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# CONCEAL OR REVEAL? THE ROLE OF LAW IN BLACK COLLAR CRIME

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**Abstract**

*This article reconsiders the way in which the State deals with the suppression or concealment of crimes, particularly child sexual abuse, by members of institutions such as churches. There are legal mechanisms available to bring such prosecutions and yet they are not being utilized. This article critically analyses the exemption from prosecution for concealing a serious indictable offence, by members of the clergy under section 316 (4) of the Crimes Act 1900 (NSW); and that section's relationship to the religious confession privilege under section 217 of the Evidence Act 1995 (NSW). The article deconstructs the three major justifications underpinning the legislative provisions. These justifications overlap, but can be isolated under the following headings: history, freedom of religion, and spiritual considerations. I argue that interpretation of section 316 (4) of the Crimes Act 1900 should, at a minimum, be confined to the scope of the religious confession privilege in section 217 of the Evidence Act 1995. Further, I argue that the justifications underpinning the legislative scheme and the assumptions they are based on are untenable in a secular society.*

## INTRODUCTION

In 2002 Australians were scandalised by the accusations of alleged inaction by Archbishop George Pell and Dr Peter Hollingworth when sexual assault complaints were made to them as prominent clergy members. This led to observations such as those made by the Democrat Senator Andrew Murray:

> There are two types of criminal and two types of crime: those who commit the crime of sexually assaulting children, and their fellow travellers, their accomplices, and those who criminally conspire and conceal those crimes to protect the perpetrators. Some church leaders are rightly accused – but far too few have been charged – with aiding

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> and abetting, being an accessory after the fact, obstructing the administration of justice, compounding a felony and criminal conspiracy.[2]

Recently both the Catholic and Anglican churches have been criticised again over similar inaction in the cases of former priests, Gerald Francis Ridsdale in Victoria and Raymond Frederick Ayles in South Australia.[3] In the case of Ridsdale, Judge Bill White in the County Court of Ballarat commented:

> The Catholic Church cannot escape criticism in my view of its lack of action on complaints being made as to your conduct, the constant moving you from parish to parish, providing more opportunities for your predatory conduct, and its failure to show adequate compassion for a number of your victims.[4]

In both cases church authorities were apparently aware of the crimes that Ridsdale and Ayles were committing but did not report them to police. In the case of Ridsdale the Catholic Church seemingly preferred to deal with the issue 'in-house' by moving him around the country and eventually defrocking him. There was complete inaction by the Anglican Church in the case of Ayles; after the victim's parent's disclosure to church leaders, they did not take any internal action (Ayles had already left the parish prior to the disclosure) nor did they make a complaint to the police.[5] Apart from the chastisement of the judiciary in the Ridsdale case, no official action was taken against those church officials who ostensibly concealed the crimes of Ridsdale or Ayles.

Given the recurrence of this theme, it is timely to reconsider the way in which the State deals with the suppression or concealment of crimes by members of institutions such as churches. There are legal mechanisms available to bring such prosecutions and yet they are not being utilized. Although the examples given above were not within the

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[2] Commonwealth, *Parliamentary Debates* , Senate, 19 June 2002, 2140, (Democrat Senator Andrew Murray).
[3] James C, 'Church 'ignored abuse', *The Advertiser* (Adelaide), 7 June 2006, 9 and Hodgson S, 'Fury at Pedophiles Sentence', *Herald Sun* (Melbourne), 11 August 2006. http://www.news.com.au/heraldsun/story/0,21985,200090899-661,00.html.
[4] Hodgson S, 'Fury at Pedophiles Sentence' *Herald Sun* (Melbourne), 11 August 2006, http://www.news.com.au/heraldsun/story/0,21985,200090899-661,00.html.
[5] *R v Ayles* [2006] SADC 67.

jurisdiction of New South Wales (NSW), it is the legal mechanisms within NSW that will be considered.[6]

This paper will critically analyse the exemption from prosecution for concealing a serious indictable offence, by members of the clergy under section 316 (4) of the *Crimes Act 1900* (NSW) and the relationship of this section to the religious confession privilege under section 217 of the *Evidence Act 1995* (NSW). The paper will discuss the three major justifications underpinning the legislative provisions. The justifications overlap, but can be isolated under the following headings: history, freedom of religion, and spiritual considerations. The paper will argue that the justifications underpinning the legislative scheme and the assumptions they are based on are untenable in a secular society. Further, the paper will argue that interpretation of section 316 (4) of the *Crimes Act 1900* should, at the minimum, be confined to the scope of the religious confession privilege in section 217 of the *Evidence Act 1995*.

The issue, with which this paper is primarily concerned, pertains to the concealment by clergy members and churches as institutions[7] of child sexual abuse perpetrated by other clergy members. It is contended that it is no longer acceptable for the church to be viewed in isolation, both by itself and by the state. Isolationism is acknowledged as an explanation as to why the church in the past neither reported cases of child sexual abuse to police, nor encouraged the victims or their families to do so.[8] Isolationism has also contributed to the tendency of the church to view the sexual abuse of children as a moral failure rather than as a serious breach of criminal law.[9] Moreover, the church has exercised mercy towards clergy members but has lacked mercy towards those who have been abused. The paper will argue that the state has traditionally viewed the church in

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[6] All Australian jurisdictions have such mechanisms but they vary substantively from state to state. See *Criminal Code Act 1899* (Qld) s133; *Criminal Code* (WA) s136; *Criminal Code Act 1983* (NT) s104; *Criminal Code Act 1924* (Tas) s102; *Criminal Code* 2002 (ACT) s716; *Criminal Law Consolidation Act 1935* (SA) s241; *Crimes Act 1958* (Vic) s326.

[7] The words clergy, priest and church are being used in this paper in a generic and non-gendered sense. I acknowledge that there have been instances where nuns have perpetrated such abuse, see Burke K, Church Demands Silence Over Abuse' *Sydney Morning Herald* (Sydney), 21-22 December 2002, 7. I would also like to acknowledge that whilst many examples presented throughout the paper will have reference to the Catholic Church, it is not my intention to focus on this institution for any particular reason. Much of the research and comment in this area relates to the Catholic Church and it is for this reason that this institution is prominent in the paper.

[8] Parkinson P (Prof), "The problem of child sexual abuse in church communities" in *Child Sexual Abuse in Queensland: Selected Research Papers*, Queensland Crime Commission, Brisbane, 2000, 70.

[9] Ibid.

isolation and as such has contributed to the 'culture of silence' around child sexual abuse by clergy members. This in turn has generated a culture where crimes are perpetuated, as the state is not prosecuting the crime of concealment by clergy members.

The paper will deconstruct the justifications and rationales for the privilege and exemption concepts by employing 'genealogy' as a tool for analysis. The purpose of using this framework is not to uncover the 'origin' of concepts, but to diversify the theme of continuity in a historical analysis, in order to understand how domains of knowledge have been formed. What is sought is how the privilege and exemption concepts were 'invented'. The knowledge associated with law and religion was made; it didn't just appear.[10] It is therefore necessary to identify the 'politics of truth'. That is, an analysis of the struggle for power and domination between 'unequals' through rituals and procedures that impose rights and obligations; to understand knowledge, its process of manufacture and the manipulation of traditional history.[11] The paper will analyse the discourse relating to the privilege and exemption concepts to 'disturb what was previously considered immobile', to 'fragment what was thought unified', and to show 'the heterogeneity of what was imagined consistent with itself.'[12]

Part One of the paper will discuss the legislative position, detailing the evidentiary privilege in relation to religious confessions; the offence of concealing a serious indictable offence and the exemption from prosecution for specified professions or callings; and as a point of comparison the professional communications privilege will be discussed to give an example of a privilege based in secular rationales. Part Two of the paper will deconstruct the historical justifications in relation to the privilege and exemption concepts, and demonstrate that this position is uninformed as it is based on assumptions about the existence and scope of the privilege as formulated by the common law. Part Three of the paper will deconstruct the freedom of religion

[10] Foucault, Michel. "Truth and Judicial Forms" Excerpt in *Power: Essential Works of Foucault, 1954-1984: vol. 3*, translated by Robert Hurley, The New Press 1974, 4. Foucault is discussing the invention of knowledge by examining Nietzsche's theory that a historical analysis of the formation of the subject and the birth of a certain type of knowledge is undertaken without ever granting the pre-existence of a subject of knowledge.
[11] Foucault, Michel. "Nietzsche, Genealogy, and History", Bouchard DF (ed) *Language, Counter-Memory, Practice: Selected Essays and Interviews*, Cornell University Press 1977, 150. See also Foucault, above n 10, 7.
[12] Foucault, above n 10, 147.

justification, and will argue that the doctrine of separation of church and state is undermined because the law is not founded on secular rationales. Part Four of the paper will explore the recurrent theme of spiritual considerations as a justification, and will argue that the primacy the law gives to the considerations of freedom of religion and spiritual considerations undermines the right of children to not be sexually abused.

## PART ONE: THE LEGISLATIVE POSITION

### 1.1 Privilege

The general policy behind the privilege concept in the law of evidence means that a witness who is otherwise competent, and who can give evidence relevant to the proceedings, can refuse to disclose that information if it was given to the witness in confidence.[13] The consequence of a privilege validly invoked is that the witness is not compellable and this creates an impediment to the fact-finding task of the court. Privileges are devised to protect the rights of a party to litigation or prosecution so as to ensure a fair trial, and in most circumstances it is their right to waive the privilege. As such, the government must ensure statutory privileges are in the public interest and in the interests of the administration of justice.

The law of evidence has traditionally recognised certain relationships, where essentially the preservation of trust between the confider and confidant, overrides the law's interest in full disclosure of facts. For example, to promote the stability of marriage the law recognises a privilege between husband and wife, and the law recognises a privilege between lawyer and client to promote candid exchange in preparation for litigation.[14] These privileges were formulated under the common law and, although their scope and applicability may have been altered, they have been preserved by statute. The religious confessions privilege has also been embodied in the legislation, but unlike the other privileges mentioned its rudiments are difficult to derive.

### 1.2 Religious Confessions Privilege

[13] McNicol SB, *Law of Privilege*, Law Book Company 1992, 1.
[14] Callahan MJ, "Historical Inquiry into the Priest-Penitent Privilege" (1976) (3) *The Jurist*, 328, 328-329.

The 'origin' of the religious confessions privilege is illusive; commentators, lawyers and politicians alike struggle to pinpoint its source. As will be demonstrated in Part Two, the common law position in relation to this privilege is uncertain. To overcome any uncertainty or inconsistency in the law, and the way in which it is applied, the legislature in NSW decided to embody the religious confessions privilege in legislation.

The *Evidence Act 1898* (NSW)[15] did not contain a privilege pertaining to religious confessions until amending legislation,[16] inserted section 10 (1). This created a statutory privilege restricted to the contents of a confession. 'Religious confession' for the purposes of this section means:

> 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.[17]

This provision appears to afford protection to formal or ritual confessions that are unequivocally referrable to the 'priestly character' of the clergy.[18] Further, the provisions only afford protection to those denominations with an established or ritual system of confession and penitence.[19] This was confirmed by the then Attorney General of NSW:

> Many people need to express themselves to a clergyman or other confidante; but unless that expression falls within the strict confines of the existing recognised privileges, it is not likely that the law ought to be extended to include them. However, the freedom of the ritual confession – which in our society is primarily practised by the Roman Catholic Church and some other orthodox churches – ought to be retained in order that people may protect their freedom of worship.[20]

Section 127 of the *Evidence Act 1995* (NSW) is essentially the same as its counterpart in the 1898 Act. Section 127 (1) creates a statutory privilege restricted to religious confessions made to a member of the clergy, when a member of the clergy, of *any* church or religious denomination. The exception to this being, if the communication

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[15] This Act was repealed and replaced with the *Evidence Act 1995* to counterpart the (Uniform) *Evidence Act 1995* (Cth).
[16] *Evidence (Religious Confessions) Amendment Act 1990* (NSW).
[17] Section 10 (6) *Evidence Act 1898* (NSW).
[18] McNicol SB, above n 13, 333.
[19] McNicol SB, above n 13, 335.
[20] Mr Dowd, New South Wales Assembly, *Parliamentary Debates (Hansard)*, 13 September 1989 at 9900.

involved was made for a criminal purpose.[21] The definition of religious confession is exactly the same as in the 1898 Act.[22] This is because the section was derived from the 1898 Act; it was not proposed by the Australian Law Reform Commission (ALRC).[23] Despite the indication that the privilege applies to any church or religious denomination, it is apparent that it will not encompass all religions because the definition of 'religious confession' is referrable to a 'ritual'. Not all churches engage in 'ritual confession' as acknowledged by the Attorney General. Further, there is no express provision for loss of this privilege and it applies to the fact that the confession was made, and to the content of the communication.[24]

The legislature identified three major justifications for embodying this privilege in legislation: history, freedom of religion, and spiritual considerations. The same justifications underpin the reforms to the *Crimes Act 1900* (NSW) in relation to the exemption from prosecution for concealing a serious indictable offence by clergy members. As such, the scope of the exemption should be limited to knowledge acquired in a ritual confession about a crime.

The justifications for the religious confessions privilege will be examined more fully in the following parts of the paper. It will be demonstrated that two of the justifications, freedom of religion and spiritual considerations, are primarily founded in non-secular rationales. This is logical, as the subject pertains to religious confessions. However, it is argued that the justifications are untenable in secular society and only assist in defining the scope of the privilege, and in turn, the scope of the exemption from prosecution. Other forms of privilege are founded on secular rationales. The following discussion on the professional confidential relationship privilege is included to provide a point of comparison, to demonstrate how the scope of this privilege is referrable to the rationales that underpin it, and consequently, how those rationales define the scope of the exemption from prosecution.

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[21] Section 127 (2) *Evidence Act 1995* (NSW).
[22] Section 127 (4) *Evidence Act 1995* (NSW).
[23] Odgers S, *Uniform Evidence Law*, 5th ed., Law Book Company, Sydney, 2002, 402. The ALRC proposed a general exclusionary discretion applicable to all "confidential communications" (fn 466).
[24] Ibid 402. The privilege also applies in circumstances where an Act provides that the rules of evidence don't apply, or that a person or body is not bound by the rules of evidence, or that a person is not excused from answering any question or producing any document or other thing on the ground of privilege or on any other ground.

### 1.3 Professional Confidential Relationship Privilege – Division 1A *Evidence Act 1995*

This Division applies only to the NSW Act; there is no comparable Division in the Commonwealth Act.[25] A "protected confidence" is defined as:

> … a communication made by a person in confidence to another person (in this Division called a confidant):
>
> (a) in the course of a relationship in which the confidant was acting in a professional capacity; and
>
> (b) when the confidant was under an express or implied obligation not to disclose its contents, whether or not the obligation arises under law or can be inferred from the nature of the relationship between the person and the confidant.[26]

The scope of the term 'acting in a professional capacity' is uncertain, but the types of relationship contemplated by the Attorney General include 'confidences imparted to doctors and other health professionals, journalists, social workers and in other relationships where confidentiality is an integral element.'[27]

Exclusion of evidence of protected confidences requires the court to balance the 'public interest in preserving the confidential nature of certain relationships (which might be undermined by forced disclosure of confidential communications) against the public interest in having the relevant evidence placed before the court to ensure a fair trial.'[28] The public interest in preserving the confidential nature of certain relationships is best demonstrated by giving examples.

The public interest in preserving the confidentiality of doctor/patient is 'public health', in that this relationship assists in the treatment of physical and psychic problems.[29] It would be counterproductive to the treatment process if a patient were inhibited in disclosing certain information by the prospect that information relating to their illness

[25] Odgers S, above n 24, 86 – the Division was incorporated into the *Evidence Act 1995* by the *Evidence Amendment (Confidential Communications) Act 1997* (NSW).
[26] Section 126A *Evidence Act 1995* (NSW).
[27] Odgers S, above n 24, 387.
[28] NSW Attorney General's Department, Discussion Paper, "Protecting Confidential Communications from Disclosure in Court Proceedings" (June 1996), par 4.9 in Odgers S, above n 24 , 388-389.
[29] Odgers S, above n 24, 394.

could be adduced in evidence. Similarly, in the psychotherapist/client relationship in which full disclosure by the client is required for effective therapy, the concept of confidentiality is crucial.[30] Essentially, people would be less likely to disclose information or seek the services of these professions at all, particularly if their need for the service was connected to an illegal activity- such as drug use. This would not serve the public interest in the treatment (or containment) of disease, the treatment of mental illness or the minimisation of crime.

The scope of the privilege in relation to the doctor/patient and psychotherapist/client relationship pertains to the treatment situation, and is in place to protect the confider not the confidant. There is acknowledgement that ethical conflicts arise in these professions and that there is no procedure to deal with this. The provision of a discretionary privilege allows competing public interests to be taken into account, and allows courts to be sensitive to the individual needs of witnesses and of certain relationships in deciding whether evidence should be adduced.[31]

It may be that confidential counselling outside the confessional could be included within the scope of this privilege. However, the legislature enacted a separate provision for religious confessions that is not subject to judicial discretion, and rejected the proposal of the ALRC to have them included in the confidential relationship privilege.[32] This suggests that priests are compellable to give evidence of communications made outside the confessional. If a confidential communication were made outside the confessional a priest could not rely on the inviolable seal of the confession as a justification for not disclosing evidence.

The essence of the confidential communications privilege and religious confessions privilege is the preservation of trust and confidence where specific relationships are established. This enables doctors, for example, to effectively treat their patients, and it enables members of the clergy to provide spiritual assistance to members of their church. As such, it would not be within the scope of the confidential communications privilege where a doctor acquired information pertaining to a crime committed by a

[30] Odgers S, above n 24, 395.
[31] Odgers S, above n 24, 394.
[32] Odgers S, above n 24, 402.

colleague (who was not a patient). Nor would it be within the scope of the religious communications privilege where a priest acquired information pertaining to a crime committed by another priest (who was not a penitent).

### 1.4 Concealing a Serious Indictable Offence

The general rationale for amendments to the *Crimes Act 1900* (NSW) at the time was to reform the law concerning offences involving interference with the course of justice.[33] This was seen to be needed because:

> At present there is no comprehensive statement of law relating to public justice offences. The law is fragmented and confusing, consisting of various common law and statutory provisions, with many gaps, anomalies and uncertainties. Common law offences have no specific penalty provided, and the exact limits of these offences are sometimes difficult to establish.[34]

The amendments to the *Crimes Act* have certainly consolidated the law but whether the amendments have actually ameliorated the law with regard to the application of the reforms is an entirely different issue. In relation to the concealment of child sexual abuse by the clergy, there appears to be reluctance in exercising the discretion to prosecute under this section. The arguments supporting this proposition will become apparent in the following discussion.

Section 316 Concealing serious indictable offence

> (1) If a person has committed a serious indictable offence and another person who *knows or believes* that the offence has been committed and that he or she has information which might be of material assistance in securing the apprehension of the offender or the prosecution or conviction of the offender for it fails without reasonable excuse to bring that information to the attention of a member of the Police Force or other appropriate authority, that other person is liable to imprisonment for 2 years.
>
> (2) …

[33] Mr Dowd, Second Reading, New South Wales Assembly, *Parliamentary Debates (Hansard)*, 17 May 1990 at 3691.
[34] Ibid 3692.

(3) …

(4) A prosecution for an offence against subsection (1) is not to be commenced against a person without the *approval of the Attorney General* if the knowledge or belief that an offence has been committed was formed or the information referred to in the subsection was obtained by the person *in the course of practising or following* a profession, calling or vocation prescribed by the regulations for the purpose of this subsection. (Emphasis added.)

Clause 6 (f) of the Crimes (General) Regulation 2000 prescribes *inter alia*, 'a member of the clergy of any church or religious denomination'.[35]

'Knows or Believes' an offence has been committed

Section 316 of the *Crimes Act* was enacted to replace the common law offence of misprision of felony.[36] Section 316 is wider than the offence of misprision of felony, in that a 'belief' that an offence has been committed is all that is required. This imposes a duty on a person who has direct or indirect knowledge or evidence to report the crime to the appropriate authorities.

'In the course of practising or following a profession, calling or vocation'

Meeting this requirement could provide a 'reasonable excuse' for not disclosing a crime. 'In the course of…etc' is a broadly stated requirement that has not yet been interpreted by the judiciary. The scope of the requirement can be gleaned from the prescribed professions listed in the regulation as exempt from prosecution. It is contended that the extent of the exemption is confined to the scope of the evidentiary privileges referrable to some of those professions.[37]

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[35] Other professions, callings or vocations prescribed are (a) a legal practitioner, (b) a medical practitioner, (c) a psychologist, (d) a nurse, (e) a social worker, including (i) a support worker for victims of crime, and (ii) a counsellor who treats a person for emotional or psychological conditions suffered by them, (g) a researcher for professional or academic purposes, and (h) if the serious indictable offence referred to in section 316 (1) is an offence under section 60E of the Act, a school teacher, including a principal of a school - '(h)' was inserted by the Crimes (General) Amendment (School Protection) Regulation 2003 which commenced on 10 February 2003.

[36] The offence at common law of failing to report a known felony to the police within a reasonable time, when a reasonable opportunity for doing so existed: *R v Wozniak* (1988) 16 NSWLR 185 in Nygh PE & Butt P (eds), *Butterworths Concise Australian Legal Dictionary*, 2nd ed, Butterworths 1998.

[37] For example - a legal practitioner, medical practitioner, psychologist, nurse, social worker or counsellor.

This issue was raised, by the author, in an interview with Justice Dowd, who as Attorney General initiated these amendments to the *Crimes Act*. In relation to the inclusion of medical practitioners in the regulation, Justice Dowd stated the rationale was that people had to disclose, for example, how they had received a wound in order to obtain proper medical treatment.[38] They may have received the wound whilst committing a crime and would not fully disclose if there was a likelihood of police involvement. Although section 316 of the *Crimes Act 1900* precedes Division 1A of the *Evidence Act 1995*, the scope and rationales underpinning the exemption and privilege are the same. On the inclusion of the clergy in the regulation, Justice Dowd indicated his intention at the time was that the exemption was confined to the scope and rationales for the religious confessions privilege. As such a Catholic priest would be prosecuted for not disclosing the confession of a crime by a Protestant. In this situation the priest is not receiving the confession in the course of his profession or calling, but is considered a member of society with a civil duty to report the crime.

The judiciary may not interpret the exemption in this way. It is open to them to construe the exemption as being much wider than this. That is because the regulation prescribes 'a member of the clergy of *any* church or religious denomination'. However, not all churches or religions practice 'ritual confessions'.[39] By using such a general phrase, the intention of the legislature could be interpreted as indicating that the exemption is not referrable to the confines of the religious confessions privilege. On the other hand, a court considering the context in which the words 'of any church or religious denomination' occur should have regard to the other professions listed in the regulation. In doing so, the court would have to determine the scope of the exemption in relation to what was 'in the course of practising' those professions.[40] It is the author's opinion that this would logically lead them to conclude that the exemption is confined to the scope

[38] Interview with Justice Dowd, Judge in the Common Law Division of the Supreme Court of New South Wales and former Attorney General of NSW, 5 June 2003, interview by Lesley Townsley.
[39] It was emphasised in the debates that the privilege would not provide protection for communications between members of the clergy and their parishioners that are not in the nature of counselling and not confessions. New South Wales, *Parliamentary Debates,* Council, 21 November 1989, 12805 (EP Pickering).
[40] Even if the court thinks it appropriate to refer to extrinsic material for guidance, for example the minister's second reading speech to interpret the meaning of those words; it would be of little or no assistance. It contains no reference to section 316 (4) or the inclusion of the professions or callings in the Regulation.

and rationales relating to the evidentiary privileges. This would result in the confinement of the exemption for the clergy, as it would be referrable to the scope of the evidentiary privilege for religious confessions. That is, the exemption only extends to knowledge of a crime obtained in a ritual confession.

Approval of the Attorney General

It must be noted that the section does not afford complete protection from prosecution for the enumerated professions in the regulation. A prosecution can be commenced with the approval of the Attorney General. A decision to prosecute is made on the advice of either or both the Office of the Director of Public Prosecutions or the Criminal Law Review Division in the Attorney General's Department. The prosecutorial discretion can be understood as a 'bridge between the strict enforcement of the law and letting crimes go unpunished.'[41] In deciding whether to commence with a prosecution the dominant consideration of what is required in the public interest is balanced against more pragmatic considerations, such as the sufficiency of evidence and the prospect of securing a conviction.[42] It is has been asserted that exercising the discretion is not driven by political motives in Australia.[43] The author does not wish to question the integrity of the Attorney General, or suggest intentional bias in exercising this discretion. However, the fact that a member of the executive branch of government holds the discretion is indicative of its political nature.

The author is unaware of any prosecutions of clerics under this section for concealing the crimes of other clerics in relation to child sexual abuse. The unwillingness of the State to prosecute is connected to notions of religious freedom and the continuing isolationism of the church. However, these reasons are irreconcilable with the position that the discretion to prosecute should be exercised if the obtaining of information occurred outside the practice of a calling or vocation. Providing there is sufficient evidence the public interest demands this. Consequently, clerics are considered members of society with a civic duty; it is not an impingement on their religious

[41] Interview with Justice Dowd, above n 39.
[42] Brown D, Farrier D, Neal D, Weisbrot D, *Criminal Laws: Materials and Commentary on Criminal Law and Process in New South Wales*, 2nd ed, The Federation Press 1996, 140.
[43] Interview with Justice Dowd, above n 39. Justice Dowd was referring here to the political nature of legal appointments in the United States and how that might influence the discretion to prosecute.

freedom, because at the time of obtaining the information they are not 'practising or following a calling or vocation'. As one American commentator observes:

> Religious liberty does not require the government to back off in the face of irrefutable, weighty, and sickening evidence of a concerted enterprise to further criminal activity… When the Constitution guaranteed religious freedom, no one believed it also provided a license to commit religiously-motivated crime.[44]

The legislative reforms in respect to the *Evidence Act* and *Crimes Act* were enacted to ameliorate the law with respect to the requirements of disclosure regarding confessional communications made to a cleric. It is contended that the privilege and exemption provisions were limited deliberately by the legislature so that communications made outside a ritual confession are excluded.

Professional confidential relationship privilege is used as a point of comparison. This privilege balances the competing public interest in preserving the confidential nature of certain relationships against the public interest in having relevant evidence placed before a court to ensure a fair trial. This part of the paper has demonstrated how the scope of this privilege is referrable to the rationales that underpin it, and consequently how those rationales define the scope of the exemption from prosecution. This position is parallel to the privilege and exemption concepts.

The three major justifications that underpin the legislative reforms are history, freedom of religion and spiritual considerations. The paper will now consider the adequacy of justifications given to support the legislative reforms by deconstructing the discourse and ideology that has informed them.

## PART TWO: HISTORICAL JUSTIFICATIONS

The legal arguments said to support the existence of the priest-penitent[45] privilege at common law are, that it must have existed at the time of Reformation, and had not been

[44] Hamilton M, "Sacrificial Lambs?: Child Abuse, Religious Exemptions, and the Separation of Church and State" 28 March 2002, FindLaw Legal Commentary, http://writ.findlaw.com/hamilton/20020328.html

[45] In this part of the paper the privilege will be referred to as that of the priest-penitent, as it is derived from the common law. The religious confessions privilege is statutory language adopted when reforms to the *Evidence Act* were enacted.

displaced by any statute; and it was impliedly recognised in the case of *R v Hay*.[46] However, it has been suggested that the privilege between priest and penitent did not exist at common law.[47] This view is based on the assertion that the modern law of evidence developed after the Reformation and as such, it was very unlikely that a privilege in favour of priests would have been created.[48] Further, there is a paucity of judicial support for the claim that no privilege arises out of the priest and penitent relationship. Both positions, as to existence or non-existence of the privilege, can be legitimised by the manipulation of traditional history. The effect of reliance on traditional history confirms the belief that the present 'rests upon profound intentions and immutable necessities' and it does so by 'dissolving the singular event into an ideal continuity – as a teleological movement or natural process.'[49] The analysis of this position will demonstrate that the historical justifications for the religious confessions privilege in the *Evidence Act* are based on assumptions and inconsistencies, and consequently, that this position is uninformed.

### 2.1 Existence of the Privilege at Common Law

*R v Griffin*[50] supports the proposition that the privilege existed at common law.[51] The court upheld that communications between a chaplain and the defendant charged with murder of her infant child were privileged. Reference to the death of the infant was made during the conversations, and the chaplain as her spiritual adviser had administered the consolations of religion. Alderson B. stated:

> I think these conversations ought not to be given in evidence. The principle upon which an attorney is prevented from divulging what passes with his client is because without unfettered means of communication the client would not have proper legal assistance. The same applies to a person deprived of whose advice the prisoner would not have

[46] (1860) 2 F. & F. 4 in Mr Dowd, Second Reading, New South Wales Assembly, *Parliamentary Debates (Hansard)*, 13 September 1989 at 9899.
[47] McNicol SB, above n 13 at 324; Callahan MJ, above n.14 at 328-329; Perrella MA, "Should Western Australia Adopt An Evidentiary Privilege Protecting Communications Given in Religious Confessions?" (September 1997) 4 (3) *E Law – Murdoch University Electronic Journal of Law*, 6, http://www.murdoch.edu.au/elaw/issues/v4n3/perr43.html; Mr Dowd, Second Reading, New South Wales Assembly, *Parliamentary Debates (Hansard)*, 13 September 1989 at 9898; The Hon. Franca Arena, New South Wales Council, *Parliamentary Debates (Hansard)*, 21 November 1989 at 12806.
[48] McNicol SB, above n 13 at 326.
[49] Foucault, above n 11, 154-155.
[50] (1853) 6 Cox C.C. 219.
[51] McNicol SB, above n 13 at 324.

> sustained proper spiritual assistance. I do not lay this down as an absolute rule, but I think such evidence ought not to be given.[52]

In *R v Hay*[53] a Catholic priest returned a stolen watch to police and was called to give evidence as to who had given him the watch. The priest refused to disclose this information claiming it had a connection with the confessional. The court held the priest in contempt because the question did not require the priest to disclose anything said in confession. A fact that occurred after and out of the confession, even though in consequence of it was not within the privilege.[54] In other words, the priest was not acting in his capacity as a spiritual adviser by taking the watch and returning it.[55] Hill J relies on the authority of Lord Coke in recognising that the privilege existed before Reformation and had survived it because no statute had displaced it.[56] Further, that the Anglican clergy fall within the privilege where they have received confessions according to the rubric of the Visitation of the Sick with the view to giving absolution.[57] This is because the recognition of confession implies the recognition of secrecy 'otherwise, no one would be likely to confess, and therefore the directions to the Anglican clergy, to exhort their penitents to confess, would be idle and futile.'[58]

Whilst both cases are put forward to support the existence of the priest-penitent privilege at common law, being consistent with the teleology of the justification, there are differences that should not be overlooked. Hill J, in *R v Hay* explicitly confines the scope of the privilege to sacramental confessions and rationalises this position through traditional historical and theological analysis. Whereas in *R v Griffin*, the privilege is extended to communications made to a spiritual adviser; whether or not in sacramental confession, this position is rationalised by legal analogy. This demonstrates irregularity in legal reasoning, which in turn demonstrates that the 'origin' of the privilege is not immutable. The justification for basing the privilege on 'origins' within traditional history, or by analogy with other legal rights, does not give the impression of reassuring stability or validity in the present.

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[52] *R v Griffin* (1853) 6 Cox C.C. 219 in McNicol SB, above n 13 at 324-325.
[53] (1860) 2 F. & F. 4.
[54] *R v Hay* (1860) 2 F. & F. 4 at 8.
[55] Ibid 9.
[56] Ibid 6-7.
[57] Ibid 7.
[58] Ibid 7.

### 2.2 Non-existence of Privilege at Common Law

Proponents of the view that the priest-penitent privilege does not exist at common law put the following cases forward. It should be noted that in terms of legal authority each case has little precedential value beyond persuasive authority. The cases that contain statements are either *obiter dicta* or could be differentiated on the facts. Again, this can only lead to the conclusion that justifications based on this position are uninformed in a legal sense. However, their historical value places them in a position that potentially undermines the arguments for the existence of the privilege at common law.

The issue in *Broad v Pitt*[59] pertained to the attorney-client privilege. Best CJ states:

> I think this confidence in the case of attorneys is a great anomaly in the law. The privilege does not apply to clergymen, since the decision the other day, in the case of *Gilham*.[60]

*Wheeler v Le Marchant*[61] concerned the parameters of legal professional privilege, Lord Jessel states:

> Communications made to a priest in the confessional on matters perhaps considered by the penitent to be more important even than his life or his fortune, are not protected.[62]

*Normanshaw v Normanshaw & Measham*[63] concerned a vicar who was compelled to give evidence of a conversation in an interview with a woman who was alleged to have committed adultery. Jeune P stated:

> … that each case of confidential communication should be dealt with on its own merits, but in the present instance, he saw no reason as to why the witness should not speak as to his conversation with the respondent… [In summing up] it was not to be supposed for a single moment that a clergyman had any right to withhold information from a court of law. It was a principle of our jurisprudence that justice should prevail, and no unrecognised privilege could be allowed to stand in the way of it.[64]

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[59] (1828) 3 C. & P. 518.
[60] *Broad v Pitt* (1828) 3 C. & P. 518 at 519.
[61] (1881) 17 Ch. D. 675.
[62] *Wheeler v Le Marachant* (1881) 17 Ch. D. 675, 681.
[63] (1893) 69 L.T. 468.
[64] *Normanshaw v Normanshaw & Measham* (1893) 69 L.T. 468, 469.

It is unclear whether any 'confession' was made to the vicar and as other witnesses had testified to admissions made by the respondent it is doubtful whether the vicar's testimony was required at all. Further, the report does not disclose any reference by Jeune P to precedent or other legal analysis in support of this view. Given this, the principle expounded could only be considered as persuasive legal authority.[65]

Irrespective of its value as precedent, Jeune P made some pertinent observations. Confidential communications are to be dealt with on their own merits and it is not to be assumed that there is a 'right' to withhold information from a court. This indicates that the privilege cannot be automatically invoked, so as to usurp the function of the court in determining whether the evidence is relevant and the witness is compellable. However, the denial that this right does not exist is not based on principle or reliable knowledge and is therefore an assumption. Equally, the proposition that a right does exist is an assumption. As was demonstrated earlier the legal arguments in favour of the existence of the privilege are not based on established principle or reliable knowledge.

Reference to legal discourse alone has not produced reliable knowledge in the sense that it does not contribute to comprehensive understanding of the subject. The development of knowledge requires something more. But this does not necessarily require the subject to be taken out of the historical context. The analysis here is not concerned with historical 'origins', but with 'unities' formed to establish understanding. These 'unities' are validated by syntheses in knowledge that are generally accepted from the outset.

Lawmakers often overlook the consequence of basing interpretation of a subject in a historical context and accepting the syntheses in knowledge. A context in which the dominant ideologies and religions of the majority have promulgated their tenets, customs and rituals, appropriated language and validated their history, may become the norm against which the new is to be judged. An example of this can be seen in the legislative debates, as one member of the NSW Legislative Council stated in relation to clarifying the definition of 'religious confession':

> I… was assured that the interpretation of the proposed subsections must be made in a historical context. Those provisions speak about ritual confessions; that is, established

[65] See also the corresponding analysis of the case in McNicol SB, above n 13, 327.

> religious rituals that have been established over hundreds of years. It is important to take that perspective. I wanted to ensure that the proposed legislation did not inadvertently give protection to some of the jumped-up religions that have sprung up around the world in recent years.[66]

At work here are all the accepted syntheses of knowledge Foucault identifies that legitimise the proliferation of dominant ideology.[67] *Tradition* - in that defining a 'ritual' requires reference to the permanence of the sacrament; *development* and *evolution* in that dispersed events are represented by the anomalies in the common law, and the organising principle is embodied in the legislation, and; *spirit*, the sovereignty of collective consciousness transpiring into unity and explanation. This can be identified in normative statements such as: 'The reasons for the privilege are deep seated. Most reasonable people feel it is reprehensible conduct to violate a confidence;'[68] and 'Most people in the community believe that this right already exists.'[69] The consequence of accepting these syntheses is that it does not create meaningful understanding of the subject; it only contributes to understanding how this domain of knowledge has been formed.

Reliance on traditional history is uninformed because it is based on unexamined assumptions. The irregularities in legal reasoning demonstrate that the 'origin' of the privilege is not immutable and recourse to a history that is also based on assumptions results in an uninformed position. The conflicting views as to whether the privilege arose pre-Reformation or post-Reformation demonstrate the kinds of assumptions the common law is based on.

The development of knowledge requires something more than recourse to origins. Unquestioned syntheses in knowledge form unities; their purpose is to establish further understanding of the subject. However, the traditional history of the religious confessions privilege, and the unities within that history, do not contribute to

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[66] The Hon. SB Mutch, Second Reading, New South Wales Council, *Parliamentary Debates (Hansard)*, 21 November 1989 at 12807.
[67] Foucault, Michel. *The Archaeology of Knowledge*, Routledge, London, 1992, 21-22.
[68] Mr Dowd, Second Reading, New South Wales Assembly, *Parliamentary Debates (Hansard)*, 13 September 1989 at 9900.
[69] Mr Harrison, Second Reading, New South Wales Assembly, *Parliamentary Debates (Hansard)*, 16 November 1989 at 12758.

meaningful understanding of the subject. Other justifications are required to reinforce the legitimacy of the law such as the principle of freedom of religion and the importance of spiritual considerations.

## PART THREE: FREEDOM OF RELIGION

The doctrine of separation of church and state is devised by two principles: non-establishment of any religion through law (non-establishment principle), and the principle of free exercise of any religion (freedom of religion).[70] The doctrine can be understood as addressed to all governmental institutions, in relation to religious institutions, to imply that the state should not interfere with the church and the church should not interfere with the state.[71]

This is viewed as essential for free and democratic society and as such has been included in the Australian Constitution.[72] It is suggested that the inclusion of freedom of religion in the Constitution was owed more to political expediency than to principled reflection by the founding fathers.[73] Religious groups were successful in campaigning to have reference made to 'Almighty God' in the preamble. As a way of reassuring non-religious voters and voters from minority religions s116 was inserted to assure them that the government could not impose or interfere with religion.[74]

### 3.1 Non-Establishment Principle

With regard to the non-establishment principle the High Court of Australia has interpreted the prohibition against a 'law for establishing any religion' as aimed at laws that make a particular religion the national religion, or establish a state church, or

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[70] Sadurski W, "On Legal Definitions of Religion" (1989) 63, *Australian Law Journal*, 834 in Sadurski W (ed), *Law and Religion*, Dartmouth Publishing, England, 1992, 297.
[71] Audi R, "The Separation of Church and State" (1989) 18, *Philosophy and Public Affairs*, 259 in Sadurski W (ed), *Law and Religion*, Dartmouth Publishing, England, 1992, 32.
[72] Section 116 Australian Constitution – The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth.
[73] Booker K, Glass A, Watt R, *Federal Constitutional Law: An Introduction*, Butterworths, Australia, 1994, 227.
[74] Ibid 227.

entrench a religion as a national institution.[75] This construction of section 116 can be compared to how the United States Supreme Court has interpreted the non-establishment principle. On the issue of whether or not state aid to religious schools amounted to the establishment of religion, the court formulated the following test for validity under the First Amendment. A law will be invalid if it fails either (1) *purpose* – does the law have a non-secular purpose, or (2) *effect* – is its primary effect to advance or inhibit religion or (3) *entanglement* – does the law lead to an excessive entanglement of government with religion.[76] This is a more expansive interpretation of the principle than that of the High Court and religious confessions privilege apparently satisfies this test as the privilege is recognised by a significant number of states in America.[77]

However, there is significant controversy in the United States surrounding the constitutional validity of mandatory reporting laws requiring clerics to report child abuse, including the forced disclosure of confidential penitential communications.[78] This is seen as a violation of the free exercises of religion clause in the First Amendment. Conversely, eleven states have passed Religious Freedom Restoration Acts (RFRA), which amongst other things limit the reporting requirements of the church.[79] The federal RFRA was held to be unconstitutional because it blocked the application of generally applicable laws to religious individuals and entities; the state laws have not been challenged.[80] This highlights a fundamental tension between laws that give more weight to spiritual liberty than the protection of children. This issue will be explored further in Part Four of the paper.

### 3.2 Freedom of Religion

It is suggested that the doctrine effects not only institutions within a democracy, but is also applicable to individual conduct.[81] Preferences for certain religions sometimes

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[75] *A-G (Vic) (ex rel Black) v Commonwealth* (1981) 146 CLR 559 in Booker K, et al above n 73, 228.
[76] *Lemon v Kurtzman* 403 US 602 (1971) in Booker K, et al above n 73, 228.
[77] Callahan MJ, above n 14 329.
[78] Scott JW, "Confidentiality and Child Abuse: Church and State Collide" (February 1986), *Christian Century*, obtained from http://www.religion-online.org .
[79] Hamilton M, "Religious Freedom Restoration Acts may help conceal clergy child abuse" (2002), FindLaw Legal Commentary, http://www.cnn.com/2002/LAW/11/11findlaw.analysis.hamilton.church .
[80] Hamilton M, "Religious Freedom Restoration Acts may help conceal clergy child abuse" (2002), FindLaw Legal Commentary, http://www.cnn.com/2002/LAW/11/11findlaw.analysis.hamilton.church.
[81] Audi R, above n 71, 29.

occur in lawmaking because individuals bring certain predilections to their functions as lawmakers. This is inevitable, but as we live in a secular and democratic society, it is contended that while any kind of factor, including a non-secular factor, may enter the discussion of issues, 'the final decision to adopt the policy should be fully warranted (and motivated) by secular considerations and promulgated in that light.'[82] In other words, actions permissible under separation of church and state should not depend on religious justification for validity.[83]

The fundamental right to unfettered practice of religion is a broadly stated principle. It requires that religions be classified and defined. Inevitably what is actually recognised is the fundamental right to unfettered practice of *some* religions. In the Parliamentary debates the NSW Attorney General indicated the narrow application of the principle to the religious confessions privilege[84] when he stated that the main benefactors would be Roman Catholics and some orthodox religions and that the purpose would be to overcome anomalies in the common law and 'to give back' the right of freedom of religion to Catholics and their priests.[85] By inference there will be some religions that will be excluded and some religions given preference. Others are more blatant in their predilection towards exclusion. This position is apparently justified otherwise 'jumped up'[86] religions and 'non-recognised churches and anti-churches'[87] could also claim protection for communications.

This position exposes the 'politics of truth' at work through this form of discrimination, and is connected to historical justifications. Power and domination is being exercised by the majority; their power is referrable to the tenets, customs and rituals they have promulgated to validate their history. Again, this positions the majority and their standards to be the norm against which the new or different is to be judged. This validates the definition of religion and legitimises justifications for exclusion. It

[82] Audi R, above n 71, 50. A secular reason is defined as a reason whose justificatory element does not depend on the existence of God, or on theological considerations, or on the pronouncements of a person or institution qua religious authority.
[83] Audi R, above n 71, 55.
[84] See quote on page 6.
[85] Interview with Justice Dowd, above n 38.
[86] The Hon. SB Mutch, New South Wales Council, *Parliamentary Debates (Hansard)*, 21 November 1989 at 12807.
[87] The Hon. FJ Nile, New South Wales Council, *Parliamentary Debates (Hansard)*, 21 November 1989 at 12831.

legitimises certain types of religion and hence the operation of the exemption and privilege in certain situations. Additionally, the rituals and procedures embodied in the law, imposing rights and obligations, have not created further understanding of the subject. What it does demonstrate in this situation is how the law is being utilised as a tool for domination.

It has been observed that the principle of free exercise of religion:

> … has an expanding dynamic built into it (calling for a positive and active legal attitude towards claims to have one's religious requirements respected through legal accommodation, exemptions and privileges), and this very dynamic threatens to undermine the disengagement of the State from religious matters demanded by the non-establishment principle.[88]

The non-establishment principle would not be eroded by the principle of religious freedom if policies and laws had sufficient grounding in secular considerations. This, to some extent, would also ameliorate this issue of discrimination against minority religions and the non-religious as:

> Adherence to the principle of secular rationale helps to ensure that, in determining the scope of freedom in a society, the decisive principles and considerations can be shared by people of differing religious views, or even no religious conviction at all.[89]

Additional arguments that support the free exercise of religion rationale are ingrained in non-secular considerations, which in reality allow the jurisdiction of the church to override the jurisdiction of the state – 'asserting the spiritual over the temporal'.[90] Examples include the rationale that ministers will always abide by the ethical duty of confidence, and that breach of this confidentiality can result in excommunication from the church. The church promotes the confidentiality of the confessional as sacrosanct and ministers have a duty not to violate the sacramental confessional seal.[91]

It is legitimate to ask, if not religious reasons then what secular reasons could the law be based on in regard to religious exemptions and privileges. However, framing the

[88] Sadurski W, above n 70, 297.
[89] Audi R, above n 71, 60.
[90] McNicol SB, above n 13, 330.
[91] Perrella MA, above n 47, [17-18].

question in this way reverts to a simple dichotomy, which in itself does not provide a satisfactory answer. The answer will never be satisfactory because of the complexities of sustaining religious freedom within a secular society. The approach becomes one of attempting to strike a balance between competing interests. This of course requires a shift in power relations. In the past and in the present, primacy has been given to spiritual considerations over temporal considerations in relation to the relevant religious privilege and exemption from prosecution. This shows partiality towards the rights of the clergy, undermines the rights of children not to be abused and exposes a lack of mercy from both the State and the Church towards them. The primacy given to these considerations and the consequence of this position by lawmakers will be discussed further in Part Four of the paper.

## PART FOUR: SPIRITUAL CONSIDERATIONS

The purpose of this part of the paper is to explore the recurrent theme of spiritual considerations as a justification pertaining to the laws in question. The common law analysis in Part Two of the paper was limited to gaining an understanding of its applicability as a historical justification. In this section the common law analysis will be elaborated on to extract the extents to which spiritual considerations have been relevant in formulating the law. This approach also applies to spiritual considerations regarding the freedom of religion justification. In doing so, the paper will discuss the consequences of allowing the jurisdiction of the church to override the jurisdiction of the state. The primacy given to spiritual considerations[92] over temporal considerations[93] by the clergy, and the allowances made by the state to accommodate this, is ultimately impinging on the right of children to not be sexually abused. There are limits to the allowances the state will make and this is evidenced by confining the scope of religious confessions privilege in the NSW legislation to 'ritual confessions'.

### 4.1 Spiritual vs. Temporal

[92] Spiritual is used to denote matters that relate to the spirit or soul, especially as acted on or proceeding from God, holy, divine, inspired; or concerns with sacred or religious things.
[93] Temporal is used to denote things of this life and secular justifications or rationales.

The anomalies that arose in the common law do not only relate to whether the priest-penitent privilege existed or not, but also as to the scope and applicability of the privilege. Further, the following cases emphasise the tension in balancing spiritual and temporal considerations.

In *Broad v Pitt*[94] Best CJ points to anomalies in the law regarding privileges:

> I think this confidence in the case of attorneys is a great anomaly in the law. The privilege does not apply to clergymen, since the decision the other day, in the case of *Gilham*. I, for one, will never compel a clergyman to disclose communications, made to him by a prisoner; but if he chooses to disclose them, I shall receive them in evidence.[95]

Best CJ exposes a fundamental tension in the philosophical framework of this area of the law. The tension is between the natural law argument of what the law ought to be, and positivist argument of what the law is.[96] Best CJ acknowledges what the law is but would refuse to follow it based on a perception of what the law ought to be. Here natural law arguments are prevailing over positivist arguments and as a result, spiritual considerations are prevailing over temporal considerations. When natural law arguments prevail, it is on the premise that a priest would never disclose a communication even if compelled by law. Based on this theory, the law should accept and accommodate this by not requiring the cleric to disclose, as it would be against conscience to do so.

This statement from *R v Griffin*[97] has been mentioned earlier in support of the proposition that the priest-penitent privilege existed at common law, but it is worth repeating for the purpose of illustrating the point. Alderson B. stated:

> I think these conversations ought not to be given in evidence. The principle upon which an attorney is prevented from divulging what passes with his client is because without unfettered means of communication the client would not have proper legal assistance. The same applies to a person deprived of whose advice the prisoner would not have sustained proper spiritual assistance. I do not lay this down as an absolute rule, but I think such evidence ought not to be given.[98]

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[94] (1828) 3 C. & P. 518.
[95] *Broad v Pitt* (1828) 3 C. & P. 518, 519.
[96] McNicol SB, above n 13, 330.
[97] (1853) 6 Cox C.C. 219.
[98] *R v Griffin* (1853) 6 Cox C.C. 219 in McNicol SB, above n 13, 324-325.

This statement gives spiritual considerations equal weight with temporal considerations in that 'proper spiritual assistance' is equated with 'proper legal assistance'. The equation therefore rationalises the existence of the privilege based on a temporal analogy. This reasoning avoids the tension between natural law and positivist arguments by focusing on the purpose of the communication for the confider; not on the nature of the confidential relationship or the confidant.

The following cases of *R v Lynch*[99] and *R v Howse*[100] discuss legislative provisions that are broader in definition than the corresponding provision in NSW for the religious confessions privilege. The main difference being that there does not have to be a formal confession made as a matter of religious duty or established custom. However, the confession must be at least partly impelled by religious belief or practice.

In *R v Lynch* the accused was charged with defilement of a girl under 18 years of age. The accused called on a priest of the Church of England to ask the priest to persuade the girl's father to agree to marriage. He also made statements that he had intercourse with the girl. Crisp J held in regard to section 96 of the *Evidence Act 1910* (Tas):

> At common law I have no doubt it was confined to a ritual confession made according to the discipline of the particular faith in so far as a privilege existed at all. I do not wish to be taken as deciding that nothing other than a ritual confession is covered by that 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 with the requirements of liturgy*. But here the confession was not made for any spiritual purpose. I am satisfied that it was not here made to a priest in the character of a priest… I hold the evidence to be admissible.[101] (Emphasis added)

*R v Howse* considers the scope of the privilege under the *Evidence Amendment Act (No 2) 1980* (NZ). The evidence of the minister Mr Walton, who had received a telephone call from the defendant after he had killed his girl friend, was admissible. During the conversation the defendant had admitted stabbing the girl and had asked Mr Walton to pray for her. The court held that a confession in the religious sense ordinarily meant an 'avowal of penitence and a request for forgiveness or absolution' and where this did not

[99] [1954] Tas S.R. 47.
[100] [1983] NZLR 246 (CA).
[101] *R v Lynch* [1954] Tas S.R. 47, 48.

apply to certain churches or beliefs at the minimum there must be a request for spiritual help, even if this only constitutes part of the communication.[102] The defendant had not claimed he was motivated by his own religious belief and this did not accord with the rationale of the privilege being 'that a person should not suffer temporal prejudice because of what is uttered under the dictates or influence of spiritual belief.[103]

In the latter half of the twentieth century, in some jurisdictions at least, there is an attempt to accommodate the various religious groups in society. Although the definition has been expanded so as not to require a formal confession in both of these cases, it does not mean that the privilege will attach to all confidential communications. The communications are relevantly confined to those that are a 'request for spiritual help' or made for a 'spiritual purpose'. In doing so the law is seeking to address any imbalance that would occur if all communications made to a cleric fell within the scope of the privilege.

The next case demonstrates the privilege in a predominantly Catholic country, Ireland, and as such can be considered a non-secular society. There the privilege is recognised by common law but not the common law of England. In *Cook v Carroll*[104] a priest was held in contempt of Court for refusing to testify as to the matters during a conference at his house, in the presence of the defendant and the plaintiff's daughter.[105] On appeal to the High Court the priest again refused to testify and the court had to determine whether the priest was guilty of contempt.

In *Cook*, Duffy J distinguished and refused to apply the common law of England. The Constitution of Ireland recognised the special position of the Roman Church 'as the guardian of the Faith professed by a great majority of its citizens' and 'affirms the indefeasible right of the Irish people to develop its life in accordance with its own

[102] *R v Howse* [1983] NZLR 246 (CA), 250-251.
[103] *R v Howse* [1983] NZLR 246 (CA), 251.
[104] [1945] I.R. 515 (hereafter *Cook*).
[105] The daughter alleged that the defendant had seduced her and her mother brought an action for the seduction. The daughter attributed paternity of her unborn child to the defendant, who on learning this went to the parish priest. In the report it is said that the priest "intervened in the hope of averting a public scandal in the interest of his flock, by either inducing the girl to withdraw a false charge, or persuading the man to make amends for the wrong done to her." [1945] I.R. 515, 516.

genius and traditions.'[106] As such Duffy J found that he must treat the law in Ireland at the date of the Constitution as '*tabula rasa*'.[107] This interpretation of the law allowed Duffy J to extend the privilege to that of sacerdotal privilege.[108] The main reasons for this being that such intimate confidence 'wears a sacred character of immense potential benefits to the community' and to protect confidences that would not have been otherwise exchanged except for the implicit belief in confidentiality.[109]

The approach of Duffy J is impeccably legalistic and using this legalism to wipe the slate clean, provides the basis on which an alternate form of legalism can be established. This 'surreptitious appropriation of a system of rules' is used not only to verify the existence of the priest-penitent privilege but also to expand its scope to include communications outside of the confessional. As Foucault observes:

> The successes of history belong to those who are capable of seizing these rules, to replace those who had used them, to disguise themselves so as to pervert them, invert their meaning, and direct them against those who had initially imposed them; controlling this complex mechanism, they will make it function so as to overcome the rulers through their own rules.[110]

At this point in history Duffy J has been successful in seizing the rules of legal reasoning so as to direct those rules against and replace the principles contained in English common law. This process enabled Duffy J to manufacture the discourse of the common law of Ireland by manipulating the traditional history of the law. Reformulating the law in this way is legitimised by acknowledging the non-secular nature of the society in which the law is applicable.

As was mentioned in Part Three of the paper, there is a fundamental tension between laws that give more weight to spiritual liberties than temporal liberties, such as the protection of children. Arguments that support the free exercise of religion, in relation

[106] *Cook v Carroll* [1945] I.R. 515, 519 – Duffy J goes further stating that it in a State where 9 out 10 citizens are Catholic it would be "intolerable that the common law, as expounded after the Reformation in a Protestant land, should be taken to bind a nation which persistently repudiated the Reformation as heresy."
[107] *Cook v Carroll* [1945] I.R. 515, 522 – '*tabula rasa*' scraped tablet; clean slate.
[108] Ibid, 523-524 – sacerdotal privilege is the legal right for a priest to refuse in a court of law to divulge any confidential communication whatever made to him as a priest. See also *In re Keller* (1887) 22 L.R. Ir. 158.
[109] *Cook v Carroll* [1945] I.R. 515, 520-524.
[110] Foucault, above n 11, 151.

to the non-disclosure of confessional communications, are ingrained in spiritual considerations. For example, the rationale that ministers will always abide by the ethical duty of confidence and that breach of this confidentiality can result in excommunication from the church. When these arguments outweigh temporal considerations the state is effectively validating the position that the jurisdiction of the church overrides that of the state.

This is a particularly contentious issue in relation to child sexual abuse. The state's position is questionable because by not viewing the concealment of crimes as a crime, and by not taking action to prosecute the crime, the state is tentatively complicit in the concealment of child sexual abuse by the clergy.

**CONCLUSION**

Allegations of child sexual assault by members of the clergy have caused outrage in Australia and internationally.[111] It is regarded as a particularly abhorrent crime given the betrayal of trust involved and the suffering of the victims. This outrage is intensified by revelations that the clergy and the church have concealed the abusive acts of fellow clergy members. Between 1993 and 1999, 61 Catholic priests and brothers were sentenced for sexual offences in Australia.[112] Many of these cases go back years, even decades, and often the offenders have been charged with multiple offences. In some instances, it is indicative of the process of denial by the church in bringing the perpetrators to justice by fostering a 'culture of silence" and allowing perpetrators continued access to children.

As one commentator observes, given the vast opportunities within church communities to access children by the clergy and lay people:

[111] See for example Seccombe M, Burke K, "The people's will: G-G must resign" *Sydney Morning Herald*, 6 May 2003, 1 – where 76% of the Australian electorate surveyed believed the Peter Hollingworth should resign as Governor General because he had allowed a paedophile priest to continue working; Lowell EV, "Child abuse scandal forces US church to confront its demons" *The Observer*, 3 March 2002, where there are calls for Cardinal Bernard Law, America's senior Catholic prelate to resign over accusations that he covered up the crimes of paedophile priests and moved them between parishes.
[112] Parkinson P, above n 8, 62.

> It is not surprising then, that churches have a problem with child sexual abuse. It would be surprising if they did not. The issue is how well churches have addressed the problem and what measures they have taken to seek to prevent abuse.[113]

The issue of child sexual abuse by the clergy is public and there is increasing demand for more accountability by church leaders. In the United States the issue of sexual abuse and the denial of the issue by the church reached a crisis point.[114] Similarly, in Australia, the issue was been highlighted by the accusations of inaction against Archbishop George Pell, and the accusations of inaction against Dr Peter Hollingworth, when sexual assault complaints were made to him as Anglican Archbishop of Brisbane.[115] And more recently the issue has arisen with the prosecutions of Gerald Francis Risdale and Raymond Frederick Ayels for sexual offences.

The Catholic Church in Australia produced a protocol to address the procedural and pastoral procedures for sexual abuse. However, the increasing number of allegations of sex abuse and sexual misconduct by the clergy led to a review of this protocol and, as a result, it may offer less transparency and public accountability – 'ostensibly in the interests of protecting clergy rights.'[116] The Vatican went further, vetoing a plan by Catholic Bishops in the United States to adopt a policy of 'zero tolerance' towards clergy found guilty of child sex abuse.[117] It appears that the Catholic Church, at least in some respects, is continuing to be isolationist by maintaining a level of self-regulation with low-level accountability, and maintaining an unmerciful attitude towards the victims of abuse.

There are examples of churches taking a more proactive stance. An Anglican priest was defrocked on the grounds of sexual misconduct for an indecent assault involving a 14-year-old girl more than twenty years ago.[118] This measure was made possible by an amendment to the church's sex abuse procedures. The church took action despite the

[113] Ibid. .
[114] Goodstein L, "Over 1200 priests in sex scandal" *Sydney Morning Herald*, 13 January 2003, 9.
[115] See Taylor J, "Australian child abuse scandal rocks church amid new evidence" Story from AFP, 31 May 2002, obtained from Softcom webnews http://www.softcom.net; "Catholic child abuse furore" *The Bulletin*, 5 June 2002, obtained from http://bulletin.ninemsn.com.au .
[116] Burke K, "Pell leads push to protect clergy accused of abuse" *Sydney Morning Herald*, 28 November 2002, 5.
[117] Ibid – "The Vatican said the terms of abuse were too widely defined, contradicted canon law and failed to protect an alleged offender's right to due process."
[118] Burke K, "Priest defrocked for sexual misconduct" *Sydney Morning Herald*, 17 March 2003, 7.

DPP dropping criminal charges due to a conviction being unlikely. Given the controversy surrounding the perceived inadequacy of response by the former Archbishop of Brisbane on these issues, the church and the broader public is clearly sending a message of intolerance towards sexual abuse by the clergy.

Many professions in NSW have a duty to report suspected cases of child sexual abuse.[119] The clergy are not included in the enumerated professions. The state has characterised sexual abuse as an indictable offence yet they are not treating the concealment of this crime as criminal. Why not? The rationales underpinning law provide untenable justifications. A pertinent observation in this respect is, 'that the idea of religious freedom as a good advanced by the law suggests that possible conflicts with religious observances can alter the very definition of a crime.'[120] In this situation, concealment of an offence as a crime has been redefined by the unsustainable justifications underpinning the law.

Society should demand a higher level of accountability by the state. The criminality of concealment by churches is apparently condoned when the state does not pursue the prosecution of those involved in concealing criminal acts. As one American commentator observes:

> The only conclusion observers can draw is that until Catholic Bishops and Protestant equivalents are prosecuted and put behind bars for failure to report, or for collusion or accessory to a crime, the cover-ups and inaction will continue.[121]

There are some jurisdictions, mainly in the United States, making laws to hold the church more accountable in cases of child sexual abuse.[122] This position is said to make the overall topography clear:

> … both in the letter of the law and the spirit in which it is interpreted and prosecuted – and reported. Whereas religious bodies have traditionally been accorded a large

[119] The *Community Welfare (Child Assault) Amendment Act 1985* various categories of people to reported suspected cases including: teachers; physiotherapists; counsellors for schools and family courts; child care workers; psychologists; speech therapists; nurses and police. In at Brown D et al, above n.42 at 902
[120] Robilliard JA, "Religion, Conscience and Law" (1981) 32 (4), *Northern Ireland Legal Quarterly*, 358 in Sadurski W (ed), *Law and Religion*, Dartmouth Publishing, England, 1992, 265.
[121] Gaylor AL, "Churches Challenged To Reform in the Face of Black Collar Crimes" http://www.ffrf.org/articles/pedochallenge.html.
[122] French authorities are convicting clerics on charges of failing to assist a person in danger and failing to report a crime. In Paedophilia In Religion, source Independent News, 4 September 2001. http://www.idahoatheist.org.

measure of deference and confidentiality, they are now to be *treated more like secular institutions*.[123] (Emphasis added)

In those jurisdictions proposed changes to the law are largely based on mandatory notification of child (sexual) abuse, and to punish supervisors who knowingly expose children to child abusers.[124] This has possible consequences for the preservation of the religious confessions privilege. In Connecticut, a Bill was debated that would have required priests to report abuse if a child was in imminent danger, even if they learned about it during confession. The Bill was amended to keep confessions private because there were protests from Catholics.[125] In Illinois, a Bill was introduced to add the clergy to the list of mandatory reporters but it was criticised because the Bill would not require the clergy to report information learnt while acting as a spiritual advisor.[126] Although mandatory reporting is an option, where a balance could be struck between spiritual and temporal considerations, by adding the clergy to the list of mandatory notifiers excluding information obtained by confession, this is not necessarily needed in NSW if section 316 of the *Crimes Act* is utilised.

Several criticisms have been levelled at the inclusion and operation of section 316, including a recommendation that it should be repealed.[127] Some of the criticisms pertain to the potentially inappropriate use of the section by law enforcement agencies and the philosophical objection that although there may be a moral duty to assist police, there should not be a legal duty.[128] Despite these criticisms the section has been retained, and confining its scope to the rationales that underpin the privileges in the *Evidence Act* provides an opportunity to use section 316 appropriately as it applies to the enumerated professions, particularly the clergy. Without this clarity we would have the ironic situation where lay people not only have a higher legal duty to assist in the administration of justice, but also a higher moral duty than the clergy. The state should be compelled to reconsider the untenable justifications for viewing the church in

[123] Hoover DR, "Cutting the Church Less Slack" (2002) 5 (2), *Religion in the News*, http://www.trincoll.edu.
[124] Ibid.
[125] The Associated Press, "Sex-abuse Scandal Spurs Debate over Confidential Confessions" 19 June 2002, http://www.freedomforum.org .
[126] Ibid.
[127] New South Wales Law Reform Commission, *Review of Section 316 of the Crimes Act 1900 (NSW),* Report 93 (1999), 3.58.
[128] Ibid [3.58-3.59].

isolation and allowing a culture of crime to be perpetuated. The state must intervene otherwise they are potentially complicit in the concealment of these crimes.

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