

TRANSCRIPT

FAMILY AND COMMUNITY DEVELOPMENT COMMITTEE

Inquiry into the handling of child abuse by religious and other organisations

Ballarat — 28 February 2013

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Ms D. Hadden.

The CHAIR — On behalf of the committee I welcome Ms Dianne Hadden. Thank you for your willingness to appear before this hearing. All evidence taken by this committee is taken under the provisions of the Parliamentary Committees Act, attracts parliamentary privilege and is protected from judicial review. Any comments made outside the precincts of the hearings are not protected by parliamentary privilege. This hearing today is being recorded and you will be provided with a proof version of the transcript. Following your presentation to us this afternoon, committee members will ask questions relating to both your submission and the evidence that you provide to us. We welcome you and thank you again for being before us.

Ms HADDEN — Thank you. I made a written submission on 27 August 2012. I will not read it out, but I will speak to some of the main areas.

The CHAIR — We have read it. Thank you.

Ms HADDEN — Yes, thank you. This inquiry, apart from hearing tragic evidence, is very important in my view for law reform in this state. I know that there has been some legislation that has been passed through the state Parliament as a result of recommendations taken up by Justice Cummins's report on protecting vulnerable children. So we are on the way, but because there is a lot more work to be done I do not believe that we as a state legislature are doing enough to protect children from child abuse, and it needs to be tightened up a heck of a lot. Having said that, it is very difficult to make an allegation and have that allegation supported by firm evidence for the police to pursue a criminal prosecution. But having said that, that should not be a reason why people do not go to the police and have their allegations tested and followed through with.

One of the main areas of law reform that I have considered in my paper and which I will speak to briefly is section 182 of the Children, Youth and Families Act 2005 in relation to persons who are mandated to report child abuse. The full list of persons who were to have been gazetted in the 2005 act have never been gazetted, so you only have a handful of people who are gazetted or mandated to report child abuse to the Secretary of the Department of Human Services, which is not the police — that is, teachers, nurses, police and doctors. Lawyers still are not gazetted to mandatorily report any child abuse. My further submission is that that list of mandated persons to report child abuse should be expanded to include all religious, including ministers, deacons, brothers, sisters, employees and volunteers of religious organisations and NGOs. This was a recommendation of the 2012 Cummins report, and my submission is that it needs to happen sooner than later.

Apart from its many recommendations, the Cummins report also made a number of recommendations for amendments to the Crimes Act. It is my view that our Crimes Act can be improved upon, and it will not take too much to improve upon it to extend the duty to report to a minister of religion and any office-holder who is employed by, is a member of, or is a volunteer of a religious or spiritual organisation that provides services to children and young people.

I have also looked at and considered the setting up of an independent and properly resourced statutory authority, such as an ombudsman-type authority. We have our children's commissioner in this state. Certainly in my view his powers would need to be expanded upon to give him an oversight role to investigate all claims of clergy abuse, both physical and sexual. But that is not to say that that body would in any way attempt to usurp the role of the police. In my view all reports of child abuse should be reported to Victoria Police. There is no question about that in my view. But this body could and should be the current commissioner for child safety's role expanded and properly resourced to oversight the issue of the practices, policies and protocols in religious and NGO organisations in relation to how children are treated and how any complaints about their treatment are handled.

Another issue is section 326 of the Crimes Act. In my submission I have recommended that that be amended, and it could be amended fairly simply and quickly. It can be amended to be along the lines of the New South Wales offence of misprision of a felony, which is failure to report a crime. At the moment section 326 of our Crimes Act is pretty light on, and I do not know of any prosecutions under that section at all. Section 326 is concealing offences for benefit, and the penalty is one year maximum. The New South Wales offence is a lot stricter, and its penalties are much harsher. There is two years and five years under their section, which is 316 of their Crimes Act.

The other recommendation that I make is that section 494 of the Children, Youth and Families Act be amended so that a person can be convicted of an offence for failing to protect a child from harm. At the moment that

provision has a subsection where proceedings can only be issued after consultation with the departmental secretary, and my view is that is too restrictive. It gives too much power to the departmental secretary to determine whether or not the matter is referred to Victoria Police, and I do not think that is appropriate at all.

The New South Wales police have been fairly active in prosecuting priests, especially in the Hunter Valley, under the misprision of a felony offence — section 316 in that state — and that is the attempts to cover up abuse within a diocese. As I said our section 326 is fairly difficult and somewhat ties the police's hands behind their back.

The other issue I have considered, too — and which of course the committee would be well aware of — is the Irish Ryan commission. That resulted in an offence being passed by the Irish parliament in July, I think it was, last year, 2012 — a withholding of information offence against children and vulnerable persons. That Ryan commission was set up to investigate offences against children in the Roman Catholic schools. It only went back to 1975 until 2004 — that was the period of investigation. It was established by legislation in 2004. It took two years to establish the commission; then the commission ran for three years hearing evidence. As a result of the Ryan commission's findings and recommendations, which were in five volumes and which were tabled in the Irish parliament, this new offence of withholding of information was passed.

I am uncertain as to whether there have been any prosecutions under that section, but I am sure the committee would be able to obtain that information from your Irish counterparts. The penalty for withholding of information under that Irish act is fairly hefty. The penalty is 5000 euros or up to 10 years prison, so they are not mucking around — the Irish government, once the Ryan commission's report was tabled and analysed. Those offences include false imprisonment, rape, sexual assault, incest and trafficking.

Another matter that arose from the Ryan commission in Ireland was the setting up of the redress board in 2002. That was set up to provide for compensation for adults who had been children and who had been abused during that period within the Roman Catholic schools. The compensation claims period was extended to September 2011. From my research it operates similar to our Victims of Crime Assistance Tribunal, but it is an independent body. It has a retired judge who operates it. It is wholly independent. It is chaired by the Honourable Mr Justice Esmond Smyth. It was set up to award compensation to people who as children were abused while resident in industrial schools, reformatories and other institutions subject to state regulation or inspection.

Following on from that the Irish government has set up another fund, because as at September 2011 the compensation claims can no longer be obtained under that redress board. The Irish government has also set up — well, encouraged — a statutory fund to support services to victims of crime. That arose after the Ryan report was published and tabled in the parliament. It was established under a 2002 indemnity agreement with the Catholic authorities, and to date — as at October last year — 21 million euros had been received towards the fund. That is invested through the National Treasury Management Agency. I am assuming that has followed on from the redress board, where the claims for compensation finished in September 2011. That would, in my view, assist victims and survivors who are not able to go through the criminal justice system for a number of reasons and also where the perpetrators or alleged perpetrators are no longer alive.

The issue of the Roman Catholic Church and the fact that it is not a legal entity is known to the committee, and I have made some reference to that. It is very difficult. There is some movement by the High Court and the New South Wales Supreme Court and the Court of Appeal towards rectifying the ability to sue the organisation, but it is very difficult. The one case — and it is only persuasive — is the England and Wales Court of Appeal decision of 12 July 2012, which alters the common law of vicarious liability by extending situations of employment to relationships that are akin to employment. That was a case of allegations of sexual abuse and assault perpetrated by a priest in the church, and that is a case that to my knowledge has not been yet tested in this state. It is certainly the leading judgement of Lord Justice Ward, and his judgement certainly assists victims now in my view — except the difficulty, of course, is running these cases and funding them. Hence the importance, in my view, of establishing and setting up by legislation an independent statutory body similar to the redress board and similar to the other body which the Irish government has established, which obtains money from the church authorities and other religious authorities and places it into this fund run by the national treasury.

That is probably about all I need to talk to you about.

The CHAIR — Thank you very much, Ms Hadden. Mr Wakeling has a question.

Mr WAKELING — Thank you, Chair, and thank you, Ms Hadden, for your submission today. In your submission you highlight a case in the US in which Monsignor Lynn was imprisoned for five years under a felony, child endangerment, which involved his knowledge of priests being moved from parish to parish and obviously the crimes that were perpetrated as a consequence and his knowledge of that. Then you allude to the fact that a similar provision could well be enacted within the Crimes Act 1958 of Victoria, so I would be interested if you could perhaps provide some further information on that.

Ms HADDEN — Yes, well, we could — well, the government could. The concealing offences for benefit, if it was amended to cover that movement and hiding of potential offenders, certainly would overcome the problems that are there now. But that could also be so if the government was to pass legislation similar to — or probably word for word with — the Irish act, the Criminal Justice (Withholding of Information on Offences against Children and Vulnerable Persons) Act, which is, very simply that:

... a person shall be guilty of an offence if —

- (a) he or she knows or believes that an offence, that is a Schedule 1 offence, has been committed by another person against a child, and
- (b) he or she has information which he or she knows or believes might be of material assistance in securing the apprehension, prosecution or conviction of that other person for that offence,

and fails without reasonable excuse to disclose that information ... to ... the Garda Síochána —

which is the police. We could do that. The government could instruct the Department of Justice to revisit section 326 or remove it or amend it, similar to or the same as this section in the withholding-of-information act. It is fairly simple to do. I think it is not about whether you will do it but when you will do it.

Mr McGUIRE — Thank you, Dianne, for your submission and testimony. I would like you to elaborate on one of the points you raised in your evidence and in your report, and it goes to the important change to the common law in England that has widened the scope of vicarious liability by extending it from well-established situations of employment relationships to those that are ‘akin to employment’. This is a critical issue that obviously we are looking at as well. How do you think that proposition could be introduced here?

Ms HADDEN — It is very difficult. I am not a trust lawyer, so it is something that you, in my respectful opinion, would need to consider fully as to whether you pass legislation that includes the religious as employers. It probably would be resisted, but it is an issue, in my view, that really needs a senior counsel or QC in the area of trusts and employment to look at. That decision of the England and Wales Court of Appeal was a very important decision. I do not know that it has been tested in Australia, but it is certainly something where, in my view, the committee could engage a senior trust lawyer to consider how it could be implemented in legislation.

As you know, there are the difficulties of how each parish operates. They operate really quite like nothing we have ever known, and that probably all needs to be looked at thoroughly so that people know who the employer is, who the employee is and what their responsibilities are. Certainly they cannot say, ‘I’m only employed by the bishop or God; therefore you can’t sue me’. That attitude needs to be removed from the 21st century.

Mr O’BRIEN — It is fantastic to have someone of your experience, both as a legislator and as a lawyer, to give a submission and take the time to put down your thoughts. They are most constructive. You have touched on the important issue of the seal of confession, and you have looked at it from both a canon law point of view and a legislative point of view. If I can summarise, you propose that there be a mandatory reporting obligation without exception and that effectively it would be for the Catholic Church to essentially rewrite its canon law so that it can deal with compliance with that. Could you explain your reasons for that prioritisation and the way you have thought about that issue?

Ms HADDEN — I am not Roman Catholic; I am Anglican. I do not personally believe that any paedophile priest would make a confession that he has abused a child. With today’s knowledge we can no longer accept as a community that a priest can abuse a child and continue to abuse a child and be protected by the church, canon law and the seal of confession. I do not know of any other situation where you are given such criminal information and allowed to conceal it. This is where section 326 of our Crimes Act, if it were tightened up a lot, would prevent the concealing of criminal acts by religious brothers and sisters. That is my personal view. If I

have killed someone and go to a priest under the seal of confession and say, 'I've killed someone; I've killed X', I do now know. It is very difficult.

Then of course it is difficult as a lawyer. We have our lawyer-client professional privilege. It is very difficult. What has gone on, especially in Ballarat and this diocese, needs to stop. Seven priests were investigated: one died and six were prosecuted and convicted. That is a very large number for one church, St Alipius, and it needs to stop. There is no question that it needs to stop, and it can only stop with legislators passing laws. Both the Crimes Act and the Children, Youth and Families Act need to be tightened up. The Children, Youth and Families Act does not take into account the role of the police prosecutor and the criminal law. I do not believe in the seal of confession, to be quite honest.

Mr O'BRIEN — I have a follow-up question. You mentioned legal professional privilege, and we have had this discussion. There are arguably exceptions to that privilege in circumstances where a person receiving information is aware of future crimes, that they have a right to tell authorities. It has not been expressed that a similar right exists presently for priests under the confessional seal. Do you believe there are analogies that can be appropriately drawn for those considering the canon law response to a mandatory reporting obligation enshrined in legislation? That your duty to protect the child essentially — —

Ms HADDEN — It is absolutely paramount.

Mr O'BRIEN — Can you explain again why you would say that should be the case?

Ms HADDEN — Because no-one should abuse a child. The safety of a child is paramount. At law, as parents and guardians of children, we are not to harm them, we are to keep them safe and we are not to abuse them, especially when they are entrusted to your care as either a teacher or a priest.

Mr O'BRIEN — What obligations does that put on the recipient of information that a child might be in danger?

Ms HADDEN — The obligation is that you should be reporting a potential crime. You are concealing information that should be put to the police authorities.

The CHAIR — I do not think there are any more questions, so on behalf of the committee I thank you very much for your appearance before us this afternoon and for your evidence. It has been most helpful indeed.

Witness withdrew.