

AUSTRALIAN CATHOLIC BISHOPS' CONFERENCE

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CONFIDENTIAL

The Most Reverend Ronald Mulkearns
Chairman
Special Issues Committee
Bishop's House
P.O. Box 121
BALLARAT VIC 3350

My Lord,

Re: **Protocol for dealing with allegations of criminal behaviour**

Monsignor Manning asked me to read the protocol. I have some concerns with the protocol and having discussed them with Fr Brian Lucas, I would like to raise them with the Special Issues Committee.

From the point of view of meeting the concerns referred to in the letter from Mr Carey Tobin of Catholic Church Insurances of May 27th 1988, the protocol seems to address the Canonical principles enunciated then by Fr Rodger Austin and to address the matter of a Bishop or religious superior becoming liable for damages. However I have questions in relation to the mandatory reporting of child abuse and about the responsibilities of Bishops and Major Superiors described at Section 3 of the protocol.

1. Mandatory Reporting

The protocol does not deal directly with the statutory obligations, which may exist for those involved in the investigative process, to report child abuse to the appropriate civil authorities.

It is said:

- at 4.1.2 that bishops and major superiors must not obstruct or pervert the process of civil law.
- at 5.3 that the ACBC shall place on retainer civil lawyer in each State, etc.

- at 6.3 that notification be made to the bishop or the major religious superior, etc.
- at 6.4 that the advisory committee shall evaluate the complaint and make contact with departmental officers, if appropriate ('departmental officers' is defined at Section 2 to include police and those officers of the relevant State Government Department responsible for child welfare).
- at 6.6.3 that the bishop or major superior must act in accordance with the law and not in a way that will prejudice the process of law.

However the statutory obligations of individuals who, in the Church process from reporting, to notification of the Bishop or major superior, to investigation and possible treatment, become aware of the abuse is not made clear.

In the Committee's file there is a document giving an account of State legislation. On my lay reading of the various State legislation this account would seem to be up to date for New South Wales, Queensland, South Australia, Victoria, Western Australia and the ACT but inaccurate for Tasmania and the Northern Territory.

In New South Wales the mandatory reporting requirements can be avoided if the information is kept within the clergy, i.e. by taking advantage of the exemption for Ministers of Religion. However I have grave reservations about doing so given the potential for scandal which I will refer to later. Further, it is unlikely that the information could be kept entirely within the bounds of the clergy.

It is my view that the protocol should include a section on the statutory obligation to report which exists in several jurisdictions. That a Church process is instigated ought not prevent the operation of the civil law. Further, the use of the exemption for ministers of religion in NSW, which is primarily aimed at the confessional, may be brought into disrepute if it is used as a means of avoiding mandatory reporting of child sexual abuse and of keeping the investigation of child abuse allegations in-house and out of the courts.

In the States other than New South Wales, of course, no exemption for ministers of religion applies and if they belong to one of the defined categories they would be obliged to report.

Briefly the following table would seem to summarize the current differences between the States on mandatory reporting:

Mandatory Reporting of Child Abuse - State Statutory Requirements

| State | Persons Required to Notify |
|--------------|--|
| NSW | <ol style="list-style-type: none"> 1. For physical assault and neglect: medical practitioners 2. For sexual assault: medical practitioners, school counsellors, teachers, social workers, psychologists, refuge workers, child care workers, nurses, welfare workers, probation and parole officers, child care centres, youth workers, family support workers, early childhood teachers, family court counsellors, district officers, child protection workers, police officers, speech pathologists, occupational therapists and pharmacists. [An exemption applies if the person is also a minister of religion. Currently marriage counsellors under oath of secrecy under the Family Law Act must report but their evidence is not admissible. There are currently amendments proposed to the Family Law Act to remove that privilege.] |
| Vic. | No mandatory reporting. |
| Qld. | Medical practitioners. |
| S.A. | Medical practitioners, dentists, nurses, psychologists, pharmacists, teachers, teachers aides, kindergarten employees, police officers, employees of agency providing health and welfare services to children, social workers in hospitals health centres or medical practice, others determined by regulation. |
| W.A. | No mandatory reporting but there is an agreement to report between the children's hospital and the W.A. State Government. |
| Tas. | Probation officers, child welfare officers, welfare officers, persons holding children's boarding home or day nursery licences, school principals including infant schools, kindergarten teachers, officers engaged primarily in welfare work, Education Department guidance officers, psychologists, social workers, medical practitioners, registered nurses. |
| N.T. | Any person not being a member of the police force. |
| A.C.T. | No mandatory reporting. However there is provision for it in Section 103 of the Children's Services Ordinance 1986 which has not yet been implemented. |

2. Responsibilities of Bishops and Major Superiors

The statement (at Section 3) of the responsibilities of Bishops and Major Superiors sets priorities which are potentially scandalous.

The protocol is potentially a public document. It is designed to establish a procedure to safeguard the bishop, major religious superior, diocese or religious institute against civil liability. Hence in the event of an action being taken against any of the above, defence counsel would presumably use the protocol and the fact that it had been followed as evidence of having acted reasonably to prevent further harm. The letter from Mr Carey Tobin makes it clear that if a major superior or bishop knows or reasonably suspects and does not act to prevent further molestation then there is no insurance cover under the public liability policy.

In the event of the protocol being admitted as evidence it becomes a public document. As a public document it would be read with an eye to seeking scandal.

If one reads the list of responsibilities, the list includes defence of good reputation and image of individuals and the Church, the rights of members of the Church, the discipline and the settling of disputes, the management of allegations, the right to investigate, a uniform approach, and *appearing* to be impartial. Except under the general heading "all of Christ's faithful" the need to protect victims of crime and to prevent further injury or injustice to them are *not mentioned*. Seeking justice and *being* impartial are surely important responsibilities.

The media would have a field day with this document, ridiculing the Church, justly in this instance, for being more concerned to defend itself and its reputation and its *image* than to defend the defenceless.

In the section entitled "Values to be Promoted" the welfare of complainant, victim or accused is mentioned at 4.1.3 and not obstructing the process of civil law is mentioned at 4.1.3. However the value of seeking to ensure that a criminal is brought to justice is not mentioned.

It is of the utmost importance that the criminal behaviour by a person in a position of trust within the Church be subject both to the civil law and to canon law. In no way can one be seen to substitute for the other. For the sake of the Church, reasonable suspicion of a crime must be reported to the authorities. Any attempt to contain it within an in-house investigation and management risks bringing the Church into disrepute. Further, quite apart from the due process of the civil law, the investigation in the terms of Canon 1717

ought not, from a prudential point of view, be an entirely in-house affair. The faithful and the whole community ought have the confidence that such investigations are carried out impartially. Some doubt about the latter may arise if the investigation is undertaken exclusively by priests or religious. The involvement of professional lay people would be prudent.

Finally, in order to avoid legal complication and to protect the sacrament, priests and bishops involved in investigating allegations of criminal behaviour should not hear the confession of a person who is accused of a crime they are investigating.

3. A Model for Managing Allegations of Criminal Behaviour

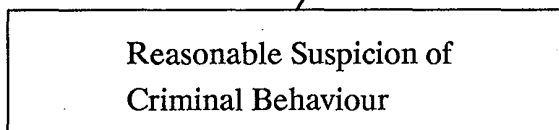
My major concerns with the protocol may be summarized by the following points:

- a) There is no separation between counselling and investigation. Counselling is not adequate if part of its function is to investigate behaviour for canonical or civil reasons.
- b) Mandatory reporting is not adequately dealt with and there is grave risk of scandal in using the NSW exemption for clergy to escape the justice system.
- c) There is a moral obligation to seek to bring a criminal to justice. The Church is part of the wider community and a crime against a person is also a crime against the whole community. The community has a right and an obligation to punish a person who acts against the community in a serious way. The abuse of trust in a priest or religious abusing a child exacerbates the offence and increases the importance of bringing him to justice.
- d) The protocol is too heavily weighted in favour of the accused and pays too little attention to the needs both of the victim and the community.
- e) The wording of the document and the overall impression of an in-house self protection of one's own and one's image are scandalous.
- f) An implication which can be read into the document is that the Church rejects the decision of the various State Governments to establish child welfare authorities and the policy of notification of child abuse.

The following is an alternative model:

The management of accusations of criminal behaviour, particularly child abuse, should be separated into several distinct and independent stages and categories thus:

1. Initial investigation
 - not to be undertaken by a group composed exclusively of clergy and religious.

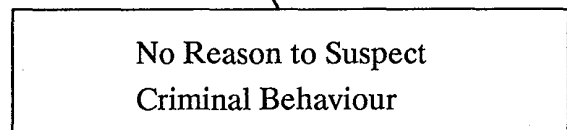


2. Report to authorities by initial investigation team and suspension of accused.

3. Counselling and support offered by Church for complainant and complainant's family. Counselling must be independent of investigations.

4. Counselling, support and perhaps treatment for accused.

5. Independent investigation of allegations by Church authorities in order to resolve canonical issues. This could be done by the initial investigation team but not by anyone involved as a counsellor for either party.



2. Counselling for Accused

3. Counselling for Complainant and Complainant's Family.

Yours sincerely

N.A. Tonti-Filippini

Nicholas Tonti-Filippini