Modifying the “seal of confession”

Submission to the Royal Commission into Institutional Responses to Child Sexual Abuse.

Lawrie Moloney

The only purpose for which power can be rightly exercised over a member of a civilised community, against his will, is to prevent harm to others.

John Stuart Mill 1859 On Liberty

Confession, Canon Law and the Hippocratic Oath

Amongst other responsibilities, priests within the Catholic Church are formally empowered to hear individual confessions. They have the power to absolve the penitent from the confessed sin or in certain circumstances, to refuse absolution. Canon Law lays out the nature of the relationship between the priest and the penitent:

The sacramental seal is inviolable; therefore it is absolutely forbidden for a confessor to betray in any way a penitent in words or in any manner and for any reason (Can. 983 §1).

As trainee priests in the 1960s, we were told that we would be expected to suffer any indignity, even laying down our lives in extreme cases, rather than 'break the seal' of the confessional. I can only assume that Canon Law’s uncompromising approach to confidentiality in confession is what leads compassionate Catholic priests such as Fr. Frank Brennan to come to the following conclusion.

If a law is introduced to say that a priest should reveal a confession, I’m one of those priests who will disobey the law.2

I lay no claim to expertise on either Canon Law or medical ethics. It is clear nonetheless that the seal of the confessional seeks to address an issue that had been addressed some centuries earlier by Hippocrates. An impressive and indeed an extraordinarily moving document, the Hippocratic Oath deals amongst other things with the question of the nature of confidentiality in the doctor patient relationship. A translation of the relevant part of the Hippocratic Oath is as follows:

And whatsoever I shall see or hear in the course of my profession, as well as

---

1 Adjunct Professor, La Trobe University.
2 Cited in Eureka St 26 (24) Why the seal of the confessional should remain in tact. In this article, Fr. Brennan noted that his statement to The Australian of November 30th that he would go to gaol rather than break the confessional seal (see “Catholic Row over probe into confession), had been accurately reported.
outside my profession in my intercourse with men, if it be what should not be published abroad, I will never divulge, holding such things to be holy secrets.\(^3\)

A more contemporary version of the Oath, said to have been written by ..., expresses similar sentiments in simpler and less nuanced language.

I will respect the privacy of my patients, for their problems are not disclosed to me that the world may know.\(^4\)

Unlike the absolute confidentiality provision contained within Canon Law's approach to confession, both versions of the Hippocratic Oath leave room for consideration of other priorities. In speaking of never divulging that which should not be published abroad, the original Oath clearly recognises that there are limits to the default presumption of confidentiality. And by using the word respect, the more contemporary version also falls short of declaring an absolute requirement for privacy.

**Healers, helpers and limits to confidentiality**

For many years, individuals consulting medical doctors and other healing and helping professionals such as psychologists, social workers, counsellors, psychotherapists and mental health workers, have done so in the normal expectation that information they divulge and admissions they make will remain confidential.\(^5\) But this presumption of confidentiality has always existed in some tension with a reciprocal obligation to ensure, so far as it is reasonably possible, that the person seeking the help remains safe and is also prevented from seriously harming others.

Within the healing and helping professions, responses to the tension between the right to privacy and the broader duty of professional care began to receive increasingly formal attention in the final decades of the last century. Before returning to the question of the confessional seal therefore, I present a very brief summary of how this tension has been addressed.

Though many cases could be cited, I shall focus here on a pivotal case within my own profession of psychology – one that occurred in 1976 in California, and one that has clear implications for other helping and healing professionals.

---

4 Louis Lasagna (1964). At the time, Dr. Lasagna was Academic Dean of the School of Medicine at Tufts University.
5 I say "usually" because there are both "Big C" and "small c" cultural issues that impact on attitudes to professional confidentiality. "Big C" issues are those that apply to identifiable groups, while "small c" issues are those that reflect our evolving norms of behaviour. It has been my experience in working with some Indigenous Australians for example, that the sharing of information that I would consider to be confidential, is thought of as positively helpful in arriving at a solution to the problem. At the "small c" level, there have also been shifting cultural norms regarding boundaries of confidentiality. These days for example, young people who consult professionals such as medical practitioners or psychologists would normally expect the content of these consultations to remain private unless they gave permission for some or all of the matters of concern to be revealed to a parent or other caring adult.
In the case of Tarasoff, a university psychologist's client had killed his girlfriend after telling the psychologist of his intention to murder her. Following her murder, the parents sued the university. They claimed that the fact that the psychologist had informed the university security staff of his client's stated intention was not enough. They argued that their daughter had not received adequate warning.

The initial judgment, which exonerated the psychologist, went to appeal. The appeal court concluded that the psychologist had indeed failed in his duty to provide sufficient warning to his client's girlfriend. At a minimum, he should have found a way of ensuring that the young woman herself was informed of the danger she was in. The Tarasoff 'duty to warn' requirements have since been adopted by the majority of states in the United States.

At the time, the appeal court judge (Justice Tobriner) summed up the court's conclusion as follows.

> The public policy favoring protection of the confidential character of patient-psychotherapist communications must yield to the extent to which disclosure is essential to avert danger to others. The protective privilege ends where the public peril begins (17 Cal. 3d 425, 442 1976).

'Public peril' in the form of acts such as murder and violent armed robbery (or threats of such acts), are not normally stock in trade for those in the helping and healing professions. On the other hand, many consultations involve difficulties in personal relationships either as a cause or a consequence of the client's distress. More or less coincident with the judgment in Tarasoff, we have come to increasingly appreciate the 'public peril' that can face children and other vulnerable family members - women, the seriously mentally ill, the aged etc.

**Emerging evidence on the risk of violence and abuse**

As trainee clinical psychologists in the early 1970s, my colleagues and I were taught nothing about any of these forms of family violence. If violence in the family was mentioned at all, it was assumed to be a private matter, not worthy of comment or further exploration - having little or nothing to do with 'mental health' or the problems with which our clients presented. Perhaps more shockingly, we were also taught that incest was extremely rare.

Empirical evidence of a 'battered child syndrome' first became available in 1962 but was largely ignored for more than 20 years. In the 1960s and 1970s, researchers in a number of Western countries presented convincing empirical evidence of significant violence in the family - mainly though not exclusively against women. It too was gained little traction until the 1990s.

Since then, the accumulated research into rates of abuse and rape of children and into rates of family violence has become increasingly impossible to ignore. Not only have we become aware of the enormity of these problems,
we now know considerably more about their dynamics and consequences.

We know for example that much systemic family violence is driven by a sense of male entitlement and that violence within families is more likely to flourish in conditions of isolation and low accountability. We also know not only that sexual abuse of children is common, but that the behaviour of many abusers is deliberate and predatory and that many operate within the families in which the children reside or, as in the case of some priests and religious for example, deliberately develop close associations with those families.

In addition, we have come to recognise that such betrayals of trust and intimacy can have both long term and potentially devastating consequences. Many lives are ruined. For some the disorienting pain is of such intensity that suicide becomes the only perceived solution.

Understanding and assessing risk

Such knowledge has contributed to changing the way in which responsible healing and helping professionals think about approaching questions of risk. For one thing, it has caused us to give ever more careful consideration to the question of limits to confidentiality. Our ethical and sometimes our legal duty to warn and to protect, once assumed to be matters likely to be encountered only rarely, now require careful and constant review. For properly trained family mediators, family therapists and relationship counsellors for example, risk assessment at the beginning of and throughout engagement with clients has become standard practice.

In the light of this knowledge, the long-standing power of courts to subpoena a practitioner, a practitioner’s documents or both, have also taken on a new dimension. Amongst other things, the power to subpoena recognises the need at times for an independent arbitrator who has the capacity and power to weigh a default expectation of privacy and confidentiality against the duty to ensure public safety. Though it can be abused or misused as a mere ‘fishing expedition’, the capacity to subpoena healers and helpers or their documents has become an increasingly important aspect of legal process in cases in which individuals are deemed to be at significant risk.

Of course if practitioners believe the reasons for the subpoena are frivolous or inadequate, they can provide a statement of objection. Sometimes the objections are accepted, while at other times the subpoena stands. It is an imperfect system in which courts must do the best they can to weigh normal expectations of confidentiality against a requirement to ensure that safety is privileged and justice is done.

Mandatory reporting laws go a step further. It is important to recognise that

---

6 The traditional exceptions to this, such as family mediation and relationship/couples counselling (previously known as marriage guidance or marriage counselling), have come under increasing challenge and are unlikely to survive into the future (see study by Family Court Judges Altobelli and Bryant below).
healing and helping professionals comply with these laws not just because they are legally obliged to and certainly not because they represent a perfect solution to the problem. Indeed most practitioners recognise that the law is a blunt instrument when it comes to dealing with human relationships.

But most also accept the constraints that laws impose because through research and reflective practice, they have come to appreciate the multiple dangers associated with acting in personal or even professional isolation. My counselling psychology students for example, were taught that the privilege of sharing clients’ innermost secrets must be balanced against clearly articulated systems of accountability. They came to appreciate that mere good intentions on the part of the professional do not guarantee good practice.

Confession and confidentiality

The above represents a brief and inevitably incomplete summary of current thinking about confidentiality and its limits in the healing and helping professions. Assuming that the section of Canon Law cited above represents current Catholic thinking about confidentiality within Confession, it is clear that to date this thinking has remained ignorant of or indifferent to the contemporary struggles and nuanced reasoning that has been taking place in so many other areas of healing and helping services personal.

Of course this only matters if:

a) it can be successfully argued that when compared with other forms of assistance sought by those experiencing guilt, depression, stress and other forms of psychic pain, Catholic confession is a categorically different exercise – and
b) because of this difference, confession can make a legitimate claim for exemption from the generally accepted principles of duty of care and duty to warn, as well as from subpoenas and mandatory reporting.

As one who grew up in a Catholic culture (which included making my “first confession” at the age of about seven)\(^7\), and one who spent five years as a trainee Catholic priest, I believe I have a good understanding of both the experience and the purpose of the sacrament of confession.

As a psychologist, I have also come to appreciate the considerable overlap between confession and counselling/psychotherapy as legitimate and useful processes, even if the primary purpose of the former (reconciliation with God) and the primary purpose of the latter (reconciliation with oneself and possibly with others) are differently constructed.\(^8\)

---

\(^7\) I appreciate the fact that debate exists with respect to the age at which ‘first confessions’ should be made. I have chosen not to enter this debate as an adequate contribution would require a further submission at least as long as the present one.

\(^8\) This statement begs many further questions. Why is it for example that the sacrament of reconciliation (confession) has almost disappeared in its individualized form in most Western countries, while individual counselling and psychotherapy has continued to grow in popularity?
This different perception of its primary purpose may be a key formal reason behind the strong resistance of the Catholic hierarchy (though not the general community)\(^9\) to any modification of the confessional seal. Indeed the Catholic hierarchy has gone so far as to declare that this issue to be ‘non negotiable’.\(^10\)

I do understand that in the context of the Catholic notion of mortal sin, which condemns a person to eternal damnation until the sin is expunged, any perceived obstacle that might prevent that person reconciling with his or her God, should be resisted.\(^11\) In my view however, this represents a counsel of perfection that rests on a number of assumptions deserving of closer scrutiny.

Perhaps the most fundamental (and intuitively understandable) assumption is that any modification to the confessional seal would lead to a reduction in the number of individuals willing to make use of this sacrament. In his Eureka St article in support of the confessional seal (cited above), Fr. Brennan expressed such a view in the following terms.

> If it were mandatory for everyone to report, pedophiles and perpetrators of domestic violence would be left with no one to speak to.

There are several reasons why this view should be questioned. The first and more obvious argument is that despite the continuation of the “seal”, the number of penitents making use of individual confession has plummeted during the past twenty or thirty years. It might of course be the case that this considerably diminished number nonetheless contains an over representation of those whose sins are at the very serious end of the spectrum. It might be that these individuals choose confession, at least in part, because of its guarantee of absolute confidentiality. These may for example include murderers and those who abuse their partners and other family members. It may also include pedophiles, though Fr. Brennan believes that this is unlikely.\(^12\)

The above ‘over representation hypothesis’ assumes that individuals are more motivated to seek help and tell the truth when confidentiality can be guaranteed. Somewhat counter intuitively however, the best empirical evidence available suggests that such an assumption is likely to be incorrect.

A comprehensive review of the evidence for this assertion is beyond the scope of this submission. However the reader may care to examine a recent presentation and a subsequent publication on this issue by a Judge and Chief

---

\(^9\) In his Blog of Dec 8 2016 on the question of the confessional seal, Francis Sullivan noted that, “At the moment there appears to be a very clear divide between the Church leaders in Australia and many parts of the broader community.” From my broad reading in this area, I would take it that the ‘broader community’ would include the broader Catholic community.

\(^10\) See Francis Sullivan Blog Dec 8.

\(^11\) For example in support of Fr. Brennan’s Eureka article cited above, one respondent suggested that, “Saving a soul from hell is the sole urgent reason why confession exists.”

\(^12\)
Justice of the Family Court of Australia. Altobelli and Bryant (2015a; 2015b)\(^{13}\) make reference to key empirical studies into the principle of confidentiality as it plays out in law, in counselling and psychotherapy and in mediation. They have also reported on the results of a study of practitioner and client confidentiality within the Family Court itself.

Referring to the empirical studies, Altobelli and Bryant (2015a) cite a conclusion arrived at by Reich (2001)\(^{14}\) who, in addition to his own research into confidentiality within mediation processes, summarized results of empirical research into the impact of confidentiality in counselling and psychotherapy (Shuman & Weiner 1987)\(^ {15}\) and in law (Zacharias 1989)\(^ {16}\). Reich’s conclusion was that:

> The premise that mediation needs confidentiality implicitly holds that the existence of confidentiality is important for two parties contemplating or using mediation and that confidentiality causes parties to reveal information they would not reveal in the absence of confidentiality. These enormous and fundamental assumptions are not supported by the previous empirical evaluation in psychotherapist patient research. (Italics added)

Though the sample size was small, Altobelli and Bryant’s reporting of the study on the absence of confidentiality in Family Court disputes over children is methodologically very interesting. Prior to 2006, all family law mediation in children’s cases was privileged. After 2006, mediators employed by the Family Court were reclassified as Family Consultants. Put simply, family consultants continue to work in the previously privileged role of family mediators. In their new enhanced role however, they now inform their clients that in the event that agreement can’t be reached, they may provide the court with any information they think would be helpful in resolving the dispute about their children.

At the time, this dual role was a radical innovation. But the research reported by Altobelli and Bryant suggests that most family consultants who had previously worked in a privileged environment believe that knowledge that admissions made might be revealed to a judicial officer does not appear to inhibit most parents from disclosing some serious issues that would likely count against them if the case went to court.

It seems that other needs, including perhaps the need to unburden oneself or ‘get things right’, can at times have considerable power. Broadly speaking, these results are consistent with the results obtained by Shuman & Weiner in their counselling and psychotherapy research and by Zacharias’ research in the field.

---

\(^{13}\) Altobelli, T. & Bryant, D. (2015a) Has confidentiality in family law dispute resolution reached its use by date? Seen and heard: Children and the Courts Conference. Canberra 7-8 February 2015


of law. In essence, they question the traditional assumption that guarantees of presumptions of confidentiality will encourage individuals to be more revealing and more truthful.

We do need to know more about what promotes and constrains help-seeking behaviour, including, I believe, a desire to make use of confession. For now however, it seems clear that though psychologists and related professionals cannot guarantee absolute confidentiality, their practices continue to grow. They also continue to be approached by clients who have broken the law and/or who are a danger to themselves or a danger to others.

Researchers such as Reich have gone so far as to question the usefulness of and need for professional privilege and confidentiality altogether – even challenging such ‘sacred cows’ as lawyer-client privilege. As a practitioner however, I would not support abandoning the default expectation of confidentiality in the healing and helping professions. I would also fully support confidentiality as the default expectation in confession. In so doing, I acknowledge that while privilege and confidentiality may not be an especially high priority in some cultures, in Western cultures, broadly conceived, privacy is a highly valued aspect of the relationship between professionals and their clients.

At the same time, I am arguing, as I believe Hippocrates would have argued, that professional confidentiality should never be an absolute promise. I am arguing this because all of us, but especially those in professional roles, have responsibilities that must sometimes extend beyond an exclusive focus on the relationship between ourselves and those who seek our assistance.

As a psychologist therefore, I tell my clients that my working presumption is that what goes on in the room stays in the room. But I must also tell my clients that I am ethically and legally bound by two principles that place limits on the normal presumption of confidentiality. First, I have a “duty of care/ duty to protect” if I believe that my client may self-harm. Second, I have a “duty to warn” if there is evidence that my client intends to harm or is seriously thinking about harming another.

In providing this information to a client, it is also important to appreciate that for a professional healer or helper, the context should always be one of care and concern. As a counselling psychologist, my approach would always be to work with the client on how best to notify the authorities when the circumstances demand this and how best to support him or her through this process.

Counselling and psychotherapy are not substitutes for accepting social responsibility for serious criminal behaviour. But neither should past or planned criminal behaviour lead a counsellor or therapist to abandon a client at his or her time of need.

Unfortunately in wrestling with the implications of a strict adherence to the seal, several church commentators have instead proposed ways of avoiding hearing the confession if the priest suspects in advance that the sin to be divulged is
likely to be one that might have serious ramifications.

In its 2012 November 12th edition for example, The Age reported that according to Cardinal Pell,

"Priests should avoid hearing confession from colleagues suspected of committing child sex abuse to avoid being bound by the Seal of Confession. "If the priest knows beforehand about such a situation, the priest should refuse to hear the confession." Cardinal Pell said.

A far more compassionate way of dealing with such a situation would be for the person to whom the pedophile (in this case) had turned for help, to engage with the penitent and support him in reporting his behaviour to the authorities. Ironically, it is the very existence of the seal that, in Cardinal Pell's example, precludes the demonstration of such compassion.

In the light of this and in the light of what we know about the rates of and reasons for rape and serious abuse of children and other vulnerable individuals within families and within institutions, I believe the onus falls squarely on the Catholic Church to convincingly demonstrate why protocols governing confession should be substantially different to those that govern and inform other professionals.

In this final section therefore, I note and respond to three recurring arguments proposed by key church representatives in support of retention of the confessional seal.17

Recent arguments and statements in favour of retaining the seal.

Separation of church and state

In his Eureka St article on the confessional seal Fr. Brennan offered the following observation.

"Given the separation of church and state, the royal commission is not in a position to prescribe changes to church teaching, discipline or structures. But it is in a position to prescribe minimum standards of accountability, transparency and training.

By way of illustration, Fr. Brennan followed this statement with a further observation seemingly linked to the first of the above sentences

---

17 Versions of these arguments can be found in the Dec 4 article in Eureka St by Fr. Frank Brennan, the Dec 8 Royal Commission Blog by Francis Sullivan - both noted above - and in statements attributed by The Australian of Nov 30th 2016 to Archbishop Denis Hart, Archbishop of Melbourne and Tim Brennan, Executive Officer of the Catholic Church's National -Office for Professional Standards.
I have no doubt abuse would have been less prevalent in the Catholic Church if some of the bishops were married with their own children or if some of the bishops were women. The state is not in a position to direct that priesthood and elevation to the episcopacy be available to married men and women.

Many have argued that the relatively high rates of pedophilia in the Catholic Church are in part linked to the existence and persistence of a male celibate hierarchy. As it would be difficult if not impossible to prove the link definitively, these arguments can remain only inferential. Like many however (including, I suspect, Fr. Brennan), I am disappointed and frustrated that the possibility – perhaps even the likelihood - of a connection between a male celibate hierarchy and higher than general rates of pedophilia in the Catholic Church has not prompted moves amongst church leaders to support serious structural reform. On the contrary, there remains a clear reluctance on the part of senior Church authorities to even begin to consider changes to the current structural arrangements.

More than that, some statements from Catholic officials on the question of church/state separation seem designed to create an impression that under no circumstances will any overlap between the two jurisdictions be tolerated. In an interview with The Australian of Nov 30th 2016 for example, the following observation was attributed to Tim Brennan, Executive Officer of the Catholic Church’s National Office for Professional Standards.

We can have a talkfest, but ... the Royal Commission doesn’t write the theology of the Catholic Church and neither does the Australian government.

Amongst its many functions, theology is typically recruited into assisting in the propagation of the tradition and practices of the religion it serves. This means that any perceived encroachment of the state into theological matters is always a sensitive matter. It likely to be resisted, even if the practices themselves appear to be linked with undesirable outcomes. Rather than debate the theology therefore, it is seems far more useful to run with Fr. Brennan’s observation that the Commission is in a position to, “prescribe minimum standards of accountability, transparency and training”.

My broad view therefore is that the Commission should do all that it can to ensure that priests and others in formal positions within the Catholic Church are subjected to the same expectations as other professionals. My narrower argument is that if this prescriptive role of the Commission is accepted, then the expectations governing confession should also be in line with expectations governing other healing and helping professions. Such an approach does not violate the separation of Church and State principle. It is in effect what has happened in Ireland, a country known for its strong links with Catholicism.

Few Catholics make use of personal confession. Therefore there is no need to interfere with the seal.

I am old enough to recall when individual confessions were very common. On a typical Saturday evening, the waiting time to have one’s confession heard
could easily extend to an hour or more. The fact that this is no longer the case simply reflects shifting priorities and shifting understandings of the sacrament of penance. Currently for example, there is a desire amongst many Catholics to participate in a form of group confession. These understandings and practices are likely to change into the future though the direction of the changes is impossible to predict.

Much more important however is the argument from principle. Even if numbers availing themselves of personal confession were to remain low, the culture of (to again draw on an expression used by Fr. Brennan) 'Father knows best', will continue to be reinforced so long as the seal of confession remains absolute. This is because whether intended or not, a core presumption behind the seal is that the priest (and the Church represented by the priest), have sufficient expertise to deal with all contingencies, including contingencies in which the penitent or those in his or her immediate orbit are at risk of serious harm. 18

As noted earlier, this is a dangerous presumption. While it could be argued that the absolute nature of the seal may have been culturally congruent in the days when Catholics depended entirely on their priests for moral guidance, its continuation in the light of our current knowledge of widespread abuse and family violence appears to be little short of arrogant.

Pedophiles are secretive and manipulative. They don’t make use of confession.

Fr. Brennan has rightly observed that, “Pedophiles tend to be secretive and manipulative.” Indeed I would go further and suggest that many pedophiles have psychopathic tendencies – that is, they act largely out of self-interest, have little capacity for empathy and refuse to accept that their actions are immoral. 19

Though it would logically follow that such individuals would not be attracted to confession, we can never be sure that this would always be the case.

It is important to recognise that labels are simply that. They can never describe the whole individual. In addition, the Christian philosophy that drives Catholic teaching is a philosophy of forgiveness. My Catholic childhood was full of stories of sinners who found redemption. Some even became saints! In Catholic terms, the road to redemption begins with genuine confession of sin.

It is also important to recognise that what prompts repentance is not always entirely clear – even to the penitent. Because of this, we cannot simply

---

18 Fr. Brennan and others have suggested that in the case of a penitent confessing a serious crime such as pedophilia, they would refuse absolution unless the person agreed to report themselves to the authorities. They would not however make such a report themselves. Though I understand this solution is informed by the constraints of canon law, I would respectfully suggest it is an inadequate response and certainly one that falls short of the principles established in cases such as Tarasoff.

19 This accords with my experience of my counselling psychology students' attempts to conduct group work amongst convicted pedophiles and sexual offenders. The students reported that up to half refused to admit that they had done anything wrong.
assume that pedophiles have never or would never go to confession. Nor, as argued earlier, can we assume that a decision to go to confession will be strongly influenced one way or the other by knowledge of the existence of the seal.

Because of their secrecy and manipulative tendencies and on the basis of his personal experience as a confessor, Fr. Brennan adds that pedophiles, “don’t come to confession.” There is really no way of knowing if Fr. Brennan’s immediate experience represents priests’ overwhelming experience. At least one former priest, REDACTED, has had the courage to speak (via a recent Facebook posting) of having a pedophile who priest approach him as a confessor some thirty years ago.

In addition I would suggest that in the current climate, it would take some courage for priests to publicly admit that a pedophile had come to them to confession and that under the constraints of the seal, they had made no attempt to ensure that the police were made aware of the crime (other than perhaps relying on the individual to ‘turn himself in’), and were now living with the distinct probability that further crimes had been committed.

Finally, it is worth emphasizing that within the Catholic culture as it exists, the very existence of the ‘seal’ continues to make it far more difficult than it need be to gather information on how many pedophiles may have sought forgiveness via confession and reformed, how many may have sought forgiveness and relapsed, or how many may have sought ‘forgiveness’ as a way of ensuring that the slate was clean so that they could go out and do it again.

Concluding comment

The bulk of my work over the past forty years or so has been as a practitioner, teacher and researcher. As a practitioner, I have learned to be highly respectful of maintaining privacy as my default position with my clients. I imagine I would have had a similar approach to confession had I gone on to practise as a priest. But just as I needed to come to terms with the limitations of this default position in my role as a psychologist, I feel certain I would have had to confront the same issues as a priest. I may for a time have accepted the seal of confession as sacrosanct. But just as I came to realize that there were circumstances in which it would be unethical to privilege the contents of couples counselling (or marriage guidance as it was called), I feel certain that I would have come to a similar conclusion about the confessional seal.

As a teacher, I came to appreciate how easy it is for students to work with a client in isolation from other supports. Sometimes this was mistakenly fuelled by a belief in the power of counselling and psychotherapy and/or a belief in one’s personal power to help solve all difficulties. Part of professional practice training consisted of challenging such beliefs. I have little doubt these issues also confront priests. I am less certain however that priests receive the sort of training necessary to ensure they are sufficiently aware of the dangers of
adopting this position – a position that currently applies at all times in the confessional.

Finally as a researcher, I came to recognise the value as well as the limitations of good quality empirical data. While data do not in themselves tell us how to act, they can challenge us to think differently about key issues. I have written recently about what good quality research tells us with respect to effective counselling and psychotherapy, noting that some of this research flies in the fact of conventional wisdom. In this submission, I have touched on research that suggests that contrary to popular wisdom, there is little hard evidence that the absence of privilege or confidentiality has a significant impact on people’s willingness to seek help or speak with candour about what troubles them. I see no reason why this would not apply in the case of the confessional seal.

Summary statement.

Canon Law requires priests to exercise absolute confidentiality in all circumstances with respect to matters raised by a penitent during confession. The 'confessional seal' as it is known is categorical. As the expression implies, Catholic Church Law offers no compromise with respect to any limits that might apply to the contract of confidentiality between priest and penitent.

By way of contrast, recognition of limits to confidentiality has informed medical ethics and medical practice since at least the time of Hippocrates. Such limits have also been articulated with increasing clarity within other healing and helping professions.

In addition, courts and regulatory bodies have examined the tension between the default expectation of a confidential contract between healer/helper and patient/client on the one hand, and professionals’ broader duty of care and duty to warn on the other. Key judgments have concluded that when client revelations suggest a realistic possibility of danger, the expectation of protective privilege must give way to minimising the risk of public peril.

In arriving at this principle, courts have effectively endorsed a hierarchy of risk and protection that prioritises victims and potential victims. They have also afforded a lesser priority to concerns expressed by some practitioners that anything other than a guarantee of absolute confidentiality would result in fewer individuals being prepared to seek help - especially if issues brought to a helper or healer (or for that matter a confessor) were potentially self incriminating.

Though it may be an intuitively persuasive argument, the concern about diminishing help seeking behaviour in the face of less then absolute confidentiality has little empirical support. Indeed the existing evidence

---

suggests little or no difference in the type of revelations made by individuals in situations of absolute vs limited confidentiality (or even no confidentiality).

A further argument in favour of privileging confidentiality has been that matters of concern brought to confessors and to healing and helping professionals are not infrequently associated with problems occurring within family, personal and caring relationships. Historically, relationship problems have been thought to belong largely if not exclusively to the private realm.

We now know that a strong focus on privacy in family, personal and other caring relationships presents considerable dangers. The reason is that over the past fifty years or so, we have accumulated considerable empirical evidence on the significant risks faced by vulnerable individuals inside family and other personal relationships and within institutions whose primary role is the provision of care. The dark underbelly of exploitation, violence and abuse within a percentage of close personal, family and institutionally based relationships has been found to be further exacerbated when the family or institution exists in a culture characterized by low levels of external accountability.

Perhaps paradoxically, this knowledge increases rather than diminishes the importance of providing continued opportunities for individuals to confess, consider, reflect on or generally get help for behaviours and problems associated with personal relationships and to retain the default expectation that whatever is revealed is regarded as confidential.

At the same time a contemporary understanding of the nature of violence and abuse within families, personal relationships and institutions has increased the obligation on those in the role of helpers and healers to consider the extent to which anybody associated with the problems presented is likely to be at serious risk.

In cases in which there is prima facie evidence that one or more individuals associated with problems brought to a helping or healing professional may be at risk, courts also have powers to subpoena individual practitioners and/or their documents. Beyond that, with respect to the past, present or probable future rape or sexual exploitation of children - perhaps our most vulnerable citizens - some form of mandatory reporting now exists in all Australian States.

Finally, besides being required to adhere to a range of legal and statutory requirements, professional organisations have increasingly articulated their own expectations that in responding to problems presented to them, their members will actively and continually assess risk to the individual and risk to others.

In the light of these requirements and expectations, consideration must be given to what if anything makes confession sufficiently different to other help seeking processes to permit it to stand outside both the current expectations around confidentiality and its limitations.
If the Commission accepts that confession is in the same broad category as other healing and helping options, it should recommend that priests hearing confessions from pedophiles should be required to follow the protocols required of other healing and helping professionals. If it has the power to do so, it should extend this recommendation to all matters heard by confessors that are likely to place either the penitent or a person or persons known to the penitent at serious risk.

Core recommendation

That in their role as confessors, and in all other roles, it is recommended that Catholic priests be required to adhere to the same limits to confidentiality that apply to the vast majority of individuals in the helping and healing professions.