

# 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

12th September 2012

Dear Ms Crozier,

**Inquiry into Handling of Child Abuse by Religious and other Organisations -  
COIN Submission No 10**

***“Prosecuting the Catholic Church Hierarchy for “covering up” child sexual  
abuse by priests: General Principles”***

In this submission, COIN addresses general principles of the criminal law applying to conduct when a member or members of the RCC hierarchy (eg an archbishop, bishop, auxiliary bishop, monsignor, etc) “covers up” or fails to report child sexual abuse by a priest within that member of the hierarchy’s area of responsibility, or “moves on” a perpetrator, eg, to another parish in or outside of Victoria. COIN refers to its prior submission No 9 concerning prosecution of the RCC hierarchy, plus the advice of Mr Papas SC attached to it, and asks that both submissions be read as a whole.

**Accessory after the fact** An individual may be considered an accessory after the fact if that person performs an act that assists or has the potential to assist the principal offender to evade justice<sup>1</sup>. Section 325 of the *Crimes Act 1958 (Vic)* creates an offence that is a separate, ‘stand-alone’ offence, distinct from the liability incurred by the principle offender. In Victoria, an accessory after the fact is limited to serious indictable offences such as sexual assault.

Liability as an accessory after the fact only arises if the principal offence has been committed<sup>2</sup>. If the principal offender is acquitted the accessory after the fact cannot be convicted unless there is sufficient evidence that the principle offence took place.<sup>3</sup> The liability of the accessory does not depend on the conviction of the principal offender.

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<sup>1</sup> *R v Dawson [1961] VR 773*

<sup>2</sup> *Ibid.*

<sup>3</sup> *R v Carter & Savage; Ex Parte A-G [1990] 2 OD R 371*

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**Crimes Act s 325** There are two elements to the offence under section 325; the actus reus and mens rea elements. The accessory must perform an act that assists or has the potential to assist the principal offender escape from the administration of justice.<sup>4</sup> The accessory must perform a positive act which may take many different forms.

The mental element is that the accused must both know of the commission of the principal offence and intend to assist the principal offender evade justice.<sup>5</sup> The scope of liability has been broadened by statute, such that it is not necessary to establish that the accused was aware of the precise offence committed by the principal offender. The prosecution must further prove that the accessory intended to assist the principal offender to evade justice in some way: eg., seeking to impede apprehension, prosecution, conviction or punishment.<sup>6</sup> If the accused acts partly for his or her own benefit and partly in order to assist the principal offender he will be liable as an accessory.<sup>7</sup> However, merely sharing in the proceeds of an offence is not sufficient.<sup>8</sup>

**Crimes Act 1958 s 326** Section 326 of the *Crimes Act 1958* creates a summary offence for concealing offences for benefit. While the same two elements in section 325 must be proven, a further element of benefit is required. The section deems that a person accepts a benefit by accepting or agreeing to accept any benefit or advantage, or the promise of any benefit or advantage either to himself or to another whether or not the benefit or advantage is in money or money's worth.

**Limitations on ss 325, 326** The main limitation to both section 325 and 326 is that it would be difficult to satisfy the actus reus element where a Priest, who has knowledge of the crime, moves the offender to another Parish. Currently, there seems to be no duty on a Parish member where there is knowledge or suspicion of sexual assault.

Another restraint pertinent to both section 326 and 325 relates to criminal evidence and procedure under section 127 of the *Evidence Act 2008 (Vic)*. If information about sexual abuse by a Priest is given during the sacrament of confession to a person when a member of the clergy, section 127 entitles a member of the clergy of any church or religious denomination to refuse to divulge that such a religious confession was made, or its contents. The removal of the privilege is allowed only where the penitent consents.

**Misprision of Felony** As mentioned in Mr Papas' SC's advice attached to COIN submission No 9, the common law offence of misprision of felony was abolished in Victoria in 1981. However, as noted there, sexual offences committed prior to 1981 may still be prosecuted today pursuant to laws then in force, including misprision. The identification of relevant historical offences and procedures is complex, but such historical abuse and its prosecution should, COIN submits, be part of the Committee's inquiry. Those offenders in the hierarchy, if still alive, should be investigated and, if credible evidence exists, those matters should be considered by authorities for possible prosecution.

**Naming and Shaming:** COIN is of the view that, so far as is publicly known, the conduct of the RCC hierarchy in Victoria over the past several decades (ie, within the living

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<sup>4</sup> *R v Tevendalen [1955] VLR 95 (CCA)*

<sup>5</sup> *R v Tevendalen [1955] VLR 95 (CCA)*

<sup>6</sup> *Crimes Act 1958 (Vic) s325(1)*.

<sup>7</sup> *R v Reeves (1892) 13 LR (NSW) 220*

<sup>8</sup> *R v Barlow (1962) 79 WN (NSW) 756.*

memory of the oldest victims) is so grossly inexcusable and damaging to victims in particular, and the health, wellbeing, and economy of Victoria generally, that this committee must take active steps to identify all members of the hierarchy who held positions of responsibility over the relevant period, and bring them to account if credible evidence emerges of misconduct amounting to possible criminal offences. To this end, COIN recommends that the committee:

- (1) Compiles a comprehensive list of all members of the RCC hierarchy operating in Victoria, now alive or dead, over the relevant historical period;
- (2) Ascertains the responsibilities of each such member in relation to proven, or alleged, sexual assaults of children and vulnerable adults;
- (3) Regarding those members still alive, call them before the committee to answer questions relating to their involvement in relation to complaints received from victim(s), or dealings with the alleged offender and complainant;
- (4) In relation to priests convicted of relevant sexual offences:
  - a. call those convicted persons before the committee to answer similar questions about the involvement of hierarchy members in the relevant incidents;
  - b. Call all hierarchy members before the committee to answer questions on the basis that different legal principles may apply in relation to s 325 and 326 given the fact of conviction.

**Reform Proposals** The Protecting Victoria's Vulnerable Children Inquiry Report (Cummins J) recommended amendments to section 326, ie., that a duty should be created where there is a reasonable suspicion that a child or young person is being or has been physically or sexually abused by an individual within a religious or spiritual organisation. A failure to report would attract a suitable penalty having regard to section 326. COIN adopts this reform and urges the Committee to recommend it to government.

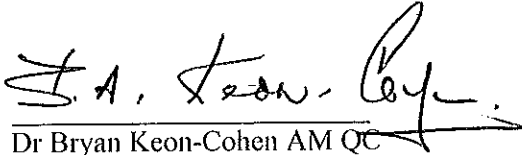
**Independent Judicial Inquiry:** As previously stated, COIN considers that the Government's choice to refer the issue of the sexual assault of children by personnel associated with the Roman Catholic Church ("RCC"), let alone by personnel from thousands of additional religious and other organisations,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

Accordingly, COIN considers your Committee to be a "first step" only 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.

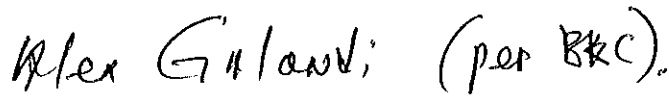
**Focus on the RCC** COIN considers that the Committee's Term of Reference are unworkable if thorough examination of this significant problem, and well-founded recommendations to government, are to occur. The Terms of Reference embrace thousands of religious, and other, organisations and would require 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 endeavour to conduct a though, focused inquiry as compare to a superficial treatment of

many organisations. COIN, in support of the above, refers to its Submission No 8 and the attached advice of Mr. R Miller of counsel.

**Public Submission:** COIN requests that this submission be made public.



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