

Special Commission
of Inquiry into matters
relating to the police
investigation of certain child
sexual abuse allegations
in the Catholic Diocese of
Maitland–Newcastle

Part G (Confidential)

Margaret Cunneen SC

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Contents

The legal framework	1
Analysis.....	1
Specified person	1
Specified offences	1
The evidence considered	1
Assessment of the available evidence	2
Evidence not considered	4
The evidence of Archbishop Wilson	4
Complaint evidence.....	4
Other evidence	4
The Strike Force Lantle brief.....	4
Misprision of felony	5
Elements of the offence	5
Commission of a felony	5
Knowledge of the commission of the felony by another person.....	5
Knowledge of facts that would materially assist in the detection and arrest of the felon at the material time	6
Concealment of that knowledge	6
Concealing serious indictable offence: s. 316 of the Crimes Act	7
Elements of the offence	7
A person has committed a serious indictable offence.....	7
Another person knows or believes that the offence has been committed	8
That person has information which might be of material assistance in securing the apprehension of the offender or the prosecution or conviction of the offender.....	8
That person fails without reasonable excuse to bring that information to the attention of a member of the Police Force or other appropriate authority.....	8
Determination.....	9

Part G Determination pursuant to section 10(1) of the Special Commissions of Inquiry Act

The legal framework

- 1 Chapter 5 of the public part of this report sets out the legislation and principles guiding the Commission's consideration of s. 10(1) of the *Special Commissions of Inquiry Act 1983* (NSW) and the nature of the evidence to be considered having regard to ss. 9(3) and 9(4) of that Act.

Analysis

Specified person

- 2 The Commission is of the view that there is 'sufficient evidence warranting prosecution' in relation to Archbishop Philip Wilson.

Specified offences

- 3 The offences under contemplation are common law misprision of felony and the offence contained in s. 316¹ of the *Crimes Act 1900* (NSW) pertaining to concealing a serious indictable offence.²

The evidence considered

- 4 The following evidence (or relevant parts thereof) before the Commission is likely to be both available and admissible in criminal proceedings and thus relevant to a consideration of s. 10(1) of the *Special Commissions of Inquiry Act* in relation to Wilson (as set out in Addendum 1):
- oral evidence of AM given in camera on 21 June 2013 and 22 and 29 July 2013
 - redacted transcript of AM's evidence given at a private hearing on 27 February 2013³
 - redacted statutory declaration of BG dated on 27 July 2013⁴
 - business records of the Catholic Diocese of Maitland–Newcastle, as follows:
 - the Diocesan appointments document in relation to Father James Fletcher⁵
 - the Diocesan appointments document in relation to (then) Father Philip Wilson⁶
 - meeting records for East Maitland Parish Council dated 8 February 1966 and 11 July, 12 September and 10 October 1976⁷

¹ Relevantly the section in this form has been in effect since amendments to s. 316 of the *Crimes Act 1900* (NSW) became operative on 1 January 2000.

² An overview of the relevant law relating to these offences is set out in Chapter 5.

³ Private hearing transcript of evidence of AM, dated 27 February 2013, conf ex PP.

⁴ Statutory declaration of BG, dated 27 July 2013, conf ex PW S.

⁵ Diocese of Maitland Clergy appointment document of Fletcher, dated 7 December 1968, ex 219, tab 518.

⁶ Diocese of Maitland Clergy appointment document of Wilson, dated 8 September 1975, conf ex PW A, tab 1, pp 1–2.

⁷ Minutes of meeting of Parish Council, dated 8 February 1976, 11 July 1976, 12 September 1976 and 10 October 1976, conf ex PW E, tab 3.

- criminal history transaction record for Father James Fletcher⁸
- oral evidence of Father Glen Walsh given in camera on 26 June 2013⁹
- entries in Walsh’s 2004 diary¹⁰
- statutory declaration of Ms Emma Sullivan dated 18 December 2013¹¹
- oral evidence of Detective Chief Inspector Peter Fox given in camera on 11 December 2013¹²
- statutory declaration of Senior Sergeant Mark Twyman dated 18 December 2013 and related correspondence.¹³

5 The Commission notes that in the usual course of events evidence would be unlikely to be received in relevant criminal proceedings by way of statutory declaration. The substance of evidence disclosed to the Commission by way of statutory declaration is, however, likely to be admissible in relevant future criminal proceedings if obtained in proper form. Accordingly, such evidence was considered in relation to s. 10 of the *Special Commissions of Inquiry Act*. In addition, in considering the evidence which would be both available and admissible in future criminal proceedings for the purposes of s.10 of the *Special Commissions of Inquiry Act*, the form in which the evidence was elicited (for example, with counsel assisting leading AM in relation to his sexual abuse by Fletcher)¹⁴ is not a matter determinative of admissibility in such criminal proceedings. The transcripts of evidence from AM’s hearings before the Commission would not be tendered as AM’s evidence in any future criminal proceedings: rather, similar evidence would be elicited orally from AM during his evidence in chief as led by the prosecution.¹⁵

Assessment of the available evidence

- 6 AM came to the Commission’s attention during a review of correspondence located in the holdings of the Diocese.¹⁶ Commission personnel contacted him.
- 7 Aged 52 years, AM gave evidence before the Commission detailing sexual assaults Fletcher committed on him in 1971,¹⁷ when he (AM) was 10 years old, and two conversations he had with Wilson (then Father Wilson) in 1976, when he (AM) was 15 years old.¹⁸
- 8 Having observed AM give evidence on a number of occasions (including during extensive cross-examination), the Commission finds that on the matters in question his evidence was consistent and credible.
- 9 In particular, AM’s evidence, if available and accepted, would include that AM made a disclosure to Wilson around Easter 1976, when AM was in year 10 at school,¹⁹ in a conversation between

⁸ Fletcher Criminal History Schedule of Results – Record of Charges, dated 16 May 2003, ex 219, tab 381.

⁹ TOR 2, T7.21–42 (Walsh in camera, 26 June 2013 at 5:00pm).

¹⁰ Diary entries of Walsh, dated 18 April – 8 May 2004, conf ex P.

¹¹ Statutory declaration of Sullivan, dated 18 December 2013, conf ex SSSS.

¹² TOR 2, T4.5–13 (Fox in camera, 11 December 2013 at 6.50pm).

¹³ Statutory declaration of Twyman, dated 18 December 2013, conf ex TTTT.

¹⁴ An approach not challenged by counsel for Wilson during AM’s hearings.

¹⁵ This principle was established in *Jackson v Slattery* [1984] 1 NSWLR 599; Hutley JA stated that when s. 10(1) speaks of evidence in a criminal proceeding it does not contemplate the actual record of evidence given before the commission. Rather, what has to be considered under s. 10(1) is whether evidence similar to that given before the commission *could*, assuming all legal steps were taken to make it available, be given in a criminal trial. See further the discussion at para 5.11 and following (Chapter 5).

¹⁶ Letter from AM to Malone, dated 29 June 2010, conf ex O.

¹⁷ In his letter to Malone dated 29 July 2010, AM twice recorded the year the abuse occurred as being 1970. Having corrected that date to 1971 in his evidence before the Commission, he told counsel for Wilson ‘I miscalculated the year, that’s all’: TOR 2, T41.43 (AM in camera, 22 July 2013); letter from AM to Malone, dated 29 June 2010, conf ex O.

¹⁸ TOR 2, T44.12–30; T42.26–29 (AM in camera, 22 July 2013); T59.4–24 (AM in camera, 29 July 2013). AM also gave evidence before the Commission about the abuse by Fletcher at a private hearing on 27 February 2013.

¹⁹ TOR 2, T42.19–37 (AM in camera, 22 July 2013).

them after a youth group meeting. AM said he spoke to Wilson because he found Wilson approachable when he was running the youth group AM attended.²⁰ AM's evidence was that while he was unable to recall the exact words he used in the disclosure to Wilson or his knowledge of the particular terms for the sexual acts to which he was subjected,²¹ AM told Wilson that, on multiple occasions, Fletcher had forced some 'acts of punishment' on him, including:

- making AM undress while Fletcher was fondling his own penis
- forcing AM to handle Fletcher's penis until Fletcher ejaculated, or 'relieved himself'
- trying to force his penis into AM's mouth.²²

- 10 AM's evidence was that the disclosure also included AM telling Wilson that Fletcher's abuse of him had gone on for eight or nine months.²³
- 11 AM's evidence, if available and accepted, was also that during the first conversation around Easter 1976 Wilson asked AM whether he had told anyone else of Fletcher's abuse of him, to which AM replied that he had not, and that Wilson then told AM he would 'have it looked into'.²⁴
- 12 AM's evidence, if available and accepted, was that AM had a further conversation with Wilson some months later in 1976, again after a youth group meeting.²⁵ At this time AM asked Wilson what was happening concerning what he had told Wilson about Fletcher and Wilson responded that 'they are still looking into it'.²⁶ This second conversation occurred against the background of AM and Wilson having seen each other regularly at youth group meetings in the months following AM's disclosure to Wilson.²⁷
- 13 The appointments document for Fletcher records that he was appointed to East Maitland parish throughout 1971.²⁸ AM testified before the Commission that Fletcher sexually assaulted him on multiple occasions while he (AM) was an altar boy at East Maitland church in 1971.²⁹
- 14 The appointments document for Wilson records that he was appointed to East Maitland parish in 1976.³⁰ In addition, the minutes of East Maitland Parish Council record Wilson's involvement with parish youth groups in 1976.³¹
- 15 It may further be noted that there is evidence establishing that criminal charges were brought against Fletcher on 14 May 2003.³² Father Glen Walsh's oral evidence establishes that he communicated to Wilson in late April 2004 that he (Walsh) had been told very recently 'about a [further] victim of Father Fletcher' and had reported that to Bishop Michael Malone.³³ In

²⁰ TOR 2, T15.34–47 (AM in camera, 21 June 2013); T60.10–25 (AM in camera, 29 July 2013).

²¹ TOR 2, T11.8–12.18 (AM in camera, 21 June 2013).

²² TOR 2, T96.6–14 (AM in camera, 29 July 2013).

²³ TOR 2, T11.8–12.18 (AM in camera, 21 June 2013).

²⁴ TOR 2, T14.44–15.6; T13.25–32 (AM in camera, 21 June 2013).

²⁵ TOR 2, T19.42–20.1 (AM in camera, 21 June 2013).

²⁶ TOR 2, T20.18–26 (AM in camera, 21 June 2013).

²⁷ TOR 2, T20.5–9 (AM in camera, 21 June 2013).

²⁸ Diocese of Maitland Clergy appointment document of Fletcher, dated 7 December 1968, ex 219, tab 518.

²⁹ TOR 2, T6.1–25; T16.36–39 (AM in camera, 21 June 2013).

³⁰ Diocese of Maitland Clergy appointment document of Wilson, dated 23 August 1975, conf ex PW A, tab 1, pp 1–2.

³¹ Minutes of meeting of Parish Council, dated 8 February 1976, 11 July 1976, 12 September 1976 and 10 October 1976, conf ex PW E, tab 3.

³² Fletcher Criminal History Schedule of Results – Record of Charges, dated 16 May 2003, ex 219, tab 381.

³³ TOR 2, T7.21–8.47 (Walsh in camera, 26 June 2013 at 5:00pm). This was, in fact, the witness AB who ultimately gave tendency evidence in the criminal proceedings against Fletcher for his offending against AH. See also diary entries by Walsh, dated 18 April 2004 to 8 May 2004, conf ex P.

addition, Wilson was in New South Wales in September or October 2004,³⁴ when the police investigation into Fletcher remained on foot and the criminal trial was yet to be heard.

- 16 The evidence of Fox revealed that, in his role as officer in charge of the investigation into Fletcher, he had no contact with Wilson between 2002 and the time of Fletcher's death, in 2006.³⁵ Further, the evidence of Ms Emma Sullivan and Senior Sergeant Mark Twyman also indicates that Wilson did not provide any information (in the form of a report or otherwise) to the police regarding Fletcher.³⁶

Evidence not considered

The evidence of Archbishop Wilson

- 17 In accordance with the requirements of s. 9(4) of the *Special Commissions of Inquiry Act* and for the purposes of its task under s. 10(1) of the Act, the Commission did not have regard to any evidence considered unlikely to be admissible in relevant criminal proceedings. Such evidence includes all oral and written evidence Wilson gave to the Commission, which was compelled under s. 23(1) of the Act.³⁷ In view of the terms of s. 23(2), all such material would not be admissible for the prosecution in relevant criminal proceedings against Wilson.

Complaint evidence

- 18 The Commission also received certain complaint evidence.³⁸ Collectively, this evidence might be characterised as 'late' complaint evidence, which would be admitted as evidence in criminal proceedings in limited circumstances only, since the complaints were made so long after the events in question. It is the Commission's view that such evidence would probably not be admitted in relevant criminal proceedings against Wilson. All such evidence was disregarded for the purposes of the Commission's assessment pursuant to s. 10(1) of the *Special Commissions of Inquiry Act*.

Other evidence

- 19 Additionally, the Commission heard evidence about Wilson in relation to matters not directly connected with AM's disclosure.³⁹ In the Commission's estimation, such evidence would not be sufficiently probative as to facts potentially at issue in relevant criminal proceedings and therefore would not be likely to be admitted in such proceedings. Accordingly, that evidence was disregarded for the purposes of the assessment carried out under s. 10(1) of the Act.

The Strike Force Lantle brief

- 20 As described in Chapter 8 of the public part of this report, the Lantle brief of evidence was received into evidence during the Commission's hearings in relation to term of reference 1 for a limited purpose – to provide the evidentiary basis underpinning the report of the independent expert, Mr Ian Lloyd QC, who assessed the quality of the Lantle police investigation. Further,

³⁴ Statement of BG, dated 23 July 2013, conf ex PW S.

³⁵ TOR 2, T4.2–13 (Fox in camera, 11 December 2013 at 6.50pm).

³⁶ Statutory declaration of Sullivan, dated 18 December 2013, conf ex SSSS, para 6; statutory declaration of Twyman, dated 18 December 2013, conf ex TTTT, para 9.

³⁷ Namely: affidavit of Wilson, dated 14 March 2013, conf ex PW I; TOR 2, T68.2–103.30 (Wilson in camera, 20 June 2013, at 2.27pm); Wilson in camera, 20 June 2013, at 3.57pm; Wilson in camera, 21 June 2013; Wilson in camera, 27 June 2013; Wilson in camera, 27 July 2013 and Wilson private hearing, 15 March 2013.

³⁸ Oral public evidence of the mother of AM given in camera on 27 September 2013; oral public evidence of the sister of AM given in camera on 27 September 2013; letter from AM to Malone, dated 29 June 2013, conf ex O.

³⁹ These aspects are set out in Chapter C4: Archbishop Wilson and his knowledge of McAlinden's propensity for child sexual abuse.

some statements contained in the Lantle brief were reviewed for another purpose unrelated to Wilson.⁴⁰

- 21 The Commission has, however, had no regard to the material in the Lantle brief in the assessment carried out for the purposes of s. 10(1) of the *Special Commissions of Inquiry Act*. In its entirety, the Lantle brief – in the form admitted into evidence before the Commission – would not be admissible in criminal proceedings relating to any specified offences alleged against Wilson. Further, the individual statements contained in that brief are not considered of sufficient probative value to be relevant and thus admissible in any potential criminal proceedings against Wilson.

Misprision of felony

- 22 Chapter 5 of the public part of this report provides an overview of the law in relation to the offence of misprision of felony. The common law offence of misprision of felony operated in New South Wales before being statutorily abolished⁴¹ and replaced by s. 316 of the *Crimes Act 1900*.⁴²

- 23 Relevantly for the current purpose, s. 340 of the *Crimes Act* provides:

The offences at common law abolished by this Division are abolished for all purposes not relating to offences committed before the commencement of this Part (as substituted by the *Crimes (Public Justice) Amendment Act 1990*).

- 24 The effect of that provision is that the common law offence of misprision of felony remains available for an offence alleged to be committed before the offence was statutorily abolished in 1990.

Elements of the offence

Commission of a felony

- 25 If available and accepted, the evidence of AM would establish the commission of several offences on him by Fletcher in 1971, each of which constituted a felony. In 1971 Fletcher's conduct in having AM masturbate him, inserting or attempting to insert his penis into AM's mouth and ejaculating is collectively or severally capable of evidencing the offence of indecent assault of a male, pursuant to s. 81 of the *Crimes Act* (carrying a maximum penalty of five years' penal servitude), as constituted in 1971.⁴³
- 26 As discussed in paragraph 5.32 of the public part of this report, offences carrying sentences of penal servitude were defined as felonies for the purposes of the offence of misprision of felony.

Knowledge of the commission of the felony by another person

- 27 If available and accepted, the evidence of AM would establish Wilson's knowledge in 1976 of behaviour by Fletcher against AM that constituted felonies. As discussed in paragraph 5.35 of the public part of this report, the relevant test for 'knowledge' is the subjective knowledge of the person in question – in this instance, Wilson. Subjective knowledge is to be distinguished

⁴⁰ See TOR 2, T2.44–3.22 (Tendering of Documents, 10 December 2013).

⁴¹ *Crimes (Public Justice) Amendment Act 1990*, ss. 2–3, sch 1; GG No 141 of 9.11.1990, p 9816 (introducing s. 341) on 25 November 1990, but not with respect to offences committed before that date (s. 340).

⁴² On 25 November 1990.

⁴³ Sections 81 and 81A were repealed by the *Crimes (Amendment) Act 1984*, as part of a legislative package in part designed to decriminalise homosexuality in NSW. Sexual offences involving children were, however, continued in legislative provisions introduced by the 1984 Act (see for example ss. 78K, 78Q). Further, the repeal of ss. 81 and 81A by the 1984 Act did not bar any prosecution for offences committed by the perpetrator prior to the repeal: *R v Plummer* (unreported, NSWCCA, 12 July 1989).

from constructive knowledge, which can objectively be attributed to the hypothetical reasonable person, or mere suspicion of a crime, both of which are insufficient to satisfy the required mental element of the offence of misprision.⁴⁴

- 28 If available and accepted, AM's evidence would establish subjective knowledge in Wilson of Fletcher's commission of felonies, in view of the explicit nature of the disclosure and AM's evidence about Wilson's apparent understanding of what was being communicated to him. AM gave evidence that his first conversation disclosing the abuse to Wilson lasted 'between 30 and 40 minutes'.⁴⁵ AM told the Commission he was in tears during the conversation⁴⁶ and that:

... when [Father Wilson] asked for the description of the acts of punishment that were inflicted on [me] by Father Fletcher I described ... Fletcher having me take off my clothes and kneel before him while he undid his trousers and he was fondling his penis. He would clinch [sic] you on the back of the neck with his finger and thumb and make you put your hands up and stroke his penis, until he ejaculated. Other times he tried to force it in my mouth.⁴⁷

- 29 When asked about Wilson's reaction after his disclosure, AM told the Commission:

... that he was shocked and horrified at the – that Fletcher would be capable of doing such a thing – and that he would certainly have it looked into.

...

... as I said he was truly, you know, truly shocked and horrified that such events had occurred at the hand of James Fletcher.⁴⁸

- 30 The Commission considers AM's evidence about his perception of Wilson's reaction to his disclosure likely to be admissible in relevant criminal proceedings.⁴⁹

- 31 AM gave evidence that a second conversation took place after youth group about six months following his disclosure to Wilson.⁵⁰ During this second conversation, AM said he asked Wilson what was happening in response to what he had told him about Fletcher. AM said Wilson told him that 'they are still looking into it'.⁵¹

Knowledge of facts that would materially assist in the detection and arrest of the felon at the material time

- 32 On the basis of AM's evidence, if it were available and accepted, Wilson had knowledge of facts that would have materially assisted police in the detection and arrest of the felon (Fletcher). Wilson knew the identity of the alleged offender,⁵² the location of the offences he had been told about⁵³ and considerable factual detail about the actions constituting the offences.⁵⁴

Concealment of that knowledge

- 33 In *Sykes v DPP*⁵⁵ the court held that the offence of misprision of felony was committed where a person failed to disclose known facts within a reasonable period of time. The gravamen of AM's evidence was that he disclosed Fletcher's abuse of him in great detail⁵⁶ and then had a further

⁴⁴ See *R v Wozniak* (1988) 16 NSW CR 185 at 194.

⁴⁵ TOR 2, T16.10–13 (AM in camera, 21 June 2013).

⁴⁶ TOR 2, T29.12–19 (AM in camera, 21 June 2013).

⁴⁷ TOR 2, T96.6–14 (AM in camera, 29 July 2013).

⁴⁸ TOR 2, T13.30–38 (AM in camera, 21 June 2013).

⁴⁹ Relevantly, see s. 65(2)(b) *Evidence Act 1995* (NSW).

⁵⁰ TOR 2, T18.9–27; T19.25–30 (AM in camera, 21 June 2013).

⁵¹ TOR 2, T20.18–20 (AM in camera, 21 June 2013).

⁵² Namely James Fletcher.

⁵³ TOR 2, T7.17–23 (AM in camera, 21 June 2013); East Maitland Catholic Church, altar boys' change room.

⁵⁴ TOR 2, T11.40–44; T12.28–13.23 (AM in camera, 21 June 2013).

⁵⁵ *Sykes v DPP* [1962] AC 528.

⁵⁶ TOR 2, T11.40–12.6; T12.28–13.23 (AM in camera, 21 June 2013).

conversation with Wilson some six months later with a view to establishing what had occurred in response to his initial disclosure.⁵⁷

- 34 During AM's disclosure to Wilson, Wilson asked him whether he had told anyone else about Fletcher's abuse of him. AM confirmed he had not – that Wilson was the first person he had confided in.⁵⁸ Accordingly, on AM's account, Wilson was on notice that AM's parents, the police and other individuals and authorities were unaware of the information he had obtained as a result of AM's disclosure to him.⁵⁹
- 35 AM gave evidence that from the time of his disclosure he continued to attend youth group and see Wilson weekly until the second conversation with Wilson about six months later.⁶⁰
- 36 The evidence does not disclose any reporting by Wilson to either the New South Wales Police Force (including the officer in charge of the Fletcher investigation from June 2002) or any other authority⁶¹ at any time, including since the enactment of s. 316 of the *Crimes Act* in its current form on 1 January 2000.⁶²
- 37 To the extent currently relevant, the Commission considers that in the circumstances no justification or excuse for Wilson's failure to report to police arises from a suggested confidential relationship of priest and parishioner.⁶³ AM was a 15-year-old boy disclosing to an adult (his youth group leader) whom he trusted and believed would act upon his disclosure.⁶⁴

Concealing serious indictable offence: s. 316 of the Crimes Act

- 38 Chapter 13 of the public part of this report discusses the relevant law in relation to s. 316 of the *Crimes Act 1990 (NSW)*, 'concealing serious indictable offence'.

Elements of the offence

- 39 The elements of an offence pursuant to s. 316 of the *Crimes Act* (since 1 January 2000⁶⁵) are noted in the following paragraphs along with the relevant supporting evidence.

A person has committed a serious indictable offence

- 40 A serious indictable offence is an offence that carries a maximum penalty of life imprisonment or five or more years imprisonment.⁶⁶
- 41 If available and accepted, AM's evidence is capable of establishing that Fletcher committed multiple indecent assaults on him and thus committed offences against s. 81 of the *Crimes Act*. If proven, each such offence would have carried a maximum penalty of five years penal servitude and was thus a serious indictable offence for the purposes of s. 316 of the Act.

⁵⁷ TOR 2, T18.9–27; T19.29–20.20 (AM in camera, 21 June 2013).

⁵⁸ TOR 2, T14.44–15.6 (AM in camera, 21 June 2013).

⁵⁹ TOR 2, T9.37–47 (AM in camera, 21 June 2013).

⁶⁰ TOR 2, T18.17–27 (AM in camera, 21 June 2013).

⁶¹ Given the statutory context and purpose, the Commission regards the term 'other appropriate authority' in s. 316 as contemplating an investigative or prosecuting agency. This does not extend to the Church, which did not have a relevant role in the investigation, apprehension or prosecution of offenders.

⁶² See oral evidence of Fox 11 December 2013; statutory declaration of Sullivan, dated 18 December 2013, conf ex SSSS, para 6; statutory Declaration of Twyman, dated 18 December 2013, conf ex TTTT, para 9.

⁶³ *Sykes v DPP* [1962] AC 528 at 564 per Lord Denning.

⁶⁴ TOR 2, T21.4–5 (AM in camera, 21 June 2013).

⁶⁵ Section 316 became 'concealing serious *indictable* offence' on that date, having been since its proclamation on 17 March 1991 'concealing serious offence'.

⁶⁶ Section 4, *Crimes Act 1900 (NSW)*.

Another person knows or believes that the offence has been committed

42 If available and accepted, AM's evidence is consistent with Wilson being another person who knew or believed that offences had been committed, in view of the context and content of the disclosure made to him. As noted in paragraph 29, AM told the Commission that, having heard his disclosure, Wilson said he 'would certainly have it looked into'⁶⁷ and that Wilson was '... shocked and horrified that such events had occurred at the hand of James Fletcher'.⁶⁸ That evidence is also consistent with Wilson having the requisite knowledge or belief at that time that Fletcher had committed an offence or offences against AM.

43 Pursuant to s.313 of the *Crimes Act*, the prosecution is not required to establish that the accused knew that the relevant offence was a serious indictable offence.

That person has information which might be of material assistance in securing the apprehension of the offender or the prosecution or conviction of the offender

44 Were AM's evidence to be available and accepted, Wilson can be taken to have had information – including about the identity of the offender, the identity of the victim, the location of the offences, the detail of the acts committed on AM and, by inference, the background circumstances, such as Fletcher's attachment to the nominated parish – that might have been of material assistance in securing the apprehension, prosecution or conviction of the offender in relation to the offences perpetrated on AM.⁶⁹

45 The evidence is also capable of establishing that, had Wilson reported Fletcher's abuse of AM, this might have been of material assistance in securing Fletcher's conviction in relation to his offences against AH, in view of the possibility of information about AM's abuse being available as tendency evidence⁷⁰ in the Fletcher criminal trial.

That person fails without reasonable excuse to bring that information to the attention of a member of the Police Force or other appropriate authority

46 The evidence does not disclose any reporting by Wilson to either the New South Wales Police Force (including the officer in charge of the Fletcher investigation from June 2002) or any other authority⁷¹ at any time, including since the enactment of s. 316 of the *Crimes Act* in its current form on 1 January 2000.⁷²

47 'Without reasonable excuse' is not an element to be established initially by the prosecution in any potential criminal proceeding. Rather, a defendant may seek to rely on *reasonable excuse* and, if so, bears an evidentiary burden to elicit or point to evidence that legitimately raises the question of reasonable excuse. If reasonable excuse is so raised, the prosecution is obliged to negative the reasonable excuse beyond reasonable doubt, as part of its general onus to prove the elements beyond reasonable doubt.

48 The Commission considers that the material relevantly available does not sufficiently raise the issue of reasonable excuse. There is for example, no evidence of actual steps taken by Wilson to report the matter to a particular person or persons; nor is there evidence as to the reason for

⁶⁷ TOR 2, T13.32 (AM in camera, 21 June 2013).

⁶⁸ TOR 2, T13.37–38 (AM in camera, 21 June 2013).

⁶⁹ This element requires that the perpetrator of the abuse (for example, Fletcher) be alive and thus liable to be arrested, prosecuted or convicted, at the time the alleged concealment took place. In other words, the alleged concealment in connection with Fletcher must have occurred before his death in 2006. An alleged concealer may, however, continue to be exposed to prosecution, notwithstanding the subsequent death of the perpetrator.

⁷⁰ Section 97, *Evidence Act 1995* (NSW).

⁷¹ See footnote 61.

⁷² See oral evidence of Fox 11 December 2013; statutory declaration of Sullivan, dated 18 December 2013, conf ex SSSS, para 6; statutory declaration of Twyman, dated 18 December 2013, conf ex TTTT, para 9.

such report or evidence of any belief as to such step being a suitable means by which appropriate action could reasonably be expected to be taken. The Commission accepts, however, that in any future criminal proceedings, depending on the evidence adduced, the matter of 'reasonable excuse' may arise.

- 49 For completeness, it is noted that ss. 316(4)⁷³ and 316(5)⁷⁴ of the *Crimes Act* provide for executive actions in the initiation of criminal proceedings and are outside the scope of any matters with which the Commission was concerned for the purposes of s. 10(1) of the *Special Commissions of Inquiry Act*.

Determination

- 50 The evidence the Commission has identified and reviewed for the purposes of its determination concerning s. 10(1) of the *Special Commissions of Inquiry Act* is found to be clear and compelling.⁷⁵ In addition, it is evidence capable of being accepted beyond reasonable doubt.⁷⁶ In forming this view, the Commission has had due regard to the circumstances of the matter, including that a prosecution, if brought, would depend substantially on the evidence of one person, AM, who was an adolescent (aged 15 years) at the time of his disclosure to Wilson in 1976.
- 51 It should also be noted that the Commission is aware of certain material that was not made available to Wilson or his representatives.⁷⁷ The Commission had no regard to that material in considering this or any other aspect of its report.
- 52 Considering the totality of the evidence likely to be available and admissible in any future criminal proceedings, the Commission is satisfied that there is sufficient evidence warranting the prosecution of a specified person – namely, Archbishop Philip Wilson – for two specified offences: first, misprision of felony (being a continuing offence, from 1976, when first fixed with relevant knowledge, until the statutory abolition of that offence); second, a breach of s. 316(1) of the *Crimes Act 1900* (NSW) (being a continuing offence, commencing from the time of introduction of that offence, with Wilson fixed with relevant knowledge or belief at that time, and relevantly until Fletcher's death on 7 January 2006).⁷⁸
- 53 For completeness, it is noted that the Commission is aware that there is an ongoing police investigation into these matters that is independent of the Commission's work. Those responsible for that investigation or for the assessment of material obtained from that investigation might well reach a different view about the sufficiency of evidence warranting prosecution.

⁷³ Section 316(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.

⁷⁴ Section 316(5): The regulations may prescribe a profession, calling or vocation as referred to in subsection (4).

⁷⁵ Consistent with the level of proof contemplated by *Briginshaw v Briginshaw* (1938) 60 CLR 366, at 361–362.

⁷⁶ See also Office of the Director of Public Prosecutions for New South Wales, *Prosecution Guidelines*.

⁷⁷ Wilson sought access to AM's counselling file and police material over which a claim of public interest immunity was advanced on behalf of the New South Wales Police Force; access to this material was denied by the Commissioner: Decision of Commissioner Cunneen SC, dated 22 July 2013, in relation to Archbishop Wilson's application for access to AM's counselling file heard on 22 July 2013; decision of Commissioner Cunneen SC, dated 17 January 2014, in relation to Archbishop Wilson's application for access to particular material relating to AM heard on 8 November 2013.

⁷⁸ See footnote 69 above.

