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Advice - COIN - Commission of Inquiry Now

Justice for victims of Catholic Clergy Sexual Assault in Victoria

The President of COIN Dr Bryan Keon- Cohen AM QC has asked that I provide an advice *inter alia* with respect to the state of the law in Victoria regarding the elements of sections 325 and 326 of the *Crimes Act 1958* and to identify the problems in the legislative scheme that might affect the ability of the authorities to launch prosecutions in appropriate cases.

This advice is in the context of the current Commonwealth Royal Commission into institutional responses to alleged criminal abuse of children by inter alia religious and other organisations. Terms of reference for the inquiry raise the question as to whether there might not be a need for changes to the law or procedures to prevent future abuse and to assist in dealing with allegations of abuse. This advice focuses on Victorian law. However, the issues discussed, broad principles isolated and reforms proposed are intended to apply Australia-wide.

Whilst a number of former Catholic clergy have been successfully prosecuted in Victoria over the last twenty years for sexual assault, the question is raised as to whether their crimes (or other crimes) were covered up or somehow not properly followed up. Is there or was there a basis that would have permitted the investigation and prosecution of members of the Catholic Church hierarchy who having been told of or knowing of the alleged activities of offending priests did nothing or worse? There are suggestions that some offenders were indeed moved from their parishes and placed elsewhere with no reports or otherwise made to police or higher church authorities.

s 325 *Crimes Act 1958* (Vic) ("the Act")

At common law the offence of accessory after the fact existed to cover the criminal act of

relieving, comforting or assisting a felon with the knowledge that a felony had been committed. In Victoria s 325(1) of the Act provides that:

Where a person (in this section called the principal offender) has committed a serious indictable offence (in this section called the principal offence), any other person who, knowing or believing the principal offender to be guilty of the principal offence or some other serious indictable offence, without lawful authority or reasonable excuse does any act with the purpose of impeding the apprehension, prosecution, conviction or punishment of the principal offender shall be guilty of an indictable offence.

There is of course little difficulty in contemplating that sexual abuse of a child by a priest would be defined as a "serious indictable offence". It is defined to include offences for which the maximum penalty is life or over 5 years. If there is evidence that a member of the senior clergy was informed of alleged sexual assault and then did some act to assist the person who was the alleged offender then that senior clergyman might well be guilty of a criminal offence. It is important to note that the offence has a number of individual elements, each which needs to be proven beyond reasonable doubt.

Firstly a principal offence needs to have been committed. Secondly the person who is said to be assisting must know or believe that the principal offender was guilty of the offence AND intended to assist the principal offender escape apprehension, prosecution, conviction or punishment.

Is there evidence that senior Catholic Clergy knew or believed that a priest committed an offence of sexual assault against a child? It should be noted that in the absence of direct proof of knowledge of the offending behaviour such as admissions or other direct observation, proof will ultimately require the inference to be drawn based on all the circumstances. The senior clergy may well accept being told of the allegation but what if the response is that the allegation wasn't believed? What of proof of the act done with the requisite intent. Is there evidence that senior clergy moved an offending priest to another diocese with the intent to impede the prosecution conviction etc.?

s 326 the Act

In Victoria, s 326 abolished the common law offence of misprision of felony and replaced it with the offence of concealing a serious indictable offence in return for a benefit. (The misprision offence applies to offences committed prior to 1 September 1981)

Is there evidence of any benefit? S 326 (3) defines benefit to include non-monetary advantage or benefit. The provisions of this section create a summary offence with the maximum penalty of one year's imprisonment.

It would appear that this provision is unlikely to have particular relevance to the alleged behaviour of senior clergy. Perhaps there may be evidence of benefit or advantage being personally received but in my opinion this section is of little assistance in the context of the matters being considered by the Royal Commission.

Prosecutions of Senior Clergy or others in the Catholic Church

In my opinion the existing law in Victoria adequately provides for the appropriate investigation and prosecution of any person within the Catholic Church who may have intentionally done an act with the intent to impede the prosecution and punishment of priests who had committed sexual offences. Such investigation and prosecution requires of course evidence of the commission of a sexual offence or offences, and evidence of the act or acts of the person who is trying to assist the principal offender.

Evidence can be found from various sources and includes letters, diaries, direct accounts of victims and their families, church and school records, bookkeeping records, rosters, video and film records of events such as gatherings, camps fundraising events etc. The list is an open ended one that can be used by investigators and then prosecutors to draw a picture of sexual abuse that can be very powerful and convincing.

Of significance is the need to have an evidentiary basis upon which a jury could ultimately infer beyond reasonable doubt that the acts of the accessory were done with the necessary knowledge or belief and intent. It would not be sufficient to be able to point to the mere approval of a transfer of an offending priest to another diocese by his superior. The superior may have been simply rotating his priests for appropriate reasons. Simply because the transfer occurred soon after a complaint was made may not be sufficient to do any more than raise a suspicion. The timing may be co-incidental. Even if the superior was in possession of knowledge of a complaint of a sexual assault may not be sufficient. The superior may have a doubt about the veracity or truthfulness of the complaint.

Whatever the state of the evidence in the possession of investigators, ultimately police have to make a judgment as to whether a brief of evidence should be prepared and authorised for prosecution. That brief would or should contain all of the factual matters that would go to the issue of whether there is a case to be made out. It would contain all of the relevant statements and documents that would go to the elements of the possible offence of assisting the offender. The matter would then be reviewed by solicitors within the Victorian Office of Public Prosecutions (OPP), who would determine on the material provided whether there was a sufficient case to proceed, and whether any other evidence was required.

I am not aware of any prosecutions against senior clergy or other Catholic hierarchy for an offence of assisting the offender. If there is evidence to

support the proposition that there could have been or even should have been, the question of course arises as to why not?

It is unclear to me whether any barriers have existed, or currently exist, to such prosecutions commencing. Did police investigators consider any such alleged assistance? Was the alleged conduct brought to the attention of police investigators by any of the complainants or their families or by anybody within the Catholic Church? Was anything done to prevent evidentiary material from being brought to light or to the attention of investigators? Did the investigators act on the material if any that was brought to their attention? Were any briefs for the offence of assisting the offender ever sent to the OPP for prosecution? All these questions are raised for the Commission's attention.

There may be an argument that s 325 of the Act is not sufficiently broad to cover the conduct of those within the Catholic Church who were intent on covering up the activities of priests who were acting illegally. If there is evidence to suggest that prosecutions were not commenced because of a perceived lack of statutory power to do so, then that argument may have some merit. On its face though, in my opinion s 325 of the Act provides an appropriate and wide reaching criminal offence that could have been used and is still open to be used against any person who may have tried to cover up the activities of clergy who had committed sexual assault.

The criminal law should not be used to seek punishment against those who may not have acted with a strong moral compass or in some manner that is regrettable or unfortunate. Criminal conduct deserving of punishment must be strictly defined and reserved for the sort of behaviour that ultimately attracts such serious measures. There would be little debate that if a senior member of the Catholic Church intentionally impeded the investigation and prosecution of a fellow priest knowing or believing that the priest had sexually abused a child, that a serious crime had been committed. Such behaviour should be followed up and investigated and prosecuted. The question is of course whether there is sufficient evidence of such behaviour.

Possible reform to law and procedure

If the Royal Commission reveals support for the proposition that there has been a widespread failure to investigate and or prosecute individuals within the Catholic Church who have engaged in "covering up" child sexual assault by priests, then there may be an argument to introduce a discrete offence for those in Church or other associated roles such as in education, aged care and such. The new offence could perhaps introduce an objective test to the knowledge or belief element. Rather than the present subjective test of knowing or believing the principal offender to be guilty of the principal offence, the test might be broadened somewhat.

There might be a new Victorian s 325A which identifies individuals who work in a trust or care environment such as Churches, Schools, Aged Care,

Psychiatric Institutions, Disability Care and so on. The assisting individual would commit an offence if where a serious indictable offence has been committed by a fellow employee or member of the care organisation, and that assisting individual knew or believed or ought reasonably to have known or believed that an offence had been committed, then did some act that intentionally assisted the offender to avoid punishment or prosecution apprehension or conviction. The act would still need to be done with the relevant intent to assist so as to avoid the risk of innocent assistance being included.

It is intended that this advice be considered primarily by the membership of COIN. I understand that the advice may be provided as part of submissions that COIN might make to the Commonwealth Royal Commission. The advice may also be distributed by COIN as part of its aims and objectives in the broader public debate on the question of alleged Clergy sexual assault. It should be understood that the matters raised herein are general in nature and without recourse to the detailed material that will no doubt be raised in the course of the Inquiry.



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