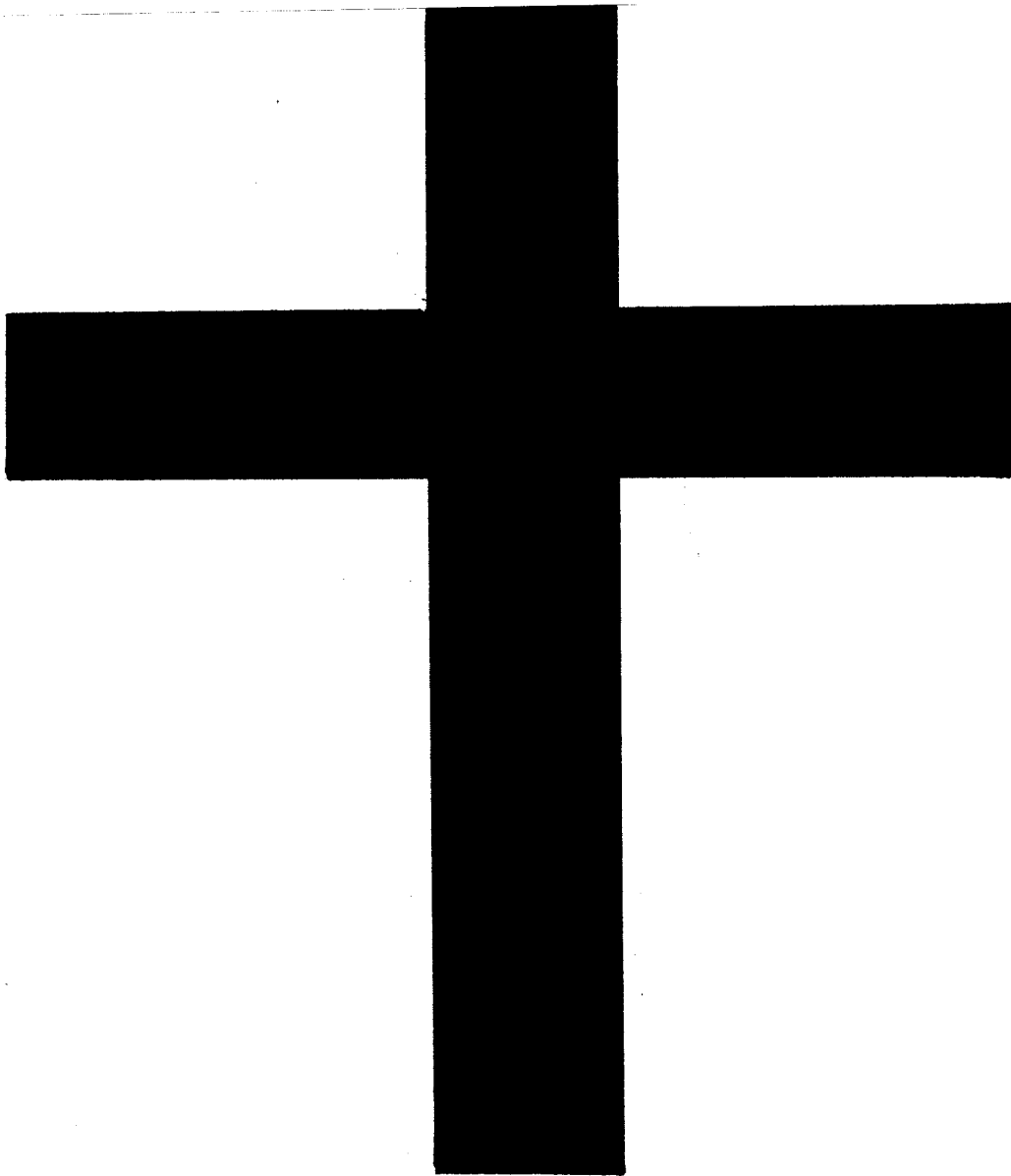


# The protection of statements made to religiously ordained officials.

Queensland Law Reform Commission  
Report No 41

Copyright is retained by the Queensland Law  
Reform Commission.





Telephone: 227 4544

Law Reform Commission,

P.O. Box 312, North Quay,

Brisbane, Q. 4002.

2nd April, 1991

The Hon. Dean Wells, M.L.A.,  
Attorney-General of Queensland,  
50 Ann Street,  
BRISBANE. Q. 4000.

My dear Attorney-General,

**The protection of statements made to religiously ordained officials.**

On 18th January, 1991 you forwarded to the Queensland Law Reform Commission a copy of the **Evidence (Religious Confessions) Amendment Bill, 1989 (New South Wales)**. You requested the Commission to examine this New South Wales Bill, and advise you of the view taken by the Commission to this legislation.

The **Evidence (Religious Confessions) Amendment Act (New South Wales)** became operational on 19th December, 1989. The Act mirrors the Bill you forwarded to the Commission with one amendment : unlike the Bill, the right to refuse to divulge a religious confession extends to past, as well as present, members of the clergy.

The Commission has considered your request in the context of the N.S.W. Act, and not the Bill. Its report is attached.

The report is divided into two chapters.

The first chapter outlines the arguments for and against protecting statements made by religiously ordained officials from disclosure in legal proceedings. It then sets out the reasons why the Commission is opposed to the protection given by the N.S.W. legislation.

The second chapter examines the N.S.W. legislation. Problems about ambit and context are raised and discussed. However, as the Commission has recommended that the protection given by the N.S.W. legislation not be extended to Queensland, no specific recommendations are made.

Yours faithfully,

The Hon. Mr. Justice  
B.H. McPherson, C.B.E., S.P.J.  
Chairman, Queensland Law Reform Commission.

**1. SHOULD ORDAINED OFFICIALS OF RELIGIOUS ORGANISATIONS BE PROTECTED FROM DIVULGING STATEMENTS IN LEGAL PROCEEDINGS MADE TO THEM BY MEMBERS OF THEIR RELIGIOUS ORGANISATION?**

The integrity of the legal system relies upon access to the truth.

Legal adjudicators fashion their decisions on the facts presented to them. To arrive at a just decision, legal adjudicators must have access to all relevant facts. Justice requires that legal adjudicators should not be restricted in their inquiry for the truth.

Therefore, as a general principle, all people who are called before courts to give evidence should be required to answer, fully and truthfully, the questions asked of them.

This general principle should not be displaced unless for some special reason the public interest is better served by not requiring a witness to testify.

The members of many religious denominations and practices confide in their ordained officials. At the request of the Attorney-General, the Commission considered whether these communications should be protected from disclosure in legal proceedings.

**(i) Argument for-**

The role of religiously ordained officials could be inhibited if they were required to disclose confidences. One of the primary roles of these officials is to reconcile the members of their religious denomination with their God. This requires an examination and explanation of the actions and thoughts of members of the religious denomination. This process has the ancillary advantage of arming the religiously ordained official with sufficient information to help the person who is confiding past actions and thoughts, to reconcile with self and with family and friends. The community is benefited through this process by the lessening of tension between its members.

Members of religious denominations would not be forthcoming if they thought that their confidences would be repeated in Court. As a consequence, the role played by religiously ordained officials as spiritual and community adviser would be jeopardised.

It is likely that a case in which a religiously ordained official refuses to give evidence concerning confidences given in an official capacity will attract significant media attention should the official be required to testify. The role of religiously ordained officials, irrespective of their denomination, could be publicly undermined as a result.

(ii) **Argument against-**

Protecting communications made to religiously ordained officials can have adverse effects for the community.

Potentially, the privilege could protect a repeat offender who discloses crimes to a religiously ordained official. Criminal proceedings against the repeat offender could be inhibited if the religiously ordained official cannot repeat the confession to the courts. Further, the repeat offender may commit other offences uninhibited if prosecuting authorities are unable to explore all sources of possible evidence.

This concern will be exacerbated if the protection is extended to other professional groups whose need for confidentiality of communication is similar to that of religiously ordained officials.

The public interest arguments for protecting statements made to religiously ordained officials also apply to other professional groups. Members of many professions require full and truthful accounts from their clients to properly perform their job and to assist their clients.

For instance, the work of both social workers and marriage counsellors involves building a relationship of trust with clients so that all relevant information can be disclosed. Without all relevant information, the advice given by these professionals to their clients may be incorrect.

Similarly, doctors may misdiagnose patients if they have not received all relevant facts. Rape victims who do not want to press criminal charges should feel confident, when seeking medical treatment, about informing a doctor that she has been the victim of a rape.

Journalists, too, can argue that sources will be more forthcoming in disclosing public interest stories if the sources can be assured that their names would not need to be divulged.

Yet, communications made to these professional groups are not presently privileged in Queensland.

If legislative protection is given to communications made to religiously ordained officials it should logically be extended to these other professional groups.

(iii) **The Commission's recommendation-**

The Commission doubts that legislation to protect communications made to religiously ordained officials is necessary or desirable.

In practice, the question about whether statements made to a religiously ordained official should be protected in court proceedings rarely arises.

Indeed, in those jurisdictions which protect confessions made to clergymen, judicial attention to these provisions is scant.<sup>1</sup>

This is understandable. It would be highly unlikely that another party in litigation or criminal proceedings would find out about a communication to a religiously ordained official.

The Commission therefore questions why the protection is being considered at this stage.

On balance, the Commission believes that the potential benefit derived from protecting statements made to religiously ordained officials is outweighed by the possible disadvantages. This is particularly the case when the statement involves a confession about the commission of a crime.

The Commission understands that in practice a Catholic priest who hears a reconciliation (a confession) about criminal offences committed by a penitent will not divulge the contents of the reconciliation. However, the priest will not grant absolution to the penitent unless the penitent informs the police about the offences. Implicitly, the church has recognised that offenders who have confessed to crimes should not be protected by the reconciliation process. The Commission believes that the law should also reflect this attitude.

The Commission is also mindful that the logic behind extending protection to statements made to religiously ordained officials applies to other professional groups. The breadth of evidence which courts can use to come to a just decision will be reduced as a result. This possibility should be avoided.

---

<sup>1</sup> The Australian Digest lists *R. v. Lynch* [1954] Tas. S.R. 47 as a singleton case which has considered the ambit of legislative protection of confessions to clergymen in Australia.

## 2. COMMENTS ABOUT THE EVIDENCE (RELIGIOUS CONFESSIONS) AMENDMENT ACT, 1989 (N.S.W.).

In the previous chapter, the Commission recommended that legislation to protect statements made to religiously ordained officials should not be enacted.

However, the Commission has also been requested to examine and comment upon the **Evidence (Religious Confessions) Amendment Act, 1989 (N.S.W.)**.

This section therefore explores problems about the context and ambit of the New South Wales legislation. In light of the Commission's policy recommendation, no conclusions have been formulated about these problems.

Three other Australian jurisdictions have extended privilege to confessions made to members of the clergy. The manner in which legislation defines the privilege in these three jurisdictions is, in essence, identical. The relevant provisions are also referred to in the discussion below.

### (i) In what context should the privilege be acknowledged?

The four Australian jurisdictions which have legislated to protect statements made to a religiously ordained official from being divulged in Court proceedings extend this privilege to clergy of any church or religious denomination.<sup>2</sup>

In addition, the privilege protects only those statements which are confessional. The privilege extends to confessional statements only if they have been made to clergy in their professional character.<sup>3</sup>

Whilst it is clear from these legislative provisions that catholic confessionals (now termed reconciliations) are privileged, it is not clear what type of statements made in other religious denominations also gain the protection of the legislation.

It may be that there are special reasons to protect communications made by catholics to their priests. Practicing members of the catholic faith are required to regularly confess their sins. Confession is contingent upon absolution. For catholic priests, the sacramental confessional seal is inviolate : breach of its confidentiality brings with it automatic excommunication from the church.<sup>4</sup>

---

<sup>2</sup> Northern Territory - Section 12(1) ; Tasmania - Section 96(1) ; Victoria - Section 28(1) ; New South Wales - Section 10(1) and (6), **Evidence Act, 1898**.

<sup>3</sup> Ibid.

<sup>4</sup> Cannon Laws 983 and 1388 (1983 Code of Cannon Law).

However, there are other religions which place on their religiously ordained officials an ethical duty not to divulge what is said to them in confidence. In many religions, the members of the religious organisation see their religiously ordained officials as spiritual advisers. Whilst forms of religious expression other than catholicism may not place an individual duty on its members to confess at regular intervals to a religiously ordained official, the confidential nature of communications between church members and their officials may be essential for these members to approach ordained officials for spiritual assistance, explanation and reconciliation.

Arguably, statements made by members of a religion in confidence to their officials which have the effect of preserving or enhancing religious commitment and practice should be protected by the privilege, irrespective of the nature of that religion. To apply the privilege to one form of religious practice would be discriminatory to those who practice other religious beliefs.

How, then, should the privilege be defined?

**First, consideration could be given to listing those religions in which statements made to religiously ordained officials should be protected in legal proceedings.**

The Macquarie Dictionary defines "clergy" as -

"the body of men ordained for ministering in the Christian Church, as distinct from the laity."<sup>5</sup>

The use of the word "clergy" in defining the privilege has the effect of restricting the privilege to the Christian religion. Yet, in muslim, jewish and other religions the arguments for maintaining the confidences of the followers of these religions who are seeking spiritual assistance are equally relevant.

One solution is to list the types of religiously ordained officials to whom confidences can be made in privilege.

This approach has been adopted in some United States legislation. For instance, in Massachusetts, the privilege is extended to "priests, rabbis, ministers, and Christian Science practitioners".<sup>6</sup>

Scientology has been recognised as a religion in Australia.<sup>7</sup>

---

<sup>5</sup> The New Budget Edition, Herron Publications, West End 1985.

<sup>6</sup> St. 1962, Apr. 24, c.372, amending G.L., c.233.

<sup>7</sup> See *Church of the New Faith v. Commissioner of Pay-Roll Tax (Vic.)* (1983) 154 C.L.R. 120.

Mississippi defines "clergyman" as a minister, priest, rabbi, or other similar functionary of a church, religious organisation, or a religious denomination.<sup>8</sup> In Ohio, the privilege is extended to "regularly ordained, accredited, or licensed minister of an established and legally cognisable church, denomination, or sect...".<sup>9</sup>

**A second option in defining whether privilege should apply is to assess the content of, rather than to whom, the statement is made.**

All four Australian jurisdictions extend the privilege only to statements of a confessional nature when received by the religious official in a professional capacity.

Apparently, "confession" should be confined to its religious, rather than legal, sense. In a Tasmanian Supreme Court case, His Honour Justice Crisp observed -

"At common law I have no doubt [the word "confession"] was confined to a ritual confession made according to the discipline of the particular faith ... I do not wish to be taken as deciding that nothing other than a ritual confession is covered by the section. It may be that in our statute we have gone further. It may be that it extends to confessions for spiritual ends which do not conform to the requirements of a liturgy".<sup>10</sup>

The ambit of the word "confession" is unclear. Certainly, the word has a precise meaning within the catholic religion. However, if it is intended that the word should extend to other religious denominations, it would not appear to clearly classify the spiritual exchanges within those religions which are covered.

The context of the type of statement to which the privilege applies would need to be more exhaustively listed.

For instance, in Alabama the breadth of the communications protected by the privilege has been widened to include communications -

"...with a clergyman in his professional capacity and in a confidential manner

- (i) to make a confession;
- (ii) to seek spiritual counsel or comfort; or

---

<sup>8</sup> Miss.R.Evid. 505 (1986).

<sup>9</sup> Ohio Rev. Code Ann. Para. 2317.02 (C.) (Anderson Supp. 1988).

<sup>10</sup> R. v. Lynch [1954] Tas. S.R. 47 at 48.



- (iii) to enlist help or advice in connection with a marital problem...".<sup>11</sup>

**A third option in defining the context in which statements made to religiously ordained officials should be privileged is to concentrate neither on definitions of religion nor on the essence of the communication. Instead, the principles which make a communication deserving of privilege can be set out.**

For instance, Wigmore<sup>12</sup> sets out four conditions which must be present to establish a privilege against the disclosure of communications between two people standing in a particular relationship -

- (i) The communication must originate in a confidence of secrecy;
- (ii) The confidentiality of the communication must be essential to the relationship between the two people;
- (iii) In the opinion of the community, the secrecy surrounding the relationship must deserve recognition and countenance; and
- (iv) The injury done to the relationship by compulsory disclosure must be greater than the benefit to justice.<sup>13</sup>

When the privilege is claimed, the statement and the context in which it was made can be assessed by the legal adjudicator in light of these principles. The decision made will vary with the circumstances of each communication.

**(ii) To what court proceedings should the privilege apply?**

In New South Wales, a member of the clergy can refuse to divulge the contents of a religious confession in legal proceedings or hearings before a tribunal, court, or inquiry -

- (a) whose enabling statute states that the adjudicating body is not bound by the rules of evidence ; or
- (b) whose enabling statute says that witnesses called before it are not excused from answering any question or producing any document on the ground of privilege.

---

<sup>11</sup> Ala. Code Para. 12-21-166 (1986).

<sup>12</sup> 'Evidence in trials at common law' by J.H. Wigmore, revised by J.T. McNaughton Vol. 8 Paras. 2285 & 2396. Little, Brown & Company, Boston, 1961.

<sup>13</sup> These four principles were used when the Irish Supreme Court determined that confidential communications between a parish priest and parishioners should be privileged : *Cook v. Carroll* [1945] I.R. 515 at 520.

Specifically, the legislation says that the privilege can be taken in any hearing or proceedings before a royal commission, the Independent Commission Against Corruption, special commissions of inquiry, and parliamentary committees.<sup>14</sup>

By contrast, the Northern Territory and Tasmanian legislation applies the privilege to "any proceeding".<sup>15</sup> In Victoria, the privilege can be taken in "any suit, action or proceeding whether civil or criminal".<sup>16</sup>

If statements made to religiously ordained officials were protected from being divulged in legal proceedings in Queensland, the legislation would need to address what adjudicating bodies other than courts should be covered by the legislation.

The Commissions which have recently been established in Queensland are not given power under their enabling statutes to decide claims of privilege. These claims must be adjudicated by a Judge of the Supreme Court in chambers.<sup>17</sup> Therefore, a person who wished to claim privilege before these Commissions would incur considerable expense in asserting their claim. It may be more efficient for the Commissions themselves to enquire and make a determination about the claim. If the person claiming the privilege was aggrieved by the decision of the Commission, that person could then appeal to the Supreme Court.

### (iii) Who may claim the protection of the privilege?

The New South Wales legislation allows the privilege to be claimed by a past or present member of the clergy. Other jurisdictions place the duty to claim the privilege on present, not past, members of the clergy.

The New South Wales legislation also allows a member of the clergy to refuse to divulge information in legal proceedings. By implication, whether the protection of a religious confession should be claimed would appear to be the decision of the member of clergy to whom it was made, not the person who made it.

By contrast, the legislation in the Northern Territory, Tasmania, and Victoria place upon members of the clergy a duty not to divulge confessions made to them in legal proceedings unless the confessor consents. Certainly, a member of the clergy can claim the privilege. Further, a person who made the confession to the member of the clergy could obtain declaratory relief if a member of the clergy failed to take the privilege when duty-bound to do so.

---

<sup>14</sup> Section 10(3)(4) The Evidence Act 1898 (N.S.W.).

<sup>15</sup> Northern Territory - Section 12(1) ; Tasmania - Section 96 (1).

<sup>16</sup> Victoria - Section 28(1).

<sup>17</sup> For instance the Criminal Justice Act, 1989-1990, sections 3.9 and 3.10 ; The Electoral and Administrative Review Act 1989-1990, section 2.21 ; and Public Sector Management Commission Act, 1990, section 4.7.

**(iv) Possible limits to the application of the privilege.**

The legislative provisions of the Northern Territory, Tasmania and New South Wales do not protect communications made for a criminal purpose.<sup>18</sup>

In the context of a privilege for religious communications, the need for this type of provision is questionable. It is difficult to think of an example of a communication made for the purposes of seeking spiritual assistance or comfort which is also made for a criminal purpose. The two categories would appear to be mutually exclusive. Therefore, if a statement was made for a criminal purpose, the privilege could not apply.

**(v) Should consideration be given to the creation of a general privilege for statements made within a professional relationship?**

The Commission has previously observed that a range of professional groups may have grounds to seek protection from divulging confidences that are as strong as those applying to officials of religious organisations.

As a consequence, an extension of privilege to statements made in a religious context without reference to other professional settings may be seen as arbitrary.

In considering whether and what statements made to professionals should be privileged, both the Canadian and Australian Law Reform Commissions have recommended the enactment of general principles by which claims of professional privilege can be judged.<sup>19</sup> Claims by officials of religious organisations that confidences to them should be protected is acknowledged in both Commission reports.<sup>20</sup> But, rather than provide a specific privilege for spiritual confidences, both Commissions preferred that such confidences be judged according to general principles applicable to all professions.

A similar discretion could be given to adjudicators in legal proceedings to deal with professional witnesses.

Such a provision could be framed in general terms.

For instance, the Canadian Law Reform Commission recommended that statements made to a professional by a person who has consulted that professional are privileged "if in the circumstance, the public interest and the privacy of the relationship outweighs the public interest in the administration of

<sup>18</sup> Northern Territory - section 12(3) ; Tasmania - section 96(3) ; and New South Wales - section 10(2).

<sup>19</sup> The Law Reform Commission of Canada. First Report - Evidence. Ottawa, 1975 at pages 30 & 80.  
The Australian Law Reform Commission. Report No. 26 - Evidence, A.P.G.S., Canberra, 1985, in Vol. 2 at page 51.

<sup>20</sup> More particularly in the Australian Report. See Vol. 1 at pages 506-509.

justice."<sup>21</sup>

Alternatively, the provision could incorporate general principles by which the claim for privilege should be assessed. The four conditions to establish a privilege against the disclosure of communications outlined by Wigmore (see page 7), could provide a starting point. The fourth principle should be expanded to make clear that legal adjudicators should consider the injury done to both the relationship between the communicant and the professional specifically, and relationships of that type generally.

Once the privilege is established, the legal adjudicator should then consider whether the public interest in protecting the communication from disclosure in court proceedings outweighs the desirability of admitting the statements as evidence.<sup>22</sup> Relevant factors could include -

- (a) the likely significance of the statement to resolving the issues in dispute;<sup>23</sup>
- (b) if the proceedings are criminal proceedings - the seriousness of the offence; and
- (c) any mechanisms available to limit publication of the evidence.<sup>24</sup>

---

<sup>21</sup> First Report - Evidence Op.Cit. at pages 30-31.

<sup>22</sup> See the Evidence Amendment (No.2) Act, 1980 (N.Z.), section 35(1) & (2).

<sup>23</sup> Ibid - (2)(a).

<sup>24</sup> Australian Law Reform Commission. Report No. 26 - Evidence. Op.Cit. Vol. 2. Draft Bill. Section 103, at page 50.