the context of the French Revolution, Pius VI issued the brief *Quod Aliquantum* on the French *Civil Constitution of the Clergy*. The *Civil Constitution* had been passed in July 1790 by the French National Constituent Assembly, aiming to subject the Church in France to the revolutionary government.³⁴⁵ Dioceses and parishes were considered vacant until their occupants had taken an oath to the *Civil Constitution*.³⁴⁶ Seeing similarities between the actions of the French Assembly and Henry II of England, Pius narrated and lauded the resistance and martyrdom of St Thomas of Canterbury.³⁴⁷ The Pope wrote that "*Jesus Christ, in instituting His Church, gave to the Apostles and to their successors a power accountable to no other power*", and he condemned the idea "*that ecclesiastical discipline can be changed by laymen*".³⁴⁸

³⁴⁰ LEO XIII, "Encyclical Immortale Dei", 1 November 1885, art. 35, in *ASS* 18(1885), 174, English translation at <https://www.vatican.va/content/leo-xiii/en/encyclicals/documents/hf_l-xiii_enc_01111885_immortale-dei.html>, last accessed on 11-04-2025.

³⁴¹ PIUS XI, "Encyclical Quas Primas", 11 December 1925, art. 31, in *AAS*, 17(1925), 608–609, English translation at <https://www.vatican.va/content/pius-xi/en/encyclicals/documents/hf_p-xi_enc_11121925_quas-primas.html>, last accessed on 10-04-2025.

³⁴² BENEDICT XV, "Bull Providentissima Mater", 27 May 1917, in *AAS*, 9/2(1917), 5.

³⁴³ PAPPIN, G., *The Return*

³⁴⁴ PIUS XII, "Allocution Ci Riesce", 6 December 1953, V, in *AAS*, 45(1953), 798.

³⁴⁵ MARWIN, E., *Pius VI*

³⁴⁶ *Ibid.*

³⁴⁷ *Quod Aliquantum*.

³⁴⁸ *Ibid.*

In his encyclical *Vix Dum a Nobis* nearly a century later, Pius IX considered proposed laws of the Austrian Empire which aimed to reduce the Church to “*a most pernicious servitude under the dominion of the civil power*”.³⁴⁹ He explained that the new laws would grant the civil government the power to decree and establish anything it saw fit in spiritual and ecclesiastical matters, and that bishops would be forced to govern their dioceses according to the will of the civil authorities.³⁵⁰ Pius observed that the power of ecclesiastical governance is independent from political rule, and that the Church’s pastors and doctors are subject to no earthly power in performing the ministry of salvation.³⁵¹ He recalled the examples of Saints Thomas and Anselm of Canterbury, urging the Austrian bishops to likewise struggle for the Church’s liberty against the unjust laws.³⁵²

Finally, in his encyclical *Vehementer Nos* of 1906 on the French law of separation, Pope Pius X criticised governmental actions taken to arrive at “*complete and official separation*” of the Church from the State.³⁵³ He decried that the law “*thwarts the preaching of Catholic faith and morals and sets up a severe and exceptional penal code for clerics ... [placing] the Church in a position of humiliating subjection*”.³⁵⁴ He also condemned other unacceptable provisions of the law, including that the administration and supervision of ecclesiastical property was taken away from the ecclesiastical hierarchy.³⁵⁵ In his subsequent encyclical *Gravissimo Officii Munere* on the same topic, he stated that: “*[i]f any State has separated from the Church, while leaving to her the resource of the liberty common to all and the free disposal of her property, that State has without doubt ... acted unjustly; but nevertheless, it could not be said that it has created for the Church a situation absolutely intolerable*.”³⁵⁶ Hence, in the teaching of Pius X, an intermediate freedom of the Church where she enjoys “*the liberty common to all and the free disposal of her property*”, while not ideal, is clearly preferable to greater civil interference.

³⁴⁹ *Vix Dum a Nobis*, 566 (my translation).

³⁵⁰ *Ibid*, 569–570.

³⁵¹ *Ibid*, 566–567.

³⁵² *Ibid*, 570–572.

³⁵³ PIUS X, “Encyclical *Vehementer Nos*”, 11 February 1906, art. 1, in *ASS*, 39(1906), 4, English translation at <https://www.vatican.va/content/pius-x/en/encyclicals/documents/hf_p-x_enc_11021906_vehementer-nos.html>, last accessed on 03-04-2025.

³⁵⁴ *Ibid*, art. 9.

³⁵⁵ *Ibid*, art. 8; see also PIUS X, “Encyclical *Gravissimo Officii Munere*”, 10 August 1906, art. 3, in *ASS* 39(1906), 386, English translation at <https://www.vatican.va/content/pius-x/en/encyclicals/documents/hf_p-x_enc_10081906_gravissimo-officii-munere.html>, last accessed on 04-04-2025.

³⁵⁶ *Gravissimo Officii Munere*, art. 8.

B. The magisterium of Vatican II

The Second Vatican Council neither used nor rejected the term “*societas perfecta*” to describe the Church.³⁵⁷ Article 1 of *Lumen Gentium* speaks of the Church as a “*sacrament*” or “*sign*”, which some theologians took to be a departure from the idea of the Church as a perfect society.³⁵⁸ However, *Lumen Gentium* affirms the substance of the idea of the Church as a *societas perfecta*, since it calls the Church a “*society structured with hierarchical organs*”,³⁵⁹ describes the Apostles as “*rulers in this society [who] took care to appoint successors*”,³⁶⁰ and states that the bishops “*have the sacred right and the duty before the Lord to make laws for their subjects, to pass judgment on them and to moderate everything pertaining to the ordering of worship and the apostolate*”.³⁶¹ *Gaudium et Spes* also asserts that the Church is “*autonomous and independent*” from the political community in her own field.³⁶² Additionally, we saw in Chapter 1 that *Dignitatis Humanae* asserts various freedoms for the Catholic Church, and *Christus Dominus* claims freedom for bishops in the discharge of their offices. Therefore, it is clear that Vatican II left intact the substance of the doctrine of the Church as a perfect society, namely that she is independent from the civil power, and that she possesses the means necessary to freely regulate her internal discipline. These principles are not inconsistent with the fact that canon law has subsequently been developed in light of the conciliar vision with a greater emphasis on collegiality and service to the Church community.³⁶³ Indeed, in *Sacrae Disciplinae Leges*, Pope John Paul II noted that collegiality “*eminently characterizes and distinguishes the process of origin of the present Code*” and that “*authority [is] a service*”, while confirming that the Church is “*organized as a social and visible structure [which] must also have norms: in order that its hierarchical and organic structure be visible [and] in order that the exercise of the functions divinely entrusted to her, especially that of sacred power ...*

³⁵⁷ PAPPIN, G., *The Return*

³⁵⁸ *Ibid.* See, e.g., ORSY, L., “The Second Vatican Council and Postconciliar Canon Law”, in *Britannica*, 19 February 2025, <<https://www.britannica.com/topic/canon-law/The-Second-Vatican-Council-and-postconciliar-canon-law>>, last accessed on 16-04-2025.

³⁵⁹ *Lumen Gentium*, art. 8. See also *Dignitatis Humanae*, art. 13: “*a society of men who have the right to live in society in accordance with the precepts of the Christian faith*”.

³⁶⁰ *Lumen Gentium*, art. 20.

³⁶¹ *Ibid.*, art. 27; PAPPIN, G., *The Return*

³⁶² *Gaudium et Spes*, art. 76.

³⁶³ C.f. ORSY, L., *The Second* See also BROWN, P., “The 1983 Code and Vatican II Ecclesiology: The Principle of Subsidiarity in Book V”, in *The Jurist* 69(2009), 587–588; LEYS, A., “Structuring Communion: The Importance of the Principle of Subsidiarity”, in *The Jurist*, 58(1998), 87–99; KASPER, W., “The Theological Foundations of Human Rights”, in *The Jurist*, 50(1990), 165.

may be adequately organized". Emphasising the truly binding nature of the Code, he asserted that "*the canonical laws by their very nature must be observed*".³⁶⁴

Several years after Vatican II in his apostolic letter *Sollicitudo Omnium Ecclesiarum*, Pope Paul VI explicitly restated the traditional doctrine that the Church is a perfect society, endowed with her own rights and means, independent of the State.³⁶⁵ He observed that dialogue between the Church and State aims to protect the free exercise of the Church's action so that she may effectively perform the task given to her by God.³⁶⁶ In a similar vein, Pope Benedict XVI observed in 2005 that the Church and the State "*are distinct, yet always interrelated*", while asserting that the Church "*has a proper independence and is structured on the basis of her faith as a community which the State must recognize*".³⁶⁷ In chapter 1.2.B, we saw that the Code itself affirms the Church's independence from civil power in the spheres of preaching the gospel, forming sacred ministers, dealing with temporal goods, and adjudicating spiritual matters or matters of ecclesiastical discipline. Hence, it is settled Catholic doctrine that the Church is a society independent of the civil power, and that civil law to the contrary does not affect the binding nature of the Church's laws.

3. The freedom of bishops and other clerics

Vatican II specifically asserted the "*full and perfect freedom and independence from any civil authority*" which diocesan bishops enjoy in discharging their office.³⁶⁸ This teaching builds on prior magisterial statements which have often arisen in the context of historical persecutions of the Church. For example, in his encyclical *Quod Nunquam* of 1875, Pope Pius IX considered laws within the kingdom of Prussia which had infringed the liberty of the Church.³⁶⁹ He took specific issue with laws which empowered lay tribunals to depose bishops and others with the care of souls, noting that this had happened to two bishops "*with the greatest injustice*".³⁷⁰ Invoking the "*violatio libertatis ... Ecclesiae*", the Pope declared the laws invalid and opposed

³⁶⁴ *Sacrae Disciplinae Leges*.

³⁶⁵ PAUL VI, "Apostolic Letter *Sollicitudo Omnium Ecclesiarum*", 24 June 1969, in *AAS*, 61(1969), 476: "*Neque est infitandum ... Ecclesiam et Civitatem, in suo cuiusque ordine, esse societates perfectas, ac propriis inde pollere iuribus et mediis, suisque uti legibus, quacumque uniuscuiusque patet provincia.*"

³⁶⁶ *Ibid*, 477.

³⁶⁷ BENEDICT XVI, "Encyclical *Deus Caritas Est*", 25 December 2005, art. 28(a), in *AAS*, 98/3(2006), 238–239, English translation at <https://www.vatican.va/content/benedict-xvi/en/encyclicals/documents/hf_ben-xvi_enc_20051225_deus-caritas-est.html>, last accessed on 06-04-2025.

³⁶⁸ *Christus Dominus*, art. 19.

³⁶⁹ PIUS IX, "Encyclical *Quod Nunquam*", 5 February 1875, in *ASS*, 8(1874–1875), 251–255.

³⁷⁰ *Ibid*, 251–252 (my translation).

to the divine constitution of the Church.³⁷¹ Finally, he asserted that the Lord did not place the secular powers over the bishops in matters relating to the sacred ministry, and that no secular power was able to deprive a bishop of his office.³⁷² Similarly, in his *Syllabus*, Pius condemned the proposition that the lay government has the right to depose bishops and does not need to obey the Roman Pontiff in matters regarding the institution of bishops and bishoprics.³⁷³

In his encyclical *Meminisse Iuvat*, Pope Pius XII also drew attention to the persecution of the Church in certain countries, with many bishops having been “*driven from their sees or so impeded that they cannot freely exercise their ministry*”.³⁷⁴ He asserted that the Church has a right “*under the mandate of the Holy See, to choose and consecrate bishops who will lawfully govern the Christian flock*”, noting that the Church is not “*a creature of a single nation, dependent on its civil authority*”.³⁷⁵ Considering the situation of “*shepherds kept far from their flocks, or otherwise restrained from the free exercise of their ministry*”, the Pope sought that they “*be restored as speedily as possible to the positions they formerly, and properly, held*”.³⁷⁶ This emphasises that the liberty of the Church is violated both when bishops are deposed from their offices, and when they retain their offices but are impeded from the free exercise of their ministry.

Although the magisterium has often dealt specifically with the freedom of bishops, the liberty of the Church may also be infringed when her lesser ministers are impeded in their ministry. In his brief *Charitas Quae*,³⁷⁷ Pope Pius VI again took up the issue of the French *Civil Constitution of the Clergy*. He condemned the State’s expulsion of pastors from their offices who refused to swear an oath to the *Civil Constitution*.³⁷⁸ Since the obligation to swear an oath applied to both bishops and priests, the Pope’s opposition to the *Civil Constitution* confirms that the *libertas Ecclesiae* may be unjustly infringed when priests are impeded in their ministry. The Pope addressed parish priests and curates, reminding them that the mandate they received

³⁷¹ *Ibid*, 252–253.

³⁷² *Ibid*, 253.

³⁷³ *Syllabus*, LI.

³⁷⁴ PIUS XII, “Encyclical *Meminisse Iuvat*”, 14 July 1958, art. 11, in *AAS*, 50(1958), 452, English translation at <https://www.vatican.va/content/pius-xii/en/encyclicals/documents/hf_p-xii_enc_14071958_meminisse-iuvat.html>, last accessed on 11-04-2025.

³⁷⁵ *Ibid*, art. 15.

³⁷⁶ *Ibid*, art. 32.

³⁷⁷ PIUS VI, “Brief *Charitas Quae*”, 13 April 1791, in *La Santa Sede*, <<https://www.vatican.va/content/pius-vi/it/documents/breve-charitas-quae-13-aprile-1791.html>>, last accessed on 16-04-2025 (Italian translation).

³⁷⁸ *Ibid*, art. 7.

from their legitimate bishop could only be removed by that bishop, and that even if they were expelled from their office by the civil power, they would remain always legitimate pastors with obligations to their flocks.³⁷⁹ He also urged bishops who had been removed from their sees by the civil authorities to stand fast in their duty to their flocks, referring to the spiritual marriage between a bishop and his flock which can only be dissolved by death or the Pope's apostolic authority.³⁸⁰

Hence, several magisterial documents have dealt specifically with the freedom of ministry of bishops which *Christus Dominus* asserts. The civil power may neither depose bishops nor restrict their ministry. Rather, bishops must enjoy a truly free exercise of their ministry, independent from the civil power. Even though it is only the bishops who are the successors of the Apostles,³⁸¹ it is clear from the teaching of Pope Pius VI in *Charitas Quae* that this liberty also extends to parochial clergy. Indeed, insofar as canon law confers rights and obligations on priests, these rights and obligations cannot be restricted by the civil power in light of the Church's independence as a perfect society considered in the preceding section.

4. The legitimacy of the Victorian situation in light of the magisterium

In Chapter 1.3.B, it was seen that the *WSA* generally makes it a crime for Catholic clergy to engage in ministry in Victoria unless they possess a WWC clearance (with limited exceptions for clerics visiting temporarily and those with practically no contact with children). However, it was seen in Chapter 1.3.A that the Code grants various rights of ministry. Cardinals have the right to hear confessions anywhere in the world. Papal legates in Victoria have the right to perform liturgies within the territory of their legation. The Victorian diocesan bishops have broad powers to govern their sees and confer the sacraments. Non-diocesan bishops also have extensive canonical rights to hear confessions, preach, and confer other sacraments. Priests not canonically impeded have the right to celebrate the Eucharist. Those enjoying a habitual faculty to hear confessions granted by the competent authority may exercise that faculty in Victoria unless specifically denied by the local ordinary, and priests generally have the right to preach subject to the necessary ecclesiastical permission. Baptism may be conferred by any person in a case of necessity. In danger of death, any priest is empowered to administer the sacraments of confirmation, confession and anointing of the sick, and to administer the Viaticum.

³⁷⁹ *Ibid*, art. 30.

³⁸⁰ *Ibid*, art. 28.

³⁸¹ *Christus Dominus*, arts. 2, 4; *Lumen Gentium*, art. 22.

In light of the doctrine of the Church as a perfect society which is independent of the civil power, any civil law which restricts the above canonical rights or obligations, including the *WSA*, is illegitimate from the standpoint of ecclesiastical doctrine. Further, insofar as such a civil law restricts the ministry of diocesan bishops, it contradicts their “*full and perfect freedom and independence from any civil authority*” in the discharge of their apostolic office.³⁸² The case of Bishop Max Davis is a clear example. After being acquitted in a civil court, Bishop Davis was impeded by the civil authorities for nearly two years before he could return to ministry as bishop of the Australian Military Ordinariate. The restriction of the ministry of parochial clergy by the civil law also illegitimately violates the liberty of the Church according to the doctrine in *Charitas Quae*.

It was also seen in Chapter 1.4 that the canonical relationship between a diocesan bishop and his clergy is not one of employment or servile obedience. Although the Code does not extensively articulate the nature of the relationship, diocesan priests enjoy a certain legitimate autonomy, even while having a special obligation to show reverence and obedience to their ordinary in matters prescribed by canon law. However, the Victorian courts temporarily pressured this relationship through imposing vicarious liability on bishops and dioceses for the acts of their clergy. Although the High Court corrected this legal novelty, it indicated that the Victorian Parliament could impose such liability through legislation. Such an imposition of liability would pressure the bishop-priest relationship to become one where bishops would need to micromanage and infringe the just autonomy of their clergy so as to minimise civil liability. The Church’s freedom as an independent and perfect society would be illegitimately violated insofar as the civil law interfered with her internal law articulated in the Code.³⁸³ Strictly, this would be the case if the bishop-priest relationship was pressured to change from one of assistants and counsellors to one of servile obedience,³⁸⁴ especially where the proper power of parish pastors is concerned.³⁸⁵

³⁸² *Christus Dominus*, art. 19.

³⁸³ As noted, the additional commentary in the PCLT’s Explanatory Note is not an authentic interpretation and does not possess the force of law.

³⁸⁴ See Code, c. 384.

³⁸⁵ See *ibid*, c. 515§1.

5. Cooperation between Church and State

A. Magisterial encouragement of cooperation

Despite the firm assertions of ecclesiastical independence considered in the preceding sections, various magisterial documents have discussed that “*sounder cooperation*” between the Church and political communities which is sought by article 76 of *Gaudium et Spes*. In *Vehementer Nos*, Pius X emphasised the importance of cooperation and friendly relations between the Church and the State, acknowledging the legitimate sphere of authority of the civil power.³⁸⁶ In a similar vein, Gregory XVI in 1832 praised that mutual concord between the Church and State which was always propitious and salutary to both the sacred and civil government.³⁸⁷ Near the end of the nineteenth century, Leo XIII encouraged complete harmony and the avoidance of conflict in matters of mixed jurisdiction.³⁸⁸ As the reforms of William the Conqueror showed, civil assistance to the Church in strengthening her structures and internal discipline can be very effective when done with the consent of the competent ecclesiastical authority.

More recently, Pope Francis has stated that “*ecclesiastical authority and civil power are called to cooperate for the integral good of the human community*”.³⁸⁹ Indeed, according to Pius XII, the Church contributes not only to the spiritual welfare of persons, but also to the social good, since it “*bids men live in charity, justice, and obedience to law; it condemns and outlaws vice; it incites citizens to the pursuit of virtue and thereby rules and moderates their public and private conduct*”.³⁹⁰ Consequently, a healthy cooperation between the Church and State is useful both for the Church’s mission and the common good of civil society. These mutual benefits are especially important to bear in mind in any negotiations between the civil and ecclesiastical powers.

³⁸⁶ *Vehementer Nos*, art. 3.

³⁸⁷ *Mirari Vos*.

³⁸⁸ *Immortale Dei*, art. 35.

³⁸⁹ FRANCIS, “Message of the Holy Father Francis to the President of the Pontifical Council for Promoting Christian Unity on the Occasion of the 13th Inter-Christian Symposium”, 19 August 2013, in *The Holy See*, <https://www.vatican.va/content/francesco/en/messages/pont-messages/2013/documents/papa-francesco_20130819_xiii-simposio-intercristiano.pdf>, last accessed on 12-05-2025.

³⁹⁰ *Meminisse Iuvat*, art. 7. See also art. 31.

B. A concordat as a possible method of cooperation

In his allocution *Ci Riesce* of 1953, Pope Pius XII observed that concordats are, for the Church, an expression of the collaboration between Church and State.³⁹¹ A concordat between the Holy See and Australia would be a clear means to facilitate positive cooperation. Through modifying the applicability of certain canons of the Code in Victoria,³⁹² such a concordat could legitimise the action of the civil power in vetting ecclesiastical ministers and affecting their canonical rights, obligations and relationships. Since, under international law, Australia has legal personality but the Australian states do not, any concordat applying in Victoria would need to be negotiated between the Holy See and the Australian government.³⁹³ However, such a concordat implemented through federal legislation would bind the Australian states, including Victoria.³⁹⁴

The French Concordat of 1801 (“*French Concordat*”) provides a salient example, as its provisions specifically concerned the State’s role in the selection of clerics.³⁹⁵ Even though the *French Concordat* did not establish Catholicism as the state religion, articles 4 and 5 provided that the First Consul of the French Republic could nominate bishops and archbishops, on whom the Pope would then confer canonical institution.³⁹⁶ However, these provisions were to be re-negotiated if a future First Consul was not Catholic.³⁹⁷ Article 10 of the *French Concordat* provided that, although the bishops were to nominate parish clergy, the choice of candidates was “*limited to those persons agreeable to the Government*”. Unlike the nomination of bishops, article 10 would remain unchanged the event of a non-Catholic First Consul. These provisions are in harmony with the then recent papal teachings in *Charitas Quae* and *Quod Aliquantum*, since they do not limit the exercise of ecclesiastical ministry once it is conferred on a cleric. Rather, the *French Concordat* is an instance where the legitimate ecclesiastical authority

³⁹¹ *Ci Riesce*, VII.

³⁹² See Code, c. 3.

³⁹³ PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA SENATE LEGAL AND CONSTITUTIONAL REFERENCES COMMITTEE, *Trick or Treaty? Commonwealth Power to Make and Implement Treaties*, Canberra, Commonwealth of Australia, 1995, 202–204.

³⁹⁴ *Commonwealth of Australia Constitution*, ss. 51(xxix), 109.

³⁹⁵ PIUS VII, “Convention between His Holiness Pius VII and the French Government”, 15 July 1801, translated by FRASER, M., in “Napoleon’s concordat (1801): text”, *Concordat Watch*, <<https://www.concordatwatch.eu/kb-1496.834>>, last accessed on 18-04-2025.

³⁹⁶ See MINNERATH, R., “Bonaparte’s Concordat and its Survival”, translated by CHAIZE, I., in *Napoleonica® the Journal*, 3(2023), 60.

³⁹⁷ *French Concordat*, art. 17.

consented to the State's participation in the exercise of ecclesiastical authority.³⁹⁸ Specifically, the *French Concordat* demonstrates that concordats may legitimately make concessions to the civil power in both the selection of bishops and the negative vetting of candidates for parochial office, even where Catholicism is not established as the state religion. While Gregory XVI, Pius IX and Leo XIII were writing on the *libertas Ecclesiae* and developing the idea of the Church as a perfect society, the Holy See left the *French Concordat* intact until it was unilaterally revoked by the French government in 1905.³⁹⁹ This suggests that it was not incompatible with the doctrine of the Church as a perfect society.

Through the *WSA*, the Victorian legislature does not generally consider a cleric without a WWC clearance suitable to engage in ministry involving children. Similar to article 10 of the *French Concordat*, a concordat could be sought with the Australian government which provides that no priest or deacon would be nominated to an office which included ministering to children, such as the office of a parish priest, unless the civil power had first vetted the cleric through a WWC clearance or equivalent. The Holy See could also undertake not to nominate any bishop who did not already possess a WWC clearance or equivalent, which would give the Victorian authorities less power than the French First Consul had in selecting bishops. This would legitimise the subjection of bishops and other clergy to WWC clearances. It would also seem prudent that the concordat make provision for the sharing of information on any conviction of a Catholic cleric in a civil court with the cleric's ordinary and the Holy See through the local papal legate, since it is possible that a cleric could be convicted in a civil court without notifying the ecclesiastical authorities of his conviction (especially if the cleric did not receive a prison sentence). Finally, the Holy See could seek to address the relationship between a bishop and his clergy in the concordat in a way which excludes the application of vicarious liability. However, in light of the present political climate, achieving agreement on this latter proposition would seem unlikely, since it would limit the compensation available to victims of clerical sexual abuse.

6. Possible unilateral action by Church authorities

If a suitable concordat could not be concluded, ecclesiastical authorities could also undertake certain unilateral actions in response to the problems identified to the extent that they consider it opportune to do so.

³⁹⁸ See also: PIUS XII, "Encyclical Ad Apostolorum Principis", 29 June 1958, art. 38, in *AAS*, 50(1958), 610.

³⁹⁹ See MINNERATH, R., *Bonaparte's ...*, 58, 67.

A. Derogation from canonical norms for Australia

The Holy See is able to unilaterally derogate from relevant canons of the Code for the Australian jurisdiction to legitimise the civil power's action in pursuing a good aim (the protection of children) through an otherwise illegitimate means (violating the Church's liberty). For example, Pope Francis' 2023 *Motu Proprio Vos Estis Lux Mundi* provides various norms regarding the reporting of sexual delicts and related procedural matters. However, article 20 provides that “[t]hese norms apply without prejudice to the rights and obligations established in each place by state laws, particularly those concerning any reporting obligations to the competent civil authorities.” This is a general derogation in favour of any civil laws conflicting with the document's other norms. If article 20 did not exist, any civil laws contrary to the provisions of *Vos Estis Lux Mundi* would be illegitimate through violating the Church's independence from the civil power. However, as the canonical legislator deliberately yields to the civil law, the civil law does not in fact overrule canon law.

B. Strengthening and applying the canon law on celebrets

It is evident that clerics who have been convicted of criminal offences should be closely scrutinized before being allowed to minister. This is especially the case for clerics who have committed sexual offences against children or vulnerable persons. Such abuse harms the victims themselves, and also sharply weakens the effectiveness of the Church's public witness. However, we saw that a visiting priest not impeded by canon law automatically has the right to offer mass if he “presents a letter of introduction from his ordinary or superior, issued at least within the year”.⁴⁰⁰ Similarly, visiting priests enjoying a habitual faculty to hear confessions granted by the competent authority may automatically exercise that faculty unless specifically denied by the local ordinary. The Code does not explain why a celebret should be necessary for mass but not the other sacraments. It would seem prudent that the law regarding celebrets be extended to cover the other sacraments, especially the exercise of a habitual faculty to hear confessions. However, to avoid the risk of invalid confessions made by the faithful in good faith, the law should only concern liceity, and should not be expressed to have invalidating consequences.⁴⁰¹ Further, a celebret should not be required in cases of necessity, in harmony with the principle that the salvation of souls is the supreme law of the Church.⁴⁰²

⁴⁰⁰ Code, c. 903.

⁴⁰¹ See *ibid*, c. 10.

⁴⁰² See *ibid*, c. 1752.

In addition to any reform of canon 903, bishops should proactively deny celebrets to their clergy who have been convicted of relevant crimes. If bishops do not do so for unworthy clerics, they can simply travel to another diocese and make use of their rights and faculties under the Code away from the supervision of their ordinary. However, it is fitting that canon 903 puts the onus to vet a cleric on his own ordinary or superior, not on the local ordinary of where the cleric seeks to minister. A cleric's own ordinary likely maintains an extensive personnel file on the cleric in a secret archive, potentially including certain acts of preliminary penal investigations.⁴⁰³ This information allows for a more holistic assessment of a cleric's fitness to minister than can be undertaken by the ordinary of a receiving diocese on the basis of more limited information.⁴⁰⁴ Additionally, a cleric's canonical right to "*protect his ... own privacy*",⁴⁰⁵ is better protected through minimising the number of persons who have access to his information for the purposes of assessing his fitness to minister. This seems especially justified for past cases of impropriety by a cleric which have already been subject to canonical investigation, punishment and appropriate satisfaction.

If the sole onus on a cleric's own ordinary to determine his fitness to minister were considered insufficient in the important struggle against clerical abuse, the Code should be amended to allow receiving ordinaries to demand further information from visiting clerics and to suspend their faculties until the receiving ordinary confirms them. An important part of promoting a culture of respecting and applying the law is to make sure that the law itself is workable so that it is not habitually violated by the authorities tasked with applying it. It was seen that the Victorian bishops have implemented requirements *contra legem* which restrict visiting clerics' rights under the Code pending approval from the receiving diocese. If diocesan bishops deem it so important that clerics' rights are restricted *contra legem* for the purpose of combatting abuse and protecting the reputation of dioceses, it might be appropriate for the universal legislator to formally approve these common violations of universal law through amending the relevant norms of the Code. Alternatively, the Code could be amended to allow episcopal conferences to enact particular law specifying the rights and duties of travelling clerics, especially in light of local civil law requirements.⁴⁰⁶ Any such particular law should not be

⁴⁰³ *Ibid*, c. 1719; MUROPA, C., "Personnel Files, Confidentiality, and the Right to Privacy", in *Studia Canonica*, 57(2023), 86–94.

⁴⁰⁴ See also Code, c. 971.

⁴⁰⁵ *Ibid*, c. 220.

⁴⁰⁶ See *ibid*, c. 455§1.

made at the diocesan level in order to ensure regulatory uniformity for clerics travelling between dioceses.

C. Clarifying the relationship between bishop and priest in canon law

The Code itself is quite limited in what it says about the nature of the relationship between a bishop and his clergy. It does, however, assert that a cleric owes a special obligation of reverence and obedience to his ordinary.⁴⁰⁷ Although the PCLT clarified various aspects of the bishop-priest relationship, including that a diocesan priest enjoys a legitimate initiative and just autonomy, its Explanatory Note does not have the force of law. To the extent that the bishop-priest relationship necessarily includes such initiative and autonomy on the part of the priest, the canons of the Code would benefit from clarification to clearly and authoritatively assert this. In particular, canon 273 could be amended to include a second paragraph which explains that the special obligation of reverence and obedience is not akin to secular employment, and that a bishop should not invoke this special obligation in a way which undermines the legitimate autonomy of a cleric in pursuing a ministry which he has been assigned by ecclesiastical authority.

7. Conclusion

In this Chapter, the doctrine of the Church as a perfect society, independent from the civil power, was examined. The particular freedoms of a bishop and other clergy in ministry were also considered. In light of these doctrines, it was seen that the Victorian *WSA* and the potential application of vicarious liability to the bishop-priest relationship were illegitimate from a Catholic perspective, especially insofar as they conflicted with the canonical norms in the Code. However, the magisterium also seeks positive cooperation between Church and State, and the potential to remedy the situation through a concordat was examined. Finally, it was seen that Church authorities could also undertake unilateral actions to respond to certain problems identified in the preceding analysis. Of course, it is ultimately a question of prudence for the Pope and the bishops, as governors of their sees, to decide how to govern the Church and defend her liberty. The historical examples of episcopal responses to civil interference in the rights of the Church considered earlier may provide helpful inspiration.

⁴⁰⁷ *Ibid*, c. 273.

V. Conclusion

In this paper, the current state of the *libertas Ecclesiae* in Victoria was reviewed by reference to two recent developments in the civil law, namely the government vetting of the Church's ministers through WWC clearances, and the pressuring by courts of the nature of the bishop-priest relationship. In Chapter 1, the magisterium of Vatican II on the liberty of the Church was examined, as well as the translation of this magisterium into legal norms in the Code. Next, the canons of the Code regarding the Church's selection of her ministers were considered, as well as the nature of the civil vetting regime in the Victorian *WSA*. The implementation of this civil legislation by the Victorian bishops was analysed, and it was seen that this was not entirely in harmony with the norms of the Code. The nature of the relationship between a diocesan bishop and his clergy was then examined, as well as the recent action by Victorian courts to pressure this through the imposition of the legal doctrine of vicarious liability.

In Chapter 2, lessons were sought from the legal history of England prior to the Reformation. The reforms of William the Conqueror provided an example of that positive cooperation between Church and State which is sought by *Gaudium et Spes*. The investiture controversy reinforced the paramount role of the Apostolic See in determining ecclesiastical discipline, as well as showing the important role which diocesan bishops can play in seeking positive compromise between the temporal and ecclesiastical powers. The episode of the *Constitutions of Clarendon*, and the responses of the Archbishop of Canterbury and the Pope, provided another example of episcopal resistance to the unjust usurpation of ecclesiastical rights by the State. However, this dispute, which partially concerned the clerical forum privilege, served to emphasise the importance of distinguishing between merely disciplinary ecclesiastical laws which are capable of change, and laws which are so fundamental to the Church that they cannot be compromised. Finally, the papal response to the English Reformation again asserted the independence of the Church in the face of a hostile civil power, emphasising the importance of the liberty of the Church in choosing her own ministers.

In Chapter 3, the development of the ecclesiastical magisterium subsequent to the Reformation on the *libertas Ecclesiae* was examined. It was seen that the magisterium teaches that the Church is a perfect society, independent of civil power, and that she may not be subjected to the State. In particular, the magisterium has emphasised the Church's liberty in choosing her bishops and parochial clergy, and that these ministers must not be impeded in the execution of their ministry. It was concluded that the Victorian vetting legislation illegitimately violated the *libertas Ecclesiae* insofar as it contradicted the rights and obligations of clerics imposed under

the Code. Similarly, the imposition of vicarious liability on bishops for the acts of their clergy risks illegitimately pressuring the nature of the priest-bishop relationship, even though this relationship could be more clearly defined in canon law. In view of the frequent calls of Popes to seek positive cooperation between Church and State, the possibility of a concordat between the Holy See and Australia was examined, as well as possible unilateral action by the Holy See in the form of a derogation from certain canonical provisions in force in Australia to legitimise government action. Finally, several possible reforms to the Code were considered in relation to the law on celibacy and the law regarding the relationship between a bishop and his clergy.

It is clear that the protection of children and vulnerable persons from abuse by clerics, and the repair of such harm, is a noble and pressing goal which is shared by both the Victorian civil authorities and the Church, who “*cares for all and protects with a special affection those who are smallest and defenceless*”.⁴⁰⁸ As shown by the civil and religious reforms of William the Conqueror, effected in collaboration with the Archbishop of Canterbury and in harmony with the Roman Pontiff, cooperation can greatly enhance the pursuit of a shared goal. Thus, in the words of Pope Francis, may the Church and the civil power “*cooperate for the integral good of the human community*”.⁴⁰⁹

⁴⁰⁸ FRANCIS, “Apostolic Letter *Come Una Madre Amorevole*”, 4 June 2016, preamble, in *AAS*, 108/7(2016), 715, English translation at <https://www.vatican.va/content/francesco/en/motu_proprio/documents/papa-francesco-motu-proprio_20160604_come-una-madre-amorevole.html>, last accessed on 20-04-2025.

⁴⁰⁹ FRANCIS, *Message*