



8th February 2016

Reasons for Decision with respect to Bishop Ronald Mulkearns

Case study No. 28 is concerned with the response of the Roman Catholic Diocese of Ballarat to the sexual abuse of children. The Commission is proposing to sit again in the week commencing 22 February 2016 in Ballarat to take further evidence.

The Bishop with ultimate responsibility for the Diocese during much of the period of time that the case study is concerned with was Bishop Mulkearns. He was the Bishop from 1971 until 1997 when he retired. His evidence in relation to the management of offending priests and the Diocese response to survivors is obviously relevant and significant.

Before the case study hearing commenced I issued a summons requiring Bishop Mulkearns to attend the hearing. However, before he could give evidence the Commissioners were informed that the Bishop was suffering from bowel cancer and was seriously ill. It was also indicated that he was suffering cognitive problems, his memory was poor and his health may preclude him from giving evidence. I have previously excused him from attending in answer to the summons.

The Commission has now received in evidence a report from Dr David Fonda, a Consultant Geriatrician, Rehabilitation Specialist and a specialist in Bowel

and Bladder Control. Dr Fonda has had access to relevant medical reports in relation to Bishop Mulkearns. He records that the Bishop has suffered a stroke and suffers colon cancer with a tumour in his pelvis attached to his right ureter. He is suffering chronic kidney disease, can only walk short distances with the help of a walking frame, suffers anxiety, and has difficulty sleeping.

When Dr Fonda spoke with Bishop Mulkearns the Bishop apparently expressed concerns that his memory of relevant events was vague and he believed that as a consequence he may be seen as a hostile or unreliable witness if he gave evidence.

Dr Fonda was asked by Bishop Mulkearns lawyers to report on a number of specific questions. Those questions and answers will be annexed to my reasons which will be published shortly on our website.

His report included the following:

- *Bishop Mulkearns did appear to be tiring during the latter part of my assessment with him and I would have thought ideal duration of interaction for cross examination would be between one hour and two hours maximum on any one day with a short interval during this.*
- *Further cross examining should be delayed for a number of days to allow him to recover physically and emotionally.*
- *Given the above provisos in the method of assessment and location of assessment, I believe Bishop Mulkearns should be able to answer “yes or no or I do not recall” to most questions.*
- *If information is provided in a more complex way, this may lead to more confusion in his ability to respond.*

- *If information is prompted then I believe he should be able to provide a response as above.*
- *His speed of processing of information is slow and therefore a lot of patience would be required to allow him to understand the questions, which might need to be paraphrased.*
- *At times, he has trouble finding the right word and prompting with choices would be an effective strategy.*
- *I suspect he would struggle with anything other than simply structured information and questions.*
- *Bishop Mulkearns says he does struggle to follow and retain a thread of information when he is reading something, which he enjoyed doing in the past. Therefore, if information is presented to him in the written form to process before an examination, this may prove difficult. He may need the help of his legal advisors or others to assist in this. If feasible, then having limited information presented to him in the written format to be read, processed and considered (possibly with his legal representative) prior to cross examination then this may lead to a more useful outcome.*
- *It is not clear to me (as I did not pursue this) if he does or does not have knowledge about the events of relevance to the Royal Commission. These may be suppressed but might be accessible under cross examination. However, it would not surprise me if, despite being able to recall information with prompted questions, he may still remain vague about the exact time and place these occurred. This is a common observation I see with older people where that level of detail does not seem to be easily recalled. It is also common in all people for there to be gaps in memory despite prompting.*

When the capacity of Bishop Mulkearns to give evidence was discussed on Friday his counsel indicated that notwithstanding the state of his general health and his cognitive difficulties the Bishop was prepared to give evidence.

However, having regard to his poor health, it was submitted that it would be preferable for him to give evidence for short periods approximately one and a half hours followed by an interval of some days after which his evidence could resume. It was submitted that this evidence should be given remotely, that is from the nursing home in which he resides to avoid the additional burden of travel and stress of the courtroom in which the hearing will be conducted.

Counsel accepted that the proposal required for the Bishop to give evidence would present practical difficulties. It may also become apparent, and having regard to the medical reports likely, that as he attempts to give answers to questions that his cognitive impairments mean that his evidence is unreliable and any questioning would be of no utility and would not assist the Commission in resolving issues relevant to the case study.

Counsel for the various survivors submitted that Bishop Mulkearns should be required to give evidence, accepting that it may be necessary to examine him remotely from his present residence. Dr Hanscombe, for six survivor witnesses, submitted that the medical evidence indicated that the Bishop's evidence would not assist the Commission and he should now be excused from further attendance.

Inquiries have been made and it seems that a room would be available at the nursing home from which Bishop Mulkearns could give evidence. Whether appropriate technical arrangements can be made is still being investigated. Obviously if these arrangements cannot be made, although it would require

extra burdens on the Bishop, he could be taken to another place including the Ballarat courthouse where he could give evidence.

In all the circumstances, but without any conclusion as to the likely utility of the process, the Commission will require Bishop Mulkearns to give evidence. Whether that evidence will be taken remotely from the nursing home or another place will be discussed with his lawyers.

In deciding that the Bishop should give evidence it will be important for all parties to bear in mind that the taking of his evidence will be difficult for both him and for counsel assisting seeking a response to questions concerning the Bishop's actions some years previously. Whether his evidence could be of utility will have to be assessed after questioning has commenced.

The need for this assessment is apparent from the comment by Dr Fonda that without the assistance of his lawyers, Bishop Mulkearns may not be able to effectively answer questions. Having regard to the issues which Bishop Mulkearns will be asked to address during the hearing, if the answers are to be provided by the lawyers rather than by him, this will clearly be unsatisfactory.

If it seems to the Commission that questioning is futile we will bring it to an end. If that is necessary it will still be possible for the Commission to reach a conclusion in relation to many relevant factual issues from the many documents already in evidence together with the evidence of the other witnesses.

Annexure A

(a) What is Bishop Mulkearns' current state of mental and physical health?

- I believe Bishop Mulkearns has mild cognitive impairment (MCI) of vascular etiology. The effects of recent surgery and anesthesia could possibly have impacted on his baseline function as was assessed last year. Notwithstanding, from a cognitive perspective, he performs surprisingly well with the deficits noted above.
- Bishop Mulkearns' physical health is certainly less good than when he was assessed last year. Unquestionable, he does have colon cancer, which is obstructing one of his ureters and causing deterioration in his kidney function. He is aware of his reduced life expectancy, which he indicates he has been told could be around six months. He has lost considerable weight but currently is eating reasonably well and is stable with no acute medical problems.
- Bishop Mulkearns says he is very stressed by the events surrounding the Inquiry and the thought of being further involved in the Inquiry. He says this is constantly on his mind. Whilst denying being depressed, he scored at the extreme in the depression scale.
- He does have chronic abdominal pain related to his cancer requiring significant doses of morphine related narcotic medication.

(b) "In your opinion, and in all the circumstances, is Bishop Mulkearns' state of mental and physical health such that he can appear and give evidence to the Royal Commission? "

- Whilst Bishop Mulkearns is able to slowly mobilise, I feel that in his current state, it would be a hardship for him to have to attend a Commission Hearing lasting more than an hour or two (including travel) outside of his current accommodation.
- From a physical point of view, there is no reason why members of the Commission could not attend Bishop Mulkearns in his residence, which has ample meeting space available.
- Whilst Bishop Mulkearns' attention and level of cooperation is very good, he does tire and therefore any interaction should be able to tolerate in short bursts. For example, I spent 2 ½ hours with him with a short break in between to stretch our legs and have a drink. That I

feel would be maximum time in any one period of cross examining. Further cross examining should be delayed for a number of days to allow him to recover physically and emotionally.

- Bishop Mulkearns did appear to be tiring during the latter part of my assessment with him and I would have thought ideal duration of interaction for cross examination would be between one hour and two hours maximum on any one day with a short interval during this.
- Whilst Bishop Mulkearns is taking significant narcotic pain medication, this in its own right should not preclude him being cross examined by the Royal Commission with the above proviso.
- Whilst he admits to feeling stressed and distressed by the events that took place, I do not feel this would preclude Bishop Mulkearns being able to respond to questions of events that have taken place, given his performance in my assessment today.
- I do not see that his concern about not remembering or giving misleading information should be a basis for him not able to answer simple structured questions (see below).

(c) “Having regard to Bishop Mulkearns’ current state of mental and physical health, what potential effects may the process of giving evidence, and any related stress, have on the following:

1. Bishop Mulkearns Capacity to process information.

- Given the above provisos in the method of assessment and location of assessment, I believe Bishop Mulkearns should be able to answer “yes or no or I do not recall” to most questions.
- If information is provided in a more complex way, this may lead to more confusion in his ability to respond.
- If information is prompted then I believe he should be able to provide a response as above.
- His speed of processing of information is slow and therefore a lot of patience would be required to allow him to understand the questions, which might need to be paraphrased.
- At times, he has trouble finding the right word and prompting with choices would be an effective strategy.
- Bishop Mulkearns says he does struggle to follow and retain a thread

of information when he is reading something, which he enjoyed doing in the past. Therefore, if information is presented to him in the written form to process before an examination, this may prove difficult. He may need the help of his legal advisors or others to assist in this. If feasible, then having limited information presented to him in the written format to be read, processed and considered (possibly with his legal representative) prior to cross examination then this may lead to a more useful outcome.

- Whilst this may slow the overall process of cross examining Bishop Mulkearns over numerous smaller sessions, it may nonetheless lead to more useful responses for the Commission.

2. *His Capacity to understand complex questions or multifaceted questions.*

- Scores on cognitive testing (MMSE, ACE-R etc) give an indication of cognitive function and areas of deficit. There is no cut-off score that determines Capacity, but rather it helps guide thinking about Capacity and what adaptations might need to be made. His scores were not in a “definite” not capable range.
- I suspect he would struggle with anything other than simply structured information and questions.
- See above how information might be presented.

3. *His ability to communicate effectively and accurately.*

- I believe Bishop Mulkearns is able to communicate effectively, albeit at times with prompts and reminders, although additional time is required to assimilate information (provided not too complicated) and to allow for his responses.
- I believe, if unable to recall information, then with prompting or additional information, and adequate time to process this information, that he would be able to communicate effectively his response. (This does not mean that he would recall events, which he cannot recall).

4. *His ability to give a true and accurate account of events, which occurred between 1971 and 1997.*

- Bishop Mulkearns was able to provide me with fairly detailed

recollection of events that took place before he was ordained a Bishop, different important times in his life within the Church, and even subsequent to that.

- He was able to provide detailed account of his medical history related to stroke, cancer treatment and medical practitioners.
- It is not clear to me (as I did not pursue this) if he does or does not have knowledge about the events of relevance to the Royal Commission. These may be suppressed but might be accessible under cross examination. However, it would not surprise me if, despite being able to recall information with prompted questions, he may still remain vague about the exact time and place these occurred. This is a common observation I see with older people where that level of detail does not seem to be easily recalled. It is also common in all people for there to be gaps in memory despite prompting.
- I did not question him about his involvement with the events that took place between these years. He clearly understood what the Royal Commission investigation was about and why they would want to speak to him.
- As I did not ask him anything specific about this period of time, I could not comment what his actual recall of detail was. However, it is conceivable that with appropriately structured questions, that he might be able to provide simple answers, (e.g. yes, no) to factual information that is already on record. The fact that he may not be able to spontaneously provide this information would not preclude the fact that with prompting he may be able to recall this.