



# SEAL OF CONFESSION

The public interest  
in confidential  
communications



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PM Glynn Institute  
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# Executive summary

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The public interest is engaged in a diverse range of matters in politics and society, usually revolving around basic human goods and the benefits they bring both to individuals and to society.

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Understanding the different public interests involved, including the public interest in protecting different forms of confidential communication and the reasons for this, helps us in this task.



# Seal of Confession

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## PUBLIC INTEREST IN PROTECTING CONFIDENTIAL COMMUNICATIONS

Protecting the confidentiality of communications in some circumstances is a familiar and largely uncontroversial idea, at least at the level of general principle. Different professional associations uphold confidentiality as a principle that their members should observe as part of their duty to the people they serve. In some situations, Australian law respects the confidentiality of professional relationships and grants protection to confidential information communicated within these relationships. To be sure, it is in the interest of the doctor's patient or lawyer's client to protect their confidential communication with the professional. In the end, however, when confidential communications are granted legal privilege or other forms of legal protection, it is because it is in the public interest to protect such communications.

The public interest is engaged in a diverse range of matters in politics and society, usually revolving around basic human goods and the benefits they bring both to individuals and to society. In the case of confidential communications there is a public interest in fostering trusting, confidential relationships which promote goods that are inherently valuable, and which help to ensure the effective functioning of important institutions.<sup>1</sup> It benefits both individuals and society to have professionals bring their skills to bear in situations that would not otherwise be addressed or treated. As a result, the community has an interest in ensuring that people are not discouraged from accessing services like healthcare, legal counsel, or spiritual direction, which often involve disclosing deeply personal matters. It is fundamentally good for individuals and for society at large for people to be able to approach these services with confidence, knowing that they can reveal the full extent of the problems they are facing without fear of exposure, discrimination, or losing their livelihood. In such contexts, treating these communications as confidential is undoubtedly good for the individuals concerned, because it removes what could be a barrier for them to access necessary healthcare, legal advice, or spiritual reconciliation.

Confidential communications are also necessary for important institutions to function. The legal system, for example, could not serve the public interest if it did not allow counsel to prepare the best possible case for their clients. This would result in a loss of confidence

<sup>1</sup> Kirsty Magarey, "Priests, Penitents, Confidentiality and Child Sexual Abuse", Australian Parliamentary Library Flag Post, 24 November 2012 (aph.gov.au).

in the legal system which would in turn represent the loss of a significant societal good. Similarly, the healthcare system would be far less effective if people with criminal histories, complicated relationships, embarrassing ailments, or addictions were not able to disclose the full extent of their condition out of fear of exposure. Here it can be seen that the fundamental principle of being able to trust the providers of services that are needed most is in the public interest for individuals and society. Protection of confidential communications supports this public interest. In both the legal and medical examples, removing confidentiality would remove trust, create a significant impediment to accessing services, and significantly compromise the effective functioning of important institutions.

Highlighting the good that is served in protecting socially desirable confidential communications also suggests something about the harm caused when this confidentiality is breached. Disclosures made in seeking medical, legal, or spiritual advice can not only be embarrassing or awkward but shameful, even when no wrong-doing is involved. Sometimes these disclosures will entail matters of conscience, reflecting something about a person's sense of right and wrong, of what is acceptable and unacceptable. More generally, advice on these sorts of matters often encompasses troubles or failures which cause people discomfort or anxiety, which they wish to address privately or with some degree of discretion. Just as the assurance of confidentiality enables people to seek help in tackling their problems, a breach of this confidentiality leaves them exposed and vulnerable. Individuals have a private interest in being protected from exposure when they are vulnerable, but there is also a public interest in this protection when confidentiality enables matters to be brought into the light, even if to begin with the circle of light is small. This in turn points to the limits of protecting confidentiality. When confidentiality is asserted against the good of individuals and society, the public interest lies in withdrawing protection and bringing matters into the open.

Questions about the limits of the public interest in protecting confidential communications have focussed in recent years on the Catholic practice of confession. Historically, the public interest in protecting confidential communications in confession has arisen from social goods such as fostering religious institutions, keeping the churches and courts out of conflict, and encouraging socially desirable confidential communications, which, in the case of confession, centre on its role in helping people to amend their behaviour and change their lives, for the good of themselves and others. Since its origins the Catholic Church itself has regarded communications between a priest and penitent as confidential. This is captured in the idea of the seal of confession. The seal of confession might also be understood, however, as a way of protecting a confidential communication, like the legal protections that exist for lawyer-client communications or like the national and international ethical guidelines that exist for medical practitioners and their patients.

The seal of confession has raised challenges for public policymakers in Australia in light of the recommendations of the Royal Commission into Institutional Responses to Child



Sexual Abuse. Among their recommendations, the Royal Commissioners called for the introduction of laws compelling people to report information relating to child sexual abuse, and that there be no exemption to mandatory reporting laws. This included circumstances in which information about child sexual abuse was disclosed in a religious confession. The Royal Commission's findings and recommendations underscore the importance and strength of the public interest in the protection of children. For this reason, it is necessary that any discussion of the seal of confession addresses how disclosures of child sexual abuse in confession could result in effective action against such abuse.

Mandatory reporting legislation has been enacted in most jurisdictions to address the public interest in rectifying the horrendous harms that have been committed against children in our country. In this context the seal of confession seems to be at odds with the public interest in protecting children. Considering this question requires further reflection on the public interest in maintaining the confidentiality of the seal of confession. Although it predates the Royal Commission, a report published in 2010 by the Australian Law Reform Commission highlights several reasons why protecting confidential communications is in the public interest for Australian society. It provides a useful framework for thinking about how a relationship that involves confidential communications can be beneficial, not just for the individuals involved, but for the broader society.

As a case study in confidential communications, the seal that attaches to the Catholic sacrament of confession can be seen to uphold the public interest in maintaining the confidentiality of a relationship that provides spiritual advice and healing, and which encourages people to make amends for their wrong-doing and change their behaviour. This is because, on a proper understanding of what goes on between the priest and the penitent during confession, the relationship mirrors those other professional relationships in which Australian public policy recognises a confidential communication which it is in the public interest to protect.

Thinking about the seal of confession in this way will not in and of itself resolve all tensions between Catholic practice and Australian law. It does, however, open possibilities for reconsidering how the balance between different public interests might be drawn.

## WHAT ARE CONFIDENTIAL COMMUNICATIONS?

Many professional communications attract obligations of confidentiality. These communications may not necessarily be protected by the law even though there is a public interest in maintaining their confidentiality.

In its provisions for communications involving legal professionals, the uniform *Evidence Act 1995*<sup>2</sup> defines “confidential communications” as those in which one of the parties is under an obligation not to disclose the communication’s contents.<sup>3</sup> Where Australian law recognises certain kinds of communications as legally privileged, these communications may be inadmissible as evidence in legal proceedings. Legal privilege covers a number of rules excluding evidence that would be adverse to a fundamental principle or relationship if it were disclosed.

Division 1A of the New South Wales version of the *Evidence Act* (which is not found in the Commonwealth version of the Act) protects confidential communications by preventing the admission of relevant evidence, on the basis that there is a public interest in preserving the confidentiality of the information disclosed in trusting relationships. Given the delicate nature of what needs to be disclosed to lawyers, doctors, and psychotherapists, for example, there is a public interest in maintaining client and patient confidences. As a result, in New South Wales a judge can determine that the confidentiality of certain communications needs to be maintained by refusing to admit some evidence that was raised by another party to the legal proceedings. In these cases, the judge determines whether the claim for legal privilege has been established, and whether more significant harm would be caused were the privilege to be waived. In some cases, clients can also waive the privilege when it belongs to them.

Professions, especially those in legal and medical spheres, have always recognised the value in maintaining confidential communications within professional relationships. These professions understand that the public benefits when they keep the confidences of those they assist. Under normal circumstances, these professional relationships already have professional standards of confidentiality, such as the Royal Australian College of General Practitioners’ criteria for confidentiality and privacy of health information, which require that the professional does not reveal to a third party what has been disclosed within a professional context.<sup>4</sup>

Australian law has been reluctant, however, to protect professional communications generally. Historically, the common law recognised a legal professional privilege, which protects the communications between lawyers and their clients, if these involve legal advice or preparations for legal proceedings. In other relationships that require confidential communications, the common law was content to compel people to give evidence that includes highly confidential information, and which compromises their professional obligations to their clients or patients.

<sup>2</sup> The uniform *Evidence Act 1995* was an attempt to codify the common law of evidence throughout Australia, so that the same rules of evidence would be applied in legal proceedings across all Australian jurisdictions. It was initially enacted by the New South Wales Parliament for its courts and by the Commonwealth Parliament for courts exercising federal jurisdiction. It was subsequently adopted in Victoria, Tasmania, the Northern Territory, and the Australian Capital Territory. There are some variations between each jurisdiction’s version of the Act. References to ‘the uniform *Evidence Act 1995*’ in this paper indicate provisions that are uniform. If a provision that is being discussed is unique one jurisdiction, it is referred to as such, e.g. ‘the New South Wales version of the *Evidence Act 1995*’.

<sup>3</sup> Uniform *Evidence Act 1995*, section 117(1).

<sup>4</sup> Royal Australian College of General Practitioners, *Standards for general practices*, 4th edn, Criterion 4.2.1: Confidentiality and privacy of health information (convocation.racgp.org.au).

# RECOMMENDATIONS OF AUSTRALIAN LAW REFORM COMMISSION

The approach taken by the Australian Law Reform Commission demonstrates that there is a growing understanding in Australia of the public interest in confidential communications. In 2004, the ALRC was commissioned to review the operation of the uniform *Evidence Act 1995*. In the report that followed, the Commission issued a series of recommendations to improve efficiency and effectiveness in the application of evidence law in Australia. It is important to note that these recommendations were released prior to the Royal Commission into Institutional Responses to Child Sexual Abuse. Nevertheless, we can see in the ALRC recommendations a helpful framework for discussing how maintaining confidentiality can be in the public interest of Australians.

One of the ALRC's conclusions was that "the uniform Evidence Acts should be amended to provide for a professional confidential relationship privilege."<sup>5</sup> The Commission argued that it would be in the public interest to extend legal privileges to communications in professional relationships that require confidentiality. The ALRC qualified this by advising that the court should be required to weigh up the harm that would likely come as a result of the disclosure of confidential communications in evidence, while concluding that there are situations where it is within the interests of justice to maintain confidentiality. It recommended that the admission of evidence and the disclosure of confidential communications should be at the discretion of the judge, who would have the opportunity to weigh the potential harm against the desirability of the evidence.

The ALRC refers to existing provisions in the New South Wales *Evidence Act 1995* as an example of the kind of protection of confidential communications that federal law should acknowledge is in the public interest. The New South Wales Act states:

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.<sup>6</sup>

The rationale behind this thinking was summarised in 1997 by the Attorney-General, Jeff Shaw QC, who told the New South Wales Parliament:

<sup>5</sup> Australian Law Reform Commission, *Uniform Evidence Law* (ALRC Report 102, 2006), paragraph 15.1.

<sup>6</sup> *Evidence Act 1995* (NSW), section 126B. Section 126A (1) defines "a protected confidence" as a communication made by a person in confidence to another person acting in a professional capacity who was under an obligation not to disclose its contents, arising either as a matter of law or from the nature of the relationship.

evidence must be excluded if there is a likelihood that harm would or might be caused, whether directly or indirectly, to the person who imparted the confidence and the nature and extent of that harm outweighs the desirability of having the evidence given or the documents produced.<sup>7</sup>

In this speech, Mr Shaw highlighted the essential good that exists in keeping communications within certain professional relationships confidential. While the ALRC's recommendations on confidential communications were not implemented, its report highlights the benefits that arise from protecting confidential communications within a range of professions, and why broader protection of confidentiality is beneficial to the public interest.

## Examples of confidential communications

The framework provided by the ALRC's discussion of confidential communications would apply to several professional relationships in which there may be a public interest in maintaining the confidentiality of disclosed information. In all of these examples, there is a recognition that significant harm could result from requiring disclosure. By compelling this information, there is an evident tension in the professional duties and the legal requirements of these professionals.

The most well-established form of confidential communication in Australian law is the lawyer-client privilege. Under the uniform *Evidence Act 1995*, evidence may not be adduced in legal proceedings if doing so would disclose confidential communications made either for the dominant purpose of a lawyer providing legal advice to a client or for the dominant purpose of a client being provided with professional legal services relating to litigation. The proper functioning of the courts depends upon lawyers being able to prepare the strongest possible case for their clients. This is only possible if a lawyer has access to all relevant information. If there is reluctance on the part of the client to disclose information, then it diminishes the effective functioning of the legal process and the rights of people before the courts.

Other examples of confidential communications that attract a public interest without legal protection include the doctor-patient relationship. If doctors are going to be able to work in their patients' best interests, then they must have access to all relevant information. Any hindrance to the flow of this information or hesitation on the part of the patient, especially from fear that embarrassing information will be shared with a third party, compromises the ability of the doctor to provide effective treatment.

<sup>7</sup> New South Wales, *Parliamentary Debates*—Legislative Council, 22 October 1997, p. 1120; see also S. Odgers, *Uniform Evidence Law*, 6th edn (2004), [1.3.11940]. Mr Shaw's remarks highlight the question of the harm that might be caused by disclosure of confidential communications. Section 126A(1) of the *Evidence Act* defines the harm from the disclosure of confidential communications to include "actual physical bodily harm, financial loss, stress or shock, damage to reputation or emotional or psychological harm (such as shame, humiliation and fear)" (emphasis added).

The uniform *Evidence Act* also makes provision for journalists who have promised informants that their identity will be kept secret. In these circumstances, and subject to certain qualifications, journalists cannot be compelled to disclose the informant's identity.<sup>8</sup> This provision provides protection, for example, for a person's exposing governmental misconduct. What is protected here is not the confidentiality of communications, which will be drawn on for the journalist's published work, but the confidentiality of the informant's identity. People disclosing information to journalists that is in the public interest may face significant detriment, including criminal prosecution and loss of livelihood, if they are identified. The public interest in the disclosure of governmental and other institutional misconduct which would otherwise remain unknown warrants the protection of confidentiality for journalists and their informants.

Another example of a kind of protection of communications in trusting relationships that has a tradition in Australian law is the right under statute for select family members to request not to give evidence against a defendant in criminal proceedings.<sup>9</sup> In this case, the uniform *Evidence Act* allows the court discretion to permit family members, specifically spouses, parents, or children, to refrain from being compelled to provide evidence that would harm their relationship with the accused. The tradition of respecting communications between spouses during their marriage, for example, highlights the public interest in maintaining high degrees of trust in marital relationships. It also acknowledges the harm that can be caused, including the destruction of relationships, by compelling someone to give evidence against their spouse, parent, or child.

These examples highlight a widely accepted public interest in maintaining the confidentiality of certain relationships. Protecting confidentiality in these professional or personal relationships protects the benefits of social and personal goods such as legal advice, medical care, and familial trust. These social and personal goods would be compromised if there was uncertainty about whether information entrusted to others in seeking assistance would be disclosed. More specifically, the protection of some confidential communications acknowledges that there are circumstances in which compelling people to break their obligation of confidentiality can cause more harm than good.

The conditions for a public interest in protecting confidentiality are also discernible in the Catholic Church's practice of confession. Confession requires a confidential relationship between a priest and a penitent that depends on the penitent's security in disclosing sensitive information. This relationship, like the other examples discussed above, exists for the benefit of the person about whom information might be disclosed. As a result, the Catholic Church requires its priests to keep all information disclosed in confession strictly confidential. When regarded as a professional obligation to maintain confidences, the Catholic Church's seal of confession is not an anomaly in Australian society. Rather, the seal of confession is an example

<sup>8</sup> Uniform *Evidence Act* 1995, section 126K.

<sup>9</sup> Uniform *Evidence Act* 1995, section 18.

of another relationship that achieves individual and social goods through maintaining the confidences of those in the relationship. As we shall see, far from being a remnant of a previous age, the Catholic practice of confession shares similar requirements of confidentiality to those of other contemporary professional relationships.

## CATHOLIC PRACTICE OF CONFESSION

### What is confession?

Confession, also known as the ‘sacrament of penance’<sup>10</sup> or the ‘sacrament of reconciliation’, involves a one-to-one and in-person conversation between a Catholic priest and a penitent. The sacrament derives from Christian scripture and church tradition and is understood by Catholics to have been instituted by Jesus Christ, who gave his disciples the power to forgive sins in his name.<sup>11</sup> Confession is one of the seven sacraments of the Catholic Church that, along with other sacraments such as baptism, communion, and anointing of the sick, are indispensable parts of Catholic spiritual life.<sup>12</sup> Together, the sacraments allow Catholics to receive the healing and transformative power of Jesus Christ. They are interrelated, and if Catholics have committed serious sins, for example, they are prohibited from receiving communion until they have been to confession and received absolution. Regular recourse to the sacraments of confession and communion is seen as an essential for growing in faith and practical goodness, benefiting the individuals concerned and the community in which they live.

Catholics believe that in confession, through the ministry of the priest, they confess their sins directly to God. Confession exists to enable a direct and intimate encounter between the individual conscience and God. Having confessed with contrition and an intention to change, Catholics are confident that God forgives them and reconciles them with the church. In today’s Australia, the sacrament takes the form of a short conversation in which a penitent discloses their sins to the priest. The priest in turn hears this disclosure, usually provides some spiritual guidance or practical advice, and pronounces through the ritual words of absolution God’s forgiveness of their sins.

Sin is moral failure. Included among less serious sins are the misdemeanours and failings that can mark daily human life and relationships. Much more serious are those sins, especially acts

<sup>10</sup> *Code of Canon Law* (1983), Title IV, Book IV, canon 959.

<sup>11</sup> See for example Matthew 9:1–8 and Mark 2:5–12, which show Jesus Christ’s power to forgive sins. Catholics believe that Jesus conferred this priestly power to forgive sins on the apostles and their successors. See for example Matthew 18:18 and 2 Corinthians 5:18–20.

<sup>12</sup> These sacraments are interrelated because Catholics believe that in each “Christ himself is at work: it is he who baptises, he who acts in his sacraments in order to communicate the grace that each sacrament signifies”: *Catechism of the Catholic Church*, 2nd edn (1997), §1127.

of grave evil, that rupture our relationship with God and with each other. Such rupture creates a state of enmity with God, which is understood by Catholics to make human beings incapable of joining God in eternal life. A fundamental belief of Catholics is that Jesus Christ, through his life, death, and resurrection, has made it possible for people to be reconciled with God, no matter what their sin. As a result, Catholics acknowledge their need for God's forgiveness of their wrongdoings through the confessing of their faults and receiving sacramental forgiveness of their sins. Catholics believe that Jesus instituted the sacrament of confession with his disciples as the principal means of reconciling people with God and allowing them access to God's forgiveness and grace.

## **What happens in confession?**

Catholics are free to confess to any priest at any place at any time that they can arrange. However, the conventional practice of confession occurs during allocated times in a parish church, for example from 5–6 pm on a Saturday. During these times, the priest sits in a small room called a confessional and hears many confessions. Although there is no time pressure, individual confessions tend to last no longer than five minutes. Priests are trained to assist penitents who feel unsure of how to proceed.

When entering the confessional, the penitent can usually choose between sitting face-to-face in a chair across the room from the priest, or sitting or kneeling anonymously behind a fixed screen or grille. This preserves anonymity, if desired, and means that the priest often does not know the identity (or even the physical features) of the person confessing to him. The priest will never ask the name of a penitent.

The priest and penitent ordinarily begin with the Sign of the Cross, after which the priest encourages the penitent to a sincere confession. The penitent proceeds to recall all the sins that they can remember since their last confession. This tends to involve recounting in simple terms actions or patterns of behaviour that the penitent acknowledges as sinful. While the penitent is free to say as much as they want, specific details and exact recollections are not necessary in a confession and only the essentials of the wrongs committed are required for a genuine confession. The confession of particular sins can be as concise as a list of the commandments against which the penitent has sinned. Priests also do not probe for information about other persons whom the penitent may mention in passing, and will ask the penitent only to recount the essence of what they have personally done wrong. The details are known to God and are between God and the penitent. The sacrament requires that the penitent confess with genuine remorse and a firm resolution to change. This is never easy and requires that penitents 'swallow their pride' and own up to what they have done wrong.

Once penitents have finished confessing, they conclude with words to the effect of "I am sorry for these and all my sins." The priest then usually responds with some spiritual

guidance and practical advice related to what the penitent has confessed and proposes an act of private penance. An act of penance works with the penitent's desire for amendment of behaviour and generally involves a couple of short prayers or a good work to be done after the confession. The requirement for the penitent to genuinely want to change their behaviour highlights the sense in which the sacrament of confession is not just a series of magic words that make everything all right, but a process of healing and reconciliation that prompts genuine change and self-reformation in the character of the believer.

The penitent is then invited to make an act of contrition which takes the form of a short prayer expressing sorrow for their sins and the desire for God's forgiveness. Many Catholics have an act of contrition memorised. However, most confessionals will have a small prayer printed out for the penitent to use which can be as simple as words to the effect of: "My God, I am sorry that I have sinned, because you are so good, and with your help I will not sin again." The priest, in administering the sacrament, then says the prescribed prayer for absolving the penitent of their sins. In the sacramental action of absolution, God forgives the penitent of their sins—through the ministry of the priest. The confession concludes as the penitent says "Amen" and makes the Sign of the Cross. The priest then declares, "The Lord has freed you from your sins. Go in peace." The penitent leaves the confessional.

The significance of this sacrament for Catholics is that it allows a direct encounter between a penitent and God. The priest is only a conduit for the sacrament, enabling the penitent to converse directly with God and to be forgiven not through the priest's own power but "In the name of the Father, the Son and the Holy Spirit." The sacrament also enables penitents to receive grace from God to help them in their efforts to live a better life. The Catholic practice of confession is a very intimate and private conversation that makes present in words and actions the loving mercy of God. Catholics should go to confession whenever they are conscious of having committed grave sin, and they may go to confession as often as they feel the need.<sup>13</sup> Catholics over the age of discretion are required to confess grave sins at least once a year.<sup>14</sup>

<sup>13</sup> *Code of Canon Law*, canon 988 §1: "A member of the Christian faithful is obliged to confess in kind and number all grave sins committed after baptism and not yet remitted directly through the keys of the Church nor acknowledged in individual confession, of which the person has knowledge after diligent examination of conscience."

<sup>14</sup> *Code of Canon Law*, canon 989: "After having reached the age of discretion, each member of the faithful is obliged to confess faithfully his or her grave sins at least once a year."



# THE SEAL OF CONFESSION

In the words of the Catechism of the Catholic Church, it is because of the “delicacy and greatness of this ministry” that confessions are kept secret under the seal of confession, also referred to as the ‘sacramental seal’.<sup>15</sup> The intention behind providing for the penitent’s total anonymity (if so chosen) is to allow the penitent to be open and honest before God so that nothing deters the penitent from receiving the mercy that reconciles them with God. Given the significance that confession has for Catholics and the sensitive nature of what is disclosed in a confession, the church believes that revealing what was said during the sacrament is a grave wrong. The church teaches that the seal of confession carries a mandate that comes from God which cannot be amended, even by the Pope. This has been formally recognised in the Catholic Church since the Fourth Lateran Council in 1215, and was universally understood in the centuries prior.

Priests are bound by canon law—the body of laws that govern the Catholic Church—not to disclose or act upon the information that they hear in the sacrament, without exception. Canon 983 § 1 states that the seal of confession is “inviolable” and that it is “absolutely wrong for a confessor in any way to betray the penitent, for any reason whatsoever, whether by word or in any other fashion.” This mandate is upheld even under threat of punishment and death. As a result, there have been numerous historical examples of priests who were killed after refusing to reveal the contents of a penitent’s confession.<sup>16</sup>

In practice, the seal of confession covers the sins confessed during the sacrament and the identity of the penitent. Even when the penitent discusses matters in a confession that are not strictly their sins, such as the temptations they experience or the sins of others, the priest is obliged not to reveal or act upon any of what he has heard.<sup>17</sup> This applies not only to forbidding disclosure of what was said in confession to others, but also to prohibiting superiors from using knowledge of someone’s sins received in confession in acts of governance or administration.<sup>18</sup>

<sup>15</sup> *Catechism of the Catholic Church*, §1467: “Given the delicacy and greatness of this ministry and the respect due to persons, the Church declares that every priest who hears confessions is bound under very severe penalties to keep absolute secrecy regarding the sins that his penitents have confessed to him. He can make no use of knowledge that confession gives him about penitents’ lives. This secret, which admits of no exceptions, is called the ‘sacramental seal,’ because what the penitent has made known to the priest remains ‘sealed’ by the sacrament.” See also, *Code of Canon Law*, canon 983 §1.

<sup>16</sup> Some examples are provided in Anthony Fisher OP, “Safeguarding the Seal of Confession”, *The Australasian Catholic Record*, Vol. 5(2), April 2018, pp. 139-40. For a valuable introduction to the canon law relating to this issue, see Manuel Jesus Arroba Conde and Michele Riondino, *Introduction to Canon Law* (Mondadori Education, 2019), pp. 114–15.

<sup>17</sup> Fisher, above, p. 134: “In addition to reporting matters that both the penitent and the confessor regarded as sins, penitents have sometimes spoken of other matters . . . These ‘other matters’ may or may not bear upon the sinfulness of the penitent’s acts or appropriate remedies and spiritual counsel, but experienced confessors recognise that much is said in confession that is not precisely or only confession of sin. In the confidentiality of the sacrament of reconciliation, all manner of things may ‘tumble out’, as the penitent manifests his or her conscience to God.”

<sup>18</sup> *Code of Canon Law*, canon 984.

If a penitent needs the assistance of an interpreter to make their confession, the interpreter is likewise bound to secrecy, as is anyone who “in any way” has “knowledge of sins from confession” (for example, by inadvertently overhearing someone’s confession).<sup>19</sup> It is important to note that the seal of confession is not the same as a ‘seal of the confessional’, and has nothing to do with the physical place where the confession is heard, but rather relates to the disclosing of a penitent’s sins for the purpose of receiving absolution from the priest.

The penalty stipulated for breaking the seal of confession is *latae sententiae*—immediate and automatic— excommunication.<sup>20</sup> Excommunication is the most severe penalty that the Catholic Church can administer, and it prohibits a person from celebrating or receiving any sacrament or exercising any church ministry.<sup>21</sup> A priest cannot break the seal to save his own life or to aid in any other public good. Given that only a few other acts receive such a severe penalty under canon law, it is evident how serious the church is about any barrier to accessing the sacrament. This is because, as discussed earlier, Catholics understand reconciliation with God as something fundamental to living a Christian life and as essential for life with God in eternity. The rationale behind the seal of confession is that, because it requires so much vulnerability on the part of the penitent, it ought to be protected with absolute confidentiality on the part of the priest. As a result, for the Catholic Church, the sacramental seal is not just a tradition or discipline passed down through time but a moral necessity.<sup>22</sup>

The assurance of the seal of confession encourages Catholics to seek the healing and forgiveness that the sacrament provides, to take responsibility for their sins and wrong doing, and to draw on the help it offers for reform of life and becoming a better person. Compromising the seal of confession raises the prospect of significant harm to priests who are bound to uphold it, to penitents who depend on it for their salvation in this life and the next, and to religious communities which should normally be free to administer their rituals and organize their affairs in accordance with their most important beliefs.

<sup>19</sup> *Code of Canon Law*, canon 983 §2.

<sup>20</sup> *Code of Canon Law*, canon 1388 §1. “A confessor who directly violates the sacramental seal incurs a *latae sententiae* excommunication reserved to the Apostolic See.” This delict is also considered among the matters reserved to the Congregation for the Doctrine of the Faith according to Article 4 §1, No. 5 of the *motu proprio Sacramentorum sanctitatis tutela* issued on 21 May 2010. This decree concerns the graver delicts (or violations) against the sanctity of the sacrament of penance. See also John A. Renken, *The Penal Law of the Roman Catholic Church* (St Paul University Publisher, 2015), pp. 312–314.

<sup>21</sup> *Code of Canon Law*, canon 1331 §1.

<sup>22</sup> In 2019 Pope Francis restated church teaching on the seal of confession: “Reconciliation itself is a benefit that the wisdom of the Church has always safeguarded with all her moral and legal might, with the sacramental seal. Although it is not always understood by the modern mentality, it is indispensable for the sanctity of the sacrament and for the freedom of conscience of the penitent, who must be certain, at any time, that the sacramental conversation will remain within the secrecy of the confessional, between one’s conscience that opens to grace, and God, with the necessary mediation of the priest. The sacramental seal is indispensable, and no human power has jurisdiction over it, nor can lay any claim to it.” See “Address to participants at the course organized by the Apostolic Penitentiary”, 29 March 2019 (vatican.va).

## Seal of confession and sexual abuse of children

The sacrament of confession came under close public examination following the investigations of the Royal Commission into Institutional Responses to Child Sexual Abuse. In 2017 the Commission concluded five years of investigations into the failure of Australian institutions, including the Catholic Church, to address child sexual abuse and to protect children. Several of the recommendations that followed the conclusion of the investigation concerned some of the factors that contributed to the Catholic Church's failure to take effective action in cases of child sexual abuse. The Commission's recommendation to extend mandatory reporting of child sexual abuse to information disclosed to ministers of religion in confession underscored the imperative that the whole community accords to protecting children. It also raised the prospect of a public interest in breaching the seal of confession in some circumstances.<sup>23</sup>

Among the scenarios in which a priest might obtain information about child sexual abuse that is subject to the seal of confession, there are two which help to illustrate some important issues. Although rare, in either of these scenarios, there are options available to the priest hearing the confession to intervene to stop the abuse without breaking the sacramental seal. It should also be noted here that the sacrament of confession is often conducted in a way that inhibits the priest's ability to know the identity of the person who is confessing to him.

The first scenario involves an abuser confessing their abuse. In this circumstance, the priest hearing the confession will, when offering spiritual guidance, urge the abuser to turn himself in to the authorities. It should also be noted that, given that the point of confession is for the penitent to address the burdens of their conscience to God, not for priests to mine for information, penitents may choose to confess in only the most generic terms. This means that in the event that someone confesses that they 'have sinned against the sixth commandment,' the priest hearing the confession may have no reasonable basis for inferring that the sin involved abuse, as opposed to consensual adultery, and so may not feel able to probe further.

The second scenario involves a survivor of sexual abuse disclosing their own abuse by a perpetrator. In this scenario, the priest would first emphasise to the penitent that, as a survivor of abuse, they have committed no wrong. The priest would then gently invite the survivor to speak about the abuse outside of the sacrament, either to him or to someone else. If this information were then disclosed to the priest outside of confession, the priest would have no hesitation in complying with mandatory reporting responsibilities and reporting this information to the relevant authorities. In this situation, the priest affirms to the survivor the importance of the survivor disclosing this information to a trusted reporter and encourages and helps them to do this. The safety of the sacrament can here serve as a place for survivors to disclose their experiences without fear of repercussions, and to seek healing and support.

<sup>23</sup> For a canonist's response to the Royal Commission, see Rik Torfs, "Canon Law and the Recommendations of the Royal Commission" in S. Crittenden (ed.), *Health and Integrity in Church and Ministry: An ecumenical conversation on the task of rebuilding and renewal after the Royal Commission into Institutional Responses to Child Sexual Abuse* (Franciscan Friars Australia, 2018), pp. 15–39.

# CONFESSION AS A CASE STUDY IN CONFIDENTIAL COMMUNICATIONS

The ALRC definition of confidential communications provides a useful framework for identifying relationships in which maintaining confidentiality is in the public interest. Just like the other relationships in which the ALRC identified the necessity of confidence to prevent harm, the seal of confession likewise prevents potential harm caused to penitents. Legislators have to consider the importance of protecting confidential communications in confession to prevent this harm, in light of the strong public interest in protecting children from the harm of sexual abuse.

It is important to note that a crucial difference between the seal of confession and other kinds of confidential communications is that the seal of confession does not admit any limitations or exceptions. By contrast, the confidentiality permitted between, say, a lawyer and a client, does not create an obligation of confidence over information that could help prevent certain death or bodily harm. Nevertheless, the ALRC report highlights a primary reason why the priest-penitent relationship fits with the other professional relationships that attract a public interest in protecting confidentiality. In confession, the strict maintenance of the penitent's confidence is essential for the spiritual healing and the reform of attitudes and behaviours that confession encourages.

Historically, the law in various Australian jurisdictions has accommodated the seal of confession because it was thought unjust to require a clergyman to break his religious vows. The emancipation of Catholics in England in the nineteenth century precipitated legal reforms relating to the treatment of Catholics in Australia. This included legal protection specifically directed towards Catholic priests, so that they could not be compelled to disclose what was revealed in the sacrament of confession in Australian courts of law; protection that continues in statutes today.<sup>24</sup> Behind the law's willingness to respect this in some Australian jurisdictions was a recognition of the importance of the sacred vow that Catholic priests took to uphold the seal of confession, and of the injustice that compelling a breach of it would entail to both priest and penitent.

It is important to note that according to current Australian law, in priest-penitent communications the legal privilege belongs to the priest (the confidant) and not to the confiding penitent.<sup>25</sup> Penitents can speak about what was said in their confession if they so choose, but this does not release the confessor from his obligation to protect the seal. The legal privilege is attached to the priest's obligation not to reveal what was disclosed in a confession, and this cannot be waived by the penitent.

<sup>24</sup> For example, section 127 of the uniform *Evidence Act 1995* provides "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."

<sup>25</sup> See for example note 24 above.

Following the Royal Commission, law reform in various jurisdictions has introduced requirements for mandatory reporting of information concerning child sexual abuse. These mandatory reporting laws, which require prompt disclosure of any information about child sexual abuse, override any protection other laws may provide against compelling a priest to disclose information confided to him in confession. These reforms have overtaken earlier proposals to introduce some level of legal protection for confidential communications more generally. In its report, the ALRC advised against a unique legal privilege for the priest-penitent relationship, as currently exists in Australian law. Instead, the report proposed that religious confessions should fall under the protection extended to a broader range of confidential relationships.<sup>26</sup>

As discussed previously, the public interest in protecting confidential communications in the examples highlighted by the ALRC arises from the good that these relationships achieve both for individuals and for society. The similarities that can be identified between these more widely recognised forms of confidential communications and the Catholic sacrament of confession direct attention to the public interest in the positive contribution that the priest-penitent relationship makes to society.

Just as in the relationship of patients to their doctor or psychotherapist, the relationship within the sacrament of confession only functions effectively in a context of confidentiality. Just as patients need to be free from the fear of potential embarrassment if they are to disclose all of the information necessary for their treatment, so too those who seek reconciliation with God and their neighbour, and help to overcome their moral weaknesses and failures, need to be free from any fear of exposure. Depriving penitents of this confidence creates a significant impediment to seeking the spiritual healing and practical help they need.

## **The seal of confession and the prevention of harm**

The ALRC report's recommendation to extend protection for certain confidential communications reflects the public interest in preventing the harm that can be caused by disclosure of personal and private information. The primary reason that the seal of confession ought to be recognised as another form of confidential communication warranting protection is the public interest in preventing the harm that could be caused by breaking the seal; to the confider, to the confidant, and to the integrity of a relationship of trust which fosters important individual and social goods.

It is in the public interest to maintain a relationship that is a source of spiritual healing for many people in Australia. The public interest in protecting confidential communications

<sup>26</sup> Australian Law Reform Commission, *Uniform Evidence Law* (ALRC Report 102), paragraph 15.86.

in the confessional need not conflict with the public interest in protecting children. The opportunity that the seal of confession provides for safe disclosure can help survivors of abuse to come forward to speak about what has happened to them. The seal of confession also provides an opportunity to confront perpetrators, in those rare cases when they admit their crimes, and to encourage them to accept responsibility and submit to the law.

The priest-penitent relationship involved in the Catholic practice of confession, and its aim of connecting the penitent with God, is fundamentally undermined without the preservation of the penitent's confidence. Although the validity of the sacrament and the ministry of the priest to absolve sins would still stand, compelling disclosure of the contents of a confession risks destroying the trust that Catholics have in the sacrament. Requiring mandatory reporting by priests outside the confessional is accepted and welcomed. Requiring priests to be informants in the administration of a sacrament, even in the service of the imperative to protect children, would put up a barrier between Catholics and their access to the love and mercy of God, and to the healing and real change it can bring to a person's life.

What is at stake for Catholics is the prevention of the full practice of their faith. Not only would priests be forced by these laws to violate their consciences, but faithful Catholics would inevitably become wary of confessing any serious sin to their priest, despite their obligation under canon law to confess such sins each year. Once the seal is broken in one place, determining what ought to remain confidential and what ought to be disclosed depends on the interpretation of individual priests. Instead of being a place where Catholics go to confront and begin to amend the moral failures in their own lives, this service that confession provides to the common good would be jeopardised.

One group that will undoubtedly be placed at risk of harm by a requirement to report information disclosed in sacramental confession in certain circumstances is the thousands of dedicated priests who would be forced to choose between obedience to the law of the land, and obedience to the law of God. As journalist Waleed Aly argued in 2012, removing the seal of confession "leaves us searching for a very strange creature indeed: someone devoted enough to enter the priesthood, but not devoted enough to care about eternal damnation."<sup>27</sup> The result of forced disclosure will be to put faithful priests at risk of criminal charges for fulfilling their obligations to God and the church.

In addition to the harm that will be caused to priests, penitents, and a religious community, the Jesuit lawyer Frank Brennan argues that the seal of confession is a rare opportunity that remains for even the very worst of humanity, such as the child sex abusers, to bring their crimes into the light. Breaching the seal of confession "may take away the one possibility that a sex offender will repent and turn himself in."<sup>28</sup> Even though this remains unlikely,

<sup>27</sup> Waleed Aly, "Choir of Dissent Off-Key on the Sanctity of Confession", *Sydney Morning Herald*, 16 November 2012.

given the nature of sexual predators, without the sacramental seal it becomes impossible that someone guilty of such terrible evil might even entertain discussing their crimes with another person. It is certain that no abuser would admit their guilt in a confession that would be subject to mandatory reporting. There are other more effective means of ensuring child protection that would not force priests to violate their consciences and compromise the spiritual practice and religious life of Catholics.

## RETHINKING A DELICATE BALANCE

The sacrament of confession maintains such extraordinary levels of confidentiality because it attempts to find human beings in their darkest moments and call them to freedom and peace through a personal encounter with God's mercy. On a purely secular level, the sacrament of confession provides spiritual guidance and healing for thousands of Australians and galvanises them to be better people. At a more fundamental level, it recognises the human need to start working through one's faults and remorse with a trusted counsellor, in the reassurance that what is said will remain confidential.

Those in the Catholic Church who failed to take effective action in cases of child sexual abuse must be held accountable, and maintaining the seal of confession is not a claim for general immunity to mandatory reporting for Catholic priests and other church workers. Like other Australians, priests are not above the law, and Catholic communities across the country are deeply committed to protecting children and exposing sexual abuse. What a proper understanding of the public interest in confidential communications reveals, however, is that the priest-penitent relationship within the sacrament of confession meets the criteria of a relationship that ought to have legal protection necessary to maintain confidences, because of the goods it entails for individuals and society.

It is timely that we should revisit how we think about the Catholic sacrament of confession. We should do so in light of the acknowledged public interest in maintaining confidential communications and the strong public interest in protecting children. It is a delicate balance, adopting measures that protect vulnerable people effectively, and, at the same time, maintaining the confidentiality of the seal of confession. Getting this balance right is difficult and important, and understanding the different public interests involved, including the public interest in protecting different forms of confidential communication and the reasons for this, helps us in this task.

<sup>28</sup> Frank Brennan, "Why I will break the law rather than the seal of confession", *Sydney Morning Herald*, 15 August 2017. Father Brennan has since written in more detail about how he would respond to the laws now in effect in Australia and the disclosure of child sexual abuse in confession in three different scenarios. See Frank Brennan, "The Seal of Confession", extract from a homily for Sunday 6 September 2020 (cathnews.co.nz).

## ***Seal of Confession: the public interest in confidential communications***

This essay unpacks the significance of confession for Catholics and the individual and social goods it serves.

It takes the reader on an intellectual journey about the nature of confidential communications and the public interest in protecting them, before proposing that we rethink the seal of confession as another example of confidential communications and a public interest.

*Seal of Confession* is intended to contribute to deeper thinking and renewed conversations about this central part of the Catholic faith, and its intersection with important issues confronting Australian society, in a way that contributes to a positive and respectful public debate.

This is the second occasional paper to be published by the PM Glynn Institute, Australian Catholic University's public policy think-tank. It has been prepared by Damien Freeman and Joseph Doyle, under the guidance of an advisory committee comprising:

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Robert Moore, *Solitary Islands* 2016 (detail).

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