



The Secretary  
Standing Committee on Legislation  
Parliament House  
4 Harvest Terrace  
WEST PERTH WA 6005  
[lclc@parliament.wa.gov.au](mailto:lclc@parliament.wa.gov.au)

24 July 2020

Dear Secretary,

RE: CHILDREN AND COMMUNITY SERVICES AMENDMENT BILL 2019

Please find attached the Submission of Catholics for Renewal regarding the *Children and Community Services Amendment Bill 2019* currently before the WA Parliament.

Should you have any questions about the Submission, please do not hesitate to contact me by email or by phone. My details are below.

Yours sincerely,

(Dr) Peter J Wilkinson  
President  
Catholics for Renewal



**SUBMISSION**

**TO THE STANDING COMMITTEE ON LEGISLATION**

**OF THE PARLIAMENT OF WESTERN AUSTRALIA**

**INTO THE**

**CHILDREN AND COMMUNITY SERVICES AMENDMENT**

**BILL 2019**

**Selected Topics:**

**Mandatory reporting of Child Sexual Abuse by Ministers of Religion**

**and**

**Seal of Confession**

**CATHOLICS for RENEWAL Incorporated**

**Submitted on 24 July 2020**

## ***Introduction***

This submission to the Standing Committee on Legislation of the Parliament of Western Australia into the *Children and Community Services Amendment Bill 2019* has been prepared by Catholics for Renewal, a group of committed Catholic women and men who seek the renewal of the Catholic Church so that it follows Jesus Christ more closely. Catholics for Renewal was established in 2011. The names and backgrounds of the persons who prepared the submission are provided in Appendix One.

Catholics for Renewal has examined the issues related to child sexual abuse in the Catholic Church over many years and has previously made submissions to the Victorian Parliamentary Inquiry into the Handling of Child Abuse by Religious and Other Organisations (2012-13) and the Royal Commission into Institutional Responses to Child Sexual Abuse (2012-17). Several of its members also gave evidence at the public hearings of both inquiries.

In 2019 it published its position on similar matters it wants the forthcoming Plenary Council of the Catholic Church in Australia to attend to in ***Getting Back on Mission: Reforming Our Church Together***.<sup>1</sup> Among these is the Recommendation (4.7):

..that, as there is a critical need to ensure that child sexual abusers are not left unidentified and at large in the community, the Plenary Council should carefully examine the seal of confession as it currently operates in the First Rite, with a view to: i) maintaining its essential purpose while conforming to civil laws requiring reporting knowledge of child sexual abusers at large obtained in a sacramental confession; and ii) mandating that absolution be deferred, conditional on the abuser penitent selfreporting the crime(s) committed to the civil authorities of the jurisdiction where the crime(s) was committed and providing proof of the self-reporting". (p.207)

Catholics for Renewal fully supports Recommendations 7.3 and 7.4 (below) of the Royal Commission into Institutional Responses to Child Sexual Abuse<sup>2</sup> and the arguments supporting them:

Recommendation 7.3: State and territory governments should amend laws concerning mandatory reporting to child protection authorities to achieve national consistency in reporter groups. At a minimum, state and territory governments should also include the following groups of individuals as mandatory reporters in every jurisdiction: a) out-of-home care workers (excluding foster and kinship/relative carers); b) youth justice workers c); early childhood workers; d) registered psychologists and school counsellors; and e) people in religious ministry.

Recommendation 7.4: Laws concerning mandatory reporting to child protection authorities should not exempt persons in religious ministry from being required to report knowledge or suspicions formed, in whole or in part, on the basis of information disclosed in or in connection with a religious confession.

**Catholic for Renewal fully supports, therefore, those sections in the Children and Community Services Amendment Bill 2019 designed to introduce mandatory reporting of child sexual abuse for ministers of religion, specifically:**

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<sup>1</sup> Catholics for Renewal, *Getting Back on Mission: Reforming Our Church Together*, Garratt Publishing, Mulgrave, 2019.

<sup>2</sup> Royal Commission into Institutional Responses to Child Sexual Abuse, *Final Report Recommendations*, Volume 7, Improving institutional responding and reporting recommendations, 2017, p.17

## **Clause 51, Section 124A**

(1) (to be inserted in section 124A):

*minister of religion* —

(a) means a person who is recognised in accordance with the practices of a faith or religion as a person who is authorised to conduct services or ceremonies in accordance with the tenets of the faith or religion; and

(b) includes such a person regardless of how the person’s position or title is described (for example, member of the clergy, priest, minister, imam, rabbi or pastor);

(2) In section 124A in the definition of *commencement day*:

(a) in paragraph (b) delete “operation;” and insert: operation; or

(b) after paragraph (b) insert:

(c) in relation to a minister of religion — the day on which the Children and Community Services Amendment Act 2019 section 51 came into operation;

## **Clause 52, Section 124B**

(1) In section 124B(1)(a) and (c)(i) delete “teacher or boarding supervisor; and” and insert: teacher, boarding supervisor or minister of religion; and

(2) In section 124B(4):

(a) delete “A requirement” and insert: The duty

(b) delete “teacher or boarding supervisor.” and insert: teacher, boarding supervisor or minister of religion.

## **Clause 53, Section 124BA (to be inserted):**

Provisions for ministers of religion

(1) In this section – *religious confession* means a confession made by a person to a minister of religion in the minister’s capacity as a minister of religion in accordance with the tenets of the minister’s faith or religion.

(2) For the purposes of section 124B(1)(c)(i), a minister of religion who forms a belief on the basis of information disclosed to the minister in the minister’s capacity as a minister of religion is taken to form the belief in the course of the minister’s work.

(3) A minister of religion is not excused from criminal responsibility for an offence under section 124B(1) on the grounds that —

(a) the minister’s belief is based on information disclosed to the minister during a religious confession; or

(b) disclosure of the minister’s belief or information on which the belief is based is otherwise contrary to the tenets of the minister’s faith or religion.

## ***Contributions to previous inquiries into child sexual abuse***

In the context of this inquiry and for transparency, Catholics for Renewal wishes to advise the Parliamentary Committee that Professor Cahill and Dr Wilkinson were senior consultants on the Catholic Church to the Australian Royal Commission into Institutional Responses to Child Sexual Abuse, and that their RMIT report *Child Sexual Abuse in the Catholic Church: An Interpretative Review of the Literature and Public Inquiry Reports* was cited frequently in the Royal Commission's *Final Report* (2017). In November 2019 both were also invited to give evidence to a public hearing of the New Zealand Royal Commission of Inquiry into Historical Abuse in State Care and in the Care of Faith-based Institutions, and to present a detailed Submission to that Inquiry. Dr Leahy made an important submission to the Australian Royal Commission, which is cited in Books One and Two of Volume 16 of the Commission's *Final Report*. Mr Johnstone gave evidence at a public hearing of the Royal Commission in February 2017, and Catholics for Renewal made a formal submission to both Victorian Parliamentary Inquiry into the Handling of Child Abuse by Religious and Other Organisations (2012-13) and the Royal Commission into Institutional Responses to Child Sexual Abuse (2012-17). Professor Cahill has also been an adviser to the UK's Independent Inquiry into Child Sexual Abuse.

### ***The ravished innocence of the sexually abused child***

Any discussion on the Seal of Confession cannot overlook the child who has been sexually abused or the child who has survived. Their ravished innocence lies at the very centre of the Catholic catastrophe. Thousands of lives have been badly damaged, if not destroyed, across the world in the continuing and tragic saga of child sexual abuse. It can be traced back even to New Testament times and has always been an unholy scandal.

The fact that the sexual abuse of children in families is far more common than in religious settings, often raised in this context, is irrelevant to the reporting of knowledge of child sexual abuse gained in a religious confession.

The tragedy in the Catholic Church is compounded by the fact that the Church has educated and cared for millions of children, even in the most scarifying of circumstances, giving them bright, fulfilling and transcendent futures, not least in Western Australia.

In his own time in the Greco-Roman and Jewish context, Jesus overturned the contemporary concept of the child. He told his adult followers that they must become like little children (*Mt* 18:2) and witheringly denounced those who would harm a child: "Whoever causes one of these little ones who believe in me to sin, it would be better for him to have a great millstone fastened around his neck and to be drowned in the depths of the sea" (*Mt* 18:6). For Jesus, children are precious; they have status and they have standing. He scolded his disciples for preventing parents from bringing their children to him: "Let the children come to me. Don't stop them! For it is to such as these that the Kingdom of God belongs" (*Lk* 18:16).

The Jesuit historian, John W. O'Malley (2002), writes that, while it is true that there have been 'scandals aplenty' in the Catholic Church's long and twisting history, there has been nothing like the current child sexual abuse scandal. For among its differentiating characteristics has been its clearly systemic and global nature, the accompanying crisis in church authority that remains unresolved, the abundance of documentary evidence, and the public scrutiny by criminal courts, government inquiries and media reports. It has not been a scandal arising from isolated instances of clergy or prominent laity, or the mishandling of individual cases by individual bishops. The sheer number of cases has led to:

...a growing and widespread persuasion that the scandal has occurred not simply because of the moral weaknesses that touch us all, including bishops, but because there is some underlying systemic cause....Which part of the system needs to be changed? That is the absolutely critical question (O'Malley 2002: 15).

Paraphrasing Lord Acton that power corrupts and ecclesiastical power corrupts ecclesiastically, O'Malley suggests that at this time when public suspicion and criticism of those with ecclesiastical power has never been greater, there is no longer any benefit of the doubt in relation to the Church's doctrine, discipline or any of its public statements.<sup>3</sup>

### ***Religious Freedom and the Common Good***

The issues raised by the Bill represent a choice between 'putting child safety first' or maintaining fidelity to a teaching of the Catholic Church on the Seal of Confession – a choice between religious freedom and the common good. The Catholic Archbishop of Perth, Timothy Costelloe SDB, claims that the issue is rather one of state respect for religious freedom and that the religious freedom of Catholics is being violated by the state's demand that it renounce a teaching of the Catholic faith, according to which the Seal of Confession is a matter of Divine Law. If he were to renounce that teaching, the Archbishop has told the Minister and the Parliament that he would be severing his communion with his Church. And should the faithful of the diocese follow him in that renunciation, they too would risk excommunication.

Unlike France and the USA, and more like Canada, Australia has a moderate model of intersection between religion and state.

- Firstly, the Australian state has a facilitating role in allowing citizens to exercise their right to religious freedom and to practise their religious beliefs according to their traditions and modes of worship. But the right to religious freedom is a relative, not an absolute right.
- Secondly, in Australia, the state has a role in brokering the relationship between the various faith traditions - whether Christian, Jewish, Hindu, Muslim, Sikh or Buddhist – to ensure there is interreligious harmony and social cohesion. On balance, and notwithstanding any negative aspects associated with religion, religious communities contribute much to a nation's social capital.
- Thirdly, the state has the responsibility of monitoring religious entities and their communities in order to ensure their compliance with the law and the common good of Australian society. There is always the possibility of bad religion and bad religious practice.
- Fourthly, the state has a responsibility to protect its citizens from damaging and destructive religious beliefs and practices.

In Australia's liberal democracy, an action such as imposing mandatory reporting laws on religious ministers, to the extent of disclosing knowledge gained in a religious confession, requires the state to show clear justification for its necessity. But the Church also has an obligation to explain why such an intrusion is unnecessary, or even harmful, which the Archbishop has done.

The moral philosophical debate about religious freedom and religious practices was initially framed around the Hindu practice of *suttee* (a widow being obliged to throw herself onto the funeral pyre of her husband) which was forbidden by the British Raj. More recently the debate has been around doctors being allowed to override the parents' refusal to allow blood transfusions to be given to their sick child. This refusal is based on the Jehovah's Witness interpretation of a Biblical text. The Australian Royal Commission, in one of its recommendations, asked the Jehovah's Witnesses to abandon their two-witness rule involving complaints of child sexual abuse based on their interpretation of Deuteronomy 19:15 (Rec. 16.27). In more recent times, the state has also been forced to take action against religiously inspired terrorism, albeit based on a bad or false interpretation of Qu'ranic texts.

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<sup>3</sup> Cahill, D and Wilkinson, P, *Child Sexual Abuse in the Catholic Church: An interpretative Review of the Literature and Public Inquiry Reports*, RMIT University, Melbourne, August 2017

### *Internal alternative views on the teaching of the Seal of Confession*

Catholics for Renewal wishes to alert the WA Parliament to the internal alternative views on the present teaching of the Catholic Church, which present a formidable challenge to maintaining the present teaching on this matter. When the Archbishop of Perth insists that the proposed legislation is a violation of its religious freedom, he owes it to the Parliament and the citizens of the State to address publicly, and in a formal setting, the following issues in defence of the present teaching on the Seal of Confession.

First and most important, there is the central question which has dominated theological debate up until the 20<sup>th</sup> century: how can the obligation of the seal be reconciled with the Law of Charity, which mandates that we should shield our neighbour against physical and spiritual injury to the best of our ability? Should the integrity of the seal take priority over the integrity and safety of the child? The Church's response to these questions is based on the claim that the information is beyond human knowledge, as asserted by Archbishop Costelloe. Yet, the most eminent theologian, St Thomas Aquinas (1225-74), allowed that a priest, once he keeps intact the integrity of the Sacrament, must take preventative measures to stop 'an impending calamity'. Also, a member of a religious community, in an election for a superior, may not vote for a candidate if the unworthiness of the candidate is only known through a sacramental confession.

Second, it is difficult to maintain that the confessional seal is of divine law when there is no direct foundation in the New Testament. In the first three to four centuries of the Church, public confession of sins was the normal practice. Private confession as the normal practice only came later, at the time of St. Augustine of Hippo (354-430 CE).

Third, in Church history there are two instances where the Church allowed the confessional seal to be broken (cf. Appendix 3: *The Seal of Confession: Its History and Interface with Civil and Criminal Law*, based on the historical research of the German Franciscan, Bertrand Kurtscheid (1877 – 1940)). The first instance was in 1477 when the State required the confessor/priest to break the seal if he became aware of any plot against the king or the state. The second instance was in 1755 when Pope Benedict XIV, in the Instruction *De Servorum Dei Beatificatione et Canonizatione*, allowed confessor/priests to reveal confessional material in any posthumous process to beatify or canonize some holy person or martyr. This permission was abrogated by the 1917 *Code of Canon Law*.

Fourth, the Anglican Church in Australia has in recent years changed its stance on the confessional seal in its confessional practice. Perhaps the Catholic Church might examine and accept the current Anglican practice in Australia regarding the confessional seal and the disclosure of information of child sexual abuse.

Fifth, the Catholic Church should address the issue of so-called 'cheap forgiveness' in its confessional practice. This calls for a review of the penance given for the sin (and crime) of child sexual abuse, and the restitution that must be given to the injured person. Consideration should also be given to whether First Confession should be delayed from the age of 7 years until 12-13 years of age. Some German and American bishops in the early 1970s requested the Holy See to allow this.

Last, the Catholic Church might also consider the use of the notion of 'reserved sin' for the sin and crime of child sexual abuse. A reserved sin is one which only a bishop or a pope is permitted to forgive, usually a particularly serious sin such as heresy or desecrating the consecrated host. Catholics for Renewal has suggested that the Catholic Church might make the sin/crime of child sexual abuse a 'reserved sin' which bishops alone can absolve, and then only on condition that the offender penitent reports his crime and sin to the criminal justice authorities. The penance (and restitution) that could be imposed might be self-reporting to the civil authorities.

## *Vatican response to Royal Commission recommendation on Seal of Confession*

The Royal Commission, in its *Final Report* recommended that:

The Australian Catholic Bishops Conference should consult with the Holy See, and make public any advice received, in order to clarify whether: a) information received from a child during the sacrament of reconciliation that they have been sexually abused is covered by the seal of confession; b) if a person confesses during the sacrament of reconciliation to perpetrating child sexual abuse, absolution can and should be withheld until they report themselves to civil authorities. (Rec. 16.26)

In apparent response to that recommendation, the Holy See published on 29 June 2019 a document titled *Note of the Apostolic Penitentiary on the Importance of the Internal Forum and the Inviolability of the Sacramental Seal*.<sup>4</sup> In it the Holy See takes an extremely hardline interpretation of the teaching on the Seal of Confession (cf. Appendix Two for a summary of the document).

The *Note of the Apostolic Penitentiary* even forbids confessor/priests from acting to protect a child when the child discloses during confession not their own sin, but the sin of another person who has sexually abused them in the past and/or continues to abuse them. This would seem contrary to right reason, and certainly to the Law of Charity. When children confess their own sexual abuse by others in a religious confession the Royal Commission found that confessor/priests never acted on this information, even though the actual sin was not that of the child. This left the abused child in danger of further sexual assault.

The *Note* also forbids confessor/priests from making absolution conditional. Yet the Royal Commission found that when confessions were made by offending priests and religious brothers to a confessor/priest, no confessor/priest had withheld absolution on condition that the offending penitent first make a confession to criminal justice authorities or (as had happened in the past) to church authorities.

The *Note* also repeats the *in persona Christi* (in the person of Christ) teaching based on the concept of ‘ontological change’ (a change in the very being). According to Church teaching, the confessor/priest acts not in his own identity as an individual, but *in persona Christi* (in the person of Christ). The sacrament of priestly ordination, according to the Church, brings about an ‘ontological change’ – a change in the very being – of the one ordained. The effect of this in the case of the sacrament of confession (or Penance or Reconciliation) is to make the priest who hears what is confessed no longer the human individual that he is in normal life, but Christ himself ministering to the penitent.

The Apostolic Penitentiary asserts:

- The priest becomes aware of the sins of the penitent “not as man, but as God”, to such an extent that he simply “does not know” what he was told during confession, because he did not listen to him as a man but, precisely, in the name of God.
- The confessor can therefore “swear”, without any prejudice to his conscience, to “not know” what he knows only as a minister of God.

This feature of the ‘help’ given by the confessor/priest, so this argument goes, is shared by no other helping profession, and thus entitles the confessor/priest to an exemption from the mandatory

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<sup>4</sup> English text of the Apostolic Penitentiary document available at [http://www.vatican.va/roman\\_curia/tribunals/apost\\_penit/documents/rc\\_trib\\_appen\\_pro\\_20190629\\_forointerno\\_en.html](http://www.vatican.va/roman_curia/tribunals/apost_penit/documents/rc_trib_appen_pro_20190629_forointerno_en.html)

reporting rule applying to the other professions, or even to his ministry outside the sacramental forum. Church teaching on *in persona Christi* notwithstanding, that fact is that the confessor/priest is in the same situation as other helping professions: he has knowledge of a child sexual predator at large in the community, which is knowledge that the civil authorities can use to prevent further abuse of children by that predator. It is hard to see how either state or church could justifiably object to the extension of the proposed mandatory reporting law to confessor/priests, even if its application was rare.

In its most emphatic statement, the *Note of the Apostolic Penitentiary* affirms that:

- The sacramental seal is indispensable, and no human power has jurisdiction over it, nor [can] lay any claim to it. It is indispensable for the sanctity of the sacrament and for the freedom of conscience of the penitent, who must be certain, at any time, that the sacramental conversation will remain within the secrecy of the confessional.
- The inviolable secrecy comes directly from the revealed divine right. It does not admit any exception in the ecclesial sphere nor, least of all, in the civil one.

So far, no Australian bishop has expressed any disquiet about the interpretation of the Seal in this document, which is surprising, given that in 2017 three archbishops – Costelloe, Wilson and Coleridge - in their sworn evidence to the Royal Commission on 24 February 2017 in Case 50, said that after considering the advice of canonists and theologians on the matter, a child who reports abuse of their person by a priest is not a confession of the child's personal sin, but rather a factual report on the abusive priest and that, as such, should not be bound by the Seal of confession.<sup>5</sup>

While Archbishop Costelloe might incur excommunication should he unilaterally dissent from the current teaching on the Seal as expressed in the *Note of the Apostolic Penitentiary* and the *Catechism of the Catholic Church*, he should be mindful that the Apostle Paul stood up to and criticised the position taken by the Apostle Peter on the issue of circumcision of non-Jewish Christians. Perhaps the Archbishop might consider showing prophetic courage and, for the sake of protecting innocent children from sexual predators, voice publicly his disquiet with the *Note of the Apostolic Penitentiary*.

### **Conclusion**

While the WA government and the Archbishop of Perth both agree that the common good demands the protection of children must always be the first priority, the Archbishop does not consider that the good of protecting children from sexual abuse is of such sufficient importance as to justify the state overriding a particular tenet of religious belief. This disagreement has arisen with the *Children and Community Services Amendment Bill 2019* which proposes to introduce mandatory reporting of child sexual abuse for ministers of religion and to oblige these ministers to disclose knowledge of child sexual abuse gained in a religious confession.

The Parliament must now weigh up the arguments for and against the proposed amendment, and assess the possible harms flowing from not legislating with the risks associated with intruding into a matter of significant importance to the Catholic Church in WA. The Church is also bound, in its service of the common good of both the Church and civic communities, to acknowledge the objections

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<sup>5</sup> Royal Commission into Institutional Responses to Child Sexual Abuse, Case Study 50: Institutional review of Catholic Church authorities. Transcript available at: <https://www.childabuseroyalcommission.gov.au/sites/default/files/file-list/Case%20Study%2050%20-%20Transcript%20-%20Institutional%20review%20of%20Catholic%20Church%20authorities%20-%20Day%2025%20-%2024022017.pdf> (accessed 24/07/2020)

within its own membership to the official claims for the status of the teaching on the Seal.

Apart from the more fundamental arguments set out in this submission, the existence of alternative views within the Catholic community on the teaching on the Seal diminishes the force of the Church's claim that the proposed amendment is a clear violation of its religious freedom. Neither do the history of the Seal of Confession and the theology around it support that claim (cf. Appendix Three).

Recognition of the rights of the child, accompanied by government legislation across Australia and the world to remove the legal privilege from confessional knowledge of child abuse, has outpaced the development of church doctrine on this matter. Already the States of Tasmania and Victoria and the ACT have enacted legislation to give force to the Royal Commission's recommendations 7.3 and 7.4. Victoria's *Children Legislation Amendment Bill 2019* adds people in religious ministries to those who must report when they form a belief on reasonable grounds that a child is in need of protection, even when the belief derives from a disclosure in a religious confession.<sup>6</sup>

If other local churches, like the Archdiocese of Perth, have to endure legislation contrary to Church teaching, they are entitled to plead their inability to renounce unilaterally the teaching on the Seal, they can also foster dialogue within the Church to generate a needed development of this teaching.

The WA Parliament might also wish to take note of the Paramountcy Principle which underpins the 2001 UK Nolan Report, *A Programme for Action* and the follow-up 2007 UK Cumberlege Evaluative Report, *Safeguarding with Confidence: Keeping Children and Vulnerable Adults Safe in the Catholic Church*. Both these reports, sponsored by the Catholic Bishops of England and Wales, state the Principle as: "The welfare of the child is the paramount consideration in proceedings concerning children".

Catholics for Renewal submits that the WA Parliament should seek the higher good, and give the protection of innocent children from sexual abuse the first priority, even if that protection entails a clash with Catholic Church teaching. The legislation would leave untouched the existing privilege attaching to all other disclosures in religious confessions.

**Catholic for Renewal fully supports those sections in the Children and Community Services Amendment Bill 2019 designed to introduce mandatory reporting of child sexual abuse for ministers of religion.**

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<sup>6</sup> A background to the Bill by Moores Legal is here: <https://www.moores.com.au/news/breaking-news-religious-and-spiritual-leaders-to-be-mandatory-reporters-wit>

## APPENDIX ONE

### **Dr Gail Grossman Freyne LLB, PhD**

She has an LLB from Melbourne University and a PhD in Ethics from University College, Dublin. She practiced law in both Australia, as a member of both the Victorian and Queensland bar, and in the United States, where she worked as a personal injury attorney in New Orleans. She is a trained Psychotherapist and Mediator who directed her own practice in Dublin, Ireland for twenty-five years. She has taught courses in Feminist Family Therapy and Ecofeminist Ethics at the Masters level for the University of Wales Trinity Saint David. Her published books and articles have considered the questions of Systemic Therapy, gender and power in marital relationships, women's ordination in the Catholic Church, ecofeminist philosophy (Lexington Press, 2108) and transgender studies (Routledge, 2020). Her books include *Care, Justice and Gender - A New Harmony for Family Values* (Veritas:Dubin, 2006) and her most recent, *The Curious Case of Inequality: A Journey for Justice with Dorothy L. Sayers* (ATF:Adelaide, 2017). In the wider international context she is advisor to Catholics for Free Choice, Europe, and in the United States she is a member of the boards for the Joan D. Chittister Foundation and for the Literary Trust.

### **Emeritus Professor Desmond Cahill OAM, BTS, MTS, BA, MEd, PhD**

Educated in Australia at Melbourne and Monash Universities and in Italy at the Pontifical Urban University, he is a trained psychologist and social researcher. He is an Honorary Fellow of the Australian Council of Educational Leaders for his work in immigrant, cross-cultural, interfaith and international education, and received an O.A.M. for his services to intercultural education and to the interfaith movement. He currently chairs Religions for Peace Australia, and is deputy moderator of Religions for Peace Asia. He led Melbourne's successful bid to stage the 2009 Parliament of the World's Religions and was its Melbourne program director. He is a foundation member of the Victoria Police Multifaith Council. With Professor Gary Bouma, Dr Hass Dellal and Dr Michael Leahy, he published *Religion, Cultural Diversity and Safeguarding Australia* (2004) and *Freedom of Religion and Belief in 21<sup>st</sup> Century Australia*,(2011). He also contributed two articles to the *Encyclopedia of Religion in Australia* on the structure of the Catholic Church and the interfaith movement. He was senior consultant on the Catholic Church to the Australian Royal Commission into Institutional Responses to Child Sexual Abuse, and in 2019 gave evidence to the New Zealand Royal Commission of Inquiry into Historical Abuse in State Care and in the Care of Faith-based Institutions. In 2020 he was made a member of the Australian unit of the UNESCO Chair in Bioethics and Ethics. Currently, he is Emeritus Professor of Intercultural Studies at RMIT University.

### **Peter Johnstone OAM, FAICD, BA (Admin), MA (Theology)**

He has worked at all levels of government in Australia including many positions of Chief Executive, and chaired many boards. He has extensive experience in public policy, executive leadership and governance in government and in the not-for-profit sector. He has headed Commonwealth human services programs and a number of Victorian Government departments including Director General of Community Services, and CEO for a number of local governments. His roles as Chair have included Jesuit Social Services, VincentCare Victoria, the Council of Catholic Social Services, the Jesuit College of Spirituality, and Deputy Chair of National Seniors Australia. He was founding President of Catholics for Renewal and is currently Convener of the Australian Catholic Coalition for Church Reform. He was a member of the Melbourne Archdiocesan Commission for Justice, Development and Peace from 1994 to 2008. He gave oral and written evidence on Church governance to the Royal Commission on Institutional Responses to Child Sexual Abuse and to the Victorian Parliamentary Inquiry into the Handling of Child Abuse by Religious and Other Organisations. He is Principal of PJ Governance, advising on governance primarily in the not-for-profit sector.

### **Dr. Michael Leahy STL, MEd, PhD**

A former Catholic priest, he graduated in 1969 from the Pontifical Urban University, Rome, with Licentiate in Sacred Theology. On leaving the priesthood in 1973, he taught in Catholic secondary schools for several years before taking up an appointment as lecturer in religious education at the then WACAE. He was employed in that capacity by the Catholic Adult and Tertiary Education Institute of Western Australia until the end of 1988. Having by that time added a Ph D in educational philosophy to his M Ed in the same area, he returned with his wife and three children to Victoria. After an interruption to his career through ill health, he eventually completed a second Ph D in political philosophy at Deakin University where he taught philosophy and public policy until he retired. He is the author of numerous publications in educational and political philosophy.

**Dr. Peter Wilkinson BEd, LMiss, DMiss (PUG)**

He is an ordained Catholic priest who resigned from priestly ministry and the Columban Missionary Society in 1976. He completed his theological studies in Australia and postgraduate studies in Missiology at the Pontifical Gregorian University in Rome, gaining a Licentiate in 1963 and a Doctorate in 1971. He has also studied at the Universities of Paris (Sorbonne), Vienna, Menendez y Palayo (Santander), Yonsei (Seoul), RMIT (1976), and LaTrobe (1985). While a priest, he taught at the Columban Society's seminaries in Melbourne and Sydney (1963-1968) and worked in the Archdiocese of Seoul and Diocese of Andong in the Republic of South Korea (1971-1975). Following his resignation from ministry he worked in the areas of immigration, settlement, education, and multicultural affairs with the Good Neighbour Council of Victoria (1976-1979), the Ecumenical Migration Centre (1979-1981) and the Australian Institute of Multicultural Affairs (1981-1986). He was also a Visiting Lecturer in the Department of Theology: Mission and Ministry at Yarra Theological Union (1985-1999). Since retiring he has been a member of Catholics for Renewal and the current president. He has produced several reports- *Catholic Parish Ministry in Australia: Facing Disaster?* (2011), *Catholic Parish Ministry in Australia: The Crisis Deepens* (2012), and *Catholic Synods in Australia: 1844-2011-* and a series of articles on Catholic Church councils in Australia. With Professor Cahill he co-authored the RMIT report *Child Sexual Abuse in the Catholic Church: An Interpretative Review of the Literature and Public Inquiry Reports* for the Australian Royal Commission into Institutional Responses to Child Sexual Abuse (2016). With Professor Cahill, he also gave evidence and made a written submission to the New Zealand Royal Commission of Inquiry into Historical Abuse in State Care and in the Care of Faith-based Institutions.

## APPENDIX TWO<sup>7</sup>

In response to a recent inquiry (30 August 2019) by Dr Peter Wilkinson to the Australian Catholic Bishops Conference (ACBC), the General Secretary advised that the consultation between the ACBC and the Holy See concerning recommendations of the Royal Commission that the Conference has already referred to the Holy See is ongoing, and that during the Australian bishops' visit to Rome in June 2019, further consultation took place.

On 29 June 2019, the Apostolic Penitentiary issued a document titled *Note of the Apostolic Penitentiary on the Importance of the Internal Forum and the Inviolability of the Sacramental Seal* which was published on the Vatican website.<sup>8</sup> The *Note* was approved by Pope Francis, and is most significant, for it contains very strict interpretations of the indispensability and inaccessibility of the seal of confession, including the following:

- The sacramental seal is indispensable, and no human power has jurisdiction over it, nor [can] lay any claim to it. It is indispensable for the sanctity of the sacrament and for the freedom of conscience of the penitent, who must be certain, at any time, that the sacramental conversation will remain within the secrecy of the confessional.
- The inviolable secrecy comes directly from the revealed divine right. It does not admit any exception in the ecclesial sphere nor, least of all, in the civil one.
- The Church has always taught that priests, in the celebration of the Sacraments, act in the very person of Christ the Head.
- The confessor must defend the sacramental seal, if necessary ‘to the spilling of his own blood’ (martyrdom).
- The seal is regulated by canons 983-984 and 1388, §1 of the Code of Canon Law, and explained in the *Catechism of the Catholic Church* (Para. 1467) which states that “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”.
- The confessor is never allowed, for any reason whatsoever, “to betray in any way a penitent in words or in any manner” (C. 983, §1), just as “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” (C. 984, §1).
- The sacramental seal includes “all the sins of both the penitent and others known from the penitent’s confession, both mortal and venial, both occult and public, as manifested with regard to absolution and therefore known to the confessor by virtue of sacramental knowledge”.
- The sacramental seal concerns everything the penitent has admitted, even in the event that the confessor does not grant absolution. If the confession is invalid or for some reason the absolution is not given, the seal must be maintained in any case.
- The priest becomes aware of the sins of the penitent “not as man, but as God”, to such an extent that he simply “does not know” what he was told during confession, because he did not listen to him as a man but, precisely, in the name of God.
- The confessor can therefore “swear”, without any prejudice to his conscience, to “not know” what he knows only as a minister of God.

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<sup>7</sup> The text of this Appendix 2 is an extract from the *Formal Presentation Address* prepared by Emeritus Professor Desmond Cahill and Dr Peter Wilkinson as the evidence which they gave to a Public Hearing on 8 November 2019 of the New Zealand Royal Commission of Inquiry into Historical Abuse in State Care and in the Care of Faith-based Institutions.

<sup>8</sup> Full text in English available at:

[http://www.vatican.va/roman\\_curia/tribunals/apost\\_penit/documents/rc\\_trib\\_appen\\_pro\\_20190629\\_forointerno\\_en.html](http://www.vatican.va/roman_curia/tribunals/apost_penit/documents/rc_trib_appen_pro_20190629_forointerno_en.html)

- In the presence of sins that involve criminal offenses, it is never permissible, as a condition for absolution, to place on the penitent the obligation to turn himself in to civil justice. Where a penitent has been a victim of the evil of others, the confessor should instruct the penitent regarding his rights and the practical juridical instruments to refer to in order to report the fact in a civil and/or ecclesiastical forum to invoke justice.

## APPENDIX THREE

### THE SEAL OF CONFESSION: ITS HISTORY AND INTERFACE WITH CIVIL AND CRIMINAL LAW<sup>9</sup>

#### Introduction

During the twentieth century, the issue of the confessional seal received some scholarly attention in the first three decades though none of it referred to children's confession, particularly given that Pope Pius X in the Instruction *Quam Singulari* had lowered the age of first communion and thus of first confession from 12-14 years in the immediate pre-puberty growth phase to 7 years as the 'age of reason' and insisted that it be made before first communion, which has been consistent Vatican policy for many centuries.

In 1927, the English translation of *A History of the Seal of Confession* by the German Franciscan Bertrand Kurtscheid (1877-1941) appeared as an updated version of the 1910 German original. He refers to earlier work on the topic of the confessional seal in 1708 by Lenglet du Fresnoy, in 1910 by Fritz Sauter and in 1911 by E. Schwartz. He dismisses all three as inadequate. In particular, Kurtscheid (1927) criticises as historically inaccurate Sauter's contention that confessional secrecy is not an official obligation of the confessor, since this would bind anyone who came to know, often accidentally, to what has been confessed to the secrecy provisions.

Kurtscheid's monograph has been described as a masterpiece by Thompson (2011), a New Zealand scholar who has examined very thoroughly the interface between the religious confession privilege and the common law in English-speaking countries. He seems not to have had access to English language sources, as he does not reference Nolan's entry in the 1912 *Catholic Encyclopedia* – it is probably emblematic of the 20<sup>th</sup> century neglect of the topic that there is no entry in the 2003 *New Catholic Encyclopedia*. He does reference the Mormon scholar, Charles Lea's *A History of Auricular Confession and Indulgences in the Latin Church Vol.I* (1896) but not O'Donnell's *Seal of Confession* (Ireland, 1911) nor Watkins' *A History of Penance* (London, 1920). In the various sources of the history of the sacrament of penance (or reconciliation as it became known after the Second Vatican Council), reference is made to the seal but only in passing, as it is always assumed that the seal is inviolate and absolute.

The canonists did not add much in the second half of the twentieth century, as seen from a search of *Canon Law Abstracts* from 1973-2016. However, since the turn of the millennium, interest has increased. Smith (2001) suggests that if a long conversation ends with a sacramental confession, then the whole confession is privileged under the seal. Earlier, Moriarty (1998) had discussed a case in Oregon where a confession had been taped in a prison cell on the orders of the district attorney. The bishop requested the destruction of the tape which was achieved when the taping was found to be unconstitutional. The age of first confession was also raised as a serious pastoral issue. Cardinal Julius Döpfner of Munich had allowed first communion to be made before first confession, but Rome, in consistency with its centuries-long policy and through Cardinal Ratzinger as head of the Congregation for the Doctrine of the Faith, had stepped in to forbid it. Several years previously in 1973, seemingly in response to a similar request from the American bishops, a Vatican declaration had decided in favour of first confession before first communion on three grounds:

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<sup>9</sup> This Appendix is an extract from Cahill, D and Wilkinson, P, *Child Sexual Abuse in the Catholic Church: An interpretative Review of the Literature and Public Inquiry Reports*, RMIT University, Melbourne, August 2017, Appendix 2

1. The rights of the child as a human being to privacy of conscience and his or her right as a Christian to participate in the Sacrament of Penance
2. The spiritual benefits accruing to young Christians as yet incapable of serious sin
3. The linking of Penance with the Eucharist from the very beginning, lest the Eucharist be approached lightly.

Any discussion in the academic literature has emphasised the inviolability of the seal. In Australasia, Daly (2013) emphasised this, citing the case of Francis Douglas, a New Zealand Columban priest, who was executed by the Japanese after visiting some guerrilla fighters who wanted his spiritual services, as the Japanese wanted to know the contents of his conversations. Douglas is seen as a martyr for the confessional seal.

The magisterially authoritative 1993 *Catechism of the Catholic Church* is quite clear that “the Church declares that 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” (par. 1467). Par. 2490, quoting Canon 983 §1 states that the sacramental seal is inviolable; therefore, it is a crime for a confessor in any way to betray a penitent by word or in any other manner or for any reason”.

### **The Seal of Confession in Patristic Times**

The following account is based largely on Kurtscheid’s forensic analysis of the sources. St Thomas Aquinas defined the seal of confession or the *sigillum confessionis* as ‘the obligation to keep secret whatever has been revealed in confession’. Kurtscheid (1927) suggests that the seal flows from the very nature of confession, and is based on divine law even though it does not flow from Jesus’ actual sayings. It is not intrinsic to the sacrament, because in the early Church the public confession of sins was the norm and secrecy was not the norm. It is clear from *Mt* 13:31 that Christ expressly conferred on his Church the power to forgive sin in his name, though the development of the details was left to the Church. “She (the Church) therefore has the right to fix the formalities and conditions for the exercise of this power. This fact explains the various changes which the sacrament of Penance underwent over time. The Church simply accommodated itself to the times and to the views of the people, without altering any essential part of the Sacrament” (Kurtscheid, 1927: 2-3). Writing well before Vatican II times, he goes on: “Christ gave no express command regarding the seal; at least none that has come down to us. Moreover, the seal necessarily presupposes a secret confession, which Jesus nowhere proscribed as the sole admissible form” (Kurtscheid, 1927: 3). This gives great power to the Church in respect of the conditions surrounding the administration of the sacrament.

The early history of the seal is entwined in two questions: whether and to what extent secret sins were a matter of a public confession?; and whether they were subject to public penance? The biblical sources, in Kurtscheid’s view, are not able to tell us whether confession should be public or private. The *Didache* (80-100 CE), the *Epistle of Barnabas* (towards the end 1st century), the Letter of Pope Clement I (88-99 CE) to the troubled Corinthian community, and the *Shepherd of Hermas* all wrote clearly of the obligation to publicly confess one’s sins. Public confession was the norm in the early Church. In the third century, Origen used the analogy that sins concealed in the heart are like undigested food which causes distress until it is vomited up. The central and controversial issue was whether certain serious sins, though committed in secret, were subject to public penance and thus to public knowledge. Irenaeus answered in the affirmative (*Adv. Haereses* 1, 6, 3). Tertullian, Cyprian and Ambrose were of the same view. Pacian thought only murder, idolatry and adultery were to be subject to public penance.

The pastoral leaders of the Eastern Church, including St Basil in his *Letter to Amphilochius* and

Gregory of Nyssa in his *Letter to Letoius*, were also in agreement. In 314 CE, the Council of Ancyra ruled that in the case of unnatural vice, such public sins as adultery, abortion, bestiality, incest with one's sister and theft required public penance. In the Eastern Church, by the beginning of the fifth century, the practice of public penance for secret sins had probably disappeared. It lasted longer in the Western (Latin) Church.

Given the emphasis on public confession and public penance, there were no regulations regarding the seal, though indications that confessed sins were to be kept secret began to emerge. The rudiments of the confessional seal begin to take hold in a remarkable development of a Church doctrine. St. Basil mentions a Church directive for safeguarding confessional secrecy, while St Augustine in *Sermo 82* emphasises that he endeavours to keep secret sins secret. By the time of St Augustine, the dispute of whether secret serious sin is needed to be publicly confessed had been resolved – he simply does not mention public confession.

As Kurtscheid documents, it is with Pope Leo I (440-461 CE), known as Leo the Great, in his letter to the bishops of Campania, Samnium and Picenum, that we have the first decretal safeguarding the secrecy of confession. He considered it an abuse where secret sins were written down and read in open assembly in the practice of public penance. What worried Leo was that the shame and the fear of legal prosecution would be a deterrent for many from benefiting from the 'salutary remedy of penance'.

The documentary silence until the ninth century suggests confessional secrecy had passed into normal pastoral practice. Public penance was never introduced into the Irish or English Churches – their missionaries would subsequently take the practice of secret, individual confessing to continental Europe. The emphasis was on secret atonement for secret transgressions. The Synod of Parvia in 850 did allow that confessional secrecy could be transgressed if the confessor needed advice – he could consult the bishop, but only if the sinner's name was kept confidential. At the close of the ninth century in the *Penitentiale Summorum Pontificum*, Canon 105 represents the first direct legislation on the seal by the Western Church – breaking the seal was to be punished by removal from ecclesiastical office and lifelong exile. Other documents from the 10<sup>th</sup> and 11<sup>th</sup> centuries reinforce the seal.

In the context of confessional secrecy, Peter Abelard criticises those priests "who are light-minded and careless, and it is difficult for them to hold their tongues" (*Hon. II om Ramis Palmarum, Sermo VIII*). Anselm (1033-1109), Archbishop of Canterbury, was insistent on secrecy as a strict obligation of the confessor, though the duty was still ill-defined. It is at this time that there emerged an issue that has dominated pastoral considerations until the 19<sup>th</sup> century: whether the seal could be violated to prevent a calamity to the State or to the common good. It was also during the 11<sup>th</sup> – 13<sup>th</sup> centuries that controversies emerged about the use of knowledge received during a sacramental confession, though the dominant thinking was that 'he must act as if not he, but God alone, knew this'.

The key moment in the history of the seal of confession is the Fourth Lateran Council in Rome in 1215. Its 21<sup>st</sup> canon, headed *Omnis Utriusque Sexus*, legislated what synods and individual bishops had been saying for four centuries. It reads:

All the faithful of both sexes shall after they have reached the age of discretion faithfully confess all their sins at least once a year to their own (parish) priest and perform to the best of their ability the penance imposed, receiving reverently at least at Easter the sacrament of the Eucharist, unless perchance at the advice of their own priest they may for a good reason abstain for a time from its reception; otherwise they shall be cut off from the Church (excommunicated) during life and deprived of Christian burial in death. Wherefore, let this salutary decree be published frequently in the churches, that no one may find in the plea of ignorance a shadow of excuse. But if anyone for a good reason should wish to confess his sins to another priest, let him first seek and obtain permission from his own (parish) priest, since otherwise he (the other priest) cannot loose or bind him.

Let the priest be discreet and cautious that he may pour wine and oil into the wounds of the one injured after the manner of a skilful physician, carefully inquiring into the circumstances of the sinner and the sin, from the nature of which he may understand what kind of advice to give and what remedy to apply, making use of different experiments to heal the sick one. But let him exercise the greatest precaution that he does not in any degree by word, sign, or any other manner make known the sinner, but should he need more prudent counsel, let him seek it cautiously without any mention of the person. He who dares to reveal a sin confided to him in the tribunal of penance, we decree that he be not only deposed from the sacerdotal office but also relegated to a monastery of strict observance to do penance for the remainder of his life.

Kurtscheid interprets the canon as requiring the confessor to treat his penitents 'with leniency and prudence'. The seal rests solely on the confessor and it would take almost eight centuries before the seal was extended to the penitent. He can seek advice from another, but only on the condition that the identity of the penitent is never revealed. Caesarius of Heisterbach reported various abuses such as the priest who attempted to seduce a woman penitent by threatening to reveal the contents of her confession. He was denounced by the woman and subsequently banished.

The absoluteness of the seal was stressed by many such as St Anthony of Padua who, in commenting on Canon 21, wrote, "I maintain that whosoever reveals the confession made to him, sins more grievously than the traitor Judas" (Kurtscheid 1927: 124-125). However, there continued to be disputation about the absoluteness of the seal. In his *Summa Aurea*, William of Auxerre documents the opinions of several theologians that the seal could be broken for grave reasons. Breaking the seal in extenuating circumstances would always be a very minority position.

Whilst the teaching of the Fourth Lateran Council (1215 CE) was renewed in successive centuries, including at the Council of Trent (1545-63), issues continued to arise. One question was: Can a confession be called a sacramental confession if it is made without contrition and without a firm purpose of amendment? Thomas Chabham of Salisbury Cathedral, who wrote the most complete account of the Lateran decision, placed the question in the context of heresy, asking whether a heretic who confesses his doctrinal errors but refuses to stop disseminating them nor to reveal and denounce his fellow heretics. His opinion was that any confession made with the intention of continuing in a sinful state cannot be regarded as a sacramental confession and, hence, the confessor is not bound by the seal. In fact, if anyone confesses that he or she is determined to commit some serious and damaging sin, the confessor would be bound to reveal the details. Other eminent canon lawyers in the 14<sup>th</sup> – 16<sup>th</sup> centuries such as Francis a Ripen and Jacob Menochius were of the opinion that the confessor must take the same attitude to future possible sins as towards other secrets confided to the priest outside confession, which may be revealed for justified reasons. Only past and confessed sins fell under the seal.

### ***Teaching of the French Church***

In France, the so-called Gallican teaching emerged, which allowed for the breaking of the seal. Following a decree of King Louis XI in 1477, which required every citizen under pain of death to report any known plot against the king or the state, the canonical opinion in response to the decree was that the confessor is obliged to denounce conspiratorial and seditious plots. The theologians strove to accommodate church practice to the civil law. Kurtscheid gives several examples including the conspiracy of Charles of Bourbon against King Francis I (1515 – 1547), where the Bishop of Autun was subpoenaed as a witness. The bishop said that he knew of the affair only through confession, as Charles of Bourbon holding a particle of the true cross told him of the plot. It transpired that he had not made a complete confession, and had not asked for nor received absolution. Because it was not a sacramental confession, this allowed the bishop to reveal all he knew. In 1547 in Paris, in the *Glossa Ordinaria* to the *Decretum Gratiani*, it is recorded that a priest, if under threat of excommunication to hold to the seal, could secretly communicate a confession to the bishop.

The Gunpowder plot in England had brought about the execution of the Jesuit, Father Garnet, because he had not broken the seal by denouncing the conspiracy, which he knew about through the confession of Thomas Winter before the plot took place. Horrified at the revelation, the priest consulted his superior in the confessional, who urged Fr. Garnet to do all in his power to dissuade Winter from carrying out the plot. But to no avail. The episode generated much antipathy against the Jesuits in the controversy that followed. King James I intervened, claiming that the Jesuits had instituted a new doctrine, as the Scholastic theologians had taught that the seal could be broken when necessary to prevent a heinous crime, though the name of the penitent should not be revealed. Fr Garnet was defended by Cardinal du Perron and Cardinal Robert Bellarmine in defending the strict view of the Jesuits of the inviolability of the seal. In France, the stricter view was not popular, and King Henry IV became very agitated in the early 1600s when his confessor said the seal must never be broken, not even to save the king's life. Much pressure was put on the Jesuits, and in 1612 they accepted, probably very reluctantly, the Sorbonne teaching in breaking the seal regarding the protection of the king's life. There were subsequent cases where the secrecy of the confessional was broken when priests were revealing conspiracies against the king. Gallican canonists such as Durand of Maillane expressly exempt the crime of *lèse-majesté* from the confessional seal. Lenglet du Fresnoy (1708) cites seventeen violation cases, though in about half of these cases Kurtscheid thought it is doubtful that the seal was broken.

Kurtscheid states very explicitly that he sees the French Gallican teaching as an aberration. He quotes the names of many theologians over many centuries who usually based their view on the teaching of St Thomas Aquinas that the seal was strict and universal. But controversy did not dissipate until the 20<sup>th</sup> century. The central issue was: **how can the obligation of the seal be reconciled with the Precept of Charity, which mandates that we should shield our neighbour against physical and spiritual injury to the best of our ability?** It raised the issue about the confessor making use of knowledge gained in the confessional to the detriment of the penitent. The negative response to the question was based on the claim that the information was beyond human knowledge. Quoting Thomas Aquinas, Kurtscheid summarizes, "Whatever the priest knows through confession, he, in a sense, does not know, because he possesses this knowledge not as a man, but as the representative of God. He may, therefore swear to his ignorance in court, because the obligation of a witness extends only to his human knowledge. Similarly, a superior may let a transgression of a subordinate go unpunished if he knows of it solely through confession" (Kurtscheid 1927: 195). However, Aquinas does allow that a priest, once he keeps intact the integrity of the Sacrament, must take preventative measures to stop 'an impending calamity'. A member of a religious community, in an election for a superior, may not vote for a candidate if the unworthiness of the candidate is only known through the confessional. Duns Scotus is even stricter than Aquinas. Alexander of Hales writes that a priest may refuse communion to a person whom he knows to be unworthy through confession if he asks for communion in secret but such a refusal could not be exercised publicly.

The majority view, that confessional knowledge could be used, but only if others did not notice it, had its opponents, such as Richard of Middleton, because it might deter Catholics from making their confessions. But the consensus was to hold to the strict view. Another issue regarding the lawful and unlawful use of knowledge gained through confession concerned bishops and religious superiors using confessional knowledge in making or participating in making appointments. Thomas Sanchez cites forty theologians and canonists who would consider it lawful, though he himself, supported by Suarez and Cardinal de Lugo, held the contrary view, because the penitent may grow suspicious and some people would be deterred from confession. An interesting case was in 1673 when the vicar-general of Trent requested the clergy to reveal which sins were the most frequently committed in the city, and they refused to comply. In China, some missionaries gave a certificate to those who had confessed, so as to admit them to communion; but in 1806 this was condemned by the Sacred Congregation for the Propagation of the Faith. At various times, the Holy Office has complained about priests who spoke privately or publicly about what they heard in confession, even in sermons for 'the edification of the people' (Kurtscheid 1927: 240).

Another issue with a long history, going back to the 11<sup>th</sup> century, was whether in an emergency a penitent could confess to a layperson. Gratian, Peter Lombard and Huguccio were in agreement while Albert the Great and Aquinas gave it a quasi-sacramental character (Aquinas uses the phrase ‘*quoddam sacramentale*’). But the view was opposed by the Franciscan school led by Alexander of Hales and Bonaventure, as well as Duns Scotus. Was the lay confessor bound by the seal? Pope Innocent IV answered in the affirmative, as did Aquinas. This opinion was held until the middle of the sixteenth century, when the view that the lay-confessor was held to a natural but not sacramental silence, prevailed. But if a person confesses to a layman believing him to be a priest, the layman is bound by the seal.

Another issue was the use of an interpreter for a confession. Thomas Aquinas argued that because the interpreter supplements the actions of the priest, the interpreter is obliged to strict silence and, in the view of most but certainly not all commentators, to the sacramental seal. But that the penitent was not bound by any sacramental secrecy was accepted by all authors.

The next issue was the extent of the coverage of the confessional seal. Kurtscheid responds: “The Seal of confession, therefore, extends to all those communications the revelations of which would lower the penitent in the estimation of the others, and thus deter him from the Sacrament of Penance” (Kurtscheid 1927: 266). Directly under the seal were the actual sins, whereas other information which might cause the identity of the penitent to be known was indirectly under the seal. Another question was whether confessors could reveal confessional material in any posthumous process to beatify or canonize some holy person or martyr. In *De Servorum Dei Beatificatione et Canonizatione*, Pope Benedict XIV ruled in the affirmative, but the Church’s magisterium changed its mind on this in the 1917 *Code of Canon Law* (Canons 2027 §2, no. 1 and 1757 §3, no. 2).

There was also debate as to whether the seal is based on natural law and/or divine law. The Fourth Lateran Council (1215) had not ruled on this, though later councils ruled that confession is a divine institution. The opinion was firm that it cannot be based merely on ecclesiastical law, which would imply that a pope could dispense with the seal. Yet not even a pope can dispense a priest from the obligation of keeping the sacramental seal. The seal belongs to the essence of the sacrament, though it is not the core of the sacrament, which is absolution. The argument that it is based on divine law is not without problems. Kurtscheid, as have most theologians and canonists though not Suarez and Cardinal de Lugo, acknowledges that there is no express command of Christ regarding the confessional seal, and in the early Church the form of the sacrament was unequivocally public confession, because the public humiliation was seen to be efficacious.

The next issue was whether and how far an individual penitent could dispense the confessor from the obligation to secrecy, because not even the pope can grant such a dispensation. Some, such as Alexander of Hales and Duns Scotus, considered that the penitent cannot make such a dispensation because of the *bonum commune* of the sacrament, and because the Catholic community had ‘an incontestable right’ to universal secrecy of the confession. A more middle position emerged, saying that it could be given only when it was necessary and advantageous for the reception of the sacrament. It was only in the 1983 *Code of Canon Law* that the seal was officially extended to the penitent (Rosney 2008).

Prior to the Fourth Lateran Council, there were few stated penalties for violating the confessional seal. The subsequent penalty of ecclesiastical imprisonment became problematic given that eventually the Church no longer has the right to inflict the penalty. The ecclesiastical penalties were severe, e.g. fasting three times a week on bread and water to be taken kneeling on the floor followed by prostration on the floor in the doorway with the brethren stepping over him to humiliate him. The 1917 *Code of Canon Law*, following a 1915 Instruction of the Holy Office makes a clear distinction between direct and indirect violation of the seal, with excommunication for the former and for the latter it can be a sentence such as suspension from saying Mass, from hearing confessions, loss of ecclesiastical benefices or honours and even formal laicization, similar to those for soliciting in the confessional

(Canon 2368).

### **The Seal of Confession and the Civil and Criminal Law**

As already indicated, after Kurtzschid's encompassing and thorough research, the review of the literature conducted by Cahill and Wilkinson (2016) found not much attention was given to the issue of the confessional seal. Several canonists (Moriarty 1998, Connaghan 2011, Coronelli 2013, Daly 2013) have written on the inviolability of the seal, representing the highest and most rigorously protected form of secrecy within the Church (Coronelli 2013). Some attention has also been given to a comparison of the Eastern and Western codes regarding the Sacrament of Penance (Abbass 2011). But much more attention, since the Second Vatican Council, has been given to the 'third rite of reconciliation' and 'general absolution' where the penitent is not required to make an individual confession, unless they have committed a serious mortal sin.

However, much attention has been given to the intersection of the seal and the common law in the context of the right to religious freedom, together with legal history. Zubacz (2009) has examined the issue in the Canadian context, while the New Zealand legal scholar, S. K. Thompson, has provided a very focused and well-researched account of the privileging of the confessional seal in the major common law countries.

Thompson (2011) broadens the debate beyond religious confession in the various Christian traditions to a religious communications privilege analogous to that between a lawyer and client and a physician and patient. He is very dismissive of evidence law textbooks as being misdirected and misinformed in accepting the conclusion that no religious confession privilege at common law existed. He goes back to when the first such texts began to appear at the beginning of the 19<sup>th</sup> century, with Peake in 1801, Phillips in 1814 and Starkie in 1824, all of whom admitted no such policy. However, there were some exceptions with Best in 1849, Nokes in 1950, and Winchworth in 1952.

Thompson (2011) notes that except for Queensland, South Australia and Western Australia, the other seven jurisdictions in Australia have religious confession privilege statutes. In New Zealand, the privilege was accepted in 1885 with the *Evidence Further Amendment Act*, broadened in 1895. The 2006 Act broadened it even further, making New Zealand "one of the most generous expressions in the common law world" (Thompson 2011: 374).

Justification for the privilege has been made simplistically in terms of freedom of religion and conscience. Thompson gives five other reasons adduced for the privilege, beginning with the protection of the confidentiality of religious communications, because of their special nature together with the privacy interests of the penitent. A third reason given by Thompson (2011) would be the 'futility principle', insofar as the priest confessor would always be prepared to be imprisoned if required to give evidence about his confessional knowledge. As an extension of this is the 'legitimacy principle', based on Benthamite utilitarianism that the legitimacy of the courts would be undermined by the futility principle. The last reason is the 18<sup>th</sup> century idea that no one should be compelled to give evidence.

Thompson (2011), who supports the common law privilege, suggests that no single argument suffices, but only the aggregation of all the reasons. His view is that the strongest argument for a religious communications privilege in his view is society's interest in the preservation of the religious freedom principle.

### **The Confessional Seal in the Context of Clerical Child Sex Abuse**

Bertrand Kurtzschid would have been well aware of Pius X's Instruction *Quam Singulari* in 1910, that lowered the age of first confession. He does not make reference to it in his treatise, even though he was well aware of the problem that soliciting in the confessional had been an issue for many centuries

in the Church. Younger children were now at risk. It is surprising, perhaps even reprehensible, that Kurtscheid himself, as well as canonists and sacramental theologians throughout the whole of the twentieth century, failed to alert themselves, and to discuss the seal of confession and the duty of care that was intrinsically being placed on the confessor.

There were serious issues at stake regarding information given (not a sin committed) by a child during a confession. It is likely that this occurred, but the priest would have felt obliged to not act on the information, even though it was not an actual sin of the child. The child was probably in danger of further sexual assault and expressing a fear. The other issue concerned confessions made by offending priests and brothers themselves to a confessor priest. Both Keenan (2012) and Winship (2013) refer to this issue - no confessor seems to have withheld absolution until the perpetrator had made a confession to criminal justice or even church authorities as had happened in the past, as we have seen.

In our review of the literature, only one author discussed confession in the context of child sexual abuse. Joe Grayland, a New Zealand liturgical theologian, reflected on the fact that Catholic confession grossly underplays restitution to the victim. “The present rites’ critically underdeveloped theology is due in part to its overdeveloped emphasis on the individual penitents’ confession of sin and their immediate absolution effectively limits our understanding of restitution” (Grayland 2004: 156). He insists that while the actual confessing of one’s sins is necessary, the core element of the confession is ‘the process of penance’. He is critical of the Roman-Irish monks who spread the practice of confession throughout Europe in the 10<sup>th</sup> century. He concludes that the present rite of sacramental reconciliation, in dealing with a very grave public sin such as child sexual abuse, is seriously inadequate, because it undervalues and ignores the need for a just and inter-relational restitution (Grayland 2004). The name change at the time of the Second Vatican Council from the Sacrament of Penance to Sacrament of Reconciliation should have presaged, not only in the 1960s and subsequently, both so-called progressives and conservatives to the issue of reconciliation and restitution to the victims. But it did not, as they concerned themselves with fierce culture debates over general absolution and the other introduced rites of reconciliation, and lamented over the precipitous decline in confessional attendance as Catholics stopped going to confession. While all this was happening, countless children were being abused by predator priests and brothers.