COIN

COMMISSION OF INQUIRY NOW

Justice for victims of Catholic Clergy Sexual Assault in Victoria

The Hon Georgie Crozier MLC,
Chairman, Family and Community Development
Committee, Parliament of Victoria, Spring Street
MELBOURNE VIC 3000

16 August 2012

Dear Ms Crozier,

Inquiry into Handling of Child Abuse by Religious and other Organisations -
COIN Submission No 8: The powers, privileges and procedures of the Committee

As you may be aware, COIN has publicly criticised (1) the government's decision to initiate your inquiry as against a properly empowered, independent judicial inquiry; (2) your Terms of Reference; and (so far as this is publicly known) (3) your Committee's apparent inactivity to date, especially given your very wide Terms of Reference and your 12 month reporting deadline.

This position has been recorded in COIN's submissions to you on other topics as follows:

Independent Judicial Inquiry: As previously stated, COIN considers that the Government's choice to refer the issue of the sexual assault of children by personnel associated with the Roman Catholic Church("RCC"), let alone by personnel from thousands of additional religious and other organisations, to a Parliamentary Committee for inquiry and report is inadequate and unworkable. COIN favors the commissioning of a properly empowered, independent, judicial inquiry into this problem. This issue will be addressed in a further submission.

Accordingly, COIN considers your Committee to be a "first step" towards the instigation of such a judicial inquiry. COIN thus recommends that the Committee, in its final Report, records and acknowledges its inadequacy; and recommends to government that such a further, independent judicial inquiry be forthwith commissioned.

Focus on the RCC COIN considers that the Committee's Term of Reference are unworkable if thorough examination of this significant problem, and well-founded recommendations to government, are to occur. The Terms of Reference embrace

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thousands of religious, and other, organisations and would require many years to pursue: yet the Committee is required to report by 30 April 2013. Second, COIN considers RCC clergy, and the Church's hierarchy, to be the main perpetrators of sexual assault upon children and vulnerable adults in Victoria. Thus, in this submission, COIN focuses solely on the RCC, and encourages the Committee to do likewise, both as a matter of practical reality and in an endeavor to conduct a though, focused inquiry as compare to a superficial treatment of many organisations.

COIN relies upon the above and in support, attaches by way of its submission on this topic an advice of Mr. R Miller of counsel. COIN adopts all of Mr. Miller's advice.

Mr. Miller has instructed me, and I advise, that this submission should be placed on the Committee's public register; and that he is happy to appear before the Committee in relation to his advice, should you so wish.

Yours faithfully,

B. A. Keon-Cohen.

Dr Bryan Keon-Cohen AM QC
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MEMORANDUM TO: **Dr Bryan Keon-Cohen AM QC**

FROM: **Robert Miller, Barrister.**

POWERS AND FUNCTIONS OF THE FAMILY AND COMMUNITY DEVELOPMENT COMMITTEE OF THE VICTORIAN PARLIAMENT

1. In this advice I address several questions concerning the powers, functions and procedures of the Family and Community Development Committee ("FDC Committee") of the Victorian Parliament and how that Committee might pursue its current inquiry into the Handling of Child Abuse by Religious and other organisations. I advise that during the period 1979 to 1985 I was elected to the Legislative Assembly of the Victorian Parliament as the Member for Prahran. During this period I served on various Parliamentary Committees including as Chairman of the Public Bodies Review Committee. I have been a practising member of the Victorian Bar since 1982.

2. In preparing this advice I have reviewed the FDC Committee's Terms of Reference (17/4/2012) and its Submission Guide (July 2012).

BACKGROUND

3. Parliament has two principal functions: legislative and investigative or inquisitorial. Accordingly, Parliament may appoint Committees to investigate and report back to it on any matter which it considers appropriate.

4. A matter of major public importance has been the continuing scandal of child abuse by religious and other organisations in this State. On 17 April 2012 the Governor in Council pursuant to s. 33 of the *Parliamentary Committees Act* 2003 (Vic), published the Terms of Reference for an inquiry to be carried out by the Committee and for it to report back to Parliament no later than 30 April 2012.

5. I do not deal here with the Terms of Reference in any detail, since they are very well known to you.

6. This Committee is one of eleven Joint Committees established by the *Parliamentary Committees Act* 2003 ("the 2003 Act"). As a creature of statute the Committee is only empowered to act within the confines of the 2003 Act. It has no power other than that conferred by statute, but it does have certain inherent powers to regulate its proceedings and to punish for contempt of Parliament. The members of the Committee are appointed by each Parliament and are drawn from both Houses, hence the term "joint" Committee: see s. 5 of the 2003 Act.

THE ACT

7. The 2003 Act repealed the 1968 *Parliamentary Committees Act* following findings made by the Scrutiny of Acts and Regulations Committee. The evidentiary powers of Parliamentary Committees were expanded by the 2003 Act to enable the Parliamentary Committees to "send for" persons, documents or other things such as electronic records. I deal with this specific power below.

8. The Minister introducing the 2003 Bill into the Legislative Assembly said that Parliamentary Committees would thereafter have the power to request electronically stored information and exhibits. see Hansard, Legislative Assembly, 6 November 2003, p. 1606.

9. The members of the Committee have limited tenure. Pursuant to s. 6 of the 2003 Act the Committee itself only holds office and its members may only exercise the powers conferred on it, as here, by a Reference from Parliament, for the period during which its members are appointed to the Committee, i.e. until the dissolution of the Legislative Assembly or the next election.

JURISDICTION OF THE COMMITTEE

10. The Committee is invested by the 2003 Act with extremely broad and wide ranging powers to review, consider and conduct investigations on matters associated with the family, or the welfare of the family as well as on a range of social issues. By s. 11 the Committee is empowered as follows:

"11. Family and Community Development Committee

The functions of the Family and Community Development Committee are, if so required or permitted under this Act, to inquire into, consider and report to the Parliament on -

(a) any proposal, matter or thing concerned with:

(i) the family or the welfare of the family;

(ii) community development or the welfare of the community;

(b) the role of Government in community development and welfare, including the welfare of the family."

11. Section 11(a)(i) is a very open-ended grant of authority to the Committee to inquire into virtually any matter or thing as long as there is a nexus with "the family" or "the welfare of the family". "Family" is not defined in the 2003 Act. However, we all have an intuitive understanding of what is a "family". This concept may take many forms of "family", and such an entity may involve different members. There can be no doubt, in my view, that the Committee has jurisdiction to embark on its inquiry into the handling of child abuse as any form of child abuse must axiomatically impinge on, or be connected with the child's family as well as the child itself.

12. I anticipate that submissions will be made to the Committee by Church organisations that seek to limit or constrain the scope of this inquiry and which ignore s. 11 of the 2003 Act. No doubt reference will be made to the caveat contained in the second last sentence of the Terms of Reference where the Committee is to be mindful of not encroaching on the responsibilities of investigatory agencies or the courts in particular cases or to prejudicing the conduct or outcome of court proceedings. The carefully drawn Terms of Reference appear to severely constrain the Committee's powers to act in accordance with Parliament's clear intention in s. 11 of conferring on the Committee to permit an inquiry into any (emphasis added) matter concerning the welfare of the family. I do not here seek to do any more than flag this problem for your attention.

MEMBERSHIP

13. The composition of the Committee is well known to you and has been widely publicised. There are continuing concerns and grave doubts that the members of the Committee are capable of conducting a proper inquiry into such a complex reference with its inevitable focus on possible criminal activities.

14. It is now August 2012. The Committee has called for public submissions but as yet has held no public hearings to consider this matter. Given the 30 April 2013 deadline for reporting to Parliament and the extraordinary breadth of the Terms of Reference, embracing as they do all religious and non government organisations in Victoria (probably numbering several thousand), it is already readily apparent that the Committee cannot possibly meet its current deadline if it is to produce a meaningful Report to Parliament. The Committee may, if it so determines, seek an extension of its reporting deadline from the Parliament.

15. It was my experience that Parliamentary Committees do not usually sit while Parliament is in session, that is, while Parliament is actually sitting. Section 25 of the 2003 Act confirms that without the leave of the House, a Joint Committee must not sit when Parliament is sitting. Further, the Committee must not sit in any other place, other than a place within the Parliamentary precinct, without such leave when Parliament is sitting. Pursuant to s. 25(1)(b) of the 2003 Act, Parliamentary Committees are authorised to travel throughout Victoria, interstate and overseas to conduct public hearings when Parliament is not in Session.

16. Witnesses may be examined and evidence obtained at a sitting of the Committee using audiolink or audiovisual link subject to the unanimous approval of all Committee members.

PUBLIC HEARINGS

17. As a general proposition the Committee will hold all its hearings in public. Hearings are governed by ss. 27 and 28 of the 2003 Act. As the Parliamentary website states "Committees generally take evidence in public, but deliberate in private. A key part of committee activity is public engagement and consultation with the community". Section 27 provides that the Committee may hold a public hearing on any matter being considered by the Committee but it may refuse to hear evidence at a public hearing that it (i.e. the Liberal majority) considers irrelevant or unnecessary.

18. I anticipate that representatives of Church or other bodies will object to any evidence being adduced which concerns a victim's own experience or the facts concerning actual abuse or abuses perpetrated on any child as being irrelevant to or outside the Terms of Reference. In my experience, the Terms of Reference are diabolically clever. On a strict and literal interpretation the Committee is only authorised to examine the processes by which organisations respond to criminal abuse of children by personnel associated with the relevant organisations. It appears to be arguably an inquiry focussing on the organisation's internal processes and procedures, not on the facts concerning cases of actual abuse of children.

19. The power to exclude evidence is governed by s. 27(2) of the 2003 Act. This confers a discretionary power on the Committee to hear or not hear evidence which is characterised as irrelevant or unnecessary. The discretion not to hear evidence is usually exercised by the Chairman of the Committee. That discretion may need to be tested, if such evidence is excluded, and put to a vote by all members of the Committee.

20. Section 28(2) of the 2003 Act prescribes that the Committee must take all evidence in public. However, Section 28(3) provides that the Committee may take evidence in private if the Committee resolves that special circumstances make it desirable to take the evidence in private when part or whole of the relevant public hearing may be conducted in private.

LEGAL REPRESENTATION

21. There is no right of legal representation before the Committee for a victim of criminal abuse by a member of a religious or other organisation. Section 27(3) of the 2003 Act is quite specific and explicit on this matter: "a person or other body" may not be represented by an Australian legal practitioner at a public hearing held by the Committee. However, a lawyer may represent "a person" or "other body", (presumably an entity recognised by the law such as a specific Diocese), with the approval of a resolution from both Houses of Parliament. Obtaining such a resolution would be a slow, cumbersome and difficult process with no guarantee of success.

22. Legal representation is, however, permitted at a public hearing of the Committee pursuant to s. 27(4). Pursuant to this subsection a lawyer may give evidence on behalf of himself or herself, or on behalf of a body of which the lawyer is a member. Thus, should any lawyer seek to represent, for example, a victim support group before the Committee, such a lawyer may need to become a member of such a body, or even several bodies, which represent victims to avoid the strictures of s. 27(3) of the 2003 Act.

EVIDENCE

23. The Committee has broad powers to obtain evidence to be produced at its public hearings. By s. 28(1) of the 2003 Act it is empowered "to send for persons, documents and other things". Accordingly, it can obtain evidence in documentary, electronic or witness form. I am of the opinion s. 28(1) does not authorise the Committee to obtain evidence by way of entering any premises to search and seize documents. This sub-section refers to "sending" for evidence. It does not extend to the obtaining of evidence by any other means. This issue may need to be tested before the Committee.

24. Should a person or body fail to respond to the Committee's request for documents then the Committee has the draconic and rarely used power to arrest and punish for contempt of the Parliament. This authority is derived from s. 19 of the *Constitution Act* 1975 (Vic). By this section the Assembly and the Council, and their Committees, hold and enjoy the same privileges, immunities and rights as were held by the House of Commons in 1855. These powers and privileges include the inherent power to take any action to ensure the functioning of its Chambers, to regulate its proceedings and to arrest and punish for contempt or breach of privilege. Again, the procedure is slow, cumbersome, very uncertain and has rarely been used in Victoria.

IMMUNITY FROM JUDICIAL REVIEW

25. Section 50 of the 2003 Act expressly seeks to protect Committee proceedings, reports and recommendations from judicial consideration. The rationale for this protection is (as the Minister said in his Second Reading Speech) "to enable Committee members to discharge their duties and responsibilities without obstruction or fear of prosecution and to foster free and frank discussion of proposals and matters that may be considered by the committee:. see Hansard Op cit. p. 1607.

PRACTICAL REALITIES

26. As a former Parliamentary Committee Chairman I can confidently predict that:

(a) when this enquiry eventually gets under way the Government Members of the Committee will liaise closely with all responsible Ministers about the political sensitivities of this task;

(b) decisions on the scope and reach of the inquiry will be canvassed with the Attorney-General or his advisers by Government Members and the Chairman will rule accordingly;

(c) decisions on the admissibility of evidence will probably be made with similar consultation by Committee Members with the Attorney-General;

(d) the Committee will not return this Reference to the Parliament as being unworkable or too vast in scope despite the Members' lack of forensic skills. It may however request an extension of time within which to complete its investigations and to deliver its Report.

27. I trust the above is helpful.

Robert Miller
Barrister
Owen Dixon Chambers
9 August 2012