

## REPORT OF THE CLERGY DISCIPLINE WORKING GROUP

### Introduction

#### (a) Private confession of sins in the Anglican Church of Australia

1. Provision for private confession of sins and absolution in the Church of England was made in *The Book of Common Prayer* of 1662 ("BCP") as well as the earlier Books of Common Prayer of 1549 and 1552: *The Ecclesiastical Law of the Church of England*, R. Phillimore, 2nd ed., 1895, at 541-542.
2. *The Order for the Visitation of the Sick* in BCP contains the following rubric:

"Here shall the sick person be moved to make a special confession of his sins, if he feel his conscience troubled with any weighting matter. After which confession, the Priest shall absolve him (if he humbly and heartily desire it) after this sort."
3. Reference to private confession of sins and absolution was made in The Exhortation in *The Order for the Administration of the Lord's Supper or Holy Communion* in BCP. This part of The Exhortation is in the following terms:

"...if there be any of you, who by this means cannot quiet his own conscience herein, but requireth further comfort or counsel, let him come to me, or to some other discrete and learned Minister of God's Word, and open his grief; that by the ministry of God's holy Word he may receive the benefit of absolution, together with ghostly counsel and advice, to the quieting of his conscience, and avoiding of all scruple and doubtfulness."
4. Private confessions in the Church of England have never been compulsory. While the occasions when such confessions are contemplated are deemed to be special, no limit is placed on their frequency: *The Rector and Churchwardens of Chapel St. Mary, Suffolk v Packard* [1927] P. 289 at 301 (Sir L. Diblin, Dean of the Arches); see also *Doctrine in the Church of England*, The Report of the Commission of Christian Doctrine appointed by the Archbishops of Canterbury and York in 1922, 1938, at 191-193.
5. Identical provision for private confession of sins and absolution has been made in the Anglican Church of Australia ("the Church") from the time of its separation from the Church of England on 1 January 1962 by reason of the adoption of BCP as its authorised standard of worship and doctrine: *Constitution*, s.4.
6. Further provision for private confession of sins and absolution has been made in the Church by the General Synod through the passing of the *Australian Prayer Book Canon 1977* and the *Prayer Book for Australia Canon 1995*.
7. The rubric in the service *The Ministration to the Sick* in *An Australian Prayer Book* ("AAPB") is in the following terms:

"When the priest examines the sick person as to his faith, and as to whether he truly repents of his sins and is in love and charity with all, the sick person is then moved to make a special confession of his sins if he feels his conscience troubled with any weighty matter."

8. The rubric following the confession in the service *Reconciliation of the Penitent* in *A Prayer Book for Australia* ("APBA") provides: "The Priest may offer guidance, counsel and encouragement." The introduction to this service specifies that the Priest may offer guidance, counsel and encouragement "at the request of the penitent". One of the rubrics in the service *Ministry with the Dying* provides that the service *Reconciliation of the Penitent* may be used "if the Dying person is moved to make a special confession of sins".

**(b) The obligation of a priest not to disclose a confession**

9. In the Church of England the obligation of a Priest not to disclose a confession has been contained in the proviso to canon numbered 113 of the *Canons of 1603* ("the proviso to Canon 113") which is in the following terms -

"Provided always, that 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 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."

10. From the separation of the Church from the Church of England the proviso to Canon 113 continued in force in the dioceses of the Church: *Constitution*, s.71.

11. In 1989 the General Synod passed the *Canon concerning confessions* 1989 ("*Confessions Canon*") which, so far as relevant, is in the following terms -

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.

3. The proviso to canon numbered 113 of the *Canons of 1603*, and any other law of this Church concerning the making of confessions to an ordained minister, in so far as the same may have any force, shall have no operation or effect in this Church."

12. The *Confessions Canon* applies in those dioceses in which it has been adopted by ordinance. The proviso to Canon 113 continues to apply in those dioceses which have not adopted the *Confessions Canon*. The application of the *Confessions Canon* or the

proviso to Canon 113 in the dioceses of the Church is set out in Appendix 1 to this Report.

### **The 1998 General Synod**

13. Bill No. 10 which was entitled the *Clergy Discipline (Disclosure of Confessions) Canon 1998* ("the Bill") was promoted at the meeting of the General Synod held in February 1998.
14. The substantive provisions of the Bill were in the following terms:

#### **"Disclosure of Confessions**

2. The synod of a diocese may by ordinance permit or require ordained ministers to reveal crimes or offences or sins which involve the sexual abuse of a minor confessed by -
  - (a) an ordained minister licensed by the bishop of the diocese or resident in the diocese; or
  - (b) a person holding a position in the diocese specified in the ordinance

to the bishop of the diocese and/or to a tribunal of the diocese in or in connection with disciplinary proceedings against the minister or the person holding the position.

#### **Relationship of Canon to the Existing Law of the Church concerning Confessions**

3. Whichever of canon numbered 113 of the Canons of 1603 and the Canon concerning confessions 1989 as is in force should be read subject to this Canon."
15. In the debate on the motion that the Bill be approved in principle emphasis was placed both upon the obligation of the Church to protect children entrusted to its care from sexual abuse by clergy and lay leaders and the importance of absolute confidentiality of a confession.
16. Following this debate the General Synod passed the resolution "that the Primate be asked to appoint a Task Force to consider the matters raised in the debate on Bill No. 10."

### **The Clergy Discipline Working Group**

17. In June 1988 the Acting Primate, the Most Rev. Peter Carnley, appointed a Working Group comprising Mrs. Marion Rainsford (Tasmania), Very Rev. (subsequently Rt. Rev.) Godfrey Fryar (Canberra and Goulburn), Rt. Rev. David Farrer (Wangaratta) and Mr. Garth Blake (Sydney). The word "Discipline" in the name Clergy Discipline Working Group given by the General Synod Office has been understood in the sense of rules of the Church binding upon clergy.

18. The Working Group had the benefit of papers, notes and/or correspondence provided by the following persons:
- (a) Rt. Rev. Phillip Newell, Bishop of Tasmania;
  - (b) Rev. Dr. Gordon Preece, of Ridley College, Melbourne;
  - (c) Rev. Dr. Phillip Tolliday, of St. Barnabas' Theological College, Adelaide;
  - (d) Canon J Robert Wright of The General Theological Seminary, USA;
  - (e) Mr Richard Waddell, Barrister, Melbourne;
  - (f) Mr Roderick Best, Director, Legal Services, Department of Community Services, Sydney
19. The Working Group met on 3 August 2000 in Sydney and on 10 November 2000 in Melbourne.

### **History of private confession and the seal of the confessional**

20. Until its practice was condemned by Pope Leo I in 459 public confession and penance was practiced in the early Church.
21. With the gradual abandonment of public confession and penance there developed the practice of private confession and the obligation of silence by the Priest.
22. From the sixth century onwards there are references in various synods and councils to the obligation of maintaining the seal of the confessional. In 1215 Pope Innocent III promulgated Canon 21 of the Fourth Council of Lateran which was binding on the whole Church and specified that a Priest who revealed a sin disclosed to him in a confession was to be deprived of priestly office and confined to a monastery. This Canon was reinforced by the promulgation of a similar canon by provincial synods in England.
23. At the Reformation such of the canon law that applied in England as was not "repugnant, contrariant or derogatory" to the laws or statutes of the realm, nor to the prerogatives of the Crown, received statutory recognition: *Submission of the Clergy Act*, 1533, s.7.
24. *The Canons of 1603* were made by the Convocations of Canterbury and York and promulgated with the consent and license of the Crown. The proviso to Canon 113 is the only reference in post Reformation Canon law to the seal of the confession: *The Seal of the Confessional*, R.D.H. Bursell, (1990) 2 Ecc. L. J. 84 at 87, n.37 and the text cited therein.

### **Principles applicable to private confession of sins and absolution**

25. It is implicit from the words "if he humbly and heartily desire it" in *The Order for the Visitation of the Sick* in BCP and *The Administration to the Sick* in AAPB that before the obligation upon the Priest to absolve the penitent arises the following three elements must be present: contrition, a full and honest confession of sins and a purpose of amendment. The elements of contrition and purpose of amendment will be largely indicated by the content of the confession of sins and the penitent's general demeanour during the confession.
26. Contrition and a purpose of amendment will require the following action by the penitent in the following circumstances:
- (a) where the conduct has caused injury to another person, then reparation or the making of amends for the injury done will be necessary. Where appropriate the Priest may give advice as to what sort of reparation will be necessary;
  - (b) where the conduct is criminal, then reporting of that conduct by the penitent to the police or other appropriate authority may be necessary;
  - (c) where the penitent is a member of the clergy and the conduct is inconsistent with the standards to be observed by members of the clergy, then reporting of that conduct by the penitent to the bishop of diocese may be necessary;
  - (d) where the penitent is a lay leader and the conduct is inconsistent with the standards to be observed by members of the Church, then reporting of that conduct by the penitent to the person appointing the penitent to his or her leadership position may be necessary.

Some standards to be observed by members of the clergy are set out in section 1 of the *Offences Canon 1962*.

### **The issue of a confession of child sexual abuse**

27. Special care will need to be taken in the case of a confession of child sexual abuse. It is important for a member of the clergy to whom a confession of child sexual abuse is made to be aware that this area of criminal activity involves the following common elements:
- (a) the abuse is usually secretive and known only to the abuser and the victim;
  - (b) offenders generally do not stop at abusing unless there is some intervening factor;
  - (c) often there is a distortion of cognition involved, for example, a belief that the victim enjoyed the sexual interaction;
  - (d) the abuse generally begins with something minor, and gradually builds up to more involved sexual interaction through a process of grooming;
  - (e) the abuse continues because the child often adopts some form of survival behaviour which the offender interprets as acceptance of the activity;

- (f) whether based on a preference or not, offenders generally enjoy the activity;
- (g) the sexual abuse is generally not a self-contained incident - it is part of a relationship that is corrupting and violating;
- (h) when exposed, offenders will generally attempt to justify, minimise or excuse their behaviour, ranging from blaming the victim, to claiming their behaviour was a result of their own abuse or that they were under the influence of stress or alcohol; and
- (i) offenders are mostly recidivists:

see *Final Report of the Royal Commission into the New South Wales Police Service, The Paedophile Inquiry*, August 1997, para. 3.20.

28. The Royal Commission into the New South Wales Police Service noted that, while some experts believe that with appropriate strategies and support behaviour modification can be achieved for adult child sex offenders, the general consensus of experts was that such offenders cannot be 'cured' but only managed. It concluded on the evidence that there cannot be any certainty that treatment will prevent an offender from reoffending: *Final Report of the Royal Commission into the New South Wales Police Service, The Paedophile Inquiry*, paras 3.55 and 19.4 n.1018.
29. It follows that in a case of a confession of child sexual abuse by a member of the clergy or lay leader the Priest could not responsibly pronounce absolution until appropriate reparation had been made by the penitent. This reparation, apart from exceptional cases, would include an apology to the victim, and the reporting of the conduct both to the police or other appropriate authority and to the bishop of the diocese or to the person appointing him or her to the position of leadership, as the case may be.

### **Scope and effect of the proviso to Canon 113 and the Confessions Canon**

30. When considered in the light of the following matters:
- (a) the similarity of the language of the proviso to Canon 113 and the rubric providing for private confession in *The Order for the Visitation of the Sick* in BCP and the reference to private confession in The Exhortation in *The Order for the Administration of Holy Communion* in BCP;
  - (b) the fact that the proviso to Canon 113 was promulgated against the background that under the pre-Reformation canon law of England the seal only applied to sacramental confession: *The Seal of the Confessional*, at 84; and
  - (c) the fact that the only provision in BCP for private confession was *The Order for the Visitation of the Sick*;

it appears clear that the duty imposed by the proviso to Canon 113 and section 2 of the *Confessions Canon* only applies to a confession made in accordance with *The Order*

for the Visitation of the Sick in BCP, the service *The Ministration to the Sick* in AAPB or the service *Reconciliation of a Penitent* in APBA. Support for this view appears in various texts: see *A Manual for Confessors*, F.G. Belton, rev. ed., 1931, at 89; *The Law of the Seal of the Confession*, R S Nolan, *The Catholic Encyclopedia*, 1913, vol. 13; *The Seal of the Confessional*, at 88-92, 109.

31. It follows from the fact that the rubrics in these services refer to a Priest that the words "the said minister" in the proviso to Canon 113 and "an ordained minister" and "such minister" in section 2 in the *Confessions Canon* should be understood as a reference to a Priest or a Bishop.
32. The express exception in the proviso to Canon 113 to the duty imposed upon a Priest to honour the seal of the confessional is likely to be the offence of high treason: *In re St. Edmund's Churchyard, Gateshead* [1995] Fam. 172 at 178 (Bursell QC, Ch.) and the texts cited therein.
33. It is unclear to what the words "under pain of irregularity" in the proviso to Canon 113 refer. One view is that disclosure by a Priest of matters revealed in the course of a private confession would require the canonical censure of deprivation of holy orders. Another view is that there is no such consequence because the rule against disclosure binds only in conscience: *Ecclesiastical Law Handbook*, Lynne Leeder, 1997, at para.10.78 and the texts and report cited therein.
34. The proviso to Canon 113 and section 2 of the *Confessions Canon* will not apply in the following circumstances:
  - (a) where the penitent speaks about matters other than his or her own personal past sins. Thus, statements about another person's sins or the penitent's future intentions are not part of the confession;
  - (b) where the penitent does not show contrition and a purpose of amendment by taking appropriate action. Such a confession could not be said to be "for the unburdening of conscience and to receive spiritual consolation and ease of mind".

### **Whether the seal attaching to a confession could expose members of the Church and the public to the risk of harm**

35. In the speech in support of the motion that the Bill be approved in principle and the subsequent debate at the 1998 General Synod the question was raised as to whether the seal attaching to a confession could expose members of the Church and the public to the risk of harm. While not limited to this situation this question was explored in the context of the risk of harm to children attending Sunday schools, youth groups, camps or otherwise entrusted to the care of the Church from members of the clergy and lay leaders who had confessed to child sexual abuse.
36. The following three situations can arise where a confession is made in such a context:
  - (a) firstly, the penitent without delay takes the appropriate action of reporting both to the police or other appropriate authority and, where the penitent is a member

of the clergy or a lay leader, to the bishop of diocese or the person appointing him or her to the position of leadership, as the case may be;

- (b) secondly, the penitent wishes to consider whether to take such action and the completion of the applicable service (refer to paragraphs 2, 7 and 8) is postponed pending this consideration; and
  - (c) thirdly, the penitent refuses to take such action and terminates the confession.
37. In the first situation there will be no risk of harm to children. The result of the action following the confession will mean that both the police or other appropriate authority and the responsible person within the Church are in a position to take appropriate action to protect children from harm.
38. However, in the second and third situations there will be risk of harm to children. While the Priest will have to consider whether he is under a legal, and/or a moral, obligation to breach any confidentiality attaching to the communication in order to protect children or other vulnerable persons from the risk of harm and the consequences thereof, he will not breach the seal of the confessional by so doing. The correct analysis in the second and third situations is that neither the proviso to Canon 113 nor section 2 of the *Confessions Canon* applies to the "confession", as it is not a confession made in accordance with *The Order for the Visitation of the Sick* in BCP, the service *The Ministration to the Sick* in AAPB or the service *Reconciliation of a Penitent* in APBA.

#### **Whether disclosure of a confession to which the seal applies can be required by the law**

39. The question of whether the law requires disclosure of the contents of a confession to which the proviso to Canon 113 or section 2 of the *Confessions Canon* applies can arise in two different contexts:
- (a) firstly, where there is a statutory obligation to report child abuse; and
  - (b) secondly, where questions are asked about a confession and its contents in court proceedings.
- (a) **Mandatory reporting of child abuse**
40. The position differs significantly between the States and Territories. The trend in recent years has been towards legislation imposing mandatory reporting of child abuse upon particular professionals who, in some cases, could include members of the clergy. A summary of the relevant legislative provisions applicable in the States and Territories is set out in Appendix 2.
- (b) **Disclosure of a confession in court proceedings**
41. The position differs significantly between the States and Territories. A summary of the relevant legislative provisions or general law applicable in the States and Territories is set out in Appendix 2.

#### **The way forward**

42. The Working Group is of the opinion that there is the potential for considerable misunderstanding within the Church as to the principles applicable to private confessions and to the scope of the proviso to Canon 113 and section 2 of the *Confessions Canon*. It is important that these matters be clearly understood and that appropriate steps are taken to make members of the Church, and particular members of clergy, aware of these principles and the scope of these provisions.
43. While we recognise the tragedy of child sexual abuse within the community at large and within the Church, we consider that consideration by the General Synod of the principles applicable to private confessions should not be limited to any one sin.
44. We recommend that the General Synod at its meeting in July 2001 pass four resolutions:
- (a) a resolution adopting principles applicable to private confessions and the scope of the proviso to Canon 113 and section 2 of the *Confessions Canon*;
  - (b) a resolution providing for the identification of applicable teaching resources and the development of pastoral guidelines for the hearing of private confessions;
  - (c) a resolution requesting appropriate training in each diocese on the issues of human sexuality, abuse of people generally and sexual abuse of children in particular and the hearing of private confessions;
  - (d) a resolution requesting each diocese in the States other than New South Wales to institute or maintain a system of screening of all persons who work with children (the position in New South Wales is already governed by legislation - see Appendix 4).

The text of the proposed resolutions is set out in Appendix 5 to this Report.

23 March 2001

Garth Blake

+ David Wangaratta

+ Godfrey Fryar

Marion Rainsford

**Appendix 1**

**Application of the *Confessions Canon* and the proviso to Canon 113 in the dioceses of the Church**

1. The *Confessions Canon* was adopted by ordinance in the following diocese on the following dates:

Adelaide - 10 September 1994;  
 Armidale - 29 September 1992;  
 Bendigo - 15 June 1996;  
 Brisbane - 24 June 1993;  
 Bathurst - 12 September 1993;  
 Bunbury - 12 February 1993;  
 Gippsland - 17 October 1992;  
 Grafton - 5 June 1993;  
 Melbourne - 16 October 1992;  
 Newcastle - 3 June 1994;  
 North Queensland - 1 May 1993;  
 North West Australia - 14 September 1992;  
 Northern Territory - 12 June 1993;  
 Perth - 1 October 1992;  
 Riverina - 29 June 1994;  
 Rockhampton - 21 May 1995;  
 Sydney - 12 October 1993;  
 Tasmania - 18 October 1992;  
 The Murray - 6 September 1992;  
 Wangaratta - 5 September 1992;  
 Willochra - 7 May 1995.

2. The following dioceses declined to adopt the *Confessions Canon* on the following dates:

Ballarat - 19 October 1992;  
 Canberra and Goulburn -

3. On 27 October 1997 the diocese of Sydney by the *Church Ministry Confessions Ordinance 1993 Repeal Ordinance 1997* repealed the *Church Ministry (Confessions) Ordinance 1993* by which it had adopted the *Confessions Canon*. The effect of this exclusion of the *Confessions Canon* is that the proviso to Canon 113 has applied in the diocese of Sydney since 24 October 1997.

## **Appendix 2**

### **Mandatory reporting of child abuse in the States and Territories**

1. Where mandatory reporting does apply, the applicable legislation in each State and Territory contains a provision which specifies that by reason of the making of such a report there has been no breach of professional ethics, and that no civil liability is incurred, by the person making the report.
  - (a) **New South Wales**

2. Mandatory reporting of child sexual abuse in certain circumstances is prescribed by section 25C(1)(a) of the *Ombudsman Act* 1974 (NSW) and under section 27(2) of the *Children and Young Persons (Care and Protection) Act* 1998 (NSW).
3. Such mandatory reporting under the *Ombudsman Act* is, relevantly, limited to the head of a non-government school: ss.25A(1) and 25C(1)(a).
4. Such mandatory reporting under the *Children and Young Persons (Care and Protection) Act* is limited to a person who, in the course of his or her professional work or other paid employment delivers health care, welfare, education, children's services, residential services or law enforcement, wholly or partly to children, and a person who holds a management position in an organisation the duties of which include direct responsibility for, or direct supervision of, the provision of those services, wholly or partly, to children: s.27(1). A children's service encompasses education and care for pre-school children, but does not include lessons or coaching in, or providing for participation in, a religious activity: s.200(1), (2)(c)(i).

**(b) Victoria**

5. Mandatory reporting of child sexual abuse in certain circumstances is prescribed by section 64(1A) of the *Children and Young Persons Act* 1989 (Vic). Such mandatory reporting is limited to persons practising particular professions or carrying out the duties of a particular office, position or employment including a person registered as a psychologist or a teacher and a person with post secondary qualifications in youth, social or welfare work who works in the health, education or community or welfare services field: s.64(1C)(b), (d) and (g).

**(c) South Australia**

6. Mandatory reporting of child sexual abuse in certain circumstances is prescribed by section 11(1) of the *Children's Protection Act* 1993 (SA). Such mandatory reporting is limited to particular persons including a psychologist, a teacher in any educational institution and an employee of, or volunteer in, a non-government agency, that provides health, welfare, education, child care or residential services wholly or partly for children (being a person who is engaged in the actual delivery of those services to children or holds a management position in the relevant organisation and the duties of which includes direct responsibility for, or direct supervision of, the provision of those services to children): s.11(2)(d), (h) and (j).

**(d) Queensland**

7. Mandatory reporting of child sexual abuse in certain circumstances is prescribed by section 147B(1) of the *Child Protection Act* 1999 (Qld). Such mandatory reporting applies only to a child in residential care and is limited to particular officers and a person employed in a licensed care service, but does not apply if that person has a reasonable excuse: s.147B(1) and (5).

**(e) Western Australia**

8. There is no legislation requiring mandatory reporting of child sexual abuse. The *Child Welfare Amendment Bill 1998* (WA), which is before the Western Australian Parliament, provides for mandatory reporting of child sexual abuse by an approved person in certain circumstances: s.120F(1). An approved person is unlikely to ever include a member of the clergy: s.120A.

**(f) Tasmania**

9. Mandatory reporting of child sexual abuse in certain circumstances is prescribed by section 14(2) of the *Children, Young Persons and Their Families Act 1997* (Tas). Such mandatory reporting is limited to a prescribed person who includes a registered psychologist and a principal and a teacher in any educational institution.

**(g) Northern Territory**

10. Mandatory reporting of child sexual abuse in certain circumstances is prescribed by section 14(1) of the *Community Welfare Act 1983* (NT). Such mandatory reporting is applicable to all persons, apart from members of the Police Force.

**(h) Australian Capital Territory**

11. Mandatory reporting of child sexual abuse in certain circumstances is prescribed by section 159 of the *Children and Young People Act 1999* (ACT). Such mandatory reporting is limited to particular persons including a teacher at a school and a person employed to counsel children or young people at a school: s.159 (d) and (f).

**Appendix 3**

**Disclosure of a confession in court proceedings in the States and Territories**

1. There are three positions which apply in the States and Territories.

**(a) Protection from disclosure in Victoria, Tasmania and the Northern Territory**

2. In Victoria the position is governed by section 28(1) of the *Evidence Act 1958* (Vic). This section provides that no clergyman of any religious denomination shall without the consent of the person making this confession divulge in any proceeding whether civil or criminal any confession made to him in his professional character according to the usage of the religious denomination to which he belongs.
3. In Tasmania the position is governed by section 96(1) of the *Evidence Act 1910* (Tas). This section provides that no clergyman of any religious denomination shall divulge in any proceeding a confession made to him in his professional character, except with the consent of the person who made such confession. In *R v Lynch* [1954] Tas.S.R.47 Crisp J at 48 held that the word confession in this section encompassed a ritual confession made according to the discipline of a particular faith. He suggested, without deciding, that the section might extend to confessions for spiritual ends which do not conform to the requirements of a liturgy.

4. In the Northern Territory the position is governed by section 12(1) of the *Evidence Act 1939 (NT)* which is in substantially identical terms to section 96(1) of the *Evidence Act 1910 (Tas)*.
- (b) **Privilege to refuse disclosure in New South Wales and the Australian Capital Territory**
5. In New South Wales the position is governed by Division 1A (sections 126A to 126F) of Part 3.10 and section 127 of the *Evidence Act 1995 (NSW)*.
6. A person who is or was a member of the clergy of any 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: s.127(1). A religious confession is defined as a confession made by a person to a member of the clergy in the member's professional capacity according to the ritual of the religious denomination concerned: s.127(4).
7. The court may direct that evidence of a protected confidence not be disclosed in a proceeding: s.126B(1)(a). A protected confidence is defined as a communication made by a person in confidence to a confidant in the course of relationship in which the confidant was acting in a professional capacity and when the confidant was under an express or implied obligation not to disclose its contents, whether or not the obligation arises under law or can be inferred from the nature of the relationship between the person and the confidant: s.126A(1).
8. In the Australian Capital Territory the position is governed by section 127 of the *Evidence Act 1995 (Cth)* which is in identical terms to section 127 of the *Evidence Act 1995 (NSW)*.
- (c) **No protection from disclosure in South Australia, Queensland and Western Australia**
9. 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, such as there is against the existence of any privilege, as is the almost unanimous opinion of textwriters and official reports: see, for example, *Phipson on Evidence*, 14th ed. 1990, para. 20-13; *Cross on Evidence*, 5th Aust. ed., 1996, para [25315]; *Law of Privilege*, Suzanne B. McNicol, 1992, at 324-328; *An Evidential Privilege for Priest-Penitent Communications*, D. W. Elliott (1994) 3 Ecc. L. J. 272 at 273-274, 281 and the cases, texts and reports cited therein.

#### **Appendix 4**

##### **Obligations upon employers in relation to child-related employment in New South Wales**

1. The obligations upon employers in relation to child-related employment is prescribed by the *Child Protection (Prohibited Employment) Act 1998 (NSW)* and the *Commission for Children and Young People Act 1998 (NSW)*, which each commenced on 3 July 2000.

**(a) *Child Protection (Prohibited Employment) Act***

2. An employer must not commence employing any person in child-related employment without first requiring that person to disclose whether he or she is a prohibited person: s.7(1).
3. An employer must not commence employing, or continue to employ, in child-related employment a person that the employer knows is a prohibited person: s.8(1).
4. A prohibited person means a person convicted of a serious sex offence, before or after the commencement of the Act, which includes an offence involving sexual activity or acts of indecency, that was committed in New South Wales and that was punishable by imprisonment for 12 months or more, or that was committed elsewhere and would have been punishable by imprisonment for 12 months or more if it had been committed in New South Wales: s.8(1),(3)(a),(b).
5. Child-related employment includes performance of work under a contract or as a volunteer or as a minister of religion or other member of a religious organisation that primarily involves direct contact with children where that contact is not supervised including employment in pre-schools, in any religious organisation, involving the provision of counselling or other support services for children and at overnight camps for children: s.3, definitions of 'child-related employment' and 'employment'.

**(b) *Commission for Children and Young People Act***

6. It is the duty of an employer to carry out all relevant procedures of employment screening (which includes a check for any relevant criminal record) before employing the preferred applicant in primary child-related employment: ss.34(a), 37(1),(2).
7. Primary child-related employment includes paid child-related employment to which the *Child Protection (Prohibited Employment) Act* applies or child-related employment to which the *Child Protection (Prohibited Employment) Act* applies by a minister of religion or other member of a religious organisation: s.37(6)(a),(b).
8. Pursuant to s.34(a) the Commission for Children and Young People has been engaged by the Anglican Church in New South Wales, to carry out relevant procedures of employment screening on its behalf, including employment in all parishes.

**Appendix 5****Resolutions to be moved at the July 2001 meeting of the General Synod**

1. That the General Synod adopts the principles relating to private confessions and the scope of the proviso to Canon 113 of the *Canons of 1603* and section 2 of the *Canon concerning confessions* 1989 set out in the Report of the Clergy Discipline Working Group dated 31 January 2001 and in particular declares:
  - (a) that the duty imposed by the proviso to Canon 113 and section 2 of the *Confessions Canon* only applies to a confession made in accordance with the service *The Order for the Visitation of the Sick* in *The Book of Common Prayer*

of 1662, the service *The Ministration to the Sick* in *A Prayer Book for Australia* or the service *Reconciliation of a Penitent* in *A Prayer Book for Australia*;

- (b) that the duty imposed by the proviso to Canon 113 and section 2 of the *Confessions Canon* only arises where the elements of contrition, a full and honest confession of sins and a purpose of amendment are present;
  - (c) that in a case of a confession of child sexual abuse by a member of the clergy or lay leader, the Priest could not responsibly pronounce absolution until the penitent had reported the conduct both to the police or other appropriate authority and to the bishop of the diocese or to the person appointing him or her to the position of leadership, as the case may be.
2. That the General Synod requests that the House of Bishops identify appropriate teaching resources and develop pastoral guidelines for the hearing of private confessions.
  3. That the General Synod requests that each diocesan bishop take steps to ensure that the training of ordinands and lay leaders and post-ordination training for clergy includes instruction upon the issues of human sexuality, abuse of people generally and sexual abuse of children in particular and the hearing of private confessions.
  4. That the General Synod requests each diocese in States other than New South Wales institute or maintain a system of screening of all persons who work with children.