

NSW Ombudsman

Our reference: C/2006/7161
Your reference: mh/815005
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25 March 2008

Sr Moya Hanlen OLSH
Diocesan Chancellor
Diocese of Wollongong
PO Box 1239
WOLLONGONG NSW 2500

Dear Sr Hanlen

**Ombudsman notification concerning Fr John Nester (Priest, Parish of Fairy Meadow)
and various alleged victims**

Thank you for the further information provided regarding the above matter involving Fr John Nester that we are monitoring under section 25E of the *Ombudsman Act 1974* (the Act). We received the information from the Diocese of Wollongong (the diocese) on 7 March 2008.

I note that Kamira Stacey Consulting (contracted to investigate this matter) has completed its investigation report and provided it to the diocese along with its recommended findings based on the evidence it obtained. It appeared that at this stage the diocese has not formed its own view in regard to the appropriate findings nor communicated any such proposed findings to Fr Nester.

As part of our monitoring of this investigation, I provide some comments below for your consideration and I also request further information.

1. Investigation report prepared by Kamira Stacey Consulting

The investigation report reflects a generally sound understanding of the requirements of the Act and, in particular, of investigations of reportable allegations under Part 3A of the Act. However, I provide the following comment in regard to the report relating to allegation 4.

Please give consideration during the final decision making in this matter to the fact that not all sexual misconduct is defined as involving a pattern of behaviour aimed at the involvement of children in sexual acts. Two factors are relevant to the weighing of evidence in regard to this allegation.

Firstly, grooming behaviour is only one example of sexual misconduct. Whilst the definition of grooming behaviour includes conduct 'aimed at engaging ... a child as a precursor to

sexual abuse', there is no requirement that such an intention be 'proved'. Grooming is a process. Depending on the circumstances, the initial stage may involve breaking down inhibitions and gaining the trust and affection of the child or children, and does not always have a sexual element. In weighing evidence in an allegation of grooming, it is often useful to consider the typical conduct that is considered to be characteristic of grooming behaviour (such as orchestrating time with a child or children without the presence of other adults, boundary breaching, special attention) and ascertaining the degree of presence of these typical characteristics. In doing so, it is important to keep in mind that, whilst there is a wealth of information available about 'typical' grooming behaviours, atypical behaviours may also be part of a pattern of grooming behaviour and should be considered in the context of all evidence obtained. For example, although 'secrecy' is often present in grooming behaviour, blatant conduct is also characteristic - various factors, such as the position held by the alleged groomer, may be relevant in whether or not conduct is blatant or clandestine. Our child protection guidelines provide some examples of grooming behaviour, however they are mere guidelines and therefore neither exhaustive nor binding.

Secondly, sexual misconduct also includes a range of other behaviour that, if established, will constitute sexual misconduct whether or not the conduct was part of a pattern of grooming behaviour. Examples of such conduct are listed both in our guidelines and the Commission for Children and Young People's guidelines, and include inappropriate conversations of a sexual nature, unwarranted and inappropriate touching of a child and sexual exhibitionism in front of a child.

Finally, I found the wording of allegation 4 to be confusing in regard to the use of the phrase - 'It is most likely'. On first glance this appeared to confuse what was alleged with what was established. On second reading I formed the view that the phrase was intended to reflect that the nominated timeframe for each alleged incident was an estimated timeframe. I would appreciate confirmation of this interpretation and suggest that you might choose to clarify that aspect of the report in any final documentation prepared by the diocese.

2. Jurisdiction in regard to allegation 3

I note that the alleged victim of allegation three has not been identified by the diocese. The investigation report did not document whether or not records from the hospitals in the area of the relevant camp, where the child may have been treated, had been requested. However, in view of the difficulties in obtaining any such documentation without the consent of the alleged victim, and information that the camp was 'travelling' and that the date of the injury to the child's leg is not known, I am not suggesting any further investigative inquiry in this respect.

When an allegation is made that on its face is reportable, but in circumstances where the alleged victim is neither identified nor identifiable, it will often be assessed that the allegation does not reach the threshold of a reportable allegation. (One obvious exception is in regard to allegations involving the possession of child pornography.) Similarly, where an alleged victim has not been identified after all reasonable inquiries at the end of an investigation process, it may be assessed at that stage that the allegation does not reach the threshold of reportable. I have given consideration to the facts of this matter and I am satisfied that allegation 3 meets the threshold of a reportable allegation. The identity of an alleged victim being unknown generally poses procedural fairness difficulties in regard to the person who is the subject of the allegation being able to respond to the allegation. It also poses practical

difficulties in terms of investigating the allegation. However, in this matter, Fr Nestor has conceded that he is aware of the identity of the alleged victim. I note that Fr Nestor refused to divulge this information to the investigator, which limited the extent of investigation possible. However sufficient investigation was possible to establish some evidence of the alleged conduct.

3. Concerns raised by Fr Nestor

Fr Nestor raised a number of concerns in his letter to the investigator dated 4 November 2007 and I would appreciate confirmation from the diocese that these concerns had been considered and, if appropriate, acted upon. (I have noted the concerns that Fr Nestor has raised in regard to the role of this office, and should Fr Nestor raise these concerns directly with us we will respond to them.)

One of Fr Nestor's concerns was in regard to the investigator's advice that she would not be providing Fr Nestor with a copy of her report to the diocese. I trust that the diocese will inform Fr Nestor of his right to obtain a copy of the investigation report via a Freedom of Information (FOI) request, free of charge, in the event that the investigation is considered to constitute relevant employment proceedings upon finalisation. The diocese should explain to Fr Nestor that any such application would be subject to the exemptions contained in the FOI Act and that some information in the report may need to be deleted. The reasons for any such deletions should be fully explained.

Fr Nestor also stated that being directed not to approach witnesses in this matter constituted a denial of procedural fairness. We consider it wholly appropriate that Fr Nestor was directed not to approach witnesses in this matter. Such a direction was necessary to ensure that the integrity of the evidence provided by those witnesses was not compromised, that witnesses who have expressed fear or other concerns were protected from real or perceived harassment and intimidation and that Fr Nestor was protected from any assumptions about his intentions in approaching witnesses. Procedural fairness requires that Fr Nestor be given sufficient information to enable him to respond to allegations against him. It does not require access to alleged victims and witnesses and allowing such access would be considered poor investigative practice and highly concerning. From the information provided to date, it appears to us that sufficient information has been provided to Fr Nestor to enable him to respond to the allegations against him, subject to limitations created by Fr Nestor himself (in apparently refusing to provide information known to him).

I noted Fr Nestor's complaint that there has been a 'lack of consideration of proven character and context' during this investigation. Fr Nestor raised the point that the allegations the subject of this investigation pertain to the period 1989 – 1994 and suggested that, were there basis to the allegations, there would be evidence of similar conduct before and after this period. We do not agree with this proposition, and our experience with matters of this nature does not lend support to it. However, we would appreciate further information from the diocese in regard to the extent to which relevant archived records might exist (relating to the period prior to 1989), whether or not any such records were reviewed and any benefits or limitations of such a review. I would also appreciate advice about any steps taken to confirm or otherwise Fr Nestor's claims of proven character in the years 1994 –present. In requesting this information, I am not suggesting that the investigation required it, however the investigation does require full documentation of the decision-making around action taken and action not taken. Particularly given that the concern was raised by Fr Nestor, any reasons for

not making inquiries of this nature should be fully explained and documented in the final report provided to us.

4. Information required

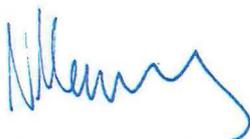
Under section 25E(3) of the Act, I require the following information:

1. The diocese's final findings and report on this matter. With consideration to comments in this letter, please include:
 - a. full reasons for either accepting or rejecting the recommendations of Kamira Stacey Consulting,
 - b. any comments on or clarification regarding any aspects of Kamira Stacey Consulting's report,
 - c. confirmation that the diocese has given consideration to the concerns raised by Fr Nestor, including information about any action taken as a result or the reasons for not taking action, where appropriate.
2. A copy of any advice to Fr Nestor about proposed findings, any response from Fr Nestor, and any final advice to Fr Nestor about findings and action taken.
3. Any other information you consider relevant in order for us to assess whether or not the reportable allegations against Fr Nestor was properly investigated and whether or not appropriate action was taken at the conclusion of the investigation.

I would appreciate receiving the information requested at the earliest practical time. If the information cannot be provided within **Tuesday 6 May 2008**, please provide a status update at that time.

If you have any questions about this letter, please contact me on **(02) 9286 0957**. Please note that I will be on leave 17 April – 28 May 2008 (inclusive). During that time, if Kelvin Simon is not available, please contact Anne Barwick (Assistant Ombudsman) if you have inquiries about this matter.

Yours sincerely



Natasha Mewing
A/Team Manager
for the Ombudsman