

CONCEALING AN OFFENCE – THE OBLIGATION TO REPORT CRIMINAL OFFENCES TO THE POLICE

In the work of *Towards Healing*, and in other aspects of the life and work of the Catholic Church in Australia, there may well be situations where people are told of the commission of serious criminal offences. On most occasions, there will be no conflict whatsoever between one's legal duty and one's ethical duty. However, there are situations where information is given in confidence and the circumstances are such that ethical dilemmas may arise.

Towards Healing makes it clear that Catholic Church personnel will adhere to all relevant mandatory reporting laws, and cannot be bound by requests for confidentiality where they have a legal obligation to report. It also emphasises that complainants should be strongly encouraged to take complaints of criminal offences to the police. A *Towards Healing* matter will not commence unless the police have already dealt with the matter and brought it to a conclusion from their perspective, or the complainant has given a signed statement that he or she does not want to take the matter to the police.¹

This paper has been written at the request of the National Committee on Professional Standards, through Sr Angela Ryan, to provide general explanation and advice about provisions in the criminal law which may expose personnel associated with the Catholic Church to the risk of committing a criminal offence if they fail to report material information about the commission of a crime to the police. The paper has a particular focus on the kinds of issues which arise in relation to complaints of abuse. Its purpose is only to provide an introductory explanation in non-technical language to assist the work of those involved with *Towards Healing*.

If an issue arises in an individual case, concerning whether a matter should be reported to the police where ethical considerations would dictate against it, it will be necessary to get legal advice specific to the case in question. It is not sufficient to rely on this paper.

The legal obligation to report offences

In all states and territories other than Western Australia, (at the time of writing), there is a duty on some professionals to report reasonable suspicions about child abuse to the relevant authorities, usually the Government department responsible for child protection. The list of professionals covered by mandatory reporting legislation varies from one jurisdiction to another, and the relevant laws on this are well known to state and territory Directors of Professional Standards and others in leadership roles in relation to work with children. Although prosecutions under mandatory reporting legislation are very rare, people who are convicted of a failure to report can be fined or worse, depending on the law of the relevant jurisdiction.

In addition to the mandatory reporting laws in relation to child abuse, there are statutory offences of concealment of information about serious criminal offences. In most states, it is only an offence to conceal a crime in exchange for a benefit or advantage. In South

¹ Section 37 of *Towards Healing* (2000).

Australia, it is an offence to conceal information in order to impede the police or to assist the offender to escape apprehension, prosecution or conviction.

In NSW, however, there is an offence which has been much more broadly drafted. It applies whether or not there is any benefit or advantage to the person concealing the relevant information. However, there is a defence of reasonable excuse for withholding information, and certain categories of professionals cannot be prosecuted without the approval of the Attorney-General.

Of most concern to the work of the National Committee for Professional Standards would be the NSW legislation.

Background: the common law offence of misprision of felony

At common law, there was an offence called 'misprision of felony' which applied to the concealment of serious offences. At that time the law distinguished between 'felonies' and 'misdemeanours'. Felonies were the more serious criminal offences. The law no longer distinguishes between misdemeanours and felonies.

In all states and territories, the common law offence of misprision of felony has been abolished. In most of the states and territories, the criminal law is codified and does not rely on the common law at all. The exceptions to this are NSW, Victoria and South Australia. In NSW, the offence of misprision of felony was abolished by section 341 of the Crimes Act 1900. In South Australia it was abolished by the Criminal Law Consolidation Act 1935, Schedule 11. In Victoria, it did not survive the abolition of the distinction between felonies and misdemeanours by the *Crimes (Classification of Offences) Act 1981*.² Instead, that Act inserted a new provision which makes it an offence to conceal information about a serious indictable crime in exchange for a benefit or advantage. This is now s.326 of the Crimes Act 1958 and is discussed below.

Concealing information about an offence for benefit or advantage

In most states, the only offence relevant to concealment of knowledge of a criminal offence is where that concealment occurs for benefit or advantage. This is the law under the Crimes Act (Cth) s.44 (which also applies to offences against the law of a territory) and the Criminal Codes of the Northern Territory, Queensland, Tasmania, and Western Australia.

The offence is called a "compounding offence." The provision in Queensland is typical. Section 133(1) of the Criminal Code in Queensland provides:

"Any person who asks for, receives, or obtains, or agrees or attempts to receive or obtain, any property or benefit of any kind for himself, herself or any other person, upon any agreement or understanding that the person will compound or conceal a crime, or will abstain from,

² *A v Hayden* (1984) 156 CLR 532, per Mason J; *Howard's Criminal Law*, 5th ed. by Professor Fisse, (1990), p 353, n.23; L. Waller and CR Williams, *Criminal Law, Text and Cases*, (9th ed, Butterworths, 2001) at 11.50.

discontinue, or delay, a prosecution for a crime, or will withhold any evidence thereof, is guilty of an indictable offence.”

The provisions in the other States are in similar terms, although there are a few minor differences between them.³

Victoria has a provision which is quite similar in effect to the states which include an offence of compounding. The relevant section in Victoria is the Crimes Act s.326:

326. Concealing offences for benefit

(1) Where a person has committed a serious indictable offence,⁴ any other person who, knowing or believing that the offence, or some other serious indictable offence, has been committed and that he has information which might be of material assistance in securing the prosecution or conviction of an offender for it, accepts any benefit for not disclosing that information shall be guilty of a summary offence and liable to level 8 imprisonment (1 year maximum)...

(3) For the purposes of this section a person shall be deemed to accept a benefit if he accepts or agrees 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....

In all these jurisdictions, an offence is committed if the person accused of concealment accepts a benefit for not disclosing that information. In all the jurisdictions apart from Victoria, the offence extends to asking for such a benefit.

The benefit need not be monetary or in money's worth. It can be any benefit or advantage for oneself or another. The key thing is that there has been some deal done to agree not to disclose the information in exchange for a benefit or advantage of some kind, or, in most states, the soliciting of such an agreement.

It is difficult to see how there could be an acceptance of a benefit or advantage in exchange for not revealing a criminal offence if someone is acting in good faith in a professional setting. However, such an offence could occur within the life of the Church where, for

³ Northern Territory, Criminal Code s.104(1): “Any person who asks, receives or obtains, or agrees or attempts to receive or obtain, any property or benefit of any kind for himself or any other person upon any agreement or understanding that he will compound or conceal a crime, or will abstain from, discontinue or delay a prosecution for a crime, or will withhold any evidence thereof, is guilty of a crime.”
Tasmania, Criminal Code s.102: “Any person who solicits, receives, or obtains, or agrees to receive or obtain, any property or benefit of any kind for himself or any other person, as a consideration for any agreement or understanding that he will compound or conceal a crime, or will abstain from, discontinue, or delay a prosecution for a crime, is guilty of a crime.”

Western Australia, Criminal Code s.136: “Any person who asks, receives, or obtains, or agrees, or attempts to receive or obtain, any property or benefit of any kind for himself or any other person, upon any agreement or understanding that he will compound or conceal a crime, or will abstain from, discontinue, or delay, a prosecution for a crime, or will withhold any evidence thereof, is guilty of an a crime and is liable to imprisonment for 7 years.”

⁴ In this legislation, “serious indictable offence” means an indictable offence which, by virtue of any enactment, is punishable on first conviction with imprisonment for life or for a term of five years or more.

example, an employee or parishioner has a hold over a superior and agrees not to disclose knowledge of the superior's criminal conduct in exchange for advancement to a position of leadership or influence.

The law in South Australia: impeding investigation or assisting offender

The law in South Australia does not require that the person concealing the offence has gained any benefit or advantage. However, the person's actions must have impeded the investigation of the offence or assisted the offender to escape justice. There is a defence of reasonable excuse. Section 241 of the Criminal Law Consolidation Act 1935 provides:

- (1) Subject to subsection (2), a person ("the accessory") who, knowing or believing that another person ("the principal offender") has committed an offence, does an act with the intention of--
- (a) impeding investigation of the offence; or
 - (b) assisting the principal offender to escape apprehension or prosecution or to dispose of proceeds of the offence,
- is guilty of an offence.
- (2) An accessory is not guilty of an offence against subsection (1)--
- (a) unless it is established that the principal offender committed--
 - (i) the offence that the accessory knew or believed the principal offender to have committed;
 - or
 - (ii) some other offence committed in the same, or partly in the same, circumstances; or
 - (b) if there is lawful authority or a reasonable excuse for the accessory's action.

There will not be a successful prosecution under this section unless the prosecution can establish that the accused person has done an act of some kind with the intention of impeding an investigation or to assist the principal offender in some way. The act could be something such as helping to destroy incriminating evidence or falsely telling the police that no-one is at the premises where the offender is hiding when the police come searching for him. An omission to act, such as a failure to report when one knows someone has committed a crime, is not, in itself, an offence.

The law in NSW: Crimes Act s. 316

While in all the other states and territories, the law has moved away from the old common law offence of misprision of felony and imposed additional elements such as concealment for benefit or gain, the NSW law is widely drafted to make it an offence to conceal any material information about a serious crime.

The terms of the offence

In NSW, section 316 of the *Crimes Act* is as follows:

Concealing serious indictable offence

- (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.

(2) A person who solicits, accepts or agrees to accept any benefit for himself or herself or any other person in consideration for doing anything that would be an offence under subsection (1) is liable to imprisonment for 5 years.

(3) It is not an offence against subsection (2) merely to solicit, accept or agree to accept the making good of loss or injury caused by an offence or the making of reasonable compensation for that loss or injury.

(4) A prosecution for an offence against subsection (1) is not to be commenced against a person without the approval of the Attorney General if the knowledge or belief that an offence has been committed was formed or the information referred to in the subsection was obtained by the person in the course of practising or following a profession, calling or vocation prescribed by the regulations for the purposes of this subsection.

(5) The regulations may prescribe a profession, calling or vocation as referred to in subsection (4).

"Serious indictable offence" means an indictable offence that is punishable by imprisonment for life or for a term of 5 years or more.

The legislation provides a constraint upon prosecution of certain categories of professional people who may have good reason not to report an offence of which they become aware in the course of their professional work. Prosecutions can only be brought with the consent of the Attorney-General. That list includes clergy. Section 6 of the Crimes (General) Regulation 2000 provides:

For the purposes of section 316 (4) of the Act, the following professions, callings or vocations are prescribed:

- (a) a legal practitioner,
- (b) a medical practitioner,
- (c) a psychologist,
- (d) a nurse,
- (e) a social worker, including:
 - (i) a support worker for victims of crime, and
 - (ii) a counsellor who treats persons for emotional or psychological conditions suffered by them,
- (f) a member of the clergy of any church or religious denomination,
- (g) a researcher for professional or academic purposes,
- (h) if the serious indictable offence referred to in section 316 (1) of the Act is an offence under section 60E of the Act, a school teacher, including a principal of a school.

As subsection (2) indicates, in NSW, an agreement not to disclose in exchange for a benefit aggravates the offence, but the offence in subsection (1) does not rely on proof of any benefit or advantage.

The elements of the offence

The elements of the offence in NSW involve the following:

(i) Someone must have committed a serious offence

For there to be a prosecution under this provision, there must be someone who has committed an offence which the other knows about or believes he or she has committed. That person will be called the principal offender. It follows that for a prosecution to result against the person who has allegedly concealed information, the principal offender must be convicted of the serious offence first. For the purposes of this section, 'offence' includes an attempt to commit an offence, even if the attempt was not successful.

In the criminal law, each offence must be proven specifically. An offence is an occasion on which the law is broken. It would not be sufficient for conviction under this provision that one knew or believed that someone had committed other offences which have not been the subject of charges. For example, if someone knows or believes that a youth leader has sexually abused Jonathan, a boy in the youth group, then it would not be sufficient for the prosecution to show that the youth leader was eventually convicted of sexually abusing a teenage girl who lived next door to him, but not Jonathan. If the accused person only knew about the youth leader's offending behaviour in relation to Jonathan, and had no information which could have provided the police with any assistance in relation to the other offence for which the youth leader was eventually convicted, then the prosecution must prove that the principal offender committed a sexual assault offence against Jonathan.

(ii) The other person must know or believe that the offence has been committed

The person who is accused under these sections must know or believe that the principal offender has committed an offence. It is not necessary to 'know' that the principal offender has committed a serious offence. It is sufficient that one believes the principal offender has committed an offence, if the next criterion is also fulfilled:

(iii) One must have information which might be of material assistance in securing the prosecution or conviction of an offender

All of us who watch the national news or read the papers will quite often know or believe that someone has committed an offence. The heart of the matter is that one must have information which might be of material assistance to the police in the apprehension, prosecution or conviction of a person for that offence.

One is most likely to have information which is of material assistance to the police where one is told something by the principal offender or witnessed something in relation to the offence. That might occur for example, where an adult daughter finds substantial quantities of blood on her father's clothing after he was out for the night at a time when someone with whom he was in conflict was murdered. If she believed that he was the murderer, and he is later convicted of that murder, her failure to disclose the information she had to the police would be an offence.

If an adult complainant of sexual abuse tells an interviewer details of an offence which she alleges was committed against her, the knowledge that the interviewer has of that in itself will not be of material assistance to the police in securing the apprehension of the offender or the prosecution or conviction of the offender. It is nothing more than knowledge of the complaint. The police can do little unless she herself makes the complaint to them and is prepared to make a statement. All the interviewer can do is encourage her to go to the police, as *Towards Healing* already provides.

(iv) The failure to report must be without reasonable excuse

While the scope of application of this law is quite wide, there is a defence of 'reasonable excuse'. It is not clear how this will be interpreted. Clearly, in circumstances where, for example, a psychologist is working with a sex offender in a treatment program, any prosecution for failure to disclose material information to the police would be met by a defence of reasonable excuse. Whether or not that will be a successful defence cannot be determined in advance of making the decision whether, in good conscience, to choose not to report knowledge of or belief about a matter to the police.

(v) The constraint on prosecution

To allay the concerns of professionals, the law was amended in 1997 to provide that certain professionals could not be prosecuted without the approval of the Attorney-General. One could expect that where a professional acts in good faith and with a legitimate reason not to disclose knowledge of an offence, it is most unlikely that the Attorney-General would approve a prosecution; but whether or not his approval will be sought or granted cannot be known in advance of making the decision whether, in good conscience, to choose not to report a matter to the police.

The recommendations of the Law Reform Commission

The NSW Law Reform Commission reported in 1999 on s.316 of the Crimes Act and was highly critical of it.³ The majority recommended that s.316(1) should be repealed. The minority accepted the criticisms of that section, but thought it could be redrafted to be much

³ NSW Law Reform Commission, Report no 93, *Review of Section 316 of the Crimes Act 1900 (NSW)* (1999).

more narrow in scope. The minority included two Supreme Court judges (one of whom had been the State's Attorney-General) and a respected District Court judge. They wrote:⁶

"It must be accepted, as the Report demonstrates, that the present provision is seriously flawed; to be brutal about it, it is in several crucial respects virtually meaningless...the section in its present form is completely inappropriate."

The Government has not yet indicated any intention to implement either the majority or minority recommendations.

Conclusions

The law on the question of concealment of offences is clear in most states, and personnel associated with the Catholic Church should have no reason to fear prosecution if they act conscientiously and in good faith in seeking to deal with issues arising from sexual abuse complaints.

The exception is NSW, where the protection for professionals from an oppressive prosecution rests in the good sense of the police and the Director of Public Prosecutions, the requirement for the approval of the Attorney-General to prosecute certain categories of professionals, and the defence of reasonable excuse. A further protection relevant to the work of the National Committee is that for a prosecution to succeed, the prosecution would first have to secure a conviction of the principal offender and prove that the accused professional had knowledge or belief about the offence for which the conviction was secured, and have material information in relation to it which might have assisted the police.

Two options are, in my view, open to the National Committee, or the State committee, if it remains concerned about this situation. The first is to ask the Government to consider implementing either the majority or minority recommendation of the NSW Law Reform Commission. It is unacceptable that professionals, acting conscientiously and with a view to tackling the problem of sexual abuse in our community, should have any fear of prosecution, however remote, for decisions which are ethically justifiable.

The second option is to continue to seek agreement on a protocol with the police. I realise that discussions on this have been revived. A protocol of this kind can do much to avoid misunderstandings which may arise in relation to the different roles fulfilled by the police and those working under *Towards Healing*.

Patrick Parkinson
February 2004

⁶ Ibid at 3.65.