



Appendix 3

THE DOCTRINE COMMISSION OF THE ANGLICAN CHURCH OF AUSTRALIA A REPORT TO STANDING COMMITTEE ON CONFIDENTIALITY AND CONFESSIONS – JAN 2014

In June 2013, the Doctrine Commission was asked by the General Secretary to provide comment on a proposed motion for General Synod on the confidentiality of communications made to clergy. This motion had been drafted by the Professional Standards Commission (PSC) to provide guidance for the Church on the confidentiality (or otherwise) of confessions. Although the present Royal Commission into Institutional Child Abuse is part of the current context for this enquiry, our Church has wrestled with this issue for more than a decade. In 2001, the General Synod received a report from the Clergy Discipline Working Group and passed GS Resolution 24/01 in response. This resolution asked the House of Bishops to provide pastoral guidelines on the hearing of private confessions. In response, the House of Bishops has issued protocols on this matter, the most recent of which is Protocol 14 (issued in 2011).

The confidentiality of confessions is regulated by one of two canons (depending on the diocese) – Canon 113 of the Canons of 1603, and the Canon Concerning Confessions 1989. The 1989 Canon is a modernised version of the 1603 Canon that for the most part mirrors the 1603 version.¹ It provides:

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 PSC motion argues that the combined effect of the GS Resolution 24/01 and the Bishops' Protocol 14 on Private Confession (which directs the withholding of absolution in cases where there is no repentance) is that a 'confession' is not valid or complete where absolution is withheld because a perpetrator will not report his or her offence to the police or other authority. In cases where there is no valid confession, it is argued that the requirement of confidentiality does not apply, and therefore a clergyperson can report a matter such as the disclosure of child sexual abuse to the relevant authorities.

The Doctrine Commission recognises that there is uncertainty about the interpretation of the Canon, and that the PSC motion is in tension with a widely held view that confidentiality attaches to a confession, regardless of whether absolution is given or

¹ An important difference between the two canons is that the 1603 Canon allows an exception to the principle of absolute confidentiality (as further discussed below).

withheld. We recognise that there is a further tension between the confidentiality of confessions and the increasing evidence that the so-called ‘seal of the confessional’ has sometimes been used to conceal wrongdoing, especially in relation to child sexual abuse. The Doctrine Commission has therefore taken the opportunity to re-examine the matter from first principles.

Confession

The practice of confession needs to be shaped by our theological framework, especially the doctrines of creation, sin, and redemption, and their application to the understanding of human society. All people have been made in God’s image and must be treated with dignity and respect. We are also all corrupted and affected by sin. The atonement tells us that God takes sin seriously – so seriously, in fact, that Christ died so that our sins might be forgiven. God desires reconciliation and the restoration of broken relationships, both with him and with one another. Through Christ, forgiveness is freely offered to the sinner, calling for the acknowledgment of sin, true repentance and amendment of life, bearing ‘fruits worthy of repentance’ (Luke 3:8). This is the proper context for the practice of confession. 1 John 1:8-9 tells us ‘If we say that we have no sin, we deceive ourselves, and the truth is not in us. If we confess our sins, he who is faithful and just will forgive us our sins and cleanse us from all unrighteousness.’

The New Testament recognises a corporate dimension to confession: ‘confess your sins to each other and pray for each other so that you may be healed’ (James 5:16). There is a basic human reluctance to confront our own sin, and the involvement of others can encourage repentance and provide an opportunity for pastoral care of the penitent. While public confession is recorded in the Scriptures (e.g., Jer 29, Ezra 9-10) and was sometimes practised in the early church, there is often a reluctance to confess private sins in public.

Over time, the wisdom and experience of the church led to the principles of private confession, recognising the pastoral importance of ‘the unburdening of conscience and [receiving] spiritual consolation and ease of mind’ by the confession of ‘secret and hidden sins’. The role of the minister in pronouncing absolution is to declare God’s promise of forgiveness to those who repent. As the service of Evening Prayer in BCP reminds us,

[God] hath given power, and commandment, to his Ministers, to declare and pronounce to his people, being penitent, the Absolution and Remission of their sins: He pardoneth and absolveth all them that truly repent, and unfeignedly believe his holy Gospel.

It is in this context that the historic ‘seal of the confessional’, as reflected in Canon 113 and the Canon Concerning Confessions 1989 developed. In a number of jurisdictions, the civil law has come to recognise a legal privilege for confessions, so that ministers whose consciences are bound by a canon of the Church will not be held in contempt by the courts. While we are grateful for these historically allowed protections from civil prosecution, this is an occasion for our Church to follow the apostolic pattern of voluntarily relinquishing these rights in certain circumstances, out of a consideration of the welfare of others. There are clear deficiencies with the principle of absolute confidentiality.

The Problem of Absolute Confidentiality

The application of absolute confidentiality privileges the individual penitent confessing to serious crimes or abuse over past, present or possible future victims. This fails to recognise that we live in community and are responsible for our human relationships, and that sin cannot be individualised. We cannot separate our relationship with God from our relationship with others. Human existence is innately multi-dimensional, so sin is multi-dimensional, as is forgiveness.

The biblical principle of love requires us to do everything in our power to further the welfare of all and protect them from harm. The obligation to love does not terminate with the person making a confession but extends to victims of past and present actions and potential victims of future actions. For this reason, it is necessary to revisit and amend the 1989 Canon and the principles reflected therein. Our pastoral priority must lie with victims and with potential victims in all matters of abuse. Insofar as the practice of absolute confidentiality of confessions has hampered our pastoral effectiveness to so many, we should subject it to scrutiny. Its deployment appears to some to indicate self-protection and ecclesial self-interest, and not godly wisdom or best pastoral practice. Maintaining the practice of absolute confidentiality leaves priests and bishops open to manipulation by unscrupulous offenders, because the making of a confession then paralyses communication and action.

These difficulties are compounded by a lack of consistency in the civil law across Australia in relation to the priest-penitent privilege – for example, different rules apply in NSW, Victoria and Western Australia. Furthermore, the Church is subject to rules about mandatory reporting which are in partial conflict with the 1989 Canon, and ministers may be compelled to give evidence before a Royal Commission, which may be subject to different evidentiary rules. The question of the issue of confidentiality in ministry is a wider task, beyond the scope of this paper. The Doctrine Commission would welcome the opportunity to explore this matter at greater length.

For present purposes, we affirm the importance of confidentiality as a general principle in ministry. We recognise that there should be a presumption of complete confidentiality in relation to information revealed in a pastoral context. Ministers should keep in strictest confidence all that has been ‘committed to them in trust’ and should not reveal pastoral information to others or gossip. The national code of conduct, *Faithfulness in Service*, in para. 4.8 establishes confidentiality in pastoral relationships as a standard of ministerial behaviour. This expectation is only relieved when consent is given by the person in the pastoral conversation, disclosure is required as allowed by law, or disclosure is in the public interest (such as to avoid the risk of serious injury or harm to any person).

Canon 113 of 1603 recognised that confidentiality had to be maintained unless the minister’s silence were to cause him and the wider community irreparable harm – ‘except they [the sins confessed] be such crimes as by the laws of this realm his own life may be called into question for concealing the same’. This establishes both that such confidentiality is of the utmost importance, and also that exceptions could be made under extraordinary circumstances. We now recognise that significant harm or risk of harm to past, present and potential victims may constitute such extraordinary circumstances as to override the pastoral imperative of confidentiality.

Recommendations

Given the obligation to love and the importance of confidentiality, any exceptions to the principle of confidentiality must be clearly defined and ministers need to be well informed, especially with regard to the limits of confidentiality.

A variation to our practice will require amendments to the 1989 Canon. It is beyond the competence of the Doctrine Commission to draft Canon Law, but we invite others to do this task, bearing in mind the following two principles.

1. There ought to be a presumption of confidentiality for information revealed in a ministry context, which includes both private confession and wider pastoral conversations.
2. Absolute confidentiality should not apply to confessions of serious crimes and other acts that have led or may lead to serious or irreparable harm, including domestic violence and sexual offences against children. In these cases, a minister should encourage the penitent to go to the police voluntarily, and accompany the person to ensure that this happens and to provide support. If this does not happen then the minister may reveal the contents of the communication to the appropriate civil or church authorities only.

We further recommend that the Liturgical Panel be asked to revise the liturgy for the Ministry of Reconciliation, to make reference to the limits to confidentiality in certain circumstances and to include a clear statement of the need for the penitent to engage in amendment of life.

The Doctrine Commission of the Anglican Church of Australia
January 2014

CONFESSION IN THE CHURCH

AN HISTORICAL ANALYSIS

This paper is arranged in sections as follows:-

- A. Introductory
- B. General Summary
- C. Analysis of leading writings
- D. Practical Matters
- E. Conclusions

A. INTRODUCTORY

This paper is presented at the request of the Standing Committee to be informative about the history of confessions in our church.

The setting up of the Royal Commission provided the impetus for the Standing Committee to ask lawyers to do research on the rule of sanctity or "Seal" of the confession in the law of our church. It was anticipated that there was a real possibility that non-Christians would attack the churches on the basis that there was no Seal of the Confession doctrine and that any attempt to rely on it would be met with railings about "cover up".

The Standing Committee considered that the research undertaken in this connection might be of interest to a wider audience and requested this paper.

There are two valuable books which together give a fairly clear picture of the history of confession in the church: the two works are complementary.

The History of the Seal of the Confession by the Rev Dr B Kurtscheid (a Roman Catholic priest) was written in German in 1912 and translated into English in 1927 and is still available. As its title suggests, it seeks to trace the history from the very early church until recent times. It is based on European scholars and documents. Of course, the author has to rely on ancient documents and the sometimes inconsistent utterances of popes and scholars, but he usually mentions all major theories and states what he considers was the prevailing view.

Religious Confession Privilege and the Common Law by A Keith Thompson was published in 2011. Professor Thompson is an Auckland lawyer who for many years worked for the Mormon church and now lectures in Notre Dame University in Sydney. His book focuses on more modern times and how the Seal of the Confession doctrine is part of the secular law of Australia and other countries and how it applies in the Anglican and protestant churches. The numbers in "[]" in this memorandum refer to page numbers in *Kurtscheid*, the numbers in round brackets refer to pages in *Thompson*.

It is clear from Scripture that confession is a vital part of our order. Before the General Confession in our daily office services, texts are read such as 1 John 1:9, “If we confess our sins, God is faithful and just, and will forgive our sins and cleanse us from all unrighteousness”.

B. GENERAL SUMMARY

The popular view shown in TV dramas is the priest vested with his stole hears a confession, gives absolution and nothing in the world can make him reveal what was told him.

That scenario is true in some sections of the church even today. However, it would be a mistake to consider that that has always been accepted as the norm or that the church has always held the same theology concerning the confession. This will become apparent from the summaries in Section C.

We must also be careful when considering the past, not to view it with our eyes which are accustomed to thinking in modern categories. In particular, we think in terms of church and state being separate from each other. That view would not have occurred to the men and women of the middle Ages.

We must also remember that for a substantial period of English History, the Archdeacon’s Court often called the Bawdy Court was responsible for policing the morals of the community. There was no police force and the Justices of the Peace tended not to get involved with what we would call nuisance crime or offences against morality, so that the church was delegated to deal with such crime. Thus, in England, the power of the church to compel or encourage confession and to deal with moral offences by way of penance was really part of the State justice system.

Returning to the history, Kurtscheid and Thompson deal with the confession in distinct periods:

- (i) from Constantine to Leo the Great (ie 313-461)
- (ii) from Leo to the 4th Lateran Council (461-1215)
- (iii) from 1215 to the reformation
- (iv) after the Reformation.

At the beginning of the first period, sin was confessed publicly and public penance was imposed.

As the writings of S Augustine demonstrate, there was considerable ill feeling by those who had remained faithful to Christ during periods of persecution against those who had succumbed to the pagans and now wished to rejoin the church when it was safe to do so. There was great pressure on the church leaders to be strict in their readmission to fellowship policy.

However, there were movements away from this policy as early as 379 the writings of St Basil show an endeavour to remove anything that might dissuade the faithful from confessing their sins [47].

This feeling grew and towards the end of this period, Leo and others saw that their policy was not encouraging membership of the church. They therefore changed tack and held that secret sins could be met by private confession which the priest was bound not to divulge and private penance.

In 459 Pope Leo wrote the first papal decretal safeguarding the secret of the confession [51].

Although public penance after secret sin was allowed for some while afterwards, the Council of Arles in 554 limited the types of offence for which it should be ordered and the practice gradually ceased [65].

At this time, the Seal of the Confession was linked to the effectiveness of the “sacrament” of penance. Confession, absolution and penance was deemed effective to cancel the sin. Thus it must be considered that the sin never occurred. As part of this scheme, it was impermissible for the priest to revive the sin in the eyes of the community by divulging it.

Again a further development was that the sin should not be revealed indirectly, ie by requiring the sinner to do some public act.

Up until 1215, the Seal of the Confession doctrine was administered from place to place in Europe in different ways.

The third period began with the 4th Lateran Council of 1215 made confession obligatory on all the faithful, but provided that the confessor must treat his penitents with leniency and prudence as a true physician of the soul [115].

The Council also decreed (a) that the confessor not betray the sinner evening the least way by words or by any action, (b) in doubtful cases, the confessor could seek advise from a senior member of clergy, but could not in so doing identify the penitent and (c) imposed a penalty of disposition from orders and relegation to a strict monastery [116]-[117].

The decrees of the 4th Lateran Council were renewed during succeeding centuries. Kurtscheid notes many of the synods that reaffirmed them between 1223 and 1860 [127]. It would seem that the decrees were accepted and observed.

The Reformation at the beginning of the fourth period might have been thought to have removed confessions from the agenda. In particular, the link between confession and the “sacrament” of penance was broken.

Thompson argues and presents material to suggest that this did not happen.

After the Guy Fawkes plot of 1605 during which a catholic priest was convicted of treason and executed for not revealing a confession by one of the conspirators (the case of Father Garnet SJ) [156]. The Garnet case is used by some commentators to suggest that the lore of the confession did not survive the Reformation. Thompson does not consider that this follows.

There is little material as to confession in the Anglican Church between 1605 and 1850. Thompson, however, considers that what evidence there is suggests that the Seal of the Confession survived both as a rule of church law and a matter of privilege for clergy in secular law. He admits that many learned scholars and lawyers do not share his view.

The Anglican Church of Australia has repealed all pre-Reformation canon Law so that today any decree of the 4th Lateran Council can have no effect except insofar as the

decrees were accepted as part of the law of our church in the 19th century. This may well have occurred.

Thus, the practice of the church in matters of confession has not always been uniform and the underlying theology has also undergone changes.

C. ANALYSIS OF LEADING WRITINGS

This memorandum does not seek to go into the detail provided in Dr Kurtscheid's book or Professor Thompson's book (these clearly being the leading writings in the field), but hopes to give sufficient detail of their arguments to support the view set out in the summary in Section B to show that the practice of the church in this matter varied from age to age whilst still keeping the basic principle that what was told to a priest in sacramental confession was to be kept secret.

I will rarely repeat the details already given in Section B. In this section, the pronoun "he" will be employed of the priest as at all times prior to the 20th century, this was accurate.

In brief summary, *Kurtscheid* demonstrates that in the primitive church, confession was public and penance was public [27] et seq. Just when private confession took the place of public confession is unclear. However, St Augustine does not mention public confession, which indicates that it ceased by the end of the 4th century [21].

In the Fourth Century, the Syrian Church Father Aphraates (after 345) compares sinners who confess secret sins to wounded soldiers and exhorts priests not to expose those who confess lest they be held up to hatred by their enemies [44]-[45].

More reliable evidence as to the practices in the early church comes from the time of Leo the Great. A papal letter in 459 condemns the reintroduction of public confession, and rules that private confession with strict silence on behalf of the confessor is sufficient [55].

The early theories are that in confessing to a priest, the penitent is really confessing to God through the conduit of the priest. The conduit must not reveal what was communicated to God.

The Eastern Church took the same line by the 7th Century [56].

A capitulary of Charlemagne in 813 leaves no doubt that at the beginning of the 9th Century, the seal of the confession was considered to be a strict obligation of the confessor [79].

Lanfranc, Archbishop of Canterbury in the 11th Century put that the betrayal of a confession ran contrary to the very nature of the sacrament of confession as the confessor, after absolution, (and after penance?) must consider the sin as no longer present washed away as in baptism [93].

There is acceptance of the seal of the confession from then on in East and West. However, there is no specific reference to the seal in church law until the 9th Century (61). It would appear that the rule in England may have derived from Celtic practices in the Church in Ireland (61).

The Fourth Lateran Council of 1215 confirms the position [115]-[124]. Canon 21 of 1215 imposing a penalty on clergy who betray the confession (65).

The Fathers were not unmindful of some of the problems this absolute view.

The problem of the person who confesses that he intends to commit a crime is met by at least two answers, (1) that one can only confess and be absolved with respect to a past sin and (2) that the confessor is entitled to take steps to reveal the intention to those who could prevent the crime so long as that revelation would not cause injury to the penitent [149].

Pope Alexander III in a letter to the Bishop of Beauvais (c 1180) expressed the opinion that a confession of sins must not be rejected even when the penitent cannot be absolved because he has no purpose of amendment [169]. Others took the same view [175].

However, there seems to be an exception where a heretic makes a “confession” to a priest, not intending to submit himself to penance and obtain absolution but merely to irritate and provoke the priest [177]. This is not sacramental confession, but an abuse of it [180].

Again Gerson and others consider that the priest may tell the penitent that anything he or she is about to say will not be kept secret in which case there is no sacramental confession and the seal does not apply [181]-[182].

The seal of the confession extends to the priest not making use of the knowledge obtained from the confession to the detriment of the penitent [239]. The very worst case was where the priest sold details of the confessions he heard to blackmailers or the State prosecutors.

This Seal was taken to the extent that a priest could not vote against election of a penitent to an office because of what he knew about him from the confession. The priest must assume that the confession never occurred.

Early on there was an attempted distinction between what was a sacramental confession and what was told to a priest otherwise. However, in time, the seal of the confession applied whenever a penitent told a priest of his or her sins with a view to seeking absolution or other benefits from the church.

There was controversy as to what was the situation where a penitent confessed his or her sin, but then refused to perform the penance and repeated the offence. The prevailing view was that the Seal of the Confession still prevailed [169].

If a penitent confesses to a lay person believing that that person is a priest, the better view is that the seal applies [251]. That is not a universally held view. Some theologians say that the confession is not sacramental so the Seal does not apply, but there is a “natural” obligation on the lay person not to reveal the content of the confession [253].

The same point applies to interpreters or other persons who hear what was said in the confession [254].

Historically, there have been problems where a person has told a priest that there is a conspiracy to assassinate the king or head of State. A book published in 1601 gives

the example of a priest who was told of a plot to kill King Francis I of France. The priest revealed the plot and the penitent was executed no-one seems to have thought ill of the priest [164].

Similar concerns motivated Canon 113 of 1604 which made an exception where the priest himself could lose his life by not revealing what he had been told.

Another problem is where the penitent confesses to a conspiracy to kill (a past sin) and threatens to implement the conspiracy (a future sin). Ordinarily a future sin has never occurred so that it cannot be confessed. However, when it has future implications, the church lawyers were troubled. Even the most conservative ruled that the priest must do all he could to dissuade the penitent and to warn those in danger, but the warning must not identify the penitent [179].

It is interesting that the problems inherent in the strict view of the Seal of the Confession discussed above were what troubled the Sydney Synod when it repealed the General Synod Canon that replaced Canon 113 of 1604. Unfortunately, the synod did not have access to the thoughts of leading churchmen of former ages who had already deeply considered the problems and retained the Seal of the Confession.

The *Thompson* book deals with more modern problems, particularly how far ministers in Protestant churches where confession and penance are not considered sacramental are bound by the seal and how far the seal is affected by statute and common law promulgated since the Reformation.

Thompson's purpose for chs 2 & 3 is to demonstrate with historical and canonical evidence that religious confession was practised and privileged in England from before Magna Carta and was still recognised by Coke in his *Institutes* in the 17th Century (29). Although there is some evidence to the contrary and some decided cases and text writers take contrary views, *Thompson* makes out a credible argument.

Judge Bursell in his "The Seal of the Confession" (1990) 7 *Ecclesiastical Journal* 1 gives seven reasons why the seal of the confession continued to apply in Anglican practice and in law after the reformation (80). However the respected ecclesiastical lawyers, Norman Doe and Lynne Leeder are not convinced (82).

In Chapter 4, *Thompson* points out that the religious confession privilege actually predates the formulation of the modern rules of evidence (90).

Thompson discusses a number of cases decided since the 17th Century, but no clear principle emerges save that there are strong arguments against the proposition appearing in some textbooks on the Law of Evidence that religious confessions are not privileged. The relevant cases are listed at (193).

The Australian cases discussed in *Thompson* chapter 7 tend to the view that, apart from statute, there is no religious confession privilege in Australia in the sense that a court will exclude evidence of a religious confession or decline to permit the evidence to be given. *Thompson* argues against this proposition.

The position is unclear as there are some authorities the other way and, up until recently, there has been a marked reluctance of the authorities to compel priests to break the seal of the confession.

D. PRACTICAL MATTERS

The distinction must be made between ecclesiastical law and the secular law. Under the former, the old rule was that a priest who divulged what was told in confession was stripped of his orders and sent to a monastery for life. Nowadays, any ecclesiastical penalty would be less severe.

However, this may be irrelevant in secular law which may order a priest to give evidence and if he fails to do so jail him or her for contempt of court.

Again, so far as the secular law is concerned, if the priest is subpoenaed to give evidence before a Royal Commission, the rules as to professional or clergy privilege are abrogated and the witness is required to answer even though the answer cannot be used against them in any subsequent criminal proceedings.

In summary, the secular law is a little unclear, but, apart from statute, particularly s 127 of the *Evidence Act* 1995, clergy are compellable to give evidence as to what occurred in a confidential session with a penitent in which the penitent sought absolution.

The Evidence Act 1995 is a Commonwealth statute which was intended to be uniform throughout Australia, but has only been adopted by NSW, Victoria, Tasmania, the ACT and the Northern Territory. S 127 cannot be relied on in other States where there is no protection given to clergy.

Section 127 (1) of the *Evidence Act* is as follows:-

“A person who was or is 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.”

The section does not apply if the confession was made for a criminal purpose.

The section defines “religious confession” as meaning “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.”

There have not been any decisions on the scope of this section by a superior court. However, there was a case in Sydney where, after an interview, a rector accompanied a penitent to the police station with respect to an offence against children. At the man’s trial, the Crown subpoenaed the clergyman to say what the accused had told him before he went to the police station. The diocese had a QC argue that the predecessor of s 127 made the conversation between the accused and his rector privileged. The District Court Judge upheld that submission.

The Diocese of Sydney’s only record of this is a copy of the subpoena which has on it the name of the accused and the court number. I have not read the reasons for judgment (if any).

This case, even though only decided at District Court level, would suggest that the courts accept that of a person tells an Anglican priest something in confidence on a pastoral occasion that conversation is privileged in the same way as if he or she told his or her lawyer and does not depend on absolution being given.

Thus, although there is no conclusive material the above strands all tend in the direction that the seal of the confession operates both in church law and secular law (in the Eastern States and the Northern Territory) as soon as a person tells his or her priest something in a situation where he or she would expect the priest to receive the information on a confidential basis.

Probably the main reasons why there have been few decided cases on the subject are (a) the police are reluctant to give evidence of what was said in confession either because of public interest considerations or because the jury might take an adverse view and (b) experienced clergy know that they must say to a person who is likely to say something horrible that they will be obliged to report crimes to the authorities or that confession and absolution are not valuable unless there is repentance which involves the penitent reporting himself or herself to the police. The problems occur when the confession of crime comes completely unexpectedly.

E. CONCLUSIONS

The principal purpose of this note is to inform of the history of the confession and to demonstrate that from time to time, the church has viewed the seal of the confession in different ways, but the view has been universally taken for 1600 years that essentially the seal of the confession is inviolable.

Whilst any conclusion in this area can only be reached with some reservations, the better view is that even in the Anglican Church after the Reformation, the Seal of the Confession applies.

Peter W Young
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