

rarity or abundance of the species as a whole will determine whether the requirement is met or not. So far, however, it seems that neither Ministers nor English Nature are prepared to balance these considerations against the protection of the bats no matter how much hardship is inflicted on the users of churches.

CONCLUSION

Analysis of the law shows that there is no shortage of opportunities to grant licences which will allow the use of churches uninfested by bats. The question remains – what can be done in practice to get rid of them? The correspondence in 2014 produced an intriguing range of possibilities, including revving motorcycles, burning incense, installing and turning up the volume of the electronic muezzin in a mosque, and stuffed owls. A study by the University of Bristol in 2014 offered two scientifically researched solutions, namely ultrasound equipment and intense lighting. However, the efficacy of any one deterrent may vary with the species of bat. This, and the more homely remedies tried earlier, indicates that noise is the most promising way of discouraging the bat population.

In the end, bats are wild animals, and belong in the wild, not in buildings designed and used for purposes other than as bat sanctuaries. If there were greater willingness to recognise this, within the framework of the Habitats Regulations, then a reasonable solution would be to allow experiments, undertaken with specialist advice, with a wide variety of deterrents. Limited studies are in train, but in the meantime the nuisance from bats continues, as it has for many years. There is no need for amendment of the law, merely for a change of attitude.

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The Confidentiality of Confessions in the Anglican Church of Australia

GARTH BLAKE SC

Chairperson, Professional Standards Commission, Anglican Church of Australia

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On 1 July 2014 the General Synod of the Anglican Church of Australia passed the Canon Concerning Confessions 1989 (Amendment) Canon 2014, which creates

a further exception to the confidentiality of a confession.¹ Under this further exception, a member of the clergy is only required to keep the confession of a 'serious offence' confidential where reasonably satisfied that that the penitent has reported the serious offence to the police and, if the penitent is a church worker or a member of the clergy, to the Director of Professional Standards (section 2A(2)). In moving this Bill, I argued that the fundamental theological principle to which it gave expression is that the safety of the members of the Church and the public should be of paramount concern when considering the issue of the confidentiality of confessions, and that accordingly confessions must not operate as a cloak for the concealment of serious criminal offences.

A 'serious offence' is defined in section 2A(1) as:

a criminal offence of the Commonwealth, of a State or of a Territory, or of another country which is equivalent to such a criminal offence of the Commonwealth, of a State or of a Territory:

- (a) involving child abuse; or
- (b) involving child exploitation material; or
- (c) punishable by imprisonment for life or for a term of 5 years or more.

The words and expressions 'child', 'child abuse', 'child exploitation material', 'church worker', 'clergy', 'Director of Professional Standards', 'ordained minister' and 'police' are also defined. The expression 'child abuse' encompasses bullying, emotional abuse, neglect, physical abuse, sexual assault, sexual harassment, sexually inappropriate behaviour or spiritual abuse. The expression 'child exploitation material' encompasses material (including any film, printed matter, electronic data, computer image or any other depiction) that describes or depicts a person who is or who appears to be a child engaged in sexual activity, or in a sexual context, or as the subject of torture, cruelty or abuse (whether or not in a sexual context).

The member of the clergy may reveal the confession to a professional advisor for the purpose of obtaining advice as to whether the confessed conduct constitutes a serious offence (section 2A(3)).² It is a defence to a charge of breach of discipline or any offence against a member of the clergy arising from his or her disclosure to any person of a confession that does not constitute a serious

1 Available at <http://www.anglican.org.au/governance/Documents/Canon%2011%202014%20-%20Canon%20concerning%20confessions%201989%20%28Amendment%20%20Canon%202014_for%20website.pdf>, accessed 20 August 2014.

2 A similar provision is found in Constitution 21 of the Fourth Lateran Council in 1215 which relevantly provides: 'Let him take the utmost care, however, not to betray the sinner at all by word or sign or in any other way. If the priest needs wise advice, let him seek it cautiously without any mention of the person concerned. For if anyone presumes to reveal a sin disclosed to him in confession, we decree that he is not only to be deposed from his priestly office but also to be confined to a strict monastery to do perpetual penance.'

offence that he or she in good faith believed that the confessed conduct did constitute a serious offence (section 2A(4)).

The General Synod also passed the following Resolution (67/14): ‘That the General Synod requests the National Bishops’ Meeting to provide suitable resources for use by those hearing confessions which address the issues surrounding penitence, contrition and amendment of life in the light of contemporary expectations concerning transparency and disclosure.’

While the focus on the Anglican Church by the Royal Commission into Institutional Responses to Child Sexual Abuse, which was jointly established by letters patent of the Commonwealth and State governments in early 2013, has provided the immediate context for this Canon, the Church has been wrestling with the issue of the confidentiality of confessions since 1998.

Prior to the establishment of the Anglican Church of Australia on 1 January 1962,³ the Dioceses of Australia and Tasmania were part of the Church of England and as such had the same rules for the confidentiality of confessions as applied in the Church of England, namely the proviso to Canon 113 of the *Constitutions and Canons Ecclesiastical* (1603):

if any man confess his secret and hidden sins to the Minister, for the unburdening of his conscience, and to receive spiritual consolation and ease of mind from him; we do not in any way bind the said Minister by this our Constitution, but do straitly 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.

In 1989, as part of the revision of the Church’s inherited canon law, the General Synod passed the Canon Concerning Confessions 1989 which provides (section 2):

If any person confess his or her secret and hidden sins to an ordained minister for the unburdening of conscience and to receive spiritual consolation and ease of mind, such minister shall not at any time reveal or make known any crime or offence or sin so confessed and committed to trust and secrecy by that person without the consent of that person.⁴

3 Prior to 24 August 1981 the name of the Church was the Church of England in Australia.

4 Available at <<http://www.anglican.org.au/governance/documents/canons/canon%201992-10%20confessions.pdf>>, accessed 17 July 2014.

In 1998 the General Synod considered the Bill for the Clergy Discipline (Disclosure of Confessions) Canon 1998, which would have conferred authority on a diocese to permit or require clergy to make disclosures to the bishop of the diocese and/or to a tribunal of the diocese where child sexual abuse was confessed to him or her by clergy or lay leaders. After debate the Bill was withdrawn and the General Synod passed a resolution to establish the Clergy Discipline Working Group, to consider the issues raised by a confession of child sexual abuse. Part of the background to this Bill was the Report of the Royal Commission into the New South Wales Police Service in 1997, which recognised that child sexual offenders are mostly recidivists and that, according to expert consensus, the condition cannot be cured.⁵ This means that a failure to disclose a confession of child sexual abuse to an appropriate authority places other children at risk of harm.

The Report of the Clergy Discipline Working Group was considered by the General Synod in 2001.⁶ The working group expressed the opinion that it is implicit from the words ‘if he humbly and heartily desire it’ in the ‘Order for the visitation of the sick’ in the *Book of Common Prayer* that, before the priest is obliged to absolve the penitent, the following three elements must be present: contrition, a full and honest confession of sins and a purpose of amendment (para 25). Contrition and a purpose of amendment may require, inter alia, reporting by the penitent to the police or other appropriate authority in the case of criminal conduct (para 26). The duty of confidentiality will not apply, inter alia, ‘where the penitent does not show contrition and a purpose of amendment by taking appropriate action’, as such a confession could not be said to be ‘for the unburdening of conscience and to receive spiritual consolation and ease of mind’ (para 34). In particular, the duty of confidentiality will not apply where the penitent delays in going, or refuses to go, to the authorities (paras 36–38). The General Synod passed Resolution 24/01 declaring the circumstances in which confidentiality applies to a confession, affirming the elements of repentance and endorsing the section of the report entitled ‘The way forward’ (paras 42–44), and requesting the House of Bishops to develop pastoral guidelines for the hearing of private confessions.⁷

In 2006 the House of Bishops published the protocol entitled *Private Confession: pastoral guidelines with special reference to child sexual abuse* (amended in 2011).⁸ In this protocol the bishops suggest that, where child

5 Royal Commission into the NSW Police Service, ‘Final Report, volume IV: the paedophile inquiry’, para 3.20, available at <<http://www.pic.nsw.gov.au/OtherReportsAndPublications.aspx>>, accessed 6 August 2014.

6 Report of the Clergy Discipline Working Group, available at <<http://www.anglican.org.au/governance/commissions/documents/professional-standards/bisclergydisciplinereport2001.pdf>>, accessed 17 July 2014.

7 Available at <http://www.anglican.org.au/general-synods/Pages/synod_proceedings_2001.aspx>, accessed 17 July 2014.

8 Available at <<http://www.anglican.org.au/governance/documents/bishops-protocols/1348%20bishops%20protocol%2014%20private%20confession%20-%20reference%20to%20child%20sexual%20abuse.pdf>>, accessed 17 July 2014.

sexual abuse is confessed, absolution must be declined and the matter must be referred on to a special confessor. The special confessor must withhold absolution until satisfied that there is genuine repentance and, apart from exceptional circumstances, until the penitent has reported the matter to the police or other appropriate authority.

Since 1998 there has been a growing conflict between the rules of the Church of absolute confidentiality of a confession of child abuse except with the consent of the penitent and the statutory provisions providing for mandatory reporting of child abuse in each state and territory in Australia.⁹ The groups of persons mandated to notify cases of suspected child abuse range from persons in a limited number of occupations (Queensland and Western Australia), through a more extensive list (in Victoria) and a very extensive list (in the Australian Capital Territory and New South Wales, South Australia and Tasmania), to to every adult (in the Northern Territory).¹⁰ In most jurisdictions in Australia (with the exception of Queensland, Western Australia and South Australia), ministers of religion have a statutory obligation to report suspected child abuse to a specified civil authority where that knowledge is obtained in a confession. In South Australia there is an exception to the statutory obligation for ministers of religion where the information was communicated in the course of a confession made in accordance with the rules and usages of the relevant religion.¹¹

Furthermore, there is, and will be, a conflict between the rules of the Church of absolute confidentiality of a confession of child abuse except with the consent of the penitent and criminal offences relating to the concealment of crimes in some jurisdictions in Australia. In New South Wales, the common-law offence of misprision of felony is an available charge for offences committed before 25 November 1990,¹² and since that date this offence has been replaced by a statutory offence which is currently known as concealing a serious indictable offence.¹³ A serious indictable offence is defined as an indictable offence that is punishable by imprisonment for life or for a term of five or more years.¹⁴ In the other jurisdictions, there is no

9 Earlier provisions for mandatory reporting of child abuse in New South Wales did not apply to ministers of religion: *Child Welfare Act 1939* (NSW), s 148B; *Children (Care and Protection) Act 1987* (NSW), s 22(2), (3).

10 The persons who are required to report suspected child abuse and neglect, along with applicable statutory provisions in each jurisdiction, are listed in the document 'Mandatory reporting of child abuse and neglect', available at <<http://www.aifs.gov.au/cfca/pubs/factsheets/a141787/>>, accessed 29 July 2014. A detailed examination of these statutory provisions and their predecessors is contained in the report *Mandatory Reporting Laws for Child Sexual Abuse in Australia: a legislative history*, available at <<http://www.childabuseroyalcommission.gov.au/research/research-program/published-research>>, accessed 20 August 2014.

11 *Children's Protection Act 1993* (SA), s 11(4).

12 *Crimes (Public Justice) Amendment Act 1990* (NSW), s 340.

13 *Crimes Act 1900* (NSW), s 316.

14 *Ibid*, s 4.

common-law offence of misprision of felony or statutory equivalent. However, in some jurisdictions there is a criminal offence for a person to conceal a known criminal offence where they derive a benefit.¹⁵ Recently, in Victoria, the statutory offence of failure to disclose a sexual offence committed against child under the age of sixteen years has been enacted.¹⁶ These offences are not a dead letter: the Special Commission of Inquiry into matters relating to the police investigation of certain child sexual abuse allegations in the Catholic Diocese of Maitland–Newcastle in its report dated 30 May 2014 found that there is sufficient evidence warranting the prosecution of a senior church official in connection with the concealment of child sexual abuse.¹⁷

In 2013 both the effect of Resolution 24/01 of the General Synod and the opinion of the Clergy Discipline Working Group were questioned within the Church. This resulted in the Doctrine Commission considering the confidentiality of confessions in January 2014. The Report of the Doctrine Commission expresses the opinion that the practice of confession needs to be shaped by the Church's theological framework, especially the doctrines of creation, sin and redemption, and their application to the understanding of human society.¹⁸ The application of absolute confidentiality privileges the individual sinner over past, present or possible future victims. Maintaining the practice of absolute confidentiality leaves clergy open to manipulation by unscrupulous offenders, because the making of a confession then paralyses communication and action. Canon 113 of 1603 recognised that confidentiality is of the utmost importance, and also that exceptions could be made under extraordinary circumstances. Significant harm or risk of harm to past, present and potential victims may constitute such extraordinary circumstances such as to override the pastoral imperative of confidentiality.

The Canon Concerning Confessions 1989 (Amendment) Canon 2014 was passed unanimously by the General Synod and came into force on 4 July 2014. It will only come into force in a diocese when it is adopted by the synod of that diocese. The further exception to the confidentiality of a confession created by this Canon does not require a member of the clergy to disclose the confession of a serious offence to the police (and, where applicable, the

15 Crimes Act 1958 (Vic), s 326; Criminal Code (Qld), s 133; Criminal Code (Tas), s 102; Criminal Code (WA), s 136; Criminal Code (NT), s 104.

16 Crimes Act 1958 (Vic), s 327, as enacted by the Crimes Amendment (Protection of Children) Act 2014 (Vic) which commenced on 27 October 2014.

17 Available at <http://www.dpc.nsw.gov.au/announcements/scoi_child_sexual_abuse_allegations_in_the_hunter_region/release_of_report_of_special_commission_of_inquiry_into_matters_relating_to_the_investigation_of_certain_child_sexual_abuse_allegations_in_the_catholic_diocese_of_maitland-newcastle>, accessed 30 July 2014.

18 Available at <http://www.anglican.org.au/general-synods/2014/Documents/books/Book%205%20-%20of%20website_with%20links.pdf>, accessed 17 July 2014.

Director of Professional Standards) or in any way prescribe in what circumstances a member of the clergy may pronounce absolution in the context of a confession. Further, this exception will not have any impact on the privilege for a religious confession conferred by section 127 of the uniform Evidence Act (which applies in federal courts and courts in the Australian Capital Territory, New South Wales, the Northern Territory, Tasmania and Victoria¹⁹), which relevantly provides:

(1) A person who is or was a member of the clergy of any church or religious denomination is entitled to refuse to divulge that a religious confession was made, or the contents of a religious confession made, to the person when a member of the clergy.

...

(4) In this section: *religious confession* means a confession made by a person to a member of the clergy in the member's professional capacity according to the ritual of the church or religious denomination concerned.

A member of the clergy will have the right conferred by section 127 of the Evidence Act not to disclose the contents of a confession, notwithstanding that in respect of the confession of a serious offence he or she may not be required to keep the confession confidential under the canon law of the Church.

The position in each of South Australia, Queensland and Western Australia is governed by the common law. While there is a paucity of clear authority on the matter, the almost unanimous opinion of text writers is against the existence of any religious confession privilege at common law.²⁰ Accordingly, this exception will not have any impact in these jurisdictions.

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19 Evidence Act 1995 (Cth); Evidence Act 2011 (ACT); Evidence Act 1995 (NSW); Evidence (National Uniform Legislation) Act 2011 (NT); Evidence Act 2001 (Tas); Evidence Act 2008 (Vic).

20 J Heydon, *Cross on Evidence* (ninth Australian edition, Chatswood, NSW, 2013), para 25315; S McNicol, *Law of Privilege* (Sydney, 1992), pp 324–328; D Elliott, 'An evidential privilege for priest–penitent communications', (1994) 3 Ecc LJ 272–298 at 273–274, 281 and the cases, texts and reports cited therein. A Thompson, *Religious Confession Privilege and the Common Law* (Leiden, 2011), argues that the privilege existed before the Reformation and has not been abrogated or extinguished.