

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 9: “Prosecuting the RCC hierarchy for aiding and abetting sexual
assault of children by catholic clergy”.**

(1) In this submission, COIN discusses Victorian criminal law in relation to the prosecution of members of the Victorian RCC hierarchy for ‘covering up’ or failing to report clergy abuse, or for impeding the prosecution of priests under their supervision or control who have committed, or are, on reasonable grounds, suspected of having committed, or are likely to commit, sexual offences.

(2) **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.

(3) Accordingly, COIN considers your Committee to be only 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.

(4) **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, organizations 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 compared to a superficial treatment of many organisations.

(5) In support of the above, COIN refers to and relies upon COIN’s submission no 8, including an advice of Mr. R Miller of counsel attached thereto.

(6) **Difficulties of Criminal Prosecution:** As is well known, prosecuting offenders for child sexual assault involves peculiar difficulties: these flow onto the arena, the subject of

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this submission: prosecuting those who facilitated such assaults.

(7) In Victoria, the Director of Public Prosecutions may initiate proceedings against an alleged offender for contraventions of various provisions of the *Crimes Act 1985* (Vic). Relevant provisions operative today include:

- Section 45 – sexual penetration of a child under the age of 16
- Section 47A – persistent sexual abuse of child under the age of 16
- Section 47 – indecent act with child under the age of 16
- Sections 48 and 49 - sexual acts committed against a young person by a person in a position of care, supervision or authority over them.

It is noted that these provisions may not apply historically: a range of different offences may be attracted by the same “sexual abuse” conduct over past decades.

(8) Reporting a sexual assault is in itself a very difficult process. Sexual assault victims are the least likely of all victims of a crime to report the experience to the police.¹ Child victims face even greater difficulties in reporting the crimes compared to adult victims. The offender is often known to the child and to his/her family. This discourages a child from speaking out due to fear of punishment or not wanting to bring trouble to family members or the perpetrator. Some children may not realize that the conduct in question is unacceptable, let alone illegal.

(9) Furthermore, less than one in seven reports of penetration of a child made to the police will be prosecuted and conviction rates for sexual assault against children are low.²

(10) Added to the above, are problems associated with a child victim coping with a criminal trial. Justice Yeats of the Western Australian District Court has commented:³

“[In the] formal setting in the face of 12 strangers... and a number of strangely costumed barristers, court staff and judge... [and] the presence of the accused person... children have been overwhelmed by the strangeness and strangers of the courtroom such that, on occasion, they have simply been unable to answer any questions reliably at all. We learned that children were being further damaged by the court process.”

(11) Appeals in this arena are frequently launched, and often successful. A study by Dr Judy Courtin⁴ has shown that of 70 recent convictions in Victorian after trials for sexual assault involving children, 38 were appealed of which 28 were against conviction. Thirteen of those appeals were allowed; one was resulted in acquittal, the remaining 12 were ordered to retrial.⁵

¹ Victorian Law Reform Commission, *Sexual Offences: Final Report Summary*, Report 78 (2003-4).

² Ibid.

³ (Her Honour Judge) Mary Ann Yeats, ‘Alternative Arrangements for Giving Evidence: A Judicial Perspective’ (Paper presented at the Children as Witnesses Workshop, 14 November 2003, Melbourne).

⁴ Judy Courtin, ‘Judging the Judges: How the Victorian Court of Appeal is Dealing With Appeals Against Conviction in Child Sexual Assault Matters’ (2006) 18 *Current Issues in Criminal Justice* 268-269.

⁵ For a much more detailed analysis of the statistics of appeals and acquittals recorded in the study, see the article by Judy Courtin *ibid.*

(12) The time involved in such processes, from the initial report to the police, to trial, to possible appeal and even retrial, can span several years and can cause considerable additional trauma, not only for the victim but for his/ her family.

(13) Considering all these factors, COIN questions whether the realities of criminal prosecution in this area in Victoria is an effective avenue to bring offenders to justice; and to deliver some justice or reparation to the victim, his or her family, and the Victorian community. In Victoria, experience suggests that the criminal law often fails to deliver timely justice to victims, if it delivers justice at all. Hence, in this submission, COIN recommends amendments to the relevant provisions of the *Crimes Act*, and to investigation processes.

(14) **Advice from Mr. Nicholas Papas SC** COIN attaches for your attention an advice from Mr Nicholas Papas SC, dated 20/8/2012. Mr Papas SC discusses sections 325 and 326 of the *Crimes Act 1958* (Vic) and the application of those provisions by Victoria's criminal investigation and prosecution agencies. COIN adopts Mr Papas SC's advice and commends it to you as part of this submission.

(15) **Application of section 325 in recent decades in Victoria** COIN refers to the above discussion, and supports Mr Papas SC's observations in relation to the apparent infrequent prosecutions of priests for sexually abusing children, and the total lack of prosecutions in relation to aiding and abetting such crimes against the RCC hierarchy. COIN considers, that given the now notorious extent of the RCC hierarchy's history of denial, cover up, and failure to report to authorities in Victoria that such lack of apparent investigation by police is unacceptable. COIN recommends that much greater resources be given to police to pursue this area of criminal activity as a matter of heightened priority.

(16) **Recent NSW Prosecution: Fr Tom Brennan:** COIN refers to the NSW equivalent of s 325: ie. *Crimes Act* (NSW) s 316(1):

“If a person has committed a serious indictable offence and another person who knows or believes that the offence has been committed and that he or she has information which might be of material assistance in securing the apprehension of the offender or the prosecution or conviction of the offender for it fails without reasonable excuse to bring that information to the attention of a member of the Police Force or other appropriate authority, that other person is liable to imprisonment for 2 years.”

(17) COIN considers this provision to be preferable to the Victorian s 325(1), discussed above, and recommends it to the Committee for consideration and adoption.

(18) On 30 August 2012, a priest, Fr Tom Brennan, now aged 74 years, was arrested and charged with two counts of misprision of a felony – ie, failing to disclose a serious crime - in NSW. COIN has few details available, but presumes these charges were laid under the above s 316. It appears that these charges relate to alleged child sex offences committed by another defrocked priest, Fr John Denham. These offences allegedly occurred at St Pius X school, Newcastle, NSW, in the late 1970s. At the relevant time, Fr Brennan was school principal, and Fr Denham a teacher at the school. Denham is now 70 years old, Two boys were assaulted by Denham and they reported the incidents to Brennan , who caned them. According to *The Age* Fr Brennan has been an acting-bishop, and “right hand man” to a

bishop.⁶ Fr Brennan is the first Australian catholic priest to be charged with concealing the alleged child sex crimes of another priest.

(19) It is further noted that on 6/8/2012, the NSW Attorney General announced that from that date, decisions as to whether a prosecution should be pursued would be made by the NSW DPP and not, has previously, by the Attorney.⁷ This initiative, arising as it did in the context of clergy sexual abuse, is welcomed. Victoria should maintain such discretions with the Victorian OPP.

(20) **USA Prosecutions**⁸ Recent developments in this area of the criminal law in the USA should be noted.

(21) **Monsignor W J Lynn:** The Committee is referred to the recent prosecution and conviction of sixty-one year old Monsignor William J. Lynn in the Archdiocese of Philadelphia, USA. In June 2012 he was convicted by a court of ‘child entrapment’ under state law. COIN has been unable to locate the law under which Lynn was charged, or the case name and details.

(22) However, newspapers report that it was alleged Lynn failed to report abuse to authorities, consistently downplayed abuse claims, and thwarted inquiries. Investigators had portrayed Lynne as:

‘a key gatekeeper in the Archdiocese, the administrator whose recommendations to (his) Cardinal ... helped shuffle and protect priests who had been accused or even admitted abusing children’.

(23) Lynne was secretary for clergy in the Archdiocese for 12 years, a role involving the supervision of hundreds of priests. Prosecutors alleged that he recommended that another priest, Edward Avery, be allowed to live or work in parishes in the 1990s despite indications that he might abuse children. In addition, Lynn helped steer Avery into a treatment program and knew that Avery was later sent to live in a new Parish where he assaulted an altar boy. In 1999, Avery was convicted of sexual assault of an altar boy at St Jerome Church, and was sentenced to 3 to 6 years in a state prison.

(24) Lynn’s superior, Archbishop Cardinal Anthony Bevilacqua (1988 – 2003), it was claimed, ordered Lynn to remain silent about the abuse. Further, Lynn and others in the hierarchy, had hidden thousands of church records relating to clergy abuse, mainly during Bevilacqua’s period as Archbishop. Bevilacqua, who retired in 2003 and died in January 2012, was seen by many as the appropriate person to be charged: these observers considered Lynn to be merely a stand-in for his Archbishop.

(25) After a three-month trial. Lynn was thus found to have “endangered” a child: Lynne ‘let Avery stay in active ministry after learning that Avery has molested a minor years earlier’. The sentencing Judge, Judge Judy M. Teresa Sarmina, said Avery had turned a blind eye while “monsters in clerical garb” sexually abused children and devastated the Church and community. Lynn was acquitted of conspiracy and a second endangerment charge. Lynn has indicated that he will appeal his conviction.

⁶ See Joanne McCarthy, “Priest charged with abuse cover-up”, *The Age*, 31/8/2012, p 5.

⁷ Dan Box, “Victim of Priest felt no clergy listened”, *The Australian*, 6/8/2012, p 5.

⁸ See generally BBC News – US & Canada, “US Monsignor William Lynn sentenced for abuse cover up”, 24/7/2012, www.bbc.co.uk/news/world-us-canada-18973996; John P Martin & Joseph A Slobodzian, “msgr. Lynn sentenced to three to six years on prison,” *The Philadelphia Inquirer*, 24/7/2012.

(26) Lynn is the first Catholic Church official in the USA to be tried (let alone convicted) of enabling child sex abuse, ie, prior to Lynn's case, no US Bishop who covered up and enabled the abuse of a victim had ever been held accountable in a criminal court.

(27) Victim support groups in the USA have described Lynn's conviction as "a watershed moment in the Catholic abuse crisis."

(28) **Missouri Prosecution: Bishop Robert Finn:** Bishop Finn of the Diocese of Kansas City-St Joseph, is scheduled for trial in September 2012 on charges that he failed to report suspicions that one of his priests might be an abuser. The priest is facing child pornography charges. If convicted, Finn would be the first Bishop ever found guilty of a crime associated with clergy sexual abuse.

(29) **COIN's Submission:** COIN is of the view:

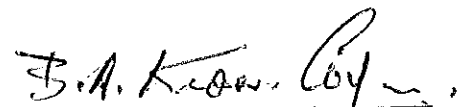
1. that the above Victorian statutory provisions, as they stand and as interpreted by the courts, are inadequate to deal with the extent and seriousness of 'cover ups' by the RCC hierarchy over recent decades;
2. that these provisions should be amended to facilitate criminal prosecution, in appropriate circumstances, of those in the RCC hierarchy who have "covered up" or "hidden" clergy sexual assault (eg, by moving offenders to another parish) or who failed to act (eg, by not reporting matters to police) in circumstances where credible evidence was before them of sexual assaults of children or vulnerable adults. To this extent, COIN seeks to expand the application of *Crimes Act* s 325.

(30) COIN thus requests that the Committee recommend to the Victorian Government that the above s 325(1) be amended by including the words highlighted below:

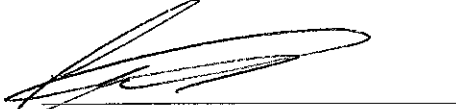
s 325(1) 'Where a person (in this section called "the principal offender") has committed a serious indictable offence (in this section called "the principal offence"), any other person who, knowing or believing the principal offender to be guilty of the principal offence or some other serious indictable offence, **or who ought reasonably to have suspected that such an offence had occurred**, 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.'

(31) **Public submission** COIN requests that this submission be made public.

Yours faithfully,



Dr Bryan Keon-Cohen AM QC
President COIN



Chiry Chen,
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Enc: Advice: Mr Nic Papas, SC, 20/8/2012

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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.

The advice is in the context of the Parliamentary inquiry into the handling of alleged criminal abuse of children by 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.

Whilst a number of former Catholic clergy have been successfully prosecuted 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 any 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 to police or higher church authorities.

s 325 *Crimes Act* 1958 ("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 member of the clergy 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 an offence of sexual assault against a child was committed by a priest? It should be noted that in the absence of direct proof of knowledge of the offending behaviour such as with admissions or other direct observation, then 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

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 inquiry.

Prosecutions of Senior Clergy or others in the Catholic Church

In my opinion the existing law 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 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 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?

In my view, and without the benefit of the material that will be placed before the Inquiry it is unclear whether there were any barriers 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?

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 Parliamentary Inquiry 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 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 Parliamentary Inquiry. 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.



Nicholas Papas SC
Deakin Chambers

20th August 2012