

IS THE SEAL OF THE CONFESSIONAL PROTECTED BY CONSTITUTIONAL OR COMMON LAW?

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I INTRODUCTION

The Australian Royal Commission into Institutional Responses to Child Sexual Abuse ('Royal Commission') has now been completed. The Royal Commission has now issued its *Final Report*,¹ *Criminal Justice Report*² and *Redress and Civil Litigation Report*.³ The extent of abuse uncovered by the Royal Commission has shocked many, with one of its reports estimating that there are 60 000 survivors of institutional child sexual abuse in Australia.⁴ A national redress scheme commenced on 1 July 2018 to provide financial compensation to survivors of abuse. Significant law reform will likely occur as a result of the Royal Commission's exhaustive work. Of course, this problem is not limited to Australia, with large-scale institutional abuse discovered elsewhere.⁵ It goes without saying that survivors of child sexual abuse deserve our fullest sympathy and compassion for what they have endured. For many survivors, the effects of the abuse will affect them throughout their lives.⁶ The legal system cannot change what happened to them, but it has a large part to play in terms of uncovering and responding to abuse.

The Royal Commission has shone a spotlight on the response and attitude of 'institutions' to alleged abuse. The reference to 'institution' here will often mean a religious institution. In many cases, the response of the institution to suggestions of abuse has been found to be inadequate. Obviously, it is hoped that institutions now have much better systems in place than was previously the case, to reduce the chances of abuse occurring, or to discover and weed it out more quickly where it is occurring. The large question of institutional responses to child abuse figured prominently in the Commission's *Final Report*. The Commission has noted that many survivors of institutional abuse reveal that they disclosed

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1 Commonwealth, Royal Commission into Institutional Responses to Child Sexual Abuse, *Final Report* (2017).

2 Commonwealth, Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice Report* (2017).

3 Commonwealth, Royal Commission into Institutional Responses to Child Sexual Abuse, *Redress and Civil Litigation Report* (2015).

4 *Ibid* 8.

5 Marie Keenan, *Child Sexual Abuse and the Catholic Church: Gender, Power, and Organizational Culture* (Oxford University Press, 2012) 17–19.

6 Anthony Gray, 'Extending Time Limits in Sexual Abuse Cases: A Critical Comparative Evaluation' (2009) 38 *Common Law World Review* 342, 344–6.

what was happening, but that the institution did not respond effectively.⁷ Some survivors have reported that their abuser confessed the abuse to other members of the religious institution of which they were a part, but the person to whom the abuser confessed failed to inform the police. As a result, abuse continued.⁸ This raises the question of the duty, if any, of a person to whom abuse was disclosed to report that abuse to authorities. Obviously, the law has in some cases introduced a mandatory duty to report suspected abuse, as will be seen.

At least in some circumstances, the disclosure of the abuse may have occurred during the religious practice known as ‘confession’. In this process, a person who has done wrong confesses that wrong to a religious figure. The further question thus arises as to the duty, if any, of a religious figure to whom abuse was disclosed to report that abuse to authorities. The ritual of confession has a long tradition in religion, and has fundamental significance for adherents of some faiths. What is said during confession is typically thought to be sacrosanct and inviolable, at least for some faiths.⁹ Specifically, the Roman Catholic tradition is adamant regarding the sanctity of the confession. This is sometimes referred to as the ‘seal’ of confession. Confession and its traditional characteristics are generally considered to be part of the notion of ‘freedom of religion’ to which many jurisdictions, including Australia, subscribe.

Whilst the abuse that has occurred, and that has been alleged to have occurred, is of course not confined to the Roman Catholic faith, it has been noted that ‘all the evidence suggests that the Catholic Church has experienced a disproportionate problem in relation to child sexual abuse’.¹⁰ Parkinson notes the Catholic Church has ‘attracted attention also because of widespread allegations that it has covered

7 *Final Report*, above n 1, vol 16.

8 Joe Harman, ‘The Power of Confession: Mandatory Reporting, Confession and the *Evidence Act*’ (2013) 38 *Alternative Law Journal* 239, 243:

[d]ifferent protections for perpetrators and victims are arguably problematic given what we now know of clergy abuse and the difficulties, to date, of prosecution for offences or civil suit for compensation. Notwithstanding that the actions confessed have been morally (sin) and legally (crime) wrong (both on the basis of canon and secular law) no action or disclosure by clergy has been compellable. The effect has been to conceal and allow the ongoing perpetration of abuse.

See also Paul Winters, ‘Whom Must the Clergy Protect? The Interests of At-Risk Children in Conflict with Clergy-Penitent Privilege’ (2012) 62 *DePaul Law Review* 187, 221: ‘[i]ntervention must be provided promptly because the level of a victim’s stress is directly proportional to the length of time the victim is subjected to the trauma-causing event’.

9 Libreria Editrice Vaticana, *Code of Canon Law*, The Holy See, [983 §1] <<http://www.vatican.va/archive/ENGL104/P3G.HTM>>: ‘[t]he sacramental seal is inviolable; therefore it is absolutely forbidden for a confessor to betray in any way a penitent in words or in any [other] manner and for any reason’; Seymour Moskowitz and Michael J DeBoer, ‘When Silence Resounds: Clergy and the Requirement to Report Elder Abuse and Neglect’ (1999) 49 *DePaul Law Review* 1, 8: ‘[t]oday, 1,600 years after Pope Leo I’s declaration [about the private nature of confession], these doctrines regarding the Sacrament of Penance and the Seal of Confession remain inviolate’.

10 Patrick Parkinson, ‘Mandatory Reporting of Child Sexual Abuse by Religious Leaders’ in Ben Mathews and Donald C Bross (eds), *Mandatory Reporting Laws and the Identification of Severe Child Abuse and Neglect* (Springer, 2015) 295, 296. A study commissioned by the United States Conference of Catholic Bishops found allegations of abuse were made against approximately 4 per cent of priests in the period between 1950 and 2002: John Jay College of Criminal Justice, *The Nature and Scope of Sexual Abuse of Minors by Catholic Priests and Deacons in the United States, 1950–2002* (2004) 162.

up these offences and has otherwise failed to respond appropriately to victims'.¹¹ There may be some institutional features of the Catholic Church which explain this.¹² Perhaps not coincidentally, one of these features is said to be the general secretive approach and silencing of debate,¹³ as well as strongly hierarchical structures which encourage strict obedience. There is evidence that the Church simply moved suspected paedophile priests to other dioceses, rather than deal with the allegations, out of a (misguided) belief in maintaining the reputation of the church at all costs.¹⁴ This secrecy can worsen the impact of the abuse on the survivor.¹⁵ This makes the question of the status of the confessional, and in particular disclosure in the confessional of child sexual abuse offences, especially pointed.

This situation sets up a conflict between two fundamentally important principles. On the one hand, the state has a strong legitimate interest in protecting from harm children living within it. Virtually all in society would accept the role (duty) of the state to intervene to protect a child from harm, or to do what it can to prevent further harm. On the other hand, Australia is a vibrant liberal democracy built on a Judeo-Christian heritage, and is a very successful multicultural (and multi-faith) society, while recognising and respecting those who are agnostic or atheist. Australia, like most Western nations, recognises and protects religious freedoms. Many of its laws have religious underpinnings. In the current context, some argue that the church ritual of confession must be respected, and its secrecy maintained, as a key religious observance and part of freedom of religion.¹⁶

Fundamentally, this article will ask and suggest answers to two questions: (1) whether a law removing the statutory privilege currently enjoyed by religious figures would be constitutionally invalid due to s 116 of the *Australian Constitution*; and (2) whether law mandating religious figures to report suspected child abuse would be constitutionally invalid due to s 116 of the *Australian Constitution*. A subsidiary question will be the status at common law, if any, of a priest-penitent privilege. This is important because the statute book of some states does not contain a specific priest-penitent privilege. The Royal Commission has recommended

11 Parkinson, above n 10, 297.

12 Keenan, above n 5, 25–51.

13 Ibid 37–9.

14 Ibid 186–7. In some jurisdictions, delays in reporting suspected abuse to authorities preclude either or both a criminal or civil legal action against, respectively, the alleged perpetrator and their religious institution.

15 Ibid 205:

It was the failure of the diocesan authorities to deal with their concerns regarding the continued ministry of abuse perpetrators that most distressed many parents [according to an Irish Report into abuse]. It is clear that the suffering and stress of survivors was often related to the fact that their abuser was still functioning as a cleric and might therefore be a threat to other children.

Keenan discusses one abusive priest, against whom allegations of abuse were made by two boys. The boys were sworn to silence. Little action was taken against the priest, and he went on to abuse other children over an 18-year period: at 223.

16 'What impact does it have on social cohesion and respect for the law if the law refuses to accommodate genuinely and deeply held beliefs and religious practices which have long been respected in the past? Arguably, the case for overriding the seal of the confessional has not been made out': Parkinson, above n 10, 305.

that religious figures be required to report suspicion of child abuse.¹⁷ Already some states and territories have indicated their intention to change their laws so as to make members of clergy subject to mandatory reporting regimes.¹⁸ The article considers whether a law of this nature would be inconsistent with the free exercise of religion enshrined in s 116 of the *Australian Constitution*.

The article is structured as follows. Part II will consider the position of the confessional in terms of the common law of Australia. The history of the confessional, and its secrecy characteristic, will be explored. It is important to note and acknowledge the centrality of the confessional to the Catholic faith, in particular. This assists with later discussion of freedom of religion, and whether laws relating to the confessional will infringe religious freedoms in a manner that is challengeable. This Part will also consider the extent to which the privilege was or is part of the English common law. This is logically necessary in order to consider the subsequent question of whether the secrecy of the confessional is currently recognised as being part of the Australian common law, as being ‘received’ law. This is particularly important for those jurisdictions in Australia which do not currently recognise a statutory privilege with respect to the priest-penitent relationship.

Part III considers the position of the confessional and Australian statute law. It includes discussion of the extent and effectiveness of existing mandatory reporting schemes in relation to suspected child abuse at a more general level. This will be relevant to Part V of the paper, including any approach based on proportionality testing. If the courts were to apply proportionality testing, the efficacy of the provision which impacts on religious freedom would be relevant. Hence, the need for some discussion at a policy level of the efficacy or otherwise of existing laws relating to mandatory reporting, though concededly these laws as presently crafted apply to office holders other than clergy.

Part III also explains existing legislation applicable to the confessional. It is necessary to explain existing legislation in order to properly understand the significance of the two proposals contained in Part IV and V of the article, namely an abrogation of the existing privilege, and then a possible mandatory reporting requirement on clergy. Those proposals are best understood in terms of the change they would represent to existing laws. Thus, the existing legal situation is explained first in Part III, before consideration of possible reform in Parts IV and V.

Part IV considers the first major question, that of the constitutional status of a possible statute removing the existing statutory recognition of the priest-penitent privilege, contained in s 127 of the uniform evidence legislation.¹⁹ In order to answer this question, the existing s 116 case law must be examined, to determine the likely answer to a constitutional challenge, on the assumption that the High

17 *Final Report*, above n 1, vol 7, 100.

18 South Australia, Western Australia, Victoria, Tasmania and the Australian Capital Territory. New South Wales, Queensland and Northern Territory have not (yet) formally committed to this step.

19 The uniform evidence legislation refers to the following Acts: *Evidence Act 1995* (Cth); *Evidence Act 2011* (ACT); *Evidence Act 1995* (NSW); *Evidence Act 2008* (Vic); *Evidence Act 2001* (Tas). They will hereby be referred to as the ‘uniform evidence legislation’.

Court applies existing s 116 precedents. The article will consider arguments either way. However, in recognition of the fact that existing s 116 case law has been stridently criticised, it may be that in future the High Court considers other approaches to s 116 interpretation. Specifically, it may draw upon United States case law, given s 116 was derived from the *United States Constitution* amend I ('First Amendment').

Alternatively, the concept of proportionality has gained significance recently in terms of consideration of constitutional rights. It is possible it could be applied to s 116 cases in the future. The article explores how a proportionality approach might change the result of any constitutional challenge to removal of the priest-penitent privilege. It concludes that the answer to whether a constitutional challenge to removal of the priest-penitent privilege will be successful will depend on whether the existing approach to s 116 interpretation is taken, or whether the American or proportionality approach is taken. Specifically, a challenge will likely be unsuccessful if based on the existing approach to s 116, or the United States approach. However, if a proportionality approach were taken, the prospects of a successful challenge are stronger.

Part V considers the second major question, whether a law introducing a mandatory reporting requirement on religious figures federally, is likely to be found constitutionally valid. Again, it will consider this matter from the point of view of the existing s 116 jurisprudence, as well as two alternative approaches. It concludes that it would be very difficult to successfully challenge such legislation on the existing approach to s 116. Similarly, if a United States-style approach were taken, the challenge would likely not succeed. However, if a proportionality approach were taken, the prospects of a successful challenge are much stronger.

The focus will be on the *constitutionality* of such measures. The difficult policy question of the extent to which the privilege *should* be recognised, abrogated or abolished in law is a matter that is largely beyond the scope of the article, except in so far as it relates to the constitutional questions surrounding s 116 and its protection of religious freedom.

II THE CONFESSIONAL AND THE COMMON LAW IN AUSTRALIA

A *Brief History of the Confessional*

The confession has a long history in the practice of religion. Though opinions differ, the practice seems to have commenced after Christ's death, in the form of a system of public confession.²⁰ It is sometimes not entirely clear whether this

20 A Keith Thompson, *Religious Confession Privilege and the Common Law* (Martinus Nijhoff Publishers, 2011) 60. Some trace it to cultures, including ancient Egypt, India and China, in times predating Christ: O John Rogge, *Why Men Confess* (Da Capo Press, first published 1959, 1975 ed) 149. I am greatly indebted to Thompson's work in referring me to much of the material discussed in this part of the paper.

confession was made to the general public, or only the relevant congregation. It seems to have become connected with a system whereby the wrongdoer would confess their wrongdoing to a member of the clergy. It appears that, at least by the fourth century, confession had become a private, rather than public act.²¹ However, the secrecy aspect of the confessional had not necessarily been established. It is said that the requirement of secrecy was part of Irish custom.²² There is evidence of a letter by Pope Leo I in 459 AD where he admonishes that disclosure of secret confessions in open assembly is an abuse that must cease.²³ The punishment of excommunication and lifelong exile for breach of the seal of the confession appears in 9th century statute.²⁴

Lanfranc, appointed Archbishop of Canterbury in 1070, in his *De Celandra Confessione*, states that '[h]e sins against this sacrament [ie, Penance] who in any manner whatever arouses public suspicion regarding what has been confessed to him, or causes penitents to be defamed'.²⁵ He opined that a person who reveals a confession commits a crime deserving of death.²⁶ This position was maintained by his successor Anselm who claimed that confession must be kept 'absolutely secret, if confession is to serve its purpose'.²⁷ Henry I, King of England between 1100–35, concluded that:

Priests should guard that they not reveal to acquaintances or strangers what has been confessed to them by those who come for confession; for if they do it, even in good faith, they will be sentenced to live all the days of their life as an honorless pilgrim.²⁸

The Gratian *Decretum* of 1151 reflects the inviolability of confession.²⁹ The practice of the confession was confirmed in the Fourth Lateran Council of 1215, which in its 21st Canon declared:

Let the priest absolutely beware that he does not by word or sign or by any manner whatever in any way betray the sinner: but if he should happen to need wiser counsel let him cautiously seek the same without any mention of person. For whoever shall dare to reveal a sin disclosed to him in the tribunal of penance we

- 21 Thompson, above n 20, 61; Bertrand Kurtscheid, *A History of the Seal of Confession* (F A Marks trans, B Herder Book, 1927) 44, quoting Syrian Church Father Aphraates in the fourth century: '[t]o him who shows you his wounds apply the healing penance. Exhort him who is ashamed to lay bare the injury, that he may not conceal it from you. Do not expose him who manifests it to you ...' (emphasis altered).
- 22 Thompson, above n 20, 61; Kurtscheid, above n 21, 45, 47, 50, quoting Paulinus, Basil and Augustine as emphasising the confidentiality of the confession in the fourth and fifth centuries.
- 23 Kurtscheid, above n 21, 26.
- 24 See Kurtscheid, above n 21, 87.
- 25 Thompson, above n 20, 64, citing Kurtscheid, above n 21, 92.
- 26 Kurtscheid, above n 21, 93.
- 27 Thompson, above n 20, 65, citing Kurtscheid, above n 21, 75.
- 28 John C Bush and William H Tiemann, *The Right to Silence: Privileged Clergy Communication and the Law* (Abingdon Press, 1989) 48–9.
- 29 It is translated as '[l]et the priest who dares to make known the sins of his penitent be deposed': see William J Slattery, *Heroism and Genius: How Catholic Priests Helped Build — And Can Help Rebuild — Western Civilization* (Ignatio Press, 2017).

decree that he shall be not only deposed from the priestly office but that he shall be sent into the confinement of a monastery to do perpetual penance.³⁰

There appears to be some limited acceptance, or suggestion, that the seal of the confession is not absolutely protected. For instance, some argued that the seal was not applicable when the priest did not grant the confessor absolution. It was claimed that one of the conspirators of the so-called Gunpowder Plot in 1605 confessed the upcoming crime to a priest (Father Garnet), who did not report it to authorities. Father Garnet was executed by the State. James I, always keen to assert the primacy of monarchical power over other sources, including the spiritual, claimed that the seal of the confessional should be broken where it was necessary to prevent a 'great crime'.³¹ Others claimed it could be broken to prevent a plot to kill the sovereign.³²

Today, the seal of the confession is found in Canons 983 and 984 of the *Code of Canon Law*.³³ Brooks describes the prime importance of the confession in the Catholic faith:

These canons prohibit the use of information learned in confession for any reason, even if secular law requires it ... [f]or Catholic clergy, then, the duty of confidentiality transcends human law because violation has the potential to put a priest's very soul in jeopardy. For these priests, the claim of right to keep certain confidences inviolate transcends any prudential concerns: it stems from a duty to their God.³⁴

We understand from this passage the importance of the secrecy of the confessional. A religious figure who breached it faced excommunication from the church and banishment from that society. They would lose their job and their career; they would relinquish any premises that had been provided by the church for them.

We should also understand why religion viewed the confessional as being so important. A person who confessed their sins was seeking absolution for them.

30 Thompson, above n 20, 65, quoting R S Nolan, 'Seal of Confession' in Charles G Hebermann et al (eds), *The Catholic Encyclopedia* (Robert Appleton, 1912) vol 13, 649, 649.

31 Kurtscheid, above n 21, 158.

32 Kurtscheid, above n 21, 167, citing French Solicitor-General Denis Talon.

33 'The sacramental seal is inviolable; therefore it is absolutely forbidden for a confessor to betray in any way a penitent in words or in any manner and for any reason': Libreria Editrice Vaticana, above n 9, [983 §1]; see also at [984 §1]–[984 §2]:

A confessor is prohibited completely from using knowledge acquired from confession to the detriment of the penitent even when any danger of revelation is excluded ... A person who has been placed in authority cannot use in any manner for external governance the knowledge about sins which he has received in confession at any time.

Similarly, see Libreria Editrice Vaticana, *Catechism of the Catholic Church*, The Holy See, [1467] <http://www.vatican.va/archive/ENG0015/_P4E.HTM>:

every priest who hears confessions is bound under very severe penalties to keep absolute secrecy regarding the sins that his penitents have confessed to him. He can make no use of knowledge that confession gives him about penitents' lives. This secret, which admits of no exceptions, is called the 'sacramental seal,' because what the penitent has made known to the priest remains 'sealed' by the sacrament.

34 Samuel G Brooks, 'Confession and Mandatory Child Abuse Reporting: A New Take on the Constitutionality of Abrogating the Priest-Penitent Privilege' (2009) 24 *Brigham Young Journal of Public Law* 117, 120–1.

The confession was a necessary step to forgiveness of the sin, and towards the salvation of the individual.³⁵ And secrecy was essential to this kind of penance.³⁶ In the Catholic faith, penance is one of the seven sacraments, or most fundamental of church doctrines.³⁷

It is also relevant to point out that at least until the time of Pope Innocent IV (1243–54), members of the clergy served as judicial officers. It is thus not surprising that the law courts would adopt and apply church doctrine as if it were ‘law’.

Henry VIII’s *Act of Six Articles* left the existing situation regarding the confessional undisturbed.³⁸ The (Catholic) Council of Trent in the 16th century finally clarified that a sinner was required to confess their sin to a priest in order to be absolved of their wrongdoing.³⁹ The proviso to the 113th Canon of the Anglican Church in 1603–04 also referred to confession:

Provided always, that if any man confess his secret and hidden sins to the Minister for the unburthening [sic] of his conscience, and to receive spiritual consolation and ease of mind from him, We do not any way bind the said Minister by this our Constitution, but do straitly [sic] charge and admonish him, that he do not at any time reveal and make known to any person whatsoever, any crime or offence so committed to his trust and secrecy (except they be such crimes as by the Laws of this Realm his own life may be called into question for concealing the same) under pain of irregularity.⁴⁰

However, in contrast with the Catholic Church, confession in the Anglican faith was voluntary in nature.⁴¹

During this middle age period the interrelation between church and state was becoming more contentious. Legal doctrine had developed which apparently conferred special rules and privileges on religious figures. The monarch, the putative head of the state church, claimed complete immunity from temporal

35 Chad Horner, ‘Beyond the Confines of the Confessional: The Priest-Penitent Privilege in a Diverse Society’ (1997) 45 *Drake Law Review* 697, 698; Craig P Cassagne Jr, ‘What is a “Confession Per Se?”: *Parents of Minor Child v Charlet* Priest-Penitent Privilege and the Right of the Church to Interpret its Own Doctrine’ (2015) 42 *Southern University Law Review* 255, 271: ‘[w]ithout confession, those Catholics who gravely sin after Baptism are not capable of eternal life’.

36 ‘In all its journeys through the ages and encounters with different cultures ... the discipline of the inviolability of the seal of the confessions has remained unchanged as it is of the essence of the sacrament of penance’: Jude O Ezeanokwasa, ‘The Priest-Penitent Privilege Revisited: A Reply to the Statutes of Abrogation’ (2014) 9 *Intercultural Human Rights Law Review* 41, 51.

37 Ibid 48.

38 *Act of Six Articles 1539*, 31 Hen 8, c 14.

39 Henry Charles Lea, *A History of Auricular Confession and Indulgences in the Latin Church* (Lea Brothers, 1896) vol 1, 213–5.

40 See *Constitutions and Canons Ecclesiastical: Treated upon by the Bishop of London* (John Bill and Christopher Barker, 1676) 54–5.

41 R Michael Cassidy, ‘Sharing Sacred Secrets: Is it (Past) Time for a Dangerous Person Exception to the Clergy-Penitent Privilege?’ (2003) 44 *William and Mary Law Review* 1627, 1637.

law.⁴² These special rules included, for example, the ‘benefit of clergy’ by which religious figures were rendered immune from the influence of secular courts (later evolving to a kind of ‘get out of jail free card’ for non-religious figures otherwise facing the death penalty). Another example is the sanctuary principle, whereby a person on church grounds was also out of reach of the secular courts.⁴³ This had close links with confessional, in that the purpose of sanctuary was to salvage their relationship with God.⁴⁴ However, British monarchs became progressively more hostile towards the power of the church. The days of a monarch imploring judges to act in accordance with religious doctrine were long gone, replaced by monarchs who resented what they saw as a competing source of power and influence. James I was a prime example of the latter.

Not surprisingly then, these doctrines that had reflected a privileged legal position with respect to religious matters foundered. The principle of sanctuary was abolished by James I in the early 17th century, and the benefit of clergy was abolished in the early 19th century. However, they demonstrate sentiment in the middle ages whereby the rules applied to religious figures and institutions differed from that applicable to others in society,⁴⁵ in various guises. This sentiment took some centuries to unravel. The rules around the confessional may also be seen as such an instance, though it occupied a stronger place in religious practice, being more well-established than the others. Further, its status in the law remains somewhat uncertain. Unlike the fate of the benefit of clergy and sanctuary, consigned to history through legislation, the sanctity of the confession was never abolished by statute.⁴⁶

B The Secrecy of the Confessional and the Common Law

I have pointed out that the secrecy of the confessional has been recognised as a fundamental part of religious law for many centuries. I have also pointed out that the sanctity of the confession was never abolished by statute, unlike other religious doctrine which impacted on the secular legal system. Yet most scholars note that the doctrine of the secrecy of the confessional is not part of the common

42 James VI and I, ‘A Speech in the Starre-Chamber’ in Johann P Sommerville (ed) *King James VI and I: Political Writings* (Cambridge University Press, 1994) 204, 205–6. Subsequently the superiority of the Parliament over the monarch was established in the Glorious Revolution, as was the applicability to the monarch of both statute law (*Magdalen College Case* (1615) 11 Co Rep 66, 72a; 77 ER 1235, 1243) and the common law (*Petitions of Right Act 1860*, 23 & 24 Vict, c 34), overruling the *Prohibitions Del Roy* (1607) 12 Co Rep 64; 77 ER 1342.

43 It was believed for a time that every church was a sanctuary: *Corone* (1580) BNC 47, 54; 73 ER 867, 869–70.

44 Trisha Olson, ‘Of the Worshipful Warrior: Sanctuary and Punishment in the Middle Ages’ (2004) 16 *St Thomas Law Review* 473, 477–81.

45 For example, Johann P Sommerville noted that ‘[p]resbyterians claimed their system of church government was immediately ... ordained by God ... to exempt themselves from control by Parliament’: Johann P Sommerville, ‘English and European Political Ideas in the Early Seventeenth Century: Revisionism and the Case of Absolutism’ (1996) 35 *Journal of British Studies* 168, 187; and John Selden’s ‘the Church runs to Jus divinum’: Sir Frederick Pollock (ed), *Table Talk of John Selden* (Quaritch, 1927) 61.

46 Nolan, above n 30, 653.

law. It is necessary to consider briefly whether this is in fact true, and if it is true, when (and perhaps why) this occurred. As indicated above, this discussion is considered particularly pertinent to those of the Australian jurisdictions which have not enacted a statutory privilege. In respect of those jurisdictions, the status of the secrecy of the confessional at common law assumes particular relevance still today.

The possible disappearance of the common law privilege might be related to the schism of the mid-16th century in the era of Henry VIII, and the breakaway from 'Rome', given the close links between Catholicism and the confessional.⁴⁷ It might be explained by base anti-Catholicism, certainly not unheard of in history. It might be related to the decline of natural law and the rise of legal positivism in the 19th century. Its disappearance can seem at odds with the kind of religious toleration which often attracted philosophers.⁴⁸ However, evidence and investigation, rather than assumption or hypothesis, is needed. As will be seen later in the article, the position of the common law is particularly important in respect of those Australian states which have not included in evidence legislation a particular provision exempting confessions heard during a confessional from being submitted as evidence in a legal matter.

There are a few points to note before the relatively brief discussion of the case law. Firstly, there are not a lot of cases on point. This is perhaps understandable given that the prosecuting authorities will in most cases not be aware of the content of any confession made to a religious figure. Secondly, some of the relevant cases were unreported. We know of them only through other judgments, which clearly is not an ideal basis from which to investigate the record. Thirdly, many of the comments made are obiter dicta in nature. And lastly, in some cases comments made are not supported expressly by case authority.

Having said that, a useful starting point is often considered to be the decision in *Du Barré v Livette*.⁴⁹ The case actually concerned attorney-client privilege.

47 Mary Harter Mitchell, 'Must Clergy Tell? Child Abuse Reporting Requirements Versus the Clergy Privilege and Free Exercise of Religion' (1987) 71 *Minnesota Law Review* 723, 736:

With the English Reformation in the sixteenth century ... the basis for the clergy privilege began to founder. For a time, the Anglican church, which had replaced the Roman Catholic church as the established church of England, continued the practice of confession and the requirement of secrecy. As the new church discarded various 'Romish' practices, however, emphasis on the confessional dwindled and confession to a cleric became optional in the Anglican church.

48 Jeremy Bentham, 'Rationale of Judicial Evidence' in John Bowring (ed), *The Works of Jeremy Bentham* (William Tait, 1843) vol 7, 363–7:

with any idea of toleration, a coercion of this nature [being required to breach the seal of the confessional] is altogether inconsistent and incompatible. In the character of penitents, the people would be pressed with the whole weight of the penal branch of the law; inhibited from the exercise of this essential and indispensable article of their religion ...

John Locke's 'religious tolerance' in James H Tully (ed), *John Locke: A Letter Concerning Toleration* (Hackett Publishing, 1869) apparently did not extend to Catholics: Eldon Eisenach, 'Religion and Locke's *Two Treatises of Government*' in Edward J Harpham (ed), *John Locke's Two Treatises of Government: New Interpretations* (University Press of Kansas, 1992) 50, 59: 'in all three [works, Locke] absolutely denies toleration to Catholics', quoted in Carolyn Maree Evans, *Legal Protection of Religious Freedom in Australia* (Federation Press, 2012) 8.

49 (1791) 1 Peake 108; 170 ER 96 ('*Du Barré*').

However, in the course of argument the court heard about an unreported circuit decision of *R v Sparkes*, where an accused confessed their crime to a protestant clergyman. The contents of the confession were held to be admissible as evidence against the accused, and they were convicted. Lord Kenyon CJ in *Du Barré* distinguished that case, concluding that he '[w]ould have paused before [he] admitted the evidence there admitted' (speaking of *R v Sparkes*).⁵⁰

In this case the role of the treatise writers was critical. The same Peake who reported *Du Barré* was also an evidence writer. In his *A Compendium of the Law of Evidence* (1801)⁵¹ Peake preferred the position taken in *R v Sparkes*, where apparently a confession made during a confessional was held admissible against the person who made the confession. Thompson notes that other evidence treatise writers at the time adopted the same position.⁵² In turn, judges relied on what Peake and others had said.⁵³ These judges criticised the position of other judges, for example Best CJ in *R v Radford* (1823) (unreported),⁵⁴ who had not allowed the priest to give evidence of a confession in that case.⁵⁵

Thompson is critical of these developments in the common law:

Peake's indirect influence on generations of subsequent judges and commentators cannot be fully calculated, though since his text is cited, he is certainly partly responsible for Park J's proposition that *R v Sparkes* conclusively decided that a 'minister is bound to disclose what has been revealed to him as a matter of religious confession' ... [but] Park J's reliance upon the Peake and Starkie analysis of Buller J's decision in *R v Sparkes* led him into error. That error does not originate in the statement of what was decided in *R v Sparkes*, but in Peake and Starkie's failure to add that Buller J's decision in that case had been disapproved of by Kenyon CJ in *Du Barré v Livette*, the only place where *R v Sparkes* had been mentioned at all.⁵⁶

Thompson speculates that reporter Peake may have been impressed with counsel's argument in *Du Barré*, relying on what was said in *R v Sparkes*, before Kenyon CJ rejected it, and that, if that were the case, 'it is surely ironic that the reporter's analysis of the common law where religious confession privilege is concerned, has prevailed over that of the Chief Justice of the day'.⁵⁷

50 Ibid 97.

51 Thomas Peake, *A Compendium of the Law of Evidence* (E&R Brooke and J Rider, 1801).

52 Thompson, above n 20, 16.

53 'And his lordship could not have excluded this evidence because it was a breach of confidence in the clergyman to give it, because a minister is bound to disclose what has been revealed to him as a matter of religious confession, *Rex v Sparkes*, cited Peake, NPC 79, 1 Starkie on Evidence, 105': Park J in *R v Gilham* (1828) 1 Mood CC 186, 198; 168 ER 1235, 1239.

54 Thompson, above n 20, 20.

55 And elsewhere, Best CJ took a similar position: 'I, for one, will never compel a clergyman to disclose communications, made to him by a prisoner': *Broad v Pitt* (1828) 3 Car & P 518, 519; 172 ER 528, 529. Best's views here were apparently endorsed by Finlason J in *R v Hay* (1860) 2 F & F 4, 6; 175 ER 933, 934: 'a passage from the "Laws of Henry I" ... will show that the recognition [of the seal of confession] was of Saxon, and the exception [for treason] of Norman origin. The sanctity of confession, with that exception, has been recognized [under English common law]'.

56 Thompson, above n 20, 18, 20.

57 Ibid 20.

By the late 19th century the common law position had become clearer. Jessel MR in two cases spoke strongly against the existence of any privilege attaching to the confessional.⁵⁸ These comments were obiter dicta, since they again occurred in a case involving attorney-client, rather than priest-penitent privilege, and it has been observed that the judgments are either entirely precedent free or reliant on case law concerning matters other than priest-penitent privilege.⁵⁹ The dicta comments of Jessel MR are referred to in both *Cross on Evidence* and the Australian edition for the proposition that there is no privilege for priest-penitent confession.⁶⁰ The Australian Law Reform Commission ('ALRC') concluded that the privilege is not part of Australian common law.⁶¹

On the other hand, in 1853 in *R v Griffin* the Court had found that evidence of what was said in the confessional should not be given.⁶² In an 1890 letter Coleridge CJ writes of a case involving Constance Kent, who was thought to have divulged details of her criminality to a priest. Coleridge CJ's letter suggests that leading common lawyer Willes J said in relation to the case that priests had a legal right of privilege with respect to anything said during confession.⁶³ Of perhaps marginal relevance to common law practice is the early New York decision of *The People v Phillips*.⁶⁴ There the court rejected use of evidence derived during a confessional. In so doing, the Court rejected the decision in *R v Sparkes*, noting Kenyon CJ's wariness regarding its correctness.

Thompson's detailed consideration of these and other precedents, together with many other reference materials and arguments that particular events extinguished the privilege, leads him to conclude that religious confession privilege has not been extinguished at common law.⁶⁵ I will critically consider below the issue of whether the privilege is part of the common law of Australia.

58 *Wheeler v Le Marchant* (1881) 17 Ch D 675, 681 ('*Wheeler*'): '[c]ommunications made to the 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' (talking about which communications are considered confidential and 'protected'); *Anderson v Bank of British Columbia* (1876) 2 Ch D 644, 651 ('*Anderson*):

in foreign countries where the Roman Catholic faith prevails, it is considered that the same principles ought to be extended to the confessional, and that it is desirable that a man should not be hampered in going to confession by the thought that either he or his priest may be compelled to disclose in a Court of Justice the substance of what passed in such communication. This, again, whether it is rational or irrational, is not recognised by our law.

59 Thompson, above n 20, 22, 24.

60 J D Heydon, *Cross on Evidence* (LexisNexis Butterworths, 9th ed, 2013) 870 [25315], citing Sir James Fitzjames Stephen, *Digest of the Law of Evidence* (Macmillan, 12th ed, 1936) 219–21.

61 Australian Law Reform Commission, *Evidence*, Report No 26 (Interim) (1985) vol 1, 257–8 [461] ('*ALRC Report*').

62 Alderson B in *R v Griffin* (1853) 6 Cox CC 219, 219:

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 an unfettered means of communication the client would not have proper legal assistance. The same principle applies to a person deprived of whose advice the prisoner would not have proper spiritual assistance. I do not lay this down as an absolute rule; but I think such evidence ought not to be given.

63 Bush and Tiemann, above n 28, 112.

64 NY Ct Gen Sess (1813), abstracted at P McGroarty, '*The People v Daniel Phillips and Wife*' (1843) 1 *Western Law Journal* 109.

65 Thompson, above n 20, 155.

C Is the Privilege Part of the Common Law of Australia?

A further complication in Australia relates to the fact that some jurisdictions, specifically Queensland, Western Australia and South Australia, have not signed up to the uniform evidence scheme. Their evidence legislation does not specifically acknowledge the existence of privilege in relation to material obtained during confessional. Thus, the question arises as to the extent to which the suggested privilege is part of the common law. This would be the common law of Australia, given the fact that the High Court has declared there is one unified common law of Australia, as opposed to different common law applicable in different jurisdictions within Australia.⁶⁶ Obviously, however, the position in England is of relevance to the Australian common law position.

Section 24 of the *Australian Courts Act 1828* (UK) deals with the reception of English law that was in force at the date of the Act. Now, as has been alluded to above, the common law position as at 1828 on the question of recognition of the privilege is not entirely clear; some cases apparently recognised the privilege; others rejected it. By the latter part of the 19th century, opposition to the privilege appeared to harden.

There is limited High Court case law considering the question of whether principles of English common law were received and became part of Australian common law by virtue of the *Australian Courts Act 1828* (UK). The cases have distinguished between situations where a given law reflected local policy and was thus solely adapted to the country in which it was made, or was of more general application.⁶⁷ The question is whether the principle of English common law would be 'suitably applied' or 'reasonably applied' to conditions in the colony.⁶⁸ It is a rare case where the Australian courts have found that a principle of English law has been found inapplicable to the colonies.⁶⁹

Another question is whether, if applicable, the relevant English common law principle that is imported reflects the state of English common law in 1828, or whether it also takes on board any developments in the common law of England since that time. This is important in terms of the principle of the seal of the confessional, because I have alluded to real differences of opinion in 1828 as to whether it was a recognised principle of the English common law. Subsequent late 19th century cases cast significant doubt as to whether the privilege was part of English common law, although as has been alluded to earlier, these developments are themselves open to substantial criticism.

66 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 563 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ).

67 *Delohery v Permanent Trustee Co of New South Wales* (1904) 1 CLR 283, 310–11 (Griffith CJ).

68 *Dugan v Mirror Newspapers Ltd* (1978) 142 CLR 583, 587 (Barwick CJ), 591 (Gibbs J), 592 (Stephen J agreed), Jacobs J asked whether the English law 'could be applied': at 605, in a judgment with which Mason J agreed at 601. Murphy J left open the question of reception of the English common law in that case: at 611.

69 *State Government Insurance Commission v Trigwell* (1979) 142 CLR 617, 626 (Gibbs J).

The better view seems to be that the English common law that is to be 'received' is not frozen in time to the position in 1828, but could take into account subsequent developments in English common law.⁷⁰ If this is the case, then the privilege would not be part of received English common law, given the late 19th century precedents in *Wheeler* and *Anderson*, where Jessel MR stated in (strong) dicta that the privilege did not exist in common law. This has been enough for the author of *Cross on Evidence*⁷¹ and the Australian Law Reform Commission to conclude that the privilege is not part of Australian common law.⁷²

The question of whether the privilege exists as part of Australian common law has been considered only in a very small number of cases. The most important statement about it appears in the judgment of Dixon J in *McGuinness v Attorney-General (Vic)*:

the law was faced at a comparatively early stage of the growth of the rules of evidence with the question how to resolve the inevitable conflict between the necessity of discovering the truth in the interests of justice on the one hand and on the other the obligation of secrecy or confidence which an individual called upon to testify may in good faith have undertaken to a party or other person. Except in a few relations where paramount considerations of general policy appeared to require that there should be a special privilege, such as husband and wife, attorney and client, communications between jurors, the counsels of the Crown and State secrets, and, by statute, physician and patient and priest and penitent, an inflexible rule was established that no obligation of honour, no duties of non-disclosure arising from the nature of a pursuit or calling, could stand in the way of the imperative necessity of revealing the truth in the witness box.⁷³

Though the words of Dixon J may be interpreted in different ways, the natural interpretation to be given to them seems to be that the priest-penitent privilege does not exist at Australian common law, and exists in the law, if at all, only through statute.⁷⁴ In *Baker v Campbell*, the apparent lack of recognition in the common law of Australia of privilege with respect to religious figures was confirmed by the High Court in obiter dicta.⁷⁵

Thompson concludes, contrary to my reading of these precedents and the position of *Cross on Evidence*⁷⁶ and the *ALRC Report*, that:

in the absence of any statutory instrument abrogating religious confession privilege, a decision in the High Court of Australia denying a religious confession

70 Ibid 625; Leslie Zines, 'The Common Law in Australia: Its Nature and Constitutional Significance' (2004) 32 *Federal Law Review* 337, 339; Alex C Castles, 'The Reception and Status of English Law in Australia' (1963) 2 *Adelaide Law Review* 1, 7–14.

71 Heydon, above n 60, 870 [23515].

72 *ALRC Report*, above n 61, 257–8 [461].

73 (1940) 63 CLR 73, 102–3 (emphasis added).

74 This is the interpretation placed on the words by Thompson, above n 20, 184.

75 (1983) 153 CLR 52, 65–6 (Gibbs CJ), 75 (Mason J, who appeared to criticise this situation), 93–4 (Wilson J), 128 (Dawson J). Further to the criticism of Mason J is the following passage from Heydon, above n 60, 870 [23520]: 'On principle there seems to be better ground for recognising this privilege [of priest-penitent confession] than several that are established under the modern law'.

76 Heydon, above n 60, 870 [23520].

privilege of some kind at common law, seems unlikely⁷⁷ ... [he cites various arguments, concluding] all suggest that the High Court of Australia would recognise a confidential religious communications privilege (including a religious confession privilege) in practice.⁷⁸

Of course, I mean no disrespect to the author of a masterly book on religious confession privilege to say that I disagree with his conclusion. I do not think that the High Court would recognise that such a doctrine exists in the common law. It would be contrary to its existing precedent in this area. It would contradict the leading evidence textbook. It seems contrary to the tenor of the judgments in this area in the further way that they generally decry the development of further privileges that would protect a person from giving evidence.

Thompson cites two other arguments to support his position. He refers to international human rights instruments which clearly protect religious freedom as a fundamental right, suggesting the High Court might be influenced by this, and comparative case law elsewhere.⁷⁹ My perception is that the High Court's use of international and comparative legal materials is piecemeal, at best. The fact that a right is recognised in international human rights instruments often does not convince the High Court that this should be the position in Australian law, or that Australian law should be influenced by international law.⁸⁰

Further, Thompson refers to the 'gravitational pull' that he claims the seven Australian statutes which recognise a statutory religious privilege have (should have?) on the common law.⁸¹ In other words, he suggests that the existence of the privilege in statute means, or ought to help convince the High Court that, such privilege should be recognised at common law. In one way, the fact that a right exists in statute law is neutral as to the status of the common law on the same subject. One argument would be — if the right already existed at common law, why was it necessary to legislate it? A counter-argument might be that legislating it provides stronger protection for the right than the common law would. This argument is that the statute simply aims to reflect what already exists in common law. Thus, the fact that a right exists in legislation is considered ambiguous on the question of whether such a right exists in common law.

Further, the High Court's statements and practice regarding the interplay between the common law and statute is (respectfully) far from consistent. It cannot be said

77 Thompson, above n 20, 210.

78 Ibid 214.

79 Ibid 194–8.

80 For example, in the context of constitutional law, George Williams, Sean Brennan and Andrew Lynch, *Australian Constitutional Law and Theory: Commentary and Materials* (Federation Press, 6th ed, 2014) 891 conclude that 'the High Court has been reluctant to use [international law] in interpreting the *Constitution*'. See recently *Tajjour v New South Wales* (2014) 254 CLR 508, 567 [96] (Hayne J): 'The provisions of an international treaty to which Australia is a party do not form part of Australian law unless those provisions have been validly incorporated into Australian municipal law'; and to like effect Keane J: at 606 [249]; *Assistant Commissioner Condon v Pompano Pty Ltd* (2013) 252 CLR 38, 66 [55] (French CJ); *AMS v AIF* (1999) 199 CLR 160, 180: 'As to the *Constitution*, its provisions are not to be construed as subject to an implication said to be derived from international law' (Gleeson CJ, McHugh and Gummow JJ).

81 Thompson, above n 20, 207–10.

with confidence that the Court accepts generally that the common law should be moulded by statute. To cite one example in a different context, the common law of *forum non conveniens* in Australia applies a test of ‘clearly inappropriate forum’.⁸² In contrast, Australian statutes often apply the English test of ‘more appropriate forum’.⁸³ In this context, Australian law has accepted that there can be differences between statute law and common law on the same subject. To be fair, there are also instances in a different context where the High Court has apparently accepted that statutory developments can influence development of the common law.⁸⁴ In conclusion on this point, it is doubted how strong the ‘gravitational pull’ is in relation to moulding the common law to conform with statutory provisions in some, but not all, Australian statutes. In conclusion, the secrecy of the confessional is not a doctrine recognised in the Australian common law.⁸⁵

III THE CONFESSORIAL AND STATUTE LAW IN AUSTRALIA

In this Part, existing mandatory reporting legislation with respect to suspected child abuse in Australia is outlined. Of particular interest is the efficacy of such reporting schemes in detecting and reducing levels of child abuse. This is important for the discussion in Parts IV and V. We will discuss there that freedom of religion is not absolute, and so interferences with it will be balanced in some way against the benefits of such regulation. As such, discussion of the efficacy of existing mandatory reporting schemes is relevant for current purposes. And given Parts IV and V consider changes to the existing approach, specifically removing the existing statutory privilege and introducing a mandatory reporting scheme applicable to clergy, it is necessary to outline what the existing statutes provide in relation to the secrecy of the confessional. Proposals for law reform are best considered in light of an understanding of the existing state of the statute book. As indicated above, at the time of writing, several states and territories have indicated their intention to extend mandatory reporting schemes to material divulged during confessional, as a result of the work of the Royal Commission.

82 *Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538, 539.

83 *Spiliada Maritime Corporation v Cansulex Ltd* [1987] AC 460, 477, 483 (Lord Goff); see, eg, *Supreme Court (General Civil Procedure) Rules 2015* (Vic) r 7.05; *Uniform Civil Procedure Rules 2005* (NSW) r 8.2; *Jurisdiction of Courts (Cross-Vesting) Act 1987* (Cth) ss 5(1)–(2).

84 *Andrews v ANZ Banking Group Pty Ltd* (2012) 247 CLR 205, 215–16: ‘it may be observed that this pattern of remedial legislation suggests the need for caution in dealing with the unwritten law as if *laissez faire* notions of an untrammelled “freedom of contract” provide a universal legal value’ (French CJ, Gummow, Crennan, Kiefel and Bell JJ).

85 *Criminal Justice Report*, above n 2, pts III–IV, 174 concluded it was not ‘entirely clear’ whether the religious privilege exists in Australian common law.

A Extent of Mandatory Reporting of Suspected Child Abuse in Australia

Legislation mandating the reporting of suspected child abuse in particular cases is of relatively recent origin. Pivotal in historical development here was work by Kempe and others which highlighted the extent of child abuse in society, and the limited extent to which medical professionals responded to suspicion of abuse.⁸⁶ This research was the catalyst for the introduction of mandatory reporting legislation, requiring medical professionals and educators, among other groups typically in a position to be aware of possible abuse, to report their suspicions to authorities. Currently in Australia, each state and territory,⁸⁷ as well as the Commonwealth,⁸⁸ has in place legislation which requires nominated categories of individuals in particular cases to report suspected abuse. The legislation is not uniform; it varies in relation to things such as the category of individual to whom the obligation applies, and the kinds of suspected abuse that must be reported. It is not necessary for current purposes to discuss and explain these differences, and that work has been done elsewhere in any event.⁸⁹ It might be sufficient to note that the South Australian legislation is the only one that currently applies specifically to religious figures.

Of more interest to us here is discussion of mandatory reporting as a legitimate policy tool in tackling child abuse. This occurs in the context of the repeated observation that report rates of suspected child abuse remain low, and that most incidents are not reported or investigated.⁹⁰

Various reports have noted the general utility of mandatory reporting schemes. For example, the Cummins Inquiry found that mandatory reporting schemes increased the likelihood that abuse will come to the attention of authorities.⁹¹ The Wood Inquiry found that mandatory reporting schemes overcame privacy and

86 C Henry Kempe et al, 'The Battered-Child Syndrome' (1962) 181 *Journal of the American Medical Association* 17.

87 *Children and Young Persons (Care and Protection) Act 1988* (NSW) ss 23, 27; *Children, Youth and Families Act 2005* (Vic) ss 162, 182, 184; *Public Health Act 2005* (Qld) ss 158, 186(2), 467; *Education (General Provisions) Act 2006* (Qld) ss 364–366A; *Child Protection Act 1999* (Qld) ss 13E, 186; *Children's Protection Act 1993* (SA) ss 6, 10–11; *Children and Community Services Act 2004* (WA) ss 124A–124H; *Children, Young Persons and Their Families Act 1997* (Tas) ss 3, 14; *Children and Young People Act 2008* (ACT) s 356; *Care and Protection of Children Act 2007* (NT) ss 15–16, 26.

88 *Family Law Act 1975* (Cth) s 67ZA.

89 See Ben Mathews, 'Mandatory Reporting Laws for Child Sexual Abuse in Australia: A Legislative History' (Report, Royal Commission into Institutional Responses to Child Sexual Abuse, August 2014); Ben Mathews et al, 'Child Abuse and Neglect: A Socio-Legal Study of Mandatory Reporting in Australia' (Report, Australian Government Department of Social Services, April 2015).

90 See Barbara Fallon, Nico Trocmé and Bruce MacLaurin, 'Should Child Protection Services Respond Differently to Maltreatment, Risk of Maltreatment, and Risk of Harm?' (2011) 35 *Child Abuse & Neglect* 236.

91 Philip Cummins, Dorothy Scott and Bill Scales, 'Protecting Victoria's Vulnerable Children Inquiry' (Report, Protecting Victoria's Vulnerable Children Inquiry, January 2012) vol 1, 347 ('*Cummins Inquiry*').

ethical concerns that might otherwise exist around the sharing of information.⁹² The Cummins Inquiry found that the substantiation rate of suspected child abuse disclosed through a mandatory disclosure regime was higher than for non-mandated disclosure.⁹³ The Layton Review reported ‘strong and unequivocal support for ... mandatory notification’, and noted its effectiveness in ensuring that vulnerable children were protected and assessed.⁹⁴

A range of research has concluded that mandatory reporting schemes improve reporting behaviour and thus ensure that more abuse is uncovered by authorities than if the regime did not exist.⁹⁵ Specifically, trend analysis over a seven-year period by Mathews, Lee and Norman suggested the introduction of mandatory reporting regimes produce an immediate and sustained increase in the level of reporting of abuse.⁹⁶

Of the various mandatory reporting legislation referred to above, only the South Australian legislation defines ‘mandatory notifiers’ to specifically include religious figures. Section 11(2)(ga) of the *Children’s Protection Act 1993* (SA) specifies a minister of religion, and s 11(2)(gb) specifies an employee or volunteer in an institution formed for religious purposes, as mandatory notifiers. However, s 11(4) exempts from this requirement a priest or other religious minister who received the information pursuant to a confession made in accordance with the rules of the relevant religion. The Victorian Cummins Inquiry recommended that ministers of religion and employees and volunteers of a religious organisation be made mandatory notifiers, subject to an exception with respect to material divulged during confession.⁹⁷ This recommendation has not been acted upon at the time of writing. However, the Victorian Government has signalled it will amend its legislation in light of the Royal Commission.

Two states have created an offence of failing to report a sexual offence committed against a minor.⁹⁸ However, again an exception is created with respect to

92 James Wood, ‘Report of the Special Commission of Inquiry into Child Protective Services in New South Wales’ (Report, Special Commission of Inquiry into Child Protective Services in New South Wales, 24 November 2008) 181 (*Wood Inquiry*).

93 Cummins, Scott and Scales, above n 91, 347.

94 Robyn Layton, ‘Our Best Investment: A State Plan to Protect and Advance the Interests of Children’ (Report, Child Protection Review, March 2003) 10.4, 10.6.

95 Victorian Law Reform Commission, *Sexual Offences Against Children*, Discussion Paper No 12 (1988) 66, which found that ‘mandatory reporting can significantly increase the detection of abuse without a massive waste of investigative resources, and without greater unwarranted intrusion into people’s lives than a voluntary reporting system’.

96 Ben Mathews, Xing Ju Lee and Rosana E Norman, ‘Impact of a New Mandatory Reporting Law on Reporting and Identification of Child Sexual Abuse: A Seven Year Time Trend Analysis’ (2016) 56 *Child Abuse & Neglect* 62, 62; Ben Mathews, ‘Mandatory Reporting Laws and Identification of Child Abuse and Neglect: Consideration of Different Maltreatment Types, and a Cross-Jurisdictional Analysis of Child Sexual Abuse Reports’ (2014) 3 *Social Sciences* 460, 470–1; Ben Mathews and Donald C Bross, ‘Mandated Reporting Is Still a Policy with Reason: Empirical Evidence and Philosophical Grounds’ (2008) 32 *Child Abuse & Neglect* 511, 511; Ben Mathews et al, ‘Reports of Child Sexual Abuse of Boys and Girls: Longitudinal Trends over a 20-Year Period in Victoria, Australia’ (2017) 66 *Child Abuse & Neglect* 9, 9.

97 Cummins, Scott and Scales, above n 91, 355.

98 *Crimes Act 1958* (Vic) s 327(2); *Crimes Act 1900* (NSW) s 316.

information garnered through a process of confession.⁹⁹ This situation is likely to change. The Royal Commission recommended that all states and territories legislate an offence of failing to report child sexual abuse within an institutional context.¹⁰⁰ It found no exemption should apply with respect to material disclosed during confession.¹⁰¹

Others doubt the effectiveness of mandatory reporting in relation to anything said at confessional:

paedophile priests simply do not go to confession. Partly this is because of the distorted thinking that is commonly part of their offence, that they have convinced themselves that what they are doing is not wrong. Partly, it is due to a fear that any priest they approach would not give them an easy absolution ... [i]f any ever did go to confession, they [would] make sure it was in circumstances where they would not be recognised. The priest hearing the confession would probably not know of the identity of the offender or of the victim, and so would have no specific crime to report. Furthermore, if a single priest broke the seal of the confession and reported the matter to the police, [it] would be the last time any paedophile priest confessed to anything anywhere.¹⁰²

Parkinson concludes the ‘case is quite weak for clergy to be required to report suspected child sexual abuse generally, if the objective is to identify sexually abused children and for the child protection authorities to respond accordingly’.¹⁰³ Others say that priests will follow canon law over secular law, in the event of conflict.¹⁰⁴ In its *Criminal Justice Report*, the Royal Commission referred to numerous examples in its hearings where details of sexual abuse of children had been disclosed to clergy during confessional.¹⁰⁵ It added that the fact that some people to whom a law would apply would not comply with it was not sufficient reason to decline to enact it.¹⁰⁶

B Legislation Regarding the Confessional

Section 127 of the uniform evidence legislation provides that a person who is or was a member of the clergy of any church or religious denomination may refuse to divulge that a religious confession was made, or the content of that confession, to that person while a member of the clergy. The uniform evidence

99 *Crimes Act 1958* (Vic) s 327(7)(b); *Crimes Regulation 2015* (NSW) reg 4(f) simply exempts ‘clergy of any church or religious denomination’ from the requirement. In other words, it is not limited to the confessional.

100 *Criminal Justice Report*, above n 2, pts III–IV, 213–14.

101 *Ibid* 224.

102 Geoffrey Robinson, ‘On Breaking the Seal of the Confession’ (2012) 22(23) *Eureka Street* 32, 32–3.

103 Parkinson, above n 10, 305; see also Ezeanokwasa, above n 36, 85: ‘the statutes abolishing priest-penitent privilege are like a bridge to nowhere in terms of having any significant impact on stopping or mitigating the prevalence of child abuse’.

104 Bush and Tiemann, above n 28, 28: ‘canon law solves the problem for the priest. He has no alternative but to obey the law of the church, regardless of what the civil law says or does not say, allows or does not allow’.

105 *Criminal Justice Report*, above n 2, pts III–IV, 221.

106 *Ibid* 222.

legislation provision applies in the Commonwealth jurisdiction,¹⁰⁷ as well as in the jurisdictions of New South Wales,¹⁰⁸ Victoria,¹⁰⁹ Tasmania,¹¹⁰ and the Australian Capital Territory.¹¹¹ The Royal Commission specifically declined to make any recommendation regarding this provision.¹¹²

None of the legislation in the other Australian jurisdictions deals with the matter specifically.¹¹³ However, s 67E(1) of the *Evidence Act 1929* (SA) states that a ‘communication relating to a victim of an alleged sexual offence’ is protected from disclosure in a legal proceeding ‘if made in a therapeutic context’. Whilst this most clearly relates to the disclosure of the offence or alleged offence by the victim, it is possible it could be applied to a situation where the perpetrator or alleged perpetrator discloses it to a member of the clergy at confessional, on the assumption that the confessional can be seen as ‘therapeutic’. Section 56B of the *Evidence Act 1939* (NT) simply protects ‘confidential communications’ from disclosure. It is likely that a conversation held through the confessional process would be seen as ‘confidential’. Section 20C(1) of the *Evidence Act 1906* (WA) states that a ‘court may direct that evidence not be adduced in a proceeding’ if adducing it would disclose a protected confidence. ‘Protected confidence’ is defined in s 20A(1) to mean a communication made by one person in confidence to another (confidant) where the confidant was acting in a professional capacity, and when the confidant was under an express or implied obligation not to disclose its contents.¹¹⁴ This is subject to an exception in s 20E in respect of ‘misconduct’, defined to include an act committed by the confider. However, s 20E(2) clearly provides that the exception relating to misconduct applies only to communication done ‘in the furtherance of misconduct’.¹¹⁵

From this discussion of the existing statutory regime in relation to mandatory reporting of suspected child abuse and statutory exemption of information obtained through the confessional from a general obligation to give evidence, I will now consider two legal questions. Firstly, whether any move to repeal or amend s 127 of the *Evidence Act 1995* (Cth) would infringe s 116 of the *Australian Constitution*, and secondly, whether any move to introduce mandatory reporting on members of the clergy federally would do so. In so considering, the question of the correct approach to and interpretation of s 116 of the *Australian Constitution* itself becomes an issue, given the extent of criticism of the existing approach, and the fact that the High Court has not interpreted the section in detail for some time.

107 *Evidence Act 1995* (Cth) s 127.

108 *Evidence Act 1995* (NSW) s 127.

109 *Evidence Act 2008* (Vic) s 127.

110 *Evidence Act 2001* (Tas) s 127.

111 *Evidence Act 2011* (ACT) s 127.

112 See *Criminal Justice Report*, above n 2, pts III–IV, 224.

113 *Evidence Act 1977* (Qld) is completely silent on point.

114 *Evidence Act 1906* (WA) s 20A(1).

115 *Ibid* s 20E(2).

IV WOULD REPEALING THE STATUTORY PRIVILEGE FOR RELIGIOUS CONFESSIONS BE UNCONSTITUTIONAL?

Logically, the first question that arises is which head/s of power would authorise the Commonwealth to repeal or amend s 127 of the *Evidence Act 1995* (Cth). And the answer is also logical — the same head of power that supported the introduction of the Commonwealth *Evidence Act 1995* (Cth) would support the amendment or repeal of particular provisions. An example of acceptance by members of the High Court of the logic that Parliament can (constitutionally) repeal whatever it can enact occurred in *Kartinyeri v Commonwealth*.¹¹⁶ Another obvious choice for the Commonwealth would be s 51(xxix), regarding implementation of the *United Nations Convention on the Rights of the Child*.¹¹⁷

The second, more contentious, question is the extent to which amendment or repeal of s 127 of the *Evidence Act 1995* (Cth) might infringe s 116 of the *Australian Constitution*.¹¹⁸ Of most relevance here are those aspects of the section (paraphrasing) providing that the Commonwealth shall not make any law for prohibiting the free exercise of religion, nor for establishing any religion. It is based on, though worded differently than, the First Amendment to the *United States Constitution*.¹¹⁹ It would be difficult to argue that a law which amended or repealed s 127 would infringe s 116 of the *Australian Constitution*. Since federation no law has been struck out as being contrary to the requirements of s 116.

A handful of cases have been decided in relation to s 116, and there are limited comments in the case law relevant to the situation currently being discussed. In the first case, *Krygger v Williams*,¹²⁰ the court curtly dismissed an appeal to s 116 in relation to compulsory military training. The plaintiff's argument that military service was unconstitutional because it offended his religious beliefs was rejected. In so deciding, Griffith CJ noted that:

To require a man to do a thing which has nothing at all to do with religion is not prohibiting him from a free exercise of religion. It may be that a law requiring a man to do an act which his religion forbids would be objectionable on moral grounds, but it does not come within the prohibition of sec 116 ...¹²¹

116 (1998) 195 CLR 337, 355: 'The power to make laws includes a power to unmake them' (Brennan CJ and McHugh J) (*Hindmarsh Island Bridge Case*), citing *Duport Steels Ltd v Sirs* [1980] 1 WLR 142, 168 (Scarman L), cited in *Kable v DPP (NSW)* (1996) 189 CLR 51, 75.

117 *United Nations Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UTS 3 (entered into force 2 September 1990) (*United Nations Convention on the Rights of the Child*).

118 *Australian Constitution* s 116 states: '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.'

119 *Adelaide Company of Jehovah's Witnesses Inc v Commonwealth* (1943) 67 CLR 116, 127 (Latham CJ), 155 (Starke J) (*Jehovah's Witnesses Case*); *A-G (Vic) ex rel Black v Commonwealth* (1981) 146 CLR 559, 578 (Barwick CJ), 598–603 (Gibbs J), 609 (Stephen J), 614 (Mason J), 632 (Murphy J), 652 (Wilson J) (*DOGS Case*). It is fair to say the differences were accentuated in the *DOGS Case*. In *Church of the New Faith v Commissioner of Pay-Roll Tax (Vic)* (1983) 154 CLR 120, 136, Mason ACJ and Brennan J referred to the 'similar' nature of s 116 and the *United States Constitution* amend I.

120 (1912) 15 CLR 366 (*Krygger*).

121 *Ibid* 369. Barton J was similarly dismissive, concluding the law did not prohibit the free exercise of the plaintiff's religion and there was no 'attempt to show anything so absurd as that the appellant could not exercise his religion freely if he did the necessary drill': at 372–3.

The second sentence suggests Griffith CJ would have no constitutional objection to a law amending or repealing s 127. Let us accept for the purposes of argument that the Catholic Church forbids a priest from disclosing what was learned during confessional. According to Griffith CJ, a law requiring that information to be disclosed (or, more precisely, which removed a right to claim privilege in respect of it), would be ‘merely’ objectionable on moral grounds. It would not ground a constitutional objection under s 116. Barton J’s comments are more equivocal. The priest might argue that ‘he could not exercise his religion freely’ if he were required to disclose what was learned during confessional.¹²² On the other hand, it could be argued that a law abrogating the privilege did not prevent the priest from exercising their religion freely, just limiting one aspect of it.

In the war-time *Jehovah’s Witnesses Case*¹²³ the High Court again rejected a s 116 challenge to government regulations providing for organisations to be declared prejudicial to the war effort. The Governor-General had declared the plaintiffs to be such an organisation, and pursuant to such declaration, government representatives took possession of the plaintiff’s premises. The plaintiff espoused doctrine that claimed the British Empire and other organised political bodies were organs of Satan, and that God’s law prevailed over secular law.

The chief relevance of the case for current purposes is the observation by the Court that freedom of religion was not absolute in nature. Justices accepted that religion could be limited without constitutional objection if it were necessary to maintain civil government or to secure the continued existence of the community.¹²⁴ Laws that were ‘reasonably necessary for the protection of the community and in the interests of social order’ were valid.¹²⁵ Obviously the context there was perceived existential threats to society. Child abuse, though clearly extremely serious, is of a different nature. As a result, much of what the Court had to say in the case regarding limits on s 116 freedoms are of marginal relevance. However, on the dicta of Starke J, laws requiring the disclosure of a confession about child abuse could clearly be seen as ‘reasonably necessary for the protection of the community’ and in the interests of ‘social order’.¹²⁶ Williams J’s acceptance of ordinary secular law relating to the worldly organization of the community could also be of some utility. Clearly, many other jurisdictions around the world have seen fit to abrogate the privilege, particularly in the context of suspected child abuse. In sum, the *Jehovah’s Witnesses Case* provides some support for the argument that a proposal by the Commonwealth to amend or repeal s 127 would not infringe s 116 of the *Australian Constitution*.

In subsequent decisions the Court has emphasised that the use of the word ‘for’ in three of the separate limbs of s 116 requires consideration of the purpose of the law

122 Ibid 372.

123 (1943) 67 CLR 116.

124 Ibid 131 (Latham CJ), 149 (Rich J), 157 (McTiernan J), 160 (Williams J).

125 Ibid 155 (Starke J). Williams J agreed that ‘ordinary secular laws relating to the worldly organization of the community’ would be valid: at 160.

126 Ibid 155.

said to be invalidated by s 116.¹²⁷ The Court has emphasised that this means that the protection to be accorded religious freedom in Australia is narrower than that accorded in the *United States Constitution*, where a law with respect to religion could offend the First Amendment, without having regard to its purpose.¹²⁸ In other words, it may be considered to be a law with respect to religion because of its *effect* on religion, as opposed to its *purpose* to interfere with free exercise of religion, to use one example.

In emphasising consideration of the purpose of a challenged provision in considering whether it is invalidated by s 116, different views have become evident as to the implication of finding that a law had a purpose of inhibiting the free exercise of religion. For some judges, this would make the legislation *prima facie* invalid. So, for instance, in *Kruger*,¹²⁹ Toohey J expressed the test in terms of whether ‘a purpose of the [challenged law was] to prohibit the free exercise of the religion’.¹³⁰ Gaudron J agreed that the purpose requirement for invalidity under s 116 would be satisfied if there were evidence the law had a purpose of prohibiting the free exercise of religion.¹³¹ However, a narrower view is evident in other judgments in the case. For instance, Brennan CJ stated that ‘[t]o attract invalidity under s 116, a law must have *the* purpose of achieving an object which s 116 forbids’.¹³² Gummow J likewise (with whom Dawson J agreed) expressed a narrow view, holding that the word ‘for’ in the phrase ‘for prohibiting the free exercise of any religion’:

directs attention to the objective or purpose of the law in issue. The question becomes whether the Commonwealth has made a law in order to prohibit the free exercise of any religion, as *the* end to be achieved. ‘Purpose’ refers not to underlying motive but to *the* end or object the legislation serves.¹³³

Now, there has been substantial critique of the existing jurisprudence regarding s 116 of the *Australian Constitution* in the literature.¹³⁴ It is not necessary here to go into the criticism in detail. However, the extent of the criticism, and the fact interpretation of s 116 has not been considered by the Court for some time, suggests it is possible that, if asked, the High Court might be prepared to adopt

127 *DOGS Case* (1981) 146 CLR 559, 579 (Barwick CJ), 615–16 (Mason J), 653 (Wilson J); *Kruger v Commonwealth* (1997) 190 CLR 1 (*Kruger*) (all members of the Court, except McHugh J, who did not consider s 116). Use of ‘purpose’ as the touchstone for s 116 invalidity has been trenchantly criticised: Luke Beck, ‘The Case against Improper Purpose as the Touchstone for Invalidity under Section 116 of the *Australian Constitution*’ (2016) 44 *Federal Law Review* 505.

128 See *Sherbert v Verner*, 374 US 398, 403 (1963) (*Sherbert*).

129 (1997) 190 CLR 1.

130 *Ibid* 86.

131 *Ibid* 133.

132 *Ibid* 40 (emphasis added), citing *DOGS Case* (1981) 146 CLR 559, 579, 615–16, 653.

133 *Ibid* 160 (emphasis added). The other judge in the case, McHugh J, did not consider s 116. Section 116 was considered only in very minor detail in *Williams v Commonwealth* (2012) 248 CLR 156, 222–3 [107]–[110] (Gummow and Bell JJ), and on a point of no relevance here; it was not discussed in *Williams v Commonwealth [No 2]* (2014) 252 CLR 416.

134 Beck, ‘The Case against Improper Purpose’, above n 127; Nicholas Aroney, ‘Freedom of Religion as an Associational Right’ (2014) 33 *University of Queensland Law Journal* 153; Stephen McLeish, ‘Making Sense of Religion and the *Constitution*: A Fresh Start for Section 116’ (1992) 18 *Monash University Law Review* 207.

a different interpretation of s 116 than has so far been evident. It is considered useful here to consider, albeit briefly, what a different approach to interpretation of s 116 might look like. At least two options present themselves. The High Court might embrace something of the United States approach to interpretation of a constitutional protection of free exercise of religion. Alternatively, the High Court might determine that a proportionality analysis that has commended itself to the High Court in different constitutional contexts, including protection of express and implied rights or freedoms provisions, might be applied to s 116 cases. I must explain each of these possible alternatives succinctly, before considering their possible application to the two questions posited.

A United States Approach

Before considering whether any light can be shed on interpretation of s 116 by the United States case law, at least two riders seem appropriate. The first is that the First Amendment freedom of religion provision in the *United States Constitution* is expressed more broadly than s 116 of the *Australian Constitution*. Specifically, it does not include the word ‘for’ in relation to the religious protections that it provides. As discussed above, this has been important for the Australian High Court in narrowing the protection given by s 116 to laws which have the purpose of interfering with the religious freedoms protected by the provision. By way of contrast, laws may be successfully challenged on First Amendment religious freedom grounds although they are not shown to have the purpose of interfering with religious freedom, as will be seen. On the other hand, of those occasions where the High Court has considered First Amendment religious freedom case law, it has on some occasions at least pointed out that the First Amendment and s 116 are similar.¹³⁵ It has on some occasions found the First Amendment case law to be of some use in the interpretation of s 116, though on occasion it has reached an interpretation of s 116 that was at direct odds with the United States provision, specifically regarding the question of government funding for non-government schools.¹³⁶ And secondly, the First Amendment has been extended so as to apply to state law,¹³⁷ while s 116 is a protection only from federal law. So with these riders in play, we should briefly consider the United States case law, to see whether they can assist in determining the extent to which the *Australian Constitution* affects the question of privilege being accorded to the religious confessional. In particular, it may shed light on the meaning of ‘free exercise of religion’ in terms of constitutional protection.

In essence, at one point, the Court had interpreted freedom of religion as a near absolute freedom, permitting government interference only where there was a compelling reason to do so, such as regulation of a substantial threat to public

135 *Jehovah’s Witnesses Case* (1943) 67 CLR 116, 127 (Latham CJ), 155 (Starke J).

136 This was held to be prohibited by the First Amendment: *Everson v Board of Education of the Township of Ewing*, 330 US 1 (1947), but a challenge on s 116 grounds was dismissed: *DOGS Case* (1981) 146 CLR 559.

137 *Cantwell v Connecticut*, 310 US 296, 303 (1940).

safety or order, and only where the regulation imposed was minimally invasive of religious freedoms.¹³⁸ At a time when this was the law, the case probably closest fact-wise to the religion confession context arose, *Wisconsin v Yoder*.¹³⁹ There government legislation required young people to attend school to a certain age. The Amish successfully argued such a law interfered with their religious freedom in a way offensive to ‘free exercise’. The Court noted the wish of the Amish to remove young people from government-run education systems at an age lower than the state’s mandatory age limit reflected a deep religious conviction as to the best interests of their young.¹⁴⁰ It was central, rather than peripheral, to their beliefs. The Court found only state interests of the highest order could counteract that belief; even the pursuit of minimum education levels for young people within a state was not sufficient to override the religious freedom of the Amish.¹⁴¹

Subsequently the Supreme Court pulled back from the very strong protection it had been according religious freedom.¹⁴² It confirmed the validity of generally applicable legislation which incidentally affected religious freedom. It re-affirmed the position that the law of the land was superior to religious doctrine, and that to allow a person to effectively immunise themselves from generally applicable legislation, by claiming the law interfered with their religious freedoms, would invert that position.¹⁴³ The only exception to this position, and this test, was when other freedoms, not just freedom of religion, were implicated,¹⁴⁴ or when the law was not, in fact, generally applicable, but singled out religion.¹⁴⁵ In either of such cases, the ‘compelling interest’ strict scrutiny approach would again apply.¹⁴⁶

The Supreme Court has consistently shown a great reluctance to interfere in ‘internal affairs’ of a religious institution.¹⁴⁷ This includes questions of ‘theological controversy, church discipline, ecclesiastical government, or the conformity of the church [members] to the standard of morals required of them’.¹⁴⁸ The Court has often either refused to adjudicate such controversies, or overturned attempts by lower courts to do so, on the basis that the free exercise clause of the First

138 *Sherbert*, 374 US 398, 403 (1963), quoting *National Association for the Advancement of Colored People v Button*, 371 US 415, 438 (1963).

139 406 US 205 (1972).

140 *Ibid* 217–18.

141 *Ibid* 235–6.

142 For example, Ira C Lupu and Robert W Tuttle, ‘Sexual Misconduct and Ecclesiastical Immunity’ [2004] *Brigham Young University Law Review* 1789, 1801–3 observe the Supreme Court’s shift from a separation philosophy to a neutrality philosophy in relation to religious freedom in the First Amendment.

143 *Employment Division, Department of Human Resources of Oregon v Smith*, 494 US 872, 878–80 (1990) (‘*Smith*’).

144 *Ibid* 881.

145 *Church of the Lukumi Babalu Aye Inc v City of Hialeah*, 508 US 520, 531–4 (1993) (‘*Lukumi*’).

146 A subsequent attempt by Congress to effectively circumvent the *Smith* decision and return the law to the ‘compelling interest’ position in *Sherbert* was then struck out as unconstitutional in its application to state law: *City of Boerne v Flores, Archbishop of San Antonio*, 521 US 507 (1997).

147 Lupu and Tuttle, above n 142, 1807–8.

148 *Watson v Jones*, 80 US (13 Wall) 679, 733 (Miller J) (1872).

Amendment prohibits courts from intervening in relation to such matters,¹⁴⁹ at least absent alleged fraud, collusion or arbitrariness.¹⁵⁰

An important decision for current discussion purposes is *Lukumi*.¹⁵¹ The case involved the religious practices of adherents of the Santeria faith, a fusion of African religion and Roman Catholicism. It was a central tenet of the Santeria faith that adherents practise animal sacrifice. In response to community concern, the local council passed various ordinances. These ordinances acknowledged community concern that certain religions may engage in practices inconsistent with public morality, and expressed a commitment to a prohibition on any acts of a religious group that were inconsistent with public morality. A later ordinance banned the slaughter of any animal as part of a ritual.¹⁵² Adherents of the faith successfully challenged the ordinances as a breach of their First Amendment religious freedoms.

Crucially, the Court had to determine which test to apply. A law that was generally applicable and neutral as to religion would be subject to the *Smith* test and would likely be valid; a law that was not so generally applicable would be subject to the strict scrutiny *Sherbert* approach. The Court found the law was not generally applicable and neutral — the ordinances aimed to target practices of those of the Santeria faith. Most, if not all, of the impact of the ordinances was on adherents of that faith. The Court noted that ‘[t]he principle that government, in pursuit of legitimate interests, cannot in a selective manner impose burdens only on conduct motivated by religious belief is essential to [the free exercise of rights]’.¹⁵³ This meant that the strict scrutiny *Sherbert* test applied; a test the council could not meet. The law was said to be justified by animal cruelty and public health concerns, but the Court found the law to be under-inclusive in seeking to meet such objectives, and not sufficiently narrowly tailored. As can be seen, the decision as to whether the *Smith* approach or the *Sherbert* approach is to be applied is often outcome-determinative.

In summary, the United States today applies different tests, according to whether the law which impacts religion is of general application, or whether it targets religion. A law of the former variety is likely to withstand a constitutional challenge; a law of the latter variety is susceptible to constitutional challenge,

149 *Jones v Wolf*, 443 US 595, 602 (1979): ‘the [First] Amendment requires that civil courts defer to the resolution of issues of religious doctrine or polity by the highest court of a hierarchical church organization’ (Blackmun J, with Brennan, Marshall, Rehnquist, and Stevens JJ agreeing); *Serbian Eastern Orthodox Diocese for the United States of America and Canada v Milivojevic*, 426 US 696, 715–16 (Brennan J, with Stewart, White, Marshall, Blackmun, and Powell JJ agreeing) (1976): ‘final authority with respect to the promulgation and interpretation of *all* matters of church discipline and internal organization rests with the Holy Assembly’ (emphasis in original); *Hosanna-Tabor Evangelical Lutheran Church and School v Equal Employment Opportunity Commission*, 565 US 171 (2012).

150 *Gonzalez v Roman Catholic Archbishop of Manila*, 280 US 1, 16 (Brandeis J) (1929).

151 508 US 520 (1993).

152 *Ibid* 524–8.

153 *Ibid* 543 (Kennedy J, with Rehnquist CJ, White, Stevens, Scalia and Thomas JJ agreeing).

unless compelling justification can be shown, and the law is minimally invasive of the religious freedom. The United States courts generally shy away from assessing religious doctrine or internal affairs of a religion. The American approach will be applied presently to the two questions to which this article is directed.

B Proportionality

The High Court has recently emphasised the use of ‘proportionality’ in constitutional law interpretation.¹⁵⁴ It did so in a case involving the implied freedom of political communication.¹⁵⁵ Of course, proportionality is not a foreign concept in constitutional law, being used in some cases to determine whether a Commonwealth law is within a head of power, particularly purposive powers,¹⁵⁶ express constitutional limits on power,¹⁵⁷ and used by some judges when interpreting some other express human rights protections that exist in the *Australian Constitution*.¹⁵⁸ As a result, it is quite possible, if the High Court decides that the existing state of the law on s 116 is unsatisfactory, that it will turn to questions of proportionality to assist it in reconciling freedom of religion with other legitimate interests, including community safety. This is not the place for a full-throated analysis of whether the High Court should or should not apply the principle of proportionality in more contexts of constitutional interpretation, other than its recent use in the context of the implied freedom. However, certainly the current Chief Justice of the High Court is a leading advocate of proportionality analysis in constitutional law.¹⁵⁹ Her Honour has stated it is relevant at a broad constitutional level,¹⁶⁰ and not apparently confined to the implied freedom of political communication. It would not surprise if adoption of proportionality analysis is viewed in future years as one of the defining features of the Kiefel era.

In the *McCloy* decision, a majority of the Court spelled out in more detail how proportionality might be used in assessing whether a law was consistent with a constitutional restriction. A three-stage approach was outlined, at least in the

154 *McCloy v New South Wales* (2015) 257 CLR 178 (*‘McCloy’*).

155 An earlier example of this appeared in the judgment of Mason CJ in *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1, 30–1.

156 *McCloy* (2015) 257 CLR 178, 195 [3] (French CJ, Kiefel, Bell and Keane JJ).

157 *Castlemaine Tooheys Pty Ltd v South Australia* (1990) 169 CLR 436, 473–4 (Mason CJ, Brennan, Deane, Dawson and Toohey JJ).

158 *McCloy* (2015) 257 CLR 178, 195 [3] (French CJ, Kiefel, Bell and Keane JJ); see, eg, *Street v Queensland Bar Association* (1989) 168 CLR 461, 511–12 (Brennan J).

159 Justice Susan Kiefel, ‘Proportionality: A Rule of Reason’ (2012) 23 *Public Law Review* 85.

160 *Rowe v Electoral Commissioner* (2010) 243 CLR 1, 140 when, speaking of proportionality, Kiefel J said it ‘is how to determine the limit of legislative power, where its exercise has the effect of restricting protected interests or freedoms’. Her Honour suggested the doctrine was applicable to ‘constitutional protections’.

context of the implied freedom of political communication.¹⁶¹ The third stage was referred to as ‘proportionality testing’. There are some questions as to whether this is the form in which proportionality testing will be applied in other contexts. The High Court has said that proportionality need not be applied the same way across jurisdictions;¹⁶² leading constitutional law scholars Williams, Brennan and Lynch add that it does not necessarily apply in the same way to different sections of the *Australian Constitution*, or that it even applies to all parts of the *Constitution*.¹⁶³

Having acknowledged that, the three-stage approach identified in *McCloy* considered:

- (a) *Suitability* — whether there is a rational connection between the challenged measure and its claimed purpose;
- (b) *Necessity* — whether there are other equally effective means of achieving the legitimate objective that are less invasive of the right or freedom, and obvious and compelling; and
- (c) *Adequate in its balance* — comparing the positive effect of the law with its interference with the right or freedom; the greater the restriction on the freedom, the greater the positive effect of the law would need to be, in order to be constitutionally valid.¹⁶⁴

To repeat, it is a large question whether this approach is to be confined to consideration of the implied freedom of political communication, or whether it should be extended to other freedoms in the *Constitution*, including the right to religious freedom. At the very least, such a change in approach is worth considering in the context of s 116, given the generally unsatisfactory nature of the case law. In the following sections I will apply this possible new approach, to determine the constitutional answer to the two major questions posed in this article.

I will now proceed to consider whether the repeal of s 127 of the *Evidence Act 1995* (Cth) would, or would not, be a breach of s 116 of the *Australian Constitution*.¹⁶⁵ I will consider this on the existing state of s 116 authorities, and also the alternative approaches offered by the United States case law or proportionality testing. Then,

161 The majority considered: (a) whether the law burdened the implied freedom of communication in its terms, operation or effect; (b) whether the purpose of the law and the means adopted to achieve its purpose were compatible with the constitutionally prescribed system of representative and responsible government; and (c) whether the law was reasonably appropriate and adapted to achievement of the legitimate objective: *McCloy* (2015) 257 CLR 178, 193–5 [2] (French CJ, Kiefel, Bell and Keane JJ, with Gageler, Nettle and Gordon JJ dissenting on this point). Obviously French CJ has subsequently left the Court, and the views of Edelman J on this point are not known at present. See also *Brown v Tasmania* (2017) 261 CLR 328 where a majority applied a proportionality analysis (Kiefel CJ, Bell, Keane and Nettle JJ).

162 *McCloy v New South Wales* (2015) 257 CLR 178, 215 [72] (French CJ, Kiefel, Bell and Keane JJ).

163 Williams, Brennan and Lynch, above n 80, 799 [17.94].

164 *McCloy* (2015) 257 CLR 178, 217–19 (French CJ, Kiefel, Bell and Keane JJ).

165 I will not consider the alternative question of the constitutionality of a possible *amendment* to s 127, as opposed to *repeal*. Space is obviously limited, and such consideration would be difficult in the absence of detail regarding the precise scope of the amendment.

in the alternative, or in addition, Part V considers whether a provision introducing a requirement of mandatory reporting by clergy would breach s 116, if included in a federal law.

It is somewhat daunting for anyone to mount a convincing argument that a law infringes s 116 of the *Australian Constitution* on the existing jurisprudence, given the bare fact that, in more than 117 years, no challenge has been successful.

The argument in favour of validity would draw on statements by members of the High Court in the *Jehovah's Witnesses Case* that freedom of religion is not absolute, and that federal legislation with legitimate objectives may prevail against a constitutional challenge, even when they appear to affect the exercise of religious freedoms. Members of the Court in that case pointed to legitimate legislative objectives of community safety, in upholding the challenged legislation.¹⁶⁶ Somewhat analogously, the argument would be that laws designed to detect and prevent child abuse are also strongly justified on community safety grounds.¹⁶⁷

As indicated above in Part III, there is evidence that laws requiring mandatory reporting increase the rate of reporting, and detection, of child abuse. There is also evidence that paedophile priests have confessed their crimes to other priests.¹⁶⁸ There is doubt, at the very least, that removing the secrecy aspect will reduce this practice:

Research further suggests that the level of confidentiality one expects has relatively little bearing on one's behavior. Several academics conducted studies to test the layperson's expectation of confidentiality when communicating with an attorney or psychotherapist. These studies revealed that most individuals will disclose confidential information, regardless of whether they expect that information to be privileged. Although the underlying studies did not deal specifically with the

166 *Jehovah's Witnesses Case* (1943) 67 CLR 116, 131–2 (Latham CJ), 149–50 (Rich J), 155 (Starke J), 157 (McTiernan J), 160–1 (Williams J).

167 A counter-argument to this would be that the justifications are not comparable. The Court in the *Jehovah's Witnesses Case* was dealing with regulation of religious freedom in the context of an existential threat. It was in that context that the Court found that the religious freedom would need to yield to the broader public interest. Some might argue that, with no disrespect intended to survivors of child sexual abuse, that the issue of child abuse is of a different order than the kind of existential threat concerned in the *Jehovah's Witnesses Case*.

168 Keenan, above n 5; John Cornwell, *The Dark Box: A Secret History of Confession* (Basic Books, 2014) 189; Michael Andre Guerzoni and Hannah Graham, 'Catholic Church Responses to Clergy-Child Sexual Abuse and Mandatory Reporting Exemptions in Victoria, Australia: A Discursive Critique' (2015) 4(4) *International Journal for Crime, Justice and Social Democracy* 58, 66 refer to one convicted sex offender Father McArdle who apparently confessed to 30 different priests over a 25-year period that he had committed approximately 1400 sexual assaults on children. Another offender said he had confessed to other priests 200 times. More generally the United States Supreme Court reflected on the impact of mandatory disclosure on the flow of information in *Branzburg v Hayes*, 408 US 665, 693 (1972):

we remain unclear how often and to what extent informers are actually deterred from furnishing information when newsmen are forced to testify before a grand jury ... the evidence fails to demonstrate that there would be a significant constriction of the flow of news to the public if this Court reaffirms the prior common-law ... rule [requiring disclosure] ...

clergy-penitent privilege, several other authors have used this research in arguing against the privilege.¹⁶⁹

This evidence directly contradicts claims by supporters of retaining the seal that its removal would be ineffective, because priests do not often hear confessions of sexual abuse by other priests.¹⁷⁰ Thus the federal government would argue that its law was aimed at a legitimate objective, and tailored to the achievement of that objective. In other words, that it was minimally invasive of the religious right, ‘merely’ stripping the confidentiality of the confession. The government might argue no other measure less minimally invasive of the religious right was feasible; if the privilege were to remain in place, religious figures would not breach the seal of the confessional.

Those arguing in favour of validity would also point to the use of the ‘purpose’ test in s 116 cases. They would argue that the purpose of the repeal of s 127 was to detect and prevent child abuse. As indicated above, three of the six Justices in *Kruger* found that a law could only infringe s 116 if it had the sole purpose of infringing the religious freedom. Here, other purposes for the repeal of s 127 could be readily identified, it being conceded either that (a) the law incidentally affected religious freedom, or that (b) it did have a purpose of infringing religious freedoms, but that this was not *the* purpose of the law.¹⁷¹

It might also be argued that removal of s 127 does not prohibit the free exercise of religion at all; rather it simply removes a privilege that religious figures formerly enjoyed. Religions remain entirely free to offer the religious ritual of the confessional, as they have done for centuries. The removal would simply concern matters which could be given in evidence in a (secular) court.

Arguments could also be raised here as to the meaning of ‘free’. In the s 116 cases, the main example where this was discussed was the judgment of Latham CJ in the *Jehovah’s Witnesses Case*. There Latham CJ pointed out the hotly contested meaning of the innocuous word ‘free’, and alluded to the fact that its use in the context of another constitutional provision, s 92, had again not

169 Rena Durrant, ‘Where There’s Smoke, There’s Fire (and Brimstone): Is It Time to Abandon the Clergy-Penitent Privilege?’ (2006) 39 *Loyola of Los Angeles Law Review* 1339, 1352–3. Horner, above n 35, 731: ‘There is no evidence to suggest that religiously motivated people, who believe that absolution and counseling are important to their spiritual development and fortunes, would forgo counseling if they knew that their clergyperson could testify in court regarding the crime.’

170 Parkinson, above n 10, 305, referring to evidence from Bishop Geoffrey Robinson that ‘[i]n 52 years as a priest, he had never had to deal with the situation of a person using the confessional to reveal the sexual abuse of children’; Mitchell, ‘Must Clergy Tell?’, above n 47, 812:

If, to comply with statutory reporting requirements, clergy begin to disclose otherwise confidential information, the expectation of secrecy will be destroyed. In the short run, confiders will feel betrayed; in the long run, they are likely to stop confiding in the clergy.

As a result, the clergy will no longer be a source of tips on child abuse, and the reason for requiring them to disclose in the first place will dissolve.

171 There is no suggestion (as yet) in the s 116 case law that the Court would consider a test based on the predominant purpose of challenged legislation. So far, at least, the argument has been whether a test of ‘the purpose’ or the test of ‘a purpose’ should be used, as opposed to an intermediate test. Obviously, if the Court were to adopt an approach involving asking whether the law had ‘a purpose’ of interfering with free exercise, challengers’ prospects of success would be greater. A law repealing s 127 could clearly be argued to have a purpose of interfering with religious freedom.

been applied in absolute terms.¹⁷² In other words, the requirement in s 92 of the *Australian Constitution* that trade, commerce and intercourse among the states should be ‘absolutely free’ had not been interpreted to mean no regulation was ever (constitutionally) permissible. Indeed, long after the *Jehovah’s Witnesses Case*, it has been interpreted as an anti-discrimination and anti-protectionist norm.¹⁷³ In other words, ‘free’ does not mean ‘no regulation’. This would support the argument that removal of a privilege that the practice of confession enjoyed at one time does not prohibit ‘free’ exercise, on the basis that free does not mean ‘free of all regulation’.

Finally, there are sound arguments to counter the argument some posit that somehow religion is in its own ‘sphere’, and that religion, or more precisely, canon law, is sovereign in this sphere.¹⁷⁴ This is apparently a common belief, with some religious figures believing that in the event of a conflict between their religious obligation and their obligation to obey secular law, the former obligation prevails.¹⁷⁵ Such a belief would find support in tenets of natural law, and in the philosophical debate about the possible duty to disobey an ‘unjust’ law.

On the other hand, it does not find much support in legal principle. It seems fundamentally counter to the rule of law, and the equality of law that is often placed within it, to have a system whereby the law does not apply to all. As Mason ACJ and Brennan J put it succinctly, ‘[r]eligious conviction is not a solvent of legal obligation’.¹⁷⁶ In *McFarlane v Relate Avon Ltd*, Laws LJ reflected on the interplay between law and religion in important terms:

172 *Jehovah’s Witnesses Case* (1943) 67 CLR 116, 126–7.

173 *Cole v Whitfield* (1988) 165 CLR 360. This is not to suggest that the word ‘free’ in s 116 should be interpreted to mean that no discrimination among religions, or between religion and no religion, is permitted.

174 Julian Rivers, ‘The Secularisation of the British Constitution’ (2012) 14 *Ecclesiastical Law Journal* 371, 399; Julian Rivers, *The Law of Organized Religions: Between Establishment and Secularism* (Oxford University Press, 2010) 318; Ian Leigh, ‘Balancing Religious Autonomy and Other Human Rights under the European Convention’ (2012) 1 *Oxford Journal of Law and Religion* 109, 111: ‘pluralism requires the recognition of a non-state sphere where religious bodies and individuals are free to apply their own standards’; Rex Ahdar and Ian Leigh, *Religious Freedom in the Liberal State* (Oxford University Press, 2nd ed, 2013) 48: ‘there are two distinct “kingdoms”, authorities or jurisdictions — the spiritual (or heavenly) and the temporal (or earthly)’; Shelley K Wessels, ‘The Collision of Religious Exercise and Governmental Nondiscrimination Policies’ (1989) 41 *Stanford Law Review* 1201, 1219; Alvin J Esau, ‘“Islands of Exclusivity”: Religious Organizations and Employment Discrimination’ (2000) 33 *University of British Columbia Law Review* 719, 827.

175 ‘Any legislative amendment that purported to require priests to violate the sacramental seal of confession will be ineffective as priests will simply be unable and unwilling to comply ... Canonical obligations override inconsistent obligations purportedly imposed by civil law’: Catholic Church in Victoria, Submission to Family and Community Development Committee, Parliament of Victoria, *Inquiry into the Handling of Child Abuse by Religious and Other Non-Governmental Organisations*, 21 September 2012, 107 [15.4], cited in Guerzoni and Graham, above n 168, 66. In contrast was the evidence of Cardinal Pell: Evidence to Family and Community Development Committee, Parliament of Victoria, Melbourne, 27 May 2013, 26 (Cardinal George Pell, Catholic Archdiocese of Sydney): ‘We have always complied with the law of the land, and we will comply with the law of the land in the future ... I repeat, whatever we are compelled to do, we will do’, cited in Guerzoni and Graham, above n 168, 64.

176 *Church of the New Faith v Commissioner of Pay-Roll Tax (Vic)* (1983) 154 CLR 120, 136.

the conferment of any legal protection or preference upon a particular substantive moral position on the ground only that it is espoused by the adherents of a particular faith ... is deeply unprincipled; it imposes compulsory law not to advance the general good on objective grounds, but to give effect to ... substantive opinion. ... The promulgation of law for the protection of a position held purely on religious grounds cannot therefore be justified; it is irrational ... [and] divisive, capricious and arbitrary.¹⁷⁷

My conclusion, on the existing state of the Australian authorities on s 116, is that removal of the statutory privilege found in s 127 of the uniform evidence legislation would not breach the requirements of the section. This is firstly because 'free exercise' has not been interpreted to mean, and should not mean, free of any regulation. Governments have, and can, point to justifications for intrusion on religious freedom, and could do so in the current context. No-one could deny that it is a legitimate objective for a government to seek to provide a safe environment for children. It is secondly because, according to the High Court's pronouncements in *Kruger*, or at least that of three of the Justices, a law which offended s 116 would have to have *the* purpose of affecting free exercise, and the government could easily point to a law which removed the privilege having another purpose. And claims by some religious bodies that they enjoy some kind of protected sphere subject only to religious, rather than secular, regulation have never been accepted by the High Court as being supported by s 116.

Regarding the possible alternative approaches, in terms of American law it must be noted that the priest-penitent privilege has been substantially abrogated by legislation in many states of the United States.¹⁷⁸ Winters notes that 23 states include religious figures within their mandatory reporting requirements, but exclude from this requirement information gleaned during the confessional.¹⁷⁹ Two states make religious figures mandatory reporters without that exclusion. Some states include as mandatory reporters any person, which can obviously include religious figures. Some of these expressly abrogate the priest-penitent privilege.¹⁸⁰ The United States Supreme Court has never definitely determined whether a law

177 [2010] EWCA Civ 880 (29 April 2010) [21]–[22] (Laws LJ); see also Jürgen Habermas, 'Religion in the Public Sphere' (2006) 14 *European Journal of Philosophy* 1, 9 who, speaking of the religious adherent, concluded that he or she:

no longer lives as a member of a religiously homogeneous population within a religiously legitimated state. And therefore certainties of faith are always already networked with fallible beliefs of a secular nature; they have long since lost — in the form of 'unmoved' but not 'unmovable' movers — their purported immunity to the impositions of modern reflexivity.

See also Norman Doe, *Law and Religion in Europe: A Comparative Introduction* (Oxford University Press, 2011) 138: 'The fundamental principle which emerges is that religious organizations are autonomous to the extent permitted by the law'; Reid Mortensen, 'Rendering to God and Caesar: Religion in Australian Discrimination Law' (1995) 18 *University of Queensland Law Journal* 208, 220–1.

178 Mitchell, 'Must Clergy Tell?', above n 47, 733–4; Cassagne, above n 35, 265; Karen L Ross, 'Revealing Confidential Secrets: Will It Save Our Children?' (1998) 28 *Seton Hall Law Review* 963, 978; Ezeanokwasa, above n 36, 42–3; Cassidy, above n 41, 1645–51; Marci A Hamilton, 'The Time Has Come for a Restatement of Child Sex Abuse' (2014) 79 *Brooklyn Law Review* 397, 409–10.

179 Winters, above n 8, 190.

180 *Ibid.*

violating the seal of the confessional is offensive to First Amendment rights, but most American scholarship on point suggest state laws removing the privilege are likely to survive a First Amendment challenge.¹⁸¹

That having been said, the Supreme Court has been concerned with laws that appear to be targeted at religious practices, as opposed to laws that are more general in nature, with an incidental impact on religious freedom. In some cases, this can be a fine line to draw. For instance, the law challenged in *Lukumi* did not expressly target the specific religious practices of the Santeria, and their prohibitions on cruelty and animal slaughter by ritual did not expressly refer to religious practice, as opposed to other contexts in which such behaviour might occur. Yet the law was struck down.

How does this apply to a statute removing the privilege that the confessional formerly enjoyed? Such a law would clearly be directed at a religious practice. The United States Supreme Court has indicated that, in such cases, the government must show a compelling justification, and that the law is minimally invasive of the religious freedom. While conceivably protection of children from ongoing abuse would be a compelling justification, it is harder to argue that the law is ‘minimally invasive’. It strips the practice of confessional, itself central to the Catholic faith, of its secrecy aspect, an aspect which has been shown to be one of its longstanding characteristics. It may be that if the strict scrutiny, compelling justification approach were applied to the context of s 116 of the *Australian Constitution* and repeal of s 127 of the evidence legislation, the court would find it invalid.

What would the result be if the ‘proportionality’ testing approach were applied to resolve s 116 questions? As explained above, a majority of the High Court has found that proportionality testing involves consideration of three criteria, namely whether the law is suitable (rational connection between challenged measure and claimed purpose), necessary (availability of other equally effective means of achieving the same objective which are less invasive of the freedom and obvious and compelling), and adequate in its balance (comparing the positive effect of the law with its interference with the freedom).¹⁸²

A law removing the statutory privilege attached to the confessional is considered suitable. It is likely to assist in the detection of some past abuse, and assist to prevent future abuse. The question of necessity is more ambivalent — clearly there are many other policy mechanisms available to detect past abuse and prevent future abuse, other than removing the privilege associated with the confessional. Many of these would affect the exercise of religious freedom to a lesser extent than removing the statutory privilege. If an example were needed, one might be a policy decision to devote greater resources to police to enable them to investigate

181 See Caroline Donze, ‘Breaking the Seal of Confession: Examining the Constitutionality of the Clergy-Penitent Privilege in Mandatory Reporting Law’ (2017) 78 *Louisiana Law Review* 267; Mary Harter Mitchell, ‘Child Abuse Reporting Requirements versus the Clergy Privilege and Free Exercise of Religion’ (1987) 71 *Minnesota Law Review* 723; Ross, above n 176.

182 *McCloy v New South Wales* (2015) 257 CLR 178, 194–5, 217–20 (French CJ, Kiefel, Bell and Keane JJ).

suspected abuse, or to educate more people about abuse. This would obviously have less impact on the religious freedom.

In terms of balancing, obviously the interest of the state in protecting the vulnerable is extremely important. Whilst the extent to which removal of the statutory privilege will in practice lead to further evidence of abuse being made public is open to some conjecture, it is likely a court would find that this pressing interest would trump the statutory privilege associated with the confessional. The significant impact on one aspect of religious practice is acknowledged; however, it is only one aspect, fundamental though it may be. In summary, were the Court to apply proportionality testing to s 116 in the way it did to the implied freedom of political communication, the High Court might find that the repeal of s 127 is constitutionally invalid, because the government cannot show the measure is 'necessary'.

V WOULD FEDERAL MANDATORY REPORTING OF CHILD ABUSE LEGISLATION APPLICABLE TO THE CLERGY BE UNCONSTITUTIONAL?

There are examples in the literature of scholars calling for the imposition of mandatory reporting regimes on priests.¹⁸³ The Royal Commission recommended that state and territory governments create a new criminal offence of failing to report child sex abuse in institutions, with no exception for material disclosed during confession. Would such a law at federal level be constitutionally valid? Firstly, the federal government would need to point to a head of power to justify such legislation. Practically, it would be much easier, and thus more likely, for any such requirement to appear in state law, given that child protection is primarily seen as a state issue, and the mandatory reporting requirements are for the most part currently found in state, rather than federal, legislation. Indeed, that was the recommendation of the Royal Commission. That having been said, the most obvious head of power for the Commonwealth would be the s 51(xxix) external affairs power, in terms of implementation of the *United Nations Convention on the Rights of the Child*.¹⁸⁴ It may rely on its referral powers, s 51(xxxvii) or (xxxviii) of the *Constitution*. Less promisingly, on current authorities, the federal government might look to s 81 of the *Constitution*, in recognition of the fact that it provides funding to religious institutions. Thus, it might provide that it is a condition of

183 Guerzoni and Graham, above n 168, 70: 'members of the clergy should, given their unique relationship of trust and time shared with children, be required to be included as mandatory reporters of child abuse'; Harman, above n 8, called for the repeal of *Evidence Act 1995* (Cth) s 127 and equivalent state provisions.

184 *United Nations Convention on the Rights of the Child*.

this funding that the recipient religious institution agrees to mandatory reporting of suspected child abuse.¹⁸⁵

Now, assuming a head of power existed, would such a Commonwealth law infringe the requirements of s 116? An argument that it does might utilise the comment of Griffith CJ in *Krygger* to the effect that to require a person to do something that was nothing at all to do with their religion was not a prohibition of free exercise in breach of s 116.¹⁸⁶ Obviously, the corollary argument would be that to require a person to do something that was a very serious breach of their religious duty (requiring a Catholic priest to breach the seal of the confessional) would be a prohibition on free exercise.

Again, arguments could be made as to the purpose of this legislation. The government here might be on stronger ground in asserting that the purpose of the legislation is to detect and prevent child abuse. They would argue that the effect on religious freedom was incidental. This may be more problematic in the context where the legislation will clearly target religious figures. It might not be a general reporting statute, applying to a range of reporters. If it were cast in such general terms, it would be easier for the Commonwealth to argue that the impact and effect of the regime on religious practice was incidental. In contrast, if it were a provision that specifically targeted priests, it would be harder to argue that the effect was merely incidental; it could look as if the Parliament was specifically targeting a religious practice, thus prohibiting the free exercise of religion.

Even if a law mandated that religious figures report suspected child abuse, including suspicions derived from what was said during a confessional, this will not automatically mean the legislation would fall foul of s 116. The government might then respond with the argument alluded to above — that ‘free exercise’ does not mean ‘free of any regulation’. They would argue they have not outlawed or banned the confessional, but simply regulated it. As such, they have not prohibited free exercise, but merely provided regulation. And they would argue that it is for a legitimate community safety objective, an objective considered acceptable to the High Court in terms of regulation (interference) with religious freedom in the *Jehovah’s Witnesses Case*.

In sum, a s 116 challenge based on the existing authorities is considered unlikely to succeed. This conclusion is premised on the basis that the introduction by the federal government of a mandatory reporting scheme applies to a range of individuals working or dealing with children, so as to *include*, but not to *target*, religious figures. Further, the federal government has a strong argument, on the existing authorities, that such legislation would be consistent with ‘reasonable

185 There is a lively constitutional debate, into which it is considered beyond current purposes to enter, in relation to the scope of s 81, and in particular whether it is an independent head of power in terms of federal government funding, or whether it is not an independent head of power, in which case another head of power must be utilised to justify (constitutionally) the spending: see *Williams v Commonwealth* (2012) 248 CLR 156; cf *Combet v Commonwealth* (2005) 224 CLR 494; *Victoria v Commonwealth* (1975) 134 CLR 338 (*AAP Case*).

186 *Krygger* (1912) 15 CLR 366, 369.

regulation' of a religious freedom, based on a pressing legitimate objective, in the knowledge that religious freedoms are not absolute in nature.

Regarding the alternative approaches, consider the United States position, distinguishing laws of general application from laws which single out religion. Now these mandatory reporting statutes typically apply to a range of occupations involving close connection with students. It might apply, for instance, to teachers, child care workers, nurses, as well as religious figures. One argument might be that such a law is of general application, not singling out religion or religious practice, but incidentally impacting on a religious practice, in its application to a broader range of groups.¹⁸⁷ Incidentally, this kind of discrimination-based approach to interpretation of s 116 has recently been promoted in the Australian literature.¹⁸⁸ According to *Smith*, this would not be offensive to First Amendment religious freedoms. Another argument that the law was not offensive to First Amendment freedoms would be that the law would not, as in *Lukumi*, be prohibiting a religious practice. The practice of confession could still continue. It would be rather that the secrecy of the practice would be removed. This would be sufficient to distinguish the position of removal of secrecy of the confessional from the banning of animal slaughter in *Lukumi*.

Further, the concern of the United States Supreme Court that the Court not get involved in the mediation or adjudication of church doctrine, and that the Court not interfere with 'internal affairs' of the church, would not be implicated here. The Court would not be telling the church that confessional should no longer be seen as part of the sacrament. It would not be telling it that it ought not to continue with the practice. It would not even be telling it to change the consequences if a priest were to violate the secrecy of it. These would all remain as 'internal affairs' of the church.¹⁸⁹ It would simply change legal consequences in relation to some confessions. In summary, if the American approach to religious freedom and constitutional matters were adopted in Australia, it is considered that a constitutional challenge to a mandatory reporting requirement on religious figures would fail.

What of a possible 'proportionality testing' approach to s 116, as applied to a mandatory reporting statute applicable to religious figures? The law would be considered suitable. Certainly, given the academic literature generally lauding the effectiveness of mandatory reporting schemes in uncovering abuse, a rational connection could be shown between the measure and the claimed purpose, to uncover past abuse and work to prevent future abuse.

187 Brooks, above n 34, 130 (citations omitted): 'An argument that these statutes [requiring clergy to report] are not neutral or generally applicable would almost certainly fail. None of the statutes single out a particular religion or religious belief for a burden and ... clergy are by no means singled out for more onerous treatment'. See also Cassidy, above n 41, 1708.

188 Luke Beck, 'The *Australian Constitution's* Religious Tests Clause as an Anti-Discrimination Provision' (2016) 42 *Monash University Law Review* 545.

189 Winters, above n 8, 211: 'penitents' verbal confessions of sin to clergymembers are individual and personal. They are ... distinct from matters concerning internal governance of the church'.

Again, however, difficulties arise with the ‘necessity’ aspect of proportionality. It is hard to argue that the imposition of a mandatory reporting requirement on religious figures is ‘necessary’ to achieve the objective of uncovering and preventing abuse within religious institutions. There are other means of achieving that legitimate objective that are less invasive of the right, and obvious and compelling. For instance, removal of the statutory privilege, as opposed to mandating reporting, would be less invasive of the right. Perhaps one could quibble as to whether it was ‘compelling’. It remains to be seen how such concepts will be interpreted and applied, given their newness.

There is an argument about whether such a measure would be ‘equally effective’. Obviously, mandatory reporting would likely disclose more abuse than mere removal of the confession. Police will often not be aware of what had been said to whom during confession, so a simple removal of the statutory privilege will likely uncover much less abuse than a blanket mandatory reporting system would. But at a broader level of comparison, there are other measures available to prevent and detect child abuse that are less invasive of the religious freedom. An example might be the devotion of greater resources to police to investigate (and educate) in this area. On balance, it is reasonable to conclude a mandatory reporting scheme would struggle to meet the ‘necessity’ test. Again, it can be argued to be adequate in its balance given the compelling state interest in protecting the vulnerable, together with the literature demonstrating the effectiveness of mandatory reporting schemes in leading to the discovery of more abuse. The impact on one (important) aspect of religious freedom is acknowledged, and it is clearly of greater import than mere removal of the privilege, but this may be outweighed by the state interest.

VI CONCLUSION

This article has considered a recommendation from the Royal Commission to the effect that the statutory priest-penitent privilege be removed, and/or that religious figures be added to existing mandatory reporting regimes. It has acknowledged the fundamental importance of the confessional to some faiths, and its longstanding, central place in religious tenets, though it is likely not protected by Australian common law. It is very difficult when such a fundamental religious tenet clashes with other fundamental values and interests, such as the interest of the state in ensuring children are not harmed. This interest is reflected in existing mandatory reporting regimes requiring particular professionals who work closely with children to report suspected abuse. At present, these schemes do not specifically extend to religious figures, and uniform evidence legislation protects clergy from being required to answer questions which would divulge information learned during confessional. Change is likely given the Royal Commission’s recommendations, though it did not recommend specific changes to the uniform evidence legislation.

The paper has asked whether a federal law removing this existing statutory privilege in evidence legislation, or a law specifically imposing a statutory obligation on clergy to report suspected abuse, despite the circumstances in which that information was gleaned, would be constitutional. It has proven to be extremely difficult for anyone alleging a breach of s 116 of the *Australian Constitution* to make out their case, due to the way in which the section's requirements have so far been interpreted. It concludes that, according to the existing approach to interpretation of s 116 issues, there are good arguments in favour of validity. It is likely that a constitutional challenge to either a removal of s 127 or a mandatory reporting obligation on religious figures would fail. This is because the Court is likely to continue to insist that the proscribed law must have the, or a, purpose of interfering with religion, and the Commonwealth can counter that the law is designed to tackle child abuse, with incidental effects on religion. Alternatively, it can argue that 'free exercise' is consistent with reasonable, justified legislation, and point to the obvious public interest in seeking out evidence of child abuse in doing so.

Given the criticism of the current approach to s 116 interpretation, and the fact the High Court has not considered the section in detail for some years, it is possible it may take a different approach to s 116 issues in future. In that light, two alternative approaches have been considered, the approach to religious rights taken by the United States courts, and proportionality testing, which has recently appealed to the Australian High Court in comparable constitutional contexts. The article found that, if the United States position were taken that a law targeting religious practice would need compelling justification and be shown to be minimally invasive of the right, the challenged provision would likely founder. This is likely to be the result in relation to a repeal of s 127. However, were the Commonwealth to introduce a broad mandatory reporting provision which applied to a range of occupations and fields, this would likely not offend s 116, assuming that the United States approach were taken. This would be a law of general application, as opposed to a law targeting religion. As a result, the more relaxed test of constitutionality would be applied.

If the High Court were to extend its 'proportionality testing' approach to s 116, the chances of a successful challenge to either of the federal government's proposed legislative amendments would increase. This is in particular because one aspect of proportionality testing requires the government to show the law is 'necessary' and minimally invasive of the relevant right, here religious freedom. This may be difficult for the government to be able to demonstrate, more so the general mandatory reporting obligation. Alternatively, arguably equally effective legislative means of achieving the legitimate objective can be readily imagined. It should, however, be conceded that proportionality testing remains at a nascent stage of development, and subsequent case law may clarify the meaning of 'necessary' in this context.

It is not necessary for the purposes of the article to make a judgment about whether Parliament should, in its weighing up of religious freedom rights as compared with the rights of children to bodily integrity, decide to abrogate the

existing statutory privilege, or extend the mandatory reporting requirement to religious figures. This is primarily a matter for Parliament to determine. Any change in this area is likely to be very controversial. It may be church doctrine will adapt so that any religious figure who breached the seal of the confession in order to comply with a legal requirement to divulge evidence should not suffer the drastic consequences that currently attach to such a breach of confidentiality. However, the High Court has accepted that religious belief is not a 'solvent of legal obligation'¹⁹⁰ — in other words, no one is above the law, including religious figures. As much as religious figures are devoted to religious doctrine, they must accept this position.

190 *Church of the New Faith v Commissioner of Pay-Roll Tax (Vic)* (1983) 154 CLR 120, 136.