

# The Priest-Penitent Privilege in Australia and its Consequences

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## Introduction

In an increasingly secular world it is more and more likely that a court may call upon a priest to give evidence without understanding and respecting the priest's ethical obligations. The laws of their churches prevent Catholic and Anglican priests from revealing what is said to them in a formal confession. This is the case even when they are legally obliged to do so as a witness in court.

In Australia, four of the states and territories and the Commonwealth have included a priest-penitent privilege in their Evidence Acts. The privilege provided by the statutes is restricted to ritual confession and does not always provide the protection priests or penitents may assume it does.

In the other Australian jurisdictions the common law principles apply. It is generally accepted that there is no privilege for priests or penitents at common law, although the case-law is not clear.

The laws of the state and the laws of the church are not always compatible. The laws of the state do not always provide protection for priests. Where the priests are protected the laws of the state provide no more protection to the penitent than the church already gives them.

Both the Catholic and Anglican churches have clear rules or laws, known as canons, governing the conduct of their priests and in some cases their followers. The canons are clearly recorded and easily identified. The canons of both churches have provisions specifically dealing with their priests obligations in relation to confession. Further confession has a long history in both churches. Both churches provide for formal ritual confession.

## Legal Privilege

A legal privilege enables a witness to refuse to reveal information or communications to a court or tribunal. If a witness can claim privilege they can withhold the information even if it is relevant to the trial.<sup>1</sup> The situations where privilege exists are very limited and are considered to be anomalies of the law.<sup>2</sup>

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<sup>1</sup> McNicol, S. (1992) *Law of Privilege*, (Sydney : Law Book Co., 1992) at 1

<sup>2</sup> *Broad v Pitt* (1828) 172 ER 528 at 528

One of the most well-known privileges is the lawyer-client privilege, which protects professional communications with lawyers.

## Hearsay

Some people believe that statements made in a ritual confession would be excluded from evidence by the rule against hearsay. This is not the case.

The rule against hearsay evidence prevents witnesses from repeating statements made out of court in order to prove the truth of those statements.<sup>3</sup> However, there are many exceptions to the hearsay rule. In civil cases hearsay can be admitted as evidence of the truth of statements of admission by a party to those proceedings.<sup>4</sup> In criminal cases admissions or confessions may be admitted as evidence of the truth of the admission or confession.<sup>5</sup> A religious 'confession' will often be a confession at law as well. A religious confession may in some circumstances be able to fall within one of the exceptions to the hearsay rule.

## Statutes

Currently five Australian jurisdictions have a section in their Evidence Act protecting ritual confessions to priests. These are Victoria, the Northern Territory, the Commonwealth, New South Wales and Tasmania. The sections of the various Evidence Acts are set out Appendix 1.

The Commonwealth Act applies to the Federal Family Court, the Federal Court and the High Court.<sup>6</sup> Both the Queensland and Western Australia Law Reform Commissions have expressly rejected the idea of introducing the priest-penitent privilege into the Evidence Acts of their states.<sup>7</sup>

The wording of the sections is not uniform. They can be divided roughly into two groups; those in which the privilege is given to the penitent and those in which it is given to the priest.

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<sup>3</sup> Waight, P and Williams, B (2002) *Evidence Commentary and Materials 6<sup>th</sup> Edition* (Sydney : Lawbook Co., 2002) at 598

<sup>4</sup> Waight, P and Williams, B (2002) *Evidence Commentary and Materials 6<sup>th</sup> Edition* (Sydney : Lawbook Co., 2002) at 657

<sup>5</sup> Waight, P and Williams, B (2002) *Evidence Commentary and Materials 6<sup>th</sup> Edition* (Sydney : Lawbook Co., 2002) at 671

<sup>6</sup> Middleton, T. (1995) Privileges Under the Evidence Act 1995 (Cth) *Queensland Law Society Journal* 25(4) August 1995 at 349

<sup>7</sup>see: Queensland Law Reform Commission *Protection of Statements to Religiously Ordained Officials* Report 41 (Queensland: the Commission, 1991), Queensland Law Reform Commission *Review of the Uniform Evidence Acts* Report 60 (Queensland: The Commission, 1995), Law Reform Commission of Western Australia, *Professional Privilege for Confidential Communications* Report No 90 (Western Australia: The Commission, 1993)

In addition to the priest-penitent privilege sections, New South Wales has a professional communications privilege section. In theory it could apply to communications between a priest and a confider.<sup>8</sup>

## General

The two different wordings for the priest-penitent privilege sections are distinct and exist for quite distinct reasons. They do have some things in common.

In both cases the confession made must be ritual or formal. The term 'confession' as used in the statutes should be interpreted according to its common law meaning. At common law the term confession in connection with disclosures to priests means a ritual confession.<sup>9</sup>

In *R v Lynch*<sup>10</sup> Justice Crisp left it open that the statutes may have gone further than protecting ritual confessions. They may also protect a confession not in ritual form, but for spiritual ends.<sup>11</sup> The confession may not need to be in the ritual format and could even be as informal as a chat with the priest about spiritual matters. The question has not been tried since.

No specific examples of what could be covered have yet been given by either statute or case law. It would appear that Catholic confession would certainly be covered.<sup>12</sup>

All of the statutes attempt to cover all religious denominations and churches; however, it is interesting to note that they all refer to 'clergy', a term which is generally associated with the Christian religion.<sup>13</sup> In the United States of America this problem is solved by having an extensive list of religious officials who could be covered.<sup>14</sup>

## Belongs to the Penitent

In the Northern Territory and the Victorian Evidence Acts, the privilege belongs to the penitent. The idea behind the privilege is to prevent priests revealing what is said to them in confidence. This is similar to the lawyer-client privilege where the lawyer is prevented from revealing what the client says to them.<sup>15</sup>

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<sup>8</sup> New South Wales Legislative Council debates 22 October 1997; 1130

<sup>9</sup> *R v Lynch* [1954] Tas SR 47 at 48

<sup>10</sup> [1954] Tas SR 47

<sup>11</sup> *R v Lynch* [1954] Tas SR 47 at 48

<sup>12</sup> Queensland Law Reform Commission *Protection of Statements to Religiously Ordained Officials* Report 41 (Queensland: the Commission, 1991) at 4

<sup>13</sup> Queensland Law Reform Commission *Protection of Statements to Religiously Ordained Officials* Report 41 (Queensland: the Commission, 1991) at 5

<sup>14</sup> Queensland Law Reform Commission *Protection of Statements to Religiously Ordained Officials* Report 41 (Queensland: the Commission, 1991) at 5 - 6

<sup>15</sup> McNicol, S. (1992) *Law of Privilege*, (Sydney : Law Book Co., 1992) at 44

The Northern Territory and Victorian sections are very similar but there are subtle differences between them. In the Northern Territory the privilege is in section 12(1)(3) of the *Evidence Act 2005* and in Victoria the privilege is in section 28(1)(4)(5) of the *Evidence Act 1958*.

Below are sections 12(1) of the Northern Territory Act and 28(1) of the Victorian Act. The words in brackets appear only in the Northern Territory provision and the words in italics appear only in the Victorian provision.

No [A] clergyman of any church or religious denomination shall [not,] without the consent of the person making the confession divulge in any *suit action or proceeding whether civil or criminal* any confession made to him in his professional character *according to the usage of the church or religious denomination to which he belongs*.

This privilege, like the lawyer-client privilege, can be waived by the consent of the person making the communication; i.e. the penitent. A priest who is asked to give evidence about communications which fall under this section must claim the privilege on behalf of the penitent unless the penitent has given their consent for the information to be disclosed. If the priest failed to do so it is unclear what kind of relief the penitent could claim.<sup>16</sup> Even if they can claim relief it is unlikely that it would be helpful as the information would already be disclosed.

The section appears to apply only to current members of the clergy and not former members.<sup>17</sup> This may be of little practical significance; once a person is a member of the clergy in many churches they remain one all their lives even if they are not directly responsible for a parish or other ministry. However; it may become relevant in situations where a person has left the clergy due to personal reasons or because of disciplinary action by the church.

In the Northern Territory the section applies to any 'proceedings'<sup>18</sup> while in Victoria a broader list of words are used. In Victoria the section applies in any suit, action or proceedings whether civil or criminal.<sup>19</sup> In practice there is no difference between the two sections; one is simply wordier than the other.

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<sup>16</sup> Queensland Law Reform Commission *Protection of Statements to Religiously Ordained Officials* Report 41 (Queensland: the Commission, 1991) at 8

<sup>17</sup> Queensland Law Reform Commission *Protection of Statements to Religiously Ordained Officials* Report 41 (Queensland: the Commission, 1991) at 8

<sup>18</sup> s 12(1) *Evidence Act 2005* (NT)

<sup>19</sup> s 28(1) *Evidence Act 1958* (Vic)

## Belongs to the Priest

In New South Wales, Tasmania and the Commonwealth Evidence Acts the privilege belongs to the priest. It is unusual for a privilege to belong to the confider not the confidant.<sup>20</sup>

The wording of the priest-penitent privilege sections in the New South Wales, Tasmanian and Commonwealth Evidence Act is identical. (Collectively these Evidence Acts are known as the Uniform Evidence Act.) Set out below is section 127(1) of the *Evidence Act* 1995 (Cth), the *Evidence Act* 1995 (NSW) and the *Evidence Act* 2001 (Tas).

A person who is or was a member of the clergy of any church or religious denomination is entitled to refuse to divulge that a religious confession was made, or the contents of a religious confession made, to the person when a member of the clergy.

Religious confession is defined in the Acts as ‘confession made by a person to a member of the clergy in the member’s professional capacity according to the ritual of the church or religious denomination concerned’.<sup>21</sup>

Section 127 of the Uniform Evidence Act has its origins in section 10 of the 1898 NSW *Evidence Act*. It does not follow the Australian Law Reform Commission’s recommendations.<sup>22</sup> The Australian Law Reform Commission recommended a generic privilege which could, in theory, apply to any confidential communication. The privilege would apply to a communication if there was an ethical or moral obligation not to disclose and the communication was sufficiently important to protect when compared to the need for the evidence.<sup>23</sup>

When section 10 was first introduced into the NSW *Evidence Act* in 1989 there was a concern that “jumped up religions such as the emerging new religion of scientology”<sup>24</sup>, would be covered. An emphasis was put on the historical significance of confession and its ritual nature.<sup>25</sup>

It is interesting to note that one of the common arguments against the introduction of such a privilege is that it may be discriminatory towards some

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<sup>20</sup> see also the spousal privilege for another example of where this is the case, in the case of the spouse privilege both parties hold the privilege and it can only be waived by the consent of both parties. See McNicol, S. (1992) *Law of Privilege*, (Sydney : Law Book Co., 1992) at 318

<sup>21</sup> s 127(4) *Evidence Act* 1995 (Cth)

<sup>22</sup> Odgers, S. (2000) *Uniform Evidence Law 4<sup>th</sup> Edition*, (North Ryde, N.S.W. : LBC Information Services, 2000) at 325

<sup>23</sup> Australian Law Reform Commission *Evidence* Report 38 (Canberra: The Commission, 1987) para 54

<sup>24</sup> as per Hon BB Mutch New South Wales Legislative Council Debates 21 November 1989, 12 807 – 12808

<sup>25</sup> New South Wales Legislative Council Debates 21 November 1989, 12 807 – 12808,

religions that do not have any form of ritual confession.<sup>26</sup> In the case of section 10 it would appear that any discrimination, within the section, was deliberate.

A point was also made in the New South Wales Legislative Council debates that the Catholic Church in particular was moving to de-ritualise its confessional rites. It was emphasised that, even if a penitent didn't go into a 'little black box', the confession should still be valid.<sup>27</sup>

The privilege belongs to the member (or former member) of the clergy and cannot be waived by the consent of the penitent. In a sense the penitent's wishes are irrelevant. The privilege is also not absolute; the priest is entitled to refuse but not obliged to refuse to divulge the content of a religious confession.<sup>28</sup> Further, the priest can refuse to divulge whether or not a confession was made at all.<sup>29</sup>

Section 127 applies even where another Act says that the rules of evidence do not apply.<sup>30</sup> The section does not apply if the confession was made for a criminal purpose.<sup>31</sup> It is doubtful that religious confessions could ever be made for a criminal purpose. This section may have been included to try to temper the broadness of the provision and show that it is not absolute.

## Professional Communications Privilege

In 1997 New South Wales added two new privileges to its Evidence Act. They were a professional communications privilege and a privilege for councilors of sexual assault victims.<sup>32</sup> The professional communications privilege may provide a way for less formal conversations with a priest to be protected in New South Wales.

The professional communications privilege covers confidential communications within a professional relationship. It does not apply automatically but can be granted if the court thinks a particular relationship fits within the definition. The court must exercise its discretion if it is satisfied that it is likely that harm would be caused to a protected confider if the evidence is given and that the harm outweighs the desirability of the evidence being given.<sup>33</sup>

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<sup>26</sup> McNicol, S. (1992) *Law of Privilege*, (Sydney : Law Book Co., 1992) at 331

<sup>27</sup> New South Wales Legislative Council Debates 21 November 1989, 12 808

<sup>28</sup> Queensland Law Reform Commission *Protection of Statements to Religiously Ordained Officials* Report 41 (Queensland: the Commission, 1991) at 8

<sup>29</sup> New South Wales legislative Council Debates 21 Nov 1989, 12 806

<sup>30</sup> s 127(3)(a) *Evidence Act* 1995 (Cth)

<sup>31</sup> Queensland Law Reform Commission *Protection of Statements to Religiously Ordained Officials* Report 41 (Queensland: the Commission, 1991)at 9

<sup>32</sup> *Evidence Amendment (confidential Communications) Act* 1997 (NSW)

<sup>33</sup> s126B(3) *Evidence Act* 1995 (NSW)

Harm is defined broadly in section 126A<sup>34</sup> as including actual physical bodily harm, financial loss, stress or shock, damage to reputation, or emotional or psychological harm.

Section 126B(4) sets out factors which the court must take into account in determining if harm would be caused and if it outweighs the good of giving the evidence. The list includes things like the probative value of the evidence, the nature and gravity of the offence being tried and the means available to the court to limit any harm.<sup>35</sup> The list is not exhaustive.

It is possible that the drafters intended the privilege to only apply if the test set out in section 126B(3)<sup>36</sup> was satisfied. The way the section is drafted leaves open the possibility that the court can exercise its discretion even when the test is not fully satisfied.<sup>37</sup> This arises because of the wording of section 126B(1).<sup>38</sup>

Section 126B(1) states that the court may direct that evidence not be given if the evidence would disclose a protected confidence, or the contents of a document recording a protected confidence, or protected identity information.<sup>39</sup> This is before the test is set out in section 126B(3).

A 'protected confidence' and 'protected identity information' are both defined in s 126A.

**protected confidence** means a communication made by a person in confidence to another person (in this Division called the **confidant**):

- (a) in the course of a relationship in which the confidant was acting in a professional capacity, and
- (b) when the confidant was under an express or implied obligation not to disclose its contents, whether or not the obligation arises under law or can be inferred from the nature of the relationship between the person and the confidant.

**protected identity information** means information about, or enabling a person to ascertain, the identity of the person who made a protected confidence.

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<sup>34</sup> *Evidence Act 1995 (NSW)*

<sup>35</sup> s126B(4) *Evidence Act 1995 (NSW)* for a complete list see appendix [1]

<sup>36</sup> *Evidence Act 1995 (NSW)*

<sup>37</sup> Odgers, S. (2004) *Uniform Evidence Law 6<sup>th</sup> Edition* (Pyrmont, N.S.W. : Lawbook Co., 2004) at 494 - 495

<sup>38</sup> *Evidence Act 1995 (NSW)*

<sup>39</sup> Odgers, S. (2004) *Uniform Evidence Law 6<sup>th</sup> Edition* (Pyrmont, N.S.W. : Lawbook Co., 2004) at 494 - 495

The professional communications privilege belongs to the confider and can be waived by their consent.<sup>40</sup> The privilege is designed to protect the confider and not the relationship or class of relationships.<sup>41</sup> The privilege does not impose any obligations on particular professions to respect confidences.<sup>42</sup>

The court is able to give directions preventing the evidence being given on its own initiative or on the application of the confider or confidant, even if neither are parties to the court proceedings.<sup>43</sup>

The court also has the power to make ancillary orders aimed at reducing the harm to the confidant so that the evidence can be given.<sup>44</sup>

The privilege potential applies to many different professions. Professions which could be covered by the privilege include doctors, nurses, accountants, physiotherapists, counselors, therapists, social workers and private investigators; the precise scope remains uncertain.<sup>45</sup> It has already been shown to apply to journalists.<sup>46</sup>

It is still unclear exactly which professions and which communications will be covered by this privilege. It is likely that decisions will be made on a case by case basis.

This privilege may cover communications with priests that are in the nature of counseling or other less formal discussions not covered by the priest-penitent privilege.<sup>47</sup> The penitent will hold the privilege. For the privilege to apply to the communication it would need to be shown that there would be some harm to the penitent if the communication was disclosed. The harm that would come to the priest appears not to be relevant.

## Common Law

In Western Australia, South Australia and Queensland, the common law applies. None of these states specifically deal with the privilege in their Evidence Acts.

The commonly held view is that there is no privilege for priests or penitents under common law. In reality it is not as clear as that. Australia has had no cas++es

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<sup>40</sup> s 126C *Evidence Act 1995* (NSW)

<sup>41</sup> NSW Attorney Generals Department, *Protecting Confidential Communications from Disclosure in Court Proceedings* Discussion paper (New South Wales June 1996) paras 4.9 – 4.11

<sup>42</sup> New South Wales Legislative Council Debates 22 October 1997, 1122

<sup>43</sup> s 12B(2) *Evidence Act 1995* NSW

<sup>44</sup> s 126E *Evidence Act 1995* (NSW)

<sup>45</sup> Odgers, S. (2004) *Uniform Evidence Law 6<sup>th</sup> Edition* (Pymont, N.S.W. : Lawbook Co., 2004) at 492, for a detailed look at some of these categories see Pgs 498 - 502

<sup>46</sup> Odgers, S. (2004) *Uniform Evidence Law 6<sup>th</sup> Edition* (Pymont, N.S.W. : Lawbook Co., 2004) at 501 see *NRMA John Fairfax* [2002] NSWSC 563

<sup>47</sup> New South Wales Legislative Council Debates 22 October 1997, 1130 per Reverend Hon FJ Nile

about the priest-penitent privilege in jurisdictions which do not have the privilege in their statute. From the English cases it appears that the privilege did exist at some time in the past. Over time, the privilege seems to have disappeared.<sup>48</sup>

## England

### Early Cases and Pre-Reformation Argument

There is historical uncertainty as to whether or not the privilege existed before the Reformation. There is no firm historical data either way.<sup>49</sup>

Before Henry VIII, much of the law of England would have reflected the beliefs and law of the Roman Catholic Church. The law of the Roman Catholic Church required people to go to confession and priests not to reveal what was said to them in confession. It is unlikely that the Law of England would have been inconsistent with church law.<sup>50</sup>

The modern laws of Evidence, which cover the priest-penitent privilege, may not be as old as the Reformation. If this is the case, the fact that priests may have been exempt at the time of Henry VIII is not relevant.<sup>51</sup>

The most compelling evidence for the privilege comes from the 'Gun Powder Plot' trial of Father Henry Garnet, a Jesuit Priest.<sup>52</sup>

In his trial for treason, Father Garnet claimed that any knowledge he had of the plot had come to him only via a confession and he could not reveal what was said. Father Garnet was executed for his part in the 'Gun Powder Plot'. It is unclear whether or not his claim of privilege was accepted. There appears to be some evidence that he had more involvement than merely hearing confessions.<sup>53</sup>

The privilege was implicitly recognised by the prosecutor Lord Coke. Lord Coke did not deny the privilege's existence but said that as the confession was about high treason it ought to be revealed.<sup>54</sup>

Lord Coke implicitly recognised the privilege by claiming that High treason is an exception to it.<sup>55</sup> The exception proves the rule.

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<sup>48</sup> "I have no doubt that the seal of confession was respected in the courts of England before the Reformation ... and its recognition before the Norman conquest seems to be proved ... Later English Judges interpreting the common law have disagreed ..." per Duffy J in *Cooke v Carroll* (1945) IR 515 at 517

<sup>49</sup> Allard, V. (1953) The Confessor in Court, *The Jurist* 13 (1953): 4 at 4

<sup>50</sup> Allard, V. (1953) The Confessor in Court, *The Jurist* 13 (1953): 4 at 4

<sup>51</sup> McNicol, S. (1992) *Law of Privilege*, (Sydney : Law Book Co., 1992) at 324

<sup>52</sup> see Volume 2, State Trails

<sup>53</sup> Allard, V. (1953) The Confessor in Court, *The Jurist* 13 (1953): 4 at 4 - 5

<sup>54</sup> Allard, V. (1953) The Confessor in Court, *The Jurist* 13 (1953): 4 at 4

<sup>55</sup> Case note to *R v Hay* (1860) 175 ER 33

The more modern case law does not give a clear picture as to whether or not the privilege exists at common law. There are currently no Australian cases which consider the priest penitent privilege in jurisdictions where there is no statute.

***Broad v Pitt*** (1828) 172 ER 528

This case was not about the priest-penitent privilege and the comments in it about the priest-penitent-privilege are not binding.<sup>56</sup> Best CM<sup>57</sup> said that there is no clergy privilege and that the lawyer-client privilege was an anomaly.<sup>58</sup>

He did say that he would never compel a clergyman to give evidence, but if the clergyman chose to do so he would receive the evidence.<sup>59</sup>

***R v Griffin*** (1853) 6 Cox CC 219

A workhouse chaplain was called to give evidence against a woman who was accused of harming her child. The priest said that he had spoken to the woman as a spiritual advisor but did not specifically claim that there was a ritual confession. Alderson B said the evidence shouldn't be given. The prosecutor, Badkin, chose not to tender the evidence.<sup>60</sup>

Alderson B compared conversations of a client with a lawyer with the conversations of a person with a priest, concluding that they were of the same character. He stopped short of laying down a firm rule that priests did not have to give evidence of what people say to them.<sup>61</sup>

***R v Hay*** (1860) 175 ER 933

In this case the Catholic priest was put in gaol for not giving evidence when required to do so.<sup>62</sup>

Hay went to the house of Rev John Kelly after stealing a watch. He gave the watch to Rev Kelly as part of giving confession. When the case came to trial Rev Kelly was called as a witness to testify from whom he had received the watch.

When Rev Kelly was asked to swear to 'tell the whole truth' he objected. He objected on the grounds that there may be some things he could not reveal as they were said to him in confession. He was eventually sworn and then asked to say who gave him the watch.

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<sup>56</sup> The comments were obiter.

<sup>57</sup> The judge in this case.

<sup>58</sup> *Broad v Pitt* (1828) 172 ER 528 at 528

<sup>59</sup> *Broad v Pitt* (1882) 172 ER 528 at 529

<sup>60</sup> *R v griffin* (1853) 6 Cox CC 219

<sup>61</sup> *R v Griffin* (1853) 6 Cox CC 219

<sup>62</sup> *R v Hay* (1860) 175 ER 933 at 934

Rev John Kelly refused to say who gave him the watch on the grounds that to do so would implicate the person who gave him the watch. Rev Kelly said that he would be excommunicated for implicating the person who gave him the watch as it was part of confession. The judge went to some lengths to explain that he was not required to reveal what was said, just who had given him the watch.<sup>63</sup> The priest still refused and was committed to gaol for contempt of court.<sup>64</sup>

The judge's emphasis on the distinction between revealing who gave the watch to the Rev Kelly and revealing the content of confession implies that a privilege for the contents of confession existed.

The report of *R v Hay* appends extensive case notes which go through the history of the privilege and conclude that historically the privilege did exist.

### ***Wheeler v LeMarchant* (1881) 17 Ch D. 675**

This was a case about lawyer-client privilege. In a non-binding comment<sup>65</sup> Jessel MR<sup>66</sup> said that the existence of privileges in law was very limited. He said that confessions to a priest were not privileged even though the penitent may consider the communication more important than their life or fortune.<sup>67</sup>

This case is generally accepted as stating the law in England, but the comments in it are not binding.<sup>68</sup>

### ***Normanshaw v Normanshaw* (1893) 69 TL 468**

Mr Normanshaw caught his wife in the act of adultery. Mrs Normanshaw later went and saw Rev Richard Linton. During the divorce trial Rev Linton was called as a witness to give evidence about a conversation he had with Mrs Normanshaw. He refused, saying that he had consulted with a number of his friends and they had advised him that he should not reveal what a parishioner had told him. The Judge did not accept this. In summing up the Judge said that a clergyman had no right to withhold information from the court.<sup>69</sup>

## **Application of Australia's Modern Statutes**

In the three cases which dealt with a priest who refused to testify only one, *R v Hay*,<sup>70</sup> would be covered by modern statutes. The other cases, *R v Griffin*<sup>71</sup> and

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<sup>63</sup> The same exception applies to the lawyer-client privilege.

<sup>64</sup> *R v Hay* (1860) 175 ER 933 at 934

<sup>65</sup> obiter

<sup>66</sup> Master of the Rolls, the judge in this case.

<sup>67</sup> *Wheeler v LeMarchant* (1881) 17 Ch. D 675 at 681

<sup>68</sup> *Cook v Carrol* [1945] IR 515

<sup>69</sup> *Normanshaw v Normanshaw* (1893) 69 LT 468 at 469

<sup>70</sup> (1860) 176 ER 933

*Normanshaw v Normanshaw*<sup>72</sup>, do not appear to have involved ritual confessions. If they did not, the modern Australian statutes would not have allowed the priests to refuse to give evidence under the priest-penitent privilege. If the conversations took place in New South Wales they may be covered by the professional communications privilege.

If the priest in *R v Hay* had been in New South Wales, Tasmania or a Commonwealth court, he may not have had to reveal who gave him the watch to have done so would have revealed the fact as well as the content of the confession.<sup>73</sup>

The cases do not provide an absolute rule as to the existence or non-existence of the privilege. For practical purposes priests should assume that there is no privilege at common law, even though it could be argued that this has never been properly determined.

## Ireland

### ***Cook v Carol*** [1945] IR 515

The common law in Ireland has not followed the path of the common law in England; there is a priest-penitent privilege in Ireland.<sup>74</sup>

In *Cook v Carol* a young woman claimed that a married man was the father of her unborn child. The local priest Rev WJ Behan called both parties to his house to try and determine the truth. He wanted the man to admit to being the father or convince the girl to withdraw her accusation if incorrect.

During the trial the parties gave contradicting evidence about the meeting with Rev Behan. Rev Behan was called to give evidence as to which version was correct. He refused to give evidence on the grounds of privilege and was fined 10 pounds for contempt of court; he did not appeal the decision.<sup>75</sup>

When the case was appealed by the defendant, Rev Behan was called as a witness again. The judge looked at the history the English common law and the Irish common law and concluded that in this case they differed.

In the appeal it was argued that even if the privilege did exist that it had been waived in this case. Both parties had given evidence of the conversation and both wanted the priest to validate their version of events. The judge did not agree with this reasoning. He said that the privilege belonged to the priest and

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<sup>71</sup> (1853) 6 Cox CC 219

<sup>72</sup> (1893) 69 TL 468

<sup>73</sup> see s 127 *Evidence Act* 1995 (Cth) (NSW) 2000 (Tas)

<sup>74</sup> *Cook v Carrol* [1945] IR 515 at 524 - 525

<sup>75</sup> *Cook v Carrol* [145] IR 515 in head note at 515

not the confiders. The priest-penitent privilege is different from the lawyer-client privilege because the priest is not a servant as the lawyer is. The penitent does not employ the priest. This makes the character of the relationship different.<sup>76</sup>

Duffy J looked at the Wigmore principles for recognising privileges.<sup>77</sup> The Wigmore principles are a set of guidelines that have been used to decide whether or not a particular privilege should be recognised by the law.

- (1) The communications must originate in a confidence that they will not be disclosed.
- (2) This element of confidentiality must be essential to the full and satisfactory maintenance of the relationship
- (3) The relation must be one which, in the opinion of the community, ought to be sedulously fostered; and
- (4) The injury which would endure to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of litigation.

He concluded that communications between a priest and a penitent seemed to fit the Wigmore principles perfectly in Ireland.<sup>78</sup>

Duffy J also noted that Wigmore attributed the reason that the priest-penitent privilege had not been recognised in England to the third element. The third element talks about the importance of the relationship to the community. In England the importance of the church and the ritual of confession were not as high as in Ireland.<sup>79</sup>

The conversation which took place in this case was not a ritual confession. It was merely a confidential communication. A conversation of this nature would not be covered by any of the Australian statutes for the priest-penitent privilege. The conversation may have been covered by New South Wales' professional communications privilege.

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<sup>76</sup> *Cook v Carrol* [1945] IR 515 at 523 - 524

<sup>77</sup> *Cook v Carrol* [1945] IR 515 at 520

<sup>78</sup> *Cook v Carrol* [1945] IR 515 at 521 - 522

<sup>79</sup> *Cook v Carrol*[1945] IR 515 at 521

# Church Law

## Biblical Importance and History of Confession

The concept of confession and forgiveness is at the very heart of Christianity. There is provision for formal ritual confession in the Roman Catholic, Greek, Oriental and Anglican churches. Other Christian denominations do have confession but it is not as ritual in nature.<sup>80</sup>

### Biblical Importance

The point of confession is the forgiveness that comes as a result. Forgiveness of sins is central to a Christian's relationship with God.<sup>81</sup> Throughout his ministry Jesus forgave and encouraged forgiveness of sins. Examples include the healing of the paralytic in Mark 2; 1 – 12, the forgiveness of the woman who washed Jesus feet in Luke 7; 36 – 50 and the parable of the lost sheep in Luke 15; 1 – 7. Jesus' ministry was not to those who did not need forgiveness but to those who did.

Jesus answered "Those who are well have no need of a physician, but those who are sick; I have come to call not the righteous but sinners to repentance. Luke 5; 31 – 32 (NRSV)

Jesus' ministry of forgiveness culminated with his death as the forgiveness of sins as explained to the disciples in the last super.<sup>82</sup>

For this I my blood of the new covenant, which is poured out for many for the forgiveness of sins. Matthew 26: 28 (NRSV)

Forgiveness is the cornerstone of the Christian religion. A priest's biblical authority for hearing a confession and pronouncing absolution can be traced back to Jesus' commission to the disciples in both John and Mathew.<sup>83</sup>

If you forgive the sins of any, they are forgiven them; if you retain the sins of any, they are retained. John 20:23 (NRSV)

### History of Confession

Private confession has existed for about 1000 years the churches, although confession itself has existed for much longer.

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<sup>80</sup> New South Wales Legislative Council Debates 21 November 1989, 12 806

<sup>81</sup> Fink, P.E. (1990) *The New Dictionary of Sacramental Worship* (Collegeville, Minn. : Liturgical Press, c1990) at 473

<sup>82</sup> Fink, P.E. (1990) *The New Dictionary of Sacramental Worship* (Collegeville, Minn. : Liturgical Press, c1990) at 474

Bradshaw, P. (ed) (2002) *The New Westminster Dictionary of Liturgy and Worship*, (Louisville, KY : Westminster John Knox Press, c2002) at 366 see *John 20:23, Mathew 16:19 and 18:18.*

Baptism is considered the initial sign of forgiveness of sin with the Eucharist the reminder of that forgiveness.<sup>84</sup>

For the early church confession was public. Confession was made to the whole church community. Generally confession was only used for very serious or public sins. Public confession was common until 459 AD, when it was condemned by Pope Leo I.<sup>85</sup>

The move towards for privacy for penitents arose slowly over time but was not formalised until six centuries after public confession was banned.<sup>86</sup> In 1215 Pope Innocent III introduced Canon 21 of the fourth council of Lateran. The Canon prevented priests from revealing what was said to them in confession. Priests who disclosed what was said to them were deprived of priestly office and confined to a monastery for life.<sup>87</sup> The complete ban on the use of everything heard in confession did not eventuate until 1682.<sup>88</sup>

The obligation of secrecy today can be summed up by the maxim 'about confessional matters the priest knows even less than what he knows nothing about'.<sup>89</sup>

## **The Reformation and creation of the Church of England**

At the time of the reformation the Canon laws of the Catholic Church which applied in England remained as the canons of the new church, except those that were 'repugnant, contrary or derogatory to the laws, state or realm'.<sup>90</sup> The Canon concerning confession remained part of the church law in England.<sup>91</sup>

## **Catholic Church**

The Catholic Church is governed by the Canon law of 1983. This replaced the earlier Canon law of 1917.<sup>92</sup> The Catholic Canons relevant to confession are set out in Appendix 2.

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<sup>84</sup> Fink, P.E. (1990) *The New Dictionary of Sacramental Worship* (Collegeville, Minn. : Liturgical Press, c1990) at 475

<sup>85</sup> Anglican Church of Australia (2001) *Report of the Clergy Discipline Working Group* at 4

<sup>86</sup> Fink, P.E. (1990) *The New Dictionary of Sacramental Worship* (Collegeville, Minn. : Liturgical Press, c1990) at 251

<sup>87</sup> Anglican Church of Australia (2001) *Report of the Clergy Discipline Working Group* at 4

<sup>88</sup> Fink, P.E. (1990) *The New Dictionary of Sacramental Worship* (Collegeville, Minn. : Liturgical Press, c1990) at 251

<sup>89</sup> Fink, P.E. (1990) *The New Dictionary of Sacramental Worship* (Collegeville, Minn. : Liturgical Press, c1990) at 251

<sup>90</sup> Anglican Church of Australia (2001) *Report of the Clergy Discipline Working Group* at 4

<sup>91</sup> Anglican Church of Australia (2001) *Report of the Clergy Discipline Working Group* at 4

<sup>92</sup> The Canon Law Society of Great Britain and Ireland (1995) *The Canon law Letter and Spirit*, ( London : Geoffrey Chapman, 1995) at vii – xi

The secrecy of the confessional is paramount to the modern rite of penance or confession for Catholics. The patron saint of confessors is Saint Nepomecene. He was drowned for refusing to tell the King he served what the Queen had confessed to him.<sup>93</sup>

Canon 983 is the main Canon which prevent Catholic priests from revealing what is said to them in confession. The Canon makes it punishable for the priest to betray the penitent in any way. This includes in ways other than words. The prohibition is absolute and applies whether or not the priest gives absolution. Even if the penitent gives the priest permission to reveal what was said the priest is unable to do so under Canon law.<sup>94</sup>

Priests are also prevented from using anything they hear in confession to the detriment of the penitent, by Canon 984. This canon applies even when the danger of revealing who the penitent is has been excluded.<sup>95</sup>

A priest who deliberately reveals what is said to him is automatically excommunicated. Excommunication can only be lifted by the Apostolic See (the Pope). Priests who indirectly reveal what is said in confession are punished according to the gravity of the offence.<sup>96</sup>

Lay Members of the Catholic Church are also bound by the Canon law. Canon 989 requires Catholics, over the age of seven, to confess their grave sins at least once a year.<sup>97</sup> The requirement is specific. It requires the penitent to confess the kind and number of the sin.<sup>98</sup> This is a minimum and technically only applies to grave sins.<sup>99</sup> Most serious crimes would be grave sins. It is also recommended that Catholics confess less grave sins as well.<sup>100</sup>

## Anglican Church

The Anglican Church provides for private ritual confession in both its church law and custom.<sup>101</sup> In 1992 the Anglican Church of Australia adopted a new canon

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<sup>93</sup> New South Wales legislative Council debates 21 November 1989, 12 869

<sup>94</sup> The Canon Law Society of Great Britain and Ireland (1995) *The Canon law Letter and Spirit*, (London : Geoffrey Chapman, 1995) at 535 - 536

<sup>95</sup> The Canon Law Society of Great Britain and Ireland (1995) *The Canon law Letter and Spirit*, (London : Geoffrey Chapman, 1995) at 536

<sup>96</sup> Canon 1388;1 The Canon Law Society of Great Britain and Ireland (1995) *The Canon law Letter and Spirit*, (London : Geoffrey Chapman, 1995) at 799

<sup>97</sup> The Canon Law Society of Great Britain and Ireland (1995) *The Canon law Letter and Spirit*, (London : Geoffrey Chapman, 1995) at 539 See also Canon 97; 2 at 55 - 56

<sup>98</sup> The Canon Law Society of Great Britain and Ireland (1995) *The Canon law Letter and Spirit*, (London : Geoffrey Chapman, 1995) at 538

<sup>99</sup> The Canon Law Society of Great Britain and Ireland (1995) *The Canon law Letter and Spirit*, (London : Geoffrey Chapman, 1995) at 538

<sup>100</sup> per Canon 988;2 Canon 988; 2 The Canon Law Society of Great Britain and Ireland (1995) *The Canon law Letter and Spirit*, (London : Geoffrey Chapman, 1995) at 539

<sup>101</sup> Anglican Church of Australia (2006) *Private Confession Pastoral Guidelines with Special Reference to child Sex Abuse* at 1

about confession known as the canon concerning confession 1989, canon 10 of 1992.<sup>102</sup> The new canon replaced the existing canon 113 of 1603 which had come into force in Australia with the arrival of the Church of England. Canon 113 continued in force after the Anglican Church of Australia became an autonomous member of the Anglican Communion in 1962.<sup>103</sup> The Anglican canons about confession are set out in Appendix 3.

The new canon only comes into force in those dioceses which give their consent. In those dioceses where consent was not given the original canon is still in force.<sup>104</sup> When the new canon was first passed all dioceses except Ballarat consented. However, Sydney later withdrew their consent.<sup>105</sup>

The main difference between the two canons is the language used. There are two other major differences worth noting.

The first difference is that canon 113 states that the canon does not apply 'under the pain of death'. If the priest may be killed for not revealing what was told to them in confession they may reveal it without the penitent's consent.<sup>106</sup> There is no death penalty in Australia, so this exception does not apply in the courts. In theory this exception may apply in circumstances where the priest is threatened by individuals or groups outside of the law. This would apply only in the dioceses of Sydney and Ballarat where canon 113 still exists.

The second difference is that the canon concerning confession, canon 1989, allows priests to reveal what is said to them in confession if the penitent gives their consent.<sup>107</sup>

The penalty for a priest who improperly divulges what is said to them in a confession is unclear. In the canon the penalty is 'under pain of irregularity'. It would appear that this could be the removal of holy orders, or there may be no penalty as the canon only binds the conscience.<sup>108</sup> It is unlikely that a priest giving evidence in breach of the canons would go unnoticed or uninvestigated by the church.

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<sup>102</sup> Anglican Church of Australia (2006) *Private Confession Pastoral Guidelines with Special Reference to child Sex Abuse* at 2

<sup>103</sup> Anglican Church of Australia (2001) Report of the Clergy Discipline Working Group, at 2 see also s71 constitution of the Anglican Church of Australia

<sup>104</sup> Anglican Church of Australia (2001) Report of the Clergy Discipline Working Group at 2-3

<sup>105</sup> Anglican Church of Australia (2001) *Report of the Clergy Discipline Working Group* at 12 in Appendix 2

<sup>106</sup> Anglican Church of Australia (2006) *Private Confession Pastoral Guidelines with Special Reference to child Sex Abuse* at 4

<sup>107</sup> Anglican Church of Australia (2006) *Private Confession Pastoral Guidelines with Special Reference to child Sex Abuse* at 4

<sup>108</sup> Anglican Church of Australia (2001) *Report of the Clergy Discipline Working Group* at 7

The Anglican Church recognises that there is a difference between confession of a crime and confession of a sin, although both often happen at the same time. In the Anglican Church's pastoral guidelines on confession it is recommended that if it appears that a person is about to confess a crime the priest should ask the person if they wish to make a confession. If a person wishes to make a confession the priest must then make sure it is done in a private place, preferably the parish church, according to the rite of confession.<sup>109</sup>

If a penitent does confess a crime as a sin, the Anglican priest can defer or refuse to give absolution until the penitent has performed specific acts, such as reporting the crime to the police. The seal of confession still attaches, even if absolution is never given.<sup>110</sup>

The Anglican canons about confession only apply to priests. Confession is usually reserved for special or serious circumstances.<sup>111</sup> "All may, non must, some should" is a common phrase used in the Anglican Church to describe the obligation as to private confession.

## **The Collision of Church and State Law**

### **Victorian and Northern Territory Statutes**

The priest penitent privilege in the Evidence Acts of Victoria and the Northern Territory does not protect priests and adds nothing in the way of protection to penitents that the church law did not already give them.

The statute prevents priests from revealing what is said without the penitent's permission and only applies to ritual confession.<sup>112</sup> It only applies to priests whose churches have ritual confession such as the Anglican and Catholic churches. These churches have their own law which prevents priests from revealing what is said to them. It is the churches not covered by the statute which do not always prevent their ministers<sup>113</sup> from revealing what is said to them in a confession-like discussion.

The statutes allow the penitent to waive their rights and permit the priests to give evidence.

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<sup>109</sup> Anglican Church of Australia (2006) *Private Confession Pastoral Guidelines with Special Reference to child Sex Abuse* at 1-2

<sup>110</sup> Anglican Church of Australia (2006) *Private Confession Pastoral Guidelines with Special Reference to child Sex Abuse* at 1

<sup>111</sup> Anglican Church of Australia (2001) *Report of the Clergy Discipline Working Group* at 1

<sup>112</sup> s 12 *Evidence Act* 2005 (NT), s28 *Evidence Act* 1959 (Vic)

<sup>113</sup> Many churches who would not be cover by the statute do not consider them selves to have a priesthood, people holding a similar role to priest are referred to as ministers.

Catholic priests are prevented by church law from revealing what is said to them in confession; even if the penitent gives them permission.<sup>114</sup> Catholic priests hold the laws of the church to be more important than the laws of the state when the two clash.<sup>115</sup>

Anglican priests cannot reveal what is said to them without permission from the penitent. If permission is given they can reveal what was said to them.<sup>116</sup> The Statutes have the same affect as the Anglican Church Law. The statutes give the penitent no more protection than the Anglican Church Law.

The only change that the statutes bring is that priests are not put in the position of refusing to divulge when the prosecution asks them to give evidence. It is unlikely that the penitent (if they are the defendant in the case) will give them permission to do so.

### **New South Wales, Commonwealth and Tasmanian Statute**

The priest-penitent privilege in the Uniform Evidence Acts does not provide more protection to penitents than the church law but does provide protection for some priests.

The laws are discriminatory. They only apply to ritual confessions such as those in the Anglican and Catholic churches.<sup>117</sup> Less ritual confessions conducted in other churches are not covered. The priests in those are not protected from revealing what is said to them.

### **Professional Communications Privilege**

The possibility of this privilege applying to confidential conversations between priests and a member of the community means that it is less discriminatory in nature. It could in theory apply to a confession which was made in a non-ritual setting, but which is still a confession to a priest in their professional capacity.<sup>118</sup>

The privilege can be waived by the penitent, which would mean the priest would have to give evidence.<sup>119</sup> If the section was applied in the case of a ritual confession Catholic priests would still not be able to reveal what was said to them.<sup>120</sup>

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<sup>114</sup> canons 989 The Canon Law Society of Great Britain and Ireland (1995) *The Canon law Letter and Spirit*, (London : Geoffrey Chapman, 1995) at 535

<sup>115</sup> McNicol, S. (1992) *Law of Privilege*, (Sydney : Law Book Co., 1992) at 329 - 330

<sup>116</sup> Canon Concerning Confessions 1989, canon 10, 1992

<sup>117</sup> McNicol, S. (1992) *Law of Privilege*, (Sydney : Law Book Co., 1992) at 330

<sup>118</sup> New South Wales Legislative Council Debates 22 October 1997, 1130 per Reverend Hon FJ Nile

<sup>119</sup> s126C *Evidence Act 1995* (NSW)

<sup>120</sup> canons 989 The Canon Law Society of Great Britain and Ireland (1995) *The Canon law Letter and Spirit*, (London : Geoffrey Chapman, 1995) at 535

## Contempt

If a minister<sup>121</sup> is not covered by privilege, they can be compelled to give evidence. If they refuse to do so, they can be held to be in contempt of court. The punishments for contempt range from imprisonment to a fine.

## Conclusion and Recommendations

In Australia there is no clearly recognised privilege for priests or penitents at common law. In five jurisdictions an attempt has been made to remedy this by introducing the privilege through statute. The usefulness of the statutory provisions is limited. They only apply to ritual confessions. This only covers a very small number of communications with priests.

The current situation leaves open the possibility of conflict between the churches and the court system. This would be damaging to both institutions. Both have a valuable part to play in society and should not be in conflict with one another.

A privilege like the professional communications privilege is the most appropriate for Australia's multi-cultural and multi-faith community. It is non-discriminatory and could have a wide application.

More would need to be done to make sure that Catholic priests were not disadvantaged by its introduction. Such a privilege would need to include a provision that the court must take into account whether the priest (or other professional person) is under a strict obligation not to divulge. In the case of Anglican priests, the fact that they can only reveal with the consent of the penitent should also be taken into account. This will be particularly relevant if it is someone other than the penitent who is asking for the confession to be revealed.

To allow s126B *Act 1995 Evidence (NSW)*<sup>122</sup> to provide the same protection as the priest-penitent privilege sections two new subsection would need to be added to section 126B(4).

S126(4) without limiting the matters that the court may take into account for the purpose of this section, it must take into account the following matters:

...

- (i) Whether or not the person who received the protected confidence is under an ethical, moral or legal obligation not to disclose the protected confidence
- (j) The harm that would or might be done to the person who received the protected confidence in the professional capacity in which they heard the protected confidence, including professional reprimand.

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<sup>121</sup> see footnote 113

<sup>122</sup> see appendix 1

With these additional sub-sections it would be possible to protect both penitents and priests from the harm that could result from revealing the content of confession using a professional communication privileged.

## Appendix 1 - Statutes

### **S12(1)(3) Evidence Act 2005 (NT)**

- (1) A clergyman of any church or religious denomination shall not, without the consent of the person who made the confession, divulge in any proceeding any confession made to him in his professional character.
- (3) Nothing in this section shall protect any communication made for any criminal purpose, or prejudice the right to give in evidence any statement or representation at any time made to or by a medical practitioner in or about the effecting by any person of an insurance on the life of himself or any other person.

### **S28(1) Evidence Act 1958 (Vic)**

- (1) No clergyman of any church or religious denomination shall without the consent of the person making the confession divulge in any suit action or proceeding whether civil or criminal any confession made to him in his professional character according to the usage of the church or religious denomination to which he belongs.

### **S127 Evidence Act 1995 (Cth) (NSW) 2000 (Tas)**

- (1) A person who is or was a member of the clergy of any church or religious denomination is entitled to refuse to divulge that a religious confession was made, or the contents of a religious confession made, to the person when a member of the clergy.
- (2) Subsection (1) does not apply if the communication involved in the religious confession was made for a criminal purpose.
- (3) This section applies even if an Act provides:
  - (a) that the rules of evidence do not apply or that a person or body is not bound by the rules of evidence; or
  - (b) that a person is not excused from answering any question or producing any document or other thing on the ground of privilege or any other ground.
- (4) In this section:

**religious confession** means a confession made by a person to a member of the clergy in the member's professional capacity according to the ritual of the church or religious denomination concerned.

## **Division 1A Evidence Act 1995 (NSW)**

### **126A Definitions**

(1) In this Division:

***harm*** includes actual physical bodily harm, financial loss, stress or shock, damage to reputation or emotional or psychological harm (such as shame, humiliation and fear).

***protected confidence*** means a communication made by a person in confidence to another person (in this Division called the ***confidant***):

- (a) in the course of a relationship in which the confidant was acting in a professional capacity, and
- (b) when the confidant was under an express or implied obligation not to disclose its contents, whether or not the obligation arises under law or can be inferred from the nature of the relationship between the person and the confidant.

***protected confider*** means a person who made a protected confidence.

***protected identity information*** means information about, or enabling a person to ascertain, the identity of the person who made a protected confidence.

(2) For the purposes of this Division, a communication may be made in confidence even if it is made in the presence of a third party if the third party's presence is necessary to facilitate communication.

### **126B Exclusion of evidence of protected confidences**

(1) The court may direct that evidence not be adduced in a proceeding if the court finds that adducing it would disclose:

- (a) a protected confidence, or
- (b) the contents of a document recording a protected confidence, or
- (c) protected identity information.

(2) The court may give such a direction:

- (a) on its own initiative, or

- (b) on the application of the protected confider or confidant concerned (whether or not either is a party).
- (3) The court must give such a direction if it is satisfied that:
- (a) it is likely that harm would or might be caused (whether directly or indirectly) to a protected confider if the evidence is adduced, and
  - (b) the nature and extent of the harm outweighs the desirability of the evidence being given.
- (4) Without limiting the matters that the court may take into account for the purposes of this section, it is to take into account the following matters:
- (a) the probative value of the evidence in the proceeding,
  - (b) the importance of the evidence in the proceeding,
  - (c) the nature and gravity of the relevant offence, cause of action or defence and the nature of the subject matter of the proceeding,
  - (d) the availability of any other evidence concerning the matters to which the protected confidence or protected identity information relates,
  - (e) the likely effect of adducing evidence of the protected confidence or protected identity information, including the likelihood of harm, and the nature and extent of harm that would be caused to the protected confider,
  - (f) the means (including any ancillary orders that may be made under section 126E) available to the court to limit the harm or extent of the harm that is likely to be caused if evidence of the protected confidence or the protected identity information is disclosed,
  - (g) if the proceeding is a criminal proceeding—whether the party seeking to adduce evidence of the protected confidence or protected identity information is a defendant or the prosecutor,
  - (h) whether the substance of the protected confidence or the protected identity information has already been disclosed by the protected confider or any other person.
- (5) The court must state its reasons for giving or refusing to give a direction under this section.

### **126C Loss of professional confidential relationship privilege: consent**

This Division does not prevent the adducing of evidence given with the consent of the protected confider concerned.

### **126D Loss of professional confidential relationship privilege: misconduct**

- (1) This Division does not prevent the adducing of evidence of a communication made or the contents of a document prepared in the furtherance of the commission of a fraud or an offence or the commission of an act that renders a person liable to a civil penalty.
- (2) For the purposes of this section, if the commission of the fraud, offence or act is a fact in issue and there are reasonable grounds for finding that:
  - (a) the fraud, offence or act was committed, and
  - (b) a communication was made or document prepared in furtherance of the commission of the fraud, offence or act, the court may find that the communication was so made or document so prepared.

### **126E Ancillary orders**

Without limiting any action the court may take to limit the possible harm, or extent of the harm, likely to be caused by the disclosure of evidence of a protected confidence or protected identity information, the court may:

- (a) order that all or part of the evidence be heard in camera, and
- (b) make such orders relating to the suppression of publication of all or part of the evidence given before the court as, in its opinion, are necessary to protect the safety and welfare of the protected confider.

### **126F Application of Division**

- (1) This Division does not apply in relation to a proceeding the hearing of which began before the commencement of this Division.
- (2) This Division applies in relation to a protected confidence within the meaning of this Division whether made before or after the commencement of this Division.
- (3) This Division does not apply in relation to a protected confidence within the meaning of Division 1B or Division 2 of Part 5 of Chapter 6 of the *Criminal Procedure Act 1986*.
- (4) The court may give a direction under this Division in respect of a protected confidence or protected identity information whether or not the protected confidence or protected identity information is privileged under another

section of this Part or would be so privileged except for a limitation or restriction imposed by that section.

## **Appendix 2 – Catholic Canons**

### **Canon 97; 2**

A minor who has not completed the seventh year of age is called an infant and is considered incapable of personal reasonability; on completion of the seventh year, however, the minor is presumed to have the use of reason.

### **Canon 983; 1**

The sacramental seal is inviolable. Accordingly, it is absolutely wrong for a confessor in any way to betray the penitent, for any reasons whatsoever, whether by word or in any other fashion.

### **Canon 983; 2**

An interpreter, there is one, is also obliged to observe this secret, as are others who in any way whatever come to knowledge of sins from a confession.

### **Canon 984; 1**

The confessor is wholly forbidden to use knowledge acquired in confession to the detriment of the penitent, even when all danger of disclosure is excluded.

### **Canon 988; 1**

Each of Christ's faithful is bound to confess, in kind and number, all grave sins committed after baptism, of which after careful examination of conscience he or she is aware, which have not yet been directly pardoned by the keys of the Church, and which have not been confessed in an individual confession.

### **Canon 988; 2**

It is recommended that Christ's faithful confess venial sins also

### **Canon 989**

All the faithful who have reached the age of discretion are bound faithfully to confess their grave sins at least one per year.

### **Canon 1388; 1**

A confessor who directly violate the sacramental seal incurs a *latae sententia* excommunication reserved to the Apostolic See; he who does so only indirectly is to be punished according to the gravity of the offence.

### **Canon 1388; 2**

Interpreters and the others mentions in Canon 983; 2, who violate the secret, re to be punished with a just penalty, not excluding excommunication.

## **Appendix 3 – Anglican Canons**

### **Canon numbered 113 of the *Canons of 1603***

"Provided always, that if any man confess his secret and hidden sins to the minister, for the unburdening of his conscience, and to receive spiritual consolation and ease of mind from him; we do not any way bind the said minister by this our Constitution, but do straitly charge and admonish him, that he do not at any time reveal and make known to any person whatsoever any crime or offence so committed to his trust and secrecy, (except they be such crimes as by the laws of this realm his own life may be called into question for concealing the same,) under pain of irregularity."

### ***Canon concerning confessions 1989***

"If any person confess his or her secret and hidden sins to an ordained minister for the unburdening of conscience and to receive spiritual consolation and ease of mind, such minister shall not at any time reveal or make known any crime or offence or sin so confessed and committed to trust and secrecy by that person without the consent of that person.

The proviso to canon numbered 113 of the Canons of 1603, and any other law of this Church concerning the making of confessions to an ordained minister, in so far as the same may have any force, shall have no operation or effect in this Church."

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- 1.3. *Normanshaw v Normanshaw* (1893) 69 LT 468
- 1.4. *R v Griffin* (1853) 6 Cox CC 219
- 1.5. *R v Hay* (1860) 175 ER 933
- 1.6. *R v Lynch* [1954] Tas SR 47
- 1.7. *Wheeler v LeMarchant* (1881) 17 Ch. D 675

## 2. Statutes

- 2.1. *Evidence Amendment (confidential Communications) Act 1997* (NSW)
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- 2.3. *Evidence Act 2005* (NT)
- 2.4. *Evidence Act 1959* (Vic)
- 2.5. *Evidence Act 1995* (Cth)
- 2.6. *Evidence Act 2000* (Tas)

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