

TOWARDS HEALING

ASSESSING COMPLAINTS WHEN THE EVENTS OCCURRED A LONG TIME AGO

Introduction

Many complaints brought under *Towards Healing* relate to events which occurred a very long time ago, creating particular difficulties for assessors in reaching a conclusion about the events in question.

That this should occur is not surprising. It is only in recent years that issues of sexual abuse by priests and religious, and cruelty in orphanages and children's homes, has come to be widely talked about. The *Towards Healing* process itself is relatively new, and before this, proper complaints processes did not exist. Legal proceedings represented the only option, with all their difficulties. Many people severely affected by childhood abuse in Catholic settings still do not know about *Towards Healing*, and complaints tend to increase significantly after media publicity. These factors, amongst others, make it inevitable that a significant proportion of the work of *Towards Healing* at present responds to what may be termed 'historic abuse' - abuse alleged to have occurred a long time ago. Historic abuse cases are most likely to arise in relation to events in childhood.

Often, complaints emerge as a consequence of the arrest or conviction of a priest, religious, or other person associated with the Catholic Church such as a schoolteacher. The widespread publicity in relation to the arrest or conviction leads other victims to come forward. Where pedophilia is involved, it is more likely than not that an offender will have multiple victims, so this should not be surprising. Nor is it surprising that other victims have not come forward to the police earlier. It is not uncommon for victims to think that they will not be believed, to have buried the incident in the past, or to fear going to the police because they don't want to have to go through the criminal justice process. Often they are unaware that there were other victims. The publicity attached to one case means that others have much less reason to fear coming forward.

The purpose of this brief paper is to provide some guidance on factors to consider in assessing such complaints, and what particular issues arise for consideration from the fact that the complaint is being brought so many years after the event. This guidance is written against the background of legal principles concerning such issues in the context of criminal trials. However, it is important to recognise that there are differences between the role and purpose of *Towards Healing* and the role of the criminal justice system and that principles derived from the criminal law, while very important, need to be applied with reference to the context in which many inquiries under *Towards Healing* take place.

Towards Healing investigations without a disciplinary aspect

Towards Healing was not developed as a disciplinary process. Certainly it involves inquiries into complaints of abuse and sometimes requires an assessment of disputed allegations. However the context in which such inquiries occur is in offering a pastoral response to people complaining of being victims of abuse by Church personnel. A *Towards Healing* process can occur whether or not the accused person is still alive and working with the Church. Consequently, not all investigations, by any means, involve a disciplinary response to the alleged offender.

There are many reasons why there may be no disciplinary aspect to the investigation. First of all, the accused person may already be in jail on charges of similar behaviour towards other victims.

In other cases, even though the accused has not gone to trial in the criminal courts, (for example, because old age or illness means he is not fit to stand trial) the history of offending behaviour is now well-known to the Church authority and the accused person has already been removed from all involvement in pastoral work, rendering a further disciplinary investigation unnecessary unless action is to be taken for compulsory laicization under canon law.

In other cases still, the alleged offender has died or has long since left the priesthood or religious order and for this reason there is not a disciplinary aspect to the *Towards Healing* investigation.

There may also be cases where the complainant is genuinely uncertain about the identity of those who allegedly abused him or her, or the name or description given cannot be reconciled with the records of the Church authority. Even in these situations, the Church authority may be satisfied after investigation that the complainant has been victimised on the basis of the interview with the complainant and the Church authority's knowledge of the situation around that time in the institution concerned. This may justify a pastoral response without a disciplinary process following on from the investigation.

The role of an assessment where there is no disciplinary aspect

Where a complaint under *Towards Healing* does not involve a disciplinary investigation of someone under the authority of the Church whether because he has already been convicted of serious offences of a similar nature, or because the alleged offender has died or left the Church organisation, the inquiry is necessarily of a different kind to a disciplinary process. The assessor may well not have the benefit of the accused person's response to the allegations.

There is still a need for caution and proper assessment of such cases. The fact that an accused person has since died or has long since left the Church and cannot be traced, is no reason to treat the complaint at face value just because it is not contradicted. The

assessor must be mindful of the need to protect the reputation and good name of the accused person, the more so if he or she has died, since his or her relatives will not have any legal recourse to challenge the findings. While it may be unusual, the Church is also vulnerable to fraudulent claims. There is also the possibility that a complaint, while genuinely made, is the consequence of what psychologists call 'confabulation'. Recollections of real events mix with fictitious elaborations upon those events over the course of time to create beliefs about the past which, while firmly held, are erroneous.

Even where the accused person has already been convicted of sex offences against other children, there is still a need for an assessment of the complainant's account. The fact that an accused person has already been convicted of sexual offences against children means that the assessor need not doubt the accused's propensity for abuse. However, the assessor must still be satisfied that the present complainant has been victimised. The conviction makes the assessor's task easier in coming to a conclusion about the events complained of, but it does not eliminate the need for proper scrutiny of the complaint.

General principles in assessing historic allegations of abuse

Whether or not the accused person is still alive and available to cooperate with an inquiry, there are some general principles applicable to the assessment of historic abuse claims which should be considered in any case where the victimisation of the complainant has not been proven in court or admitted.

1. The complainant's account

The assessment of child abuse complaints does not rest only on what a complainant has said. Interviewers who investigate possible abuse are listening for a range of things. In relation to child sexual abuse, for example, the detail given may well be supported by descriptions of feelings, smells and sights which give a sense of authenticity to the account. Furthermore, people who have been sexually abused often have a range of emotions that are evident such as sadness, shame and guilt, even many years after the event.

Whatever the form of the abuse, the story is often difficult to tell without intense emotions, whether it is of sadness, shame or anger. These aspects of how the account is given are significant in assessing the authenticity of the recollections.

2. Corroboration

Corroboration is not essential, even in a criminal trial, but obviously, where there is some corroboration of at least some significant aspects of a complainant's account, it is easier to reach a conclusion on the veracity of the account than if there is no corroboration at all.

In the context of *Towards Healing* cases, there can be a number of different kinds of corroboration which can assist an assessor in reaching a conclusion, together with all the other evidence, about whether the complaint is likely to be true:

- Corroboration of the propensity of the accused person to abusive behaviour because of evidence of abuse of another child or children.
- Corroboration of an aspect of the alleged events, for example where another person gives an account of a teacher often being alone in a room with the complainant in circumstances where this would have been unusual.
- Corroboration of negative reactions to the accused person, for example, the account of another person who was in the same school or children's home at the time, and who recalled that the complainant was exceptionally fearful of being left alone with the accused person, or very hostile towards him without obvious reason.
- Corroboration that the child was victimised. There may be evidence that the child was hospitalised due to injuries consistent with the alleged abuse; or a psychiatrist or psychologist may express a professional opinion that the complainant's symptoms are strongly indicative of childhood abuse, without being able to say whether or not the alleged perpetrator was responsible.

Of course, none of these are probative of the alleged abuse in themselves, and not all such evidence may be admissible in a criminal trial. The *Towards Healing* assessment is not, however, a quasi-criminal process. Even where there is a disciplinary process which may have serious consequences for the accused person, it is not punitive in character.¹

3. *Indications of prior complaint*

A factor to consider in evaluating complaints of historic abuse is whether or not there is any evidence that the complainant spoke about the abuse nearer in time to the alleged events. It is well understood, of course, that in child abuse cases in particular, very often the abuse is not disclosed to anyone until many years after the events. The abuser may be a family member in a position of power, there may have been threats made to the child if he or she tells, the child may have felt there was no-one who would listen, or the child may have consented to the activity at the time, only later realising how wrong and damaging it was.

For these and other reasons, absence of a complaint for many years should not be taken as an indication of lack of truthfulness,² and it is common for serious abuse only to be revealed once the victim reaches his or her adulthood.

¹ See e.g. *R v Davis* (1995) 57 FCR 512.

² This is stated for example in s. 294 of the *Criminal Procedure Act 1986* (NSW). This provides:
 (1) This section applies if, on the trial of a person for a prescribed sexual offence, evidence is given or a question is asked of a witness that tends to suggest:
 (a) an absence of complaint in respect of the commission of the alleged offence by the person on whom the offence is alleged to have been committed, or
 (b) delay by that person in making any such complaint.
 (2) In circumstances to which this section applies, the Judge:

However, if there is evidence that the complainant did tell a parent or friend near to the time of the abuse, or, for example, in his or her early adult years, this does indicate that the complainant has had a long-standing recollection of the abusive incident and has been consistent in complaining of it. Conversely, if there has been no prior complaint to anyone else, even long into the complainant's adult years, then the issue needs to be explored why it has only been recently that he or she has spoken about it or acted upon it. There may be good reasons for that delay. Alternatively, the lack of any previous complaint to anyone may suggest, in the absence also of any other evidence to support the allegations, that the recollection of abuse itself is quite recent and may be other than the accurate recollection of real events from long ago.

In this context, particular care needs to be taken with recovered memories. There has been an intense debate among psychologists and psychiatrists about this issue. There is now much more of a consensus about this than there was about ten years ago.³ Indeed, there is now a considerable amount of evidence for the fact that traumatic amnesia can and does occur, and that the account can be reliable.⁴

However, for an assessor, the issue is not whether people can suppress, and then recover, memories of traumatic events. The question is whether, in the individual circumstances of the case at hand, the person's recovered memories are reliable. This is a much more difficult question. The nature of recovered memory is that one may not be able to say in an objective sense that the recovered event is true. The recovery of traumatic memories is a process over time, and often memories emerge first in confusing fragments, and require interpretation and ordering. There is every possibility of suggestion, including self-suggestion, and confabulation.

The same is true where the recollections occurred under hypnosis. People who are in a hypnotic trance are highly suggestible, and experts have pointed out the ease with which a person can be hypnotised into believing that something occurred when it did not.⁵ Indeed it is possible for a person to cling very strongly to a false memory induced by hypnosis, so sure are they that it really happened. Hypnosis increases people's confidence about a memory, but not the reliability of those memories.

For these reasons, unless there is strong corroborative evidence, memories recovered from a position of amnesia, whether assisted by therapeutic techniques or not, cannot be the basis of a conclusion that the events complained of actually occurred in the face of

(a) must warn the jury that absence of complaint or delay in complaining does not necessarily indicate that the allegation that the offence was committed is false, and

(b) must inform the jury that there may be good reasons why a victim of a sexual assault may hesitate in making, or may refrain from making, a complaint about the assault.

³ See e.g. G. Davies and T Dalgleish (eds) *Recovered Memories: Seeking the Middle Ground*, (John Wiley, Chichester, England; 2001).

⁴ I have dealt with this at length in *Child Sexual Abuse and the Churches*, (Aquila Press, Sydney 2003), ch. 5.

⁵ J Weekes, S. Lynn, J Green, J Brentar, "Pseudomemory in Hypnotized and Task-Motivated Subjects" (1992) 101 *Journal of Abnormal Psychology* 356-360.

denial. They may have occurred, but it can only be a matter of the complainant's own subjective conviction.

4. *Consistency with prior complaint*

Just as evidence of complaint much nearer to the time of the abuse is useful in supporting a conclusion that the recollection is of events that occurred as described, so significant inconsistencies between accounts may cast doubt upon the accuracy of a person's recollections.

Those inconsistencies may be unimportant if they relate to peripheral and incidental aspects of the account. A complainant may, for example, be unclear in her mind about whether a particular event occurred in April or May of the year in question, when nothing turns on whether it was indeed April or May. More problematic is when there are significant inconsistencies between the accounts on central matters. For example, a complainant may have told her mother in 1994 that she was sexually abused by Father X. If in 2004, she says rather that the abuser was Father Y, and she is describing the same events, then there has to be a serious doubt about whether a finding can be made against either Father X or Father Y, in the absence of other strong evidence and satisfactory explanation of the different identification.

Particular difficulties arising from complaints of historic abuse

Assessors should also be aware of particular problems which arise when complaints are made many years after the events are alleged to have occurred. The length of time involved may, in many cases, make it unfair to an accused person to conclude on the evidence available that the events complained of actually occurred, particularly in the face of the accused person's denial.

The difficulties are two-fold. First, there is the effect of the interval between event and complaint under *Towards Healing* on the accuracy of the complainant's recollections. Secondly, there is the issue of prejudice to the accused person in perhaps losing the opportunity to defend himself or herself against the allegations by producing evidence to contradict them.

1. *The problem of fading memories*

All memory is fallible. Our conviction that something happened at some point in the past, and even the level of detail we are able to provide about it, is not a certain indicator that it occurred. The mind does not recall events in the way that a computer records data. Everything that we remember goes through a process of interpretation when it is first committed to memory. It also goes through a process of reconstruction when it is recalled from memory. Our memories of childhood events may be a combination of what we stored in memory at the time, the stories which our parents or friends told us, and pictures

we have seen. These different sources of information can blur into a single account of the event or situation, only some of which is the product of a child's direct memory of it.

We do, of course, remember some things much better than others. Traumatic events which occur to us are likely to have a much more profound impact on our minds and may be remembered vividly – sometimes all too vividly – many years later. Nonetheless, in assessing events which occurred long ago, it is important to consider what effect the passing of time may have had on the recollections of those involved and whether or not, on all the evidence available now, it is possible to reach a conclusion that the events complained of occurred. To conclude that we cannot know what the truth is so long after the events is a reasonable conclusion in many situations, but it has the necessary outcome that the complaint cannot be substantiated.

2. The problem of prejudice to the accused person

The other problem, when the accused person denies the allegations, is whether the passage of time means that the accused person has lost important opportunities to defend himself or herself against the allegations. Records may have been destroyed, key people who might have been able to cast light on the issues may have died. Of course, this is as much a problem in finding evidence corroborative of the complainant's account as it is in providing reasons to believe that the account is not accurate. Nonetheless, it is the prejudice to the accused person arising from the lost opportunity to support his or her denial which needs to be carefully weighed in determining whether it is possible to reach a conclusion that the events in question occurred.

On this issue, guidance may be derived from the principles of the criminal law.⁶ The position in the criminal law is that juries are advised that they can convict on the uncorroborated evidence of a complainant where there is a long delay before the complaint is made if they are satisfied of its truth and accuracy after first scrutinising the evidence with great care. However, they must be warned that because of the passage of time the evidence of the complainant cannot be adequately tested and that it would therefore be dangerous to convict on that evidence alone. That warning needs to be borne in mind continuously when scrutinising the evidence.⁷

The position ought to be similar in considering whether a conclusion can be reached that the abuse complained of occurred in a *Towards Healing* investigation. It is not always the case, of course, that the passage of time has made any difference to the capacity of the accused person to rebut the allegations.⁸ However, where there is evidence which could have been examined if the complaint had been made years earlier, or witnesses who could have been spoken to, the fact that they are no longer available to the accused person to corroborate his or her version of events must weigh very heavily in the balance.

⁶ The leading cases in the High Court are *Longman v R* (1989) 168 CLR 79; *Crampton v R* (2000) 75 ALJR 133; *Doggett v R* (2001) 75 ALJR 1290.

⁷ *R v BILT* (2002) 54 NSWLR 241 at 273 per Sully J.

⁸ *Ibid* per Wood CJ at CL at 247-250.

in deciding whether it would now be unfair to the accused person to reach a conclusion that the abuse occurred in the face of his or her denial.

Conclusion

There are at least three conclusions that can be reached concerning complaints of abuse. The first is an acceptance that the complainant has given an accurate account of what occurred; the second is that the accused person's account is to be preferred; the third is that the passage of time makes it impossible now to reach any safe conclusions about what occurred given the conflicting accounts presented.

When allegations are made about events which occurred a long time ago, the less the corroborating evidence, the more difficult it will be to reach a conclusion that the events occurred in the face of a denial by the accused person. To say that no conclusion can be reached about what occurred twenty or thirty years ago is not to indicate a disbelief either of the complainant or the accused person. It is to recognise that the passage of time and consequent loss of opportunity to support one's account of events, makes it unfair to reach an affirmative conclusion with the consequence that the negative conclusion must be reached.

However, even in the criminal law, convictions are reached based upon evidence of events occurring many years ago. In the ultimate analysis, it is for the assessor to examine all the evidence with great care, bearing in mind the evidence which years ago might have been there to rebut the allegations, but is no longer, in coming to a conclusion.

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