

Our Ref: P Gamble
Your Ref: L. Rolls
Direct Line: 9617 5779
Direct Fax: 9629 4670

28 November 1995

Mr Laurie Rolls
Professional Standards Risk Management Service
Level 1
324 St. Kilda Road
MELBOURNE 3004

Dear Laurie

MISPRISION OF FELONY AND OTHER CRIMINAL CHARGES

You have asked us to consider the possibility of charges being laid against individuals within the Church arising from their concealment of knowledge of the activities of paedophile Priests.

It is certainly the case that victims support organisations are encouraging the police in Victoria to investigate the hierarchy of the Church with a view to laying charges where it can be proved that there was knowledge on the part of the hierarchy of sexual abuse and no action was taken to report the offender.

In that regard we enclose for your information a copy of an article from the Warrnambool Standard reporting on the police investigations conducted into Bishop Mulkearns arising out of the Ridsdale incidents.

Information that we have suggests that the police are continuing investigations in Victoria in an effort to establish the level of knowledge held by the Bishop of another Diocese in respect of another offender.

MELBOURNE
575 Bourke Street
Melbourne 3000
Victoria Australia
GPO Box 4592 Melbourne
DX 102 Melbourne
Telephone: (03) 9617 5711
International: 613 9617 57
Facsimile: (03) 9614 5577
Email:
dmb@melbourne.lawnet.co

**MELBOURNE PARTNERSHIP
PARTNERS**
William T McKay
Peter M Beaumont
Patrick W T McCabe
Andrew R Bretherton
Anthony Elder
E R Huan Walker
Peter M Nadalin
Steven Amendola
David E Nathan
Bernard J O'Shea
Belinda H M Lim
Peter Merrycees
Paul D Gamble
Brendon R Watkins
Peter E Cash
Craig Penn-Tonkin
Dan M Hogan
Jonathan S Sandler
Stephen G Walters
Rick L Horsley
Michael E Wilton
Philip E Batty
David M Bradley

SENIOR ASSOCIATES
John E Boyall
Andrew D Bruce
Martin J Casey
Ian F K Fullagar
Marilyn F Levy
Carolyn M Sanders
Andrew M Pinder
Andrew J Bini
Richard J Fleming
Ross W McClymont
Sarah M Rey
Ian W Vinson

CONSULTANTS
Alan J Fenton
Hugh M Graham
Peter R Murphy
Moir E Rayner

SYDNEY
16 Barrack Street
Sydney 2000
New South Wales Australia
GPO Box 427 Sydney 2001
DX 254 Sydney
Telephone: (02) 295 9999
International: 612 295 9999
Facsimile: (02) 295 9990

BRISBANE
Level 8 Comalco Place
12 Creek Street
Brisbane 4000
Queensland Australia
GPO Box 2477
Brisbane 4001
DX 272 Brisbane
Telephone: (07) 3229 2961
International: 617 3229 2961
Facsimile: (07) 3220 0210

The laws covering offences such as those commonly referred to as "Misprision of Felony" or "Accessory After the Fact" are varied throughout Australia and the only convenient way to deal with them is on a state by state basis. However, the common law position is worth reviewing to gain an understanding of the circumstances looked at by the Court in respect of these offences.

Misprision of Felony:

In a number of states Misprision of Felony has been abolished as a statutory offence. The essence of the offence is the failure on the part of the accused to communicate to the proper authority the accused's knowledge of the commission of a felony by another. Chitty, in his text defined "Misprision" as:

"Any person knowing the crime to have been committed and concealing it, even though he has not actively assisted the offender, will be guilty of a misprision of the crime which he has been instrumental in concealing ... in all cases therefore, when a felony has been committed, it is the absolute duty and only safe conduct of the party who is aware of the circumstance, to reveal it as soon as possible to some judge or Justice of the Peace."

In today's language the matter ought be reported to the police rather than a judge or Justice of the Peace.

Compounding a Felony:

Compounding is another common law misdemeanour punishable with fine and imprisonment which involves the agreement by the accused, for reward, not to prosecute someone who has committed an offence.

The notion of benefit is an essential criterion for establishing the offence of compounding a felony to have been committed.

Accessory after the fact:

Blackstone said that a person will be an *accessory after the fact* if:

"knowing a felony to have been committed he receives, relieves, comforts or assists the felon ... generally, any assistance whatever given to a

felon, to hinder his being apprehended, tried or suffering punishment, makes the assistor an accessory".

In this context, the term "accessory after the fact" may be seen as describing both the common law offences of misprision of a felony and compounding a felony.

In virtually all Australian states these common law offences have been substituted with offences under the various Crimes Acts which we will now proceed to review.

In many Australian states the distinction between felony and misdemeanour has been removed. In such states there will be no charge of Misprision of Felony except:

- (a) where the offences took place prior to the abolition of the distinction,
- (b) where there is now a statutory offence which substitutes for the common law offence.

Victoria:

Accessory After the Fact:

Section 325(1) of the Crimes Act (1958) provides:

"Where a person (in this section called the "principal offender") has committed a serious indictable offence (in this section called "the principal offence") any other person who knowing or believing the principal offender to be guilty of the principal offence or some other serious indictable offence, without lawful authority or reasonable excuse does any act with the purpose of impeding the apprehension, prosecution, conviction or punishment of the principal offender, shall be guilty of an indictable offence."

Historically the crime of accessory after the fact requires a positive act on the part of the perpetrator which act is done with the purpose of impeding the apprehension, prosecution, conviction or punishment of the offender.

It is insufficient, under Victorian Law, for a person to take no action. That will not result in a successful charge of accessory after the fact being brought.

Misprision of Felony:

Misprision of Felony has been abolished from the Statutes in Victoria since 1981, when Section 326 of the Crimes Act was amended to provide:

"Where a person has committed a serious indictable offence, 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 the offender for it, accepts any benefit for not disclosing that information, shall be guilty of an indictable offence ..."

Section 326(3) provides that the benefit need not be in money or moneys worth.

Where the knowledge of a felony existed prior to 1981, then it is possible that an offender may be charged even today with the offence of Misprision of Felony.

New South Wales:Accessory After the Fact:

Section 347 of the Crimes Act 1900 (as amended) provides:

"Every accessory after the fact to any such felony may be indicted, convicted and sentenced as an accessory, either before, or together with, or after the trial of the principal felon, whether such felon has been previously tried or not, or is amenable to justice or not".

Section 350 of the Crimes Act provides for a maximum penalty of five years upon conviction.

Section 371 of the New South Wales Crimes Act provides:

"In every case of felony, at common law or by statute, any number of accessories thereto whether before or after the fact may be charged with substantive felonies in the same indictment, and be tried together, although the principal felon is not included in the indictment, or is not in custody or amenable to justice".

The judgment in R. -v- Williamson (1972) confirmed that at least in New South Wales, the act of concealing evidence of a felony will suffice to prove the offence of accessory after the fact. Furthermore, the act must be capable of assisting the principal felon, though it need not have achieved this purpose; R. -v- Maloney (1901).

Misprision Of Felony:

The common law offence of Misprision of Felony has been abolished in New South Wales by Section 341 of the Crimes Act. It has been replaced by the statutory offence of concealing a serious offence for benefit (similar to that as contained in Section 326 of the Victorian Crimes Act). In New South Wales there is no definition of benefit within the Act although it does appear that personal gain is contemplated.

Queensland:

Accessory After the Fact:

Section 544 of the Queensland Criminal Code provides that:

Any person who becomes an accessory after the fact to a crime is guilty of a crime, and is liable, if no other punishment is provided, to imprisonment for two years".

In Queensland, on the authority of R. -v- Rowley (1948) no charge will be tried until the guilt of the alleged principal offender has been established.

Section 545 of the Queensland Criminal Code provides a parallel offence in the context of misdemeanours.

"Any person who becomes an accessory after the fact to a misdemeanour or any offence of such a nature that the offender may be sentenced on summary conviction to imprisonment for six months, is guilty of a misdemeanour and is liable to a punishment equal to one half of the greatest punishment to which the principal offender is liable on conviction. If the principal offence is such that an offender is punishable on summary conviction, the accessory may also be summarily convicted. "

Section 10 of the Code provides that:

"A person who receives or assists another who is, to his knowledge guilty of an offence, in order to enable him to escape punishment, is said to be an accessory after the fact to the offence".

The Australian Concise Oxford Dictionary defines "receive" as:

"admit; consent or prove able to hold; provide accommodation for; submit to; serve as a receptacle of (had to receive the visits, attentions of); Admit to membership of the Church etc; be marked more or less permanently with; convert into sound or picture".

The Australian Concise Oxford Dictionary defines "assist" as :

"help; take part in; be present at".

The case of R -v- Winston (CA unreported 17th November 1994) held that

"some positive act has to be found in an aspect of the behaviour of the person charged directed towards the principal offender before it can be said that he has been assisted or received."

The court later said that:

" It can be said that to "receive" implies an act of acceptance of the offender ~~into an area or location which the accessory controls or over which he exercises some influence and it will involve some measure of positive support for the offender"~~

In our view, a proper interpretation of this section of the Queensland Criminal Code requires a positive act to be taken by the accused. In our view it is not sufficient for the prosecution to assert that knowledge which was not acted upon is akin to taking a positive step to conceal facts or evidence. (ie: destruction of documentary evidence)

Misprision Of Felony:

There is no statutory offence of misprision of felony in Queensland nor are we aware of any section of the Code which abolishes the common law offence.

Western Australia:Accessory After the Fact:

In Western Australia Section 10(1) of the Criminal Code (WA) provides:

"A person who, knowing that another person has committed an offence receives or assists that other person in order to enable that other person to escape punishment is said to become an accessory after the fact to the offence"

We make the same comments in relation to the Western Australian provisions as those which appear in the Queensland Criminal Code.

Misprision Of Felony:

In Western Australia there is no offence of Misprision of Felony in the statutes.

Tasmania:Accessory After the Fact:

Section 6(1) of the Criminal Code Act (1924) provides that:

"A person who receives or assists another who is, to his knowledge guilty of a crime, in order to enable him to escape punishment, is said to become an accessory after the fact to such crime".

The Tasmanian Code defines "crime" as an offence punishable upon indictment. It follows that the old common law distinction between felony and misdemeanour is preserved such that only an indictable offence can support a charge under Section 6(1) of accessory after the fact. It is only in the State of Tasmania that this distinction is preserved.

Misprision Of Felony:

There is no offence of misprision of felony on the statutes of Tasmania.

There remains a distinction between felonies and misdemeanours in Tasmania which could support a charge of Misprision at common law. There is no report of any such charge having been laid in recent times.

Northern Territory:

Accessory After the Fact:

Section 13 of the Criminal Code (NT) provides that:

"A person who receives or assists another who, to his knowledge, has committed an offence in order to enable him to escape prosecution becomes an accessory after the fact to the offence".

In the Northern Territory it would appear that "offence" includes both indictable and summary offences however, reverting to our analysis of the Queensland Code, the terminology "receive or assist" requires some positive act on the part of the accused rather than simply having knowledge which is not passed on to the relevant authority.

Misprision Of Felony:

In the Northern Territory there is no offence of Misprision of Felony.

Australian Capital Territory:

Accessory After the Fact:

Section 346 of the Crimes Act (1900) provides that:

"A person or receives or assists another person who is, to the knowledge of the first mentioned person, guilty of an offence under a law of the Territory in order to enable that other person to escape punishment or to dispose of the proceeds of the offence is guilty of an offence punishable on conviction by imprisonment for two years".

Misprision Of Felony:

There is no distinction between "felony" and "misdemeanour" (see Section 9 of the Code). Accordingly as there are no felonies there can be no offence of Misprision of Felony in the Australian Capital Territory.

Conclusion:

We trust that this advice has provided some clarification as to the various statutory positions as they presently exist around Australia.

In order to complete this advice we will need to complete a historical search of other jurisdictions as where there have been changes to the Code over time it may be that offences of Misprision of Felony have previously existed on the record but are now abolished, however that does not necessarily mean that no charge can be laid in respect of historical information received by the police. Of particular concern is the late reporting of sexual offences to the police where on our experience there has been a considerable delay (in some cases approaching 40 years) before the offences are reported to the police and action taken.

It would appear accordingly that it is only in the States of Victoria and New South Wales that there may be consideration given to charging members of the Church hierarchy with Misprision in circumstances where knowledge of a felony has been concealed.

The remaining states where there is no distinction between "felony" and "misdemeanour" will not support such a charge even at common law. The only state where that is a possibility is Tasmania where the law retains that distinction.

In the other states it would be necessary for any charges to be brought under the terms of the relevant Crimes Acts detailed herein.

We will provide you with further advice on the historical development of the Codes in due course.

Yours faithfully
DUNHILL MADDEN BUTLER

Signed
Paul Gamble



Professional Standards Risk Management Service

Level 1, 324 St. Kilda Road, Melbourne, 3004
Telephone (03) 9693 2282 Facsimile (03) 9682 5252
G.P.O. Box 180B, Melbourne, Vic. 3001

5th January 1996

Private & Confidential

Rev. Monsignor A Hart V.G.
Diocese of Maitland
341 High Street
MAITLAND NSW 2330

Dear Monsignor,

Misprision of Felony

The police in the States of Victoria and New South Wales have indicated they are adopting the principle they should investigate the possibility of laying charges of Misprision of Felony in relation to all cases involving criminal sexual activity.

Their enquiries in this connection have alerted a number of Church personnel to the possibility charges might ensue. Accordingly we have obtained some general advice on the subject which may be of assistance to those who encounter this situation.

Upon reading the document it will be readily seen this is advice of a quite general nature. Specific advice should be sought at an early stage should the need arise.

As a part of the service provided to Dioceses and Religious Institutes an attempt is being made to minimise the legal expense incurred by us all. By all means do feel free to contact the writer before seeking advice in a particular case. The answer you seek might be available from advice already in our possession.

Yours sincerely,

Signed

LAURIE ROLLS

Encl.

1207ETL3