



BILL BRIEF

SB 5280 – Clergy-Penitent Privilege

Key facts

- Clergy-penitent privilege is the legal protection for private conversations between an ordained member of a religious organization and the penitent or confessor.
- Clergy are not currently mandated reporters in Washington State but there are liability protections for those who break confidentiality in a good-faith effort to report child abuse.
- SB 5280 seeks to make clergy mandated reporters, even when information is disclosed through privileged communication, which can include Catholic Confession.

The Debate

Do first amendment rights to freedom of religion supersede state laws that require mandated reporters to report suspected child abuse, even if that information was obtained through confession? Do the Establishment and Free Exercise Clauses supersede the common interest to protect children?

Background

The Catholic Church's abuse scandal during the 2000s prompted action from many states to enact legislation designed to protect children from abuse (see below). The Catholic Church, the Church of the Latter Day Saints, and the Jehovah's Witnesses have raised concerns about this type of legislation, and the Catholic Church in particular holds that confession is "inviolable" and it would be against their religion for priests to be required to report child abuse that is revealed through confession.

What is clergy-penitent privilege?

Clergy-penitent privilege is similar to attorney-client privilege. It's a confidential conversation between a clergy and a penitent that is not required to be disclosed, even in court. The penitent holds the privilege which means that only they can decide to waive confidentiality. Without permission, the clergy cannot reveal anything from the conversation even to another clergy member. Cases across the country, and *State v. Glenn* in Washington, have determined that the following requirements must be met for a conversation to be considered privileged:

- The conversation must be a private, one-on-one conversation.
- The conversation must take place according to that religion's doctrine on "confession." For Catholics, this looks like standard confession but may look different in other religions.
- The clergy must be an ordained member of their religious institution.

What is a mandated reporter?

A mandated reporter is legally obligated to report suspected child abuse to the Department of Children, Youth & Family (DCYF) or law enforcement. In Washington State this includes teachers, law enforcement officers, health care professionals, and generally anyone who supervises children. Failure to do so is a gross misdemeanor.

How does SB 5280 tie these together?

SB 5280 does two things: it makes clergy, while acting in their official capacity, mandated reporters and removes the clergy-penitent privilege only with regard to child abuse. Should the bill become law, clergy will be legally required to report child abuse if a penitent discloses that they are a victim of child abuse, are abusing a child, or are aware of child abuse occurring. However, this bill does not require clergy to testify in court regarding privileged conversations—those protections remain intact.

What other states have these laws?

Currently, Texas, Oklahoma, North Carolina, Rhode Island, DC, and Guam have the specific exemption proposed in SB 5280. New Hampshire and West Virginia have laws that are similar but are not quite as explicit. There is a concern that this bill would bring legal action as a violation of the first amendment, but *State v. Motherwell* held that reporting requirements do not impede on the clergy's ability to provide counseling even if they are required to report. If challenged, it would be a complicated weighing of the Free Exercise Clause, the Establishment Clause, and the established public interest in protecting children who have unique vulnerability that requires additional protections.

Additional resources (more available upon request)

[State v Glenn \(2003\)](#) “The trial court did not hold that the church could not report the contents of Glenn's statements. It merely said that Eide could not testify in court as to the contents of Glenn's statements. Further, [RCW 26.44.060](#)(1) and (3) 6 provide immunity from liability to those who report instances of child abuse, even if they obtain the information through conversations protected by the clergy/penitent privilege.⁷ **The State has failed to show that the trial court's action has a coercive effect against the church's religious practice of protecting children and exposing sinners. Thus, the constitutional challenge fails.**”

[State v. Motherwell \(1990\)](#) The trial court concluded that the reporting statute did not violate the free exercise clause. The court found that although the defendants had established their prima facie *361 case of infringement, the State satisfied its counterburden because **the State's interest in protecting the welfare of children was compelling and the State used the least obtrusive means of implementing that interest.**

[State v. Buss \(1993\)](#) “Further, Washington's statutory privilege applies only if Buss' statements were a "confession . . . in the course of discipline enjoined by the church". [RCW 5.60.060](#)(3). LaMoria did not administer the Catholic sacrament of confession in the narrow, ecclesiastical sense. **A narrow reading of "confession" or "course of discipline" includes only the sacrament of confession, which did not occur.**”

[State v. Martin \(1999\)](#) We affirm the decision of the Court of Appeals... in this manner: (1) the phrase "in the course of discipline enjoined by the church to which he or she belongs" refers to the member of the clergy and not to the penitent; (2) "confession" is defined by the religion of the clergy; (3) confidential communications between the member of the clergy and the penitent are privileged and the presence of a third person may vitiate the privilege unless that person is another member of the clergy or the person's presence is necessary for the communication; and (4) the penitent is the holder of the privilege and the only person who can waive it.”

[“The Clergy-Penitent Privilege: An Overview”](#) by F. Robert Radel, II and Andrew A. Labbe

[“Sharing Sacred Secrets: Is it \(Past\) Time for a Dangerous Person Exception to the Clergy-Penitent Privilege?”](#) by R. Michael Cassidy

[“Concerns raised over Washington State mandatory reporting bill that lacks confession exception”](#) Catholic Review

[“Catholic officials seek loophole in WA bills on child abuse reporting”](#) Seattle Times