
SENATE COMMITTEE ON PUBLIC SAFETY

Senator Nancy Skinner, Chair
2019 - 2020 Regular

Bill No: SB 360 **Hearing Date:** April 2, 2019
Author: Hill
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Urgency: No **Fiscal:** Yes
Consultant: SJ

Subject: *Mandated Reporters: Clergy*

HISTORY

Source: Author

Prior Legislation: None known

Support: California Civil Liberties Advocacy; Child USA; Consumer Attorneys of California; Crime Victims United of California; National Association of Social Workers, California Chapter; Restorative Justice Initiative; Stop Child Abuse Advocates for Reform Society; 1 individual

Opposition: California Catholic Conference; Pacific Justice Institute- Center for Public Policy

PURPOSE

The purpose of this bill is to require a clergy member to report whenever the clergy member, in their professional capacity or within the scope of their employment, has knowledge of or observes a child whom the clergy member knows or reasonably suspects has been the victim of child abuse or neglect, including when the clergy member acquires the knowledge or reasonable suspicion of child abuse or neglect during a penitential communication.

Existing law establishes the Child Abuse and Neglect Reporting Act and states that the intent and purpose of the Act is to protect children from abuse and neglect. (Pen. Code, § 11164.)

Existing law defines the occupations that are mandated reporters which includes but is not limited to teachers, athletic coaches, social workers, peace officers, firefighters, physicians, psychologists, psychiatrists, emergency medical technicians, licensed family therapists, child visitation monitors, and clergy members. (Pen. Code, § 11165.7, subd. (a).)

Existing law requires a mandated reporter to make a report whenever the mandated reporter, in his or her professional capacity or within the scope of his or her employment, has knowledge of or observes a child whom the mandated reporter knows or reasonably suspects has been the victim of child abuse or neglect. Requires the mandated reporter to make an initial report by telephone to the agency immediately or as soon as is practicably possible, and to prepare and send, fax, or electronically transmit a written follow up report within 36 hours of receiving the information concerning the incident. Provides that the mandated reporter may include with the

report any non-privileged documentary evidence the mandated reporter possesses relating to the incident. (Pen. Code, § 11166, subd. (a).)

Existing law provides that a mandated reporter who fails to report an incident of known or reasonably suspected child abuse or neglect as required by this section is guilty of a misdemeanor punishable by up to six months confinement in a county jail or by a fine of \$1,000 or by both that imprisonment and fine. Provides that the intentional concealment of a mandated reporter's failure to report an incident known by the mandated reporter to be abuse or severe neglect is a continuing offense. (Pen. Code, § 11166, subd. (c).)

Existing law provides that a clergy member who acquires knowledge or a reasonable suspicion of child abuse or neglect during a penitential communication is exempt from the mandated reporter reporting requirements. Defines "penitential communication" as a communication, intended to be in confidence, including, but not limited to, a sacramental confession, made to a clergy member who, in the course of the discipline or practice of his or her church, denomination, or organization, is authorized or accustomed to hear those communications, and under the discipline, tenets, customs, or practices of his or her church, denomination, or organization, has a duty to keep those communications secret. (Pen. Code, § 11166, subd. (d)(1).)

Existing law clarifies that a clergy member has a duty to report known or suspected child abuse or neglect when the clergy member acting in some other capacity that would otherwise make the clergy member a mandated reporter. (Pen. Code, § 11166, subd. (d)(2).)

Existing law defines "member of the clergy" as a priest, minister, religious practitioner, or similar functionary of a church or of a religious denomination or religious organization. (Evid. Code, § 1030.)

Existing law defines "penitent" as a person who has made a penitential communication to a member of the clergy. (Evid. Code, § 1031.)

Existing law defines "penitential communication" as a communication made in confidence, in the presence of no third person so far as the penitent is aware, to a member of the clergy who, in the course of the discipline or practice of the clergy member's church, denomination, or organization, is authorized or accustomed to hear those communications and, under the discipline or tenets of his or her church, denomination, or organization, has a duty to keep those communications secret. (Evid. Code, § 1032.)

Existing law provides that a penitent, whether or not a party, has a privilege to refuse to disclose, and to prevent another from disclosing, a penitential communication if he or she claims the privilege, subject to Evidence Code section 912. (Evid. Code, § 1033.)

Existing law provides that a member of the clergy, whether or not a party, has a privilege to refuse to disclose a penitential communication if he or she claims the privilege. (Evid. Code, § 1034.)

Existing law provides that the right of any person to claim a privilege is waived with respect to a communication protected by the privilege if any holder of the privilege, without coercion, has disclosed a significant part of the communication or has consented to disclosure made by anyone. (Evid. Code, § 912, subd. (a).)

This bill requires a clergy member to report whenever the clergy member, in their professional capacity or within the scope of their employment, has knowledge of or observes a child whom the clergy member knows or reasonably suspects has been the victim of child abuse or neglect, including when the clergy member acquires the knowledge or reasonable suspicion of child abuse or neglect during a penitential communication.

COMMENTS

1. Need for This Bill

According to the author:

All 50 states have statutes mandating that certain groups report suspected child abuse or neglect. This is no accident: there has long been a consensus that child abuse and neglect is categorically different than other crimes. Child victims don't understand what is happening to them. Worse still, adult abusers often make children feel responsible for their abuse, resulting in guilt, shame, and a fear of reporting. When children are the victims, our country has decided the rules should be different.

Unfortunately, California has not applied those rules equitably to all mandated reporters. California gives clergy – priests, rabbis, ministers, religious practitioners, or similar functionaries of a church, temple, or recognized denomination or organization – an exemption not granted to any of the other 45 mandated reporters listed in statute. Even spousal privilege and doctor-patient privilege are nullified in cases of child abuse or neglect.

Additionally, recent investigations by 14 attorneys general, the federal government, and other countries have revealed that the clergy-penitent privilege has been abused on a large scale, resulting in the unreported and systemic abuse of thousands of children across multiple denominations and faiths.

In 1973, the U.S. Congress rejected a proposal to codify the clergy-penitent privilege in the Federal Evidence Code, choosing instead to leave the decision up to individual states. Connecticut, Indiana, Mississippi, Nebraska, New Hampshire, New Jersey, North Carolina, Oklahoma, Rhode Island, Tennessee, Texas, and West Virginia already have statutes similar to this bill proposal.

2. Mandated Reporting

Existing law requires members of 46 occupations to report known or suspected child abuse or neglect. (Pen. Code, § 11166, subd. (a).) Failure to report an incident of known or reasonably suspected child abuse or neglect is a misdemeanor punishable by up to six months in jail, a fine, or both. (Pen. Code, § 11166, subd. (c).) Clergy members, defined as “a priest, minister, rabbi, religious practitioner, or similar functionary of a church, temple, or recognized denomination or organization,” are included in the list of mandated reporters. (Pen. Code, § 11165.7, subd. (a)(32).) Notably, clergy members are provided an exemption from reporting under the mandated reporter statute if the knowledge or reasonable suspicion of child abuse or neglect is acquired during a penitential communication. (Pen. Code, § 11166, subd. (d)(1).) Existing law defines penitential communication as “a communication, intended to be in confidence, including, but not

limited to, a sacramental confession, made to a clergy member who, in the course of the discipline or practice of his or her church, denomination, or organization, is authorized or accustomed to hear those communications, and under the discipline, tenets, customs, or practices of his or her church, denomination, or organization, has a duty to keep those communications secret.” (*Id.*)

This bill would repeal the provisions of law related to the clergy exemption from reporting known or reasonably suspected child abuse or neglect. In doing so, a clergy member who failed to report child abuse or neglect when the clergy member acquired the knowledge during a penitential communication would be subject to the same criminal liability as other mandated reporters.

3. How Other States have Approached Clergy as Mandated Reporters

All 50 states have a mandated reporter statute. A 2015 publication by the U.S. Department of Health and Human Services (HHS) on clergy members as mandated reporters reported that 28 states listed clergy members as mandated reporters. (HHS, *Clergy as Mandated Reporters of Child Abuse and Neglect* (2015) <<https://www.childwelfare.gov/pubPDFs/clergymandated.pdf>> [as of Mar. 27, 2019].) Another 16 states did not specifically list clergy members as mandated reporters, but instead enumerated “any person” as a mandated reporter. (*Id.*) Of the 28 states that enumerated clergy members as mandated reporters, 24 of those states explicitly included an exemption for abuse discovered through penitential or pastoral communications. (*Id.*) Of the 16 states with “any person” mandated reporter statutes, 7 explicitly provide a penitential communication exemption. (*Id.*) As of 2015, among states that list clergy as mandated reporters or enumerate “any person” as a mandated reporter, only 6 states deny the clergy-penitent privilege in cases of child abuse or neglect. (*Id.*) Of note, even in states that deny clergy-penitent privilege in cases of child abuse or neglect, the ability to compel testimony from clergy who learned of abuse during a penitential communication may be limited. (*See e.g.* N.H.R.S.A. § 169-C:32 and § 516:35 [New Hampshire’s mandated reporter statute includes “priest, minister, or rabbi or any other person having reason to suspect that a child has been abused or neglected” but § 516:35 provides that a “priest, rabbi or ordained or licensed minister of any church or a duly accredited Christian Science practitioner shall not be required to disclose a confession or confidence made to him in his professional character as spiritual adviser, unless the person confessing or confiding waives the privilege”].)

Recently there have been efforts to add clergy members to the list of mandated reporters in states that do not already include them in their reporting statutes. (*See* <<https://www.wkbw.com/news/i-team/priests-other-clergy-would-be-mandatory-child-abuse-reporters-under-proposed-new-york-law>>; <https://www.huffingtonpost.com/entry/clergy-child-abuse-sex-reporting_us_5c49eb19e4b013f47a6bf77c> [as of Mar. 27, 2019].) In light of the ongoing revelations of child sex abuse within various churches, the clergy exemption from reporting child abuse when the knowledge regarding the abuse was learned through a penitential communication is being more heavily scrutinized. (*See* <<https://www.nytimes.com/2018/08/29/opinion/catholic-priest-abuse-reporting.html>>; <<https://www.theatlantic.com/national/archive/2012/03/should-clergy-report-confessions-of-child-abuse/254053/>> [as of Mar. 27, 2019].)

4. First Amendment Concerns

Requiring clergy members to report child abuse learned during a penitential communication may raise First Amendment concerns. The clergy exemption from the mandated reporting of child abuse when learned through a penitential communication is tied to the clergy-penitent privilege, codified in California law in Evidence Code sections 1030-1034. Other types of privileged communications, including attorney-client privilege, doctor-patient privilege, and psychotherapist-patient privilege, are codified. (Evid. Code, § 900 et seq.) Notably, only clergy members are granted an exemption under the mandated reporting statute.

The clergy-penitent privilege is a long established privilege rooted in religious doctrine and practice. (Jacob M. Yellin, *The History and Current Status of the Clergy-Penitent Privilege* (1983) 23 Santa Clara L. Rev. 95, 95.) The clergy-penitent privilege “reflects a public policy that values the sanctity of conversations between members of a particular faith and their religious advisors.” (Caroline Donze, *Breaking the Seal of Confession: Examining the Constitutionality of the Clergy-Penitent Privilege in Mandatory Reporting Law* (2018) 78 La. L. Rev. 267, 275.) The clergy-penitent privilege is unique among the privileges because the person on the receiving end of the communication, the clergy member, may claim protection from compelled disclosure under the Free Exercise Clause of the First Amendment, a defense that is not available to a doctor, attorney, or psychotherapist. (*Id.* at 272.) Another aspect of the clergy-penitent privilege that sets it apart from the other privileges is the fact that “a communicant’s waiver of privilege may not be sufficient for clergy, specifically those of the Catholic faith, to justify revealing the details of a private confession.” (*Ibid.*) In the case of a Catholic priest, he faces excommunication from the Church if he discloses a communication made to him during Confession. (Samuel G. Brooks, *Confession and Mandatory Child Abuse Reporting: A New Take on the Constitutionality of Abrogating the Priest-Penitent Privilege* (2009) 24 BYU J. Pub. L. 117, 120 (2009).)

The constitutionality of a state’s mandated report statute that requires clergy members to report child abuse but that does not provide an exemption for penitential communications remains an evolving legal question. The Free Exercise Clause “embraces two concepts—freedom to believe and freedom to act. The first is absolute, but in the nature of things, the second cannot be.” *Cantwell v. Connecticut* (1940) 310 U.S. 296, 304. Prior to its decision in *Employment Division v. Smith*, the U.S. Supreme Court employed a test balancing the interest asserted by the government against the claim of religious liberty asserted by the affected person when evaluating a claim of a Free Exercise Clause violation. (*Sherbert v. Verner* (1963) 374 U.S. 398.) In *Sherbert*, the court held that the government regulation would be valid only if the government had a compelling interest and no alternative forms of regulation would serve that interest. (*Id.* at 403, 406-409.)

The analysis changed following *Employment Division v. Smith*, (1990) 494 U.S. 872. In that case, the U.S. Supreme Court held that “if prohibiting the exercise of religion...is not the object [of the regulation]...but merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended.” (*Id.* at 878.) The court explained: “We have never held that an individual’s religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate.” (*Id.* at 878-879.) In response to *Smith*, a more stringent standard for reviewing laws based on violations of the Free Exercise Clause—reviving the *Sherbert* test—was codified in the federal Restoration of Religious Freedom Act (RFRA). However, RFRA was struck down by the U.S. Supreme Court with respect to its applicability to the states in 1997, and California has not codified its own RFRA since that time. (*City of Boerne v. Flores* (1997) 521 U.S. 507.)

Some legal scholars have argued that in states that do not have their own RFRA, “mandatory reporting legislation abrogating the clergy-penitent privilege easily survives a Free Exercise challenge under *Smith*” and that “eliminating the privilege actually enhances the general applicability of mandatory reporting laws.” (Donze, *supra* at 288.) Arguably, a mandated reporter statute that includes clergy members but does not provide for the penitential communication exemption would survive even under a strict scrutiny analysis.

The analysis of a challenge to a mandated reporter statute that includes clergy members but does not provide for the penitential communication exemption as a violation of the California Constitution’s Free Exercise Clause would differ to some extent from one relying on the Free Exercise Clause of the U.S. Constitution due to the unique language found in the state’s Clause. The California Constitution provides:

“Free exercise and enjoyment of religion without discrimination or preference are guaranteed. *This liberty of conscience does not excuse acts that are licentious or inconsistent with the peace or safety of the State.* The Legislature shall make no law respecting an establishment of religion. A person is not incompetent to be a witness or juror because of his or her opinions on religious beliefs.” (Cal. Const., art. 1, § 4 (emphasis added).)

Arguably, the free exercise of religion in this case—that is, refusing to disclose penitential communications in child abuse cases—is “inconsistent with the peace and safety of the state.”

5. Argument in Support

California Civil Liberties Advocacy writes:

By removing the exemption for clergy-penitent privilege, California law will ensure that incidences of child abuse and neglect no longer go unreported. Religious institutions have had decades to address this matter internally and they have utterly failed to do so....Abusers will no longer be protected by the “sanctuary” provided by religious institutions and abuse survivors will no longer be silenced by clerics who admonish them not to disclose the matter to anyone else. If enacted, SB 360 will rightfully restore the civil liberties of society’s most vulnerable, and ensures that children receive the equal protection of the law.

6. Argument in Opposition

The California Catholic Conference writes:

We oppose SB 360 because it crosses a constitutionally protected element of our religious faith: penitential communications.

There is no question that protecting children and young people must be held accountable for their crimes but disregarding fundamental religious freedom rights is unnecessary and inappropriate. The sanctity of religious communications can be protected and respected and criminals brought to justice for their crimes. These two public priorities are not mutually exclusive.