Priests, Penitents, Confidentiality and Child Sexual Abuse

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In the light of Prime Minister Gillard's announcement of a Royal Commission into institutional responses to the sexual abuse of children there has been a particular focus on the role of the 'confessional seal'. The Roman Catholic practice whereby communications made in the confessional are treated as absolutely confidential has been hotly debated, in particular whether this doctrine forms an inappropriate impediment to the appropriate investigation and treatment of cases of abuse.

The issue of evidence of child sexual abuse within the confessional seal arises in three different contexts: mandatory reporting of suspected child abuse, evidence to be given in legal proceedings, and evidence before a Royal Commission.

Mandatory Reporting

The public discussion has mostly been about the role of mandatory reporting, with Mr Pyne leading the commentary, saying that, as an MP, he cannot countenance a failure to give police evidence on these issues. Similarly Mr Abbott has commented that everyone who becomes aware of sexual offences against children, including priests, must adhere to the legal requirements regarding mandatory reporting. The list of political contributors on this issue is long, including state politicians, such as NSW Premier Barry O'Farrell, who commented that failure to report was hard to comprehend, while the Prime Minister commented on the 'sins of omission' involved in an adult averting their eyes from the problem.

Mandatory reporting is primarily given legal effect in state and territory legislation – with the Commonwealth having some provisions in the *Family Law Act 1975* covering family law disputes involving children (note that recent amendments would also require journalists to reveal their sources if it was in the child's best interests in proceedings before the family

court). There is, however, no general coverage of mandatory reporting of child abuse under federal legislation.

The states and territories vary in their legal requirements to report. The most common model involves nominating particular professions, or particular activities, as attracting responsibilities of reporting. Thus, for instance, Victoria requires (in summary) doctors, nurses, teachers, principals and police to report their belief on reasonable grounds that a child is in need of protection from physical or sexual abuse. The Northern Territory is the only Australian jurisdiction to impose a broader, blanket duty to report such matters. The varying requirements for reporting are documented in the Australian Institute of Family Studies' paper on mandatory reporting of child abuse and neglect.

Priests operating in areas involving children – such as in schools or medical institutions – may be covered by the legislative requirements of mandatory reporting, however it is unlikely that at this point all theoretical instances involving the confessional seal would be covered by the current legal requirements of mandatory reporting.

Evidence law and evidentiary privileges

In contrast with mandatory reporting – which seeks to prevent future harm, evidence law deals with matters which are (or may be) before the courts. Australia's evidence laws, like mandatory reporting, vary in their regulatory approach, although there is a certain impetus to establish uniform evidence laws (see, for instance, *Uniform Evidence Law*, an Australian Law Reform Commission (ALRC) Report issued with the NSW and Victorian law reform commissions). The Commonwealth *Evidence Act 1995* (the Evidence Act) has, since its passage, given an exemption to confessional evidence from the general requirement to provide evidence to a court. The Act applies in Federal courts and in the ACT. It has been used as a model for some State evidence acts.

Section 127 of the Evidence Act gives protection for religious ministers who are the recipients of confidential information in the context of a 'religious ceremony', although it does not protect such evidence if the communication was made 'for a criminal purpose'. (There is no legislative definition of 'criminal purpose', but it is presumed this exception would apply if the communication is not effectually a confession, but instead involves the confessor in a conspiracy or as an accessory.) The application of the rule is broad, applying even when 'another Act' does not apply the rules of evidence as encompassed by the Evidence Act.

This confessional privilege is categorised as one of the 'other' privileges (Division 2 – 'Other privileges') in the Act which will prevent a court from requiring evidence (Part 3.10 'Privileges'). There are other privileges in this part of the Act, including, most classically, client legal privilege – protecting evidence given to a lawyer while acting in that role (Division 1); the journalist's privilege – preventing a journalist from having to give evidence which would reveal a confidential source (Division 1A); and a right to privilege against self-incrimination (also Division 2-'Other privileges').

These privileges, known as 'shield laws', can be found in both the common law and in statute law. A brief examination of developments in privilege law may throw some light on

the confessional privilege. A common thread is that these privileges apply in situations where they are dependent on a trusting, confidential relationship. Furthermore the role those relationships play promote values society regards as inherently significant -- the values promoted by spousal relationships, through journalism and by religion and religious practice.

Traditionally there was thought to be a 'marital status' privilege in the common law, however in *Australian Crime Commission v Stoddart* [2011] HCA 47 the High Court concluded that the common law did not in fact recognise a privilege against spousal incrimination. While making this ruling the Court gave a detailed historical consideration of the doctrine and made reference to some of the policy reasons for the 'privilege'.

After *Stoddart* the spousal privilege still exists in various statutory forms, but can no longer be assumed as part of the common law in any particular situation. The case has required a reconsideration of some text books regarding evidence and their treatment of the privilege, while the policy implications are yet to be addressed. The lower court's central judgement had commented that '[i]t is one thing to require a person to incriminate him or herself before an examiner … It is quite another to require one spouse to incriminate the other. The impact that this type of compulsion may have on a marriage needs no elaboration.' (Logan J in the majority in the Federal Court).

The judge also commented '[i]f you want to alter the law which has lasted for centuries and which is almost ingrained in the English Constitution, in the sense that everybody would say, "To call a wife against her husband is a thing which cannot be heard of," – to suggest that it be dealt with by [statutory] inference, and that you should introduce a new system of law without any specific enactment of it, seems to me to be perfectly monstrous.' This is, however, in effect what the High Court proceeded to do, although its decision was based on the understanding that the common law privilege had never existed in that form, so their finding was not dependant on statutory interpretation, so much as establishing a different historical reality.

The NSW government, in the face of opposition by the Greens, recently abolished the spousal privilege more comprehensively by statute.

Another privilege, the journalists' privilege, has also been the subject of recent change. Two private member's bills were introduced and considered by the Commonwealth Parliament. Both bills gave protection to journalists, but one of the bills (the Brandis Bill), reflected recommendations by the ALRC, and would have also protected a range of confidential professional relationships (such as doctor or nurse/patient, sexual assault counsellor/client, psychologist/client, therapist/client, social worker/client, private investigator/client). Arguably this provision would have covered the priest/penitent relationship were it not already dealt with in section 127. While the journalists' privilege was to be given statutory protections, it was proposed that the confidential professional relationships would only apply under a judicial discretion.

The Parliament endorsed the narrower Bill (the Wilke Bill), commenting of the more inclusive Brandis Bill, that 'the implications of a general professional confidentiality privilege in Commonwealth law have not been adequately explored.'

Since the passage of the commonwealth's journalists' privilege amendments, Western Australia and Victoria have both passed shield laws for journalists. The Victorian legislation reflects the narrower approach, whereas the Western Australian legislation applies a general professional confidential communications protection as well, reflecting the Brandis approach. See more information on this development in a Civil Liberties Australia note by Rhys Michie.

The clearest result of this legislative activity would seem to be a drift away from more uniform evidence laws.

Evidence in Royal Commissions

Finally there is the question of the confessional seal in the context of a Royal Commission and the investigative powers that such a Commission has. A Royal Commission is not subject to the Commonwealth's Evidence Act but operates in parallel, with its own regime of evidence rules. The Royal Commissions Act 1902 was the subject of a 2010 report by the Australian Law Reform Commission, *Making Inquiries: A New Statutory Framework*. The report concluded a new legislative framework was needed and also provided a useful analysis of the current legislation. Their recommendations have not been implemented.

Cross on Evidence (8th edition) observes that it is sometimes a matter of dispute how far, and how many of, the rules of evidence apply, or should apply, in non-court based tribunals.

… It is largely because the concerns and purposes of these bodies vary so widely that few general principles can be discerned. In any given tribunal the rules may, as in the case of courts, vary according to the gravity of the issue involved… In those cases where a witness can be compelled to give evidence [as they can under the Royal Commissions Act], the normal range of privileges will presumably apply in the absence of specific statutory provision, since it would be odd for a court to be in a weaker position than a tribunal in securing relevant evidence.' (Paras 1050 & 1070.)

In Australia a Royal Commission, a non-court based tribunal, has sui generis (unique) powers of investigation which are in some ways more extensive than a court's. Maybe because such Commissions are not established to determine individual guilt their powers can be less fettered than a court's. Thus, for instance, the privilege against self-incrimination is not available to a witness before a Royal Commission (section 6A), although the evidence obtained by the Commission cannot subsequently be used in a court of law (section 6DD). Similarly the legal professional privilege is more circumscribed than in a court of law (section 6AA), while the Royal Commissions Act contains no direct reference to any spousal immunity or priest/penitent privilege.

There have been critiques of the arrangements for Royal Commissions, including that they can function as a 'star chamber', whereby a commissioner can be an 'informant, prosecutor and judge'. The Law Council's submission to the ALRC inquiry on Royal Commissions made a large number of suggestions for reform (as did the ALRC), and commented that, while coercive information gathering powers are needed to perform the important and legitimate function of public scrutiny of government action, these powers

must be seen as exceptional, particularly when used in executive rather than judicial processes, given their intrusive impact on individual rights.

It is interesting to recall at this point the provision in the Evidence Act (section 127, the confessional privilege) stipulates that the provision applies 'even when another Act does not apply the rules of evidence as encompassed by the Evidence Act.' It is unclear how this apparent legislative over-ride provision would be interpreted by the courts. As a later Act, the Evidence Act would normally be presumed to prevail over the earlier act, although necessary statutory implications may function to support the continued application of the earlier legislative arrangement.

The ALRC's view is that the applicable statutory provisions of the Royal Commissions Act currently function to rule out 'confidential professional relationships privilege' (which at the time was viewed as incorporating the journalists' privilege) and the religious confessions privilege (as well as privileges attaching to evidence of settlements), p. 463. They are supported in this by Stephen Donaghue who, in *Royal Commissions and Permanent Commissions of Inquiry* (2001, Butterworths), comments that it is 'generally accepted that no common law privilege attaches to religious confessions, and that, as a consequence and in the absence of legislative recognition, the coercive powers of commissions could be used to attempt to elicit such information.' He does, however, go on to comment '…it may be doubted that commissions would seek to use their powers this way (see the observations of Best CJ in *Broad v Pitt* (1828) 172 ER 528), given that the attempt at coercion is almost certain to fail....'.

Donaghue goes on to point out that it's unlikely the confessional privilege could be claimed when other privileges, more firmly established in law, such as the legal professional privilege, are not given full protection. Finally his text noted there is a section of the New South Wales Crime Commission Act, which, in contrast to the Royal Commissions Act, includes an explicit protection of religious confessions (that reference is now to section 40 of the 2012 Crime Commission Act).

Another legislative provision, however, suggests that the Evidence Act's arrangements should apply to witnesses before a Royal Commission. Section 7 of the Royal Commissions Act provides that 'every witness … shall have the same protection… as a witness in any case tried in the High Court'. The plain English meaning of the section would be that the Evidence Act's privileges, which protect witnesses before the High Court, would therefore also apply to witnesses before Royal Commissions. The ALRC's view, however, is that this 'answer is not entirely clear'. It would seem the legislation could be taken to refer to the common law privileges rather than the statutory privileges currently available in the High Court under the Evidence Act.

On a policy front the ALRC's recommendation was that 'some of these types of information do not justify an exemption from disclosure, but a restriction on public access may be warranted…. These [types of information] include: national security information; information otherwise subject to confidential professional relationships privilege, religious confessions privilege, or a privilege for evidence relating to settlement negotiations; information relating to secret processes of manufacture; and information otherwise subject to a secrecy provision.'

The rationale for this conclusion was that:

The interests protected by the statutory privileges are important, and an inquiry should only compel such information if it is absolutely necessary for the purposes of the inquiry. Nevertheless, the purpose of establishing Royal Commissions … is to ascertain the truth without the restrictions on evidence imposed by courts. They are investigatory bodies, rather than judicial bodies, and the restrictions on evidence that apply to inquiries should not necessarily be consistent with those that apply in the courts. Further, the addition of privileges is likely to reduce flexibility, increase formality, and increase the likelihood of legal challenge of inquiry decisions. The ALRC therefore does not recommend that these privileges should apply to Royal Commissions…

This response is qualified by a recognition that

…inquiries can be expected to recognise the importance of the interests protected by the statutory privileges, and exercise their discretion appropriately…

It should be noted in this context that, while the Royal Commissions Act gives recognition to a 'reasonable excuse', meaning 'an excuse which would excuse an act or omission of a similar nature by a witness before a court of law', the provisions stipulating the penalty for 'refusing to be sworn or to give evidence' apply with strict liability and, unlike other sections of the Act, do not allow for a reasonable excuse. The penalty for refusing to give evidence is $1000 or six months imprisonment, however the Act further provides (section 6C) that acts or omissions committed on different days constitute separate offences, so that, sequentially, someone refusing to answer questions could conceivably be kept imprisoned for the life of the Commission (and a further six months).

The ALRC recommended preserving such penalty provisions on the basis that there is a defence of reasonable excuse in some situations and

[n]o suggestion has been made to this Inquiry that s 6C of the Royal Commissions Act causes problems in practice. In the ALRC's view, such a provision has the desirable effect of providing a continuing incentive to comply with a notice to produce information.

The Law Council, however, had pointed out that the penalty arrangements breach the Commonwealth's *Guide to Framing Commonwealth Offences* because they attach a six month penalty to a strict liability offence. In the event no legislative amendments have been enacted, and in a sense this policy disagreement would seem to be circumvented by the fact that if section 6C were repealed it would be effectively replaced by the general provision in section 4K of the *Crimes Act 1914*, which similarly allows the repeated application of a penalty for continued intransigence. (The ALRC point out section 4K reflects the common law, where a failure to comply with a notice within a prescribed time is likely to be considered a continuing offence: *Hopfner v Flavel* (1990) 48 A Crim R 149.)

A marginal issue?

If the prospective Commissioner(s) were to take a stern line on the confessional seal then priests called to give evidence might be hoping to have shared Fr Frank Brennan SJ's

experience. Fr Brennan is quite open that in his 27 years of priestly ministry he has never heard a confession of child sexual abuse. Similarly Bishop Geoffrey Robinson has never been faced with such a dilemma in his 52 years of priestly ministry. It has been speculated that this may, in part, be because the mentality of paedophilia is most commonly in denial (as with some other criminal activities) – not recognising or acknowledging what has been done, or not recognising what is happening as wrong or a 'sin'. Consequently it does not form the subject of confessional material.

Be that as it may there is other evidence that the issue is likely to be less significant, with numerous commentators, both religious and otherwise, suggesting the issue of confessional evidence is not of central importance. This is because fewer and fewer people are utilising the sacrament, as well as choosing to discuss other matters when they do attend. Furthermore the evidentiary significance of confessional material could be marginal, particularly if the process is conducted anonymously. Fr Brennan points out that in the nine years of the Irish inquiry into church sexual abuse the issue of confessional evidence never arose.

In 1987, before the confessional privilege had been enacted, the ALRC's inquiry into evidence law said they could find no indication that an Australian court had ever asked for confessional evidence, let alone been refused it (para 206).

John McNally, a spokesman for victims group Broken Rites, said the [confessional evidence] debate was a distraction. He said a much more serious problem was that many church officials did not act when they heard rumours of abuse, or when victims complained to them directly they had been molested.

The upcoming Royal Commission will deal with much weightier and more significant issues than the confessional seal, nevertheless questions around this practice have taken a certain hold of the collective imagination. It would seem the idea of priestly prisoners of conscience has a certain dramatic appeal, while the debate also conjures up historical memories of epic battles between state and religion: Memories of the horrors of the reformation; or the death of Thomas More at the hands of Henry VIII (following his silence in the face of pressure to assent to certain religious propositions); or even the conflicts over the significance of the sacraments themselves.

It is also because, as a theoretical dilemma, it presents a very real conflict of two fundamental human rights. The rights of the child to be protected from all forms of abuse by every endeavour of the state and all responsible adults, could, on some theoretical level, be in conflict with freedom of religion and conscience. A quintessential moral dilemma, not to be easily dismissed, but also not to be focussed on to the detriment of more substantive issues. So, while not central, the question of evidence before a Royal Commission, the reform of evidence law and the rules around mandatory reporting will still arise.

Two fundamental human rights

Professor Greg Craven writes passionately in defence of the confessional, commenting in the early days of the discussion that no parliament in its right mind would contemplate

tampering with the confessional seal. He argues that, as a universally recognised right, freedom of religion must encompass the confessional, which is central to Roman Catholic religious freedom. Canon law provides for the automatic excommunication of priests who break the confessional seal – a very serious consequence for the individual's freedom of religion. The principle that such profound religious beliefs should not be interfered with is widespread, however legislative recognition and protection of the confessional privilege is not universal.

The confessional theology taught by the Roman Catholic church is central to that church's practice, and an understanding of the sacramental value of the confessional is pivotal in Church teaching. It is accorded the significance of being one of only seven sacraments which are collectively crucial in the life of every Roman Catholic. The significance of a sacrament may not be widely comprehended outside the church, although the role of the confessor as spiritual adviser, guide or counsellor is more immediately comprehended. In Roman Catholic theology however, a counselling role is only incidental to the sacramental act, which exercises a power in and of itself. The sacraments and their practice go to the kernel of these religious beliefs and practice.

It is also significant to these discussions that Catholic theology teaches that absolution is only possible when genuine penitence has been achieved. The confidential nature of the confessional is well understood, but unfortunately it would seem that individual understandings of the appropriate priestly responses to possibly difficult moral situations are not quite so universal. Cardinal Pell's seemingly simplistic suggestion that he would recommend the avoidance of a possible confession of paedophilia sits at odds with Bishop Geoffrey Robinson's alternative approach whereby the confessional may be a means of reaching such a sinner and working to prevent recurrence of the problem. Absolution requires, in the words of the Church, 'a firm purpose of amendment' and 'carefully to avoid the occasions of sin.' As Bishop Robinson and others suggest, these conditions could well necessitate an approach by the penitent to the secular authorities. (There are some models of the journalists' privilege in which a journalist's adherence to the journalists' code of ethics can be significant when determining the availability of the journalists' privilege, although there are also concerns about the that code's enforceability and interpretation. It may be that the complex interaction of pastoral care, theology and canon law makes these matters even more difficult to interpret.)

Section 116 of the Constitution bans the Commonwealth from making laws prohibiting the 'free exercise of religion'. Both Professor Craven and the ALRC's report into evidence, suggest that laws which restrict the free practice of the confessional would violate this provision. It might be difficult to 'fit' a royal commission's letters patent and subsequent actions into the constitutional category of 'law making by the Commonwealth' because there may be no 'law' 'made' in the process . Nevertheless freedom of religion may need to be given a broader significance than Australia's interpretive, constitutional parameters.

On the other side of the ledger will sit the right of the child to have every endeavour taken, and every evidential contribution made, towards the prevention of abuse. Theoretically, respecting the confessional privilege could involve a tribunal being blocked from accessing potentially relevant evidence in a case of child sexual abuse. This is particularly crucial in the case of child sexual assault because confessional evidence may well be the *only* reliable evidence available. A recent high court case illustrated the difficulties of obtaining a

conviction in cases involving children as witnesses. In *Douglass v R* [2012] HCA 34 the trial judge at first instance had found the defendant guilty of aggravated indecent assault on the strength of the child's evidence. However on appeal successive judges, including the majority of the High Court, over-ruled the trial judges' findings, allowing the appeal on the grounds that the child's evidence was necessarily or inherently incapable of producing a verdict beyond reasonable doubt. This may well have been the appropriate outcome in this case, but it highlights the difficulties that arise with children as witnesses.

Conclusion

The Royal Commission, as has been commented, will face an enormous task, and these issues of evidence, however difficult, should not be unduly emphasised. Unfortunately this brief examination has not begun to touch upon the complexities. Unaddressed issues include possible confessional evidence from the victim rather than the perpetrator. If a penitent is prepared to forego confidentiality then an offender may be able to be identified appropriately, however in the absence of the victim's consent how should the confessor treat evidence regarding a perpetrator? The need for trust and confidentiality in such situations may be even more imperative.

There are differences between the recognition given to various religions. The Roman Catholic church, with its clearly defined theology around the confessional seal, may be treated differently to other religions (the Evidence Act refers to a 'religious ceremony'). Is this to give special treatment to the Catholic church – which may be due to different theological beliefs – but is it nevertheless discriminatory? But if the confessional privilege were to be removed would the Roman Catholic church be unfairly discriminated against by not having their more central religious beliefs protected? The privilege does not exist in common law, but this lacuna may itself be a discriminatory result of religious history in England at the time of the common law's development. Furthermore there are non-religious confidences – with possibly more immediate calls for protection (for instance the sexual assault counsellor with notes from a victim's interview, facing jail rather than giving up the notes to the defendant in a criminal case).

One of the central issues, however, is likely to be not of evidence law but of mandatory reporting and how this is governed. Providing for church coverage in mandatory reporting need not require the legislative breach of the confessional seal – as the Report into Protecting Victoria's Vulnerable Children found in 2012 (the Cummins Report). After extensive considerations its recommendation was that reporting duties

...should extend to:

- A minister of religion; [or]
- a person who holds an office within, is employed by, is a member of, or a volunteer of a religious or spiritual organisation that provides services to, or has regular contact with, children and young people.

An exemption for information received during the rite of confession should be made. (Recommendation 47)

In contrast the Irish approach has been to legislate a blanket requirement for mandatory reporting. In the face of some opposition the *Criminal Justice (Withholding of Information on Offences Against Children and Vulnerable Persons) Act 2012* was enacted on 18 July 2012. It would seem there have not been any significant developments under this legislation. It is hard to imagine a successful prosecution since the evidential issues would remain complex, and it should be remembered that a priest has done no wrong other than maintaining confidentiality – they cannot be thought to condone the acts a penitent may confess to, nor need there be any assumption that absolution will be inappropriately given, or that steps would not be taken to address the wrongs through the penitent.

The Government, as it drafts terms of reference for the Royal Commission, may want to consider the rules encompassed in the Evidence Act regarding the confessional privilege. It would seem that the current legal arrangement governing Commissions will leave in the hands of the Commissioners a decision as to whether to require specific answers to requests for such evidence. Leaving such questions in the hands of the Commissioners would be akin to a judicially determined exemption, as has sometimes been recommended with respect to such privileges. Another suggested reform has been to leave the privilege intact but subject it to a statutorily guided discretion, which could incorporate the risk of harm to another person as a consideration in favour of mandating the giving of the information. These questions and outcomes are all directed to a hypothetical instance of specific evidentiary conflict, however the ongoing question of mandatory reporting, with its high level of community concern, is likely to need to be addressed more acutely by the future Commission. Jurisprudential considerations governing the confessional privilege may assist.

ENDS

Original website; FlagPost, 14 Nov 2012, information and research from Australia's Commonwealth Parliamentary Library, where Kirsty Magarey is a researcher:
http://parliamentflagpost.blogspot.com.au/2012/11/priests-penitents-confidentiality-and.html

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