

COIN

COMMISSION OF INQUIRY NOW

Justice for victims of Catholic Clergy Sexual Assault in Victoria

The Hon Georgie Crozier MLC,
Chairman, Family and Community Development
Committee, Parliament of Victoria, Spring Street
MELBOURNE VIC 3000

17 September 2012

Inquiry into Handling of Child Abuse by Religious and other Organizations
COIN Submission No. 12:
Mandatory reporting and the *Sacrament of Penance* within the Catholic faith

This submission concerns the issue of mandatory reporting in relation to a religious rite known as the *Sacrament of Penance* within the Catholic faith. In summary, COIN submits that mandatory reporting should be extended to information gained in the confessional by a priest when such information raises a reasonable apprehension that sexual abuse of children or vulnerable adults has occurred, or is likely to occur. In today's society, where many professional and caring groups are, in such situations, excused from complying with their relevant and professional rules and ethical codes requiring confidentiality, no such exemption from mandatory reporting is justified in relation to what amounts to no more than doctrine and practice of a private organisation: ie, the Sacrament of Penance.

Sacrament of Penance, Canon Law, Church Practice

This Catholic rite is traditionally conducted within a confessional box or booth. The *Sacrament of Penance* ("Confession") dates to the early middle ages.

The Code of Canon Law requires all Catholics, who have attained the age of discretion, confess their sins through confession. Canon Law 920 requires all Catholics to receive communion during Easter. Thus during that period of time, members of the church community are encouraged to confess serious sins prior to their communion with God, ie. the Eucharist.

The *Confession* is administered by a validly-ordained priest who has jurisdiction to absolve the penitent. A local religious superior may grant any priest, either permanently or for a limited time, the faculty to hear confessions. However that superior is obliged to ensure, by an adequate means, that the priest has the knowledge and character to do so. Any priest can exercise this faculty with permission of his religious superior.

The priest is considered, in religious terms, to be the rightful representative of God and an instrument of God's merciful love for the sinner. He is as a minister of Christ's mercy. He acts *in persona Christi*. His role in this respect is understood to be of considerable

importance, as in the course of the confessional the priest offers absolution of the sinner and facilitates his or her communion with God and the Church.

For Catholic priests, the confidentiality of all statements made by penitents during the course of confession is absolute. This strict confidentiality is known as the *Seal of the Confessional*. According to the Code of Canon Law, para 983:

"The sacramental seal is inviolable; therefore it is absolutely forbidden for a confessor to betray in any way a penitent in words or in any manner and for any reason." (Code of Canon Law, 983 § 1)

Thus, priests, and anyone who witnesses or overhears the confession (e.g. an interpreter, caregiver, or aide of a person with a disability), may not reveal what they have learned during confession to anyone, even under the threat of their own death or that of others.

When a priest receives information about clergy sexual abuse via the confession, he may encourage the penitent (either victim or perpetrator) to surrender to authorities. However, the priest himself may not disclose material so received to civil authorities. Such encouragement is the extent of leverage a priest wields: he cannot make advising the authorities a condition of absolution and, as mentioned, he may not directly or indirectly disclose the matter to civil authorities himself.

A priest who receives the confession and breaks that confidentiality, ie. breaches the *Seal of the Confessional*, incurs *latae sententiae* (automatic) excommunication. This power reserved to the Apostolic See (Code of Canon Law, 1388 § 1).

In contrast, a priest who commits an indictable criminal offence, such as sexual abuse of a minor, does not incur *latae sententiae*, under Canon Law.

Apart from these basic obligations concerning confession, stipulated in Canon Law, there is no formally established Code of Practice or Code of Ethics, or set of specific practice guidelines for the priests' faculty of administering the *Confessional*. For example:

- The RCC hierarchy insists that the interpersonal process of the confessional is different from the interpersonal process inherent in pastoral counselling or psychotherapy. However, there is no ruling with respect to a possibility of dual relationships. A penitent's spiritual director or a pastoral counsellor can also be the same priest, who administers the *confession* to the penitent.
- No specific practice guidelines exist with regard to dealing with penitents' disclosures during the confessional that may amount to criminal conduct.
- In unusual circumstances where the penitent confesses serious conduct which may amount to a criminal offence, a priest may disclose the relevant portions of the confession to his Bishop, in order to seek guidance whether or not

absolution may be granted. The priest however, maintains a discretion as to whether or not he should seek such guidance and permission to grant absolution.

- Further, no specific practice guidelines exist with regard to a bishop's decision making process when determining a priest's capacity and suitability for the execution of the *Confessional*.

In normal circumstances, a person's disclosure of past or intended serious harm to self or others demands immediate intervention from civil authorities, medical and other crisis response support services or community emergency services.

Failure to intervene or respond to disclosures of criminal actions committed or intended, should, COIN submits be considered a gross breach of duty of care with respect to members of our community.

Other Caring Professions and Occupations

Many other confidentiality regimes now operating in the community allow "breaches" of confidence in various situations - eg., to save the life of or prevent harm to another - and consider such "breaches" to be entirely proper and ethical. COIN submits that, judged against these developments, the confessional warrants no special treatment excusing priests administering the sacrament from as lawfully binding obligation to report: ie, a mandatory reporting regime. Examples of such regimes no operating in Victoria follow.

Lawyers: Client Legal Privilege:

Common Law Principles The common law doctrine of client legal privilege ("privilege") protects some documents and information from disclosure when held by a lawyer. The basic principles may be summarised as follows:

- Privilege belongs to the client not the solicitor. The solicitor does not have the right to waive the client's privilege;
- The onus of establishing privilege rests on the person claiming privilege;
- Privilege continues indefinitely, beyond the end of a lawyer's retainer and even beyond the client's death;
- Privilege may be overridden expressly by statute (see below);
- Privilege may be overridden in limited circumstances by opposing public policy arguments (see below);
- Privilege may be waived expressly, for example by tendering a document into evidence;
- Privilege may be waived impliedly, for example by putting the substance of the communication into issue in court proceedings.

Exceptions to Client Legal Privilege Some lawyer-client communications will not usually attract privilege. For example:

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- Communications made for the purpose of facilitating a crime or fraud: see *R v Cox and Railton* (1884) 14 QBD 153;
- A client's name: see *Southern Cross Commodities Pty Ltd (In Liq) v Crinis* [1984] VR 697;
- The fact that a client sought legal advice; see *R v R* [1995] 1 Cr App R 183.

A lawyer may sometimes disclose confidential information, despite a client's claim of legal professional privilege, if:

- the disclosure is to avoid probable commission or concealment of a serious criminal offence; and
- the law would probably compel disclosure. (Rule 3.1.1 of the *Professional Conduct and Practice Rules* 2005.)

Victorian Legal Profession's Conduct Rules 2005 state:

3.1 A practitioner must not disclose to any person, who is not a partner proprietor director or employee of the practitioner's firm, any information which is confidential to a client and acquired by the practitioner's firm during the client's engagement unless:

3.1.1 The client authorizes disclosure;

3.1.2 The practitioner is compelled by law to disclose; and

3.1.3 The practitioner discloses information in circumstances in which the law would probably compel its disclosure, despite a client's claim of legal professional privilege, and for the sole purpose of avoiding the probable commission or concealment of a serious criminal offence.

3.1.4 The information has lost its confidentiality;

3.1.5 The practitioner obtains the information from another person who is not bound by confidentiality owed by the practitioner to the client and who does not give the information confidentially to the practitioner.

COIN submits that the public policy underlying para 3.1.3 above applies equally to the confessional.

Medical Privilege

Section 141 of the *Health Services Act 1988* (Vic) ("HSA") preserves confidentiality in public and private hospitals, day procedure centres and community health centres. The act applies to the health service itself, the board of the service, or a person who is or was a member of the board, a delegate to a board, a proprietor of such a service, or engaged or employed in a service or performing work for it. The above are in most cases generally prohibited from disclosing information that could directly or indirectly identify a patient. If they do disclose such information, they have committed an offence under the HSA 1988 and may be fined.

In addition to such statutory offences, medical practitioners may be sued at common law if they disclose medical information without a patient's permission. Such conduct may lead to a doctor may be sued for breach of contract or negligence.

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The *Human Rights Act 2001* (Vic) and the *Privacy Act 1988* (Vic) confer statutory privacy rights on patients, whether they are treated in a public or private facility.

Disclosing confidential Medical information It must however be remembered that situations can arise where disclosure is warranted. Cases in which confidential information may be lawfully disclosed are set out in HAS ACT s 141(3). These include disclosure to a court in the course of criminal proceedings.

The Australian Medical Association's Code of Ethics requires medical practitioners to maintain a patient's confidentiality. As to exceptions, the AMA Code of Ethics, 2006, 1.1 para L states:

Maintain your patient's confidentiality. Exceptions to this must be taken very seriously. They may include where there is a serious risk to the patient or another person; where required by law; where part of approved research; or where there are overwhelming societal interests.

COIN submits that protection of children from a real threat of sexual abuse amounts to such a "societal interest".

Social Workers

The Australian Association of Social Workers' Code of Ethics 2010 stipulates information privacy/confidentiality rules as following:

5.2.4: Information Privacy/Confidentiality: *Social Workers will only reveal confidential information ... in any one or more of the following situations, provided it is permitted by law:-*

if by revealing information to relevant third parties an actual identifiable risk of harm to a specific person or persons can be prevented.

(AASW Code of Ethics, 2010)

Psychologists

The Australian Psychological Society (APS) Code of Ethics 2007 articulates strong ethical principles which set clear standards to guide both psychologists and members of the public as to what is considered ethical professional conduct by psychologists. The APS Code of Ethics (2007) is built on three general principles: (i) Respect for the rights, dignity and autonomy of people, and justice; (ii) Propriety; and (iii) Integrity. The Code states:

Psychologists are obligated to disclose confidential information without consent where there is a legal obligation to do so; or if there is an immediate and specific risk of harm to an identifiable person or persons that can be averted only by disclosure of information.

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Children Youth and Families Act 2005 (Vic)

This act sets out when a child is deemed by the statute to be in need of protection (s. 162); and persons deemed to be “mandatory reporters for the purpose of” the act. These include a doctor, nurse, teacher, police officer, psychologist and “a member of a prescribed class of persons” (s 182(1)(a)-(l)). It is regrettable that for 18 years, no additional classes have been gazette – a problem disc used by Cummins J in his report (see below). Section 162(1) states that “a child is in need of protection” if various situations arise, including “significant harm as a result of sexual abuse.”)S 162(1)(d)). The issue thus squarely applies to the threat of clergy sexual abuse.

Given these laws concerning mandatory reporting, COIN submits that it is anomalous and indefensible that a priest in a catholic school is mandated to report conduct endangering children learnt, eg. in the schoolyard, but not in the confessional. COIN recommends that, amongst other reforms, priests (and perhaps their equivalent in other religious organizations) be added to the list in s 182(1). Sections 181-184 are attached to this submission.

Other Legislation:

Situations where laws may require disclosure of otherwise confidential information include:

- revealing to police or a court the presence of alcohol or any other drug in the breath or blood of a driver after a motor accident: *Road Safety Act 1986 (Vic)* part 5;
- reporting of information under the *Births Deaths and Marriages Registration Act 1996 (Vic)*;
- reporting a reportable death or a reviewable death to the Coroner: *Coroners Act 2008 (Vic)* Part 3;
- requirement of Family Court Judges, staff, etc, who have reasonable grounds to suspect child abuse, to report to the relevant child protection agency: see *Family Court Act 1975 (Cth)* s 67ZA (discussed further at Cummin J, Report, Vol 2, p 345.)
- notifying infectious diseases and micro-organisms to the Department of Health under *Public Health and Welfare Act (Vic)* Division 3.

Cummins J Report:

The Committee’s attention is drawn to *The Report of Protecting Victoria’s Vulnerable Children Inquiry* (2012, Vic Govt P:rinter) (“Cummins J Report”), especially those sections that deal with mandatory reporting (Vol 2, Ch 3 p 68 and see further below); sexual abuse of children (Vol 2, Ch 5.4.8 p 102); preventing child sexual abuse (Vol 2, Ch 7.3.3, p 139 and ff); and especially Ch 14 (Vol 2 pp 330 – 367). Save for observations below that differ from Cummins J, COIN commends this material to the Committee for close study.

COIN supports and draws particular attention to the following aspects of the Cummins J Report:

- (a) **Key Points:** (Vol 2 p 330): see especially the mandatory reporting scheme; state prescribed criminal reporting provisions; and the need for a formal investigation by government;

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- (b) **Mandatory Reporting:** (Vol 2, Ch 14.4, pp 342-52): COIN refers in particular to the failure of governments for 18 years to gazette, under the CYF Act, additional professions as mandated reporters, leaving, currently, only teachers, police officers, doctors, nurses and midwives mandated (Vol 2 p 344). COIN submits that catholic priests conducting confession, and generally (along with other ministers etc from other faiths) should be added to this list.
- (c) **South Australian precedent:** (Vol 2 p 344) COIN refers to the extension of reporting requirements to ministers of religion in South Australia with no adverse results reported;
- (d) **Full implementation of CYF Act:** (Vol 2 p 348-9) COIN refers to the call for full implementation of the *Children Youth and Families Act 2005*, s 182; ie, as Cummins J recommends (Recommendation 44): “gazette those professions listed in ss 182(1)(f) – (k)” not yet mandated. COIN further recommends ministers of religion be included, especially catholic priests, as already occurs in South Australia. See also Cummins J, Vol 2, p 350 for discussion.
- (e) **Bishops Arguments:** COIN refers to the Victorian Catholic Bishops’ arguments recorded at Vol 2 p 351, that oppose the extension of mandatory reporting to priests. COIN rejects these arguments as unacceptable in principle in a society which must prioritize the safety of children above matters of faith; and as amounting to no more than wild assertions unfounded in practice and experience. COIN submits that the protection of children and the proper administration of the law cannot be over-ridden by a private organization’s doctrines and beliefs meant only for its adherents or members. To do so is to invite anarchy. Priests, like all citizens, must obey the law. If “violating the confessional” - ie, reporting relevant information gleaned from the confessional – amounts to an “impossible burden” (Vol 2 p 351) then the church’s response is simple: first, the church should follow the example of many other professions and carers and amend its private rules; second and alternatively, such a priest so “impossibly burdened” should not, in conscience, conduct confession at all; or third, that priest, if he refuses to “violate” the confessional, should accept the possibility of criminal sanctions. The overwhelming public interest and the protection of children and vulnerable adults, demands no less. To this extent COIN, with respect, disagrees with the conclusions of Cummins J in this part of his Report.
- (f) **Internal Processes etc discouraging reporting:** (Vol 2 Ch 14.5.2: pp 353-5). COIN supports this discussion, especially recommendation 47 – save for the “exemption for information received during the rite of confession” (Vol 2 p 355). No such exemption is warranted. See also COIN’s submissions Nos 9 and 10 concerning the application and reform of Victorian criminal law in relation to clergy sexual abuse.
- (g) **Further Inquiry:** As often mentioned in its submissions (and repeated below) COIN supports recommendation 48 (Vol 2 p 356).

COIN Recommendations In contrast to psychologists, social workers, medical practitioners, and legal practitioners, priests assume multiple roles within their parish communities. They act as trusted confidants on a par with “brothers” and “fathers”; and as elders, mentors, pastors, moral guides, practitioners of the *confessional*, preachers, support and community leaders, and teachers. Many of these roles entail different relational and professional boundaries, yet all lack specific guidelines or any assigned code of ethical practice.

COIN recommends:

- (i) That the practice of the confessional be made subject to mandatory reporting of information concerning the actual sexual abuse of children or vulnerable adults, or where the priest forms a reasonable apprehension that such abuse is intended, thus placing a person or persons at serious risk of personal harm,
- (ii) In particular, priests authorized with the faculty to practice the confessional are made subject to mandatory reporting responsibilities in relation to:
 - Actual or reasonably suspected child sexual, emotional, and physical abuse;
 - Actual or reasonably suspected child neglect;
 - Actual or reasonably suspected abuse and neglect of persons from other vulnerable groups (persons with intellectual disability or mental health issues; persons subject to guardianship orders);
 - Criminal activities, allegedly committed by a penitent or other parties, based on penitent’s confessional disclosure; and
 - A penitent’s or other parties’ expressed intentions to commit criminal acts.

COIN suggests that in Victoria’s community today it is appropriate that priests authorized with the faculty to practice the *Sacrament of Penance* be obligated, under legislation, to demonstrate a sense of responsibility to the safety and wellbeing of their penitents, their community, to the institution of the Church, to members of other professions with whom they interact, and to society at large.

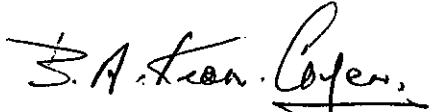
Independent Judicial Inquiry: As previously stated, COIN considers that the Government’s choice to refer the issue of the sexual assault of children by personnel associated with the Roman Catholic Church (“RCC”), let alone by personnel from thousands of additional religious and other organisations, to a Parliamentary Committee for inquiry and report is inadequate and unworkable. COIN favors the commissioning of a properly empowered, independent, judicial inquiry into this problem.

Accordingly, COIN considers your Committee to be a “first step” only towards the instigation of such a judicial inquiry. COIN thus recommends that the Committee, in its final Report, records and acknowledges its inadequacy; and recommends to government that such a further, independent judicial inquiry be forthwith commissioned.

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Focus on the RCC COIN considers that the Committee's Term of Reference are unworkable if thorough examination of this significant problem, and well-founded recommendations to government, are to occur. The Terms of Reference embrace thousands of religious, and other, organisations and would require many years to pursue: yet the Committee is required to report by 30 April 2013. Second, COIN considers RCC clergy, and the Church's hierarchy, to be the main perpetrators of sexual assault upon children and vulnerable adults in Victoria. Thus, in this submission, COIN focuses solely on the RCC, and encourages the Committee to do likewise, both as a matter of practical reality and in an endeavour to conduct a though, focused inquiry as compared to a superficial treatment of many organisations. COIN, in support of the above, refers to its Submission No 8 and the attached advice of Mr. R Miller of counsel.

Public submission COIN requests that this submission be recorded on the Committee's public register.



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