

Appendix 1

Timeline of Events of Significance to the Work of the Commission

- 1940 John Charles McQuaid was appointed Archbishop of Dublin.
- 1950 The Mother and Child Scheme was introduced by the Minister for Health to provide mothers with free maternity treatment and their children with free medical care up to the age of 16.
- 1951 The Mother and Child Scheme was dropped by the government following opposition from the Catholic Church and the medical profession. Dr Noel Browne resigned as Minister for Health.
- 1962 – 1965 Second Vatican Council was held in Rome.
- 1968 *Humane Vitae* Encyclical was promulgated by Pope Paul VI reaffirming the traditional teaching of the Catholic Church on abortion, contraception and other issues pertaining to human life.
- 1972 Archbishop McQuaid retired as Archbishop of Dublin. He was succeeded by Dr Dermot Ryan.
- 1973 Ireland joined the EEC.
- The *Civil Service (Employment of Married Women) Act 1973* ended the requirement that women retire from the Civil Service on marriage.
- McGee – v – Attorney General*
The Supreme Court decided that a law prohibiting the importation, sale or advertising of contraceptives violated constitutional protections for marital privacy.
- 1977 Department of Health issued a Memorandum on Non-accidental injury to children.

- 1978 Cardinal Karol Wojtyla was elected Pope John Paul II, following the death of Pope John Paul I.
- 1979 The *Health (Family Planning) Act 1979* provided that contraceptives may be dispensed by a pharmacist on presentation of a valid prescription for 'bone fide family planning or adequate medical reasons'.
- Pope John Paul II visited Ireland
- 1980 Guidelines on the Identification and Management of Non-Accidental Injury to Children were published by the Department of Health.
- 1983 The 'Pro-Life' amendment to the Constitution was passed. This provided that the right to life of the unborn with due regard to the equal right to life of the mother be enshrined in the Constitution.
- Revised 'Guidelines on Non-Accidental Injury to Children' were published by the Department of Health.
- 1984 Dr Kevin McNamara, the bishop of Kerry, was appointed Archbishop of Dublin, following the appointment of Archbishop Ryan to the Roman Curia in 1983.
- Fifteen-year old Ann Lovett died after giving birth in a grotto outside the town of Granard, Co Longford. Her infant son also died.
- The 'Kerry Babies' Tribunal was established to investigate how Joanne Hayes and her family confessed to the killing of a new born baby found stabbed to death on a beach at Cahirciveen, Co Kerry. The Tribunal concluded that Joanne Hayes was not the

mother of the baby and had no responsibility for the killing. It found that she was the mother of another new born baby whose body was found on the Hayes family farm.

1985 The *Health (Family Planning) (Amendment) Act 1985* liberalised the law on contraception by allowing condoms to be sold to people over 18 without a prescription.

Eileen Flynn was dismissed from her job as a secondary school teacher in a state-funded convent school when she gave birth to a baby as an unmarried mother, the father of the baby being a separated married man.

1986 The first divorce referendum was defeated.

1987 Guidelines on Procedures for the Identification, Investigation and Management of Child Abuse were published by the Department of Health

Archbishop McNamara died.

1988 Dr Desmond Connell was appointed Archbishop of Dublin.

1992 Bishop Eamonn Casey resigned as Bishop of Galway after revelations that he fathered a child 18 years previously.

In the X case, a pregnant, 14-year-old rape victim who was prevented from leaving Ireland to obtain an abortion in England appealed to the Supreme Court. The Court held that the Pro-Life Amendment gave a *right* to abortion in certain limited circumstances including when the mother's life is in danger.

A three-part referendum on abortion rights was held:

The proposal to amend Article 40 of the Constitution so that it would be unlawful to terminate the life of an unborn unless such termination was necessary to save the life, as distinct from the health, of the mother was rejected.

The proposal that the right to life of the unborn enshrined in Article 40 of the Constitution shall not limit the freedom to travel abroad for services was passed.

The proposal that the right to life of the unborn enshrined in Article 40 of the Constitution shall not limit the freedom to obtain or make available, in the State, subject to such conditions as may be laid down by law, information relating to services lawfully available in another state was passed.

- 1993 Homosexuality was decriminalised. The *Criminal Law (Sexual Offences) Act 1993* repealed legislation prohibiting all homosexual acts between males and introduced 17 as the age of consent for homosexual activities.
- 1994 The Fianna Fail/Labour Coalition Government collapsed as a result of controversy over the failure to extradite Fr Brendan Smyth to Northern Ireland on charges of child sexual abuse.
- 1995 The second divorce referendum was passed.
- The *Regulation of Information (Services Outside the State for Termination of Pregnancies) Act 1995* was passed.
- 1996 The *Framework Document* was published.

- 1998 The *Protections for Persons Reporting Child Abuse Act 1998* was passed, providing immunity from civil liability to persons who report child abuse “reasonably and in good faith” to the Health Board or the Gardaí.
- 1999 ‘*Children First*’ National Guidelines for the protection and welfare of children were introduced by the Department of Health and Children.
- 2000 The Commission to Inquire into Child Abuse in residential institutions was established.
- 2001 Archbishop Connell was created Cardinal.
- Archdiocesan seminary at Holy Cross College, Clonliffe, Dublin was closed.
- 2002 The fifth abortion referendum was defeated. It proposed to remove the threat of suicide as a grounds for legal abortion in Ireland and to introduce tough new penalties for those performing or assisting abortions.
- The BBC broadcast the Panorama programme ‘Suing the Pope’ about the activities of Fr Sean Fortune in the diocese of Ferns.
- Bishop Brendan Comiskey resigned as Bishop of Ferns.
- RTE Prime Time special ‘Cardinal Secrets’ investigated cases of child sexual abuse by clerics in Ireland.
- The Government announced an inquiry into the handling of child sexual abuse in the diocese of Ferns.
- 2004 Cardinal Connell retired as Archbishop of Dublin. Archbishop Martin was appointed as Archbishop.

- 2005 Pope John Paul II died. Cardinal Joseph Ratzinger was elected Pope Benedict XVI.
- Our Children, Our Church* was published
Report of the Ferns Inquiry was published.
- 2006 This Commission was established.
- The Supreme Court ruled that the section 1.1 of the *Criminal Law (Amendment) Act 1935* was unconstitutional as it created an absolute offence which did not allow a male accused of unlawful carnal knowledge of an underage girl any defence, once the fact of sexual intercourse an act not in itself unlawful, was proved.
- The *Criminal Law (Sexual Offences) Act 2006* was passed, providing for a defence of honest mistake as to age.
- 2007 A referendum on child protection was proposed. No date has yet been agreed for the referendum.
- The Government published the Bill to provide for Civil Partnerships for same-sex couples.
- 2009 Commission of Investigation into Child Abuse (Ryan Commission) published its report into the abuse of children in residential institutions and industrial schools.

Introduction

A2.1 This chapter examines the legal framework within which allegations of child sexual abuse have been investigated, prosecuted and adjudicated upon in the criminal justice system in the period from 1975 to 2004 which is under review by the Commission. It sets out the applicable law on sexual abuse of children and the law on sexual offences in general where that impacts on the issues under review by the Commission.

Sexual assault

A2.2 The term 'sexual assault' is often used to describe the entire range of offences involving sexual aggression by one person on another. However, in law, sexual assault has a specific meaning. During the period under review by the Commission the name of this offence has changed. Until 1990 it was known as 'indecent assault'. There were different penalties for a sexual assault on a male and on a female. Section 2 of the *Criminal Law (Rape) (Amendment) Act 1990* (the 1990 Act) changed the name of the offence to sexual assault but it did not define the offence itself and, in fact, the offence has never been defined by statute. Therefore, the elements of the offence must be outlined from the relevant common law principles developed by the courts over the years. Essentially the offence consists of touching another person in a sexual way without that person's consent.

A2.3 The elements required to prove that a sexual assault occurred are as follows:

- (a) An assault must be proved to have been perpetrated by a person;
- (b) The assault and the circumstances accompanying the assault must be shown to be indecent by the contemporary standards of right-minded people;
- (c) The person who perpetrated the assault must be shown to have intended to commit an assault as referred to in (b) above.

Age of consent

A2.4 In general, where there is consent to sexual activity, there is no assault because the act is not committed against the person's wishes. However, under Irish law, a boy or a girl under the age of 15 is incapable at

law of consenting to sexual activity. Section 14 of the *Criminal Law Amendment Act 1935* provides:

“It shall not be a defence to a charge of indecent assault upon a person under the age of fifteen years to prove that such person consented to the act alleged to constitute such indecent assault”.

A2.5 This means that a person who perpetrates a sexual act upon a child under the age of 15 years would be unable to avail of a defence that the child was consenting to the activity involved.

A2.6 The law in relation to this issue was recently considered by the Supreme Court in July 2005 in the case of *C.C. and P.G. v. Ireland*.¹²⁶ Following that decision, it is a defence for a person charged with a sexual assault offence to show that the activity was consensual and that he or she had made a genuine mistake as to the person’s age when the conduct alleged to be a sexual assault occurred. There is no requirement for the mistake as to age made by the person to be objectively reasonable although the circumstances surrounding the alleged activity can be taken into account by the judge or jury in deciding if the mistake asserted by the person was genuine or not.

Sentencing for sexual assault

A2.7 Various laws prescribed the penalties for sexual assault in the time period under review by the Commission reflecting the changing attitudes of society to this type of offence. Differing penalties existed for an indecent assault perpetrated on a male and a female until the *Criminal Law (Rape) (Amendment) Act 1990* was enacted. Prior to that, Section 62 of the *Offences Against the Person Act 1861* provided a penalty of ten years penal servitude for an indecent assault on a male, whereas a maximum sentence of two years imprisonment could be imposed for an indecent assault on a female. That had remained the position until 1935 when Section 6 of the *Criminal Law Amendment Act 1935* increased the penalty for indecent assault on a female to five years where the offence was a second or subsequent offence perpetrated by the offender in question. Following that, Section 10 of

¹²⁶

(2006) IESC 33.

the *Criminal Law (Rape) Act 1981* raised the penalty for sexual assault on a female to ten years imprisonment.

A2.8 Section 2 of the *Criminal Law (Rape) (Amendment) Act 1990* unified the law in this area and imposed a maximum five year penalty for all sexual assaults. The situation with regard to sexual assaults on children has now been further amended by Section 37 of the *Sex Offenders Act 2001* which provides for more stringent penalties for the sexual assault of a minor. Section 37 of the *Sex Offenders Act 2001* provides for a penalty of 14 years imprisonment for sexual assaults perpetrated on children under 17 years of age. For all other sexual assaults the maximum penalty that could be imposed was increased to ten years imprisonment. These apply only to offences committed after the Act came into force.

A2.9 In the case of *S.M. v. Ireland*,¹²⁷ Laffoy J. found that the distinction between the sentencing structure for indecent assault offences on males and females as laid down by Section 62 of the *Offences Against the Person Act 1861* which applies to offences committed against males prior to 1990, was unconstitutional on the basis that it offended against the principle of equality before the law enshrined in Article 40.1 of the Constitution. Section 62 provided a penalty of up to ten years for an indecent assault on a male but only two years for a similar assault on a female. That decision means, in effect, that no statutory penalty now exists for the sexual assault of a male perpetrated before 1990 and common law principles apply to the sentencing in these cases. The practice being adopted by the courts following this decision appears to be to apply the two year maximum sentence for indecent assault on a female, to all such cases.

Aggravated sexual assault

A2.10 The offence of aggravated sexual assault was created under Section 3 of the *Criminal Law (Rape) (Amendment) Act 1990*. It is a gender neutral offence and is differentiated from general sexual assault by the level or threat of violence involved in the assault or the grave nature of the injury, humiliation or degradation caused to the person assaulted. It carries a maximum penalty of life imprisonment. Section 3(1) defines the offence as follows:

¹²⁷ Unreported, High Court 12 July 2007 (Laffoy J.).

“In this Act ‘aggravated sexual assault’ means a sexual assault that involves serious violence or the threat of serious violence or is such as to cause injury, humiliation or degradation of a grave nature to the person assaulted”.

Rape offences

A2.11 There are two forms of rape known to Irish law since the enactment of the *Criminal Law (Rape) (Amendment) Act 1990*. There is rape as defined and created by the common law and now defined in Section 2 of the *Criminal Law (Rape) Act 1981*. In addition, there is also an offence of rape under Section 4 of the *Criminal Law (Rape) (Amendment) Act 1990*. Both offences carry a maximum sentence of life imprisonment and could be used in relation to the prosecution of child sexual abuse allegations in some instances.

Common law rape

A2.12 Rape as defined by the common law has been ascribed a definition by Section 2 of the *Criminal Law (Rape) Act 1981* in the following terms:

“(1) A man commits rape if—

(a) he has unlawful sexual intercourse with a woman who at the time of the intercourse does not consent to it, and
(b) at that time he knows that she does not consent to the intercourse or he is reckless as to whether she does or does not consent to it,

and references to rape in this Act and any other enactment shall be construed accordingly.

(2) It is hereby declared that if at a trial for a rape offence the jury has to consider whether a man believed that a woman was consenting to sexual intercourse, the presence or absence of reasonable grounds for such a belief is a matter to which the jury is to have regard, in conjunction with any other relevant matters, in considering whether he so believed.”

A2.13 As shown by the definition, common law rape can only be committed by a man on a woman. For such an offence to be proved the following elements must be shown to exist:

- Sexual intercourse must have occurred, which means vaginal intercourse with the person must be proved. Intercourse is complete

once there is any penile penetration of the vagina. There is no need to prove ejaculation by the man concerned;

- An absence of consent from the female involved must be proved. The concept of 'consent' for this offence is not defined by statute although consent obtained by the use of force or fraud or by an abuse of authority does not constitute consent in law. In addition, Section 9 of the *Criminal Law (Rape) (Amendment) Act 1990* provides that a failure or omission to offer resistance to the doing of an act that is an offence if done without consent does not constitute consent to the act itself;
- The man must intend to have intercourse with the woman and at the time of the intercourse he either knows that she is not consenting or is reckless as to whether she is or is not consenting.

Rape under Section 4 of the *Criminal Law (Rape) (Amendment) Act 1990*

A2.14 Rape under Section 4 of the *Criminal Law (Rape) (Amendment) Act 1990* was introduced in the wake of calls for reform on the law on rape offences in the 1980s. The offence encompasses two different acts and carries a maximum sentence of life imprisonment. The following sexual assaults may constitute 'Section 4 rape':

- penetration (however slight) of the anus or mouth by the penis;
- penetration (however slight) of the vagina by any object held or manipulated by another person.

A2.15 One of the acts which constitute rape under Section 4 of the 1990 Act can be perpetrated by a female. What is colloquially known as 'male rape' can be prosecuted under Section 4 of the *Criminal Law (Rape) (Amendment) Act 1990* as a rape offence.

Offences perpetrated by males on other males

Buggery

A2.16 Until the enactment of the *Criminal Law (Sexual Offences) Act 1993* (the 1993 Act) all sexual acts between males were deemed to be criminal in nature. This applied irrespective of the age of the people involved and whether they consented to the acts involved. The 1993 Act decriminalised consenting sexual activity between males over the age of 17. Section 3 provided that it is an offence to commit or attempt to commit an act of

buggery with any person under the age of 17 years, unless the defendant was married to or believed with reasonable cause that he or she was married to the person with whom buggery is committed.

A2.17 There was no statutory definition of the buggery offence in the 1993 Act and O'Malley's text on Sexual Offences¹²⁸ quoted from another textbook as to the definition of the offence itself (where buggery is called sodomy):

*“Everyone commits the [offence] called sodomy who
(a) carnally knows any animal; or
(b) being a male, carnally knows any man or any woman (per anum).”*

A2.18 The penalties for the offence of buggery are dependent on the age of the victim. Buggery of a person under the age of 15 could give rise to a maximum of life imprisonment while buggery of a person between 15 and 17 years of age could give rise to a maximum penalty of five years imprisonment for a first offence and ten years imprisonment for a second or subsequent offence. The attempted buggery of a person in either age band gives rise to graduated penalties depending on whether it is a first or subsequent offence. Consent provided no defence to a charge of buggery contrary to Section 3 of the 1993 Act.

A2.19 It should be noted that Section 3 of the *Criminal Law (Sexual Offences) Act 1993* has now been repealed and replaced by Section 2 and Section 3 of the *Criminal Law (Sexual Offences) Act 2006*. However, the discussion above is relevant as one of the acts which it is prohibited to perform with a person under the age of 17 years under the 2006 Act is that of buggery.

Gross Indecency

A2.20 Until 1993, Section 11 of the *Criminal Law Amendment Act 1885* prohibited acts which were described as “*outrages on decency*”. Section 11 of the 1885 Act provided:

128

O'Malley, T, *Sexual Offences: Law, Policy and Punishment* (Dublin: Roundhall/Sweet & Maxwell, 1996).

“Any male person who, in public or in private, commits, or is a party to the commission of, or procures or attempts to procure the commission by any male person of, any act of gross indecency with another male person, shall be guilty of a misdemeanour...”

A2.21 The offence created under the 1885 Act covered actions between males irrespective of age. Both men had to be consenting to the activity in question and both parties had to be acting in concert. This offence was repealed under the 1993 Act and replaced with the offence of gross indecency. Section 4 of the *Criminal Law (Sexual Offences) Act 1993* provided:

“A male person who commits or attempts to commit an act of gross indecency with another male person under the age of 17 years shall be guilty of an offence and shall be liable on conviction on indictment to imprisonment for a term not exceeding 2 years”.

A2.22 This offence was also age specific in that it applied to acts committed on or with a male under the age of 17. There was no statutory definition of gross indecency and general definitions have been adopted by the courts to deal with the matter. As with the definition of sexual assault, circumstances of gross indecency might be said to arise where there is a marked departure from the conduct expected by decent members of society but more specific examples of such conduct would depend on the situation concerned and whether it was done in public or in private. This offence has also been repealed and replaced by the offences created under Section 2 and Section 3 of the *Criminal Law (Sexual Offences) Act 2006*.

Unlawful carnal knowledge and replacement offences

Unlawful carnal knowledge

A2.23 Prior to May 2006 sexual intercourse with girls under the age of 17 years was criminalised by Sections 1 and 2 of the *Criminal Law Amendment Act 1935*. That legislation provided for an offence of having sexual intercourse with a girl under the age of 15 years with a penalty of up to life imprisonment and for a separate offence of having sexual intercourse with a girl between the age of 15 and 17, for which the penalty was set at five years

for a first offence and ten years imprisonment for a second offence. Until the decision in *C.C. v Ireland*¹²⁹, it was considered that neither consent on the part of the girl involved nor mistake on the part of the male as to her age would afford a defence to the offence. However, the Supreme Court held in the *C.C.* case that a criminal offence which creates absolute liability for an act which in itself was not criminal did not accord with the personal rights of the citizen guaranteed under the Constitution and that the lack of the availability of a defence for the male of mistake as to the girl's age in the circumstances of the particular case meant that the provisions of Section 1 of the 1935 Act were unconstitutional.

Criminal Law (Sexual Offences) Act 2006

A2.24 Arising from that, the *Criminal Law (Sexual Offences) Act 2006* was enacted. This created offences of defilement of a person under the ages of 15 and 17 years respectively. This criminalises “*sexual acts*” as defined under the legislation carried out with a child. Such sexual acts include sexual intercourse between people not married to each other, buggery, aggravated sexual assault and rape as defined by Section 4 of the *Criminal Law (Rape) (Amendment) Act 1990*. The section also provides for the defence of mistake as to age on the part of the male involved although it also stipulates that the absence or presence of reasonable grounds for such a belief is something that the tribunal of fact can have regard to in making a decision as to whether the belief in question was genuine.

A2.25 Section 2 of the 2006 Act provides:

“(1) Any person who engages in a sexual act with a child who is under the age of 15 years shall be guilty of an offence and shall be liable on conviction on indictment to imprisonment for life or a lesser term of imprisonment.

(2)...

(3) It shall be a defence to proceedings for an offence under this section for the defendant to prove that he or she honestly believed that, at the time of the alleged commission of the offence, the child

¹²⁹ [2006] 4 IR 1.

against whom the offence is alleged to have been committed had attained the age of 15 years.

(4) Where, in proceedings for an offence under this section, it falls to the court to consider whether the defendant honestly believed that, at the time of the alleged commission of the offence, the child against whom the offence is alleged to have been committed had attained the age of 15 years, the court shall have regard to the presence or absence of reasonable grounds for the defendant's so believing and all other relevant circumstances.

(5) It shall not be a defence to proceedings for an offence under this section for the defendant to prove that the child against whom the offence is alleged to have been committed consented to the sexual act of which the offence consisted.”

A2.26 Section 3 of the 2006 Act is in similar terms and relates to offences against people between 15 and 17 years old. It has a graduated system of penalties depending on whether the offence in question was the principal offence or an attempt of same and/or whether the perpetrator is convicted of a first offence or where the offence is a second or subsequent conviction of the person concerned.

Solicitation offences

A2.27 Until 1993 the only statutory law on soliciting was contained in the *Vagrancy Act 1898*, which contained an offence of “*soliciting for immoral purposes*”. This was replaced by the *Criminal Law (Sexual Offences) Act 1993* with a summary offence of soliciting or importuning another person for the purposes of committing a buggery, gross indecency or unlawful carnal knowledge. This offence acts to prevent the sexual exploitation of young people who are vulnerable.

A2.28 In its original form Section 6 of the 1993 Act provided as follows:

“A person who solicits or importunes another person for the purposes of the commission of an act which would constitute an offence under section 3, 4 or 5 of this Act or section 1 or 2 of the Criminal Law Amendment Act, 1935, shall be guilty of an offence

and shall be liable on summary conviction to a fine not exceeding £1,000 or to imprisonment for a term not exceeding 12 months or to both.”

A2.29 This definition of the offence was changed in Section 250 of the *Children Act 2001*¹³⁰ but that has been subsequently substituted by Section 2 of the *Criminal Law (Sexual Offences) (Amendment) Act 2007*. Offences under this section now give rise to a maximum penalty on conviction on indictment of five years imprisonment. In its amended form, Section 6 of the 1993 Act provides that the soliciting must relate to the defilement of a young person under the ages of 15 or 17 respectively as defined under the *Criminal Law (Sexual Offences) Act 2006* or a sexual assault offence. Section 6 of the 1993 Act now provides:

“6.—(1) A person who solicits or importunes a child (whether or not for the purposes of prostitution) for the purposes of the commission of an act that would constitute an offence—
(a) under section 2 or 3 of the Criminal Law (Sexual Offences) Act 2006, or
(b) referred to in section 2 of the Act of 1990,
shall be guilty of an offence.
(2)...”

A2.30 This means that the soliciting or importuning of any child (meaning a person under the age of 17) for sexual intercourse, buggery, aggravated sexual assault, rape under Section 4 of the 1990 Act or for a sexual assault offence is covered by the section.

130

Section 250 of the *Children Act 2001* provided as follows:

“The Criminal Law (Sexual Offences) Act, 1993, is hereby amended by the substitution for section 6 of the following:

‘6. A person who solicits or importunes another person (whether or not for the purposes of prostitution) for the purposes of the commission of an act which would constitute an offence under section 3, 4 or 5 of this Act or section 1 or 2 of the Criminal Law Amendment Act, 1935, shall be guilty of an offence and shall be liable on summary conviction to a fine not exceeding £1,500 or to imprisonment for a term not exceeding 12 months or to both.’”

The Sex Offenders Act 2001 – notification requirements for sex offenders

A2.31 The *Sex Offenders Act 2001* provides that those convicted of certain sexual crimes are required to notify certain information to the authorities - their name(s), address(es), their date of birth and travel arrangements outside of the State. These notification requirements also apply to people convicted of offences in other jurisdictions which contain similar legislation. Overall, the legislation seeks to ensure that some level of monitoring exists over the whereabouts and movements of sex offenders. The requirements of this Act are generally described in terms of being placed on a 'sex offenders' register'. There is no such register.

A2.32 Section 10(1) of the 2001 Act also requires that the notification requirement for a sex offender in the State as follows:

“A person who is subject to the requirements of this Part shall, before the end of the period of 7 days beginning with the relevant date, or, if that date is prior to the commencement of this Part, that commencement, notify to the Garda Síochána—

- (a) his or her name and, where he or she also uses one or more other names, each of those names, and*
- (b) his or her home address.”*

A2.33 Section 10(6) of the 2001 Act also outlines that the notification should include information about the person's date of birth, name and home address. These notification requirements also apply to a person who moves from the address that has been previously notified to the authorities. Requirements to notify the relevant Garda Station about travel arrangements are also imposed where the person intends to leave the State for more than seven days.

A2.34 The *“relevant date”* for complying with the notification requirement is defined by Section 6 of the 2001 Act and it refers to the date of conviction. The notification obligation is imposed on a sex offender from that date. The date of conviction may not itself be the date upon which the convicted sex offender would have to notify Gardaí of the relevant information. Section 10(7) of the 2001 Act stipulates that certain periods of time are to be

disregarded when calculating the seven day period for notification purposes. Section 10(7) provides:

“For the purpose of determining any period for the purposes of subsection (1), (2), (3) or (4), there shall be disregarded any time when the person concerned is—

(a) remanded in custody,

(b) serving a sentence in prison, or

(c) temporarily released under section 2 or 3 of the Criminal Justice Act, 1960.”

A2.35 This means the sex offender’s notification requirement would begin after release from prison where he/she is convicted and sentenced to a term of imprisonment on the same day. In those circumstances, where the sex offender receives a custodial sentence the notification requirement is imposed on him/her after his release from prison. After that, Section 12 of the 2001 Act imposes criminal liability for a failure to notify the relevant information to the Garda authorities within seven days of the sex offender’s release.

A2.36 The length of time that a person is subject to the notification requirements under the 2001 Act is set out in the Act. Where the person is sentenced to imprisonment for a term exceeding two years the notification period is indefinite. Where the term of imprisonment is between six months and two years the notification period is ten years. If the term of imprisonment imposed is less than six months then the notification requirement is imposed for seven years. Allowance is also made for a suspended sentence and a non-custodial sentence by imposing a notification period in both circumstances of five years.

A2.37 In addition, the 2001 Act introduced post-release supervision orders. This means that the sentencing judge can impose orders which require the offender to be under the supervision of the probation service after release from prison and can also specify other conditions to be complied with by the person. The failure to comply with such supervision orders is a criminal offence under the 2001 Act. In addition, certain Garda officers can apply for “sex offender orders” under the 2001 Act to prohibit a person to whom the 2001 Act applies from doing certain things. Such orders can be made where

the person was convicted of a sexual offence for the purposes of the 2001 Act and there are reasonable grounds for believing that an order under the section is necessary to protect the public from serious harm from him or her.

Child pornography and trafficking

Child Pornography

A2.38 The principal legislation in the area of visual representations of child abuse is the *Child Trafficking and Pornography Act 1998* (the 1998 Act). Both the production, distribution and the possession of images and materials which constitute child pornography are prohibited under the 1998 Act. There is a wide definition of the materials that constitute prohibited materials under the 1998 Act. Section 2(1) of the 1998 Act defines “*child pornography*” as including any visual, audio or computer generated representations, including documents, that

“(i) shows or, in the case of a document, relates to a person who is or is depicted as being a child and who is engaged in or is depicted as being engaged in explicit sexual activity

(ii)...or relates to a person who is or is depicted as being a child and who is or is depicted as witnessing any such activity by any person or person...or ...

(iii) whose dominant characteristic is the depiction, for a sexual purpose, of the genital or anal region of a child

(c) any visual or audio representation that advocates, encourages or counsels any sexual activity with children which is an offence under any enactment, or

any visual representation or description of, or information relating to, a child that indicates or implies that the child is available to be used for the purpose of sexual exploitation within the meaning of section 3.”

A2.39 The definition also includes photographs or negatives of same and storage devices.

A2.40 As outlined above, the production, distribution, printing, publishing, importation, exportation, sale, showing, encouragement, facilitation and

possession of child pornography are prohibited by the 1998 Act. Simple possession of child pornography can give rise to a maximum sentence of five years imprisonment whereas any of the activities prohibited by Section 5 of the 1998 Act, which include the production, distribution, importation and exportation of such images can give rise to a maximum sentence of 14 years imprisonment. The wide-ranging nature of the definition of child pornography is designed to ensure that such images and materials are captured by the remit of the 1998 Act and the prohibitions contained therein.

Child Trafficking

A2.41 The trafficking and taking of children for sexual exploitation was criminalised in the 1998 Act itself. However, that prohibition has been amended in more recent times by the *Criminal Law (Sexual Offences) (Amendment) Act 2007* and is now subject to further revision by the *Criminal Law (Human Trafficking) Act 2008*. Under Section 3 of the 1998 Act as originally enacted a person who organised or facilitated the entry or transit or exit through the State of a child for the purposes of sexual exploitation or the provision of accommodation for a child for such a purpose was guilty of an offence. The section also criminalised the taking, detention, or use of children for such purposes. Section 3 of the *Criminal Law (Human Trafficking) Act 2008* has substituted Section 3 of the 1998 Act and provides that a person involved in child trafficking for the purposes of sexual exploitation can be sentenced to life imprisonment. The concept of “*sexual exploitation*” is defined by the 1998 Act (as substituted by the 2008 Act) and involves the following:

“*sexual exploitation*’ means, in relation to a child—

- (a) *inviting, inducing or coercing the child to engage in prostitution or the production of child pornography,*
- (b) *the prostitution of the child or the use of the child for the production of child pornography,*
- (c) *the commission of an offence specified in the Schedule to the Sex Offenders Act 2001 against the child; causing another person to commit such an offence against the child; or inviting, inducing or coercing the child to commit such an offence against another person,*
- (d) *inviting, inducing or coercing the child to engage or participate in any sexual, indecent or obscene act, or*

- (e) *inviting, inducing or coercing the child to observe any sexual, indecent or obscene act, for the purpose of corrupting or depraving the child...*"

A2.42 Section 3(2A) and Section 3(2B) of the *Child Trafficking and Pornography Act 1998* (as inserted by the *Criminal Law (Sexual Offences) (Amendment) Act 2007*) provide for offences where a person intentionally meets or travels to meet a child for the purposes of doing anything that would constitute 'sexual exploitation', for which the definition outlined above applies. Section 3(2A) criminalises someone who meets or travels to meet a child within the State for sexual exploitation purposes whereas Section 3(2B) of the 1998 Act introduces a partial extraterritorial offence where a citizen (or person ordinarily resident in the State) meets or travels to meet a child outside of the State for such purposes. For both offences it is necessary to show that the person met or communicated with the child on two or more previous occasions and is doing so for the proscribed purpose. A person convicted of this offence is liable on conviction to a maximum sentence of up to 14 years imprisonment.

Sexual Offences (Jurisdiction) Act 1996

A2.43 The enactment of the *Sexual Offences (Jurisdiction) Act 1996* (the 1996 Act) ensures that sexual offences committed by citizens of the State or by those ordinarily resident in the State against a child (meaning somebody under 17 years old) can be prosecuted in this jurisdiction if the activity in question would also constitute an offence under the law of the country in which the activity occurred. This allows the State to prosecute people for offences which might be known in colloquial terms as 'sex tourism' whereby people travel abroad to perpetrate offences against children and then journey back to the State.

A2.44 In addition, Section 3 of the 1996 Act creates the offence of knowingly transporting a person for the purposes of enabling the other person to commit an offence against a child in another jurisdiction while Section 4 of the 1996 Act prohibits the publication of information intended to or likely to promote, advocate or incite the commission of an offence by a person under Section 2 of the 1996 Act. Thus, this legislation acts to ensure that advertising of such 'sex tourism' is also prohibited in wide terms to ensure that it cannot be

accessed by those wishing to perpetrate offences against children abroad. It should also be noted that Section 7 of the *Criminal Law (Human Trafficking) Act 2008* provides for extra-territorial jurisdiction in relation to the prosecution of people for child trafficking offences concerned with the sexual exploitation of children, although those offences created by Section 3(2A) and Section 3(2B) of the *Child Trafficking and Pornography Act 1998* are excluded from this extraterritorial jurisdiction.

Reckless endangerment

A2.45 In response to a recommendation in the *Ferns Report*, the offence of reckless endangerment was introduced by Section 176 of the *Criminal Justice Act 2006*. It applies to the activities or omissions of those in authority which causes or permits a child to be left in a situation of substantial risk of serious harm or sexual abuse and criminalises such actions or omissions. In addition, the section also stipulates that it is an offence to fail to take reasonable steps in that regard to ensure that children, as defined under the *Criminal Justice Act 2006*, under their care or authority are free from sexual abuse or serious harm.

A2.46 This offence is extensive in its terms in criminalising the behaviour of authority figures that cause, permit or otherwise fail to act in the face of a situation where they know that there is a “*substantial risk*” to a child of such harm or sexual abuse ensuing from a failure to act. The penalty for such an offence is a maximum term of ten years imprisonment.

A2.47 Section 176 of the *Criminal Justice Act 2006* provides:

“(1) *In this section—*

“*abuser*” means an individual believed by a person who has authority or control over that individual to have seriously harmed or sexually abused a child or more than one child;

“*child*” means a person under 18 years of age, except where the context otherwise requires;

“*serious harm*” means injury which creates a substantial risk of death or which causes permanent disfigurement or loss or impairment of the mobility of the body as a whole or of the function of any particular member or organ;

“sexual abuse” means an offence under paragraphs 1 to 13 and 16(a) and (b) of the Schedule to the Sex Offenders Act 2001.

(2) A person, having authority or control over a child or abuser, who intentionally or recklessly endangers a child by—

(a) causing or permitting any child to be placed or left in a situation which creates a substantial risk to the child of being a victim of serious harm or sexual abuse, or

(b) failing to take reasonable steps to protect a child from such a risk while knowing that the child is in such a situation, is guilty of an offence...

(4) A person guilty of an offence under this section is liable on conviction on indictment, to a fine or to imprisonment for a term not exceeding 10 years or both.”

Appendix 3

Glossary of Terms

Ad Limina visit: Each bishop of a diocese is obliged to visit, at stated times, the "thresholds of the Apostles", Saints Peter and Paul, and to present themselves before the Pope to give an account of the state of their dioceses. The last Ad Limina visit made by the Archbishop of Dublin was in 2006.

Administrative leave: A procedure whereby a priest accused of sexual abuse steps aside, without any admission of guilt, from his responsibilities, including any parish commitment, while an investigation takes place.

Advisory panel: A panel set up by bishops and heads of religious orders to advise them in dealing with allegations of clerical child sexual abuse. The functions of the panel were set out in the *Framework Document* (see Chapter 7). The advisory panel is sometimes called the advisory group but the functions are the same.

Archbishop's House: The headquarters of the Archdiocese of Dublin.

Archdiocese: In this report means the Archdiocese of Dublin.

Canon law: The body of law by which the Catholic Church is governed.

Chancellery: The office of the Archdiocese which assists in the discharge of the functions of the chancellor.

Chancellor: In canon law, the person who is to ensure that the acts of the curia are drawn up and dispatched and that they are kept safe in the archives of the curia. In the Archdiocese of Dublin as in many other dioceses, his principal duty is to attend to canon law matters on behalf of the Archdiocese.

Child: A person who has not yet reached his or her 18th birthday.

Child abuse guidelines: Guidelines issued at various dates by the Department of Health – see Chapter 6.

Children First: The current guidelines in relation to child sexual abuse issued in 1999 by the Department of Health and Children.

Child Protection Service: The office in the Archdiocese of Dublin which now deals with all complaints of child sexual abuse (see Chapter 3).

Child sexual abuse: child sexual abuse occurs when a child is used by another person for his or her gratification or sexual arousal or that of others.

Church: The Catholic Church

Church Penal Process: This is the canon law judicial process to investigate an allegation of an offence and to determine whether or not to impose or declare a penalty for that offence. There is also a non judicial process.

Clergy: Bishops, priests and deacons.

Conference of Bishops/Episcopal Conference: The gathering of all bishops in a defined area. The Irish Bishops' Conference is the single conference of bishops for the island of Ireland.

Conference of Religious of Ireland (CORI): An umbrella body for more than 130 religious congregations across the whole of Ireland. (This organization was previously known as the Conference of Major Religious Superiors.) The purpose of the Conference is to serve the leaders of these congregations and through them the members. It provides a forum where religious can work together on the mission they hold in common.

Congregation for the Doctrine of the Faith (CDF): is one of the offices which assists the Pope in governing the universal Church. It was originally founded in 1542 as the Congregation of the Sacred Inquisition. Its main function now is to promote and safeguard the doctrine on faith and morals throughout the Catholic world: everything which in any way touches such matters falls within its remit. It deals with cases of child sexual abuse against clerics.

Curia: The Roman curia consists of the departments and ministries that assist the Pope in the government of the universal Church. A diocesan curia is composed of those people who assist a bishop to govern his diocese.

Delegate: In canon law, the person appointed by a bishop or head of a religious order to conduct the preliminary investigation into an allegation of clerical child sexual abuse; in the *Framework Document*, the delegate is the person appointed to oversee and implement the procedures for handling allegations of clerical child sexual abuse.

Discovery: The legal term to describe the provision of documents by one party to another in legal proceedings.

Faoiseamh: an organisation which provides telephone counselling and a counselling and psychotherapy referral service for people who have been sexually, physically or emotionally abused by priests or religious. It is funded by the Conference of Religious of Ireland (CORI) and by a number of Catholic dioceses including the Archdiocese of Dublin.

Fr Brendan Smyth: He was a Norbertine priest who received widespread media coverage in 1994 when he pleaded guilty to 74 cases of child abuse in Ireland. He was sentenced to 12 years imprisonment and he died in prison. The perceived failure to extradite him to Northern Ireland to face similar charges created political controversy and led to the fall of the Fianna Fáil/Labour coalition government in late 1994.

Ferns Report: The report into the handling of complaints and allegations of clerical child sexual abuse in the diocese of Ferns was published in October 2005.

Formation: The education and spiritual development of those training for the priesthood or religious life.

Framework Document: Report and Recommendation of the Irish Catholic Bishops' Advisory Committee on Child Sexual Abuse by Priests and Religious. Also known as the Green Book. It was issued in 1996 and replaced by *Our Children, Our Church* in 2005.

Holy See: The term refers to the seat of power of the pope as Pastor of the Universal Church together with other organs of government of the Roman Curia. The term Apostolic See is also used.

Incardinated and excardinated: Diocesan priests who are ordained for the service of a diocese are said to belong to that diocese. Priests from other dioceses may apply to become a priest in a diocese. After a period, the priest may apply to be 'incardinated' into the diocese in which he is working. If this is agreed between the two dioceses, he is 'excardinated' from his original diocese and 'incardinated' into the new diocese.

Laicisation: This is a term used to describe the situation where a priest successfully applies to be relieved of his priestly duties.

Norms: rules or procedures.

Ordinary: This is a term used in canon law to describe all of those who have ordinary executive power. This includes diocesan bishops, vicars general and major superiors of clerical religious institutes.

Our Children, Our Church: Child Protection Policies and Procedures for the Catholic Church in Ireland. It was issued in 2005 and is the follow up to the *Framework Document*.

Papal Nuncio: The Ambassador of the Holy See to Ireland – see Chapter 3.

Paramountcy principle: The principle that the welfare of the child is the paramount concern.

Precept: an order from a bishop to a priest – usually restricting him in carrying out some or all of his priestly functions.

Risk assessment: The process of determining whether a person presents a degree of risk to a child.

Secret archives: This is a safe or cabinet where documents which are of great sensitivity need to be kept in conditions of maximum security. Examples of such documents include documents relating to clerical child sexual abuse.

Standards of Proof

Balance of Probabilities: The standard applied in civil proceedings: is this evidence more likely than not to be true. This was the test applied by the Commission to the evidence it received.

Beyond a reasonable doubt: The standard of proof applicable in criminal proceedings.

Moral certainty: The standard of proof required for judicial decisions in canon law.

State Agencies: The Gardaí, the Department of Education and Science and the Health Service Executive (HSE) (and former health boards).

Supply work: This is the term which is used where a priest asks another priest (not necessarily from the same diocese) to carry out his parish duties while he is away for whatever reason. In the Archdiocese of Dublin, supply work is frequently carried out by members of religious orders and societies. It may also be carried out, for example, by priests who are visiting from abroad.

Suspension: A penalty available under canon law which debars a priest from exercising his priestly ministry for a limited period.

Appendix 5

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Appendix 7

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Ms Ita Mangan

Mr Hugh O'Neill

Legal Team

Ms Maeve Doherty Solicitor

Ms Deirdre Murphy SC

Mr Donal McGuinness Barrister

Administration

<i>Name</i>	<i>Date commenced</i>
Ms Nóra Ní Dhomhnaill (Commission Manager)	March 2006
Mr Oisín Russell-Conway	August 2007
Ms Bernie McAdam	June 2006
Ms Tara Brennan	April 2007
Ms Edel Murray	May 2007
Mr John Byrne	March 2006

Legal Researchers

<i>Name</i>	<i>Date commenced</i>
Ms Karina O'Leary	October 2007
Ms Veronica Buckley	November 2007

This following lists people who worked for some period of time with the Commission:

Administration

<i>Name</i>	<i>From</i>	<i>To</i>
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Ms Noeleen Kelly	March 2006	October 2006
Ms Alice Baxter	May 2006	May 2007

Legal Researchers

<i>Name</i>	<i>From</i>	<i>To</i>
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INDEX

*Note: Names in **bold** indicate priests in the representative sample*

An asterisk after a name denotes a pseudonym*

References are to chapter number followed by paragraph number

administrative leave, 4.45 - 4.50

Advisory Committee on Extra-Diocesan Priests, 33.4

advisory panel. *see* child protection advisory panel (Dublin Archdiocese)

Africa, 29.1, 39.1, 39.21

Alameda (Santa Fe), 20.62

Alcoholics Anonymous (AA), 28.68, 28.77, 28.81, 37.25, 37.40, 37.41

Allianz Group, 9.1

altar boys, complaints concerning, 12.5, 12.21, 16.12, 17.6, 20.4-20.8, 20.5, 20.15-20.17, 20.36, 20.88, 22.3, 22.14, 24.46, 28.29-28.32, 29.30, 31.2, 36.5, 41.19, 42.14, 43.2, 43.4, 43.11, 50.2, 50.3

American Canon Law Association, 4.31

American Conference of Bishops, 3.42

anonymous complaints, 1.29, 4.35

apologies, 13.49, 16.58, 58.20, 58.23

Aquila*, **Fr**, 46.1-46.11

Aran Quay parish, 12.4

Archbishop McQuaid Charitable Trust, 8.22

Archbishop McQuaid Curial Trust, 8.22

Archbishop Walsh Charitable Trust, 8.22

archbishops of Dublin, 1.16, 1.31, 1.64, 11.13. *see also individual archbishops*

awareness of complaints, 1.19-1.21

failure to report to Gardai, 1.32

handling of complaints, 1.36-1.46, 3.18-3.23

legal status, 3.8

management ability, 1.55

metropolitan archbishop, role as, 3.13, 3.14

archdiocesan documents. *see also* secret archive

discovery process, 2.17-2.35
 Garda access to, 5.27-5.33
 legal privilege, 2.25-2.32, 5.30-5.31
 shredding of, 15.17-15.18
 Archdiocese of Dublin. *see* Dublin Archdiocese
 archives. *see* secret archive
 Arran Quay parish, 52.3
 Artane Industrial School, 26.3, 26.17

Attorney General of Massachusetts, 1.28, 1.108, 1.110
 audits, 7.50-7.51
 Aghrim Street parish, 29.1, 29.38
Augustus*, Fr, 56.1-56.9
 auxiliary bishops (Dublin Archdiocese), 1.31, 1.56, 1.67, 3.17, 3.18, 3.19, 11.13
 awareness of clerical sex abuse, 1.22, 3.23
 handling of complaints, 1.47-1.54. *see also individual bishops*
 role and responsibilities, 1.56-1.59
 Ayrfield parish, 16.27, 28.17, 28.25, 28.27-28.36, 28.39, 28.43, 28.64, 28.68, 28.74,
 28.75, 28.87, 28.100, 28.104, 28.105, 28.118, 28.127

Balcurris, Ballymun, 16.24
 Baldoyle, 28.80
 Ballyfermot parish, 41.8, 41.15, 41.24
 Ballyfermot Vocational School, 28.4
 Barr judgment, 6.31
 Bayside parish, 26.14, 26.41
 Belmont Park Hospital, Waterford, 28.84, 28.87, 28.90
 Benedict XVI, Pope, 3.45
Benito*, Fr, 1.65, 48.1-48.32
 Bergin, Liam, 1.14n
 bishops. *see also* auxiliary bishops; Irish Catholic Bishops' Conference; *individual bishops*

accountability and autonomy, 3.15-3.16
 coadjutor bishops, 3.17
 metropolitan's supervisory role over, 3.13, 3.14
 oath of fidelity, 1.23, 3.28
Blaise*, Fr, 47.1-47.8
Boland, Fr Dominic Savio, 1.69, 1.78, 17.21, 32.1-32.54
 Commission's assessment, 32.49-32.54
 Bonnybrook parish, 35.15
 Boston Archdiocese (USA), 1.28, 1.108, 1.110, 3.7
 Brannick, Dr Teresa, 11.4, 11.5
 Brentwood diocese (England), 4.19
 Briscoe, Msgr Peter, 10.9, 10.13, 10.17
 Brittas Bay, Co. Wicklow, 12.21, 20.7
 Browne, Msgr Michael, 28.67, 28.68, 28.69, 28.73, 28.76, 28.77
 Byrne (Garda superintendent), 28.51, 28.54

 Cabinteely parish, 26.15
 Cabra parish, 24.2, 24.28
 California (USA), 6.54, *see also individual dioceses*
 Camon, Sean (garda superintendent), 5.26, 5.28, 5.31, 5.33
 Canadian Canon Law Society, 4.31
 canon law, 1.15, 1.18, 3.10, 3.14, 3.34-3.35, 3.40, 3.44, 4.1-4.94, 33.37, 35.16, 39.35
 civil law, and, 4.5
 codification, 4.7-4.8
 defamation, 24.29
 formation of priests, 10.3-10.4, 10.16-10.17
 incardination, rules on, 33.14, 33.15
 penalties for failure to apply, 4.81
 revision, 4.9-4.10, 4.13
 role of, 4.1-4.3
 rules regarding child sexual abuse, 1.17, 1.25-1.26, 4.30-4.64
 application of penalties, 4.52-4.55
 Crimen Solicitationis (1922/1962), 4.18-4.28
 failure to implement, 1.25, 4.88, 4.90

imputability, concept of, 4.56-4.61, 4.93
 initial inquiry, 4.38
 penal provisions, 1.25, 1.26, 1.30, 4.11, 4.65-4.72, 4.90 *see also* canonical trials
 preliminary investigation, 4.39-4.50
 prescription/limitation periods, 4.62-4.64
 procedural requirements, 4.17-4.29
 reform/pastoral care, 4.53-4.55, 4.90
 removal of faculties, 4.51
Sacramentorum Sanctitatis Tutela (2001), 4.29
 secrecy/confidentiality, obligation of, 1.27-1.33, 4.82-4.86
 'semblance of truth,' requirement of, 4.29, 4.38
 status of accused person, 4.45-4.50
 selective use of, 4.3
 status and influence of, 1.25, 4.1, 4.5, 4.11-4.15
 translation, 4.31
 uncertainty/lack of precision, 4.87-4.93
The Canon Law: Letter & Spirit (1995), 4.31
 Canon Law Association of Great Britain and Ireland, 24.32
 Canon Law Society of Great Britain and Ireland, 4.31, 4.59
 canonical precepts, 4.51, 12.35, 27.22, 27.28, 27.36, 34.26, 43.21, 48.22
 canonical trials, 1.26, 4.65-4.72, 28.118-28.122
 appeals to Rome from,
 conduct of, 4.69-4.72
 confidentiality/secrecy, obligation of, 4.82-4.86
 damages, 4.73
 Cappaghmore (Clondalkin), 28.109, 28.115, 28.117, 28.123
 Capuchin Order, 32.1. *see also* Boland, Fr Dominic Savio
Cardinal Secrets (Prime Time, 2002), 2.18, 5.12, 12.37, 17.36, 29.52, 41.41
 Carmelite monastery, Delgany, 1.66, 12.21, 12.30, 12.38, 12.49
Carney, Fr William (Bill), 1.38, 1.42, 1.44, 1.52, 1.64, 1.77, 1.89, 1.92, 4.29, 4.54, 16.2, 16.25, 16.29, 28.1-28.149
 Commission's assessment, 28.130-28.149
 Carroll, Joseph (auxiliary bishop, 1968-1989), 11.13, 30.10, 33.4

handling of complaints, 28.76, 28.78, 28.80, 28.81

Carroll, Fr Patrick, 8.1, 8.2

Cassius*, Fr, 44.1- 44.10

Catholic Church. *see* Church authorities; Dublin Archdiocese; Rome/Vatican

Catholic Youth Care programme, 3.4

celibacy, 10.18, 18.1, 18.2, 18.5, 39.6, 56.1, 56.4

chancellery (Dublin Archdiocese), 4.21

chancellors, 1.60-1.62, 11.13. *see also individual chancellors*

role and functions, 3.34-3.37

secret archive, 3.35

Channel Four, 38.3

Child Abuse Guidelines (1987), 6.71

Child Care Act 1991, 1.99, 6.19, 6.21-6.32

health boards, duties of, 6.21-6.24, 6.27

child protection advisory panel (Dublin Archdiocese), 3.53, 3.54, 7.21-7.31

Commission's view on, 7.40-7.43

complainants, involvement with, 7.31, 7.41

composition, 7.22

guidelines, 7.26-7.39

implementation of recommendations of, 7.29-7.30

investigations and reports, 12.32-12.35, 13.47, 21.29, 26.26, 27.17-27.19, 31.14,
33.24, 34.26-34.27, 35.23, 43.20, 45.2, 46.8, 48.20-48.21, 48.25, 50.12, 55.6,
55.9

procedure, 7.24-7.25

pseudonyms, use of, 7.27

role and remit, 7.21, 7.23

child protection legislation, 1.99, 1.100, 6.4, 6.7-6.32, 6.8

Child Care Act 1991, 6.21-6.31

Children Act 1989, 6.17

'fit person' procedure. *see* Children Act 1908

government task force, 6.10-6.13

Health Acts, 6.9, 6.26

Child Protection Notification System (CPNS), 6.74

child protection responsibilities

- health authorities, 6.21-6.31
- State, 1.99-1.100, 6.8, 6.10

Child Protection Service (Dublin Archdiocese), 1.16, 3.37, 11.13

- establishment, 3.51
- funding of, 8.11
- individual cases, and, 14.3, 18.6, 28.128, 29.10, 34.31, 36.12, 43.18-43.21, 45.4-45.6, 45.10, 45.12, 45.14, 45.15, 45.21, 45.22, 48.26, 48.28, 48.31, 52.19, 54.6, 55.13
- personnel, functions of, 3.55, 3.56, 3.57, 3.58
- role and functions, 3.52-3.60
- support services for victims, 8.11-8.12

child protection services (health authorities), 6.5. *see also* social work service

- awareness of child sex abuse, 6.52-6.54
- child sex abuse assessment units, 6.54, 6.56
- community care programme, 6.42-6.51
- development of, 6.37-6.54
- handling of abuse complaints, 6.55-6.57
- health boards, 6.42-6.50
- HSE, 6.51
- staff shortages, 6.56-6.57

child protection trainers, 7.52

child sexual abuse, 2.9

- definition, 2.9
- guidelines. *see* guidelines on child sexual abuse
- training of priests, as factor in, 10.19-10.31
- treatment of offenders. *see* treatment for clerical offenders

Child Sexual Abuse: Framework for a Church Response. see Framework Document (1996)

Children Act 1908, 6.8, 6.11, 6.19

- 'fit person' procedure, 6.9, 6.12, 6.17, 6.39

Children First guidelines (1999), 2.9, 5.22, 6.73-6.74

Children's Acts, 28.10

children's homes. *see* residential institutions

Children's University Hospital, Temple St, 2.10, 6.54, 6.56

Church & General Insurance Company, 9.1, 9.4, 20.100. *see also* insurance

Church authorities. *see also* canon law; Dublin Archdiocese; Irish Catholic Bishops' Conference; religious orders; Rome/Vatican

awareness of clerical child sex abuse, 1.18-1-23

canon law rules, and. *see also* canon law

failure to implement, 1.25, 4.88, 4.90

ignorance of, 4.87

Commission, contact with, 2.10

communications between, 1.63-1.69

cover-up by, 1.35, 1.113

initiatives by, 7.44-7.57. *see also* child protection advisory panel; Child Protection Service; *Framework Document* (1996)

offending priests, dealing with, 1.81-1.86

'pastoral approach,' 4.90

penal process. *see* canonical trials

reputations, concern for, 1.15, 1.30

State authorities, communications with, 1.101

State enforcement of child protection, and, 1.100

Church courts, 4.11. *see also* canonical trials

Church law. *see* canon law

Church of Ireland, 10.36

Churchill, Fr Paul, 7.17, 7.22

Cicero*, Fr, 1.54, 30.1-30.29

Commission's assessment, 30.24-30.29

Cistercian Order, 35.20, 35.22

civil legal actions, 12.29, 12.36, 13.68, 17.15, 36.11, 44.9, 47.4, 47.5, 52.21, 58.28-58.29

Cleary, Fr (Vincentian), 22.9, 22.10

Clemens*, Fr, 31.1-31.16

Commission's assessment, 31.16

clerical child sex offenders, 1.13, 1.34

advisory panel guidelines. *see* child protection advisory panel (Dublin Archdiocese)

canon law rules for dealing with. *see* canon law

complaints against. *see* complaints
 contacts between, 1.76-1.80, 21.22
 criminal convictions. *see* criminal convictions
 criminal investigations. *see* Garda investigations
 current situation, 8.31, 11.7
 diocesan priests, 1.13
 false accusations. *see* false accusations
 financial provision for, 8.17-8.31
 guilty pleas, 1.11, 11.10
 imputability, concept of, 4.56-4.61
 laicisations. *see* laicisation
 legal fees, 8.30
 monitoring. *see* monitoring of clerical offenders
 number, 1.8
 options for, 4.45-4.80, 7.33
 privileged access to children, 4.2
 re-admission to ministry. *see* return to ministry
 religious orders, members of, 1.13, 1.84. *see also* religious orders
 representative sample. *see* representative sample; *individual names [in bold]*
 reputation of, concerns for, 1.30
 transfers of, 1.66
 treatment. *see* treatment for clerical offenders
 Clerical Fund Society, 8.14, 8.18-8.22, 8.31, 21.29, 24.73, 29.46, 35.35, 42.18, 43.24
 Clogher Road parish, 20.43-20.55, 20.63, 28.24, 28.87, 28.91-28.94, 28.99, 28.101,
 28.106, 28.109, 28.115
 Clonliffe College, 5.32, 10.1, 10.32, 20.18, 20.86, 24.28, 28.3, 28.81, 32.4, 34.5,
 34.6, 35.2, 35.19
 administration, 10.1
 admission requirements, 10.3-10.7
 children's homes, students' visits to, 28.8, 28.13, 41.9-41.11
 formation of priests. *see* education/formation of priests
 Clonskeagh parish, 28.67, 28.73, 28.76
 Clontarf, 20.82
 Cloyne diocese, 2.3

coadjutor bishops, 3.17
Code of Canon Law (1983), 4.6
 College of Consultors, 3.30
 Collins, Marie, 13.1, 13.76, 13.77, 13.79
 evidence to Commission, 13.19-13.22, 58.19-58.21, 58.30
 meeting with Archbishop Connell, 13.48-13.49, 58.20
 reporting of abuse, 13.12-13.13, 13.23-13.25, 13.38-13.42
 Columban Fathers, 1.22, 4.78-4.80, 16.1. *see also* Maguire, Fr Patrick
 Policy on Sexual Abuse of Minors, 16.40
 Comiskey, Brendan (auxiliary bishop, 1980-1984), 1.22, 1.48, 3.21, 11.13, 26.10

 Commission to Inquire into Child Abuse. *see* Ryan Commission; *Ryan Report*
 Commissions of Investigation Act 2004, 2.3, 2.10, 2.14, 2.17, 2.25, 2.42
 Committee on Child Abuse (Irish Bishops' Conference), 7.45-7.48
 Committee on Industrial and Reformatory Schools. *see* *Kennedy Report* (1970)
 Common Fund, 8.13-8.14, 8.16
 community care programme (health authorities), 6.42-6.57
 DCC (director of community care), 6.42, 6.46, 6.55
 compensation to victims, 1.106, 4.3, 17.20, 41.2, 41.20. *see also* settlements with
 victims
 Dublin Archdiocese, payments from, 8.3-8.4
 insurance cover. *see* insurance
 Payne case, 24.75-24.78
 Stewardship Trust, 8.5-8.10
 complainants, 1.102-1.106, 2.11, 2.12, 6.3, 58.1-58.30
 archdiocesan support services for, 8.11-8.12
 betrayal, sense of, 58.14-58.21
 child protection advisory panel, and, 7.31, 7.41
 Church authorities, treatment by, 1.35, 7.18-7.20, 58.14-58.21
 post-1995, 58.23-58.30
 civil proceedings. *see* civil legal actions
 Commission, contacts with, 2.11-2.12
 compensation for. *see* compensation
 concerns of, 4.2

counselling for. *see* counselling
 delay in making complaint. *see* delay
 false accusations by. *see* false accusations
 families, effect on, 58.10-58.13
 fear of not being believed, 58.8-58.9
 gender ratio, 1.10, 11.12
 relationship difficulties, 58.2
 religious belief, effect on, 58.3
 reporting of complaints, 58.22
 settlements. *see* settlements with victims
 stated effects of abuse, 58.5-58.7
 support structures, 1.111
 transference of guilt, 58.4
 victim charter, 5.7
 complaints, 11.9-11.12
 anonymous, 1.29, 4.35
 archdiocesan personnel dealing with, 11.13
 Church authorities, treatment by, 1.29
 false accusations. *see* false accusations
 late complaints, 11.5
 number of, 1.8-1.12, 1.109, 11.1, 11.9
 representative sample. *see* representative sample
 time periods, 1.19
 Conference of Religious of Ireland (CORI), 3.39, 8.12
 confidentiality/secretcy, 1.15
 canon law, requirement in, 1.27-1.33, 4.25-4.27, 4.82-4.86. *see also* secret archive
 Commission memorandum on, 2.14
 shredding of documents, 15.17-15.18
 Congregation for Catholic Education for Seminaries and Educational Institutions,
 10.34
 Congregation for the Clergy (Rome), 3.45, 7.13
 Congregation for the Doctrine of the Faith (Rome), 1.18, 3.45, 4.69, 20.145, 20.148,
 27.36
 Commission's contacts with, 2.23, 2.24
 referral of sex abuse allegations to, 4.29

Connell, Desmond (Archbishop of Dublin, 1988-2004), 1.23, 1.26, 1.36, 1.42-1.46,
 1.50, 1.66, 3.17, 3.24, 3.45, 4.65, 4.88, 5.15-5.16, 7.3, 7.15, 7.21, 9.24, 17.11,
 17.36, 20.99
 advisory panel recommendations, implementation of, 7.29-7.30
 canonical advisers, 4.21
 Garda investigations, and, 5.28, 5.33
 handling of complaints, 3.22, 12.22, 12.25, 12.49, 13.15-13.18, 13.22, 13.24,
 13.35, 13.72-13.75, 17.44, 21.9, 21.18, 22.23, 23.9, 25.11, 25.12, 26.18-
 26.23, 29.41-29.42, 30.15, 30.18, 30.23, 33.14, 33.16, 33.19, 33.21, 33.24,
 33.26, 33.34, 34.4, 34.8, 34.25, 35.16, 35.20, 35.27, 35.28, 35.34-35.35,
 36.12, 37.26, 38.13, 41.25, 41.35, 42.9, 42.15, 42.17, 43.5, 43.12, 46.4, 46.6,
 48.5, 48.19, 48.27, 48.30, 49.3, 50.12, 55.5, 58.20
 Carney case, 28.99, 28.101-28.106, 28.109, 28.114, 28.127

 Payne case, 24.3, 24.29, 24.33, 24.37, 24.40, 24.47, 24.53, 24.59, 24.62-24.64,
 24.63, 24.69-24.70, 24.75-24.78, 24.80-24.81, 58.20
 Septimus case, 27.1, 27.9, 27.19, 27.22, 27.28, 27.35-27.36, 27.39
 legal privilege issue, and, 2.28, 2.29, 2.33-2.35
 medical experts, views on, 24.22
 meetings with victims, 13.48-13.49, 29.41
 reporting of complaints to Gardaí, 1.96, 13.24
 statements on child abuse, 13.55
 Connolly, Msgr, 10.38
 Constitution of Ireland, 5.50, 5.55, 5.61
 Cooney, Dr John, 20.151, 20.152, 20.155, 28.60, 28.64, 28.65, 28.72, 28.75, 28.81,
 28.84

Cornelius*, Fr, 54.1-54.7
 Costigan, Garda Commissioner, 1.92, 13.5
 Council of Priests, 3.29
 counselling, 7.20, 7.42

 cover-up by Church authorities, 1.35, 1.113

CPS. see Child Protection Service (Dublin Archdiocese)

Crimen Solicitationis (1922 and 1962), 2.23, 4.6, 4.18-4.28

- Dublin Archdiocese, use in, 4.21-4.24
- procedural requirements, 4.25-4.28
- secrecy requirement, 4.25-4.27

criminal convictions, 11.10, 13.53-13.54, 16.56-16.69, 24.69, 26.33, 29.39, 32.38, 38.11, 41.38

Criminal Law Act 1976, 55.12

Criminal Law Act 1997, 5.38

Criminal Law (Amendment) act 1885, 39.18

criminal proceedings. see Director of Public Prosecutions; Garda investigations

Crosscare programme, 3.4

Crumlin children's hospital. see Our Lady's Hospital for Sick Children, Crumlin

Crumlin garda station, 12.27

Crumlin parish, 12.4, 12.10-12.36, 12.46

culture of secrecy. see confidentiality/secrecy

Cunnane, Joseph (archbishop of Tuam), 35.13, 35.14

Curial Trust, 8.3, 8.12, 8.22-8.25, 8.26, 8.31, 24.73, 24.78

Curley, Fr Con, 20.64, 20.65, 20.66, 20.92, 20.95-20.96, 20.102

Curtin, Msgr Jerome, 11.13, 12.16, 26.25, 26.27, 28.68

Cyproterone Acetate, 20.72

Dante*, Fr, 43.1-43.27

- Commission's assessment, 43.25-43.27

Daryus*, Fr, 36.1-36.13

- Commission's assessment, 36.13

Daughters of the Heart of Mary. see St Joseph's orphanage, Tivoli Road

deaneries, 3.25

Decalogue (Ten Commandments), 4.32

defamation, 24.58, 27.29

- civil and church law, differences between, 24.29

delay, 12.28, 17.22, 27.44, 32.8, 32.54, 36.10, 39.14, 53.13

- complainant delay, 5.46, 5.52-5.60
- fair procedures, and, 5.50-5.62

prosecutorial delay, 5.61-5.62
 test to be applied, 5.59
 Delgany, Co. Wicklow. *see* Carmelite monastery, Delgany
 Department of Education and Science, 2.10, 41.37, 41.43
 Department of Health and Children, 2.9, 2.10, 6.55
 child abuse guidelines, 5.21-5.22, 6.68-6.76, 29.34. *see also* *Children First*
 guidelines (1999)
 Department of Justice, Equality and Law Reform, 5.7
 Depo-Provera, 20.67-20.72
 diocesan curia, 3.35
 Director of Public Prosecutions (DPP), 2.10, 2.17, 5.1, 5.44-5.65, 21.8, 48.18, 53.12
 Carney case, 28.32, 28.51, 28.53, 28.127
 change of mind by, 5.65, 35.49
 decisions not to prosecute, 5.45-5.46, 12.28, 17.22, 22.21, 27.16, 27.42, 27.44,
 28.127, 29.38, 31.14, 32.8, 32.54, 36.10, 39.14, 42.6, 45.18, 46.3, 48.24,
 53.13, 55.11
 delay and fair procedures, 5.46, 5.50-5.62. *see also* delay
 independence, 5.48
 prejudice, assessment of, 5.63-5.64
 prosecution of clerical offenders, 5.49, 20.108-20.111, 24.66, 27.42-27.45, 28.53,
 32.35
 prosecutorial delay, 5.61-5.62
 submission of garda file to, 5.5-5.6, 20.108
 Discalced Carmelites, 11.15
 discovery of documents, 2.17-2.36
 HSE, Commission's dealings with, 6.60-6.66
 legal challenge, 2.33-2.35
 legal privilege, 2.25-2.32
 religious orders, 2.36
 Rome, documents held by, 2.23-2.24
 dismissal from clerical state, 1.26, 4.56, 28.120

 documents. *see also* archdiocesan documents; discovery of documents; HSE
 Vatican, held by, 2.23-2.24

Dolan, Msgr John (chancellor, 1997-), 4.2, 4.11, 4.12, 4.23, 4.29, 4.41, 4.84, 4.85, 7.2, 7.43, 11.13, 17.34, 25.12, 47.2
Framework Document (1996), and, 7.12-7.14, 7.17-7.19
 handling of complaints, 16.52, 20.168, 21.15, 21.20-21.21, 23.11, 24.67, 24.72, 26.17, 26.41, 27.31, 27.33, 30.18, 30.20, 31.13, 32.32, 35.29, 36.8, 36.13, 37.35, 41.34, 41.39, 43.4, 43.6-43.8, 44.5, 48.17, 48.19, 55.4, 55.5, 55.7-55.9

Domestic Violence/Sexual Assault Investigation Unit (DVSAIU), 5.6, 5.10-5.12

Donaghmede parish, 28.87

Donato*, Fr, 25.1-25.17
 Commission's assessment, 25.14-25.17

Donnycarney parish, 1.66, 29.9, 29.12, 29.13-29.25, 29.36, 29.54, 29.55

Doran, Fr Kevin, 10.10

Doyle, Fr Thomas, 4.48

DPP. see Director of Public Prosecutions

Drennan, Martin (auxiliary bishop, 1997-2005), 11.13, 51.1-51.2

Drimnagh, 23.2, 23.4, 24.1

Drogheda, Co. Louth. see St Vincent's industrial school

drug therapy, 20.67-20.72, 20.151

Dublin Archdiocese, 1.14-1.16, 1.90, 2.17, 3.1-3.49, 3.24
 activities of, 3.4
 Ad Limina reports, 3.47, 3.48
 archbishops. see archbishops of Dublin; *individual archbishops*
 auxiliary bishops. see auxiliary bishops; *individual bishops*
 chancellery. see chancellery
 Commission's dealings with, 1.87-1.89, 2.10
 communications, 1.64-1.69
 consultative bodies, 3.29-3.30
 documents and files, access to. see archdiocesan documents
 finances of. see finances of Dublin Archdiocese
 handling of complaints, 1.29, 1.30-1.31, 1.35, 1.81-1.86, 3.18-3.24. see also child protection advisory panel; Child Protection Service
 awareness of abuse, 1.14, 1.17-1.24

canon law rules, and, 4.1-4.94
 comparisons with other dioceses, 1.107-1.112
 cover-up, 1.113
Framework Document (1996), and, 7.15-7.20
 Garda, contacts with, 5.13-5.18
 legal status, 3.5-3.8
 offending priests, dealing with, 1.81-1.86, 4.47-4.72, 4.90. *see also* canonical trials; *individuals in representative sample* [names in bold]
 personnel involved, 11.13. *see also individual officeholders*
 priorities in, 1.15, 1.30, 1.113
 reporting to civil authorities. *see* reporting of complaints
 secrecy, culture of, 1.27-1.33, 4.82-4.86
 treatment of complainants. *see* complainants
 management of, 1.55-1.62, 3.9-3.16
 parishes, 3.3
 population, 3.2, 3.3
 priests, 3.3, 3.26-3.33. *see also* priests
 religious orders, communications with, 1.69
 structures and procedures, 1.16
 Vatican/Rome, relationship with, 3.44-3.49
 vicars forane (deans), 3.25
 Dublin Archdiocese Commission of Investigation. *see* Dublin Commission
 Dublin bombings (1974), 20.129
 Dublin Circuit Court, 29.39
 Dublin Commission, 1.7, 1.8
 appointment, 2.1
 church authorities, dealings with, 1.87-1.89, 2.10
 complainants, contacts with, 2.11-2.12
 costs of, 2.42
 definition of child sexual abuse, 2.9
 discovery process. *see* discovery of documents
 establishment, 1.1, 2.5-2.7
 function of, 1.4
 hearings, 2.14-2.16

investigation of representative sample. see representative sample
 Memorandum on Confidentiality, 2.14
 practice and procedure, 2.13
 preliminary inquiries, 2.10
 report, 2.40
 research, 2.38-2.39
 terms of reference, 2.2-2.3, 2.8
 time period under investigation, 2.2
 Dublin Corporation, 6.33
 Dublin County Council, 6.33
 Dublin Diocesan Clerical Fund Society. see Clerical Fund Society
 Dublin Diocesan Directory, 20.172
Dublin Diocesan Guidebook, 13.35
 Dublin Diocesan Pilgrimage to Lourdes, 49.1, 51.1, 51.5, 51.6
 Dublin Health Authority, 6.33, 6.40-6.41, 28.11
 Dublin Metropolitan Region (DMR), 5.3
 Dublin Metropolitan Tribunal, 16.61, 16.64, 16.73
 Dublin Regional Marriage Tribunal, 3.37, 24.2, 24.4, 24.29, 24.40, 24.47, 24.54, 30.1,
 30.2, 30.9, 30.18, 30.19, 30.20
 Duffy, Fr Aquinas, 21.21, 52.14, 52.15
 Dunlavin parish, 28.13, 41.1, 41.8, 41.12-41.17, 41.34, 41.37
 Dunne, Patrick (auxiliary bishop, 1946-1984), 11.13
 investigation of complaints, 12.6, 13.6, 13.8, 13.11, 13.69, 13.70

 Eadestown parish, 20.6
 East Wall parish, 35.10-35.11, 35.19, 35.48
 Eastern Health Board (EHB), 6.33, 6.36, 6.56, 13.36, 28.5, 28.6, 28.11, 40.18-40.19,
 40.36, 41.34
 child protection services, 6.42-6.48
 childcare manager, role of, 6.47-6.48
 community care programme, 6.42-6.48
 social worker service, 6.42, 6.43, 6.47, 6.48
 Eastern Regional Health Authority (ERHA), 6.34, 6.36, 6.49, 6.50

Edenmore parish, 13.14, 13.35, 13.43-13.44, 13.51, 13.74, 26.8

Edmundus*, Fr, 1.37, 1.89, 1.92, 3.18, 4.21, 13.1-13.83

Commission's assessment, 13.69-13.83

Education Fund (Dublin Archdiocese), 8.22

education/formation of priests, 10.1-10.38

celibacy, training in, 10.18

child sexual abuse, education on issues of, 10.19-10.31

Clonliffe College, 10.1-10.31

current position, 10.32-10.35

eligibility and admission, 10.3-10.7

evaluation during formation, 10.11

Framework Document recommendations, 10.21-10.28

Garda vetting, 10.10

homosexual ideation, and, 10.32, 10.34, 10.37-10.38

Maynooth College, 10.32, 10.33, 10.36-10.38

Our Children Our Church, recommendations of, 10.31

pastoral placement, 10.12-10.14, 10.22

programme of training, 10.2

psychological assessment, 10.8-10.9, 10.19, 10.21, 10.34

screening of candidates, 10.21, 10.34-10.35

sexual activity, 10.32

sexual history, consideration of, 10.32

sexuality, and, 10.18, 10.32

spiritual director, 10.15-10.17

EHB. *see* Eastern Health Board

Elliot, Ian, 7.55

Enniskerry, Co. Wicklow, 38.1, 38.6, 41.8

Episcopal Conference. *see* Irish Catholic Bishops' Conference

episcopal vicars, 3.11, 8.1, 11.13

Eureka (California), 20.78-20.79, 20.127

Ezio*, Fr, 57.1-57.5

fair procedures, delay and. *see* delay

false accusations, 1.12, 11.11, 55.1. *see also Ricardus*, Fr*
 criminal proceedings against complainant, 55.12

False Recovered Memory Syndrome, 53.5

Faoiseamh Helpline, 7.20, 7.42, 8.12, 43.9, 52.15, 55.7

Ferns diocese, 1.79, 3.13, 4.50, 24.47

Ferns inquiry, 3.15, 4.50

Ferns Report, 1.95, 1.107, 2.2, 5.8, 6.25, 6.27, 6.31, 10.32

Field, Raymond (auxiliary bishop, 1997-), 1.23, 1.65, 3.24, 11.13, 21.21, 21.28,
 42.10, 42.16, 42.19
 investigation of complaints, 48.5-48.6, 48.11, 48.15-48.21, 48.29

finances of Dublin Archdiocese, 8.1-8.31
 assets, management of, 3.6
 clerical child sex abusers, support for, 8.17-8.31
 compensation to victims, 8.3-8.10
 support services for victims, 8.11-8.12
 supports for priests, 8.13-8.31, 24.55. *see also Clerical Fund Society*

'fit person' procedure. *see Children Act 1908*

Forristal, Laurence (auxiliary bishop, 1980-1981), 1.22, 1.54, 1.59, 7.2, 11.13, 12.10,
 12.43, 13.21
 handling of complaints, 1.54, 21.2, 21.4, 23.1, 23.5-23.9, 30.2, 30.10, 30.12, 30.13-
 30.15, 30.18-30.23, 30.27, 30.29

Fortune, Fr Sean, 1.79, 21.22

fostering of children, 28.5, 28.6

Framework Document (1996), 1.16, 1.89, 1.101, 1.111, 2.2, 3.39, 5.13, 7.1-7.57,
 10.20, 13.48, 23.7, 28.126, 30.13, 31.14, 32.44, 40.12, 41.43
 education/formation of priests, 10.21-10.28
 guidelines, 7.6, 58.24-58.26
 implementation by Archdiocese, 7.15-7.20, 13.20, 13.77, 31.15, 37.24, 43.25,
 58.26-58.27
 reporting policy, 1.33, 5.14, 5.15, 7.7-7.8
 review and replacement, 7.53
 Rome's response to, 7.13-7.14
 status of, 3.41, 7.11-7.14, 13.49
 structures and procedures for dealing with allegations, 7.9-7.10

- support person, 58.24
- training days, 7.12
- France, 43.2, 43.3, 43.9
- Francis Street parish, 26.14

Gallagher, Fr Donal, 1.69, 22.1-22.31

- Commission's assessment, 22.27-22.31
- Garda Commissioners, 1.92, 1.93, 5.2, 5.5, 13.5
- Garda investigations, 1.52, 1.79, 1.92-1.96, 1.95, 2.17, 5.1-5.43
 - analytical overview, 5.26
 - Archdiocese, contact with, 1.92, 5.13-5.18
 - documents, access to, 5.27-5.33
 - discovery process, 2.20
 - legal privilege, 5.30-5.31
 - material considered, 5.32-5.34
 - Dublin Metropolitan Region (DMR), 5.3
 - DVSAIU, 5.10-5.12
 - health authorities, referrals by, 5.21-5.23
 - individual cases. *see individual names in representative sample* [in **bold**]
 - misprision of felony investigation, 5.35-5.39, 29.52
 - NBCI. *see* National Bureau of Criminal Investigation
 - outcome of, 5.40-5.43
 - post-2002, 5.25-5.43
 - pre-2002, 5.24, 5.42
 - procedure, 5.4-5.7
 - PULSE recording, 5.8
 - recording of complaints, 5.43
 - reporting of complaints. *see* reporting of complaints
 - sex abuse unit (Harcourt Square), 1.95, 35.41
 - submission of file to DPP, 5.5-5.6
 - vetting of candidates for priesthood, 10.10
 - Woman and Child Unit, 5.9
- Garland, Finbar (garda), 28.29, 28.30, 28.32, 28.53, 28.59

Garland, Philip, 3.55, 11.13, 14.3, 14.6, 43.19, 45.4, 48.28, 48.29, 55.13

Gay Byrne Show (RTE), 24.41

General Charities Fund, 8.22

Giraldus*, Fr, 45.1-45.22

 Commission's assessment, 45.20-45.22

Glasthule parish, 26.1, 26.3, 26.9, 26.13

Gleeson, Fr Paddy, 7.17, 35.35, 35.40, 35.41, 42.14, 43.9, 43.12, 43.13

Glendalough, Co. Wicklow, 35.1, 35.15, 35.21, 35.56, 35.60

Glennon, Msgr Richard (chancellor, 1945-1955), 1.89, 11.13

 investigation of complaints, 17.5-17.6, 20.38, 21.2, 21.4, 32.5

Granada Institute, Dublin, 1.70, 1.73, 11.16

 treatment and assessments, 12.22, 13.59, 13.62, 17.34, 17.35, 21.9-21.16, 21.29, 24.40, 24.67, 27.8, 27.13, 27.17, 27.27, 27.31, 29.45, 29.49, 30.15-30.17, 30.18, 31.9, 31.14, 32.9, 32.11, 32.14, 32.31, 32.33, 32.36, 32.40, 33.19, 33.29-33.32, 34.17, 35.3, 35.23, 35.26, 37.44-37.47, 39.22-39.30, 39.39, 39.40, 40.20, 40.24, 40.30, 41.3, 42.16-42.18, 43.7, 43.16-43.17, 45.9, 45.11, 45.13, 46.8-46.9, 48.24, 48.25, 51.2

Grand Rapids, Michigan (USA), 20.135

The Grange orphanage, Kill O' The Grange, 28.8, 28.18-28.24, 28.25, 28.108

Green Book. *see Framework Document* (1996)

An Grianán, 28.22, 28.25-28.26

grooming, 4.2, 16.3, 16.12, 40.20

Guidelines for the Identification and Management of Non-Accidental Injury to Children (1980), 6.70

guidelines on child sexual abuse, 42.20

 church authorities, 7.6, 7.26-7.43, 7.53-7.55. *see also canon law; Framework Document*

 health authorities, 5.21-5.22, 6.4, 6.68-6.76, 29.34. *see also Children First guidelines*

 reporting to civil authorities. *see reporting of complaints*

Guido*, Fr, 1.12, 11.11, 51.1-51.14

 Commission's assessment, 51.14

Halston Street, 12.4

Harold's Cross parish, 52.3, 52.4, 52.7, 52.15, 52.19, 52.20, 52.21

Harrington Street parish, 12.4

Health Acts, 6.26, 6.33, 6.42

health authorities, 1.97-1.98, 6.1-6.76. *see also* health boards; HSE

- child protection role, 6.7, 6.9, 6.27-6.32, 6.37-6.51. *see also* child protection services (health authorities)
- statutory duties (1991 Act), 6.21-6.32
- community care programme, 6.42-6.57
- 'fit person' procedure, 6.9, 6.17, 6.18
- general powers and duties, 1.97, 1.99
- guidelines on child sex abuse, 5.21-5.22, 6.68-6.76, 29.34
- handling of child abuse complaints, 1.98, 6.1-6.6, 6.27-6.32, 6.55-6.57
 - individual cases. *see under names of individuals [in bold]*
- legislation relating to, 6.10-6.26
- reporting of complaints to, 5.22-5.23
- structural changes, 6.5, 6.33-6.36

health boards, 1.97, 1.98, 6.9. *see also* health authorities; *individual health boards*

- child protection role, 6.9, 6.21-6.31, 6.42-6.50. *see also* child protection services
- establishment, 6.33, 6.42
- handling of complaints, 29.28
- records, keeping of, 6.29
- residential institutions, role in relation to, 6.19-6.20
- structural changes, 6.33-6.36

Health Services Research Centre (RCSI), 7.46-7.47

hearings of Commission, 2.14-2.16

High Street parish, 52.3, 52.9, 52.11, 52.17, 52.19, 52.21

Higher Education and Training Awards Council (HETAC), 10.2

Holy Cross College, Dublin. *see* Clonliffe College

Holy Ghost Fathers, 35.2

Holy See. *see* Rome/Vatican

homosexuality, 21.2, 21.3, 21.10, 28.119, 33.35, 49.1, 51.2

apostolate to gay community, 21.2, 21.3, 21.31

candidates for priesthood, and, 10.32, 10.34, 10.37-10.38

Horatio*, Fr, 1.64, 1.79, 21.1-21.33

Commission's assessment, 21.31-21.33

hospital chaplains, 24.1

Hospitaller Order of St John of God. *see* St John of God Order

Houlihan, Brendan, 10.11

Howth District Court, 28.56

Howth parish, 41.8, 41.34

HSE (Health Service Executive), 2.10, 2.17, 11.5, 18.6, 43.13, 45.5, 45.7, 45.13-45.17

audit, 7.51

clerical child sex abuse, and, 1.97, 1.98, 5.21, 6.27

Commission's dealings with, 2.19, 6.6, 6.59-6.67, 45.22

documentation held by, 6.6

discovery process, 2.19, 6.60-6.66

filing system, 2.19, 6.60

need for collation and maintenance of, 6.29-6.30

provision to Commission, 45.22

duty to communicate information, 6.31-6.32

establishment (2005), 6.5, 6.35

inter agency review committee, 5.19

local health offices (LHOs), 6.51

powers and functions, 6.26, 6.35

Hugo*, Fr, 1.54, 23.1-23.15

Commission's assessment, 23.13-23.15

Hurley, Mark (bishop of Santa Rosa), 20.74, 20.75, 20.78-20.81, 20.84, 20.124

Hussey, Judge Gillian, 7.50

Ignatio*, Fr, 53.1-53.16

imputability, concept of, 4.56-4.61, 4.93

industrial and reformatory schools. *see* residential institutions

institutional care. *see* residential institutions

institutional immunity, 1.113

insurance, 1.20, 1.21, 3.38, 8.3, 9.1-9.39, 20.100

- agreements with Church & General
 - first 'special policy,' 9.6-9.12, 9.36
 - lump sum agreement, 9.22-9.23
 - reassessment, 9.17-9.21
 - re-opening of negotiations, 9.24-9.32
 - second agreement, 9.30-9.32
- Commission's assessment, 9.35-9.39
- compensation claims, receipt of, 9.24
- cover for liability arising from 1996, 9.33-9.34
- information known to the Archdiocese, 9.11
- insurers, 9.1
- need for insurance cover, 9.2-9.5
- parish protection policies, 9.13-9.16
- policy limits, 9.12
 - exclusion of liability, 9.9, 9.14, 9.17
- premiums, 9.12
- requirements on Archbishop, 9.7

Interpol, 45.10

investigation of complaints

- Church, by. *see* canon law; Church authorities; Dublin Archdiocese
- individual cases in representative sample. *see individual names* [in bold]
- State, by. *see* Garda investigations

Ioannes*, Fr, 1.38, 1.78, 1.89, 17.1-17.46, 32.5, 32.6

- Commission's assessment, 17.42-17.46

Irish Catholic Bishops' Conference, 3.38-3.43, 7.2

- Advisory Committee on Child Sexual Abuse, 3.38, 3.39, 5.13, 7.2-7.5
- child protection office, 7.49, 10.10
- Committee on child abuse, 7.45
- independent audit, 7.50-7.51
- initiatives by, 7.44-7.57. *see also Framework Document (1996)*
- national training initiative, 7.52
- powers of, 3.40
- research into child abuse, 7.46-7.48

Irish Catholic Property Insurance Company Ltd, 9.1

Irish College (Rome), 10.1, 10.32, 10.33

Irish Society for the Prevention of Cruelty to Children (ISPCC), 6.39

Jacobus*, Fr, 50.1-50.14

Commission's assessment, 50.14

Japan, 16.1, 16.2, 16.7-16.11

Jemez Springs (New Mexico), 20.55-20.62, 20.67-20.72, 20.129, 20.140, 39.6,
39.11, 39.20, 39.22, 39.36

John Paul II, Pope, 3.47

John XXIII, Pope, 4.9

judicial vicars, 24.27, 24.37

Kavanagh, James (auxiliary bishop, 1972-1998), 1.23, 1.47, 1.52, 1.89, 3.24, 21.2,
33.4

awareness of clerical child sex abuse, 1.22

Gardai, contacts with, 28.48-28.49, 28.52

handling of complaints, 1.52, 16.25, 20.14-20.17, 20.33, 29.31

Carney case, 28.6, 28.34, 28.39-28.41, 28.48-28.49, 28.52, 28.54, 28.56, 28.61,
28.63, 28.64, 28.70, 28.78, 28.81, 28.98, 28.106, 28.133, 28.141

Keenan, Dr Marie, 7.48, 10.37

Kelly, Fr Donal, 4.31

Kelly, Fr James, 20.44, 20.52, 28.87

Kennedy, David, 7.22, 7.23, 7.27, 7.41

Kennedy Report (1970), 6.8

Kerry (county), 41.16, 41.19

Kiernan, Sergeant (garda), 28.29, 28.30, 28.31, 28.52, 28.57, 28.59, 28.66

Kildare and Leighlin, diocese of, 3.13

Kill O' The Grange. *see* The Grange orphanage

Kilmore parish, 35.5-35.9, 35.41, 35.48

Kilquade parish, 26.4

Kiltegan Fathers. see St Patrick's Missionary Society, Kiltegan

Kinsella, Fr John, 38.1-38.17

Commission's assessment, 38.16-38.17

Klaudius*, Fr, 40.1-40.31

Commission's assessment, 40.34-40.36

Laffoy Commission, 7.45

laicisation, 7.33, 7.39, 15.8-15.10, 16.61, 18.5, 24.72, 28.120, 40.31, 41.42, 51.13

Lakelands children's home, Sandymount, 28.8

Lane O'Kelly, Dr, 28.84, 28.85, 28.87, 28.88

Laurentius*, Fr, 39.1-39.42

Commission's assessment, 39.34-39.42

law. see canon law; child protection legislation

Law Reform Commission, 2.9

legal actions. see civil legal actions

legal challenge to discovery process, 2.33-2.35

legal costs, 2.42, 8.4, 8.30

legal privilege, 2.25-2.35, 5.30-5.31

legislation. see child protection legislation

limitation periods, in canon law, 4.62-4.64

Liveline (RTE), 5.27, 5.34, 12.37

Livingstone, Fr Benedict, 20.67, 20.140

local health offices (LHOs), 6.51

London, 41.8

Los Angeles diocese (USA), 20.84-20.85, 20.112

Lourdes pilgrimage. see Dublin Diocesan Pilgrimage to Lourdes

McCarthy, Fr Francis, 24.58, 28.2, 28.13, 28.39, 28.68, 28.118, 28.126, 41.1-41.43

Commission's assessment, 41.43

McFeely, Anthony (bishop of Raphoe), 16.13, 16.72, 16.74

McGovern, Joe (Garda superintendent), 20.92-20.96

McGrady, Andrew, 1.14n

McGrath, Fr Aidan (judicial vicar), 4.19, 4.31

McMahon, Msgr James Ardle, 1.89, 11.13, 15.5, 16.25

investigation of complaints, 24.18, 25.10, 28.37, 29.5

case, and, 20.20-20.25, 20.178

McNamara, Kevin (Archbishop of Dublin, 1985-1987), 1.25, 1.36, 1.41, 4.21, 4.88,

9.4, 20.77, 20.99, 20.136

awareness of clerical child sex abuse, 1.21

handling of complaints, 3.22, 17.10, 20.79, 20.81-20.86, 20.125, 22.11, 24.27,

28.78, 28.79, 29.12, 29.14, 29.19, 29.21, 29.24, 29.54, 29.56

insurance cover, and, 9.4, 9.6

McNamee, Fr James, 1.38, 1.66, 12.1-12.51

Commission's assessment, 12.42-12.51

McQuaid, John Charles (Archbishop of Dublin, 1940-1972), 1.19, 1.36, 1.37, 1.56,

1.89, 1.92, 4.21, 26.3, 35.2, 57.1

awareness of clerical child sex abuse, 1.21

handling of complaints, 3.18, 12.6-12.8, 12.43, 13.5-13.11, 13.69-13.71, 15.3, 34.6

Madden, Andrew, 7.4, 8.3, 9.24, 24.4, 24.11, 24.15, 24.28, 24.33, 24.35, 24.38,

24.41, 24.44, 24.67, 58.16, 58.20

compensation settlement. *see under* Payne, Fr Ivan

Magnus*, Fr, 1.12, 11.11, 49.1-49.7

Commission's assessment, 49.6

Maguire, Fr Patrick, 1.22, 1.38, 1.69, 4.36, 16.1-16.75, 28.2, 28.43

Commission's assessment, 16.70-16.75

Mahony, Dr (archbishop of Los Angeles), 20.84, 20.85

Malahide, Co. Dublin, 28.77

Mangan, Fr Cyril, 7.17, 20.166, 52.7, 52.10, 52.15

Marist Fathers, 1.64, 28.67, 28.69, 28.73, 28.75, 28.77

Marius*, Fr, 34.1-34.34

Commission's assessment, 34.32-34.34

marriage tribunal. see Dublin Regional Marriage Tribunal

Martin, Diarmuid (Archbishop of Dublin, 2004-), 1.13, 1.79, 3.17, 3.48-3.49, 8.21, 12.40, 27.39, 43.20, 48.28, 54.6

co-operation with Commission, 1.87

education/formation of priests, 10.33

handling of complaints, 21.22, 21.25, 21.27, 21.29, 28.128, 51.13

legal privilege issue, and, 2.26-2.29, 5.31

publication of settlements, 1.112

reporting of complaints, 21.27

Maynooth College. see St Patrick's College, Maynooth

medical experts, 24.22. see also psychiatric/psychological assessment; *individual practitioners*

Medjugorje, 26.28

Memorandum on Non-Accidental Injury to Children (1977), 6.69

mental reservation, 58.19-58.21

metropolitan bishop, office of, 3.12

Midland Health Board, 6.33

Milltown, 28.67

Milltown Institute of Theology and Philosophy, 10.2

Minister for Health, 6.10, 6.11

Minister for Justice, Equality and Law Reform, 5.2, 7.50

misprision of felony investigation, 5.35-5.39, 29.52

monitoring of clerical offenders, 1.75, 1.82-1.85, 7.38, 7.40, 12.21, 13.57, 13.59, 16.67, 20.44-20.50, 20.45, 20.80, 20.83, 21.29, 24.61-24.62, 29.43-29.49, 34.17, 34.20, 34.44, 35.37, 37.3, 37.25-37.26, 48.28, 48.29

Moone abbey, 35.19, 35.20-35.22

Moore, Fr Harry, 1.65, 26.1-26.42

Commission's assessment, 26.36-26.42

Moriarty, James (auxiliary bishop, 1991-2002), 11.13, 13.14-13.15, 13.43-13.44

Morning Ireland (RTE), 24.76

Mourne Road parish, 24.1

Murphy (Garda Inspector), 28.30, 28.52, 28.57, 28.66

Murray, Donal (auxiliary bishop, 1985-1996), 1.47, 1.53, 1.58, 1.65, 1.89, 3.22,
11.13, 21.6, 26.34

awareness of clerical child sex abuse, 1.22

handling of complaints, 1.53, 12.22-12.25, 12.49, 21.23-21.24, 26.19, 29.4-29.12,
29.15, 29.53, 29.54, 29.56, 31.5, 31.12, 33.6-33.13, 33.18, 33.44

National Board for Safeguarding Children, 7.55

National Bureau of Criminal Investigation (NBCI), 5.6, 5.10, 5.32, 47.3, 52.11

National Child Protection Office (Maynooth), 3.55, 10.10

National Council for Educational Awards, 10.2

National Marriage Appeal Tribunal, 24.29

National Rehabilitation Hospital, Dun Laoghaire, 1.51, 1.66, 35.26, 35.27, 35.35

Naughton Fr Thomas, 1.53, 1.66, 1.89, 6.2, 8.31, 29.1-29.63, 52.2, 58.17

Commission's assessment 29.53 – 29.63

New Mexico (USA), 11.15. *see also* Jemez Springs

Noonan, Fr Mark, 22.14, 22.24

Norbertine Order, 7.3

Norman, Fr James, 13.19, 13.48, 13.55, 13.77, 58.21

Northern Area Health Board, 13.65

Ó Ceallaigh, Fiachra (auxiliary bishop, 1994-), 11.13, 27.14, 27.21, 42.8, 42.21

O'Connor, Maurice (garda chief superintendent), 28.39, 28.40, 28.48-28.49, 28.51,
28.54

O'Donnell, Fr Desmond, 10.36

O'Mahony, Dermot (auxiliary bishop, 1975-1996), 1.23, 1.42, 1.47, 1.48-1.51, 1.67,
3.24, 11.13, 18.3

awareness of clerical child sex abuse, 1.22

confidential documents, shredding of, 15.17-15.18

handling of complaints, 1.49-1.51, 15.8, 15.10, 15.13, 15.14, 15.16-15.19,
15.21, 17.7-17.9, 18.3-18.4, 18.7, 21.3, 21.5, 21.9, 23.9, 23.10, 24.21, 28.6,

28.104, 31.8, 35.26, 35.30-35.32, 35.57, 35.61, 36.6-36.8, 36.13

Payne case, 24.6-24.15, 24.18, 24.23, 24.25, 24.27, 24.28, 24.30, 24.33, 24.43, 24.44, 24.54, 24.62, 24.65, 24.68, 24.79, 24.80

Septimus case, 27.3-27.8, 27.10, 27.13, 27.37-27.38, 27.47-27.48

pastoral care of priests, responsibility for, 24.6, 24.8

Opus Dei, 3.32

oral evidence, 2.15

Orange diocese (USA), 20.112, 20.113-20.114

O'Regan, Msgr John, 11.13, 12.12-12.17, 12.43-12.45

orphanages, 28.11-28.26. *see also* residential institutions

Ó Saorai, Fr (Ayrfield parish)

Carney case, and, 28.30, 28.31, 28.33, 28.36, 28.38, 28.40-28.41, 28.44, 28.50, 28.140

Ossory, diocese of, 3.13, 30.1, 30.2, 30.9, 30.13, 30.18, 30.19, 30.27

Our Children Our Church (2005), 3.41, 5.18, 5.20, 7.52, 7.53, 10.29

education/formation of priests, 10.31

Our Duty to Care (2002), 6.75

Our Lady's Hospital for Sick Children, Crumlin, 2.10, 13.2, 13.4-13.22, 13.5

child sex abuse assessment unit, 6.54, 6.56

complaints of abuse in, 24.1, 24.3, 24.44, 24.45, 24.47, 24.48, 24.50-24.51

paedophilia, 1.76, 17.15, 17.32, 20.67, 20.83, 28.119, 28.122, 39.22

imputability in canon law, and, 4.59-4.61, 4.93

Palmerstown parish, 20.6, 20.63

Papal Nuncio, 2.24, 3.50

parents of victims

concerns of, 4.2

effects on, 58.10-58.13

Pastoral Services Fund, 8.12

Paul VI, Pope, 4.10

Payne, Fr Ivan, 1.41, 1.44, 1.50, 4.29, 4.36, 7.4, 8.3, 17.35, 24.1-24.83, 41.36

Commission's assessment, 24.79-24.83

penal provisions in church law. *see* canon law; canonical trials

personal prelatures, 3.32

Phibsborough. *see* St Peter's parish

Phineas*, Fr, 14.1-14.8

Poor of Dublin Fund, 8.26, 24.73

Pope, the, 3.44, 3.45

Portmarnock, 47.1

Portmarnock Community Centre, 28.74, 28.75

Portmarnock Leisure Centre, 28.87

Post Graduate Fund, 8.27-8.29

prescription, period of, 4.62-4.64

priests. *see also* College of Consultors; Council of Priests

- appointment of, 1.56
- assignment to parishes, 1.47
- awareness of clerical child sex abuse, 1.24
- children, sexual abuse of. *see* clerical child sex offenders
- duty of obedience, 3.28
- formation. *see* education/formation of priests
- income, 8.13-8.15
- parish priests and curates, 3.26-3.33
- personal prelatures, 3.32
- religious orders, from, 3.31-3.33
- representative sample. *see* representative sample
- supports for, 8.13-8.31
- termination payments, 8.16-8.17

Prime Time (RTÉ), 5.25, 5.27, 5.34, 13.63-13.66, 13.83. *see also* *Cardinal Secrets*

Probation Act, 28.59

Probation and Welfare Service, 1.83, 16.66, 16.67

Pro-Cathedral, Dublin, 1.78, 20.3-20.25, 20.4-20.8, 20.15-20.17

procedural rules (Vatican), 4.17-4.29. *see also* *Crimen Solicitationis*; *Sacramentorum Sanctitatis Tutela* (2001)

Propaganda College (Rome), 10.1

prosecution of offences. *see* Director of Public Prosecutions

pseudonyms, 7.27

psychiatric/psychological assessment, 1.70-1.72, 11.14. *see also* treatment for
clerical offenders
candidates for priesthood, 10.8-10.9, 10.19, 10.21, 10.34
representative sample, priests in. *see individual names [in bold]*

Public Assistance Act 1939, 6.39

PULSE, 5.8

Q (M) v Robert Gleeson and others, 6.31

Quinton*, Fr, 33.1-33.43
Commission's assessment, 33.41-33.45

Raheny, 28.77

Rape Crisis Centre, 28.78, 41.6

Raphoe, diocese of, 16.12-16.17, 16.26, 16.44

Ratzinger, Cardinal Joseph (later Pope Benedict XVI), 3.45, 27.36

Read, Msgr Gordon, 4.7, 4.19

recidivism, 1.44, 1.73

recording of cases, 1.89, 4.37
Garda, by, 5.43
Garda PULSE system, 5.8
health authorities, by, 1.98

reformatory schools. *see* residential institutions

rehabilitation, 1.75, 1.81. *see also* treatment for clerical offenders

Reidy, Dr Maurice, 20.18-20.20

religious orders, 2.10, 3.31-3.33, 29.1, 32.1, 33.1, 37.1, 39.1, 40.1, 44.2, 45.1, 46.1,
50.1, 53.1, 57.1. *see also* St Joseph's orphanage; *individual orders*
Archdiocese, communications with, 1.69
awareness of clerical child sex abuse, 1.22
co-operation with Commission, 1.87-1.89
discovery of documents, 2.36
monitoring of clerical offenders, 1.84
orphanages, 28.11-28.26

removal of faculties. see canonical precepts

Report of the Commission to Inquire into Child Abuse. see Ryan Report

reporting of complaints, 1.33, 1.36, 1.96, 1.111, 18.6, 20.4, 20.33, 20.89, 21.7-21.8, 21.27, 26.24-26.25, 27.12, 30.28, 31.9, 32.40, 34.19, 34.24, 36.9, 37.24, 40.18, 40.34, 41.6, 41.26, 41.34, 41.43, 43.12, 45.5, 50.6, 51.8, 51.9, 53.7, 55.5, 58.22

Church guidelines, 5.14-5.18, 7.7-7.8

confidentiality issues, 7.8

Department of Health guidelines, 5.21, 6.71, 6.72

failure to report, 1.32

health boards, 5.22-5.23

representative sample, 1.3, 1.8, 1.10, 1.109, 2.2

gender ratio of victims, 11.12

investigation by Commission, 2.37. *see also individual names* [in bold]

number of complaints, 1.8-1.12, 11.9

priests, 11.7-11.8

selection of sample, 11.1-11.6

research into child abuse, 7.46-7.48

Residential Institutions Redress Board, 24.3, 28.127

residential institutions, 6.8, 6.19, 6.20, 28.8-28.26, 39.10, 41.9-41.11, 41.23-41.24, 41.29-41.32, 41.33, 44.2-44.4, 45.2

health boards, role of, 6.20

visits from Clonliffe students, 28.8, 28.13, 41.9-41.11

restorative justice, 58.28

return to ministry, 1.73-1.75, 20.43

advisory panel guidelines in relation to, 7.32-7.43

conditions for, 7.33-7.34

individual cases, 15.12-15.15, 15.20

monitoring and supervision, 7.38. *see also* monitoring of clerical offenders

practical implications, 7.36

risk assessment, 7.34-7.35

Reynolds, Fr Noel, 1.51, 1.66, 30.24, 35.1-35.64

Commission's assessment, 35.56-35.64

Ricardus*, Fr, 1.12, 11.11, 55.1-55.18

Commission's assessment, 55.17-55.18

Ringsend garda station, 29.34

Ringsend parish, 26.4, 29.12, 29.26-29.33, 29.36, 29.55, 29.58, 29.61

Rolestown parish, 12.4

Roman Rota, 3.45, 16.64, 16.73

Rome/Vatican. *see also* Papal Nuncio

- appeals to,
- awareness of clerical sex abuse, 1.18
- Curia, 3.35n, 10.34
- documents held by, 2.23-2.24
- Dublin Archdiocese, and, 3.44-3.49
- Framework Document* (1996), and, 3.41, 7.13-7.14
- rules for dealing with clerical sex abuse, 4.17-4.64. *see also under* canon law

Rossetti, Fr, 35.19

Rotunda Hospital, Dublin, 20.89

Royal College of Surgeons in Ireland, 7.46

RTÉ, 12.21, 17.36, 24.41, 24.76, 38.3. *see also Liveline; Morning Ireland; Prime Time*

Rufus*, Fr, 52.1-52.24

- Commission's assessment, 52.23-52.24

Rundle, Mervyn, 29.13-29.21, 29.39, 29.40, 29.52, 29.62

Ryan, Dermot (Archbishop of Dublin, 1972-1984), 1.20, 1.23, 1.25, 1.36, 1.38, 1.41, 1.49, 1.50, 1.56, 1.64, 3.24, 4.21, 4.36, 4.88, 20.77, 24.6, 24.8, 25.7, 27.3, 27.37, 27.48, 29.14, 35.6, 57.1

- awareness of clerical child sex abuse, 1.21
- handling of complaints, 3.19-3.21, 12.10, 12.12, 12.18, 12.46-12.48, 15.5, 16.25, 16.27, 16.28, 16.72, 17.8-17.9, 18.4, 21.3, 21.31, 23.6, 23.8, 23.10, 29.6, 35.12-35.14
- Carney case, 28.4, 28.5, 28.6, 28.37, 28.46, 28.48, 28.63-28.65, 28.70, 28.71, 28.74-28.76
- Moore case, 26.1-26.2, 26.5, 26.8, 26.10, 26.11-26.12, 26.36-26.40
- Payne case, 24.5, 24.7, 24.9, 24.14, 24.27, 24.79

Ryan Commission, 1.6, 1.7, 7.45

Ryan Report, 1.5-1.7, 6.19

Sacramento diocese (California), 1.49, 15.12, 15.13 – 15.16, 15.21, 20.115, 20.117,
20.118, 20.124-20.126, 20.137, 20.160

Sacramentorum Sanctitatis Tutela (2001), 3.49, 4.29

Saggart parish, 35.15

St John of God Hospital, Dublin, 26.5, 26.38, 27.4, 27.10

St John of God Order (Hospitallers), 11.14, 11.16, 17.15, 17.26, 28.119, 33.5, 33.18,
33.19. *see also* Quinton*, Fr; St John of God Hospital

St Joseph's orphanage, Tivoli Road, 28.8, 28.11-28.17, 28.25, 28.91, 28.92, 28.96,
28.98, 28.126, 41.9, 41.10, 41.23, 41.33

St Laurence O'Toole Trust, 3.6

St Malachy's College, Belfast, 10.32

St Mary's School for the Deaf, 22.6-22.12, 22.20

St Nicholas of Myra parish. *see* Dunlavin parish

St Patrick's College, Maynooth, 7.52, 10.1

education/formation of priests, 10.32, 10.33, 10.36-10.38

St Patrick's Hospital, Dublin, 20.151, 28.60, 28.61, 28.65, 28.67, 28.68

St Patrick's Missionary Society, Kiltegan, 8.31, 29.1, 29.37, 29.43, 29.60. *see also*
Naughton, Fr Thomas

St Peter's parish, Phibsborough, 22.1, 22.4, 22.10-22.12, 22.15, 22.19

St Vincent's Hospital, Dublin, 20.24, 24.11

St Vincent's industrial school, Drogheda, 28.8, 28.10, 41.9

San Diego diocese (USA), 17.11-17.12, 17.36

Santa Fe archdiocese (USA), 20.62, 20.72

Santa Rosa diocese (USA), 20.74-20.81, 20.84, 20.124

scandal, avoidance of, 1.15, 1.32, 20.103, 20.104

school chaplains, 42.11-42.12

Scicluna, Charles J, 1.18n

Scotland Yard, 13.5

Seattle diocese (USA), 17.13-17.14

secrecy, requirement of. *see* confidentiality/secrecy

secret archive, 3.35, 4.88, 24.29, 34.8, 52.17

seminaries, 10.1, 10.32. *see also* education/formation of priests

Septimus*, Fr, 1.38, 27.1-27.48

 Commission's assessment, 27.46-27.48

Sergius*, Fr, 42.1-42.23

 Commission's assessment, 42.20-42.23

Servants of the Paraclete, 11.14, 11.15, 20.34, 20.35

 treatment centres. *see* Jemez Springs (New Mexico); Stroud (England)

settlements with victims, 1.112, 9.24, 12.29, 13.68, 16.69, 17.20, 17.25, 23.33, 36.11, 38.12, 52.22

Sex Offenders Act 2001, 1.83, 26.33, 32.38, 38.14

Sexual Abuse in the Catholic Church (2003), 1.18n

Sheehy, Msgr Gerard (chancellor, 1965-1975), 1.23, 1.26, 1.62, 3.24, 4.21, 4.31, 4.36, 11.13

 awareness of clerical child sex abuse, 1.22

 handling of complaints, 20.65, 24.5, 30.9-30.10, 30.12, 30.20, 30.21, 30.26, 30.27, 41.35-41.36

 Payne case, 24.27, 24.37, 24.47, 24.53, 24.58-24.59, 24.81, 41.36

Sisters of Our Lady of Charity. *see* The Grange orphanage; An Grianán

Smyth, Fr Brendan, 1.19, 7.3, 12.22, 24.37, 37.2

social work service (health authorities), 6.38, 6.39, 6.40-6.41, 6.42, 6.43

 child sex abuse complaints, handling of, 6.52-6.57

 staff shortages, 6.57-6.58

Society of St Columban. *see* Columban Fathers

South Eastern Health Board (SEHB), 6.33

Stardust fire, 20.127, 20.129

State authorities, 1.92-1.101. *see also* Garda investigations; health authorities; health boards; HSE

 child protection, responsibility for, 1.99-1.100, 1.113

 communications with Church authorities, 1.101

 cover-up, facilitation of, 1.113

Stella Maris Football Club, 12.5-12.9

Stenson, Msgr Alex (chancellor, 1981-1997), 1.60, 1.89, 3.37, 4.21, 4.22, 4.30, 4.35, 4.41, 4.47, 4.48, 4.88, 7.17, 7.18, 9.16, 10.11, 11.13, 12.22, 25.9

awareness of clerical child sex abuse, 1.22
 handling of complaints, 1.61, 12.22, 12.31, 16.25, 16.29, 16.44, 17.12, 17.14,
 17.15-17.16, 17.22-17.23, 17.34, 17.45, 22.23, 23.9-23.11, 24.4-24.5, 24.7,
 26.18, 29.14-29.16, 29.19-29.22, 29.36, 29.59, 32.6, 33.6, 33.14, 33.19-
 33.22, 33.25-33.26, 34.1-34.4, 34.8-34.11, 34.15, 34.20, 35.1, 35.16-35.22,
 35.56, 35.57, 37.6, 37.9-37.10, 38.4, 38.8-38.9, 38.16, 41.21-41.24, 41.34,
 42.5
 Carney case, 28.37, 28.44-28.47, 28.68, 28.74-28.75, 28.78-28.115 passim,
 28.123, 28.126, 28.131, 28.135, 29.5
 Edmondus* case, 13.17-13.18, 13.22-13.28, 13.32-13.33, 13.39-13.46, 13.51,
 13.55, 13.75-13.76

 Payne case, 24.37, 24.43, 24.45, 24.49, 24.51, 24.57, 24.71
 Septimus* case, 27.9-27.15, 27.26-27.29
 Stewardship Trust, 8.3, 8.4, 8.5-8.6, 8.23
 Dublin Archdiocese, interaction with, 8.7-8.10
 objects of, 8.5
 Stockton diocese (USA), 20.152, 20.153, 20.155
 Stroud (England) treatment centre, 1.20, 11.15, 16.14, 16.47, 20.33-20.42, 20.47-
 20.49, 20.140, 20.143, 22.13-22.18, 22.25, 26.10, 28.45, 28.72, 28.78, 28.79,
 28.81, 28.119, 29.23-29.25, 29.29, 29.36, 37.13-37.14, 37.17, 37.25, 37.30,
 38.1, 51.7, 51.10
 suffragen bishops, 3.13, 3.14
 support services, 1.16
 support structures for victims, 1.111
 Sutton Golf Club, 28.54, 28.56
 Sutton parish, 1.66, 24.2, 24.14, 24.26, 24.28, 24.40, 24.46, 24.48-24.49, 24.52
 Suttonians Rugby Club, 28.56

 Task Force on Child Care Services, 6.10-6.13
Terentius*, Fr, 37.1-37.53
 Commission's assessment, 37.49-37.53

therapy. *see* treatment for clerical offenders

training in child protection, 7.52

Tralee, Co. Kerry, 20.6, 41.19

treatment for clerical offenders, 1.70-1.72, 1.86, 7.32, 11.14-11.16

- costs, 8.31, 20.58
- counselling, 1.86
- drug therapy, 20.67-20.72, 20.151
- individual cases. *see under names in representative sample [in bold]*
- psychiatric treatment, 1.70-1.72
- treatment centres, 11.14-11.16. *see also* Granada Institute (Dublin); Jemez Springs (New Mexico); Stroud (England)

Trinity College Dublin, 5.10

Trust in Care (2005), 6.76

Tuam, diocese of, 35.13, 35.14, 35.48

Tyrus*, Fr, 18.1-18.7

- Commission's assessment, 18.7

United Kingdom, 16.1, 16.2, 16.11, 16.17, 16.30-16.33. *see also* Stroud

University College Dublin, 3.24, 7.48, 10.2, 11.4, 24.1, 24.11

USA, 17.9, 17.26, 17.30, 20.56, 20.68

- treatment centres. *see* Jemez Springs (New Mexico)

Valleymount parish, 1.89, 29.1, 29.4-29.12, 29.53, 29.56, 58.17

Vatican. *see* Rome/Vatican

Vatican II (1961-65), 4.9, 4.10, 4.13

vicarious liability, 9.3

vicars forane (deans), 3.25

vicars general, 3.9, 3.10, 3.17

Vice Officialis, 24.27

victims. *see* complainants

Vidal*, Fr, 1.49, 15.1-15.20

- Commission's assessment, 15.19

Vincentian Order, 22.1, 22.14, 22.20. *see also* Gallagher, Fr Donal

Walkinstown, 28.4

Walsh, Eamonn (auxiliary bishop, 1990-), 4.50, 7.22, 10.11, 11.13, 35.32, 41.34

committee on child abuse, chairmanship of, 7.45

handling of complaints, 24.27, 43.5

Walsh, Noel (psychiatrist), 20.24-20.25, 30.6-30.7

Payne case, 24.11-24.14, 24.16-24.25, 24.30, 24.31, 24.36, 24.80

Walsh, Dr Patrick, 12.22, 17.15, 17.18, 17.23, 17.24, 26.15, 26.20, 26.22, 26.23,
26.27, 27.13, 27.17, 27.18, 33.5, 33.8-33.13, 33.18, 33.19, 33.22, 33.23, 33.36,
33.40, 33.44, 35.3-35.4, 35.22, 35.24-35.25, 35.26, 35.30, 35.32, 35.34

Fr Horatio case, 21.11-21.21, 21.26

West Indies, 29.1, 29.41

Western Australia Task Force on Child Sexual Abuse, 2.9n

Westland Row parish, 1.83

Whitehall garda station, 28.39, 28.49

Wicklow (county), 13.36, 13.54, 13.82-13.83 *see also* Enniskerry; Glendalough

William Street North (parish), 1.78

Williams, Desmond (auxiliary bishop, 1984-1993), 8.1, 28.90, 28.97

handling of complaints, 30.5, 30.6, 30.10

Wilson, Msgr John, 8.1, 8.2, 20.75, 28.38, 28.39, 28.60, 28.62, 28.123, 28.124

Woman and Child Unit (Garda), 5.9

Woods, Dr Michael, TD, 28.6

Would You Believe (RTE), 13.61